Mixed-Motive Cases on Employment Discrimination Law Revisited: A Brief Updated View of the Swamp

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I. INTRODUCTION

In 1973 the Supreme Court enunciated an analytical framework in McDonnell Douglas Corp. v. Green\(^1\) with the purpose of providing plaintiffs in statutory employment discrimination cases\(^2\) a full and fair
opportunity to prove intentional discrimination despite the unavailability of direct evidence.\(^3\) The McDonnell Douglas framework is used primarily in cases litigated under the disparate treatment theory of discrimination\(^4\) and is based upon presumptions and burden-shifting schemes.\(^5\) McDonnell Douglas was the predominant analytical framework for statutory employment discrimination cases until the Supreme Court decided Price Waterhouse v. Hopkins\(^6\) in 1989.

In Price Waterhouse the Court recognized for the first time a new analytical framework for disparate treatment cases. The new analytical model is the mixed-motive case. In a mixed-motive case, the evidence is sufficient to allow the factfinder to conclude, as a matter of fact, that an employer’s employment decision was motivated by both lawful and unlawful reasons.\(^7\) The mixed-motive case is often contrasted with a

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4. The courts have struggled mightily to respond to legislative silence on the meaning of key concepts, such as “discriminate” and “because of,” in many of the laws prohibiting discrimination in employment. In doing so, the Supreme Court has enunciated two theories of discrimination that have dominated most of the employment discrimination law jurisprudence: disparate treatment and disparate impact. Disparate treatment discrimination occurs, for example, when an employer intentionally treats an individual less favorably because of race, color, religion, sex, or national origin. Disparate impact discrimination occurs, for example, when an employer makes employment decisions based upon a facially neutral policy or practice that has a disproportionately adverse impact on the employment opportunities of a protected class, such as blacks or women, and the policy or practice cannot be justified by business necessity. A critical distinction between the two theories is the element of intent. Intent, or discriminatory motivation, is the critical element a plaintiff must prove to establish a violation in a disparate treatment case; however, intent is not an element in a disparate impact case. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).


7. See id. at 246-47 (plurality opinion).
single-motive pretext case,\textsuperscript{8} which is illustrated in \textit{McDonnell Douglas}. The factual issue in a pretext case is whether either a lawful or an unlawful reason, but not both, was the motivation for the at-issue employment decision.\textsuperscript{9} However, the legislative history of Title VII is clear on the point that a plaintiff is not required to prove that discriminatory animus was the sole reason for an adverse employment decision.\textsuperscript{10}

In \textit{Price Waterhouse} the Court endorsed the same proof scheme for mixed-motive cases arising under Title VII that it previously had adopted in \textit{Mt. Healthy Board of Education v. Doyle}.\textsuperscript{11} \textit{Mt. Healthy} was a mixed-motive employment case arising under the Constitution.\textsuperscript{12} Under \textit{Price Waterhouse} a plaintiff must first prove that an unlawful reason was a substantial or motivating factor in an employment decision.\textsuperscript{13} If the plaintiff carries that burden, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent reliance on the unlawful reason.\textsuperscript{14} The fundamental holding of \textit{Price Waterhouse} is that, in a mixed-motive case, an employer can avoid liability by prevailing on the

\begin{footnotes}
\item[8] Some of the different labels used to describe the \textit{McDonnell Douglas} framework are pretext, indirect evidence, and circumstantial evidence cases.
\item[10] See \textit{Price Waterhouse}, 490 U.S. at 241 n.7 (observing that Congress purposefully rejected an amendment to Title VII that would have placed the word “solely” before the words “because of” in section 703(a)(1)).
\item[12] An issue the Court has never resolved is whether constitutional norms should be applied in statutory employment discrimination cases against public employers. In \textit{Washington v. Davis}, 426 U.S. 229, 247-48 (1976), the Court expressly rejected the view that the Title VII disparate impact theory was applicable to employment discrimination claims against public employers that are based solely on the Equal Protection Clause of the Fourteenth Amendment. \textit{Washington v. Davis} was a test case brought expressly for the purpose of testing whether the Title VII disparate impact theory is equally applicable to employment discrimination claims against public employers. The rationale for the results in \textit{Washington v. Davis} appears to be that the nature of discrimination prohibited under the Equal Protection Clause is qualitatively different from the discrimination that is prohibited under Title VII. In \textit{Price Waterhouse} a Title VII statutory employment case, the Court, without even acknowledging \textit{Washington v. Davis}, held that the constitutional norm on mixed-motive cases in \textit{Mt. Healthy} is equally applicable to Title VII mixed-motive cases. 490 U.S. at 247 n.12, 248-49, 254; \textit{id.} at 258-61 (White, J., concurring in the judgment); \textit{id.} at 277 (O'Connor, J., concurring in the judgment); see also \textit{id.} at 268 (O'Connor, J., concurring in the judgment) (citing another Equal Protection mixed-motive case, \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.}, 429 U.S. 252 (1977)).
\item[13] 490 U.S. at 258.
\item[14] \textit{Id.}
\end{footnotes}
same-decision defense. After Price Waterhouse the majority of the lower courts sharply distinguished between the McDonnell Douglas and Price Waterhouse analytical frameworks.

Congress overturned the fundamental holding of Price Waterhouse in the Civil Rights Act of 1991. Congress's decision to overturn Price Waterhouse and the language it adopted in doing so have created additional confusion in the long-standing debate about how to achieve equality in the workplace. McDonnell Douglas and Price Waterhouse stand at the apex of the debate. The Civil Rights Act of 1991, which overturns the fundamental holding of Price Waterhouse, further muddles the substantive and procedural swamp in employment discrimination law by raising a number of issues over which the courts are consistently inconsistent. Two of those issues are the subject of this Article. The first issue is whether the Civil Rights Act of 1991 erased the distinction between McDonnell Douglas and Price Waterhouse. The second issue concerns the reach and limits of a court's discretion to award make-

15. Id.
17. See Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229, 2311-24 (1995) (arguing that the McDonnell Douglas proof structure should be abandoned); George Rutherglen, Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination, 1 VA. J. SOC. POL'Y & LAW 43, 44-46 (1993). Professor Rutherglen has argued that much of the difficulty with the McDonnell Douglas analytical framework is that it arose at the intersection of constitutional and labor law. The constitutional dimension looks to intent; the labor law dimension looks to good cause. These "divergent" origins, he argues, account for much of the ambiguity and ineffectiveness of McDonnell Douglas and Price Waterhouse to ferret out unlawful discrimination. See id. at 47.
whole and rightful place relief when employers are successful on the statutory same-decision defense.

This Article offers some observations on these two questions. It also briefly comments upon the developing law on mixed-motive cases under the Americans with Disabilities Act ("ADA").

II. MCDONNELL DOUGLAS AND PRICE WATERHOUSE: A BRIEF OVERVIEW

The difference between the burden-shifting frameworks of a McDonnell Douglas pretext case and a Price Waterhouse mixed-motive case has been the subject of a substantial amount of critical commentary—especially since St. Mary's Honor Center v. Hicks and the enactment of the Civil


Judge Denny Chin, United States District Court for the Southern District of New York, is the co-author of an article that criticizes McDonnell Douglas and suggests an alternative to weighing and evaluating the evidence in employment discrimination cases. See Denny
Rights Act of 1991. The mixed-motive category did not emerge as an analytical model in statutory employment discrimination cases until after the Supreme Court decided *Mt. Healthy*,\(^2\) even though the issue had been present in Title VII cases prior to *Mt. Healthy*.\(^2\) The

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21. A main reason mixed-motive cases did not emerge as a factual paradigm in the early development under Title VII is that a substantial amount of attention during the first decade of litigation under Title VII was devoted to (1) broad-based pattern or practice cases and (2) class action cases involving, for example, sex-based limitations on the employment opportunities of women, and the continuing effects of overt racially discriminatory policies that many employers, public and private, had adopted prior to the effective date of Title VII. *See generally Robert Belton, Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 246-49 (1976); Alfred W. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313, 346-50 (1984).

A change in the composition of the federal courts, including the Supreme Court, brought with it a judicial retreat from the liberal interpretation of Title VII and other laws prohibiting discrimination in employment. In commenting upon the change in the judicial response to employment discrimination claims, one scholar observed that

> historically the Fifth Circuit has been a very important site for the development of anti-discrimination law. The Fifth Circuit cases decided in the first decade after the passage of the Civil Rights Act of 1964 held out the promise of an end to racial segregation and stratification in the workplace. Class actions attacking policies on hiring, promotion and transfer "across the board," judicial mistrust of subjective procedures and a presumption of discrimination in a high percentage of individual cases gave plaintiffs leverage to challenge longstanding traditions of racial segregation. The challenge posed by these early cases was cut short, however, by a retreat by the United States Supreme Court starting in the late 1970s. By the 1980s, patterns of racial segregation were more often defended in the courts as a product of choice or custom, rather than as an artifact of discrimination. The class action has all but disappeared from the scene, and high burdens of proof had been imposed on plaintiffs trying to show either intentional discrimination or group-based adverse impact. The focus of Title VII changed from the creation of new opportunities through hiring, promotion, and affirmative action to a far less ambitious emphasis on curtailing dismissals and layoffs of protected groups. When they surfaced, liberal visions of equality were often submerged in dissents.


22. *See Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-43 (6th Cir. 1997). Plaintiff in *Mt. Healthy* relied upon Title VII cases in his brief to support his argument that he was presumptively entitled to relief upon proving that he was terminated in part because of his speech, which was constitutionally protected. According to plaintiff's brief:

> A useful analogy is found in decisions dealing with the question who is entitled to a "make-whole" remedy where racial discrimination in employment has been proved. Where, for example, an employer is shown to have engaged in a pattern and practice of racial discrimination in hiring, the impermissible factor of race can be said to have played a part each time a black employee was denied a job. But,
predominant analytical model for the statutory cases prior to Mt. Healthy was the framework announced by the Supreme Court in McDonnell Douglas. After Price Waterhouse the courts tended to categorize employment discrimination cases as either pretext or mixed-motive cases, and the courts have treated these cases as essentially two mutually exclusive proof schemes in employment discrimination law.

In a pretext case, which the courts analyze solely under the McDonnell Douglas framework, once the plaintiff has established a prima facie case, the burden of going forward with the evidence shifts to the employer who must then articulate a legitimate nondiscriminatory reason for the adverse employment decision. If the employer introduces evidence of a legitimate nondiscriminatory reason, the burden of production shifts back to the plaintiff who must show that the employer's proffered explanation is untrue or unworthy of credence. At all times, the burden of proof or risk of nonpersuasion, including the burden of proving but-for causation or causation-in-fact, remains with the plaintiff.

A majority of courts addressing the issue have made a clear distinction between a McDonnell Douglas pretext case and a Price Waterhouse mixed-motive case on one key element. Most courts have held that a plaintiff must introduce either direct evidence that the employer's decision was the product of discriminatory motivation or substantially in some circumstances, an employer may be able to prove that notwithstanding its racial discrimination, the applicant would have been denied a job in any event for other legitimate reasons. This Court held in Franks v. Bowman Transportation Co., 424 U.S. 747, 44 L.W. 4356, 4363, and 4363, n. 32 (1976), that, in such circumstances, each black applicant is "presumptively entitled" to make-whole relief, and that the employer has the burden of defeating that entitlement with respect to any particular employee by proving that the employee would have been denied a job regardless of the race factor. As the Court in Franks put it, "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." Ibid.


Bowman Transportation and Teamsters were Title VII class action disparate treatment cases. Justice O'Connor distinguished the Title VII class action and individual cases in Price Waterhouse. See 490 U.S. at 265-66 (O'Connor, J., concurring in the judgment).

23. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252.


25. Id. at 253.

26. See Taylor, 193 F.3d at 232-33 (suggesting the McDonnell Douglas approach is less advantageous than mixed-motive approach); Hankins v. City of Phila., 189 F.3d 353, 364 (3d Cir. 1999), vacated and reh'g en banc granted, 188 F.3d 217 (3d Cir. 1999); EEOC v. Wiltel, 81 F.3d 1508, 1514 (10th Cir. 1996).
more evidence than is required under the *McDonnell Douglas* framework.\textsuperscript{27} If the plaintiff is fortunate enough to have evidence that falls under the direct evidence rubric,\textsuperscript{28} then the employer has the burden of persuasion to prove that it would have made the same decision if the unlawful motivation played no role in the employment decision.\textsuperscript{29} Under *Price Waterhouse* direct evidence of discriminatory motivation leaves the employer only the affirmative defense of same-decision or the argument that but-for cause or cause-in-fact has not been proved.\textsuperscript{30}

The significance of *Price Waterhouse* to the issue of whether the Civil Rights Act of 1991 erased the distinction between direct and pretext (or circumstantial) evidence lies primarily in Justice O'Connor's concurring opinion. Justice Brennan stated the holding for only a plurality of the Court. The plurality's statement of the holding is substantively different from what Justice O'Connor deems the holding to be. Nothing in Justice Brennan's plurality opinion suggests that a plaintiff must present direct evidence to shift the burden of proving same-decision to the employer. In fact, Justice Brennan stated that simply because he had focused on the specific evidence Hopkins had introduced, he was not suggesting a limitation on the nature of the evidence a plaintiff may rely upon to prove the motivating factor element.\textsuperscript{31} Justice O'Connor, on the other hand, endorsed the view that direct evidence is required in mixed-motive cases.\textsuperscript{32} Although she stated that the rule announced in *Price Waterhouse* should be viewed as a "supplement to the careful framework established" in *McDonnell Douglas*, it is clear that Justice O'Connor advocated an extremely high evidentiary standard for plaintiffs in mixed-motive cases.\textsuperscript{33} She succeeded in drawing a bright-line distinction between the circumstantial and mixed-motive cases with her direct evidence standard.

A frequently overlooked line of reasoning in Justice O'Connor's opinion in *Price Waterhouse*, on which her direct evidence rule is grounded, is based on her construction of section 703(j) of Title VII:

\begin{quote}
Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion
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\textsuperscript{27.} See infra notes 52-60 and accompanying text.
\textsuperscript{28.} See infra notes 47-50 and accompanying text.
\textsuperscript{29.} *Price Waterhouse*, 490 U.S. at 244-45.
\textsuperscript{30.} Id. at 246.
\textsuperscript{31.} Id. at 251-52.
\textsuperscript{32.} Id. at 277 (O'Connor, J., concurring in the judgment) ("What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.").
\textsuperscript{33.} Id. at 261.
was a "substantial factor" in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general population. See 42 U.S.C. § 2000e-2(j). The interpretive memorandum, whose authoritative force is noted by the plurality, specifically provides: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race."

She then cited her plurality opinion in Watson v. Fort Worth Bank & Trust, a Title VII disparate impact case. In Watson she relied substantially on section 703(j) to promulgate a very high evidentiary threshold that a plaintiff must satisfy not only to establish a prima facie case of disparate impact discrimination, but also to ultimately prove liability. Justice O'Connor's view that the reality of societal discrimination should not influence, in any way, the rules and doctrines courts adopt in interpreting laws prohibiting either constitutional or statutory discrimination is well known. The direct evidence standard that Justice O'Connor adopted in Price Waterhouse incorporates into statutory employment discrimination cases her interpretation of section 703(j) that the courts must turn a blind eye to societal discrimination in formulating rules and doctrines.

III. LEGISLATIVE RESPONSE TO PRICE WATERHOUSE

Congress amended Title VII in the Civil Rights Act of 1991 against the backdrop of McDonnell Douglas, Mt. Healthy, and Price Waterhouse by

34. Id. at 274 (quoting 110 CONG. REC. 7213 (1964)) (citation omitted).
36. 490 U.S. at 274 (O'Connor, J., concurring in the judgment).
37. 487 U.S. at 992 (plurality opinion). In Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989), a majority of the Court agreed with Justice O'Connor's plurality opinion in Watson. Wards Cove was one of a number of cases that prompted Congress to enact the Civil Rights Act of 1991. Congress's response to Wards Cove is found in Title VII, 42 U.S.C.A. § 2000e-2(k).
adding, among other provisions, two new provisions that explicitly cover federal statutory mixed-motive employment discrimination cases.39

One provision, section 703(m), states, “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.”40 The other provision, section 706(g)(2)(B), states,

> On a claim in which an individual proves a violation under section [703(m)] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section [703(m)] of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).41

The two new provisions in Title VII were enacted to abrogate the fundamental holding of *Price Waterhouse* insofar as that decision permitted an employer in a mixed-motive case to completely escape a finding of liability by proving the same-decision defense.42

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41. Id. § 2000e-5(g)(2)(B). Congress also defined the term “demonstrate” in the Civil Rights Act of 1991 to encompass both the burdens of production of evidence and the burden of persuasion. Id. § 2000e-2(m).

42. There were two other significant holdings in *Price Waterhouse*, neither of which was affected by the Civil Rights Act of 1991. The first was that evidence of sex stereotyping is sufficient as direct evidence to prove unlawful sex discrimination under Title VII. *Price Waterhouse*, 490 U.S. at 251; id. at 272 (O'Connor, J., concurring in the judgment). See generally *Bisom-Rapp*, supra note 19, at 1040-47; Tracy L. Bach, *Note, Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1264 (1993). The second unaffected holding was that the preponderance of evidence standard rather than the clear and convincing standard controls whether an employer has satisfied its burden of proof on the same-decision defense. *Price Waterhouse*, 490 U.S. at 250; see also H.R. REP. No. 102-40(I), at 45-47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 583-85.
However, Congress did not address some crucial issues on the role of the same-decision defense in mixed-motive cases when it overturned the fundamental holding of Price Waterhouse. One of the most critical questions Congress failed to address was whether a plaintiff must introduce direct evidence to shift the burden of persuasion on the same-decision defense to the employer. Although there is nothing on the face of section 703(m) that speaks directly to this issue, there are references in the legislative history to the notion of stray remarks. The section of House Report 102-40(I) setting out congressional intent to overturn Price Waterhouse states:

Some opponents . . . contend that making unlawful any consideration of race or gender in the employment decision would make an employer liable for "mere thoughts" or "stray thoughts" in the workplace. Conduct or statements are relevant under [the amendment] only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue, under the standards generally applicable in weighing the sufficiency of the evidence. For example, isolated or stray remarks not shown to have contributed to the employment decision at issue are not sufficient to establish liability. . . . Thus, in providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied in many federal circuits prior to the Price Waterhouse decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.43

It is unclear from the legislative history quoted above whether Congress's reference to stray remarks was necessarily intended to embrace Justice O'Connor's direct evidence standard for cases arising under section 703(m). However, it is clear that Congress did not affirmatively embrace the direct evidence standard. Congress's failure to address some of these crucial issues has resulted in a great deal of confusion and conflict in the lower courts.44 In fact, the legislative history is singularly uninstructive on the substantive standard to be applied in mixed-motive employment discrimination cases.

The antecedent to the Civil Rights Act of 1991 is the failed Civil Rights Act of 1990.45 Both the Senate and House versions of the Civil

44. See, e.g., Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581-84 (1st Cir. 1999) (collecting cases on the various definitions of "direct evidence" that have been endorsed by the courts on the issue of whether mixed-motive cases require direct evidence).
Rights Act of 1990 declared a congressional intent to rectify what they perceived as the Court's flawed decision in *Price Waterhouse*. The legislative histories of the two bills, however, show that the major debate about rectifying *Price Waterhouse* was whether the new statute should read, "discriminatory practice need not be the sole motivating factor," or "discriminatory practice need not be the sole contributing factor."  

IV. MIXED-MOTIVE CASES: THE AFTERMATH OF THE CIVIL RIGHTS ACT OF 1991

A. The Meaning of "Direct Evidence"

The Civil Rights Act of 1991 enables a plaintiff to establish a violation of Title VII by demonstrating that race, color, religion, sex, or national origin was a "motivating factor" as a condition precedent to receiving a mixed-motive instruction. Although the courts generally agree that plaintiffs must introduce direct evidence of a "motivating factor" under section 703(m), they have "about as many definitions of 'direct evidence' as they do employment discrimination cases." These various definitions were recently and succinctly summarized by the First Circuit in *Fernandes v. Costa Brothers Masonry, Inc.* Direct evidence is classically defined as evidence that, if believed, proves the fact of discriminatory motivation without inference, presumption, or resort to other evidence. The "animus plus" jurisdictions define direct evidence to include both the classical definition and circumstantial evidence so long as the evidence satisfies a two-pronged test: (1) it reflects directly discriminatory motivation, and (2) it bears squarely on the at-issue employment decision. The third set of jurisdictions define direct evidence to include both direct and circumstantial evidence, whether or
not it bears directly on the discriminatory motivation with respect to the at-issue employment decision.  

The different definitions of direct evidence underscore the obvious: The line between McDonnell Douglas and Price Waterhouse is very murky. Furthermore, the various definitions raise the question whether the courts' attempts to draw bright-line tests between direct and circumstantial evidence are really helpful at all.

B. Does the Civil Rights Act of 1991 Erase the Distinction Between Pretext and Mixed-Motive Cases?

Prior to Price Waterhouse, courts applied the McDonnell Douglas framework to cases in which plaintiffs relied upon either circumstantial or direct evidence, but did not make any significant distinction between pretext and mixed-motive cases. The determination whether an employer's decision was motivated by unlawful discrimination is a fact question, and courts have held that this fact can be proven by either circumstantial or direct evidence. At least one court has rejected the view that circumstantial evidence is inherently weaker than direct evidence.

After Price Waterhouse many courts began to draw very sharp distinctions between pretext and mixed-motive cases. The distinction was grounded essentially in Justice O'Connor's concurring opinion in

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50. Id. at 582. The three different approaches to direct evidence correspond to the categories of the nonrestrictive standard, the direct evidence standard, and the circumstantial evidence-plus standard. See Zubrensky, supra note 19, at 970-78.

51. See Malamud, supra note 17, at 2311 (suggesting that McDonnell Douglas does a poor job of setting the standards for pretrial decisionmaking, particularly at the summary judgment stage).

52. See, e.g., Price Waterhouse, 490 U.S. at 262 (O'Connor, J., concurring in the judgment) (considering Price Waterhouse to be a "departure from the McDonnell Douglas standard"); id. at 290 (Kennedy, J., dissenting) (criticizing the plurality for not recognizing, as Justice O'Connor did, that Price Waterhouse is a "departure from the McDonnell Douglas standard").

53. The determination whether a plaintiff has proven intentional discrimination is a question of fact that is to be decided by a jury in discrimination cases in which either party is entitled to demand a jury trial. See Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982); 42 U.S.C. § 1981a(c) (1994) (explaining that a plaintiff seeking relief under the disparate treatment theory in a Title VII or ADA case is entitled to a jury if compensatory or punitive damages are sought).


55. See Norton v. Sam's Club, 145 F.3d 114, 119 (2d Cir. 1998) (quoting United States v. Sureff, 15 F.3d 225, 229 (2d Cir. 1994)); see also St. Mary's Honor Ctr., 509 U.S. at 526 (Souter, J., dissenting) (stating that the McDonnell Douglas framework permits "plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence").
Price Waterhouse. Justice O'Connor was the only Justice who voted with the majority and took the position that direct evidence is necessary to entitle a plaintiff to a mixed-motive analysis.\textsuperscript{56} The fundamental difficulty with Justice O'Connor's position is that she rejected the classical definition of direct evidence.\textsuperscript{57} Instead, she defined direct evidence negatively:

\begin{quote}
[S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is . . . direct evidence that decisionmakers place substantial negative reliance on an illegitimate criterion in reaching their decision.\textsuperscript{58}
\end{quote}

Lower courts focused on the "stray remarks" reasoning of Justice O'Connor to develop an analysis for determining whether the evidence introduced by a plaintiff constituted direct evidence.\textsuperscript{59} The theory for relying on Justice O'Connor's stray remarks doctrine is that when the Supreme Court rules by means of a plurality in a case, such as Price Waterhouse, inferior courts should give effect to the narrowest ground on which a majority of the Justices would agree.\textsuperscript{60}

V. LIMITATIONS ON RELIEF

Section 706 of Title VII, as amended by the Civil Rights Act of 1991, limits the discretion of a court to award full relief to proven victims of unlawful employment discrimination.\textsuperscript{61} The amendment to section 706

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\item \textsuperscript{56} Price Waterhouse, 490 U.S. at 277-78 (O'Connor, J., concurring in the judgment).
\item \textsuperscript{57} See Fernandes, 199 F.3d at 581.
\item \textsuperscript{58} Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring in the judgment) (citation omitted).
\item \textsuperscript{59} See, e.g., Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1315-16 (8th Cir. 1996); Fuka v. Thomson Consumer Elecs., 82 F.3d 1397, 1403 (7th Cir. 1997).
\item \textsuperscript{60} See Fernandes, 199 F.3d at 580; Tyler, 958 F.2d at 1182.
\item \textsuperscript{61} See 42 U.S.C.A. § 2000e-5(g)(2)(B).
\end{itemize}
does not change the respective burdens imposed on plaintiffs and defendants; it simply affects the nature of the remedies available to a plaintiff if both parties satisfy their respective burdens. A major difference between establishing liability in a McDonnell Douglas pretext case and a mixed-motive case under Price Waterhouse, as modified by the Civil Rights Act of 1991, is that the plaintiff in the pretext case is the beneficiary of a presumption of entitlement to all appropriate forms of relief. The same-decision defense, if proven by an employer, severely circumscribes the discretion a court otherwise has to award complete make-whole and rightful-place relief to a proven victim of unlawful discrimination. Section 706(g)(2)(B) specifically excludes damages such as back pay, front pay, reinstatement orders, hiring orders, and promotion orders. The courts have held that compensatory and punitive damages are excluded as well.

VI. MIXED-MOTIVE CASES UNDER THE ADA

In a student-written Note published in 1995, the author argued that mixed-motive analysis should not be allowed under the ADA; however, the courts have held that employment discrimination claims under the ADA are subject to the same analysis under either a McDonnell Douglas or a Price Waterhouse framework, depending upon whether the plaintiff has direct evidence.

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62. See Medlock, 164 F.3d at 551 n.3.
63. 42 U.S.C.A. § 2000e-5(g)(2)(B)(ii). See generally Robert Belton, Remedies in Employment Discrimination Law (1992 & Supp. 1999) (covering the kinds of relief—for example, back pay, front pay, and a broad range of injunctive relief—that a court may award in statutory employment discrimination cases) [hereinafter Remedies]. In two cases, Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-21 (1975), and Franks v. Bowman Transportation Co., 424 U.S. 747, 763-64 (1976), the Supreme Court enunciated a strong rebuttable presumption that proven victims of unlawful employment discrimination are entitled to all forms of make-whole and rightful-place relief. Moreover, in City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 719 (1978), the Court held that the presumptive entitlement rule is seldom overcome. See also Remedies, supra, §§ 3.7-3.10.
67. See, e.g., Weber v. Strippit, Inc., 186 F.3d 907, 918 (8th Cir. 1999) (instructing specifically that either McDonnell Douglas or Price Waterhouse "motivating factor" not required); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 & n.3 (10th Cir. 1997); Pedigo, 60 F.3d at 1301. Other courts have expressly noted the issue but have declined to address it. See, e.g., Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995).
The arguments in favor of allowing mixed-motive cases under the ADA are quite strong, even though Congress did not explicitly amend the ADA to include a provision comparable to section 703(m) in Title VII. First, the statutory definition of discrimination in the ADA includes disparate treatment claims because one of the statutory definitions is patterned after the same provision in Title VII on which the disparate treatment theory is grounded. Second, the ADA provides that the remedies available under the ADA are the same as those that are available under Title VII. A plaintiff in a mixed-motive case brought under the Civil Rights Act of 1991 would be entitled to complete make-whole and rightful-place relief should the employer lose on its same-decision defense.

VII. THE IMPACT OF THE SAME-DECISION DEFENSE ON RELIEF

Stevens v. Gravette Medical Center Hospital, decided several years ago, strongly suggests that in cases in which employers are successful on the same-decision defense, a plaintiff's success in proving that she is a victim of unlawful discrimination will, in all probability, result only in a Pyrrhic victory. Stevens involved a Title VII sex discrimination claim in which the jury found that plaintiff's sex was a motivating factor in the employer's decision to deny plaintiff a promotion, but that the employer would have made the same decision without considering his sex. Plaintiff sought nominal damages, a declaratory judgment that the employer had engaged in a pattern and practice of discriminating against its employees because of sex, an injunction restraining the employer from further discrimination on the basis of sex, and attorney fees. The district court found plaintiff was entitled to a declaration

72. Id. at 1012-13.
that the employer violated Title VII while denying all his other requests for relief.\footnote{Id. at 1021; see also 5 Lex K. Larson, Employment Discrimination § 93.09 (2d ed. 1994).}

Nominal damages are traditionally awarded in cases in which compensatory damages are available even though the plaintiff has not established the degree of injury necessary to support an award of punitive damages. Acknowledging this rule, the court in Stevens nevertheless denied plaintiff's request for nominal damages.\footnote{998 F. Supp. at 1015 (citing 5 Larson, supra note 73, § 93.09; see also Remedies, supra note 63, § 12.11.)} Because compensatory damages are unavailable under Title VII in mixed-motive cases when an employer has been successful on the same-decision defense, the court reasoned it would be improper to award nominal damages because they are a substitute for compensatory damages.\footnote{998 F. Supp. at 1013.}

Plaintiff's argument for a declaratory judgment was based on his theory that the evidence supported a finding that the employer had engaged in a pattern or practice of intentional sex discrimination against male employees by not assigning them to the OB/GYN section of the hospital.\footnote{Id. at 1015.} The court denied his request for a declaratory judgment on the ground that the jury was not instructed to determine whether a pattern or practice against males existed at the hospital.\footnote{Id. at 1015-16.} Implicit in the court's refusal to award declaratory judgment was the understanding that proof of an employer's pattern or practice of intentional discrimination may support not only a declaratory judgment with respect to that practice, but also a broad-based injunction against the continuation of the practice. Under the court's reasoning, an individual must show a causal connection between the injury to himself and the pattern and practice of discriminatory conduct.\footnote{Id. at 1016.} The implicit rule would certainly be particularly important in some of the sexual harassment cases.

The court rejected plaintiff's claim for injunctive relief on the ground that an injunction should not issue when there is no reasonable basis to conclude that the unlawful conduct is likely to continue into the future.\footnote{506 U.S. 103 (1992).}

Finally, relying in substantial part on the Supreme Court's decision in \textit{Farrar v. Hobby,} the court denied plaintiff's request for attorney
In *Farrar* the Supreme Court held that a plaintiff must obtain some relief on the merits of his claim to qualify as a prevailing party for a statutory award of attorney fees; thus, he must obtain an enforceable judgment. The judgment in favor of the plaintiff must substantially alter the relationship between the parties whereby the employer modifies its behavior "in a way that directly benefits the plaintiff." The Court held that although a technical or Pyrrhic victory of only nominal damages is sufficient to confer prevailing party status on a plaintiff, the reasonable attorney fee in such a case will ordinarily be zero.

The court in *Stevens* also relied upon the Eighth Circuit's decision in *Pedigo v. P.A.M. Transport, Inc.* In *Pedigo* the Eighth Circuit specifically considered whether section 706(g)(2)(B)(ii) allows an award of attorney fees when both the plaintiff and the defendant have satisfied their respective burdens in a mixed-motive case. Section 706 provides that a court "may grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m)." Relying on *Farrar*, the Eighth Circuit in *Pedigo* denied a request for fees in an ADA case because a judicial pronouncement, such as a declaratory judgment, that is unenforceable does not give the plaintiff the status of a prevailing party.

In *Gudenkauf v. Stauffer Communications, Inc.*, the Tenth Circuit rejected the view that *Farrar* stands for the proposition that every nonmonetary victory precludes an award of attorney fees in statutory mixed-motive employment discrimination cases. The Tenth Circuit looked to Justice O'Connor's concurring opinion in *Farrar* in which she listed some factors that should be considered in determining whether fees would be available despite recovery of only nominal damages.

82. 506 U.S. at 111.
83. *Id.* at 111-12.
84. *Id.* at 112-15.
85. 98 F.3d 396 (8th Cir. 1996).
86. *Id.* at 397-98.
87. See supra note 41.
88. *Pedigo*, 98 F.3d at 398. One of the leading cases on the award of attorney fees in mixed-motive cases in employment discrimination law is *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996).
89. 158 F.3d 1074 (10th Cir. 1998).
90. *Id.* at 1081.
91. *Id.* at 1078.
These factors include the significance of the legal issue involved and whether the claim serves a public purpose.92

VIII. SOME CONCLUDING OBSERVATIONS

The enactment of Title VII of the Civil Rights Act of 1964 was a watershed development in the national commitment to making equality in the workplace a reality. Since the enactment of Title VII, the legislative and administrative branches of the federal government have enacted or adopted a dazzling array of laws and orders that make it unlawful to discriminate in employment because of race, color, sex, religion, national origin, age, and disability.93 These laws raise three difficult legal and policy issues: (1) what is discrimination, (2) how is it proven, and (3) if proven, what are appropriate remedies? Not only have the courts within the federal system often disagreed about the appropriate responses to these questions, but the courts and Congress have also frequently disagreed.

The circumstances that led to the enactment of the Civil Rights Act of 199194 are some of the most recent illustrations of significant disagreements between the Supreme Court and Congress that implicate each of the three basic legal and policy issues in employment discrimination law.95 Congress enacted the Civil Rights Act of 1991 because it concluded that the Supreme Court had substantially eroded the national commitment to workplace equality in a series of Supreme Court

92. See Farrar, 506 U.S. at 121 (O'Connor, J., concurring).
94. See supra notes 42-46.
95. Other illustrations of the disagreement between the Court and Congress include the following: the Pregnancy Disability Amendment to Title VII, 42 U.S.C.A. § 2000e-(k) (overturning the Court's holding in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), that discrimination because of pregnancy is not sex discrimination); section 701(j) of Title VII, 42 U.S.C.A. § 2000e-(j) (defining the term "religion" to avoid a potential constitutional question in light of the Court's decision in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971)). Congress also overturned the Court's decision in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989), by amending the ADEA to eliminate the term "subterfuge" in a statutory defense and to endorse the EEOC's cost-based justification defense. See 29 U.S.C.A. § 623(f)(2).
decisions, most of which had been decided during the Court's 1988 Term. 

Price Waterhouse was one of the principal Supreme Court cases that Congress deemed particularly inimical to the goal of remediing employment discrimination in the workplace. It is beyond dispute that Congress's intent in overruling the fundamental holding in Price Waterhouse was to clarify the law on mixed-motive Title VII employment discrimination cases. Regrettably, congressional silence on a number of significant issues in mixed-motive cases has spawned substantial conflicting interpretations in the lower courts.

The conflict and confusion in the courts over a significant number of substantive and procedural issues in the mixed-motive employment discrimination cases is, perhaps, symptomatic of a larger problem: either the inability, or the refusal, of a significant number of federal judges, including Supreme Court Justices, to recognize the continuing significance that consideration of race and sex, for example, plays in the decisionmaking process our society. The rejection of the concept of societal discrimination, which substantially undergirds Justice O'Connor's rationale for a direct evidence standard in Price Waterhouse, reflects the kind of attitude that substantially informed Congress's decision to enact Title VII in the first instance. The legislative history of the 1972 amendments to Title VII states, 

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as

96. In the congressional findings, Congress stated that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace"; that "legislation is necessary to provide additional protections against unlawful discrimination in employment"; and that one case in particular, Wards Cove, had "weakened the scope and effectiveness of Federal civil rights protections." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1992).


98. See 2 LEGISLATIVE HISTORY, supra note 45, at 36.

The inevitable effect of the Price Waterhouse decision is to permit prohibited employment discrimination to escape sanction under Title VII. . . .

The impact of the decision is particularly profound because the factual situation at issue in Price Waterhouse is a common one. . . .

If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. 

a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . . Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. 99

Both the Supreme Court's approach to mixed-motive cases and the limitations on relief that courts have endorsed, as in Stevens,100 are not likely to hasten the time when employment discrimination is substantially a phenomenon of the past.

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100. See supra text accompanying notes 71-84.