COMMENTS

Don't Throw the *Price Waterhouse* Baby Out With the Bath Water: Age Discrimination and the Direct Evidence/Mixed Motive Puzzle

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I. INTRODUCTION

Employers that discriminate against employees on the basis of age violate federal and state statutes.[1] Because discrimination is often subtle, however, proving it at trial may be difficult. As a result, the Supreme Court has found that employers discriminate even when direct evidence of discrimination is absent.[2] Instead of requiring direct evidence, courts addressing these allegations require employers to establish legitimate, non-discriminatory purposes for their actions.[3] This test, developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[4] is useful in cases lacking direct evidence of discrimination; however, it is ill-suited to cases in which direct evidence exists or in which employers have mixed motives[5] for

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1. *See, e.g.*, The Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-24 (West 1981 & Supp. 1990); WASH. REV. CODE ch. 49.60 (1990).

2. Direct evidence is evidence that proves a fact without requiring the finder of fact to make an inference or a presumption. State v. Thompson, 519 S.W.2d 789, 792-93 (Tenn. 1975). Direct evidence is often unavailable. *See* Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.").

3. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-04 (1973), sets out the classic test for allocating burdens of proof in discrimination cases. *See infra* notes 37-54 and accompanying text.

4. 411 U.S. 792 (1973).

5. In a mixed motive case, the employer's actions toward the employee are based on a combination of legitimate and illegitimate motives. Mark C. Weber, *Beyond* Price

their discriminatory acts.[6] The *McDonnell Douglas* test is inappropriate in the direct evidence setting because it provides employers with unnecessary advantages that are prejudicial to employees who have established direct evidence of discrimination. Furthermore, the *McDonnell Douglas* test is inadequate in a mixed motive setting because the test fails to delineate how and if employees can prevail when at least one of their employer's motives is legitimate. Finally, the test is inappropriate in both the direct evidence and mixed motive settings because it ignores Supreme Court precedent allocating the burden of proof in employment cases to reflect the employer's "superior access to the truth."[7]

Federal courts have recognized the inadequacy of the *McDonnell Douglas* test in the direct evidence and mixed motive settings. Although federal courts have long applied the *McDonnell Douglas* test to allocate the burden of proof in cases involving indirect evidence,[8] they have used different methods for allocating the burden of proof in cases involving direct evidence of discrimination[9] or in cases in which employers' actions were motivated by a mixture of legitimate and illegitimate considerations.[10]

Washington courts have long been in the habit of using federal case law to interpret the state anti-discrimination stat-

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Waterhouse v. Hopkins: *A New Approach to Mixed Motive Discrimination*, 68 N.C.L. REV. 495, 498 (1990).

6. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (adopting more stringent test for mixed motive cases under Title VII of the Civil Rights Act of 1964).

7. *See* Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977). Justice O'Connor found this rationale particularly compelling under the facts of *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J., concurring).

8. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1980).

9. In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), the Supreme Court held that the *McDonnell Douglas* test did not apply when the employee's case was based on direct evidence of discrimination. *See infra* notes 70-78 and accompanying text. Under *Trans World Airlines*, if the employee shows direct evidence of discrimination, the employer can only prevail with an affirmative defense, such as showing a bona fide occupational qualification. *Trans World Airlines*, 469 U.S. at 121-22, 124.

10. The Supreme Court limited application of the *McDonnell Douglas* test to cases in which the employer's decision was based on either exclusively legitimate or exclusively illegitimate motives and held that a different standard applied to mixed motive cases. *Price Waterhouse*, 490 U.S. at 246-47. *See infra* notes 98-121 and accompanying text. In *Price Waterhouse*, the Court held that if the employee established that illegitimate factors were motivating factors in the employer's decision, the employer had to show that the same decision would have been made absent the improper motive. 490 U.S. at 244-45.

ute.[11] Nonetheless, Washington courts have clung to the *McDonnell Douglas* test even in cases involving direct evidence or mixed motives.[12] Thus, Washington courts have failed to incorporate the refinements made by federal courts regarding the allocation of the burden of proof in discrimination cases.

Washington courts must abandon this slavish adherence to *McDonnell Douglas* in cases involving direct evidence and mixed motives. A more appropriate evidentiary standard would place the burden on employers to establish that they would have taken the same action toward the employees if age had not been considered.[13] A higher burden on employers would help Washington courts realize the promise of "elimination and prevention" of discrimination offered by Washington age discrimination legislation.[14]

This Comment examines why Washington should place a higher burden on employers in direct evidence and mixed motive age discrimination cases. Because Washington courts follow federal case law in interpreting state anti-discrimination legislation, Section II examines relevant federal statutes and the history of their interpretation by federal courts. Section III explores the courts' modification of the traditional federal approach found in direct evidence and mixed motive cases. Section IV discusses Washington's anti-discrimination statute[15] and Washington's judicial interpretation of that statute. Sec-

11. In Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 361-62, 753 P.2d 517, 520 (1988), the Washington Supreme Court looked to the federal Age Discrimination in Employment Act of 1967 (ADEA) to resolve an age discrimination dispute. The court characterized federal cases as nonbinding guidelines and reserved the right to adopt a different result consistent with the state statute. *See also* Dean v. Municipality of Metro. Seattle, 104 Wash. 2d 627, 636, 708 P.2d 393, 398 (1985) ("[F]ederal law may be considered instructive with regard to the interpretation of our State discrimination laws."); Davis v. Department of Labor & Indus., 94 Wash. 2d 119, 125, 615 P.2d 1279, 1282 (1980) (state uses federal interpretation of Civil Rights Act of 1964 in state sex discrimination case); Fahn v. Cowlitz County, 93 Wash. 2d 368, 375, 610 P.2d 857, 862 (1980) (state uses federal law in sex and race discrimination context); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (state uses federal age discrimination cases).

12. In Washington, even employees who have direct evidence of employer discrimination or evidence of the employer's mixed motives are still required to prove the four elements of the *McDonnell Douglas* prima facie test. Stork v. International Bazaar, Inc., 54 Wash. App. 274, 278, 774 P.2d 22, 24 (1989).

13. This test was applied in *Price Waterhouse*, 490 U.S. at 244-45.

14. The far-reaching goal of Washington's anti-discrimination statute is the "elimination and prevention" of discrimination. WASH. REV. CODE § 49.60.010 (1990). The legislature advised that such discrimination "menaces [the] free democratic state." *Id.*

15. WASH. REV. CODE §§ 49.60.010-.330 (1989).

tion V demonstrates Washington's insufficient response to federal developments in direct evidence and mixed motive cases. Finally, Section VI identifies procedural safeguards that Washington courts can employ in these cases to avoid potential problems caused by requiring employers to show that they would have taken the same action absent discrimination. By placing a greater burden of proof on the employer in direct evidence and mixed motive cases, Washington courts can better effectuate the goals of Washington's anti-discrimination statute.

II. FEDERAL ANTI-DISCRIMINATION LAW

Washington courts have drawn heavily on the expertise of federal courts to resolve discrimination questions.[16] This reliance is necessary because the state age discrimination statute does not specify what criteria an employee must meet to prevail in an age discrimination case.[17] Additionally, when seeking precedent for discrimination cases, Washington courts follow the federal pattern of minimizing distinctions among cases involving sex, race, and age discrimination.[18] Because

16. *See supra* note 11.

17. *See* Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 361, 753 P.2d 517, 520 (1988); WASH. REV. CODE §§ 49.60.010-.330 (1989).

18. For federal court cases, *see, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1984) (Title VII notion that employee benefits, which are part of employment relationship, may not be distributed in a discriminatory manner applies "with equal force" in age discrimination context because the substance of the ADEA was "derived *in haec verba* from Title VII.") (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1977)); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1978) (the common purpose of ADEA and Title VII, coupled with similar language and evidence that a specific ADEA provision was taken from Title VII, is sufficient to establish that the passages should be treated similarly); Buckley v. Hospital Corp. of America, 758 F.2d 1525 (11th Cir. 1985) (race discrimination case used to resolve age discrimination problem).

For state court cases, *see, e.g.*, *Grimwood*, 110 Wash. 2d at 362 ("Because of the similarity in purposes and substantive provisions in both the civil rights act and the ADEA, the federal courts have employed . . . [race discrimination standards] in age discrimination cases." (citations omitted)).

Although courts have used sex and race discrimination cases to resolve evidentiary issues in age discrimination cases, the cases will not be viewed as interchangeable in all instances. *Lorillard*, 434 U.S. at 575 n.14 (different provisions with respect to jury trials between Title VII and ADEA suggest that Congress' intent varied when drafting the two different laws). One commentator argues that trial courts tend to enter judgments not withstanding verdicts disproportionately in age discrimination cases in part because courts instruct juries to use evidentiary standards developed under Title VII cases, and Title VII did not contemplate the jury trial setting. Kimberlye K. Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial By Jury: Proposals for Change*, 73 VA. L. REV. 601, 603-04 (1987). Another commentator argues that the Sixth Circuit has abandoned the application of Title VII burden of

Washington courts apply federal sex and race discrimination cases as precedent to resolve state age discrimination questions, this Section will examine the federal statutes regarding sex, race, and age discrimination as well as the federal cases that have traditionally interpreted these statutes. The relevant federal statutes are Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967; the seminal cases are *McDonnell Douglas Corp. v. Green*[19] and *Texas Dep't of Community Affairs v. Burdine*.[20]

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964[21] (Title VII) forms the statutory basis for analyzing modern employment discrimination cases.[22] Title VII prohibits employers from discriminating based on race, color, religion, sex, or national origin.[23] Title VII does not specify, however, what standards should be used to measure statutory compliance or what burdens of proof should be required of each party to meet those standards.[24] Federal courts have filled these statutory gaps.[25] The cases interpreting Title VII provide the modern basis for interpreting not only Title VII but also other discrimination statutes.[26]

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proof analysis in ADEA cases because of differences in the acts and the situations they address. Mary Comins Sutton, Comment, *Should* McDonnell Douglas *Apply in ADEA Cases? The Sixth Circuit's Answer*, 15 U. TOL. L. REV. 1201 (1984).

19. 411 U.S. 792 (1973).

20. 450 U.S. 248 (1980).

21. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1990). The Civil Rights Act of 1964 was designed to heighten the effective enforcement of civil rights. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391. Title VII itself was designed to eliminate discrimination through the use of formal and informal procedures. *Id.*

22. Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1226 (1981). The article lists cases that marked the expansion of civil rights law into other contexts. *Id.* at 1226 n.89.

23. 42 U.S.C.A. § 2000e-2 (West 1981 & Supp. 1990).

24. At least one commentator notes that Congress rejected a standard of causation that required employees to prove that discrimination was the sole cause of their employers' decisions. Bonnie H. Schwartz, Comment, Price Waterhouse v. Hopkins, *57 U.S.L.W. 4409 (U.S. May 1, 1989) (No. 87-1167): Causation and Burdens of Proof in Title VII Mixed-Motive Cases*, 21 ARIZ. ST. L.J. 501, 511 (1989). Senator Chase is quoted from the Title VII debates: "If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." *Id.* at 511 n.66 (quoting 110 CONG. REC. 13, 837-38 (daily ed. June 15, 1964)).

25. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973).

26. *See supra* note 18.

B. Age Discrimination in Employment Act of 1967

Although Congress did not address age discrimination in the landmark Title VII legislation, it rectified this omission three years later by passing the Age Discrimination in Employment Act of 1967 (the ADEA).[27] The ADEA prohibits employers from discriminating against employees on the basis of age[28] by protecting employees who are at least 40 years old.[29] The purposes of the ADEA are to encourage the employment of older workers on the basis of their ability[30] and to remedy the problems older workers encounter in obtaining and retaining employment.[31] The ADEA prohibits the refusal to hire an employee, the discharge of an employee, or the performance of any other discriminatory act based on age.[32]

Although separate from Title VII,[33] the ADEA is substantively and procedurally similar to Title VII.[34] Because the ADEA is a separate statute, however, some commentators and courts have argued for separate evidentiary standards for ADEA and Title VII cases.[35] Nevertheless, the majority of cases interchange these statutory references.[36] Analysis of the cases interpreting these statutes is critical to understanding the allocation of the burdens of proof in federal age discrimination cases. Two pivotal cases defining the traditional burdens of proof in age discrimination cases are *McDonnell Douglas Corp. v. Green* and *Texas Dep't of Community Affairs v. Burdine.*

C. Traditional Federal Interpretation

In *McDonnell Douglas*, the plaintiff, Green, was a black

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27. 29 U.S.C.A. §§ 621-24 (West 1981 & Supp. 1990).

28. *Id.* at § 623.

29. 29 U.S.C.A. § 631(a) (West 1981 & Supp. 1990).

30. H.R. REP. NO. 805, 90th Cong., 1st Sess. 1-2, *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214; 29 U.S.C.A. § 621(b) (1981 & Supp. 1990).

31. 29 U.S.C.A. § 621(a) (West 1981 & Supp. 1990). For further information about the evidence of age discrimination considered by Congress in passing the ADEA, *see* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 381-84 nn.1-24 (1976) [hereinafter Harvard Note].

32. 29 U.S.C.A. § 623(a)(1) (West 1981 & Supp. 1990).

33. One of the reasons stated for enacting separate age discrimination legislation was to avoid overburdening the already overworked Equal Employment Opportunity Commission. Harvard Note, *supra* note 31, at 381.

34. *Id.* at 381 n.10 (provides a comparison of Title VII and ADEA provisions).

35. One commentator concedes that legislative history does not suggest a basis for different treatment of Title VII and ADEA. Harvard Note, *supra* note 31, at 410-11. However, he argues that the principles and policies underlying the issues of age and sex discrimination suggest two different treatments. *Id.*

36. *See supra* note 18 and accompanying text.

mechanic and laboratory technician employed at a manufacturing facility in St. Louis, Missouri.[37] After he was laid off as part of a general work force reduction, Green participated in acts of civil disobedience at the plant.[38] When McDonnell Douglas later sought to hire technicians, it turned down Green's application because of his participation in the civil disobedience.[39] Green then filed a complaint with the Equal Employment Opportunity Commission,[40] claiming that his application was denied because of his race and involvement in the civil rights movement.[41] The Supreme Court eventually granted certiorari in the case to clarify the standards governing employment discrimination.[42]

The Court held that employees bear the initial burden of proving a prima facie case of discrimination.[43] To meet that burden, an employee must show the following: (1) the employee is part of a racial minority; (2) the employee applied and was qualified for a job that the employer was seeking to fill; (3) the employee was rejected; and (4) the employer continued seeking applicants with similar qualifications after the rejection.[44] By satisfying these four elements, which comprise the first prong of the *McDonnell Douglas* three-prong test, the employee creates an inference that the employer's actions were discriminatory.[45]

Once an employee establishes a prima facie case of discrimination, the burden shifts to the employer to satisfy the second prong of the *McDonnell Douglas* test.[46] Under the second prong, the employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[47] If this burden is met, the employee can prevail only by establishing that the employer's "legitimate" reason was, in fact, pretextual.[48]

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

38. *Id.* at 794-95.

39. *Id.* at 796.

40. *Id.* The Equal Employment Opportunity Commission is the agency created by Title VII to monitor discrimination claims. 33 U.S.C.A. 42 § 2000e-4 (West 1981 & Supp. 1990).

41. *McDonnell Douglas*, 411 U.S. at 794.

42. *Id.* at 798.

43. *Id.* at 802.

44. *Id.*

45. Schwartz, *supra* note 24, at 515-16.

46. *McDonnell Douglas*, 411 U.S. at 802.

47. *Id.*

48. *Id.* at 804.

Proof of pretext[49] is the third and final prong of the *McDonnell Douglas* test.[50] An employee can show pretext if he or she proves that, despite the employer's stated reason for the rejection, the employer's decision was based on the employee's race.[51] In *McDonnell Douglas*, the Court found that Green had successfully presented a prima facie case of race discrimination but that McDonnell Douglas had successfully rebutted it.[52] The case was then remanded for the trial court to determine whether the explanations offered by *McDonnell Douglas* were merely pretextual.[53]

Thus, *McDonnell Douglas* establishes the standard for allocating proof in cases involving employee allegations of intentional unfair treatment by employers.[54] The test does not require that an employee present direct evidence of discrimination; rather, an employee need only establish an inference that discrimination has occurred. The employer then attempts to rebut this inference. If the inference is rebutted, the employee can prevail only by showing that the employer's rebuttal was pretextual.

Although it provided a basis for allocating burdens of proof in discrimination cases, *McDonnell Douglas* left many questions unanswered. In particular, the Court failed to specify how convincing an employee's showing of evidence must be in order to shift the burden of proof to the employer. The Court also failed to specify whether an employee's use of direct evidence affects the allocations of the burdens of proof. Finally, the Court did not explain what impact direct evidence or mixed motives would have on the burdens of proof in discrimination cases.

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49. Pretext is established when the employee shows that the "proffered reason was not the true reason for the employment decision." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980). Relevant evidence of pretext includes: (1) different treatment among similarly situated employees; (2) a history of particular treatment directed at the employee; (3) an employer policy regarding protected activities; and (4) the employer's attitude toward the protected class. *McDonnell Douglas*, 411 U.S. at 804-05.

50. *McDonnell Douglas*, 411 U.S. at 804.

51. *Id.* at 806 n.18.

52. *Id.* at 792.

53. *Id.*

54. Discrimination cases are divided into two categories. In disparate treatment cases, such as *McDonnell Douglas*, the court finds a specific intent to discriminate. Belton, *supra* note 22, at 1227. In disparate impact cases, the court eschews an intent analysis and determines whether apparently neutral employment practices have a negative impact on employees in protected classes. *Id.* at 1227-28.

The Court addressed the first of these unresolved issues in *Texas Dep't of Community Affairs v. Burdine*,[55] leaving the second and third issues, for the time being, unresolved. In *Burdine*, the Court determined that employees must establish their prima facie cases of discrimination by a preponderance of the evidence.[56] Additionally, the Court stated that the burden of persuasion remains with the employee throughout the action.[57] Once an employee establishes his or her case by a preponderance of the evidence, the burden shifts to the employer to articulate a nondiscriminatory reason for its action.[58] This is a burden of production and not a burden of persuasion.[59] The employer need not prove that the allegedly discriminatory act was motivated by a legitimate reason; the employer need only raise a genuine factual issue as to whether it discriminated.[60]

When the employer meets its burden of production, "the factual inquiry proceeds to a new level of specificity."[61] In this third prong of the *McDonnell Douglas* test, the employee's burden of rebutting the employer's showing of a legitimate reason for discharge "merges" with the employee's ultimate burden of persuasion.[62] The employee can satisfy the requirements of the third prong either directly, by convincing the court that "a discriminatory reason more likely motivated the employer," or indirectly, by showing that the employer's

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55. 450 U.S. 248 (1980). In this Title VII sex discrimination case, the employee accounting clerk applied for a promotion to the position of Project Director. *Id.* at 250. The position remained vacant for six months after her application, at which point the employer hired a male from another division to fill the position and fired the plaintiff as part of a reorganization. *Id.* at 250-51.

56. *Id.* at 252-53.

57. *Id.* at 253. By having the burden of persuasion, the employee is responsible for convincing the trier of fact that the employer intentionally discriminated against the employee. *Id.*

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

59. *Id.* at 255.

60. *Id.* at 254. The employer's burden when rebutting the employee's prima facie case has been the subject of some confusion. In Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978), the Court, within the space of one paragraph, described the defendant's burden to rebut as one of "proving" on the one hand and "articulating" on the other. The Court later resolved this confusion in a per curium opinion by stating that the employer merely had to "articulate" a legitimate, nondiscriminatory reason for its actions in order to meet its burden. Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). A vigorous dissent argued that the distinction between "proving" and "articulating" was illusory. *Id.* at 28 (Stevens, J., dissenting).

61. *Burdine*, 450 U.S. at 255.

62. *Id.* at 256.

evidence in the second prong was "unworthy of credence."[63] Hence, in addition to clarifying the degree of proof required in the employee's prima facie case, the Court in *Burdine* elaborated on the proof required in the third prong of the *McDonnell Douglas* test.[64]

In summary, *McDonnell Douglas* and *Burdine* represent the classic method of analyzing discrimination claims. Under this analysis, the employee establishes a prima facie case from which discrimination is inferred. The employer can rebut this inference by showing a legitimate nondiscriminatory reason for the employer's action. To prevail, the employee must then show either that the employer's explanation was pretextual or that a discriminatory reason "more likely motivated the employer."[65]

The test created in *McDonnell Douglas* and clarified in *Burdine* has been used by federal and state courts in determining whether an employee has a valid discrimination claim based on either age, sex, or race.[66] Nevertheless, traditional federal analysis leaves two critical questions unanswered. First, should a different analysis apply if the employee can show direct evidence of discrimination? Second, should the *McDonnell Douglas/Burdine* test apply to cases in which the employer has mixed motives for its actions?

III. FEDERAL COURTS GRAPPLE WITH *MCDONNELL DOUGLAS* LIMITATIONS

In the wake of confusion regarding causation and burdens of proof in discrimination cases,[67] the Supreme Court and

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63. *Id.*

64. *Id.* Prior to *Burdine*, the Supreme Court held that an employee could establish pretext by showing that the employee would not have been dismissed "but for" impermissible discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). *See also* Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1343 (9th Cir. 1987) (employee must show that age "made a difference" in the hiring decision); Kelly v. American Standard, Inc., 640 F.2d 974, 984 (9th Cir. 1981) (employee establishes "but for" causation); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (employee must show that "but for" illegal motive he would not have been fired).

Each of these cases uses the "but for" language to emphasize that the employee need not prove that the discriminatory motive was the sole factor in the employer's decision making process. *Cassino*, 817 F.2d at 1343; *Kelly*, 640 F.2d at 984-85; *Loeb*, 600 F.2d at 1019. For the Supreme Court's view of "but for" causation, *see infra* note 108.

65. *Burdine*, 450 U.S. at 252-56.

66. *See supra* note 18.

67. One commentator explains that the difficulty faced by the courts in resolving mixed motive cases stems from the assumption that the traditional pretext approach is

other federal courts have adopted two approaches to address deficiencies unearthed by federal and state applications of the *McDonnell Douglas* and the *Burdine* tests. One set of cases diverging from *McDonnell Douglas* applies a distinct method of allocating burdens of proof when employees show direct evidence of discrimination.[68] Another set of cases applies a different method of allocating burdens of proof when employers have mixed motives for their allegedly discriminatory actions.[69] The following sections describe both of these approaches and identify how they refine the traditional *McDonnell Douglas/Burdine* analysis.

A. Special Analysis When Employee Shows Direct Evidence

The Supreme Court barred the application of *McDonnell Douglas* to ADEA cases in which the employee's case is based on direct evidence of the employer's discriminatory acts in *Trans World Airlines, Inc. v. Thurston*.[70] In this pivotal case, the employer airline's employment policy allowed airline captains to continue employment as flight engineers after reaching age sixty.[71] According to the bidding procedures described in the company's collective bargaining agreement, a captain must have attained flight engineer status prior to his 60th birthday to qualify for continued employment. Under these procedures, captains would submit bids for flight engineer positions prior to their 60th birthdays. When a vacancy occurred, it would be assigned to the captain with the highest seniority who had a standing bid. If no vacancy occurred or if the captain lacked sufficient seniority, the captain would be retired on

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based on single motive decision making. Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 301 n.40 (1982). Some circuit court opinions illustrate this difficulty. For example, the Sixth Circuit found that once the plaintiff establishes that a defendant's motive was more likely discriminatory than not, the defendant must show that the "same decision" would have been made absent the discriminatory motive. Blalock v. Metal Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985). The Eighth Circuit found that once the employee establishes that an unlawful motive played a part in the employer's decision, the employer can limit the remedy afforded to the employee by showing that the same decision would have been made absent illegitimate motive. Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985). In contrast, the Third Circuit chose not to shift the burden of proof to the defendant at all. Lewis v. University of Pittsburgh, 725 F.2d 910, 915-16 (3rd Cir. 1983).

68. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

69. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989).

70. 469 U.S. 111 (1985). For a definition of direct evidence, *see supra* note 2.

71. *Trans World Airlines*, 469 U.S. at 115.

his or her 60th birthday.[72]

The Supreme Court found that this procedure constituted direct evidence of age discrimination.[73] Under the airline's procedure, captains who became disqualified to act as captains for reasons other than age were allowed automatically to displace flight engineers with less seniority. However, captains disqualified because of age were not allowed to displace flight engineers.[74] Because this procedure constituted direct evidence of discrimination, the Supreme Court held that the *McDonnell Douglas* test was "inapplicable."[75]

The Supreme Court noted that the shifting burdens of proof specified in *McDonnell Douglas* were designed to allow employees to have their "day in court" when no direct evidence was available.[76] If an employee establishes through direct evidence that his or her employer's action was discriminatory on its face, the only further inquiry is whether the employer offers an affirmative defense.[77] Although a narrow interpretation would limit the applicability of *Trans World Airlines* to ADEA actions, *Trans World Airlines* clearly represents a judicial willingness to stray from the narrow confines of *McDonnell Douglas* when employees present direct evidence of age discrimination.[78]

Some federal circuit courts have also cast aspersions on the use of the *McDonnell Douglas* test in the direct evidence setting. In *Lee v. Russell County Bd. of Educ.*,[79] the Eleventh Circuit noted that the *McDonnell Douglas* test does not offer the sole method of proving employment discrimination.[80] The court found that the first prong of *McDonnell Douglas*, in which the employee establishes the prima facie case by creating an inference of discrimination, is not necessary if the

72. *Id.* at 115-16.

73. *Id.* at 121.

74. *Id.* at 116-17.

75. *Id.* at 121.

76. *Id.* at 121 (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

77. *Id.* at 122.

78. The Court cited little authority for its position on direct evidence in *Trans World Airlines*. The first reference was to Teamsters v. United States, 431 U.S. 324 (1977). The *Teamsters* court noted that *McDonnell Douglas* did not mandate that employees introduce direct evidence. *Id.* at 358 n.44. However, *Teamsters* is actually not relevant: although the *McDonnell Douglas* test does not *require* direct evidence, the test does not *forbid* direct evidence.

79. 684 F.2d 769 (11th Cir. 1982).

80. *Id.* at 773.

employee's case is based on direct evidence.[81] The *Lee* court also found that the *McDonnell Douglas* analysis, as interpreted by *Burdine*, applies only to cases in which circumstantial evidence creates an inference of discrimination.[82] In direct evidence cases, the first prong of the *McDonnell Douglas* test is not necessary because the direct evidence itself establishes the employee's prima facie case rather than creating an inference of discrimination.[83]

In *Lee*, the court also rejected the second prong of the *McDonnell Douglas* test in situations where employees show direct evidence of discrimination.[84] The court found that the *McDonnell Douglas* test is inappropriate when discrimination is shown by "strong, direct"[85] evidence. When direct evidence establishes that the employer was motivated by racial discrimination, the employer's motive is unconstitutional, and the employer must meet the higher burden of showing that the same decision would have been reached absent the discriminatory factor.[86]

The court suggested two reasons for the higher burden in *Lee*. First, the court stated that "[t]o allow rebuttal of a proved case of discrimination simply by articulation of a plausible nondiscriminatory reason would be to 'stick [the employee] on the four prongs of McDonnell Douglas when he has already shown intentional discrimination by direct evidence.' "[87] This judicial favoritism for employees establishing discrimination cases by

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81. *Id.* at 774.

82. *Id.* In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980), the Court stated that "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."

83. *Lee*, 684 F.2d at 774.

84. *Id.*

85. *Id. Lee* does not define "strong, direct" evidence; the court is not clear about whether "weak, direct" evidence would not meet the evidentiary threshold for this analysis. In *Lee*, the school board had voted not to renew the contracts of three teachers. *Id.* at 771. The evidence that the court found persuasive included the testimony of the school principal and the superintendent of eduction, each of whom testified that the school board's actions were racially motivated. *Id.* at 774-75.

86. *Id.* (citing Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1976)).

87. *Lee*, 684 F.2d at 774 n.6 (quoting Ramirez v. Sloss, 615 F.2d 163, 169 n.10 (5th Cir. 1980)). Although the Eleventh Circuit may be right, it is quoting *Ramirez* out of context. In *Ramirez* the court used this language to criticize rigid application of the first prong of *McDonnell Douglas*, in which the plaintiff establishes the prima facie case. *Ramirez*, 615 F.2d at 169 n.10. The *Lee* footnote, however, uses this language to criticize the second prong of the *McDonnell Douglas* analysis, which allows the defendant to rebut the plaintiff's case. In fact, the *Ramirez* court applied the second prong of *McDonnell Douglas* without criticism. *Ramirez*, 615 F.2d at 169.

direct evidence implies that employers' motives as established by direct evidence are more unshakable than the motives established by inference. Therefore, a correspondingly higher showing must be made by the employer to rebut the employee's case. Second, the court implied that constitutional considerations, such as racial discrimination, may explain the higher burden of proof for employers rebutting direct evidence.[88]

The Eleventh Circuit, however, has also required a higher burden from employers in cases in which a specifically protected constitutional right was not at issue. For example, in *Buckley v. Hospital Corp. of America*,[89] the court applied a higher standard of proof when the employee provided direct evidence in an age discrimination case. The court found that three different methods of establishing a prima facie case of age discrimination could be used. An employee can produce (1) the evidence required to meet each of the three prongs of the *McDonnell Douglas* test,[90] (2) direct evidence of the employer's intent to discriminate,[91] or (3) statistical proof of a pattern of age discrimination.[92] Thus, the Eleventh Circuit distinguished direct evidence cases from *McDonnell Douglas* inferential cases. Moreover, the Eleventh Circuit clearly articulated this distinction by stating that employers bear a heavier burden when rebutting direct evidence than when rebutting an inference of discrimination created under the *McDonnell Douglas* test.[93]

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88. *Lee*, 684 F.2d at 774 (citing Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1976)).

89. 758 F.2d 1525 (11th Cir. 1985).

90. *Id.* at 1529.

91. *Id.* The court sets out this test in *Buckley* without citing authority for the direct method of proving discrimination. Several paragraphs later, however, the court cites *Lee* with approval on the issue of direct evidence; *Lee* is presumably intended to be the source of the test. *Id.* at 1529-30.

92. *Id.* at 1529. *See also* Pace v. Southern Ry. Sys., 701 F.2d 1383, 1388 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983). In *Buckley* the court refers to proving a prima facie case via statistical evidence without citing any authority. The court may have intended to reference the line of cases establishing discrimination by proof of discriminatory impact. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Any discussion of disparate impact is outside the scope of this Comment.

93. *Buckley*, 758 F.2d at 1529. Even before the Eleventh Circuit distinguished this heavier burden in *Buckley*, the First Circuit had placed a higher burden on employers in direct evidence cases. The First Circuit noted that the purpose of *McDonnell Douglas* is to provide "the employee his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the defendant-employer for whatever action was taken." Loeb v. Textron Inc., 600 F.2d 1003, 1014 (1st Cir. 1979). In dicta, the *Loeb* court determined that when an employee provides direct evidence of

These cases suggest that the federal courts do not mechanically apply the *McDonnell Douglas* test when interpreting the ADEA and Title VII. In *Trans World Airlines*, the Supreme Court clearly rejected the application of the *McDonnell Douglas* test to age discrimination cases under the ADEA when direct evidence was presented; however, the Court did not explain what standard would be used to measure the employer's attempt to rebut the employee's case. The Eleventh Circuit, also straying from the *McDonnell Douglas* test, filled this gap by allowing the employer to prevail if it could show that the same action would have been taken toward the employee absent discrimination.[94]

B. Special Analysis When Employers Act With Mixed Motives

Mixed motive cases provide another troublesome area for the application of the *McDonnell Douglas* test. In a mixed motive case, the employer's action against the employee is the product of both legitimate and illegitimate reasons.[95] Legitimate reasons include misconduct or lack of qualifications. Illegitimate reasons include racial or sexual stereotyping.[96] In analyzing mixed motive cases, courts face the reality that employers rarely base employment decisions on purely one reason.[97] If the courts strictly applied the *McDonnell Douglas* analysis in mixed motive cases, employees would never prevail because, by definition, employers in mixed motive cases always have at least one legitimate nondiscriminatory reason for their actions. In such a situation, an employer would rebut the employee's prima facie case with evidence of its legitimate

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a discriminatory motive, the *McDonnell Douglas* test might well confuse the jury. *Id.* at 1018. Instead, the court suggested that, in this type of case, the jury merely be instructed that the employee has to prove age discrimination by a preponderance of the evidence. *Id.* The *Loeb* opinion demonstrates the First Circuit's willingness to depart from the confines of *McDonnell Douglas* when the employee presents direct evidence of employment discrimination.

94. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982); *Buckley*, 758 F.2d at 1529-30. Note that the Eleventh Circuit's analysis is similar to the mixed motive approach adopted by the Supreme Court in Price Waterhouse v. Hopkins, 409 U.S. 228 (1989). *See infra* notes 98-121 and accompanying text.

95. Weber, *supra* note 5, at 498.

96. *Id.*

97. Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 113 (1986). "The mixed motive . . . problem is inherent; it reflects the contrast between the discrete nature of the regulatory prohibition and the richness of human interactions." *Id.*

motivation, and the employee would not be able to establish that the proffered reason was entirely pretextual.

The Supreme Court addressed the questions of causation and burdens of proof in mixed motive cases in *Price Waterhouse v. Hopkins*.[98] In *Price Waterhouse*, a female accounting associate, Ann Hopkins, sued her employer claiming sex discrimination when she was not promoted to a partnership position.[99] When the firm evaluated her bid for partnership, it received both positive and negative input from its partners. Partners in her home office praised her role in obtaining a $25 million contract and found that her performance was "virtually at the partner level."[100] None of the other eighty-seven partnership candidates, all of whom were male, had secured major contracts for the firm.[101] Most partners praised both her character and her accomplishments.[102]

Some partners, however, were not as supportive of Hopkins' candidacy and identified her as overly aggressive and abrasive with the staff.[103] She was criticized as being "macho";[104] one partner asserted that she "overcompensated for being a woman."[105] A key partner recommended that she should behave in a more feminine way to improve her likelihood of becoming a partner.[106] These comments suggested that Hopkins' sex played a role in the evaluation of her interpersonal skills.

The Court held that if an employee in a Title VII case shows that gender was a motivating factor[107] in the employer's decision, the employer will be found liable unless it shows that the same decision would have been made without, or "but for," consideration of gender.[108] The plurality had no difficulty rec-

98. 490 U.S. 228 (1989).

99. *Id.* at 231-32.

100. *Id.* at 233.

101. *Id.* at 234.

102. *Id.*

103. *Id.* at 234.

104. *Id.* at 235.

105. *Id.*

106. *Id.*

107. The Court defined "motivating" factor as follows: "[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." *Id.* at 250.

108. *Id.* at 244-45. The plurality reasoned that the "same decision" test applied in *McDonnell Douglas* was not the same as "but for" causation. *Id.* at 240. The plurality's allergy to the "but for" language appears to be based on the assumption that under a

onciling its decision in *Price Waterhouse* with *McDonnell Douglas* and *Burdine*. The Court noted that the application of the *McDonnell Douglas* test was limited to cases involving a single motive.[109] The *McDonnell Douglas/Burdine* test "makes no sense," the Court cautioned, when the employer's decision was the result of a mixture of legitimate and illegitimate motives.[110] However, under the test established in *Price Waterhouse*, if an employee showed an impermissible motive in a mixed motive case, the burden would shift to the employer to show that the same decision would have been made absent consideration of the employee's sex.[111] Justices O'Connor and White agreed with the plurality's result, although Justice O'Connor reached the result through different reasoning.[112]

"but for" test, the employee would be required to meet the "but for" standard. *Id.* at 241-42.

In contrast, Justice O'Connor viewed the plurality's test as one that placed a "but for" burden on the employer. "I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do." *Id.* at 262-64 (O'Connor, J., concurring). At least one commentator agrees with Justice O'Connor, arguing that the practical result of the plurality's decision is to place a burden on the employer to establish "but for" causation. Jean Calhoun Brooks, Note, *Employment Discrimination—The Supreme Court Liberates Title VII Mixed-Motive Cases From the Procrustean Bed of the McDonnell Douglas/Burdine Pretext Model*—Price Waterhouse v. Hopkins, 25 WAKE FOREST L. REV. 345, 372 (1990). However, Justice White urged, as does this Commentator, that we avoid "semantic discussions" regarding "but for" causation. *Id.* at 259 (White, J., concurring).

The plurality based its decision, in part, on an earlier Supreme Court case, Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1976), dealing with an employment decision made against an employee for his use of constitutionally protected speech. Note that this case was the same one relied upon, at least in part, in Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982).

109. *Price Waterhouse*, 490 U.S. at 247.

110. *Id.*

111. *Id.* at 244-45.

112. Justice O'Connor focused on the direct/indirect evidence distinction when rationalizing the departure from *McDonnell Douglas*. *Id.* at 270-72. (O'Connor, J., concurring). She asserted that the employer is not entitled to the same presumption of good faith offered by the *McDonnell Douglas* analysis when direct evidence indicates that the employer made "substantial reliance" on factors forbidden by Title VII. *Id.* at 271. Justice O'Connor's position was that the employee in a disparate treatment case can attempt to establish, using direct evidence, that an "illegitimate criterion was a substantial factor" in the decision. *Id.* at 276. At this point, the burden of persuasion would shift to the employer to prove that the employment decision would have been different if based only on legitimate considerations. *Id.* at 278.

Any substantive difference between Justice O'Connor's "substantial factor" and the plurality's "motivating" factor is unclear. Schwartz, *supra* note 24, at 534 n.240. O'Connor provided only a clue to the meaning of "substantial factor" when she asserted that stray remarks made outside of the decision-making context would not be substantial. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). For the plurality's definition of "motivating factor," *see supra* note 107.

Justice White agreed with the plurality's result and particularly with its reliance

Thus, the plurality limited *McDonnell Douglas* to cases involving a single motive.

The dissent in *Price Waterhouse* appropriately criticized the plurality's inconsistent rejection and subsequent acceptance of the "but for" standard of causation.[113] It criticized the departure from the *McDonnell Douglas/Burdine* paradigm in shifting the burden of proof to the employer to show an absence of discrimination.[114] The dissent cited *Burdine* in support of its contention that the Court intended the *McDonnell Douglas* test to apply where either direct or indirect evidence was offered.[115]

The dissent also reflected the concern that courts will be faced with an onerous burden when forced to decide whether to apply *McDonnell Douglas* or *Price Waterhouse*. The choice between tests would require that the lower courts make "subtle and difficult" distinctions.[116] The dissent further argued that the confusion in choosing and applying these tests would be magnified in the age discrimination context, where the employee has the right to a trial by jury[117] and where the jury is likely to be confused by complex burden shifting algorithms.[118] The dissent was persuaded that, instead of creating a new test, the *McDonnell Douglas* principle of requiring employees to retain the burden of persuasion offered the best procedure for determining whether discrimination had occurred.[119]

Price Waterhouse demonstrates that five justices on the Court have serious doubts about the efficacy of the *McDonnell Douglas* test in the mixed motive setting.[120] The results advo-

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on *Mt. Healthy*. *Price Waterhouse*, 490 U.S. at 258. He also agreed with Justice O'Connor's position that the employee should be required to show that the discriminatory motive was a "substantial factor" in making its decision but disagreed with the plurality position that the employer should be required to introduce objective evidence to carry its burden. *Id.* at 260-61.

113. *Price Waterhouse*, 490 U.S. at 281-86 (Kennedy, J., dissenting).

114. *Id.* at 286-287.

115. *Id.* at 287 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980)). The dissent also argued that the test would be limited to a small number of cases because it would only be applied in the few cases where direct evidence is available. *Id.* at 290-91.

116. *Id.* at 291.

117. The plaintiff does not have a right to trial by jury in Title VII actions. *See generally* Fayssoux, *supra* note 18, at 603.

118. *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting).

119. *Id.* at 292-93.

120. Although Congress has not yet clarified burdens of proof in mixed motive discrimination cases, the recently enacted amendment to Title VII specifically

cated by the plurality, White, and O'Connor share the least common denominator of shifting the burden of proof to the employer after the employee's strong evidentiary showing and of requiring the employer to prove that its actions would not have been different absent the discrimination. This result parallels the Eleventh Circuit's adoption of a "but for" standard in direct evidence cases.[121]

Thus, in both direct evidence and mixed motive cases, the Court has departed from the *McDonnell Douglas* model for allocating burdens of proof when employees offer direct evidence of discrimination. *Trans World Airlines* suggests that, once an employee establishes discrimination through direct evidence, no further inquiry is required to establish discrimination. In addition, the Eleventh Circuit has found that when employees present direct evidence of discrimination, their employers can only overcome the evidence by showing that they would have made the same decision "but for" the discriminatory behavior. The Court in *Price Waterhouse* applied a similar "but for" standard in mixed motive cases.

IV. WASHINGTON'S ANTI-DISCRIMINATION LAW

In addition to asserting claims under the ADEA and Title VII, employees in Washington may assert claims under Washington's own anti-discrimination statute.[122] Generally, Washington courts interpret this statute in accordance with the *McDonnell Douglas* test.

The state anti-discrimination statute declares acts of discrimination based on "race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap" to be a matter of state concern and creates

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acknowledged that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991).

121. *See supra* notes 83-85 and accompanying text.

122. WASH. REV. CODE §§ 49.60.010-.330 (1989). Cases in which employees asserted such claims include: Bennett v. Hardy, 113 Wash. 2d 912, 784 P.2d 1258 (1990) (age discrimination); Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 753 P.2d 517 (1988) (age discrimination); Stork v. International Bazaar, Inc., 54 Wash. App. 274, 774 P.2d 22 (1989) (age discrimination); Lewis v. Doll, 53 Wash. App. 203, 765 P.2d 1341 (1989) (race discrimination); Prater v. Kent, 40 Wash. App. 639, 699 P.2d 1248 (1985) (sex discrimination); Hollingsworth v. Washington Mut. Sav. Bank, 37 Wash. App. 386, 681 P.2d 845 (1984) (race discrimination); Kinney v. Bauch, 23 Wash. App. 88, 596 P.2d 1074 (1979) (sex discrimination).

a state agency to eliminate and prevent such discrimination.[123] The statute also defines employer practices that will be considered unfair. It prohibits employers from refusing to hire a person in a protected class unless the refusal is based on a bona fide occupational qualification.[124] It also bars the discharge of such employees based on age.[125] It bans discrimination through differences in compensation or in other terms or conditions of employment.[126] Finally, the statute prohibits discriminatory advertisements and application forms.[127]

The legislature has specified that the statute is to be construed liberally;[128] this provision has been acknowledged by the Washington courts.[129] The state statute, like its federal counterpart, however, does not contain a specific allocation of the burdens for proving discrimination.[130] As a result, Washington courts have looked to federal case law for guidance in construing the state statute.[131]

For example, in *Roberts v. Atlantic Richfield Co.*,[132] the Washington Supreme Court drew on "a series of federal cases" to hold that the *McDonnell Douglas* approach applies to age

123. WASH. REV. CODE § 49.60.010 (1990). To assert age discrimination under Washington law, the employee must be between the ages of forty and seventy. WASH. REV. CODE § 49.60.205 (1990).

124. WASH. REV. CODE § 49.60.180(1) (1990).

125. WASH. REV. CODE § 49.60.180(2) (1990).

126. WASH. REV. CODE § 49.60.180(3) (1990).

127. WASH. REV. CODE § 49.60.180(4) (1990).

128. WASH. REV. CODE § 49.60.020 (1990).

129. Holland v. Boeing Co., 90 Wash. 2d 384, 388, 583 P.2d 621, 622-23 (1978).

130. When the legislature originally enacted Wash. Rev. Code § 49.60.180, it specifically barred advertisements and job applications that "directly or indirectly" made reference to the employee's race, creed, color, or national origin. 1957 Wash. Laws ch. 37, § 9. This language suggests an understanding that not all discriminatory actions can be shown with direct evidence. It also suggests that either direct or indirect evidence can be the basis for the same cause of action. The Senate removed "directly or indirectly" from Wash. Rev. Code § 49.60.180 when passing the amendments proposed by House Bill 22; today that language is no longer a part of the statute. SENATE JOURNAL 814 (1961). Interestingly, the language was removed in the same year in which age discrimination was added to the statute as a prohibited activity. 1961 Wash. Laws ch. 100, § 1.

The deletion of this clause may evince an understanding that the appellations were moot because the statute never distinguished between the two types of evidence. Therefore, the legislature probably intended to treat both types of cases uniformly. The legislative materials provide no clue as to the purpose of the deletion.

131. *See supra* note 11 (examples of Washington courts following federal interpretation of Title VII and ADEA to allocate burdens of proof in discrimination cases).

132. 88 Wash. 2d 887, 568 P.2d 764 (1977).

discrimination cases brought under the Washington statute.[133] The court found that the employee bore the initial burden of presenting a prima facie case of discrimination.[134] A prima facie case is established when the employee shows that he or she (1) was within a protected class, (2) asked to retire early against his or her will, (3) doing work of apparently satisfactory quality, and (4) replaced by a younger person.[135] The burden then shifts to the employer to show that the employee was discharged for reasons other than age.[136] In applying this test, the *Roberts* court found that the plaintiff had not proved a prima facie case.[137] Subsequent cases have also demonstrated the difficulties faced by the employee in proving a prima facie case of age discrimination.[138]

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133. *Id.* at 892, 568 P.2d at 767.

134. *Id.*

135. The court's opinion recast the second of the four elements of the prima facie test articulated in *McDonnell Douglas* to reflect the factual elements of this case, which involved allegations of forced early retirement. *See Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 892-93, 568 P.2d 764, 767-68 (1977).

136. *Id.* at 892, 568 P.2d at 767. The court required that the employer "show" that the employee was discharged for non-age related reasons; this burden seems closer to the higher "prove" standard than to the "articulate" standard settled on by the Supreme Court in *Sweeney*. Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). *See supra* note 60. Note that *Roberts* predates *Sweeney*. The court's choice of words may have been unintentional.

The court in *Roberts* did not mention the third prong of the *McDonnell Douglas* test. Because the court found that the employee in Roberts failed to establish a prima facie case of age discrimination, it was not required to reach either the second or third steps of *McDonnell Douglas*. Thus, the court's discussion of the second step is dicta in this case.

137. *Roberts*, 88 Wash. 2d at 892, 568 P.2d at 767. In *Roberts* the court found that although the employee established the first and third elements of the prima facie case, the employee failed to establish that he was required to participate in the company's retirement program. *Id.* The court's decision that the employee was not discriminated against turned on the absence of compulsory participation in the retirement program. *Id.*

138. In Brady v. Daily World, 105 Wash. 2d 770, 718 P.2d 785 (1986), the court found that the employee did not establish a prima facie case of age discrimination. The court, citing *Roberts*, identified four factors that the employee must establish in order to prove a prima facie case: (1) The employee is in a protected class, (2) the employee was discharged, (3) the employee was doing apparently satisfactory work, and (4) the employee was replaced by a younger person. *Id.* at 777, 718 P.2d at 788. The court found that Brady did not satisfy the test's requirements because he was replaced by someone within the protected age group. *Id.* Because the prima facie case was not established, the court went no further in specifying standards for allocating burdens of proof.

Note that the fourth element of the prima facie case later fell from grace in both federal and state courts. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1012-13, 1014 (1st Cir. 1979); Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 363, 753 P.2d 517, 521 (1988).

The Washington Supreme Court did find that an employee established a prima facie case in *Grimwood v. University of Puget Sound*.[139] In so doing, the court cited with approval the elements of the prima facie case set out in *Roberts* and found the *McDonnell Douglas* test to be an appropriate device for allocating burdens in age discrimination cases.[140] However, the court warned, citing federal case law, that the *McDonnell Douglas* test "should not be viewed as providing a format into which all cases of discrimination should somehow fit."[141] Nevertheless, following *McDonnell Douglas*, the court explained that the employer must articulate "a legitimate, non-discriminatory reason for termination" once an employee establishes a prima facie case.[142] After the employer meets this burden, the burden shifts back to the employee to prove that the employer's reasons were pretextual.[143] Thus, the employee's burden is one of persuasion, and the employer's burden is one of production.[144]

When viewed together, these cases show that Washington courts have, for the most part, used the *McDonnell Douglas* approach when analyzing employment age discrimination cases. By adopting the *McDonnell Douglas* approach, Washington courts have inherited the analytical deficiencies in the *McDonnell Douglas* analysis. None of these cases make clear what kind of evidence should be used to establish the prima facie showing. Additionally, the foregoing cases cast no light on how to analyze cases in which only one of the employer's motives was discriminatory.

V. THE STATE RESPONSE TO THE FEDERAL CHALLENGE

Twenty-nine days after the Supreme Court decided *Price Waterhouse*, Division I of the Washington Court of Appeals decided *Stork v. International Bazaar, Inc.*[145] Mae Stork, a

139. 110 Wash. 2d 355, 753 P.2d 517 (1988). In *Grimwood*, the employee was the director of food services for a private university. *Id.* at 356, 753 P.2d at 517. The university fired him after 15 years of employment. *Id.* at 356-57, 753 P.2d at 517. The university provided him with a termination notice detailing specific acts of noncooperation that referenced an earlier memorandum to the plaintiff regarding his uncooperative behavior. *Id.* at 357, 753 P.2d at 517-18.

140. *Id.* at 362, 753 P.2d at 520.

141. *Id.* at 363, 753 P.2d at 521 (citations omitted).

142. *Id.* at 364, 753 P.2d at 521.

143. *Id.*

144. *Id.*

145. 54 Wash. App. 274, 774 P.2d 22 (1989). The briefs for *Stork* were written well

sixty-four-year-old sales clerk in her employer's retail business, applied for the position of store manager at the encouragement of the store's former manager.[146] Although Stork was qualified for the job, the employer hired someone else to fill the position, asserting that the successful candidate, unlike Stork, had a business administration degree as well as management, business, and exporting experience.[147] In spite of these apparently legitimate motives, the consultant who made the hiring decision told the former store manager that Stork was not promoted because she was "too old."[148] After the new manager was hired, he attempted to reduce the scope of Stork's duties because of her age.[149]

The court began its analysis by looking to federal cases construing the ADEA for guidance in age discrimination cases.[150] The court noted that there are three different methods of establishing a prima facie case: (1) by creating a *McDonnell Douglas* inference of intent to discriminate; (2) by establishing direct evidence of intent to discriminate; and (3) by introducing statistical proof of a discriminatory pattern.[151] The court went on to summarize the shifting burdens required under the *McDonnell Douglas* analysis after the employee establishes a prima facie case.[152] The results were then contrasted with what the court perceived to be the higher standard of proof required of the employer under *Buckley* and *Price Waterhouse*.[153] The court noted, however, that Washington courts had not resolved the issue of whether tests other than *McDonnell Douglas* would be recognized as the basis for a

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before the Supreme Court decided *Price Waterhouse*. Brief for Appellant, Stork v. International Bazaar, Inc., 54 Wash. App. 274, 774 P.2d 22 (1989) (No. 21251-6-I); Brief for Respondent, Stork v. International Bazaar, Inc., 54 Wash. App. 274, 774 P.2d 22 (1989) (No. 21251-6-I).

146. *Stork*, 54 Wash. App. at 276, 774 P.2d at 23.

147. *Id.*

148. *Id.*

149. *Id.* at 277, 774 P.2d at 24.

150. *Id.* at 278, 774 P.2d at 24.

151. *Id.* (quoting Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1529 (11th Cir. 1985)).

152. *Stork*, 54 Wash. App. at 278, 774 P.2d at 24.

153. *Id.* In the court's view of *Buckley* and *Price Waterhouse*, once the plaintiff establishes that the discriminatory factor played a substantial part in the employment decision, the defendant can rebut by showing that the same decision would have been made absent any illegitimate motive. *Id.* at 280, 774 P.2d at 25-26. "This is unlike the *McDonnell Douglas* analysis, where the employer's burden is to merely articulate a legitimate nondiscriminatory reason." *Id.* at 281, 774 P.2d at 26.

prima facie case.[154] As a result, the question of whether direct evidence of discrimination triggers a division of the burdens of proof that differs from *McDonnell Douglas* was one of first impression for the court.[155]

Because Stork had not raised the issue of a separate standard of proof in direct evidence cases, the court of appeals ruled that the issue could not be considered for the first time on appeal.[156] Nevertheless, the court concluded in lengthy dicta that it did not recognize a separate standard of proof for direct evidence age discrimination cases.[157]

In support of its position, the court first asserted that a "uniform procedure"[158] was needed for age discrimination actions. It characterized *Grimwood* as making "no distinction between direct and indirect evidence."[159] Note, however, that the reason the *Grimwood* court made no such distinction was that none was required on the facts; the employee in *Grimwood* presented no direct evidence of age discrimination. Thus, a separate test was not required.[160]

The court in *Stork* next argued that separate standards for burdens of proof for direct and indirect evidence cases would be confusing for the jury.[161] It feared that the jury would be puzzled when it was told that the employee bears the burden of proof but that when direct evidence is presented, the burden shifts to the employer.[162]

Finally, the court asserted that the distinction between direct and indirect evidence was moot because direct evidence could be used in the *McDonnell Douglas* scheme to show that the legitimate, nondiscriminatory reasons advanced by the

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154. *Id.* at 279, 774 P.2d at 25.

155. Stork v. International Bazaar, Inc., 54 Wash. App. 274, 279, 774 P.2d 22, 25 (1989).

156. *Id.* at 282, 774 P.2d at 26.

157. *Id.* at 283, 774 P.2d at 27.

158. *Id.* at 282, 774 P.2d at 26.

159. *Id.* at 282, 774 P.2d at 27.

160. Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 753 P.2d 517 (1988). Grimwood's own deposition demonstrated that he presented no direct evidence. When asked about the basis of his claim, he responded, "I don't feel I was given sufficiently good reason for my termination so I feel it has to be fundamentally another reason and that's all I can come up with." *Id.* at 361, 753 P.2d at 519. *Grimwood* is a classic situation of an employee alleging that an inference of discrimination was created by the employer's actions. Therefore, the court did not reach the question of whether a different type of proof would be required if direct evidence were available.

161. *Stork*, 54 Wash. App. at 282-83, 774 P.2d at 27.

162. *Id.* at 283, 774 P.2d at 27.

employer were pretextual.[163] Significantly absent was any discussion of the mixed motive/single motive dichotomy presented by the *Price Waterhouse* plurality. The court of appeals apparently viewed *Price Waterhouse* as providing a separate standard for direct evidence cases.[164]

Thus, the court in *Stork* established in dicta that it did not recognize two separate standards of proof in age discrimination cases. Rather, the court maintained the burden shifting analysis established by *McDonnell Douglas* and its progeny. Specifically, the pattern remained that the employee must first establish a prima facie case; the employer must then articulate a legitimate reason for the employee's discharge; finally, the employee must rebut the employer's reasons as pretextual.

In maintaining this framework in *Stork*, the court failed to apply the *Price Waterhouse* test and require the employer to show that it would have made the same decision absent consideration of age. Moreover, the court required the employee to prove that, "but for" age, the same decision would not have been made.[165] This result rejects the *Price Waterhouse* analysis and ignores the difficulties employees have in obtaining information about an employer's internal decision making process. Although the court presented policy reasons for departing from the federal analysis, it did not substantively analyze those policies or demonstrate how its result was superior. The court also failed to show that any of its rationale was based on the differing language of the state law.

Washington courts have done little to shed light on the

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163. *Id.* at 282, 774 P.2d at 27. This assertion may be an indirect reference to the language in *Burdine* asserting that, in the third prong of the *McDonnell Douglas* test, the employee has the option of using direct evidence to persuade the court that a discriminatory reason more likely than not influenced the employer. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980).

As noted earlier, several circuit courts have argued that this burden is carried out when the employee establishes "but for" causation. *See supra* note 64 and accompanying text. This result is the same "but for" causation standard as in *Price Waterhouse* but places the burden on the employee. Moreover, this result clearly controverts the policy behind placing the burden on the employer. As described by the Supreme Court, "[i]t is fair that . . . [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1982).

164. *Stork*, 54 Wash. App. at 280, 774 P.2d at 25. Justice O'Connor viewed direct evidence as the dispositive factor in shifting the burden of proof to the employer in *Price Waterhouse*, but direct evidence was not explicitly required by the plurality.

165. *Id.* at 285, 774 P.2d at 28.

Stork results in subsequent age discrimination cases.[166] In *DeLisle v. FMC Corp.*,[167] a forty-six-year-old sales representative for the employer corporation was dismissed.[168] His former sales territory was combined with another territory, and the combined territory was managed by a younger employee.[169] The trial court granted summary judgment in favor of the employer.[170]

The Court of Appeals, Division I, found that the employee would have prevailed on appeal if the evidence showed that he would have been selected to represent the new combined sales territory "but for" his age.[171] The court did not indicate whether the employer or the employee would have to meet this burden. Because the "but for" test was not being used to render judgment for the employee but rather to reverse summary judgment for the employer,[172] the decision sheds little light on the ultimate distribution of the burden of proof in age discrimination cases.

Another post-*Stork* case goes even further to suggest that Washington courts are willing to accept the "but for" standard of causation under some circumstances. In *Allison v. Housing Auth. of Seattle*,[173] the court held that when the employee alleges a retaliatory discharge, the employer must show that it would have made the same decision "but for" the protected activity.[174] Although anti-retaliation and anti-discrimination are treated in separate parts of the statute, the court noted

166. *See* Bennett v. Hardy, 113 Wash. 2d 912, 784 P.2d 1258 (1990) (court implied a cause of action under Wash. Rev. Code § 49.44.090 for employment discrimination and used the *McDonnell Douglas* analysis as articulated in *Grimwood* to determine whether discrimination had occurred); Bulaich v. AT&T Information Systems, 113 Wash. 2d 254, 778 P.2d 1031 (1989) (court applied *McDonnell Douglas* analysis to case involving no direct evidence of discrimination); DeLisle v. FMC Corp., 57 Wash. App. 79, 786, P.2d 839 (1990) (court placed "but for" burden on employer to resolve summary judgment issue); Hatfield v. Columbia Fed. Sav. Bank, 57 Wash. App. 876, 790 P.2d 1258 (1990) (court used modified version of *McDonnell Douglas* to show that employee had created an inference of discriminatory intent).

167. 57 Wash. App. 79, 786 P.2d 839 (1990).

168. *Id.* at 81, 786 P.2d at 840.

169. *Id.*

170. *Id.* at 82, 786 P.2d at 840.

171. *Id.* at 82, 786 P.2d at 841.

172. The court emphasized that this reversal was due to the fact that a summary judgment was being appealed, and "summary judgment in favor of employees is seldom appropriate in employment discrimination cases." *Id.* In addition, this case is of limited usefulness because it does not indicate which party needs to establish causation.

173. 59 Wash. App. 624, 799 P.2d 1195 (1990).

174. *Id.* at 628, 799 P.2d at 1197.

that it could "discern no logical reason for imposing different standards of causation in discrimination and retaliation cases."[175] The *Allison* court interpreted its holding as bringing the law of retaliation claims "into conformity" with the law of discrimination claims.[176] This interpretation suggests that, as in the *Stork* decision, the employee must establish the "but for" causation. However, the *Allison* court did not specifically identify who bears the burden of proving the "but for" causation. Thus, the language in *Allison* could be cited by a future court to ratify the *Price Waterhouse* result and bring state law into conformity with federal law.[177]

The Court of Appeals, Division III, also recently reversed a summary judgment decision in favor of an employer in an age discrimination case in *Hatfield v. Columbia Fed. Sav.*

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175. *Id.* at 628 & n.2, 799 P.2d at 1197 & n.2.

176. *Id.* at 628, 799 P.2d at 1197.

177. Some state courts have explicitly shifted the burden of proof to the employer in the mixed-motive setting. In Brown v. Denver Symphony Ass'n, 794 P.2d 1011 (Colo. App. 1989), the symphony claimed that Brown was fired due to gross insubordination involving a dispute as to whether the union's collective bargaining agreement covered complimentary breakfasts. *Id.* at 1012. Brown alleged that his supervisor made several statements indicating that he was too old for the job. *Id.* The court shifted the burden to the employer to justify its decision to terminate because "[i]t is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created . . . by his own wrong doing." *Id.* at 1013.

In Landals v. George A. Rolfes Co., 454 N.W.2d 891, 893-94 (Iowa 1990), the court held that if the employee presents direct evidence of discrimination and if the employer argues that other factors influenced the same decision, the employer bears the burden of proving that the same decision would have been made without the illegitimate factor.

In Smith v. FDC Corp., 109 N.M. 514, 787 P.2d 433 (1990), the court tracked the *Trans World Airlines* result and found that when the employee introduces direct evidence that the discrimination was due to an impermissible factor, no further inquiry is required to establish the employer's liability. *Id.*

Not all states have lightened the employee's burden of proof in the wake of *Price Waterhouse*. *See, e.g.*, West Virginia Inst. of Tech. v. West Virginia Human Rights Comm'n, — W. Va. —, 383 S.E.2d 490 (1989). Although *Price Waterhouse* was mentioned in a footnote, the West Virginia court reiterated its ruling in an earlier case that to prove disparate-treatment employment discrimination, the employee must show (1) that the employee belongs to a protected class, (2) that the employer made a decision adverse to the employee, and (3) that the same decision would not have been made absent the impermissible behavior. *Id.* at —, 383 S.E.2d at 494. The footnote cited *Price Waterhouse* for the proposition that all protected classes are treated the same under Title VII; the more substantive provisions of *Price Waterhouse* were ignored. *Id.* at —, 383 S.E.2d at 494 n.8.

Although not all state courts have adopted the *Price Waterhouse* analysis, the fact that several have done so indicates that the *Price Waterhouse* analysis can be helpful in examining burden of proof issues at the state level.

Bank.[178] When discussing whether the employee had successfully established a prima facie case of age discrimination, the court noted that the *McDonnell Douglas* framework did not provide the sole method for proving a prima facie case.[179] The court also remarked that the fourth element of the *McDonnell Douglas* prima facie test had been dispensed with in "cases where the plaintiff had introduced direct or circumstantial evidence of discriminatory intent . . . ."[180]

In contrast to federal courts, however, the *Hatfield* court did not see proof of discrimination by direct evidence as an alternative to a prima facie case creating an inference of discrimination. Rather, the court saw direct evidence as another method of creating that prima facie inference.[181] Because the court did not state whether the inference created by the employee was based on direct, circumstantial, or indirect evidence, the court failed to clarify whether the character of the evidence influenced the allocations of burdens of proof.[182]

Although the court stated that the requirements for proving the prima facie case could be modified if the employee presented direct evidence of discrimination, the employee in *Hatfield* apparently did not offer direct evidence of discrimination. Even though the court's comments about direct evidence

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178. 57 Wash. App. 876, 790 P.2d 1258 (1990). In *Hatfield*, the plaintiff was a vice president in the employer's loan department when a senior management official offered him a position coordinating a change in the bank's data processing system. *Id.* at 878, 790 P.2d at 1259. Although the conversion itself would take only eight months, the management official suggested that the job would continue for at least three to five years. *Id.* However, the position was eliminated as soon as the conversion was complete, and no comparable position was found for him. *Id.*

179. *Id.* at 882, 790 P.2d at 1261 (quoting Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 363, 753 P.2d 517, 520-21 (1988)).

180. *Hatfield*, 57 Wash. App. at 882, 790 P.2d at 1261 (quoting BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983)).

181. *Compare* Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) ("Where strong, direct evidence is presented, reliance on *McDonnell Douglas* as the exclusive means of proving the case and as the proper form of rebuttal is incorrect") *and* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination") *with Hatfield*, 57 Wash. App. at 882-83, 790 P.2d at 1261 (plaintiff created an "inference" of discriminatory intent without strictly meeting the *McDonnell Douglas* criteria).

182. The evidence used by the court included statements by Hatfield's supervisor that Hatfield was initially told that the position could involve growth. *Hatfield*, 57 Wash. App. at 882, 790 P.2d at 1261. The supervisor later claimed that the work was not being done, but the statements of other employees did not support this assertion. *Id.* at 882-83, 790 P.2d at 1261. This evidence appears to be more circumstantial than direct.

are probably dicta, they demonstrate a willingness on the part of at least one Washington court to soften the *McDonnell Douglas* requirements for proving a prima facie case if the employee produces direct evidence of discrimination.

The *Hatfield* court also suggested that a "but for" standard should be used to evaluate age discrimination. "The ultimate factor," said the court, "is whether age was a factor in a decision of an employer to terminate [a] . . . claimant and whether the age of the claimant made a difference in determining whether he was to be retained or discharged."[183] Although the court did not apply this test, it suggests a willingness to consider whether the employer would have made the same decision absent a discriminatory motive.

The *Hatfield* decision demonstrates that the Court of Appeals is willing to modify the *McDonnell Douglas* formula in age discrimination cases. The court cited commentary noting that the fourth element of the *McDonnell Douglas* prima facie case had been dropped in reduction-in-force cases and in cases where the employee "introduced direct or circumstantial evidence of the discriminatory intent . . . ."[184] Although *Hatfield* did not go so far as to shift the burden of persuasion in direct evidence cases, it recognized the value of reducing rigid requirements on the employee when a stronger showing of discrimination was made.

In conclusion, Washington courts have failed to reconcile *Stork* with *Price Waterhouse* in the two years since *Stork* was decided. In *Delisle* and *Allison*, the court mentioned a "but for" test without specifying which party bore the burden of proving it, and neither case dealt with the direct evidence or mixed motive questions. The court in *Hatfield* treated direct evidence as one method of creating a prima facie case of discrimination, suggesting in dicta that direct evidence of discrimination might reduce the employee's burden of proof under *McDonnell Douglas*.

Because *Stork* and subsequent Washington discrimination cases do not adequately explain the reasons for rejecting a separate test for direct evidence and mixed motive cases, the next Section addresses the criticisms of using a separate test for direct evidence and mixed motive cases, demonstrating that

183. *Id.* at 882, 790 P.2d at 1261 (quoting Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982)).

184. *Id.*

any perceived weakness in using such a test can be minimized by procedural tools.

VI. PROPOSAL FOR CHANGE

The *Stork* court chose not to adopt the *Trans World Airlines* or *Price Waterhouse* results because of policy concerns and perceived difficulties in their application. The *Price Waterhouse* dissent leveled similar criticisms.[185] This Section analyzes these criticisms and explores whether the courts could address these criticisms, where valid, without throwing the *Price Waterhouse* baby out with the bath water.

A. Confusing the Jury

In *Stork*, the court's primary criticism of *Price Waterhouse* was that instructing the jury about the appropriate test would be difficult, thus confusing the jury.[186] The potential for jury confusion can be tested by determining (1) whether having the direct evidence test is more confusing to juries than not having it, and (2) whether tools such as jury instructions, special verdicts, and summary judgment can be used to minimize potential confusion.

Would having a direct evidence test separate from the *McDonnell Douglas* test be more confusing to jurors than requiring the *McDonnell Douglas* analysis to be used regardless of the type of evidence introduced? Some commentators and jurists find application of the *McDonnell Douglas* analysis, which the *Stork* court applies, to be confusing as it stands.[187] For example, in *Price Waterhouse*, the dissenting Justice Kennedy acknowledged that courts have "long had difficulty" in the application of *McDonnell Douglas* and *Burdine*.[188]

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185. Price Waterhouse v. Hopkins, 490 U.S. 228, 288 (1989) (Kennedy, J., dissenting).

186. Stork v. International Bazaar, Inc., 54 Wash. App. 274, 282-83, 774 P.2d 22, 27 (1989). The *Price Waterhouse* dissent reached the same conclusion. 490 U.S. at 292 (Kennedy, J., dissenting).

187. Sutton, *supra* note 18, at 1219-22. The author notes that federal age discrimination cases, in contrast to the bulk of Title VII cases, are tried before a jury. As a result, problems arise in instructing the jury that were absent in the initial setting of *McDonnell Douglas*. *Id.* at 1219.

See also Fayssoux, *supra* note 18, at 626-27. The author argues that the application of *McDonnell Douglas* to the jury setting has raised a great deal of confusion, which is evident from the many reversals of verdicts entered by juries in favor of ADEA plaintiffs. The author believes that the problem is best remedied by allowing more weight to the juries' subjective assessment of witness credibility.

188. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

The Supreme Court attempted to streamline the application of the *McDonnell Douglas* test, and thus rid the test of its confusion, in *United States Postal Serv. Bd. of Govs. v. Aikens*.[189] The Court found that when the employer makes a showing of a legitimate, nondiscriminatory reason for the allegedly discriminatory act, the fact finder must then determine whether discrimination occurred.[190] The Court noted that "[a]t this stage, the *McDonnell-Burdine* presumption 'drops from the case.' "[191] Once the presumption drops, the fact finder's inquiry is not one of presumptions and rebuttals; rather, the fact finder is left to determine whether "the defendant intentionally discriminated against the plaintiff."[192] At least one Washington court has affirmed the *Aikens* clarification of the ultimate factual question in the state employment discrimination setting.[193] *Aikens* shows that, even in the nonjury trial setting, courts have addressed concerns about the complexity of the *McDonnell Douglas* formula and possible resulting confusion for the fact finder.

Such confusion, however, is not a foregone conclusion. When the judge uses procedural tools in concert with a separate test for direct evidence, the separate test will reduce rather than create juror confusion. Prior to trial, the plaintiff can move for a partial summary judgment on the legal issue of whether the employee's evidence is direct.[194] If the evidence is direct, the employee is entitled to an instruction based on *Trans World Airlines*. If the evidence is not direct, the court can give an instruction based on *McDonnell Douglas*.[195] The jury would have one clear test to apply that properly places a higher standard of proof on the employer. Thus, procedural tools such as summary judgments and jury instructions can

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189. 460 U.S. 711 (1982).

190. *Id.* at 715.

191. *Id.* (citations omitted).

192. *Id.* (citations omitted).

193. Hollingsworth v. Washington Mut. Sav. Bank, 37 Wash. App. 386, 392, 681 P.2d 845, 849 (1984).

> Where a case has been fully tried on the merits, framing the issue in terms of whether the parties met one of the steps of analysis unnecessarily evades the ultimate question of discrimination. The ultimate issue of discrimination is to be treated by the courts in the same manner as any other issue of fact.

(citations omitted). *Id.*

194. *See* WASH. CT. CIV. R. 56(d). If a party moves for partial summary judgment, the court will make an order specifying the facts that are without controversy. *Id.*

195. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1016-18 (1st Cir. 1979).

minimize possible confusion from multiple tests.[196]

Minimizing confusion through procedural tools is somewhat more difficult in mixed motive cases in which no direct evidence is established. In such cases, the jury should apply the *Price Waterhouse* test; however, deciding whether the case is a mixed motive case is a question of fact and therefore cannot be resolved by the judge prior to jury deliberations in a jury trial setting. Thus, a partial summary judgment motion would not resolve juror confusion in mixed motive cases in which no direct evidence is established.

Commentators and the courts cannot agree as to whether a mixed motive case could arise in which no direct evidence of discrimination exists. Assuming that such a case could arise, juror confusion could be minimized by the use of a special verdict.[197] If the judge finds no direct evidence of discrimination, the jury would be instructed to decide first if the employer's actions were the product of mixed motives. If the jury finds the answer to be yes, it then would apply the *Price Waterhouse* analysis. If the answer is no, the jury would fall back on the traditional *McDonnell Douglas* analysis.

Jury confusion is a legitimate concern. Nevertheless, years of potential jury confusion have not prevented either federal or state courts from applying the *McDonnell Douglas* analysis in both jury and non-jury settings. Possible jury confusion should not be raised as a bar to an otherwise useful test; rather, sources of jury confusion should be examined and reduced by the use of procedural tools.

B. Separate Test Unnecessary

The court's second critique was that a separate test to eval-

196. While instructing the jury, Washington judges must be careful to avoid the constitutional prohibition on commenting on matters of fact. WASH. CONST. art. IV, § 16. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *Id.* The constitution mandates that the judge avoid statements conveying personal attitudes about the merits of the case or allow the jury to infer a sense of the judges' own beliefs. *Id.* As long as the instruction merely states the law pertaining to the issue at hand, the judge has not made an impermissible comment. Hamilton v. Department of Labor & Indus., 111 Wash. 2d 569, 571, 761 P.2d 618, 619 (1988).

197. The trial court has discretion to submit interrogatories to the jury. Kadiak Fisheries Co. v. Murphy Diesel Co., 70 Wash. 2d 153, 165, 422 P.2d 496, 504 (1967). For examples of special verdict forms, *see* WASH. PATTERN JURY INSTRUCTIONS § 45.02 (1989).

uate direct evidence, as in *Stork*, was unnecessary.[198] In the eyes of the court, the employee can use direct evidence in showing employer pretext in the third prong of the *McDonnell Douglas* analysis to demonstrate that the employer's rationale was pretextual.[199] Although this approach works in the sole motive setting, it provides no solution in the mixed motive setting. This problem can best be demonstrated by an example.

Donald was a 54 year-old employee of Corporation A. His supervisor praised his work grudgingly, saying that although his work was slow; it was satisfactory "for an old guy." After one such incident, Donald cursed at the supervisor and left the work site for the rest of the day. Donald was fired for gross insubordination. Donald filed suit in state court, alleging that his employer discriminated against him on the basis of age in violation of Washington Revised Code chapter 49.60.

Donald's attorney, attempting to make a case under the *McDonnell Douglas* analysis, introduces enough evidence to present a prima facie case of discrimination. Donald's employer responds with evidence of company policies against using foul language in the work place and against leaving the work site during the work day without permission. The employer thus establishes a legitimate, nondiscriminatory reason for its action.

Donald uses direct evidence in rebuttal attempting to show that the employer's reason was pretextual. The direct evidence consists of Donald's supervisor's use of the "old guy" description. His employer, however, argues that cursing the supervisor in violation of work rules was probably a legitimate motive for discharge. His employer may argue that Donald's

198. Stork v. International Bazaar, Inc., 54 Wash. App. 274, 282, 774 P.2d 22, 27 (1989).

199. *Id.* Although the court cited no authority for this criticism in *Stork*, its origin is found in the *Price Waterhouse* dissent. Price Waterhouse v. Hopkins, 490 U.S. 228, 288 (1989) (Kennedy, J., dissenting). Justice Kennedy argued that *Burdine* is appropriate for direct and indirect evidence cases. Under *Burdine*, the employee can prevail in the final stage of the *McDonnell Douglas* analysis "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Price Waterhouse*, 490 U.S. at 288; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1980).

The *McDonnell Douglas* opinion does not explicitly illuminate this issue. However, *McDonnell Douglas* suggests categories of evidence that might be used in the final stage of the employee's case. These categories include treatment by the employer, the employer's reaction to legitimate employee civil rights involvement, and the employer's policy and practice regarding minority employment. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

work was actually too slow to be satisfactory. If the employer can prove these allegations, it will succeed in establishing a legitimate reason for Donald's dismissal. The employer will thus prevail unless Donald can draw on other evidence to show that the employer's action was more likely than not the result of discrimination. The finder of fact has made its decision without even considering whether the employer's legitimate reason was overshadowed by an illegitimate one.

By contrast, under the proposed analysis, the judge could make a preliminary finding that Donald's evidence was direct and that the jury should apply the *Price Waterhouse* test. In order to return a finding for the employer, the jury would have to find that Donald would have been fired without the age-related conduct. Under this analysis, the jury is more likely to return a verdict for the employee when the discharge was prompted by an illegal motive.

This example illustrates the insufficiency of the *Stork* court's solution for applying *McDonnell Douglas* in mixed motive situations.[200] Several courts, including the Supreme Court and the Washington State Supreme Court, have cautioned against the rigid application of the *McDonnell Douglas* formula.[201] Courts have thus adapted the *McDonnell Douglas* test to meet the needs of specific types of cases.[202] As the example above illustrates, the employee is less likely to prevail under the *McDonnell Douglas* test in mixed motive discrimination settings. Thus, the court in *Stork* is misguided in its belief that the separate direct evidence test is unnecessary.

C. Limited Usefulness

Another criticism leveled at the *Price Waterhouse* result was that it is applicable only in those few cases where "direct

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200. The insufficiency of *McDonnell Douglas* was the stimulus for the *Price Waterhouse* decision. *Price Waterhouse*, 490 U.S. at 248. The plurality found that adoption of the *McDonnell Douglas/Burdine* approach would require one to pretend that the employer's decision was based on a single factor. *Id.*

201. Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) (court held that application of *McDonnell Douglas* should not be "rigid, mechanized, or ritualistic"); Grimwood v. University of Puget Sound, 110 Wash. 2d 355, 362, 753 P.2d 517, 521 (1988) (court noted that the steps of the *McDonnell Douglas* prima facie test were not absolutes).

202. In Holland v. Boeing Co., 90 Wash. 2d 384, 391, 583 P.2d 621, 624 (1978), the court distinguished between the showing required to meet the burden of proof in McDonnell Douglas, a failure-to-employ case, and the case before the court, which arose from an allegedly discriminatory transfer.

and substantial proof" of an unlawful motive are accompanied by legitimate reasons for the employers actions.[203] This argument has little merit. If a different analysis provides a more just result that more clearly realizes the goal of anti-discrimination, that analysis is beneficial even if the number of cases it affects is small.

D. Differing State and Federal Purposes

In *Stork*, the court was careful to note that Washington courts have not previously considered whether techniques other than *McDonnell Douglas* can be used to establish a prima facie case of age discrimination.[204] Implicit in this statement is that what is appropriate for the federal goose may be inappropriate for the state gander. One reason for such a difference might be differing state and federal legislative purposes. If different purposes exist for state and federal age discrimination statutes, the courts might be justified in applying different tests. However, this is not the case.

The Washington statute invokes the state's police power to protect the public welfare, health, and peace to determine that "practices of discrimination" threaten the "institutions and foundation of a free democratic state."[205] The Act's goal is to eliminate and prevent discrimination.[206]

The ADEA's statement of purpose is less comprehensive. According to the statement, Congress made findings regarding disadvantage to older workers and the burden of age discrimination based upon the flow of goods in commerce.[207] It then identified the purpose of the statute as threefold: to promote employment based on ability, not age; to ban "arbitrary" employment discrimination; and to help employers and employees resolve problems resulting from age discrimination.[208] The federal statement of purpose is less aggressive than the corresponding state statement of purpose.[209]

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203. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

204. Stork v. International Bazaar, Inc., 54 Wash. App. 274, 279 774 P.2d 22, 25 (1989).

205. WASH. REV. CODE § 49.60.010 (1990).

206. *Id.*

207. 29 U.S.C.A. §§ 621(a)(1)-(4) (West 1981 & Supp. 1990).

208. *Id.*

209. In a comparison of the federal and state statutes, one commentator found WASH. REV. CODE ch. 49.60 to be more comprehensive in purpose and broader in coverage than the federal statute. Janice A. Grant, Comment, *Age Discrimination in Employment: A Comparison of the Federal and Washington State Statutory*

Because the statement of purpose in Washington's statute more aggressively targets the prevention and elimination of age discrimination than the federal statute, no statutory basis exists for arguing that the state courts should interpret the statute to place a heavier burden on employees than that shouldered by employees in federal courts. Thus, state distinctions from federal legislation do not explain why the court in *Stork* chose not to incorporate the *Price Waterhouse* result into its interpretation of state law. Indeed, if the differences between state and federal policy have any impact, it is likely to increase the employer's burden in state discrimination cases.

VII. CONCLUSION

The federal courts have departed from a rigid *McDonnell Douglas* analysis in discrimination cases involving direct evidence and mixed motives. *Trans World Airlines* released employees from having to meet the *McDonnell Douglas* burden in direct evidence cases. The federal standard established in *Price Waterhouse* shifted the burden of proof to the employer in mixed motive cases. Washington courts have avoided such a departure to the detriment of employees who have been harmed by employers who are motivated, in part, by impermissible factors. By adopting the federal standard established in *Price Waterhouse*, Washington can place the burden of proof in direct evidence and mixed motive age discrimination cases with employers and thus realistically distribute the burdens, taking into account the employers' superior access to evidence of their own intent. Federal age discrimination legislation is designed to promote employment based on ability, to ban "arbitrary" discrimination, and to resolve problems flowing from age discrimination. The more aggressively worded state statute is designed to eliminate and prevent discrimination. Both policies are furthered by forcing the employer to use its superior access to the proof of age discrimination when it is faced with direct evidence of discrimination or when its motives for acting are mixed. A separate standard for direct evidence and mixed motive cases would more clearly reflect the broad policies supporting both federal and state anti-discrimination law.

Requirements and Recent Developments, 16 GONZ. L. REV. 637, 640-41 (1981). The author noted, however, that courts have applied a liberal construction to both statutes.