1990

Price Waterhouse, Wright Line, and Proving a "Mixed Motive" Case under Title VII

Kelly Robert Dahl
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol69/iss4/5

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
**Price Waterhouse, Wright Line, and Proving a “Mixed Motive” Case Under Title VII**

<table>
<thead>
<tr>
<th>Table of Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>870</td>
</tr>
<tr>
<td>II. The Language and Purpose of Title VII</td>
<td>874</td>
</tr>
<tr>
<td>A. Facts</td>
<td>877</td>
</tr>
<tr>
<td>B. The Lower Court Opinions</td>
<td>878</td>
</tr>
<tr>
<td>C. The <em>Price Waterhouse</em> Plurality</td>
<td>880</td>
</tr>
<tr>
<td>1. The Brennan Opinion</td>
<td>880</td>
</tr>
<tr>
<td>2. The Concurring Opinions</td>
<td>884</td>
</tr>
<tr>
<td>a. The White Opinion</td>
<td>884</td>
</tr>
<tr>
<td>b. The O'Connor Opinion</td>
<td>885</td>
</tr>
<tr>
<td>D. The Dissent</td>
<td>887</td>
</tr>
<tr>
<td>E. The Rule of <em>Price Waterhouse</em></td>
<td>888</td>
</tr>
<tr>
<td>IV. The Rule of <em>Price Waterhouse</em> and the Purposes of Title VII</td>
<td>892</td>
</tr>
<tr>
<td>A. The NLRA - Proving Unfair Employment Practices Under the Act</td>
<td>893</td>
</tr>
<tr>
<td>B. The <em>Wright Line</em> Test</td>
<td>894</td>
</tr>
<tr>
<td>C. Distinguishing the <em>Wright Line</em> and <em>Price Waterhouse</em> Rules</td>
<td>896</td>
</tr>
<tr>
<td>1. The Basic Rules</td>
<td>896</td>
</tr>
<tr>
<td>2. The Application of <em>Wright Line</em></td>
<td>897</td>
</tr>
<tr>
<td>a. Meeting the General Counsel's Prima Facie Case</td>
<td>897</td>
</tr>
<tr>
<td>b. The Employer's “Shifted” Burden of Proof</td>
<td>898</td>
</tr>
<tr>
<td>D. <em>Price Waterhouse</em> Under the Evidentiary Framework of <em>Wright Line</em></td>
<td>899</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>904</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

During the 1989 term, the Supreme Court decided two cases relating to the burden of proof under Title VII of the Civil Rights Act of 1964. In Price Waterhouse v. Hopkins, the Court made a significant change in the allocation of the burden of proof that litigants must bear in certain types of employment discrimination cases. In a plurality opinion, the Court broke with past precedent in the employment discrimination area by shifting the burden of proof away from the Title VII plaintiff in "special" cases involving "mixed motives." In cases where a Title VII plaintiff can prove that an improper or discriminatory factor played a substantial role in making an employment decision, the new burden-shifting mechanism may come into play.

This "shifting burden" is a departure from the standard practice in Title VII employment cases. In the past, "mixed motive" cases did not


2. 42 U.S.C. § 2000e to 2000h-6 (1982). This statute will be referred to hereinafter as Title VII. When referring to Title VII, this Article will be focusing on the provisions prohibiting employment discrimination. See 42 U.S.C. § 2000e-2(a)(1982).


4. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)(in an employment discrimination action brought pursuant to Title VII, the plaintiff bears the burden of proving a prima facie case of employment discrimination, the defendant only bears the burden of explaining the nondiscriminatory reasons for its action); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)(the burden of persuasion never shifts from the Title VII plaintiff). However, outside of the scope of "mixed motive" cases, the McDonnell Douglas/Burdine framework remains untouched. See Ingram v. Missouri Pac. R. Co., 897 F.2d 1450, 1454 & n.4 (8th Cir. 1990); Ottaviani v. State University of New York at New Paltz, 875 F.2d 365, 370 & n.5 (2d Cir. 1989); Jindal v. New York State Office of Mental Health, 728 F. Supp. 1072, 1075-77 & n.3 (S.D.N.Y. 1990); Hill v. Bethlehem Steel Corp., 729 F. Supp. 1071, 1073-74 (E.D. Pa. 1989).

5. Improper or discriminatory factors include an individual's race, color, sex, religion or national origin as stated in 42 U.S.C. § 2000e-2(a) (1982). This type of criteria will be referred to hereinafter as "illegitimate or discriminatory factors" and their application by an employer will be referred to as an "improper motive."

6. Although Price Waterhouse was a plurality vote, Justice O'Connor's fifth and deciding vote would require a Title VII plaintiff to prove that a discriminatory factor was a substantial factor in making an employment decision before the burden-shifting mechanism can come into play. See supra notes 84-98 and accompanying text. Congress has proposed to alter this role in "mixed motive" cases, favoring a showing that an improper motive was a contributing factor in an employment decision. See H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess., at 4.
give rise to a separate method of factfinding under Title VII. Prior to
Price Waterhouse, the Title VII plaintiff bore the burden of proof
throughout the litigation. Upon a showing of a prima facie case of
disparate treatment, the burden of production shifted to the em-
ployer to demonstrate that there was a legitimate business reason for
the employment decision. This formula presented problems for
"mixed motive" plaintiffs. In a situation where legitimate and ille-
gitimate factors played a role in an employment decision, the employer
had, by definition, a legitimate business reason for making the deci-
son. Therefore, the Title VII plaintiff was left with the burden of
proving the hidden motivations underlying employment decisions.

The new formula adopted by the Court for "mixed motive" cases
has created a new mechanism for litigating certain types of employ-
ment discrimination claims. This factfinding mechanism is based on
the formula created by the Court in Mount Healthy City School Dis-
trict v. Doyle. This test was developed to deal with the difficult
problem of factually proving which of several factors motivated an
employment decision. The Mount Healthy formula has been applied
in numerous areas of the law in which intentions and motivations play
a key role.

7. The burden of proof is comprised of the burden of production and the burden of
The burden of persuasion, being a much higher hurdle to get over in the course
of litigation, is the critical component of the burden of proof. In discussing the allo-
cation of the burden of proof in Title VII cases, this Article will focus on who
should bear the risk that persuasion will not be achieved (risk of non-persuasion).
Therefore, references to the "burden of proof" are directed at the duty to per-
suade the factfinder that a party to an employment discrimination suit has proved
the case in chief or the required elements of an applicable defense.

8. The term "disparate treatment" refers to a situation where similarly situated in-
dividuals are treated differently. Such a situation gives rise to a claim under Title
VII where the party receiving less favorable treatment is a protected person for
the purposes of the statute. See Bazemore v. Friday, 478 U.S. 385, 395-96 (1986)(if
a black employee regularly receives a smaller paycheck than a similarly situated
white employee, he may have a cause of action under Title VII). See also E.E.O.C.
v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988)(stating that an employment
discrimination case based on disparate treatment requires proof of discriminatory
intent while the theory of disparate impact requires no such showing); Royal v.
Missouri Highway & Transp. Comm'n, 655 F.2d 155 (8th Cir. 1981), on remand,

9. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973)(the plaintiff al-
ways bears the ultimate burden of persuasion in actions under Title VII).


11. See Hunter v. Underwood, 471 U.S. 222 (1985)(applying the Mount Healthy stan-
ard in an equal protection case that challenged a prisoner disenfranchisement
statute in order to determine the motive behind the legislation); NLRB v. Trans-
portation Management Corp., 462 U.S. 393 (1983)(applying the standard to mixed
motivation cases in the unfair labor practice area); Village of Arlington Heights v.
Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 & n.21 (1977)(applying the
Mount Healthy test to determine the intent of the legislators in passing on a zon-
In *Mount Healthy*, a tenured teacher was fired by his employer, the school district. Although there were many legitimate reasons for firing Doyle, including an altercation he instigated in the school lunchroom over the size of a serving of spaghetti, his letter of termination indicated that the school board was upset over Doyle’s disclosure of a confidential memo and his criticism of board policy. Therefore, one factor that motivated Doyle’s dismissal was the fact that he exercised his right of free speech.

The Court sought to protect the constitutional rights of employees without allowing them to place a stranglehold on their employers by wrapping themselves in their first amendment rights. A balance had to be struck between the employee and the employer. The Court sought to protect the employer’s right to make legitimate personnel decisions while protecting the constitutional rights of employees. The Court used the allocation of the burden of proof in “mixed motive” cases as the method by which the motivation underlying the employment decision could be proven. Therefore, the Court held that in such cases the burden of proof shifts to the employer, requiring her to show that the same employment decision would have been made absent the improper motive after the plaintiff shows that such a factor played a role in the employment decision.

One area in which the *Mount Healthy* standard has received considerable use has been the area of labor law. In determining whether union animus motivated the termination of an employee, the National Labor Relations Board has adopted the *Mount Healthy* standard in “mixed motive” cases arising under section 8(a)(3) of the National Labor Relations Act. The Board adopted the standard in its decision, *Wright Line, Inc.*, like *Price Waterhouse*, dealt with the adoption of a
system to determine the real motivation underlying an employment decision. Both of these cases dealt with a situation where certain reasons for making an employment decision were statutorily impermissible. In each of these cases, legitimate and illegitimate concerns surrounded an adverse employment decision. Also, there are significant similarities between the statutory schemes governing each case. Even though the NLRA protects representative groups rather than individuals, and the remedies available to the parties differ under the respective statutes, the general goals of these two statutes parallel one another.

This Article will discuss the language and purposes of Title VII, followed by an analysis of the Supreme Court’s decision in Price Waterhouse. The reasoning of the plurality opinions will be synthesized to determine the current rules under which Title VII plaintiffs must operate. Based on this analysis, the state of the law under Title VII will be presented.

The Wright Line test will serve as an analytical tool to determine whether the rule of Price Waterhouse will effectuate the purposes of Title VII. Comparing the two statutory schemes involved in the respective cases will demonstrate that they serve significantly similar functions. Through this process, it can be determined whether the rule of Price Waterhouse was a necessary change in the law under Title VII, whether it can promote the purposes of the statute, and whether future changes, such as those proposed by the Civil Rights Act of 1990, will be necessary to realize the promise of equal opportunity employment.


19. Morris has explained the Wright Line test as follows:

The initial focus under Wright Line is on the elements of the General Counsel's prima facie case, ... that is, the existence of protected activity, knowledge of that activity by the employer, and union animus. Proof of these elements by the General Counsel warrants at least an inference that the employee's protected activity was the motivating factor in the adverse personnel action and that a violation of the Act has occurred. To rebut the General Counsel's prima facie case, the employer must demonstrate that the same personnel action would have taken place for legitimate reasons regardless of the employee's protected activity. In this regard, the employer has both the burden of going forward with the evidence and the burden of persuasion.


20. The Civil Rights Act of 1990 would have explicitly adopted the concept of “mixed motive” discrimination. See H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess., pt. 2, at 4 (“Except as otherwise provided in this title, an unlawful employment practice is established when the complaining part demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.”).
II. THE LANGUAGE AND PURPOSE OF TITLE VII

In the pertinent part, Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise 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." This language represents only a small part of the Civil Rights Act of 1964. The Act was created to enforce the civil rights of all Americans in a number of areas including voting rights, access to accommodations, and equal opportunity in employment. This particular language was intended to attack discrimination in private employment just as the fifth and fourteenth amendments attacked such discrimination in the public sector.

There is no single answer as to how Congress intended to combat the problem of discrimination in private employment. Clearly, the language of Title VII prohibits a private employer from making employment decisions because of his reliance on an illegitimate factor such as race or sex. However, what degree of reliance on such criteria is prohibited? The plain language of the statute is not self-explanatory in this regard. Therefore, the question arises as to whether the statute was intended to strictly prohibit all consideration of illegitimate factors in making employment decisions or to merely provide a remedy to those subject to actual discrimination upon proof of exclusive reliance upon such factors by the employer. The operation of Title VII must lie somewhere between these two extremes.

22. The Civil Rights Act of 1964 will be referred to hereinafter as "the Act."
24. The fourteenth amendment provides that "[n]o state shall . . . deny any person within its jurisdiction of the equal protection of the laws." U.S. Const. Amend I. While the fifth amendment contains no equal protection clause, it contains the due process clause which has been used to combat discrimination. See Johnson v. Robson, 415 U.S. 361, 364 (1974). Both constitutional provisions protect citizens against official governmental action which constitutes discrimination at the state or federal level. See also Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 808 & n.3 (M.D. Ala. 1989)(stating that a state employee's employment discrimination claim was governed by Title VII and the fourteenth amendment as enforced by 42 U.S.C. § 1983).
25. Compare Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987)(if plaintiff shows discrimination was "a" motivating factor in making an employment decision, the burden shifts to the employer to prove that it was not a determinative factor) with McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987)(employee bears the burden of showing that an illegitimate factor was determinative in making an employment decision).
26. Congress could not have intended to prohibit all consideration of gender in making employment decisions. It specifically provided that gender may be a bona fide occupational qualification. See 42 U.S.C. § 2000e-2(e)(1982). On the other hand,
The statute sets forth "a congressional declaration that all persons . . . have an equal opportunity for employment," free from employment decisions based on discriminatory criteria.\textsuperscript{27} This emphasizes that, at a minimum, improper motives must play an \textit{actual} role in bringing about the challenged personnel decision. However, Congress could not have intended to bind the hands of employers by requiring them to give special treatment to persons protected by Title VII.\textsuperscript{28} In fact, Congress specifically authorized reliance on an otherwise discriminatory factor where that criterion is a bona fide job qualification.\textsuperscript{29} Therefore, while the general goal of the statute is the elimination of discrimination in the private workplace,\textsuperscript{30} Congress intended to balance this goal against the employer's legitimate interests in running his business.

The "balance" Congress intended to strike between these two interests is evidenced by the concept of causation in Title VII actions.\textsuperscript{31} An employer can only be held liable under Title VII if he makes an adverse employment decision based on an improper motive. While interpretations of this language have varied in the past,\textsuperscript{32} the legislative history of the provision sheds much light on its meaning. Early in the

\textsuperscript{28} In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court interpreted the employment discrimination language of Title VII. The Court stated:

\begin{quote}
Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that every person be hired simply because [that individual] was formerly [subjected] to discrimination or . . . [was] a member of a minority group. \textit{Id.} at 430-31.
\end{quote}

\textsuperscript{29} See 42 U.S.C. § 2000e-2(e)(1989). See also Pime v. Loyola University of Chicago, 803 F.2d 351 (7th Cir. 1986)(having a Jesuit presence in the philosophy department was reasonably necessary to the operation of a private Catholic university, and was therefore considered a bona fide occupational qualification). But see Dothard v. Rawlinson, 433 U.S. 321 (1977)(the bona fide job qualification exception to the general prohibition against sex discrimination was intended to be applied in an extremely narrow fashion).


\textsuperscript{31} The concept of causation was in many ways the central subject of the argument between the parties in \textit{Price Waterhouse}. See, e.g., Petitioner's Brief at 21-22, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)(No. 87-1167).

\textsuperscript{32} Compare McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 664 (7th Cir. 1987) \textit{cert. denied} 485 U.S. 914 (1988)(a finding of liability under Title VII requires a clear causal relationship between the employment decision and the discriminatory motive) \textit{with} Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985)(en
drafting of the statute, a proposed amendment to the Act that would have restricted its application to employment decisions based solely on an illegitimate factor was rejected by Congress. Therefore, Congress’ conception of the causation requirement of Title VII anticipated the eventuality that decisions based on “mixed motives,” a combination of the protected interests of the employee and the employer, could come within its statutory prohibitions.

However, it is unclear whether protecting the employer’s interest in making legitimate business decisions is really of equal importance to protecting employees from discrimination. While employers have been given narrow exemptions from the prohibitions on considering illegitimate factors in making employment decisions, an employer may not generally rely on discriminatory factors in making an employment decision. The narrow area where employers may utilize illegitimate factors as a reason for an employment decision evidences the secondary nature of congressional concern for the employer’s freedom of decision under the statute. In other words, Congress intended to tilt the balance which it perceived to exist disproportionately in the employer’s favor toward the employee while preserving employer independence through its narrowly crafted exceptions from the prohibitions of Title VII.

Therefore, it is more accurate to say that the primary purpose of Title VII is to protect employees from discrimination by providing them a remedy for being subjected to discriminatory employment practices. This primary purpose is only tempered by a concern that there be a causal link between the improper motive of the employer and the adverse personnel decision. The concept of causation assures employers that they will not be punished for making an employment decision merely because the employee involved was a protected person. The statute protects the employer from strict liability under Title VII when making decisions affecting protected persons, while assuring that there is a remedy for the victims of discrimination in the private workplace.

banc (an employer can be found liable under Title VII if a discriminatory motive played some role in the personnel decision).

33. See 110 Cong. Rec. H2728 (1964); 110 Cong. Rec. S13,838 (1964). In fact, Senator Case, the Republican floor leader for the bill, suggested that this amendment would render the employment discrimination provision of the statute almost useless.

34. See Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). In fact, the courts that have applied the new evidentiary rules under Price Waterhouse continue to take special care to preserve employer autonomy in employment decision cases. See Brown v. Trustees of Boston Univ., 891 F.2d 337, 346 (1st Cir. 1989).
III. PRICE WATERHOUSE v. HOPKINS - A NEW THEORY OF CAUSATION UNDER TITLE VII

A. Facts

Ann Hopkins was a senior manager at the nationally recognized accounting firm of Price Waterhouse. At the firm, an individual became eligible for partnership when all of the partners in that person's local office submitted his or her name as a candidate. In 1982, Hopkins was a candidate for partnership, the only woman of the eighty-eight candidates that year. 35 "Forty-seven of these candidates were admitted to the partnership, 21 were rejected and 20 - including Hopkins - were 'held' for reconsideration the following year." 36

The partners in her office clearly felt that Hopkins was well qualified for membership in the firm when she was first proposed for partnership. 37 Many partners and the clients she dealt with felt that her manner was assertive and professional. However, her aggressiveness sometimes manifested itself as abrasiveness. There was also evidence that her manner occasionally created a great deal of tension at the office. This too was noted by partners in the firm, fellow workers, and clients. 38

Although there were legitimate concerns about Hopkins' interpersonal skills, several partners considered her gender as a factor in making their decision regarding her candidacy for partnership. Some partners made comments that Hopkins did not act in a "lady-like" manner. "One partner described her as 'macho'; another suggested that she 'over-compensated for being a woman'; a third advised her to take 'a course at charm school.' Several other partners criticized her use of profanity." 39 The partner who was responsible for telling Hopkins that her bid for membership in the firm had been placed on hold advised her to "walk more femininely, have her hair styled and wear

36. Id.
The endorsement by the partners in Hopkins' office stated: "Ann Hopkins performed virtually at the partner level for the U.S. State Department. While many partners were “involved” with the client, State Department officials viewed Ann as the project manager." Respondent's Brief at 3, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)(No. 87-1167).
jewelry."  

At trial, a social psychologist, Dr. Susan Fiske, testified that the partnership selection process at Price Waterhouse was influenced by factors that could be considered a form of "sex stereotyping." She pointed out that such factors were not only represented by comments directed at Hopkins' gender, but neutral criticism directed at her by individuals who barely knew her. There was other evidence that previous partnership selections were directly dependent on sex-based criteria. In previous years, it was revealed that one partner felt that all women were unqualified to attain membership with the firm.

B. The Lower Court Opinions

At trial, Judge Gesell noted that Price Waterhouse admitted that Ms. Hopkins was well qualified for partnership, but for the complaints about her interpersonal skills. According to the court, she was qualified for the position, rejected for partnership, and her employer continued to consider other employees for partnership after the decision was made. Therefore, Hopkins presented a prima facie case of discrimination under Title VII. The issue in the case, as the court saw it, was whether the concern over Ann Hopkins' interpersonal skills was merely a pretext for an employment decision based on gender.

While its posture as a pretext case under Title VII appeared to be clear, Judge Gesell broke new ground by characterizing it as a case involving "mixed motives." The court found that there were legitimate reasons for turning down Ms. Hopkins' request for partnership. However, it was also apparent that some of the comments submitted by the partners at Price Waterhouse were the product of sex stereotyping. Furthermore, substantial reliance was placed on those comments.

42. Id. See also Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)(female candidates for partnership were viewed more favorably if they acted more femininely).
44. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1113 (D.D.C. 1985). See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981)(plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)(plaintiff must prove that he was qualified for the job, that he was rejected despite his qualifications and his employer continued to seek applicants after the rejection).
As a case of disparate treatment, the action brought by Ann Hopkins required a showing of discriminatory intent on the part of her employer.\textsuperscript{45} Such intent could be inferred by the consideration of illegitimate factors in making the employment decision. While the court was convinced that concerns about Hopkins' interpersonal skills were legitimate, it found that a discriminatory factor influenced her employer's decision.\textsuperscript{46} Therefore, the court found that Price Waterhouse had an improper motive in turning down Ann Hopkins' bid for partnership. However, the court stated that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Ann Hopkins' partnership application on hold absent its reliance on illegitimate factors. When Price Waterhouse failed to carry this burden, the court entered judgement for the plaintiff.\textsuperscript{47}

On appeal, Price Waterhouse challenged the factual findings of the trial court as to the presence of sex stereotyping and the degree to which the partners relied on these comments in making the employment decision in question. However, the court of appeals found ample evidence in the record to support the factual findings of the trial court in these areas.\textsuperscript{48}

Price Waterhouse also challenged the district court's finding of discrimination based on the factual evidence, \textit{i.e.}, the presence of sex stereotyping. Price Waterhouse argued that there wasn't a sufficient


\textsuperscript{47} However, the fact that Ann Hopkins resigned her position upon learning that it would be unlikely that she would attain partnership limited the relief to which she was entitled. The statute states that it is an unlawful employment practice to \textit{discharge} an employee for an improper motive. Although an individual can qualify for relief under Title VII by arguing that a resignation was, in reality, a constructive discharge, the plaintiff failed to carry her burden in this regard. Therefore, she was only entitled to back pay for the period after her bid for partnership failed and her resignation. \textit{Id.} at 1120-21.

\textsuperscript{48} Hopkins v. Price Waterhouse, 825 F.2d 458, 468 (D.C. Cir. 1987) \textit{cert granted}, Price Waterhouse v. Hopkins, 485 U.S. 933 (1988), \textit{rev'd}, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The standard of review as to factual determinations is "clear error." A trial court is given great deference by a reviewing court since the reviewing court only has the written record before it, and the factfinder was able to view the presentation of the evidence and testimony. Therefore, the acceptance of sex stereotyping as competent evidence of discriminatory intent by a trial court may place a key element of a Title VII action beyond the review of the higher courts. \textit{See} C. WRIGHT, THE FEDERAL COURTS 479-82(3d ed. 1983).

This treatment of sex stereotyping was not unusual for the Court. The Court had previously used evidence of sex stereotyping as proof of invidious intent in discrimination cases. \textit{See} City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)(the Court held that employment decisions cannot be predicated on mere stereotyped impressions about characteristics of males or females).
causal relationship between so-called sex stereotyping and the partnership decision to support the judgment below. Noting that the circuits were split on the issue, the court rejected the contention that the evidence, i.e., the presence of sex stereotyping did not in fact motivate the partnership decision.

Adopting a "but for" causation requirement under Title VII would place an impermissible burden on a Title VII plaintiff.\(^4\) The court rejected the contention of Price Waterhouse that a Title VII plaintiff must show that the employer's consideration of a discriminatory factor was the cause of a personnel decision.\(^5\) The court felt that forcing a Title VII plaintiff to prove that a different employment decision would have been made by an employer, after proving that the decision was motivated in part by gender, would be damaging to the purposes of Title VII. Therefore, the court approved the burden-shifting mechanism adopted below. However, the court reversed with regard to the type of liability that an employer could avoid by meeting this "shifting burden." The court held that an employer could avoid all liability by showing clear and convincing evidence that the same employment decision would have been made in the absence of the illegitimate factors that played a role in the process.\(^5\)

C. The Price Waterhouse Plurality

1. The Brennan Opinion

As the Court of Appeals noted, the circuits were split as to the causation requirement under Title VII.\(^5\) The Supreme Court attempted

---

50. In rejecting the "but for" test of causation, the court rejected the views held by a number of circuits with regard to the meaning of Title VII. See, e.g., Lewis v. University of Pittsburgh, 725 F.2d 910, 915-17 (3rd Cir. 1983); Mack v Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977). See also Knighton v. Laurens County School Dist. 56, 721 F.2d 976 (4th Cir. 1983)(holding that "direct evidence" of discrimination brings the burden-shifting mechanism into play).
51. Hopkins v. Price Waterhouse, 825 F.2d 458, 471-72 (D.C. Cir. 1987). This is consistent with the position taken by the Reagan Administration with respect to what type of liability could be avoided by showing that the same employment decision would have been made without reliance on discriminatory factors. See H. R. Rep. No. 644, 101st Cong., 2d Sess., pt. 2, at 25. Traditionally the federal circuits held that an employer could avoid all liability by meeting the shifting burden. See, e.g., Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1165-66 (9th Cir. 1984). This would have been changed by § 5 of the Civil Rights Act of 1990 which provided that an employee could only avoid equitable remedies by meeting the shifting burden under Title VII. See H.R. Rep. No. 755, 101st Cong., 2d Sess., pt. 2, at 4.
52. See Walsdorf v. Board of Commissioners, 857 F.2d 1047 (5th Cir. 1988)(proof that an improper factor played a "significant" role in an employment decision constituted a per se violation of Title VII); McQuillen v. Wisconsin Educ. Ass’n Council, 830 F.2d 659, 664 (7th Cir. 1987)(discriminatory motive must be the "but for" cause of the employment decision); Bibbs v. Block, 778 F.2d 1318, 1323 (8th Cir. 1985).
to deal with this split by granting certiorari in the case. While *Price Waterhouse* produced no majority opinion, the case has produced a new mechanism for adjudicating Title VII cases involving employment decisions based on "mixed motives." The *Price Waterhouse* decision has reallocated the burden of proof among Title VII litigants. The importance of this decision is based on the fact that the burden of proof is instrumental in determining whether enough factual evidence was presented to meet the causation requirement under Title VII.

Unlike the courts below, the Brennan opinion did not treat the case as if it was based on a theory of disparate treatment. There was no extended discussion of discriminatory intent in making the partnership decision in question. Rather, the Brennan opinion, and the concurring opinions of Justices White and O'Connor, addressed the question of causation under Title VII by recharacterizing the case as one of "mixed motivation." The Brennan plurality focused on the causation requirement of Title VII. The opinion stated that "but for" causation was a hypothetical construct. Justice Brennan stated that the critical inquiry under Title VII was not whether an illegitimate factor was the "but for" cause of an unfavorable employment decision. Rather, the proper question was whether an improper motive played some role in the decision making process. The critical time period for making such a determination would be the point at which the decision was made.

Congress only intended to oblige the Title VII plaintiff to prove that the employer relied on a discriminatory factor in making his decision. The rejection of the idea that the consideration of an illegitimate factor must be the "but for" cause of an employment decision to subject an employer to liability under Title VII was based on the logical...
proof problems associated with the concept.57 Such an interpretation of the words “because of” in the text of the statute58 would make it almost impossible for an employee subjected to discrimination to prove a “mixed motive” case. “But for” causation, as Justice Brennan characterized it, could not mean that a Title VII plaintiff must factually isolate the cause of an employment decision. This would be nearly impossible in a multiple causation case. With respect to the multiple causation problem, Justice Brennan stated that “[u]nless we can identify at least one of [the causal factors] as a but-for cause of [an event there] may not [be] any ‘cause’ at all.”59 Therefore, Justice Brennan argued that Congress only intended to require a Title VII plaintiff to prove that an employer relied on an illegitimate factor in making an employment decision to show that the statute has been violated.

However, the Brennan opinion did not end its analysis with the discussion of the employee’s interest under Title VII. Justice Brennan also emphasized the idea that the statute was designed to assure employers that they would not be punished for making legitimate business decisions affecting protected persons. The opinion pointed to the existence of the “BFOQ”60 exception as evidence of the congressional concern over forcing employers to make business decisions without regard to an individual’s qualifications for the job in question.

Brennan concluded that a Title VII plaintiff can prove a prima facie case of discrimination by demonstrating that discriminatory criterion was a motivating factor in an adverse employment decision. After the plaintiff has proven her case in this manner, the burden of proof would then shift to the employer. The employer would be able to avoid liability by showing that the same decision would have been made regardless of the consideration of illegitimate factors. Justice Brennan stated that “[t]his balance of burdens is the direct result of Title VII’s balance of rights.”61

The Brennan opinion argued that this approach did not conflict

57. The “but for” causation concept was vigorously argued by Price Waterhouse as the proper standard to be applied in the case. See Petitioner’s Brief at 24-26, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)(No. 87-1167). The arguments of Price Waterhouse were not persuasive in this area because the Court had previously rejected the idea that the words “because of” in the statute required a showing that an illegitimate factor was the sole motivation underlying an employment decision. See McDonnell v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

58. See supra note 21 and accompanying text.


60. The term “BFOQ” stands for bona fide occupational qualification. See supra note 29. However, the Brennan opinion failed to point out that the “BFOQ” defense has from its creation, been subject to intense scrutiny and restrictive application. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

61. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1788 (1989). This assertion also reflected the reality that almost “every Title VII disparate treatment case will to
with the holding in Texas Department of Community Affairs v. Burdine.\textsuperscript{62} Under the rule proposed by the Brennan plurality, the plaintiff in a "mixed motive" case would bear the burden of persuasion on the issue of whether the employer relied on an illegitimate factor in making an employment decision. Therefore, the plaintiff would bear the burden of proof as to his \textit{prima facie} case under the new analytical framework. What would be altered by the new test would be the method by which the plaintiff could meet the burden of proof within the meaning of \textit{Burdine}.\textsuperscript{63} Brennan characterized the employer's burden as an affirmative defense.\textsuperscript{64}

Turning to the case at bar, Justice Brennan refused to question the trial court's finding that "sex stereotyping" constituted competent evidence of an improper motive on the part of Price Waterhouse.\textsuperscript{65} The opinion stated that it didn't take expert testimony to determine that the comments solicited from the partners were based on gender. Therefore, the presence of a discriminatory factor justified shifting the burden of proof to Price Waterhouse.

Justice Brennan suggested that this burden could be met by showing objective evidence that the same decision would have been made in the absence of the illegitimate factor. Price Waterhouse had to prove that a legitimate factor was the likely motivation underlying the deci-

\textsuperscript{62} 450 U.S. 248 (1980). There, the Court held that the Title VII plaintiff bore the burden of persuasion throughout a case based on disparate treatment. \textit{Id.} at 254.

\textsuperscript{63} The opinion stated that it was merely looking to other developed areas of the law to deal with the problem of proving which factor motivated a decision in a "mixed motive" situation. This problem was not addressed in \textit{Burdine}. However, the Court had developed such a body of caselaw pursuant to the \textit{Mount Healthy} decision. \textit{See supra} note 10 and accompanying text.


\textsuperscript{65} This may be a particularly important development in the law of employment discrimination. Since a majority of the members of the Supreme Court refused to question the competence of sex stereotyping as evidence of an improper or discriminatory motive, the trial courts will likely be able to take a deeper look at employers' records to discover hidden attitudes toward protected persons. Because of the nature of the appellate standard of review as to findings of fact, these actions by the district courts may well become nearly unreviewable in the future. \textit{See supra} note 48. \textit{Cf. Gray v. University of Arkansas at Fayetteville, 883 F.2d 1398, 1400-01 (8th Cir. 1989)}(finding of the district court that there was no credible evidence constituting direct evidence of discrimination was not clearly erroneous so the court did not apply the \textit{Price Waterhouse} test).

\textsuperscript{66} In support of considering "sex stereotyping" as evidence of employment discrimination, Justice Brennan stated:

An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't. Title VII lifts women out of this bind.

sion. Justice Brennan suggested that the reason articulated by the employer should, standing by itself, justify the decision that was made. Furthermore, he stated that the employer should be in the position to produce objective evidence to meet his burden under this framework.\textsuperscript{66}

With respect to the magnitude of the employer's burden, the Brennan plurality disagreed with the clear and convincing error standard applied below. The preponderance of the evidence standard is the typical burden of proof in civil actions. In other areas of the law where "mixed motive" circumstances have justified the burden-shifting mechanism, the Court had also adopted the preponderance of the evidence standard.\textsuperscript{67} Since Justice Brennan felt that the wrong standard was applied below, with two justices concurring, the case was remanded on the issue of the employer's burden of proof.

2. The Concurring Opinions

a. The White Opinion

In a short concurrence, Justice White found it unnecessary to go into a lengthy analysis of the purpose of Title VII. To the contrary, Justice White found the facts of the case to warrant a clear application of the \textit{Mount Healthy} standard. He found it unnecessary to determine whether the \textit{Mount Healthy} concept of causation would comport with the concept of causation under Title VII. Because this was a "mixed motive" case, it was clearly distinguishable from \textit{Burdine} and \textit{McDonnell Douglas}.\textsuperscript{68}

Pursuant to the \textit{Mount Healthy} model, the burden of proof would shift to the employer upon a \textit{prima facie} showing of a violation of Title VII by the employee. Justice White stated that the employee could make such a showing by presenting evidence that an illegitimate factor played a substantial role in motivating an employment decision. Then, the burden of proof would be properly shifted to the employer to show that the same decision would have been made regardless of the presence of the illegitimate factor.\textsuperscript{69}

Justice White agreed with the Brennan plurality that the lower courts applied the wrong standard with respect to the magnitude of the employer's burden in a "mixed motive" case. He noted that the Court in \textit{Mount Healthy} applied the preponderance of the evidence standard to the employer's burden. Justice White felt that the same standard should be applied in the case at bar.

\textsuperscript{66} Id. at 1791.
\textsuperscript{69} Id.
However, Justice White took issue with the Brennan opinion regarding the type of evidence employers should present to meet their burden in “mixed motive” cases. He saw no special reason to force the employer to produce objective evidence to meet this burden. Circumstantial evidence suggesting a legitimate reason for the employment decision could be presented to meet the employer’s burden of proof. This would be particularly true, Justice White suggested, where the employer presents credible testimony that the decision in question was not the product of an improper motive.70

b. The O’Connor Opinion

While Justice O’Connor concurred in the judgment, she felt that the mechanism adopted by the Court should be restricted by the Court’s previous decisions in *McDonnell Douglas* and *Burdine*. She strongly disagreed with the suggestion in the Brennan opinion that the concept of “but for” causation was a hypothetical construct. She viewed it as a serious concept defining the allocation of the burden of proof under a statute which was designed to limit relief to actual victims of discrimination.

Justice O’Connor stated that legal concepts of causation had been carefully developed over the years in the law of torts.71 Tort law recognized the unfairness of making a plaintiff prove “but for” causation in a multiple causation case. This unfairness was mitigated by shifting the burden of proof to the defendant upon a showing by the plaintiff that the defendant breached a duty to the plaintiff.72 The burden-shifting mechanism did not hamper the policies underlying the law of torts. Similarly, Justice O’Connor suggested that such a mechanism would not upset the dual policies of Title VII, the protection of employees from discrimination, and the creation of a remedy for the victims of violations of the statute. However, she suggested that only a showing by a Title VII plaintiff that an illegitimate factor played a substantial role in an employment decision would justify shifting the burden of proof to the employer.73

Turning to the causation requirement, Justice O’Connor stated that an employer could meet his shifted burden of proof by refuting the appearance of discrimination. This was justified because it was the employer’s consideration of an illegitimate factor that created this ap-

70. Id.
72. Id. See also Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948)(where two hunters fired their guns and only the negligence of one hunter caused the plaintiff’s injury, the burden was shifted to them to prove that their actions did not cause the plaintiff’s injury); *Restatement (Second) Torts* § 433B (1965)(supporting the shifting of burdens in multiple causation cases).
pearance in the first place. The concept of a shifting burden had been employed in class action suits in the equal protection area. The Court has shifted the burden of proof in cases challenging the validity of legislation in spite of judicial deference to the legislature in such cases. Justice O'Connor concluded that Congress could not have intended to grant more deference to private employers under Title VII than it does the government when it presumes that the legislature acts constitutionally.

Justice O'Connor admitted that the Court's previous decisions in McDonnell Douglas and Burdine indicated that the Title VII plaintiff should bear the burden of proof throughout the litigation. The decision by the Court in Price Waterhouse would clearly depart from that rule. However, she suggested that such a departure was warranted because of important distinctions between those cases and the case at bar.

Previous disparate treatment cases were not predicated on direct evidence of discrimination of the type presented by Ann Hopkins. The evidentiary framework of McDonnell Douglas was based on the assumption that direct evidence of discrimination is hard to come by. In Price Waterhouse there were legitimate reasons for rejecting Ann Hopkins for partnership. However, there was also direct evidence that the decision was the product of an improper motive.

Furthermore, Justice O'Connor stated that the cases falling into the category of the Hopkins suit were becoming more frequent. Proving that an illegitimate factor played a substantial role in the partnership decision was about as far as she could take her case. There were legitimate factors underlying the decision to balance against such proof of discrimination, which placed the burden of proof on the Title VII plaintiff under then existing law in all "mixed motive" cases. Justice O'Connor suggested that adopting the burden-shifting mechanism was necessary to realize the promise of Title VII.

Justice O'Connor suggested that the plaintiff must show that a discriminatory factor played a substantial role in the employment decision to meet her burden to prove a prima facie case of "mixed motive" under this test. She stated that stray remarks in the workplace, even concerning an individual's race or sex, would not justify shifting the burden of proof to an employer in a Title VII case. Even the testi-

74. Id. 1799-1800. See also Alexander v. Louisiana, 405 U.S. 625 (1972)(upon a showing that blacks had been systematically excluded from the grand jury process, the burden was shifted to the defendant to prove that the selection criteria used were racially neutral).
75. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 797 (1973)(the Equal Opportunity Commission made no direct finding that the employer violated the statute, its allegations were based on circumstantial evidence).
77. Id. at 1802.
mony of an expert such as Dr. Fiske regarding the impact of discriminatory comments, by itself, would not be competent evidence that the case falls within the Price Waterhouse framework.\textsuperscript{78} The "substantial role" or "substantial factor" requirement was seen as a part of the causation concept of Title VII. Justice O'Connor saw this as a necessary element of the test for several reasons.

She saw the substantial factor requirement as a justification for departing from the McDonnell Douglas standard. Strong evidence of an improper motive would create a presumption that an employer discriminated against its employee. This presumption would justify shifting the burden of proof to the employer to rebut the presumption. She also stated that the requirement would assure that stray comments in the workplace would not give rise to "mixed motive" treatment. Justice O'Connor concluded that "[w]hat is required [under Price Waterhouse] is what Ann Hopkins showed here: direct evidence that decision makers placed substantial negative reliance on improper criterion in making their decision."\textsuperscript{79}

Because she anchored her opinion to the McDonnell Douglas framework, Justice O'Connor stated that meeting the three-part test of demonstrating qualification, rejection, and continued recruitment by the employer would be a prerequisite to proving a case under Price Waterhouse. She then stated that the Title VII plaintiff should present any direct evidence of substantial reliance on discriminatory factors by the employer in making the employment decision in question. At the same time, the employer should present its evidence of the legitimate ground for the decision. Only then should a district court judge decide whether to reallocate the burden of proof under McDonnell Douglas or Price Waterhouse.\textsuperscript{80}

D. The Dissent

The dissenters argued that the plurality unjustifiably ignored a complex set of rules for proving employment discrimination cases under Title VII. The dissenters focused on the words "because of" in the statutory language. They insisted that these words were intended

\textsuperscript{78} Id. at 1804-05. In addition, Justice O'Connor recognized that illegitimate factors always play a role in decisions because they are human characteristics of which the decision makers are aware. Decision makers may discuss such characteristics in a perfectly neutral manner without falling within the purview of Title VII. See Mullen v. New Jersey Steel Corp., 733 F. Supp. 1534, 1551 (D.N.J. 1990).


\textsuperscript{80} Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1805 (1989). However, in applying the test, some courts deal with the Price Waterhouse framework, as tempered by Justice O'Connor's opinion, as an affirmative defense or an opportunity to avoid liability by demonstrating its reasons for making the employment decision. See Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 813 (M.D. Ala. 1989).
to create a "but for" causation requirement under Title VII. If it were not for an employer's bad motive the employee would not have suffered from an adverse employment decision.81

The dissent vigorously argued that the case was controlled by the McDonnell Douglas framework. There was no room in prior Supreme Court precedent nor the language of Title VII for a special category of "mixed motive" cases. The dissent concentrated on specific language in Burdine that suggested that a "pretext" plaintiff could meet her burden of proof by either circumstantial or direct evidence. Burdine made no distinction, as Justice O'Connor did, between cases based on the nature of the evidence presented by the plaintiff.82

Under the McDonnell Douglas framework, the plaintiff bore the burden of proof throughout the litigation. The dissent pointed out that the Price Waterhouse test was far more favorable to Title VII plaintiffs. Therefore, the courts would be spending valuable time with litigation, seeking to define "direct evidence" and "substantial factor." However, the dissent stated that the overall impact of the decision would be limited compared to the problems that it would raise in the area of Title VII jurisprudence. The dissent concluded that a limited number of cases would qualify for the Price Waterhouse analysis and even fewer of those would be affected by the shifting burden of proof.83

E. The Rule of Price Waterhouse

Because of the lack of a majority opinion in the case, the exact rule of Price Waterhouse does not clearly appear in the opinions of the Court. The Brennan opinion failed to garner a majority. Its view of the burden-shifting mechanism was clearly the broadest of the three opinions in the plurality.84 Therefore, while the Brennan opinion may form a basis for determining the rule of Price Waterhouse, that rule must be modified with the restrictions articulated in either the White

82. Id. at 1810-11.
83. Id. at 1812. The burden of proof only comes into play in those cases where the weight of evidence on each side is even. The party with the risk of persuasion loses in such an event. See S. GARD, 1 JONES ON EVIDENCE § 5.5 (1972). To some extent, even in these cases in which the new rule could play some part the courts have been eager to characterize the case as a non-"mixed motive" situation. See Ingram v. Missouri Pac. R. Co., 897 F.2d 1450 (8th Cir. 1989).
84. For example, the Brennan opinion would have only required that an illegitimate factor play a "motivating" role in the employment decision to justify shifting the burden of proof to the employer. The White and O'Connor opinions indicated that such factors must be shown to have played a "substantial" role in the decision to reach the same result.
The basic rule articulated in the Brennan opinion is that the plaintiff in a Title VII action bears the burden of proving that an illegitimate factor played a motivating part in an adverse employment decision. Upon such a showing, the burden of proof shifts to the employer to prove by a preponderance of the evidence that he would have made the same decision regardless of the presence of the illegitimate factor. Justice Brennan further suggested that the employer must ordinarily meet this burden by producing objective evidence of the motivation behind the decision.

Justice White’s formulation of the “mixed motive” case differed from that of Justice Brennan in several significant ways. First, Justice White was uncomfortable with the Brennan opinion’s suggestion of what would constitute a prima facie case of discrimination under Price Waterhouse. He would require a Title VII plaintiff to show that an illegitimate factor was a substantial factor in the making of the employment decision. Secondly, Justice White rejected the idea that an employer would be required to produce objective evidence of his legitimate motivation once the burden of proof was shifted in a “mixed motive” case. He suggested that this burden could be met by the articulation of legitimate reasons for the decision. The burden could also be met by the credible testimony of the employer that no discriminatory factors motivated the employment decision.

Justice White’s position regarding the employer’s burden of proof in “mixed motive” cases would be particularly damaging to the rule proposed in the Brennan opinion. He suggested that in a case where the burden is shifted to the employer, that burden could be met by a minimal presentation of evidence. The implication inherent in his opinion almost obviates the very reason for shifting the burden of proof.

Ironically, most courts struggling to apply the new rule have not picked up on this distinction. Many courts are applying the rule articulated by the Brennan opinion as if it were the opinion of the Court. See, e.g., Jindal v. New York State Office of Mental Health, 128 F. Supp. 1072, 1076 n.3 (S.D.N.Y. 1990); Gibbs v. Consolidated Edison Co., 714 F. Supp. 85, 89 n.2 (S.D.N.Y. 1989). But see Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 813 (M.D. Ala. 1989).

There is even a split within the Seventh Circuit as to what rule to apply in mixed motive cases. Compare Holland v. Jefferson Nat’l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989)(reh’g en banc denied)(stating that an illegitimate factor need only play a motivating role to shift the burden of proof to the employer pursuant to Price Waterhouse) with Smith v. Firestone Tire and Rubber Co., 875 F.2d 1325, 1330 (7th Cir. 1989)(mixed motive treatment is justified when the plaintiff presents direct evidence that an illegitimate factor played a substantial role in the employment decision). Had the Brennan formula been the correct one for either Justice White or O’Connor, they would have joined the majority opinion.

---

85. Ironically, most courts struggling to apply the new rule have not picked up on this distinction. Many courts are applying the rule articulated by the Brennan opinion as if it were the opinion of the Court. See, e.g., Jindal v. New York State Office of Mental Health, 128 F. Supp. 1072, 1076 n.3 (S.D.N.Y. 1990); Gibbs v. Consolidated Edison Co., 714 F. Supp. 85, 89 n.2 (S.D.N.Y. 1989). But see Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 813 (M.D. Ala. 1989).

86. See supra note 66 and accompanying text.
87. See supra note 69 and accompanying text.
88. See supra note 70 and accompanying text.
proof to the employer in such cases. If the employer could meet his burden by credibly articulating a legitimate reason for his decision, the shifting burden would become a mere formality. Justice White's vote is almost inexplicable. The evidentiary restrictions he would place on "mixed motive" cases represent no change from the way such cases would be treated under *McDonnell Douglas*. Therefore, under the test proposed by Justice White, the employee would be stuck, as she was before *Price Waterhouse*, attempting to prove that a discriminatory factor was the sole cause of an adverse employment decision.89

Justice O'Connor, like Justice White, would restrict the application of the "mixed motive" test to situations where an illegitimate factor played a substantial role in the employment decision. While this requirement is different from the "motivating role" standard articulated by Justice Brennan, it does not seem to be a particularly serious departure from the test proposed by the Brennan plurality. Justice O'Connor clearly suggested the "substantial factor" requirement be included in the test because she thought that it would require a stronger showing of discrimination by the Title VII plaintiff.90 The substantial factor requirement seeks to assure a close nexus exists between the discriminatory factors considered by the employer and the decision that was made. Similarly, Justice Brennan's concept of a "motivating factor" is tied to the concept of causation under Title VII. Therefore, although Justice O'Connor would require more substantial evidence of discrimination to justify "mixed motive" treatment, this suggestion would not render the *Price Waterhouse* framework a mirror image of *McDonnell Douglas*.

Justice O'Connor did express several ideas that would curtail the rule proposed by Justice Brennan. She suggested that the plaintiff's burden of proof could only be met by direct evidence of discrimination. A Title VII plaintiff must show, by direct evidence, that her employer considered an illegitimate factor which played a substantial role in the employment decision. While the requirement that the plaintiff produce direct evidence does not seem imposing, Justice O'Connor made it clear that she felt that future "mixed motive" cases would require evidence of the type presented by Ann Hopkins.91 Fur-
thermore, evidence such as the testimony of Dr. Fiske as to the impact of discriminatory comments at work, by itself, would not constitute direct evidence that an illegitimate factor played a substantial role in the decision making process. This is a far more restrictive view than that taken by Justice Brennan who would have accepted any evidence that both legitimate and illegitimate factors motivated an employment decision as proof of the plaintiff's case under *Price Waterhouse*.

The O'Connor opinion was in agreement with the White opinion in most respects. Justice White made no mention of the requirement that the plaintiff produce direct evidence that an illegitimate factor was present in the decision making process to warrant "mixed motive" treatment. However, Justice White's insistence that the consideration of an illegitimate factor play a substantial role in the employer's decision in such cases closes the gap between these two positions. To meet the higher burden of substantial reliance by the employer on an illegitimate factor, direct evidence of such reliance would be more likely to persuade a court to treat the situation as a "mixed motive" case. Therefore, given Justice O'Connor's insistence of requiring the Title VII plaintiff to produce direct evidence of discrimination, these two positions do not differ in this respect.

While the rules proposed by Justices White and O'Connor do not differ much in many respects, Justice O'Connor did not attempt to alter the employer's shifted burden of proof in the manner proposed by Justice White. Justice O'Connor would apparently not permit an employer to meet his burden by merely testifying that the employment decision was not motivated by an illegitimate factor. While she made several detailed statements indicating her disagreement with the Brennan opinion, she made no comments about the suggestion that an employer should be able to produce objective evidence to meet

---

92. In his opinion, Justice Brennan pointed out that Price Waterhouse admitted that the employer in *Transportation Management* discriminated against his employee based on the evidence submitted in that case. However, no direct evidence was presented that would have suggested that the employer bore a grudge against his employee because of his union activity. Therefore, Justice Brennan clearly felt that a Title VII plaintiff could meet the required burden to show that the case should be analyzed under *Price Waterhouse* without direct evidence of an improper motive. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1794 (1989). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 396 (1983)(comments by supervisor to fellow employee served as the basis to demonstrate that union animus played a role, along with legitimate factors, in an adverse employment decision).

his burden under the new rule. As stated earlier, this particular proposition would be devastating to the reasoning underlying the decision to shift the burden to the employer in the first place.94

Therefore, Justice O'Connor's position would be more compatible with the Brennan opinion than that taken by Justice White. This compatibility makes Justice O'Connor's vote the most probable fifth vote for a majority on the court with regard to "mixed motive" cases. It is the O'Connor opinion, therefore, that best articulates the rule of Price Waterhouse.95 First of all, the Title VII plaintiff must meet the three prong test of McDonnell Douglas.96 Then, as Justice O'Connor stated:

[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. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other concerns.97

The evidence to which Justice O'Connor refers is direct evidence of the kind that Ann Hopkins presented in Price Waterhouse.98

IV. THE RULE OF PRICE WATERHOUSE AND THE PURPOSES OF TITLE VII

The discussion in this Part will focus on the question of whether the rule of Price Waterhouse will promote the underlying purpose of Title VII. First, it will be necessary to find a sufficiently analogous statutory scheme to use as a tool to analyze Title VII. Then, by looking at cases that have developed in another area of the law it will be possible to explore how such concepts as "direct evidence" and "substantial factor" would affect that area. This analysis will reveal whether the rule adopted in Price Waterhouse was necessary and, if so, whether the Court went far enough to assure that the promise of Title VII will be realized. For the purposes of this analysis, section 8(a)(3) of the NLRA will serve as a comparative statutory scheme that

94. Supra note 89 and accompanying text.
95. See Smith v. Firestone Tire and Rubber Co., 875 F.2d 1325, 1330 (7th Cir. 1989).
96. Supra note 44 and accompanying text.
98. While this would be the most logical articulation of the rule of Price Waterhouse, most courts have failed to notice that the Brennan opinion did not garner enough votes to constitute a majority of the Court. See Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989); Gray v. University of Arkansas at Fayetteville, 883 F.2d 1394, 1398 (8th Cir. 1989); Waltman v. International Paper Co., 875 F.2d 468, 481 (5th Cir. 1989); Gibbs v. Consolidated Edison Co. of New York, 714 F. Supp. 85, 89 n.2 (S.D.N.Y. 1989); Adams v. Frank, 712 F. Supp. 74, 76 (E.D. Va. 1989). But see Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 813-14 (M.D. Ala. 1989).
can be used as a point of reference from which to view the employment provisions of Title VII.

A. The NLRA-Proving Unfair Employment Practices Under the Act

"Under Section 8 (a)(3) of the Act, it is unlawful for an employer 'by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization.' The foregoing provision does not, however, proscribe all types of employment discrimination." 99 Although it is impermissible under this provision to fire an employee based on union animus, an employer is not prohibited from firing someone for other reasons even if union animus is present. 100 Therefore, determining the actual motivation underlying an employment decision is vital to the enforcement of section 8 (a)(3).

The purpose of the discrimination provisions of the NLRA is to prevent coercive behavior by employers and unions to encourage or discourage union membership. 101 Section 8(a)(3) is merely a part of a larger system designed to prevent employers and unions from invading the protected rights of workers. The primary "right" conferred under the original provisions of the NLRA was the right to organize and bargain collectively over the terms and conditions of employment. The original provisions of the NLRA also conferred a right to strike as a form of economic leverage to enforce the right. 102 Therefore, section 8(a)(3) goes to the heart of the entire scheme of the NLRA. Unless employers, for example, were prohibited from firing employees for exercising their right to organize a union, the primary "right" conferred under the statute would be meaningless. 103

The Taft-Hartley changes in 1947 sought to further protect the rights of workers as well as employers under the NLRA. The right to collectively bargain, and the ability to complain to the NLRB of employer attempts to discourage union activity, helped the unions to become extremely powerful in the period following the passage of the Wagner Act. 104 This power invaded the protected rights of dissident workers and placed employers at a disadvantage in dealing with unions. 105 The NLRA was amended to deal with the vastly improved bargaining position of unions and cure the abuses that were occurring

105. The United Mine Workers were able extract large concessions from the federal government during the Second World War by engaging in a series of crippling strikes. Id. at 36.
at that time. The NLRA, as amended, restricted the NLRB from issuing orders based on the discharge of an employee for cause. The statute, as it stands today, represents a "balance" between the statutory rights of workers and the rights of employers to make legitimate business decisions regarding union employees.

Therefore, the respective purposes of the NLRA and Title VII are significantly analogous. Both statutes are designed to provide a method to enforce rights conferred by legislation. Although the purpose of the national labor laws is to provide for the protection of the rights of a representative group, the collective bargaining unit, the basic concept of providing a remedy to enforce protected rights remains constant. Title VII provides a remedy to individuals. With respect to the NLRA, the collective bargaining unit protects the right of the individual as that term is defined in the statute. In providing an enforcement mechanism for the rights conferred by statute, both statutes seek to "balance" the rights of protected workers against the legitimate interests of employers in operating their businesses.

B. The Wright Line Test

In Wright Line, Inc., the NLRB attempted to deal with the

---

106. In 1947, § 10(c) of the NLRA was amended. This amendment to the act provided:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.


107. However, the term "balance" may be inappropriate with respect to Title VII. It may be more accurate to say that the balance underlying Title VII is merely a concern that a sufficient causal relationship exists between the alleged discrimination and the adverse employment decision. This causal relationship insures that the employer is protected from strict liability when making decisions regarding protected persons. Therefore, the balance of rights reflected by the Taft-Hartly changes to the NLRA should be more strongly reflected in the area of labor law than the similar balance of rights under Title VII. See supra section II. See also Fragante v. City and County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) (discussing the "balance" between the rights of employers to make independent decisions, existing under the narrow BFOQ exception, and the broad right of employees to be free from unlawful discrimination in the workplace).

With regard to the similarities between the two statutes, it is interesting to note that both schemes place the ultimate burden of proof on the plaintiff. In the case of the NLRA, the ultimate burden of persuasion is placed on the General Counsel. See NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983).

However, the remedy that can be obtained before the NLRB is more limited than the remedy for a Title VII plaintiff. Under § 10(c) of the NLRA, the remedy that the NLRB can provide for an unfair labor practice is limited to the issuance of a cease and desist order, an order for reinstatement, and an award of backpay. See 29 U.S.C. § 160(c)(1989).

108. NLRB 1083 (1980).
problem of determining the motive underlying an employment decision where both legitimate and illegitimate factors were considered by the employer when the decision was made. Determining the motivating factor behind such a decision was necessary to preserve the balance between the workers' right to bargain collectively and the employer's right to run her business. Fashioning such a mechanism was also critical to the NLRB because the General Counsel bears the burden of proving that an improper motivation was the "cause of" the employment decision.

To deal with the problem of determining whether an improper motive was the cause of an adverse employment decision, the NLRB turned to the *Mount Healthy* test and decided to adopt a shifting burden mechanism in "mixed motive" cases under section 8(a)(3). The Board stated that an employer will rarely state that an employment decision was based on union animus. An employer will often articulate "legitimate reasons" for firing an employee. Indeed, those reasons may well exist in various situations. However, where both legitimate and illegitimate reasons for an employment decision do exist, the employer has blurred his true motivation by merely considering the illegitimate factor in making the decision.

The Board found that the *Mount Healthy* test was the best mechanism for dealing with such cases whether they were considered "pretext" or "mixed motive" cases. The Board determined that the burden-shifting mechanism was consistent with the legislative history and the Supreme Court precedents regarding section 8(a)(3). The burden-shifting procedure also accurately reflected the decision-making process of the Board.

Therefore, the NLRB adopted the *Mount Healthy* test as the proper procedure for adjudicating "pretext" and "mixed motive" cases under section 8(a)(3). Thus, an employee may establish a prima

109. NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 & n.28 (1957).
111. *Supra* note 10.
112. Wright Line, Inc., 251 NLRB 1083, 1083-84 (1980).
113. *Id.* at 1086-88. The Board discussed the inadequacies of the various tests used by the circuit courts under § 8(a)(3) as compared to the rule articulated by the Supreme Court in *Mount Healthy*.
114. The Supreme Court previously stated that the discriminatory impact on employee rights stemming from an employment decision must be proven "if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." NLRB v. Great Dane Trailers, Inc., 338 U.S. 26, 34 (1977). Therefore, the Court approved the shifting of the burden of proof to the employer when an employer's discriminatory conduct played a part in an adverse employment decision. *Id.*
116. *Id.* at 1089. The *Wright Line* test was endorsed by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983). The Court empha-
facie case of an unlawful labor practice against her employer by showing that union animus played a motivating part in an adverse employment decision. Upon such a showing, the burden of proof shifts to the employer to demonstrate by a preponderance of the evidence that the same decision would have been made in the absence of union animus.\textsuperscript{117}

C. Distinguishing the Wright Line and Price Waterhouse Rules

1. The Basic Rules

There are only two major distinctions between the rule of Price Waterhouse and the test adopted by the NLRB in Wright Line. First, the Supreme Court did not depart from the McDonnell Douglas standard in “pretext” cases when adopting the Price Waterhouse rule.\textsuperscript{118} In contrast to that decision, the NLRB in Wright Line saw no reason to distinguish between “pretext” and “dual motive” cases.\textsuperscript{119} The same reasons supporting the burden-shifting mechanism apply equally to each type of case. In fact, one advantage of adopting the Mount Healthy standard, as perceived by the NLRB, was the fact that the rule obviated the need to make subtle and confusing distinction between “pretext” and “mixed motive” cases.\textsuperscript{120}

Second, the Price Waterhouse test requires the Title VII plaintiff to present “direct evidence” that an illegitimate factor played a substantial role in the challenged employment decision. This difference is directly related to the refusal to leave behind the McDonnell Douglas framework and replace it with a single rule to govern all cases in which motivation is a key element. Subsequently, there is no restriction on the type of evidence that must be presented under Wright Line to show that both legitimate and illegitimate factors motivated an adverse employment decision.


\textsuperscript{118} See Wright Line, Inc., 251 NLRB 1083, 1083 n.4 (1980).

\textsuperscript{119} See Wright Line, Inc., 251 NLRB 1083, 1083 n.4 (1980).

\textsuperscript{120} Id. at 1089 & n.13.
2. The Application of Wright Line

a. Meeting the General Counsel’s Prima Facie Case

In *United Parcel Service, Inc.*, the NLRB adopted the findings of the administrative law judge that the employer violated section 8(a)(3) by discharging a truck driver for falsifying time cards as to the length of the breaks he took while on the job. The driver was involved with a union organization that was critical of both the Teamster’s Union and his employer. Although the Board determined that the driver may well have falsified his time cards, it felt that the General Counsel made out a *prima facie* case of union animus requiring the application of *Wright Line*.124

*United Parcel* involved a driver who was engaged in union activities. He was passing out leaflets at work, attempting to sway other employees to his cause. Several times the employer’s supervisors warned the driver that he should stop handing out literature at work even if he was not on the clock. There was substantial oral testimony that the employer was concerned about the distribution of the literature to other employees and the driver’s involvement with its distribution.125

There was testimony that several of the employer’s supervisors, agents of the employer, made statements revealing their animosity toward the driver. Several supervisors who played a role in “spying” on the driver made statements suggesting that he was being punished for passing out leaflets the workplace. The gist of these statements was that the employer did not “get” the driver by engaging in surveillance on these initial occasions, but would “get” him eventually. Also, the ALJ found that the surveillance that led to the driver’s suspension and dismissal was an extraordinary measure for this type of situation. Spying by the employer closely followed the employer’s expression of

---

121. 252 NLRB 1015 (1980).
122. The term “administrative law judge” shall be referred to hereinafter as ALJ.
124. Where legitimate factors are present that would justify the termination of a union employee as well as union animus, the burden-shifting mechanism comes into play. This is necessary to determine whether, as a matter of fact, the decision was the product of a statutorily improper motive. *See supra* note 19. As with any type of appeal process, the initial decision of the Board regarding the credibility of witnesses should not be disturbed without convincing reasons. *See, e.g.*, NLRB v. Hawkins Constr. Co., 857 F.2d 1224, 1228 (8th Cir. 1988); Ewing v. NLRB, 732 F.2d 1117, 1122 (2d Cir. 1984).
126. For example, one supervisor stated to another employee that “[w]e didn’t get him this time but we will get him next time.” *Id.* at 1021. Another agent of the employer made statements indicating management’s displeasure with the fact that an employee, presumably the driver, had been distributing anti-employer literature in the area covered by the driver’s route. *Id.*
displeasure with the driver’s union activities. The combination of this evidence was a *prima facie* case of a “mixed motive” employment decision under *Wright Line* partially based on union animus.127

b. The Employer's “Shifted” Burden of Proof

In *Mission Valley Ford Truck Sales, Inc.*,128 the Board adopted a finding by the ALJ that a mechanic was discharged, in part, because of his union organizational efforts.129 Pursuant to *Wright Line*, the ALJ shifted the burden of proof to the employer to prove that the same decision would have been made absent union animus. Having found that the employer met his burden under section 8(a)(3), the ALJ rejected the mechanic's claim that his termination was an unfair labor practice.130

*Mission Valley* involved a mechanic who was hired by a garage that was a non-union shop. When asked whether he would be comfortable working in a non-union shop, the mechanic stated that he didn’t mind so long as the employees were treated fairly. Subsequently, the mechanic began to engage in a union organizational effort. In response, his employer threatened the mechanic's job security.131

Within a few hours after the altercation with his employer, the mechanic was told to repair the transmission of a van. He did so, but another employee noticed that the repair took noticeably shorter than such a repair should take. Suspicious, the employee, Lewis, examined the van and determined that the repair had never been made. He brought this to the attention of the employer and the mechanic was

---

127. *See id.* at 1015-16. After shifting the burden of proof to the employer, the ALJ found that the employer's surveillance of the driver was not the normal procedure given the circumstances. The employer sought to meet this burden by repeating the suggestion that the driver was suspended and dismissed for falsifying rest stop reports. Although falsifying rest stop reports was a legitimate reason for dismissing the driver, the surveillance that uncovered the legitimate factor leading to the driver's termination was based on union animus. The employer's own agent testified that he never saw a discrepancy in the driver's rest stop reports prior to this time. Therefore, the employer could not meet his burden of proof under *Wright Line*. *Id.* at 1022.
129. Specifically, the mechanic’s employer made statements to one of his employees indicating his disapproval of the mechanic's union activities. The mechanic credibly testified that the employer said, "He didn’t want me talking to any more [sic] other employees ever again . . . saying that you once told me that you were not going to have any involvement with the Union . . . . And then he replied, 'I ought to just fire you right now or terminate you.'" *Id.* at 3. Also, the events that led up to the mechanic's dismissal transpired only hours after the aforementioned conversation took place. *Id.* at 9.
130. *Id.* at 12.
131. *Supra* note 124.
fired for falsifying work orders.\textsuperscript{132}

Lewis, who engaged in the investigation of the falsified repair, was not an agent of the employer.\textsuperscript{133} Therefore, even if the investigation was motivated by union animus on the part of Lewis, the evidence had to show that the employer was aware of this motivation when the decision was made to show that the employer violated section 8(a)(3). The ALJ found that Lewis' actions were the result of union animus. Therefore, the ALJ looked at the evidence relied on by the employer in dismissing the mechanic. He tried to determine whether the employer's hostility toward the mechanic's union activities motivated the decision, even though it was based on circumstances not instigated by the employer.\textsuperscript{134}

Considering the testimony and the evidence, the ALJ found several factors present in the case that indicated that the employment decision was not based on union animus. There was no evidence that the employer conspired with Lewis to "set-up" the fired mechanic with respect to the repair in question. Lewis testified that the transmission repair in question normally took over an hour longer than the mechanic worked on the van. This testimony was corroborated by other employees and the suggested repair time listed in the Ford Repair Manual.

Other employees also inspected the van and testified that the repair ordered had never been made by the petitioner. When the van came in for service at a later date, garage employees again inspected it and determined that the mechanic made no repair to the transmission.\textsuperscript{135} Therefore, the employer met his burden under Wright Line and avoided a finding that he violated section 8(a)(3).

D. Price Waterhouse Under the Evidentiary Framework of Wright Line

The ultimate issue that this Article explores is whether the rule adopted in Price Waterhouse comports with the purpose of Title VII. The importance of determining the intention of an employer in making an employment decision is evident in employment discrimination caselaw. This same concern underscores the decisions of the NLRB made pursuant to section 8(a)(3). Under Wright Line, a method of factually determining the most probable motivation behind an employment decision has been developed by using the Mount Healthy model, the same model used in Price Waterhouse. By comparing the method of factually proving a case under Wright Line to the rule of

\begin{itemize}
\item \textsuperscript{132} Id. at 5.
\item \textsuperscript{133} Id. at 8.
\item \textsuperscript{134} Id. at 8-9.
\item \textsuperscript{135} Id. at 10-11.
\end{itemize}
Price Waterhouse, it will be possible to clarify the meaning of the rule to see whether it will effectuate the purposes of Title VII.

Under Wright Line, the petitioner’s prima facie case of discrimination against union affiliation can be met by a number of types of evidence or a combination thereof. Direct evidence in the form of testimony about comments evidencing union animus may be used to demonstrate a discriminatory motive on the part of the employer. This type of evidence has several forms.

There has been testimony by the petitioner in an unfair labor practice setting about statements made by the employer evidencing union animus. The Board has considered testimony about comments made by the employer or the employer's agents to employees other than the petitioner evidencing union animus. Such statements are, in almost every sense, “direct evidence” of an employer’s discriminatory motive in dealing with union employees. The only question as to such evidence under Wright Line is whether the witness is credible.

Would such evidence, however, constitute “direct evidence” for the purpose of Price Waterhouse? The only indication of what Justice O'Connor meant by the term “direct evidence” appears in dicta in her concurring opinion. Justice O'Connor indicated that her insistence that a Title VII plaintiff present direct evidence that an illegitimate factor played a substantial role in the employment decision was to justify a departure from McDonnell Douglas. Therefore, she would restrict the application of Price Waterhouse to cases where the plaintiff has presented evidence of the type presented by Ann Hopkins. She stated that testimony of sex stereotyping, and presumably all expert testimony as to the effect of discriminatory comments in the workplace, would not constitute “direct evidence” by itself. Stray comments in the workplace would not justify “mixed motive” treatment of an employment discrimination case.

Therefore, credible oral testimony about statements made by the employer concerning an employee, by itself, would not constitute “direct evidence” of discrimination under Price Waterhouse. Cer-

136. See Mission Valley Ford Truck Sales, Inc., 295 NLRB No. 89 (1989)(employer expressing anger over employee’s union activity); Hospital Management Assoc., 284 NLRB 37 (1987)(employer representative coercively questioning employees about position on unionization); Valley Cabinet & Mfg., Inc., 253 NLRB 98 (1980); United Parcel Service, Inc., 252 NLRB 1015 (1980)(coercive comments to employee in an attempt to prevent him from distributing literature critical of the employer).
138. Randle v. La Salle Telecommunications, Inc., 876 F.2d 563 (7th Cir. 1989)(under Price Waterhouse, the plaintiff must present “direct evidence” of discrimination to shift the burden of proof to the employer).
139. See supra notes 78-79 and accompanying text.
tainly, Ann Hopkins relied on some oral testimony about her employer's concerns in making its partnership decision. However, that oral testimony merely corroborated the documentary evidence of the partnership deliberations, and the written comments from the partners themselves.

Oral testimony does not rise to the same level of proof as written admissions by the employer as to the factors considered by them in making the employment decision. Justice O'Connor's insistence on applying *Price Waterhouse* only in the narrow range of cases where evidence of the type presented by Ann Hopkins is available would unnecessarily limit the application of the test. The test would not apply to cases that would clearly call for mixed motive treatment under *Wright Line.* Oral testimony about an employer's union animus is often relied on in the labor area, but would be categorized as "stray comments" under *Price Waterhouse.*

The second type of evidence that has been used to meet the General Counsel's *prima facie* case of union animus under *Wright Line* is circumstantial in nature. A major factor used to corroborate the "intent" revealed by an employer's comments in the workplace has been the timing of the events leading up to the employment decision. By tracing the events leading up to the decision to dismiss an employee, it has been possible to present a comprehensive picture of the motivation underlying the decision. The timing of the decision helps to establish the causation requirement of section 8(a)(3).

Circumstantial evidence such as the timing of an employment decision falls completely outside of the scope of evidence justifying "mixed motive" treatment under *Price Waterhouse.* Certainly, the timing

---

142. See Mission Valley Ford Truck Sales, Inc., 295 NLRB (Dec. CCH) No. 89 (1989)(comments by employer to employees concerning the employer's anger over union organizational activities competent evidence of union animus). See also Nordstrom d/b/a Seattle Seahawks, 292 NLRB (Dec. CCH) No. 110 (1989)(basing determination of union animus on comments made by employer and the impressions created by such comments following a press conference by union activist employee).
143. See NLRB v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, 864 F.2d 1225, 1231-32 (5th Cir. 1989).
144. See Gray v. University of Arkansas at Fayetteville, 883 F.2d 1394, 1400 & n.2 (8th Cir. 1989)(because the court characterized evidence of black employee's salary
of the events leading up to an adverse employment decision is not "direct evidence" of the type that Ann Hopkins presented. Much like statistical evidence of disparate treatment under *McDonnell Douglas*, the timing of a decision can give rise to an inference of an improper motive. However, under *Price Waterhouse*, such evidence would not be entitled to a *presumption* of discrimination justifying a shift in the burden of proof.

Since the type of evidence that has been used to meet the petitioner's burden of proof under *Wright Line* would not be competent evidence for similar purposes under *Price Waterhouse*, it is questionable that the new rule will effectuate the purposes of Title VII. The statute only requires that a Title VII plaintiff prove that the decision was made because of reliance on an illegitimate factor. Motivation or intent is the key to establishing liability under the statute. However, as revealed by the testimony of Dr. Fiske in district court, sex stereotyping evidenced by gender-related comments indicates that an employment decision may have been based on gender. Six justices accepted the evidence of sex stereotyping as presented in *Price Waterhouse*. In spite of this, the rule articulated by Justice O'Connor would require documentary evidence that such reliance occurred in the decision making process itself to shift the burden of proof to the employer.145

In how many types of situations would this kind of evidence be available? It would seem that this kind of evidence would only be available where collegial decision making occurs. Such employment decisions are inherent to limited types of employment situations such as partnership and tenure-track teaching positions. It is inconceivable that Congress only intended to benefit this narrow category of people with a factfinding mechanism that requires the employer to refute a presumption of an improper motive in making an employment decision. Even this category of cases will eventually cease to exist as employers move away from written comments evidencing discriminatory factors in the wake of this decision. Justice O'Connor has created a narrow rule with a limited life when the purpose underlying Title VII

discrepancy as circumstantial, the case was not treated as one of "mixed motives").

145. See Smith v. Firestone Tire and Rubber Co., 875 F.2d 1325, 1329-30 (7th Cir. 1989). This is partially because of the concern to preserve the autonomy of employer decision makers. However, this has not been a problem under *Wright Line*. In fact, opening up the gates to all types of evidence has not placed employers at a significant disadvantage with respect to employment decisions concerning union employees. Employers in union "shops" have not been forced to retain union employees "because of" their protected status under the NLRA. See Stamping Specialty Co., 294 NLRB (Dec. CCH) No. 56 (1989); Beth Israel Medical Center, 292 NLRB (Dec. CCH) No. 51 (1989).
calls for a broad and far reaching test to prove “intent” in Title VII cases.

The reasons underlying the burden-shifting mechanism do not support the distinctions made by Justice O'Connor. First, the employer who relies on a discriminatory factor makes it hard to identify whether a legitimate or illegitimate factor motivated the decision. However, the type of evidence used under *Wright Line* of the employer's general feelings toward an employee adequately establishes that an illegitimate factor was present in the employer's mind at the time of the decision. This type of evidence justifies shifting the burden because the employer is statutorily barred from considering such factors.

Second, the burden-shifting mechanism of *Mount Healthy* represents the reality of access to proof. The employer can readily identify the evidence supporting the legitimate reason for the decision in question. Although there are some rights to discovery in Title VII cases, the employee is not aware of nor has any familiarity with the record-keeping techniques of the employer. Also, and more importantly, the employment decision will be made without documentation as to the discriminatory factor involved. By shifting the burden to the employer, the Title VII plaintiff who presents enough evidence to create a presumption of discrimination is protected from having a case dismissed due to the absence of documentary evidence concerning an employer's decision making process. The employer, on the other hand, will be encouraged to communicate problems to an employee and document those problems to protect himself from legal action.

Therefore, the Brennan plurality took a more realistic approach to the “proof problems” that exist under the evidentiary framework of Title VII. By “abandoning” *McDonnell Douglas* in “mixed motive” cases, the Brennan plurality freed itself from the outmoded rules for “pretext” cases. Every employment decision inherently involves a mix of various motivations. Only improperly motivated employment decision are barred by Title VII. The only principled distinction between so-called “mixed motive” and “pretext” cases is the strength of the inference of discrimination that can be drawn from the evidence presented by the Title VII plaintiff. Therefore, as the Board noted in *Wright Line*, the distinction is not helpful where discovering an employer's motivation is the key to establishing liability under a statutory scheme because of the secret nature of such decisions.

The burden-shifting mechanism does not place an impermissible burden on the employer's rights under the “balance” sought by Title VII. For example, in *Mission Ford* the employer avoided a section 8(a)(3) violation by carefully preserving evidence of the reason for the

---

146. *Supra* note 117.
employment decision. The employer showed that the events leading up to the decision were instigated by an employee, and not the employer, and that the decision was based on a legitimate business concern, that customers were not to be taken advantage of by employees. The employer's interest is protected by the burden-shifting mechanism itself. He must only show that he was most likely motivated by legitimate reasons when making an employment decision. This fact remains the same under either the Brennan or O'Connor test. However, it is unlikely that many cases will reach this point under Justice O'Connor's approach.

V. CONCLUSION

The rule of Price Waterhouse had the potential to achieve the goals of Title VII, but fell far short of the mark. The rule articulated by the Brennan plurality would free the Title VII plaintiff from the unrealistic burden placed on them by McDonnell Douglas and Burdine. The employer would be protected from incurring liability under the statute by documenting legitimate reasons for terminating a protected person. This is evident from the way that the NLRB handles employment cases where proving motivation is a key element pursuant to Wright Line.

However, Justice O'Connor attempted to go "halfway" toward the goal of abandoning McDonnell Douglas in mixed motive cases. By doing so, the rule she articulated pointed out the shortcomings of the old standard without creating a general rule to be applied to future Title VII cases. Although Justice O'Connor may wish to pursue matters on a case by case basis, that is not how the Court functions. This uncertainty, and O'Connor's conservative approach to the proof problem prompted, in part, Congressional effort to overrule Price Waterhouse. However, this legislation fell short of passage this fall.147 As a result

---

147. Section 5 of the Civil Rights Act of 1990 provided as follows:

(i) DISCRIMINATORY PRACTICE NEED NOT BE SOLE CONTRIBUTING FACTOR., — Except as otherwise provided in this title, an unlawful employment practice is established when the contributing party demonstrates that an illegitimate factor was a contributing factor for any employment practice, even though other factors also contributed to such practice.” H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess, at 2.

This section also, and potentially more importantly for Title VII plaintiffs, limited the liability an employer could avoid by meeting the shifting Price Waterhouse burden to equitable remedies. However, President Bush vetoed the bill because he claimed that it would lead to hiring quotas. The bill also addressed the other major decisions handed down by the Supreme Court in 1988-89. See Dale, Federal Civil Rights Decisions of the U.S. Supreme Court During the 1988-89 Term, a CRS Report to Congress (July 28, 1989). However, the opponents of the Bill failed to account for the fact, at least with respect to the above quoted provision, that the Wright Line burden shifting mechanism has not lead to "quota" oriented decision making in the labor field. See, e.g., Beth Israel Medical
of the ambiguities existing in the present state of the law in this area, the rule of *Price Waterhouse* will likely return to the Court and to the Congress for further clarification. If this issue is again presented to the judiciary, perhaps the Court will expand the rule in the direction taken by the NLRB under *Wright Line* and fulfill the purposes of Title VII.

*Kelly Robert Dahl '90*

Center, 292 NLRB (Dec. CCH) No. 51 (1989)(an employer lawfully discharged a newly hired chemical dependency counselor, even though the discharge was motivated in part because of the employee's unwillingness to cross a picket line, because the employer was able to prove that the employee lacked the basic qualifications to be a counselor).

* Associate, Baird, Holm, McEachen, Pedersen, Hamann & Strasheim.