NOTE

Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in *Price Waterhouse v. Hopkins*

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In employment discrimination cases, the success of the plaintiff is often determined by her ability to present sufficient evidence to obtain a finding or jury instruction which shifts the burden of persuasion as to motive to the defendant. In the Supreme Court case of *Price Waterhouse v. Hopkins*, the concurring opinion of Justice O'Connor established that to get such a burden shifting instruction or finding the plaintiff must show by direct evidence the use of an illegal criterion in the alleged discriminatory decision. This has become the standard applied in nearly all of the federal courts. However, Justice O'Connor failed to articulate clearly what she meant by "direct evidence," resulting in differing interpretations and applications of this standard by the federal circuits.

In his note, Mr. Tindall illustrates the varying applications of Justice O'Connor's "direct evidence" standard by the federal courts and the subsequent divergent conclusions in cases with essentially similar facts. The author analyzes the different possible meanings of "direct evidence" and argues that Justice O'Connor did not intend the traditional meaning of "direct evidence" to apply, but rather intended "direct evidence" to mean evidence of an employer's discriminatory perspective which is related both temporally and logically to the employment decision. Finding that lower court opinions do not reflect such an understanding, the author's proposed solution to this dizzying dilemma would be for the Court either to state explicitly that the traditional meaning of "direct evidence" does not apply,

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or to establish a test based on the probative value of the evidence rather than its type.

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PROLOGUE

Consolidated Coin Caterers ("Consolidated") operates vending machines in schools and businesses. James O'Connor, age fifty-six, and Allen Hunter, age fifty-seven, managed two of Consolidated's regions of operation. When Consolidated reduced the number of regional managers from four to two, it fired O'Connor and demoted Hunter, replacing them with two younger men, ages forty and thirty-five. Four to eight weeks before O'Connor's discharge, O'Connor, while watching a golf tournament with his supervisor Edward Williams, remarked that he could not play eighteen holes of golf five days in a row. Williams responded by saying that O'Connor was "just too old." Two weeks before his discharge, Williams told him, "O'Connor, you are too damn old for this kind of work." Then just two days before O'Connor's discharge, Williams told O'Connor that "it's about time we get some young blood in this company." Upon his termination, O'Connor sued, alleging age discrimination. Consolidated claimed that it fired him because he was "slow in responding to problem accounts" under his management.

In each of the federal district courts, regardless of the circuit in which they are located, the case described would likely proceed as follows: first, O'Connor would have to establish a prima facie case of age discrimination. He would do so by showing (1) that he is a member of the class protected by the ADEA, (2) that he was qualified for the job, (3) that he was fired or demoted, and (4) that after his termination, he was replaced by someone of similar qualifications. Second, O'Connor would also present any other evidence of defendant Consolidated's discrimination, such as Williams's derogatory remarks. Third, Consolidated would present its case, including evidence as to legitimate, non-discriminatory reasons for the decision to fire O'Connor. Finally, at the conclusion of the presentation of evidence and

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2. Because the man who replaced O'Connor was forty, he fell within the class protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1988), the federal statute which protects employees age 40 and over from age discrimination. O'Connor, 56 F.3d at 544. Both the district court and the court of appeal found this fact determinative, dismissing O'Connor's prima facie case based on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), because he "was not replaced by someone outside the protected class." O'Connor, 56 F.3d at 546. The United States Supreme Court rejected this approach, holding that "[t]he fact that one person in the protected class has lost out to another person in the protected class is ... irrelevant, so long as he has lost out because of his age." O'Connor, 1996 U.S. LEXIS at *7.
3. In November 1995, the Supreme Court agreed to hear the case but limited certiorari to O'Connor's first question presented: whether an ADEA plaintiff must show that he was replaced by someone outside the protected class; i.e., someone under 40. U.S.Law Week—Daily Edition, Nov. 15, 1995. The Court refused to grant certiorari on O'Connor's second question presented, which related to the significance of discriminatory age-related remarks made to him. Id.
per the request of one of the parties, the trial court would decide whether O’Connor had presented enough evidence to warrant a mixed-motives jury instruction—or, in a bench trial, a finding of both forbidden and permissible motives for the employment decision. If O’Connor fails to present such evidence, the case will likely be a “pretext” case. If it is, O’Connor will have the burden of persuading the trier of fact that Consolidated’s stated reasons for firing him are pretextual and the real reason was age discrimination.

If, however, O’Connor succeeds in convincing a fact finder that “an impermissible motive played a motivating part in [the] adverse employment decision,” then Consolidated will have the burden of proving that it would have fired him in the absence of the discriminatory motive. Being able to shift the burden of persuasion to Consolidated would be of great advantage to O’Connor because first, it would relieve him of the burden of disproving each legitimate reason that Consolidated puts forth to explain its action, as he would be required to do under the McDonnell Douglas “pretext” scheme. Second, if Consolidated fails to meet its persuasion burden of convincing the fact finder that it would have fired O’Connor anyway in the absence of age discrimination, O’Connor would win. Third, if the evidence is in equipoise, O’Connor would likewise prevail. Furthermore, if the plaintiff convinces the factfinder that the impermissible motive was a motivating factor in the employment decision, then, under Title VII—as amended by the Civil Rights Act of 1991—a court may grant her declaratory relief, injunctive relief, and attorney’s fees—even if the employer proves it would have taken the same action regardless of the impermissible factor.

6. The trial court in Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992), issued an example of a mixed-motives instruction:

[If you find that the plaintiff has proven by a preponderance of the evidence that his age was a motivating factor in the defendant’s decision to terminate him or refuse to transfer him, he is entitled to recover, unless the defendant establishes by a preponderance of the evidence that it would have taken the same action regardless of plaintiff’s age.]

Id. at 1179.

7. See Price Waterhouse, 490 U.S. at 278 (O’Connor, J., concurring); Ostrowski v. Atlantic Mut. Ins. Companies, 968 F.2d 171, 179-84 (2d Cir. 1992) (jury trial). How the courts decide which type of evidence the plaintiff must present and the level of proof that she must meet is the main subject of this note. Both of these topics will be dealt with in detail below.


9. Price Waterhouse, 490 U.S. at 250 (plurality opinion). While the Price Waterhouse plurality requires that a plaintiff show that an impermissible factor played a “motivating part” in the employment decision, Justice O’Connor requires that the employer place “substantial negative reliance” on such a factor. Id. at 277. In 1991, Congress ended any confusion caused by the seemingly different standards by adopting the plurality’s term outright. See 24 U.S.C.A. § 2000 e-2(m) (West 1994).

10. See Price Waterhouse, 490 U.S. at 250 (plurality opinion).

11. 42 U.S.C.A. § 2000 e-5(g) (West 1994). If the employer proves it would have taken the same action, however, the plaintiff is not entitled to damages or an order requiring reinstatement, hiring, or promotion. Id.
To determine whether O'Connor presented enough evidence to warrant a mixed-motives jury instruction or a finding of mixed motives by the judge, nearly all of the federal circuits would apply some version of the test articulated by Justice O'Connor in *Price Waterhouse v. Hopkins*,[12] requiring the plaintiff to "show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[13]Because Justice O'Connor was unclear as to what she meant by *direct evidence*, however, the federal circuits would approach the question of whether to give a mixed-motives jury instruction (in a jury trial) or to shift the burden of persuasion to Consolidated (in a bench trial) in different ways and reach different conclusions accordingly.[14]

I

**INTRODUCTION**

This note argues that Justice O'Connor's direct evidence test should be rejected—or at least clarified—because it is both confusing and overly restrictive. The test is confusing because Justice O'Connor, like the lower court opinions on which she drew, failed to use the accepted definition of *direct evidence*. She tacitly defined *direct evidence* of discrimination not as "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption,"[15] but instead as "statements by decisionmakers related to the decisional process itself."[16]Justice O'Connor's use of *direct evidence* in this non-standard way has generated confusion among the lower courts. Some courts take her literally, requiring evidence that is "direct" in the traditional sense of needing no further inference, others adopt her non-standard definition, and one court uses neither the traditional definition nor her non-standard definition.[17] Because Justice O'Connor was unclear about what she meant by direct evidence, the lower courts that apply her test reach different conclusions on similar sets of facts. In the prologue case, above, the plaintiff's success would depend in large

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[13] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring). Nearly every circuit but the Ninth and the DC circuits follows some version of Justice O'Connor's *Price Waterhouse* test. See Jackson v. Harvard University, 900 F.2d 464, 467 (1st Cir. 1990), cert denied, 498 U.S. 848 (1990); Ostrowski v. Atlantic Mut. Ins. Companies, 968 F.2d 171, 181-182 (2d Cir. 1992); Starceski v. Westinghouse, 54 F.3d 1089, 1096 (3d Cir. 1995); Fuller v. Fhipps, 67 F.3d 1137, 1141 (4th Cir. 1995); Davis v. Chevron USA, Inc., 14 F.3d 1082, 1085 (5th Cir. 1995); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1081 (6th Cir. 1994); Randle v. La Salle Telecommunications, 876 F.2d 563, 569-70 (7th Cir. 1989); Radabaugh v. Zip Feed Mills, 997 F.2d 444, 448-49 (8th Cir. 1993); Heim v. State of Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993); Haynes v. W.C. Caye Co., 52 F.3d 928, 930-31 (11th Cir. 1995). As of this writing, no Ninth or DC Circuit case has applied a version of Justice O'Connor's *Price Waterhouse* analysis.
[14] *See supra* note 13 *for citations to appropriate cases.*
[17] *See infra* Part IV, for a full discussion of the split among the federal appellate courts.
part on the circuit in which he brought his case because the shifting of the burden to the defendant would be such a large advantage to him.

In Part II, below, I discuss *Price Waterhouse v. Hopkins* in detail, with emphasis on Justice O'Connor's concurrence and her confusing use of the term *direct evidence*. In Part III, I examine what Justice O'Connor meant by the term *direct evidence*, first by examining the traditional meaning of the term, and then by examining Justice O'Connor's opinion for clues as to the term's intended meaning. I argue that Justice O'Connor was not using *direct evidence* in the traditional sense because such evidence almost never exists in the employment discrimination context and does not exist in *Price Waterhouse* itself. This section concludes by suggesting what Justice O'Connor most likely meant by the term. In Part IV, I examine the difficulties that lower courts have faced in attempting to apply Justice O'Connor's ambiguous *Price Waterhouse* opinion. Finally, in Part V, I present two possible solutions to the difficulties posed by Justice O'Connor's test. The first alternative is for the Court simply to clarify its position on mixed-motives cases. The Court could explicitly state that it does not require a plaintiff to present "direct evidence" in the traditional sense, and then clearly identify the type of evidence that is required. Such a clarification of Justice O'Connor's test would make it easier to apply because the plain meaning of the words would be in harmony with the meaning we wish to attach to them. It could also give further guidance on just how a decision maker's statement must be "related" to an employment action in order for such a statement to support a mixed-motives instruction or a judge's finding of mixed motives.

A preferable alternative, however, would be a test that turned not on the *type* of evidence but on the *probative value* of the evidence. Such a test is similar to the Second Circuit's short-lived approach in *Tyler v. Bethlehem Steel Corp.*,18 where the court stated that a plaintiff need only submit enough evidence that, if believed, could allow a reasonable jury to conclude that unlawful discrimination was a motivating factor in the adverse employment decision.19 Such a test is superior to Justice O'Connor's because: (1) it does not rely on mistaken assumptions that *direct* evidence is necessarily better evidence; (2) the meaning of the words in the test (i.e. enough evidence to allow a reasonable jury to conclude) are in harmony with the well-established uses of these terms, making it easier for trial courts to apply the test to the facts and for appellate courts to review the trial court's application of it; and (3) the outcomes will be more fair—that is, similarly situated plaintiffs (plaintiffs who have shown the likelihood of discrimination to the same degree) will be treated the same.

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18. 958 F.2d 1176 (2d Cir. 1992).
19. Id. at 1187.
II

**Price Waterhouse v. Hopkins and Justice O'Connor’s Direct Evidence Test**

Before *Price Waterhouse*, the Supreme Court had identified only one method of proving discrimination: the three-step, burden-shifting scheme of *McDonnell Douglas Corp. v. Green*. The Supreme Court applied and clarified the *McDonnell Douglas* scheme in *Texas Department of Community Affairs v. Burdine*, concluding that the burden of persuasion at all times remains with the plaintiff. After *Burdine*, the *McDonnell Douglas* test requires first that the plaintiff prove a prima facie case, which creates an inference of discrimination; second, after the plaintiff makes this showing, the defendant must articulate—that is, produce some evidence of—a legitimate non-discriminatory reason for its action; third, the plaintiff has the burden to prove that the defendant’s reason is merely a pretext and that discrimination is the true reason for the decision.

In 1989, the Supreme Court squarely faced for the first time a problem with which several courts of appeal had already wrestled: what to do when a Title VII plaintiff demonstrates unlawful discrimination in an adverse employment decision not merely with a *McDonnell Douglas* showing, but additionally with evidence indicating (1) that decision makers harbored animus or ill will against the protected class to which the plaintiff belonged, and (2) that this animus infected the decision-making process.

To deal with this situation, Justice O’Connor, in a concurring opinion, stated that “[t]he evidentiary rule . . . should be viewed as a supplement to the careful framework established by our unanimous decisions in *McDonna-

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22. Id. at 253.
23. According to the Court in *McDonnell Douglas*, a plaintiff makes a prima facie case by establishing five elements: (1) that she is within a class protected by Title VII; (2) that she applied for a position (or promotion); (3) that the defendant had a vacancy for which it was seeking applicants; (4) that the plaintiff was qualified for the position; and (5) that she was denied the position (or promotion) and the defendant continued to seek applications from similarly qualified persons. *Id.* at 802. *McDonnell Douglas* concerned an African-American employee who applied for a job with his former employer, McDonnell Douglas, 10 months after participating in a protest against McDonnell Douglas’ general reduction in workforce, which cost him his job. *Id.* at 794. The employer rejected him, ostensibly because of his participation in the protest. *Id.* at 796. The Supreme Court ruled unanimously that he had established a prima facie case of discrimination under the standard cited above. *Id.* at 807.
24. This burden is one of production only, not of persuasion: “The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . 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. These reasons must be legally sufficient to justify a judgment for the defendant.” *Burdine*, 450 U.S. at 253-54.
25. “[P]laintiff may succeed in this 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.” *Id.*, at 256.
DIRECT EVIDENCE REQUIREMENTS

nell Douglas and Burdine."27 Justice O'Connor stated that first, "the plaintiff must establish the McDonnell Douglas prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant’s general qualifications."28 Second, the plaintiff should "present any direct evidence of discriminatory animus in the decisional process."29 Third, "[t]he defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision."30 After all of this evidence has been presented,

the court should determine whether the McDonnell Douglas or Price Waterhouse framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the Price Waterhouse threshold, the case should be decided under McDonnell Douglas and Burdine, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination.31

The plaintiff satisfies the Price Waterhouse threshold by convincing the trier of fact "by direct evidence that an illegitimate criterion was a substantial factor in the decision."32 If the plaintiff succeeds in doing so, the court will shift the burden of persuasion to the defendant to "convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor."33 If the defendant fails to carry this burden, "the factfinder is justified in concluding that . . . the substantive standard for liability under the statute is satisfied."34 Since Price Waterhouse, lower courts have struggled to understand and apply Justice O'Connor's method of proof (hereafter referred to as the "direct evidence test").35 In order to understand the direct evidence test, it is necessary first to examine the case in which it arose.

A. Facts of Price Waterhouse

In August 1982, plaintiff Ann Hopkins was a senior manager at defendant Price Waterhouse, an accounting firm.36 At the time, Price Waterhouse had 662 partners, only seven of whom were women. Ms. Hopkins became a candidate for partnership when the partners in her local of-

27. Id. at 261 (O'Connor, J., concurring) (citations omitted).
28. Id. at 278.
29. Id.
30. Id.
31. Id. at 278-79.
32. Id. at 276.
33. Id.
34. Id.
35. See supra note 13 for citations to cases applying Justice O'Connor's opinion in different ways. See also Part IV below for a discussion of the federal appellate courts’ split on the application of Price Waterhouse.
fice submitted her name. Of the eighty-eight candidates for partnership in 1982, Hopkins was the only woman. Ultimately, Price Waterhouse admitted forty-seven of the candidates to the partnership, twenty-one were rejected, and twenty—including Hopkins—were held for reconsideration the next year. Price Waterhouse rejected Hopkins for reconsideration when two partners withdrew their support for her.

At Price Waterhouse, when senior managers are nominated for partnership, all of the partners are invited to submit comments on each candidate. The partners in Hopkins’s office, in a jointly prepared statement supporting her candidacy, called attention to her successful effort to secure a $25 million contract with the State Department. None of the other candidates that year had comparable success in securing major contracts for Price Waterhouse. These partners, as well as many clients, praised Hopkins’s character as well, stating that she had “a strong character, independence and integrity.” Such evaluations by clients and partners led the trial judge to conclude that Hopkins “was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.”

Staff members and other partners, however, apparently viewed some of these same traits negatively. Virtually all of the negative comments about Hopkins concerned her interpersonal skills. The District Court pointed out that opponents and even supporters of her candidacy for partnership “indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.”

Many of these negative comments showed signs of stereotypical views of women. Partners opposing her candidacy suggested that she should “take a course at charm school,” and pointed out that she was “macho” and “overcompensated for being a woman.” Even the partners that supported her seemed guided by gender stereotypes. One partner praised Hopkins for “maturing from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner can-

37. Id. at 462.
38. Price Waterhouse v. Hopkins, 490 U.S. 228, 233 n.1 (1989). Note, however, that the Price Waterhouse decision concerns only the decision to place Hopkins’s candidacy on hold.
39. Id. at 232. Thirty-two partners submitted comments on Hopkins. Thirteen supported her bid for partnership, three recommended that she be placed on hold, and eight recommended that she be rejected. Id. at 233.
40. Id. at 233-34.
41. Id. at 234. At trial, a State Department official described her as “extremely competent, intelligent... strong and forthright, very productive, energetic and creative.” Id.
43. Id. at 463.
45. Id. at 1116-17.
46. Id.
Perhaps most important, the partner responsible for explaining to Hopkins why her candidacy was placed on hold, told her that to improve her chances next time, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 48

B. The Price Waterhouse Plurality

Prior to Price Waterhouse, the Supreme Court recognized only the McDonnell Douglas/Burdine method of demonstrating intentional discrimination in a Title VII case. 49 Under the McDonnell Douglas scheme, Hopkins would first have had to show a prima facie case. Then, Price Waterhouse would have to articulate a non-discriminatory reason for not promoting her. Hopkins would have had the burden of proving that Price Waterhouse's stated reason was pretextual, and that discrimination was the true reason for the decision.

Here, the district court found that Hopkins had presented a prima facie case of sex discrimination: she was qualified for partnership, she was rejected, and Price Waterhouse continued to seek partners with her qualifications. 50 Price Waterhouse presented evidence that the reason Hopkins was not promoted was because of her poor interpersonal skills. 51 The district court found that a number of the criticisms leveled at Hopkins based on her interpersonal skills and management style were in fact genuine. 52 Even though Hopkins was able to show that sexual bias permeated Price Waterhouse's decision, she failed to prevail under the Burdine approach because she could not prove that Price Waterhouse's articulated concerns about her interpersonal skills were pretextual. 53 If Burdine represented the only possible way to prove discrimination, Hopkins's claim was doomed.

The Supreme Court, however, for the first time in a Title VII case applied a "mixed-motive" analysis. 54 The plurality held that if a plaintiff can "prove" 55 that discriminatory animus played a motivating role in the
adverse employment decision, the defendant can avoid liability only by proving that it would have made the same decision absent the discriminatory consideration. The defendant must make this showing by a preponderance of the evidence. The plaintiff will prevail if the defendant fails to carry this burden.

The plurality held that Hopkins had proven that discriminatory animus against women played a motivating role in Price Waterhouse's decision to put Hopkins's candidacy on hold, but that the lower courts had required the defendant to make its proof by clear and convincing evidence. It therefore remanded the case to "determine whether Price Waterhouse had proved by a preponderance of the evidence that it would have placed Hopkins's candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decision-making process."

C. Justice O'Connor's Concurring Opinion

Justice O'Connor, in an opinion concurring in the judgment, agreed with the plurality that the burden of persuasion should shift to Price Waterhouse "to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins's candidacy absent consideration of her gender." She stated further that where a plaintiff in an employment discrimination case "has shown by a preponderance of the evidence that an illegitimate criterion was a substantial factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered."

She wrote separately, however, in part to express her "views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." Unlike the plurality, which stated explicitly, "we do not suggest a limitation on the possible ways of proving that stereotyping played a role in an employment decision," Justice O'Connor wished to limit the plaintiff's available proof on this issue to what she calls direct evidence of discrimination. Justice O'Connor stated: "What is required [to shift the burden of proof to the defendant] is what Ann Hopkins showed here: direct evidence

56. Id. at 258.
57. Id.
58. Id. at 254.
59. Id. On remand, the district court found that Price Waterhouse had not carried this burden and found for Hopkins. Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C.), aff'd, 920 F.2d 967 (D.C. Cir. 1990).
60. Id. at 261 (O'Connor, J., concurring).
62. Id. at 262.
63. Id. at 251-52.
that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."64

Justice O'Connor ultimately placed the burden on Price Waterhouse in this case,65 so it is clear that she thought the evidence presented by Hopkins qualified as direct evidence that Price Waterhouse placed substantial reliance on the forbidden factor of gender. It is unclear, however, why she thought so. Nowhere did she explicitly define what she meant by “direct evidence.” It is unclear whether she adopted the standard definition, “[e]vidence, which if believed, proves existence of fact in issue without inference or presumption,”66 or used direct evidence to mean something else.

III

JUSTICE O'CONNOR'S MEANING OF DIRECT EVIDENCE

A. Justice O'Connor Was Not Adopting The Traditional Definition Of Direct Evidence

Direct evidence is evidence which, if believed, resolves a matter in issue, without the need of an inference.67 Justice O'Connor, in Price Waterhouse, cannot have intended that direct evidence be understood according to this traditional definition for three reasons. First, preferring direct evidence to circumstantial evidence, as these terms are traditionally defined, is a highly suspect action for a judge to take today because the notion that direct evidence is superior to circumstantial evidence has long been discredited.68 Second, it is nearly impossible for a Title VII plaintiff to present direct evidence—in the traditional sense—of discrimination, 64. Id. at 277. It is unclear from Justice O'Connor's opinion what the distinction is between her notion of "substantial reliance" on a forbidden factor and the plurality's notion of whether the forbidden factor played a "motivating role." Although from context it seems that Justice O'Connor would require a stronger connection between the discrimination and the employment decision. Compare id. at 277 (O'Connor, J., concurring), with id. at 250 n. 13 (plurality opinion). Justice O'Connor stated that her standard requires that the plaintiff demonstrate a causal connection between the discrimination and the employment decision and argued that the plurality would require no such connection. See Id. at 277-78.

The Civil Rights Act of 1991 adopted the plurality's term in a new section to Title VII, § 703(m), 42 U.S.C. § 2000e-2(m), which states 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." Appellate courts continue to use Justice O'Connor's test, but now require that the plaintiff show that the discrimination was a motivating rather than a substantial factor. See, e.g., Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993); Haynes v. W.C. Caye & Company, Inc., 52 F.3d 928 (11th Cir. 1993); Brown v. East Mississippi Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993).

65. Id. at 261.


67. See JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 24 (3d ed. 1940). Stated slightly differently, "Direct evidence . . . is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions." Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 958 (5th Cir. 1993).

68. See infra notes 73-78 and accompanying text.
both because it is nearly impossible to demonstrate a person's state of mind with direct evidence and because employers would almost never make the kinds of statements that could arguably be classified as direct evidence of an intent to discriminate. Third, Justice O'Connor concluded that the evidence that Ann Hopkins presented in her case was direct evidence even though none of Hopkins's evidence qualified as direct evidence under the traditional definition. Justice O'Connor, therefore, simply cannot have meant direct evidence in the traditional sense.

1. The Discredited Notion Of The Superiority Of Direct Evidence

Direct evidence is usually equated with eyewitness testimony, at least when the witness actually saw or heard that which is intended to be proven. With circumstantial evidence, by contrast, "additional reasoning is required to reach the proposition to which it is directed." Professors Lempert and Saltzburg illustrate the difference between direct and circumstantial evidence with the following example:

[T]estimony by a witness, Walters, that he saw the defendant, Clark, pull a gun out and shoot the victim Hill is direct evidence on the issue of who shot Hill. If believed, we know that Clark is the one. Testimony by Walters that he saw Clark standing over Hill's body with a smoking gun is only circumstantial evidence that Clark shot Hill. Even if believed it only justifies the inference that Clark did the shooting. Other inferences are possible: Clark, for example, might have heard the shot, rushed to the scene, and picked up the gun just as Walters approached.

In short, circumstantial evidence requires an inference from the evidence to the thing to be proved; direct evidence does not.

As McCormick points out, however, "[b]oth sorts of evidence are quite convincing on some occasions, but not nearly so telling in other instances." Commentators and courts have generally agreed that direct evidence is not necessarily superior to circumstantial evidence. Wigmore

69. See BLACK'S LAW DICTIONARY 460 (6th ed. 1990), which defines direct evidence as "evidence in form of testimony from a witness who actually saw, heard or touched the subject of questioning." See supra note 15.

70. Id. Also, "[c]ircumstantial evidence serves as a basis from which the trier of fact may make reasonable inferences about a matter in issue." RICHARD O. LEMPERT AND STEPHEN A. SALZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 150 (2d ed. 1982).

71. Query whether we really know from this evidence—even if we believe it—that Clark is the one who killed Hill. It is possible that Clark fired blanks at Hill, who then pretended to be shot and who was subsequently shot by someone else. Similarly, Clark could have fired and missed while someone else shot him simultaneously. While neither of these scenarios is likely, they are as plausible as Lempert and Saltzburg's alternate inference from the strong circumstantial evidence referred to in this block quotation.

72. LEMPERT AND SALZBURG, supra note 70, at 150.

73. CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE 543 n. 17 (Edward W. Cleary ed., 3d ed. 1984). McCormick cites United States v. Andrino, 501 F.2d 1373 (9th Cir. 1974), which states "[c]ircumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable." Id. at 1378 (citing United States v. Nelson, 419 F.2d 1237, 1239 (9th Cir. 1969).
states: "So far as logic and psychology assist us, their conclusions show that it is out of the question to make a general assertion ascribing greater weight to one class or the other . . . ." 74 Wigmore's reviser Peter Tillers stated further: "Wigmore's view that circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted. There are innumerable decisions that support [this] thesis . . . ." 75 The Supreme Court agreed, holding that circumstantial evidence can in some cases be "more certain, satisfying and persuasive than direct evidence." 76 More recently, federal courts have held the same. The D.C. Circuit held that "[n]o distinction is made between direct and circumstantial evidence in evaluating the sufficiency of evidence supporting a guilty verdict." 77 If, in Price Waterhouse, Justice O'Connor was requiring the plaintiff to present direct evidence in the traditional sense, because she believed it is somehow superior to circumstantial evidence, she was doing so in the face of Supreme Court cases and commentators that have long rejected this notion. 78 It seems unlikely that Justice O'Connor would have ignored all of the authority stating that direct evidence is not superior to circumstantial evidence. It seems more likely that when, in Price Waterhouse, she required a Title VII plaintiff to present direct evidence of discrimination, she was using the term to mean something else.

2. The Near Impossibility Of Presenting Direct Evidence Of An Employer's Intent

Justice O'Connor, in Price Waterhouse, required that a plaintiff present direct evidence "that discriminatory animus played a significant . . . role

75. Id. These decisions include Ex Parte Jeffries, 7 Okla. Crim. 544 (1912) (concluding that "it is a mistake to say that 'circumstantial evidence' is inferior to what is commonly called 'positive and direct testimony.' "); Holland v. United States, 348 U.S. 121, 140 (1954) (holding that "[c]ircumstantial evidence in this respect is intrinsically no different from testimonial evidence. . . . In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference."); and State v. Harvill, 106 Ariz. 386 (1970) (holding that "the probative value of direct and circumstantial evidence are [sic] intrinsically similar; therefore, there is no logically sound reason for drawing a distinction as to the weight to be assigned to each.").
77. United States v. Lam Kwong-Wah, 924 F.2d 298, 303 (D.C. Cir. 1991) (citations omitted). Similarly, the Seventh Circuit stated "there is no principled difference between direct and circumstantial evidence." Elliot v. Thomas, 937 F.2d 338, 345 (7th Cir. 1991).
78. Judge Harry Edwards of the D.C. Circuit attacked the notion that direct evidence is superior to circumstantial evidence in his dissenting opinion in Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993) (Edwards, J., dissenting). In it, he offered the following example:
"[I]f one goes to bed and there is no snow on the ground, and one wakes up to find snow on the ground, the snow is powerful evidence—albeit wholly circumstantial—that it snowed while one was asleep. Conversely, direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him."
Id. at 808.
in the employment decision," before she would shift the burden to the employer.\textsuperscript{79} She was therefore asking the plaintiff to present direct evidence of what is going on inside the head of the employer when he or she is making the employment decision at issue and demonstrate that that animus played a role in the decision. It is unlikely that Justice O'Connor intended to require direct evidence in the traditional sense because such evidence would be nearly impossible for plaintiffs to produce.

Courts and commentators agree that it is virtually impossible to demonstrate a person's state of mind by direct evidence. The D.C. Circuit stated in a criminal case: "[i]ntent may, and generally must, be proved circumstantially . . . .\textsuperscript{80} Similarly, Charles Wright stated:

> Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the existence of a conspiracy, criminal intent, or other issues involving state of mind.\textsuperscript{81}

Although the \textit{Jackson} case and Wright both refer to intent in criminal cases, the analysis applies equally well to state of mind in Title VII cases. Just as criminal intent must be proved circumstantially, so must an intent to discriminate. In both cases, the thing to be proved is the inner workings of a person's mind. What goes on in a person's mind simply cannot be observed directly.

The closest thing to direct evidence of discrimination that a Title VII plaintiff could present would be a witness reporting an unlikely admission by the employer such as, "I am firing you because you are a woman." If the trier of fact believes the witness \textit{and} believes that the employer was speaking truthfully, then this evidence would establish that the employer fired the plaintiff based on an unlawful factor without the need for a non-credibility inference.\textsuperscript{82} Nothing short of such an unlikely statement would qualify as direct evidence. Even a highly probative statement such as "All women are incompetent; you are fired" requires a fact finder to infer that the employer who believes that all women are incompetent is firing the plaintiff because she, too, is a woman and is therefore incompetent. This may be a reasonable inference to make, but it is still an inference.\textsuperscript{83} Because of the near


\textsuperscript{80} United States v. Jackson, 513 F.2d 456, 461 (D.C. Cir. 1975) (footnotes omitted).

\textsuperscript{81} Charles Alan Wright, Federal Practice and Procedure § 411 (2d ed. 1982) (footnotes omitted)(emphasis added).

\textsuperscript{82} Price Waterhouse, 490 U.S. at 277. Note that two credibility inferences are needed here. In the above example from Professors Lempert and Saltzburg, the jury must make only one credibility inference—that is, they must believe that the witness is telling the truth. Here, the trier of fact must believe both that the witness is telling the truth \textit{and} that the employer was sincere when he said, "I'm firing you because you are a woman."

\textsuperscript{83} See Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir. 1992).
impossibility that plaintiffs could ever come up with evidence that could even arguably be classified as direct evidence—in the traditional sense—of an employer’s intent to discriminate, it is doubtful that Justice O’Connor intended to require them to do so.

3. Ann Hopkins’s Evidence

The view that Justice O’Connor was using direct evidence in a non-standard way is reinforced by her apparent conclusion that Ann Hopkins’s evidence qualified as direct evidence: “What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.”84 An examination of Hopkins’s evidence illustrates that none of it is direct evidence in the traditional sense because none of it, if believed, establishes directly—that is, without requiring an inference—that Hopkins’s employers placed negative reliance on her gender.

Justice O’Connor highlighted two pieces of Ann Hopkins’s evidence: the partners’ evaluations criticizing her for not conforming to certain gender stereotypes,85 and her supervisor’s comment that she should “‘walk more femininely, talk more femininely . . . and wear jewelry.’”86 Even these highly probative pieces of evidence, however, do not show directly that these decisionmakers negatively relied on her gender in refusing to promote her. The stereotyped comments, criticizing her as “macho” and suggesting that she needed to take a course at charm school, are not direct evidence. Even if the factfinder believes that the partners made these comments (and believed they were speaking sincerely), a factfinder would still have to infer (1) that a decisionmaker who refers to a woman as macho harbors stereotypical views of the way a woman should act, and (2) that the decisionmaker’s decision regarding the plaintiff was guided by his view that women should act in such stereotypical ways. Again, these are reasonable inferences to make, but they are inferences nonetheless.87

Similarly, Hopkins’s supervisor’s statement that her problems would go away if she walked and talked more femininely, while highly probative, does not directly establish the decisionmakers’ negative reliance on her gender in their decision not to promote her. Even if the fact finder believed the witness who reported the statement and believed that the statement was said truthfully, the fact finder would still have to infer (1) that the decisionmakers had stereotypical views on gender roles to which Hopkins was

85. Id. at 272.
86. Id.
87. The “charm school” comment requires even more inferences: A fact finder would have to infer from this statement, (1) that the speaker believed that a charm school teaches women to act “appropriately”; (2) that Hopkins, because she needs to go to such a school, does not act as a woman should, and (3) that the speaker was guided by this view in deciding to oppose Hopkins’ partnership bid.
not conforming, and (2) that these stereotypical views influenced their decision not to promote her. Once again, given the context, these are reasonable inferences to make, but they are inferences nonetheless.

Justice O'Connor must not have required direct evidence as it is commonly understood, because in the very case in which she applied this requirement and found it to be satisfied, there was no direct evidence of discrimination. The most likely explanation of this discrepancy is that she was not using *direct evidence* in the traditional sense. Further guidance on her intended meaning of *direct evidence* comes from the cases on which she relied in *Price Waterhouse*.

**B. Justice O'Connor's Non-Traditional Definition of Direct Evidence**

1. **Direct Evidence In Lower Court Cases Prior To Price Waterhouse**

In the cases from which Justice O'Connor drew her direct evidence requirement, there seems to be a tacitly agreed-upon meaning of *direct evidence* which courts use when deciding employment discrimination cases. In such cases, *direct evidence* often does not carry its traditional meaning. Instead, courts use *direct evidence* to refer to statements made by employers (or supervisors) that (1) reflect a bias against, or stereotypical attitudes about, the plaintiff's protected class; and (2) are closely connected to the adverse employment action at issue either *logically*—that is, in a cause-and-effect relationship with the employment action—or *temporally*—the statement was made shortly before or after the employment action—or both. Justice O'Connor seems to have adopted this non-traditional meaning of *direct evidence* in *Price Waterhouse*.

In her concurring opinion, Justice O'Connor cited three lower court cases to support her proposition that it is fair to shift the burden of persuasion to the defendant in cases like Hopkins's.88 In each of these cases, the court referred to the plaintiff's evidence as "direct evidence" even though it was not direct evidence in the standard sense.

In *Bell v. Birmingham Linen Service*,89 plaintiff Nora Bell was turned down for a "washman" job in favor of a male with less seniority.90 Her supervisor told her that he gave the man the job because the man had experience and because if he gave Ms. Bell the job, "'every woman in the plant would want to go into the washroom.'"91 Based on this statement, the

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88. *Price Waterhouse*, 490 U.S. at 273-74. The cases cited are *Bell v. Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983); *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987); and *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir. 1985).
89. 715 F.2d 1552 (11th Cir. 1983).
90. *Id.* at 1553. At the Birmingham Linen Service, a washman's job is to "sort the linen according to the type involved, determine the nature and degree of the soil, and then decide which formula and which chemicals should be used to clean the linen." *Id.* at 1553 n. 3.
91. *Id.* at 1553. "Washroom" in this context refers not to the bathroom but to the area of the linen service where the linen is sorted and placed in washing machines. *See id.* at 1553 n. 3. The court noted
court of appeals concluded that Bell had "present[ed] direct evidence of [the] defendant's intent to discriminate," and therefore shifted the burden of persuasion to the defendant. Bell's supervisor's statement, however, is not direct evidence in the traditional sense because inferences are required to move from the supervisor's statement to the defendant's intent to discriminate. This statement is, however, a remark by a decisionmaker which indicates bias against women, Ms. Bell's protected class. The supervisor indicated by his statement that he was against the idea of women working in the washroom, where no woman had worked in thirty years. Secondly, this statement is connected to the adverse employment action at issue both logically and temporally: the statement explains why he chose a man rather than Bell, and he said it shortly after refusing to let her work as a washman.

In Fields v. Clark University, the First Circuit Court of Appeals concluded that the plaintiff Rona Fields, a sociology professor, "proved by direct evidence that discrimination was a motivating factor in the decision" not to grant her tenure. The evidence which Fields presented consisted of her allegations that the members of the all-male sociology department "subjected her to 'a continuous course of sexual harassment, sexual innuendo and denigration of her professional status.'" Foremost among these allegations was her claim that one professor, who later participated in the vote recommending that she be denied tenure, made sexual advances toward her. When she rejected him, "he warned her that her refusal 'was no way to get tenure.'" Like Bell's supervisor's statement, this remark cannot be classified as direct evidence of discrimination as direct evidence is usually defined. The statement, however, was made by a decisionmaker: a professor who would later vote on her tenure. The statement also reflects a bias against women, and is logically connected to her denial of tenure since the

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92. Id. at 1556.
93. Even if the trier of fact believes the witness' testimony that the supervisor made this statement and believes that the supervisor was speaking sincerely, the statement does not establish defendant's intent to discriminate without making two inferences. First, the trier of fact would have to infer from the statement that the supervisor is resistant to the idea of many women working in the washroom. Second, the trier would have to infer that this feeling of animus towards women in general guided him in deciding not to give the position to Bell in particular.
94. Id., at 1553.
95. 817 F.2d 931 (1st Cir. 1987).
96. Id. at 935.
97. Id. at 933.
98. Id.
99. Id.
100. In addition to the two credibility inferences, the trier of fact would have to infer first, that he would oppose her getting tenure unless she had sex with him; and second, that he voted to deny her tenure because of her refusal.
professor strongly implied that her not having sex with him would influence his vote.\textsuperscript{101}

In Thompkins v. Morris Brown College,\textsuperscript{102} the third case cited by O'Connor in Price Waterhouse, the plaintiff, Ms. Thompkins, was fired from her position with Morris Brown College because she refused to give up her second job as a high school math teacher.\textsuperscript{103} Ms. Thompkins alleged that this action constituted disparate treatment because the men who similarly maintained full-time second jobs were not fired.\textsuperscript{104} The court agreed with the plaintiff that two statements by Dr. Threatt and Dr. Payne, the college's president and vice president of academic affairs respectively, "constitute direct evidence of discrimination."\textsuperscript{105} Ms. Thompkins testified that Dr. Threatt told her that "he saw no reason for a woman to have a second job," and that Dr. Payne told her that she could not have four afternoon classes (which would allow her to teach at the high school) like the men "because those males had families and needs that the plaintiff did not have."\textsuperscript{106} Even if the trier of fact believes Thompkins's testimony and believes further that Payne and Threatt were speaking truthfully, the trier must make inferences before reaching the conclusion that the college discriminated against Ms. Thompkins.\textsuperscript{107} These statements do, however, meet the alternative definition of direct evidence: they were made by decisionmakers, they reflect a bias against or stereotypical attitudes about women,\textsuperscript{108} and they are connected logically to the adverse employment action (Ms. Thompkins was fired for holding down two jobs and one, or arguably both, statements relate to the fact that a woman does not need to work two jobs).

\begin{footnotes}
\item[101.] It is unclear when this incident occurred—whether it was on the eve of Fields' tenure vote or long before it. It therefore requires an inference to determine whether the statement is temporally connected to the adverse employment action as well.
\item[102.] 752 F.2d 558 (11th Cir. 1985).
\item[103.] \textit{id.} at 559.
\item[104.] \textit{id.} at 561.
\item[105.] \textit{id.} at 563.
\item[106.] \textit{id.} at 561.
\item[107.] From Dr. Threatt's statement, the fact finder would have to infer from his views about women having second jobs that he was not allowing Ms. Thompkins to have a second job because she is a woman. Dr. Payne's statement also requires further inferences. First, the trier of fact would have to infer from this statement (that the men had needs that the plaintiff did not have) that she did not have these needs because she is a woman. The trier would then have to infer that the decision not to allow her to have a second job was motivated by this view. Note that an equally strong inference that could be drawn here is that Dr. Payne did not think she needed a second job was because she did not have a family like the men. This would support an inference of discrimination based on Thompkins' familial status rather than on her sex. Whether Dr. Payne's statement supports inferences of discrimination based on Thompkins' gender or instead on her familial status, the statement is not direct evidence. Inferences are required in either case.
\item[108.] Dr. Threatt's statement does so, at least. It reflects the stereotypical view that work is more of the man's realm rather than the woman's. Dr. Payne's statement, however, seems more geared to the notion that people with families need to work more than people without them, so as to provide for them.
\end{footnotes}
Bell, Fields, and Thompkins each relied on other lower court cases that similarly used this non-standard definition of direct evidence. None of the evidence in these cases is direct evidence in the traditional sense. Each piece of evidence requires a fact finder to draw inferences. In each of these cases, however, the court classified as direct evidence testimony that a supervisor had made statements reflecting animus towards plaintiff's groups which were connected to the adverse action at issue.

In short, all three of the lower court cases relied upon by Justice O'Connor in Price Waterhouse that shifted the burden to the defendant once the plaintiff presented direct evidence of discrimination, adopted a non-standard definition of direct evidence. These cases did not require the plaintiff to present traditional direct evidence, meaning evidence that if believed proves that the defendant discriminated without the need of an inference. Instead, these cases required the plaintiff to present direct evidence in a much different sense, namely a decisionmaker's remarks that reflect a discriminatory bias and that are either logically or temporally connected to the action at issue. Lower courts seem to have tacitly agreed to refer to such evidence as "direct" evidence of discrimination even though it is not traditional direct evidence.

2. Justice O'Connor's Use of the Term Direct Evidence in Price Waterhouse

Although Justice O'Connor did not state exactly what she meant by direct evidence, clues to what she meant appear throughout her concurring opinion. In it, she made clear that four types of evidence do not qualify as direct evidence sufficient to shift the burden to the defendant:

(a) pure statistics;
(b) stray remarks;
(c) statements by nondecisionmakers; and
(d) statements unrelated to the employment decision at issue.

First, Justice O'Connor distinguishes between the direct evidence that Hopkins showed here and statistical evidence. She states:

I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof . . .

and shifting the burden of persuasion in a case like this one, where an em-

109. See Lee v. Russell County Bd. of Educ., 684 F.2d 769, 772 (11th Cir. 1982) (holding that the following testimony was direct evidence of discriminatory motivation: a board member stating that he was concerned about getting a greater "white presence" in the schools, and telling a principal to "build cases" against a group of black teachers which included the three plaintiffs); Miles v. M.N.C. Corp., 750 F.2d 867, 876 (11th Cir. 1985) (testimony that the hiring agent of the employer responded to question why no blacks worked at the company by saying "[H]alf of them weren't worth a shit" was considered direct evidence); and Bibbs v. Block, 778 F.2d 1318, 1320 (8th Cir. 1985) (en banc) (hiring committee member's reference to plaintiff as a "black militant" and reference to another black employee as "nigger" was direct evidence of discrimination).
ployee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. Justice O'Connor thus indicated that statistical proof does not fit within her category of direct evidence.

Second, Justice O'Connor asserted that "stray remarks in the workplace, while perhaps probative of sexual harassment," cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Justice O'Connor, however, left unclear what she meant by "stray remarks." The citation to Meritor Savings Bank is of little help, because nowhere in the cited six pages are stray remarks discussed. She also failed to provide examples of such stray remarks. In the context of the paragraph, Justice O'Connor did, however, contrast "stray remarks" which cannot justify shifting the burden to the employer with "what Ann Hopkins showed here"—namely, evidence that decisionmakers relied on illegitimate criterion—which can shift the burden.

The category of "stray remarks" therefore, has much in common with two other categories of evidence that Justice O'Connor stated fail to qualify as direct. Justice O'Connor would similarly not allow "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself . . . .", to shift the burden of persuasion to defendants. It seems, therefore, that discriminatory remarks by co-workers (as opposed to supervisors) would clearly not qualify. More disturbingly, discriminatory remarks by decisionmakers are not enough to shift the burden of persuasion unless they are related to the decisional process. So if an employee's immediate supervisor repeatedly made sexist remarks to an employee, this would be insufficient evidence for Justice O'Connor to shift the burden to the employer, as long as those remarks were not related to the decisional process. Justice O'Connor nowhere clearly articulated the degree to which a remark must be "related" to the decisionmaking process. It seems from her two illustrations discussed below, however, that to qualify as direct evidence, the remark must be related both temporally and logically to the employment decision.

In the most complete explanation of what she required Ann Hopkins to show in order to shift the burden to the defendant, Justice O'Connor stated: "What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate crite-

111. In holding pure statistical evidence insufficient to shift the burden to the defendant, O'Connor tacitly agreed with the 11th Circuit's approach in Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985). See Price Waterhouse, 490 U.S. at 232. Justice O'Connor did not, however, refer to Miles in her opinion.
113. Id. at 277.
114. Id. (emphasis added).
At one point in her opinion, O'Connor created an image to illustrate further "what Hopkins showed here":

It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. Justice O'Connor's recasting of Hopkins's evidence in this light was meant, I believe, to emphasize two things about Hopkins's evidence. First, it emphasized the close connection between the comments about her gender and the decisionmaking process. In both Justice O'Connor's hypothetical and Hopkins's actual case, the partners' comments and the ultimate employment decision are closely related. This close connection is evident in (a) the content of the discriminatory remarks, (b) the context in which they were made, and (c) the sources of the remarks. The content of the sexist remarks in the hypothetical, like the partners' actual comments about Hopkins being "macho" and "needing a course in charm school," showed bias against women. The partners in the hypothetical, like those in the actual case, made the comments in the process by which candidates were evaluated. In both cases it was decisionmakers (the partners), rather than Hopkins's subordinates or coworkers who made these comments.

Second, Justice O'Connor's hypothetical was meant to emphasize that "Hopkins had taken her proof as far as it could go," that is, without being present, she showed (a) evidence of decisionmakers' discriminatory attitudes immediately before the decision was made; and (b) evidence regarding the decision from after the decision was made illustrating that discriminatory input went into the decision itself.

Justice O'Connor's second point is evident as well: it would be difficult for Hopkins to do more than she did because she was not privy to the discussions that ultimately led to the decision not to promote her. Justice O'Connor concluded that because of the close connection to the decisionmaking process and the difficulty in proving what exactly went on behind closed doors, a court is justified in requiring the employer to prove that it would have made the same decision in spite of the employee's gender.

C. Summary of the Ambiguities in Justice O'Connor's Test

Although Justice O'Connor's opinion gives clues as to what evidence would be sufficient for a court to shift the burden of persuasion to the defendant, she did not provide the lower courts with clear guidance. Lower
courts reading her concurrence find two guiding principles that are of only limited help. First, that pure statistical proof, stray remarks, statements by nondecisionmakers and statements unrelated to the decisionmaking process will not suffice to shift the burden. Second, that proof of sexist remarks made by decisionmakers in the decisionmaking process itself, such as what Hopkins presented, will suffice.

However, in spite of Justice O'Connor's statements about what evidence cannot be used to shift the burden of proof to the defendant, several ambiguities remain in her test making it difficult for lower courts to apply. Because Price Waterhouse was a bench trial, it is unclear how her test would apply in jury trials. This question becomes especially important since the Civil Rights Act of 1991 made jury trials available to Title VII plaintiffs and defendants.\(^{118}\)

Justice O'Connor also used the term *direct evidence* in a non-traditional fashion, without explicitly acknowledging that she was doing so. From the clues in her opinion, it seems that when Justice O'Connor required *direct evidence* she meant evidence of a decisionmaker's words that show animus toward plaintiff's protected class which is related to the adverse employment decision. Some lower courts that have interpreted her opinion do not understand that Justice O'Connor was using *direct evidence* in a non-traditional way and therefore have required plaintiffs to present direct evidence in the traditional sense.\(^{119}\) Requiring such evidence makes it virtually impossible for plaintiffs to avail themselves of a mixed-motives instruction. Even those courts that adopt Justice O'Connor's unorthodox definition of direct evidence have trouble interpreting it because it is unclear when a statement is a "stray remark" or is "unrelated to the decisional process itself."\(^{120}\)

### IV

**DIFFICULTIES IN APPLICATION OF JUSTICE O'CONNOR'S DIRECT EVIDENCE TEST**

Of these ambiguities inherent in Justice O'Connor's direct evidence test, her unorthodox use of the term *direct evidence* generates the most confusion among lower courts.\(^{121}\) The courts of appeal fall into one of three categories: courts which apply or attempt to apply the traditional definition of direct evidence, those which apply O'Connor's non-standard definition, and those which apply neither, allowing the plaintiff to present any evi-

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119. See infra subsection IV(A).
120. Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring).
Evidence of discrimination to help carry its burden. Each of these three categories requires the plaintiff to meet a different standard of proof to receive a mixed-motives instruction in a jury trial or a judicial finding of mixed motives.

Category A - courts that require direct evidence in the traditional sense: These courts take Justice O'Connor at her word and require plaintiffs to actually produce direct evidence of discrimination, that is, evidence which proves discrimination without the need of an inference.

Category B - courts that require direct evidence in the non-traditional sense: these courts do not require direct evidence in the traditional sense. Instead, they require the plaintiff to present evidence that would meet Justice O'Connor's unorthodox definition of direct evidence.

Category C - courts that place no limits on the plaintiff's evidence: These courts do not purport to require direct evidence in the traditional sense, and they do not limit the plaintiff's evidence only to the evidence that Justice O'Connor would allow.

In the most complete analysis of Justice O'Connor's direct evidence test to date, Michael Zubrensky divided the federal courts of appeal into these three factions: "Direct Evidence standard" circuits, "'Circumstantial-Plus' Evidence Standard" circuits, and "Nonrestrictive Evidentiary Standard" circuits. He argued that six circuit courts—the First, Fifth, Sixth, Seventh, Tenth, and Eleventh—"impose a direct evidence requirement on mixed-motives plaintiffs ...." He stated further that all of these but the Fifth Circuit "define and apply their direct evidence [requirement] literally—requiring plaintiffs to present evidence that proves discrimination without inference." Zubrensky argued that these courts do not allow plaintiffs to shift the burden of proof based on circumstantial evidence. The Fifth Circuit, by contrast, "applies its direct evidence requirement nonliterally, as Justice O'Connor did in Price Waterhouse."

Zubrensky's second category, courts using the "'Circumstantial-Plus' evidence standard," includes the Second, Third, and Eighth Circuits. These courts, Zubrensky argued, "permit plaintiffs to use circumstantial evidence, but require that such evidence be 'directly tied to' or 'directly reflected in' the alleged discrimination."

122. Id. at 970.
123. See Id.
124. See Id.
125. See Id.
126. See id.
127. Id. at 973.
128. Id.
129. Id.
130. Id. at 976.
131. Id.
The third category in Zubrensky’s scheme is courts using the “nonrestrictive evidentiary standard.” Of the federal courts, only the Fourth Circuit uses this standard which “sanction[s] the admission of both direct and circumstantial evidence in mixed-motives cases.” Zubrensky also pointed out that a Rhode Island statute prohibits all evidentiary restrictions on plaintiffs in employment discrimination cases.

A second commentator, Linda Hamilton Krieger, adopted Zubrensky’s categorization scheme. Professor Krieger’s only change to the scheme was a note that the Seventh Circuit, which Zubrensky placed in the direct evidence category, “presently suffers from an intracircuit conflict on this issue.”

My division of the courts roughly parallels Zubrensky’s and Krieger’s. One minor difference is that I refer to the second category as “courts that follow Justice O’Connor’s non-traditional definition of direct evidence,” because I wish to highlight Justice O’Connor’s influence upon these courts. There are, however, several more significant differences. Unlike Zubrensky, I place the Fifth Circuit on par with the other courts that apply a literal definition of “direct evidence.” Since Zubrensky’s article was published, the Fifth Circuit has applied a more literal definition of direct evidence. Second, unlike Zubrensky and Krieger, I place the Seventh and Eleventh Circuits in my second “non-traditional definition” category because in recent cases, these two courts seem to have abandoned a traditional direct evidence analysis in favor of one more closely resembling Justice O’Connor’s.

A. Category A: Courts that Require Direct Evidence in the Traditional Sense

The First, Fifth, Sixth, and Tenth Circuit Courts of Appeals have attempted to apply Justice O’Connor’s direct evidence requirement as if it actually required a plaintiff to present direct evidence in the sense of “evidence, which if believed, proves the existence of a fact in issue without inference or presumption.” In so doing, some of these courts reject as

132. Id. at 970.
133. Id. at 971.
134. Id. at 971 n. 102 (citing the amendment to Rhode Island’s Fair Employment Practices Act, R.I. Gen. Laws §§ 28-5-1 to 28-5-40 (Supp. 1993)).
136. Id. (citing Randle v. LaSalle Telecom., Inc., 876 F.2d 563, 569 (7th Cir. 1989) (requiring direct evidence) and Robinson v. PPG Industries, Inc., 23 F.3d 1159, 1165 (7th Cir. 1994) (arguably loosening the direct evidence requirement)).
137. See Mooney v. ARAMCO Services Co., 54 F.3d 1207 (5th Cir. 1995).
insufficient evidence that would satisfy the standard that Justice O'Connor actually applied in *Price Waterhouse.*  

The First Circuit applied the traditional definition of direct evidence in *Jackson v. Harvard University,* a bench trial. In *Jackson,* the plaintiff argued that she should be able to shift the burden to the defendant "to prove that the same decision would have ensued in the absence of the alleged discrimination." The *Jackson* court rejected her argument because she failed to "provide direct evidence that gender bias infected the decision-making process . . . ." The court defined direct evidence as "evidence which, in and of itself, shows a discriminatory animus." The plaintiff's evidence failed to qualify as direct evidence because the district court drew from her evidence an inference that gender bias did not infect the decision-making process. The evidence did not, therefore, in and of itself, show a discriminatory animus.

In *Mooney v. ARAMCO Services Co.,* the Fifth Circuit cited this definition of direct evidence: "direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." It then examined the plaintiffs' evidence to see if it met this tough standard. Despite the strength of the plaintiffs' evidence, the court of appeals concluded that the plaintiffs had failed to "provide 'direct evidence' of age related animus." The court stated that while it could infer a conclusion of discrimination from the plaintiffs' evidence, the statements "do not provide discriminatory animus 'without inference or presumption.'" The Fifth Circuit therefore agreed with the trial court's rejection of the plaintiffs' requests for a "*Price Waterhouse* instruction." By adher-

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140. See infra note 148.
141. 900 F.2d 464 (1st Cir. 1990). In this case, Ms. Jackson sued Harvard Business School when it failed to offer her tenure. She presented evidence that the dean of the school told her that if the government or the public wanted more faculty at the business school, "they would have to impose quotas because otherwise Harvard would go through the affirmative action procedures but would not actually promote women." *Id.* at 467. She also showed that the business school had refused to grant her request to exclude from her tenure review committee a professor that she claimed was biased against women. *Id.* at 465.
142. *Id.* at 467 (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989)).
143. *Id.* at 467.
144. *Id.*
145. *Id.*
146. 54 F.3d 1207 (5th Cir. 1995).
147. *Id.* at 1217 (quoting *Brown v. East Mississippi Electric Power Ass'n,* 989 F.2d 858, 861).
148. One plaintiff's supervisor told him, "'If I can replace an expensive American expat with a younger and cheaper Brit, I can save the company a lot of money.'" *Id.* at 1218 n. 13. Another plaintiff overheard his supervisor assure a young engineer who feared he would be laid off, "'Don't worry. They're going to get rid of the older employees with the higher salaries.'" *Id.* at 1218 n. 14. A third plaintiff, after he was terminated, was told by his former supervisor that he must not have been fired "because of [his] performance because that's been excellent. 'So, it must [have been] your age.'" *Id.* at 1218 n. 15.
149. *Id.* at 1219.
150. *Id.* at 1218.
ing to a traditional definition of direct evidence, the court applied a stricter standard than Justice O'Connor actually applied in *Price Waterhouse*. Other Fifth Circuit cases have applied an analysis similar to *Mooney's*.\(^{151}\)

In *Manzer v. Diamond Shamrock Chemicals Co.*,\(^ {152}\) the Sixth Circuit stated that the plaintiff failed to present the direct evidence of discrimination needed to shift the burden of persuasion to the employer.\(^ {153}\) The court applied a strict, standard definition of direct evidence, rejecting the plaintiff's evidence as "circumstantial" because it required the jury to make inferences from the evidence to the alleged discrimination: "[T]he relevance of this statement [by the plaintiff's supervisor regarding the plaintiff's age] to Manzer's case, if any, is provided by inference."\(^ {154}\) The Court concluded that *Price Waterhouse* mixed-motives analysis was not applicable because plaintiff’s evidence was "at most, circumstantial evidence of discrimination."\(^ {155}\)

Finally, the Tenth Circuit also adopted a traditional definition of direct evidence in *Ramsey v. City and County of Denver*.\(^ {156}\) In a bench trial, the Tenth Circuit rejected the plaintiff's claim that the burden of persuasion should have been shifted to the defendant.\(^ {157}\) To shift the burden, the Tenth Circuit required that the plaintiff present direct evidence of discrimination.\(^ {158}\) The plaintiff failed to do so because the plaintiff's supervisor's statements, proffered by the plaintiff, were only "circumstantial or indirect evidence, and did not constitute direct evidence of discrimination against [Ms.] Ramsey."\(^ {159}\) These statements were circumstantial evidence because they required the fact finder to infer that discriminatory animus was the cause of the decision.\(^ {160}\)

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151. In *Davis v. Chevron USA, Inc.*, 14 F.3d 1082 (5th Cir. 1994), the court applied a strict definition of direct evidence as evidence that "directly suggest[s] the existence of bias; [where] no inference is necessary." *Id.* at 1085. The court refused to accept the plaintiff's evidence as sufficient because by itself it did not suggest gender animus. *Id.* at 1086. The plaintiff presented evidence that an interviewer asked her whether she would be able to supervise men and handle disputes with and among them. *Id.* at 1086. An inference was required to reach from the evidence to the fact of the discrimination.

152. 29 F.3d 1078 (6th Cir. 1994).

153. *Id.* at 1081.

154. *Id.* Although the court here strictly required "direct evidence" in the hornbook sense, it reached the same conclusion that Justice O'Connor would have reached under her non-standard definition of direct evidence. The evidence at issue is a single statement by the plaintiff's supervisor at trial that if the plaintiff had been fifty-five he would have been offered a program of early retirement. The plaintiff tried to use this to show that he was fired in order to keep him from obtaining retirement benefits. Justice O'Connor would likely characterize this statement as a statement "unrelated to the decisional process itself" because, without more, it does not seem to relate to the decision to fire the plaintiff, either logically or temporally.

155. *Id.*

156. 907 F.2d 1004, 1007-09 (10th Cir. 1990).

157. *Id.*

158. *Id.*

159. *Id.* at 1008.

160. *Id.* See also *Heim v. State of Utah*, 8 F.3d 1541, 1546-47 (10th Cir. 1993), where the Tenth Circuit held that a statement by the plaintiff's supervisor, "Fucking women, I hate fucking women in the
In Category A, a judge’s determination of whether the plaintiff’s evidence is direct evidence in the traditional sense is crucial. In jury trials, the plaintiff will not receive a *Price Waterhouse* instruction unless the judge determines that the plaintiff’s evidence is “direct”; in bench trials, a judge will not shift the burden of persuasion to the defendant without a similar determination. Because the test requiring the plaintiff to show traditional direct evidence is so difficult to meet, plaintiffs in these circuits have little chance of taking advantage of *Price Waterhouse* burden shifting.

B. Category B: Courts that Apply Justice O’Connor’s Non-Traditional Definition of Direct Evidence

The Category B courts (the Second, Third, Seventh, Eighth, and Eleventh Circuits) do not require an employee to present direct evidence of discrimination in the traditional sense. The plaintiff must, however, present evidence that would meet Justice O’Connor’s non-standard definition of *direct evidence*—namely, evidence of statements by decisionmakers related to the decisionmaking process that reflect discriminatory animus.161

In *Ostrowski v. Atlantic Mut. Ins. Companies*, the Second Circuit stated plainly that, while it generally followed Justice O’Connor’s “direct evidence” approach, it did not require a plaintiff to produce direct evidence in the traditional sense.163 The court stated that when, in the past, the courts used the term *direct evidence* in employment discrimination cases, they did not use it in its sense as antonym of “circumstantial,” for that type of ‘direct’ evidence as to a mental state is usually impossible to obtain . . . . ” Even a highly-probable statement like “You’re fired, old man” still requires the factfinder to draw the inference that the plaintiff’s age had a causal relationship to the decision.164

For example, in *Ostrowski*, the Second Circuit held that a plaintiff is entitled to a mixed-motives jury instruction if “the plaintiff’s nonstatistical evidence is directly tied to the forbidden animus, for example policy document office,” was an “inferential statement” and therefore “not ‘direct evidence’ of discrimination satisfying the plaintiff’s burden.”

162. 968 F.2d 171 (2d Cir. 1992).
163. *Id.* at 181-82.
164. *Id.* at 181 (quoting *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992)). In *Ostrowski*, the plaintiff sued his employer Atlantic Mutual Insurance Company, under both the ADEA and Title VII, alleging that Atlantic was retaliating against him for hiring and promoting persons over 40 protected by the ADEA and women and minorities protected by Title VII. Both statutes protect individuals who have “opposed any practice made unlawful” by the acts. 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA). Mr. Ostrowski pursued only the ADEA claim on appeal. He presented evidence that after years of favorable work evaluations, he began to receive poor reviews after hiring older persons. Regarding one hire, his supervisors told him that, “‘that’s not the type of person that we want to hire . . . that guy should have retired years ago.’ ” *Id.* at 174. The same supervisor said another hire “‘was 60 years old . . . and there is no way he can contribute.’” *Id.*
ments or statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus . . . .”\textsuperscript{165} The Ostrowski court stated further that “purely statistical evidence would not warrant such a [jury] charge . . . nor would 'stray' remarks in the workplace by persons who are not involved in the pertinent decisionmaking process.”\textsuperscript{166} Ostrowski, thus applies a standard nearly identical to Justice O’Connor’s non-standard definition of direct evidence.

The Third Circuit in \textit{Hook v. Ernst & Young},\textsuperscript{167} followed Ostrowski and Tyler’s lead in pointing out that Justice O’Connor’s use of “direct evidence” was “an unfortunate choice of terminology for the sort of proof needed to establish a mixed-motives case.”\textsuperscript{168} Instead of relying on the standard definition of direct evidence, the \textit{Hook} court looked to Justice O’Connor’s limitations on the types of evidence that can suffice to shift the burden—namely that stray remarks, statements by nondecisionmakers and statements unrelated to the decisional process cannot suffice.\textsuperscript{169} Using Justice O’Connor’s standard, the \textit{Hook} court determined that the plaintiff was not entitled to a burden-shifting instruction because the statements she proffered as evidence\textsuperscript{170} were stray remarks. Although they were made by a decisionmaker, there was no evidence they were related to the decision process. They were temporally remote, and they had nothing to do with Hook’s job performance.\textsuperscript{171} The Third Circuit’s analysis here mirrors Justice O’Connor’s.

Like the Second and Third Circuits, the Eighth Circuit refrains from using the term \textit{direct evidence} “in order to avoid the ‘thicket’ created by some courts’ use of the term ‘direct evidence’ to describe the plaintiff’s initial burden of proof in a \textit{Price Waterhouse} case.”\textsuperscript{172} The Eighth Circuit does, however, apply a standard similar to Justice O’Connor’s.\textsuperscript{173}

For example, in \textit{Kriss v. Sprint Communications Co.},\textsuperscript{174} the Eighth Circuit concluded that the plaintiff’s evidence\textsuperscript{175} constituted “little more

\textsuperscript{165} Id. at 182.
\textsuperscript{166} Id.
\textsuperscript{167} 28 F.3d 366 (3d Cir. 1994).
\textsuperscript{168} Id. at 374 (quoting Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992) and Ostrowski v. Atlantic Mut. Ins. Companies, 968 F.2d 171 (2nd Cir. 1992)) (interior quotation marks omitted).
\textsuperscript{169} Hook, 28 F.3d at 373.
\textsuperscript{170} Ms. Hook’s supervisor once told her to “‘get [her] legs and ass’ over to the client. On a separate occasion, a client asked Ms. Hook how she could get out of her blouse because it buttoned in the back. Her supervisor replied that he had buttoned it for her that morning. Id. at 369.
\textsuperscript{171} Id. at 375.
\textsuperscript{172} Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 202 n. 1 (8th Cir. 1993).
\textsuperscript{173} Id. at 201-02.
\textsuperscript{174} 58 F.3d 1276 (8th Cir. 1995).
\textsuperscript{175} The plaintiff in \textit{Kriss} presented evidence that her supervisor said that certain sales representatives were not ready to “run with the stallions,” that he called a woman in the office a “bitch,” and that he joked that he wanted to hire a sales representative away from another office because she was attractive. Id. at 1281.
than 'stray remarks in the workplace' and 'statements by decisionmakers unrelated to the decisional process itself.' Accordingly, the Eighth Circuit reversed the district court’s decision to shift the burden. For a court to shift the burden, the Kriss court held, the plaintiff must present evidence of “'conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.’” The Eighth Circuit, therefore, does not require direct evidence in the traditional sense, but it does require evidence similar to that presented by Hopkins in *Price Waterhouse*.

Unlike the Second, Third, and Eighth Circuits, the Seventh Circuit does not openly point out that it is not actually requiring direct evidence in the traditional sense. Like these three circuits, however, the Seventh Circuit requires a plaintiff to present evidence that meets a standard similar to Justice O’Connor’s non-standard definition of direct evidence. In *Robinson v. PPG Industries, Inc.*, a supervisor had told the plaintiff, aged fifty-nine, several times that the company would not retain employees up until they reached sixty-five. The plaintiff was fired and replaced by a thirty-nine-year-old. The *Robinson* court stated that a “factfinder might infer from these kinds of statements that PPG was motivated by age in its termination decisions. That is not the only inference of course . . . . But this is for the finder of fact to sort out.” Even though the *Robinson* court openly acknowledged that an inference from the evidence was required, it still referred to this evidence as “direct evidence of discriminatory animus.” The Seventh Circuit did not, therefore, require direct evidence in the traditional sense of evidence that establishes a fact without the need of an inference. Instead, it instructed the district court on remand to determine whether the remarks were “merely stray remarks that had nothing to do with his termination.” The Seventh Circuit, therefore, appears to have moved away from requiring direct evidence in the traditional sense, and moved toward requiring direct evidence as Justice O’Connor defines it.

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176. Id. at 1282 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring)).

177. *Stacks*, 996 F.2d at 1280, 1282.

178. Id. at 1282 (quoting *Radabaugh v. Zip Feed Mills*, 997 F.2d 444, 449 (8th Cir. 1993)).

179. 23 F.3d 1159 (7th Cir. 1994).

180. Id. at 1165.

181. Id. at 1165 n. 2.

182. Id. at 1165 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring)).

183. See Zubrensky, supra note 121, at 974 (citing *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989)); see also Krieger, supra note 135, at 1220-21 n. 267 (citing *Randle v. LaSalle Telecom., Inc.*, 876 F.2d 563, 569 (7th Cir. 1989) and *Robinson v. PPG Industries, Inc.*, 23 F.3d 1159, 1165 (7th Cir. 1994), noting that *Robinson* was arguably loosening the direct evidence requirement).
Similarly, the Eleventh Circuit has recently adopted Justice O'Connor's approach.\(^\text{184}\) In *Haynes v. W.C. Caye & Company, Inc.*,\(^\text{185}\) the court agreed with the plaintiff that the district court erred "by failing to recognize that certain evidence could be direct evidence of discrimination."\(^\text{186}\) The Eleventh Circuit concluded that the supervisor's statement could constitute direct evidence because it is "indistinguishable from some of the evidence which the Supreme Court in *Price Waterhouse v. Hopkins* . . . considered as direct evidence."\(^\text{187}\) In doing so, the *Haynes* court indicated that it was using the evidence accepted in *Price Waterhouse* as its benchmark rather than traditional direct evidence.

**C. Category C: Courts that Do Not Require "Direct Evidence" in Either the Traditional or Non-Traditional Sense**

Virtually all of the federal courts have required the plaintiff to show either direct evidence in the traditional sense (Category A) or in Justice O'Connor's non-traditional sense (Category B).\(^\text{188}\) In contrast to Categories A and B, the Fourth Circuit requires neither.\(^\text{189}\) It allows the plaintiff to carry her burden "by any sufficiently probative direct or indirect evidence . . . ."\(^\text{190}\) The Fourth Circuit is the only Court of Appeals that currently subscribes to this view.\(^\text{191}\) This approach was followed briefly by the Second Circuit before it adopted the Category B approach in *Ostrowski*.\(^\text{192}\)

In *White v. Federal Exp. Corp.*,\(^\text{193}\) the Fourth Circuit Court of Appeals in a bench trial case, stated that to shift the burden of persuasion to the

\(^{184}\) In fact, it is arguable that the Eleventh Circuit never required direct evidence in the traditional sense. Zubrensky argues that it did, but in the case he cites, Burns v. Gadsen State Community College, 908 F.2d 1512 (11th Cir. 1990), the plaintiff was able to shift the burden to the defendant based on evidence that, while probative, was not direct evidence in the traditional sense. *Id.* at 1518.

\(^{185}\) 52 F.3d 928 (11th Cir. 1995).

\(^{186}\) *Id.* at 929. The plaintiff's supervisor's told her, "You know, Pat, I felt that a woman was not competent enough to do this job, but I think maybe you’re showing me that you can do it." *Id.* at 930.

\(^{187}\) *Id.* at 931.

\(^{188}\) As of this writing, the Ninth and DC Circuits have not ruled squarely on the issue.

\(^{189}\) *See* Zubrensky, supra note 121, at 271.


\(^{191}\) Note, however, that the Fourth Circuit might be moving toward a Category B approach. In a recent unpublished opinion, the Fourth Circuit held that plaintiffs must present "sufficiently direct evidence of discrimination [to] qualify for the more advantageous standards of liability applicable in mixed-motive cases." *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995). The *Fuller* court required evidence of "statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Id.* at 1142 (citing, inter alia, *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 182 (2d Cir. 1992) and *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993)). It is unclear at this point whether the Fourth Circuit will continue to follow its approach in *White*, below, or whether it will embrace the *Fuller* Category B approach.

\(^{192}\) *See* Tyler v. Bethlehem Steel Corp., 939 F.2d 1176, 1185 (2d Cir. 1992) (holding that a plaintiff need only present enough evidence, either direct or circumstantial, that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were "because of" an impermissible factor).

\(^{193}\) 939 F.2d 157 (4th Cir. 1991).
employer, a plaintiff need only "prove by a preponderance of the evidence that the employer's motive to discriminate was a substantial factor" in the adverse personnel action against the plaintiff." Unlike the courts in Categories A and B, the Fourth Circuit does not require the trial judge to determine first whether the plaintiff's evidence is "direct evidence" in the traditional or non-traditional sense. It need only be convinced that it is more likely than not that the employer's motive was a motivating or substantial factor in the employment decision. The plaintiff is not precluded from using statistics, or limited to statements by decisionmakers related to the employment decision. Instead, the plaintiff can carry her burden "by any sufficiently probative direct or indirect evidence . . . ." Only in the Fourth Circuit, therefore, could statistics and "stray remarks" be used to shift the burden to the defendant.

The *Price Waterhouse* plurality seems to be in accord with the Fourth Circuit's approach. The plurality stated, "[b]y focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision . . . ." It seems that the plurality would agree with the Fourth Circuit that in a bench trial, the plaintiff, to shift the burden to the defendant, need only prove by a preponderance of the evidence that the discriminatory animus played a motivating factor in the employment decision.

As Michael Zubrensky pointed out in his Note, Rhode Island has adopted a statute that "prohibits the imposition of a direct evidence requirement on mixed-motives plaintiffs." An amendment to § 28-5-7 of Rhode Island's Fair Employment Practices Act (FEPA), states: "Nothing contained herein shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices under section 28-5-7." The First Circuit Court of Appeals, in *Resare v. Raytheon Co.*, dealt with this statute in a FEPA case. They acknowledged that, under the statute, a plaintiff need only "put forth sufficient evidence for a jury to conclude that it is more likely than not that the plaintiff's sex was 'a motivating factor' for the defendant's decision." The plaintiff would not be limited in the proof she could use in carrying this burden. Rhode Island's statute, like the court in *Tyler*, allows a plaintiff in an em-

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194. *White* was decided before the Civil Rights Act of 1991 became effective. It is likely that a plaintiff now need only prove that the employer's illegal discrimination was a motivating factor in the employment decision.  
195. Id. at 160.  
196. Id.  
198. See id. at 293 (Kennedy, J., dissenting).  
200. 981 F.2d 32 (1st Cir. 1992).  
201. Id. at 40.  
202. Id.
Employment discrimination case tried by a jury to receive a *Price Waterhouse* mixed-motives instruction as long as a jury could conclude that the plaintiff's sex was a motivating factor.

D. Application of Categories A through C to the Prologue Case

In the Prologue case, Mr. O'Connor brought an age discrimination case against his employer. He presented evidence that shortly before his termination, his supervisor told him he was "just too old," and was "too damn old for this kind of work." He would likely achieve different results depending upon where he brought his case. In the Category A courts (the First, Fifth, Sixth, and Tenth Circuits), he would have little chance to shift the burden of proof to Consolidated because none of his supervisor's statements (such as "you are too damn old for this kind of work") are direct evidence in the traditional sense. He would have a better chance in the Category B courts, which do not require direct evidence in the traditional sense. Such a court would examine his evidence to determine whether the supervisor's remarks were not stray remarks and were related to the decisional process itself. In Category B, however, O'Connor's case is close. On one hand, at least one of the remarks was made just two days before his termination. In addition, the remark, "it's about time we get some young blood in this company," is arguably related to the decisional process—that is, the decision to fire O'Connor. On the other hand, some courts may not consider two days sufficiently close to the adverse employment decision, and, unlike the partners' evaluations in *Price Waterhouse*, the remarks to Mr. O'Connor do not appear to be part of the decision-making process itself. The evidence, therefore, does not seem as probative as Hopkins's.

Mr. O'Connor would have his best chance of shifting the burden, however, in Rhode Island state court, or perhaps the Fourth Circuit, which do not limit the type of evidence which a plaintiff can use to shift the burden of proof. All of the evidence of his supervisor's remarks could therefore go toward satisfying his burden, regardless of whether these remarks are direct evidence in the traditional sense or in the sense intended by Justice O'Connor.

V

Proposals for Reform

Justice O'Connor's *Price Waterhouse* opinion is both confusing and overly restrictive. Both problems have led to unjust results. Her confusing...
use of the term *direct evidence* has helped lead to the circuit split indicated in Part IV, above. Because of this split, plaintiffs with similar evidence achieve different results depending upon where they bring their cases. Her test is overly restrictive because it limits the use of mixed-motives analysis to cases which present a particular type of evidence rather than to cases which present evidence of a particular probative value. Below, I propose two reforms to the Court's approach to mixed-motives cases: clarification and revision. The first reform solves the problem of confusion among the circuit courts. The second reform settles this confusion and leads to fairer results.

### A. Clarification of the Court's Position on Mixed-Motives Cases

The lower courts' confusion stemming from Justice O'Connor's use of the term *direct evidence* in her *Price Waterhouse* opinion has led to different results in cases with similar facts. For example, in *Mooney v. ARAMCO Services Co.*, the Fifth Circuit, which applies a traditional definition of *direct evidence*, rejected the plaintiffs' request for a mixed-motives instruction despite the following evidence: one supervisor's remark that he wanted "to replace plaintiff with a 'younger and cheaper' engineer," another supervisor's statement to a plaintiff after his termination that he had a good case of age discrimination, and a remark by a third supervisor (who himself recommended that a plaintiff be discharged) that the employer was going to get rid of the older employees with higher salaries. These statements were held to be insufficient to support a mixed-motives instruction because "they do not provide discriminatory animus 'without inference or presumption.' "

By contrast, the Eighth Circuit, which applies a non-standard definition of *direct evidence*, concluded that a plaintiff who presented evidence that is less indicative of discrimination was entitled to a mixed-motives instruction. The plaintiff presented evidence that the employer listed in a budgeting document that the company's "managers are mostly young, well-educated, and results oriented," and had on several occasions stated that the company was "young, mean, and lean." Although this evidence is no more probative than the evidence in *Mooney*, and probably less so, Mr. Radabaugh received a mixed-motives instruction because the Eighth Circuit did not require that he present direct evidence in the traditional sense.

The Supreme Court could create greater uniformity among the circuit courts, and thereby treat similarly situated plaintiffs more equally, by clari-

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205. 54 F.3d 1207 (5th Cir. 1995).
206. Id. at 1218.
207. Id. (quoting Brown v. East Mississippi Electric Power Ass'n, 989 F.2d at 858, 861 (5th Cir. 1993)).
209. Id. at 447.
ifying its position on mixed-motives cases in two ways. First, the Court could follow Tyler and Ostrowski's lead and acknowledge that "direct evidence" was "an unfortunate choice of terminology for the sort of proof needed to establish a 'mixed-motives' case." This unfortunate choice in terminology has led the First, Fifth, Sixth, and Tenth Circuits to require a plaintiff to present direct evidence in the traditional sense. Such evidence of discrimination is nearly impossible to come by, and neither the plurality nor Justice O'Connor's opinion required such evidence in Price Waterhouse. The Court could state that it does not require a plaintiff to present "direct evidence" in the traditional sense, but instead requires the type of evidence that Justice O'Connor required in Price Waterhouse—namely, evidence of statements reflecting discriminatory animus made by decisionmakers which relate to the decisionmaking process.

Such a clarification would end Category A's restrictive approach and align it closely with Category B. A further clarification, however, would be desirable to alert parties as to what sort of evidence is sufficient to shift the burden to the defendant. Currently, courts have distinguished between stray remarks and those which are "related to the decisional process" without ever articulating on what grounds they have done so. For example, in Randle v. LaSalle Telecommunications, Inc., the Seventh Circuit rejected as "stray remarks" several instances where supervisors made racially derogatory statements. The Randle court concluded that these comments were "completely unrelated to the employment decision" at issue, but nowhere explains why. By contrast, the Eleventh Circuit in EEOC v. Alton Packaging Corp., held a remark similar to one made in Randle to be sufficient to shift the burden of proof to the defendant. The Alton Packaging court held that a manager's statement that "if it was his company, he wouldn't hire any blacks" constituted "direct evidence of discrimination" because it "was made in reference to hiring." Like the Seventh Circuit in Randle, the Alton Packaging court nowhere stated when the remark was made, to whom it was made, or what elicited it. The only fact supporting that it was made "in reference to hiring" is that the supervisor mentioned hiring in the remark. Reading these cases does not give parties much guidance as to

211. See supra Part III(A)(2).
212. See supra Part III(A)(3).
213. 876 F.2d 563 (7th Cir. 1989).
214. One manager said, 'the way things are going, [LaSalle] will soon be all black.' "Id. at 570. Another plaintiff's manager stated that "if he had his way he wouldn't deal with any of them [women or blacks] . . . ." "Id. at 570 n. 4.
215. "Id. at 570.
216. 901 F.2d 920 (11th Cir. 1990).
217. "Id. at 924.
218. Id.
what sort of evidence will be sufficient to shift the burden to the defendant. Such information would be invaluable to defendants and plaintiffs to help them decide whether to pursue, defend against, or settle discrimination claims.

To help give such guidance to parties, the Court could define with greater clarity just what constitutes "a remark that is related to the decisional process" as opposed to "a stray remark." The Court could say, for example, that to qualify, evidence must be logically or temporally related to the employment decision. Granted, such a standard would not achieve complete uniformity in the treatment of plaintiffs, because courts could reasonably differ as to whether a given remark is sufficiently related temporally or logically to the employment decision. The lower courts, however, would at least use the same conceptual yardstick by which to measure the importance of a plaintiff's evidence. The lower courts could then begin a dialogue concerning how this yardstick is to be used. The lower courts would use these two principles—temporal and logical relation—to guide them in deciding whether evidence is sufficient to support a mixed-motives instruction or a judicial finding of an improper motive. The courts in cases like Randle and Alton Packaging could look at the plaintiff's evidence and measure it against these standards and articulate why, in the context of specific facts, the evidence does or does not meet them. Future litigants would be left with a better impression of what evidence would be sufficiently logically or temporally related to the employment decision to merit a burden-shifting instruction.

B. Revision of the Court's Mixed-Motives Approach

If the Court continues, however, to adhere to Justice O'Connor's requirement of non-traditional "direct evidence," unjust results will continue to occur in these cases, because Justice O'Connor's test still turns in part on the type of evidence that the plaintiff presents rather than on its probative value. A plaintiff who presents highly probative evidence that does not, in a judge's view, "relate to the decisional process," such as a decisionmaker's discriminatory statements made at some time before the adverse decision, coupled with strong statistics illustrating discriminatory practices, would not receive a mixed-motives instruction. However, a plaintiff who presents evidence that a supervisor made one discriminatory remark close to the time of the adverse employment decision might receive such an instruction.

A preferable alternative would be to resurrect the short-lived test articulated in Tyler v. Bethlehem Steel Corp., which turns on the probative

219. The Court could, for example, create a bright line by establishing that all discriminatory remarks made within, say, one week of the employment decision are presumed to be sufficiently probative. Although such a rule would increase clarity a great deal, there does not seem to be a principled basis for deciding what particular time frame would be appropriate for such a rule.

220. 958 F.2d 1176 (2d Cir. 1992).
value of the plaintiff’s evidence rather than its type. The court in Tyler held that a plaintiff need only submit enough evidence that, if believed, could reasonably allow a jury to conclude that unlawful discrimination was a motivating factor in the adverse employment decision.221 A case using the test would proceed as follows: After both the plaintiff and defendant have presented their evidence, the court would examine all of the evidence and determine whether a reasonable jury could conclude that illegal discrimination was a motivating factor in the employer’s decision. If a reasonable jury could so conclude, the jury would be instructed that if it finds that an impermissible consideration was not a motivating factor in the decision, it should rule in favor of the defendant. If, however, an unlawful motivating factor existed, the jury should decide whether the defendant carried its burden of proving that it would have made the same decision in the absence of this factor. In a bench trial, the judge would consider all of the evidence before her and decide whether the plaintiff proved by a preponderance of the evidence that an unlawful consideration was a motivating factor in the employer’s decision. If so, the judge would shift the burden to the defendant, and then decide whether the defendant demonstrated by a preponderance of the evidence that it would have made the same decision in the absence of the motivating factor.

In both judge and jury trials under this scheme, the courts would be free from what the Second Circuit calls "the hopeless task of distinguishing 'direct' from 'circumstantial' evidence."222 This test would also allow the judge to look at all of the evidence rather than just the evidence surrounding the employment decision. The courts would thereby also be free from the difficult task of deciding whether a given piece of evidence is a "stray remark" or instead temporally and logically "related to the decisional process." Furthermore, this version of the Tyler test is superior to Justice O’Connor’s because (1) it does not rely on assumptions that a particular type of evidence (discriminatory remarks that are temporally or logically related to employment decision) is necessarily more probative than other types of evidence, and (2) unlike Justice O’Connor’s “direct evidence” test, the words in the test (i.e. “enough evidence to allow a reasonable jury to conclude”) are in harmony with the well-established uses of these terms, making it easier for trial courts to apply the test to the facts and for appellate courts to review such application by the trial courts. Justice O’Connor’s test as it stands uses a definition of “direct evidence” that has never been openly articulated and that conflicts with the traditional understanding of that term. Lower courts have, not surprisingly, differed as to which of these two meanings Justice O’Connor intended. The test that I

221. Id. at 1187.
222. Id. See also the Price Waterhouse dissent’s warning that the decision in the case will require courts “to make the often subtle and difficult distinction between ‘direct’ and ‘indirect’ or ‘circumstantial’ evidence.” Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting).
propose contains no such textual ambiguities. Although deciding whether the plaintiff has presented enough evidence to allow a jury to conclude that the employer was motivated by an illegitimate motive is not an easy task, the courts will at least understand the terms of the test itself.

In jury cases, the issue comes down to the allocation of power between judge and jury. Should a jury be allowed to consider whether an impermissible factor motivated the employer (thereby shifting the burden of persuasion to it) whenever a reasonable jury could find as such? Or, alternatively, should the jury be allowed to consider this question only after a judge has first determined that the evidence is sufficiently "directly related" to the decisional process? Justice O'Connor appears to support the latter alternative, because she restricts the type of evidence that can be considered in deciding this question, thereby eliminating from consideration such evidence as statistics and statements by decisionmakers "unrelated to the decisional process itself." The former alternative, however, is more appealing. In McDonnell-Douglas-type cases tried to a jury, jurors are asked to determine, based on all of the evidence presented, "whether the plaintiff has 'proven that the defendant intentionally discriminated against [him].'" To decide this question, juries must measure the weight of the evidence, evaluate witness credibility, and determine what motivated the employers to take the challenged employment action. These are the same issues that are decided when a jury is asked to decide in a mixed-motives case whether an illegitimate criterion was a motivating factor in an employment decision. If we trust the jury to decide these sorts of questions in McDonnell Douglas cases based on all admissible evidence, both circumstantial and direct, there is no reason to distrust them when they do so in mixed-motives type cases.

223. Id. at 277 (O'Connor, J., concurring).