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CONFOUNDING THE COURTS: THE CIRCUIT COURTS' FAILURE TO ARTICULATE AN APPROPRIATE SUMMARY JUDGMENT STANDARD IN MIXED-MOTIVE INDIVIDUAL DISPARATE TREATMENT CLAIMS

Derek Runyan*

I. INTRODUCTION

The Eleventh Circuit's decision in *Quigg v. Thomas County School District*[1] solidified the division among federal circuits over the appropriate summary judgment standard in individual disparate treatment mixed-motive[2] cases based on circumstantial evidence. At the moment,[3] the circuits have adopted, in varying

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[1] Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227 (11th Cir. 2016).

[2] This Note operates under the assumption that mixed-motive cases are analytically distinct from pretext cases. *See, e.g.*, Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 38–39 (2005) ("Mixed-motive cases differ from single-motive/pretext cases . . . . Only certain proof patterns can reasonably suggest the possibility that two motives (one unlawful, the other lawful) combined to produce the adverse employment action . . . . [M]ixed-motive proof patterns have one key feature in common: a plaintiff who does not rely exclusively on pretext evidence designed to challenge and eliminate the employer's explanation."); *but see, e.g.*, Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1930–31 (2004) (arguing that the distinction between the pretext model and mixed-motive framework should be abolished and a uniform standard under 42 U.S.C. § 703(m) (2012) should be implemented).

[3] The First Circuit has declined to analyze the role of the *McDonnell Douglas* framework post the Supreme Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90, 90 (2003), but "appears to have adopted a summary judgment approach similar to the Fourth, Seventh, Ninth, and D.C. Circuits' approaches." *Quigg*, 814 F.3d 1227, 1239 n.8 (discussing Chadwick v. Wellpoint, Inc., 561 F.3d 38, 45 & n.8 (1st Cir. 2009)).

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http://lawreview.law.pitt.edu

degrees, four distinct approaches.[4] In Part IV, this Note argues that the circuit courts have failed to articulate a summary judgment standard that satisfies Rule 56 of the Federal Rules of Civil Procedure,[5] reflects the statutory language of 42 U.S.C.A. § 2000(e)-2(m) (2012), and recognizes that the *McDonnell Douglas* burden-shifting framework "is fatally inconsistent with the mixed-motive theory of discrimination."[6] For mixed-motive cases, this Note proposes in Part V that an appropriate summary judgment framework can be articulated by merging and modifying the Fourth and Fifth Circuits' standards[7] with the framework adopted by the Sixth[8] and the Eleventh[9] Circuits. Ultimately, this Note proposes the adoption of the following standard: in a mixed-motive case, a plaintiff may survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether: (1) the defendant took an adverse employment action against the plaintiff; and (2) race, color, religion, sex, or national origin was a motivating factor for the defendant's adverse employment action.[10]

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[4] *See infra* Part IV.

[5] FED. R. CIV. P. 56 (providing that a motion for summary judgment should be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law"); *see also* Christopher J. Emden, Note, *Subverting Rule 56?* McDonnell Douglas, White v. Baxter Healthcare Corp., *and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139 (2010).

[6] *Quigg*, 814 F.3d at 1237 (discussing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)); *see infra* Part IV.

[7] *See* Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (holding that a plaintiff may survive summary judgment by using the traditional *McDonnell Douglas* burden-shifting analysis or, "present[] direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision" (citations omitted)); *see also* Emden, *supra* note 5, at 166 ("This language tracks the language of Rule 56, which says that a motion for summary judgment will be granted when there is 'no genuine issue as to any material fact.'").

[8] *See* White v. Baxter Corp., 533 F.3d 381, 400 (6th Cir. 2008) (alteration in original) (quoting 42 U.S.C. § 2000(e)-2(m) (2012)) ("We . . . hold that to survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor' for the defendant's adverse employment action.").

[9] *Quigg*, 814 F.3d at 1232 ("We conclude that the proper framework for examining mixed-motive claims based on circumstantial evidence is the approach adopted by the Sixth Circuit . . .—not the *McDonnell Douglas* framework.").

[10] *See infra* Part V.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

II. TITLE VII AND THE EVOLUTION OF THE INDIVIDUAL DISPARATE TREATMENT CLAIM

After a year of debate,[11] Congress passed the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of an individual's "race, color, religion, sex, or national origin."[12] According to the Supreme Court, Congress intended the Act to remove "artificial, arbitrary, and unnecessary, barriers to employment when the barriers operate invidiously to discriminate because of race, color, religion, sex, or national origin."[13]

Individual disparate treatment claims "are traditionally categorized as either single-motive claims, i.e., where an illegitimate reason motivated an employment decision, or mixed-motive claims, i.e., where both legitimate and illegitimate reasons motivated the employer's decision."[14] To succeed on a mixed-motive claim, an employee must show "that illegal bias, such as bias based on sex or gender, 'was a motivating factor for' an adverse employment action, 'even though other factors also motivated' the action."[15] However, "single-motive claims—which are pretext claims—require a showing that bias was the true reason for the adverse action."[16]

A. McDonnell Douglas*,* Burdine *and the Single Motive Framework*

To understand the division among the circuit courts over the proper summary judgment standard in mixed-motive cases, an analysis of the formative Supreme

[11] CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 237 (1985) (dubbing the period leading to the passage of the Civil Rights Act of 1964 as "the longest debate"); *see also* Emden, *supra* note 5, at 142 ("On July 2, 1964, after twelve months of work and a debate dubbed 'the longest debate,' Congress passed the Civil Rights Act of 1964.").

[12] 42 U.S.C. § 2000e-2(a)(1)–(a)(2) (2012) ("It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or nation origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

[13] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Sarah Keates, Note, *Surviving Summary Judgment in Mixed-Motive Cases*—White v. Baxter Healthcare Corporation, 78 U. CIN. L. REV. 785, 787 (2009).

[14] White v. Baxter Corp., 533 F.3d 381, 396 (citing Wright v. Murray Guard, Inc., 455 F.3d 702, 711 (6th Cir. 2006)); *Quigg*, 814 F.3d at 1235.

[15] *Quigg*, 814 F.3d at 1235 (citing 42 U.S.C. §2000e-2(m) (2012)).

[16] *Id.* (discussing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 251–53 (1981)).

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http://lawreview.law.pitt.edu

Court case *McDonnell Douglas v. Green*[17] is required. The "critical issue" before the Court in *McDonnell Douglas* was "the order and allocation of proof in a private, non-class action challenging employment discrimination."[18] Significantly, in *McDonnell Douglas*, "the employee brought a single-motive discrimination claim."[19]

The *McDonnell Douglas* Court established a three-part burden-shifting framework to resolve the "notable lack of harmony" between "Courts of Appeals" and "to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case."[20] To satisfy the *McDonnell Douglas* framework, an employee must first establish a prima facie case of employment discrimination.[21] As articulated by the Court:

> This may be done by showing (i) that [the employee] belongs to a racial minority; (ii) that [the employee] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [the employee's] qualifications, he was rejected; and (iv) that, after [the employee's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[22]

After the employee has established a prima facie case, the burden of production then shifts to the employer to articulate "some legitimate, non discriminatory reason for the employee's rejection."[23] If that prong is satisfied, the burden of production then shifts back to the employee "to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext."[24]

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[17] 411 U.S. 792 (1973).

[18] *Id.* at 801.

[19] *Quigg*, 814 F.3d at 1237 (discussing *McDonnell Douglas*, 411 U.S. at 801); *see McDonnell Douglas*, 411 U.S. at 801 ("[T]he complainant below, charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color.' Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it.").

[20] *McDonnell Douglas*, 411 U.S. at 801.

[21] *Id.* at 802.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 804.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

Eight years later, in *Texas Department of Community Affairs v. Burdine*, the Supreme Court addressed "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed."[25] In holding that the "plaintiff retains the burden of persuasion,"[26] the Court analyzed the purpose of the burden-shifting framework.[27] Specifically, the Court provided that "[t]he prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[28] Further, in discussing the purpose of the pretext stage of the *McDonnell Douglas* framework, an employee "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision."[29] This Note proposes that because the *McDonnell Douglas* "framework is fatally inconsistent with the mixed-motive theory of discrimination[,]"[30] the Second,[31] Third,[32] Fourth,[33] Fifth,[34] Seventh,[35] Eighth,[36] Ninth,[37] Tenth,[38] and D.C.[39] Circuits have failed to articulate an appropriate summary judgment standard in mixed-motive individual disparate treatment cases by requiring a plaintiff to survive summary judgment under a pretext theory.[40]

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[25] Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 250 (1981).

[26] *Id.* at 256.

[27] *Id.* at 253–56.

[28] *Id.* at 253–54.

[29] *Id.* at 256.

[30] Quigg v.Thomas Cty. Sch. Dist., 814 F.3d 1227, 1238 (11th Cir. 2016) (discussing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)); *see infra* Part IV(A).

[31] Holocomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008).

[32] Makky v. Chertoff, 541 F.3d 205, 214 (3d Cir. 2008).

[33] Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

[34] Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

[35] Hossack v. Floor Covering Assocs., Inc., 492 F.3d 853, 862 (7th Cir. 2007).

[36] Griffith v. City of Des Moines, 387 F.3d 733, 735–36 (8th Cir. 2004).

[37] McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1123 (9th Cir. 2004).

[38] Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1225 (10th Cir. 2008).

[39] Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007).

[40] *See infra* Part IV.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
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B. Price Waterhouse *and the Judicial Recognition of the Mixed-Motive Case*

In *Price Waterhouse v. Hopkins*, a divided Supreme Court first recognized the existence of the mixed-motive theory of intentional discrimination.[41] The trial judge found that the employer based its adverse employment actions on both legitimate and illegitimate criteria[42]—which is analytically distinct from the single-motive cases previously brought before the Supreme Court.[43] The plurality in *Price Waterhouse* held that if the employee's gender was a motivating factor for an adverse employment action, the employer could only discharge its liability through "an affirmative defense."[44]

Justice O'Connor's concurrence in *Price Waterhouse* has been "treated as the operative holding of the Court."[45] In a mixed-motive case, Justice O'Connor argued that a "disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[46] Thus, "[t]his heightened evidentiary requirement 'introduced the concept of a mandatory *McDonnell*

[41] *See* 490 U.S. 228 (1989) (plurality opinion).

[42] *Id.* at 236 ("Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.").

[43] In mixed-motive cases, such as *Price Waterhouse*, both legitimate and illegitimate considerations are actually the basis of the adverse employment action. *Cf. McDonnell Douglas*, 411 U.S. at 801 (noting that the employee's Compliant "charges that he was denied employment 'because of his involvement in civil rights activities' and 'because of his race and color'").

[44] *Price Waterhouse*, 490 U.S. at 246 ("Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.").

[45] Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 532 (2008); Emden, *supra* note 5, at 146.

[46] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

Douglas.'"[47] Under this heightened requirement, only plaintiffs with direct evidence could benefit from the mixed-motive framework.[48] Further,

> [b]ecause employers were able to avoid liability in mixed-motive cases by showing that they would have taken the same action despite being motivated by an impermissible reason, *Price Waterhouse* "allowed employers to escape liability in mixed motive discrimination cases' because 'the legitimate motive served to defeat the plaintiff's claim."[49]

C. A Response to Price Waterhouse*—The 1991 Civil Rights Act*

At least partly in response to *Price Waterhouse*, Congress passed the 1991 Civil Rights Act.[50] The Act amended Title VII by adding 42 U.S.C. § 2000e-2(m), which codified a modified motivating-factor standard from the one articulated in *Price Waterhouse*. Now, a plaintiff could establish her claim for individual disparate treatment under a second framework.[51] The Act specifically provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[52] The Act established a limited affirmative defense for employers.[53] As a result, if the employer can establish that it "would have taken the same action in the absence of the impermissible motivating factor," the plaintiff's damages are restricted to "declaratory relief, injunctive relief, and attorney's fees; but may not be awarded damages or an order requiring admission, reinstatement, promotion, or payment."[54] This Note proposes that the summary judgment standard articulated by

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[47] Emden, *supra* note 5, at 146 (citing Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 118 (2007)).

[48] Katz, *supra* note 47.

[49] Emden, *supra* note 5, at 147 (citing Cassandra A. Giles, Note, *Shaking* Price Waterhouse*: Suggestions for More Workable Approach to Title VII Mixed Motive Disparate Treatment Claims*, 37 IND. L. REV. 815, 820 (2004)).

[50] Giles, *supra* note 49, at 820–21 (discussing the impact of *Price Waterhouse* on the 1991 amendments).

[51] 42 U.S.C. § 2000e-2(m) (2012).

[52] *Id.*

[53] *Id.*

[54] 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

the Sixth and Eleventh Circuits most adequately adheres to the language of 42 U.S.C. § 2000e-2(m) (2012).[55]

D. Desert Palace*: The Supreme Court Rejects the Direct Evidence Requirement*

After *Price Waterhouse*[56] and the 1991 Civil Rights Act,[57] "Courts of Appeals [were] divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a 'motivating factor' in adverse employment action."[58] In 2003, the Supreme Court, in *Desert Palace, Inc. v. Costa*, held that "in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 . . . direct evidence is not required."[59] Justice Thomas, delivering the opinion of the Court, noted that "on its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[60] The language of 42 U.S.C. § 2000e-2(m) (2012) requires a plaintiff to "demonstrate[] that race, color, religion, sex, or national origin was a motivating factor for any employment practice." Because Congress defined the word "demonstrates" as "meet[ing] the burden of production and persuasion,"[61] the Court concluded that if Congress intended a heightened evidentiary burden, as required by Justice O'Connor's concurrence in *Price*

[55] Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227 (11th Cir. 2016) (referencing White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008)) ("[T]o survive a defendant's motion for summary judgment, a . . . plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a* motivating factor for the defendant's adverse employment action."); *White*, 533 F.3d at 400 ("We . . . hold that to survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was a motivating factor' for the defendant's adverse employment action." (citing 42 U.S.C. § 2000e-2(m) (2012))).

[56] *See* 490 U.S. 228 (1989) (plurality opinion).

[57] 42 U.S.C. § 2000e-2(m) (2012).

[58] Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003).

[59] *Id.* at 92.

[60] *Id.* at 98–99.

[61] 42 U.S.C. § 2000e(m) (2012).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

Waterhouse, "it could have made that intent clear by including language to that effect."[62]

Thus, post-*Desert Palace*,[63] plaintiffs may bring mixed-motive cases predicated on circumstantial evidence.[64] This result led to the circuit-split regarding the proper summary judgment analysis of such claims.[65] Part III of this Note will discuss current summary judgment jurisprudence. Part IV of this Note will outline the circuit-split.

III. SUMMARY JUDGMENT JURISPRUDENCE IN THE POST-TRILOGY LANDSCAPE

The landscape of summary judgment jurisprudence has evolved since the Supreme Court's articulation of the *McDonnell Douglas* framework in 1973.[66] "Courts are no longer reluctant to grant summary judgment in cases where 'there exists questions of fact concerning the employer's motive, thereby denying to employment discrimination plaintiffs their day in court historically promised by the American model of litigation.'"[67] To properly assess the correct standard for summary judgment in mixed-motive individual disparate treatment cases, a brief discussion of current summary jurisprudence is required.

Rule 56 of the Federal Rules of Civil Procedure allows a plaintiff or a defendant to move for summary judgment, preventing the case from being heard by a fact-finder.[68] Specifically, Rule 56 provides that summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."[69] Three summary judgment cases have

[62] *Desert Palace*, 539 U.S. at 99.

[63] 539 U.S. 90 (2003).

[64] *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310 (4th Cir. 2005); Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007); White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008).

[65] *See infra* Part IV.

[66] Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993).

[67] Emden, *supra* note 5, at 151 (citing McGinley, *supra* note 66, at 207).

[68] FED. R. CIV. P. 56(c).

[69] *Id.* at 56(a).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

now "made it easier for defendants to obtain summary judgment in cases of at least arguable discrimination."[70]

In *Anderson v. Liberty Lobby*,[71] the Court addressed whether a court ruling on a summary judgment motion must consider the evidentiary standard when ruling on the motion.[72] In *Anderson*, the problem was whether the dispute about the material fact of actual malice was "genuine."[73] According to the Court, a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[74] The Court ruled that a "judge must view the evidence presented through the prism of the substantive evidentiary burden."[75] Essentially, courts are now required to evaluate the probative value of each of the party's evidence.[76]

The *Anderson* Court explained that in a case involving a preponderance standard,[77] the judge deciding one of these motions "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[78] Thus, the *Anderson* decision means that "trial courts are obligated to determine not only whether there is a factual dispute, but whether the evidence identified in the summary judgment opposition would satisfy the plaintiff's burden of proof at trial."[79]

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[70] McGinley, *supra* note 66, at 206.

[71] 477 U.S. 242 (1986).

[72] *Id.* at 244.

[73] *Id.* at 248.

[74] *Id.*

[75] *Id.* at 254.

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

[77] In an individual disparate treatment case the plaintiff always has the burden of proving intentional discrimination by a preponderance of the evidence, either through direct or indirect evidence. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("[T]he plaintiff has the burden of proving by the preponderance of the evidence . . . .").

[78] *Anderson*, 477 U.S. at 252.

[79] Ware, *supra* note 76, at 47 (2000); Emden, *supra* note 5, at 152.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

Celotex Corp. v. Catrett[80] further transformed the summary judgment landscape. The *Celotex* Court made clear that a party may move for summary judgment by identifying "that there is an absence of evidence to support the *nonmoving* party's case."[81] The Court ruled that "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[82] At its core, for our purposes, a defendant need only demonstrate that a plaintiff has insufficient evidence to raise a "genuine dispute as to any material fact,"[83] requiring the plaintiff to affirmatively show that it exists.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court addressed the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.[84] The decision suggests that "issues such as intent and motive may be appropriate for determination by a motion for summary judgment."[85] Broadly read, *Matsushita* instructs judges to "weigh the evidence and to decide which inference was more reasonable in light of the evidence."[86] Thus, under *Matsushita*, if there is a question of plausibility on the theory of liability, the nonmoving party is required to provide more evidence to avoid summary judgment.[87]

As the Supreme Court has not yet articulated a summary judgment standard for mixed-motive individual disparate treatment cases, the trilogy of summary judgment cases decided in 1986 will certainly shape such a standard.[88] This Note proposes that

[80] 477 U.S. 317 (1986).

[81] *Id.* at 325 (emphasis added).

[82] *Id.*

[83] FED. R. CIV. P. 56(a).

[84] 475 U.S. 574, 576 (1986).

[85] Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 93 (1999); Emden, *supra* note 5, at 152.

[86] McGinley, *supra* note 66, at 227; Emden, *supra* note 5, at 153.

[87] Ware, *supra* note 76, at 48–49; Emden, *supra* note 5, at 153.

[88] Beiner, *supra* note 85, at 96 (because "there is no separate rule of civil procedure governing summary judgment in employment discrimination cases," all the circuits' approaches must abide by Rule 56 of the Federal Rules of Civil Procedure (quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997))).

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the Fourth, Seventh, Ninth, and D.C. Circuits have articulated a summary judgment standard that satisfies Rule 56 of the Federal Rules of Civil Procedure.[89]

IV. DISCUSSING THE CIRCUIT SPLIT: THE MIXED-MOTIVE SUMMARY JUDGMENT MESS

The circuit courts of appeals have, to date, developed four varying approaches to a mixed-motive summary judgment standard.[90] Significantly, the circuits have failed to articulate a standard that conforms to Rule 56 of the Federal Rules of Civil Procedure, reflects the statutory language of 42 U.S.C. § 2000(e)-2(m) (2012), and recognizes that the *McDonnell Douglas* burden-shifting framework functions inconsistently with the purpose of the mixed-motive theory of discrimination. An evaluation of the four approaches follows.

A. A Two-Prong Test: The Eleventh Circuit Follows the Sixth Circuit

In *White v. Baxter Health Care Corp.*, an African-American employee brought, *inter alia*, a mixed-motive claim pursuant to 42 U.S.C. § 2000(e)-2(m) (2012) alleging that his employer, Baxter Healthcare Corporation, downgraded his performance evaluation.[91] The Sixth Circuit held:

> [T]o survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the

[89] Emden, *supra* note 5, at 166. The Fourth Circuit's summary judgment standard tracks the language of FED. R. CIV. P. 56(a). In *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310, 318 (4th Cir. 2005), the Court ruled as follows: "A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impressible factor such as race motivated the employer's adverse employment decision." *Accord* FED R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact . . . .").

[90] *See* Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1238–39 (11th Cir. 2016) (discussing the approach followed by the Second, Third, Fifth, and Tenth Circuits, the approach followed by the Fourth, Seventh, Ninth, and D.C. Circuits, the approach followed by the Eighth Circuit, and the approach followed by the Sixth Circuit).

[91] 533 F.3d 381, 395 (6th Cir. 2008).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

> plaintiff; and (2) "race, color, religion, sex, or national origin was *a* motivating factor" for the defendant's adverse employment action.[92]

In so holding, the court implicitly adopted a textual approach.[93] The court further stated, "[t]his burden of producing some evidence . . . is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."[94]

The *White* Court expressly rejected the *McDonnell Douglas* framework in mixed-motive cases regardless of "whether the plaintiff has presented direct or circumstantial evidence."[95] In adopting the two-prong test, the court looked to the purpose of the *McDonnell Douglas* burden-shifting framework.[96] The court indicated that "[i]n *Burdine*, the [Supreme] Court explained that the purpose of the '*McDonnell Douglas* division of intermediate evidentiary burdens' is to 'bring litigants and the court expeditiously and fairly to [the] ultimate question' of whether the defendant intentionally discriminated against the plaintiff."[97] The *White* Court continued: "[i]n single-motive Title VII cases, the *McDonnell Douglas* shifting burdens of production effectively accomplish this task by 'smok[ing] out the single, ultimate reason for the adverse employment decision.'"[98] The court also noted that "the *prima facie* case requirement 'eliminates the most common nondiscriminatory reasons for' the adverse employment action, and thus creates a presumption that the adverse employment action was not motivated by legitimate reasons, but rather by a discriminatory animus."[99] The pretext requirement, the court clarified, "is designed to test whether the defendant's allegedly legitimate reason was the real motivation

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[92] *Id.* at 400 (quoting 42 U.S.C. § 2000(e)-2(m) (2012)).

[93] *See id.*; *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) ("Our precedents make clear that the starting point for our analysis is the statutory text." (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992))).

[94] *White*, 533 F.3d at 400.

[95] *Id.*

[96] *Id.*

[97] *Id.* (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[98] *Id.* at 400 (citing Wright v. Murray Guard, Inc., 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring)).

[99] *Id.* at 400–01 (citing *Burdine*, 459 U.S. at 254).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

for its actions."[100] As a result, the court provided, "[s]uch a narrowing of the actual reasons . . . is necessary . . . in a single-motive discrimination case because the plaintiff . . . must prove that the defendant's discriminatory animus, and not some legitimate business concern, was the ultimate reason for the adverse employment action."[101]

As a result, the *White* Court deduced that in a mixed-motive context, "this elimination of possible legitimate reasons for the defendant's action is not needed."[102] Looking to the text of 42 U.S.C. § 2000(e)-2(m) (2012), the court explained, "[i]n mixed-motive cases, a plaintiff can win simply by showing that the defendant's consideration of a protected characteristic 'was *a* motivating factor for any employment practice, *even though other factors also motivated the practice*.'"[103] As a result, "the plaintiff is not required to eliminate or rebut all the possible legitimate motivations of . . . the defendant's decision to take the adverse employment action."[104] In reaching its holding, the court concluded,

> [a]s the shifting burdens of *McDonnell Douglas* and *Burdine* are unnecessary to assist a court in determining whether the plaintiff has produced sufficient evidence to convince a jury of the presence of at least one illegitimate motivation on the part of the defendant . . . [t]he only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in [mixed-motive] cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was *a* motivating factor for" the defendant's adverse employment decision.[105]

Looking to the practical implications of their newly articulated summary judgment standard, the *White* Court provided: "[a]s '[i]nquiries regarding what actually motivated an employer's decisions are very fact intensive,' such issues 'will

[100] *Id.* at 401 (citing *Burdine*, 459 U.S. at 256).

[101] *Id.*

[102] *Id.*

[103] *Id.* (citing 42 U.S.C. § 2000(e)-2(m) (2012)).

[104] *Id.*

[105] *Id.* (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

generally be difficult to determine at the summary judgment stage' and thus will typically require sending the case to the jury."[106]

The Eleventh Circuit, in *Quigg v. Thomas County School District*, adopted the Sixth Circuit's approach for evaluating mixed-motive claims that rely on circumstantial evidence.[107] The court looked to the "clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims"[108] and concluded that "*McDonnell Douglas* is inappropriate for evaluating mixed-motive claims because it is overly burdensome when applied in the mixed-motive context."[109] Specifically, the *Quigg* Court noted that the *McDonnell Douglas* "framework is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for an adverse action."[110] The court explained, "an employee can only meet her burden under *McDonnell Douglas* by showing the employer's purported legitimate reasons '*never* motivated the employer in its employment decisions or because [the reasons] did not do so in a particular case.'"[111] As a result, the court reasoned, "if an employee cannot rebut her employer's proffered reasons for an adverse action but offers evidence demonstrating that the employer also relied on a forbidden consideration, she will not meet her burden."[112] The court held, however, that "this is the exact type of employee that the mixed-motive theory of discrimination is designed to protect[,]"[113] so "it is improper to evaluate such claims at summary judgment."[114]

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[106] *Id.* at 402 (citing Wright v. Murray Guard, Inc., 455 F.3d 702, 721 (6th Cir. 2006) (Moore, J., concurring)).

[107] 814 F.3d 1227, 1232 (11th Cir. 2016) ("We conclude that the proper framework for examining mixed-motive claims based on circumstantial evidence is the approach adopted by the Sixth Circuit in *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008)—not the *McDonnell Douglas* framework.").

[108] *Id.* at 1238.

[109] *Id.* at 1237.

[110] *Id.* (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

[111] *Id.* at 1237–38 (alteration in original) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 270 (1989) (O'Connor, J., concurring)).

[112] *Id.* at 1238.

[113] *Id.* (citing *Price Waterhouse*, 490 U.S. at 257–58 (plurality opinion)).

[114] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

While reflecting the statutory language of the 1991 Civil Rights Act[115] as well as recognizing the "clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims,"[116] the Sixth and Eleventh Circuits'[117] two-prong test is inconsistent with the language of Rule 56 of the Federal Rules of Civil Procedure.[118] Under the Federal Rules of Civil Procedure, a defendant is entitled to summary judgment "if the plaintiff has failed to raise a 'genuine issue as to any material fact . . . and is entitled to judgment as a matter of law.'"[119] The *White* Court's "devoid of evidence"[120] standard falls woefully short of Rule 56.[121] First, to square the *White* standard with the language of Rule 56, "'devoid of evidence' must be evaluated the same as 'no genuine issue as to any material fact.'"[122] As a result, under the *White* standard, "if a plaintiff can put forth any evidence that could reasonably be construed to support his claim, he has created a genuine issue of material fact."[123]

[115] 42 U.S.C. § 2000(e)-2(m) (2012).

[116] *Quigg*, 814 F.3d at 1238.

[117] It is unclear whether the *Quigg* Court adopted the Sixth Circuit's devoid of evidence standard. *See Quigg*, 814 F.3d at 1239 (alteration in original) (citations omitted) ("[W]e adopt the framework put forth by the Sixth Circuit in *White*."). *Compare Quigg*, 814 F.3d at 1239 ("[The *White*] framework requires a court to ask only whether a plaintiff has offered evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a* motivating factor for the defendant's adverse employment action . . . . In other words, the court must determine whether the 'plaintiff has presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [her protected characteristic] was a motivating factor for [an] adverse employment decision.'" (emphasis in original)), *with* White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008) ("This burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim.").

[118] Beiner, *supra* note 85, at 96 (quoting Wallace v. SMC Pneumatics, 103 F.3d 1394, 1396 (7th Cir. 1997)).

[119] Emden, *supra* note 5, at 156 (citing FED. R. CIV. P. 56(a)).

[120] *White*, 533 F.3d at 400.

[121] Emden, *supra* note 5, at 156 ("The *Baxter* court has circumvented Rule 56 with its lower standard by mandating that any evidence will create a genuine issue of material fact.").

[122] *Id.* at 156; Beiner, *supra* note 85.

[123] Emden, *supra* note 5, at 156.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

Such a standard blatantly runs afoul to the Supreme Court's rulings in *Anderson v. Liberty Lobby*[124] and *Celotex v. Catrett*.[125] Because, under the *White* standard, "a plaintiff need only show enough evidence . . . to avoid a trial judge finding the record to be 'devoid of evidence,'"[126] the Supreme Court's holding in *Anderson* is squarely violated. Under a preponderance of the evidence standard,[127] the judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[128] However, the *White* Court posited that "[a]s '[i]nquiries regarding what actually motivated an employer's decision are very fact intensive,' such issues 'will generally be difficult to determine at the summary judgment stage' and thus will typically require sending the case to the jury."[129] As a result, under *White*, a judge will essentially rubber stamp the case for trial because "any evidence will create a genuine issue of material fact"[130] so "a fair-minded jury" can always "return a verdict for the plaintiff on the evidence presented."[131]

Further, the *White* standard violates the Supreme Court's decision in *Celotex*[132] by creating an overly permissive standard for the plaintiff to survive summary judgment. *Celotex* departed from the pre-1986 standard "when a mere scintilla of evidence supporting the nonmovant's case, or the slightest doubt as to the facts, was considered cause for denying a motion"[133] to a test of "whether a reasonable jury could find for the nonmovant."[134] As a result, a plaintiff seeking to avoid summary

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[124] 477 U.S. 242 (1986).

[125] 477 U.S. 317 (1986).

[126] Emden, *supra* note 5, at 156 (citing White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008)).

[127] Individual disparate treatment cases follow a preponderance of the evidence standard. *See supra* note 77.

[128] *Anderson*, 477 U.S. at 252.

[129] *White*, 533 F.3d at 402 (quoting Wright v. Murray Guard, Inc., 455 F.3d 702, 721 (6th Cir. 2006) (Moore, J., concurring)).

[130] Emden, *supra* note 5, at 156.

[131] *Anderson*, 477 U.S. at 253.

[132] Celotex v. Catrett, 477 U.S. 317 (1986).

[133] William W. Scharzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 447 (Feb. 1992).

[134] *Id.*; Emden, *supra* note 5, at 157.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

judgment must produce evidence "sufficient to survive a motion for a directed verdict or a judgment notwithstanding the verdict."[135] Absent such a showing, "a trial would be pointless."[136] The *White* standard does not require such a showing by the plaintiff; as long as "the record is not 'devoid of evidence' that can be reasonably construed to support the plaintiff's claim[,]" then a defendant's motion for summary judgment will be denied.[137]

While the Sixth and Eleventh Circuits[138] both articulate a framework that adheres to the language of the 1991 Civil Rights Act and recognize the incongruent purpose of the *McDonnell Douglas* framework in analyzing a mixed-motive claim, the "devoid of evidence" standard falls short of the Supreme Court's summary judgment jurisprudence and Rule 56 of the Federal Rules of Civil Procedure.[139]

B. Deviating from the Traditional McDonnell Douglas *Framework: The Second, Third, Fifth, and Tenth Circuits Conglomerate*

The Second,[140] Third,[141] Fifth,[142] and Tenth[143] Circuits have found that mixed-motive cases require an approach that deviates from the traditional *McDonnell Douglas* framework. Significantly, these approaches fail to satisfy the text of 42 U.S.C. § 2000(e)-2(m) (2012)[144] and fail to account for the incongruent purpose of

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[135] Scharzer et al., *supra* note 133, at 477.

[136] *Id.*

[137] Emden, *supra* note 5, at 157; *see* White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008) ("This burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim.").

[138] *See supra* note 117.

[139] *See supra* Part IV(A).

[140] Holocomb v. Iona Coll., 521 F.3d 130, 141–42 (2d Cir. 2008).

[141] Makky v. Certoff, 541 F.3d 205, 214 (3d Cir. 2008).

[142] Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

[143] Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224–26 (10th Cir. 2008).

[144] As Congress passed in 42 U.S.C. § 2000(e)-2(m) (2012), a summary judgment standard should reflect the language of the statutory text. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)) ("Our precedents make clear that the starting point for our analysis is the statutory text."); *see also* Deal v. United States, 508 U.S. 129, 136 (1993) ("Once text is abandoned, one intuition will serve as well as the other.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

the *McDonnell Douglas* framework in resolving mixed-motive claims.[145] As a result, this Note proposes that a deviating *McDonnell Douglas* summary judgment standard is inappropriate for resolving mixed-motive claims.

In *Holocomb v. Iona College*, the Second Circuit created a modified *McDonnell Douglas* standard for resolving summary judgment motions in mixed-motive claims based on circumstantial evidence.[146] Specifically, the *Holocomb* Court "depart[ed] from the traditional *McDonnell Douglas* framework after holding that 'a plaintiff who . . . claims that the employer acted with mixed motives is not *required* to prove that the employer's stated reason was pretext.'"[147] The court further stated, "[a] plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the 'impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.'"[148] While accounting for the language of the 1991 Civil Rights Act,[149] the Second Circuit failed to recognize the incongruent purpose of the *McDonnell Douglas* framework in mixed-motive claims.[150]

The Third Circuit, in *Makky v. Chertoff*, while "not decid[ing] the question whether a plaintiff pursuing a mixed-motive theory of discrimination must satisfy each of the elements of the *McDonnell Douglas* prima facie case,"[151] explained that "[t]he *McDonnell Douglas* burden-shifting framework does not apply in a mixed-motive case in the way it does in a pretext case because the issue in a mixed-motive case is not whether discrimination played the dispositive role but merely whether it played a motivating part in an employment decision."[152] Like the Second Circuit in *Holocomb*,[153] the Third Circuit failed to articulate a mixed-motive summary

[145] See *supra* Part IV(A).

[146] 521 F.3d 130, 141–42 (2d Cir. 2008).

[147] Quigg v. Thomas County School Dist., 814 F.3d 1227, 1238 (11th Cir. 2016) (discussing *Holocomb*, 521 F.3d at 141–42).

[148] *Holocomb*, 521 F.3d at 142 (citing Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 120 (2d Cir. 1997)).

[149] 42 U.S.C. § 2000(e)-2(m) (2012) (codifying the motivating factor standard).

[150] *See supra* Part IV(A).

[151] 541 F.3d 205, 215 (3d Cir. 2008).

[152] *Id.* at 214 (internal quotation marks omitted).

[153] *Holocomb*, 521 F.3d at 141–42.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

judgment standard, which accounts for the "clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims."[154]

In *Rachid v. Jack In The Box, Inc.*,[155] the Fifth Circuit "adopt[ed] a 'modified *McDonnell Douglas* approach' for mixed-motive cases."[156] In articulating a mixed-motive summary judgment standard, the *Rachid* Court held:

> [T]he plaintiff must still demonstrate a prima facie case of discrimination, the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the plaintiff meets the burden of production, the plaintiff must *offer evidence to create a genuine issue of material fact either* (1) that the defendant's reason is . . . a pretext, or (2) that the defendant's reason while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic.[157]

Although the Fifth Circuit's summary judgment standard for mixed-motive cases satisfies Rule 56 of the Federal Rules of Civil Procedure,[158] it failed to account for the *McDonnell Douglas* framework's divergent purpose with respect to a mixed-motive claim.[159]

The Tenth Circuit also missed the mark.[160] In *Fye v. Oklahoma Corp. Commission*, the Court, applying a unique approach, ruled that "the *Price Waterhouse* framework does not apply, until the plaintiff presents evidence that directly shows that retaliation played a motivating part in the employment decision . . . . [T]he plaintiff must demonstrate that the alleged [discriminatory] motive actually relate[s] to the question of discrimination in the *particular*

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[154] Quigg v. Thomas County School Dist., 814 F.3d 1227, 1238 (11th Cir. 2016).

[155] 376 F.3d 305, 312 (5th Cir. 2004).

[156] *Quigg*, 814 F.3d at 1238–39 (quoting *Rachid*, 376 F.3d at 312).

[157] *Rachid*, 376 F.3d at 312 (emphasis added) (internal quotation marks omitted) (quoting Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

[158] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[159] *See supra* Part IV(A).

[160] Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224–26 (10th Cir. 2008) (internal quotation marks omitted).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

employment decision . . . ."[161] This standard failed to account for the standard articulated by the Federal Rules of Civil Procedure,[162] the text of the Civil Rights Act of 1991,[163] and the divergent purposes of the *McDonnell Douglas* burden-shifting framework and a mixed-motive claim.[164]

C. *A Plaintiff's Choice?—The Fourth, Seventh, Ninth, and D.C. Circuits Follow a Permissive* McDonnell Douglas *Approach*

The Fourth,[165] Seventh,[166] Ninth,[167] and D.C.[168] Circuits have articulated the most plaintiff-friendly summary judgment standards in mixed-motive cases.[169] An employee may survive a motion for summary judgment by either 1) the *McDonnell Douglas* framework or 2) showing that a genuine issue of material fact exists as to whether an illegal reason was a motivating factor in an adverse employment action.[170] While the Seventh, Ninth, and D.C. Circuits fail to account for the Federal Rules of Civil Procedure 56(a) standard,[171] the Fourth Circuit "tracks the language of Rule 56, which says that a motion for summary judgment will be granted when there is 'no genuine issue as to any material fact.'"[172] Although the permissive

[161] *Id.* at 1226.

[162] *See supra* note 158.

[163] 42 U.S.C. § 2000(e)-2(m) (2012).

[164] *See supra* Part IV(A).

[165] Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

[166] Hossack v. Floor Covering Assocs., Inc., 492 F.3d 853, 860–62 (7th Cir. 2007).

[167] McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).

[168] Fogg v. Gonzales, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007).

[169] *See, e.g.*, Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1239 (11th Cir. 2016) (explaining that the Fourth, Seventh, Ninth, and D.C. Circuits allow an employee to survive a motion for summary judgment through the *McDonnell Douglas* framework or by showing a genuine issue of material fact exists as to whether an illegal reason was a motivating factor in an adverse employment action).

[170] *Id.*; *see also Diamond*, 416 F.3d at 318; *Hossack*, 492 F.3d at 860–62; *McGinest*, 360 F.3d at 1122; *Fogg*, 492 at 451, n.*.

[171] *See Hossack*, 492 F.3d at 860–62 (allowing the plaintiff to proceed under an indirect *McDonnell Douglas* framework or a direct mixed-motive theory); *McGinest*, 360 F.3d at 1122 ("[Employee] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]."); *Fogg*, 492 F.3d at 451 & n.* ("A plaintiff may also, of course, use evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case.").

[172] Emden, *supra* note 5, at 166 (quoting FED. R. CIV. P. 56(a)).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

McDonnell Douglas group, as a whole, fails to account for the divergent purposes of the *McDonnell Douglas* burden-shifting framework and a mixed-motive claim,[173] it fares substantially better than the stand-alone Eighth Circuit.

D. A Mandatory Mixed-Motive McDonnell Douglas*: The Eighth Circuit Stands Alone*

In *Griffith v. City of Des Moines*, the Eighth Circuit held that the *McDonnell Douglas* burden-shifting framework applied to the summary judgment analysis of mixed-motive claims after *Desert Palace*.[174] For a mixed-motive summary judgment plaintiff to survive summary judgment, she can either offer proof of "direct evidence of discrimination,"[175] or attempt to create the inference of intentional discrimination through the *McDonnell Douglas* burden-shifting framework.[176] The *Griffith* Court looked to the narrow holding of *Desert Palace, Inc. v. Costa*[177] to conclude that "*Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring . . . controlling summary judgment precedents."[178]

The Eighth Circuit's mandatory *McDonnell Douglas* approach failed to account for Congress' codification of the 1991 Civil Rights Act—codifying an alternative method for a disparate treatment plaintiff to recover,[179] Rule 56 of the Federal Rules of Civil Procedure,[180] and the fundamental difference in purpose between the *McDonnell Douglas* framework and the mixed-motive claim.[181] As a result, in articulating the proper summary judgment standard for mixed-motive cases, the Eighth Circuit's framework should be cast aside.

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[173] *See supra* Part IV(A).

[174] 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions.").

[175] Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003).

[176] *Griffith*, 387 F.3d at 736.

[177] *Id.*

[178] *Id.* at 735.

[179] 42 U.S.C. § 2000e-2(m) (2012) requires a plaintiff to "demonstrate[] that race, color, religion, sex, or national origin was a motivating factor for any employment practice."

[180] *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

[181] *See supra* Part IV(A).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2017.471
http://lawreview.law.pitt.edu

V. A MIXED-MOTIVE SUMMARY JUDGMENT SOLUTION: CHERRY PICKING THE CIRCUIT COURTS FOR RESULTS

The appropriate summary judgment framework for mixed-motive individual disparate treatment claims may be articulated by merging and modifying the Fourth and Fifth Circuits' standards with the framework adopted by the Sixth and Eleventh Circuits.[182] The following standard is proposed: in a mixed-motive case, a plaintiff may survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether: (1) the defendant took an adverse employment action against the plaintiff; and (2) "race, color, religion, sex, or national origin was a motivating factor"[183] for the defendant's adverse employment action. Such a framework reflects the standard imposed by the Federal Rules of Civil Procedure,[184] reflects the statutory language of 42 U.S.C. § 2000e-2(m) (2012),[185] and accounts for the "clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims."[186]

VI. CONCLUSION

With the Eleventh Circuit[187] joining the Sixth Circuit, the federal courts are squarely divided over the appropriate summary judgment standard in individual disparate treatment mixed-motive cases based on circumstantial evidence. At the moment,[188] the circuits have adopted, in varying degrees, four distinct approaches.[189] The circuit courts have failed to articulate a summary judgment standard which satisfies Rule 56 of the Federal Rules of Civil Procedure,[190] reflects the statutory

[182] *See supra* Parts IV(A)–(C).

[183] 42 U.S.C. § 2000e-2(m) (2012).

[184] *See supra* Part IV.

[185] *See supra* Part IV.

[186] Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1238 (11th Cir. 2016); *see supra* Part IV.

[187] *Quigg*, 814 F.3d at 1232.

[188] First Circuit has declined to analyze the role of the *McDonnell Douglas* framework post the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90 (2003), but "appears to have adopted a summary judgment approach similar to the Fourth, Seventh, Ninth, and D.C. Circuits' approaches." *Quigg*, 814 F.3d at 1239 & n.8 (discussing Chadwick v. Wellpoint, Inc., 561 F.3d 38, 45 & n.8 (1st Cir. 2009)).

[189] *See supra* Part IV.

[190] FED. R. CIV. P. 56 (providing that a motion for summary judgment should be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to

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language of 42 U.S.C. § 2000(e)-2(m) (2012), and recognizes that the *McDonnell Douglas*'s burden-shifting "framework is fatally inconsistent with the mixed-motive theory of discrimination."[191] Part V of this Note proposes that an appropriate summary judgment framework can be articulated by merging and modifying the Fourth and Fifth Circuits' standards[192] with the framework adopted by the Sixth[193] and the Eleventh[194] Circuits. Courts should ultimately adopt the following proposition: In a mixed-motive case, a plaintiff may survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether: (1) the defendant took an adverse employment action against the plaintiff; and (2) race, color, religion, sex, or nation origin was a motivating factor for the defendant's adverse employment action.[195]

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any material fact and that the movant is entitled to judgment as a matter of law"); *see generally* Emden, *supra* note 5.

[191] *Quigg*, 814 F.3d at 1237 (discussing Texas Dep't of Cmty. Affairs v. Burdine, 459 U.S. 248, 256 (1981)); *see supra* Part IV.

[192] *See, e.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (holding that a plaintiff may survive summary judgment by using the traditional *McDonnell Douglas* burden-shifting analysis or, "present[] direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision" (citations omitted)); *see also* Emden, *supra* note 5, at 166 ("This language tracks the language of Rule 56, which says that a motion for summary judgment will be granted when there is 'no genuine issue as to any material fact.'").

[193] *See* White v. Baxter Corp., 533 F.3d 381, 400 (6th Cir. 2008) ("We . . . hold that to survive a defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor' for the defendant's adverse employment action." (quoting 42 U.S.C. § 2000(e)-2(m) (2012))).

[194] *Quigg*, 814 F.3d at 1232 ("We conclude that the proper framework for examining mixed-motive claims based on circumstantial evidence is the approach adopted by the Sixth Circuit . . .—not the McDonnell Douglas framework.").

[195] *See supra* Part V.

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