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A Chain of Inferences Proving Discrimination

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There are three elements in a plaintiff's prima facie case of individual disparate treatment discrimination: (1) the plaintiff suffered an adverse employment action, (2) the action was linked to the defendant, and (3) the defendant's action was motivated by a protected characteristic of the plaintiff.

The third element—the defendant's intent to discriminate—is the most challenging to prove. Thus, most individual disparate treatment discrimination cases, and this Article, focus on this inquiry. Part of the difficulty is that the second element—the level of linkage between the plaintiff's harm and the defendant's action—has been tied up in the discussion of intent. After the Supreme Court decisions in Reeves *and* Desert Palace, *however, it is possible to clarify the linkage question and identify the array of claims that can be used to prove discriminatory intent.*

Claims that can be used to prove discriminatory motivation or intent include, but are not limited to, a straightforward claim of unequal treatment, a defendant's admission that it discriminated, an action based on stereotypes, and a McDonnell Douglas *approach. Where the* McDonnell Douglas *approach is used, proof may take several forms: proof that the defendant lied in its assertion of a legitimate, nondiscriminatory reason for its action; proof that completely knocks out the defendant's explanation; or proof that eliminates any likely nondiscriminatory reasons. In sum, after decades of uncertainty, a general approach to proof of individual disparate treatment cases may finally be emerging.*

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INTRODUCTION

> "Discriminate . . . 1 recognize a distinction; differentiate: *babies can* ***discriminate between*** *different facial expressions of emotion* . . . 2 make an unjust or prejudicial distinction in the treatment of different categories of people or things, esp. on the grounds of race, sex, or age . . . ."[1]

Title VII employment discrimination law still leaves a great deal of uncertainty determining what the word "discriminate" means. Ironically, the conceptual difficulty is most apparent in the most common cases: where a plaintiff claims, and the employer denies, that the employer discriminated against the plaintiff in making an individual employment decision. There now appear to be three fundamental elements necessary in every individual disparate treatment case: (1) the plaintiff suffers an adverse employment action, (2) the employment action is linked to the defendant, and (3) the defendant's action is motivated by a protected characteristic of the plaintiff.

The last element—the defendant's intent to discriminate—is the most problematic. This Article provides a thumbnail sketch of the first two elements in order to set the stage for a discussion of what discriminatory intent means or, at least, how to go about proving whether or not discrimination motivated a particular employment action. Title VII of the Civil Rights Act of 1964 focuses on employment; section 703(a)(1) specifically prohibits discrimination with respect to "compensation, terms, conditions, or privileges of employment."[2] This element creates a boundary between employment, which is subject to Title VII, and relationships and activities not involving employment, such as a customer's relationship with a business. Thus, a straightforward statutory interpretation of this element requires a plaintiff to show that her relationship to the defendant involves employment and not some other type of relationship.[3] In recent years, however, lower courts have failed to apply the statutory language. Instead, they favor various

1. THE NEW OXFORD AMERICAN DICTIONARY 488 (2001).

2. 42 U.S.C. § 2000e-2(a)(1) (2000).

3. *See, e.g.*, Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151 (1998) (arguing that "Congress's use of the phrase 'compensation, terms, conditions, or privileges of employment' emphasizes the employment-related nature of the prohibited discrimination. The phrase is better read as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee.").

prophylactic rules, limiting the type of employment actions that a plaintiff can challenge.[4] Some courts hold that Title VII only protects against discrimination in "ultimate employment decisions" such as a discharge.[5] As a result, many acts that are discriminatory do not justify a legal action challenging them because only the most severe acts command the attention of a court. However, at least one court has recently extended Title VII protection to encompass any action that materially impacts a plaintiff's job or job prospects.[6] Thus, depending on the court, a plaintiff may or may not be able to challenge an action clearly involving discrimination on the job. To demonstrate these opposing approaches, consider Dilbert cubicles where all the women's cubicles are painted pink and the men's blue. Such clear discrimination implicates the workplace of all the workers and should, therefore, be an adverse employment action sufficient to establish the first element of a disparate treatment case.[7] Given the scope of the tests outlined above, not all courts would find that type of discrimination sufficiently material, and certainly none would find it to be an ultimate employment action. However, discharges and failures to hire do satisfy the first element regardless of how it is articulated by the court.[8]

The second element—the link between the adverse action the plaintiff suffers and the defendant's intent to discriminate—is now somewhat unclear because Title VII includes two separate provisions, sections 703(a) and 703(m), each apparently establishing a different level for that linkage.[9] Section 703(a), included in Title VII as originally enacted and continuing unchanged to this day, uses the language "because of" to link together the actions the plaintiff challenges to the defen-

4. *See, e.g.*, Farrell v. Butler Univ., 421 F.3d 609, 614 (7th Cir. 2005) (denial of bonus is not an adverse employment action).

5. *See, e.g.*, Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

6. *See* Minor v. Centocor, Inc., 457 F.3d 632 (7th Cir. 2006).

7. See Ferrill v. The Parker Group, Inc., 168 F.3d 468 (11th Cir. 1999), a section 1981 case, in which the Eleventh Circuit struck down an employer's policy of racially segregating telemarketers aimed at getting out the vote for an election, with blacks calling blacks and whites calling whites with separate work areas for each group to make their calls.

8. *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333 (1999).

9. *See* 42 U.S.C. § 2000e (2000).

dant's discrimination.[10] In *Price Waterhouse v. Hopkins*, the members of the Supreme Court split as to which party had to prove linkage and to what level it had to be proved, but the Court was unanimous in finding that the language "because of" meant that the but-for standard of linkage should apply in discrimination cases.[11] Congress responded to *Price Waterhouse* by passing the Civil Rights Act of 1991,[12] which amended Title VII to add new sections 703(m) and 706(g)(2)(B). While not changing the "because of" language of section 703(a), Congress created a new, lower level of linkage for plaintiffs to establish the defendants' liability in section 703(m): plaintiffs must prove "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[13] If the plaintiff carries that burden, then the defendant has an affirmative defense available that is limited to the remedies the plaintiff receives. It is not a defense to a defendant's liability. To take advantage of this defense, the defendant must prove, according to section 706(g)(2)(B), that it "would have taken the same action in the absence of the impermissible motivating factor."[14]

There is now good authority for the straightforward statutory construction that both the "because of" standard in section 703(a) as well as the "a motivating factor" with the same-decision limitation of remedies in sections 703(m) and 706(g)(2)(B) continue to exist. In *Fogg v. Gonzales*, the employer hoped to overturn the grant of full remedies that a plaintiff won by a jury verdict.[15] The defendants argued that after the 1991 amendments, Title VII defendants always have the same-decision defense to full remedies provided in section 706(g)(2)(B).[16] According to the defendants, the addition of the new provisions shifted the role of section 703(a); now it "is merely the 'definition' of an unlawful employment practice,

10. *Id.* § 2000e-2(a)(1).

11. 490 U.S. 228 (1989). In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), an age discrimination case, the Court defined the level of linkage required in an individual disparate treatment case: "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the defendant's decision-making] process and had a determinative influence on the outcome."

12. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

13. 42 U.S.C. § 2000e–2(m) (2000).

14. 42 U.S.C. § 2000e–5(g)(B) (2000).

15. 492 F.3d. 447 (D.C. Cir. 2007).

16. *Id.* at 452.

whereas [section 703](m) provides the standard for liability."[17] Based on a plain meaning analysis, the court rejected the defendant's argument. "On its face Title VII provides alternative ways of establishing liability for employment practices based upon the impermissible use of race or other proscribed criteria—one in [section 703](a), which has been the law since 1964, and another in [section 703](m), which the Congress added in 1991."[18] This is so straightforward that it seems beyond challenge. But, it remains unclear whether either alternative approach to linkage can be used in individual disparate treatment claims without regard to the theory or claim of discrimination that is made. In other words, both of these standards exist in the abstract, but the question is whether there is something about a particular discrimination claim, theory, or argument that limits it to the use of one or the other of these two standards.[19] This question is discussed as the third element, intent to discriminate, is developed.

The defendant's intent to discriminate is the main focus of this Article. First, one thesis of this Article is that either the "because of" standard of section 703(a) or the "a motivating factor" standard of section 703(m) can be used under any theory or claim of what constitutes discrimination. Thus, the standard of proof for linking the harm suffered by the plaintiff to the defendant's discrimination is independent of the claim of discrimination. Second, the longstanding assumption that all individual disparate treatment cases were either so-called *Price Waterhouse*[20] cases or *McDonnell Douglas*[21] cases has never been true, because courts recognize a broader array of claims as support for the finding of discrimination. With the holistic approach the Court adopted in *Reeves v. Sandford Plumbing Products*, the test is whether the evidence in the record supports a finding of discrimination by a reasonable fact finder.[22] This means that the question of discrimination is dependent

17. *Id.* at 453.

18. *Id.*

19. By theory, argument, or claim of what constitutes discrimination, I mean an argument that a party can make, based on evidence in the record, that supports or undermines the ultimate inference that the defendant acted with intent to discriminate. Since a broad array of evidence can be admitted as probative of discrimination, a number of different arguments can be used just as long as each one is supported with evidence in the record.

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

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

22. Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 134 (2000).

upon the evidence adduced and the arguments the parties make to the trier of fact. Ultimately, these arguments must show that, based on the evidence, it is reasonable to conclude there was, or was not, discrimination without regard to the particular claim that was made. Third, this Article discusses a number of claims that have been used by plaintiffs. Of course, no list can be comprehensive because claims are based on different kinds of evidence. Discrimination cases arise in an incredibly broad array of circumstances, and imaginative lawyers will always come up with new and possibly compelling ways to demonstrate that an action is the product of discrimination or that it is not.

I. THE MANTRA OF *MCDONNELL DOUGLAS* AND *PRICE WATERHOUSE*

The first Supreme Court case dealing with the substance of individual disparate treatment law, decided in 1973, was *McDonnell Douglas Corp. v. Green*.[23] The case dealt with "the order and allocation of proof in a private, non-class action challenging employment discrimination."[24] The defendant refused to rehire an African-American plaintiff it had previously laid off.[25] The Court elaborated four factual claims that established what it called "a prima facie case of racial discrimination."[26] But the overall structure of the method of proof involved a modification of the traditional structure of civil litigation.[27] Instead of creating a prima facie case which, if shown, would establish liability, the prima facie showing in a *McDonnell Douglas* case only creates a limited presumption of liability, rebuttable where the defendant introduces evidence of a "legitimate, nondiscriminatory reason" for its action, thereby raising a question of fact.[28] The metaphor is that this prima facie

23. 411 U.S. 792 (1973).

24. *Id.* at 800.

25. *Id.* at 796.

26. *Id.* at 802. To establish a "prima facie case of racial discrimination," a plaintiff must show "(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."

27. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

28. *McDonnell*, 411 U.S. at 802. The procedural consequences of the *McDonnell Douglas* structure were made clear in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Establishing a prima facie case does not

showing creates a "bubble" which is "burst" when the defendant introduces its rebuttal evidence.[29] In a *McDonnell Douglas* case, the defendant carries the easier burden of production (and not a burden of persuasion) to "burst the bubble" of the plaintiff's prima facie case. Thus, the focus of *McDonnell Douglas* cases is on the third step of the analysis, where the plaintiff is required to carry her burden of proving that the defendant's asserted reason for taking the adverse employment action was a pretext for discrimination.[30] Subsequent decisions developed how this proof structure operates,[31] but the significance and role of *McDonnell Douglas* is still subject to debate.[32]

In 1989, the Court decided *Price Waterhouse v. Hopkins*.[33] There, the Court addressed the level of linkage required and unanimously agreed that but-for causation was required to establish liability.[34] The Court held that the language "because of" found in section 703(a) meant that the plaintiff must show a link between the employer's action and race or other prohibited

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mean that such a showing suffices, by itself, to support a finding of discrimination. Instead, it creates a presumption which the defendant can rebut by introducing evidence sufficient to raise a question of fact as its explanation as an alternative to discrimination. The plaintiff maintains the burden of proving discrimination throughout and so, after the defendant's rebuttal, the plaintiff can still win by proving that the defendant's asserted reason was a pretext for discrimination.

29. *See, e.g.*, Sheridan v. E.I. Du Pont de Nemours and Co., 74 F.3d 1439, 1449-50 (3d Cir. 1996).

30. *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 665 (1998) (noting that not a single reported case involving a claim of individual disparate treatment discrimination involved a defendant that was unwilling or unable to assert a legitimate, nondiscriminatory reason for its action).

31. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 608–13 (1993) (holding that an employer does not violate the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–12 (1993) (holding that the trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981) (holding that where the plaintiff proves a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions).

32. *See, e.g.*, Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2005); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109 (2007); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L. J. 1887 (2004).

33. 490 U.S. 228 (1989).

34. *See id.* at 240–42.

characteristic at a "but-for" level, but not a "sole cause" level.[35] "But-for" generally means that reliance on race or another protected characteristic of the plaintiff was necessary for the employer to have acted as it did, even though factors other than race may have influenced the employer's decision. The standard is met if, but for the plaintiff's race, the employer would not have taken the action it did.[36]

In *Price Waterhouse*, a dispute within the Court arose over who bore the burden of proof to establish the appropriate level of linkage between the act challenged by the plaintiff and the defendant's motivation for that act. The dissent wanted to leave the burden to show but-for linkage entirely on the plaintiff.[37] But the plurality held that once the plaintiff proved an initial level of linkage, the burden of proof that sex was the cause of the employer's action could be shifted from the plaintiff to the defendant.[38] Once the initial level is established, the burden shifts to the defendant to prove that it would have made the same decision even if it had not considered the plaintiff's sex.[39] As Justice O'Connor discussed in her concurring opinion, where the defendant is unable to prove it would have made the same decision had it not considered the plaintiff's sex, it is reasonable to conclude that sex was the but-for cause of the defendant's action.[40] However, if the defendant carries its burden of persuasion on the same-decision defense, it is a complete defense to liability.[41]

Within the majority, however, there was a dispute as to the showing the plaintiff needed to make to establish the initial level of linkage and shift the burden of persuasion to the defendant. The plurality thought that the burden should shift if the plaintiff showed that race or sex was "a motivating part"[42] of the action, while Justices White and O'Connor would have required the plaintiff to show that sex or race was "a substantial factor."[43]

35. *Id.* at 240–41.

36. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO L.J. 489, 494–501 (2006).

37. *Price Waterhouse*, 490 U.S. at 295 (Kennedy, J., dissenting).

38. *Id.* at 258 (plurality opinion).

39. *Id.*

40. *Id.* at 276–77 (O'Connor, J., concurring).

41. *Id.* at 277–79.

42. *Id.* at 250 (plurality opinion).

43. *Id.* at 259 (White, J., concurring), 265 (O'Connor, J., concurring).

In addition to the "a substantial factor" threshold showing of linkage by the plaintiff, Justice O'Connor added another important additional requirement. This requirement effectively divided individual disparate treatment cases into two separate categories.[44] Justice O'Connor further required that the plaintiff utilize "direct" evidence of discrimination to make the substantial factor showing.[45] Since Justice O'Connor's opinion was the narrowest ground for the holding, her bifurcated approach set the structure for all individual disparate treatment cases.[46] Thus, the first question to be answered in every case is whether the plaintiff can point to evidence that can be characterized as "direct" evidence of discrimination.[47] If "direct" evidence is produced, the *Price Waterhouse* burden-shifting approach applies.[48] If the evidence cannot be characterized as sufficiently direct, then the plaintiff presumably has the burden of proving a but-for level of connection between the challenged act and the defendant's intent to discriminate.[49] The approach using the but-for standard, which applies in the vast majority of individual disparate treatment cases, is called the "circumstantial" evidence approach, also known as a *McDonnell Douglas* or a pretext case.[50]

After Congress amended Title VII to include sections 703(m) and 706(g)(2)(B), lower courts adopted the "a motivating factor" language, thus establishing liability along with the

44. *See* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 581 (1996).

45. *Price Waterhouse*, 490 U.S. at 270–71 (O'Connnor, J., concurring). Subsequently, in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), Justice O'Connor, speaking for the Court in an age discrimination case, appeared to adopt the but-for standard in cases outside of the *Price Waterhouse* setting, stating "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."

46. Where the Court is divided so that there is no majority opinion speaking for the Court, it becomes necessary to patch together the holding. The approach accepted to do that involves finding the narrowest ground upon which a majority does agree. *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when the Court is divided, with no majority opinion, then the test for finding the holding is to look to the narrowest ground on which a majority of the justices agree). In *Price Waterhouse*, that would be Justice O'Connor's two modifications of the rule announced by the plurality: The substantial factor level of linkage and the threshold pointing to direct evidence to use the burden shifting approach.

47. Zimmer, *supra* note 44, at 579–83.

48. *Price Waterhouse*, 490 U.S. at 270–71 (O'Connor, J., concurring).

49. *Id.*

50. Zimmer, *supra* note 44, at 565–79.

same-decision defense to full remedies.[51] But most courts maintained the O'Connor requirement that, to utilize the "a motivating factor" level of showing, the plaintiff must have "direct" evidence of discrimination.[52] Most cases fell short of the required "direct" evidence justifying the use of the "a motivating factor" test. Therefore, the majority of cases continued to be governed by the but-for standard.[53]

The Supreme Court, however, recently revisited individual disparate discrimination theory and appears to have undone the prevailing view of individual disparate treatment cases that had endured since *Price Waterhouse* was decided in 1989. As will be developed, the Court eliminated, at least in mixed-motive cases, the direct evidence threshold for the "a motivating factor" standard of linking the defendant's discriminatory intent with its treatment of the plaintiff.[54] The Court also found that all types of evidence, whether characterized as direct, circumstantial, or some combination of the two, are to be considered in deciding the ultimate question of whether the defendant acted with discriminatory intent.[55]

II. DECONSTRUCTING THE MANTRA OF INDIVIDUAL DISPARATE TREATMENT LAW

In two important decisions—*Desert Palace* and *Reeves*—the Court set the stage for the eventual deconstruction of the view that there are only two categories of individual disparate treatment cases. While much is still unclear, what is clear is that cases will no longer be differentiated by the use of "direct" versus non-direct, or circumstantial, evidence. As will be developed, the ultimate question of what amounts to individual disparate treatment discrimination can be answered through reliance on direct, circumstantial, or, as will be described, "direct-lite" evidence.

In *Desert Palace, Inc. v. Costa*, the plaintiff, a trailblazing woman working in a casino warehouse, brought an equal treatment claim based on a long series of events in the work-

51. *Id.* at 589–92.

52. *See, e.g.*, Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 694–95 (7th Cir. 2006).

53. *See* Zimmer, *supra* note 32, at 1929–32.

54. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

55. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

place that culminated in her discharge for fighting.[56] While she was allegedly fired because she got into a fight, the male employee who instigated the fight and injured her was only given a brief suspension.[57] Given instructions based on section 703(m) and 706(g)(2)(B), the jury found in her favor.[58] The defendant appealed, claiming that the instructions were improper because the plaintiff did not point to any direct evidence that would allow her to get within the *Price Waterhouse* paradigm.[59] Most lower courts persisted in reading a direct evidence threshold into the use of the "a motivating factor" and "same-decision" standards established by section 703(m) and 706(g)(2)(B).[60] However, the Supreme Court unanimously decided that the "direct" evidence threshold should not apply to these new amendments.[61] "In order to obtain an instruction under [section 703(m)], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.' "[62] This conclusion was based on the statutory language of the amendments and their plain meaning.

> [T]he starting point for our analysis is the statutory text. And where as here, the words of the statute are unambiguous, the "judicial inquiry is complete." Section [703(m)] unambiguously states that a plaintiff need only "demonstrate" that an employer used a forbidden consideration with respect to "any employment practice." On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[63]

The opinion is brief, and because of that, its larger implications for individual disparate treatment law generally await further development. What is clear is that "direct evidence of dis-

56. 539 U.S. 90, 95 (2003). The approach finally adopted in *Desert Palace* was predicted as early as 1996. *See* Zimmer, *supra* note 44, at 600–04.

57. *Desert Palace*, 539 U.S. at 95.

58. *Id.* at 96.

59. *Id.*

60. *See* Zimmer, *supra* note 32, at 1912. This prerequisite was based on Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261–70 (1989) (O'Connor, J., concurring) because there was no majority opinion and her opinion was the narrowest holding.

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

62. *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m) (2000)).

63. *Id.* at 98–99 (citations omitted).

crimination is not required in mixed-motive cases,"[64] but what is unclear is whether all individual disparate treatment cases involve mixed-motives. Further, and very importantly, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[65] Therefore, at its narrowest, *Desert Palace* stands for the proposition that a plaintiff need not point to direct evidence to utilize the "a motivating factor" standard set forth in section 703(m). Wherever the "a motivating factor" standard can be used, direct, circumstantial, or any combination of the two types of evidence may be relied on to prove discrimination. Whether the "a motivating factor" standard limits may be applied to all or just some types of cases was not decided in *Desert Palace*.[66]

In what have long been characterized as the *McDonnell Douglas* cases, the Supreme Court has held that what can be called "direct-lite," along with (presumably) direct and circumstantial evidence can be used to establish liability. In *Reeves v. Sanderson Plumbing Products*, the Court applied the general standards of federal civil procedure for determining judgments as a matter of law.[67] The Court looked at all of the evidence in the record so that it might draw all reasonable inferences in favor of the nonmoving party—here the plaintiff.[68] Because the case was treated as a *McDonnell Douglas* case, the Court considered the evidence supporting the prima facie case (in terms of those four factual claims discussed above as modified to apply to a discharge case) as well as evidence tending to disprove the defendant's asserted nondiscriminatory reason. The Court found the latter evidence probative even after the defendant had introduced evidence supporting what it claimed was the legitimate non-discriminatory reason for the plaintiff's discharge.[69] In addition to evidence which was immediately relevant to the *McDonnell Douglas* analysis, other evidence was presented that would enable a reasonable jury to conclude that the defendant discriminated.[70] Significant among these were ageist comments made over time to Reeves by Chesnut, the di-

64. *Id.* at 101–02.
65. *Id.* at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).
66. *See* Zimmer, *supra* note 32, at 1919.
67. 530 U.S. 133 (2000).
68. *Id.* at 135.
69. *Id.* at 134–35.
70. *Id.* at 151.

rector of manufacturing and the power behind the throne in the toilet seat factory.[71] Chesnut told Reeves he "was so old [he] must have come over on the Mayflower," and commented to him that he "was too damn old to do [his] job."[72] The lower court refused to consider those comments, finding they had no probative weight even as circumstantial evidence because they did not fit within its narrow definition of "direct" evidence of discrimination.[73] That is, the comments were not made by the final decision-maker or in connection with the actual decision to terminate Reeves.[74] The Court rejected the lower court's approach, explaining that "[t]he [lower] court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging 'the potentially damning nature' of Chesnut's age-related comments, the [lower] court discounted them."[75] Even if not characterized as direct evidence, those ageist comments might be characterized as "direct-lite" evidence because, if believed, they tend to support the conclusion that the defendant was aware of the plaintiff's age and that awareness negatively affected his opinion regarding the plaintiff's continued employment.

At its narrowest, *Reeves* stands for the proposition that plaintiffs can rely on direct, direct-lite, or circumstantial evidence, or a combination of the three to prove a *McDonnell Douglas* case. Together, *Reeves* and *Desert Palace* demonstrate that direct, direct-lite, or circumstantial evidence can be used in both *McDonnell Douglas* cases and in section 703(m) cases of mixed-motives. Thus, individual disparate treatment cases can no longer be separated into two categories based solely on the type of evidence presented. The question remaining is whether there is some other basis for differentiating individual disparate treatment cases into the previously recognized categories: one requiring the plaintiff to prove but-for linkage, the second requiring the plaintiff to establish liability by showing that a

71. *Id.*

72. *Id.*

73. Reeves v. Sanderson Plumbing Prods., Inc. 197 F.3d 688, 692–94 (5th Cir. 1999). Had this evidence qualified as "direct" evidence, evidence that proved discrimination without need to draw an inference, then the so-called *Price Waterhouse* approach rather than the *McDonnell Douglas* approach would have applied.

74. *Id.* The plaintiff had also introduced additional evidence pointing to the defendant's discrimination, including evidence that Chesnut had abused Reeves more than he had a younger fellow supervisor, that, despite Sanderson having made the final termination decision, Chesnut was the real power in the plant, in part because he and Sanderson were married. *Reeves*, 530 U.S. at 151–52.

75. *Id.* at 152.

protected characteristic was "a motivating factor" in the defendant's action.

In sum, the mantra that all individual disparate treatment cases can be divided into those relying on direct evidence as against those relying on circumstantial evidence is no longer viable. The next Part discusses whether there is some other way to maintain the dichotomy between two categories of individual disparate treatment cases, with the plaintiff's burden of proving the but-for level of linkage as a characteristic of one category and the "a motivating factor" level as a characteristic of the other.

III. ALL INDIVIDUAL DISPARATE TREATMENT CASES POTENTIALLY INVOLVE MIXED-MOTIVES

Differences in types of evidence no longer differentiate *McDonnell Douglas* cases from section 703(m) cases along evidentiary lines. That leaves the question whether there is some other way to maintain the requirement that the "but-for" level of showing the connection between race or sex and the challenged employment action be used to establish liability. A footnote in *Desert Palace* appears to suggest that it was a narrow decision, perhaps limited to cases that can be characterized as "mixed-motive" cases. "This case does not require us to decide when, if ever, [section 703(m)] applies outside the mixed-motive context."[76] In her concurring opinion, Justice O'Connor said simply that, "Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII."[77] By limiting the reach of *Desert Palace* to "mixed-motive" cases under section 703(m), Justice O'Connor suggests that there is some other category to which sections 703(m) and 706(g)(2)(B) might not apply. *McDonnell Douglas* cases have sometimes been characterized as "single-motive" cases. So it might be argued that

76. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003).

77. *Id.* at 102 (O'Connor, J., concurring). If emphasis is put on "mixed-motive," then Justice O'Connor's concurrence might support a narrow view of *Desert Palace*. Alternatively, the entire concurring opinion could be taken as recognition by Justice O'Connor that Congress had the power to amend federal legislation, such as Title VII, in ways that overturned judicial interpretations of the statute. The Civil Rights Act of 1991 was almost entirely an example of Congress overturning a series of Supreme Court decisions that unduly narrowed various civil rights statutes. *See generally,* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task,* 69 N.C.L. REV. 1 (1990).

some difference continues to exist between single-motive and mixed-motive cases, even after it is clear that the same type of evidence can be used to prove both types of cases.

McDonnell Douglas cases are sometimes characterized as "single-motive" cases because their analysis appears to require asking an either/or question.[78] Either an employer's proffered explanation is true or merely a pretext for the actual motivation—unlawful discrimination.[79] The problem with calling *McDonnell Douglas* a "single-motive" approach is that demonstrating "but-for" linkage always involves mixed-motives until the fact finder accepts the employer's explanation or finds discrimination. It may continue to involve mixed-motives even if the plaintiff carries her burden of proving but-for linkage. In *McDonnell Douglas* itself, the defendant claimed that the plaintiff had engaged in illegal protests against the company while she claimed discrimination.[80] While it is possible that the defendant had only one motivation for its action, it is not the only possible scenario. Most importantly, a showing of "but-for" linkage can result in liability without proof that *only* the employer's discrimination motivated the employer's action. In other words, liability can be made out using the "but-for" test even if some additional reason, such as the employer's explanation, played a role in its decision.[81] Assuming a "but-for" level of proof applies, all *McDonnell Douglas* cases of liability may theoretically involve mixed motives and, given the improbability of proof of sole cause, most probably do.[82] Because cases that establish "but-for" linkage may potentially involve mixed-motives, it is not possible to differentiate among discrimination claims by finding that they involve single- or mixed-motives.

In sum, section 703(a) of Title VII requires what has been characterized as "but-for" linkage to establish liability while section 703(m) requires "a motivating factor" linkage. Either

78. Zimmer, *supra* note 32, at 1898.

79. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523–24 (1993), undermined the either/or way of describing *McDonnell Douglas* cases. The plaintiff proved the defendant's reasons to be untrue—eliminating one side of that binary question—but the Court still upheld the finding that the other side was not satisfied. *Id.* Instead of either defendant's reason or discrimination, the finder of fact had based its decision of no discrimination on a conjecture of another reason, the interpersonal hostility of the plaintiff and his supervisor. *Id.* at 508.

80. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).

81. Katz, *supra* note 36, at 521–22.

82. There are few, if any, perfect employees, especially when the employer has a strong incentive to find some deficiency.

type of linkage can be applicable to any case of individual disparate treatment brought under Title VII.[83] So the "a motivating factor" standard of section 703(m) applies to an individual disparate treatment claim, unless it is constructed in a manner that precludes reliance on this standard and therefore requires that the plaintiff prove but-for linkage.

IV. THERE ARE NOT JUST TWO PROOF STRUCTURES OR CLAIMS OF DISCRIMINATION

Categorizing all individual disparate treatment cases as either involving "direct" evidence or "circumstantial" evidence seems to assume that there are only two separate and distinct claims or proof structures in discrimination cases: *Price Waterhouse* (as modified by section 703(m)) claims on one hand and *McDonnell Douglas* claims on the other. But the holistic approach to evidence that can be probative of discrimination, which was adopted by the Court in *Reeves*, makes that categorization improbable.[84] *Reeves* made clear that, in reviewing the record to decide a motion for judgment as a matter of law that challenged a jury verdict, the court is "to draw all reasonable inferences in favor of [Reeves, who won the verdict]."[85] The lower court erred in *Reeves* by dropping from its review all the evidence in the record proving Reeves' *McDonnell Douglas* prima facie case, his rebuttal of the defendant's asserted reason, and other circumstantial evidence. All the evidence could be construed as ultimately supporting the finding of a *McDonnell Douglas* case of pretext. Thus, for example, the ageist statements could be viewed as within the relatively broad range of evidence relevant to the third, pretext stage of the *McDonnell Douglas* analysis.[86] But, given its character as an

83. As Professor Martin Katz makes clear, both section 703(a) and sections 703(m) and 706(g)(2)(B) involve "but-for" linkage. Katz, *supra* note 36, at 493–94. Section 703(a) imposes the "but-for" standard on the plaintiff to prove to establish liability. But section 703(m) allows the plaintiff to establish liability by proving the lesser, "a motivating factor" standard, while section 706(g)(2)(B) provides the defendant the chance to avoid full remedies by proving that race or sex was not the but-for cause of its action, that is, it would have made the same decision even if it had not considered race or sex in making the decision. *Id.*

84. Zimmer, *supra* note 32, at 1898.

85. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 152 (2000).

86. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 217 (1989) (to establish pretext, the plaintiff is not limited to evidence disproving the defendant's rebuttal evidence but may introduce a broader array of evidence that would support drawing the inference that the defendant's asserted reason is not true).

admission by a party opponent,[87] it would also be relevant to and probative of a claim long associated with the *Price Waterhouse* approach.[88] Under the expansive view the Court endorsed in *Reeves*, the fact finder is entitled to mix and match claims of discrimination with the evidence that supports each of them.[89]

Cases, both before and after *Reeves*, support an analysis of individual disparate treatment claims that would take a broad approach to evaluating the evidence, without compartmentalizing it so as to restrict its usefulness to specific discrimination claims or proof structures.[90] In *Ash v. Tyson Foods, Inc.*, a recent case similar to *Reeves*, the plaintiffs claimed they had been denied promotions because of their race.[91] The plaintiffs introduced evidence that supported the inference that they were more qualified than the two white workers who were promoted.[92] The probative value of that evidence was rejected, however, because it did not meet the lower court's very narrow view of comparative qualifications evidence in *McDonnell Douglas* pretext cases.[93] While the plaintiff's evidence supported the inference that they were in fact more qualified than the whites who were promoted, the court reasoned that it was not probative of discrimination because the disparity in qualifications was not so overwhelmingly clear " 'as virtually to jump off the page and slap you in the face.' "[94]

Perhaps because the lower court's ruling in *Ash* was seen by the Court as so clearly out of step with the current vision of the Supreme Court, it was reversed by a per curiam opinion: "The visual image of words jumping off the page to slap you

87. FED. R. EVID. 806.

88. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989). With Justice O'Connor requiring the plaintiff to point to direct evidence in the record in order to use the burden shifting approach, sexist statements made by the employer to the plaintiff, like the explanation given to Ann Hopkins for why her partnership bid was put on hold, satisfied that showing. *Id.*

89. Zimmer, *supra* note 32, at 1906–09.

90. *See id.*

91. 546 U.S. 454 (2006).

92. *Id.* at 455.

93. Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533–34 (11th Cir. 2005), *vacated and remanded by* 546 U.S. 454 (2006); *see also* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 600–03 (2001) (arguing that evidence sufficient to make out a prima facie case under *McDonnell Douglas* often fails to convince federal judges that illegal discrimination actually occurred).

94. *Ash*, 546 U.S. at 456–57 (quoting Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)).

(presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."[95] Although the Court did not decide "what standard should govern pretext claims based on superior qualifications,"[96] evidence that the plaintiffs were more qualified than the people whom the defendant promoted was considered probative of the issue of pretext.[97] If a fair reading of the evidence supports the conclusion that the plaintiffs were more qualified than the employees who were promoted, and if there is no other nondiscriminatory explanation for the employer's action, then it is reasonable for a jury to draw the inference of discrimination.[98] Following the expansive approach of *Reeves*, the evidence of comparative qualification need not slap a court in the face or jump off the page to be probative of discrimination. The evidence need only be sufficient to support drawing the inference of discrimination.

Additionally, *Ash* is a reprise of *Reeves* in that *Ash* also involved statements by the defendant's white plant manager that a jury might find to be racist. Such statements are probative because they tend to show the manager either discriminated against the plaintiffs in making the challenged promotion decisions or, at least, that he had the plaintiffs' race on his mind. There was evidence that the manager had "referred on some occasions to each of the petitioners as 'boy.' "[99] The lower court announced as a bright line rule that the use by an adult white person in the Old South of the term "boy" without any racial

95. *Id.* at 457.

96. *Id.* at 458. The Court described other standards that some courts have adopted. *Id.* For example, the Eleventh Circuit standard provides that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004). The standard adopted by the Ninth Circuit enables plaintiffs to establish pretext using qualifications evidence alone provided the plaintiff's qualifications are "clearly superior" to those of the selected job applicant. Raad v. Fairbanks N. Star Borough School Dist., 323 F.3d 1185, 1194 (9th Cir. 2003). The D.C. Circuit took yet another approach, concluding the fact finder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job." Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998).

97. There may be some situations where the differences between the qualifications of the employees would be so small that no reasonable jury could use that alone to find discrimination.

98. Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators* (Seton Hall Univ. Sch. of Law, Public Law Working Paper No. 1099595, 2008), *available at* http://ssrn.com/abstract=1099595.

99. *Ash*, 546 U.S. at 456.

modifier to describe an adult African American male was not probative of discrimination.[100] As quoted by the Supreme Court, the lower court rule was that, " '[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination.' "[101] Following its approach in *Reeves*, the Court found the lower court's holding to be inconsistent with the idea that the fact finder should be able to draw all reasonable inferences from the evidence.

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.[102]

Thus, *Ash* looks at the probative nature of evidence from a broad perspective. As in *Reeves*, the arguably racist comments could support a finding that the defendant's proffered justification for promoting whites instead of the plaintiffs was not true and therefore was a pretext for discrimination under the *McDonnell Douglas* approach. But, independent of a pretext analysis, that same evidence could also support a finding that the defendant's action was based on racial stereotypes and therefore was discriminatory.

Several cases before *Reeves* arguably support the notion that a broad standard of probative value, based on building chains of inferences, can lead to the conclusion that the employer discriminated. In *O'Connor v. Consolidated Coin Caterers Corp.*, the lower court held that a fifty-six year-old plaintiff failed to make a prima facie case of age discrimination because the person who replaced the plaintiff was over age forty and thus in the same protected group.[103] In assuming, but not deciding, that the *McDonnell Douglas* proof structure applied to an Age Discrimination in Employment Act of 1957 (ADEA) case, the Supreme Court rejected a rules-oriented approach in

100. *Id.*

101. *Id.* (quoting *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005)).

102. *Id.*

103. 517 U.S. 308, 311–12 (1996).

favor of an approach based on drawing inferences that lead to the ultimate question of discrimination:

> As the very name "prima facie case" suggests, there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption." The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," though the prohibition is "limited to individuals who are at least 40 years of age." This language does not ban discrimination against employees because they are aged 40 or over; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.[104]

The Court went on to deal with the hypothetical situations of a sixty-eight year-old replaced by a sixty-five year-old and a forty year-old replaced by a thirty-nine year-old and indicated that it would not be proper to draw an inference of discrimination in either case.[105] An inference of age discrimination

> cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.[106]

Thus, a very small difference in age between the two workers would not support a reasonable trier of fact to find that age explained the employer's decision. Presumably, however, as the difference in ages between the two workers increases, so does the reasonableness of drawing the inference that age was a fac-

104. *Id.*
105. *Id.* at 312–13.
106. *Id.*

tor in the decision-making. It is for the fact finder to decide whether or not to draw that inference.

In *Oncale v. Sundowner Offshore Services, Inc.*, a sexual harassment case, the district court granted summary judgment to the defendant on the ground that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male coworkers."[107] In reversing, the unanimous Supreme Court found no "categorical rule excluding same-sex harassment claims from the coverage of Title VII."[108] What is required in a same-sex harassment case, as in all other discrimination cases, is that the plaintiff prove there was " 'discrimination . . . because of . . . sex' in the 'terms' or 'conditions' of employment."[109] Thus, the Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[110] Because discrimination based on sexual preference is not sex discrimination prohibited by Title VII, merely proving that the plaintiff was harassed because of his sexual preference would not be probative of sex discrimination.[111] But that evidence could be probative of the ultimate question of whether he was harassed because of his sex.[112] The Court described, rather elaborately, how a chain of inferences worked in opposite-sex and same-sex cases, either leading to a finding of discrimination because of sex:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed

107. 523 U.S. 75, 77 (1998).
108. *Id.* at 79.
109. *Id.* at 80 (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).
110. *Id.* at 79.
111. *Id.*; *see also* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006).
112. *Oncale*, 523 U.S. at 79.

> in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was . . . "*discrimina[tion]* . . . because of . . . sex."[113]

Though cast in terms of sexual harassment scenarios, this extended quotation traced out possible ways to build a chain of inferences that supports a finding of discrimination. This rationale carries over to other scenarios of claimed discrimination. First, it makes clear that the plaintiff has choices of what kind of evidence to introduce and then what kinds of arguments she can make to the trier of fact based on that evidence. The plaintiff can build a chain of inferences leading from the evidence to the ultimate question of fact that the defendant discriminated against the plaintiff.

Under classic rules of evidence law, it is wrong to draw inference upon inference, thereby building a chain of inferences leading to the ultimate question of fact to be decided.[114] However, John Henry Wigmore long ago condemned this supposed prohibition against the pyramiding of inferences and, despite occasional aberrations, his view continues to carry the day.[115]

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113. *Id.* at 80–81.

114. *See, e.g.*, People v. Atley, 220 N.W.2d 465, 473–74 (Mich. 1974), *overruled by* People v. Hardiman, 646 N.W.2d 158 (Mich. 2002).

115. The most recent edition of Wigmore's treatise makes the point in the following much-quoted language:

> It was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and sometimes actually has been enforced. There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder the defendant's gun is found discharged. From this we infer that he discharged it, and from this we infer that it was his bullet that struck and killed the deceased. Or the defendant is shown to have been sharpening a knife. From this we argue that he had a design to use it upon the deceased, and from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data.

Wigmore had also rejected the significance of any distinction between "direct" and "circumstantial" evidence, a distinction that Justice O'Connor recreated in *Price Waterhouse*. That distinction was subsequently rejected by Congress in enacting section 703(m). Thus, it is questionable whether a rule limiting the chain of inferences, which can be used to lead to the ultimate question of discrimination, would be supported.[116]

After *Reeves* and *Ash*, it is proper for the parties to introduce a wide array of evidence that supports or rejects building a chain of inferences based on a variety of claims leading to the ultimate question of discrimination. The following Part develops four different arguments that have been used to support the finding that a defendant acted with discriminatory intent. This is not a complete list, or a taxonomy, because new factual settings will undoubtedly lead to new kinds of arguments of what does, or does not, constitute evidence sufficient to support a finding of a defendant's intent to discriminate.

V. THE VARIETY OF CLAIMS OF DISCRIMINATION

Despite the mystique that all individual disparate treatment cases are either *McDonnell* or else section 703(m) cases, the Supreme Court has, in fact, accepted a number of different claims of discrimination that form the basis for a chain of inferences that can lead to the ultimate finding of discrimination. All of these claims start with evidence that, if found to be true, support arguments that, if accepted, will support a finding that

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1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 41 at 1106–11 (Peter Tillers rev. ed., 1983) (footnotes omitted).

116. While there is no rule preventing the drawing of chains of inferences, there are problems with its use. For example, if finding Fact A gives rise to inference 1 or 2, the jury can draw inference 1. But that inference may be only eighty percent likely, which can easily be the basis to support finding fact A. But if inference 1 is only one step in the chain of inferences, then at the next step, the jury can draw inference 1a or 1b. If inference 1a is sixty percent likely, then that finding satisfies the preponderance test. But that must be discounted by the eighty percent likelihood established in drawing inference 1. The chain can continue until the ultimate factual inference is to be drawn. By that time, the inference needed to be drawn may no longer be supported using the preponderance of evidence test because of the analytic need to compound the discount down through the chain of inferences. In discrimination law, however, rejecting an employer's asserted reason for an adverse employment decision as untrue seems to make it a one step inference: it may be easy to satisfy the preponderance test as to the inference that the actual reason was discrimination because the alternative inferences—for example, an embarrassing but not illegal reason—are quite unlikely. Thanks to Charlie Sullivan, my friend, colleague and co-author, for making this point.

the defendant discriminated. Because discrimination is fact sensitive, and because what justifies drawing an inference of discrimination is subject to imaginative argument, there can be no comprehensive, closed list of claims or theories of what constitutes discrimination.[117] *Reeves* appears to support a broad approach allowing the fact finder to look at all the evidence and, based on a wide variety of claims, decide whether the defendant discriminated.

A. Unequal Treatment Claims

Given the widely accepted notion that "discrimination" is a violation of the norm of equal treatment, it is no surprise that there is considerable authority for finding that instances of unequal treatment support drawing the inference of discrimination. This is true whether the unequal treatment is between men and women or members of minority groups, and whether the evidence of unequal treatment is joined with other types of evidence to build a chain of inferences leading to a finding of discrimination.[118] In *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court found that a claim of unequal

117. Compare Katz, *supra* note 32, at 182, which describes a variety of methods, in addition to his version of *McDonnell Douglas* that is based on causation, to prove discrimination. Katz also suggests, however, that it is a taxonomy of all possible claims that could be made:

> There are only a limited number of ways to prove discriminatory causation—and they are all far from perfect. Causation may be proven by a defendant's admissions (e.g., "I fired her because she is a woman"). Needless to say, such admissions are rare. Alternatively, causation may be proven by statements by decision makers that do not amount to admissions, but which nonetheless indicate a tendency toward bias (e.g., "I do not like women" or "women do not belong at work"). As employers become more litigation-seasoned, it has become increasingly rare for plaintiffs to discover such statements. . . . Another method of proving causation is through the use of statistics. But this type of proof requires a large number of decisions by the decisionmaker in order to be useful—which is unlikely in most workplaces. . . . Finally, plaintiffs can try to prove causation by the use of comparative—but nonstatistical—evidence (e.g., the fact that the last two nonminority employees who were accused of theft were not fired, while the plaintiff was fired for theft).

Id.

118. As will become clear in this section, during the era of *McDonnell Douglas* supremacy, many cases relying on unequal treatment were analyzed as cases where that evidence demonstrated pretext for discrimination. And, of course, evidence of unequal treatment can be powerful in that regard. But this section looks at evidence of unequal treatment as an argument for a finding that the defendant acted with an intent to discriminate without the need to place that evidence into the three step *McDonnell Douglas* method of analysis.

treatment, if proven, would support a finding of discrimination.[119] Two white plaintiffs claimed that they were discriminated against based on their race.[120] The plaintiffs were fired for stealing goods from the company truck dock, while an African-American employee, who was also involved in the theft, was not discharged.[121] The defendant argued that the plaintiffs' case should be dismissed because it did not conform to the strictures established in *McDonnell Douglas*,[122] but the Court distinguished *McDonnell Douglas* and found that a simple violation of equal treatment, if proven, supports drawing an inference of discrimination: "While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not."[123] The main thrust of the decision is that all race discrimination in employment, including discrimination against white workers because of their race, violated both Title VII and 42 U.S.C. § 1981.[124]

The Court emphasized that Title VII was broader in application than just the *McDonnell Douglas* approach: "The Act prohibits *all* racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination."[125] In a footnote, the Court rejected the argument that, in proving unequal treatment, a narrow standard applied to prove that the white and black employees were similarly situated:

> Santa Fe contends that petitioners were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson . . . [But] precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation

119. 427 U.S. 273, 281–85 (1976).

120. *Id.* at 273.

121. *Id.*

122. A *McDonnell Douglas* case could not be made out since the plaintiffs did not contest that the employer fired them for theft, a legitimate nondiscriminatory reason. Thus, they could not prove that the announced reason was a pretext for discrimination. Instead, they claimed discrimination because a similarly situated African-American employee was not treated equally. *Id.*

123. *Id.* at 283.

124. *See generally id.*

125. *Id.* at 283.

> that other 'employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . .' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.[126]

Thus, as early as 1976, the Supreme Court found a claim of unequal treatment because of race, if proved, to be discrimination. The inference of discrimination could be drawn based on the evidence of unequal treatment established by comparing the treatment of members of two races that were in some sense similarly situated.

In the 1977 seminal systemic disparate treatment case, *International Brotherhood of Teamsters v. United States*, the Court first described the violation of equal treatment as the essence of discrimination: " 'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[127] With this sentence, the Court suggests that all a plaintiff must do to establish liability is to introduce evidence of unequal treatment based on gender or race. The next sentence, however, undercuts the straightforward view that a violation of equal treatment is per se discrimination: "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[128] Therefore, if the ultimate factual question is, as this quotation suggests, the employer's discriminatory motivation, evidence of unequal treatment supports a chain of inferences leading to the final step of drawing that ultimate inference of discrimination. This latter understanding appears to be the prevailing view.

More recently, in *Desert Palace, Inc. v. Costa*,[129] the Supreme Court decided another equal treatment case. As described above, the plaintiff was the first woman working in the warehouse and the only woman driving forklifts and pallet jacks.[130] The Court described her testimony of a long string of

126. *Id.* at 283 n.11 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 702, 804 (1973)).

127. 431 U.S. 324, 335 n.15 (1977).

128. *Id.*

129. 539 U.S. 90 (2003).

130. *See supra* notes 56–59.

situations where she and her male co-workers were treated differently:

> [W]hen men came in late, they were often given overtime to make up the lost time; when Costa came in late—in one case, one minute late—she was issued a written reprimand, known as a record of counseling. When men missed work for medical reasons, they were given overtime to make up the lost time; when Costa missed work for medical reasons, she was disciplined.[131]

This unequal treatment culminated in her discharge when a male employee, believing she snitched about his unauthorized lunch breaks, trapped Costa in an elevator, shoved her against the wall and bruised her arm.[132] Costa was fired for this altercation but her male attacker received only a five-day suspension.[133] In affirming the verdict for Costa, the Supreme Court approved a jury instruction that focused on whether this evidence was sufficient to support drawing the inference of discrimination under the "a motivating factor" standard of section 703(m):

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.[134]

The chain of inferences here led to the ultimate finding that sex was a motivating factor in the defendant's discharge of Costa. If the defendant did in fact treat Costa, a woman, differently than it treated similarly situated men, that difference in treatment supports drawing the inference that this difference of treatment was motivated by the employer's intent to discriminate.

Even more recently, the Supreme Court decided *Ash v. Tyson Foods, Inc.*, which ultimately is more easily understood as an unequal treatment case, though the parties—and therefore

131. Costa v. Desert Palace, Inc., 299 F.3d 838, 845 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

132. *Id.* at 860.

133. *Id.*

134. *Id.* at 858.

the courts—analyzed it as a *McDonnell Douglas* case.[135] As described above, the plaintiffs claimed that they had been denied promotions because of their race and that they had evidence supporting their claim that less qualified whites were promoted instead.[136] That evidence was bolstered with evidence that the person who made the promotion decisions had, on occasion, called both of these adult African-American men a "boy."[137] If the case had also been argued as a straightforward equal treatment case, the question for the court in deciding the motion for judgment as a matter of law would simply be whether a reasonable jury could find that the plaintiffs were more qualified than the whites who were promoted. If the motion for judgment as a matter of law had been made at the close of the plaintiffs' case-in-chief, the question would simply be whether, based on the plaintiffs' evidence, a jury could reasonably find for the plaintiffs. If the answer at that point was yes, the defendant would be expected to present its case. Presumably, the defendant would then introduce evidence to support a finding that the plaintiffs were not as qualified as the whites, as well as other evidence that might support a finding that the defendant had not discriminated. At the close of the defendant's case, the plaintiffs would have the traditional right to surrebut the defendant's case with testimony undermining the defendant's proof. At the close of all the evidence, the trial judge could again respond to another motion for judgment as a matter of law. Doing so would require the judge to determine whether a jury, reviewing all the evidence in the record, would

135. 546 U.S. 454, 455–58 (2006).

136. *See supra* notes 91–92.

137. The Supreme Court rejected the rule of the lower court that " '[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination.' " *Ash*, 546 U.S. at 456 (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)). Following its approach in *Reeves*, the Court found the rule to be inconsistent with the idea that the fact finder should be able to draw all reasonable inferences from the evidence:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.

Id.

be reasonable in concluding that the defendant discriminated.[138]

While *Ash* is more easily understood as an equal treatment case, the issue of comparative qualifications is also relevant if *Ash* is analyzed as a *McDonnell Douglas* case. First, to establish a prima facie case, the plaintiff must prove she is qualified for the job. This was not at issue in *Ash* because there was no question that the plaintiffs in *Ash* met the minimum qualifications necessary to perform the jobs that they sought and the jobs were given to white employees instead. However, a case based solely on the evidence supporting a *McDonnell Douglas* case, without more, would not be sent to a jury because no reasonable jury could find discrimination based only on that evidence. This is the result of *Texas Department of Community Affairs v. Burdine*,[139] which teaches that a *McDonnell Douglas* prima facie case does not, by itself, ultimately satisfy the plaintiff's burden of persuasion. Rather, it shifts the burden of production to the defendant to assert, with evidence sufficient to create a question of fact, a "legitimate, nondiscriminatory reason" for the action the plaintiff challenges as discriminatory.[140] If the defendant satisfies this minimal burden of production, then the plaintiff, who continues to carry the ultimate burden of persuasion on the issue of discriminatory intent, is required to prove that the reason the defendant advanced was a pretext for discrimination. If the defendant offered no legitimate, nondiscriminatory reason for its action, then the plaintiff would win just on her prima facie case.[141] *Reeves* makes clear that

138. Similarly, after the jury has rendered a verdict, the losing party could reassert a motion for judgment as a matter of law. At this juncture, the judge would determine whether, looking at the evidence supporting the party that won the verdict, a jury was reasonable in reaching the decision it did. This is what the Supreme Court did in reinstating the jury verdict in *Reeves*. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–49, 151–54 (2000).

139. 450 U.S. 248, 252–53 (1981).

140. *Id.* at 254. The effect of the *McDonnell Douglas* presumption, then, is to send the case to the jury on the issue of whether the plaintiff's prima facie case has been proved, but only if the defendant defaults and does not introduce evidence of its nondiscriminatory explanation for the act that the plaintiff challenges.

141. *Id.* at 256. If the defendant fails to introduce any evidence of its legitimate, nondiscriminatory reason (which has never happened in a litigated case, *see* Chin & Golinksy, *supra* note 30, at 665), then the fact finder merely need find that the plaintiff proved her prima facie case in order to be entitled to judgment. It is not necessary that the jury find that the defendant acted with discriminatory intent. If the prima facie case is conceded and the defendant fails to introduce evidence raising a question of fact about its legitimate, nondiscriminatory reason,

when the plaintiff produces evidence to support her prima facie case, as well as evidence that the defendant's asserted reason is not true, the case, absent unusual circumstances, then goes to the jury to decide the question of discrimination.

Second, comparator evidence plays an important role during the pretext phase of analysis in a *McDonnell Douglas* case. This is particularly so in promotion cases, where employers typically assert, as their legitimate nondiscriminatory reason, that the person promoted was more qualified than the plaintiff. In *Patterson v. McLean Credit Union*, the Court decided that, to prove pretext, an African-American plaintiff in a promotion case did not have to prove she was more qualified than the white who was promoted, which would have been the rule if the traditional litigation rules about the scope of surrebuttal applied.[142] To prove pretext, however, it is obvious that proof that the plaintiff was more qualified would be very powerful evidence of pretext and would support drawing the inference that the promotion decision was discriminatory.

As described above, although the Supreme Court in *Ash v. Tyson Foods, Inc.* rejected the lower court's special rule on the probative nature of comparator evidence, it did not say what the appropriate rule should be.[143] Nevertheless, it seems clear that evidence that the plaintiffs were more qualified than the people the defendant promoted is probative of the issue of pretext, as well as a violation of equal treatment. After *Reeves*, the evidence of comparative qualification need not "slap a court in the face" or "jump off the page" to be probative either of pretext or a violation of equal treatment.[144]

Another variant of an equal treatment discrimination claim occurs when the plaintiff proves that the defendant did not follow its own rules and procedures in making the decision that the plaintiff challenges.[145] In such cases, the plaintiff's claim is that the defendant's failure to follow its own procedures deprived the plaintiff of an opportunity he would have had if he had been treated as others had been in the past. Despite the strength of the chain of inferences, Judge Posner in

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the plaintiff would be entitled to judgment as a matter of law. *Burdine*, 450 U.S. at 254.

142. 491 U.S. 164, 188–89 (1989).

143. 546 U.S. 454, 458 (2006).

144. *But see, e.g.*, Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740–41 (7th Cir. 2006) (comparators must be significantly similar to the plaintiff to be probative of discrimination).

145. *See, e.g.*, Walker v. Abbott Labs., 416 F.3d 641, 643–44 (7th Cir. 2005).

Walker v. Abbott Labs, a promotion case where the plaintiff claimed that the employer did not follow its policy of posting job openings, denied that there is any probative value to that evidence:

> This [evidence] makes it seem that Abbott complies with its personnel rules only when it wants to. Indeed so. And there is nothing wrong with that. Unless a rule is part of the company's contract with its employees, the company is free to create exceptions to it at will. . . . A well-managed company will not make exceptions to its personnel rules promiscuously because that will generate ill will among the employees; they will feel they're being subjected to arbitrary treatment, which nobody likes. . . . But neither will a well-managed company adhere to its personnel rules with a rigidity blind to circumstances that may make the rule occasionally wholly inapt. "People in supervisory positions are not doing their best for the company if they are content to administer rules. Fairness, consistency, and demonstrated interest in employee problems are the backbone of supervisory morale building . . . . [N]o set of written policies should become a straitjacket on management thinking."[146]

While an employer could offer Judge Posner's rationale as an explanation to undermine the probative value of this evidence, it is also clear that absent such an explanation, the failure to follow normal rules and procedures can support building a chain of inferences that ultimately leads to drawing the inference of discrimination.

While unequal treatment is a separate claim of discrimination, some lower courts push straightforward equal treatment cases into a *McDonnell Douglas* claim of pretext. For example, Judge Posner appeared to conflate equal treatment and pretext approaches in *Crawford v. Indiana Harbor Belt R.R. Co.*[147]

> [I]f equally bad or worse white men employed by the defendant as conductors . . . were retained despite deficiencies as

146. *Id.* (internal citations omitted). Judge Richard Posner is no doubt the most prolific author on the federal bench and among legal academics. He brought neo-liberal economics into the mainstream of the law with his publication of the book, LAW AND ECONOMICS. That book is now in its seventh edition. More recently, he has moved focus towards pragmatism with his book entitled LAW, PRAGMATISM AND DEMOCRACY as well as with his most recent book, HOW JUDGES THINK. He does not shy away from stating his views and attempting to have them influence the shape of the law and of legal decisions.

147. 461 F.3d 844, 845 (7th Cir. 2006).

> serious as hers, and the employer failed at the summary judgment stage to offer a nondiscriminatory explanation for the difference in treatment or it did but the plaintiff presented evidence that the explanation was a pretext (that is, false), then she was, prima facie, a victim of discrimination.[148]

This is one version of the view, never upheld by the Supreme Court, that all individual disparate treatment cases are either *McDonnell Douglas* or section 703(m) cases.[149]

What is true is that, in an important and deep sense, all discrimination cases involve a violation of equal treatment. At the broadest, the question is whether the employer treated the plaintiff unfavorably because of race, creed, sex, religion, national origin, age, disability, or other characteristic protected against discrimination. Thus, the true issue is whether the employer would have treated the plaintiff more favorably if she was not within one of those protected classifications. For example, it is discriminatory if an employer promotes a white employee who is less qualified over a more qualified African American employee—but only if the employer made its decision based on the race of the candidates for promotion. It is also discrimination if a female plaintiff can show that an employer would have treated her more favorably if she had been a male, even if there is no actual male comparator who was similarly situated and who was treated more favorably. This is so even when the showing of unequal treatment is not the ultimate question to be determined, but instead is proof of a fact that supports a chain of inferences leading up to that ultimate question of the discriminatory intent of the employer.

A straightforward equal treatment case does not inherently require a plaintiff to prove unequal treatment to the but-

148. *Id.*

149. For example, in *Ptasznik v. St. Joseph Hospital*, 464 F.3d 691, 695 (7th Cir. 2006) (internal citations omitted), the court described its approach by maintaining, despite *Desert Palace*, a binary distinction among all individual disparate treatment cases as either proven by direct or by circumstantial evidence:

> Ptasznik may establish her discrimination claims using either the direct or indirect methods of proof; she has failed to do so under either method. First, under the direct method, Ptasznik must put forth evidence that her employer's decision to terminate her had a discriminatory motivation. She may do so under the direct method by providing direct evidence, such as an "outright admission" of discrimination, or by presenting sufficient circumstantial evidence. But such circumstantial evidence must point directly to a discriminatory reason for the termination decision.

for level. Instead, a plaintiff may rely on the "a motivating factor" standard. After all, "a motivating factor" case, *Desert Palace, Inc. v. Costa*, involved a claim that the plaintiff was discriminated against because she was denied equal treatment by the defendant.[150] It is also true that nothing suggests that the use of the but-for standard would, for some reason, be inappropriate in an equal treatment case. Thus, one kind of claim that the defendant acted with intent to discriminate can be based on evidence of unequal treatment and that can be linked to the adverse employment action the plaintiff challenges by either the but-for or the "a motivating factor" standard.

Beyond unequal treatment, there have been additional claims or arguments that have been accepted in order to prove a defendant's discriminatory intent. The next claim to be discussed is admissions against interest made by the employer's agents.

B. Admitting Discrimination

Given that Title VII has been interpreted to make the employer's intent to discriminate the ultimate issue in disparate treatment cases, it is no surprise that policies or statements by employers that are tantamount to admitting discrimination form the basis for drawing the inference of discrimination. For example, the policy that was attacked in *City of Los Angeles Department of Water & Power v. Manhart*—that women were required to contribute more to get a monthly pension amount equal to what men received—was unquestionably discrimination because of sex because it was an official policy expressing the intent of the employer to treat men and women differently.[151] Despite the fact that Title VII has been in effect for over forty years, less formal but nevertheless telling admissions of discrimination continue to happen and continue to be challenged.[152] From Justice O'Connor's concurring opinion in *Price Waterhouse* until the Supreme Court's decision in *Desert Palace*, the issue of the effect evidence of statements by a party

150. 539 U.S. 90, 95–96 (2003).

151. 435 U.S. 702, 704–05, 717 (1978).

152. Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 48 (2005) (studying recent class action sex discrimination cases discloses substantial continuing "overt acts of hostility towards women with an intent to preserve male workplace norms that have persisted despite our national pledges of gender equality").

opponent proving intent to discriminate, that is, in the language of Justice O'Connor, "direct" evidence of discrimination, had enormous procedural significance. The presence of "direct" evidence was a threshold to the use of the "a motivating factor" level of showing for the plaintiff to establish liability.[153] Although that procedural effect is gone, evidence of statements made by agents of a party opponent still has great significance because this evidence can be the basis for the finder of fact drawing the inference that the defendant acted with intent to discriminate. If the employer tells a job applicant that he will not hire her because she is a woman, that may not be direct evidence of an intent to discriminate because the employer may be joking or teasing. However, it is likely to be viewed by any fact finder as significant proof supporting an inference of discrimination.

The evidence in the record in *Price Waterhouse* supported such an inference, even though the evidence was not quite as explicit as saying, "[w]e did not make you partner because you are a woman." Instead the partner who informed Hopkins that her partnership bid was on hold told her that "walk[ing] more femininely, talk[ing] more femininely, dress[ing] more femininely, wear[ing] make-up, hav[ing] her hair styled, and wear[ing] jewelry" would improve her chances next time.[154] A reasonable jury could find these statements to be admissions of discrimination because they make it clear that the committee members who put her partnership bid on hold had Hopkins's gender on their minds when they made their decision. This suggests that they may have decided the issue differently if she were more conventionally feminine or if she were male.[155] Thus, the evidence of those statements, if believed, is a finding of fact upon which the fact finder could base further inferences, including the ultimate inference that Price Waterhouse intended to discriminate against Hopkins because of her sex.

Some statements might not amount to admissions. A persistent problem has been the identification by some courts of some testimony as "stray remarks." These remarks are called "stray" or, as used here, "direct-lite," rather than "direct," be-

153. Price Waterhouse v. Hopkins, 490 U.S. 228, 268–69 (1989) (O'Connor, J., concurring).

154. *Id.* at 235 (plurality opinion).

155. Underlying the claim that these statements constituted evidence of discriminatory intent is the assumption that Price Waterhouse did not treat Hopkins the same as it would have treated a male candidate for partner. Thus, there is an argument that there was a violation of equal treatment.

cause they are not clearly focused on the employment action that the plaintiff challenges. Evidence of such statements, if believed, is not an admission that the defendant discriminated. But, that does not mean that they lack all probative value as to the issue of discrimination. The lower court in *Reeves* rejected the probative value of some ageist comments made by the director of manufacturing because the comments were not "direct" evidence of discrimination that amounted to an admission that the defendant discriminated when it discharged him.[156] Nevertheless, this evidence reveals that an important employer agent, who was integral in Reeves' firing, viewed Reeves' age negatively.[157] If believed, this evidence could help build a chain of inferences leading a reasonable jury to an ultimate finding that Reeve's age motivated the defendant's decision to discharge him.[158]

The next question is whether the admissions-based claim must be shown to be the but-for cause of the defendant's act. Just as a violation of equal treatment would not seem to justify

156. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693–94 (5th Cir. 1999).

157. *Id.* at 693.

158. The failure to understand the import of *Reeves* persists. Thus, the lower court in *Ash v. Tyson Foods*, No. 96-RRA-3257-M, 2004 WL 5138005 (N.D. Ala. Mar. 26, 2004), made the same mistake that the lower court in *Reeves* did and appeared to persist in that mistake even after the Supreme Court reversed and remanded. On remand, the Eleventh Circuit in *Ash v. Tyson Foods, Inc.*, 190 F. App'x. 924, 926 (11th Cir. 2006) reaffirmed its earlier decision and persisted in its unduly restrictive view of what was probative of discrimination:

> After reviewing the record, we conclude once again that the use of "boy" by Hatley was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson's stated reasons for not promoting the plaintiffs was racial discrimination. The usages were conversational and as found by the district court were non-racial in context. But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions.

While the finder of fact might well agree, as a matter of fact and the inferences drawn based on that fact, that these statements were nonracial and unconnected with the promotion decisions that the plaintiffs challenged, it is clear that such a finding is not compelled as a matter of law as the only inference that could be based on this evidence. Thus, the issue should not have been taken from the jury. The refusal to find that such evidence is probative of discrimination and, thus, should be decided by a jury persists in the lower courts. *See, e.g.*, *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) ("stray remarks" not sufficiently related to the challenged employer action do not defeat the defendant's motion for summary judgment).

limiting the proof of that to situations where the plaintiff can prove a but-for connection between the adverse action to the plaintiff and the defendant's discriminatory intent, so, too, a claim of discrimination based on an admission of the employer that he or she did discriminate would not justify a limitation of the proof standard to the but-for level. Indeed, the basis of Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*, a case involving admission evidence, was that the equities justified a lower than but-for standard.[159]

C. Acting on Stereotypes

A variant of the claim that statements attributed to the employer are admissions of discrimination is that the evidence of acting on stereotypes can be the basis for a claim that the employer acted with intent to discriminate. In *Los Angeles Department of Water & Power v. Manhart*, the defendant's policy of requiring women workers to contribute more salary per month when they were working to get equal monthly pension benefits was based on a stereotype that women live longer than men.[160] At a general level of abstraction, that stereotype is true—women in general live longer than men.[161] But, for purposes of Title VII, the question is whether acting on that general stereotype constitutes sex discrimination against individual women who may, or may not, live longer than the average for men or any particular man.

Price Waterhouse is another case involving reliance by the employer on stereotypes.[162] The evidence included evaluations in Hopkins's file that were reviewed by the partnership committee that showed that at least some partners reacted negatively to Hopkins because she was a woman.[163]

> One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at a charm school." Several partners criticized her use of profanity; in response, one partner

159. 490 U.S. at 276–78 (O'Connor, J., concurring).
160. 435 U.S. 702, 705 (1978).
161. *Id.* at 704.
162. 490 U.S. 228, 235–36 (1989) (plurality opinion).
163. *Id.* at 235.

> suggested that those partners objected to her swearing only "because it's a lady using foul language."[164]

Further, an expert witness, Dr. Susan Fiske, evaluated some of the remarks that appeared to be gender-neutral but were critical of Hopkins—she was "universally disliked" by staff or "consistently annoying and irritating."[165] Dr. Fiske testified that these remarks exhibited stereotypical thinking about women because these remarks were so subjective and because of Hopkins's unique status as the only woman in a large pool of partnership candidates.[166] The underlying point is that, because of her unique position as the only woman up for partnership, the speakers described her in ways that were negative. Men in the pool, with the same or similar characteristics, would not have been described in such a negative way.

There is considerable debate about unconscious bias and what role evidence of such bias should play in discrimination law.[167] Nevertheless, evidence of stereotypical thinking supports an ultimate inference of intent to discriminate precisely because it is an unconscious expression of bias. Because discrimination is illegal and quite generally deemed socially and morally unacceptable, most people have strong incentives to monitor or self-censor their statements to avoid what they think are explicit discriminatory statements. But using stereotypical language can reveal the true intent of the speaker. If the speakers quoted in the testimony in *Price Waterhouse* were asked if they were discriminating against Hopkins because of

164. *Id.* (citations omitted).

165. *Id.* at 235–36.

166. *Id.* In another context, in the 1992 Presidential election campaign, Ross Perot was taken to task for racial stereotyping based on his comments to the NAACP national convention that repeatedly described his audience as "you people." Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 603 n.155 (2003). As with the testimony evaluated by the expert witness in *Price Waterhouse*, the remarks of Perot did not explicitly refer to race, but, nevertheless, the general reaction was that he was thinking stereotypically.

167. *See, e.g.*, Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias* (Yale Law Sch., Public Law Working Paper No. 148, 2007), *in* BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (forthcoming), *available at* http://ssrn.com/abstract=959228; Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006); *see also* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479–80 (2007) (arguing that many of Mitchell & Tetlock's critiques rest, not on any "scientific" ground, but on normative assumptions about what kinds of discrimination the law should seek to prevent and punish).

her sex, they would undoubtedly answer "no."[168] And, for many, that answer would probably be true at a conscious level. They were not consciously aware that their speech reflected gendered thinking about Hopkins. While a denial of discriminatory intent may generally be viewed skeptically because self-interest is involved, a denial that is true at the conscious level, but clearly not true at the unconscious level, is particularly poignant and significant. It can be the basis for a strong argument that the speaker did act on the basis of those stereotypes and therefore discriminated. As the Court indicated in *Price Waterhouse*, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[169]

An old chestnut of a case, *Slack v. Havens*,[170] gives a great example of how stereotyping can establish discriminatory intent. When a white supervisor called an African American worker back to the department and excused the only white worker before a major cleaning was to take place, his explanation for his actions was that "[c]olored folks are hired to clean because they clean better."[171] He may not have thought that he was discriminating and may have meant this as a compliment to his African-American workers. Nevertheless, it is powerful evidence that he made his decision as to who would do the cleaning based on race. In other words, he may not have been conscious that his statements reflected bias, but, by being so forthcoming with a statement as to his actual state of mind that was biased, that statement constituted strong support for a finding of discriminatory intent.

There appears to be no basis for differentiating the standard of proof—either but-for or "a motivating factor"—used to prove that a defendant's action was based on a stereotype. As with her view of admissions evidence in *Price Waterhouse*, Justice O'Connor justified her acceptance of the "a substantial factor" level of linkage and did not require a but-for level where

168. That is why the plurality's statement in *Price Waterhouse* describing what would be a showing that the decision was motivated by gender was quite ironic: "[I]f we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. at 250 (footnote omitted).

169. *Id.*

170. 7 Fair Empl. Prac. Cas. (BNA) 885, 889–90 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

171. *Id.* at 887.

there was evidence that the employer relied on stereotypical thinking.[172]

D. The McDonnell Douglas *Method*

A significant debate continues as to whether any part of *McDonnell Douglas* survives the Supreme Court's decisions in *Reeves* and *Desert Palace*.[173] That is because putting these two decisions together allows direct, circumstantial, or both types of evidence to be used to prove all individual disparate treatment claims. But neither *Reeves*, which was analyzed as a *McDonnell Douglas* case, nor *Desert Palace*, which did not even mention *McDonnell Douglas*, suggests that *McDonnell Douglas* does not remain a vibrant and useful way to prove discrimination. Rather than destroy the significance of *McDonnell Douglas*, the actual effect of *Reeves* and *Desert Palace* was to split out the level of linkage needed to establish liability based on the kinds of claims or arguments that can be made to support drawing an inference that the defendant acted with discriminatory intent. It appears that liability can be established in all individual disparate treatment cases where the plaintiff presents proof that race, sex, or another protected characteristic was "a motivating factor" or the but-for motivation for the chal-

172. 490 U.S. at 262–65.

173. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004) (Since "pretext, and mixed-motives cases are nearly interchangeable," the motivating-factor test will govern all disparate treatment cases, which "will essentially return disparate treatment jurisprudence to 1972, before McDonnell Douglas v. Green was decided. Courts will have general statutory language to apply—now the motivating factor test—but only a general vision of how much evidence is supposed to suffice for the plaintiff to avoid summary adjudication."); William R. Corbett, McDonnell Douglas, *1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212–13 (2003); William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1576 (2005); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004); 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, 79 (2003); *see also* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 135 (2005) [hereinafter *Recapturing Summary Adjudication Principles*] ("[T]he *McDonnell Douglas* prima facie case . . . by itself should usually be sufficient both to support a plaintiff's verdict and allow the plaintiff to avoid summary adjudication."); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 790–91 (2005); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 161 (2005).

lenged decision.[174] This section will proceed on the assumption that *McDonnell Douglas* survives as a way to claim discrimination because its approach remains a powerful basis for building a chain of inferences of discrimination. But there continue to be a number of arguments as to what the *McDonnell Douglas* method actually entails and why it can be useful in supporting a finding of discriminatory intent.

1. Lying as Pretext

Even among those who believe that *McDonnell Douglas* survives the deconstruction of the division based on "direct" versus "circumstantial evidence," there is disagreement as to what the *McDonnell Douglas* method actually involves. Professor Katz emphasizes that the *McDonnell Douglas* approach is about proof of "pretext." For him, proof of pretext means that the defendant lied when it asserted its legitimate, nondiscriminatory reason for the employment action that the plaintiff challenges.[175] For Katz, it is the factual determination that the defendant lied that forms the basis for building a chain of inferences leading to the conclusion that the defendant intended to discriminate:

> Once the factfinder concludes that the employer has lied, it may again draw two different inferences from this fact. First, the factfinder might conclude that the employer lied for a benign reason, such as to protect the employee's feelings. Alternatively, the factfinder might conclude that the employer lied to cover up some less benign fact [potentially leading to drawing the inference of discrimination].[176]

Proof that the defendant lied about the reason for his or her action is undoubtedly powerful evidence that can form the basis of drawing the inference of discrimination.[177] That is be-

174. Thus, the parties get to choose whether to use the "but-for" level or the "a motivating factor" level to determine liability. If the "a motivating factor" level is used, then the defendant has the opportunity, under section 706(g)(2)(B), to attempt to prove the same-decision defense to full remedies.

175. Katz, *supra* note 32, at 124–30.

176. *Id.* at 126–27. Given the cognitive bias scholarship, the defendant may well be lying to itself.

177. Another variant on the issue of the defendant lying about its reason is the situation where the defendant changes its position on why it acted as it did. The classic litigation question then is "were you lying then or are you lying now?" A common situation in which this issue arises is when the employer, in response to the initial notice by the EEOC of a charge being filed, articulates one reason but

cause proof of lying about one's motivation is closely akin to proving animus, which, although not *required* to prove intent to discriminate, does prove discriminatory intent.[178] The question, however, is whether it is necessary for the plaintiff to introduce evidence that the defendant lied, or whether an inference of lying can be drawn based on proof that the defendant's reason does not actually explain the defendant's action. Some courts limit the scope of *McDonnell Douglas* to actual proof the defendant lied. For example, in *Forrester v. Rauland-Borg Corp.*, Judge Posner opined that pretext could not be inferred from evidence that the defendant's proffered reason was not true because, "[a] pretext, is a deliberate falsehood. An honest mistake, however dumb, is not."[179] Professor Katz equivocates as to how to prove that the defendant lied. In a footnote supporting his conclusion that the defendant's lying is the key underpinning of *McDonnell Douglas*, he suggests that the plaintiff need not actually prove that the defendant consciously decided to not tell the truth, but that the inference of lying can be based on evidence that the defendant's reason is not true. "This conclusion [that the employer lied to cover up some less benign motive] might be based on the fact that the employer's reason was mistaken . . . or from the fact of mistake in addition to other facts which might suggest that the employer knew [the reason it asserted] was wrong."[180]

The term "pretext" is not limited to the concept of lying. A standard dictionary definition of pretext is "a reason given in

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then, in subsequent litigation, changes tunes to another reason. In *Reeves*, one bit of circumstantial evidence supporting the finding that the defendant discriminated against Reeves because of his age was that Chesnut, the director of manufacturing, changed his rationale for discharging Reeves once it became clear that there was no possible basis for the reason he originally asserted: Chesnut claimed that Reeves had wrongly recorded the time one employee had worked at a time when Reeves was off work and in the hospital. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 145 (1999).

178. *See* Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent versus Impact*, 41 HOUS. L. REV. 1469, 1505 (2005); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 915–18 (1993); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1237 (1999).

179. 453 F.3d 416, 419 (7th Cir. 2006) (citations omitted). The basis for the deliberate falsehood rule is in established Seventh Circuit authority. *See* Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 685 (7th Cir. 2000) ("[P]retext means a dishonest explanation, a lie rather than an oddity or an error."); Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000) ("The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise or well-considered."). That authority, however, predates *Reeves*.

180. Katz, *supra* note 32, at 126 n.68.

justification of a course of action that is not the real reason."[181] The Supreme Court has never defined "pretext" as limited to proof that the employer lied. Such a requirement would narrowly limit the potential use of the *McDonnell Douglas* claim of discrimination, especially if, as the Seventh Circuit suggests, evidence that the defendant's asserted reason was not true is not by itself probative of discrimination. Indeed, emphasizing the issue as one of lying would seem to impose an even narrower version of the "pretext-plus" rule that was rejected in *Reeves*.

Thus, proof that the employer consciously lied when it asserted its supposedly legitimate, nondiscriminatory reason for the action it took is tremendously powerful evidence that it acted with discriminatory intent. But, in absence of evidence of a conscious lie, there are additional reasons why the *McDonnell Douglas* approach remains useful.

2. Pretext as a Complete Knockout

The *McDonnell Douglas* concept of "pretext" carries probative potential beyond proof that the employer consciously lied.[182] An alternative way of justifying the *McDonnell Douglas* approach is based on the broader notion that it involves a process of elimination that can be used to build a chain of inferences leading to the conclusion that the employer acted with intent to discriminate.[183] Dean Steven J. Kaminshine describes why this process of elimination works as a claim of discrimination.[184] The prima facie showing by the plaintiff "warrants turning the spotlight on the employer and asking for an explanation for the adverse action" because the prima facie case eliminates the most common legitimate reasons for an action.[185]

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181. THE NEW OXFORD AMERICAN DICTIONARY 1350 (2001).

182. Should *McDonnell Douglas* be construed so narrowly to require actual evidence that the defendant lied, that only means that there is another argument about what constitutes an argument supporting drawing the inference of discriminatory intent that can be used and recognized.

183. Because he analyzes *McDonnell Douglas* as justified as a basis for concluding that the defendant discriminated only on the fact that it lied, Professor Katz rejects the idea that *McDonnell Douglas* is justified as a process of elimination leading to a finding that the defendant discriminated. Katz, *supra* note 32, at 126–35.

184. Kaminshine, *supra* note 32, at 8–11.

185. *Id.* at 10.

Dean Kaminshine does not appear to view pretext as proof that the defendant lied. For him, pretext cases are, in effect, single motive cases because they require the plaintiff to prove that the defendant's asserted reason actually played no motivating part at all in the decision the defendant made.[186] "Pure pretext cases are aptly described as single-motive cases because of the essence of the pretext's proof power—power that derives from its capacity to operate within the confines of the [*McDonnell Douglas*] litigation by knocking out one of the two competing reasons placed in the record."[187]

Kaminshine's complete knockout rule might be viewed as consistent with requiring a but-for showing if the plaintiff relies on the *McDonnell Douglas* method. A finding that the defendant's reason had been completely knocked out—that it played no role in the defendant's decision—would leave discrimination as the only reason explaining the evidence before the court. Knocking out the defendant's reason and deciding that discrimination was the reason the defendant acted would, therefore, meet the but-for level. When utilizing the pretext method, a court, and presumably a jury, would only review the evidence, both direct and circumstantial, regarding the defendant's asserted reason and whether the plaintiff proved that it played no part in the defendant's decision. If the jury accepted the plaintiff's proof, then a further finding of discrimination would likely be at the but-for level because no other reason in the record would remain viable.[188] Presumably, the jury would

186. His argument that the focus in a pretext case is exclusively on rebutting the defendant's assertion of its reason for the action, *id.* at 10, is not consistent with the description of the broad type of evidence probative of pretext in *McDonnell Douglas* and in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Further, it is not consistent with the holding in *Patterson* that, to prove pretext in a case where the employer asserted that it promoted a person more qualified than the plaintiff, it was not necessary for the plaintiff to prove that she was more qualified than the man who was promoted. *See Patterson*, 491 U.S. at 188–89.

187. Kaminshine, *supra* note 32, at 41.

188. A problem with this analysis is *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In *Hicks*, the Supreme Court upheld the trial court's determination that the plaintiff had failed to prove discrimination because the trial judge, as fact finder, was convinced that the reason the plaintiff was fired was neither the reasons asserted by the defendant nor discrimination because it was simple personal animosity between the plaintiff and his supervisor. *Id.* at 508, 514–15. The problem with the finding is that the only evidence in the record about personal animosity was a denial that it played any part in the decision. *See id.* at 543 (Souter, J., dissenting). Thus, just because the plaintiff completely knocked out the defendant's asserted reason, under *Hicks* and *Reeves* that would not mandate a finding of discrimination.

need to go no further.[189] But, if the plaintiff introduced additional evidence, direct or circumstantial, that was probative of discrimination but that did not focus on knocking out the defendant's asserted reason, that evidence would be evaluated under the "a motivating factor" standard—potentially enabling the defendant to limit the plaintiff's full remedies using the same-decision defense. But the justification for limiting the *McDonnell Douglas* part of this intricate way of proving discrimination seems rather weak.

3. Process of Elimination

Undoubtedly, evidence that the defendant's asserted reason played no role in its decision is a powerful basis for building a chain of inferences leading to the ultimate conclusion that the defendant acted with the intent to discriminate. But, that does not necessarily exhaust the probative potential of pretext evidence. Thus, the question is whether a finding of partial pretext—where discriminatory intent was involved along with other factors—is also sufficiently probative to support a reasonable jury finding discrimination. In other words, can the process of elimination underlying *McDonnell Douglas* work where there is evidence that the defendant's asserted reason played some role in the decision, but was not the only reason? The Seventh Circuit, in an opinion by Judge Posner, limits *McDonnell Douglas* cases to those in which the plaintiff can completely knock out the defendant's asserted reason.

In *Forrester v. Rauland-Borg Corp.*,[190] Judge Posner rejected an interpretation of the *McDonnell Douglas* approach to pretext that suggested that mixed-motives might be implicated in its application. If showing partial pretext is sufficient, then the "a motivating factor" test established in section 703(m) as interpreted in *Desert Palace* would be applicable. Posner called this "persistent dictum to the effect that pretext can be shown not only by proof that the employer's stated reason was not the honest reason for his action but also by proof that the stated reason was 'insufficient to motivate' the action."[191] For him, it was "time the dictum [is] laid to rest."[192] Judge Posner went on

189. Indeed, it would be hard to construct clear jury instructions to assist the jury to get through the intricacies of this approach.

190. 453 F.3d 416, 417–18 (7th Cir. 2006).

191. *Id.* at 417.

192. *Id.*

to analyze some, but not all, of the possible inferences that could be given to the "insufficient to motivate" language:

> If the stated reason for the challenged action did not motivate the action, then it was indeed pretextual. If it was *insufficient* to motivate the action, either this means that it didn't motivate it, or that it shouldn't have motivated it. If the first is the intended sense, the dictum is just a murky way of saying that the stated reason was not the real reason. If the second sense is the one intended, then the dictum is wrong because the question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason: not a good reason, but the true reason. [193]

Posner also contemplated whether the "insufficient to motivate" language really meant that the defendant's asserted reasons "were factors that the employer considered but that did not have enough weight in his thinking to induce him to take the action complained of."[194] For him, using the language "insufficient to motivate" masks that this was simply another way of saying that the reason, though on the mind of the employer, was a pretext.[195] This is because that reason "wasn't what induced him to take the challenged employment action, it was a pretext."[196] All of this appears to be based on an unstated premise that there is only one reason for every employment decision: either the reason the defendant asserts or discrimination as claimed by the plaintiff. In other words, Posner seems to be saying that *McDonnell Douglas* cases must be single-motive cases.

Judge Posner failed to address another possibility suggested by the "insufficient to motivate" language: one reason may be insufficient by itself to motivate a decision because it was only one of a number of reasons that together motivated the employer's action. In other words, the reason was real and it played a role, but it was only a partial explanation for the action taken by the employer. In *McDonnell Douglas*, *McDonald v. Santa Fe Trail Transport*, and *Price Waterhouse*, the defendant's asserted reason was real—engaging in illegal protest ac-

193. *Id.* at 417–18.
194. *Id.* at 418.
195. *Id.*
196. *Id.*

tivities aimed at the employer in *McDonnell Douglas*, stealing company property in *McDonald*, and lacking interpersonal skills in *Price Waterhouse*. However, even taking each asserted reason as true, the defendant did not enunciate all of the possible motivations for its action. The given list was incomplete, and discrimination may have been one of the unvoiced reasons for the employment action Thus, the defendant's reason was potentially "insufficient to motivate" the decision in the sense that it was one of several reasons but may not have been, by itself, the but-for cause of the employer's decision. If discriminatory intent played any role in the decision—that is, if it was "a motivating factor," along with the reason asserted by the defendant—then there were mixed-motives for the decision. Because it was a mixed-motive case, after *Desert Palace*, the "a motivating factor" standard would apply so that liability would be established.[197] Judge Posner's cramped view of the possible arguments of what constitutes discrimination is inconsistent with the broad approach taken in *Reeves*. There is nothing in the *McDonnell Douglas* claim that prevents the use of the "a motivating factor" standard.

Proving that the defendant lied when it asserted a legitimate, nondiscriminatory reason is one way to prove the defendant's discriminatory intent. Another is completely knocking out the defendant's reason as an explanation even if the defendant did not lie when it asserted the reason. A third way to view *McDonnell Douglas* is that proving that the defendant's asserted reason is only a partial explanation that, along with other evidence, can support drawing the inference that the defendant's intent to discriminate also played a role—that it was "a motivating factor."

In sum, there are a number of claims of discrimination that can be made based on a wide variety of factual showings. Underpinning them all is the notion of equal treatment, but the claims can be based on admissions by the defendant that it discriminated, on proof that the defendant took actions based on stereotypes, on proof that the employer lied about the reason for its action, or on a process of elimination showing that the likely legitimate reasons for the action cannot be reasonably advanced. Though *McDonnell Douglas* might be a closer case if it had to be limited in its application to the situation where the defendant's reason could be completely knocked out, it is not

197. Desert Palace, Inc. v. Costa, 539 U.S. 90, 96–97 (2003).

necessarily so limited. While the but-for level of showing is useful, it is not necessary. Therefore, it appears that either the "a motivating factor" or the but-for level of showing could be used to apply any or all of these varied claims of what constitutes discrimination. The next section will develop how the structure of individual disparate treatment law would work out in litigation.

VI. LITIGATION USING THE CHAIN OF INFERENCES APPROACH

In actual litigation, plaintiffs try to find any and all evidence that could constitute discrimination under as many different theories or arguments as they can imagine. Careful questioning of the client, independent investigation, discovery, and the use of expert testimony can provide skilled counsel with evidence to support those claims necessary to build a chain of inferences and ultimately lead a fact finder to draw the inference of discrimination. In turn, defendants try to rebut the evidence through denial, presenting their own evidence to undermine the plaintiffs' evidence, as well as presenting other evidence to support their arguments against drawing the ultimate inference of discrimination.

While the court may get involved in discovery disputes that ultimately turn on whether some kinds of evidence might be probative of discrimination, the court typically first confronts the scope of the litigation once discovery is complete and the defendant moves for summary judgment.[198] Under the generally applicable summary judgment rules, the plaintiff must point to evidence that will be introduced to support a prima facie case of the defendant's liability.[199] At this point, the possible claims of discrimination and the level of showing necessary to establish a defendant's liability become relevant. Assuming that both the "but-for" and the "a motivating factor" standards are part of Title VII law, plaintiffs have the choice of

198. Rule 12(b)(6) motions are hard to win in discrimination litigation under the general notice pleading rules. *See* Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002) (notice pleading rules apply to claims of individual disparate treatment discrimination).

199. *See* Redriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *See generally*, Chambers, *Recapturing Summary Adjudication Principles*, *supra* note 173; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

trying to prove their cases to either the but-for or the "a motivating factor" level. Plaintiffs will presumably pick the lowest level of connection between the defendant's act and discrimination—the "a motivating factor" level set by section 703(m)—since satisfying the "a motivating factor" level is all that is needed to survive the motion. More significantly, the plaintiff must point to the evidence to be introduced and argue why that evidence, if found to be true, would enable a reasonable jury to find that the defendant acted with an intent to discriminate. Since a plaintiff will try to have as many different kinds of evidence that point toward discrimination as possible, there is no need to pick one claim or theory of discrimination over another.[200] Instead, there may be multiple and overlapping claims and arguments.

Unequal treatment ultimately underpins most of these claims. For example, a plaintiff could argue that statements constituting full admissions by the defendant—telling a worker, "You are too old for this job" shortly before he or she is terminated—prove that discrimination was on the mind of the employer, even if the fact finder did not find them to be full admissions. Even if there is no finding of a direct link between the discrimination and the decision to terminate so as to constitute an admission, the statement, if believed to have been made, does reveal that the worker's age was on the mind of the employer. That same testimony would support an inference of discrimination if it revealed that the employer had acted upon stereotypes.[201]

McDonnell Douglas can also be used to support drawing the inference of discrimination. A good counterexample can be found in Judge Posner's dicta in *Forrester v. Rauland-Borg Corp.*[202] In response to the plaintiff's claim of sex discrimination, the defendant asserted that the plaintiff had been discharged because he had engaged in sex harassment of female coworkers,[203] surely a legitimate, non-discriminatory reason for taking an adverse action against an employee. In upholding

200. Strategically, a party may sometimes be faced with choosing between mutually inconsistent claims. But, in discrimination cases, the different types of evidence can support a variety of claims, all leading to the ultimate question of discrimination.

201. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–11 (1993), the Court said that confronting stereotypes that older workers were not competent drove Congress to enact the Age Discrimination in Employment Act.

202. 453 F.3d 416, 417–18 (7th Cir. 2006).

203. *Id.* at 417.

the grant of summary judgment for the defendant, Judge Posner first described how broad and easily met the burden was for the defendant to rebut the plaintiff's prima facie case in a *McDonnell Douglas* case.[204] In accepting the reason the defendant proffers, "the question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason: not a good reason, but the true reason."[205]

Later in his opinion, Judge Posner indicates that, at the pretext stage, evidence that the defendant's proffered reason was not true was not by itself probative of pretext because "[a] pretext, is a deliberate falsehood. . . . An honest mistake, however dumb, is not."[206] Putting these two propositions together means that, for Judge Posner, an employer is entitled to summary judgment even if evidence shows the reason the employer claims it relied on is "downright irrational" unless the plaintiff also introduced evidence sufficient to conclude that the employer had lied when it asserted this patently absurd reason.[207] In other words, for Judge Posner, the fact that the defendant's asserted reason is downright irrational is not probative of the reason being unbelievable.[208] That cannot be right. If all that the employer can come forward with is a "mistaken, cruel, unethical, out of his head, or downright irrational" reason for the action it is attempting to defend, that in itself is probative of discrimination, whether or not it is also proven that the employer believed it to be true. Even absent proof that the employer was deliberately lying, the failure of the employer to assert a believable reason is probative of the question of discrimination. It can be used to build a chain of inferences

204. *Id.* at 417–18.

205. *Id.* at 418. This is, of course, a reaffirmation and an extreme statement of the at-will rule, which is modified by antidiscrimination legislation.

206. *Id.* at 419. The basis for the deliberate falsehood rule is in established Seventh Circuit authority. Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 685 (7th Cir. 2000) ("[P]retext means a dishonest explanation, a lie rather than an oddity or an error."). "The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise or well-considered." Stewart v. Henderson, 207 F.3d 374, 378 (7th Cir. 2000).

207. Professor Katz, while emphasizing that pretext involves lying, might well find the assertion of a "downright irrational" reason to support drawing the inference that the defendant lied. Katz, *supra* note 32, at 126–28.

208. This approach seems consistent with Judge Posner's policy predilection that at-will employment trumps antidiscrimination law. *See* Walker v. Abbott Labs., 416 F.3d 641 (7th Cir. 2005).

leading to the ultimate question of the defendant's intent to discriminate.

While at-will employment is the norm in the United States, courts assume that employers have reasons for the employment decisions they make.[209] As a matter of law, a "downright irrational" reason for the defendant's action satisfies the employer's minimal rebuttal obligation under *Burdine*.[210] Nevertheless, asserting an irrational "reason" supports a conclusion that the defendant did not have a good reason for its action. In the absence of any believable reason in the record for the action that the defendant has taken, the fact finder may find pretext and use that to build a chain of inferences of discrimination. Thus, unlike the result achieved by the court in *Forrester*, the defendant's motion for summary judgment should be denied when the employer can only come up with a "downright irrational" reason for its action. An irrational reason is so unlikely to be the real reason that a reasonable jury could find it to be untrue and, therefore, could find it to be a pretext for discrimination.

In deciding the motion for summary judgment, the trial court judge is supposed to look at the evidence and draw all inferences in favor of the nonmoving party, typically the plaintiff.[211] In doing so, the judge should assume that the "a motivating factor" level of showing applies. The judge should determine whether a reasonable jury could find for the plaintiff on the ultimate factual question of the defendant's intent to discriminate, based on each of the individual claims or arguments of discrimination separately, or based on all of the claims collectively. The judge should avoid slicing and dicing[212] the evidence in ways that deprives it of its full potential. At the broadest level, the motion for summary judgment should be denied unless it would be unreasonable for a fact finder to build a chain of inferences leading to the final inference that discrimination was "a motivating factor" in the defendant's decision.

209. The Supreme Court assumes that employers make employment decisions for a reason. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

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

211. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). See *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 235 (3d Cir. 2007), an unusual case where party carrying the burden of proof—here the defendant on the issue of the business necessity of an employment practice—moved for, and was granted, summary judgment.

212. *See generally* Zimmer, *supra* note 93.

The next major step occurs at the close of the plaintiff's case-in-chief when the defendant is likely to file a motion for judgment as a matter of law. With the plaintiff's full case now in the record, the trial judge must again determine whether a reasonable fact finder could find discrimination based on all the evidence. If that motion is denied, then the defendant puts in its case. At the close of the defendant's case, the defendant may again move for judgment as a matter of law, with the trial judge now able to look at whether a reasonable jury could find for the plaintiff based on the complete record. At all of these stages, the trial judge is to view the record in the light most favorable to the plaintiff; thus, the record should be judged using the "a motivating factor" level of linkage between the adverse employment action the plaintiff suffered and the defendant's discriminatory intent.

If the defendant's motions are denied, the next question, if it is a jury case, will focus on what instructions should be given to the jury. The broad yet clear instruction approved by the Court in *Desert Palace* seems appropriate if the "a motivating factor" level of showing is to be used.[213] Using the "a motivating factor" level of linkage between the defendant's intent and action opens up the possibility of the defendant being able to limit full remedies to the plaintiff by proving the same-decision defense. Thus, a risk-taking plaintiff might, especially if she is convinced her cases is strong, ask for the instruction from *Hazen Paper*—that the plaintiff be required to prove that discrimination played a role in and was the determinative influence in the decision of the defendant. The higher level cuts off the same-decision defense to full remedies, but, at least theoretically, is harder in the first instance for a plaintiff to prove. Nothing prevents a defendant from accepting the plaintiff's bet that she can prove discrimination to this "but-for" level. But it is not clear whether the defendant can veto the plaintiff's choice in order to preserve its ability to prove the same-decision defense to full remedies. This would require the jury to also be given the "a motivating factor" instruction.[214] This is an odd situation because it should be easier for a plaintiff to prove discrimination to the "a motivating factor" level than to the "but-for" level. Yet some plaintiffs might hesitate taking the easier road to liability out of fear that a jury might split the baby and

213. Desert Palace, Inc. v. Costa, 539 U.S. 90, 96–97 (2003).

214. The strategic dimension of this situation was described in *Ostrowski v. Atlantic Mutual Insurance Cos.*, 968 F.2d 171, 182 (2d Cir. 1992).

find for the defendant on the same-decision defense, thereby depriving a plaintiff of compensatory and, potentially, punitive damages.

It is, of course, possible that the but-for and the "a motivating factor" instructions could be given in the alternative. That way, if the jury did not find that the plaintiff proved her protected characteristic played a role in, and was the determinative influence on, the defendant's decision (the but-for standard), then the jury would be asked in the alternative if the plaintiff proved her protected characteristic was a motivating factor in the defendant's decision. If the jury says "yes" to that, the next step is for the trial judge to decide whether the defendant introduced sufficient evidence to allow a reasonable jury to find the same-decision defense. If there was evidence that could support a finding of the same-decision defense, the judge would give the jury the instruction for the same-decision defense to full remedies. All of this high level strategizing suggests that most trial judges would prefer to use clear and simple instructions.[215]

Assuming the judge decides to give the simple "a motivating factor" instruction, the parties are left to argue their cases to the jury. Each side can argue what the true facts are, why those facts support or do not support a chain of inferences leading to the ultimate question of fact regarding the defendant's intent to discriminate, and why finding those facts to be true does or does not support the conclusion that the plaintiff proved that discrimination was "a motivating factor" for the defendant's decision. If the jury finds discrimination was "a motivating factor," then the next question is whether the defendant has carried its burden of proving the same-decision defense, which has the effect of depriving the plaintiff of full remedies.[216]

215. On appeal, the question of whether a judge erred in giving an instruction is subject to reversal only if the party claiming error shows that it was prejudicial. *See* United States v. Jensen, 41 F.3d 946, 953 (5th Cir. 1994).

216. Once there is a verdict, the losing party may file a motion for judgment as a matter of law. The standards, as described by the Supreme Court in *Reeves*, apply. Looking at the evidence favorable to the party who won the verdict and any evidence of the losing party that must be accepted as true but without looking at questions of credibility, the question is whether a reasonable finder of fact could reach the conclusion that was reached by the jury in the case. If the answer is yes, then the verdict stands. If the answer is no, then judgment as a matter of law should be granted to the moving party. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

CONCLUSION

Of the three elements of an individual disparate treatment case—(1) an adverse employment action, (2) that was linked, (3) to the defendant discriminatory intent—the defendant's intent to discriminate is the most difficult to prove. Part of the difficulty is that the question of the level of linkage—either the but-for or the "a motivating factor" level—has been bound up in the question of proof of intent. After *Reeves* and *Desert Palace*, however, it is possible to clarify both the level of showing and the array of claims that can prove discrimination. The level of showing can be the but-for level based on the "because of" language of section 703(a) or the "a motivating factor" level found in section 703(m), and either level of showing can be used to analyze any claim of discrimination. Direct, direct-lite, circumstantial evidence, or any combination of the three, can be used to prove discrimination under any claim that a reasonable jury would find to support a chain of inferences leading to the ultimate question of discriminatory intent.