

The High Price of *Price Waterhouse*:
Dealing with Direct Evidence of Discrimination

by

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An employer swings by his sales agent's office to give him recent (subpar) sales figures. After dropping the agent's sales figures on the agent's desk, the boss shakes his head and utters, "just like a DeGo."¹ Later that day he fires the agent. Of course, the agent sues. But what kind of a case will he have? It is undeniable that his sales were low and there may even be evidence that others in the same boat have suffered a similar fate. But the employer did call him a "DeGo," and appeared to equate his performance with his ethnicity. That sounds like the basis of a national origin discrimination² claim if the boss's animus toward Italians – rather than the agent's slumped productivity – prompted the decision.³

After depositing the case on the steps of a federal courthouse, the fun really begins.⁴ The court will have the unenviable task of interpreting the remark. Its initial dilemma will be whether to treat the remark as "direct evidence"⁵ of discrimination or something less than that. The decision carries great consequences for litigants.⁶ But there is no consensus among the federal courts as to what evidence is "direct."⁷ If the judge treats the comment as direct evidence of discrimination, then the case will in all likelihood speed past the employer's motion for summary judgment⁸ and end up in the hands of the jury.⁹ At trial, the agent may even be entitled to an instruction¹⁰ from the judge (to the jury) that he wins his case (and damages) unless the agency presents sufficient evidence¹¹ that it would have taken the same action even if it had no discriminatory motive.¹²

In determining whether the remark is "direct evidence," the court will likely turn to the case law. There is little chance the judge will be helped much. Rather, the court will be exposed to a flurry of rules intended to describe what direct evidence is *not*.¹³ For example, it is not an isolated or "stray" remark,¹⁴ nor one that requires too much interpretation,¹⁵ nor one uttered by someone who is not a decisionmaker. In this case, the agent's theory would be that his boss attributed his sales figures to him being Italian, and, because the termination was based on low sales, it follows that the firing was tied to his national origin and ethnicity. That much interpretation would probably convince the court that the comment was not direct evidence. In the alternative, the district court might find the remark to raise an inference of discrimination (a *prima facie* case), which could be answered by evidence of the sales figures.¹⁶ Some courts will even allow a plaintiff to use such a remark to establish both an inference of discrimination and to rebut the employer's answer, meaning the plaintiff will get a trial on his claim.¹⁷ Still others, after concluding that the remark is not direct evidence of discrimination, will not allow a plaintiff to use it at all because the evidence of poor sales figures will mean he cannot create even an inference of discrimination.¹⁸

As this article reveals, the federal courts are in complete disagreement as to the proper treatment of oral evidence in employment discrimination cases. The Supreme Court has not provided helpful guidance in the area (and may even be accused of adding to the complexity),¹⁹ and the federal appeals courts and district courts have nearly as many approaches to the issue as they do cases on their docket. This article has several purposes. The first is to determine why courts evaluate oral statements by using a rigorous, "direct evidence" standard. Answering that question means tracing the history of causation in discrimination cases, as strong evidence was originally intended to offset weak proof of causation. The article's second purpose is to demonstrate how the term "direct evidence" causes only inconsistency and confusion among the federal courts both in defining the term and in using it as a standard by which to assess the probity of oral statements. Third, this article considers whether the indirect method of proving discrimination, articulated in *McDonnell Douglas Corp. v. Green*,²⁰ offers a solution to the problem of how oral evidence should be evaluated. The article concludes that it does not. Finally, the article suggests a simplified standard for evaluating oral evidence that focuses courts on the sufficiency of the plaintiff's evidence rather than confusing methods of proof and burden-shifting schemes.

I. Why Courts Use A "Direct Evidence" Standard to Evaluate Oral Statements

The question *whether* to require that oral evidence be "direct" and "strong" cannot be answered without understanding *why* courts historically have required it to be that way. From the passage of the Civil Rights Act of 1964²¹ to the time of *Price Waterhouse v. Hopkins*,²² the causation standard in employment discrimination cases was ungenerous to plaintiffs: employees had to prove that discrimination was the "but for" reason for their injury. In

other words, a plaintiff had to prove that the employer's decision would have been different had the plaintiff been a member of another race, sex, and so on.²³ That changed once the Supreme Court decided *Price Waterhouse*, which rejected the "but-for" causation standard in favor of a lower, "motivating factor" standard. Almost overnight, the plaintiff's job became easier. It was enough to prove that a protected classification was a "motivating factor" in the employer's decision.²⁴ In order to avoid paying money damages, the employer then could prove that it would have taken the same action if the plaintiff had been a member of another race or sex.²⁵ Because this burden was simply the opposite of what the plaintiff's burden used to be, courts and commentators concluded that the law changed considerably and that the plaintiff's traditional burden of proof had shifted to the employer to prove that it did *not* discriminate.

For both Justice O'Connor, who wrote an important concurrence in *Price Waterhouse*,²⁶ and the overwhelming majority of federal courts, the solution to this lower standard of causation and shifted burden was to contain it to a small number of cases, specifically, those cases in which the plaintiff's evidence was so strong that it could justify requiring the defendant to prove a negative (that it did not discriminate because its decision would have been the same).²⁷ For Justice O'Connor, and the lower federal courts that followed her approach, only "direct evidence" of discrimination could shift the burden. All other evidence would be considered circumstantial evidence of discrimination and those cases would be decided under *McDonnell-Douglas*, where the but-for burden rested with the plaintiff at all times to prove that she was an actual victim of discrimination.²⁸ Courts set a particularly high threshold before evidence could be termed "direct." Some required the plaintiff to produce what amounted to the smoking gun. In other words, it had to be a near admission of liability by the defendant.²⁹ After all, if the defendant had practically admitted it had violated the law, then what harm at that point could come from placing a burden on the defendant to show that its discriminatory intent actually caused no injury?

Since *Price Waterhouse*, federal courts have overwhelmingly maintained the distinction between direct evidence and circumstantial evidence presented under *McDonnell Douglas*. A plaintiff therefore is generally entitled to a *Price Waterhouse* jury instruction (meaning the burden has shifted to the employer) only if his evidence is strong enough on its own to prove the ultimate fact: that discrimination occurred.³⁰ But there have been some cracks in the bifurcated approach and calls for reform. The most important development is that a few courts³¹ and commentators³² have suggested that the Civil Rights Act of 1991,³³ which adopts *Price Waterhouse's* "motivating factor" standard of causation, applies to all discrimination cases, whether the plaintiff's evidence is direct or circumstantial. In fact, the statute does not use the term "direct evidence" nor explicitly confine the "motivating factor" standard to a subset of discrimination cases. They argue that such uniformity would simplify employment discrimination cases. It would also mean that in every discrimination case the ultimate burden of *disproving* causation would rest with the employer once the plaintiff had established one of the employer's motives to be illegal.³⁴

That interpretation may be a departure from traditional tort law, where the burden of causation remains with the plaintiff, and a departure from the Supreme Court's pronouncements, notably in *Texas Dept. of Community Affairs v. Burdine*, that the burden of proof always remains with the plaintiff,³⁵ but it may be unavoidable if the Act is to be given its plain meaning. Two years after *Price Waterhouse* Congress enacted into law a standard similar to the plurality's (with one exception concerning liability), but left out of the statute Justice O'Connor's addition concerning strong evidence. Congress mandated that the motivating factor test be used in Title VII cases "even though other factors also motivated" the decision.³⁶ The "even if" language does not seem to *require* that other (legitimate) factors be present before the motivating factor standard is used. Rather, it appears to say that in some cases the defendant's motive will be, at best, "mixed."³⁷ And the alternative is hardly appealing, either. Two discrimination plaintiffs -- both claiming race discrimination -- could confront two different causation standards. A plaintiff who proceeded along the *Price Waterhouse*, direct-evidence path would have to prove that her race was a "motivating factor"³⁸ in the employer's decision, while a plaintiff relying on *McDonnell Douglas*³⁹ would need evidence that her race was a "determining," or but-for factor in the decision.⁴⁰ It makes little sense to say that a decision prompted by more than one reason, at least one of them illegitimate, is unlawful, but a decision prompted by only one reason, it being entirely illegitimate, may not be.

Whatever the correct answer concerning the reach of the "motivating factor" standard, the practical effect of the debate may be limited. If the motivating factor standard were to apply to all discrimination cases (not just cases involving direct evidence), it is unclear how that would change the way cases are tried and even decided. A case brought under *McDonnell Douglas*⁴¹ differs from a direct evidence case, where the defendant's motives are at best "mixed."⁴² Under *McDonnell Douglas*, the defendant denies any discriminatory motive whatsoever, and the jury is faced with two very different versions, only one of which can be true.⁴³ The "premise of [*McDonnell*

Douglas] and *Burdine* is that *either* a legitimate or an illegitimate set of considerations led to the challenged decision."⁴⁴ It is hard to imagine that a jury's decision on liability in that case will turn on the difference between a "motivating factor"⁴⁵ instruction and a "determinative" or "but-for" instruction. After all, there is no tricky issue of causation to sort out. After catching the employer in a lie, the jury will likely find that the intent the employer was hiding "motivated" the decision. As the employer has offered no other explanation, the intent caused the decision, too. In this case, motivation and causation go hand-in-hand.⁴⁶

There is a difference between the "motivating factor" and "but-for" standards only when the employer offers more than one explanation for its decision, and the jury must sort out *which* factor actually caused the plaintiff's injury. The argument over causation in that case ended once Congress passed the 1991 Act, which squarely places the burden of sorting all this out on the employer.⁴⁷ The employer's worry in cases under *McDonnell Douglas* may be that a jury might tolerate thin evidence of discrimination after interpreting the "motivating factor" standard to be a low threshold. The jury's interpretation in that case would be wrong, of course, as the evidence must make the ultimate fact of discrimination more likely true than not, which thin evidence presumably could not do.⁴⁸ A jury instruction might do the trick if it added "substantial" to "motivating factor," or by defining "motivating factor" as a consideration that had a "substantial affect" on the employer's decision.⁴⁹ It is unlikely Congress intended *all* motivations to be subject to scrutiny,⁵⁰ rather than only those that played a significant role, and the change would further erase any real distance between a factor that motivates and another that proves decisive.⁵¹

If the "motivating factor" standard were applicable to all discrimination cases under Title VII, the future of the direct evidence standard would head in one of two directions. The search for such evidence might simply end, it being no longer necessary to maintain a distinction between a "mixed motive" case brought under *Price Waterhouse* and a single-motive case brought under *McDonnell Douglas*.⁵² Or it could become a quest in *every* case, which is more likely. After all, courts require strong evidence to compensate for the seemingly lower burden plaintiffs enjoy under the 1991 Act,⁵³ which would mean the direct evidence threshold travels with the lower burden.⁵⁴ Direct evidence under *Price Waterhouse* might equate to strong evidence that the employer's explanation for its decision is pretextual, or a lie, under *McDonnell Douglas*.⁵⁵ So whether the 1991 Act redefines causation for all discrimination cases, or applies only to cases brought under *Price Waterhouse*, the standard is not going away and there is no avoiding the issue: what is direct evidence and does the standard work? It turns out that because the first question is unanswerable, the answer to the second question is no. Thirteen years after *Price Waterhouse*, the term has become its own irony, providing no direct answer as to what direct evidence is.

II. How the "Direct Evidence" Standard Fails in Practice By Causing Inconsistency Among the Federal Courts

At the heart of the problem of interpretation is the term itself: "direct evidence." It has become a term almost too complex to define.⁵⁶ Two distinct approaches have emerged. The first is to define it in its strictest sense and require that it describe evidence that, standing alone, leads a trier of fact to a single conclusion – namely, that the challenged employment decision was motivated by an impermissible characteristic exhibited by the plaintiff.⁵⁷ No inferences are allowed.⁵⁸ In our case, the manager's statement "just like a DeGo" falls short of this standard because a jury would have to conclude that the firing (accomplished later that day) was related to the remark more than it was prompted by the salesperson's slumping sales. Because more than one conclusion could be reached from this scant record, the utterance is not "direct evidence" under this standard. A second approach is more generous. It defines the term by including any evidence making it more likely than not⁵⁹ that discriminatory animus prompted the challenged employment decision.⁶⁰

Consider a statement that an employee is an "old S.O.B." and is "getting too old" for the job.⁶¹ The comment was uttered by Eugene Esposito, Sr., Martin Robin's boss and owner of Espo Engineering, two years before Robin was fired.⁶² Esposito claimed that the firing had everything to do with Robin's diminished sales figures.⁶³ Robin claimed the sales figures could be attributed to his illness,⁶⁴ prompting him to sue for disability discrimination in addition to his obvious claim under the Age Discrimination in Employment Act (ADEA).⁶⁵ What to do with Esposito's comments? Comments that reveal discriminatory intent usually must pass through a filter which more often than not diminishes if not eliminates their probative value. Was the age-based comment uttered by a decisionmaker? Was the comment made around the time of the employment decision adverse to the plaintiff? Was the comment about the plaintiff? Was the comment isolated or were there others? And, finally, does the comment establish (or at least question) the decisionmaker's intent, which, after all, is the ultimate issue in employment discrimination cases. In Robin's case, the remarks passed only a few of these tests. Yes, they were

uttered by someone important – the owner and CEO of the company (and certainly someone behind Robin’s discharge),⁶⁶ and, yes, the comments were about Robin. But they were uttered two years before Robin’s reduced sales figures (the company’s version) forced him out,⁶⁷ they were not combined with other comments and instead popped out as “random office banter,”⁶⁸ and, in the abstract, were “hardly offensive” (the court’s interpretation).⁶⁹

Why hardly offensive? Though the court did not elaborate, it is likely because Robin was getting older, which is perhaps why we tolerate the remark more than a statement about a black employee described as “too black.” Though, here, the treading is dangerous. The ADEA proscribes employment decisions tainted by age animus just as clearly as Title VII does with respect to race, and it was unnecessary for Esposito to mention Robin’s age if all he needed to accomplish was a criticism of Robin’s production or even Robin’s personality (the “S.O.B.” part of the equation). In what could be considered a double-standard, courts are reluctant to turn what amounts to socially acceptable banter about the aged into direct evidence of discrimination.⁷⁰

Substituting “black” for “old” may illustrate the point. Say Esposito referred to Robin as a “black S.O.B.” or “too black.” Then what result? It is hard to imagine that the court would be as dismissive of his case. Something very close to that occurred in *Hunt v. City of Markham*,⁷¹ where the district court relied on the “stray remarks” doctrine to dismiss a case brought by four white police officers who were denied raises and who later quit under intolerable conditions.⁷² For years prior to the lawsuit, the mayor of the city made several racist (and ageist) comments, such as that the city “needed to get rid of all the old white police officers” and, directly to one of the plaintiffs, “when are you going to quit so we can bring these young black men up?”⁷³ The district court found the comments rather muted on two grounds: they were uttered by the mayor, not the city council (the true decisionmaker in the case), and the city’s finances were in dire shape.⁷⁴ The appellate court reversed after finding the district court “overread” the stray remarks doctrine.⁷⁵ True, said the court, not all remarks of a derogatory nature are “evidence of actionable discrimination,” but some are even when they are not uttered by decisionmakers themselves.⁷⁶ The mayor was not far removed from the council’s decisions with respect to the officers, and certainly close enough to influence it by his own bigotry.⁷⁷ “Emanating from a source that influenced the personnel action (or nonaction) of which the plaintiffs complain, the derogatory comments became evidence of discrimination.”⁷⁸ But if the mayor only wanted to bring young men up (rather than “young *black* men”), would the result have been the same or would the court have chalked the comments up to a truism about how resignations at the top of an organization create room for promotions at the bottom?⁷⁹

Despite the rigorous but-for causation standard, courts do find that some age-based comments provide sufficient evidence. In *Wichmann v. Board of Trustees*,⁸⁰ the court of appeals reviewed a jury verdict in favor of a former employee in an age discrimination case and concluded that the plaintiff’s most “striking piece of evidence”⁸¹ was his supervisor’s comment (made to others) about why the plaintiff had been fired: “Think of it like this. In a forest you have to cut down the old, big trees so the little trees underneath can grow.”⁸² The employer argued that the remark was simply meant to reassure troubled employees about the changes at the school,⁸³ while Wichmann contended it was a thinly veiled metaphor that meant he was fired because of his age.⁸⁴ The court of appeals conceded that either interpretation would have been reasonable (though it favored Wichmann’s),⁸⁵ meaning the jury was free to choose between them, which it did in Wichmann’s favor.⁸⁶ But if Wichmann gets to a jury and wins his case largely on the basis of a metaphor, then why does Robin’s case fail soon after it gets started? Because the courts do not define “direct” evidence in the same way. For the *Robin* court, it is as close to an admission of guilt as possible,⁸⁷ while in *Wichmann* it is evidence that can be “interpreted” as an acknowledgement of discriminatory intent.⁸⁸ According to the court of appeals in *Wichmann*, even isolated remarks (which others would see as falling squarely within the “stray remarks” doctrine) could constitute direct evidence so long as they were connected to the challenged employment decision and close in time to it.⁸⁹

Another factor may explain the difference between *Wichmann* and *Robin*: review in *Wichmann* came after the jury had returned a verdict in the plaintiff’s favor.⁹⁰ Once a trial is over and the plaintiff has prevailed, federal courts undergo a transformation and begin crediting the very utterances they so often discount at the summary judgment stage. Either they are result-oriented before the trial begins or they are simply applying the wrong standard. Whether the plaintiff is at trial or defending against a dispositive motion beforehand, the same sufficiency of the evidence standard should be used.⁹¹ The transformation is nicely illustrated in *Sheehan v. Dolan Corporation*,⁹² in which the plaintiff became pregnant three times while working for a family-owned business.⁹³ According to the company, it fired her because she was an impossibly rude employee.⁹⁴ That version was not helped by the comment Sheehan’s boss told her at the time of her firing: “Hopefully this will give you some time to spend at home with your children.”⁹⁵ The jury found that remark (and other evidence) indicative of pregnancy

discrimination, and the appeals court was not inclined to disagree.⁹⁶ It noted that the jury was faced with two “radically different stories”⁹⁷ concerning Sheehan’s employment and what led to her discharge. In the end, the jury was free to credit Sheehan’s version and conclude that her boss’ comment “reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake.”⁹⁸

If the implication in the Sheehan comment is that a woman’s place is at home because of her sex, is it so different from a statement that implies an older worker belongs in the same place because of her age? Consider what was said to Roberta Baker, 60, after she was informed that she was not to be selected as the new store manager of a Speedway Superamerica gas station/food pantry.⁹⁹ Speedway had razed the store Baker had managed; the company then built a new, much larger store in its place.¹⁰⁰ Instead of giving the new managerial job to Baker, the company chose a woman 21 years younger than Baker for the position.¹⁰¹ Speedway claimed the decision was made simply on the merits.¹⁰² Baker’s bosses, Neil Blanos and Dave Wallace, communicated the company’s decision to Baker at the same time it asked her about her age and her plans to retire.¹⁰³ The district court summarized the conversation:

[A]fter Blanos told [Baker] that he did not think she was capable of managing the new store, she began to cry. In response, Blanos said, “Well, I thought you were going to retire. You had asked about retiring.” In addition, Wallace said, “Aren’t you about 58?” Baker replied that she was 60. Blanos then said, “But you talked about retiring. Are you sure you don’t want to retire?”¹⁰⁴

The conversation would be far easier to interpret if Blanos and Wallace had included a normative statement about Baker’s age (along the lines of her being “too” old for the new position). So the job of interpretation here is more difficult. Either Blanos and Wallace were genuinely trying to soften the blow levied by their decision by discussing Baker’s retirement, or they revealed what prompted their decision by confirming her age. Having two decisionmakers in the conversation does not help matters. Wallace, as Baker’s direct supervisor, was the chief decisionmaker in the case, making it arguably more important that the question about Baker’s age came from him.¹⁰⁵ But perhaps he was simply responding to Blanos’ comment about retirement, making his question less awkward and even directly relevant to Speedway’s retirement policies. Is there sufficient evidence to send the case to the jury? Not under *Robin’s* smoking gun approach to direct evidence.¹⁰⁶ But the case appears to be much closer under *Sheehan*,¹⁰⁷ where implications can support jury verdicts,¹⁰⁸ or under *Wichmann*,¹⁰⁹ where a metaphor uttered to someone *other than the plaintiff* gets the job done.¹¹⁰

At the very least, Baker may have what Sheehan has: evidence that a stereotype tainted an employment decision. Evidence of stereotypes lowers the bar considerably in these cases, but it is consistent with the message laid out in *Price Waterhouse*: namely, that discrimination in sex-based cases is often rooted in assumptions about sex roles¹¹¹ (while in other cases, such as race-based ones, it is more likely rooted in animus). And cases dealing with older workers? Perhaps a combination of the two. Calling Robin an “old S.O.B.”¹¹² displays animus (it was likely not an attempt at humor); calling an employee “senile” displays a similar unsophisticated bias.¹¹³ More ambiguous are those comments which are simply descriptive (such as “you’re getting old,” uttered in social banter),¹¹⁴ and courts are generally correct to dismiss these as – at worst – truisms about many employees. Perhaps that is what makes age-related comments so difficult to interpret: the remark “you’re getting black” preceding a firing would be nonsensical and therefore would probably never be uttered. If it were, and uttered in a derogatory sense, with a meaning of “you’re *acting* black,” it might be strong evidence of animus (though maybe not “direct” evidence). If coupled with the right kinds of other evidence, it could well lead a jury to conclude that race motivated the firing in question. A similar comment about age (“you’re getting old”) is true of all of us, especially judges, a fact which cleanses the comment of illicitness or at the very least successfully camouflages it.¹¹⁵

It is always a bad sign when the law in a case is more complicated than the facts. Direct evidence as a category fails for the same reason that a statute might be pronounced unconstitutional: it is vague. When a vague standard is passed out to hundreds of federal court judges, the results are exactly what one might expect.¹¹⁶ Age-based workplace comments should be evaluated under a single criterion: could a fact-finder reasonably conclude from the comments that the challenged employment decision turned on the plaintiff’s age? Or, put another way, do the comments raise enough doubt about why the plaintiff was fired, or demoted, or not hired? The problem may well come from the fact that *Price Waterhouse* never defined “direct” evidence,¹¹⁷ and the appellate courts can hardly agree on a standard definition for the term.¹¹⁸

This is what it is not: evidence that amounts to an admission of guilt. In other words, evidence that would make a trial on the matter utterly silly. In the extreme, it is a supervisor referring to a plaintiff as “senile” and encircling “retire now” in a smoking-gun memorandum describing retirement benefits.¹¹⁹ Or a corporate officer who explains why a woman was not promoted to route manager by telling her that management “wanted men in

these positions.”¹²⁰ But it can be less than that and still lead the jury (or judge) to conclude that sex motivated the decision at issue. Comments that an employee is “getting too old,”¹²¹ when uttered in connection with a decision adverse to the plaintiff, may be sufficient not because they rule out the need for interpretation (too old for what?) but because they may, without the need for additional evidence, directly lead the fact-finder to a single conclusion. Under this approach, courts would not ask whether the evidence was so strong and damaging to the defendant that it should be called direct. Evidence that merely convinces, rather than commands, a particular result is sufficient to support a verdict (and, correspondingly, survive summary judgment). Of course, oral evidence might fall short of this standard and still constitute the bulk of the plaintiff’s case.¹²² What to do in that instance is a further source of disagreement among the courts.

III. Examining Oral Evidence Under the *McDonnell-Douglas* Scheme

What happens to evidence that cannot be labeled “direct” because of its context? Examples include oral statements that reflect a discriminatory animus but are not uttered by the decisionmaker, or are uttered by the decisionmaker but are not contemporaneous with the challenged decision, or are not uttered in regard to the plaintiff, or are uttered about the plaintiff but also are clouded by just enough ambiguity to fall out of the “direct evidence” category.¹²³ The answer is that a court will likely subject the evidence to what has simply become known as the *McDonnell Douglas* method,¹²⁴ whereby a plaintiff with little to no evidence proves discrimination by catching her employer in a lie.¹²⁵ Under *McDonnell Douglas*, plaintiffs must prove their case is triable in three stages.¹²⁶ The first stage – the prima facie case – is flexible to adjust to the plaintiff’s particular claim.¹²⁷ *McDonnell Douglas* involved a claim of race discrimination.¹²⁸ In a case where the plaintiff alleges age discrimination, as in *Robin*, he must establish that he (1) is at least 40 years old; (2) was meeting his employer’s legitimate job expectations; (3) suffered an adverse employment action, such as being fired, not promoted, or not hired; and (4) was treated differently than significantly younger employees or can point to other evidence that the employer found his age to be significant.¹²⁹ If he can pass these four tests, then the burden shifts to the employer to justify its decision on any nondiscriminatory ground.¹³⁰ If done, the ball shifts a final time back to the plaintiff, who must demonstrate to the satisfaction of the court that the employer’s explanation is a pretext, or a lie.¹³¹

Consider a woman who is not promoted to the ranks of manager in a male dominated profession. Some time before the decision is made to deny her the promotion, a manager with partial influence over the decision says casually to one of the employees, “The problem with this job is that it’s simply not cut out for both sexes – it may not be politically correct to say it, but it’s the truth.” As courts typically define the term, the statement is not direct evidence because it is unclear how much influence this manager had over the challenged decision, whether the comment relates to the job denied the plaintiff, and even what the manager had in mind when he made the comment. We can guess which sex he is talking about when he rules out one for a job, but it is an inference, and one that a jury would have to make. Now add this fact: the woman in question had a terrible tardiness problem, which is well documented in the record. One approach is to consider the manager’s comment at the pretext stage, meaning it is evaluated only if she is able to establish a prima facie case of discrimination. Can she? Her tardiness is well documented, which means the employer will undoubtedly argue she was not meeting her employer’s legitimate job expectations. She therefore cannot establish a prima facie case. *Robin* lost his case on exactly those grounds.¹³² But that also meant his oral evidence of discrimination was never again revisited by the court.¹³³ The argument might work depending on where this case is tried. The Seventh Circuit may well buy it.¹³⁴ The Sixth¹³⁵ and Eleventh¹³⁶ Circuits would not, having adopted a rule in these cases that the employer’s explanation concerning tardiness, offered in step two of the *McDonnell Douglas* paradigm,¹³⁷ cannot be advanced in the game by using it to rebut the plaintiff’s initial showing in step one.¹³⁸

The approach favored by the Sixth and Eleventh Circuits solves one problem at the same time in creates another. The problem solved: it avoids an all-or-nothing approach with respect to oral evidence. The evidence would be revisited by the court at the pretext stage even after it concluded it fell short of direct evidence. It hardly follows that age-based comments are irrelevant simply because they do not directly prove a case. Say the evidence of a poor work record is there, but barely so. After all, “thin evidence” cases can appear on both sides. The employee has not established pretext, but on balance perhaps comments such as “too old” and “near dead” are stronger evidence than anything the employer has. A jury might reasonably question not the accuracy of the employer’s records about the plaintiff’s work record but whether that record actually prompted the decision. So revisiting the remarks makes sense even if there is other evidence that the employee’s job performance was unsatisfactory. The problem created: skipping the step in the prima facie case concerning job performance amounts to a judicial presumption that the plaintiff’s work history qualifies him for the job. The record evidence

may not support that presumption. *McDonnell Douglas* is tailored for a plaintiff to prove his case with little to no affirmative evidence.¹³⁹ But that should not mean *ignoring* other evidence that would convincingly negate his case.¹⁴⁰

Perhaps in response to this problem, the answer for some courts is a third approach: effectively merge the direct evidence and *McDonnell Douglas* constructs. Under this alternative, an utterance by a manager that falls short of direct evidence would satisfy the plaintiff's prima facie case, meaning the employer would then have to answer with a nondiscriminatory reason for its decision. It is understandable (though not helpful) that courts would attempt this compromise. Despite the lower courts' recitation of the *McDonnell Douglas* scheme as almost always beginning with a multi-faceted prima facie case, the Supreme Court has consistently held that it is not to be applied in such a rote fashion in all cases, and that any evidence sufficient to create an inference of discrimination can satisfy the prima facie aspect of the indirect evidence case.¹⁴¹ But the solution merely delays the awkwardness just around the corner: are the comments then to be used a second time to establish pretext, and, if so, then what is gained by all of this burden-shifting?¹⁴² Moreover, oral utterances often constitute a weak attempt at proving pretext, which can only be established when the employer's explanation for its decision is sufficiently called into doubt. While age-related utterances provide a context to the incredulity, more often than not they would constitute shooting at the wrong target. An utterance about being "too old," for example, is not very responsive to the employer's citation of an employee's work record, or the need for it to reduce its workforce, and so on. Once the plaintiff has opted for the *McDonnell Douglas* method, his proper focus is to contradict the defendant's stated reason for its decision.¹⁴³ At that point an assortment of oral statements on the employer's part may seem like a nonsequitur.

The *McDonnell Douglas* scheme is not the answer to how to treat utterances that fall short of the "direct evidence" threshold. Perhaps there is a way to jerry-rig or contort the scheme so that such oral evidence finds its proper place, but if so the approach has yet to be suggested. That should not be a surprise. *McDonnell Douglas* is a scheme for cases where the plaintiff does *not* have significant affirmative evidence (whether direct or otherwise) of discrimination.¹⁴⁴ In a sense, it is a last resort format for a plaintiff.¹⁴⁵ Though she lacks evidence, she can raise sufficient suspicion concerning her employer's motives to warrant a trial on her claim. For example, she falls in a protected class, was performing her job well enough, was treated differently than others by virtue of her termination, and the employer's explanation for its decision is not supported by the record.¹⁴⁶ In other words, her most important "evidence" is a record that casts doubt on her employer's version of events.

Why not position these cases so that the evidence rather than the method of proof determines the outcome? This is not the result in many cases. When a court reviews a jury verdict, the plaintiff's method of proof becomes irrelevant and the evidence is all that matters.¹⁴⁷ Not surprisingly, it is in these cases that the very evidence often found incomplete at the summary judgment stage is found to support the jury's verdict after-the-fact. There is no getting around the inconsistency. A plaintiff who wins at trial is not entitled to a more generous read of the evidence than one at the pre-trial stage. The standard for reviewing jury verdicts is the same as the standard applied in deciding a dispositive motion: whether a reasonable trier of fact could find sufficient record evidence of discrimination to support a verdict for the plaintiff.¹⁴⁸ If the standards are the same, the results should not be so different.

IV. How the Sufficiency-of-the-Evidence Standard Unifies Discrimination Cases

The problem posed by oral utterances is that they regularly fall short of what courts consider to be "direct evidence" at the same time they provide an awkward fit within the *McDonnell Douglas* scheme. Consider again the remark uttered about Robin – that he was an "old S.O.B." and was "getting too old."¹⁴⁹ On the basis of these remarks, the court rejected the oral evidence because it was not "direct" enough.¹⁵⁰ But requiring evidence to be "direct," which many courts define as evidence that needs no inferences, obligates the plaintiff to produce more evidence than is necessary to meet her burden. Juries exist in order to reach conclusions about the data presented to them, and to do so without the ability to infer would mean they could find discrimination occurred only if the evidence was so one-sided that any other result would amount to jury negation. Of course, data which requires too many inferences does not belong in front of a jury in the first place. That is an accurate statement about the evidence in all cases, though, not a reflection that discrimination cases are special and the jury's task particularly complex.

Oral evidence does provide one source of concern, which is caught by the "stray remarks" doctrine. Insensitive workplace utterances are probably common, which means either workplace discrimination is rampant or the remarks are capable of being overread. The solution is not the accumulation of bright-line rules which

often means the remarks are never adequately assessed. (E.g., Were they uttered by the decisionmaker? Was the comment about the plaintiff? Was it isolated or were there others?) These rules may be helpful as background but often miss the broader point: that evidence can fail a narrow test and still be sufficiently convincing. The only question in a discrimination case is whether sufficient evidence exists to support a jury verdict. That standard translates into two simple inquiries: (1) does the evidence reflect a discriminatory intent?; and (2) can it reasonably be related to the challenged employment decision? Robin's oral evidence (an utterance that he was "getting too old")¹⁵¹ would fail under this standard because even if it displayed a discriminatory intent, there was little evidence that it, rather than his low sales, prompted his firing. And if Esposito, Robin's employer, had attributed Robin's lower sales to his *age*? Same answer, so long as that merely describes Esposito's *theory* of Robin's decline and not the motivation behind Esposito's decision.¹⁵² What a plaintiff in Robin's case needs is evidence that a younger salesperson with similar sales figures would have been treated any better.¹⁵³

A sufficiency standard would eliminate what can only be described as an inconsistency in the methods courts use to evaluate evidence. Consider the statement by a contractor that "I don't need minorities and I don't need residents on the job," uttered in *Fernandes v. Costa Brothers Masonry, Inc.*¹⁵⁴ A federal court of appeals rejected the comment (and other similar ones) as direct evidence of discrimination on the ground that it was open to more than one interpretation, one benign and one not.¹⁵⁵ Under the benign interpretation, the comment was simply a profession that the employer had already met all of its equal employment opportunity requirements in the public works job.¹⁵⁶ The not-so-benign interpretation is obvious. But because a jury could have gone either way on the issue, the court resolved the dispute in favor of the defendant (not the plaintiff), and concluded that the statement was not direct because it was not one-sided enough.¹⁵⁷ The court then revisited the same remarks at the pretext stage under *McDonnell Douglas* and concluded that under that approach it was free to give the plaintiff's interpretation the benefit of the doubt, which in this case meant he could get a trial on his claim.¹⁵⁸ In fact, the court went so far as to say that ambiguity actually "helps" a plaintiff if his claim is brought under *McDonnell Douglas* and is attacked at the summary judgment stage.¹⁵⁹ At summary judgment, the court noted that it was compelled to interpret the evidence in a light most flattering to the non-movant (here, the plaintiff).¹⁶⁰

So *Fernandes* holds that a plaintiff gets the benefit of the doubt if his claim is brought as a pretext case under *McDonnell Douglas*,¹⁶¹ but doubts are resolved *against him* under the direct evidence method retained from *Price Waterhouse*.¹⁶² The problem with this approach is that nothing in the Federal Rules of Civil Procedure, especially Rule 56 (detailing the summary judgment standard),¹⁶³ permits a court to weigh the same evidence differently depending upon the plaintiff's method of proof. If an oral statement is capable of proving an employer's stated reasons to be pretextual, then it must also be "sufficient" apart from the *McDonnell Douglas* scheme to create a triable issue. Otherwise, the case gets to trial only by virtue of the method of proof the plaintiff has chosen. There may be good reason to require plaintiffs to be very specific about the type of discrimination they are claiming (so the defendant's answer and defense may be responsive, as in sexual harassment cases). But there is less reason for inferences to tilt in favor of some Title VII plaintiffs and against others. Indeed, under Rule 56, the inferences tilt only one way in a summary judgment case, and that is in favor of the non-moving party. The other problem with the *Fernandes* approach is that it is possible that the supervisor's statements will not be revisited at the pretext stage. This result occurred in *Robin*, where the plaintiff failed to mount even a prima facie case because the court concluded he was not meeting his employer's legitimate job expectations.¹⁶⁴ So not only is the result in a case dependent upon the method of proof used (direct evidence or pretext),¹⁶⁵ but success under a particular method of proof depends upon how seriously the court takes the prima facie case. There is good reason to take it seriously, and *Robin* was correct to dismiss the claim under *McDonnell Douglas*, but this further underscores why the plaintiff's best (oral) evidence is a misfit under that scheme.

How should the handling of evidence be reformed? First, the term "direct evidence," both as a category of evidence and a method of evaluating evidence, should be discarded. When it is defined as smoking-gun evidence, or a near admission of liability on the employer's part,¹⁶⁶ it is the equivalent of asking a hurdler to clear a ten-foot bar when only a five-foot jump is necessary to advance in the contest. And it is often defined that way. It also fails because of its narrow evidentiary focus. Imagine an employer who requires a sales agent undergoing chemotherapy to sell as much as other, healthy salespersons.¹⁶⁷ Add to these facts comments from the company president that the agent, on top of being ill, was "getting too old" and that he was "not the same man" he was six months earlier.¹⁶⁸ This was the background of *Robin*, but the employer's unconscionability did not persuade the court that a jury could find in Robin's favor on either his age or disability claims.¹⁶⁹ The result, even if ultimately correct, demonstrates the failing of a method that ignores the sum of a plaintiff's case. The court even mentioned the employer's shameful conduct at the same time it concluded it was only "empowered to decide the legal issues."¹⁷⁰ True enough, but it is unclear why juries need to be shielded from the bad acts of employers, especially

as they relate to the plaintiff in a case. Even then Robin's case may not be triable, but at least the analysis would accurately reflect the plaintiff's burden. Only a line-item approach to Robin's evidence results in a decision that fails at least to consider his alternative route to the jury: a *combination* of bad acts and age-oriented remarks which makes up for the deficiencies of each.¹⁷¹

In place of direct evidence, courts should approach discrimination cases by asking whether plaintiffs have any affirmative evidence of discrimination. Affirmative evidence of discrimination would be any evidence, whether oral, written, statistical, anecdotal, or comparative, that is capable, either on its own or in combination, of proving to a jury that the plaintiff is a victim of intentional discrimination. Affirmative evidence, therefore, is a broader category than direct evidence.¹⁷² The evidence need not be one-sided, though it must be sufficient under the preponderance standard. And it must do more than raise suspicion concerning the employer's motives for its decision; it must sufficiently *prove* discrimination so that a reasonable jury could find for the plaintiff. Affirmative evidence (especially when it is oral) does this when a reasonable jury could conclude that it establishes discriminatory intent with respect to a challenged employment decision. Evidence of animus or even intent apart from the challenged decision would fall short under this standard unless the plaintiff could establish that bias so contaminated the workplace that it likely affected the decision, too.¹⁷³

Finally, the *McDonnell Douglas* burden-shifting scheme¹⁷⁴ would be used in those instances where the plaintiff's evidence was negative in nature and in the form of rebuttal. So long as she could establish a prima facie case, which would include evidence that she was performing her job up to the employer's expectations,¹⁷⁵ she would be entitled to rebut the defendant's version as to why she was fired, or demoted, or treated differently in some materially adverse way. But in establishing that the employer's version was a lie, her efforts would be better spent directly rebutting the defendant's version, rather than re-introducing oral (or other affirmative) evidence that is not sufficient on its own. Statements uttered to the plaintiff, unless they directly bear on the employer's reason for its decision, are not relevant because they shoot at the wrong target. A black employee's evidence that the decisionmaker uttered a racist remark – even about the plaintiff -- is not responsive to the employer's assertion that the employee's tardiness prompted its decision. After all, racial animus and attitudes are not, by themselves, unlawful. Proof that the plaintiff was not tardy, or evidence that the employer did not apply that rule to non-black employees, is the kind of specific rebuttal evidence the plaintiff would be expected to provide. *McDonnell Douglas* creates a method of proof for an employee *without* affirmative evidence of discrimination but capable of proving his employer to be lying.¹⁷⁶ Limiting the plaintiff's case to specific evidence that addresses the employer's explanation would focus the efforts of both litigants and courts and provide the kind of structure that lawyers tend to favor.

In all cases, the evidence must be sufficient both to survive summary judgment and support a jury verdict in the plaintiff's favor. The plaintiff's oral evidence, allowing for reasonable inferences, may do the trick, so long as the animus it reveals may be translated into intent and connected to an employment decision. Whatever the plaintiff's evidence, whether affirmative or negative (under *McDonnell Douglas*), it must prove that unlawful discrimination motivated the employer's decision. If it did, by playing a substantial role in the decision, liability would result. The issue of damages is a separate question and depends upon the employer's proof that it would have made the same decision anyway (without considering the plaintiff's race, for example). Shifting the burden to the employer in these cases may be inconsistent with standard notions of causation (especially in other tort cases, as discrimination is an intentional tort), but it may also be unavoidable under the terms of the statute. The 1991 Act was in part prompted by *Price Waterhouse*,¹⁷⁷ and Congress' intent may well have been to confine it to direct evidence cases, but intent is a poor substitute for a statute's terms. Likewise, a return to but-for causation under Title VII has appeal, but it is a choice for Congress to make rather than judges.

V. Conclusion

For more than a decade, courts have applied a random assortment of rules to evaluate oral evidence and no unified approach has emerged. The result is that litigants have little expectation about how the next case will be handled. Consider again the manager's "just like a DeGo" remark at the time he dropped off a performance evaluation evidencing slumping sales. Before that case is litigated, the parties will not be able to answer any of the following questions: whether a court will construe the remark as direct evidence;¹⁷⁸ if not, then whether it will reconsider the remark as circumstantial evidence;¹⁷⁹ if not, then how it will use the remark in the *McDonnell Douglas* scheme.¹⁸⁰ Of course, answers to these questions depend upon other variables (there seem to be no constants here), such as what definition of direct evidence a court will employ,¹⁸¹ what bright-line rules with respect to circumstantial evidence (e.g., the stray remarks doctrine) the court will apply,¹⁸² whether the remark

would be evaluated differently if it were ageist or racist rather than related to national origin,¹⁸³ and whether the court would give the plaintiff a more generous read of the evidence after a trial rather than before.¹⁸⁴ Federal employment discrimination cases should operate in a more predictable playing field. A good place to start is to eliminate the direct evidence category and to evaluate oral evidence of discrimination no differently than other evidence: by asking whether it is sufficient to prove the plaintiff's case.

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¹ An ethnic slur typically used to describe individuals of Italian origin.

² Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against an individual because of his national origin, or because of his race, color, sex, and religion. *See* 42 U.S.C. § 20002-2(a) (1994 & Supp. 1999). Depending upon the interpretation, "Dego" is a derogatory remark tied to both one's ethnicity and national origin. Discrimination on the basis of an individual's ethnicity is unlawful under 42 U.S.C. § 1981(a). *See, e.g.,* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (interpreting Section 1981 and stating that "we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").

³ Causation is often the primary issue during the litigation of employment discrimination suits. If the employee was not fired (or demoted, etc.) "because of" his protected characteristic (here, national origin), then the plaintiff's claim fails.

⁴ Actually, the plaintiff must exhaust his administrative remedies before filing suit in federal court. In an employment discrimination context, that means filing a charge of discrimination with the Equal Employment Opportunity Commission or the appropriate state human rights agency, which would share jurisdiction over the case. *See* 42 U.S.C. § 2000e-5(a)-(k) (1994 & Supp. 1999) (describing the process by which a charge is filed and investigated).

⁵ A term which became commonly used in employment discrimination cases after *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-279 (1989) (O'Connor, J., concurring). The Supreme Court held that once a plaintiff proves that a protected characteristic played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even without consideration of the characteristic. 490 U.S. at 258. In her concurrence, which has subsequently been interpreted as the decisive vote in a plurality opinion, 490 U.S. at 261, Justice O'Connor allowed that plaintiffs could shift the burden on the issue of causation to the defendant -- thus requiring it meet the "same decision" test -- if the plaintiff could "show by direct evidence that an illegitimate criterion was a substantial factor in the [challenged] decision." 490 U.S. at 276. Justice O'Connor did not define direct evidence in this context, but did allow 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. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard." *Id.* (internal citation omitted).

⁶ The Court of Appeals for the First Circuit summarized the advantage to the plaintiff in this case as follows:

"First, the sheer strength of the evidence may carry the day. Second, it increases the chance of some form of relief, including attorneys' fees. Third, it imposes on the employer the burdens of production and persuasion, unlike the *McDonnell Douglas* model, which merely shifts to the employer the burden of producing admissible evidence to support a non-discriminatory reason for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Fourth, it is more difficult, although not impossible, for the employer to get summary judgment in light of the strength of direct evidence and the potential shifting of burdens." *Weston-Smith v. Cooley Dickinson Hospital, Inc.*, 282 F.3d 60, 64-65 (1st Cir. 2002) (internal citations omitted).

⁷ "Courts have noted the difficulty of defining direct evidence for discrimination claims. Our own statements on what constitutes direct evidence are not in complete harmony." *Sanghvi v. St. Catherine's Hospital, Inc.*, 258 F.3d 570, 574 (7th Cir. 2001) (noting the lack of consensus within the Seventh Circuit and then "assum[ing] without deciding that the broader definition of direct evidence applies.").

⁸ Summary judgment for the employer in a direct evidence case is unusual, but not unheard of. *See* *Sanghvi*, 258 F.3d at 573-74 (Treating question -- "Being an older, foreign-born physician, how comfortable do you feel dealing with young, white American women?" -- as direct evidence of discrimination, but affirming summary judgment

against plaintiff because all other evidence pointed to nondiscriminatory nature of hospital's decision not to sell a medical practice to plaintiff).

⁹ This assumes, as is common, that one of the parties has opted for a jury trial. See 42 U.S.C. § 1981a(c) (2000).

¹⁰ Called a "Price Waterhouse" instruction. See *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting).

¹¹ "Sufficient" meaning a preponderance of the evidence supports the defendant's "same decision" argument. See *Price Waterhouse*, 490 U.S. at 258.

¹² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

¹³ Many of these bright line rules can be traced to Justice O'Connor's concurrence in *Price Waterhouse*. 490 U.S. at 275-79.

¹⁴ The terms "isolated" and "stray" remarks are often used in tandem in judicial opinions. A "stray remark" is a term that formed the basis for an unofficial bright line test after *Price Waterhouse*, in which Justice O'Connor ruled out "stray remarks in the workplace" as direct evidence of discrimination. 490 U.S. at 277. Remarks are "isolated" and "stray" when they are not tied to the specific employment decision challenged by the plaintiff and instead are merely uttered during the course of the plaintiff's employment. See, e.g., *Denesha v. Farmers Insurance Exchange*, 161 F.3d 491, 500 (8th Cir. 1998) (supervisors' comments that the "younger employees were running circles around the older employees" and that the office needed to rid itself of "old heads" were not "stray remarks" but rather were direct evidence because they were uttered "contemporaneously with events that form the basis of this litigation"); *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1403 (7th Cir. 1996) ("Following the Supreme Court's decision in [*Price Waterhouse*], this circuit has held that before seemingly stray workplace remarks will qualify as direct evidence of discrimination, the plaintiff must show that the remarks 'were related to the employment decision in question.'") (citation omitted); *Beshears v. Asbill et. al*, 930 F.2d 1348, 1354 (8th Cir. 1991) (remarks that older people have problems adapting to changes and new policies constituted direct evidence because they were "not stray or random comments: they were made during the decisional process by individuals responsible for the very employment decisions in controversy").

¹⁵ "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race] . . . constitute direct evidence of discrimination." *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1105 (11th Cir. 2001) (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999)); see also *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 401 (7th Cir. 1997) ("[A] plaintiff's subjective interpretation of her employer's statements is not controlling."), citing *Mills v. First Federal Savings & Loan Assoc.*, 83 F.3d 833, 841-42 (7th Cir. 1996) ("[I]f the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, then virtually all defense motions for summary judgment in such cases would be doomed.").

¹⁶ The Seventh Circuit allows for this approach. See, e.g., *Huff v. Uarco, Inc.*, 122 F.3d 374 (7th Cir. 1997) (citing cases in support of the proposition that statements can be used to satisfy the plaintiff's prima facie case). See also *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1149 (9th Cir. 1997) (finding that discriminatory statements satisfy plaintiff's prima facie case).

¹⁷ See *Cordova*, 124 F.3d at 1150 (A plaintiff who uses oral evidence to satisfy prima facie case "'necessarily [has] raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision") (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)).

¹⁸ See *Robin v. Espo Engineering*, 200 F.3d 1081 (7th Cir. 2000).

¹⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting) (describing the "direct evidence" scheme adopted by the court's plurality as one "not likely to lend clarity to the process").

²⁰ 411 U.S. 792 (1973).

²¹ 42 U.S.C. § 2000e-1 to e-5 (1994).

²² 490 U.S. 228 (1989).

²³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-76 (1989).

²⁴ *Price Waterhouse* refers to a "motivating part," *id.* at 250, 258, while the Civil Rights Act of 1991 refers to a "motivating factor." 42 U.S.C. § 2000e-2(m) (1994).

²⁵ See 42 U.S.C. § 2000e-5(g)(2)(B) (1994).

²⁶ *Price Waterhouse*, 490 U.S. at 261.

²⁷ See *Price Waterhouse*, 490 U.S. at 270 ("McDonnell Douglas and *Burdine* assumed that the plaintiff would bear the burden of persuasion . . . and we clearly depart from that framework today. Such a departure requires justification . . ."); 490 U.S. at 276 ("The plurality thus effectively reads the causation requirement out of the

statute, and then replaced it with an ‘affirmative defense.’ In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.”).

²⁸ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

²⁹ See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000) (giving "I fired you because of your age or disability" as an example of direct evidence).

³⁰ The problem with these approaches is that each emphasizes the quality of the plaintiff's evidence instead of its simple sufficiency. See *infra* Pt.IV.

³¹ See *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 121 (2nd Cir. 1997) (pretext case applying motivating factor standard); *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084-85 (11th Cir. 1996); *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 477-80 (Tex. 2001) (discussing conflicting views among federal courts before deciding to apply motivating factor standard to all discrimination cases). But see *Watson v. Southeastern Penn. Transp. Auth.*, 207 F.3d 207, 219 (3rd Cir. 2000) (limiting motivating factor standard to so-called mixed-motive cases); *Fuller v. Phipps*, 67 F.3d 1137, 1143 (4th Cir. 1995) (same). See also *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 39 (1st Cir. 1998) (stating it was “aware of the controversy that exists over whether the “‘a motivating factor’ language in 42 U.S.C. § 2000e-2(m) applies to all discrimination cases,” or only to cases under *Price Waterhouse*, and then declining to decide the issue).

³² See Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 707 (2000); Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L. Rev. 234, 264 (2001).

³³ See 42 U.S.C. § 2000e-2(m) (1994).

³⁴ The employer could disprove causation by proving that it would have taken the same action against the plaintiff even if it had not been motivated by illegal discrimination. Properly understood, it may not be correct to call this a "shifted burden," though courts routinely do. A burden shifts *before* liability is established, and typically means that one party, if it carries the burden, can avoid a finding that it violated the law. This, after all, is the essence of the *McDonnell Douglas* burden-shifting scheme. But under the 1991 Act, which overruled *Price Waterhouse* on this point, liability is established at the moment the employer factored an impermissible characteristic into its decision. The only remaining issue in that case is what relief the plaintiff receives. That describes an affirmative defense, not a shifted burden.

³⁵ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); See also *Price Waterhouse*, 490 U.S. at 270 (O'Connor, J., concurring) (“We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. . . . *McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion [as to pretext], and we clearly depart from that framework today.”).

³⁶ See 42 U.S.C. § 2000e-2(m) (1994).

³⁷ The term “mixed motives” has come to identify a case under *Price Waterhouse*, where the plaintiff's “direct evidence” of discriminatory intent means the defendant's only strategy is to prove that it had other, more legitimate motives, too, one of which was the “but for” cause of its decision.

³⁸ See 42 U.S.C. § 2000e-2(m) (1994).

³⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

⁴⁰ The motivating factor standard cannot be construed as a but for standard for this reason: if it were, a black plaintiff charging race discrimination would have to demonstrate that the employer would have made a *different* decision had he not been black. The employer would be entitled to its affirmative defense, which would involve proof that it would have made the *same* decision had the plaintiff not been black. Both of these burdens cannot not be satisfied simultaneously. Accordingly, if these respective proofs are to have any meaning, the motivating factor test must be described as something other than a “but for” test.

⁴¹ See *McDonnell Douglas*, 411 U.S. at 804-05.

⁴² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (describing decisions based on a mixture of legitimate and illegitimate considerations).

⁴³ See *Price Waterhouse*, 490 U.S. at 247.

⁴⁴ See *id.*

⁴⁵ See 42 U.S.C. § 2000e-2(m) (1994).

⁴⁶ There is even a chance, however small, that a uniform "motivating factor" standard ends up assisting defendants in these cases. Instead of just one chance at winning, they now have two -- and two bases for appeal.

⁴⁷ See 42 U.S.C. § 2000e-5(g)(2)(B) (1994).

⁴⁸ Thin evidence of pretext would especially fail if the evidence was one-sided and favored the employer's nondiscriminatory explanation for its decision. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (stating that an employer would be entitled to judgment as a matter of law "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred").

⁴⁹ Cf. *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 108-09 (2nd Cir. 2001) (upholding jury verdict that used the term "motivating factor" but noting that the ultimate issue in disability discrimination case was "whether plaintiff's disability made a difference" in his employer's decision).

⁵⁰ Raising the issue of Congress' intent is done with great reluctance, not only because intentions are poor substitutes for text, but also because, even if they were useful, the 1991 statute conveys no singular intent. "Congress and the White House could not agree on a statutory meaning but could not resist passing the act anyway, while accompanying it with contradictory official explanations of what the new law meant. The federal courts would decide, by default." Hugh Davis Graham, *The Civil Rights Act and the American Regulatory State*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 43, 59 (Bernard Grofman ed., 2000).

⁵¹ There is little evidence that judges evaluate oral evidence differently based on the causation standard. Age-related comments should be subject to the but-for standard because the 1991 Act's motivating factor standard only applies to Title VII. It would mean that comments about age would have to meet a higher threshold before becoming actionable. But courts generally do not take that into account in assessing the oral evidence thrust before it.

⁵² The term "mixed motive" is defined in note 37, *supra*. See also, *McDonnell Douglas Corp. v. Green*, 411 U.S. 782 (1973), in which the plaintiff must prove that the defendant's presumptively valid reason for his rejection is, in fact, "a coverup," or a lie. 411 U.S. at 805.

⁵³ Even the plurality in *Price Waterhouse* conceded, albeit indirectly, that the "motivating factor" standard is a lower threshold than "but for" causation." See 490 U.S. at 241 ("When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account").

⁵⁴ For Justice O'Connor in *Price Waterhouse*, requiring direct evidence offset the plaintiff's lower burden on causation. See 490 U.S. at 276.

⁵⁵ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

⁵⁶ See *Sanghvi v. St. Catherine's Hospital, Inc.*, 258 F.3d 570, 574 (7th Cir. 2001) (noting lack of harmony among federal courts, including panels in the Seventh Circuit, concerning how direct evidence is defined); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 581-82 (1st Cir. 1999) (noting that the task of defining direct evidence "not only has divided the courts of appeals but also has created a patchwork of intra-circuit conflicts"); *Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999) (engaging in lengthy recitation of the "substantial confusion" concerning direct evidence in an opinion joined by no other panel members); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2nd Cir. 1992) ("the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases").

⁵⁷ See, e.g., *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1105 (11th Cir. 2001) ("[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination."), quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999). *Damon* gave as an example of direct evidence a management memorandum stating, "Fire Early – he is too old." 196 F.3d at 1359. See also *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1044 (7th Cir. 2000) (giving as an example of direct evidence a supervisor's statement, "I did not promote you because of your national origin").

⁵⁸ See *Fernandes*, 199 F.3d at 582 (describing this approach as the "classic" position among the courts and listing cases).

⁵⁹ This is the preponderance of the evidence standard.

⁶⁰ See *Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002) (direct evidence is conduct or statements by a decisionmaker from which a fact finder could "infer" discriminatory intent was more likely than not a motivating factor in employer's decision); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) (stating that "a remark need not explicitly refer to the plaintiff's protected status" in order to be considered direct evidence of discrimination); *Wichmann v. Board of Trustees of So. Illinois Univ.*, 180 F.3d 791, 801 (7th Cir. 1999) (direct

evidence need not be explicit, but rather could be evidence, including a metaphor, capable of being “interpreted” as an acknowledgment of discriminatory intent).

⁶¹ See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1087 (7th Cir. 2000).

⁶² See *id.* at 1087, 1089.

⁶³ *Id.* at 1087.

⁶⁴ *Id.* at 1091.

⁶⁵ See 29 U.S.C. §§ 621-634 (1994) (Age Discrimination in Employment Act), and 42 U.S.C. § 12101 (1994) (Americans with Disabilities Act). See also *Robin*, 200 F.3d at 1086.

⁶⁶ See *Robin*, 200 F.3d at 1086.

⁶⁷ See *id.* at 1089.

⁶⁸ See *id.*, citing *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1122 (7th Cir. 1998) (stating that “conversational jabs in a social setting” do not constitute evidence of intent to fire for an impermissible reason).

⁶⁹ See *Robin*, 200 F.3d at 1089. It seems reasonable to conclude, as the court did, that these failings meant *Robin* had no “direct” evidence of discrimination. But what plaintiff ever would under the court’s “I fired you because of your age or disability” understanding of the term? *Id.* at 1088.

⁷⁰ At least one court concluded that the double-standard was justified. “[S]tatements about age, unlike statements about race or gender, do not rest on a we/they dichotomy and therefore do not create the same inference of animus. Barring unfortunate events, everyone will enter the protected age group at some point in their lives.” *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999) (dismissing comment to plaintiff, “[w]ith your health and your age, you need to pick up the slack,” as stating a “fact of life”). But the dissent in *Dockins* argued that the comments in the case were not simply truisms about age, but rather explicitly concerned the plaintiff’s age. 176 F.3d at 752 n.7.

⁷¹ 219 F.3d 649 (7th Cir. 2000).

⁷² See *id.* at 652.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ See *Hunt v. City of Markham*, 219 F.3d 649, 652 (7th Cir. 2000).

⁷⁷ *Id.* at 653.

⁷⁸ *Id.*

⁷⁹ See, e.g., *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999) (rejecting comment about health and age as evidence of discrimination because “[s]tating a fact of life does not make one an age bigot”); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1122 (7th Cir. 1998) (dismissing comment “you’re getting old,” uttered to plaintiff, as a “truism” because the plaintiff “was indeed aging.”).

⁸⁰ 180 F.3d 791 (7th Cir. 1999), *vacated on other grounds sub nom.* *Board of Trustees of So. Ill. Univ. v. Wichmann*, 528 U.S. 1111 (2000).

⁸¹ See *Wichmann*, 180 F.3d at 800.

⁸² See *id.* at 801.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *id.* (noting that *Wichmann*’s supervisor “did not expressly say, ‘Wichmann was fired because he was too old,’ but a rational jury could have understood his statement to mean just that”).

⁸⁶ *Id.* at 796.

⁸⁷ See *Robin*, 200 F.3d at 1088 (stating that direct evidence “tak[es] the form of, ‘I fired you because of your age or disability.’”).

⁸⁸ See *Wichmann v. Board of Trustees of So. Ill. Univ.*, 180 F.3d 791, 801 (7th Cir. 1999) (“Language may be all the more unmistakable and vivid for being metaphorical, figurative, or nonliteral.”).

⁸⁹ See *id.* at 802.

⁹⁰ *Id.* at 796.

⁹¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (noting that the summary judgment standard is “very close” to the directed verdict standard and presents the same issue: “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law”); see also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Mayer v. Gary*

Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994) ("under *Anderson and Celotex [Corp. v. Catrett]*, 477 U.S. 242, 249-51 (1986) the pre-trial, mid-trial, and post-trial standards are supposed to be identical!").

⁹² 173 F.3d 1039 (7th Cir. 1999).

⁹³ *See id.* at 1042.

⁹⁴ *Id.* at 1044.

⁹⁵ *Id.* at 1043.

⁹⁶ *See id.* at 1046-47.

⁹⁷ *See Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999).

⁹⁸ *Id.* at 1045.

⁹⁹ *See Baker v. Speedway Superamerica LLC*, No. IP 99-0282-C-M/S, 2000 WL 33280123, at *1 (S.D. Ind. Oct. 24, 2000), *aff'd*, 28 Fed.Appx. 529, 530, 2002 WL 104867 (7th Cir. 2002) (unpublished opinion).

¹⁰⁰ *See Baker*, 28 Fed.Appx. 529, 530, 2002 WL 104867, at *1.

¹⁰¹ *See id.*

¹⁰² *See id.*, 28 Fed.Appx. at 531, 2002 WL 104867, at *2.

¹⁰³ *See Baker*, 2000 WL 33280123, at *2-3 (district court decision).

¹⁰⁴ *See id.* at *8.

¹⁰⁵ *Id.* at *3.

¹⁰⁶ *See Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000).

¹⁰⁷ *See Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999).

¹⁰⁸ *See id.* (conceding that decisionmaker "did not actually state in so many words" that plaintiff's pregnancy prompted her firing).

¹⁰⁹ *See Wichmann v. Board of Trustees of So. Il. Univ.*, 180 F.3d 791, 801 (7th Cir. 1999).

¹¹⁰ *See id.* It is worth noting that Baker's attorneys did not play up the conversation with Blanos and Wallace. In fact, they abandoned the "direct evidence" argument on appeal. *See* Brief and Required Short Appendix of Plaintiff-Appellant Roberta M. Baker at 20 n.10, *Baker* (No. 00-4134). It is likely they overread cases holding that retirement-related questions generally do not imply age discrimination unless they rise to the level of coercion. *See, e.g., Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 715 (7th Cir. 1999) ("Mr. Pitasi does not claim that the company made repeated references to urge him into retirement; we have noted that such reiterated comments may be considered by a jury to infer discrimination because they 'may reflect the employer's intention to rid itself of older workers by subtly pressuring them into retiring.'"), quoting *Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 (7th Cir. 1997). In Baker's case, the retirement question is combined with an adverse job action (not hiring Baker as the new store manager) and a direct inquiry concerning the employee's age. *See Baker*, 2000 WL 33280123, at *8 (district court decision).

¹¹¹ *See Price Waterhouse*, 490 U.S. 228, at 250-51 (objecting to the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief and rejecting "an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance").

¹¹² *See Robin*, 200 F.3d at 1089.

¹¹³ *See Samarzia v. Clark County*, 859 F.2d 88, 91 (9th Cir. 1988).

¹¹⁴ *See Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1122 (7th Cir. 1998).

¹¹⁵ Comments that are relative in nature ("you're *too* black," or "you're *too* old") should come much closer to putting the ultimate question of discrimination into play. Too black for what? No job would satisfy that test, for race can never be used as a bona fide occupational qualification. *See* 42 U.S.C. § 2000-2(e) (describing a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operations of [a] particular business or enterprise"). Too old for what? Here, the context would matter greatly. For travel? For lifting heavy weights? For flying a plane? Or for simply performing a task that under similar conditions could be performed equally well at different ages? *Cf. Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1091 (7th Cir. 2000) (noting the possibility that the plaintiff's sales, which prompted his discharge, could have been affected by his chemotherapy).

¹¹⁶ Namely, inconsistency and confusion. And these results can come as no surprise, as they were forecasted by the dissent in *Price Waterhouse*. *See* 490 U.S. 228, 291 (Kennedy, J., dissenting) ("Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process.").

¹¹⁷ Justice O'Connor comes closest in her concurrence, but defines the term by illustrating what direct evidence is *not*. See *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) (ruling out "stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process itself").

¹¹⁸ See *infra*, Pt. III.

¹¹⁹ See *Samarzia v. Clark County*, 859 F.2d 88, 91 (9th Cir. 1989).

¹²⁰ See *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 632 (7th Cir. 1996).

¹²¹ See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1089 (7th Cir. 2000).

¹²² Actually, this observation is hardly self-evident, as courts routinely categorize evidence as either direct or indirect, the former falling under *Price Waterhouse* and the latter governed by *McDonnell Douglas*.

¹²³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

¹²⁴ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

¹²⁵ Proof that the employer's reasons were in fact "a coverup" for discrimination will do the trick. See *id.* at 805.

¹²⁶ See *McDonnell Douglas*, 411 U.S. at 802-05.

¹²⁷ See *id.* at 802 n.13; see also *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (rejecting the idea that the prima facie case was "an inflexible formulation").

¹²⁸ See *McDonnell Douglas*, 411 U.S. at 801.

¹²⁹ This recitation of the prima facie case varies almost on a case-by-case basis, but reflects the most common elements. For a discussion of the elements, in particular the fourth, see *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 890-93 (7th Cir. 1997).

¹³⁰ See *McDonnell Douglas*, 411 U.S. at 802.

¹³¹ See *id.* at 804-05.

¹³² See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1092 (7th Cir. 2000) ("Robin was not meeting his employer's bona fide expectations at the time of his discharge. For us to consider Robin's evidence of pretext, he has to establish a prima facie case of discrimination, which he has failed to do.").

¹³³ See *id.*

¹³⁴ See, e.g., *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1092 (7th Cir. 2000); *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179 (7th Cir. 1997).

¹³⁵ See *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) ("when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff").

¹³⁶ See *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (noting that the circuit's caselaw "clearly instructs that plaintiffs, who have been discharged from a previously held position, do need to satisfy the *McDonnell Douglas* prong 'requiring proof of qualification.'" (citation omitted).

¹³⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹³⁸ Step one refers to the plaintiff's prima facie case. See *id.* at 802.

¹³⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").

¹⁴⁰ If a plaintiff offers no affirmative evidence of discrimination, see *infra* Pt.IV, and relies solely on proving his case under *McDonnell Douglas*, then insisting that he satisfy the prima facie case is an important exercise. It weeds out frivolous cases from the meritorious ones. The problem occurs when a court implies that a plaintiff without a case under *McDonnell Douglas* must have an admission of guilt from his employer in order to state a case. This is wrong. Circumstantial evidence may convince a jury that, an employee's work record notwithstanding, discrimination better explains the employer's decision towards him. See *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994) (holding that employee without evidence of pretext and without direct evidence could still avoid summary judgment with "evidence from which a rational trier of fact could reasonably infer" discrimination); see also *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1180 (7th Cir. 1997) (noting that an employee not meeting his employer's legitimate expectations but with affirmative evidence of discrimination would have a triable case, "[f]or it is not a defense . . . that the plaintiff *should* have been fired.").

¹⁴¹ See *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (rejecting the idea that the prima facie case was "an inflexible formulation").

¹⁴² See *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1150 (9th Cir. 1997) (holding that if derogatory statements constitute prima facie case, they “necessarily” provide sufficient evidence of pretext to warrant a trial). *Cordova’s* case was actually built on after-acquired evidence: one of the most derogatory comments cited by her was uttered *after* the company turned her down for a job. In addition, the comment was not uttered about her. 124 F.3d at 1149.

¹⁴³ See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (discussing the possibility that “weak” evidence of pretext may not suffice to carry the plaintiff’s burden).

¹⁴⁴ See *id.* at 147 (noting that under these circumstances the plaintiff’s job is to eliminate the possible lawful reasons for the employer’s decision; in that case, “discrimination may well be the most likely alternative explanation”); see also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration.”).

¹⁴⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O’Connor, J., concurring).

¹⁴⁶ Proof of different treatment is especially probative. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (In a race discrimination case brought by fired black employee who engaged in unlawful “stall-in,” “[e]specially relevant to [show pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired”).

¹⁴⁷ See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000) (“The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”).

¹⁴⁸ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (agreeing that the summary judgment standard “mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)”; see also *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994) (in diversity case, adopting the “federal reasonable-person standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and the quantum of relief”).

¹⁴⁹ See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1089 (7th Cir. 2000).

¹⁵⁰ See *id.* (characterizing the remarks as “random office banter” and “hardly offensive”).

¹⁵¹ See *id.*

¹⁵² In *Robin’s* case, the lower sales may just as easily been attributed to his cancer. See *Robin*, 200 F.3d at 1091.

¹⁵³ *Robin* may have overlooked that evidence. Shortly before he was fired, *Robin* ranked fifth out of seven salespersons in sales volume. The only salespersons he outperformed were two junior account executives with only one year of experience. See *Robin*, 200 F.3d at 1087. Though the court does not list their ages, it is safe to conclude they were younger than *Robin*, who was over 60 when fired. *Id.* at 1086. But their lack of experience makes them an imperfect comparison group for *Robin* on his age claim. *Robin’s* disability claim was probably his better case. He could have argued that the company accommodated low sales under other circumstances (breaking in new junior agents), making the reason for his sales (recovery from colon cancer) no less deserving of accommodation. But the court determined that *Robin* abandoned his disability claim by failing to request any accommodation from *Espo*. *Id.* at 1092.

¹⁵⁴ 199 F.3d 572, 578 (1st Cir. 1999).

¹⁵⁵ See *id.* at 583, 588.

¹⁵⁶ *Id.* at 583.

¹⁵⁷ See *id.* (“We conclude . . . that a statement that plausibly can be interpreted two different ways -- one discriminatory and the other benign -- does not directly reflect illegal animus and, thus, does not constitute direct evidence.”).

¹⁵⁸ See *id.* at 588 (noting that while “ambiguity” defeated the plaintiff’s direct evidence claim, “the question differs under pretext analysis”).

¹⁵⁹ See *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 589 (1st Cir. 1999).

¹⁶⁰ *Id.*

¹⁶¹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

¹⁶² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), see *supra*, Pt.I.

¹⁶³ FED. R. CIV. P. 56(c).

¹⁶⁴ See *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1091-92 (7th Cir. 2000).

¹⁶⁵ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) (discussing plaintiff's burden to provide "strong showing" of illicit motivation in direct evidence case); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (describing burden-shifting proof mechanism in indirect evidence case).

¹⁶⁶ See *Robin*, 200 F.3d at 1088.

¹⁶⁷ See *id.* at 1091-92.

¹⁶⁸ *Id.* at 1086, 1087.

¹⁶⁹ *Id.* at 1091-92 (acknowledging the ethical issues but declining to take them into consideration). *Robin* leaves open the intriguing question as to whether an employer's conduct could ever be so unethical that it would necessarily call its lawfulness into question.

¹⁷⁰ See *id.* at 1092 (citing *Fuja v. Benefit Trust Life Ins. Co.*, 18 F.3d 1405, 1412 (7th Cir. 1994)).

¹⁷¹ A defendant's bad acts are generally not admissible to show the defendant committed the acts charged in the current case. See FED. R. EVID. 404(b). This would seem to include discriminatory remarks unrelated to the plaintiff. But the Rule allows such evidence to be admitted to show motive, intent, knowledge, preparation, and plan, all of which would apply if the plaintiff could show that the employer knew of the hostility and did nothing to stop it. The employer's inaction in one case would then be linked to its action (firing the plaintiff) in another; the plaintiff's theory would be that the same motive and intent could explain both.

¹⁷¹ See *McDonnell Douglas Corp.*, 411 U.S. at 802-05.

¹⁷² See *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998) ("Although we have repeatedly held that [some] comments are not *direct* evidence of discrimination because they are either too remote in time or too attenuated because they were not directed at the plaintiff, we have not held that such comments can never constitute *circumstantial* evidence of discrimination.") (internal citation omitted); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 357 (6th Cir. 1998) (considering several ageist remarks by corporate executives as relevant evidence of pretext even though they fell short of direct evidence standard); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 632 (7th Cir. 1996) (rejecting company's argument that if stray remarks are not direct evidence they are not probative because "[t]he remarks are evidence, which together with the other evidence in this case could lead a jury to conclude, by a preponderance of the evidence, that the company engaged in unlawful discrimination").

¹⁷³ Compare *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999) (rejecting plaintiff's argument that a series of age-related comments by various employees "demonstrate[d] a corporate culture conducive to age discrimination") and *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1403-04 (7th Cir. 1996) (age-related comments by decisionmakers made in hiring contexts were not probative in termination context even though same decisionmaker made both hiring and firing decisions), with *Glass v. Philadelphia Electric Co.*, 34 F.3d 188, 195 (3rd Cir. 1994) (concluding that district court abused its discretion in excluding plaintiff's evidence of racially hostile work environment to support race discrimination claim), and *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986) (allowing evidence that plaintiff endured racial harassment from coworkers before he was fired because the evidence made it more likely that his firing was related to his complaints about his treatment).

¹⁷⁴ See *McDonnell Douglas Corp.*, 411 U.S. at 802-05.

¹⁷⁵ In *McDonnell Douglas*, a failure-to-hire case, this translated to evidence that the "was qualified for a job for which the employer was seeking applicants." 411 U.S. at 802.

¹⁷⁶ See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000) (discussing *McDonnell Douglas* as a process of proving the plaintiff's case by eliminating the employer's justifications).

¹⁷⁷ See *Landgraf v. USI Film Products*, 511 U.S. 244, 250-51 (1994).

¹⁷⁸ See *supra* Pts.I,II.

¹⁷⁹ See *supra* Pt.II.

¹⁸⁰ See *supra* Pt.III.

¹⁸¹ See *supra* Pts.I,II.

¹⁸² See *supra* Pt.II.

¹⁸³ See *id.*

¹⁸⁴ See *supra* Pts.II,III.