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Pretext After *Bostock*—Disproving One of the Employer's Reasons is Enough

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I. Introduction

When an employer gives a pretextual reason for an employee's termination, that falsehood can help prove that the true reason was discrimination.[1] The dishonesty constitutes "affirmative evidence of guilt."[2] The trier of fact may "infer the ultimate fact of discrimination from the falsity of the employer's explanation."[3] However, when an employer provides multiple reasons for firing an employee, there has been a split of opinion whether the plaintiff must disprove one or all of those reasons.[4]

In the past, a number of jurisdictions, including the Fifth Circuit, required the plaintiff to disprove all the employer's reasons.[5] For example, the Seventh Circuit once dismissed a

1. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993) ("[P]roving the employer's reason false becomes part of . . . the greater enterprise of proving that the real reason was intentional discrimination.").

2. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (establishing that, in certain circumstances, the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt).

3. *See id.* (explaining that this inference is consistent with general principles of evidence law); *see also St. Mary's Honor Ctr.*, 509 U.S. at 511 (reasoning that it is permissible for the trier of fact to infer discrimination from the employer's falsehood).

4. *Compare* Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (holding that plaintiffs must rebut each of the employer's proffered non-discriminatory reasons), *and* Wolf v. Buss (Am.), Inc., 77 F.3d 914 (7th Cir. 1996) (holding that the plaintiff failed to show that all six reasons were pretextual), *with* Lipchitz v. Raytheon Co., 751 N.E.2d 360, 372 (Mass. 2001) (holding that the plaintiff did not have to disprove every reason articulated). This article focuses on termination. However, the concepts addressed apply to other types of adverse employment actions, such as failure to hire, failure to promote, and disadvantageous transfers.

5. *See* Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 233 (5th Cir. 2015) (requiring an employee to rebut each discrete reason proffered by the employer); *see also* Chapman v. AI Transp., 229 F.3d 1012, 1024–25 (11th Cir. 2000) ("If the plaintiff does not proffer sufficient evidence to create a genuine issue

discrimination claim because the plaintiff showed that only four of the employer's six reasons for its action were pretextual.[6]

Massachusetts took a different approach, requiring the plaintiff to show that only one of the multiple reasons was pretextual (a standard hereinafter called "partial pretext").[7] The First Circuit sometimes accepts partial pretext, as when the court found an inference of discrimination where the plaintiff demonstrated the employer's knowing falsity with respect to only one of three explanations.[8] On other occasions, the First Circuit has adopted a hybrid analysis, accepting the "disprove-all-reasons" test, but also appearing to permit plaintiffs to use partial pretext if they assert that the employer relied on a mixture of lawful and unlawful factors.[9] However, a more rigid version of disprove-all-reasons may be filtering into First Circuit decisions.[10]

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of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment.").

6. *See Wolf*, 77 F.3d at 934 (holding that the four issues the plaintiff raised were not so intertwined as to call into doubt the employer's two credible reasons for termination).

7. *See Lipchitz*, 751 N.E.2d at 372.

> [T]o meet her burden of proof that discrimination was the determinative cause of the promotion decision, Lipchitz was not required to disprove every reason articulated by the defendant or suggested in the evidence . . . She could meet her burden by persuading the fact finder that it was more likely than not that at least one reason was false.

8. *See* Joseph v. Lincare, Inc., 989 F.3d 147, 161 (1st Cir. 2021) (holding that the plaintiff had enough evidence to survive summary judgment even though they raised issue with only one of the three explanations).

9. *See* Sher v. U.S. Dep't. of Veteran's Affs., 488 F.3d 489, 507, 508 n.22 (1st Cir. 2007) ("[W]hen an employer offers multiple legitimate, nondiscriminatory reasons for an adverse employment action, a plaintiff must offer evidence to counter each reason," but this requirement does not apply when the plaintiff pursues a "mixed motive" claim).

10. *See* Brandt v. Fitzpatrick, 957 F.3d 67, 76 (1st Cir. 2020) (implying that pretext analysis applies when discrimination is the single "true reason" for the employment decision); Connell v. Bank of Boston, 924 F.2d 1169, 1177 (1st Cir. 1991) (finding a plaintiff unable to show inference of age discrimination where he showed one of the employer's explanations to be pretextual, but could not so challenge a different explanation); Katz v. Organogenesis, Inc., No. 17 Civ. 11595, 2019 U.S. Dist. LEXIS 160462, at *22–24 (D. Mass. Sept. 20, 2019) (stating that the plaintiff failed to rebut all three legitimate, nondiscriminatory justifications).

The Supreme Court indicated that, in cases in which a plaintiff alleges that the termination was based on a combination of lawful and unlawful motives, the plaintiff may prove bias with circumstantial evidence, including evidence of pretext.[11] Such a holding presupposes that the plaintiff need not show every reason is pretext, because the plaintiff's theory of the case acknowledges that the employer actually acted, in part, on a lawful motive.[12] In contrast, according to the Eleventh Circuit, "pretext has no place in [mixed motive] analysis."[13] One of these cases must be wrong.

The Supreme Court's recent discussion of multiple motives in *Bostock v. Clayton County*[14] provides the tools to resolve this split and compels rejection of disprove-all-reasons.[15] *Bostock* held that gender discrimination is actionable, even if the employer was motivated by other legitimate reasons, so long as gender was a but-for cause.[16] A plaintiff need only show that the termination was based "in part" on a discriminatory motive and need not show that bias was the sole, or even the primary reason.[17] Since plaintiffs need only show that bias was "in part" the reason for discharge, and can agree with employers that other lawful reasons contributed, it would be absurd to require plaintiffs to disprove the

11. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003) (acknowledging the utility of pretext evidence in discrimination cases).

12. *See id.* at 102 (stating that in a mixed-motive case, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice").

13. *See* Vinson v. Koch Foods of Ala., LLC, 735 F. App'x 978, 981 (11th Cir. 2018) (explaining that proof of pretext is inapplicable to a claim alleging a mixed motive theory of liability).

14. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (an employer violates the Title VII prohibition against sex discrimination when it fires an individual for being homosexual or being a transgender person).

15. *See id.* at 1739 (2020) (explaining that the but-causation standard applies to Title VII claims of sex discrimination).

16. *See id.* ("When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to the challenged employment decision.").

17. *See id.* at 1741 (stating that an employer violates Title VII if it intentionally relies "in part" on an individual employee's sex when deciding to terminate the employee).

other reasons.[18] *Bostock*'s recognition of multiple, independent, but-for reasons for an employment action, and rejection of a sole or primary reason standard, highlights in new ways the dis-functional nature of the disprove-all-reasons test.[19]

This Article discusses various errors and flaws in the disprove-all-reasons standard.[20] Simply put, when a plaintiff can show that discrimination was one of the determinative reasons for an adverse employment action, there is no longer a need to disprove the other reasons.[21] Social science confirms that bias is often expressed in the presence of other, valid factors that contribute to a decision.[22] When a plaintiff disproves one of the employer's but-for excuses, a jury should be permitted to infer that discrimination inhabits the same causal space that the employer ascribed to its false explanation.[23] The jury is permitted to find that a false explanation was offered to obscure the presence of discrimination, even if other explanations are also offered.[24]

The requirement to disprove all the employer's reasons is tantamount to requiring the plaintiff to prove that discrimination was the sole reason for discharge.[25] Disprove-all-reasons requires the plaintiff to eliminate every possible reason other than

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18. *See id.* ("Often, events have multiple but-for causes").

19. *See id.* at 1739 ("[T]he plaintiff's sex need not be the sole or primary cause of the employer's adverse action").

20. *See infra* Part V.

21. *See infra* Part V.

22. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 747 (2005) (citing a study that demonstrates that discrimination may occur in contexts where it can be justified as something other than discrimination).

23. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993) (explaining that after the employee satisfies the prima facie burden, the employer has the burden to introduce evidence which, taken as true, would permit the conclusion that "there was a nondiscriminatory reason for the action").

24. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003) (acknowledging that pretext evidence is useful in a mixed motive case, where the plaintiff alleges that the employer acted based on a mixture of legitimate and illegitimate factors).

25. *See infra* Part VII; *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020) (stating that Title VII does *not* require a plaintiff to prove that sex be the sole or primary cause of an adverse employment action).

discrimination.[26] Such a difficult standard is wholly inconsistent with the plaintiff's but-for burden and *Bostock*'s rejection of the "sole reason" standard.[27] The danger in imposing an overly strict burden is that it facilitates discrimination.[28]

Because evidence of pretext is "affirmative evidence" of intentional discrimination, that inference of discrimination does not simply evaporate just because an employer alleges more than one reason for its action.[29] When a criminal defendant's alibi is disproved, the accused criminal is not saved from a negative inference merely by articulating a second alibi that cannot be directly impugned.[30] Rather, the falsity of the first alibi could lead a jury to reasonably doubt the second alibi.[31] An employer's dizzying array of explanations should not negate the persuasive effect of affirmative evidence of bias.[32]

Consequently, courts that use the disprove-all-reasons test should be asked to re-evaluate their approach in light of *Bostock*.[33] This Article posits that the plaintiff generally needs only to prove

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26. *See* Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994) (requiring plaintiffs to rebut *each* of the employer's legitimate, nondiscriminatory reasons).

27. *See Bostock*, 140 S. Ct. at 1739–40 (rejecting sole cause, and stating that but-for "can be a sweeping standard.").

28. *See* Robert J. Smith, *The Title VII Pretext Question: Resolved in Light of St. Mary's Honor Center v. Hicks*, 70 IND. L. REV. 281, 299 (hypothesizing that a heightened burden for proving pretext could "deter potential plaintiffs and attorneys from pursuing a Title VII claim because of the inevitable increase in costs of gathering additional circumstantial evidence of a discriminatory motive"); Sherie L. Coons, *Proving Disparate Treatment After St. Mary's Honor Center v. Hicks: Is Anything Left of McDonnell Douglas?*, 19 IOWA J. CORP. L. 379, 411 (1994) (criticizing *Hicks* decision to the extent that it "places an impossible burden on the plaintiff (to disprove all possible reasons for the employer's actions)").

29. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (finding that a jury is able to consider a party's dishonesty about a material fact as affirmative evidence of guilt).

30. *See* Commonwealth v. Connors, 185 N.E.2d 629, 631 (Mass. 1962) (finding that the defendant's false alibi could lead a jury to doubt the veracity of a second alibi).

31. *See id.* (same).

32. *See* Lipchitz v. Raytheon Co., 751 N.E.2d 360, 371–72 (Mass. 2001) (stating that a plaintiff should not be required to disprove every reason if one of the reasons was already disproven).

33. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (rejecting the sole-purpose requirement in favor of a but-for standard of causation).

that one of the employer's multiple asserted reasons is pretextual.[34] In the meantime, to place themselves in the best position to avoid that overly restrictive doctrine, plaintiffs in disprove-all-reasons jurisdictions should clearly allege, either in whole or in the alternative, that discrimination was one of a number of but-for reasons.[35]

II. The "But For" Standard Applies to Certain Anti-Discrimination Laws

Federal and Massachusetts anti-discrimination laws prohibit employers from firing employees "because of" gender and various other factors.[36] The "because of" standard embraces a "but-for" analysis, i.e., plaintiffs must prove they would not have been fired but-for their gender.[37]

In 1989, the Supreme Court, construing the "because of" provision of Title VII, 42 U.S.C. § 2000e-2(a)(1), recognized that Title VII liability may be established where the employer was motivated by a mix of legitimate and illegitimate factors.[38] In 1991, Title VII was amended to further recognize liability in cases

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34. *See infra* Part V.

35. Sher v. U.S. Dep't. of Veteran's Affs., 488 F.3d 489, 507–08, n.22 (1st Cir. 2007) (showing that a proper pleading may avoid the requirement to disprove all reasons).

36. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2018) (prohibiting employers from failing or refusing to hire or discharge any individual because of such individual's race, color, religion, sex, or national origin); 29 U.S.C. §§ 623(a)(1) (2018) (prohibiting age discrimination); *see* MASS. GEN. LAWS ch. 151B, § § 4(1) (2018) (establishing state law prohibiting discrimination on the basis of race, color, religious creed, national origin, sex, gender identity, and sexual orientation). For purposes of clarity, this article focuses on gender discrimination. However, the principles discussed in this article apply to other types of discrimination subject to the but-for causation standard.

37. *See Bostock*, 140 S. Ct. at 1731 (establishing a but-for standard for Title VII); *see, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (holding that Title VII retaliation claims must be proved according to traditional principles of but-for causation); Brunner v. Stone & Webster Eng'g Corp., 603 N.E.2d 206 (Mass. 1992) (requiring a but-for standard of causation for Massachusetts anti-discrimination laws).

38. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality opinion) (reasoning that Congress intended Title VII to condemn decisions based on a mixture of legitimate and illegitimate motives).

involving mixed motives, where lawful factors were considered along with unlawful factors.[39] The amendment permits the plaintiff to recover compensatory damages upon proof that discrimination was a motivating factor, "even though other factors also motivated the practice."[40]

The amendment allows an employer to defend against the claim for damages if it proves that it would have terminated the plaintiff even if it had not considered the discriminatory factor.[41] While the amendment embraced a burden-shifting approach, the but-for standard continues to apply when a plaintiff seeks damages under either sections 42 U.S.C. §§ 2000e-2(m) or 2(a)(1).[42] The addition of Section 2(m) did not signal an alteration of the but-for burden under Section 2(a)(1).[43]

The Supreme Court's recent decision in *Bostock* provides a crucial update on the but-for standard.[44] The test "directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[45] Using this test, the Court held that bias against those with same-sex attraction or transgender status constitutes sex discrimination under Title

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39. *See* 42 U.S.C. § 2000e-2(m) (2018) (establishing a burden shifting framework for Title VII cases involving mixed motives).

40. *See id.* ("[A]n 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.").

41. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2018) (providing that an employer can avoid damages if it can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor). However, even if the employer prevails in this burden, Title VII permits liability and a narrow set of remedies if the plaintiff merely shows that discrimination was a non-determinative consideration.

42. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*,* 140 S. Ct. 1009, 1017 (2020); Brandt v. Fitzpatrick, 957 F.3d 67, 76 (1st Cir. 2020) (stating that 42 U.S.C. § 2000e-2(m) adopts but-for cause, although it can shift the burden to the employer).

43. *See* Bostock v. Clayton Cnty.*,* 140 S. Ct. 1731, 1740 (2020) ("Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII, § 2000e-2(a)(1).").

44. *See id.* at 1739 (articulating "multiple but-for cause" standard).

45. *See id* (recognizing that but-for causation "can be a sweeping standard").

VII.[46] For example, if an employer promotes a woman who wears a dress, but fires a man who wears a dress, sex is a but-for factor, even if a second factor, the wearing of a dress, also contributed.[47]

A but-for cause can be one of many causes that lead to a particular result.[48] "Often, events have multiple but-for causes."[49] If sex was one but-for cause of an employment decision, it is no defense for an employer to identify some other, non-discriminatory factor that also contributed to its decision.[50] An employer violates the law when it fires an employee based "in part" on sex, even "if other factors besides the plaintiff's sex contributed to the decision."[51]

Bostock illustrated the concept of multiple, independent but-for causes with the following example.[52] Assume there are two successful and competent employees—one male and one female, and the employer intends to retain and promote both. Assume further that the employer is a Red Sox fan, with a desire to fire employees who follow the Yankees. If the employer terminates the female employee because she is a woman and because she supports the Yankees, but retains a male Yankees fan, that would constitute

46. *See id*. at 1741 ("[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."); *see also id.* at 1742 (noting that homosexuality and transgender status are related to sex, so if an employer would not have terminated an employee but for that individual's sex, the statute's causation standard is met).

47. *See id.* at 1742 (supporting the proposition that if an employer would not have terminated an employee but for that individual's sex, the statute's causation standard is met).

48. *See id.* at 1739 (explaining that a car accident might be caused both because one driver failed to signal and because another ran a red light).

49. *Id.*

50. *See id.* at 1741 ("When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision").

51. *Id*. at 1741.

52. *See id*. (providing an example to support the notion that there is a violation when an employer treats one employee worse because of that individual's sex, even though "other factors may contribute to the decision").

unlawful gender discrimination.[53] That is so, even if the employer would have retained the female had she been a Red Sox fan.[54] The plaintiff in this scenario need not prove that the employer's bias affected all women.[55] In this way, there can be liability for gender discrimination when an independent, lawful factor is also a but-for consideration.[56]

Under Title VII and Chapter 151B, the plaintiff is not required to prove that discrimination was the sole reason for discharge.[57] "[T]he plaintiff's sex need not be the sole or primary cause of the employer's adverse action."[58] Rather, there is liability when forbidden bias is part of a mixture of causes.[59]

The multiple but-for's standard is consistent with current psychological models, which show that workplace bias often occurs when non-discriminatory reasons justifying the decision are mixed

53. *See id*. at 1742 ("Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing 'because of sex' if the employer would have tolerated the same allegiance in a male employee").

54. *See id* (illustrating an example in which multiple, independent but-for causes constitute unlawful gender discrimination).

55. *See id.* at 1740–41, 1743 (reasoning that it is unlawful to subject an individual to sex discrimination, even if the employer treats female employees well, in general).

56. *See id.* at 1743 (noting that it is illegal for an employer to engage in a practice of terminating women with young children while retaining men with young children); *see also id.* at 1745 (explaining that where sex is one but-for cause of an employer's action, it is illegal even if sex is not "the only factor, or maybe even the main factor").

57. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (highlighting that under Title VII's "because of" language, plaintiff need only prove discrimination was "but for" cause as opposed to "sole" cause); *see* Lipchitz v. Raytheon Co., 751 N.E. 2d 360, 371 n.19 (Mass. 2001) (explaining that plaintiffs need not prove that discrimination sole cause of the action, but merely the "but for" cause); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 n.7 (1989) (plurality) (stating that in Title VII, "the words "because of" do not mean "'*solely* because of'"); *see also* Dartt v. Browning-Ferris Indus., 691 N.E. 2d 526, 531–33 (Mass. 1998) (rejecting a requirement that the plaintiff must prove at the prima facie stage that he had been discriminated against "solely because of a handicap").

58. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020).

59. *See id.* at 1742 ("[R]eframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability.").

with bias.[60] In one study, well-meaning study participants took part in simulated job selection processes involving Black and white candidates.[61] Where the choice for the best candidate was clear, no discrimination occurred.[62] However, where the candidates' qualifications were marginal, and a candidates' non-selection could be justified by legitimate criteria, Black candidates received significantly weaker recommendations than similarly credentialed white candidates.[63] Discrimination occurred where choices were difficult, and where valid criteria other than race were considered.[64] The study was conducted again ten years later, with the same results.[65]

Enlightened courts have long recognized that discrimination often occurs where legitimate considerations combine with illegitimate ones.[66] "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate

60. *See* Hart, *supra* note 22, at 746–47, 760 (2005) ("[M]any people who explicitly support egalitarian principles and believe themselves to be non-prejudiced also unconsciously harbor negative feelings and beliefs about [B]lacks and other historically disadvantaged groups").

61. *See id.* at 748 (noting that the job candidates ranged along a spectrum from unqualified to very qualified and included both Black and white applicants).

62. *See id*. (showing that the participants made unbiased choices when Black candidates were either plainly qualified or plainly unqualified).

63. *See id.* at 748, 760–61 (observing that race became a factor in decision-making where candidates' qualifications were marginal).

64. *See id.* at 748 ("But when these participants were presented with a marginally qualified Black candidate, they gave that candidate significantly weaker recommendations than they gave a comparably qualified white candidate").

65. *See id*. at 748 (the study was conducted in 1989 and in 1999 with similar results).

66. *See* Woods v. City of Greensboro, 855 F.3d 639, 651–52 (4th Cir. 2017), *cert. denied sub nom.* City of Greensboro v. BNT Advert. Agency, LLC, 138 S. Ct. 558, 651–52 (2017) (explaining that discrimination often takes place based on nuanced decisions, in particular, factual contexts, which may be supported with legitimate-sounding explanations, and that a biased employer will not necessarily discriminate consistently against every woman under all circumstances).

considerations."[67] Chapter 151B is the same.[68] As will be shown, the disprove-all-reasons test completely ignores the reality that decisions are often based on the confluence of legal and illegal motives. After *Bostock*, the disprove-all-reasons test should be extinct.

III. Pretext is Circumstantial Evidence of Discrimination

While proof of pretext is not required in every case,[69] it is a type of circumstantial evidence that supports a finding of discrimination.[70] An employer's explanation for a discharge is pretextual if it was not the real reason.[71] Pretext is established

67. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 252, 258 (1989) (plurality) (finding that discrimination was properly identified even though the plaintiff's interpersonal problems were a legitimate concern).

68. *See* Chief Justice for Admin. & Mgmt. of the Trial Court v. Mass. Comm'n Against Discrimination, 791 N.E.2d 316, 322 ("Even when nondiscriminatory reasons play some role in a decision not to hire a particular applicant, that decision may still be unlawful if discriminatory animus was a 'material and important' ingredient' in the decision-making calculus."). *But see* Doull v. Foster, 163 N.E.3d 976, 988 (Mass. 2021) (noting that the SJC has rejected the requirement of showing that a factor is a "material and important ingredient," as that overstates the but-for requirement).

69. *See Price Waterhouse*, 490 U.S. at 247, 257–58 (plurality) (showing that pretext is not required in a mixed motives case, especially where an employer is motivated out of stereotype, as there is no need to prove that the articulated reason was untrue); *see also* Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1240 (11th Cir. 2016) (noting that pretext is not required in mixed motive case); *see also* Holcomb v. Iona Coll., 521 F.3d 130, 141–42 (2d Cir. 2008) ("[A] plaintiff who . . . claims that the employer acted with mixed motives is not *required* to prove that the employer's stated reason was a pretext."); *see also* Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1086 (Mass. 2000) ("[T]he plaintiff is not limited to the falsity of the employer's articulated reasons in proving discrimination.").

70. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (proving that the defendant's explanation is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination).

71. *See id*. at 153 (noting that the district court correctly instructed the jury that to show that the employer's explanation was a pretext for discrimination, the Plaintiff must demonstrate that the stated reasons were not the real reasons for the discharge); *see also* Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 27 n.2 (permitting employees to prove discrimination by providing evidence that their employers gave a "false reason" for a termination, which the court defines as "not

when the trier of fact disbelieves the reasons put forward by the defendant.[72] In other words, pretext is shown where "the employer's proffered explanation is unworthy of credence," or where the evidence is sufficient "to reject the employer's explanation."[73] Even when a criticism of an employee is true, pretext is established when it did not actual motivate the termination.[74]

Circumstantial evidence is probative in discrimination cases, and its persuasive value can be greater than direct evidence.[75] Pretext can be "quite persuasive" circumstantial evidence, as it constitutes "affirmative evidence of guilt."[76] "Resort to a pretextual explanation is like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."[77]

Given that circumstantial evidence can support criminal convictions, it is therefore more than adequate to sustain the lesser burden borne by the plaintiff in a civil matter.[78] And it is clear that

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the real reason for terminating an individual's employment, regardless of whether the false reason is factually accurate").

72. *See Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

73. *Id.* at 143, 149 (quoting *Texas Department of Community Affairs v. Burdine*).

74. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 673 n.2 (2016) (reasoning that a factually accurate criticism of the plaintiff may not be the true reason for discharge); Futrell v. J.I Case, 38 F.3d 342, 349 (7th Cir. 1994) ("[E]mployer's proffered explanation for a discharge does not prevail simply because it contains a true factual predicate").

75. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (recognizing that where a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination").

76. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (stating that a factfinder is entitled to consider a party's dishonesty about material facts as "affirmative evidence of guilt").

77. Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1069 (3d Cir. 1996).

78. *See Desert Palace, Inc.*, 539 U.S. at 100 ("The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.").

analogues to pretext evidence can help secure criminal convictions, including evidence of consciousness of guilt, such as false statements to police, a false alibi or providing a false identification of oneself.[79]

Therefore, a "pretextual explanation naturally gives rise to an inference of discriminatory intent."[80] Pretext gains further evidentiary potency from the fact that the employer has exclusive access to the reasons for discharge, and when those reasons are untrue, its lack of veracity is highly suspicious.[81]

Pretext plays a central role in the *McDonnell Douglas*[82] framework, which is commonly applied in discrimination cases relying on circumstantial evidence.[83] While the *McDonnell Douglas* test is not the only way for plaintiffs to prove discrimination,[84] the framework allows plaintiffs to prove discrimination by producing only a prima facie case and proof of pretext.[85] No direct evidence, or additional evidence linking the termination to the plaintiff's protected class status, is required.[86]

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79. *See* Commonwealth v. Rojas, 447 N.E.2d 4, 6 (Mass. 1983) ("Added to these facts are the defendant's statements to the police that the jury could reasonably infer were false, his flight, and his attempt to conceal his identity when arrested in Florida.").

80. *See* Snyder v. Louisiana, 552 U.S. 472, 484–85 (2008) (considering discrimination in jury selection); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993) (noting that pretext "often considerably assists" a plaintiff in supporting a discrimination claim); *Desert Palace, Inc.*, 539 U.S. at 99–100 (acknowledging the "utility" of pretext evidence).

81. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

82. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that the employee must be afforded a fair opportunity to show that the employer's stated reason for the employee's rejection was in fact pretext).

83. *See id.* (same).

84. Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009) (declining to analyze a disparate treatment claim using the *McDonnell Douglas* framework).

85. *See Reeves*, 530 U.S. at 146–47 (explaining that to show discrimination, an employee may proffer a prima facie case and show that the employment decision was pretextual); *see* Lipchitz v. Raytheon Co., 751 N.E.2d 360, 367–68 (Mass. 2001) (construing Massachusetts law, Chapter 151B).

86. *See Reeves*, 530 U.S. at 146–47; Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 50 N.E.2d 778, 794 (Mass. 2016) (asserting that evidence

Under *McDonnell Douglas*, the prima facie burden on the plaintiff is not onerous.[87] An example of a prima facie case is one in which: (1) the plaintiff was in a protected class (e.g., female); (2) was qualified; (3) was fired; and (4) was replaced. The prima facie case is a "small showing," and one "easily made."[88]

After satisfying the prima facie requirement, the burden shifts to the employer to articulate one or more legitimate, non-discriminatory reasons for the adverse action.[89] If the employer does so, the plaintiff must provide evidence showing that the employer's reason is pretextual and that discrimination occurred.[90] However, the same evidence that shows pretext, can by itself, demonstrate discrimination.[91] "[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[92]

To demonstrate discrimination, there is no requirement that evidence of pretext be directly linked to the plaintiff's protected

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of pretext may prove discrimination, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory").

87. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

88. *See* Sullivan v. Liberty Mut. Ins. Co., 825 N.E.2d 522, 534 (Mass. 2005); Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003); *see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the prima facie burden does not equate to the ultimate burden of proof to demonstrate discrimination); *see* Sch. Comm. of Boston v. Lab. Rels. Commn, 664 N.E.2d 455, 458 n.8 (Mass. App. Ct. 1996) (explaining that the prima facie case is established when the evidence "barely preponderates toward a conclusion that discrimination has occurred") (internal citations omitted).

89. *See Burdine*, 450 U.S. at 254 (describing the burden of the employer).

90. *See id.* at 256 ("[T]he opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.").

91. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (stating that the factfinder can infer intentional discrimination occurred).

92. *Id.; see* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 n.4 (1993) (explaining that once pretext is shown, no additional proof is required to raise a reasonable inference of discrimination); Thomas v. Eastman Kodak Co., 183 F.3d 38, 57–58 (1st Cir. 1999) (reasoning that the same evidence that shows that the employer's articulated reason is false may also satisfy the burden to show that a true reason is discrimination); Lipchitz v. Raytheon Co., 751 N.E.2d 360, 367 (Mass. 2001) (explaining that proof of discrimination is not required beyond showing pretext, even where evidence of pretext does not directly touch upon the plaintiff's protected class).

characteristic.[93] The persuasive power of pretext is not dependent on whether it specifically focuses on discriminatory animus.[94] Indeed, the Supreme Court has indicated that "effective cross-examination of the defendant will suffice" to establish pretext.[95]

93. *See Reeves*, 530 U.S. at 144–47 (explaining that pretext is shown where plaintiff was blamed for things that were not his fault); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 50 N.E.2d 778, 794 (Mass. 2016) (reasoning that evidence of pretext may prove discrimination, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory"); Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1st Cir. 1999) (holding that that the district court mischaracterized the need to show a connection between the pretext and the plaintiff's specific class); *see* Bulwer v. Mount Auburn Hosp., 46 N.E.3d 24, 33 (Mass. 2016) (requiring proof of pretext to also show that the pretext conceals a discriminatory purpose "overstates the plaintiff's burden").

94. *See Reeves*, 530 U.S. at 146, 149 (rejecting the lower court's determination that additional age-specific evidence was required, in addition to proof of pretext);

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

Id. at 147; *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (reasoning that a prima facie case and proof of pretext can support an inference of discrimination).

95. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255 n.10 (1981).

Given that a modest prima facie case plus pretext are, by themselves, generally sufficient to prove discrimination,[96] it is apparent that pretext is potent evidence of discrimination.[97]

IV. Split of Authority on Disprove-All-Reasons

Prior to *Bostock* and its description of multiple "but-for" reasons, a substantial number of jurisdictions required employees to disprove *all* the employer's reasons before pretext evidence could support an inference of discrimination.[98] One case asserted that sometimes when an employer offers "several independent reasons for the challenged action . . . the employee must cast doubt on each reason to overcome summary judgment."[99] Another case asserted that "[w]here multiple reasons are advanced, the plaintiff must show that each reason was a pretext."[100] Other jurisdictions

96. *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 57–58 (1st Cir. 1999) (finding that the district court mischaracterized the plaintiff's burden when requiring the plaintiff to submit evidence in addition to pretext); DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008) (asserting that pretext, by itself, can be sufficient to prove discrimination and it is erroneous for courts to require that plaintiffs produce direct evidence to satisfy the *McDonnell Douglas* inquiry, which was designed for cases lacking direct evidence); Rodriguez v. SmithKline Beecham, 224 F.3d 1, 8 n.13 (1st Cir. 2000) (holding that the district court erred by imposing a pretext-plus standard); Lestage v. Coloplast Corp., 982 F.3d 37, 48 (1st Cir. 2020) (finding that liability was demonstrated based on a showing of pretext); *but see* Casamento v. Mass. Bay Transp. Auth., 550 F.3d 163, 165 (1st Cir. 2008).

> Nor does it furnish evidence of gender discrimination to assume (as the district judge admittedly did) that the MBTA's explanation could be regarded as "pretext" *if* Schlueter were now occupying the posted job. Possibly in some contexts a showing of a false explanation can add weight to a discrimination claim supported by evidence; but it is hard to imagine such a case where there is no evidence of a discriminatory motive in the first place; and, if an exception to this generalization can possibly be imagined, it is certainly not this case.

97. *See Thomas*, 183 F.3d at 42 (reasoning that evidence of pretext can be used to show discrimination).

98. *See* DeJesus v. WP Co., 841 F.3d 527, 533 (D.C. Cir. 2016) (requiring employees to disprove all of the employer's reasons).

99. *Id*.

100. Big Apple Tire, Inc. v. Telesector Res. Grp., 476 F. Supp. 2d 314, 329 n.124 (S.D.N.Y. 2007).

likewise required plaintiffs to disprove all the employer's reasons.[101]

In contrast, other courts allow plaintiffs to satisfy their burden with proof that just one of the employer's reasons is pretextual.[102] The Eighth Circuit has stated:

> [Plaintiff] must produce sufficient circumstantial evidence of illegal discrimination under the *McDonnell Douglas* paradigm—by presenting a prima facie case of intentional discrimination plus sufficient evidence that **one or more** of the [Defendant's] proffered nondiscriminatory reasons is a pretext for unlawful discrimination.[103]

Elsewhere, the Eighth Circuit has directly rejected the notion that the plaintiff must rebut all of the employer's reasons.[104]

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101. *See* Kaufmann v. GMAC Mortg., 229 Fed. App'x 164, 169 (3d Cir. 2007) (holding that the plaintiff must present evidence which suggests that each reason offered by the employer for the adverse action "was a fabrication"); Monk v. Potter, 723 F. Supp. 2d 860, 881 (E.D. Va. 2010) (stating that the plaintiff "must instead meet each reason head on and rebut such reason"); Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 233 (5th Cir. 2015) ("An employee seeking to show pretext must rebut each discrete reason proffered by the employer."); Idemudia v. J.P. Morgan Chase, 434 F. App'x 495, 505 n.7 (6th Cir. 2011) ("When a defendant presents multiple legitimate, nondiscriminatory reasons for the [adverse] action, however, the plaintiff must demonstrate that each independently sufficient reason is a pretext for illegal discrimination."); Wolf v. Buss (Am.) Inc., 77 F.3d 914, 934 (7th Cir. 1996) ("[Plaintiff] has ultimately failed to carry his burden of showing pretext because the four reasons which he has successfully called into question are neither 'so intertwined,' nor 'so fishy' as to call the remaining two reasons into doubt."); Chapman v. AI Transp., 229 F.3d 1012, 1024–25 (11th Cir. 2000) ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment.").

102. *See* Griffith v. Des Moines, 387 F.3d 733, 736–37 (8th Cir. 2004) (holding that a plaintiff need only prove that one of the reasons is pretextual).

103. *Id.* (emphasis added).

104. *See* Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1021 (8th Cir. 2005) (rejecting the Bank's argument that the employee must rebut every single claim); EEOC v. HBE Corp., 135 F.3d 543, 555 (8th Cir. 1998) ("[A] claimant need not disprove all possible reasons for his discharge.").

In *Lipchitz v. Raytheon Co.*,[105] the Massachusetts Supreme Judicial Court recognized that the plaintiff need not prove that discrimination was the "only" cause, stating that "[n]othing is the result of a single cause in fact."[106] "The but-for test does not say otherwise."[107] For that reason, the court concluded that the plaintiff "was not required to disprove every reason articulated by the defendant or suggested in the evidence."[108] The court went on to clarify that a single pretextual reason is sufficient to surmount the ultimate burden:

> [Lipchitz] could meet her burden by persuading the fact finder that it was more likely than not that **at least one reason was false**. [citation omitted]. From such proof the fact finder could infer that Raytheon's discriminatory animus was the determinative cause of the adverse employment decision.[109]

A substantial array of other cases reject disprove-all-reasons.[110] While the First Circuit has acknowledged that partial

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105. *See* Lipchitz v. Raytheon Co., 751 N.E.2d 360, 372 (Mass. 2001) (holding that the employee was not required to disprove every reason given by the employer).

106. *Id.* at 371 n.19.

107. *Id.* (quoting D.B. Dobbs, Torts, § 168, at 410 (2001)).

108. *Id.* at 372.

109. *Id.* at 372 (emphasis added).

110. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1298–99 (D.C. Cir. 1998) (holding that where an objective reason has been shown to be pretextual, a jury many then find that a subjective reason was pretextual); Holtz v. Rockefeller & Co., 258 F.3d 62, 78, 81 (2d Cir. 2001).

> To defeat summary judgment within the *McDonnell Douglas* framework, moreover, the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors . . . As noted, the plaintiff may instead rely on evidence—circumstantial or otherwise—showing that "'an impermissible reason was 'a motivating factor,' without proving that the employer's proffered explanation" played no role in its conduct.

See also Naumovski v. Norris, 934 F.3d 200, 214 (2d Cir. 2019) (asserting that the burden to prove pretext under *McDonnell Douglas* does not include the requirement to show that discrimination was the exclusive reason); Asmo v. Keane, Inc., 471 F.3d 588, 596 (6th Cir. 2006) (explaining that where an employer argues that various factors, in combination, caused the discharge, the plaintiff "need not show that all of the factors articulated by [the employer] are false but

pretext may be used in cases alleging mixed motive, it has used disprove-all-reasons when the plaintiff alleges that bias was the employer's sole motive.[111]

Still other cases reject disprove-all-reasons in particular circumstances, such as when:

> [1] the [employer's] reasons are so intertwined that a showing of pretext as to one raises doubts about the validity of another; [2] the pretextual character of one reason is so "fishy" or "suspicious" that a jury could find the employer lacks all credibility; [3] the employer offers a plethora of reasons and the plaintiff is able to challenge a substantial number of them; [4] the plaintiff discredits the employer's objective explanations, leaving only subjective reasons; or [5] the employer failed to argue that each factor would have independently resulted in the termination. [internal citations omitted].[112]

However, after *Bostock*, even these nuanced approaches do not go far enough. As will be shown, the best, most logical approach, permits the plaintiff to succeed based on proof of a single pretext, in conformity with the *Griffin* and *Lipchitz* cases.[113]

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rather, only that some of the factors are false and a mere pretext for discrimination").

111. *See* Sher v. U.S. Dep't of Veterans Affs., 488 F.3d at 507–08 n.22 (1st Cir. 2007) (explaining that Sher could have presented a mixed motive theory to avoid having to disprove all the employer's reasons).

112. Jaramillo v. Colo. Jud. Dep't, 427 F.3d 1303, 1310 (10th Cir. 2005) ("In some cases, however, a successful attack on part of the employer's legitimate, non-discriminatory explanation is enough to survive summary judgment even if one or more of the proffered reasons has not been discredited."); *see also* Saley v. Caney Fork, LLC, 886 F. Supp. 2d 837, 857 (M.D. Tenn. 2012) (explaining that the plaintiff does not have "to discredit every legitimate reason proffered by [the] Defendant").

113. *See* Griffith v. Des Moines, 387 F.3d 733, 736–37 (8th Cir. 2004) (explaining that proof that one or more of the employer's reasons is pretextual is sufficient to prevail under the *McDonnell Douglas* paradigm); Lipchitz v. Raytheon Co., 751 N.E.2d 360, 366 (2001) (holding that the plaintiff must only show that "at least one of Raytheon's reasons was false and from this it properly could have inferred that she was not promoted because of unlawful discrimination").

V. Disprove-All-Reasons Ignores the Persuasive Power of Pretext Evidence

According to the disprove-all-reasons jurisdictions, the probative value of pretext simply goes away if the employer merely articulates a second reason. However, the probative value of evidence does not just evaporate.[114] That is like ignoring the fact that a criminal defendant has lied about one alibi, so long as the alleged criminal offers a second one.[115] That would be an absurd result in the criminal context but has become routine in employment discrimination cases.[116]

The cases adopting disprove-all-reasons often ignore the power of pretext to generate an inference of discrimination.[117] Many cases stand for the idea that it is proper to conclude that pretext is a cover for discrimination.[118] And if pretext evidence is "quite persuasive" and constitutes "affirmative evidence of guilt,"[119] then it should remain "quite persuasive" even when the employer considered another factor.[120] There is no good explanation for why "affirmative evidence of guilt" vanishes with the articulation of a second, third, or fourth reason.

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114. *See* Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL'Y 177, 179, 184 (2001) (explaining that the Fifth Circuit was incorrect when asserting that the "plaintiff's prima facie case loses all of its probative force once the defendant introduces its rebuttal evidence").

115. *See* Commonwealth v. Connors, 185 N.E.2d 629, 631 (Mass. 1962) (finding that the defendant's false alibi could lead a jury to doubt the veracity of a second alibi).

116. *Compare Connors*, 185 N.E.2d at 631 (reasoning that a suspicion raised by initial false alibi not dispelled with presentation of second alibi), *with* Katz v. Organogenesis, Inc., No. 17-cv-11595-ADB, 2019 U.S. Dist. Lexis 160462, at *22–24 (D. Mass. Sept. 20, 2019) (reasoning that a plaintiff must disprove all the employer's reasons).

117. *See* Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 233 (5th Cir. 2015) ("An employee seeking to show pretext must rebut each discrete reason proffered by the employer.").

118. *See e.g.,* Snyder v. Louisiana, 552 U.S. 472, 484–86 (2008) (explaining that pretext can lead to an inference of discrimination).

119. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

120. *Id*. at 147.

"Disprove-all-reasons" is inconsistent with the nature of circumstantial evidence, which is supposed to be reviewed, in its totality, to determine whether it creates a "mosaic" that supports the finding of bias.[121] It is illogical and formulaic to hold that one pretext cannot be part of that mosaic and cannot be considered either alone or in tandem with other types of circumstantial evidence, unless there is a blanket showing of pretext across all explanations. The assertion that pretext evidence is probative only when every reason is successfully challenged is a "*per se* rule," which is inappropriate for weighing the value of circumstantial evidence.[122]

Moreover, when one or more of the employer's assertions is false, a jury might consider that falsehood to cast doubt on the employer's remaining assertions.[123] The Third Circuit has stated:

> We do not hold that, to avoid summary judgment, the plaintiff must cast doubt on each proffered reason in a vacuum. *If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder.* That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available.[124]

The principle of *falsus in uno, falsus in omnibus*—falsity in one, falsity in all—should give the jury the option to disbelieve

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121. *See* Burns v. Johnson, 829 F.3d 1, 16 (1st Cir. 2016) (explaining the mosaic approach).

122. *See* Sprint/United Mgmt. v. Mendelsohn, 552 U.S 379, 387–88 (2008) (instructing the district court to avoid "per se" rules regarding the admissibility of circumstantial evidence of bias).

123. Fuentes v. Perskie, 32 F.3d 759, 764 n.7 (3d Cir. 1994) (explaining that the employee, after showing one of the employer's reasons is false, can show that the employer's other arguments should be doubted).

124. *Id.* (emphasis added); *see also* Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1126 (10th Cir. 2005) ("[W]e recognize that when the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lack credibility. Under those circumstances the jury need not believe the employer's remaining reasons.") (internal quotations and citations omitted).

other reasons.[125] However, disprove-all-reasons assumes that a jury has no basis for doubting reasons one and two, when they find that reasons three, four and five untrue. Disprove-all-reasons provides an employer incentive to offer a slew of non-discriminatory reasons, with the hope that at least one percent of those reasons cannot be challenged directly.[126]

When there is proof of pretext, it should be assumed that the pretext, and the inferences it generates, replaces the causal "space" of the disproved explanation.[127] An employer articulates a reason for discharge for the very purpose of asserting that the reason made a difference in its decision.[128] If that reason is shown to be false, then, naturally, the pretext inhabits a difference-making portion of the actual motive(s) for discharge.[129] There is simply no reason why partial pretext cannot be probative of discrimination.[130] Consequently, the showing of one pretext must be assumed to support a finding that discrimination was a but-for reason.[131]

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125. *See* Logue v. Int'l Rehab. Assocs., 683 F. Supp. 518, 518 (W.D. Pa. 1988), *aff'd mem.*, 866 F.2d 1410 (3d Cir. 1988) (explaining that the court can follow the *falsus in uno, falsus in omnibus* approach in weighing evidence of pretext).

126. *See* Chapman v. AI Transp., 229 F.3d 1012, 1051 (11th Cir. 2000) (Birch, J., concurring in part) (explaining the incentive structure this framework creates).

127. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981) ("[The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.").

128. *See id.* at 255 (stating that after the prima facie case is established, the employer must clearly set forth, supported by admissible evidence, its legitimate business reasons for the adverse action).

129. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (indicating that pretext evidence may be used in cases involving multiple motives, to demonstrate that just one of those motives was discriminatory).

130. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 855, 857 (9th Cir. 2002), *aff'd on other grounds*, 539 U.S. 90 (2003) ("Although *McDonnell Douglas* may be used where a single motive is at issue . . . it also might be invoked in cases . . . in which mixed motives are at issue.").

131. *See* Logue v. Int'l Rehab. Assocs., 683 F. Supp. 518, 520 (W.D. Pa. 1988), *aff'd mem.*, 866 F.2d 1410 (3d Cir. 1988) ("We therefore find that plaintiff's discharge was based on discrimination by reason of her sex.").

VI. Disprove-All-Reasons is Inconsistent with But-For Causation

The partial pretext test is justified by the principle that, under the but-for standard, the plaintiff need not argue that discrimination was the only reason for discharge.[132] Indeed, the plaintiff may even agree that the employer considered other valid factors at the time.[133] So, it makes no sense to require the plaintiff to disprove a reason not in dispute.

Say, for example, an employer has a policy of terminating employees after three unexcused absences. Assume further that an employee was genuinely absent the first two times, but the employer, motivated by sexism, manipulates the records to make it appear that the employee was absent a third time. The employer then fires the employee, claiming the employee was terminated due to three absences. In this scenario, to show that the termination was discriminatory under the but-for test, the employee should be able to challenge only the third absence as pretextual. However, under the disprove-all-reasons test, the employee is required to show that all three absences were pretextual. In this way, disprove-all-reasons is utterly inconsistent with the but-for standard.

Bostock contemplates a situation where the plaintiff agrees that one or more of the employer's reasons was true, but the termination was based in part on discrimination.[134] Human experience and social science demonstrate that multiple but-for causes are commonplace. Disprove-all-reasons is directly inconsistent with the idea that there may be a mixture of legitimate and illegitimate reasons, and should therefore be rejected.

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132. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020) (rejecting the sole-cause standard).

133. *See* 42 U.S.C. § 2000e-2(m) (2018) ("[A]n 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.").

134. *See Bostock*, 140 S. Ct. at 1741 (explaining that a violation of Title VII occurs when an "employer fires an individual in part because of sex.").

VII. Disprove-All-Reasons Improperly Imposes a Sole Causation Standard

The disprove-all-reasons approach requires the plaintiff to prove that discrimination is the sole reason for discharge—a standard never properly applied to Title VII or Chapter 151B.[135]

At the outset of a case, the employer has an infinite number of potential reasons for the discharge.[136] However, the plaintiff's prima facie case immediately challenges the most common non-discriminatory reasons for the employer's action, including lack of qualification, lack of competence and lack of job availability.[137] In response to the prima facie case, the employer must specify its reasons, and support those reasons with evidence.[138] Once the employer responds, the *McDonnell Douglas* framework has succeeded in reducing the number of potential reasons from infinite to one or a few.[139]

Assume at this point that the employer has articulated three reasons. If the plaintiff is required to disprove all three, the

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135. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 252, 258 (plurality opinion) (holding that discrimination was properly found even though the plaintiff's interpersonal problems were a legitimate concern); Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Mass. Comm'n Against Discrimination, 791 N.E.2d 316, 322 (Mass. 2003) ("[E]ven when nondiscriminatory reasons play some role in a decision not to hire a particular applicant, that decision may still be unlawful if discriminatory animus was a 'material and important ingredient' in the decision-making calculus.").

136. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire.").

137. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981) ("The prima facie case serves an important function in litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."); Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1084 (Mass. 2000) (explaining that the plaintiff's prima facie case eliminates "lack of competence and lack of job availability" as reasons for the rejection).

138. *See Burdine*, 450 U.S. at 254 (explaining that the defendant must produce evidence that it rejected the plaintiff based on a legitimate, nondiscriminatory reason).

139. *See id*. at 255 n.8 (stating that the purpose of the *McDonnell Douglas* framework is to "sharpen the inquiry").

plaintiff is being required to eliminate every single one of the employer's infinite possible reasons, leaving discrimination as the only reason remaining.[140] Consequently, the disprove-all-reasons standard is equivalent to the "sole" standard—an erroneously burdensome requirement, given that the sole standard does not apply to Title VII or Chapter 151B.[141]

Some jurisdictions that have accepted disprove-all-reasons forthrightly refer to it as the standard for "single motive" cases.[142] However, there is a profound inconsistency when a court requires the plaintiff to surmount a "sole" motive standard, though the statutory burden is much more lenient.[143]

The troubling implication here is that some circumstantial evidence of bias (partial pretext) is deemed irrelevant in cases involving but-for causation.[144] The other side of the same troubling coin is that the plaintiffs' causation burden of proof becomes far more onerous to the extent they seek to rely on pretext as evidence.[145] Such a situation is untenable, regardless of how the issue is framed.[146] As will be shown in the following section, the

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140. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 232 (5th Cir. 2015) ("An employee seeking to show pretext must rebut each discrete reason proffered by the employee.").

141. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020) ("[T]he plaintiff's sex need not be the sole or primary cause of the employer's adverse action."); Lipchitz v. Raytheon Co., 751 N.E.2d 360, 371 n.19 (Mass. 2001) (stating that discriminatory animus need not be "the only cause").

142. *See* Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016) (explaining that the *McDonnell Douglas* framework "is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for the adverse action.").

143. *See* Burrage v. United States, 571 U.S. 204, 211 (2014) (explaining that under but-for standard, the unlawful reason need only be the "straw that broke the camel's back").

144. *Contra* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009) ("A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the '"but-for"' cause of the challenged employer decision.").

145. *See* Chapman v. AI Transp., 229 F.3d 1012, 1049 (11th Cir. 2000) (Birch, J., concurring in part) (explaining that requiring the plaintiff to show pretext for all proffered reasons is illogical in some cases).

146. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014–15 (2020) ("[A] plaintiff bears the burden of showing that race was a

Supreme Court has clearly rejected this cramped notion that pretext is irrelevant to cases involving multiple motives.[147]

VIII. Disprove-All-Reasons is Contrary to Desert Palace

The disprove-all-reasons test is contrary to the Supreme Court's decision in *Desert Palace, Inc. v. Costa*.[148] That case examined the "motivating factor" amendment to Title VII, which permits recovery of damages if unlawful bias was a "but-for" cause, even if other lawful motives were also considered by the employer.[149] Under this amendment, the plaintiff has the initial burden of proving that discrimination was a motivating factor in the employer's decision.[150] In the underlying case, the plaintiff, Costa, sought to satisfy the initial burden with circumstantial evidence, including pretext evidence.[151] The Supreme Court accepted the case to determine whether the plaintiff was required to use direct evidence to satisfy that initial burden.[152]

In resolving that question, the Supreme Court acknowledged that circumstantial evidence is quite useful in discrimination cases and then singled out pretext evidence as a type of "probative" circumstantial evidence.[153] The Court "recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence'" is "one form of *circumstantial evidence* that

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but-for cause of its injury . . . [A]s a lawsuit progresses . . . the burden itself remains constant.").

147. *See generally* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

148. *Id.*

149. *See* 42 U.S.C. § 2000e-2(m) (2018); 42 U.S.C. § 2000e-5(g)(2)(B) (2018).

150. *See* 42 U.S.C. § 2000e-2(m).

151. *See Desert Palace, Inc.*, 539 U.S. at 96 (listing the evidence presented by plaintiff).

152. *See id.* at 92 ("The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII"); Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1236 n.5 (11th Cir. 2016) ("[D]irect evidence is evidence proving, without inference, that illegal reasons motivated an adverse employment action.").

153. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003) ("The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'").

is probative of intentional discrimination."[154] The Court then concluded that circumstantial evidence alone will satisfy the plaintiff's burden in mixed motive cases, because circumstantial evidence is not only sufficient, but also it can be more persuasive than direct evidence.[155]

Given that the Court in *Desert Palace* identified proof of pretext as a type of probative circumstantial evidence, and further announced that circumstantial evidence alone is adequate to prove the existence of a discriminatory motivating factor, the unavoidable implication is that partial pretext can be used and be persuasive in cases where bias has combined with other, legitimate motives.

IX. The Historical Case for Disprove-All-Reasons

Courts that apply the disprove-all-reasons standard generally do so without explaining the reasons for the rule, and without harmonizing the rule with the notion of but-for causation or the holding of *Desert Palace*.[156]

Proponents of disprove-all-reasons claim to find support for their position in *Burdine's* description of the third ("pretext") stage of the *McDonnell Douglas* framework: that it provides the plaintiff "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[157] This statement at first blush appears to indicate that the plaintiff must prove untrue all the "reasons" of the defendant.[158]

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154. *Id.* (emphasis added).

155. *See id.* at 92, 100 (holding that direct evidence is not required).

156. *See, e.g.*, Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 233 (5th Cir. 2015) (failing to explain or justify the application of the disprove-all-reasons rule).

157. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

158. *See id.* at 256 ("The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.").

However, *Burdine* does not actually say that. Instead, *Burdine* is merely describing the third stage as an occasion, an "opportunity," in which the plaintiff is invited to attack the employer's reasons.[159] *Burdine* does not demand that all the reasons be disproved, nor does it claim that partial pretext lacks probative value.[160]

Moreover, the *Burdine* language was tailored to the situation directly before it—where the plaintiff was alleging a single, discriminatory motive.[161] Thus, the *Burdine* Court did not have cause to apply *McDonnell Douglas* to a case involving a mix of valid and unlawful reasons, and did not purport to adopt a framework for cases that could include such a combination. Indeed, even if *Burdine* was describing a framework for a common scenario, that does not mean that such framework applies to every case.[162] This dictum is weak fodder to support disprove-all-reasons, and after *Bostock*, it is no fodder at all.

When explaining its adoption of disprove-all-reasons, the Eleventh Circuit, in *Quigg v. Thomas Cnty Sch. Dist.*, attempted to distinguish cases involving a mixture of legal and illegal motives from "single-motive" claims, in which the only motive is bias.[163] *Quigg* then posited that the *McDonnell Douglas* framework, and the *Burdine* pretext analysis, were developed in the "single-

159. *Id.*

160. *See id.* (pointing to the plaintiff's "full and fair opportunity" to demonstrate pretext).

161. *See* NLRB v. Transp. Management Corp., 462 U.S. 393, 400 n.5 (1983) (describing *Burdine* as involving the situation in which there are "either illegal or legal motives, but not both."); Price Waterhouse v. Hopkins, 490 U.S. 228, 246–47 (plurality opinion) (rejecting the *Burdine* framework for purposes of mixed motive analysis, because *Burdine* addressed a single issue case, and was directed to discovering whether the employer's articulated reason was "*the* true reason . . . for the decision—which was the question asked by *Burdine*.").

162. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 n.6 (1976) (noting that the *McDonnell Douglas* inquiry represents a flexible set of proofs, and the fact that the Court has identified a version of the framework to be applicable in a common scenario does not mean that such framework should be applied to every other discrimination case).

163. Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1235–36, 1235 n.4 (11th Cir. 2016).

motive" context.[164] The *Quigg* decision goes on to state that *McDonnell Douglas* is inapplicable to cases alleging a mixture of motives, "because the [*McDonnell Douglas*] framework is predicated on proof of a single, 'true reason' for an adverse action."[165] The Court argued that *McDonnell Douglas* was designed to narrow all the possible reasons down to a single discriminatory one.[166]

The Eleventh Circuit then proceeded to associate single-motive claims with the idea of proving pretext, further narrowing the concept to the extent that pretext was said to be relevant only when the plaintiff alleges bias as a single motive.[167] "[S]ingle-motive claims—which are also known as '"pretext"' claims—require a showing that bias was the true reason for the adverse action."[168] From this set of assumptions, the Eleventh Circuit appears to conclude that as pretext is part of the *McDonnell Douglas* analysis, and because the *McDonnell Douglas* analysis applies to single-motive cases, that proof of pretext is irrelevant to mixed-motive cases.[169] Even worse, by this line of reasoning, to the extent that a plaintiff introduces pretext evidence, it could be deemed an admission that the plaintiff regards the case to be alleging a single motive.

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164. *See id.* at 1236–37 ("*McDonnell Douglas* is inappropriate for evaluating mixed-motive claims").

165. *See id.* at 1237 (rejecting the *McDonnell Douglas* framework in mixed motive cases).

166. *See id* (accepting the Sixth Circuit's analysis that "the *McDonnell Douglas* approach is a single-motive framework – its burden-shifting steps are designed to narrow the possible reasons for an adverse employment action, with the goal of identifying whether discriminatory animus was 'the ultimate reason' for the action.").

167. *See id.* at 1235 (explaining the distinction between single motive and mixed motive claims).

168. *Id.* at 1235.

169. *See id.* at 1237–38 (11th Cir. 2016); *see also* Smith v. Vestavia Hills Bd. of Educ., 791 Fed. Appx. 127, 130–31 (11th Cir. 2019) (stating that *McDonnell Douglas* is only for single-motive claims and is not used for evaluating cases involving mixed motives).

The assumptions underlying the Eleventh Circuit's conclusion are incorrect. Pretext evidence is just as relevant to a mixed motive case as it is to a single motive case.[170]

Moreover, it is simply not true that *McDonnell Douglas* was developed for cases involving a single motive.[171] "*McDonnell Douglas* arose in a context where but-for causation was the undisputed test."[172] *McDonnell Douglas* took a broad view of causation, stating that "it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise."[173] It is strange indeed that *McDonnell Douglas*, initially created to address but-for, has instead been twisted into proving only sole motive, which has never been a standard or requirement in Title VII and is inconsistent with its own description of the reach of the statute.

The case of *McDonald v. Santa Fe Trail Transp. Co.*[174] represents an early example of *McDonnell Douglas* being applied where the employer considered both lawful and unlawful factors.[175] In *McDonald* (which is a different case from *McDonnell Douglas*), two white employees and one Black employee were charged with stealing the employer's antifreeze—a crime that the white employees acknowledged.[176] The white employees were fired but the Black employee was retained.[177] The white employees sued,

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170. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003) (identifying pretext evidence as a type of circumstantial evidence that is probative in discrimination cases); Griffith v. City of Des Moines, 387 F.3d 733, 735–36 (8th Cir. 2004) (stating that pretext evidence may permit a jury to determine that unlawful discrimination has occurred).

171. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (noting that Green's termination occurred after Green took part in a "stall-in" designed to tie up access to the employer's plant at a peak traffic hour).

172. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017 (2020).

173. *See McDonnell Douglas*, 411 U.S. at 801 (stating that Congress requires that barriers that promote discrimination be removed).

174. 427 U.S. 273 (1976).

175. *See id.* at 282–83 (plaintiffs were fired after they stole materials from the employer, but they may nevertheless seek damages for race discrimination).

176. *See id.* at 276 (noting that the white plaintiffs and Black comparator were jointly charged with misappropriating 60 cans of antifreeze).

177. *See id.* (firing the two white employees but not firing a similarly situated Black employee).

alleging race discrimination.[178] The case was dismissed by the district court and that dismissal was affirmed by the court of appeals, because there was "no allegation that the plaintiffs were falsely charged."[179] At the Supreme Court, the employer argued that it was entitled to fire the white employees due to their crime.[180] The employer argued that the *McDonnell Douglas* framework was inapplicable, because there was no doubt that the employer considered the plaintiffs' participation in serious misconduct.[181] Indeed, the employer apparently did not terminate all white employees—just the ones that stole—thus showing that the crime was indeed a factor that was considered.

The Supreme Court found the situation to be "indistinguishable from *McDonnell Douglas*," and held that the plaintiffs should have the opportunity to prove that the employer's reason was pretext.[182] In defining "pretext," the Court made it clear that the notion of pretext does not mean that the plaintiff "must show that he would have in any event been rejected or discharged solely on the basis of his race, *without regard to the alleged deficiencies* . . . . [N]o more is required to be shown that that race was a 'but for' cause."[183] In other words, pretext may be used to help prove a case of race discrimination, even though race was only one of a number of but-for causes, and even if the employer also considered or "regarded" legitimate factors other than race.[184] The Court wrote, "We cannot accept [the employer's] argument that the

178. *See id.* (alleging race discrimination when filing EEOC charges).

179. *Id.* at 279.

180. *See id.* at 281 ("Respondents contend that, even though generally applicable to white persons, Title VII affords petitioners no protection in this case, because their dismissal was based upon their commission of a serious criminal offense against their employer.").

181. *See id.* at 283 ("We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime directed against the employer.").

182. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 (1976) (indicating that Title VII does not permit employers to use crime as a pretext for racial discrimination).

183. *Id.* at 282 n.10 (emphasis added).

184. *See id.* (accepting that discriminatory conduct may take place in a context which causes the employer legitimate, independent concern).

principles of *McDonnell Douglas* are inapplicable where the discharge was based, as [the employee's] complaint admitted, on participation in serious misconduct or crime directed against the employer."[185] *Quigg*'s assumption that *McDonnell Douglas* and pretext analysis were developed to apply only to single motive cases is demonstrably false.[186] Therefore, there does not seem to be any strong, logical justification for disprove-all-reasons.[187]

X. The Prima Facie Case Has Probative Effect, Even Though It Does Not Eliminate All Legitimate Reasons

The prima facie case is considered probative of bias, even though it does not eliminate all of the employer's reasons.[188] Likewise, partial pretext should be considered as evidence, although it does not directly eliminate all of the employer's reasons.

The prima facie case remains probative at *McDonnell Douglas*' third stage, even though it tends to eliminate some, but not all of the employer's reasons.[189] This leaves unanswered the perplexing question of why a prima facie case is still considered valuable evidence, while partial pretext is not, even though both eliminate just some of the employer's reasons.

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185. *See id*. at 283.

186. *Compare* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–83, n.10 (1976) *with* Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1237 (11th Cir. 2016) (asserting that the *McDonnell Douglas* framework is only appropriate for use with single-motive claims).

187. *See McDonald*, 427 U.S. at 283 ("The Act prohibits *all* racial discrimination in employment without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination.").

188. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981) (reasoning that a prima facie case eliminates some, but not all nondiscriminatory reasons for an adverse action).

189. *See Reeves*, 530 U.S. at 143; *Burdine*, 450 U.S. at 255 n.10 ("Nonetheless, this [prima facie] evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.").

Some courts that utilize the disprove-all-reasons test find support in the Supreme Court's description of the probative value of the prima facie case in *Furnco Constr. Corp. v. Waters*:[190]

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [citation omitted]. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when 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 only with *some* reason, based his decision on an impermissible consideration.[191]

However, given that the prima facie case only partially eliminates the employer's reasons, the *Furnco* passage cannot be considered to stand for the proposition that the only valid evidence is that which eliminates every reason. Thus, the continued relevance of the prima facie case at the third stage supports the notion of partial pretext.

Furthermore, to the extent that the *Furnco* passage indicates there is a necessity to eliminate "all legitimate reasons," that discussion is off-point, as the case did not consider but-for causation, the consequences when an employer asserts multiple reasons, or the adequacy of the partial-pretext evidence.[192] *Furnco*'s statement is dicta because in that case, no pretext was found, and so the court had no reason to address the validity of partial pretext.[193] The case's off-point discussion is clearly outdated in light of the holdings of *Desert Palace* and *Bostock*.[194]

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190. 438 U.S. 567, 577 (1978) (describing why the *McDonnell Douglas* framework is probative of discrimination).

191. *Id.*

192. *See id.* at 577–78 (noting that "[pretext] evidence might take a variety of forms.").

193. *See id.* (finding no pretext).

194. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (indicating that pretext evidence may be used in support of a mixed motive claim)*; see* Bostock v.

XI. Plaintiffs Should Draft Their Pleadings to Embrace the Concept of Mixed Motive

The First Circuit represents a hybrid position, adopting disprove-all-reasons as a sort of default, but rejecting it if the plaintiff asserts that their claim of discrimination involves a mixture of legitimate and discriminatory factors.[195] However, so many courts are analyzing cases as single-motive, that they seem to be presuming that plaintiffs are alleging a single motive, when there is no reason why a plaintiff would voluntarily accept such a high burden.

Plaintiffs seeking to insulate themselves from disprove-all-reasons should specify in their pleadings that discrimination was a but-for cause of their terminations, and that the employer may have relied on other motives as well.[196] Plaintiffs can expressly indicate in their complaints the possibility that their terminations may have been based on a mixture of unlawful and lawful factors.[197] Plaintiffs may also add a claim under 42 U.S.C. § 2000e-2(m), in addition to a claim under 42 U.S.C. § 2000e-2(a)(1), to emphasize that they are alleging mixed motives.[198] Those seeking to studiously avoid the shifting burdens contemplated by Section 2(m) also have the option of including clarifying language in motions, pretrial memoranda and proposed jury instructions.

Clayton Cnty., 140 S. Ct. 1737 (2020) (stating that there may be multiple but-for causes of an employment decision).

195. *See* Sher v. U.S. Dep't of Veterans Affs., 488 F.3d 489, 507–08 n.22 (2007)("[W]hen an employer offers multiple legitimate, nondiscriminatory reasons for an adverse employment action, a plaintiff generally must offer evidence to counter each reason," but applying this rule because the plaintiff presented her claim as involving a single motive instead of mixed motives); *see also* Kempf v. Hennepin Cnty., 987 F.3d 1192 (8th Cir. 2021) (adopting disprove-all-reasons for the purposes of a particular case, because all parties agreed for this to be the standard).

196. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) (stating that there is no requirement to specify whether a claim is mixed motive in the complaint).

197. *See id.* (same).

198. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-2(a)(1) (2018); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1740 (2020) (asserting that 42 U.S.C. § 2000e-2(m) and 42 U.S.C. § 2000e-2(a)(1) provide parallel remedies).

XII. Conclusion

The law must be applied in a manner that serves its purpose of prohibiting discrimination, even when legitimate factors also contribute to an adverse action, as imposition of an overly strict test facilitates discrimination.

There is a gross inconsistency between the requirement to disprove-all-reasons, which represents a sole standard, and the fact that Title VII is designed to impose liability where there is a confluence of reasons, of which bias is only one. There is also an absence of logic when pretext is understood to generate an inference of unlawful motive and causation, but that inference is held to vanish if the employer asserts just one more reason. Likewise, the assumption that pretext analysis was developed solely for single motive cases lacks sense, when Title VII has never embraced the sole standard.

Partial pretext—proof of a single pretext—should be considered potent circumstantial evidence because the inference of discrimination inhabits the causal gap left by the false reason that the employer asserted. *Desert Palace* invites plaintiffs to submit evidence of pretext to support their mixed motives claims.[199] Disprove-all-reasons is precisely the type of "per se" rule of evidence that the Supreme Court has rejected.[200] Given *Bostock*'s recognition of multiple but-for motives, Courts should re-examine and reject disprove-all-reasons.[201]

199. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003) (finding direct evidence of discrimination is not required to prove employment discrimination in mixed-motive cases under Title VII).

200. *See* Sprint/United Mgmt. v. Mendelsohn, 552 U.S 379, 387–88 (2008) (stating that a "per se" rule limiting introduction of certain types of circumstantial evidence of bias is improper).

201. *See Bostock,* 140 S. Ct. at 1741 (stating that "often events have multiple but-for causes").