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Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA

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by Michael J. Zimmer*

Individual disparate treatment law appears to be in a chaotic state. The one clear thrust is that the Supreme Court's jurisprudence in the area, and even Congress's most recent amendments[1] to Title VII,[2] no longer govern the field alone. This chaos, however, may be the prelude to a new coherence. That possibility is the point of this Article, which will explore it from the viewpoint of the Age Discrimination in Employment Act ("ADEA").[3]

Part I sets the stage by describing the initial failure of Justice Brennan's attempt in *Price Waterhouse v. Hopkins*[4] to supplant the pre-existing framework established in *McDonnell Douglas Corp. v. Green*[5] with a new framework. The actual effect of *Price Waterhouse* was not only to create a new, alternative approach to analyzing individual disparate treatment cases, but also to limit the application of that approach to a small subset of cases involving "direct" evidence of discrimination. Even Congress's 1991 amendments to Title VII did not have the immediate effect of removing the *McDonnell Douglas* framework as the general approach applied to most cases. Part II traces

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1. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999).
3. 29 U.S.C.A. §§ 621-634 (West 1994 & Supp. 1999).
4. 490 U.S. 228 (1989).
5. 411 U.S. 792 (1973).

recent developments among the courts of appeals. These decisions have taken a number of different approaches that have differing effects on the existing law of individual disparate treatment discrimination. The most significant decisions have supplanted the *McDonnell Douglas* approach in Title VII cases with a modified *Price Waterhouse* approach. Part III then addresses whether such new approaches should be applied in individual disparate treatment cases in which plaintiffs have asserted age discrimination under the ADEA. Finally, Part IV looks to the consequences of these developments in terms of the remedies available in age discrimination cases.

I. THE INITIAL FAILURE OF JUSTICE BRENNAN IN *PRICE WATERHOUSE*

A quick trip down memory lane sets the backdrop for where we are now. In 1973 the Supreme Court in *McDonnell Douglas* created a standard for proving a prima facie case of discrimination that was easy for plaintiffs to establish.[6] By 1981, in *Texas Department of Community Affairs v. Burdine*,[7] the Supreme Court started cutting back on *McDonnell Douglas*. The defendant's rebuttal became as easy to establish as the plaintiff's prima facie case showing, and the Court made it clear that, in the final analysis, the plaintiff had the ultimate burden of proving that she was the victim of intentional discrimination.[8] The evisceration of *McDonnell Douglas* that began in *Burdine* was not completed until the 1993 decisions in *Hazen Paper Co. v. Biggins*[9] and *St. Mary's Honor Center v. Hicks*.[10] Since then critics have charged that the way courts apply *McDonnell Douglas*, and perhaps *McDonnell Douglas* itself, has become an obstacle rather than an aid to the full enforcement of our antidiscrimination laws.[11]

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6. *Id.* at 802 (holding that a plaintiff can establish a prima facie case "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

7. 450 U.S. 248 (1981).

8. *Id.* at 256.

9. 507 U.S. 604, 608-14 (1993) (limiting the range of relevant circumstantial evidence, and expanding the scope of the employer's rebuttal to include even illegal reasons).

10. 509 U.S. 502, 514-20 (1993) (holding that plaintiff's proof that defendant's reason is not true is insufficient by itself to support a finding of liability).

11. *Hicks* produced an outpouring of commentary, most of it quite critical. *See, e.g.*, Stephen Plass, *Truth: The Lost Virtue in Title VII Litigation*, 29 SETON HALL L. REV. 599 (1998); Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post*-Hicks *Environment*, 26 FLA. ST. U. L. REV. 49 (1998); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation*: St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183 (1997); Kenneth

In 1989, before the full retreat on *McDonnell Douglas* had become clear, Justice Brennan tried unsuccessfully to establish a new method of proof that would supplant *McDonnell Douglas* as the primary approach for analyzing individual disparate treatment cases. In *Price Waterhouse v. Hopkins,*[12] Justice Brennan, writing for a plurality of four, said that to establish a prima facie case, the plaintiff need only prove, by a preponderance of the evidence, that her race, gender, or other protected characteristic was a motivating factor for the employer's decision she challenged.[13] Upon that showing, the burden of persuasion shifts to the defendant to try to avoid liability by proving as an affirmative defense that it would have made the same decision absent the discrimination.[14]

In a footnote Justice Brennan indicated that this new approach would take precedence over, but would not completely replace, the *McDonnell Douglas* method.[15] For all practical purposes, however, the net effect would be that the new approach would supplant *McDonnell Douglas*. The footnote starts with the proposition that "plaintiffs often will allege, in the alternative, that their cases are both [*Price Waterhouse* and *McDonnell Douglas* cases]."[16] Once discovery is complete, the trial judge must decide whether there is evidence to support the *Price Waterhouse* approach, which applies whenever there is evidence that "both legitimate and illegitimate considerations played a part in the decision against" the plaintiff.[17] If there is, then the "particular case involves mixed motives."[18] Because in every *McDonnell Douglas* case there is the plaintiff's evidence that an illegitimate consideration was involved as well as the defendant's evidence of a nondiscriminatory reason for its action, it would seem that evidence of more than one motive is present in the record in every case. That would seem to allow

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R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939 (1995); Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994); Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green: *The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385 (1994). *But see* William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 361 (1998); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995).

12. 490 U.S. 228 (1989).
13. *Id.* at 258.
14. *Id.*
15. *Id.* at 247 n.12.
16. *Id.*
17. *Id.*
18. *Id.*

the factfinder to find in every case one of three possible outcomes: (1) the motive was only the one asserted by the plaintiff; (2) the motive was only the one asserted by the defendant; or (3) both were to some extent involved so that the motives could be said to be mixed. With such evidence in the record, the case should then be sent to the factfinder, first on the *Price Waterhouse* mixed-motives theory and then, if the jury does not find for the plaintiff on that approach, on the *McDonnell Douglas/Burdine* circumstantial evidence theory. "If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision," thereby failing to prove the *Price Waterhouse* count, "then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual."[19] What Justice Brennan did not say, at that point, is what happens to the *McDonnell Douglas* count if the plaintiff is successful in proving the *Price Waterhouse* count that "more likely than not [] forbidden characteristic played a part in the employment decision."[20] Presumably, if the factfinder so concludes, there is no need to go further with the *McDonnell Douglas* inquiry. Instead, the factfinder should, if the defendant has introduced evidence sufficient to create a material issue of fact on the point, proceed directly to the affirmative defense of deciding whether "the defendant may avoid . . . liability . . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[21]

While Justice Brennan claimed that *Price Waterhouse* did not affect *McDonnell Douglas*, *McDonnell Douglas* did lose its pride of place because the *Price Waterhouse* approach comes first. Moreover, in practical effect *Price Waterhouse* supplanted *McDonnell Douglas* because, if the plaintiff wins on *Price Waterhouse,* the factfinder never gets to *McDonnell Douglas.* In the alternative, if the plaintiff fails to convince the factfinder that an impermissible factor, such as race or sex, played a motivating part in the employer's decision, it is difficult to imagine the factfinder then being convinced that the true reason for, or the single source of, the employer's action was intentional discrimination under *McDonnell Douglas.* That conclusion is especially true because, at the time the Court decided *Price Waterhouse*, four of the courts of appeals required the plaintiff to make the *McDonnell Douglas* showing to the

19. *Id.*
20. *Id.*
21. *Id.* at 258.

"but-for" level,[22] which is a much more arduous burden than the "motivating factor" level of *Price Waterhouse*.

Justice Brennan failed in his attempt to restart individual disparate treatment theory based on his new theory because his opinion carried only three other Justices. To make a decision of the Court, it is necessary to look to the concurring opinion of either Justice White or Justice O'Connor. Both raised the bar for the plaintiff's initial showing. Rather than the "motivating factor" test proposed by Justice Brennan, they required the plaintiff to prove that the impermissible consideration was a "substantial factor" in the employer's decision.[23]

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22. *Id.* at 238 n.2. Seven of the courts of appeals required only that the plaintiff prove "that a discriminatory motive was a 'substantial' or 'motivating' factor." *Id.* Those courts then divided on (1) the availability of the same decision defense when the defendant proved that it would have taken the same action even if it had not considered the impermissible factor, (2) the level of proof necessary to sustain that defense, and (3) the effect of the defense as cutting off liability or only limiting remedies. *Id.*

23. *Id.* at 258 (White, J., concurring in the judgment); *Id.* at 261 (O'Connor, J., concurring in the judgment). Delineating the actual differences among these standards is daunting. It is clear that there is a spectrum among these articulations ranging from something being the sole factor that explains the employer's action to something being merely one of a number of motivating factors. At one extreme, when something is the sole factor that explains the event, it is the only reason for it. In an employment termination case under that standard, the employee who proves the employer discriminated nevertheless loses unless she was perfect, because only then would the employer have had no grounds other than discrimination.

A but-for standard means that factors other than discrimination could be involved but the event would not have happened without the discriminatory factor. In an age case, the court described the but-for test as asking the jury to decide "whether age accounts for the decision—in other words, whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same." Gehring v. Case Corp., 43 F.3d 340, 344 (7th Cir. 1994). There is a real difference between the sole and the but-for tests. In *Abrams v. Lightolier, Inc.*, 50 F.3d 1204 (3d Cir. 1995), a case tried before *Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir. 1995) (en banc) (overturning precedent that imposed a sole factor test in age discrimination cases), the jury was given a "sole cause" charge on the ADEA count but was given a but-for charge on a supplemental state law count of age discrimination. *Abrams*, 50 F.3d at 1211. Reviewing the same evidence for both counts, the jury found for the employer on the ADEA count but found for plaintiff on the state law count. *Id.* While age was the but-for reason for defendant's action, plaintiff's age was not the sole factor accounting for the employer's decision to terminate him. *Id.*

The next level is the "determinative factor" test. While there may be some nuanced differences between this test and the but-for test, this test seems to carry virtually the same connotation as the but-for test.

The substantial factor test, espoused by Justices O'Connor and White in *Price Waterhouse*, involves a showing that is less significant than the but-for test. "Substantial" connotes considerable, meaningful, or significant. In contrast, the motivating factor test signifies less involvement than the substantial factor test. "Motivating factor" appears to mean only that the protected characteristic was real and present to help explain the

Justice O'Connor added another, more significant obstacle to the use of the new method. She would further require the plaintiff to rely on direct evidence of discrimination to qualify for the lower threshold showing to make out a prima facie case of discrimination.[24] In nineteenth century evidence law, direct evidence was evidence that proved a fact at issue without the need to draw an inference. While Justice O'Connor did not exactly define the term, the statements of defendant's decisionmakers that admitted using gender satisfied her notion of direct evidence in *Price Waterhouse*.[25] In dissent, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, jumped at the chance of limiting the effect of *Price Waterhouse* by describing the holding of the case as being based on Justice O'Connor's, rather than Justice White's, concurrence.[26]

> [T]he actual holding of today's decision . . . [is] that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.[27]

As predicted by astute commentators,[28] the lower courts generally adopted Justice O'Connor's concurrence in the first round of decisions after *Price Waterhouse*. What this meant was that *McDonnell Douglas* survived as the primary way to analyze individual disparate treatment cases because, as the dissent in *Price Waterhouse* indicated, there are only a limited number of cases in which plaintiffs can produce the direct evidence necessary to trigger the *Price Waterhouse* framework.[29]

This pride of place for *McDonnell Douglas* did not change immediately, even after Congress amended Title VII in the Civil Rights Act of 1991. These amendments adopted Justice Brennan's motivating factor inquiry and changed the effect of the defendant's proof of the same-decision

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employer's decision, but such a factor need not be significant, much less determinative. *But see* Glover v. McDonnell Douglas Corp., 981 F.2d 388, 395 (8th Cir. 1992), *vacated & remanded*, 510 U.S. 802 (1993) (equating substantial factor with motivating factor).

24. 490 U.S. at 278 (O'Connor, J., concurring in the judgment).

25. *Id.* at 279.

26. *Id.* at 280 (Kennedy, J., dissenting).

27. *Id.*

28. *See* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 49 N.C. L. REV. 1, 51 n.274 (1990).

29. 490 U.S. at 290-91 (Kennedy, J., dissenting).

defense (i.e., that it would have made the same decision even if it had not considered the impermissible factor), so that instead of cutting off the defendant's liability, a same-decision showing now only limits the plaintiff's remedies.[30] Congress reduced the consequences of the proof of the same-decision defense from a full defense to liability to a restriction on the plaintiff's entitlement to full remedies. New section 706(g)(2)(B) now provides that once a plaintiff makes out her case under section 703(m), if the defendant carries its burden of persuasion to prove that it "would have taken the same action in the absence of the impermissible motivating factor," the plaintiff is allowed only limited remedies.[31] These include declaratory relief announcing that she was the victim of the defendant's discrimination, an injunction against the defendant's further discrimination, and "attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [703(m)]."[32] Thus, if the defendant carries its burden, the plaintiff is denied compensatory and punitive damages as well as backpay, reinstatement, and other positive equitable relief.

In sum, Justice Brennan did not win the first round in his attempt to supplant *McDonnell Douglas* with his new approach. The 1991 amendments to Title VII were not taken to change the fundamental bifurcated structure of individual disparate treatment law, with *Price Waterhouse* applicable in only a small subset of cases. The question is whether, in the longer run that we may now be beginning to see in recent decisions by the courts of appeals, some variant of the motivating factor threshold, with the same-decision defense, may prevail over the *McDonnell Douglas* approach as the primary method of analyzing individual disparate treatment cases. The stage is perhaps being set for the ultimate victory of Justice Brennan's approach, or something very much like it.

II. THE COURTS OF APPEALS: ADRIFT OR FINDING A NEW PATH?

While several of the lower courts have continued to apply the Supreme Court's bifurcated structure based on cases being analyzed under either *McDonnell Douglas* or *Price Waterhouse*, a number of them have been moving away from that approach in three principal ways. However, several courts of appeal have thus far stayed the course. For example,

30. New section 703(m) provides 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." 42 U.S.C.A. § 2000e-2(m).

31. 42 U.S.C.A. § 2000e-5(g)(2)(B).

32. *Id.* § 2000e-5(g)(2)(B)(i).

the Fourth Circuit continues to use the classic definition of direct evidence—evidence proving the fact at issue without the need to draw any inferences—as the threshold showing necessary to trigger *Price Waterhouse*.[33] Further, *McDonnell Douglas* is the default approach if *Price Waterhouse* is found not to apply; thus, most cases are treated as *McDonnell Douglas* cases.[34] Finally, the Fourth Circuit has rejected the idea that the 1991 amendments apply to *McDonnell Douglas* as well as *Price Waterhouse* cases.[35] Similarly, the Seventh Circuit defines direct evidence quite narrowly.[36]

Among those courts that have moved away from the Supreme Court's approach, three different paths have emerged. The first path is that of the Fifth Circuit, which appears to have effectively abrogated *McDonnell Douglas* so that all cases must proceed under *Price Waterhouse*, with the plaintiff required to introduce direct evidence of discriminatory intent to recover.[37] *Reeves* involved evidence that one of the decisionmakers in plaintiff's termination had several months previously described plaintiff as so old that he "must have come over on the Mayflower," and that he was "too damn old to do the job."[38] Nevertheless, the trial court sent the case to the jury under *McDonnell Douglas*, not *Price Waterhouse*.[39] On appeal of the jury verdict for plaintiff, the Fifth Circuit found that these same statements were insufficient to satisfy its pretext-plus requirement under *McDonnell Douglas*.[40]

> Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson [the company president] that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50—Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investiga-

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33. *See* Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995). The Fourth Circuit's definition of direct evidence may actually be narrower than what Justice O'Connor had in mind in *Price Waterhouse*.

34. *Id.* at 1141-44.

35. *Id.* at 1142.

36. *See* Indurante v. Local 705, Int'l Bhd. of Teamsters, 160 F.3d 364, 367 (7th Cir. 1998).

37. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 444 (1999) (No. 99-536).

38. *Id.* at 691.

39. *Id.*

40. *Id.* at 693.

> tion, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.[41]

Reeves means that if the plaintiff cannot successfully argue that evidence in the record satisfies the direct evidence threshold required for use of *Price Waterhouse,* then the plaintiff is not going to be able to satisfy the pretext-plus requirement that the Fifth Circuit has imposed on the *McDonnell Douglas* approach. This is so even if the plaintiff is successful, as he was in *Reeves,* in proving that the employer's reason for its action was not true. In essence, to be successful in the Fifth Circuit, all individual disparate treatment cases must involve direct evidence of discriminatory state of mind.

Like the Fifth Circuit's approach in *Reeves*, two other paths appear to be moving away from *McDonnell Douglas*, but, unlike the path taken by the Fifth Circuit, these paths are moving toward a more proplaintiff posture. The second path that some courts have taken merely expands the threshold definition of direct evidence to allow for a broader potential application of *Price Waterhouse* while otherwise maintaining the bifurcated structure of analyzing all individual disparate treatment cases as either *McDonnell Douglas* or *Price Waterhouse* cases. Depending on how wide that threshold is, more and more individual disparate treatment cases may be analyzed using *Price Waterhouse.* Though it has now made a more radical change in approach that will be looked at below,[42] the Second Circuit was the first to expand the definition of direct evidence to include some circumstantial evidence as long as that evidence is tied directly to the alleged discrimination against the plaintiff.[43] This circumstantial-plus approach excludes statistical evidence and evidence of discriminatory statements by the defendant's agents if they are "'stray' remarks," that is, not sufficiently tied to the decision the plaintiff challenges to shed light on the intention of the employer when it made that decision.[44] The Third Circuit adopted the Second Circuit's approach in *Griffiths v. CIGNA Corp.*[45] Otherwise, the Third Circuit has since maintained the bifurcated structure, allowing for

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41. *Id.* at 693-94.

42. *See infra* text accompanying notes 53-54.

43. Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 182 (2d Cir. 1992).

44. *Id.*

45. 988 F.2d 457, 470 (3d Cir. 1993), *overruled on other grounds*, Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir. 1995) (en banc).

only a small subset of cases to be analyzed under *Price Waterhouse.* After the 1991 amendments, a plaintiff in the Third Circuit with the appropriate circumstantial-plus evidence to trigger the use of *Price Waterhouse* need only prove that a protected characteristic was a motivating factor to establish liability, subject to the affirmative defense limiting full remedies.[46] In *McDonnell Douglas* cases, a plaintiff still must prove that the protected characteristic was a determinative influence in the employer's decision.[47]

While continuing to require direct evidence as a threshold to the application of *Price Waterhouse,* the District of Columbia Circuit has defined direct evidence in a way that appears slightly broader than *Ostrowski* and *Griffiths.* In *Thomas v. National Football League Players Ass'n,*[48] the court described direct evidence as evidence "relat[ing] to the question of discrimination *in the particular employment decision,* not to the existence of other, potentially unrelated, forms of discrimination in the workplace."[49] Thus, in a discharge case, all evidence concerning discharges would be direct, while, for example, evidence about failures to hire or promote would not.

Finally, an even broader approach to the use of direct evidence to set the scope of the application of *Price Waterhouse* comes from the Eighth Circuit. In *Deneen v. Northwest Airlines, Inc.,*[50] the court found that plaintiff had introduced direct evidence of pregnancy discrimination when she showed that her supervisor, who knew she was pregnant, required her to bring a doctor's note before he would let her return to work from a layoff.[51] Despite the fact that the supervisor made no explicit reference to the fact that she was pregnant or that he was requiring the note because she was pregnant, the court found this conduct to be direct evidence because such notes were not required of employees coming back from a layoff who were not pregnant.[52] Thus, evidence of different treatment was characterized as direct evidence, thereby entitling plaintiff to rely on *Price Waterhouse.*

If all evidence of any different treatment is characterized as direct evidence, then the definition of direct evidence becomes so broad that it encompasses most individual disparate treatment cases. As a result, *McDonnell Douglas* will lose its place as the approach governing most

46. *Griffiths,* 988 F.2d at 471.
47. *Miller,* 47 F.3d at 598.
48. 131 F.3d 198 (D.C. Cir. 1997).
49. *Id.* at 204.
50. 132 F.3d 431 (8th Cir. 1998).
51. *Id.* at 436.
52. *Id.*

individual disparate treatment cases. Most cases will be analyzed under *Price Waterhouse*, leaving *McDonnell Douglas* applicable to only a small subset of individual disparate treatment cases that lack evidence that can be characterized as direct. *Deneen* may be a step towards radically changing the proportion of *Price Waterhouse* and *McDonnell Douglas* cases, if not requiring that all cases be decided under *Price Waterhouse*.

The third path several courts have begun to take undermines the distinction between *Price Waterhouse* and *McDonnell Douglas* by applying the *Price Waterhouse* motivating factor threshold to all individual disparate treatment discrimination cases. While holding to its definition of circumstantial-plus evidence as the threshold to the application of the *Price Waterhouse* approach, the Second Circuit, in *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*,[53] held that the motivating factor level of showing made out a prima facie case for both *Price Waterhouse* and *McDonnell Douglas* cases.[54] Thus, both *McDonnell Douglas* and *Price Waterhouse* continue to exist, but an important distinction between the two kinds of cases, that the plaintiff need prove that the impermissible factor was the determinative one in *McDonnell Douglas* cases while she need only prove it to be a motivating factor in *Price Waterhouse* cases, has been eliminated. The only remaining difference between the two types of cases is that the same-decision defense to full remedies created by section 706(g)(2)(B) applies to *Price Waterhouse* cases but does not apply to *McDonnell Douglas* cases. Because the comparatively easy motivating factor level is all that a plaintiff in the Second Circuit need prove under either *McDonnell Douglas* or *Price Waterhouse,* a plaintiff will always argue that the circumstantial evidence approach of *McDonnell Douglas* applies to avoid the same-decision defense. Under *Fields* defendants will now argue that every case involves direct evidence so that they can at least try to prove the same-decision affirmative defense to escape liability for full remedies.

Fields effectively turns Justice O'Connor's approach in *Price Waterhouse* on its head. While it is likely that most cases will still be treated as *McDonnell Douglas* cases and that only a small subset will be treated as *Price Waterhouse* cases, the operation of this will now be profoundly proplaintiff, which is just the opposite of the prodefendant result contemplated by Justice O'Connor and the dissenters in *Price Waterhouse.*

At least one judge of the Eleventh Circuit has gone even further than *Fields* by eliminating *McDonnell Douglas* as a way for factfinders to

53. 115 F.3d 116 (2d Cir. 1997).
54. *Id.* at 121.

analyze cases. This approach all but eliminates the bifurcated approach to analyzing individual disparate treatment cases by adopting the *Price Waterhouse* analysis for deciding all individual disparate treatment cases. All that is left of *McDonnell Douglas* under this approach is its use procedurally to create a rebuttable presumption of liability against the defendant to find evidence of the nondiscriminatory reason that the employer claims motivated the decision that the plaintiff challenges. Having fulfilled that role when the employer produces evidence of its alleged nondiscriminatory reason, *McDonnell Douglas* drops completely out of the case before it goes to the factfinder. In *Wright v. Southland Corp.*,[55] Judge Tjoflat, with whom the other two judges concurred only in the result, proposed a new way of analyzing all individual disparate treatment cases.[56] He would require direct evidence in every individual disparate treatment case, but he defined direct evidence simply as evidence sufficient to satisfy the preponderance of evidence test: "'[D]irect evidence,' in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."[57]

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55. 187 F.3d 1287 (11th Cir. 1999).

56. *Id.* at 1300-02.

57. *Id.* at 1293. This test resembles a number of the approaches suggested by some of the critics of *McDonnell Douglas*. For example, Professor Linda Hamilton Krieger proposes a test that "a Title VII plaintiff would simply be required to prove that his group status *played a role* in causing the employer's action or decision." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1242 (1995). Professor Kenneth R. Davis would adopt the motivating factor test under which "[t]he jury would decide whether the plaintiff has proven that illegal discrimination motivated the adverse employment decision. The defendant would then have the opportunity to limit the remedy by proving that it would have taken the same action based on a legitimate reason." Davis, *supra* note 11, at 761. A careful application of the traditional civil procedure approach has been proposed by Judge Denny Chin and Jodi Golinsky:

> The best approach is perhaps the most basic one: first, evaluating plaintiff's proof, direct or otherwise, of discrimination; second, evaluating defendant's proof that it did not discriminate, including evidence of defendant's explanation for its employment decision; and third, evaluating the evidence as a whole. Courts should focus on the "ultimate issue" of whether the plaintiff has proven that it is more likely than not that the employer's decision was motivated at least in part by an impermissible or discriminatory reason. In a summary judgment context or on a motion for judgment as a matter of law following a verdict for the plaintiff, the court must evaluate the evidence as a whole resolving all conflicts in the proof and drawing all reasonable inferences in favor of the plaintiff.

Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 673 (1998) (footnote omitted). Another approach would not articulate the issue as one of causation but

Judge Tjoflat distinguished this preponderance definition of direct evidence from what he called the dictionary definition of direct evidence—"'evidence, which if believed, proves existence of fact in issue without inference or presumption.'"[58] The dictionary definition of direct evidence is inadequate when the issue is intent to discriminate because the only evidence that would satisfy that test "would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic."[59] Using his analysis to review all the prior decisions of the Eleventh Circuit, Judge Tjoflat found that none of the cases that found direct evidence of discrimination present in the record satisfied the stringent dictionary definition of direct evidence.[60] All the prior cases in which liability was found based on direct evidence, however, did satisfy his preponderance definition of direct evidence.[61]

This new preponderance definition of direct evidence applies to what had been both *Price Waterhouse* and *McDonnell Douglas* cases. The role

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otherwise is quite similar to Judge Tjoflat's approach in *Wright*. Professor Mary Ellen Maatman analyzes *Price Waterhouse*, *Hazen Paper*, and *Hicks* from the perspective of rhetoric and points to their underlying common thread of a prerealist search for "pure" causation that cannot be attained. Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 12-48, 64-88 (1998). She suggests that the link between the plaintiff and the employer's action be based on the nature of the injury to the plaintiff, which is the approach associated with contemporary views of causation in torts. *Id.*

I have earlier argued that the effect of the 1991 amendments was to collapse *McDonnell Douglas* into *Price Waterhouse*. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 600-21 (1996). In that article I argued that the plain language of the new statute does not distinguish between circumstantial and direct evidence cases and that a straightforward application of the statutory language would eliminate much of the sterile confusion that has emerged in debating the *McDonnell Douglas* approach:

> In sum, new sections 703(m) and 706(g)(2)(B) apply to all individual disparate treatment cases brought under Title VII. Because all evidence of discrimination is circumstantial, courts should not attempt to categorize such evidence as direct or circumstantial. All relevant evidence, that is, evidence that is material and probative, should be equally weighed by the factfinder in determining whether the employer discriminated.

Id. at 621.

58. 187 F.3d at 1293 (quoting BLACK'S LAW DICTIONARY 460 (6th ed. 1990)).

59. *Id.* at 1295. Early on, Professor Charles A. Sullivan made the point that what Justice O'Connor was really talking about was not direct evidence but instead admissions of a party against its interest. Charles A. Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1131 (1991).

60. 187 F.3d at 1298.

61. *Id.*

of *McDonnell Douglas* is diminished from its role as the primary method for analyzing individual disparate treatment cases to a procedural role to aid the plaintiff by creating a rebuttable presumption of liability to force the employer to come forward with the nondiscriminatory reason it claims justified its decision.[62] Once that reason is known (whether or not because of the application of *McDonnell Douglas*), *McDonnell Douglas* drops completely out of the case because "the elements needed to establish the *McDonnell Douglas* presumption, standing alone, are not sufficient to prove that the plaintiff, more probably than not, was a victim of illegal discrimination."[63] Thus, the preponderance definition of direct evidence applies in all individual disparate treatment cases, and the determination of whether it is satisfied is made based on all the evidence—the *McDonnell Douglas* elements, the employer's asserted reason, evidence that the reason is a pretext, dictionary direct evidence, and all the other evidence in the record. In essence, direct evidence simply becomes all the circumstantial evidence admitted to prove discrimination, leaving nothing of the dichotomy between direct and circumstantial evidence or the dichotomy between *Price Waterhouse* and *McDonnell Douglas* when the case goes to the factfinder.

That nothing is left for *McDonnell Douglas* to do once the case goes to the factfinder is clear from the fact that the *Price Waterhouse* affirmative defense, as modified by the 1991 amendments, applies in all individual disparate treatment cases. Thus, if the plaintiff proves that discrimination was a motivating factor pursuant to this preponderance of the evidence standard, "the defendant can nevertheless prevail by showing that the same employment decision would have been made absent the discriminatory motive."[64] In an accompanying footnote, Judge Tjoflat described the effect of the 1991 amendments: "In Title VII cases, this showing [of the same-decision defense] serves only to limit the liability

62. Judge Denny Chin found that, in his review of the reported cases, the defendant never failed to come forward with evidence of a nondiscriminatory reason for the decision that the plaintiff challenged as discriminatory. Chin & Golinsky, *supra* note 38, at 665.

63. 187 F.3d at 1292. This takes up a point made by Professor Deborah C. Malamud. She traced the Supreme Court's individual disparate treatment cases and concluded that "the Supreme Court never succeeded in setting the prima facie case threshold high enough to permit the proven prima facie case to support a sufficiently strong inference of discrimination to mandate judgment for the plaintiff." Malamud, *supra* note 11, at 2236-37. If that is true, then *McDonnell Douglas* is not really a way for the factfinder to analyze cases. The holding, however, can be preserved by allowing it to play the procedural role delineated by Judge Tjoflat.

64. 187 F.3d at 1302-03.

of the employer; it does not relieve the employer of liability altogether."[65]

In sum, the law of individual disparate treatment discrimination appears to be moving away from the bifurcated approach established by the Supreme Court and toward a unified approach, at least in Title VII cases, based on the plaintiff's proof that an impermissible reason was a motivating factor in the challenged decision, with the prima facie showing subject to the same-decision affirmative defense to full remedies. Some courts are doing this simply by expanding the definition of direct evidence to expand the scope of application of the *Price Waterhouse* approach. The Second Circuit in *Fields* has virtually collapsed *McDonnell Douglas* into *Price Waterhouse*, at least for purposes of establishing liability if the plaintiff can prove that a protected characteristic was a motivating factor in the employer's decision. By maintaining the same-decision defense in *Price Waterhouse* cases but not applying it in *McDonnell Douglas* cases, the Second Circuit has fundamentally reversed the dynamics in individual disparate treatment cases. Finally, at least one judge has relegated *McDonnell Douglas* to a procedural role to be used to induce the defendant to come forth with evidence of a nondiscriminatory reason for the action the plaintiff challenges. Once evidence of that reason is in the record, the case is analyzed by the factfinder using *Price Waterhouse*. Thus, Justice Brennan's approach in *Price Waterhouse*, as modified by the 1991 amendments to Title VII, may yet carry the day. *McDonnell Douglas* may be losing its position as the approach by which most individual disparate treatment cases are analyzed. The next part of this Article deals with the special problem of proving individual disparate treatment under the ADEA.

III. INDIVIDUAL DISPARATE TREATMENT AND THE ADEA

A. *The Supreme Court's Jurisprudence*

Until the enactment of the 1991 Civil Rights Act and the Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins*,[66] the courts approached individual disparate treatment cases of age discrimination the same way as they approached Title VII cases. Indeed, at a broad level, the Supreme Court acknowledged a uniform approach to the antidiscrimination statutes. For example, in *Trans World Airlines v.*

65. *Id.* at 1303 n.17.
66. 507 U.S. 604 (1993).

Thurston,[67] the Court relied on Title VII authority in an ADEA case, stating that the "interpretation of Title VII . . . applies with equal force in the context of age discrimination."[68]

In the 1991 Civil Rights Act, however, the amendments that Congress made concerning individual disparate treatment discrimination were made to Title VII and not to the ADEA or other antidiscrimination statutes. This created the possibility that approaches to individual disparate treatment cases would diverge from the prior uniform model, with Title VII cases determined by the 1991 amendments, but cases brought under the ADEA analyzed based on pre-existing law.

The 1993 decision in *Hazen Paper*, which involved facts that arose before the effective date of the 1991 amendments to Title VII, added its own set of problems. On the one hand, the Court repeatedly cited Title VII cases along with ADEA cases in describing individual disparate treatment discrimination and did not distinguish the approaches by statutory source of the claim. That supports the idea that there continues to be a uniform approach to individual disparate treatment cases across the different federal antidiscrimination statutes. On the other hand, Justice O'Connor set forth an enigmatic description of disparate treatment that can be construed as being at odds with the approach Congress took to Title VII cases in the 1991 amendments: "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."[69] The language is enigmatic because it does not indicate which party carries what burden of proof when litigating the issue of whether the employee's protected trait actually played a role and had a determinative influence in the employer's decision. While skeptical that "determinative" means plaintiffs must negate a same-decision showing, Professor Harold Lewis assumes, not implausibly, that the Court intends for them to prove both that age played a role and that it had a

67. 469 U.S. 111 (1985).

68. *Id.* at 121. The Supreme Court also adopted *McDonnell Douglas* in section 1981 cases. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court said: "We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether the defendant intentionally discriminated against the plaintiff. . . . [T]his scheme of proof . . . should apply to claims of racial discrimination under § 1981." *Id.* at 186 (citations omitted).

69. 507 U.S. at 610.

determinative influence (whatever that means) in the decisions they challenge.[70]

In contrast, I have earlier taken a different approach based on aligning Justice O'Connor's *Hazen Paper* language with the burden-shifting approach of the 1991 amendments.[71] This is possible because the language used by Justice O'Connor appears to be easily divisible into two separate parts: first, that "the employee's protected trait actually played a role," and; second, that the protected trait "had a determinative influence on the outcome."[72] While under section 703(m) the plaintiff bears the burden of proving that a protected trait was a motivating factor in the challenged decision, that language is not very different in meaning from Justice O'Connor's requirement that a protected trait must have actually played a role in the challenged decision. When a plaintiff proves that a protected trait in fact was a motivating factor, then section 706(g)(2)(B) shifts the burden of persuasion to the defendant to prove that it "would have taken the same action in the absence of the impermissible motivating factor."[73] If the defendant is successful in carrying that burden, then the protected trait, in the language of Justice O'Connor in *Biggins,* did not have "a determinative influence on the outcome" because of the fact that an impermissible factor motivated the employer made no difference, much less a determinative difference, in what happened to the plaintiff. If the defendant fails to carry its burden, then, again quoting Justice O'Connor, it is reasonable to conclude that the protected trait arguably *did* have "a determinative influence on the outcome." That conclusion is based on the fact that we know that the employer was motivated by the impermissible factor and, given the defendant's failure to prove that the impermissible factor made no difference in how the plaintiff was treated, it is reasonable to conclude that this factor did make the difference in how the plaintiff was treated. In short, in *Hazen Paper* Justice O'Connor seemed to anticipate the two-step analysis established in the 1991 Act.[74]

It is also instructive that Justice O'Connor's two-part division in *Hazen Paper* evokes the approach she earlier took in *Price Waterhouse* of allocating shifting burdens of proof to the plaintiff and the defendant

70. 1 HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, LITIGATING CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION CASES § 9.5 (2d ed. 1999).

71. Zimmer, *supra* note 57, at 586-88.

72. 507 U.S. at 610.

73. 42 U.S.C.A. § 2000e-5(g)(2)(B).

74. Zimmer, *supra* note 57, at 588.

while ultimately maintaining a but-for standard for connecting the defendant's action to the plaintiff's harm.

> Where a disparate treatment plaintiff has made such a showing [that an illegitimate factor played a substantial role in the employment decision], the burden then rests with the employer 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 . . . . If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made "because of" consideration of the illegitimate factor and the substantive [but-for] standard for liability under the statute is satisfied.[75]

Thus, *Hazen Paper* is not inconsistent with the idea that the approach to age discrimination cases should be the same as in Title VII cases.[76]

B. The Lower Courts' Jurisprudence

There is not much real authority in the lower courts actually applying the same-decision defense in an ADEA case since Congress enacted the 1991 amendments to Title VII. This is perhaps because the courts have been strict in patrolling the boundary between *McDonnell Douglas* and *Price Waterhouse* and have not found ageist statements, even by decisionmakers, to meet the threshold test of direct evidence necessary

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75. 490 U.S. at 276-77 (O'Connor, J., concurring in the judgment).

76. Since *Hazen Paper* the Supreme Court has decided another individual disparate treatment case of age discrimination. *See* O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996). Like *Hazen Paper* it is somewhat ambiguous in impact. The question presented was whether there was a safe harbor from age discrimination cases involving terminations because plaintiff's replacement was also within the over-age-40 group protected by the ADEA. *Id.* at 309. The circuit court viewed it as a *McDonnell Douglas* case. *Id.* at 310. In an aside, Justice Scalia appeared to invite someone to argue that *McDonnell Douglas* was not available in age discrimination cases: "We have never had occasion to decide whether that application of the Title VII rule [of *McDonnell Douglas*] to the ADEA context is correct, but since the parties do not contest that point, we shall assume it." *Id.* at 311. That statement is somewhat enigmatic because it could mean that the Court might decide that *McDonnell Douglas* would apply to Title VII cases but not to ADEA cases. Another possibility is that *McDonnell Douglas* does not apply in ADEA cases because it has been overruled for Title VII purposes as well. Nevertheless, because the Court in *O'Connor* did go on to construe *McDonnell Douglas*, it is difficult to know what that statement means in the longer run.

The Supreme Court has recently decided to hear another individual disparate treatment case of age discrimination. *See* Reeves v. Sanderson Plumbing Prods., Inc., 180 F.3d 263 (5th Cir. 1999) (unpublished table decision), *cert. granted,* 120 S. Ct. 444 (1999) (No. 99-536). *Reeves* is discussed *supra* notes 37-41 and accompanying text.

for the application of *Price Waterhouse*.[77] The lack of direct evidence of discrimination prevents cases from ever getting to the stage at which the same-decision defense could apply. There is, however, some dicta in several cases, including two Eighth Circuit decisions, that say the 1991 amendments to Title VII apply in age discrimination cases.[78] In *Breeding v. Arthur J. Gallagher & Co.*, for example, the court equated the analysis applicable to age and sex discrimination cases and indicated that the effect of a successful same-decision defense was to limit remedies, not to cut off liability.[79]

> Ms. Breeding first contends that she has made out a submissible case of sex and age discrimination under . . . *Price Waterhouse v. Hopkins* . . . . "When a plaintiff puts forth direct evidence that an illegal criterion, such as age [or sex], was used in the employer's decision to terminate the plaintiff," we apply the standards enunciated in *Price Waterhouse v. Hopkins*, as modified by § 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). *Fast v. Southern Union Co.*, 149 F.3d 885, 889 (8th Cir. 1998). Under this modified *Price Waterhouse* standard, a defendant is liable for discrimination upon proof by direct evidence that an employer acted on the basis of a discriminatory motive, and proof that the employer would have made the same decision absent the discriminatory motive is only relevant to determining the appropriate remedy.[80]

There is also dicta in several cases cutting the other way. In a footnote in *Miller v. CIGNA Corp.*,[81] the Third Circuit, in justifying its reliance on Title VII authority in an age discrimination case arising before the effective date of the 1991 amendments, suggested that those amendments created a divergent path for Title VII and ADEA cases:

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77. For a good example, see *Reeves* discussed *supra* notes 37-41 and accompanying text. *See also* Cox v. Dubuque Bank & Trust Co., 163 F.3d 492, 497 (8th Cir. 1998) (holding that an employer has the right to ask an older employee about retirement plans); Philipp v. ANR Freight Sys., Inc., 61 F.3d 669, 674 (8th Cir. 1995) (holding that references by the decisionmaker to plaintiff as "the old man" plus many age-related statements by nondecisionmakers were insufficient to establish direct evidence threshold); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218 (5th Cir. 1995) (holding that age-related statements by plaintiff's supervisor did not constitute direct evidence because they primarily indicated a desire to employ lower-paid employees); Armbruster v. Unisys Corp., 32 F.3d 768, 779 (3d Cir. 1994) (holding that the *Price Waterhouse* threshold was not satisfied when a company official said the company could not afford to keep people over fifty and fifty, meaning employees over age 50 who made at least $50,000 per year).

78. *See* Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999); Fast v. Southern Union Co., 149 F.3d 885, 889 (8th Cir. 1998).

79. 164 F.3d at 1160.

80. *Id.* at 1156 (citations omitted) (alteration in original).

81. 47 F.3d 586 (3d Cir. 1995) (en banc).

> In the course of this opinion, we have relied on Title VII cases because the development of the relevant case law under the two statutes prior to the Civil Rights Act of 1991 followed parallel courses .... The substantive provisions of the 1991 Act that amended Title VII did not amend the ADEA, and Miller does not contend that [the 1991 amendments are] applicable to ADEA cases.[82]

It appears likely that the Third Circuit would maintain the bifurcated structure of separate *McDonnell Douglas* and *Price Waterhouse* approaches in age discrimination cases, with the but-for level of showing for *McDonnell Douglas* cases and the motivating factor level for *Price Waterhouse* cases, and the same-decision defense limited to *Price Waterhouse* cases.

As indicated above, Judge Tjoflat, in *Wright v. Southland Corp.*, suggested a modified approach that would leave the threshold showing of the motivating factor test for age discrimination cases but provided for the same-decision defense to have the effect that it had in *Price Waterhouse* of cutting off liability and not merely limiting damages.[83] He then suggests that the threshold showing required of the plaintiff is the same in cases brought under the ADEA and section 1981, but a successful same-decision showing by the defendant operates as a complete defense to liability under those statutes rather than as a limitation on remedies.[84] Thus, Judge Tjoflat's approach maintains the uniform structure of individual disparate treatment law to the extent of applying the same motivating factor threshold to cases brought under all antidiscrimination statutes, including Title VII and the ADEA. He then deviates from this uniform structure with regard to the consequences of the successful assertion of the same-decision defense. Thus, when the ADEA defendant carries its burden of proving that it would have made the same decision even absent consideration of the plaintiff's age, the plaintiff loses completely.

While plausible, this approach is not necessary. In the development of the federal common law[85] of disparate treatment discrimination under all the federal antidiscrimination statutes, the courts can look to particular provisions of a statute for approaches that best implement the

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82. *Id.* at 598 n.10.

83. 187 F.3d at 1303 n.17 ("In Title VII cases, this showing [of the same-decision defense] serves only to limit the liability of the employer; it does not relieve the employer of liability altogether.").

84. *Id.* ("In other areas of employment discrimination law, however, this showing is a complete defense.").

85. *See* David E. Seidelson, *Federal Common Law: Whose Baby Are You?*, 5 WIDENER J. PUB. L. 365 (1996).

national policy against discrimination. So far the Supreme Court has found a uniform approach to interpreting the different antidiscrimination statutes to be appropriate in carrying forth the will of Congress. While Congress did not amend the ADEA, or the other antidiscrimination statutes, when it added sections 703(m) and 706(g)(2)(B) to Title VII, it is clear that Congress took no steps to foreclose the courts from relying on those provisions in interpreting the ADEA and the other federal antidiscrimination statutes.

Beyond the value of uniformity in approach, there are good reasons to move toward the *Price Waterhouse* approach, as modified by the 1991 amendments, in age discrimination cases. First, *McDonnell Douglas* appears to have run its course. Especially since the 1993 decisions in *Hazen Paper* and *Hicks,* there has been a torrent of criticism of what has become of the *McDonnell Douglas* approach.[86] Also, as discussed above,[87] most of the courts of appeals have been moving away from its use. Second, the problem that initially justified *McDonnell Douglas*, that much discrimination will go unremedied if plaintiffs are required to find and introduce direct evidence of the employer's discriminatory state of mind, persists. Third, the modified *Price Waterhouse* approach, allowing all individual disparate treatment cases, whether based on direct or circumstantial evidence, to be analyzed under the motivating factor threshold, takes account of the difficulty plaintiffs have in finding direct evidence of discrimination but also protects defendants from the unwarranted imposition of all remedies by providing the same-decision defense to full remedies.[88] Finally, no aspect of age discrimination appears to warrant a different approach from the one applicable to race, gender, religion, and national origin discrimination under Title VII.

In sum, the full implementation of all the federal antidiscrimination laws would be better achieved by adopting, as a uniform approach for all individual disparate treatment cases, the approach that would allow the plaintiff to establish the defendant's liability by carrying the burden of proving that a protected characteristic was a motivating factor of the challenged employment decision.[89] If the plaintiff carries that burden,

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86. *See supra* note 11.

87. *See supra* text accompanying notes 37-65.

88. When the plaintiff's case is strong, it is difficult for the defendant to convince the factfinder that it would have made the same decision even if it had not considered the impermissible factor. When the plaintiff has a weak case but nevertheless convinces the factfinder that the impermissible factor was a motivating factor in the employer's decision, the defendant will typically have a strong case that it would have made the same decision even in absence of the impermissible factor.

89. *McDonnell Douglas* would still be available before the case goes to the factfinder to create a rebuttable presumption of discrimination until the defendant produces evidence

then the defendant has the opportunity to carry as an affirmative defense the burden of proving that it would have made the same decision in the absence of the impermissible factor. If the defendant is successful, then the plaintiff would be entitled only to limited remedies. If the defendant fails to prove that it would have made the same decision even if it would not have considered the impermissible factor, then the plaintiff would be entitled to full relief under the antidiscrimination statute she relied on in bringing her action. Thus, Justice Brennan should triumph even at this late date.

IV. ADEA REMEDIES IN SAME-DECISION DEFENSE CASES

The basic remedy structure available in ADEA actions is similar but not identical to the remedies available under Title VII. In ADEA actions brought by individuals, section 626(b) provides broad remedies but does so by looking to the Fair Labor Standards Act.[90] A backpay award in Title VII is called a claim for unpaid wages under the ADEA, but they are basically the same.[91] The difference is that the ADEA does not provide for compensatory or punitive damages, which are now available under Title VII. The ADEA, however, does provide for liquidated damages in an amount equal to the amount of the unpaid wages award if the violation by the defendant was willful.[92] Like Title VII, the ADEA provides that "[i]n any action . . . the court shall have jurisdiction to grant such . . . equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion."[93]

So, what happens when a defendant is successful in asserting the same-decision defense? Under Title VII, it is clear that the specific provisions of section 706(g)(2)(B) apply. Section 706(g)(2)(B) provides that the court:

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of the nondiscriminatory reason it claims motivated the decision the plaintiff challenges.

90. That section provides: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title [the Fair Labor Standards Act], and subsection (c) of this section." 29 U.S.C.A. § 626(b).

91. CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 20.8 (2d ed. 1988). The ADEA also provides: "Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title." 29 U.S.C.A. § 626(b).

92. 29 U.S.C.A. § 626(b). This section provides "[t]hat liquidated damages shall be payable only in cases of willful violations of this chapter." *Id.*

93. *Id.*

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [703(m)] . . .; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[94]

The declaratory relief available to the plaintiff is simply a court declaration that the defendant discriminated against the plaintiff. While not automatic, injunctive relief is available in individual disparate treatment cases so courts can "enjoin[] defendants from discriminating or retaliating in the future against the named plaintiffs."[95] With regard to declaratory and injunctive relief, the limitations on remedies in cases involving the same-decision defense would not seem to pose any difficult problems in an ADEA action because the remedies are so similar to those available under Title VII.

The remedy that may raise a more substantial question of statutory interpretation concerns attorney fees. Here the differences in language between the two statutes might make a difference in outcome. The general provision for attorney fees in Title VII is based on section 706(k), which reads, "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs."[96] But section 706(g)(2)(B) appears to create a specific standard for attorney fees in same-decision defense cases. When the plaintiff has prevailed in establishing the defendant's liability by proving the defendant relied on an impermissible motivating factor, but the defendant successfully

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94. 42 U.S.C.A. § 2000e-5(g)(2)(B). Subparagraph (A) refers to section 706(g)(2)(A), which provides:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section [704(a)].

Id. § 2000e-5(g)(2)(A).

95. BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1745-46 (3d ed. 1996). Some courts have denied injunctive relief when the plaintiff proved only an isolated instance of discrimination. *See, e.g.*, Spencer v. General Elec. Co., 894 F.2d 651, 660-61 (4th Cir. 1990), *overruled on other grounds*, Farrar v. Hobby, 506 U.S. 103 (1992). Others have issued injunctions in cases involving only isolated instances of discrimination. *See, e.g.*, EEOC v. Gurnee Inn Corp., 914 F.2d 815, 817 (7th Cir. 1990).

96. 42 U.S.C.A. § 2000e-5(k).

proves its same-decision defense, the court "may grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [703(m)] [thereby proving that an impermissible factor was a motivating factor in the decision plaintiff challenges]."[97]

There is no comparable provision in the ADEA that focuses on attorney fees in the same-decision defense situation. The provision of the FLSA that the ADEA incorporates as to attorney fees for all age discrimination cases differs from the general Title VII standard of section 706(k) because it does not focus on who the prevailing party was. It also differs from the special standard of section 706(g)(2)(B) that applies in the same-decision defense situation because the FLSA provision appears to mandate attorney fees whenever plaintiffs prevail, with no discretion in the trial court to deny those fees.[98] Thus, the FLSA provides, "The court in such action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."[99]

The question is whether, in a same-decision defense case, the discretionary standard that applies in Title VII cases ought to be read into the ADEA in same-decision defense cases arising under that statute. Generally, it would not seem to make much difference because the range of discretion allowed trial courts in Title VII cases to deny attorney fees to prevailing plaintiffs is limited to a narrow set of special circumstances.[100] However, relying on the word "may," several courts have denied attorney fees in same-decision defense cases brought under Title VII because any amount of attorney fees would not be proportionate to the minimal relief the plaintiff otherwise received. For example, in *Sheppard v. Riverview Nursing Center, Inc.*,[101] plaintiff proved that her pregnancy was a motivating factor for the employer's decision to lay her off, but defendant carried its burden of proving that it would have laid her off in any case for nondiscriminatory reasons.[102] Taking its cue from and expanding upon the Supreme Court's decision in *Farrar v. Hobby*,[103] the court relied on the word "may" in section 706(g)(2)(B) to

97. *Id.* § 2000e-5(g)(2)(B)(i).
98. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86 (2d Cir. 1983).
99. 29 U.S.C. § 216(b) (1994 & Supp. III 1997) (emphasis added).
100. LINDEMANN & GROSSMAN, *supra* note 95, at 1866-70.
101. 88 F.3d 1332 (4th Cir. 1996).
102. *Id.* at 1333.
103. 506 U.S. 103, 112-15 (1992) (holding that "a plaintiff who wins [only] nominal damages is a prevailing party under [42 U.S.C.] § 1988," but that because of proportionality the plaintiff is not entitled to an award of attorney fees).

require proportionality analysis in same-decision defense cases, even though plaintiff was, pursuant to section 703(m), a prevailing party.[104]

Sheppard is an improper interpretation of Title VII's same-decision defense provisions. While section 706(g)(2)(B) grants the trial court some discretion, Congress, in differentiating the relief that is available from that which is not, itself engaged in the proportionality analysis that the *Sheppard* court held is to be applied by the trial judge on a case by case basis. First, Congress made it clear in section 703(m) that "an unlawful employment practice is established" when the plaintiff proves that the defendant relied on an impermissible motivating factor in making the decision that is being challenged.[105] Second, when the defendant fails to prove the same-decision defense, the plaintiff is entitled to full remedies under the general remedial provisions of section 706(g).[106] Third, if the defendant proves that it would have made the same decision even if it had not considered the impermissible factor, section 706(g)(2)(B) determines that the prevailing plaintiff receives only limited remedies, including limited declaratory and injunctive relief and "attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [703(m)]."[107] That structure establishes the proportionality of the attorney fee award in cases brought under section 703(m), whether the same-decision defense created in section 706(g)(2)(B) is proven or whether it fails.

Imposing another round of proportionality on top of the proportionality that Congress determined in passing sections 703(m) and 706(g)(2)(B) risks making those provisions superfluous. Section 706(g)(2)(B)(ii) provides that, when the defendant successfully asserts the same-decision defense, the court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment [of backpay]."[108] The unavailability of this positive relief requiring the

104. 88 F.3d at 1338. The Eleventh and Seventh Circuits appear to have followed *Sheppard*. *See* Akrabawi v. Carnes Co., 152 F.3d 688 (7th Cir. 1998); Canup v. Chipman-Union, Inc., 123 F.3d 1440 (11th Cir. 1997). The Ninth Circuit, however, has not. *See* Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997).

105. 42 U.S.C.A. § 2000e-2(m).

106. *Id.* § 2000e-5(g)(2)(B).

107. *Id.* § 2000e-5(g)(2)(B)(i). If the plaintiff pursues only a claim under section 703(m) and prevails, but is subjected to limited remedies because the defendant successfully asserted the same-decision defense, the plaintiff is entitled to full attorney fees, subject to the special circumstances exception. If the plaintiff pursues more than just section 703(m) claims, but the plaintiff's success is limited to the section 703(m) case and that success is further limited because the defendant proved its same-decision defense, only those fees attributable to the section 703(m) claim are recoverable.

108. *Id.* § 2000e-5(g)(2)(B)(ii).

defendant to do something, such as pay the plaintiff money or rehire the plaintiff, means that in many same-decision defense cases the defendant will not be found to have changed position as a result of the plaintiff's lawsuit. Such a change in position is a prerequisite required by *Sheppard* to be a sufficient base to make the proportionality determination that would justify granting the plaintiff attorney fees.[109] Using the unavailability of that type of relief in *Sheppard*'s second level proportionality analysis operates to deny to the plaintiff the only economic relief that is available under section 706(g)(2)(B)(i). Congress could not have intended such a result.

In the event that the *Sheppard* approach is upheld in Title VII cases, the statutory difference between the provision of attorney fees in section 706(g)(2)(B)(i) in Title VII cases and the provision for attorney fees in age discrimination cases might then be significant. The discretionary linchpin the court found in *Sheppard*, the use of the word "may," is absent in the section of the FLSA that applies in age discrimination cases. Section 216(b) provides, "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action."[110] Because the grant of declaratory relief is included within the term "any judgment" and because the grant of attorney fees is made mandatory by the term "shall," nothing about the *Sheppard* analysis would apply in age discrimination cases in which the defendant successfully asserts the same-decision defense.

In sum, the ADEA should be interpreted to allow the plaintiff to establish the defendant's liability by proving age was a motivating factor in the decision she challenges. If the defendant then fails to prove that it would have made the same decision even if it had not considered age, the plaintiff is entitled to full remedies, including unpaid wages and front pay as well as declaratory and injunctive relief. Further, the plaintiff should also be entitled to liquidated damages if she proves that the defendant's violation was willful. On the other hand, if the defendant successfully proves that it would have made the same decision

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109. The relief that is available under section 706(g)(2)(B), other than attorney fees and costs, appears not to count in the second level proportionality analysis proposed by the Fourth Circuit in *Sheppard*. First, because the Supreme Court denigrated the significance of simple declaratory relief in *Farrar*, the grant of a declaratory order that the defendant discriminated against the plaintiff is not counted in *Sheppard*'s proportionality analysis. Second, unless the plaintiff continues to be employed by the defendant, courts may not issue an injunction prohibiting the defendant from discriminating against the plaintiff in the future. Thus, that trigger for the proportionality analysis would be available in same-decision defense cases only when the plaintiff continued to work for the defendant.

110. 29 U.S.C. § 216(b).

even if it had not considered age, then the plaintiff's remedies should be limited to a declaratory order that the defendant discriminated against the plaintiff, injunctive relief against the defendant under the general standards for granting injunctions, and mandatory attorney fees attributable to her individual disparate treatment claim.

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