UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-35410

RUTH E. HOCHBERG

Plaintiff/Appellant,

v.

LINCARE, INC.,

Defendant/Appellee.

BRIEF OF AMICUS CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Jeffrey Needle
Law Office of Jeffrey Needle
119 First Avenue South, Suite 200
Seattle, WA 98104
(206) 447-1560

Daniel L. Johnson
Breskin Johnson & Townsend PLLC
1111 Third Avenue Suite 2230
Seattle, WA 98101
(206) 652-8660

Attorneys for Amicus Curiae
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. Interest of Amicus

The Washington Employment Lawyers Association (WELA) has approximately 125 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association (NELA). WELA's members are Washington attorneys who primarily represent employees in employment law matters, including cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e. WELA members frequently represent pregnant employees seeking either reasonable accommodation or asserting disparate treatment under both state and federal law.

II. Summary of Argument

In this case the Court ruled that Plaintiff failed to establish a prima facie case because she failed to establish that she was "meeting the legitimate expectations of her employer," and because she failed to establish that "other employees with similar qualifications were treated more favorably." Summary Judgment Order at 9. Plaintiff contests this factual conclusion.

The district court's apparent conclusion that the failure to establish a prima facie case justified dismissal was error. The shifting burdens of *McDonnell Douglas* were not intended as a vehicle to prevent Plaintiff from reaching trial. To the contrary, they were established as a *guideline* to assist Plaintiff in reaching trial in

recognition that discriminatory intent is difficult to prove. The shifting burdens were not meant to apply in a "rigid, mechanized, or ritualistic" manner.

Moreover, the Court erred in its articulation of the necessary elements of a prima facie case. Whether similarly situated employees were treated more favorably than Plaintiff is an issue related to pretext, and is a question of fact for the jury and not a question of law for the court. Whether Plaintiff was meeting the legitimate expectations of the her employer is also relevant to pretext. More significantly, Plaintiff is required to establish neither to survive a summary judgment motion.

In order to survive summary judgment Plaintiff need *only* produce evidence sufficient to infer that an illegal reason was "a motivating factor" for an adverse employment decision. Plaintiff does not have to create an inference that an illegal reason was "a motivating factor" *and* that she was "meeting the legitimate expectations of her employer." She does not have to create an inference of "a motivating factor" *and* that "other employees with similar qualifications were treated more favorably."

The district court was mindful of the need to avoid conflating "the minimal inference needed to establish a prima facie case with the specific, substantial showing [a plaintiff] must make at the third stage of the *McDonnell Douglas* inquiry to demonstrate that [an employer's] reasons for [the discriminatory conduct] were

pretextual." Summary Judgment Order at 14. Out of an abundance of caution, the district court then preceded with the second and third stage of the *McDonnell Douglas* shifting burden analysis. *Id.*

The Defendant's articulated reason for demotion was poor job performance. Summary Judgment Order at 14. This was the same factor considered by the Court and rejected as part of Plaintiff's prima facie case. Because the employer satisfied its burden of production, the Court considered the issue of pretext.

The district court ruled erroneously that to establish pretext plaintiff must produce "specific, substantial evidence." Order at 14, 15. Although this more onerous standard of proof has been previously required in the absence of direct evidence, the Supreme Court has now eliminated the distinction between direct evidence and circumstantial evidence for the purpose of surviving summary judgment. "Specific, substantial evidence" of pretext is no longer required regardless of whether Plaintiff relies upon direct or circumstantial evidence.

In reference to pretext, the district court further explained that "Plaintiff now bears the burden to demonstrate that Defendant's stated reason for the demotion was false and that the true reason was unlawful sex discrimination." Order at 14-15. The Court ruled that because Plaintiff failed to establish that the articulated reason was false, Plaintiff could not prove pretext. But to survive summary judgment, sex

discrimination need not be the only reason, it need only be "a motivating factor" for the adverse employment action. Even if the Defendant's articulated reason is the true reason, Plaintiff can survive summary judgment if additional and illegal reasons also motivated the employer.

III. Argument of Counsel

A. The Shifting Burdens of *McDonnell Douglas* Are to Be Applied Flexibly Depending on the Facts and Circumstances.

In this case, the district court set forth rigid and erroneous requirements for establishing a prima facie case. The district court ruled that Plaintiff could not meet a prima facie case if she could not establish that 1) she met the legitimate expectations of her employer *and* 2) that she was treated differently than similarly situated employees. But in order to survive summary judgment, Plaintiff had to establish neither.

Title VII makes it an "unlawful employment practice" for an employer to discriminate against an employee "because of" sex, race or any other protected characteristic. 42 U.S.C. § 2000e-2(a)(1). The Pregnancy Discrimination Act, a 1978 amendment to Title VII, states explicitly that sex discrimination includes discrimination against individuals "because of pregnancy" or who are "affected by pregnancy" and child-birth. 42 U.S.C. § 2000e(k). Plaintiff satisfies this burden by

establishing that pregnancy was a "motivating factor" in the decision to demote her. *See Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1042 (9th Cir. 2005)("Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of the evidence ... that a protected characteristic played 'a motivating factor'"). To overcome summary judgment, a plaintiff merely must raise a triable issue as to this question. *Id.*

The shifting burdens of *McDonnell Douglas* were never intended to impede Plaintiff's ability to reach trial. To the contrary, they were developed in recognition that discriminatory intent is often difficult to prove and to assist Plaintiff in surviving summary judgment. *See Costa v. Desert Palace*, Inc., 299 F.3d 838, 855 (9th Cir. 2002)(en banc)("This legal proof structure [McDonnell Douglas] is a tool to assist plaintiffs at the summary judgment stage so that they may reach trial").[1]

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[1] Contrary to its intended purpose, the rigid application of the *McDonnell Douglas* shifting burdens operates to make it more difficult for Plaintiff and reach trial. A recent study has carefully analyzed employment discrimination cases filed in federal court at both the trial and appellate level. *See* Kevin Clermont and Stewart Schwab, Discrimination Plaintiffs in Federal Court: From Bad to Worse, *Harvard Law & Policy Review*, (Winter 2009). Available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf. This study updated a previous study of five years ago and relied upon data gathered by the Administrative Office of the United States Courts (AO"), assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research. *Id.* at 4 n2.

The Harvard study reveals that employment discrimination cases are far less

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Supreme Court granted certiorari to determine "the exact scope of the prima facie case under McDonnell Douglas." *Id.* at 569. In relevant part, the Court ruled that "t]he method suggested in McDonnell Douglas for pursuing this inquiry . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to

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likely to succeed at pretrial, trial and appeal than other types of cases. "[W]e should disclose at the outset our concluding view that results in the federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts. Our study of the federal district courts shows employment discrimination plaintiffs bringing many fewer cases now." *Id.* at 5. "The most significant observation about the district courts adjudication of these cases is the long-run lack of success for employment discrimination plaintiffs relative to other plaintiffs. Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases (15%) was lower than that for nonjobs cases (51%)." *Id.* at 30. The gap in win rates between employment discrimination plaintiffs and other plaintiffs appears, for example, in pretrial adjudication. . . . Over the period of 1979-2006 in federal court, employment discrimination plaintiffs have won 3.59% of their pretrial adjudications, while other plaintiffs have won 21.05% of their pretrial adjudications." *Id.* at 31.

"One fine study of employment discrimination cases looked at a sample of cases from two districts during a period around 2000 and found that the court decided summary judgment motions by defendants in 22.8% of the cases, with the defendants experiencing a 63.6% success rate on those motions (with a much higher rate against pro se plaintiffs). Thus, summary judgment is a common means of disposing of this category of cases. Moreover, a sampling of judicial opinions available online regarding defendants' summary judgment motions in Title VII employment discrimination cases showed a statistically significant effect of the political party of the President who had appointed the trial judge on the outcomes in those cases." (citations omitted). *Id.* at 31 n68.

evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Id.* at 577.[2] The purpose of the prima facie case is simply to create an inference of discrimination. *See Furnco,* 438 U.S. at 576 ("But McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act'").[3]

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[2] *See also U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983)("[t]he prima facie case method established in McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination'") (*quoting Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978)); *Sanghvi v. City of Claremont,* 328 F.3d 532, 543 (9th Cir. 2003)("As the Supreme Court has stated, the McDonnell Douglas formula is not to be applied in a 'rigid, mechanized, or ritualistic' manner, and there may be cases for which this formulaic showing is not required").

[3] *See also Robinson v. Adams,* 847 F.2d 1315, 1316 (9th Cir. 1987)("The McDonnell Douglas test defines one method of proving a prima facie case of discrimination--proof from which a trier of fact can reasonably infer intentional discrimination"); *Spaulding v. University of Washington,* 740 F.2d 686, 700 (9th Cir. 1984)(Of course, Title VII's nature and purpose require that the McDonnell Douglas test be flexible. What must be shown to support an inference that the plaintiff was discriminated against depends on the facts of each case"); *Hagans v. Andrus,* 651 F.2d 622, 625-626 (9th Cir. 1981)("The Supreme Court itself, noting that the test stated in McDonnell Douglas does not apply to every case, has interpreted McDonnell Douglas to require a Title VII plaintiff to offer sufficient evidence 'to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.'") (*citing International Bhd. of Teamsters v. United States, supra,* 431 U.S. at 358, 97 S.Ct. at 1866).

In this case, Plaintiff disputes the Court's factual finding that she failed to establish the prima facie case as formulated by the district court.[4] But dismissal for failure to establish a prima facie case (regardless of the formulation) defeats the central purpose of Title VII unless Plaintiff is allowed to present additional evidence which bears on the ultimate question; whether gender is a motivating factor. *See Bolton v. Sprint/United Management Co.*, 220 Fed.Appx 761, 766-767 (10th Cir. 2007) ("concluding that plaintiffs 'did not establish a prima facie case based on the reasons for their discharge raises serious problems under the McDonnell Douglas analysis' because it 'frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor'")(*citing MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991); *Ortiz v. Norton*, 254 F.3d 889, ___ (10th Cir. 2001)("Using the defendant's reasons for the challenged actions . . . made the playing field unlevel for the plaintiff when his burden was supposed to be 'not onerous.' Instead, the judge's approach cut off the plaintiff's opportunity to show that the proffered reasons for the adverse dismissal were pretext, and we have previously held that this is an erroneous

[4] The district court cites *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1962 (9th Cir. 2002) in support of its formulation of the prima facie case. But *Villarimo* does not include the element that Plaintiff "was performing according to her employer's legitimate expectations." Rather it requires that Plaintiff establish that she "was qualified for the position." *Id.*

analysis").

To survive summary judgment, Plaintiff is only required to create a question of fact on the ultimate question - whether an illegal reason was a motivating factor. No particular type of evidence is required. Nor is it significant how that evidence is designated - as part of the prima facie case or pretext. Nor is it significant whether that evidence is classified as "direct" or "circumstantial." The inflexible utilization of the *McDonnell Douglas* shifting burdens creates a barrier to the vindication of civil rights, and is inconsistent with Congressional policy.

1. The District Court Erred in Considering the Defendant's Evidence of a Non- Discriminatory Reason in the Context of Plaintiff's Prima Facie Case.

The district court concluded that Plaintiff failed to make a prima facie case of discrimination in part because she could not demonstrate that she had met Defendant's "legitimate employment expectations." Summary Judgment Order at 12.[5] In reaching this factual conclusion, the district court credited the Defendant's evidence that it demoted Plaintiff because she was not performing her job adequately.

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[5] Courts have used a wide variety of terminology to describe what a plaintiff must show to establish that she is "qualified" under the *McDonnell Douglas* formula. *See Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1031 (9th Cir. 2006) ("he performed his job adequately"); *Bodett v. Coxcom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004) ("she was qualified for her position"); *Graham v. Long Is. RR*, 230 F.3d 34, 38 (2nd Cir. 2000) (he "was performing his duties satisfactorily").

This was an erroneous application of *McDonnell Douglas*. Proper application of the framework of shifting burdens requires that the court consider Plaintiff's evidence, at the prima facie case stage, *independently* of the employer's asserted nondiscriminatory reason for its action, which comprises the second stage of the analysis. *E.g., Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-61 (3rd Cir. 1999).

It is improper for the district court to rely on the nondiscriminatory reason for termination to find plaintiff's prima facie case inadequate. This is true even if that evidence happens to show that, in the employer's view, the plaintiff was not meeting its legitimate expectations. *Cline,* 206 F.3d at 661 (*citing United Postal Serv. Bd. Of Govs. v. Aikens*, 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983)). *See also MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1120 (10th Cir. 1991) (employer's explanation for adverse action is not ... appropriately brought as a challenge to the sufficiency of the plaintiffs prima facie case) (*quoting Yarborough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 512 (7th Cir. 1986)).

The district court's analysis of the evidence here "improperly imported the later stages" of the inquiry into the initial prima facie case stage. *Cline,* 206 F.3d at 661. The court conflated the Plaintiff's burden at the prima facie case stage with the "ultimate question," which is properly considered only at the final stage of the

analysis. *Id.* at 660.

2. A Plaintiff is Not Required to Present Evidence of Comparators Who Were Treated More Favorably.

The district court also concluded that Plaintiff failed to meet her burden to demonstrate a prima facie case by failing to introduce evidence that other employees were treated more favorably than she. Summary Judgment Order, at 12.[6] This also was erroneous. It is well-established that such evidence is *not* required as part of a prima facie case, but is merely one method by which an employee may raise an inference of discrimination. In *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th cir. 2004), the Plaintiff satisfied all of the elements of the prima facie case, except that she failed to show that other similarly situated employees outside of the protected class were treated more favorably. *Id.* at 743-44. The Court ruled that this element of the prima facie was not required. The Court ruled a plaintiff may show *either* that similarly situated individuals outside her protected class were treated differently, *or* other circumstances surrounding the adverse employment action give rise to an inference

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[6] In this case the district court ruled that comparators were not similarly situated to Plaintiff to be valid comparators. Summary Judgment Order at 5-7. But it is unclear whether the district court recognized this as a question of law or fact. In the Ninth Circuit it is a question of fact for the jury. *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 885 n.5 (9th Cir.2007)(The Ninth Circuit "agree[s] with our sister circuits that whether two employees are similarly situated is ordinarily a question of fact")(*citing* decisions in the Second, Tenth and District of Columbia Circuits).

of discrimination. (emphasis original). *See also Czekalski v. Peters*, 475 F.3d 360, 365-66 (D.C. Cir. 2007); *Graham*, 230 F.3d at 39 (plaintiff "may" raise an inference of discrimination with comparator evidence); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1229 (10th Cir. 2000) (error to require comparator evidence at prima facie stage).

Comparator evidence, if it is introduced at all, should be considered only at the final stage of the burden-shifting analysis, when the ultimate question of discrimination is reached.

> [T]he district court's sequencing determination was in error, for the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality *vel non* of the employer's articulated reason for having acted adversely to the plaintiff's interests.

Conward v. Cambridge School Committee, 171 F.3d 12, 19 (1st Cir. 1999) (citations omitted). In this case, Plaintiff did offer comparator evidence. But to *require* comparator evidence, as the district court did here, seriously undermines the legal protections against discrimination because whenever an employee's situation was too unique to permit valid comparisons, she would lose her case regardless of whether the employer had a discriminatory motive. *Marzano*, 91 F.3d at 510-11. The district court erred in concluding that Plaintiff was required to produce comparator evidence to survive summary judgment.

3. Testimony By Co-Workers Regarding the Plaintiff's Performance Can Create an Issue of Fact Whether Plaintiff Was "Qualified."

Defendant moved to strike the testimony of Plaintiff's co-workers concerning Plaintiff's performance and qualifications. The district court denied this motion, correctly concluding that other employees' "personal opinions about Plaintiff's qualifications are admissible." Summary Judgment Order, at 6. Nevertheless, it found the testimony could not create a genuine issue of material fact because these employees were not supervisors and therefore could not know "Defendant's legitimate expectations for a supervisor." *Id.* at 14-15.

Courts have readily accepted even the plaintiff's own testimony that she was performing satisfactorily as sufficient to discharge that burden.

> [A] plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant period of time.

Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470 (10th Cir. 1992). See also *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1119-20 (10th Cir. 1991)(reviewing cases). Equally, a plaintiff can meet that burden through the testimony of co-workers. *Kenworthy*, 979 F.2d at 1470. The district court's conclusion that co-worker testimony could not create an issue of fact concerning

Plaintiff's satisfactory performance was erroneous.

The court appeared to reject the co-worker testimony because the co-workers at issue were subordinate employees rather than supervisors, like the Plaintiff. Summary Judgment Order, at 5-7. According to the district court, non-supervisors could not, as a matter of law, have personal knowledge of their employer's "legitimate expectations" of a supervisor. Yet, a subordinate employee may have significant and especially reliable knowledge of what her employer genuinely expects of its supervisory employees. That may be true, for example, where the employees had been working for the employer for many years, and had reported to several different supervisors.

Moreover, the district court's conclusion is at odds with its own decision to deny the Defendant's motion to strike. In deciding that the opinion testimony of Plaintiffs' co-workers was admissible, the court had to conclude that the testimony was both (1) rationally based on the perception of the witness and (2) helpful to a fact-finder. *See* Fed. R. Evid. 701. Having concluded that the testimony met this standard, the district court could not have concluded it had no capacity to create a triable issue of fact without weighing the testimony against competing evidence and/or assessing the witness's credibility, neither of which is permissible at the summary judgment stage. "At the summary judgment stage, the district court is not

to weigh the evidence or determine the truth of the matter but should only decide whether there is a genuine issue for trial." *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

B. Plaintiff Need Not Offer "Specific and Substantial Evidence" to Establish Pretext.

The district court clearly required that to establish pretext, Plaintiff must present "specific and substantial" evidence. Summary Judgment Order at 15. This was error. Specific and substantial evidence is no longer required to prove pretext, even in the absence of direct evidence. Plaintiffs relying upon circumstantial evidence are not required to produce more compelling evidence than required for direct evidence. *See Cornwell v. Electra Cent. Credit Union,* 439 F.3d 1018, 1030 (9th Cir. 2006)([w]e conclude that in the context of summary judgment, Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence")(relying upon *Desert Palace v. Costa*).

In *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003), the Court acknowledges the Ninth Circuit history of requiring "specific" and "substantial" evidence when relying upon circumstantial evidence in support of

pretext. The Court then stated "[n]evertheless, it is important to note that *Desert Palace* affirmed the value and import of circumstantial evidence in *all* cases." *Id.* at 1066-67 (emphasis original). "Accordingly, we refuse to make such a distinction in Stegall's case." *Id.* at 1067.

In *Cornwell v. Electra Cent. Credit Union,* 439 F.3d 1018, 1030 (9th Cir. 2006), the Ninth Circuit acknowledged the apparent "tension" between *Costa v. Desert Palace* and Ninth Circuit decisions requiring that circumstantial evidence be "specific" and "substantial." The Court further acknowledged that a panel of the Ninth Circuit was not at liberty to overturn another panel's decision in the absence of "intervening higher authority" that is "clearly irreconcilable" with a prior circuit holding, ... *Id.* at 1030-31. Although the Court in *Cornwell* did not reach the question of whether there existed qualifying "intervening higher authority," clearly *Costa v. Desert Palace* qualifies.[7] The central holding of *Costa* is that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence, . . ." *Costa,* 539 U.S. at 100, 123 S.Ct. 2148. That intervening higher authority is simply

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[7] The Court in *Cornwell* concluded: "Whether or not the precedential weight of *Godwin* has been diminished to any degree by the Supreme Court's decision in *Costa*, or by our decision in *McGinest*, we conclude that Cornwell's evidence is sufficient to create a genuine issue of material fact regarding the motives for his demotion under either the *Godwin* standard which would require "specific" and "substantial" circumstantial evidence of pretext, or the *McGinest* standard, which would not." *Id.* at 1031.

irreconcilable with a requirement that the burden for surviving summary judgment be more onerous when based upon circumstantial evidence.

C. To Survive Summary Judgment, The Employee Need Not Establish That The Employer's Articulated Reason For An Adverse Action is False.

In this case, the Court stated clearly that "Plaintiff now bears the burden to demonstrate that Defendant's stated reason for the demotion was false and that the true reason was unlawful sex discrimination." Order at 14-15. This is incorrect. Even if the employer's articulated reason is true, Plaintiff can nevertheless survive summary judgment by establishing that sex discrimination was also a motivating factor in the decision to demote her. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1091 (9th Cir. 2008)("An employee 'may offer evidence, direct or circumstantial, 'that a discriminatory reason more likely motivated the employer' to make the challenged employment decision.' Alternatively, an employee may offer evidence 'that the employer's proffered explanation is unworthy of credence'")(citations omitted).

In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), Justice Brennan, writing for a plurality of four, rejected the requirement that plaintiff prove "but for" causation in order to establish liability under Title VII. 490 U.S at 240. In order to satisfy the "because of" standard of causation, plaintiff simply had to prove that an illegal motive was "a motivating factor" in the defendant's decision making process. *Id.* at

250-51. Title VII was intended to prohibit an employment decision which was tainted in any way by a discriminatory motive. "We take these words [because of] to mean that gender must be irrelevant to employment decisions." *Id.* at 240.

In reference to the type of evidence necessary to prove that a protected characteristic was a "motivating factor," the plurality stated "we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case." *Id.* at 251-252. The plurality also concluded that a defendant could nevertheless escape all liability if it could prove by a preponderance of the evidence that it would have made the same decision even without consideration of the protected characteristic. *Id.* at 242.[8]

In response to a series of Supreme Court decisions, Congress passed the Civil

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[8] Justice White concurred in result. He differed with the plurality only concerning the specifics of the employer's burden. Relying upon *Mt. Healthy City Bd of Ed. v. Doyle*, 490 U.S. 274 (1977), Justice White rejected the "motivating factor" standard and concluded that in order to prove a violation of the statute, plaintiff must prove that the protected characteristic was a "substantial factor" in the decision making process. *Id.* at 258-260. In all other respects, Justice White agreed with the plurality that *Mt. Healthy* provided the proper framework for analyzing "mixed-motives" cases. 490 U.S. at 259. Conspicuously absent from Justice White's concurring opinion is any passing reference to the type of evidence required.

Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964. With respect to *Price Waterhouse,* the amendment clarified that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in the employment action; the "substantial factor" standard articulated by Justices White and O'Connor was rejected. In relevant part, the amended statute provides as follows:

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. 2000e-2(m).[9]

The evidentiary framework of *McDonnell Douglas* is not inconsistent with the motivating factor standard articulated in *Price Waterhouse* and qualified by the Civil Rights Act of 1991. They are two separate concepts. The shifting burdens of *McDonnell Douglas* provide an evidentiary framework for the purpose of proving

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[9] The Civil Rights Act of 1991 made it easier for Plaintiff to survive summary judgment. Prior to the Civil Rights Act of 1991, plaintiff had to create a triable issue of fact concerning the existence of a discriminatory motive *and* that the illegal motive was a "but for" cause of the adverse employment action. The Civil Rights Act of 1991, however, requires only that plaintiff create a triable issue of fact that an illegal motive existed and that it influenced the adverse action *to any degree*. The methods of proof and types of evidence to be utilized by plaintiff have not changed. Having satisfied this burden, summary judgment must be denied.

discriminatory intent; the existence of a discriminatory motive. The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all. The motivating factor standard, on the other hand, addresses the issue of causation and not intent.

Even in a case litigated under the hoary "but for" standard of causation, Plaintiff did not have to establish that an illegal reason was the only reason for an adverse employment action. When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse,* 450 U.S. at 241 (Brennan, J., plurality opinion) *citing* 110 Cong.Rec. 2728, 13837 (1964). Accordingly, in numerous cases courts have routinely instructed juries that to prevail a protected characteristic "need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference.'" *E.g., Graham v. Dresser Industries Inc.,* 928 F.2d 408 (9th Cir. 1991)(*citing* Ninth Circuit cases)

The number of motives or reasons for an adverse employment action is entirely unrelated to the concept of pretext. Pretext is simply one method of proving discriminatory intent. In proving pretext, the employee seeks to prove that the employer's articulated reason is an attempted coverup for the existence of an illegal

motive. The inference of an illegal motive is created by proof that 1) the employer's articulated reason(s) is not the true reason(s) for an adverse employment action; 2) even if true, it did not motivate the adverse employment decision; *or* 3) that it an illegal reason in addition to the employer's articulated reason motivated the adverse employment decision. Any of these three methods will suffice to prove that the employer's articulated reason is a cover up for an illegal reason. The *McDonnell Douglas* framework does not address the issue of causation. It only addresses the issue of discriminatory intent. In that regard, the number of motives is irrelevant.

There are many different ways of proving that an illegal reason is "a motiving factor" for an adverse employment decision. Evidence that the Plaintiff was meeting the legitimate expectations of employment is one type of evidence, but it is not required by the statute. Even employees who are below average performers are protected by the statute. The statute protects everyone from invidious discrimination, not just those who are meeting the reasonable expectations of the employer.

> Proof of [employment] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. . . . The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible

> reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.

Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987)(Posner, J.).

1. Temporal Proximity Alone Can Defeat Summary Judgment.

In this case, the Plaintiff alleges that she was subjected to very different treatment after the employer learned that she was pregnant and was then demoted. The temporal proximity between the employer's discovery that Plaintiff was pregnant and her demotion can in and of itself create a question of fact sufficient to defeat summary judgment where there is a close proximity between the two.

> [W]e have held that causation may be established based on the timing of the relevant actions. Specifically, when adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred. Yartzoff, 809 F.2d at 1375-76 (finding causation based on timing of retaliation); Miller v. Fairchild Industries, Inc., 885 F.2d 498, 505 (9th Cir.1989) (holding that discharges 42 and 59 days after EEOC hearings were sufficient to establish prima facie case of causation); Hashimoto, 118 F.3d at 680. Moreover, we have held that evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.

Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 507 (9th Cir. 2000)(*quoting Strother Southern California Permanente Medical Group,* 79 F.3d 859, 870-71 (9th Cir. 1996).[10] While these cases generally arise in the context of

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[10] *See also Davis v. Team Elec. Co.*, 520 F.3d 1080, 1094 (9th Cir. 2008)("We have held that "causation can be inferred from timing alone where an adverse

retaliation, the same reasoning must apply in any case where Plaintiff asserts that she was terminated shortly after her employer became aware of her pregnancy.

In this case, the employer learned of Plaintiff's pregnancy in October, 2005. Almost immediately thereafter Plaintiff was treated much more unfavorably than previously. *See* Appellant's Brief at 9-10. Plaintiff filed a pregnancy discrimination complaint in December, 2005, which was discovered by her supervisor in January, 2006. During the month of January, Plaintiff's adverse treatment escalated and her supervisor closely questioned her co-workers with apparent purpose of finding fault with Plaintiff's performance. Plaintiff was demoted on February 21, 2006.

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employment action follows on the heels of protected activity"); *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 919 (9th Cir. 1996)("temporal proximity" between filing of a complaint and discharge may be sufficient to find a causal link where a complainant's layoff occurred only four months after he filed a discrimination complaint); *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir. 1987) ("causation . . . may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision"); *Ray v. Henderson,* 217 F.3d 1234, 1244 (9th Cir. 2000) ("That an employer's actions were caused by an employee's engagement in protected activities may be inferred from 'proximity in time between the protected action and the allegedly retaliatory employment decision'"); *Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 731-32 (9th Cir. 1986) (concluding that there was adequate evidence of a causal link where the retaliatory action occurred less than two months after the protected activity); *Kahn v. Salerno,* 90 Wn.App. 110, 131-32, 951 P.2d 321 (1998)("Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive").

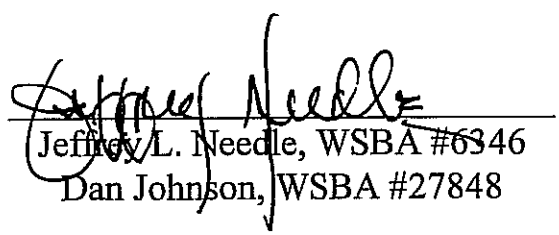
Appellant's Brief at 10-11. The close proximity between the supervisor's knowledge of her pregnancy and/or her pregnancy discrimination complaint and the adverse treatment is sufficient without more to create a question of fact sufficient to survive summary judgment.

IV. Conclusion

The shifting burden model of *McDonnell Douglas* was intended to assist Plaintiff in reaching trial. The shifting burden model must be applied so as to allow Plaintiff to present any evidence which supports an inference that an illegal reason was a motivating factor in the decision to adverse employment action. Its inflexible application creates a barrier to the vindication of civil rights.

Respectfully submitted this 14 day of October, 2008.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION



Jeffrey L. Needle, WSBA #6346
Dan Johnson, WSBA #27848

STATEMENT OF RELATED CASES

Plaintiff is not aware of any related cases pending before this court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6118 words and 544 lines.

Dated: 10/14/08

Signature of attorney