St. Mary's Law Journal

Volume 36 | Number 2 Article 4

1-1-2005

Much Ado about Nothing - Why Desert Palace Neither Murdered McDonnell Douglas nor Transformed All Employment Discrimination Cases to Mixed-Motive Essay.

Matthew R. Scott

Russell D. Chapman

ESSAY

MUCH ADO ABOUT NOTHING—WHY *DESERT PALACE* NEITHER MURDERED *MCDONNELL DOUGLAS* NOR TRANSFORMED ALL EMPLOYMENT DISCRIMINATION CASES TO MIXED-MOTIVE*

MATTHEW R. SCOTT**
RUSSELL D. CHAPMAN***

---

* Special thanks to our partner, Tom Case, for his insight, and to our associate, Linda Thai, for proofing the final product.

** Partner, Bell Nunnally & Martin LLP, Dallas, Texas. Board Certified, Labor and Employment Law, Texas Board of Legal Specialization; J.D., Drake University, 1995; B.S., University of Iowa, 1990. This Article is dedicated to the memory of my parents, Lester and Rachel Scott. I also want to express my love and admiration for my wife, Michelle; her undying love and support make life worthwhile.

*** Partner, Bell Nunnally & Martin LLP, Dallas, Texas. Board Certified, Labor and Employment Law, Texas Board of Legal Specialization; J.D., University of Tulsa College of Law, 1978 (with honors); LL.M., Southern Methodist University, 1983; B.A., University of Oklahoma, 1975.

I. INTRODUCTION

In recent months, authors,[1] lawyers,[2] and a few courts,[3] have argued the Supreme Court's decision in *Desert Palace, Inc. v. Costa*[4] killed the *McDonnell Douglas v. Green*[5] burden-shifting analysis *and* rendered all employment cases "mixed motive," thus requiring the motivating factor standard of liability.[6] They have reasoned that, because *Desert Palace* does away with the requirement of direct evidence in mixed-motive cases, the *McDonnell Douglas* burden-shifting paradigm is no longer required.

Simply looking to the Supreme Court's statement of the case should dispel the notion that *Desert Palace* banished *McDonnell Douglas* to the history books: "The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction . . . ."[7] What is more, much of the *McDonnell Douglas* death knell analysis, as well as the argument that all employment cases are mixed motive, suffers from a fatal misunderstanding of the purposes and—most importantly—

---

1. *See* William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003) (stating that the *McDonnell Douglas* framework is "dead as a doornail"); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003) (indicating that the *McDonnell Douglas* analysis is no longer required).

2. *See* Lall v. Perot Sys. Corp., No. Civ.A. 3:02-CV-2618-P, 2004 WL 884438, at *5 (N.D. Tex. Apr. 23, 2004) (claiming that *McDonnell Douglas* no longer applies); Keelan v. Majesco Software, Inc., No. Civ.A. 3:02-CV-1670-L, 2004 WL 370225, at *4 (N.D. Tex. Feb. 26, 2004) (reciting the plaintiff's claim that *Desert Palace* controls discrimination claims).

3. *See* Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 WL 21976027, at *12 (S.D. Iowa July 3, 2003) (agreeing that *Desert Palace* and Civil Rights Act of 1991 freed plaintiffs from *McDonnell Douglas*); *see also* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003) (stating that *McDonnell Douglas* operates contrary to the Civil Rights Act of 1991). *But see* Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003) (indicating that *Desert Palace* did not equate to the entire demise of the *McDonnell Douglas* burden-shifting analysis).

4. 539 U.S. 90 (2003).

5. 411 U.S. 792 (1973).

6. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003) (holding that § 2000e-2(m) does not require a plaintiff to produce direct evidence of discrimination); *see also* McDonnell Douglas, Corp. v. Green, 411 U.S. 792, 802-04 (1973) (articulating the burden-shifting analysis).

7. *Desert Palace*, 539 U.S. at 92.

distinctions between 42 U.S.C. § 2000e-2(a)[8] and 42 U.S.C. § 2000e-2(m).[9] Finally, such a reading of *Desert Palace* would render § 2000e-2(a) null and void, something Congress could not have intended in enacting § 2000e-2(m). Thus, *Desert Palace* is not the torch of *McDonnell Douglas*'s funeral pyre.

II. The History of Burden Shifting—McDonnell Douglas to Reeves

McDonnell Douglas presented a simple question: How to allocate the burdens in Title VII employment discrimination cases.[10] "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination."[11] To remedy this void, the Supreme Court created a simple burden-shifting framework:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[12]

If the plaintiff establishes this prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[13] Once done, the burden shifts again, affording the plaintiff "a fair opportunity to show that the employer's stated reason for plaintiff's rejection was in fact pretext" for illegal discrimination.[14]

Later decisions refined the framework. By emphasizing "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,"[15] the Court held "[t]he defendant need not per-

---

8. 42 U.S.C. § 2000e (2001).
9. 42 U.S.C. § 2000e (2001).
10. *McDonnell Douglas*, 411 U.S. at 800.
11. *Id.*
12. *Id.* at 802.
13. *Id.*
14. *Id.* at 804.
15. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

suade the court that it was actually motivated by the proffered reasons," but rather, "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[16] Thus, a defendant need only "set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."[17]

Additionally, the Court noted that, "[i]n the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment."[18] Furthermore, the Court instructed us that, once the defendant successfully meets its burden of production, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[19] The presumption, "having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture."[20] Thus, the trier of fact must proceed "to decide the ultimate question: whether plaintiff has proven, 'that the defendant intentionally discriminated against [him]' because of" the impermissible factor.[21] We also learned that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity)"[22] combined with the elements of the prima facie case, *may*, but do not compel, a finding of "intentional discrimination."[23]

The Court essentially went silent on this scheme until 2000,[24] when it announced its decision in *Reeves v. Sanderson Plumbing Products, Inc.*[25] There, the Court, addressing a purported split in

16. *Id.* at 254-55.

17. *Id.* at 255.

18. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-10 (1993).

19. *Id.* at 510.

20. *Id.* at 510-11.

21. *Id.* at 511 (quotation omitted).

22. *Id.*

23. *St. Mary's Honor Ctr.*, 509 U.S. at 811.

24. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (determining when an employer is vicariously liable for a supervisory employee who in his or her sexual harassment of their subordinates creates a hostile work environment tantament to employment discrimination); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (noting that an employee may assert an affirmative defense of "reasonable care" to avoid vicarious liability).

25. 530 U.S. 133 (2000).

the circuits, claimed to reject "pretext plus,"[26] which required a plaintiff not only to disprove the employer's proffered legitimate reason for the challenged employment action, but also required evidence of discrimination.[27] This decision reaffirmed what the Court said in *St. Mary's Honor Center v. Hicks*:[28] "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[29]

---

26. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000) (holding that the elements of the prima facie case combined with the evidence proving the falsity of defendant's proffered justification is enough to permit, but not compel, the jury to "conclude that the employer unlawfully discriminated").

27. *See* Fisher v. Vassar Coll., 114 F.3d 1332, 1339 (2d Cir. 1997) (holding that a plaintiff can prevail only if he establishes "intentional discrimination by a preponderance of the evidence" in addition to showing pretext alone); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994-95 (5th Cir. 1996) (finding that after a plaintiff establishes a prima facie case of discrimination, an inference of discrimination is raised and the plaintiff has the opportunity to show the defendant's "rationale was merely a pretext for discrimination"); Theard v. Glaxo, Inc., 47 F.3d 676, 680 (4th Cir. 1995) (providing that a plaintiff must offer evidence of defendant's pretext for discrimination and that discrimination is the defendant's justification); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994) (indicating that after a plaintiff has established a prima facie case, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason; then the prima facie case disappears unless the plaintiff "produce[s] sufficient evidence, direct or indirect, to show that the reasons advanced by the employer constitute a mere pretext for discrimination"). Note that *Reeves* abrogated all these cases. *Reeves*, 530 U.S. at 530.

28. 509 U.S. 502 (1993).

29. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (addressing the sufficiency of prima facie evidence and evidence of pretext to support a finding of untextual discrimination). Thus, contrary to popular opinion, *Reeves* did not rewrite the landscape of employment law. Although *Reeves* purported to dispatch pretext-plus, *Reeves*'s central teaching is identical to Justice Scalia's opinion for the majority in *St. Mary's Honor Center. Compare St. Mary's Honor Ctr.*, 509 U.S. at 511 (indicating that

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.)

with Reeves, 530 U.S. at 146 (stating that

> the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination. In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*.).

III. THE PROBLEMS CREATED BY *PRICE WATERHOUSE*

In *Price Waterhouse v. Hopkins*,[30] the Court considered whether an employment decision is made "because of" sex in a mixed-motive case (i.e., where both legitimate and illegitimate reasons motivated the decision).[31] The Court concluded that, under § 2000e-2(a)(1), an employer could avoid a finding of liability by proving it would have made the same decision even if it had not allowed the impermissible factor (in that case, gender) to play such a role.[32] The Court was divided, however, over the question of when the burden of proof may be shifted to an employer to prove the affirmative defense.[33]

Justice Brennan, writing for a plurality of four Justices, held that when a plaintiff proves her "gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[34] Justice White, in his concurring opinion, would have shifted the burden to the employer only when a plaintiff showed the unlawful motive was a substantial factor in the adverse employment action.[35]

Although Justice O'Connor also would have required the plaintiff to show that an illegitimate consideration was a "substantial factor" in the employment decision, in her view, the burden on the issue of causation would shift to the employer only where the plaintiff could show by direct evidence that an illegitimate criterion was a substantial factor in the decision.[36] Following this decision,

---

Thus, even if the plaintiff proves the employer's legitimate, nondiscriminatory reason was false, this alone does not compel a finding of liability. As the Court noted, if the defendant gave the false reason to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent. *Reeves*, 530 U.S. at 148. The real inquiry should be, whether the false reason amounted to a pretext for unlawful discrimination.

30. 490 U.S. 228 (1989).

31. Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989).

32. *Id.* at 244.

33. *Id.*

34. *Id.* at 258.

35. *Id.* at 259 (White, J., concurring).

36. *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring).

many circuit courts, relying on Justice O'Connor's opinion, adopted her direct evidence standard.[37]

IV. CONGRESS'S RESPONSE TO *PRICE WATERHOUSE*

Two years after *Price Waterhouse*, Congress passed the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964."[38] In particular, Section 107 of the 1991 Act (42 U.S.C. § 2000e-2(m)),[39] sets forth standards applicable in mixed motive cases.[40] The first standard establishes an alternative for proving that an unlawful employment practice has occurred: "Except as otherwise provided in this subchapter, 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."[41] The second standard provides that, with respect to a claim where an individual proves a violation under Section 2000e-2(m), "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[42] To avail itself of the affirmative defense, the employer must demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor. . . ."[43]

---

37. *See* Mohr v. Dustrol, Inc., 306 F.3d 636, 640-641 (8th Cir. 2002) (quoting Justice O'Connor's delineation between comments by supervisors as direct evidence and comments by other employees as mere stray remarks); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (repeating the requirement of direct evidence in order to trigger the mixed-motive analysis); Trotter v. Bd. of Trustees of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996) (quoting Justice O'Connor for the proposition that stray remarks are not sufficient evidence to require the employer to prove that its decision was based on legitimate criteria); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995) (citing Justice O'Connor's requirement that there must be direct evidence of discrimination before obtaining a mixed-motive instruction).

38. Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994).

39. 42 U.S.C. § 2002e-2(m) (2001).

40. *See* 42 U.S.C. § 2002e-2(m) (2001) (discussing the applicable standards in a mixed-motive case).

41. 42 U.S.C. § 2000e-2(m) (2001).

42. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (citing 42 U.S.C. § 2000e-5(g)(2)(B) (2001)).

43. 42 U.S.C. § 2000e-5(g)(2)(B) (2001).

V. The Difference Between Pretext and Mixed-Motive

A. *The Incorrect Analysis*

Much of the confusion over *Desert Palace*'s ultimate effect on the practice of employment discrimination law stems from a basic misunderstanding of the important distinctions between 2000e-2(a) and 2000e-2(m). And, this same fundamental flaw provides an unsteady foundation for the argument of those prognosticators declaring *McDonnell Douglas* dead. Starting with a defective concept of what constitutes a "mixed motive" case, they reason that any case where the plaintiff alleges one (illegitimate) motive and the defendant offers another (legitimate) motive is a mixed motive case.[44]

For example, Professor William R. Corbett posits that a Title VII claim achieves mixed-motive status by combining the plaintiff's allegations with the employer's proffered reasons.[45] Likewise, Professor Jeffrey A. Van Detta claims simply adding the plaintiff's claims to the employer's legitimate, nondiscriminatory reason, which are steps one and two of the *McDonnell Douglas* framework, creates a mixed motive case.[46] In expressing this view, both Professor Van Detta and Professor Corbett claim the prima facie

---

44. *See* William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199, 213-14 n.67 (2003) (stating that once a defendant gives a legitimate nondiscriminatory reason and the plaintiff meets the motivating factor standard, then the plaintiff is entitled to a mixed-motive jury instruction). It is interesting to note that at least one of these authors, Professor Corbett, fashions his argument, not from the language of *Desert Palace*, but from the exchanges between counsel and the Court during the oral argument of *Desert Palace*. *Id.* This seems a flimsy basis on which to predicate such a colossal sea of change in employment law. *Id.* In truth, in light of the attention given to the subject at oral argument, the Court's opinion in *Desert Palace*, and its complete silence on this issue, compels a more convincing argument that the Court rejected any suggestion that henceforth all Title VII cases will now fall under the "mixed motive" analysis. *Id.*

45. *See id.* at 215 (stating that plaintiffs have been more successful in surviving summary judgment under mixed-motive analysis than under pretext analysis). What he fails to realize, however, is that the pre-*Desert Palace* mixed-motive cases required direct evidence of discrimination. *Id.* Direct evidence, quite naturally, is, of course, far more capable of creating a fact issue for trial than circumstantial evidence. *Id.*

46. Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 Drake L. Rev. 71, 76, 79 (2003) (noting the Supreme Court's decision in *Desert Palace, Inc. v. Costa* transformed every Title VII disparate treatment claim into a 'mixed motives' claim).

case accompanied by the legitimate nondiscriminatory reason creates a fact issue for trial.[47]

In advocating this view, both Professor Van Detta and Professor Corbett fail to recognize the meager proof a plaintiff must adduce to establish a prima facie case. Normally, the prima facie case consists of nothing more than proof of (1) membership in a protected class, (2) qualification for the job sought, (3) failure to obtain the job sought, and (4) evidence the job either remained open or was filled by someone outside the protected class.[48] Nowhere in any of these steps is there a requirement that the plaintiff produce *any* evidence of unlawful discrimination!

But Professor Van Detta is completely untroubled by this absence of statutorily required evidence of discrimination, as his argument seeks to dispose of this requirement altogether. He enthusiastically quotes Owen M. Fiss's statement that Title VII is violated when an employer "judges people on the basis of race, regardless of whether the employer chose that particular criterion."[49] This Orwellian view implicitly edges perilously close to punishing thoughts rather than deeds. But Professor Van Detta does not stop there. In fact, he sides with Mr. Fiss, stating "reasons or motives" for employment decisions are "irrelevant."[50] Welcome to 1984 and the world of the Thought Police.[51]

---

47. *See id.* at 79 (commenting that under *Desert Palace, Inc. v. Costa*, every case is deemed to be a mixed motive case when "the employee raises a prima facie case and the employer responds with a reason").

48. *Id.*

49. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 298 (1971).

50. *See* Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 96 (2003) (agreeing "[t]he conduct that is regulated is the use of the criterion . . . and the reasons or motives for the choice of the criterion are irrelevant under the theory and structure of fair employment laws").

51. *See generally* GEORGE ORWELL, 1984 (Signet Classics 1976) (1949) (exploring the extreme situations that can occur when society punishes a person based on his thoughts). Indeed, the House Judiciary Committee that recommended passage of 2000e-2(m) specifically rejected such a potentially unconstitutional construction of Title VII: "This provision would not make mere discriminatory thoughts actionable. Rather, to establish liability under the proposed Subsection 703(a), the complaining party must demonstrate that discrimination was a contributing factor in the employment decision-i.e., that discrimination actually contributed to the employer's decision with respect to the complaining party." H.R. REP. NO. 102-40 (II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

Professor Van Detta also has no problem discarding centuries of tort law. He decries *McDonnell Douglas* for unfairly putting plaintiffs "to the [w]all,"[52] and welcomes *Desert Palace*'s shifting the burden to employers to prove lawful conduct.[53] In doing so, Professor Van Detta quickly casts aside one of the most fundamental precepts of all tort law—the burden is on the plaintiff to prove the fact alleged (in this case, unlawful discrimination)!

Professor Van Detta's (and to a much lesser degree Professor Corbett's) admitted eagerness to advocate the plaintiff/employee's cause clouds his analysis to the point of heresy.[54]

B. *The Correct Analysis*

As the deficiencies in these analyses show, simply adding the plaintiff's allegations to the employer's legitimate, nondiscriminatory reason cannot create a mixed-motive case. Rather, the phrase "mixed motive" must draw its definition from the *defendant's* contentions (i.e., a legitimate and a discriminatory reason), not from combining the plaintiff's allegation with the defendant's contention. This much is clearer from Justice Thomas's initial preamble in *Desert Palace*: "In *Price Waterhouse v. Hopkins*, the Court considered whether an employment decision is made 'because of' sex in a 'mixed-motive' case, *i.e., where both legitimate and illegitimate reasons motivated the decision.*"[55] Clearly, then, a mixed-motive case requires a mix of *employer* motives, not merely mixing the plaintiff's alleged employer motive with the employer's claimed motive.[56]

---

52. Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 100 (2003).

53. *Id.* at 135.

54. *See* William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMPL. L. 199, 201 (2003) (indicating the holding in *McDonnell Douglas* is dead); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 100 (2003) (viewing the decision in *Desert Palace* as a positive one). Professor Van Detta proclaims *McDonnell Douglas'* death is not "deserving of our memory," presumes all employment plaintiffs are "victims," and christens Federal Rule of Civil Procedure 56 "The Terminator." *Id.* at 74-75, 79, 105.

55. Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (emphasis added).

56. *See* Roberson v. Alltel Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004) (stating that "[u]nder the mixed-motive framework, the individual must demonstrate, by either direct or

Thus, a case properly analyzed under § 2000e-2(a) (what some commentators refer to as pretext cases) involves the plaintiff alleging an improper motive for the defendant's conduct, while the defendant disavows that motive and professes only a non-discriminatory motive. On the other hand, a true mixed motive case under § 2000e-2(m) involves either a defendant who (a) *admits* to a partially discriminatory reason for its actions, while also claiming it would have taken the same action were it not for the illegitimate rationale or (b) otherwise credible evidence to support such a finding.

The rationale for the distinction, as well as the reason for the different liability standards, is simple. When the defendant renounces any illegal motive, it puts the plaintiff to a higher standard of proof that the challenged employment action was taken *because of* the plaintiff's race/color/religion/sex/national origin. But, the plaintiff, if successful, is entitled to the full panoply of damages under § 2000e-5 and 42 U.S.C. § 1981a.[57]

At the same time, where the defendant is contrite and admits an improper motive (something no jury will take lightly), or there is evidence to support such a finding, the defendant's liability risk is reduced to declaratory relief, attorneys' fees and costs if the defendant proves it would have taken the same action even without considering the protected trait.[58] The quid pro quo for this reduced financial risk is the lesser standard of liability (the challenged employment action need only be a motivating factor).

VI. REPORTS OF *McDONNELL DOUGLAS*'S DEMISE ARE GREATLY EXAGGERATED[59]

Furthermore, if those declaring *McDonnell Douglas* dead were correct, that death came through an odd silence. First, nothing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*. In rejecting the plaintiff's argument that, after *Desert*

---

circumstantial evidence, that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons").

57. 42 U.S.C. §§ 1981a, 2000e-5 (2001).

58. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2001); *see also Desert Palace*, 539 U.S. at 94 (listing the remedies available to a plaintiff who proves a violation under § 2000e-2(m) to "declaratory relief, certain types of injunctive relief and attorney's fees and costs").

59. JOHN BARTLETT, FAMILIAR QUOTATIONS 528 (Justin Kaplan ed., Little, Brown & Company 16th ed. 1992) (1855) (quoting Mark Twain). Our apologies to Mark Twain.

Palace, plaintiffs are no longer bound by the *McDonnell Douglas* framework, one district court correctly observed *Desert Palace*'s "narrow holding has absolutely no bearing on the applicability of the *McDonnell Douglas* framework . . . ."[60]

The court noted that "[t]he Supreme Court did not in any way suggest in *Desert Palace* that it intended to alter the burden-shifting framework that it had established, upheld, and applied for over thirty years."[61] And another court stated the matter even more succinctly:

> As an initial matter the court rejects Plaintiffs' suggestion that the *McDonnell Douglas* burden-shifting paradigm no longer exists after *Desert Palace*. This would not be an evolution but a revolution in employment discrimination law. If the Supreme Court were going to make a draconian departure from 30 years of well-established employment discrimination precedent, it would have done so with unmistakable clarity. In *Desert Palace*, the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas*.[62]

VII. New Fifth Circuit Guidance—They Got It Mostly Right

In its first two post-*Desert Palace* discussions, the Fifth Circuit commuted *McDonnell Douglas*'s premature death sentence to life, and properly clarified that mixed-motive cases derive their "mixed" nature from a combination of reasons *from the defendant* (i.e., the defendant offers, or there is objective evidence, not just the plaintiff's testimony, of both a legitimate reason for its actions and an illegitimate reason). In *Rachid v. Jack in the Box*,[63] the court noted "mixed-motives cases arise when an employment decision is based on a *mixture* of legitimate and illegitimate motives."[64] The court also recognized that, before a mixed-motive instruction

---

60. Lall v. Perot Sys. Corp., No. Civ.A. 3:02-CV-2618-P, 2004 WL 884438, at *5 (N.D. Tex. Apr. 23, 2004).

61. *Id.*

62. Keelan v. Majesco Software, Inc., No. Civ.A. 3:02-CV-1670-L, 2004 WL 370225, at *4 (N.D. Tex. Feb. 26, 2004).

63. 376 F.3d 305 (5th Cir. 2004).

64. Rachid v. Jack in the Box, 376 F.3d 305, 309-10 (5th Cir. 2004) (citing Louis v. E. Baton Rouge Parish Sch. Bd., 303 F. Supp. 2d 799, 801-04 (M.D. La. 2003)) (emphasis added).

is permissible, the evidence must be sufficient to allow a trier of fact to find both forbidden and permissible motives.[65]

This implies, and rightly so, that such evidence must come either (1) from the defendant (i.e., an admission), or (2) from evidence *other than* the plaintiff's own testimony. This makes sense, as otherwise a plaintiff's mere *allegation* of improper motive would convert a case to mixed-motive, thus allowing all employment discrimination plaintiffs to shift the burden of proof. If this were correct (and it cannot be), no longer would plaintiffs be required to prove the employer discriminated; rather, employers would now be required to prove they *did not* discriminate. This reading gives far too broad a sweep to *Desert Palace.*

The court then merged the *Price Waterhouse* and *McDonnell Douglas* approaches.[66] Under this "integrated approach,"[67] the court held that the first two *McDonnell Douglas* prongs are unaffected.[68] First, "a plaintiff must still demonstrate a prima facie case of discrimination," and second, "the defendant then must articulate a legitimate, non-discriminatory reason for its decision."[69] Under the court's new bifurcated third prong, the plaintiff must prove "'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).'"[70] This contradicts the court's earlier intimation that evidence sufficient to obtain a mixed-motive instruction must come *from the defendant*, and suggests that the plaintiff gets to determine how the case is ultimately submitted to the jury.[71]

This is where the opinion breaks down because, as discussed, if this is correct, no case will ever again be tried under the pretext

---

65. *Id.* at 309-10 (citing Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 553 (10th Cir.1999)); *see also* Roberson v. Alltel Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004) (indicating that "[u]nder the mixed-motive framework, the individual must demonstrate, by either direct or circumstantial evidence, that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons").

66. *Rachid*, 376 F.3d at 312.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Roberson v. Alltel Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004).

standard. With its shift of the burdens to a defendant, plaintiffs will always favor the lower mixed-motive standard.[72]

In its second case to discuss the issue, *Roberson v. Alltel Information Services*,[73] another panel of the Fifth Circuit followed this merging approach, carefully noting the mixed-motive case contains "either direct or circumstantial evidence, that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons."[74]

This correctly indicates, that courts, not plaintiffs, must determine whether cases are submitted under the mixed-motive versus pretext standard.[75] Thus, it appears the Fifth Circuit has correctly recognized that, not only is *McDonnell Douglas* alive and well, but also that not all cases are mixed-motive cases simply by adding the plaintiff's prima facie case to the employer's legitimate, nondiscriminatory reason.

VIII. CONCLUSION

Professor Corbett's declaration that *McDonnell Douglas* is "dead as a doornail"[76] and Professor Van Detta's overreaching declaration that, "[b]y a stroke of the judicial pen, the unanimous Supreme Court in *Costa* has transferred every Title VII disparate treatment claim to a 'mixed-motives' claim" both seek to undo three decades of Supreme Court employment law, which the Supreme Court neither implied, and of which motivation has expressly disavowed.[77] More important, they evidence a fundamental misunderstanding of 2000e-2(a) and 2000e-2(m).

---

72. *See* William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 209 (2003) (arguing that under current law, plaintiffs will bring their cases under § 2000e-2(m)).

73. 373 F.3d 647, 651 (5th Cir. 2004).

74. Roberson v. Alltel Info. Servs., 373 F.3d 647, 651 (5th Cir. 2004).

75. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (indicating "the employer has a limited affirmative defense"). As noted earlier, it is arguably only the defendant who can determine whether a case will be tried under a mixed-motive analysis, mixed-motive is an affirmative defense the defendant must plead and prove.

76. William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003).

77. Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 75 (2003). Professor Van Detta simply and flatly refuses to recognize that 2000e-2(m)'s mixed-motive standard only applies to mixed-motive cases, despite Justice Thomas' footnote 1 limitation

While all this has provided good grist for the academic mill,[78] it has had little practical impact on the state of the law in the federal district courts. And, as for those authors who claimed the "dominant conclusion" among district courts was that *Desert Palace* altered the *McDonnell Douglas* framework,[79] those authors admittedly did not have the benefit of later decisions from the courts of appeals, including the Fifth Circuit's *Rachid* and *Roberson* decisions.[80] Thus, their erroneous conclusions can, as far as Fifth Circuit practitioners are concerned, be excused. Furthermore, these authors (and some courts) fail to recognize that, to obtain the mixed-motive instructions, the *defendant/employer* must put it in play by asserting it as an affirmative defense and offering sufficient evidence it employed both legitimate and illegitimate rationales in making the challenged decision.[81]

In truth, *Desert Palace* was little more than an evidentiary case. As Justice Thomas wrote for the unanimous *Desert Palace* Court, we must decide "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under" 42 U.S.C. § 2000e-2(m).[82] *Desert Palace* did not end *McDonnell Douglas*'s reign as the apex analytical framework within which all employment discrimination cases are evaluated. Rather,

---

and the analysis of nearly every Supreme Court case addressing 2000e-2(m). *Id.* at 78. *See also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (stating that

> [t]wo years after *Price Waterhouse*, Congress passed the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." In particular, § 107 of the 1991 Act . . . "respond[ed]" to *Price Waterhouse* by 'setting forth standards applicable in 'mixed motive" cases' in two new statutory provisions.) (citation omitted).

78. *See* T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgments in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 139 (2004) (indicating that the correct approach is to "modif[y] the third step in the *McDonnell Douglas* burden-shifting paradigm, with significant practical consequences favoring plaintiffs (citing Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180 (N.D. Iowa 2003))).

79. *Id.* at 138.

80. Mr. Nagy's Article was admittedly written before the Fifth Circuit had weighed in on Desert Palace's impact on summary judgment. T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgments in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 139 (2004).

81. *See* Garcia v. City of Houston, 201 F.3d 672, 676 (5th Cir. 2000) (stating "[i]n order to prove a mixed-motive defense the employer should be able to present some *objective* proof that the same decision would have been made").

82. *Desert Palace*, 539 U.S. at 100.

Desert Palace merely made clear that, in enacting 2000e-2(m), Congress did not increase a plaintiff's evidentiary burden beyond traditional and "deep-rooted"[83] evidentiary standards.

83. *Id.*