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Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(M) of Title VII

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MIXED MOTIVES AND MOTIVATING FACTORS: CHOOSING A REALISTIC SUMMARY JUDGMENT FRAMEWORK FOR § 2000E-2(M) OF TITLE VII

INTRODUCTION

Imagine, right now, an employee or job applicant somewhere in the United States who has recently experienced discrimination at the hands of an employer, at least partly on the basis of race, color, sex, religion, or national origin.[1] This hypothetical protagonist is reasonably well-informed and decides to seek redress in a court of law. Eventually, the parties reach the stage of summary judgment, by which time the plaintiff has elected to proceed under the motivating factor ("mixed-motive") theory created by the Civil Rights Act of 1991.[2] Further, as in most cases, the plaintiff offers circumstantial (rather than direct) evidence to support the claim.[3]

When anticipating the employer's motion for summary judgment, the plaintiff's attorney might believe that her basic task is to show that the plaintiff was the object of an adverse employment decision and that the plaintiff's

1. Under Title VII of the Civil Rights Act of 1964, these are all protected characteristics upon which most employers cannot legally base an adverse employment decision. *See* 42 U.S.C. § 2000e-2(a)(1) (2006). But in reality, our hypothetical employee or job applicant would be just one of many people who find or perceive themselves to be the victim of such a decision. In 2008, the Equal Employment Opportunity Commission (EEOC) received over 69,000 formal complaints under Title VII, though some of the complaints were concurrently filed under other antidiscrimination statutes. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TITLE VII OF THE CIVIL RIGHTS ACT of 1964 CHARGES: FY 1997–FY 2007, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

2. 42 U.S.C. § 2000e-2(m).

3. "Direct evidence of discrimination is evidence that, 'if believed, proves the existence of a fact in issue without inference or presumption.'" Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999) (quoting Burrell v. Bd. of Trs. of Ga. Military Coll., 125 F.3d 1390, 1393 (11th Cir. 1997)). By contrast, circumstantial evidence only suggests a discriminatory motive. *See id.*; Amrhein v. Health Care Serv. Corp., 546 F.3d 854, 858 (7th Cir. 2008) (quoting Lewis v. Sch. Dist. #70, 523 F.3d 730, 742 (7th Cir. 2008) (echoing the Eleventh Circuit's definition of direct evidence and describing circumstantial evidence as that "which allows the trier of fact to *infer* intentional discrimination . . . typically through a longer chain of inferences")). Employment discrimination complaints based on direct, rather than circumstantial, evidence are comparatively rare because "direct evidence of intentional discrimination is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), *as recognized in* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003); *see also* Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

protected characteristic was a "motivating factor" in that decision.[4] More precisely, to avoid summary judgment under the Federal Rules of Civil Procedure, she would need to show that genuine issues of material fact remained with regard to the adverse employment decision and the discriminatory motivating factor.[5] Yet, in four federal circuits, the attorney would be partially wrong.[6] In at least five other circuits, the attorney could not be sure which framework the court might apply.[7]

Notwithstanding the plain language of § 2000e-2(m), the federal appellate courts have split over the question of which framework to apply at summary judgment to claims brought under § 2000e-2(m), when supported by circumstantial evidence. In the larger context of Title VII litigation, the existence of such an inconsistency is perhaps unsurprising. More than one conflict in this fractured area of law has resisted resolution.[8] The struggle to identify the correct summary judgment framework for a § 2000e-2(m) circumstantial evidence claim is only one problem, but it is a particularly pressing one.[9] Fortunately, this question has at last met a realistic answer, embodied in a 2008 decision by the Sixth Circuit.[10]

4. *See* § 2000e-2(m) ("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.").

5. *See* FED. R. CIV. P. 56(c).

6. *See* discussion *infra* Parts II, III for a detailed overview of the frameworks utilized by the federal circuits.

7. The court might not know either. The First, Second, Third, Seventh, and Tenth Circuits have not taken a position on this issue, as noted in *White v. Baxter Healthcare Corp*., 533 F.3d 381, 399 (6th Cir. 2008).

8. *See* discussion *infra* Part II. For example, the circuits were once split over the direct evidence requirement described in Part II. *See* discussion *infra* Part II. The Ninth Circuit described the debate over that issue as a "quagmire," "morass," and the spawning point for a "cottage industry of litigation." Costa v. Desert Palace, 299 F.3d 838, 851, 853 (9th Cir. 2002). Similarly, the Supreme Court remarked in *Price Waterhouse v. Hopkins* that the mixed-motive issue had "to say the least, left the Circuits in disarray." Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n. 2 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), *as recognized in* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003).

9. Jaclyn Borcherding, Note, *Deserting* McDonnell Douglas*?* Desert Palace, Inc. v. Costa, 57 BAYLOR L. REV. 243, 262 (2005) ("The summary judgment stage is critical because it is where most employment discrimination cases are either won or lost."). For plaintiffs in employment discrimination cases, surviving pretrial adjudication (like a summary judgment motion) is a tough battle. A study in 2004 found that defendants in such cases win over twenty-two percent of pretrial adjudication in federal courts, compared to just over four percent for plaintiffs. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444 (2004). Approximately 70% of the cases surveyed were brought under Title VII. *Id*.

10. *White*, 533 F.3d at 381.

Part I of this Comment will provide a brief historical overview of the issue. Part II will unravel and critique the frameworks (mainly, the iterations of the *McDonnell Douglas* framework) favored by the circuits.[11] Part III will focus on the Sixth Circuit's new "motivating factor" framework and its rationale. Part IV will offer additional reasons supporting the Sixth Circuit's decision, based on social-psychological studies of discriminatory behavior.

I. TITLE VII TO *DESERT PALACE*: AN OVERVIEW OF THE MIXED MOTIVE CLAIM

A. Title VII and Price Waterhouse

The original legislative foundation for the claim described in this Comment's introduction is Title VII of the Civil Rights Act of 1964. It declares unlawful any "employment practice" that "discriminate[s] against any individual [. . .] because of such individual's race, color, religion, sex, or national origin."[12] In effect, Title VII sought to forbid most intentional employment discrimination predicated on any of the protected characteristics of race, color, religion, sex, or national origin.[13] This statute would eventually give rise to the framework issue, but not before additional legislation and Supreme Court opinions significantly altered the Title VII landscape.[14]

11. The author does not purport to review every conceivable summary judgment framework. Rather, Part II of the Comment summarizes the distinct approaches taken by the federal circuit courts that have recognized and responded to this issue. *See* discussion *infra* Part II. Readers who are also interested in frameworks beyond those adopted by any circuit can find novel proposals among the scholarly literature on this topic. *See, e.g.*, Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 166–67 (2007) (advocating for a new integration of § 2000e-2(m) and the *McDonnell Douglas* pretext framework and contending that all other approaches to the choice of mixed-motive frameworks "posit a false dichotomy"); 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, 117–19 (2003) (arguing the pretext framework is obsolete and re-conceptualizing the motivating factor framework to substitute causation for unlawful intent).

12. 42 U.S.C. § 2000e-2(a)(1) (2006).

13. Some employers are exempt. By its own terms, Title VII does not apply to Indian tribes or certain private nonprofit organizations. 42 U.S.C. § 2000e(b). In addition, an employer may sometimes discriminate on the basis of religion, national origin, or sex where these characteristics are part of a bona fide occupational qualification (the "BFOQ" exception). *See* Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (recognizing the BFOQ exception but describing it as "extremely narrow").

14. The most important of these events (the Supreme Court's decision in *Price Waterhouse* and the passage of the Civil Rights Act of 1991) will be discussed in some detail below. *See infra* notes 15–31 and accompanying text. For a concise summary, see EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, THE CIVIL RIGHTS ACT OF 1991, http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html (last visited June 8, 2010).

In 1989, more than two decades after Title VII's passage, the Supreme Court in *Price Waterhouse v. Hopkins* was called upon to decide whether an employer who discriminated against an employee for a mixture of reasons, some legal and some illegal, could be held liable for a violation of Title VII.[15] A plurality ruled that a plaintiff could potentially hold an employer liable for such mixed-motive discrimination where the unlawful motive (e.g., gender) was a factor in the employment decision.[16] Justice O'Connor separately concurred in judgment but stated that the plaintiff should be obliged to show that the unlawful motive was a *substantial* factor.[17] Furthermore, Justice O'Connor's analysis demanded that the plaintiff bring *direct* evidence of discrimination.[18]

Two points of special importance emerged from *Price Waterhouse*. The first is that the case legitimized the mixed-motive analysis, which previously had been rejected by some circuits in favor of a more stringent "but-for" standard of causation.[19] After *Price Waterhouse*, federal courts would no longer treat discrimination as a simple on-or-off proposition. Rather, employers could be held liable for adverse employment decisions fueled by a mixture of lawful and unlawful motives, even if the plaintiff did not prove that, "but for" the discriminatory motive, the employment decision would have been in her favor.[20]

Nonetheless, the Court's ruling gave the employer a sizeable loophole. Even after the plaintiff met the burden of production, the employer could escape liability by showing it would have taken the same adverse employment action in the absence of the unlawful motive.[21] If successful, this argument was a complete affirmative defense.[22]

15. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (plurality opinion).

16. *Id.* at 240 ("We take [§ 2000e-2(a)(1)] to mean that gender must be irrelevant to employment decisions.").

17. *Id.* at 265 (O'Connor, J., concurring).

18. *Id.* at 276 ("[I]n order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."). Justice O'Connor also referred to direct evidence as "strong" evidence. *Id.*; *see also infra* note 69 and *supra* note 3.

19. After the plaintiff establishes the presence of an illegitimate discriminatory factor in an employment decision, her case will still fall short of "but-for" causation if the decision "nevertheless would have transpired in the same way" even in the absence of that factor. *See Price Waterhouse*, 490 U.S. at 240. Before *Price Waterhouse*, the Third, Fourth, Fifth, and Seventh Circuits had nullified mixed-motive claims by requiring the plaintiff to show that the employer's discriminatory intent played a "but-for" role in the adverse employment decision. *Id.* at 238 n.2.

20. *See id.* at 240.

21. The plurality and the two concurring justices agreed on this point. *See id.* at 244–45, 261, 276.

22. *Id.* at 246.

Consequently, the Court's plurality and concurring opinions left the inveterate element of but-for causation partly intact, because the employer's affirmative defense meant that an unlawful motive could play a part in an adverse employment decision as long as it did not control the outcome.[23] In this sense, *Price Waterhouse* did little more than fiddle with the burden of proof.[24] The Court's ruling signaled that unlawful motives were permissible as long as the employer could show that such motives fell short of "but for" causation.

The second point of importance is that, following *Price Waterhouse*, most of the lower courts adopted Justice O'Connor's direct evidence requirement for mixed-motive claims.[25] Mixed-motive claims based on circumstantial evidence were categorically rejected. Thus, the lower courts were not yet required to choose between or among summary judgment frameworks designed for circumstantial evidence,[26] such as the pretext framework derived from *McDonnell Douglas v. Green*.[27] That fact is significant because it means the primary issue confronted in this Comment (the choice of frameworks) lay dormant for the time being. The situation, however, was destined to change swiftly.

23. *See id.* at 240 (suggesting that the phrase "because of" in § 2000e-2(a)(1) did not mean "but-for" causation was part of the plaintiff's prima facie case, but that the inclusion of the employer's affirmative defense tempered the plurality's interpretation and made "but-for" causation a decisive element of the mixed-motive analysis).

24. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 309 (5th Cir. 2004) ("*Price Waterhouse* involves a shift of the burden of persuasion to the defendant. In other words, under *Price Waterhouse* . . . the burden of proof shifts to the employer to show that the same adverse employment decision would have been made regardless of discriminatory animus.").

25. Kristina N. Klein, Note, *Oasis or Mirage?* Desert Palace *and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1184 (2006). Courts treated Justice O'Connor's opinion as controlling because her concurrence was thought—correctly or not—to be the narrowest holding. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. ___, 129 S. Ct. 2343, 2357 (2009) (Stevens, J., dissenting) (quoting Marks v. United States, 430 U.S. 188, 193 (1977)) ("[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'").

26. White v. Baxter Healthcare Corp., 533 F.3d 381, 397 (6th Cir. 2008) ("As mixed-motive plaintiffs were not allowed to demonstrate their claims through circumstantial evidence, these courts [prior to *Desert Palace*] did not even consider whether such plaintiffs should be required to satisfy the *McDonnell Douglas/Burdine* burden shifting framework in order to [survive summary judgment]."). In other words, courts did not have to choose between *McDonnell Douglas* (a framework designed earlier for single-motive claims based on circumstantial evidence) and competing frameworks (such as the motivating factor framework crafted by the Sixth Circuit) for mixed-motive claims until after *Desert Palace*.

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973). For a more detailed explanation of *McDonnell Douglas* (both the case and the eponymous framework), see *infra* notes 40–48 and accompanying text.

B. The Civil Rights Act of 1991

Displeased by *Price Waterhouse*, Congress passed the Civil Rights Act of 1991 to supersede the Supreme Court's decision.[28] In a portion later codified as 42 U.S.C. § 2000e-2(m), the Act pronounced, "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."[29] The "motivating factor" language partially dispensed with the *Price Waterhouse* affirmative defense and would eventually form the basis of a distinctive "motivating factor" framework. [30]

Part of the affirmative defense survived. Even after the plaintiff established an illegitimate motive, the Act blocked most forms of monetary relief to the plaintiff (except attorney's fees and costs) if the employer could carry the burden of establishing that the illegitimate motive was not a "but for" factor in the adverse employment decision.[31]

C. Desert Palace*: The Supreme Court Speaks?*

In 2003, the Supreme Court analyzed § 2000e-2(m) in its review of a Ninth Circuit case, *Costa v. Desert Palace*.[32] The Ninth Circuit had affirmed the grant of a mixed-motive jury instruction for a claim supported by

28. 42 U.S.C § 2000e-2(m) (2000). "The inevitable effect of the *Price Waterhouse* decision is to permit prohibited employment discrimination to escape sanction under Title VII . . . . Legislation is needed to restore Title VII's comprehensive ban on *all* impermissible consideration of race, color, religion, sex, or national origin in employment." H.R. Doc. No. 102-40(I), at 46, 47–48 (1991), *reprinted in* Civil Rights Act of 1991, 1991 U.S.C.C.A.N. 549, 584, 585–86. The Supreme Court has since declined to apply *Price Waterhouse* in other contexts. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. ____, 129 S. Ct. 2343, 2352 (2009) ("Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.").

29. § 2000e-2(m).

30. Regarding the affirmative defense, see s*upra* notes 19–24 and accompanying text. The motivating factor language features prominently in the Sixth Circuit's framework. *See infra* Part III.

31. 42 U.S.C. § 2000e-5(g)(2)(B) (2006). "[If] an individual proves a violation under § 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs . . . and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ." *Id.*

32. Desert Palace, Inc., v. Costa, 539 U.S. 90, 101 (2003). At the Ninth Circuit level, the case was Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (en banc).

circumstantial evidence.[33] The Ninth Circuit's ruling was notable for Title VII litigants because it addressed an unresolved question: whether the trend towards demanding direct (and not merely circumstantial) evidence for mixed-motive claims had survived the Civil Rights Act of 1991.[34]

After discussing the legislative history of § 2000e-2(m), the Supreme Court affirmed the Ninth Circuit's ruling and held that plaintiffs could rely on circumstantial evidence to support a mixed-motive claim under § 2000e-2(m).[35] Departing from her position in *Price Waterhouse*, Justice O'Connor concurred and endorsed the use of circumstantial evidence, expressly attributing her changed position to the legislative intent behind § 2000e-2(m).[36] The Court's ruling abrogated the demand for direct evidence previously imposed upon plaintiffs by several of the federal circuits, which were following Justice O'Connor's prior concurrence in *Price Waterhouse*.[37]

As momentous as such a ruling may seem, *Desert Palace* focused on jury instructions, not summary judgment frameworks, and some courts have found this distinction meaningful.[38] Yet, even if one is reluctant to accept that *Desert Palace* represents a paradigm shift for summary judgment frameworks in mixed-motive cases, one must credit *Desert Palace* with making the present debate possible. Because the Court validated § 2000e-2(m) claims based on circumstantial evidence, plaintiffs and defendants (not to mention scholars, law students, and circuit courts) would have the chance to argue over which circumstantial-evidence framework to apply at summary judgment.[39] The next section discusses the framework most circuits have applied in some form or another—the "McDonnell Douglas" framework.

33. *Costa*, 299 F.3d at 865. The court remanded the case on an issue related to punitive damages. *Id.*

34. *Desert Palace, Inc.*, 539 U.S. at 95.

35. *Id.* at 101–02 ("[D]irect evidence of discrimination is not required in mixed-motive cases . . . .").

36. *Id.* at 102 (O'Connor, J., concurring) ("I join the Court's opinion. . . . [I]n the Civil Rights Act of 1991, Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII.").

37. *See* Klein, *supra* note 25, at 1184.

38. The Court's majority opinion in *Desert Palace* begins its analysis by stating, "This case provides us with the first opportunity to consider the effects of the 1991 [Civil Rights] Act on *jury instructions* in mixed-motive cases." *Desert Palace, Inc.*, 539 U.S. at 98 (emphasis added). The Eighth Circuit would later seize upon this point in *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004), to support its argument that the ramifications of *Desert Palace* did not extend to summary judgment. For further development of this point, see *infra* note 66 and accompanying text.

39. *See supra* note 26 and accompanying text.

D. A Step Backwards: McDonnell Douglas *and* Burdine

Given the chronological progression of the above topics, this subsection's location may seem incongruous. Both the cases to be discussed here (*McDonnell Douglas v. Green* from 1973 and *Texas Department of Community Affairs v. Burdine* from 1980) predate all of the case law and legislation discussed so far, with the exception of Title VII itself.[40] The reason is simple: it was only after *Desert Palace* that the framework from *McDonnell Douglas* grew popular in the Title VII context.

Claims of illegal discrimination based on circumstantial evidence were traditionally subject to the three-step burden-shifting framework established in *McDonnell Douglas v. Green*.[41] The *McDonnell Douglas* "pretext" framework consists of three burden-shifting steps.[42] First, the plaintiff must establish a prima facie case for intentional discrimination; second, the defendant may offer a legitimate, nondiscriminatory reason for the adverse employment decision in question; third, the plaintiff must show any proffered legitimate reason to be pretextual.[43] The prima facie case is further broken down into several components.[44]

In 1980, seven years after the Supreme Court in *McDonnell Douglas* enumerated and described each of the burden-shifting steps, the Court in *Burdine* added that the ultimate burden of proving intentional discrimination always rested with the plaintiff and was never transferred to the defendant.[45] The Court also remarked that the burden-shifting process is designed "to bring the litigants and the court expeditiously and fairly to this ultimate question [of

40. *See supra* notes 12, 15, 28, 32 and accompanying text.

41. *See* Van Detta, *supra* note 11, at 132 (describing the "classic circumstantial evidence case" as "the kind to which courts since 1973 routinely applied a *McDonnell Douglas* analysis").

42. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973).

43. *Id.*

44. The prima facie case requires the plaintiff demonstrate that: (1) the plaintiff is a member of a protected group; (2) the plaintiff applied for a job for which the employer was hiring and for which the plaintiff was qualified; (3) notwithstanding the plaintiff's qualifications, the employer rejected the plaintiff; and (4) the position afterwards remained open. *See id.* at 802.

45. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1980). Below, the Fifth Circuit had held that the defendant was obligated to establish a legitimate reason for its employment decision by a preponderance of the evidence. *See id.* at 252. Even after *Burdine*, courts were divided over the pretext stage. *See* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 714–16, 718 (1995) (describing how courts split into at least three camps over *Burdine* and explaining how the Supreme Court partially clarified *Burdine* in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

intentional discrimination]."[46] It is supposed to do so by "[eliminating] the most common nondiscriminatory reasons for the plaintiff's rejection."[47]

In the present, scholarly discourse still ranges broadly over the merits and defects of *McDonnell Douglas*.[48] For the most part this Comment does not enter that general debate. To the extent that *McDonnell Douglas* competes with other frameworks in the context of § 2000e-2(m), Parts II and III of this Comment do subject it to a limited critique.

II. POST-*PALACE*: THE CIRCUITS DIVERGE

A. The Fifth Circuit: Modifying McDonnell Douglas

In 2004, the Fifth Circuit set forth its position on the framework issue in *Rachid v. Jack in the Box, Inc.*, where the court ruled that the mixed-motive analyses found in *Desert Palace* and *Price Waterhouse* were applicable to a claim under the Age Discrimination in Employment Act (ADEA).[49] Yet, rather than falling back on the classic *McDonnell Douglas* test, the Fifth Circuit forged a hybrid framework, a "modified *McDonnell Douglas* approach," for its summary judgment framework in mixed motive cases.[50] Like *McDonnell Douglas*, this test had three steps.[51] The first two were identical to *McDonnell Douglas* in every way, but in the final step the court held that "the plaintiff must . . . offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative) or (2) that the

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

47. *Id.* at 254. That observation may seem innocuous for the moment, but it is one major reason that *McDonnell Douglas* is arguably ill-suited for summary judgment motions in § 2000e-2(m) cases. This point is pursued—and perhaps even belabored—in due course. *See infra* notes 55–63, 74–80, and accompanying text.

48. For an evidentiary framework, *McDonnell Douglas* arouses singularly impassioned arguments from its detractors and supporters. *See, e.g.*, Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 404 (2005) (levying charges of legal "heresy" against certain critics of *McDonnell Douglas*); Jeffrey A. Van Detta, *Requiem for a Heavyweight:* Costa *as a Countermonument to* McDonnell Douglas*—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 967–68 (2004) (attributing support for *McDonnell Douglas* in part to "historical denial").

49. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004) (noting that the "core sections" of the ADEA and Title VII are almost identical). For purposes of summary judgment analyses, the court in *Rachid* treated the ADEA and Title VII as practically interchangeable. *See id.*

50. *Id.* at 312.

51. *Id.*

defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic."[52]

The *Rachid* court devoted part of its rationale to explaining why it applied *Desert Palace* (a Title VII case) to an ADEA claim.[53] It spared relatively little attention to explaining why a modified *McDonnell Douglas* test was the best summary judgment framework, much less how *Desert Palace* could have mandated such an outcome.[54] The court's omission has not escaped the notice of other courts and commentators.[55]

First, *McDonnell Douglas* was originally intended to smoke out a single illegitimate motive, and thus by original design it overlooks the mixed-motive concept altogether.[56] One could argue, *ipso facto*, that courts should not use *McDonnell Douglas* in mixed-motive cases.[57] In reply to that point, some commentators have argued that *McDonnell Douglas*'s original purpose does not preclude it from also serving in a more flexible, mixed-motive role, especially when modified to take § 2000e-2(m) into account.[58] Yet, while a showing of pretext (the third step) is optional under the Fifth Circuit approach, the plaintiff's prima facie case remains mandatory.[59] The defendant's task of proffering a legitimate reason for the adverse employment decision also endures.[60] For the most part, then, any merits or defects from the first two steps of the original *McDonnell Douglas* framework must survive the transition to the modified framework. At least two specific problems are identifiable.

First, the Fifth Circuit's retention of the prima facie case in mixed-motive claims is simply unnecessary. After all, the mixed-motive prong in the Fifth Circuit's third step ignores the defendant's offer of a legitimate motive in the second-step.[61] The first two steps of *McDonnell Douglas*'s burden-shifting become duplicative. A plaintiff who proceeds on a mixed-motive theory under § 2000e-2(m) should have no need for a multi-step, burden-shifting procedure. Instead, to survive summary judgment, the plaintiff should only have to bring

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

53. *See id.* at 310–12.

54. *Rachid*, 376 F.3d at 310–12.

55. The Sixth Circuit included *Rachid* among the opinions it criticized for being made "without much, if any, consideration of the issue." White v. Baxter Healthcare Corp., 533 F.3d 381, 398 (6th Cir. 2008).

56. *See id.* at 400–01.

57. *See id.*

58. *See* Klein, *supra* note 25, at 1196. In dicta, the Supreme Court has pointed out that *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

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

60. *Id.*

61. *See id.*

evidence that unlawful discrimination was a motivating factor, as plainly stated in § 2000e-2(m) itself.

An even more robust criticism of the Fifth Circuit's prima facie case is that it may actually prevent some plaintiffs from moving forward on a mixed-motive theory, even when the facts indicate the employer was truly motivated in part by illegal discriminatory intent.[62] The whole point of completing the first step of the burden-shifting scheme is to eliminate the "most common nondiscriminatory reasons" for the employer's decision.[63] Thus, under *McDonnell Douglas* (original or modified), a failure to eliminate these reasons would justify granting summary judgment to the defendant. Yet, under § 2000e-2(m), a plaintiff building a prima facie case should only be tasked with showing that a discriminatory animus was a motivating factor, without regard for whether other reasons played a part in the employer's decision.[64] Once the plaintiff carries this burden, evidence of additional, nondiscriminatory reasons should never justify summary judgment, because even if the employer established the partial affirmative defense permitted by statute, "the questions of injunctive or declaratory relief and attorney fees and costs still remain."[65]

Lest this concern appear entirely theoretical, it should be noted that the early results of *Rachid* are rather discouraging for plaintiffs in the Fifth Circuit. Scholars have noted that "a search of Fifth Circuit decisions that cited *Rachid* and actually applied its mixed-motive analysis reveals two decisions in which the Fifth Circuit reversed a district court grant of summary judgment and twenty-one decisions in which the Fifth Circuit affirmed such grants of summary judgment."[66] The concern that the Fifth Circuit's hybrid framework pays only lip service to § 2000e-2(m) has some basis in fact and may be confirmed as courts decide more cases under the modified framework.

B. The Eighth and Eleventh Circuits: Pure McDonnell Douglas

Following the Civil Rights Act of 1991 and *Desert Palace*, the Eighth and Eleventh Circuits have concluded that *Desert Palace* did not alter the choice of summary judgment frameworks in mixed-motive cases. In 2004, the Eighth Circuit applied *McDonnell Douglas* when it affirmed a grant of summary

62. Wright v. Murray Guard, 455 F.3d 702, 717 (6th Cir. 2006).

63. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

64. 42 U.S.C. § 2000e-2(m) (2006).

65. *Wright*, 455 F.3d at 717. Naturally, the plaintiff would prefer to rebut evidence of nondiscriminatory motivations brought by the employer, to prevent the employer from establishing its partial affirmative defense. *See* 42 U.S.C. § 2000e-5(g)(2)(B). This defense, of course, limits the range of remedies available to the plaintiff. *See id.* To review the elements of the defense, *see supra* note 31.

66. Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal District Courts*, 77 MISS. L.J. 977, 1032 (2008) (internal citation omitted).

judgment to an employer–defendant in *Griffith v. City of Des Moines*, a mixed-motive case.[67] The plaintiff in *Griffith* argued the court should use a modified *McDonnell Douglas* framework.[68] Yet, because the Supreme Court's *Desert Palace* decision only analyzed a mixed-motive jury instruction issue, the Eighth Circuit decided that *Desert Palace* was "an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents," which had relied exclusively on *McDonnell Douglas* for circumstantial mixed-motive claims.[69]

The Eighth Circuit also placed considerable emphasis on the Supreme Court's choice to apply *McDonnell Douglas* in a post-*Desert Palace* case.[70] Because the Supreme Court evidently did not intend *Desert Palace* to terminate *McDonnell Douglas* entirely, the Eighth Circuit assumed *Desert Palace* was not meant to alter the application of *McDonnell Douglas* at all.[71] Thus, the Eighth Circuit continues to distinguish claims based on circumstantial evidence from claims based on direct evidence. Only after producing direct evidence can a mixed-motive plaintiff sidestep *McDonnell Douglas* in the Eighth Circuit.[72]

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

68. *Id.*

69. *Id.* The Supreme Court did not expressly address *McDonnell Douglas* in *Desert Palace*. *See* Klein, *supra* note 25, at 1088 ("[I]f *Desert Palace* significantly changed the Title VII landscape, then surely the Supreme Court would have at least cited *McDonnell Douglas* in its decision.").

70. *Griffith*, 387 F.3d at 735. For the post-*Desert Palace* case relied upon by the Eighth Circuit, see Raytheon Co. v. Hernandez, 540 U.S. 44, 50 n.3 (2003). The plaintiff in this case brought a claim of employment discrimination under the Americans with Disabilities Act (ADA), not Title VII. *Id.* at 49. Interpretations of Title VII and other antidiscrimination statutes are sometimes interchangeable. *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004). But the impact of *Raytheon* on § 2000e-2(m) is doubtful because the ADA contains no provision equivalent to the motivating factor standard in § 2000e-2(m). *See* 42 U.S.C. §§ 12111–17 (forbidding discrimination only "because of" a disability). For an argument urging courts to adapt the motivating factor standard for use under the ADA, see Seam Park, *Curing Causation: Justifying a "Motivating-Factor" Standard under the ADA*, 32 FLA. ST. U. L. REV. 257, 277–78 (2004). In mid-2009, the Supreme Court reviewed a similar issue for the Age Discrimination in Employment Act (ADEA) but found that the ADEA does not authorize mixed-motive age-discrimination claims. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. ____, 129 S. Ct. 2343, 2350 (2009).

71. *Griffith*, 387 F.3d at 735–36.

72. *Id.* at 736 (defining direct evidence as "evidence showing a specific link between the alleged discriminatory animus and the challenged decision" and "evidence that clearly points to the presence of an illegal motive") (internal citation omitted). It is clear that the Eighth Circuit's notion of "direct evidence" incorporates a heightened evidentiary standard. *See Id.* at 736 (describing direct evidence as "strong" evidence and explaining that "'direct' refers to the causal strength of the proof"). For more general remarks on direct evidence, *see supra* notes 3 & 18 and accompanying text.

The Eleventh Circuit, too, has apparently retained *McDonnell Douglas* as its sole Title VII summary judgment framework for claims based on circumstantial evidence. In the 2004 case *Burstein v. Emtel*, the Eleventh Circuit effectively joined the Eighth Circuit's position, albeit with a more subdued tone.[73] An unpublished opinion, *Burstein* never acknowledged *Desert Palace* or the ongoing debate over summary judgment frameworks. Instead, the court simply noted, "In cases involving circumstantial evidence of discrimination . . . under Title VII . . . courts use the analytical framework set forth in *McDonnell Douglas v. Green* . . . which requires the plaintiff first to demonstrate a *prima facie* case of discrimination or retaliation."[74]

In the preceding year, the Eleventh Circuit had grappled with *Desert Palace* more directly in *Cooper v. Southern Company* and emerged with a relatively clear allegiance to *McDonnell Douglas*.[75] Yet, *Cooper* was not a mixed-motive case. The court underscores this fact but dodges the question of whether it would have used *McDonnell Douglas* at summary judgment if the *Cooper* plaintiff had expressly relied on a mixed-motive theory rather than a single-motive theory.[76]

The central criticism levied at the Eight and Eleventh Circuits is that the courts blatantly misconstrue *Desert Palace* by ignoring the obvious implications of the Supreme Court's reasoning in that case. The Court repeatedly stated that a mixed-motive theory imposes no special or heightened evidentiary requirement, as compared to the requirements of single-motive theory.[77] Yet, the burden on a plaintiff under *McDonnell Douglas* is higher than under a simple motivating factor framework, because *McDonnell Douglas* requires plaintiffs to not only eliminate nondiscriminatory reasons for the employment decision, but to also present evidence of a discriminatory reason.[78] Consequently, by applying *McDonnell Douglas* to claims brought under § 2000e-2(m), the Eighth and Eleventh Circuits are applying a

73. Burstein v. Emtel, Inc., No. 04-12841, 2005 WL 1370122, at *208 (11th Cir. June 8, 2005).

74. *Id.* A footnote in the opinion also discusses the plaintiff's failure to bring "direct" evidence of discrimination, which is a meaningful requirement only if the court was in accord with the Eighth Circuit. *Id.* at 208 n.6.

75. *See* Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004).

76. *See id.* at 725 n.17. Like the Eighth Circuit, the court also points to the lack of attention *McDonnell Douglas* received in *Desert Palace*. *Id.*

77. *See* Desert Palace v. Costa, 539 U.S. 90, 98, 101 (2003). As one commentator put it, "*Desert Palace* is not merely a 'jury instruction' case . . . but, rather, [it] establishes an entirely new avenue for plaintiffs to circumstantially prove a case of discrimination using a mixed-motive analysis." Weems, *supra* note 66, at 1029.

78. One Sixth Circuit judge used this line of reasoning when he described the *McDonnell Douglas* framework as "more stringent" than a simple motivating factor framework. White v. Baxter Healthcare Corp., 533 F.3d 381, 411 (6th Cir. 2008) (Gilman, J., concurring).

heightened evidentiary standard contrary to the Supreme Court's decision in *Desert Palace*.[79]

A brief hypothetical illustrates the effect of this stance. If a plaintiff brings a mixed-motive theory based on circumstantial evidence in one of these two circuits, he or she is automatically subjected to *McDonnell Douglas* when the defendant files a motion for summary judgment.[80] If the plaintiff can establish a prima facie case, the defendant will then proffer a legitimate reason and argue that this reason would have led to the same decision in the absence of the alleged discriminatory motive.[81] At the third stage, the plaintiff is forced to rebut the employer's proffered reason—i.e., expose it as pretext—even though the Civil Rights Act of 1991 ostensibly guarantees the plaintiff some measure of relief whether or not the employer's proffered reason is pretextual.[82] If unable to show pretext, the plaintiff is completely cut off from statutory relief by this arbitrary evidentiary scheme.[83]

C. The Fourth, Ninth, and D.C. Circuits: Motivating Factor or McDonnell Douglas

The following subsections describe the developments in the Fourth, Ninth, and D.C. Circuits, using the Fourth Circuit's analysis as the primary illustration of their shared standards. In *McGinest v. GTE Service Corp.* (2002)[84] and *Fogg v. Gonzales* (2007),[85] the Ninth Circuit and D.C. Circuit, respectively, have taken positions practically identical to the one set forth by the Fourth Circuit.

79. *See Desert Palace*, 539 U.S. at 98–99.

80. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004).

81. To review the basic *McDonnell Douglas* burden-shifting process, see *supra* notes 40–48 and accompanying text.

82. *See* 42 U.S.C. § 2000e-2(m); § 2000e-5(g)(2)(B) (2006).

83. "[T]he approach of the Eighth and Eleventh circuits will almost inevitably prevent plaintiffs in those circuits from exercising the circumstantial mixed-motive option which the Supreme Court's decision in *Desert Palace* provided to them." Weems, *supra* note 66, at 1030. "The [*McDonnell Douglas*] burden-shifting approach, in theory if not in practice, is frequently inconsistent with the Civil Rights Act of 1991." Davis, *supra* note 45, at 745.

84. As the Ninth Circuit concluded, "[W]hen responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [The plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the defendant-employer]." McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2002).

85. Fogg v. Gonzales, 492 F.3d 447, 451 (D.C. Cir. 2007). The D.C. Circuit departs superficially from its sister circuits when it refers to the motivating factor test as a "motivating part" or "substantial factor" test. *Id.* While the latter term smacks of a heightened evidentiary standard, the *Fogg* court later adheres to the plain "motivating factor" language from § 2000e-2(m). *See id.* at 453.

As exemplified in *Diamond v. Colonial Life & Accident Insurance Co.*, the Fourth Circuit permits § 2000e-2(m) plaintiffs a choice: at summary judgment, they may proceed either by surviving *McDonnell Douglas* or by presenting evidence sufficient to raise genuine issues of material fact over whether the defendant's adverse employment decision was motivated, at least in part, by an illegitimate discriminatory factor.[86] Plaintiffs do not have to meet a heightened evidentiary standard of the sort seen in the Eighth Circuit. Rather, plaintiffs "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 impermissible factor such as race motivated the employer's adverse employment decision."[87]

While likely preferable to the alternatives available in the Eighth or Fifth Circuits, the open choice between *McDonnell Douglas* and a motivating factor framework is perhaps an unnecessary one. Given that *McDonnell Douglas* places a greater burden on plaintiffs, informed plaintiffs should consistently select a motivating factor framework.[88] Yet, if nothing else, retaining an open-minded position has kept the above circuits somewhat clear of the fray.[89] It is difficult to criticize such a flexible framework.

Still, one potential criticism of these circuits' laissez-faire approach is that it creates confusion, because plaintiffs are not clearly directed to choose between a mixed-motive and single-motive theory before summary judgment. From the D.C. Circuit, *Fogg v. Gonzales*[90] provides a specific example in which the plaintiff's indecision stymied the lower court.[91] After the defendant filed a motion for judgment as a matter of law, the judge finally settled upon a single-motive theory, with *McDonnell Douglas* as the accompanying

86. This standard is found in *Fogg*, 492 F.3d at 454; *Diamond v. Colonial Life & Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *McGinest*, 360 F.3d at 1122.

87. *Diamond*, 416 F.3d at 318.

88. *See supra* note 75 and accompanying text.

89. Judge Moore's concurring opinion in *Wright* dismissed the Fifth Circuit, excoriated the Eighth and Eleventh Circuits, but only implicitly disagreed with the Fourth, Ninth, and D.C. circuits by advising the Sixth Circuit to exclude *McDonnell Douglas* from mixed-motive claims. *See* Wright v. Murray Guard, 455 F.3d 702, 717–20 (6th Cir. 2006) (Moore, J., concurring). The author has found no courts and few commentators who focus direct criticism on the Fourth, Ninth, or D.C. circuits. *But see* Katz, *supra* note 11, at 164–66 (repudiating the "choice" camp and situating the pretext and motivating factor frameworks to serve complementary, rather than competing, roles in mixed motive claims).

90. *Fogg*, 492 F.3d at 451.

91. *See* Borcherding, *supra* note 9, at 263 (noting that the standard for determining whether a plaintiff should survive a motion for judgment as a matter of law is "the same as the standard for defeating a motion for summary judgment . . . .") (quoting Dunbar v. Pepsi-Cola Gen. Bottlers, Inc., 285 F. Supp. 2d 1180, 1195 (N.D. Iowa 2003); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

framework, merely because the *defendant's* motion mentioned pretext.[92] Ironically, the defendant did not wish the trial court to use a pretext framework and argued on appeal in favor of eliminating the distinction between mixed-motive and single-motive frameworks.[93] Although the D.C. Circuit reversed portions of the lower court's ruling, it found no abuse of discretion in the trial judge's selection of a theory for the parties based on the defendant's chance mention of pretext.[94]

Admittedly, the questions of *who* chooses how to classify the complaint (i.e., as proceeding under § 2000e-2(m) or under a single-motive theory) and *when* that choice must be made are not entirely unique to these circuits. Their approach merely seems to invite the most confusion over choice and timing.[95] To ameliorate the problem, these circuits could at least make one framework the default standard for cases where the plaintiff's choice is unclear.[96]

A second potential criticism originates from those commentators who consider *McDonnell Douglas* either entirely "superfluous"[97] in light of the motivating factor test or "dead"[98] in the wake of *Desert Palace*. They would prefer these circuits to do away with *McDonnell Douglas* altogether and leave plaintiffs with the motivating factor framework for both single and mixed-motive theories. Yet, that position is probably too extreme, given that the

92. *Fogg*, 492 F.3d at 451. The oddity in this case arises from the fact that *plaintiffs* should choose the theory, as the opinion itself seems to recognize. *See id.* at 451 (explaining that "[u]sing the mixed-motive theory, a *plaintiff* can establish an unlawful employment practice . . . .") (emphasis added).

93. *Id.* at 452–53.

94. *Id.* at 454.

95. By contrast, in the Eighth and Eleventh Circuits, the choice of theories and the timing of that choice are irrelevant, because the courts there apply a traditional pretext framework to all Title VII claims based on circumstantial evidence, regardless of whether the claims are brought pursuant to § 2000e-2(m) or Title VII's general antidiscrimination provision, § 2000e-2(a)(1). *See supra* notes 64–73 and accompanying text. Somewhat similarly, a Fifth Circuit plaintiff theoretically ought to be able to proceed under § 2000e-2(m) by default, and so a judge would never be left with the awkward task of gleaning the plaintiff's theory from the parties' briefs. *See supra* notes 49–52 and accompanying text. The Sixth Circuit's approach may raise some questions in this area. *See infra* Part III.

96. Ideally, the default standard would be the motivating factor framework, whose advantages over the pretext framework are a central point of discussion in this article. *See infra* notes 127–40 and accompanying text. If a plaintiff did not prefer the default framework, the plaintiff could make that clear through the same means by which the plaintiff identifies the complaint as proceeding on a mixed or single-motive theory. *See infra* notes 148–49 and accompanying text.

97. Davis, *supra* note 45, at 752.

98. Van Detta, *supra* note 48, at 966. One district court has adopted this expansive view, at least with regard to Title VII. *See* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991–92 (D. Minn. 2003) (finding that *McDonnell Douglas* no longer applied to single *or* mixed-motive theories after *Desert Palace*).

Supreme Court continues to make use of *McDonnell Douglas* in some contexts after *Desert Palace*.[99]

As the Supreme Court had cautioned, *Desert Palace* did not require the Court to decide if the motivating factor test applied outside the mixed-motive context.[100] With that question undecided, the motivating factor framework is probably not yet ready to supplant *McDonnell Douglas* in every Title VII claim. A more modest argument is that *within* the mixed-motive context, a simple "motivating factor" framework should replace *McDonnell Douglas*. That is precisely the stance taken by the Sixth Circuit, as explained in the following section.

III. THE SIXTH CIRCUIT TAKES A STAND: THE MOTIVATING FACTOR FRAMEWORK

*A. Pre-*White*: Evading the Issue*

For a few years following *Desert Palace*, the Sixth Circuit managed to avoid the prickly question of how to unravel *Desert Palace*'s abolishment of the distinction between direct and circumstantial evidence, for purposes of evaluating mixed-motive claims. In 2005, one unpublished opinion acknowledged the issue but refused to resolve it.[101] Another unpublished opinion from the same year suggested that a modified pretext framework, similar to the Fifth Circuit's hybrid, would be the best choice.[102]

Later still, in the 2006 case *Wright v. Murray Guard, Inc.*, the majority opinion noted that *Desert Palace* presented an unresolved question regarding summary judgment frameworks and circumstantial mixed-motive claims.[103] Unfortunately, the majority opinion avoided settling the question of *Desert Palace*'s impact on the choice of frameworks.[104] The court clearly averred that it was simply persisting in the same analysis it would have used for a mixed-motive claim supported by direct evidence before *Desert Palace*.[105] It did not decide whether mixed-motive theories supported by circumstantial evidence ought to be analyzed with a pretext framework, as discrimination claims supported by circumstantial evidence traditionally were.[106]

The more helpful analysis in *Wright* originates in the concurring opinion by Judge Moore (who also authored the majority opinion).[107] Not only did her

99. *See supra* note 67 and accompanying text.
100. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003).
101. Harris v. Giant Eagle, 133 F. App'x 288, 297 (6th Cir. 2005).
102. Aquino v. Honda of Am., 158 F. App'x 667, 675–76 (6th Cir. 2005).
103. Wright v. Murray Guard, Inc., 455 F.3d 702, 712 (6th Cir. 2006).
104. *Id.* at 712 n.4.
105. *Id.*
106. *See id.*
107. *See id.* at 704, 716.

concurring opinion undertake a thorough review of the frameworks in other circuits, but it also clearly articulated how the Sixth Circuit should respond to *Desert Palace* on the issue of summary judgment frameworks for circumstantial mixed-motive claims.[108] Judge Moore's opinion prefigured the majority holding in *White v. Baxter* and formed the backbone of that decision, which this Comment examines next.[109] Most of the essential points from Judge Moore's *Wright* concurrence reappear in the *White* opinion.[110]

B. White v. Baxter*: The Motivating Factor Framework Is Born*

In 2005, a pharmaceutical salesman named Todd White filed suit against his employer, Baxter Healthcare Corporation, for violations of Title VII and a Michigan state statute, the Elliot-Larsen Civil Rights Act.[111] He alleged employment discrimination based on his male gender and African–American race.[112] This discrimination was supposedly shown by (1) Baxter's refusal to promote White to a sales manager position, (2) the downgrading of his sales performance and a consequent diminution of his 2004 raise, and (3) a denial of company benefits.[113] After the district court granted Baxter's motions for summary judgment, White appealed but abandoned the gender discrimination claim and the challenge to lost benefits.[114] Furthermore, White's challenge of the refusal-to-promote was grounded on a single-motive theory.[115] Consequently, when the Sixth Circuit reviewed the grant of summary judgment, the only mixed-motive theory before it was the salary-reduction challenge, accompanied by the following facts.[116]

To evaluate employees in 2004, Baxter had set up a table ("the Grid") categorizing various products and the degree of success salespersons would need in each product area to earn a "passing" grade.[117] Salespersons would receive a salary raise commensurate with their level of performance; those at the very bottom would receive no raise at all.[118] Previously, White had achieved outstanding performance reviews in his six years with Baxter, but in

108. *Wright*, 455 F.3d at 716–20 (Moore, J., concurring).

109. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 397–402 (6th Cir. 2008).

110. However, the *White* opinion lacks some relevant criticisms articulated in *Wright*. *See infra* text accompanying notes 144–149.

111. *White*, 533 F.3d at 385, 389.

112. *Id.* at 389.

113. *Id.*

114. *Id.*

115. *See id.* at 390.

116. *See White*, 533 F.3d at 395.

117. *Id.* at 387–88. Baxter organized the results of the evaluations along a spectrum. At the top was "Exceeds," followed by "Meets [Expectations] Plus," "Meets," "Meets Minus," and "Does Not Meet." *Id.*

118. *Id.* at 388.

2004, White's regional manager (Phillips) found that White's sales performance deserved the lowest score on the Grid, though he raised the final grade by one rank, supposedly in acknowledgment of White's past superior performance.[119] As a result, Baxter did raise White's salary in 2004, but the increase was smaller than it would have been if White had scored higher on the Grid.[120] A plain reading of the Grid revealed that White's performance should have placed him in the intermediate grade: one rank above the grade awarded him by Phillips.[121] On the other hand, Baxter had set additional goals for White and certain other salespersons to increase sales of a specific drug, and White had concededly failed to meet those added goals.[122]

Still, White introduced evidence that the Grid was a more recent standard than the personalized goals and should have overridden the latter, as well as evidence that other employees were evaluated under the Grid's terms only.[123] Furthermore, White had produced evidence that Phillips had made disparaging remarks about black male employees.[124] Phillips had also sent an email to multiple employees, containing an off-color joke which connected Osama bin Laden to O.J. Simpson.[125]

With these facts, the Sixth Circuit had to decide whether Baxter had been entitled to summary judgment on White's mixed-motive theory.[126] The court reversed the grant of summary judgment.[127] First, from Phillips's behavior, the court found a reasonable jury could have inferred discriminatory animus.[128] Second, given that employees other than White had apparently been evaluated under the Grid's standards alone (and not with additional goals in mind), the court found a reasonable jury could conclude Phillips's rating choice was motivated at least in part by his discriminatory animus.[129]

Most importantly for this Comment's purposes, the court finally selected its post-*Desert Palace* framework for circumstantial mixed-motive claims at summary judgment.[130] After another extensive review of the various frameworks followed by other circuits, the Sixth Circuit validated Judge Moore's concurrence from *Wright* by holding that "the *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the summary

119. *Id.* at 385–86, 388.
120. *Id.* at 389.
121. *See White*, 533 F.3d. at 388.
122. *See id.* at 387–88.
123. *See id.* at 405.
124. *Id.* at 385.
125. *Id.*
126. *See White*, 533 F.3d at 390.
127. *Id.* at 406.
128. *Id.* at 404.
129. *Id.* at 405–06.
130. *Id.* at 400.

judgment analysis of Title VII mixed-motive claims."[131] Rather, "[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 plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor . . . .'"[132]

The court naturally focused part of its discussion on the Supreme Court's interpretation of § 2000e-2(m) in *Desert Palace*.[133] With the distinction between direct and circumstantial evidence erased for mixed-motive cases, the Sixth Circuit saw no cause to withhold the "motivating factor" standard inherent to § 2000e-2(m) from plaintiffs whose claims were supported by circumstantial evidence, rather than direct evidence.[134] After all, the pure motivating factor framework had always been applicable to claims based on direct evidence.[135] Following *Desert Palace*, the rationale for segregating frameworks had vanished along with the distinction between direct and circumstantial evidence.[136]

Moreover, the Sixth Circuit was concerned that *McDonnell Douglas* was ill-suited for mixed-motive claims.[137] The pretext framework's purpose, as identified by the Supreme Court in *Burdine*, was "'to bring litigants and the court . . . to [the] ultimate question' of whether the defendant intentionally discriminated against the plaintiff."[138] That purpose was accomplished "by 'smok[ing] out the single, ultimate reason for the adverse employment decision.'"[139]

As the Sixth Circuit understood, a mixed-motive theory by nature never requires smoking out a single, ultimate reason.[140] Once a mixed-motive plaintiff has brought evidence of an illegitimate motivating factor, the plaintiff

131. *White*, 533 F.3d at 400.

132. *Id.* (quoting 42 U.S.C. § 2000e-2(m)).

133. *Id.*

134. *Id.*

135. *See id.* at 397.

136. *See White*, 533 F.3d at 400.

137. *Id.* at 400–01.

138. *Id.* at 400 (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1980)).

139. *Id.* (quoting Wright v. Murray Guard, 455 F.3d 702, 720 (6th Cir. 2006)); *see also supra* note 35 and accompanying text.

140. This point echoes Justice Brennan's opinion in Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994). He argued that "[w]here a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was *the* 'true reason' for the decision—which is the question asked by *Burdine*." *Id.* (citation omitted). Or as one commentator put it, "The [*McDonnell Douglas/Burdine*] scheme was born out of the notion that Title VII cases required proof of *but-for*, or sole-factor, causation." Klein, *supra* note 25, at 1182.

has no responsibility to eliminate the employer's proffered legitimate reason for the adverse employment decision, because no amount of legitimate reasons can entirely offset the illegitimate motivating factor.[141] At most, legitimate reasons may afford the defendant a limited affirmative defense, which the defendant is burdened with establishing.[142] As the Sixth Circuit concluded, the plaintiff should not be saddled with the pretext framework and the added burden of rebutting a proffered legitimate reason.[143]

*C. Post-*White*: What the Sixth Circuit Missed*

If the *White* opinion suffered any particular weakness, it was the court's failure to expressly reiterate Judge Moore's observation in *Wright* that the pretext framework might unjustly terminate some mixed-motive claims at summary judgment.[144] Instead, the court mostly spoke of *McDonnell Douglas* as "not needed" and "unnecessary."[145] The opinion also left a small role for *McDonnell Douglas* to play in mixed-motive cases.[146] The court observed that plaintiffs might wish to use part of the *McDonnell Douglas* prima face case (the first step in the burden-shifting process).[147]

For all that, the court still emphasized that "compliance with the *McDonnell Douglas/Burdine* shifting burdens of production is *not* required . . . ."[148] Under these circumstances, the court added, summary judgment would typically be inappropriate because inquiries into an employer's motivations are "very fact intensive."[149]

141. *See supra* notes 61–62 and accompanying text.

142. *See supra* note 31 and accompanying text.

143. White v. Baxter Healthcare Corp., 533 F.3d 381, 401 (6th Cir. 2008).

144. Wright v. Murray Guard, 455 F.3d 702, 717 (6th Cir. 2006). These are the same concerns critics of the Eighth Circuit have voiced. *See supra* notes 74–83 and accompanying text.

145. *White*, 533 F.3d at 400–01.

146. *Id.* at 400 n.10. As an aside, the court observed that *McDonnell Douglas* was still the appropriate framework for single-motive claims (i.e., claims proceeding under 42 U.S.C. § 2000e-2(a)(1) when based on circumstantial evidence). *Id.*

147. *Id.* at 401. Normally, establishing the prima facie case in the pretext framework creates a presumption of discriminatory animus unless the defendant offers a legitimate reason for its conduct. *Id.* at 400–01. But it is not entirely clear from the *White* opinion whether a § 2000e-2(m) plaintiff who chose to invoke and establish the prima facie case from *McDonnell Douglas* would still be able to benefit from this presumption. In a more recent case from the Sixth Circuit, the court did not expressly mention any presumption but acknowledged "[t]he fact that [the plaintiff] has established a prima facie case under the *McDonnell Douglas* framework can be considered in favor of his mixed-motive claims." Graham v. Best Buy Stores, L.P., 298 F. App'x 487, 495 (6th Cir. 2008).

148. *White*, 533 F.3d at 401.

149. *Id.* at 402.

Possibly, a second deficiency in the court's opinion is that it ignored the question of how the choice of theories (mixed or single) is made and when that choice must be made. While it may seem to be a mechanical issue, the labeling of a claim as proceeding under § 2000e-2(m) or § 2000e-2(a)(1) is important because it determines which framework the court should employ at summary judgment.[150] Ideally, plaintiffs should identify the theory in the complaint or at least in any briefs filed in opposition to the defendant's motion for summary judgment.[151] They could also discuss the issue at a pretrial conference.[152] These practical precautions would ensure that trial courts apply the motivating factor framework whenever a plaintiff intends to proceed under § 2000e-2(m).

IV. CHOOSING A FRAMEWORK: EMPIRICAL SUPPORT FOR THE SIXTH CIRCUIT

This section adds support for the Sixth Circuit's motivating factor framework, with special attention paid to empirical evidence. As some scholars have put it, "[When] legal doctrines rely on stated or unstated theories about the nature of real world phenomena . . . those theories should remain consistent with advances in relevant fields of empirical inquiry."[153] The evidence will show that the motivating factor framework fits the facts of discrimination just as well as it fits the text and function of § 2000e-2(m).

A. Multiple Motivations and Empirical Reality

In *Price Waterhouse*, Justice Brennan's plurality opinion explained that an employer's adverse decision is discriminatory if the plaintiff's protected status consciously influences the employer's decision, to the point that the employer would state at the moment of decision (if asked and if honest) that the protected status was a reason for its decision.[154] Apparently, the plurality thought that illegal discrimination had to play a calculated role in the employer's decision, a notion that has been perpetuated with every rote

150. The court in Hernandez v. Earth Tech, Inc., 2008 WL 4104366, at *1 (E.D. Mich. Aug. 29, 2008) drove this point home for the plaintiff when it refused to apply the motivating factor framework from *White v. Baxter*, because the plaintiff had "never advanced a mixed-motive theory of recovery in any of his submissions [to the court]."

151. Pursuant to FED. R. CIV. P. 56.

152. *See* FED. R. CIV. P. 16(c)(2)(A).

153. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1001 (2006); *see also* Elizabeth M. Schneider, *The Dangers of Summary Judgment*: *Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 776 (2007) ("More social science and expert testimony could illuminate the interrelationship of fact and law in gender [discrimination] cases.").

154. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion).

recitation of the "ultimate question" in disparate treatment cases.[155] Whether as a result of the Supreme Court's view of discrimination or for other reasons, unconscious discrimination has tended to escape judicial scrutiny under Title VII.[156]

Yet, social-psychological research has shown that illegitimate discrimination can flourish at a less-than-conscious level in the workplace.[157] According to such research, recognizing discrimination only when it is blatant and overt "ignores how discrimination actually works in many situations and leaves much discrimination untouched."[158] To detect discrimination, an observer must understand that an employer's illegitimate motivation may consist of a preexisting "biased mental state."[159] Illegitimate discrimination in the form of, for example, racial bias may be more implicit than explicit, and focusing solely on overt forms of intent will cause courts to overlook a great deal of discrimination.[160] This is not to say that acts of discrimination in such cases are necessarily unintentional. As one social psychologist has explained: "[P]eople probably can help it when they stereotype and prejudge. . . . Because perceivers have options available, they may be said to intend the one they choose."[161]

Based on the empirical data regarding the nature of discrimination, one can draw certain conclusions about multiple motivations. When discrimination consists of stereotypes, in part, and operates beneath the level of purposeful intent, it follows that other motivations must also play a part in these discriminatory decisions, so that the actor's conduct appears at first blush to be

155. That is, the question of whether the employer intentionally discriminated for an illegitimate reason. *See e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

156. Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination*: *Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 347 (2008) ("While unconscious discrimination is actionable under Title VII (presumably), scholars are in agreement that court regulation of it has failed."). But not all courts have ignored the issue. *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (holding that racial discrimination in employee evaluations was illegitimate "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.").

157. *See* Tolson, *supra* note 156, at 356 ("The persistence of unconscious discrimination in the workplace has been documented in numerous studies.").

158. Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 99 (2008) (applying social cognition theory to Title VII and other antidiscrimination statutes).

159. Krieger & Fiske, *supra* note 153, at 1056–57.

160. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1128 (2008).

161. Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, *in* UNINTENDED THOUGHT: THE LIMITS OF AWARENESS 253, 277 (James S. Uleman & John A. Bargh eds., 1989).

motivated solely by legitimate reasons residing closer to the surface of his cognition. That is to say, the type of submerged discrimination that is left untouched by conventional legal wisdom *must* be accompanied by reasons that appear legitimate, in order to be less than blatant and overt.[162] Superficially legitimate motivations for adverse employment decisions are logically the only means by which biased mental states[163] can operate while remaining undetected.

The psychological theory of aversive (i.e., subtle) racism illustrates this reasoning:

> [A]versive racists will not discriminate when 'the appropriate decision is obvious,' such as where a candidate for a position is clearly qualified or not qualified; however, where the appropriate decision is not clear "because of ambiguous evidence about . . . the candidate's qualifications . . . bias is expected." In the latter situation, "the aversive racist can justify or rationalize a negative response on the basis of some factor other than race."[164]

In the aversive racism scenario, the candidate's ambiguous qualifications would potentially be a legitimate (albeit superficial) motivating factor for an adverse employment decision, while the aversive racism itself would be an illegitimate motivating factor.

Overall, these types of theories suggest that multiple motivations are at work in many illegitimate discriminatory decisions, including adverse employment decisions. While that would not be true of every case, decisions openly motivated by discrimination are relatively rare, as previously noted.[165] Most of the time, courts and parties must deal with subtler forms of alleged discrimination. And it is here that multiple motives likely flourish.[166]

B. The Need for a "Motivating Factor" Framework

The situation described in the preceding section is plainly well-suited for an application of § 2000e-2(m).[167] Yet, in order for the statute to function properly—in order for the law to counter intentional discrimination effectively—frameworks in conflict with the reality of multiple motivations cannot be permitted to smother the plaintiff's claim at summary judgment.

162. *See supra* note 155 and accompanying text.

163. *See supra* note 156 and accompanying text.

164. Bodensteiner, *supra* note 158, at 101–02 (quoting John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141, 145, 148 (Arthur G. Miller ed., 2004)).

165. *See supra* note 3 and accompanying text.

166. Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench*: *Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 846 (2004) ("[I]t is reasonable to expect that most subtle discrimination cases will be mixed motive cases.").

167. *See supra* note 160 and accompanying text.

Instead, courts should choose a framework that comports with the complexity of discrimination.[168]

The motivating factor framework selected by the Sixth Circuit draws directly from the language of the statute and thus avoids impeding or cutting off valid claims at summary judgment.[169] Conversely, as discussed in Parts II and III, the pretext frameworks used by most other circuits clash with a plain reading of § 2000e-2(m)[170] and unrealistically presuppose a single, discriminatory motive, which, in reality, is less prevalent than an intermingling of legitimate and illegitimate biases.[171] By following the Sixth Circuit's lead, courts can avoid the "endless confusion"[172] of issues engendered by the pretext frameworks and also ensure that they are allowing § 2000e-2(m) to combat unlawful discrimination, even discrimination that might lurk beneath legitimate motivations.

Ideally, social-psychological research will not only reach lawyers and the courts, but also permeate society's understanding of discrimination.[173] As plaintiffs and their attorneys become more aware of how discrimination works, they may be expected to ground their complaints more frequently in § 2000e-2(m).[174] In these cases, courts should follow the trend set by the Sixth Circuit and use a motivating factor framework, because it alone is capable of weeding out any illegitimate motivation, *even when* that motivation is intermingled with ostensibly lawful reasons for the adverse employment decision. Subtle or

168. Significant progress in combating discrimination could be made if "proof schemes developed by the courts [are] revisited and modified to reflect the current understanding [of discrimination]" in the social sciences. Bodensteiner, *supra* note 158, at 127.

169. *See supra* note 131 and accompanying text.

170. *See supra* notes 55–63, 74–80, 134–40, and accompanying text.

171. *See* Bodensteiner, *supra* note 158, at 103.

172. Davis, *supra* note 45, at 705; *see also* Krieger, *supra* note 166, at 838 (noting the profound consequences of differing pretext frameworks provided by the Seventh Circuit and Supreme Court).

173. Of course, the nature of discrimination is not perfectly clear yet. *See* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2418 (2003) (book review) (admitting "it is hard to say precisely what discrimination means."). However, the very theories discussed in this article show that knowledge of discrimination is growing, and modern educational institutions can pass that knowledge on to society at large. *See, e.g.*, NATIONAL EDUCATION ASSOCIATION, SOCIAL JUSTICE: STRATEGIES, http://www.nea.org/tools/18848.htm (last visited June 8, 2010) (urging educators—of which it claims 3.2 million as members—to "[u]nderstand the mechanisms that perpetuate oppression").

174. Long before *White v. Baxter*, Congress seems to have believed § 2000e-2(m) would prove popular amongst plaintiffs. In its explanation for why the Civil Rights Act of 1991 was needed, the House of Representatives agreed with the Justice Department that "virtually every Title VII disparate treatment case will to some degree entail multiple motives." H.R. REP. No. 102-40(I), at 47 (1991) *as reprinted in* 1991 U.S.C.C.A.N. 549, 585.

otherwise, no form of illegitimate employment discrimination should evade § 2000e-2(m).[175]

C. Why Some Courts Overlook Empirical Research

Regrettably, courts often overlook the results of empirical research concerning the nature of bias and discrimination.[176] The absence of such considerations in most of the preceding cases is telling. Even the Sixth Circuit's opinion in *White v. Baxter* is devoid of social–psychological studies or concern for how the various frameworks might be more or less preferable from a social sciences perspective. Instead, it concentrates exclusively on narrow legal analysis of the *Desert Palace* and *McDonnell Douglas* frameworks.[177] Yet, if § 2000e-2(m) is to work properly, it is vital for courts to make empirically informed decisions about which summary judgment framework to utilize. They cannot do so if they ignore what the social sciences have to say about discriminatory behavior.

One possible difficulty is that many judges fail to capture the "insider" perspective on discrimination.[178] Comfortable with their own perceptions of reality and with purely legal concepts of discrimination, they may see little need to rely on the social sciences. Yet, if judges were made aware (perhaps by plaintiffs)[179] of advances in the social sciences, they would be able to detect the subtler strands of discrimination in employers' behavior, mixed in with whatever legitimate reasons the employer may offer for an adverse employment decision. That would be a patent improvement for claims under § 2000e-2(m) at summary judgment, where judges must apply the frameworks analyzed in this Comment.

175. After all, § 2000e-2(m) was designed to catch forms of discrimination that had previously escaped sanction under *Price Waterhouse*. *See supra* note 28 and accompanying text. One of the "primary purposes" of § 2000e-2(m) was "to provide more effective deterrence." H.R. REP. No. 102-40(I), at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 552.

176. *See* Bodensteiner, *supra* note 158, at 99 ("[M]ost reported decisions addressing proof of discrimination do not address theories of human behavior . . . ."); Krieger, *supra* note 166, at 835 (likewise asserting that "courts do not appear to be cognizant of recent advances in cognitive social psychology"). However, plaintiffs can still sometimes put expert socio-psychological testimony to good use. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), the Supreme Court acknowledged and discussed the social-psychological trial testimony of Dr. Fiske. *See generally* Susan T. Fiske et al., *Social Science Research on Trial*: *Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049 (1991).

177. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).

178. Robinson, *supra* note 160, at 1157 (explaining that the phenomenon of perceptual segregation "pits the plaintiff's subjective perception against the judge's own subjective perception, and the law privileges the latter").

179. *See supra* notes 170–71 and accompanying text.

CONCLUSION

As a social phenomenon, discrimination is still widespread, but part of the solution may be as simple as adjusting the types of frameworks courts use at summary judgment in employment discrimination cases. Specifically, in cases brought under 42 U.S.C. § 2000e-2(m), courts should use a motivating factor framework, not only because the framework conforms to Supreme Court precedent in *Desert Palace*, but also because it "fits the facts" of discrimination.[180] The motivating factor framework is essential to the proper application of the statute, and in light of the prevalence of multiple motivations and the volume of claims that may be based on § 2000e-2(m) following decisions like *White v. Baxter*, it is all the more critical for courts to choose the right framework at summary judgment.

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180. "The first call of a theory of law is that it should fit the facts." OLIVER WENDELL HOLMES, THE COMMON LAW 211 (1938).

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