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The Respective Burdens of Proof in Title VII Cases: Price Waterhouse v. Hopkins Confuses the Issue

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THE RESPECTIVE BURDENS OF PROOF IN TITLE VII CASES: *PRICE WATERHOUSE v. HOPKINS* CONFUSES THE ISSUE

In August, 1982, a prestigious public accounting firm, Price Waterhouse, ("PW")[1] nominated 88 candidates for partnership. Only one candidate was a woman. Her name is Ann Hopkins. This Note focuses on her employment discrimination action against PW, which the United States Supreme Court decided on May 1, 1989.[2]

Price Waterhouse v. Hopkins is a victory for Ms. Hopkins and millions of employed women, and other minorities throughout the United States. The opinion has several significant aspects. First, the case defines the respective evidentiary burdens of a plaintiff-employee and defendant-employer in a Title VII[3] suit, when the plaintiff-employee has shown that the defendant-employer's employment action resulted from a consideration of legitimate and illegitimate factors[4] (i.e., "mixed motive case"). Second, the express allocation of the burdens of proof resolved a conflict among the various Courts of Appeals. Third, the Court failed to issue a majority opinion. This is significant in light of the current republican administration and its influence on what is now a conservative Court.

This Note will delineate the background and facts which led to the Court's decision in *Price Waterhouse*. The Note will discuss the opinions, current ramifications and its future impact on discrimination decisions of a more conservative Court.

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[1] Price Waterhouse (Price) is an accounting firm which operates as a partnership, providing services in tax, auditing, and management consulting to businesses and governmental agencies. *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1111 (D.C. 1985).

[2] Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

[3] Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000(e)-2000(h). Title VII provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

(Along with Title VII, Congress has enacted the following statutes to deal with discrimination: the Civil War Reconstruction statutes, 42 U.S.C. § 1981; the Equal Pay Act of 1963, 29 U.S.C. § 206; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 , and the Rehabilitation Act of 1973, 29 U.S.C. § 701-796. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 39 (1988)).

[4] "Legitimate" factors are factors not related to gender, and "illegitimate" factors are factors related to gender. *See generally* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

BACKGROUND

In *Bradwell v. Illinois*,[5] Justice Bradley stated, "the natural and proper delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[6] Justice Bradley was a supreme legal intellect, but his perception of the capability of women proved to be totally erroneous.

During the 1980's, women have comprised approximately 45% of the nation's workforce.[7] While most women earn their living in the "traditional" fields, more and more women are entering "nontraditional" fields.[8] For example, in 1987, approximately 7% of the nation's workforce was engineers; this is impressive when compared to the 1971 figure of 0.8%. Additionally, in 1971, only 5.7% of the nation's police officers and detectives were women; that figured doubled to 11.4% in 1987. The largest increase has occurred in the truck driving field; while less than 1% of the nation's truck driver's in 1982 were women, today women comprise 11.2% of the field.[9]

Despite their increasing numbers, women are continually subjected to sexual discrimination at work. As Congresswoman Mary Rose Oakar notes, "[despite legislative attempts], women continue to earn a significantly lower percentage of wages [than men] . . . In terms of annual earnings, women's wages [are only] . . . 64.3 percent of men's."[10]

Additionally, sexual discrimination occurring today will impact the workplace in the future. Our current ideals and values influence our future attitudes. As Congresswoman Claudine Schneider notes: "[d]iscrimination now will affect us years into the future—in the next decade, seven out of ten new workers will be women."[11] Statistics support Congresswoman Schneider's statements. The results of a study conducted by the Congressional Task Force on Women, Minorities, and the Handicapped in Science and Technology indicate that in the year 2000, approx-

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[5] 83 U.S. (16 Wall.) 130 (1873).

[6] *Id.* at 141 (Bradley, J., concurring).

[7] Stevens, *No One is Expendable*, 69 NAT'L BUS. WOMAN, Aug./Sept., 1988, at 19.

[8] *Where Few Women Have Gone Before*, 69 NAT'L BUS. WOMAN, Aug./Sept., 1988, at 20. *See also* Taub, *Keeping Women in Their Place: Stereotyping per se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345 (1980). (in 1987, 98% of the nation's secretaries were women, 93% of the nation's registered nurses were women, and 72% of the nation's teachers were women).

[9] All statistics represent survey results of U.S. Bureau of Labor Statistics as appearing in National Business Woman, *supra* note 8.

[10] Oakar, *Why We Need Pay Equity Reforms*, 69 NAT'L BUS. WOMAN, Feb./Mar., 1988, at 15. For an enlightening discussion on sexual discrimination as it relates to employee pension programs as well as insurance, *see* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982).

[11] Schneider, *Applause for BPW's Supporting Role in Enacting the Civil Rights Restoration Act*, 69 NAT'L BUS. WOMAN, Apr./May, 1988, at 28.

imately 65 percent of new entrants into the nation's labor force will be women.[12] In view of the long term effects of sexual discrimination, cases such as *Price Waterhouse* set the mode for the future.

FACTS

The plaintiff's, Ann B. Hopkins, career with PW's Office of Government Services (OGS) was progressing quite well.[13] As a senior manager, she played a key role in winning multi-million dollar contracts with the Farmers Home Administration[14] and the State Department.[15] It is estimated that these two contracts brought the firm $34-44 million in revenues. The firm's senior partner characterized the contract with the State Department as a "leading credential" that brought the firm business with other federal agencies.[16] As a result of her efforts, Ms. Hopkins earned a reputation as a highly competent leader who demanded a great deal of herself and her support.[17]

When she was proposed as a partnership candidate in August, 1982, her record for successfully securing major contracts was unmatched by any of the other 87 partnership candidates. Despite her performance, women partners were not commonplace at PW. In fact, at OGS, all partners were men; even more astonishing, only seven out of 662 PW partners were women.[18]

Although the OGS partners unanimously endorsed her for partnership, other partners were not so eager to select a female peer. The evaluations they submitted to the Admissions Committee, and their statements at trial, included the following comments: [she lacks] "interpersonal skills"; [she needs] "a course at charm school"; "she may have overcompensated for being a woman"; [concerns over her use of profanity arose] "because she is a lady using foul language"; "several partners [regard her profane language] as one of the negatives"; and [she is] "macho."[19] The most offensive comment, however, came from a partner who advised Ms. Hopkins to "walk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[20]

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[12] *No One is Expendable, supra* note 7, at 19.

[13] In 1982, Ms. Hopkins worked for OGS. OGS specialized in designing and implementing consulting and management projects for government offices. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.C.D.C. 1985).

[14] Hopkins v. Price Waterhouse, 825 F.2d 458, 462 (D.C. Cir. 1987).

[15] *Hopkins*, 618 F. Supp. at 1112.

[16] *Hopkins*, 825 F.2d at 462.

[17] *Hopkins*, 618 F. Supp. at 1112-13.

[18] *Id.* at 1112.

[19] *Hopkins*, 825 F.2d at 463, (citing various portions of the trial court transcript and plaintiff's and defendant's exhibits).

[20] *Hopkins*, 618 F. Supp. at 1117.

Subsequently, Ms. Hopkins was denied partnership in 1982. The Admissions Committee recommended that her candidacy be held for a year and resubmitted at that time.[21] However, the following year, partners in the OGS refused to repropose her.[22]

When she was not reproposed for partnership consideration, Ms. Hopkins sued PW in the United States District Court for the District of Columbia. She alleged a violation of Title VII of the Civil Rights Act of 1964.[23] She contended that the firm's partnership decision making process was tainted by sex discrimination.[24]

The District Court held for Ms. Hopkins on the liability issue. The court found that she had sufficiently demonstrated that her gender was a factor in PW's decision.[25] The court ruled that once a plaintiff demonstrates the presence of discriminatory animus, the plaintiff is entitled to equitable relief, unless the employer can show, *by clear and convincing evidence*, that the employment decision would have been the same without the discrimination.[26] The court found that PW had failed to meet this standard.[27]

The Court of Appeals for the District of Columbia Circuit affirmed this portion of the District court's decision.[28] The Court of Appeals held that in a Title VII action, once a plaintiff has shown that discriminatory animus played a significant role in the contested employment decision, the burden shifts to the employer to show by clear and convincing evidence that the discriminatory factor was not determinative.[29] If the employer satisfies this burden, there is no liability.[30]

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[21] *Hopkins*, 825 F.2d at 463.

[22] *Id.*

[23] 42 U.S.C. § 2000(e)-2000(h).

[24] *Hopkins*, 825 F.2d at 468.

[25] *Hopkins*, 618 F. Supp. at 1120.

[26] *Id.* The District Court stated: "once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination." *Id.* (citing with approval Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); Day v. Mathews, 530 F.2d 1083, 1085-86 (D.C. Cir. 1976).

[27] *Id.*

[28] *Hopkins*, 825 F.2d at 473. (The Court of Appeals reversed and remanded the District court's decision as to damages. *Id.* at 473.)

[29] *Id.* at 471 (citing with approval Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983)).

In *Toney*, the D.C. Circuit restated the doctrine it earlier espoused in Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976): once discrimination is established, the burden shifts to the employer to show, by "clear and convincing evidence," that the discrimination was not the effective cause of the adverse employment decision. *Toney* v. Block, 705 F.2d at 1366.

[30] *Hopkins*, 825 F.2d at 470-71. (Compared with the District court, which ruled that employer who proved this would merely avoid equitable relief.) *Hopkins*, 619 F. Supp. at 1120.

When the Court of Appeals decided Ms. Hopkins' case, the courts of appeals were in conflict over the parties' burdens of proof. The First, Second, Sixth, and Eleventh Circuits held that once the plaintiff demonstrated that discriminatory animus was a motivating factor in the employer's decision, the employer escaped liability by proving that it would have made the same decision in the absence of discrimination.[31] However, these courts, unlike the D.C. Circuit, did not require clear and convincing evidence. (The D.C. Circuit (in *Price Waterhouse*) and the Ninth Circuit.)[32] A different standard existed in the Third, Fourth, Fifth, and Seventh Circuits, where the plaintiff was required to show that "but for" discriminatory animus, the decision would have been in her favor.[33]

In *Bibbs v. Block*,[34] the Eighth Circuit, sitting *en banc*, stated an entirely different standard. In *Bibbs*, the court stated that once the plaintiff established a Title VII violation, the burden of production *and* persuasion shifted to the defendant.[35] However, under *Bibbs*, the defendant could overcome this burden by a mere preponderance of the evidence.[36]

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[31] Price Waterhouse v. Hopkins, 109 S. Ct. at 1784 n.2; *see also e.g.*, Blalock v. Metal Trades, 775 F.2d 703 (6th Cir.1985) (once employee demonstrated that religious discrimination was motivating factor in discharge, employer must show that, even absent the discrimination, the employee still would have been discharged); Fields v. Clark, 817 F.2d 931 (1st Cir. 1987) (when plaintiff proves "by direct evidence" that sexual discrimination was a "motivating factor" in employment decision, employer must show, by a preponderance of evidence, that decision would have been the same absent the discrimination); Berl v. Westchester County, 849 F.2d 712 (2d Cir. 1988) (under "dual motivation/same decision" test, plaintiff has initial burden of proving that discriminatory motive played "substantial part" in employer's decision; burden then shifts to employer to show it would have made same decision in absence of discriminatory conduct); Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (where employee presented direct evidence of sexual discrimination, employer must show that sexual bias "had no relation whatsoever to the employment decision").

[32] *Price Waterhouse*, 109 S. Ct. at 1784 n.2; *see also, e.g.*, Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 n.1 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) ("but for" test requires plaintiff prove that discriminatory reason was a determinative factor in employment decision); Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985) (in suit alleging employer retaliation, employee may disprove legitimate reason for employer adverse action by proving that "the adverse action would not have occurred 'but for' the protected conduct"); Peters v. City of Shreveport, 818 F.2d 1148 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988) ("but for" causation standard applies to both Title VII and Equal Pay Act Claims); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1068 (1988) (under "but for" standard, plaintiff must show discriminatory motive was a "determining factor" in the challenged decision).

[33] *Price Waterhouse*, 109 S. Ct. at 1784 n.2; *see also e.g.*, Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175; Ross v. Communications Satellite Corp., 759 F.2d 355; Peters v. City of Shreveport, 818 F.2d 1148; McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659.

[34] 778 F.2d 1318 (8th Cir. 1985) (en banc). In *Bibbs*, plaintiff brought suit alleging he was denied a promotion because of his race. The *Bibbs* court found that plaintiff established a violation of Title VII. *Id.* at 1319. As such, the burden of production and persuasion shifted to the defendant to show that the proven discrimination did not cause the employment decision. *Id.* at 1324 (citing with approval King v. Trans-World Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984)).

[35] *Id.* at 1324 (citing with approval King v. Trans-World Airlines, Inc., 738 F.2d 255, 259).

[36] *Id.* at 1325.

In an effort to resolve this conflict, the Supreme Court granted certiorari in *Price Waterhouse v. Hopkins*[37].

Prior to *Price Waterhouse*, the Supreme Court decided numerous Title VII cases. The most important of these were *McDonnell Douglas Corporation v. Green*[38] and *Texas Department of Community Affairs v. Burdine*.[39]

In *McDonnell Douglas*, the Court stated that in a disparate treatment case, when an adverse employment action is taken, the plaintiff carries the initial burden of proof of establishing a prima facie case of discrimination.[40] The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[41]

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[37] 108 S. Ct. 1106 (1988).

[38] 411 U.S. 792 (1973). In *McDonnell Douglas*, plaintiff, a black man hired by defendant as a mechanic, brought suit alleging a violation of Title VII of the Civil Rights Act of 1964. Plaintiff asserted that his discharge from employment as well as defendant's general hiring practices were racially motivated. The precise issue presented was "the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* at 800. A unanimous Court, per Justice Powell, held that Title VII plaintiffs carry the "initial burden" of establishing "a prima facie case of racial discrimination." *Id.* at 801. A plaintiff does this by establishing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants' (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications." *Id.* at 802. If the plaintiff establishes a prima facie case, the burden shifts to the defendant-employer to "articulate some legitimate, nondiscriminatory reason for the employer's rejection." *Id.* at 803. If the defendant does this, the plaintiff is afforded a fair opportunity to demonstrate that the defendant's "reason" was in fact "pretext." *Id.* at 804.

[39] 450 U.S. 248 (1981). In *Burdine*, plaintiff, a female former employee, brought suit against her former employer alleging that she was denied a promotion and subsequently terminated because of her sex. Justice Powell again authored a unanimous opinion, in which the Court embraced the doctrine it had earlier espoused in *McDonnell Douglas*, discussed *supra* note 38. In *Burdine*, the Court more clearly defined the "burden" which "shifts" to the employer after the plaintiff has proved a prima facie case of discrimination. The Court stated that the Title VII plaintiff's prima facie case is the equivalent of showing "an infuence of discrimination." *Burdine*, 450 U.S. at 254. Thus, the burden shifting to the defendant-employer "is to rebut the presumption of discrimination." *Id.* at 254; *see infra* note 45. The Court stated succinctly and unequivocally that the "ultimate burden of persuasion" remains with the plaintiff "at all times." *Burdine*, 450 U.S. at 253.

[40] *McDonnell Douglas*, 411 U.S. at 802.

[41] *Id.* "Disparate treatment" should be distinguished from "disparate impact." "Disparate treatment" means that the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or natural origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "Disparate impact" involves employer practices which are facially neutral but "fall more harsh on one group than another and cannot be justified by business necessity." *Id.* at 336 n.15.

Prior to the Court's recent decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), there were different evidentiary burdens placed upon the employer depending upon whether the case involved disparate treatment or disparate impact. In disparate treatment cases, proof of discriminatory motive by the plaintiff was critical. *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). For this reason, the burden of persuasion remained with the plaintiff at all times. *Burdine*, 450 U.S. at 253 (*see supra* note 39). Conversely, in disparate impact cases, proof of discriminatory motive was not required. *Teamsters*, 431 U.S. at 336 n.15 (citing Griggs v.

In *Burdine*, the Court clarified the "intermediate evidentiary burdens" it introduced in *McDonnell Douglas*.[42] In *Burdine*, the Court stated that the ultimate burden of persuasion remains with the plaintiff at all times.[43] The plaintiff's establishment of a prima facie case creates a rebuttable presumption that the employer unlawfully discriminated against the employee.[44] The defendant may rebut this presumption by producing evidence that the employee was rejected for a legitimate/nondiscriminatory reason.[45]

With *McDonnell Douglas* and *Burdine* as its primary guides, the Court set out to decide *Price Waterhouse v. Hopkins*.

THE DECISION

The Court could not reach a majority opinion in *Price Waterhouse*.[46]

Justice Brennan's plurality opinion focused on the following areas:

A. *Causation* — Whether the burden of persuasion shifts to the employer in a mixed-motive case;[47]

Duke Power Co., 401 U.S. 424, 430-32 (1971)). Rather, the plaintiff was attempting to prove that an employment practice had an adverse effect on a class of employees. *Atonio*, 109 S. Ct. at 2131 (Stevens, J., dissenting). Thus, after the plaintiff established sufficient proof of discriminatory impact, the burden of persuasion shifted to the employer. *See id.*, 109 S. Ct. at 2130 n.14 (Stevens, J., dissenting). After *Atonio*, in relation to the evidentiary burdens, there is no difference between disparate treatment and disparate impact cases. In *Atonio*, the Court abandoned earlier precedent and held that, in disparate impact cases, the "burden of persuasion . . . remains [at all times] with the . . . plaintiff." *Id.* at 2126.

[42] *Burdine*, 450 U.S. at 253.

[43] *Id.*

[44] *Id.* at 254.

[45] *Id.* In *Burdine*, the Court explained the manner in which the defendant may produce evidence sufficient to rebut the presumption accordingly: "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. [citation omitted] It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Burdine*, 450 U.S. at 254-55. If the defendant carries this burden, the plaintiff is then given the opportunity to prove, by a preponderance of the evidence, that the "legitimate, nondiscriminatory reason" offered by the defendant were not actually "true reasons." *Id.* at 253 (citing with approval McDonnell Douglas Corp. v. Green, 411 U.S. at 804). (*See infra* note 98).

[46] *Price Waterhouse*, 109 S. Ct. at 1780. Justice Brennan announced the judgment of the Court; Justice Marshall, Blackmun, and Stevens joined in Justice Brennan's plurality opinion. Justices White and O'Connor each concurred separately. Justice Kennedy wrote a dissenting opinion, in which he was joined by Justice Scalia and Chief Justice Renhquist.

[47] *See id.* at 1784.

B. *Evidence* — Whether the employer must present "objective evidence" to rebut the plaintiff's case;[48] and

C. *Level of persuasion* - Whether the employer must prove by "clear and convincing evidence" or "by a preponderance of the evidence" that the employment decision would have been the same, absent the discriminatory animus.[49]

A. *Causation.* This issue was the focal point of tension between the parties and the Court Justices.

PW argued that a Title VII violation occurs only when discriminatory animus is a "decisive consideration" in the employer's decision-making process.[50] Specifically, it was PW's position that the words "because of," which appear in Title VII, are the equivalent "colloquial shorthand" for the expression "but-for causation."[51] Under PW's theory, it is not enough for the plaintiff to prove that discriminatory animus "played a part" in the employer's decision; the plaintiff must prove that if the employer had not discriminated, the decision would have been different.[52]

The plaintiffs' argument was radically different. She contended that an employer violates Title VII by merely allowing discriminatory animus to "play any part" in the employment decision.[53] Under this theory, once a plaintiff has met this initial burden, the employer cannot avoid liability.[54] That is, the employer may present proof that it would have made the same decision absent the discriminatory animus; however, this will only serve to limit equitable relief.[55]

The plurality refused to embrace either position.[56] The plurality initially noted that Title VII strikes a balance between employee rights (prohibiting discriminatory animus), and employer prerogatives (permitting consideration of other qualities and characteristics).[57] It is this

[48] *See id.* at 1789-92.

[49] *See id.* at 1792-93.

[50] *Id.* at 1784.

[51] *Id.* at 1785. The plurality describes a but-for cause as follows: "[i]n determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way." *Id.*

[52] *Id.* at 1784.

[53] *Id.* Ms. Hopkins argued that an employer violates Title VII whenever it allows race, gender, religion or natural origin to influence an employment decision in any way.

[54] *Id.*

[55] *Id.* at 1783. Ms. Hopkins argued, in essence, the holding of the District Court, which was later modified by the Court of Appeals.

[56] *Id.* at 1784. The plurality remarked that, "the truth lies somewhere in between."

[57] *Id.* at 1784-85. The plurality articulated the statute's balancing of interests as follows: "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion,

balance of rights which dictates the respective burdens of proof of each party.[58]

Specifically, Title VII prohibits an employer from considering gender, race, natural origin, or religion when making an employment decision, while permitting the employer to take adverse action for other reasons.[59] As such, once a Title VII plaintiff shows that discriminatory animus played a "motivating part" in an employment decision, the employer may avoid liability only by proving that it would have made the same decision in the absence of the discriminatory animus.[60]

Under the plurality's approach, the plaintiff is persuading the factfinder of one thing (discriminatory animus or "illegitimate factors"), while the employer is persuading it of another ("legitimate factors").[61] Therefore, the burden of persuasion does not actually "shift" from the plaintiff to the employer on the causation issue.[62] Rather, since each is proving something entirely different, the employer's burden is more properly characterized as an "affirmative defense."[63]

Justice O'Connor disagreed with this analysis, as did the dissenting Justices. Justice O'Connor's concurring opinion suggests that when the plaintiff demonstrates, by *direct evidence*, that discriminatory animus was a "substantial factor"[64] in an adverse employment decision, the burden of persuasion *shifts* to the employer to prove that "it is more likely than not that the decision would have been the same absent the consideration of the illegitimate factor."[65]

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and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice." *Id.*

[58] *Id.* at 1787-88.

[59] *Id.* at 1787. For an overview of Title VII, see generally 15 AM. JUR. 2D *Civil Rights* §§ 290-449 (1976).

[60] *Price Waterhouse*, 109 S. Ct. at 1787-88.

[61] *Id.* at 1788.

[62] *Id.* In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, the Court reaffirmed this concept, stating that the burden of persuasion remains with the plaintiff at *all* times. *See Atonio*, 109 S.Ct. at 2126.

[63] *Price Waterhouse*, 109 S. Ct. at 1788. (citing NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983)). "[W]e hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an *affirmative defense*: the plaintiff must persuade the factfinder on one point, and then the employer, it if wishes to prevail, must persuade it on another." *Id.* (emphasis added).

[64] *Id.* at 1803 (O'Connor, J., concurring).

[65] *Id.* at 1804.

The standard announced by the dissent is considerably more demanding of the Title VII plaintiff. Under the dissent's framework, the burden of persuasion remains with the plaintiff at all times; the plaintiff must prove that the employment decision was made "because of" sex.[66] The plaintiff failed to meet this standard because she did not prove that the partnership decision would have been different if Price had not discriminated.[67] Thus, the dissent would have remanded with judgment entered in favor of PW.[68]

B. *Evidence.* After determining the respective burdens of proof for each party on the issue of causation, the plurality focused attention on the type of evidence each party must present to satisfy those burdens.[69]

The plurality stated that in a mixed-motive case, the Title VII plaintiff must show "that the employer actually relied on her gender in making its decision."[70] With respect to the specific facts in the case at bar, the plaintiff proved that: 1) PW invited partners to submit comments, 2) some comments were based upon sexual bias, 3) these comments were relevant to the Admission Committee's decision, and 4) PW did not disclaim reliance on the sexually biased statements.[71] As a result, the plurality held that Ms. Hopkins had sufficiently met her burden of proof.[72] However, the plurality refused to elaborate any further, stating, "we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case."[73]

As to the employer's proof, the plurality held that the employer must prove that a legitimate reason, standing alone, would have induced the same result.[74] In order to achieve this, the employer must present "objec-

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[66] *Id.* at 1814 (Kennedy, J., dissenting).

[67] *Id.* The dissent based this conclusion upon the District Court's finding that Ms. Hopkins had not proven "that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations." *Id.* (citing the District Court's decision, *Hopkins*, 618 F. Supp. at 1120).

[68] *Id.*

[69] *Id.* at 1789-90.

[70] *Id.* at 1791. Regarding the plaintiff's evidence of gender discrimination in the form of "stereotyped remarks" of PW's partners, the plurality stated that these statements, in and of themselves, would not "inevitably prove that gender played a part in a particular employment decision." However, the stereotyped remarks could serve as evidence indicating that gender played such a part. *Id.*

[71] *Id.* Price Waterhouse did suggest that this was a case of mere "discrimination in the air." *Id.* However, the plurality agreed with Ms. Hopkins, who argued that this was a case of "discrimination brought to the ground and visited upon" an employee. *Id* (quoting Brief for Respondent at 30).

[72] *Id.*

[73] *Id.*

[74] *Id.*

tive evidence" as to its decision in the absence of discrimination.[75]

Justice White concurred with the plurality, but he disagreed as to this "objective evidence" standard.[76] Justice White stated that, "there is no special requirement that the employer carry its burden by objective evidence."[77] Justice White suggests that, in order to succeed, the employer need only "credibly testif[y] that the action would have been taken for the legitimate reasons alone."[78]

C. *Level of Persuasion.* The lower courts ruled that once the plaintiff shows that discriminatory animus played a part in the employer's decision, the employer must prove by *clear and convincing evidence* that it would have made the same decision, absent the discrimination.[79]

The plurality disagreed, holding that, where conventional relief is sought, clear and convincing proof is seen only in rare instances, such as in an action for defamation.[80] As such, conventional rules do not require an elevated standard of proof for an employer in the present case.[81] Thus, the "better rule" is that the employer must make a showing only by a preponderance of the evidence.[82] With this standard, both Justices White[83] and O'Connor[84] concurred.

The plurality concluded that when a Title VII plaintiff proves that discriminatory animus (namely, gender) played a "motivating part" in the employer's decision, the employer may avoid liability only by proving

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[75] *Id.* Along with the "objective evidence" requirement, the plurality additionally stated that an employer may not satisfy its evidentiary burden "by merely showing that at the time of the decision it was motivated only *in part* by a legitimate reason." *Id.* (emphasis added).

[76] *Id.* at 1796 (White, J., concurring).

[77] *Id.* Justice White stated:

> "In my view . . . there is no special requirement that the employer carry its burden by objective evidence. In a mixed motive case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof."

Id.

[78] *Id.* The plurality remarked that Justice White's suggested evidentiary standard "is baffling." *Id.* at 1791 n.14.

[79] *Hopkins*, 825 F.2d at 471; *Hopkins*, 618 F. Supp. at 1120.

[80] *Price Waterhouse*, 109 S. Ct. at 1792 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)). (In *Gertz*, the Court restated the New York Times Co. v. Sullivan, 376 U.S. 254, standard that public officials and public figures may recover for injury to their reputation only by showing by clear and convincing evidence that they were injured by defamatory falsehoods. *Gertz*, 418 U.S. at 342).

[81] *Price Waterhouse*, 109 S. Ct. at 1792.

[82] *Id.*

[83] *Id.* at 1795-96 (White, J., concurring) (citing Mt. Healthy City School (Dist.) Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (once plaintiff shows constitutionally protected speech was "motivating factor" in adverse treatment, employer must show by a preponderance of the evidence that decision would have been the same in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

[84] *Price Waterhouse*, 109 S. Ct. at 1796.

by a preponderance of the evidence that it would have made the same decision in the absence of the discriminatory animus.[85] Ms. Hopkins had proved that her gender played a motivating part in PW's partnership decision.[86] However, the Court of Appeals did not decide if PW had met its burden by a *preponderance of the evidence*.[87] Therefore, the Court reversed the Court of Appeals judgment against Price on liability and remanded the case to the Court of Appeals.[88]

ANALYSIS OF THE OPINIONS

The Plurality

The plurality opinion has two flaws. First, it appears inconsistent with several of the Court's earlier Title VII decisions. Second, it is confusing, and the lower federal courts — which were already in "disarray"[89] in this legal area — will undoubtedly have trouble applying it.

1. Inconsistency with earlier Title VII cases

The plurality states that the PW decision is not traversing upon "new ground."[90] Rather, it is consistent with the court's earlier Title VII cases and thus, "treads [a] well-worn path."[91] This does not appear to be so.

The dissent states that the plurality's "path may be well-worn, but it is in the wrong forest."[92] The dissent's statement was caused by the plurality's apparent alteration of a standard first developed in *McDonnell Douglas* and then fine-tuned in *International Brotherhood of Teamsters u United States*[93] and *Burdine*.[94] The dissent stresses the necessity to more closely adhere to the evidentiary framework set forth in those earlier Title VII cases.[95]

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[85] *Id.* at 1795. The plurality stated: "We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even it if had not taken the plaintiff's gender into account." *Id.*

[86] *Id.*

[87] *Id.* As noted earlier, *supra* note 29, the Court of Appeals for the Third Circuit followed its earlier precedent (Toney v. Block, 705 F.2d 1364), and held that the employer must show by "clear and convincing evidence" that discrimination did not effect the employment decision. *Hopkins*, 825 F.2d at 471. (citation omitted).

[88] *Id.*

[89] *Price Waterhouse*, 109 S. Ct. at 1784 n.2.

[90] *Id.* at 1789.

[91] *Id.* at 1790.

[92] *Id.* at 1811 (Kennedy, J., dissenting).

[93] 431 U.S. 324 (1978). In *Teamsters*, the Court described the rationale for *McDonnell Douglas*'s four elements (*see infra* note 124) of a prima facie case. 431 U.S. at 358 n.44.

[94] *Price Waterhouse*, 109 S. Ct. at 1806 (Kennedy, J., dissenting).

[95] *Id.*

In *McDonnell Douglas*[96] and *Burdine*,[97] the Court stated that the plaintiff must prove by a preponderance of the evidence that circumstances exist which give rise to an inference of unlawful discrimination; this creates a rebuttable presumption of discrimination. The employer may rebut this presumption by *producing evidence* (i.e., articulating some legitimate reason) that the decision was made for a legitimate reason.[98]

The standard the plurality announces in *Price Waterhouse* is seemingly different. The plurality justifies this different standard by classifying *Price Waterhouse* as a "mixed-motive" case.[99]

The plurality states that, similar to *Burdine*, under *Price Waterhouse*, the burden of persuasion does not shift, but is more similar to an affirmative defense.[100] However, the glaring difference between *Burdine* and *Price Waterhouse* lies in the nature of the evidentiary burden placed upon the employer.

In *Burdine*, the Court stated that the employer satisfies its burden if the evidence it presents raises "an issue of fact as to whether it discriminated against the [employee]."[101] In order to accomplish this, the employer need only explain "what [it] has done"[102] by articulating some lawful reasons for its actions.[103]

In *Burdine*, the Court concluded that the Court of Appeals had erred because it "placed on the [employer] the burden of persuading the court that it had convincing, *objective* reasons" for its decision.[104] The Court reversed the Court of Appeals because this standard required the employer to prove more than was necessary.[105] Thus, under *Burdine*, the employer's burden can be characterized as "minimal."[106]

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[96] 411 U.S. at 802.

[97] 450 U.S. at 253-54.

[98] *Id.* at 254. In *McDonnell Douglas* and *Burdine*, the Court stated that if the employer carries this burden, the plaintiff may then "prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253 (citing with approval *McDonnell Douglas*, 411 U.S. at 804). (*See supra* note 45).

[99] *Price Waterhouse*, 109 S. Ct. at 1779.

[100] *Id.* at 1788.

[101] *Burdine*, 450 U.S. at 254-55.

[102] *Id.* at 257 (quoting Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1979)).

[103] *Id.* at 256.

[104] *Id.* at 256-57. (emphasis added).

[105] *Id.*

[106] *See* Comment, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 569-70 (1982).

In *Price Waterhouse* the plurality adopts the standard the Court had earlier rejected in *Burdine*. The plurality required PW to satisfy its burden by *producing* "objective evidence" of a sufficient reason for its probable decision which existed at the time the decision was made.[107] Thus, PW's articulated reason for refusing to grant Ms. Hopkins partnership (i.e., her abrasiveness with staff members) was not sufficient to meet the "objective evidence" standard set forth by the plurality.[108] Yet, it seems that Price Waterhouse's offering of proof would have satisfied the "minimal" *Burdine* standard.[109]

2. *Confusion for the Lower Courts*

The Court granted certiorari in *Price Waterhouse* to resolve a conflict among the courts of appeals and to offer the lower courts some guidance in this very complex and often confusing area of the law.[110] Unfortunately, the plurality's opinion merely serves to create further confusion. As the dissent notes, "the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion."[111]

Since the plurality provides no precise guidelines to determine which cases are "mixed-motive" cases, the lower courts may become confused in determining when to apply the *Price Waterhouse* test and when to apply the *Burdine* test. Because of the different evidentiary burdens required by each test, this determination can easily be the most important factor deciding the outcome of the case.

As an analogy, in equal protection cases, very often the most important issue the court faces is whether to apply the rational basis test or the strict scrutiny test. Generally, because of the polaric differences in these two tests, this determination ultimately decides the case.

Under the plurality's framework in *Price Waterhouse*, a similar result may occur in Title VII cases. Yet, the plurality provides little or no guidance to the lower courts in determining when to apply *Burdine* and when to apply *Price Waterhouse*. Thus, the lower courts are left to their own discretion on the most important issue in the case.

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[107] *Price Waterhouse*, 109 S. Ct. at 1791.
[108] *Id.* at 1791-92.
[109] *See* Zimmer, *supra* note 3, at 48.
[110] *Price Waterhouse*, 108 S. Ct. 1106 (1988).
[111] *Price Waterhouse*, 109 S. Ct. at 1806 (Kennedy, J., dissenting).

The Dissent

The plurality's opinion may be inconsistent with earlier Title VII cases, and it may also be confusing. However, the dissent's standard appears to be unrealistic.

The dissent states that earlier decisions of the Court have consistently stated that the burden of persuasion remains with the plaintiff at all times.[112] However, the dissent seems to take this standard one step further. The dissent suggests that in order to be successful on her claim, the Title VII plaintiff must prove that the employer's decision would have been different if the employer had not discriminated.[113] Ms. Hopkins had failed to meet this standard, because she had not proved that she would have been granted partnership if Price had not discriminated against her.[114]

In order to meet the dissent's very difficult standard, it appears the Title VII plaintiff, in effect, must prove that there was no legitimate reason for the employer's decision. In other words, the plaintiff must seemingly prove that discrimination was the *sole* reason for the employer's decision. Such a standard seems unrealistic, if not impossible, when considering that Ms. Hopkins probably presented more evidence than the average Title VII plaintiff.[115]

Admittedly, Ms. Hopkins had effectively proved that Price Waterhouse allowed sexual stereotyping to play an important role in its decision-making process.[116] However, under the dissent's suggested standard, this offering was not sufficient to prove that discrimination caused Price Waterhouse's decision.[117] Yet, realistically, as Justice O'Connor notes, "Ann Hopkins had taken her proof as far as it could go. [It is as if] . . . she was told by one of those privy to the decision-making process that her gender was a major reason" for PW's decision.[118] The dissent would have Ms. Hopkins prove much more. More proof than this does not appear possible.

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[112] *Id.* at 1809 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248). The dissent's philosophy proved convincing in the Court's recent decision in *Wards Cove Packing Co. v. Atonio*. In *Atonio*, the Court held that the burden of persuasion remains with the plaintiff in disparate impact, as well as disparate treatment cases. (*See supra* note 41, *infra* note 143).

[113] *Price Waterhouse*, 109 S. Ct. at 1814.

[114] *Id.*

[115] *Cf. Burdine*, 450 U.S. 248; McDonnell Douglas Corp. v. Green, 411 U.S. 792.

[116] *Price Waterhouse*, 109 S. Ct. at 1802 (O'Connor, J., concurring).

[117] *Id.* at 1814 (Kennedy, J., dissenting).

[118] *Id.* at 1802 (O'Connor, J., concurring).

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Justice O'Connor's Concurrence

Of the four opinions submitted in *Price Waterhouse*, Justice O'Connor's concurring opinion appears to formulate the most realistic evidentiary framework. Also, although it provides a different test than *McDonnell Douglas* and *Burdine* for Title VII cases, its test supplements the test announced in those cases.

Justice O'Connor suggests adherence to the Court's earlier decisions in *Burdine* and *McDonnell Douglas*. However, she further suggests that cases like *Price Waterhouse* are distinguishable from those cases, and thus, require a different standard.[119]

For Justice O'Connor, the primary distinguishing characteristic in Title VII cases is the *type* of proof the plaintiff offers.[120] If the plaintiff offers circumstantial evidence, she falls under the *McDonnell Douglas-Burdine* framework; if the plaintiff offers direct evidence, she falls under the *Price Waterhouse* framework.[121]

The test Justice O'Connor suggests in *Price Waterhouse* is different from *Burdine* in that, under the *Burdine* test, the burden of persuasion at all times remains with the plaintiff.[122] Under *Price Waterhouse*, once a plaintiff has presented direct evidence of discrimination (e.g., statements from partners which impacted the decision), the burden of persuasion shifts to the employer.[123]

The test has the following elements. First, the plaintiff must establish the *McDonnell Douglas* prima facie case.[124] Additionally, the plaintiff should produce any direct evidence of discriminatory animus in the decision-making process.[125] The employer then presents all of its evidence as to legitimate, nondiscriminatory reasons for its decision.[126] Once all

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[119] *Id.* at 1796-97.

[120] *Id.* at 1801-02.

[121] *Id. Price Waterhouse* marked the first time the Court was faced with "direct evidence" of discrimination. The Ninth Circuit had previously decided a case involving direct evidence. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). In *Slack*, black plaintiffs presented direct evidence of discriminatory animus in the form of statements made by employer's agents: "Colored people should stay in their places," and "Colored folks are hired to clean because they clean better." *Id.* at 1092-93. The Ninth Circuit held that the trial court reasonably found discrimination in the terms and conditions of employment as applied to the black plaintiffs. *Id.* at 1095.

[122] *Price Waterhouse*, 109 S. Ct. at 1801.

[123] *Id.* at 1795.

[124] *Id.* at 1805 (O'Connor, J., concurring). In order to establish a prima facie case, *McDonnell Douglas* required the plaintiff to prove: 1) that he belonged to a minority, 2) that he was qualified for the job offered, 3) that despite his qualifications, he was rejected, and 4) after rejection, the employer continued to seek applicants. 411 U.S. at 802.

[125] *Price Waterhouse*, 109 S. Ct. at 1805 (O'Connor, J., concurring).

[126] *Id.* (O'Connor, J., concurring).

the evidence is received, the court decides whether to apply the *McDonnell Douglas-Burdine* test or the *Price Waterhouse* test.[127] If the plaintiff does not meet the "*Price Waterhouse* threshold," the court should apply the *McDonnell Douglas-Burdine* test, and the plaintiff bears the burden of persuasion throughout the trial.[128]

The test seems workable and realistic, yet it does have one major flaw. As pointed-out by the dissent, such a test would be difficult to practically apply because it requires courts to "make the often subtle and difficult distinction between 'direct' and . . . 'circumstantial' evidence."[129] Nevertheless, of the different tests suggested, Justice O'Connor's appears to be the most realistic and it seems consistent with earlier Title VII cases, representing a logical supplement to those cases.

THE FUTURE

In the near future, we can expect the inevitable retirement of Justices Brennan and Marshall. With the current republican administration, this means that there will be at least two more conservative appointments to an already conservative Court.

As such, we can expect changes in highly controversial areas of the law: abortion rights,[130] Thirteenth Amendment-private contract rights, and Fourteenth Amendment rights. We can also expect to see changes in the Title VII area.

Specifically, we can expect to see the dissenting opinion's standard soon become the majority. That is, the courts of appeals were already in "disarray" as to the issue addressed in *Price Waterhouse*. Because the plurality's opinion does not offer much guidance to the lower courts, we can expect additional confusion. This will require further elaboration by the Supreme Court in this area, and it will provide the conservative Court an opportunity to express a standard of review similar to that expressed by the dissent.

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[127] *Id.* (O'Connor, J., concurring).

[128] *Id.* (O'Connor, J., concurring).

[129] *Id.* at 1812 (Kennedy, J., dissenting).

[130] The Court has already taken steps to curtail a woman's right to abort an unwanted pregnancy with its recent decision in Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989). Although *Webster* does not overrule Roe v. Wade, 410 U.S. 113 (1973), *Webster* certainly makes it easier for states to regulate abortions not necessary to save the mother's life. Specifically, in *Webster*, the Court upheld the validity of Missouri statutes which provide, among other things, that it is unlawful to use public funds, employees, or facilities to encourage or counsel a woman to have an abortion not necessary to save her life. *Webster*, 109 S. Ct. at 3040; MO. REV. STAT. §§ 188.205, 188.210, 188.215. The Court reasoned that the Due Process Clause generally confers no right to governmental aid. *Webster*, slip 109 S. Ct. at 3042. Thus, the statutes were valid, and they did not conflict with any earlier court abortion decisions. *Id.* In the future, we can undoubtedly expect further restrictions upon a woman's abortion rights, as the Court comes closer and closer to overruling *Roe u Wade*.

CONCLUSION

Title VII of the Civil Rights Act of 1964 is utilized as a tool to prevent employment discrimination. However, the courts of appeals were in conflict as to the respective burdens of proof of the parties in Title VII cases.[131]

In an effort to resolve this conflict, the United States Supreme Court granted certiorari in *Price Waterhouse v. Hopkins*.[132] The Court could not reach a majority opinion in *Price Waterhouse*; Justice Brennan announced the plurality opinion and judgment of the Court.[133]

Under the plurality's framework, when a Title VII plaintiff proves that gender played a motivating part in an employment decision, the employer may avoid liability only by proving by a preponderance of the evidence that its decision would have been the same absent the discrimination.[134] The plurality's opinion in *Price Waterhouse* seems inconsistent with the Court's earlier Title VII cases, *McDonnell Douglas* and *Burdine*, in that under *Price Waterhouse*, the employer must present "objective evidence" as to its decision.[135] Additionally, the plurality's opinion seems to further confuse an already complicated area of the law.

Conversely, the dissent's suggested standard seems unrealistic. Under the dissent's standard, the Title VII plaintiff must show that the employer's decision would have been different if the employer had not discriminated.[136] This standard seems to place an insurmountable burden upon the plaintiff.

Justice O'Connor's approach seems to be the most practical, and it appears consistent with earlier Title VII decisions by the Court. Justice O'Connor distinguishes *Price Waterhouse* from earlier cases in that Ms. Hopkins offered *direct* evidence of discrimination.[137] As a result, Justice O'Connor suggests that when a plaintiff presents direct evidence of discrimination, the burden of persuasion should shift to the employer to prove that the employment decision would have been the same, absent the discrimination.[138]

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[131] *Price Waterhouse*, 109 S. Ct. at 1784 n.2.
[132] 108 S. Ct. 1106 (1988).
[133] *Price Waterhouse*, 109 S. Ct. at 1780.
[134] *Id.* at 1795.
[135] *Id.* at 1791.
[136] *Id.* at 1814 (Kennedy, J., dissenting).
[137] *Id.* at 1802 (O'Connor, J., concurring).
[138] *Id.* at 1796.

In the end, the Court reversed the decision of the Court of Appeals, because the Court of Appeals required Price Waterhouse to prove its affirmative defense by clear and convincing evidence.[139] The Court remanded, instructing the Court of Appeals to determine if Price Waterhouse had proved its defense by a preponderance of the evidence.[140]

In the future, we can expect a more conservative Court. As such, we can expect the dissenting opinion to, at some point, become the majority.

Temporarily, minorities can celebrate a small victory. Under the current scenario, a Title VII plaintiff need only show that discrimination was a "motivating part" in the employment decision.[141] It is then up to the employer to disprove the discriminatory animus.[142] However, in the future, we can expect to see a significant change; the Title VII plaintiff will probably be required to prove her case under the dissent's rigid standard. As a result, future Title VII plaintiffs may be hard-pressed to win discrimination suits.[143]

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[139] *Id.* at 1795.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] This trend has already begun to develop as evidenced by the Court's decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115. In the case, Justice White wrote the majority opinion for the Court, in which he was joined by the "conservative members" - Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. In *Atonio*, the Court turned its back on precedent and concluded that in disparate impact, like disparate treatment cases, the burden of persuasion does not shift to the employer when a plaintiff establishes a prima facie case. Thus, what used to be a haven of victory for plaintiffs was closed down by the conservative court.