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"Mixed-Motive" Discrimination Under the Civil Rights Act of 1991: Still a "Pyrrhic Victory" for Plaintiffs?

by Thomas H. Barnard* and George S. Crisci**

One of the many statutory changes brought about by the Civil Rights Act of 19911 involved an effort to overturn the United States Supreme Court's decision in Price Waterhouse v. Hopkins.2 In that case, the Supreme Court held that when the plaintiff shows that an impermissible factor (e.g., race or gender) played a motivating role in an employment decision, the employer still can avoid liability by proving that it would have made the same employment decision in the absence of the impermissible factor.3

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2. 490 U.S. 228 (1989).
3. Id. at 245. Although there was no majority opinion in Price Waterhouse, the plurality opinion (written by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens) and the opinions by Justices White and O'Connor concurring in the judgment all agree that an employer can avoid liability if it proves by a preponderance of the evidence that it would have reached the same decision if the discriminatory motive had
Congress responded by amending Title VII of the Civil Rights Act of 1964\(^4\) so that the employer can be found liable if an impermissible factor played a motivating role in the employment decision, even if the employer would have made the same employment decision in the absence of the impermissible factor; however, if the employer can prove that it would have made the same decision, then the employee cannot recover damages or gain reinstatement, hiring, or promotion.\(^6\) A court still could order declaratory or injunctive relief, and it may still award attorney fees to the employee as the prevailing party.\(^5\)

While this amendment, in theory, would seem to benefit employees—or at least their attorneys, who now can recover their fees—it has, in practice, changed very little. In discrimination cases courts usually have refused to award attorney fees to the employee when the employer proves that it would have made the same employment decision absent the discriminatory motive and when injunctive relief is not necessary. Consequently, employers and employees effectively achieve the same result as if the case had been litigated under the *Price Waterhouse* analysis. For retaliation cases, the result has been even worse. Most courts, including every appellate court that has addressed the issue, have held that the 1991 Act does not overrule *Price Waterhouse* for retaliation cases. Thus, employees do not even get declaratory relief when they have been retaliated against, and the employer is completely exonerated from any liability.

This Article addresses the issue of mixed-motive discrimination and retaliation litigation in four parts. Part I briefly recounts the changes that the 1991 Act implemented. Part II discusses how the courts have addressed the issue of attorney fees when the employee proves that unlawful discrimination was a motivating factor in the adverse employment decision, but the employer proves that it would have reached the same decision in the absence of a discriminatory motive.

Part III discusses the conflict among the courts over whether the 1991 Act even applies to mixed-motive retaliation cases. Finally, Part IV presents the argument that the majority rule that has emerged for both issues represents a practical and sensible approach to employment discrimination and retaliation litigation.

I. THE CIVIL RIGHTS ACT OF 1991: ATTEMPTING TO CHANGE THE RULES OF MIXED-MOTIVE LITIGATION

Until the 1991 Act went into effect, mixed-motive litigation was dictated by the Supreme Court's 1989 decision in *Price Waterhouse*. That case involved a Title VII gender discrimination claim in which both unlawful discrimination and legitimate nondiscriminatory reasons motivated the adverse employment decision. Borrowing by analogy from unlawful discrimination and retaliation cases under the National Labor Relations Act and retaliation cases under the First Amendment, the Supreme Court held that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." Several appellate courts subsequently applied this principle to retaliation cases and cases brought under other discrimination statutes, such as the Age Discrimination in Employment Act.

As it did with several decisions that the Supreme Court handed down in 1989, Congress sought to overrule the holding in *Price Waterhouse* by including section 107 in the 1991 Act. Section 107(a) first addressed the standard for proving liability in mixed-motive cases by providing: "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." This language eliminated the affirmative defense to liability in discrimination cases that had been established in *Price Waterhouse*. Consequently, if the employee can prove that unlawful...

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10. See, e.g., Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039-41 (2d Cir. 1993); Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir. 1993), overruled on other grounds, Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir. 1995) (en banc); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470-71 (10th Cir. 1992); Adler v. Madigan, 939 F.2d 476, 479 (7th Cir. 1991).
discrimination was one of several motivating factors, the employer would be liable even if it would have made the same adverse employment decision in the absence of the discriminatory motive.

Section 107(b) then revived the affirmative defense for purposes of determining the appropriate remedy when the employer proves that the same decision would have been made in the absence of the discriminatory motive:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 107(a) of the 1991 Act] 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 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in [42 U.S.C. §2000e-5(g)(2)(A)].

Thus, while section 107(a) of the 1991 Act imposes liability upon an employer whenever an adverse employment decision is motivated, at least in part, by unlawful discrimination, section 107(b) insulates that employer from damages and equitable relief other than injunctive relief if the unlawful discriminatory motive was not the determinative factor in the adverse employment decision. However, such employers still face the looming possibility of having to pay the employee's usually hefty attorney fees because the employee, unlike under the Price Waterhouse rule, is a prevailing party for purposes of collecting attorney fees.

II. awarding attorney fees in mixed-motive discrimination cases

Section 107(b) of the 1991 Act authorizes, but does not require, courts to award attorney fees to the "prevailing" employee in a mixed-motive discrimination case when the employer proves that the same adverse employment decision would have been made absent the unlawful discriminatory motive. Most courts have exercised their discretion in such instances by declining to award attorney fees or by drastically reducing the requested fee award.

13. Id. § 2000e-5(g)(2)(B).
A. The Majority Rule

The leading decision under the majority rule is the Fourth Circuit's decision in Sheppard v. Riverview Nursing Centre, Inc.\textsuperscript{14} In Sheppard the employee alleged that she had been laid off because of her pregnancy. Five weeks after the lawsuit commenced, the employer offered, and the employee rejected, a $5000 settlement. The jury concluded that while the employee's pregnancy was a motivating factor in the layoff decision, the employer would have laid her off in any case for legitimate, nondiscriminatory reasons.\textsuperscript{15}

The district court awarded the employee a declaratory judgment, denied injunctive relief because it found "insufficient danger of a continuing violation," and then awarded the employee $40,000 in attorney fees.\textsuperscript{16} The district court rejected the employer's argument that the employee was not entitled to attorney fees because she did not receive damages, reinstatement, or other injunctive relief.\textsuperscript{17} The district court reasoned that because section 107(b) already precluded monetary relief and most forms of equitable relief but allowed attorney fees, the availability of attorney fees would effectively be nullified if recovery of fees depended upon the degree to which the employee obtained relief.\textsuperscript{18}

The appellate court, in a two-to-one decision, vacated the district court's ruling and remanded for further consideration.\textsuperscript{19} The court based its decision upon two reasons. First, the majority concluded that "[t]he district court apparently believed that an award of attorney's fees was mandatory in mixed-motive cases."\textsuperscript{20} Noting that section 107(b) provides that a court may award attorney fees, the appellate court indicated that "[t]he word 'may' means just what it says: that a court

\begin{footnotes}
14. 88 F.3d 1332 (4th Cir. 1996).
15. Id. at 1334.
16. Id. The employee had voluntarily reduced her demand from approximately $81,000 to approximately $44,500 because she had failed to prove that she would not have been laid off absent any discrimination. Sheppard v. Riverview Nursing Centre, Inc., 870 F. Supp. 1369, 1375-76 (D. Md. 1994). The district court then reduced the award further based upon failure to document adequately and excessive time for particular tasks. Id. at 1377-79.
17. 870 F. Supp. at 1374-75. The district court also rejected the employer's argument that Rule 68 of the Federal Rules of Civil Procedure precluded attorney fees because the settlement offer was less than the final judgment, reasoning that attorney fees under Title VII are not the post-offer costs that are subject to Rule 68. Id. at 1382-84. However, the district court did reduce the employee's recovery of costs from $4,500 to $167. Id. at 1384.
18. Id.
19. 88 F.3d at 1333.
20. Id. at 1335.
\end{footnotes}
has discretion to award (or not to award) attorney's fees." Noting further that section 107(b) also provides that a court shall not award damages or reinstatement, the majority commented that "[p]lainly, if Congress had wished to require recovery of attorney's fees, it would have provided that courts 'shall' grant fees instead of that they 'may' do so." Rather, the district court should have considered the principles outlined in the Supreme Court's decision in *Farrar v. Hobby.* In *Farrar* plaintiff sought $17 million in damages in a section 1983 case, but he received only nominal damages of one dollar and no injunctive or other equitable relief. The Supreme Court held that while plaintiff was a prevailing party, and therefore eligible for attorney fees, any attorney fee award should be guided by considerations of proportionality. Because plaintiff's success was minimal, the Supreme Court held that the only reasonable fee was "no fee at all."

The majority in *Sheppard* first addressed the district court's conclusion that *Farrar* was not applicable in Title VII mixed-motive cases because it construed 42 U.S.C. § 1988, while *Sheppard* involved section 107(b) of the 1991 Act. The majority responded that "any difference between the two provisions does not justify disregarding *Farrar*" and that, "*Farrar* ... addressed a[n] ... issue ... that lies at the heart of this case: Assuming that a given plaintiff is eligible to receive attorney's fees, what factors should inform a district court's exercise of its statutory discretion in deciding whether to award fees?"

The majority next addressed the district court's concerns that denying recovery of attorney fees "would render the statute ineffective and practically meaningless." The majority agreed that denying attorney fees simply because the employee was precluded from recovering damages under section 107(b) "would amount to an empty exercise," but it responded,

21. *Id.*
22. *Id.*
23. *Id.*
25. *Id.* at 106-08.
26. *Id.* at 114-15.
27. *Id.* at 115.
28. 88 F.3d at 1334.
29. *Id.* at 1336.
30. *Id.* (quoting *Sheppard*, 870 F. Supp. at 1381).
[I]f denial of fees would invariably render the statute 'ineffective' and 'practically meaningless,' Congress would have written a mandatory provision requiring that attorney's fees be awarded in every case. That it did not do so suggests that Congress was wary of enacting legislation whose benefit inures primarily to lawyers in the form of a substantial fee recovery, even if relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals.\textsuperscript{31}

The majority also agreed that "[f]actoring \textit{Farrar}'s principles into the analysis under [section 107(b)] will not suppress the incentive to file Title VII actions."\textsuperscript{32} The majority cited two reasons: (1) "[t]here is always the risk that a plaintiff will not prevail on the merits, yet this is not a disincentive to the initiation of Title VII actions," and (2) "because a case generally does not become a mixed-motive or pretext case until after the evidence is developed, plaintiffs ordinarily will not know whether their claim implicates [section 107(b)] at the time of filing suit."\textsuperscript{33}

The majority then discussed the factors that a district court should consider in determining whether an attorney fee award was appropriate, including (1) "the reasons why injunctive relief was or was not granted, or the extent and nature of any declaratory relief;"\textsuperscript{34} (2) "whether the public purposes served by resolving the dispute justifies the recovery of fees;"\textsuperscript{35} and (3) whether the employee rejected a settlement offer.\textsuperscript{36} The majority indicated that while "an illicit factor will have played some role in cases subject to [section 107(b)], . . . within that category of cases, there are large differences."\textsuperscript{37} Elaborating, the majority stated,

Some mixed-motive cases will evidence a widespread or intolerable animus on the part of a defendant; others will illustrate primarily the plaintiff's unacceptable conduct which, by definition, will have justified the action taken by the defendant. The statute allows district courts to distinguish among cases that are in reality quite different.\textsuperscript{38}

\begin{itemize}
\item 31. \textit{Id.}
\item 32. \textit{Id.}
\item 33. \textit{Id.} at 1336-37 (citation omitted) (citing Fuller v. Phipps, 67 F.3d 1137, 1142-43 (4th Cir. 1995)).
\item 34. \textit{Id.} at 1336.
\item 35. \textit{Id.} (citing \textit{Farrar}, 506 U.S. at 121-22 (O'Connor, J., concurring) (a plaintiff's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client").
\item 36. \textit{Id.} at 1337.
\item 37. \textit{Id.} at 1336.
\item 38. \textit{Id.}
\end{itemize}
Finally, the majority responded to the lengthy dissent. To start, the majority disagreed that attorney fees must be awarded in section 107(b) cases “even when ‘special circumstances’ exist that would render the grant of fees ‘unjust,’” because “[t]his conclusion cannot be squared with the statutory language.” The majority likewise disagreed that the words “may” and “shall” can be synonymous, commenting that “[e]ven young children would say otherwise.” The majority added that any merit to this argument fails when Congress has used both verbs in neighboring passages. Moreover, the dissent’s contention that “may” in section 107(b) applied only to the granting of injunctive relief was, according to the majority, refuted by the statutory language: “The word ‘may’ qualifies the award of all forms of relief.” Finally, the majority commented that the dissent’s proposed interpretation of section 107(b) “entails an anomalous outcome,” explaining that:

It places mixed-motive plaintiffs in a more favorable position than plaintiffs for whom discrimination is the sole cause of an adverse employment decision . . . . Suppose that a plaintiff was discharged for embezzling funds, divulging company secrets, or acting abusively toward his or her co-workers, but that an illicit factor also played some role in the dismissal. Such a plaintiff would automatically recover attorney's fees under the dissent's view of [section 107(b)]. A plaintiff who engaged in no misconduct, by contrast, would find any recovery of fees subject to Farrar's proportionality standards. This could not have been Congress' intention.

On remand the district court reversed its previous position and held that the employee was not entitled to any recovery of attorney fees because “[t]he mix of ‘proportionality’ concerns . . . militates in favor of no—or a nominal—fee, there having been only a small degree of success.” The district court explained,

[T]his case involved a small, unsophisticated employer who did not display a necessarily invidious animus, but simply made a business decision that was contrary to the will of Congress, in that consideration of the plaintiff’s (and several other employees’) pregnancy played a part

39. Id. at 1342 (Michael, J., dissenting).
40. 88 F.3d at 1338.
41. Id. at 1342 n.2 (Michael, J., dissenting).
42. 88 F.3d at 1338.
43. Id.
44. Id. at 1341 (Michael, J., dissenting).
45. 88 F.3d at 1338.
46. Id.
The defendant now certainly understands that what had once been a lawful business consideration in making staffing cuts has been outlawed by Congress. There was not the least hint of personal spite or ill will against the plaintiff or other employees.\textsuperscript{48}

The district court added that “the Court's declaratory judgment did nothing more than ratify the jury's verdict” and that “the lack of injunctive relief reflects the Court's judgment that there was no danger of further discrimination against this plaintiff, against the pregnant, or, for that matter, by this defendant at all.”\textsuperscript{49} Finally, the district court indicated that “the Court must also consider that, by litigating this case in the face of a reasonable settlement offer, the plaintiff has a proportionality strike against her.”\textsuperscript{50}

Most courts that have subsequently addressed this issue have adopted the \textit{Sheppard} approach. Given that \textit{Sheppard} places the recovery of attorney fees entirely within the district court's discretion based upon several fact-intensive factors, its application not surprisingly has yielded varying, but consistent, results.

In \textit{Canup v. Chipman-Union, Inc.},\textsuperscript{51} the court affirmed the district court's refusal to award attorney fees when the employee had proven that race was a motivating factor in his discharge but the employer had proven that the employee would have been discharged anyway for violating the “good moral behavior” provision of the employment manual by having an extramarital affair with a subordinate.\textsuperscript{52} In addition, the employee had rejected a $20,000 pretrial settlement offer.\textsuperscript{53} Furthermore, the district court also had declined to order declaratory or injunctive relief.\textsuperscript{54}

The appellate court offered two reasons for its decision. First, the employee had failed to obtain any equitable relief. The appellate court commented that the ordering of such relief would be an important factor in deciding to award attorney fees:

Consider a case in which a company-wide policy that violates Title VII contributed to a plaintiff's termination—yet, the jury still believed the termination would have occurred notwithstanding the discriminato-

\begin{itemize}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} 123 F.3d 1440 (11th Cir. 1997).
\item \textsuperscript{52} \textit{Id.} at 1440-41. The employee requested $110,779.50 in attorney fees and $12,553.20 in costs. \textit{Id.} at 1441. The district court awarded costs of only $6768.43, a ruling that neither party appealed. \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 1444.
\item \textsuperscript{54} \textit{Id.}
\end{itemize}
ry policy. No damages would be awarded, but injunctive relief might be appropriate. In that case, the public purpose for the suit is greater, and affirmative relief would have been obtained—even though the plaintiff could not be benefitted because the District Court would lack the power to order reinstatement.55

Second, the appellate court looked at the nature of the nondiscriminatory reason for the discharge as an added factor to review:

[An “innocent” employee whose conduct played no role in his termination (e.g., reduction in force cases) stands in a different situation than one who engages in misconduct. Furthermore, misconduct manifests itself with varying degrees, so the severity of the defendant's wrongdoing can be considered in determining whether the defendant should be obligated to pay the plaintiff’s attorney fees.66

Finally, the appellate court addressed the relevance of considering the employee's rejection of a settlement offer:

[W]e are concerned that any settlement offer—regardless of how slight it may be—will appear overwhelming in a case in which Congress has decreed that no damages may be awarded. Therefore, although rejection of a settlement offer may be considered, we do not believe that it should ordinarily be a controlling factor in assessing a fee request.67

In Akrabawi v. Carnes Co.,68 the appellate court likewise upheld the district court's refusal to award attorney fees.69 The employee proved that national origin was a motivating factor in the denial of a promotion, but the employer proved that the employee would have been denied the promotion in any event because the employee had provided information on his application for the position that could not be verified.60 The appellate court agreed with the district court that (1) the employee met with only limited success in showing the employer's discrimination; (2) the employee's own conduct played a larger role in the employer's decision than any discrimination; and (3) "evidence of invidious discrimination is minimal and the evidence of employee misconduct is serious."61

55. Id. at 1444 n.5.
56. Id. at 1444.
57. Id. at 1445.
58. 152 F.3d 688 (7th Cir. 1998).
59. Id. at 698.
60. Id. at 696.
61. Id.
In *Stevens v. Gravette Medical Center Hospital*, the court declined to award attorney fees when (1) the employee proved that he had been denied a promotion and forced to resign, in part because of reverse gender discrimination, but the employer proved that the same events would have occurred absent a discriminatory motive; (2) the employee was not entitled to a declaratory judgment that the employer had engaged in a pattern or practice of reverse gender discrimination; and (3) the employee was not entitled to injunctive relief because he had failed to prove that the employer had a pattern or practice of gender discrimination that continued after his resignation. Interestingly enough, the court agreed that "a significant legal interest [was] at issue and that a public goal [was] served by such litigation," but it added that "in this case no significant precedent has been established that will serve to alter the behavior of potential defendants." The court denied attorney fees because "this case... conferred no substantial benefit on Stevens or on anyone else." By contrast the court in *Forrest v. Stinson Seafood Co.* applied the *Sheppard* factors and held that the employee was entitled to attorney fees. Plaintiff, a female employee, proved that she had been denied a position on a fishing boat because of gender, but the employer proved that she would not have been selected in any event "because of factors unrelated to her sex such as experience or skill." The court construed *Sheppard* as providing "the following factors relevant to a district court's determination of an appropriate award of attorneys' fees in a mixed-motive case: promotion of public purposes, how widespread the discrimination was, animus on the part of the defendant, misconduct [by the plaintiff], and any reasonable offer of settlement." The court held that all these factors favored awarding attorney fees.

First, the lawsuit "ha[d] been of significant public service in opening an otherwise relatively closed career path to women" because no woman ever had worked on one of the employer's fishing boats. In addition, the lawsuit was the "primary force behind [the employer's] decision to

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63. Id. at 1021.
64. Id.
65. Id.
67. Id. at 45-46.
68. Id. at 42 n.2.
69. Id. at 45 (citing Sheppard, 88 F.3d at 1336-37).
70. Id.
71. Id.
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revise its arbitrary and discriminatory policies.\textsuperscript{72} Second, "[t]he
evidence showed that [the employer's] management, as well as a former
fishing boat captain, agreed that there would never be a woman on [one
of the employer's] boat[s]."\textsuperscript{73} Third, when the employee persisted in
obtaining the desired position, the employer enacted minimum qualifica-
tions for boat positions that did not apply to all of the crew members
who had been previously hired by the employer's boat captains.\textsuperscript{74} This
reaction led the court to comment that "[t]he tactics employed by . . .
management in attempting to make minimum qualifications and hiring
practices retroactive demonstrate a sophistication in personnel issues
and confirm its clear position against hiring women on its boats."\textsuperscript{75}
Fourth, the employee had never engaged in any misconduct; rather, she
always was "considered an excellent employee."\textsuperscript{76} Finally, the employer
never tried to settle the case. Quite the contrary, the employee made an
offer to settle, and the employer never responded.\textsuperscript{77} Consequently, the
court awarded approximately $33,000 in attorney fees and $1100 in
costs.\textsuperscript{78}

Finally, in a somewhat confusing decision, the court in Norris v. Sysco
Corp.\textsuperscript{79} upheld an attorney fee award in a mixed-motive gender
discrimination promotion case in which the employer proved that it
would not have promoted the employee even if it had no discriminatory
motive.\textsuperscript{80} The court upheld the district court’s adoption and application
of the Sheppard factors, but it did not elaborate upon the district court’s
analysis of those factors other than to conclude that the decision was not
an abuse of discretion.\textsuperscript{81} Contributing to the complexity is the fact that
the employee also prevailed on an Americans with Disabilities Act claim
based upon the employer’s failure to provide reasonable accommodation
and the fact that district court had slashed the employee’s attorney fee
request by approximately sixty percent because of unacceptable billing

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 45-46.
\textsuperscript{80} Id. at 1053.
\textsuperscript{81} Id. at 1051-52. Indeed, the court declared, "We do not discuss the precise elements
mentioned by the district court because we have no wish to, inadvertently or otherwise,
ossify this area by enshrining a list of items to be considered when plaintiffs go shopping
for fees." Id. at 1052. Unfortunately, the district court’s decision on the attorney fees issue
is unreported and not available in either the LEXIS or WESTLAW databases.
practices. Consequently, to what extent the attorney fee award was attributed to the mixed-motive gender discrimination claim is unclear.

B. The Minority Rule

The leading decision under the minority rule is the Tenth Circuit's decision in Gudenkauf v. Stauffer Communications, Inc. It is the only appellate court decision that has rejected the Sheppard analysis.

In Gudenkauf the district court held that the employee was entitled to attorney fees when the employee proved that her termination was motivated in part by her pregnancy, even though the employer proved that she would have been terminated in any event. After determining the lodestar amount, the district court reduced the fee award by one-half to reflect the employee's overall success on the mixed-motive claim.

In affirming, the appellate court rejected what it believed was the method used by the court in Sheppard of applying Farrar in mixed-motive discrimination cases. According to the court, the court in Sheppard erroneously held that "Farrar should be applied in a mixed motive case to deny all but a nominal fee recovery simply because a mixed motive plaintiff does not recover money damages or obtain injunctive relief." Rather, the court believed that "Farrar essentially holds that failure to recover more than nominal damages in a § 1983 action is a Pyrrhic or technical victory precluding an award of attorney's fees under § 1988 only when the action serves no public purpose," and that "Farrar recognizes that recovery may be had even where actual damages are minimal or nonexistent if plaintiff succeeds in serving an important public purpose.

The court, therefore, held that a finding of liability in a mixed-motive discrimination case satisfies the standard in Farrar for awarding attorney fees—even when the employer proves that it would have taken the same action absent the discriminatory motive and when injunctive relief is unnecessary—because "[a]n examination of the language and legislative history of [section 107(a)-(b)] clearly demonstrates Congress' conclusion that a plaintiff serves such a purpose when she proves

82. Id. at 1046-47.
83. 158 F.3d 1074 (10th Cir. 1998).
86. 158 F.3d at 1080.
87. Id. at 1078.
88. Id. at 1080.
impermissible discrimination was a factor in her termination."\textsuperscript{89} The court added, "A verdict for a plaintiff in a mixed motive Title VII case constitutes a victory on a significant legal issue that furthers a public goal, a goal that is advanced notwithstanding the fact that a plaintiff recovers no damages."\textsuperscript{90} Consequently, the court concluded that attorney fees ordinarily should be awarded to a plaintiff who prevails under section 107(a) "in all but special circumstances."\textsuperscript{91}

In mandating what appears to be a strong presumption in favor of attorney fees, the court had two concerns. First, denying attorney fees would send the wrong message to employers who are motivated by unlawful discrimination (i.e., "that a little overt sexism or racism is okay, as long as it was not the only basis for the employer’s action").\textsuperscript{92} Second, denying attorney fees in mixed-motive discrimination cases undermines the purpose of Title VII because such a ruling would often leave prevailing plaintiffs without a remedy to make them whole.\textsuperscript{93}

Expressing the belief, however, that "Congress did not intend to place ‘mixed-motive plaintiffs in a more favorable position than plaintiffs for whom discrimination is the sole cause of an adverse employment decision,’” the Court also affirmed, over the employee’s obvious objection, the district court’s one-half reduction in the requested attorney fee award.\textsuperscript{94} The court noted that the employee was not fully successful on her [section 107(a)] claim and we find nothing in [section 107(b)] to indicate that Congress did not intend for fees to be awarded based on degree of success on the entire [section 107(a)] claim, as they would be had the plaintiff convinced the jury that she was terminated because of the discrimination.\textsuperscript{95}

The court then adopted a "proportionality analysis," formulated by the district court, for assessing the amount of a reasonable attorney fee award and whose factors include: (1) "how successful the plaintiff was in proving that an employer’s discrimination, and not the employee’s own misconduct, drove the employment decision;" and (2) "the extent to which the mixed-motive verdict may have served one or more of the plaintiff’s legitimate purposes for filing the suit and pursuing the

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1081.
\textsuperscript{91} Id. (internal quotation marks omitted).
\textsuperscript{92} Id. at 1082 (quoting H.R. REP. No. 102-40(I), at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 585 (citation omitted by court)).
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 1084 (quoting Sheppard, 88 F.3d at 1338).
\textsuperscript{95} Id. (citing Hensley v. Eckerhart, 461 U.S. 424, 436 (1983); id. at 441 (Brennan, J., dissenting)).
litigation through trial." The court was quick to emphasize, in a footnote, that the 1991 Act "makes it clear that a plaintiff serves an important public purpose any time she establishes that improper discrimination played a role in an adverse employment action taken against her." Only one appellate court has reviewed Gudenkauf, and that court rejected its reasoning. In Norris v. Sysco Corp., the Ninth Circuit criticized Gudenkauf for two reasons. First, the Tenth Circuit's reading of Sheppard "to mean that only a nominal fee recovery will be allowed when a plaintiff does not obtain damages or an injunction in a mixed motive case ... somewhat mistakes the Sheppard approach." Second, the court was concerned that "Gudenkauf does seem to go somewhat further [than Sheppard] when it declares that even in the face of nominal, de minimis, or no, relief a plaintiff should 'ordinarily' recover fees." The court responded, "Perhaps in the long run, Gudenkauf's 'ordinarily' will rarely yield a result different from Sheppard's 'proportionality,' but to the extent it would, we are satisfied that Sheppard states the correct rule."

III. STILL AVOIDING LIABILITY IN MIXED-MOTIVE RETALIATION CASES

For the most part, employees have fared even worse in mixed-motive retaliation cases. Because of what appears to be a glaring oversight in section 107(a), most courts, including every appellate court that has addressed the issue, have held that the Price Waterhouse rule still applies in mixed-motive retaliation cases. Consequently, employees who have been unable to prove that the employer's retaliatory motive was the
determining factor in the adverse employment decision (and not just one of several motivating factors) are not prevailing parties and are denied any remedies, including recovery of attorney fees.

The source of the problem is found (or, to be more accurate, is not found) in section 107(a), which delineates the requirements for proving mixed-motive discrimination. Section 107(a) declares that an "unlawful employment practice is established when . . . race, color, religion, sex, or national origin was a motivating factor for any employment practice." Conspicuously absent from the definition of "unlawful employment practice" in mixed-motive cases is any reference to retaliation as a motivating factor or to the statutory provision that establishes retaliation as an unlawful employment practice. The problem is exacerbated by section 107(b), which provides limited relief "[o]n a claim in which an individual proves a violation under [section 107(a)]." Moreover, the statutory provision in Title VII that immediately precedes section 107(b) makes specific reference to retaliation. This omission suggests, if not mandates, that Congress's efforts to overrule Price Waterhouse did not include retaliation cases.

Some courts have included retaliation cases under section 107(a) by relying upon references in the legislative history that Congress intended to overrule Price Waterhouse in its entirety and by invoking common sense. In de Llano v. North Dakota State University, the court declared that "it would be illogical and contrary to congressional intent to apply different standards of proof and accompanying relief provisions to retaliation claims as opposed to discrimination claims." In Heywood v. Samaritan Health System, the court, after noting that the statutory language does not include retaliation, pronounced that "it is certainly reasonable to assume that the Congressional policy articulated in the amendment and in the House report, reaches

106. See 42 U.S.C.A. § 2000e-5(g)(2)(A). That statute provides, No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.
Id. (emphasis added).
108. Id. at 170.
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retaliation as well as the enumerated considerations." Some courts even have seemingly overlooked the omission in the statute and simply have declared that section 107(a) applies to retaliation cases.

One of the earliest cases to reject this approach was *Riess v. Dalton.* In that case the jury found that "reprisal for protected EEO activity was a motivating factor [in plaintiff's discharge] but that Defendant would have fired Plaintiff even absent this unlawful consideration." The court then denied the employee's motion for attorney fees, in part because he was not a prevailing party under section 107(b).

The court began its analysis by declaring that the plain meaning of section 107(b) shows that it applies only to violations of section 107(a). Because section 107(a) does not include mixed-motive wrongful retaliation on its face, the remedies under section 107(b) are unavailable.

The court then rejected the employee's argument that a right to relief under section 107(b) for mixed-motive retaliation should be inferred because the omission of mixed-motive retaliation claims from section 107(a) was a "mere oversight" by Congress. The court observed that "where Congress intended to address retaliation violations, it knew how to do so and did so expressly." The court noted that 42 U.S.C. § 2000e-5(g)(2)(A), which immediately precedes section 107(b), does include retaliation, leading the court to conclude that "[t]he fact that Congress expressly treated [retaliation] violations in such close proximity

110. Id. at 1081.
111. In *Hall v. City of Brawley,* the court simply quoted from dicta in *Landgraf v. USI Film Products,* that "section 107 responds to *Price Waterhouse v. Hopkins* . . . by setting forth standards applicable in "mixed-motive" cases." 887 F. Supp. 1333, 1345 (S.D. Cal. 1995) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 251 (1994)). The sole issue in *Landgraf* was whether the 1991 Act should be applied retroactively to cases that were pending when it went into effect. 511 U.S. at 247. The proper interpretation of section 107 was not an issue. In *Doe v. Kohn Nast & Graf, P.C.,* 862 F. Supp. 1310, 1316 n.2 (E.D. Pa. 1994), the court simply declared that section 107(a) "was designed to overrule that part of *Price Waterhouse.*" In *Medlock v. Johnson & Johnson Cos.,* No. 94-2317-JWL, 1996 U.S. Dist. LEXIS 18275, at *8-9 (D. Kan. Oct. 4, 1996), the court rejected, without analysis, the employer's contention that section 107(a) does not specifically refer to retaliation.
113. Id. at 743. The jury also found that gender was not a motivating factor in the discharge. Id.
114. Id. at 746.
115. Id. at 744.
116. Id.
117. Id. at 745.
118. Id.
to Section 107(b) demonstrates that where Congress intended to address retaliation violations, it knew how to do so and did so explicitly.\textsuperscript{119}

Finally, the court rejected the employee's contention that excluding mixed-motive retaliation from section 107 "would be inconsistent with the goals and remedial purposes of Title VII."\textsuperscript{120} The court responded that Congress addressed discrimination and retaliation in separate and distinct statutes.\textsuperscript{121} In addition, the result was consistent with \textit{Price Waterhouse}, which the court assumed (as it had to) to be a correct interpretation of Title VII for claims that were not covered by section 107.\textsuperscript{122}

Since \textit{Reiss} was decided, four courts of appeals have addressed this issue. All have held, for reasons similar to those articulated in \textit{Reiss}, that section 107 does not apply to mixed-motive retaliation cases.\textsuperscript{123}

\section*{IV. REACHING A PRACTICAL RESULT}

A strong case can be made that the emerging majority rule for the appropriate remedies in both mixed-motive discrimination and retaliation cases represents a practical, common-sense approach\textsuperscript{124} to an area of the law that generates a huge amount of litigation. In both instances, the employee—or, to be more accurate, the employee's attorney—is precluded from reaping a financial windfall even though the evidence establishes that any discriminatory motive would not have made a difference in the outcome. Moreover, the concerns expressed by those courts that support the minority rule regarding the impact upon employer conduct simply are not realistic.

All too often employment discrimination and retaliation lawsuits shift their focus from a dispute over whether the employee was treated

\begin{itemize}
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} See Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); McNutt v. Board of Trustees of Univ. of Ill., 141 F.3d 706, 708 (7th Cir. 1998); Woodson v. Scott Paper Co., 109 F.3d 913, 931-35 (3d Cir. 1997); Tanca v. Nordberg, 98 F.3d 680, 682-84 (1st Cir. 1996). Although the Eleventh Circuit has not addressed this issue, one district court within that circuit has reached the same conclusion. See Lewis v. YMCA, 53 F. Supp. 2d 1253, 1262 (N.D. Ala. 1999).
\item \textsuperscript{124} The majority rule in retaliation cases goes even further than a common-sense approach. It is the approach that is compelled by a plain reading of the statutory language. Whether Congress intended this result or not, section 107(a) does not refer to retaliation claims (even though other provisions in Title VII clearly do). Thus, retaliation claims are not covered by section 107(b). Efforts by a minority of courts to "write in" what Congress allegedly intended based upon generalized statements in the legislative history runs counter to accepted rules of statutory construction.
\end{itemize}
lawfully to a battle over the employee's attorney fees. Settlement efforts often fail primarily because employees' attorneys believe that the proposed settlement, while adequate or better for their clients, does not properly compensate them.

This result is especially frustrating when the employee's case is very weak because there is strong evidence of a nondiscriminatory, determinative motive for the adverse employment action. The employer reasonably offers a relatively small sum for settlement that most likely would exceed what the employee would receive if the case went to trial; however, because that offered amount does not cover what the employee's attorney believes is the reasonable value of services rendered to that point, the offer is rejected.

Therefore, if the employer receives a favorable jury verdict on the mixed-motive issue and if injunctive relief is inappropriate, it would be patently unfair to punish an employer who has offered a better than reasonable settlement and reward an employee and attorney for wasting judicial resources, not to mention the employer's resources, in pursuing a litigation strategy that achieves a worse result than what was offered. The sizable resources that usually are involved in employment discrimination and retaliation cases should not be expended when the most that the employee can obtain is a technical victory with no substantial monetary or equitable remedy.

The majority rule compels employees and their attorneys to take a hard look at their cases when the discovery process reveals—if it was not already known by both before they filed the lawsuit—that the same adverse result would have occurred even if a discriminatory or retaliatory motive was not present. Faced with the undesirable prospect of being denied monetary remedies, injunctive relief, and attorney fees in discrimination cases and of being denied the designation of "prevailing party" in retaliation cases, employees and their attorneys have an added incentive to end the litigation before additional resources are expended in a futile effort that will not yield back pay, reinstatement, damages, or injunctive relief.

However, the minority rule espoused in Gudenkauf only encourages needless litigation of employment discrimination and retaliation lawsuits even when the employee is not entitled to any substantive relief. By establishing what amounts to a presumption in favor of awarding attorney fees even when the nondiscriminatory motive is determinative, the minority rule actually encourages employees and their attorneys to continue litigating lawsuits with the hope of covering their losses as far as the cost of legal services is concerned. Regardless of the reasons the proponents of section 107 may have had, encouraging continued litigation of meritless employment discrimination and retaliation claims
so that attorneys can be paid for failing to achieve any meaningful results for the employee could not have been one of them.

The court in Gudenkauf also was concerned that the majority rule encourages employers to commit discrimination and then rewards them for having done so when the discriminatory motive is not determinative. This concern is not accurate for two reasons. First, employers in mixed-motive cases often pay a heavy price because they have been forced to expend substantial resources to pay for their attorneys. Arguably, the threat of such an expenditure just to avoid the full range of remedies that usually are available to employees is enough of a disincentive to flout the laws against employment discrimination and retaliation.

Second, the majority rule is flexible enough to sanction employers who blatantly violate the laws against discrimination and retaliation by imposing injunctive relief and attorney fees. In Forrest v. Stinson Seafood Co.,125 which applied the majority rule in a discrimination case, the court assessed attorney fees because the employer unequivocally had an invidious discriminatory motive, expressed no desire to alter that attitude, and refused to consider the possibility of settlement. In addition, the nondiscriminatory reason did not involve any misconduct by the employee. Finally, the case involved an attempt to open equal employment opportunities in a work area in which discrimination had gone unchallenged to that point. This holding properly stands for the proposition that while an employee should not continue to pursue a mixed-motive lawsuit that will not yield any substantively beneficial results, neither should an employer blatantly ignore its legal obligations and then refuse to discuss reasonable settlement options.

Whether the majority rule in mixed-motive discrimination in retaliation cases can withstand further scrutiny remains to be seen. This issue has yet to be addressed by the Supreme Court. Indeed, the Court repeatedly has declined to address this issue. If the Court decides to address this issue, it is hoped that it will adopt the Sheppard proportionality rule or a rule very similar to it.

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125. 990 F. Supp. 41 (D. Me. 1998). For a discussion of this case, see supra notes 66-78 and accompanying text.