Buffalo Law Review

Volume 58 | Number 1 Article 3

1-1-2010

The Causation Standard in Federal Employment Law: *Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991

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INTRODUCTION

In some extraordinary cases, the Supreme Court's assertion of unrestrained judicial authority through interpretation of a federal statute may almost demand a congressional response. The Roberts Court's remarkable 2009 decision in *Gross v. FBL Financial Services, Inc.*,[1] formulating a necessary or "but-for" causation standard for actionable intentional discrimination under the Age Discrimination in Employment Act of 1967 (ADEA),[2] is such a case. By reading governing language in the ADEA differently than how the Court in 1989 had interpreted identical language in Title VII of the Civil Rights Act of 1964 (Title VII),[3] the decision in *Gross* asserts the current Court's independence from a prior Court's interpretive judgment in a governing precedent.[4] Moreover, by ignoring

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1. 129 S. Ct. 2343 (2009).

2. 29 U.S.C. §§ 621-633a (2006).

3. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (interpreting 42 U.S.C. §§ 2000e-2000e-17 (2006)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1027.

4. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

the likely expectations and intent of Congress as expressed in its legislative response to that precedent, *Gross* seems to reject the use of past interpretations as the basis for a dialogue with Congress to ensure the alignment of future judicial interpretations with legislative intent. Instead, the Court in *Gross* effectively claims authority to interpret the meaning of the governing words in the ADEA abstracted from any consideration of likely congressional intent.

Notwithstanding the Roberts Court's apparent disinterest in a cooperative dialogue with the legislative branch, a Congress committed to the original promise of the ADEA must respond. Congress may do so as it responded to the precedent-setting 1989 Title VII decision, *Price Waterhouse v. Hopkins*,[5] which the Court rejected in *Gross*. In § 107 of the Civil Rights Act of 1991 (1991 Act),[6] Congress enacted a contributing or "motivating" cause standard for establishing liability for intentional discrimination under Title VII, while allowing employers the opportunity to avoid most forms of individual relief to discrimination victims—but not to escape liability altogether as did *Price Waterhouse*—by proving the absence of "but-for" causation.[7] Congress could respond directly to the Court's recalcitrance in *Gross* by enacting an identical "motivating" factor provision for the ADEA,[8] perhaps as one of several amendments to strengthen the age discrimination statute. Furthermore, to avert future decisions like *Gross*, Congress could also add "motivating factor" provisions to other federal statutes, such as the Americans with Disabilities Act (ADA)[9] and the Family and Medical Leave Act (FMLA)[10], which the current Court presumably would read to require proof of necessary or "but-for" causation. Indeed, Congress might consider clarifying the applicability of a contributing or "motivating" factor causation standard to

5. 490 U.S. 228.

6. *See* § 107(a).

7. *Id.*

8. A form of such legislation was introduced in both Houses of Congress several months after the decision in *Gross*. *See* S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009); discussion *infra* note 271.

9. 42 U.S.C. §§ 12101-12213.

10. 29 U.S.C. §§ 2601-2654 (2006).

the various anti-retaliation provisions in all federal employment statutes.[11]

Using § 107 as a model for amendments to other federal employment statutes would seem attractive to those in Congress concerned about the difficulty of proving intentional discrimination on the basis of either a protected status, such as older age, or against protected activity, such as the assertion of some statutory right like freedom from status discrimination or family or medical leave. While the core meaning of forbidden intentional employment discrimination is clear—considering or taking into account, at least to some degree, a forbidden status category or activity[12]—proving that such consideration actually occurred within the conscious, or unconscious,[13] thought processes of

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11. *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (2006) (prohibiting discrimination against employees of publicly traded companies who report suspected violations of securities law); Federal Juror System Improvement Act, 28 U.S.C. § 1875 (2006) (amended 2008) (protecting jurors' employment); Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660 (2006) (prohibiting discrimination against employees who make complaints or sue under OSHA); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (2006) (prohibiting discrimination against beneficiaries and participants of ERISA plans for enforcing rights under that statute). Legislation introduced in Congress in October, 2009, to overturn the *Gross* decision would extend the "motivating" cause standard to "the exercise of any right established by Federal law." S. 1756, 111th Cong. § 3 (2009); H.R. 3721, 111th Cong. § 3 (2009); discussion *infra* note 271.

12. The Court, for instance, has made clear in numerous decisions that Title VII liability requires proof only of consideration, not animus toward, plaintiff's protected status. *See, e.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("[A]bsence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy . . . ."); Goodman v. Lukens Steel Co., 482 U.S. 656, 668-69 (1987) (finding that a union cannot take into account race in deciding how to process grievance despite lack of "racial animus" or denigration of blacks); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708-09 (1978) (finding that actuarially sound nature of gender-based insurance tables does not justify their adoption to determine pension contributions). *See generally* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 233, 298-99 (1971).

13. *See generally* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987).

decision makers is usually problematic.[14] Section 107 of the 1991 Act promised to ease the burden of proving illegal intentional discrimination by clarifying that a Title VII plaintiff must prove only that the consideration of one or more of the five Title VII-forbidden status categories (race, color, religion, sex, or national origin) "was a motivating factor" for the challenged employment decision; the claimant, the 1991 Act made clear, need not prove that the consideration was a necessary or sufficient cause of the decision.[15]

This clarification promised to be particularly important for the ordinary employee, who has less than an unblemished record and who could be faced with the burden of untangling the threads of possible multiple motivations for an adverse employment decision. Furthermore, whether consideration of a forbidden category was a motivating factor in any employment decision is a question of fact that usually turns in part on the credibility of witnesses; it therefore would seem that under § 107's standard most serious claims of intentional illegal discrimination should

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14. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). A range of empirical studies have demonstrated the special difficulties that plaintiffs have had successfully litigating employment discrimination claims. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 454-56 (2004) (finding that employment discrimination plaintiffs lose at a greater rate than plaintiffs before, during, and after trial, including on appeal); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558-60 (2001) (finding that employee discrimination plaintiffs success rate are below that of other plaintiffs in federal courts); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch., Research Paper No. 08-022, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138373 (finding higher summary judgment rates for employment discrimination cases).

15. 42 U.S.C. § 2000e-2(m) (2006). In *Price Waterhouse* the Court had held that while a Title VII plaintiff must prove only contributing causation, a defendant may avoid liability by proving that it would have made the "same decision" in the absence of its consideration of a protected status. 490 U.S. 228, 258 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *see also id.* at 259 (White, J., concurring).

not be taken from juries on motions for summary judgment or directed verdicts. Although § 107 of the 1991 Act also provided that an employer that proves that the illegal consideration was not a necessary cause of the challenged decision avoids any legal or equitable remedies requiring payments to or the hiring of complainants,[16] the establishment of "the motivating factor," contributory causation standard for basic Title VII liability promised to be significant. By allowing the award of attorneys' fees to plaintiffs for cases in which they could prove contributing causation, regardless of the employer's success in limiting other remedies,[17] the "motivating factor" causation standard promised to make the threat of litigation more realistic in more cases and thus to affect employers' calculations of rational settlement.

Congress, however, should not use § 107 as a model for a legislative response to the Court's decision in *Gross*. It should not do so because the federal judiciary has interpreted § 107 in ways that significantly compromise the section's promise of making the difficult proof of illegal intentional discrimination somewhat easier.[18] The lower federal courts have compromised this promise both by limiting the reach of § 107's "motivating factor" causation standard, and—through the misuse of legal doctrine fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*[19] and *Texas Department of Community Affairs v. Burdine*[20] to assist plaintiffs—by denying juries authority to find illegal "motivating factor" causation.[21] The Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa*,[22] especially when read with the Court's decision three years before in *Reeves v. Sanderson Plumbing Products*,

16. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006).

17. *See* § 2000e-5(g)(2)(B)(i).

18. *See infra* text accompanying notes 167-203, 223-50.

19. 411 U.S. 792 (1973).

20. 450 U.S. 248 (1981).

21. Many lower courts also have frustrated the promise of the 1991 Act by denying or reducing the award of attorneys' fees when employers successfully prove that they would have made the same decision in the absence of illegal discrimination. *See infra* note 111 and cases cited therein.

22. 539 U.S. 90 (2003).

Inc.,[23] seemed to revive the 1991 Act's promise by rejecting a limitation on the reach of the "motivating factor" standard. Lower courts' interpretations of *Desert Palace*, however, have been generally narrow; these interpretations continue to limit the reach of § 107 and to use the Court's *McDonnell Douglas-Burdine* framework to restrict juries' discretion to find "motivating factor" causation.[24]

Before responding to *Gross* in an amendment to the ADEA, or to any other federal employment statute, legislative drafters should understand the history of the judiciary's treatment of causation under the federal anti-discrimination in employment laws. They should understand the *Price Waterhouse* decision, the Congressional response to that decision in § 107, and how courts have compromised that response. Such an understanding is necessary if the Congressional response to *Gross* is to be more effective than was the response to *Price Waterhouse*.

This Article is framed to provide this understanding. Part I provides an analysis of the Court's treatment of causation in Title VII decisions through *Price Waterhouse*. This part also analyzes the congressional response in § 107. Part II explains how the lower courts chose to treat the causation issue in ADEA cases after *Price Waterhouse* and the 1991 Act, and then highlights how the Supreme Court made a remarkably different choice in *Gross*. The analyses in Parts I and II demonstrate why members of Congress who want the ADEA to be a strong tool against age discrimination in employment would want to overturn that decision. Part III indicates why Congress should not do so simply by adding to the ADEA a provision like § 107 of the 1991 Act. This part explains how the lower courts, both before and even after *Desert Palace,* have narrowed the scope of § 107 by interpreting it to provide a separate cause of action, rather than a causation standard for all Title VII disparate treatment actions. Part IV presents a recommendation for how Congress could more effectively formulate a contributing or motivating cause standard not only for anti-discrimination law mandates like those in the ADEA and Title VII, but also for other federal employment law prohibitions. Part IV also explains further why a

23. 530 U.S. 133 (2000).

24. *See infra* text accompanying notes 223-50.

contributing cause standard is consistent with the consideration of the pretext proof contemplated within the *McDonnell Douglas-Burdine* framework.

I. A "MOTIVATING FACTOR" STANDARD FOR TITLE VII

A. *Before* Price Waterhouse

Until its decision in *Price Waterhouse* almost twenty-five years after the passage of Title VII, the Supreme Court did not attempt to definitively settle the minimum causal linkage required to establish actionable intentional discrimination under any federal employment discrimination law. Even before *Price Waterhouse*, however, the Court in Title VII disparate treatment cases effectively rejected two alternative possible minimum causation standards, sole causation and sufficient causation. A sole causation standard would require that consideration of a forbidden category be the only reason for the challenged employment decision. A sufficient causation standard would require that consideration of one of the five forbidden categories would be sufficient to determine the decision, even if other considerations were relevant to the decision makers. A sufficient causation linkage differs from a necessary causation linkage; the latter requires that the decision would not have been made but for consideration of the linked cause, while the former requires that it would have been made without consideration of any other causes. For instance, if an employer rejects a female applicant for a laboratory position because she lacks a doctorate, but would have hired either an otherwise similar female with a doctorate or a similar male even without a doctorate, the woman's gender was not a sole or a sufficient cause, but was a necessary cause of her rejection.[25]

The Court's most important early Title VII cases treating proof of an individual instance of disparate treatment were *McDonnell Douglas* and *Burdine*. These

25. In some cases there might be a sufficient causation linkage without a necessary causation linkage. For instance, if the employer in the example in the text would not consider hiring either any women or any individuals without doctorates for the position, being a woman and lacking a doctorate both would be sufficient causes for rejection, but neither would be a necessary cause for the rejection of a female who lacked a doctorate.

decisions offered plaintiffs a framework for proving indirectly the existence of a covert motivation condemned by Title VII by proving the implausibility of alternative legal motivations. Central to this framework and the assistance it offered to plaintiffs was the Court's direction to the lower courts to apply "a legally mandatory, rebuttable presumption"[26] of illegal discrimination if a Title VII plaintiff establishes a prima facie case[27] raising "an inference of discrimination" by eliminating "the most common nondiscriminatory reasons for the plaintiff's rejection" and the defendant employer does not offer another "legitimate, nondiscriminatory reason" for the challenged decision. This mandatory presumption forced a defendant employer that denied discriminatory motivation to specify an alternative nondiscriminatory motivation and thus enabled plaintiffs to attempt to prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence" as well as "directly by persuading the court that a discriminatory reason" existed.[28]

By facilitating proof of the existence of a bad motive through proof of the absence of a good motive, the Court did not purport to determine the degree of minimal causal linkage between the bad motive and the adverse employment decision challenged by the plaintiff. The Court's analysis in *McDonnell Douglas* and *Burdine* does seem to reject, however, both sole and sufficient causation as minimum standards by suggesting that proving the employer's "proffered explanation" to be "unworthy of credence" or pretextual would raise an inference not that the employer's professed good motivation did not exist at all or that it was not a necessary contributing cause, but only that there was also some other cause, and thus probably an illegal cause, for the challenged decision.[29] In *McDonnell Douglas,* the Court asserted that "[e]specially relevant" to a showing in that case that the employer's proffered

26. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

27. *Id.* at 254. As stated in *Burdine*, to establish a prima facie case that forces a defendant to offer a legitimate reason, the "plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Id.* at 253.

28. *Id.* at 256.

29. *Id.*

explanation for not rehiring the plaintiff—his participation in an unlawful obstruction of access to and egress from the employer's property—was a pretext for a decision motivated by the plaintiff's race would be evidence "that white employees involved in acts . . . of comparable seriousness . . . were nevertheless retained or rehired."[30] Such evidence would only raise an inference that the employer's fully legitimate and credible proffered reason for not wanting to rehire the plaintiff, his illegal conduct, was not a sufficient consideration and thus that some other consideration, most probably race, was also a necessary cause.[31] This certainly would not prove that the employer would no longer hire other individuals of the plaintiff's race, even if they were qualified and had not participated in illegal activity against the employer.

The Court in *McDonald v. Santa Fe Trail Transportation Co.* indeed acknowledged that the Court's opinion three years earlier in *McDonnell Douglas* had rejected a requirement of sole or sufficient causation by stating that a legitimate consideration cannot justify also taking into account race in an employment decision.[32] In *McDonald*, the Court applied this principle by holding that the white plaintiffs' misappropriation of cargo from their railroad employer did not excuse their employer's treating an African American co-thief and employee more leniently.[33] Proof that the white employees' race was neither a sole cause nor a sufficient cause of their discharge—proof, in other words, that their misappropriation of the cargo was also a necessary cause of the discharge—was no defense to their Title VII claim.

The Court's application in *McDonnell Douglas* and *McDonald* of Title VII's proscription of intentional discrimination to decision making that takes race into account, regardless of whether the decision making would make race determinative as a sole or sufficient cause in the absence of other causal factors, what might be called "race-

30. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

31. Proof that a particular cause is not sufficient does not prove, as a matter of logic, that that cause was not necessary. It does prove, however, that there is at least one other necessary cause.

32. 427 U.S. 273, 282 n.10 (1976).

33. *Id.* at 282-83.

plus" discrimination, followed directly from the Court's earlier condemnation in *Phillips v. Martin Marietta*,[34] of similar "sex-plus" decision making. In *Phillips* the Court held in a unanimous per curiam decision that Title VII's prohibition of intentional discrimination covered an employer's policy against hiring women, but not men, with pre-school age children, for particular positions even though the company had hired a disproportionate number of female applicants for these positions.[35] The company's disproportionate hiring of women surely proved that being female was not the sole or sufficient cause of women with young children being rejected, but it did not insulate the company from liability under Title VII.[36]

The Court's analysis in *McDonnell Douglas* might be read to suggest that since proof of the insufficiency of a proffered good motive would be relevant to proof of at least a necessary causal linkage between a Title VII-condemned consideration and a challenged employment decision, such a linkage must be proven in all Title VII disparate treatment cases.[37] The Court's description of possible probative evidence in *McDonnell Douglas* and in *Burdine*, however, indicates that the Court did not intend to require that plaintiffs prove the insufficiency of the good motive in all cases and thus could not have settled on necessary causation as the minimally required linkage. In *McDonnell Douglas* the Court noted other evidence that might be relevant, but that could only prove directly the existence of a bad discriminatory motive, rather than the absence or insufficient force of a good motive—such as McDonnell Douglas's professed desire to avoid employing those who have engaged in illegal action against it.[38] This other evidence, which had no direct relevance to McDonnell Douglas's professed good motive, included the employer's reaction to legitimate civil rights activities of employees, its

34. 400 U.S. 542 (1971).

35. *Id*. at 544.

36. The Court did leave open the possibility of a bona fide occupational qualification defense. *Id*.

37. Indeed, in *McDonald* the Court read *McDonnell Douglas* to mean that "no more" is required than "but for cause." 427 U.S. at 282 n.10. This reading, of course, does not settle whether less than "but-for" necessary causation could be sufficient in some cases.

38. McDonnell Douglas v. Green, 411 U.S. 792, 804-05 (1973).

"general policy and practice with respect to minority employment" and its treatment of the plaintiff during his prior employment.[39] Moreover, in *Burdine* the Court stated that a Title VII plaintiff can carry her ultimate burden of proving that "she has been the victim of intentional discrimination . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[40] The latter, "indirect" method of proof might tend to prove the nonexistence or at least the insufficiency of an alternative motive and thus the necessity of a bad discriminatory motive. The former, "direct" method of proof, however, only can establish the existence of the bad motive, not the insufficiency of a good motive. Notwithstanding the Court's perhaps unconsidered use of the word "more," the relative strength of a good motive cannot be established by proof of the existence of a bad motive.

Regardless of the import of this analysis in *McDonnell Douglas* and *Burdine*, the Court in other pre-*Price Waterhouse* decisions made clear that the *McDonnell Douglas-Burdine* framework was designed, not to force plaintiffs to prove the insufficiency of a good motive as well as the existence of a discriminatory motive, but rather to offer only an option to assist plaintiffs with the difficult proof of covert discrimination. In several cases before *Price Waterhouse,* the Court treated overt sex-based policies to constitute intentional discrimination without attempting to shoe horn analysis into the *McDonnell Douglas-Burdine* framework.[41] More importantly, in *United States Postal Service Board of Governors v. Aikens*, the Court confirmed that the purpose of the *McDonnell Douglas-Burdine* framework was not to establish subsidiary legal rules to be met before finding actionable discrimination, but only to offer plaintiffs a way to compel employers to offer legitimate reasons for challenged decisions and thus an opportunity for proof of pretext.[42] The *Aikens* Court directed courts to

39. *Id*.

40. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

41. *See, e.g.*, Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Dothard v. Rawlinson, 433 U.S. 321 (1977).

42. 460 U.S. 711, 716 (1983).

evaluate the evidence offered in a case where intentional discrimination is claimed only to determine "the ultimate question" of discrimination and to not make their inquiry even more difficult by applying legal rules which were devised to govern "'the basic allocation of burdens and order of presentation of proof.'"[43] Thus, the Court held that the trial court and appellate court in *Aikens* had mistakenly focused analysis on whether the plaintiff's evidence was adequate to establish a prima facie case sufficient to compel the defendant to provide a legitimate motive for not promoting the plaintiff, even after the defendant had offered such a motive after trial: "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."[44] The court, as finder of fact at this point, is only to evaluate all the evidence to determine the ultimate question of discrimination.[45]

Yet in *Aikens*, as in its other pre-*Price Waterhouse* disparate treatment cases, the Court did not directly separate the two parts of this ultimate question: first, whether a forbidden status category was considered in deciding on the challenged employment action; and second, if it was, to what degree did the consideration cause the action. For instance, in a footnote, the *Aikens* Court noted without comment on the issue of causation the relevance of some evidence, such as racist comments from a decision maker and the relative treatment of other black employees, that could help prove that race was considered during decisions not to promote the plaintiff without proving that it was a necessary cause of those decisions.[46] Thus, while the decision in *Aikens* confirmed that *McDonnell Douglas* and *Burdine* should be read only as a means of compelling a defendant to explain a challenged decision, and not as interpretations of the underlying meaning of Title VII's proscription of intentional discrimination, including the minimum causal linkage it embodies, *Aikens* did not offer a resolution of the causation issue.

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43. *Id.* (quoting *Burdine*, 450 U.S. at 252).

44. *Id.* at 715.

45. *Id.* at 716-17.

46. *Id.* at 713 n.2.

Not surprisingly, therefore, before *Price Waterhouse* the circuit courts of appeal had not reached a consensus on the issue of the minimum causal linkage required to prove actionable intentional discrimination in a Title VII case. Although no courts of appeals required that plaintiffs prove sole or sufficient causation, the courts split between requiring proof of necessary or but-for causation and requiring proof of some lesser, and perhaps less well defined, linkage such as "substantial" or "significant" or "discernible" "motivating" factor in the employment decision.[47] Some of the courts that did not require plaintiffs to prove necessary causation did allow defendants to prove the absence of such causation—to prove, in other words, that the same decision would have been made "but for" consideration of the plaintiff's forbidden status category—as a defense to liability or as a basis for limiting relief.[48]

B. Price Waterhouse

The Court thus granted certiorari in *Price Waterhouse v. Hopkins* in part at least for the purpose of finally and directly resolving the causation issue that it had avoided in the two and a half decades since the passage of Title VII.[49] The result was the publication of four opinions on the issue, none of which commanded the assent of more than four Justices and no two of which commanded the assent of the

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47. *Compare* McQuillen v. Wis. Educ. Ass'n Council, 830 F.2d 659, 664 (7th Cir. 1988) (requiring "but-for" causation), *and* Lewis v. Univ. of Pittsburgh, 725 F.2d 910, 914 (3d Cir. 1983) (same), *and* Mack v. Cape Elizabeth Sch. Bd., 553 F.2d 720, 722 (1st Cir. 1977) (same), *with* Walsdorf v. Bd. of Comm'rs, 857 F.2d 1047, 1052 (5th Cir. 1988) (requiring the illegal motive to be a "significant factor"), *and* Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) (same).

48. *See, e.g.*, Haskins v. U.S. Dep't of Army, 808 F.2d 1192, 1197-98 (6th Cir. 1987) (requiring the illegal motive to have been a "motivating factor" but allowing defendant to limit the remedy by proving that it would have made the same decision absent the illegal motive); Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc) (holding that if the "unlawful motive played *some part* in the employment decision or decisional process, the plaintiff is entitled to some relief" but allowing defendant to avoid back pay and reinstatement by showing that it would have made the same decision in the absence of the illegal motive (emphasis added)).

49. 490 U.S. 228 (1989); *see also* Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228.

same Justice. A four-Justice plurality concluded that the statute's proscription of discrimination should be interpreted to require proof of only a "motivating" cause linkage, but then afforded employers an affirmative defense to avoid liability by showing that discrimination was not a necessary cause.[50] A three-Justice dissenting opinion would have held that the statute required plaintiffs to prove necessary causation.[51] Justice O'Connor, in an opinion only for herself, agreed with the dissenters that the statute required a necessary causation linkage, but asserted that in some cases such a linkage can be shown by a plaintiff's "strong" proof of "substantial" causation, unless the defendant cannot prove the absence of necessary causation.[52] Justice White, in another individual concurrence, described the difference between the plurality and Justice O'Connor as "semantic" and stated that he could accept either approach because both were consistent with the Court's protection of public employees' First Amendment rights from public-employer retaliation.[53]

The dissenting opinion, authored by Justice Kennedy for himself, Chief Justice Rehnquist, and Justice Scalia, advances unconvincing arguments for finding a necessary causation linkage requirement in the statute. Justice Kennedy first asserted that the words "because of" in the statute's proscription of discrimination "because of such individual's race, color, religion, sex, or national origin" should be presumed to have the plain meaning of "everyday speech."[54] Citing a statement in an interpretive memorandum for Title VII in the Congressional Record for support of the "everyday speech" standard, Justice Kennedy claimed that in everyday speech "because of" means "to make a difference."[55] In fact, our speech and our notions of causation are much more complicated than Justice Kennedy allowed. As pointed out by the plurality, for instance, where

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50. *Price Waterhouse*, 490 U.S. at 244-45 (plurality).

51. *Id.* at 284 (Kennedy, J., dissenting) ("Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause.").

52. *Id.* at 276-78 (O'Connor, J., concurring in judgment).

53. *Id.* at 258-59 (White, J., concurring in judgment).

54. *Id.* at 281 (Kennedy, J., dissenting).

55. *Id.*

there are two independently sufficient causes for an action, in everyday speech we would treat each as a cause of the action, a cause that "made a difference," though neither would be a necessary cause.[56] Thus, most of us would state that where an employer refuses to hire either women or blacks, the employer's refusal to hire a black woman is caused by its consideration of both sex and race. Consider also an employer who refuses to promote to a managerial position any woman who has young children, any black woman, or any black who has young children. If a black woman with a young child is denied a promotion, most of us in our everyday speech would state that being black and being a woman both made a difference and both were causes of the denial. Yet neither race nor sex was a necessary *or* a sufficient cause. Most of us in our everyday speech indeed probably use cause, or the phrase "make a difference," in the sense of contributing cause, a factor that has some relevance to the outcome, or in the case of a decision, such as a personnel decision, is taken into account.

Justice Kennedy's other affirmative arguments for requiring a necessary causation linkage are equally unconvincing.[57] The few phrases relevant to causation that he drew from earlier opinions does not address whether the statute required necessary causation.[58] His reliance on the common law of torts requiring a "but-for" or necessary causation linkage as a minimum condition for imposing liability ignores the broader public purposes of Title VII.[59] While the tort system is designed to provide for appropriate compensation and efficient deterrence of costly actions, Title

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56. *Id.* (plurality).

57. Justice Kennedy's criticism of the "inconsistency" of the plurality opinion, however, was more compelling. *Id* at 285-86 (Kennedy, J., dissenting); *see also infra* text accompanying note 76.

58. None of the quotations even addressed whether the level of causation to which they referred was required by the statute as a minimal standard, and only one, from *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983), used the language of "but-for" causation to make clear the level of causation found by the Court. *See Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting). Furthermore, *Newport News* was not a directly relevant precedent because it involved an overt policy of differential treatment that the Court found to discriminate on the basis of sex, rather than an inquiry into tangled covert motivations. 462 U.S. at 683-84.

59. *See Price Waterhouse*, 490 U.S. at 282 (Kennedy, J., dissenting).

VII also represents a public condemnation of decision making affected by certain forms of discriminatory bias. Determining the meaning of the ambiguous "because of" phrase in § 703(a)(1) cannot rely on common law precedents any more than it can rely on an interpretation of "everyday speech"; it requires an analysis of this public purpose and the difficulty of proof of discriminatory motivation.[60]

Justice Brennan's *Price Waterhouse* plurality opinion, in which Justices Marshall, Blackmun, and Stevens joined, unfortunately does not provide such analysis in reaching its dual conclusions that plaintiffs must prove only that consideration of a Title VII-forbidden factor played a "motivating part"[61] in a challenged decision, but that defendants can avoid liability by proving that they would have made the same decisions "but for" the forbidden consideration.[62] To set the "motivating" factor causation standard, Justice Brennan did little more than note the ambiguity in the statutory phrase and cite the broad coverage of the Act through the unjustified effects-based disparate impact theory of proof and the narrow bona fide occupational qualification (BFOQ) defense,[63] neither of which has any particular relevance to the causation issue in disparate treatment litigation. Justice Brennan did not

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60. Furthermore, the law of torts does not always apply a simple requirement that plaintiffs prove necessary causation. For instance, two parties responsible for two independent physical actions, such as two separate but merging forest fires, each of which was sufficient to cause injury to a third party, can both be liable to the third party for the injuries, though the actions of neither was a necessary cause of the injuries. *See* RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."); FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS, § 20.3 (3d ed. 2007). Moreover, if a plaintiff can demonstrate that his injury was caused by one of two independent negligent actions by separate parties, each party may be liable unless she can prove that her action did not cause the injury. *See* RESTATEMENT (SECOND) OF TORTS, *supra*, § 433B(2); HARPER ET AL., *supra*, § 20.2.

61. 490 U.S. at 250 (plurality).

62. *Id.* at 244-45.

63. *See id.* at 243-44. The BFOQ defense, which applies "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise," is codified at 42 U.S.C. § 2000e-2(e) (2006).

discuss the particular difficulties plaintiffs might have proving the relative weights of entangled motives and whether those difficulties might discourage attorneys bringing actions even against many personnel actions that would not have been taken but for discriminatory bias. He also did not discuss whether the public purposes of Title VII would be served by encouraging plaintiffs to bring actions to condemn and discourage, at least through the imposition of litigation costs, decision making tainted by such bias, regardless of whether the bias could be shown to have affected decisions in particular cases.

Justice Brennan expended more words attempting to justify the affirmative defense to liability he afforded employers who could prove—hypothetically—that they would have made the same decisions but for the discriminatory bias that they took into account in their actual decisions. He did so by citing other defenses, such as the BFOQ,[64] legislative history indicating that Congress wanted to protect employers' personnel discretion in the absence of discriminatory bias,[65] the first amendment case found particularly relevant by Justice White,[66] and Court-approved precedent formulated by the National Labor Relations Board.[67] He did not cite any particular provision or language in the statute on which this affirmative defense can rest or any delegated legislative authority to formulate an affirmative defense that is not an interpretation of particular statutory language. The dissent correctly criticizes the plurality opinion's legal basis for its claimed authority to formulate this defense, for treading a path "in the wrong forest"; and the dissent also fairly opines that what the plurality's formulation effectively accomplishes is the adoption of a "necessary causation" standard, with a shift of the burden of proof on the standard to the employer

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64. *Price Waterhouse*, 490 U.S. at 242-43.

65. *Id.* at 243-44.

66. *Id.* at 248-49; *see also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

67. *Price Waterhouse*, 490 U.S. at 249. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 402-03 (1983) (holding use of burden shifting on causation issue in discrimination cases to be within the discretion of the National Labor Relations Board).

whenever a plaintiff can prove that a discriminatory motive existed.[68]

As the dissent acknowledges,[69] Justice O'Connor's concurrence is more consistent than is the plurality decision because it expressly finds a necessary causation standard in § 703(a)(1) and then shifts the burden on to defendants to prove the absence of such causation in a limited group of cases.[70] Her reasons for finding a necessary causation standard in the statute—finding the statute's "plain language" unambiguous and drawing a dubious inference from some unrevealing legislative history[71]—are no more compelling than the reasons for the same interpretation offered by the dissent or the "motivating factor" interpretation of the same statutory language by the plurality. Justice O'Connor, however, did offer a more persuasive analysis of why the burden of proof on necessary causation should at least in some cases be placed on defendants. Justice O'Connor noted that in cases involving entangled multiple motives the common law of torts, in fact, does sometimes reverse the burden of proof to defendants on the causation issue because not doing so would demand "the impossible" from plaintiffs.[72] She also noted "mounting evidence in the decisions of the lower courts" that in many Title VII cases a plaintiff, like the unsuccessful female applicant for a partnership in the case at bar, does not have the ability to untangle the threads of multiple causation.[73]

Furthermore, Justice O'Connor explained why reversing the burden of proof is necessary to ensure fulfillment of the goals of Title VII. These goals, she noted, in addition to compensation to the victims of discrimination, include causing employers to "'endeavor to eliminate, so far as possible, the last vestiges' of discrimination in employment."[74] "There is no doubt," she allowed:

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68. 490 U.S. at 289 (Kennedy, J., dissenting).

69. *Id.* at 290.

70. *See id.* at 269 (O'Connor, J., concurring in judgment).

71. *Id.* at 262.

72. *Id.* at 264.

73. *Id.* at 273.

74. *Id.* at 264-65 (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

> that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . Reliance on such factors is exactly what the threat of Title VII liability was meant to deter[, as] . . . Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex.[75]

To serve this goal of deterrence, Justice O'Connor concluded, it is appropriate at least to eliminate a "presumption of good faith" to penalize employers where plaintiffs have proven that an illegitimate criterion was a "substantial" factor in an adverse employment decision.[76] Because of the costs and risks of litigation, the penalty of having to prove the absence of necessary causation has a monetary deterrent value for employers who allow consideration of a forbidden status category. Justice O'Connor's opinion thus recognizes the value to plaintiffs and to the deterrent goals of Title VII of plaintiffs having to prove only that the illegitimate criterion was a "substantial factor" in a challenged decision, even where employers can defeat liability by proving that the same decision would have been made in the absence of consideration of the factor.

Justice O'Connor's opinion becomes much less clear and persuasive, however, when it attempts to define the cases in which it is appropriate to shift the burden of proof to defendants on the issue of necessary causation, and in so doing attempts to distinguish the framework she favored from that advanced by the plurality. First, while Justice O'Connor placed much stress on the word "substantial" as important to the minimum causal linkage she would require, it is not clear that any meaningful distinction can be drawn between a contributing or "motivating" factor and a "substantial factor" Once a requirement of necessary causation is set aside, what does it mean for a factor to be taken into account as a basis for a decision, but not in a

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75. *Id.* at 265.

76. *Id.* at 265-66. The Court had established a similar burden-shifting presumption that a particular individual member of a class was the victim of a pattern or practice of discrimination that plaintiffs prove existed. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 772-73 (1976).

substantial way?[77] Justice O'Connor asserted that for a factor to be "substantial . . . a reasonable fact finder" must be able to "draw an inference" that the factor was a necessary cause of the decision.[78] Any evidence sufficient to support an inference that the factor played a role in actually motivating the decision, however, logically would support an inference that it was a necessary cause of the decision in the absence of any evidence that other legitimate factors existed, and under Justice O'Connor's own framework, proving legitimate motives is for defendants. Justice O'Connor suggests that "a mere reference to 'a lady candidate' might show that gender 'played a role' in the decision"[79] without being sufficient to support an inference of necessary causation; but there is nothing in the plurality opinion, or in any other decision of the Court, that suggests that mere awareness of the gender of an employee is the kind of consideration of sex that is condemned by Title VII. Proof of motivation requires proof of more than awareness of a protected status category; it requires proof that the category was considered relevant to the decision.

More important to the confusion the decision ultimately created in the lower courts, however, was Justice O'Connor's attempt to limit the cases to which her defense applied to ones where the proof of discrimination is by "direct evidence."[80] The primary source of the confusion was Justice O'Connor's failure to define how she intended to use the word "direct." In the context of a Title VII intentional discrimination case at the time of *Price Waterhouse* "direct evidence" could be reasonably used to contrast "circumstantial evidence," as it is in the law of evidence. Alternatively, based on the two alternative means of proving actionable discrimination listed in *Burdine*,[81] the term could be used to contrast the "indirect" evidence of

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77. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 508 (2006) (explaining that there is no logical distinction between a "substantial factor" and a "motivating factor" contributory causation standard).

78. *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring in judgment).

79. *Id.* at 277.

80. *Id.* at 276.

81. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); *see also supra* text accompanying note 28.

discrimination that proves "that the employer's proffered explanation is unworthy of credence."[82]

Justice O'Connor's opinion, however, does not seem to use "direct evidence" in the former sense, as does the law of evidence, to contrast circumstantial evidence that requires inferences to be probative.[83] The opinion never uses the word "circumstantial" nor does it refer in any way to the law of evidence. Furthermore, the evidence of sex discrimination that Justice O'Connor found sufficiently "direct" to warrant a finding that gender was a "substantial" factor in Price Waterhouse's denial of a partnership to Ann Hopkins was all circumstantial; its probative value all required a fact finder to draw from statements of decision makers inferences about their motivation—albeit relatively clear inferences.[84]

Justice O'Connor's discussion of evidence that she did not consider "direct," however, also does not seem to fit with the second alternative: the "indirect" evidence that proves the existence of discrimination indirectly by proving "that the employer's proffered explanation is unworthy of credence."[85] She agreed with the plurality that "stray remarks in the workplace" cannot justify shifting a burden of persuasion onto an employer.[86] She also more specifically

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82. 450 U.S. at 256.

83. *See* MCCORMICK ON EVIDENCE 734 (Kenneth S. Brown ed., 6th ed. 2006) (collecting cases); 1A WIGMORE, EVIDENCE § 25 (Tillers rev. 1983) (same).

84. Justice O'Connor found highly probative of the existence of discriminatory motivation, that "evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes" and "the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her 'professional' problems would be solved" if she walked, talked, dressed and groomed "'more femininely.'" *Price Waterhouse*, 490 U.S. at 272 (O'Connor, J., concurring in judgment). This is indeed very strong evidence that the partners' sexual stereotyping influenced the decision to deny Hopkins a partnership, but it is not evidence, like an eyewitness account, that directly demonstrates motivation without the need of any logical inference. The only truly direct evidence regarding intent are statements of the decision makers concerning their state of mind, and such statements generally admit discriminatory intent only in Title VII cases where the employer attempts to rely on an acceptable defense, such as a bona fide occupational qualification or a reasonably limited affirmative action plan.

85. *See Burdine*, 450 U.S. at 256.

86. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment).

would find insufficient "standing alone" "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself," or testimony like that of Hopkins' expert, on the meaning of sex-based language at the work place.[87] Yet any probative value, however strong or weak, of any sex-based statements, or indeed "stray remarks," from anyone at the work place would be "direct" in the sense of directly showing the possible existence of an illegitimate discriminatory motive, rather than indirectly showing such a motive by demonstrating the absence of an illegitimate motive. Perhaps Justice O'Connor intended only to give examples of evidence that would be insufficiently "strong," even if "direct" in the *Burdine* sense, rather than to claim that all relatively weak evidence is "indirect."[88] If so, it is not clear that she intended that such weak evidence, though insufficient "standing alone," should be treated as irrelevant to the question of whether a "substantial" motivation has been proven. It is also not clear that her framework ultimately differs from that provided by the plurality.

Justice White, in his *Price Waterhouse* concurring opinion, indeed took the position that the difference between the plurality's affirmative defense on the one hand, and Justice O'Connor's embrace of "but-for" causation with a shifting burden of proof on the other hand, is only "semantic," and unnecessary to be resolved.[89] Justice White instead found each approach to fit within the model provided by the Court's decision in *Mt. Healthy City Board of Education v. Doyle*,[90] governing the protection of first

87. *Id.*

88. Justice O'Connor never expressly characterizes the evidence that she finds inadequate as not "direct." Rather, she simply characterizes evidence that she finds adequate to be "direct." *See id.* Her opinion thus can be read to require that evidence of a "substantial" motivation be "direct," as the term is used in *Burdine,* but to clarify that all such "direct" evidence will not suffice to prove substantial motivation.

89. *Id*. at 258-59 (White, J., concurring in judgment).

90. 429 U.S. 274 (1977). The Court in *Mt. Healthy* was not completely clear whether an employer's "same decision" defense to plaintiffs' claim that they were adversely affected by their first amendment-protected expression defeated liability or only compensatory individual remedies. *See* Sheldon Nahmod, Mt. Healthy *and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 607 (2000). In an opinion confirming that the *Mt. Healthy* affirmative defense is also available in equal protection cases, however, the Court stated

amendment speech of public employees from employer retaliation. Justice White did not elaborate further whether he thought the plurality's approach differed in any way from the *Mt. Healthy* model, quibbling only with the plurality's suggestion that an employer should have to disprove necessary causation through "objective" evidence beyond the credible testimony of decision makers.[91] Significantly, neither Justice White nor the *Mt. Healthy* opinion on which he relied makes any mention of the ambiguous "direct evidence" requirement that obfuscates Justice O'Connor's opinion.

Any reasonable reading of Justice O'Connor's and Justice White's concurrences, therefore, would find that of Justice White to be more easily compatible with the four-Justice plurality opinion, and thus controlling. Lower court judges could have been reasonably expected to ignore Justice O'Connor's elaborate, but ambiguous sixth-vote concurring opinion, and to look instead to the relatively straight forward plurality opinion, modifying it only if necessary to align with *Mt. Healthy*[92] and with Justice White's insistence that there be no limitation on how employers might prove they would have made the same decision "but for" a discriminatory motivation.[93] As is recounted below,[94] however, this reasonable expectation was never realized.

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that "where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability." Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam); *see also* Christina B. Whitman, *An Essay on* Texas v. Lesage, 51 MERCER L. REV. 621 (2000).

91. *Price Waterhouse*, 490 U.S. at 261 (White, J., concurring in judgment).

92. Justice White, in his concurrence quoted the critical, most instructive passage from the *Mt. Healthy* decision. *Id.* at 259. That passage does not suggest any modification of the plurality's framework. Interestingly, the passage seems to equate a "motivating factor" standard with a "substantial factor" standard: "in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in [the employer's] decision not to rehire him." *Id.* (quoting *Mt. Healthy*, 429 U.S. at 287).

93. *See supra* text accompany note 91.

94. *See infra* text accompany notes 126-33, 167-70.

C. *Section 107 of the 1991 Act*

Section 107(a) of the Civil Rights Act of 1991 directly rejects the manner in which the various *Price Waterhouse* opinions dealt with the issue of minimum causal linkage by pronouncing that "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."[95] The provision thereby rejects, in favor of a "motivating factor" standard, the standard of necessary or but-for causation embraced by the dissenters and by Justice O'Connor in *Price Waterhouse*. It also rejects any ambiguous "substantial" qualification on the "motivating" standard, and for purposes of establishing liability for actionable discrimination under Title VII, any affirmative defense through the showing of the absence of necessary causation.

Section 107(b) offered defendants an analogous defense to limit the remedies that can be awarded against them, however, by proving that they "would have taken the same action in the absence of the impermissible motivating factor."[96] The remedies that are to be excluded by a successful "same action" defense are "damages" or "admission, reinstatement, hiring, promotion, or payment" of back wages.[97] The relief that may be granted regardless of any successful "same action" defense include "declaratory relief, injunctive relief [that is not otherwise excluded], and attorney's fees and costs."[98]

Section 107(a) only settled the question of causation for pre-existing Title VII causes of action; it did not establish a new cause of action. Section 107(a) is a congressional interpretation of the meaning of the "because of" phrase in § 703(a)(1), as well as in other proscriptions of discrimination

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95. Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2006).

96. Civil Rights Act of 1991 § 107(b)(3), 42 U.S.C. § 2000e-5(g)(2)(B).

97. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

98. 42 U.S.C. § 2000e-5(g)(2)(B)(i). This compromise was actually available to the Court in *Price Waterhouse* given the broad discretionary language of § 706 of the Civil Rights Act of 1964, which allows, but does not require particular remedies. *See* Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5 (2006).

by employment agencies, labor organizations, and apprenticeship or training programs in § 703(b), § 703(c), and § 703(d) of the Act.[99] Congress may have chosen to establish the "motivating factor" standard by adding a provision (m) to § 703 of Title VII, to avoid having to amend numerous other provisions and to clarify that it wished the "motivating" standard to pervade the statute. Perhaps Congress also wanted to make clear its view that it was not changing the meaning of "because of" in the original provisions, but rather was interpreting what was meant from the time of the passage of the Act.[100] In any event, § 703(m) cannot stand alone as a proscription of discrimination; it does not even independently specify the parties upon which obligations not to discriminate are imposed. The "any" discriminatory "employment practice" to which it refers must be based on references to the pre-existing prohibitions of discrimination in the Act. There is nothing in the language or the legislative history of § 107 to suggest that Congress intended to establish a new cause of action rather than to reject the *Price Waterhouse* Court's interpretation of how pre-existing actions are to be treated.[101]

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99. The applicability of § 107 to other proscriptions of discrimination in Title VII is less clear. Neither the specific and unqualified prohibition of score adjustments on "employment related tests" in § 703(*l*), as added by the 1991 Act, nor the specific prohibition of discriminatory job notices or advertisement in § 704(b) requires a causation standard. The "motivating factor" standard seems to fit the directive in § 717 that most federal government-affiliated employers shall take personnel actions "free from any discrimination based on race, color, religion, sex, or national origin," but § 107(b)'s "same decision" defense for remedies only modifies § 706(g) and thus is not directly applicable to the delegation of remedial discretion to the EEOC in § 717(b).

100. *See infra* notes 101, 105.

101. The Committee Reports instead make clear that § 107 was passed to restore what Congress in 1991 viewed as the intent of Congress in 1964 in passing § 703(a). Thus, the Judiciary Committee Report on the 1991 Act stated:

> When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions. However, the Court's decision in *Price Waterhouse* undercut this prohibition, threatening to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.

The language of § 107 also makes clear that the "motivating factor" causation standard it adopts is applicable to all cases under any of Title VII's pre-existing proscriptions of intentional discrimination. The only limiting or qualifying phrase in § 107(a) is the introductory "[e]xcept as otherwise provided in this title," which can be read to refer to qualifications on liability such as the BFOQ defense in § 703(e),[102] or the bona fide seniority system defense in § 703(h).[103] The provision also ends by stating that the "motivating factor" standard applies "even though other factors also motivated the practice."[104] This phrase attempts to insure the reach of the causation standard to more difficult cases like *Price Waterhouse* itself where an employer successfully demonstrates the existence of other motivating factors; it cannot be reasonably read to limit the reach to cases where such a demonstration is made. The phrase is written as a phrase of emphasis, not a phrase of exclusion. Furthermore, as causation standards help define the underlying wrong that is to be condemned, there is no good reason for any legislator to want a different underlying causation standard in some cases than in others, however the legislator thinks the burden of proof on causation should be allocated. Not surprisingly, the legislative history of § 107 reveals no intent to limit the reach of § 107's "motivating factor" causation standard to cases where evidence establishes that some other factor "also motivated the practice."

H.R. REP. NO. 102-40, pt. 2, at 17 (1991). Similarly, the Report of the Committee on Education and Labor on the Civil Rights Act of 1990, which was vetoed by President George H. Bush, but eventually passed as the 1991 Act, stated: "Legislation is needed to *restore* Title VII's comprehensive ban on all impermissible consideration of race, color, religion, sex or national origin in employment." H.R. REP. NO. 101-644, pt. 1, at 31 (1990) (emphasis added). It would have been absurd for Congress to have overturned *Price Waterhouse* by adding a new cause of action, rather than by clarifying the meaning of the old cause of action. If § 703(m) provided a cause of action separate from that of § 703(a)(1), rather than a causation standard governing the original § 703(a)(1), then *Price Waterhouse* would stand as a governing precedent for § 703(a)(1) actions.

102. 42 U.S.C. § 2000e-2(e) (2006).

103. 42 U.S.C. § 2000e-2(h).

104. *Id.*

The legislative history instead confirms that Congress passed § 107 to clarify that employers, as well as the entities covered by the other § 703 provisions, commit an actionable wrong by taking into account one of the forbidden status categories during any employment decision, regardless of whether that decision would have been the same in the absence of the discriminatory motivation.[105] Congress provided defendants in § 107(b) a "same decision" defense in recognition that those subjected to such wrongs do not deserve compensation if they would have been treated the same in the absence of the impermissible motivating factor. In the view of the 1991 Act, however, a discriminatory motivating factor is still "impermissible"[106] and wrong, and still should be publicly condemned as such. As Justice O'Connor acknowledged in her *Price Waterhouse* concurrence, it still may stigmatize.[107] It needs to be deterred, moreover, because in many future cases it may make a difference to its victims.

Notwithstanding § 107(b)'s limitation on remedies in cases where defendants can prove that their challenged decisions would have been the same in the absence of the impermissible motivating factor, the 1991 Act promised to make the Title VII private cause of action a much more effective tool to deter intentional employment

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105. *See* H.R. REP. NO. 102-40, pt. 2, at 18 (1991) ("In providing liability for discrimination that is a 'contributing factor,' the Committee intends to restore the rule applied by the majority of circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to *play a role* in a contested employment decision may be the subject of liability." (emphasis added)); *see also id.* ("[T]he complaining party must demonstrate that discrimination was a contributing factor in the employment decision—*i.e.,* that discrimination actually contributed to the employer's decision with respect to the complaining party."); H.R. REP. NO. 102-40, pt. 1, at 48 (1991) (explaining that the standard is whether the protected status category "*actually contributed* or was otherwise *a factor in* an employment decision."). The legislative history does not reflect any intent that the "motivating factor" language indicate anything other than contributing cause. Indeed, the Act used the language of "contributing factor" before a late amendment substituted the "motivating factor" phrase. As explained by the final House report accompanying the enacted bill: "This change is cosmetic and will not materially change the courts' findings." 137 CONG. REC. 13537-38 (1991).

106. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

107. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring in judgment).

discrimination. This was true both because of the Act's adoption of the motivating factor standard and because of the Act's guarantee of a jury trial in all cases alleging intentional discrimination with the prospect of legal damages.[108] Adoption of the motivating factor standard offered promise because most individuals have imperfect records as employees; the records of most offer ample reasons to be treated adversely by employers or potential employers. In most cases, therefore, employers can offer legitimate explanations for adverse treatment that cannot be proven to be completely implausible or even insufficient. As Justice O'Connor explained in her *Price Waterhouse* opinion, lower court decisions before *Price Waterhouse* had demonstrated the great difficulty plaintiffs with imperfect work records or resumes have untangling plausible legitimate motivations from illegitimate discriminatory biases, even when the plaintiffs have adequate evidence to demonstrate that the biases were brought to bear in an adverse decision.[109] By confirming that plaintiffs could establish liability by proving that discriminatory bias was a contributing "motivating factor," the 1991 Act made more realistic actions against the existence of such bias in the workplace.[110] More employees presumably could find lawyers willing to bring more cases with less clear evidence of how the employees would have been treated but for discriminatory bias. Employers who could not be confident that they could prove the absence of but-for causation would have to calculate that it might be better to settle and pay something for the existence of bias in their work place. Plaintiffs' lawyers presumably could realistically threaten to proceed with litigation where they could prove the existence of bias in the employer's decision-making process, as all parties would realize that lawyers could collect attorneys' fees based on proof of bias even if the employer could prove that the bias would have made no difference to the lawyers' imperfect clients.[111]

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108. *See* 42 U.S.C. § 1981a(c) (2006).

109. *See* 490 U.S. at 273-74 (O'Connor, J., concurring in judgment).

110. 42 U.S.C. § 2000e-2(m) (2006).

111. Section 107(b) expressly authorizes the grant of "attorney's fees," regardless of a defendant's proof that it would "have taken the same action." 42 U.S.C. § 2000e-5(g)(B). Nonetheless, many lower courts have denied the incentive of attorney's fees to eliminate the conduct Congress proscribed

The fortification of the intentional discrimination cause of action promised by the 1991 Act was enhanced further by the Act's guarantee of a right to have a jury determine whether a discriminatory motive existed.[112] The prospect of a jury makes the threat of a trial more meaningful to an employer in cases where plaintiffs have sufficient evidence of discriminatory motivation to withstand a motion for summary judgment or for a directed verdict.[113] Jury trials are both more expensive and more unpredictable. The latter

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through § 107. *See, e.g.*, Canup v. Chipman-Union, Inc., 123 F.3d 1440, 1442 (11th Cir. 1997) (denying fees even though plaintiff proved consideration of race was a factor in his termination); Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1339 (4th Cir. 1996) (remanding to district court with discretion to grant or deny fees even though plaintiff proved sexual harassment). The court in *Sheppard*, the most cited decision on the issue, relied on the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), which had held that since attorney's fees awards under 42 U.S.C. § 1988 should be proportionate to plaintiff's success, a plaintiff who recovered only nominal damages of a dollar should be awarded no fees. *Sheppard*, 88 F.3d at 1339; *Farrar*, 506 U.S. at 114-15. The *Sheppard* court, ignoring the fact that Congress had set a standard of public purpose through the compromise expressed in § 107, stated that in some cases fees would be appropriate based on several factors, including "the public purposes served" by the litigation. 88 F.3d at 1336. Some courts have awarded fees citing *Sheppard*. *See, e.g.*, Forrest v. Stinson Seafood Co., 990 F. Supp. 41, 45 (D. Me. 1998) ("[The] lawsuit was the primary force behind [the employer's] decision to revise its arbitrary and discriminatory policies."). For a different approach more consonant with the congressional policy balance expressed in § 107, see *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1080 (10th Cir. 1998), which noted that "Congress conclu[ded] that a plaintiff serves . . . a public purpose when she proves impermissible discrimination was a factor in her termination.".

112. 42 U.S.C. § 1981a(c).

113. As later explained by the Court in the important Title VII case, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-50 (2000) (quoting FED. R. CIV. P. 50(a)), the standard for judgment as a matter of law—that there be "no legally sufficient evidentiary basis for a reasonable jury to find" for the nonmoving party—applies as well to motions for summary judgment. The *Reeves* court, citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n.6 (1962), further explained that for both motions, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. The existence vel non of a particular motivation is of course a question of fact, often turning on the assessment of the credibility of witnesses who claim to have heard or rather deny expressions of bias. *Id.*

may be particularly true for cases brought by plaintiff-employees with whom jurors can sympathize—perhaps more easily than can the successful lawyers who become judges. The unpredictability could be compounded by § 107 allowing jurors to accept both the plaintiff's proof of the existence of a discriminatory motive and the defendant's proof that it was not a necessary cause of the adverse action.[114] The prospect of such a compromise could both encourage plaintiffs' attorneys and change employers' calculations of the value of settlements.

Furthermore, the 1991 Act's clarification of Title VII's causation standard, in tandem with the Court's clarification in *Aikens* of the function of the *McDonnell Douglas-Burdine* framework,[115] enabled trial courts to provide juries with direct and easy-to-comprehend instructions that could avoid the confusion of meritorious cases. Under § 107, juries only need to be instructed that to establish liability a plaintiff must prove that one of the forbidden status categories was a "motivating factor" in the challenged adverse employment action, and that to avoid certain remedies a defendant must prove that it "would have taken the same action in the absence of" this "impermissible motivating factor."[116] Given § 107's rejection of the Court's *Price Waterhouse* decision, the trial courts did not have to be concerned with fashioning complicated formulations to reconcile the latter decision with the *McDonnell Douglas-Burdine* proof framework.

Indeed, the Court's pre-1991 Act decision in *Aikens* indicated that at least in the absence of a request by plaintiff for an instruction explaining the value of pretext evidence,[117] the *McDonnell Douglas-Burdine* framework

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114. 42 U.S.C. § 2000e-5(g)(2).

115. *See supra* text accompanying notes 41-45.

116. 42 U.S.C. § 2000e-5(g)(2)(B).

117. After *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), but before the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), it was still possible for plaintiffs to argue reasonably that they should be able to obtain an instruction directing jurors to find the existence of discriminatory motivation if the jurors found that the defendant's proffered legitimate motive was pretextual. Even after *Hicks*,, 509 U.S. at 511, in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 133, 146-48 (2000), plaintiffs may still argue that they should be able to obtain an instruction explaining that a finding of pretext may be considered relevant to the question of a discriminatory motive. Such an instruction does not, however, require any

need not be mentioned in jury instructions at all. The *Aikens* Court held, it will be recalled, that once the employer escapes the force of a mandatory presumption of discrimination by articulating a legitimate explanation for taking the adverse action against the employee-plaintiff, it is irrelevant whether the plaintiff has proven all the elements of a prima facie case sufficient to impel the employer to offer such a legitimate motivation.[118] Thus, since the only issue before the fact finder after a Title VII trial in which discriminatory intent is alleged is the issue of discriminatory motivation, a jury only needs to be instructed to consider all the evidence of the parties to determine whether there was such motivation, which, after the 1991 Act, means whether discriminatory bias was a factor in the challenged decision.

Congressional supporters of the 1991 Act thus could have thought that they had strengthened considerably the deterrent force of Title VII against the existence of forbidden discriminatory bias in employment decision making. They had done so by clearing a direct path for plaintiffs through the confusing tangle of the various opinions in *Price Waterhouse,* by pronouncing that plaintiffs need only prove contributing, rather than necessary, causation and by requiring employers and other potential Title VII respondents to defend their decision making to the peers of their employees acting as judges of the credibility and plausibility of evidence.

As explained below, however, the lower federal courts have compromised the 1991 Act's potential strengthening of Title VII by limiting the relevance of § 107 for many

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explanation of the *McDonnell Douglas-Burdine* prima facie case or its burden-of-production shifting framework. *See Reeves*, 530 U.S. at 153-54. Pretext instructions have been required in some, but not all, circuits. *Compare* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (holding that in appropriate cases jurors must be instructed that they can infer discriminatory motive from their disbelief of employer's proffered explanation), *and* Ratliff v. City of Gainesville, 256 F.3d 355, 360-61 (5th Cir. 2001) (same), *with* Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1233-34 (11th Cir. 2004) (holding it is not reversible error to deny requested pretext jury instructions, if instructions accurately stated the law and did not preclude the jury from using pretext evidence to find discrimination), *and* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789-90 (8th Cir. 2001) (same).

118. *Aikens*, 460 U.S. at 715; *see also supra* text accompanying note 44.

disparate treatment cases.[119] Not surprisingly, these same courts also did not interpret *Price Waterhouse* and the Congressional response in a manner that facilitated the proof of disparate treatment cases under the ADEA.

II. A "BUT-FOR" STANDARD FOR THE ADEA

A. *Before* Gross v. FBL Financial Services

The lower courts, with few exceptions, made two basic interpretive choices for ADEA disparate treatment cases in the wake of *Price Waterhouse* and the 1991 Act. First, they held that the *Price Waterhouse* burden-shifting causation system rather than the alternative burden-shifting system embraced by Congress in § 107 should apply to the ADEA.[120] Second, they held that the application of the *Price Waterhouse* system should be conditioned on the threshold proof standards set forth in Justice O'Connor's concurring opinion in *Price Waterhouse*.[121]

The first choice was reasonable. The wording of the prohibition of intentional discrimination in the ADEA is identical to the wording of the prohibition of disparate treatment discrimination in Title VII, with the substitution of "age" in the ADEA for the categories of "race, color, religion, sex, or national origin" in Title VII.[122] Section 107, however, amended only Title VII, not the ADEA or any

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119. *See infra* text accompanying notes 167-203 and 223-50.

120. *See, e.g.*, Febres v. Challenger Caribbean Corp., 214 F.3d 57, 62 (1st Cir. 2000); Lewis v. YMCA, 208 F.3d 1303, 1304-05 (1st Cir. 2000) (per curiam); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 (3d Cir. 1995); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 180 (2d Cir. 1992); Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 658 (7th Cir. 1991).

121. *See infra* notes 129-34 and cases cited therein.

122. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a)(1), 81 Stat. 602, 603 (codified at 29 U.S.C. § 623(a)(1) (2006)); Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (2006)). Each states that it shall be an unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's," in the case of § 703(a)(1) of Title VII, "race, color, religion, sex, or national origin," or in the case of § 4(a)(1) of the ADEA, "age."

other federal law. Furthermore, Congress did not through the 1991 Act, or any other legislation, otherwise amend the ADEA in response to *Price Waterhouse*. It was reasonable for the lower courts to interpret *Price Waterhouse* as the Court's default system for proof of causation under at least similar vaguely written federal employment discrimination statutes and § 107 as a rejection of this default standard for only Title VII. Congressional silence on other statutes like the ADEA could be interpreted with a pregnant negative—acceptance of the default rule.

This interpretation was not inevitable.[123] Since *Price Waterhouse* was itself a Title VII case involving sex discrimination, the courts also could have reasonably interpreted the Congressional rejection of the *Price Waterhouse* system for Title VII, without any negative pregnant for other statues, simply as a rejection of this system for the only statute on which Congress was then focusing its attention.[124] The lower courts then could have adopted § 107's burden-shifting as an alternative default system that more likely expressed Congressional preference for federal employment law.[125] Nonetheless, the general allegiance in the lower courts to the default standard of a

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123. *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 661-72 (2008) (arguing that courts should have unified employment discrimination law on disparate treatment based on the 1991 Act).

124. If Congress had amended the prohibition of age discrimination in the ADEA in the 1991 Act, the negative pregnant argument would have had much greater force. *See* Lindh v. Murphy, 521 U.S. 320, 330 (1997) ("[N]egative implications raised by disparate provisions are strongest when the [relevant statutory provisions] were being considered simultaneously when the language raising the implication was inserted."). The only provision in the 1991 Act that mentions the ADEA, § 115, amending 29 U.S.C. § 626(e), addressed a conflicting statute of limitations problem in ADEA litigation by discarding the use of the Fair Labor Standards Act limitations system in favor of one more akin to that of Title VII; nothing in the 1991 Act addressed the substantive prohibitions of the ADEA.

125. As noted by Justice Stevens in his dissenting opinion in *Gross v. FBL Financial Services, Inc.*, there is evidence of such intent in the U.S. House of Representatives' Report on the 1991 Act, which states that a "number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA) . . . are modeled after and have been interpreted in a manner consistent with Title VII," and "these other laws modeled after Title VII [should] be interpreted in a manner consistent with Title VII as amended by this Act . . . ." 129 S. Ct. 2343, 2356 n.6 (2009) (Stevens, J., dissenting) (citing H.R. REP. NO. 102-40 (II), at 4 (1991)).

Supreme Court-formulated *Price Waterhouse* rather than to the legislatively formulated § 107 was not surprising.

Much more surprising, and much less reasonable, was the lower courts' embrace of Justice O'Connor's concurring opinion in *Price Waterhouse* as controlling in ADEA cases. This embrace was almost unanimous,[126] until the Supreme Court's rejection in *Desert Palace v. Costa* of Justice O'Connor's direct evidence distinction for Title VII cases governed by § 107 of the 1991 Act. As explained above, Justice O'Connor's *Price Waterhouse* opinion provided a sixth vote in favor of a burden-shifting system only for cases in which plaintiffs offered adequate "direct evidence" of the existence of intentional discrimination.[127] The opinion thus limited the reach of burden-shifting under *Price Waterhouse* in a significant way that Justice White's fifth vote concurring opinion did not. The lower courts nonetheless adopted Justice O'Connor's standard of requiring plaintiffs to present "direct evidence" of an age-based motivation as a condition for requiring defendants to prove the absence of but-for causation.[128] Plaintiffs who could not marshal such evidence were forced to prove pretext under the old

126. *But see infra* note 204 and accompanying text.

127. *See supra* text accompanying notes 79, 92-93.

128. Some of the courts that read Justice O'Connor's opinion as controlling did so based on the Court's statement in *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" This statement, however, was made by the Court in both *Marks* and *Gregg* to determine whose view among five Justices in the majority should be controlling, not to determine which five Justices constituted the majority. *See Marks*, 430 U.S. at 193-94; *Greggs*, 428 U.S. at 169. To determine which five Justices constituted the majority, a court should look for the greatest agreement among five Justices. Otherwise, where two groups of four Justices are in slight disagreement, a single Justice could control the holding in a case by formulating a narrow concurring opinion that varies greatly from each of the other two opinions. Thus, in *Price Waterhouse*, Justice White's opinion should be treated as supplying the fifth vote because it was much closer to that of Justice Brennan's four-Justice plurality and Justice White's opinion should be controlling because it provided what might be termed in minor respects a more "narrow" basis for the decision. *See supra* text accompanying notes 89-91. *Cf.* Gross v. FBL Fin. Servs. Inc., 129 S. Ct. 2343, 2357 (2009) (Stevens, J., dissenting) (noting that Justice White's opinion provided a fifth vote on burden-shifting, so the *Marks*-test was not relevant).

McDonnell Douglas-Burdine framework. These plaintiffs thus retained the burden of proving age discrimination as a necessary cause by proof of the insufficiency of the employers' proffered justifications.[129]

While the lower courts—at least before *Desert Palace*—were almost united in finding law in Justice O'Connor's *Price Waterhouse* opinion, they were not united in their discernment of the meaning of that law. Some courts in ADEA cases professed to read Justice O'Connor's direct evidence language as a reference to the distinction in evidence law between direct and circumstantial evidence.[130] These courts considered relevant to a *Price Waterhouse* burden-shifting case only what the courts loosely described as evidence that is probative without the need of any logical inference of the existence of discriminatory motivation. Other courts read Justice O'Connor's language to refer to the distinction made in *Burdine* between evidence that directly proves the existence of a discriminatory motive and evidence that only can do so indirectly by proving the absence or at least insufficiency of other motives.[131] Most of these latter courts, however, parsing Justice O'Connor's language more closely, indicated that they would consider only a subset of such *Burdine*-type direct evidence as within the set of qualifying evidence. Typically this subset included only evidence of statements by a decision maker that reflected some evidence of animus toward the plaintiff's advanced age and also were closely connected to the

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129. *See, e.g.*, Hill v. Lockheed Martin Logistics Mgmt., 314 F.3d 657, 663-64 (4th Cir. 2003), *rev'd on other grounds*, 354 F.3d 277 (4th Cir. 2004); Vesprini v. Shaw Contract Flooring Servs., 315 F.3d 37, 41 (1st Cir. 2002); Wright v. Southland Corp., 187 F.3d 1287, 1305-06 (11th Cir. 1999); Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997); Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994), *abrogated by* Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231 (3d Cir. 1999); Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991); Summers v. Comm. Channels, Inc., 729 F. Supp. 1234, 1237-38 (N.D. Ill. 1990).

130. *See, e.g.*, *Vesprini*, 315 F.3d at 40-43; Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996) ("'Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact (*i.e.*, unlawful discrimination) *without any inferences or presumptions*.'" (quoting Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 958 (5th Cir. 1993))).

131. *See, e.g.*, *Hill*, 314 F.3d at 664-65; *Wright*, 187 F.3d at 1293, 1303 n.18; *Lightfoot*, 110 F.3d at 913; *Armbruster*, 32 F.3d at 778.

challenged adverse decision.[132] The standards for close connection to a challenged decision, whether measured in time or in job relatedness, varied.[133]

Although the more restrictive interpretations of Justice O'Connor's "direct evidence" language hampered plaintiffs more, all the interpretations made proof of age discrimination more difficult because they refused to allow *Price Waterhouse* burden-shifting on the causation issue in cases where the standard could make more of a difference—cases in which plaintiffs did not have unusually strong evidence of discrimination. These cases included ones in which plaintiffs could not connect evidence of discriminatory animus around the workplace with a challenged adverse decision as well as ones in which plaintiffs had little evidence of discriminatory evidence to add to evidence questioning the credibility of an employer's justifications for the adverse decision. The lower courts' use of the "direct evidence" limitation thus forced plaintiffs in most cases to prove necessary, rather than only contributing, causation through proof of the insufficiency of the legitimate motivations offered by defendants.

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132. *See Wright*, 187 F.3d at 1303-04 (holding that evidence that the individuals responsible for plaintiff's termination made comments about plaintiff's age in connection with his performance three months before the termination was "direct" evidence); *Armbruster*, 32 F.3d at 778.

133. *See, e.g.*, Wexler v. White's Fine Furniture, 317 F.3d 564, 572 (6th Cir. 2003) (finding direct evidence in remarks allegedly made by decisionmakers near the time of the adverse action); Morris v. N.Y. City Dep't of Sanitation, No. 99-CV-4376(WK), 2003 U.S. Dist. LEXIS 5146, at *21 (S.D.N.Y. Mar. 31, 2003) (finding that evidence of age-related comments allegedly made by "by an individual with substantial influence over [plaintiff's] employment" near the time of plaintiff's constructive discharge and during a discussion of plaintiff's future with defendant-employer was "direct" evidence); Engstrand v. Pioneer Hi-Bred Int'l, Inc., 946 F. Supp. 1390, 1399 (S.D. Iowa 1996) ("[W]hen assessing the ultimate issue of intentional discrimination, the court may properly disregard any stray remarks made by the decisionmaker but not causally related to the decisionmaking process.") (suggesting the same holds true even if the comments were made near the time of the adverse decision), *aff'd*, 112 F.3d 513 (8th Cir. 1997); *Summers*, 729 F. Supp. at 1239 (noting lack of job-relatedness as one reason plaintiff's evidence was not "direct").

B. Gross v. FBL Financial Services

The lower federal courts continued to consistently apply the *Price Waterhouse* burden-shifting system on the causation issue in ADEA cases until the Supreme Court's decision in *Gross*.[134] After the Court's 2003 decision in *Desert Palace* to reject Justice O'Connor's distinction of direct evidence for Title VII litigation, however, some, though not all, federal courts of appeals opinions held that the direct evidence distinction also should not apply in ADEA litigation.[135] It was thus not surprising that the Court finally decided to address the causation issue in an ADEA case by granting certiorari to review the Eighth Circuit Court of Appeals' decision in *Gross* to continue to require direct evidence as a condition of *Price Waterhouse* burden-shifting.[136]

The Supreme Court in *Gross* could have reasonably set aside its *Price Waterhouse* decision to adopt the § 107 causation standard and proof system as default rules for other federal anti-discrimination in employment commands. The case for the Court doing so at the apex of the federal judiciary was stronger than the case for the lower courts doing so. The Court had itself formulated *Price Waterhouse* from ambiguous language; reversing this formulation to accord with Congress' response of a much clearer legislative pronouncement would have been within the interpretive authority of the Court and could be defended easily as an expression of inter-branch cooperation in lawmaking. The best time for the Court to respond to Congress by replacing the *Price Waterhouse* system with that of § 107 would have

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134. *See, e.g.*, Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004); EEOC v. Warfield-Rohr Casket Co., 364 F.3d 160 (4th Cir. 2004); *Wexler*, 317 F.3d 564.

135. *Compare, e.g.*, *Rachid*, 376 F.3d at 310-11 (finding Desert Palace to warrant rejection of direct evidence requirement for ADEA litigation), *and* Estades-Negroni v. Assocs. Corp. of N. Am., 345 F.3d 25, 30 (1st Cir. 2003) (same), *with* Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 361 (8th Cir. 2008) (continuing to apply direct-evidence standard to claims brought under the ADEA), *vacated*, 129 S. Ct. 2343 (2009), *and* Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 n.3 (3d Cir. 2004) (same), *and Warfield-Rohr*, 364 F.3d at 163 n.1, 164 n.2 (applying *Price Waterhouse* and assuming that the direct-evidence standard applies to ADEA cases).

136. 526 F.3d 356 (8th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3340 (U.S. Dec. 5, 2008) (No. 08-441).

been during the first years after the passage of the 1991 Act. The Court's long acceptance of the lower courts' consistent embrace of *Price Waterhouse* must have created some expectation in Congress that *Price Waterhouse* burden-shifting would govern the causation issue in federal employment statutes in the absence of express instructions to the contrary in new legislation.

Furthermore, the adoption of § 107 by the Supreme Court as a default standard for the ADEA seemed even less likely in the wake of the Court's decision in *Smith v. City of Jackson*.[137] In *Smith*, the Court held that the codification of the disparate impact cause of action through § 105 of the 1991 Act did not affect disparate impact litigation under the ADEA because the 1991 Act did not expressly amend the ADEA with respect to disparate impact.[138] The Court in *Smith*[139] stated that Congress' failure to amend the ADEA meant that disparate impact actions under that statute should be governed by the last relevant Title VII disparate impact precedent, *Wards Cove Packing Co. v. Atonio*.[140] Applying the same logic, the Court would have had to read Congress' failure to amend the ADEA with respect to causation in disparate treatment cases to mean that the ADEA causation issue should be governed by the last relevant Title VII precedent, *Price Waterhouse*, which incidentally was decided the same term as *Wards Cove*.

Given its decision in *Smith,* it thus seemed likely that the Court would not cast the *Price Waterhouse* precedent totally aside in favor of the § 107 model, but would instead resolve, in light of its *Desert Palace* decision, the issue on which it granted certiorari: "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]."[141] The Court in *Gross*, however, without giving the Justice Department as representative of the Equal Employment Opportunity Commission an

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137. 544 U.S. 228 (2005).

138. *Id.* at 240.

139. *Id.*

140. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (2006)).

141. *Gross*, 129 S. Ct. at 2346.

opportunity to brief the issue,[142] rendered moot questions about the relevance and meaning of Justice O'Connor's direct evidence standard. The Court, in a 5-4 decision penned by Justice Thomas, did so by rejecting for ADEA litigation the *Price Waterhouse* burden-shifting system as well as the system suggested by Congress in § 107 of the 1991 Act.[143] The Court held that a plaintiff in an ADEA disparate treatment case must prove that consideration of age was a "but-for" or necessary causation of the defendant's challenged adverse employment decision[144]—the position taken by Justice Kennedy for only three Justices twenty years before in *Price Waterhouse*. The four dissenting Justices in *Gross* would have held *Price Waterhouse* burden-shifting applicable in ADEA cases without use of any direct evidence standard.[145]

Justice Thomas's majority opinion gives no convincing reason for rejecting the holding of *Price Waterhouse* as precedent for interpreting the ADEA and for instead favoring Justice Kennedy's dissenting interpretation of identical controlling language in Title VII.[146] Justice Thomas stressed that Congress did not amend the ADEA as it amended Title VII through § 107 of the 1991 Act and thus that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."[147] This, however, is not an argument against the relevance of *Price Waterhouse*, the Court's controlling precedent before the 1991 Act, but rather an argument to support its relevance. On the one hand, if the passage of § 107 communicated anything from Congress concerning a causation standard for laws other than Title VII, it was that the § 107 system rather than the Title VII system should provide the default standard. On the other hand, if Congress' failure to amend the text of other laws like the ADEA when it amended the text of Title VII communicated anything, it was that Congress was satisfied with the *Price Waterhouse* system for these other laws.

142. *Id.* at 2353 (Stevens, J., dissenting).

143. *Id.* at 2346, 2348-49 (majority opinion).

144. *Id.* at 2352.

145. *See Gross*, 129 S. Ct. at 2357-58 (Stevens, J., dissenting).

146. *See supra* note 51 and accompanying text.

147. *Gross*, 129 S. Ct. at 2349.

There is no reasonable way to read the legislative history of the 1991 Act, as did Justice Thomas, to empower the Court to ignore *both* the *Price Waterhouse* precedent and the legislatively formulated § 107 system. Justice Thomas's twisting of the relevance of § 107 seems all the more egregious because he used Congress' effort to make proof of causation easier under Title VII as an excuse to move in the opposite direction from *Price Waterhouse* to make the proof of age discrimination more difficult.[148]

Justice Thomas also allowed "it is far from clear that the Court would have the same approach" for Title VII "were it to consider the question today in the first instance."[149] This candid admission that a current majority of the Court would not have adopted the *Price Waterhouse* approach "in the first instance" is not a reason to reject it as a statutory precedent, however. The rejection of a statutory precedent, which of course can be overturned at any time by Congress, requires some justification beyond a change in the membership of the Court. The only further justification offered by Justice Thomas was that the "burden-shifting framework is difficult to apply."[150] Yet Justice Thomas did not explain this assertion and it is hard to understand why a simple jury instruction assigning a burden of persuasion to plaintiffs on contributing causation and to employers on but-for causation poses any difficulties.[151] Justice Thomas cited to two lower court opinions from the early 1990s,[152]

148. Justice Thomas, in an illogical footnote purporting to distinguish the Court's indistinguishable reliance on *Wards Cove* in *Smith v. City of Jackson*, asserted that "Congress' careful tailoring of the 'motivating factor' claim in Title VII . . . confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA." *Id.* at 2352 n.5. Justice Thomas contended that if "motivating factor" was already the causation standard for Title VII claims, Congress would not have added § 703(m) to Title VII through the 1991 Act. *Id.* This contention, however, has relevance only to the argument that § 703(m) should not be applied to the ADEA; it has no relevance to the applicability of *Price Waterhouse* burden-shifting to ADEA liability. The applicability of the latter assumes that § 703(m)'s absolute "motivating factor" causation standard without burden-shifting on liability is *not* the law. *Id.*

149. *Id.* at 2346.

150. *Id.* at 2352.

151. *See supra* text accompanying notes 115-18.

152. *Gross*, 129 S. Ct. at 2352 (citing Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992); Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655 (7th Cir. 1991) (en banc)).

only one of which, a dissent, seems generally to agree.[153] The other opinion's reference to "murky waters"[154] is directed primarily at the real difficulty the lower courts had in applying *Price Waterhouse*—agreeing on a consistent interpretation of the meaning of a direct evidence standard.[155] The rejection of that standard for ADEA cases governed by *Price Waterhouse* burden-shifting thus would have resolved any difficulty of application as surely as did the *Desert Palace* decision for Title VII cases governed by § 107 burden-shifting.

Justice Thomas's use of a "difficulty-of-application" excuse to reject the burden-shifting aspect of the *Price Waterhouse* precedent is indeed especially troublesome because Congress elected to adopt this aspect of *Price Waterhouse* in § 107.[156] Section 107, it will be recalled, uses the same kind of burden-shifting to allow employers to avoid specific significant remedies in Title VII disparate treatment cases by demonstrating the absence of but-for causation.[157] Even if there were evidence that burden-shifting was difficult to apply, that evidence would be better weighed as part of a policy judgment made by Congress, rather than by the Court against a contrary legislative judgment.[158]

Even if there were merit to Justice Thomas's curious contention that the passage of the 1991 Act, rather than confirming the use of burden-shifting on the causation issue in employment law, instead somehow freed the Court from the restraints of the *Price Waterhouse* burden-shifting precedent, his opinion does not offer persuasive arguments to posit a necessary causation standard for the ADEA. In a single paragraph, Justice Thomas could only recycle the arguments for a necessary causation standard that Justice Kennedy had advanced in his *Price Waterhouse* dissenting

153. *Visser*, 924 F.2d at 661 (Flaum, J., dissenting).

154. *Tyler*, 958 F.2d at 1179.

155. *Id.* at 1183-86.

156. *See Gross*, 129 S. Ct. at 2352; *id.* at 2356-57 (Stevens, J., dissenting).

157. *See supra* text accompanying notes 95-98.

158. Moreover, as Justice Stevens noted in his dissent, the holding in *Gross* will require complicating jury instructions and analysis in cases in which both ADEA and Title VII claims are involved, with burden-shifting only relevant to the latter. *Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting).

opinion.[159] Thus, relying on truncated definitions of "because of" from three dictionaries, Justice Thomas asserted that this critical phrase in the ADEA, as well as Title VII, must mean "by reason" of or "on account of" as an "ordinary meaning." Justice Thomas's opinion displays no awareness that this translation does not offer an answer, but rather continues to beg the question of what level of causation is denoted by "reason of" or "on account of." As suggested above with respect to Justice Kennedy's translation to "make a difference," in ordinary speech we certainly treat sufficient causes as reasons as well as causes, regardless of whether the causes are necessary.[160] Indeed, in ordinary speech we often treat multiple contributing reasons as causes even when none are necessary or sufficient. For instance, we would state that each failing score on one of five tests was a reason for or cause of a failing grade for a semester even though no single low individual test score was either necessary or sufficient for the semester grade.[161]

Because Justice Thomas wrote comforted by the illusion that the critical phrase "because of" can denote only necessary causation, he was able to avoid determining the most sensible construction of the phrase through any

159. *Id.* at 2350 (majority opinion).

160. *See supra* text accompanying notes 55-57.

161. Justice Thomas also quoted dicta in an earlier ADEA decision of the Court, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), asserting that an employment discrimination claim "cannot succeed unless the employee's protected trait actually played a role . . . *and had a determinative influence on the outcome*." *Gross*, 129 S. Ct. at 2350 (quoting *Hazen Paper*, 507 U.S. at 610). This post-*Price Waterhouse* and post-1991 Act dicta would seem to apply to Title VII disparate treatment cases as well, however, and thus must be tempered with recognition that even the word "determinative" can express contributing causation. Moreover, Justice O'Connor's dicta in *Hazen Paper* must be read in the context of the opinion's holding that a decision based on a status "correlated with age, as pension status typically is," is not motivated by age. *Hazen Paper*. 507 U.S. at 611. Furthermore, as Justice Stevens noted in his dissent, 129 S. Ct. at 2355, Justice O'Connor's opinion in *Hazen Paper* also suggested contributing causation as the standard for ADEA liability. Justice O'Connor stated: (1) that the ADEA "requires the employer to *ignore* an employee's age," (2) that "[w]hen the employer's decision is *wholly motivated* by factors other than age," there is no violation of the ADEA; and (3) that there might be "dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status." *Hazen Paper*, 507 U.S. at 611-13 (emphasis added). Nor has the Court definitively provided any causation standard for the ADEA in any other decision.

analysis of the purposes and operation of the employment discrimination laws in general or of the ADEA in particular. Like Justice O'Connor in her concurring opinion in *Price Waterhouse,* Justice Breyer offered such analysis in his dissenting opinion in *Gross.*[162] Justice Breyer stressed that separating multiple entangled motivations for decisions, unlike determining the cause of physical events, is usually "a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different."[163] Justice Breyer suggested that because such inquiries may be particularly difficult for employees without access to decision makers thought processes, it is a sensible translation of employment discrimination commands to ask the employee to prove only contributing causation, even if the employer can avoid liability by demonstrating the absence of necessary causation.[164] Rather than engaging the coherence and accuracy of Justice Breyer's position, in a footnote response, Justice Thomas merely asserted that the Court "must give effect to Congress' choice" to not amend the ADEA when it amended Title VII through § 107.[165]

The assertion of judicial power in *Gross* is remarkable, however, precisely because it is not reasonable, as explained above, to view the "choice" of Congress to enact § 107 as a choice to reject for the ADEA both *Price Waterhouse* and § 107 burden-shifting.[166] The Court's unconvincing rejection in *Gross* of both its own precedent and of the lead of Congress in § 107 thus is likely to prompt further Congressional action. Before taking that action in the form of a simple extension of the § 107 model to the ADEA in particular or to employment statutes in general, however, Congress should understand how the reach of § 107 has been limited by the federal judiciary.

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162. *See Gross*, 129 S. Ct. at 2358 (Breyer, J., dissenting).

163. *Id.* at 2359.

164. *Id.*

165. *Id.* at 2350 n.3 (majority opinion).

166. *See supra* text accompanying notes 146-48.

III. THE UNFULFILLED PROMISE OF § 107

A. *Judicial Interpretation of § 107 Before* Desert Palace

As suggested above, Congressional supporters of the 1991 Act and the original goals of Title VII could have thought that by rejecting the causation standard of *Price Waterhouse* in favor of the motivating factor standard of § 107, they had strengthened considerably the deterrent force of the Title VII disparate treatment cause of action against employment discrimination.[167] The federal judiciary, however, viewed quite differently the 1991 Act's relevance to the proof of intentional discrimination. Before the Ninth Circuit Court of Appeals' en banc decision reviewed in *Desert Palace*,[168] most panels of the various Circuit Courts of Appeals treated the causation standard pronounced in § 107(a) as applicable to only a limited set of cases alleging intentional discrimination, notwithstanding the unqualified language of the provision and the absence of any legislative history suggesting any intended qualification. These Court of Appeals' decisions,[169] moreover, found the standard for the limitation embedded in the same "direct evidence" language in Justice O'Connor's concurring opinion in *Price Waterhouse* that the courts used to apply *Price Waterhouse* to ADEA cases. The courts' embrace of Justice O'Connor's opinion for Title VII as well as ADEA cases was despite the fact that Congress, at least for Title VII, had directly rejected that opinion's premise of a necessary causation standard. The federal judiciary used some ambiguous words in a non-controlling opinion of a single Justice to trump the clear meaning of a subsequently enacted Congressional directive.[170]

The lower courts had the same difficulty reaching consensus on the meaning of Justice O'Connor's "direct

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167. *See supra* text accompanying notes 118-19.

168. Costa v. Desert Palace, Inc., 299 F.3d 838, 847-48 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

169. *See, e.g.*, Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552-53 (4th Cir. 1999); *see also infra* text accompanying notes 182-193 (discussing *Fernandes*, 199 F.3d 572); *infra* cases notes 171-72 and cases cited therein.

170. It may be impish, but not inaccurate, to characterize Justice O'Connor's ambiguous words on direct evidence as "stray remarks."

evidence" standard for Title VII litigation as they did for ADEA litigation. For Title VII cases as well some courts tried to tie the standard to a distinction of circumstantial evidence,[171] while others formulated some other definition based on how closely the evidence was tied to the challenged employment decision.[172] Regardless of the standard used, however, the effect on Title VII plaintiffs was the same as the effect on ADEA plaintiffs: those who could not present adequate "direct evidence" were forced to proceed under the *McDonnell Douglas-Burdine* framework and demonstrate discrimination as a necessary cause by proving the pretext or insufficiency of the employers' proffered justifications.

Consider, as an example of the pre-*Desert Palace* use of the "direct evidence" dicta to preserve the *McDonnell Douglas-Burdine* framework and a necessary causation standard, *Shorter v. ICG Holdings, Inc.*[173] Sheila Shorter, the plaintiff in the case, alleged that her termination from a corporate recruiter position with ICG was caused by the racism of her supervisor, Judy Dughman, after Dughman replaced the supervisor who hired Shorter. ICG claimed, based on the testimony of numerous other employees, that Shorter was fired for "inadequate job performance."[174] The appellate court reviewed the trial court's grant of summary

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171. *See, e.g.*, Heim v. Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993) (holding that plaintiff whose supervisor allegedly remarked, "Fucking women, I hate having fucking women in the office," offered merely circumstantial evidence of discriminatory intent and therefore was not entitled to a mixed-motive instruction); Sabree v. United Bhd. of Carpenters & Joiners Local No. 33, 921 F.2d 396, 404 (1st Cir. 1990) (labeling *Price Waterhouse* as a "direct" evidence case and plaintiff's case as a "circumstantial" evidence case to be governed by *McDonnell Douglas*); Templet v. Hard Rock Constr. Co., No. 02-0929, 2003 U.S. Dist. LEXIS 1023, at *6-9 (E.D. La. Jan. 27, 2003).

172. *See, e.g.*, Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999) (holding that plaintiff was not entitled to a mixed-motive instruction as she failed to offer direct evidence, which could have included "discriminatory references to the particular employee in a work context, or stated hostility to women being in the workplace at all"); *Kubicko*, 181 F.3d at 552-54 (finding that statements made by a decisionmaker two days before plaintiff's termination were "direct" evidence of retaliation in violation of Title VII); Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1212 (10th Cir. 1999), *overruled in part by* Fye v. Okla. Corp. Comm'n, 516 F.3d 1217 (10th Cir. 2008); *see also infra* text accompanying notes 173-77.

173. 188 F.3d 1204 (10th Cir. 1999), *overruled in part by Fye*, 516 F.3d 1217.

174. *Id.* at 1208-09.

judgment for ICG in the typical manner of the lower courts after *Price Waterhouse* and the 1991 Act—by bifurcating consideration of the adequacy of plaintiff's "direct evidence" of discriminatory causation, on the one hand, and of her "indirect evidence" of such causation, on the other.[175] The latter evidence, the court explained must fit into the "*McDonnell Douglas* framework," which requires the plaintiff to prove the employer's proffered legitimate motive is pretextual and thus that the discriminatory motive was a necessary cause.[176] Only adequate direct evidence, which the court described as probative "without inference or presumption,"[177]can warrant a finding of discrimination without proof of pretext. Applying its strict definition of direct evidence, the court found none of Shorter's evidence to be "direct," even though this evidence included testimony that Dughman had called Shorter an "incompetent nigger" a day or two after Shorter's termination, and that Dughman had made several race-related comments to Shorter, including criticizing her for talking like people of her "culture, race, or color."[178] These comments, the court asserts, are "statements of personal opinion," rather than "direct evidence that Dughman fired Shorter because she was black. Instead, the trier of fact would have to infer Dughman's motive from her statements."[179]

The court's further analysis of the case under the *McDonnell Douglas* framework indicates that its refusal to apply a motivating factor causation standard based on this application of the direct evidence language may have been critical to upholding the trial court's grant of summary judgment against Shorter. Since Shorter, a typical employee with far from a perfect record of achievement, had little evidence to disprove the existence of some complaints against her past performance, the court found that she did not offer sufficient evidence to disprove the adequacy of ICG's proffered explanation of inadequate job performance.[180] The court noted again the racist comments

175. *Id.* at 1207-10.

176. *Id.* at 1208.

177. *Id.* at 1207.

178. *Id.* at 1206, 1208.

179. *Id.* at 1208.

180. *Id.* at 1208-10.

of the supervisor who fired her, but stated that without "some nexus between the statements and the defendant's decision to terminate the employee," a trier of fact could not find pretext.[181]

The *Shorter* court applied an especially restrictive definition of the protean "direct evidence" standard. A similar, if less obvious, impact on plaintiffs' ability to prove causation occurred even in cases professing to apply a broader definition, based not on excluding all circumstantial evidence, but rather on favoring a particularly reliable type of *Burdine*-type direct evidence of the existence of discriminatory motivation. An example is provided by the frequently cited decision in *Fernandes v. Costa Brothers Masonry, Inc.*[182] Fernandes and two other "dark-skinned Cape Verdeans"[183] alleged that they were not rehired by Costa Brothers because of their race and color. The trial court granted Costa Brothers' motion for summary judgment and the appellate court took the occasion to present a treatise on how the courts have and should treat Title VII intentional discrimination cases after *Price Waterhouse* and the 1991 Act.[184] The court asserted that plaintiffs may prove "disparate treatment under Title VII" either "on a mixed-motive approach or on a pretext approach."[185] To protect the framework for the latter, the court asserted, § 107 and the "motivating factor" standard can be allowed to apply only to the former, for "[i]t is readily apparent that th[e] mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis."[186] Thus the court claimed that all courts must protect the judiciary's "traditional *McDonnell Douglas* analysis" by restricting "access" to the legislatively set § 107 framework by demanding a special "quality" of evidence, as described in "Justice O'Connor's seminal concurrence in *Price Waterhouse*."[187]

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181. *Id.* at 1210.

182. 199 F.3d 572 (1st Cir. 1999).

183. *Id.* at 577.

184. *Id.*

185. *Id.* at 579-80.

186. *Id.* at 580.

187. *Id.*

After acknowledging the various lower court interpretations of the "direct evidence" standard for restricting "access" to the system set by Congress,[188] the *Fernandes* court chose what seems to be a variant on what the court termed an "animus plus" interpretation.[189] The plaintiff's evidence must show animus directly through statements that are not ambiguous; "a statement that plausibly can be interpreted two different ways—one discriminatory and the other benign—does not directly reflect illegal animus and, thus, does not constitute direct evidence."[190] The *Fernandes* plaintiffs' evidence that the owner of Costa Brothers stated "I don't need minorities, and I don't need residents on this job" and "I don't have to hire you locals or Cape Verdean people"[191] were inadequate "to unlatch the door" to the framework enacted by Congress because they could be "plausibly" interpreted to mean that the company did not have "to make special efforts to comply with EEO requirements" of "some sort of quota system."[192] In other words, the court upheld the lower court's refusal to allow a jury as fact finder to apply the "motivating factor" standard in determining what the employer meant by some potentially inculpating, albeit ambiguous, statements because the statements could be "plausibly" interpreted, in favor of the movant for summary judgment, not to be inculpating. Statements must allow fact finders only one possible interpretation to "unlatch the door" to what Congress enacted.

The *Fernandes* court did hold that the trial court should have allowed the jury to consider the case as under the

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188. The court found "three schools of thought": a "Classic" position, purporting to exclude any circumstantial evidence requiring an inference, for which it cites *Shorter*, inter alia; an "Animus Plus" position, which requires evidence of "conduct or statements that . . . reflect directly the alleged discriminatory animus and . . . bear squarely on the contested employment decision"; and an "Animus" position, used by a "few courts" to distinguish evidence in some way directly probative of animus rather than merely probative of the insufficiency of other motives. *Id.* at 581-82. The first option of course adopts the evidentiary meaning of "direct," while the other two options are based on the *Burdine* meaning of direct.

189. *Id.* at 583.

190. *Id*. at 583.

191. *Id*.

192. *Id*. at 583-84.

McDonnell Douglas framework; the jury thus should have been instructed to determine whether the plaintiff had proved the employer's explanation of hiring the most readily available qualified workers was pretextual.[193] The court even acknowledged that the plaintiffs' evidence of the owner's ambiguous statements concerning Cape Verdeans would be relevant to the finding of pretext. Yet it is clear that the court anticipated that the trial court would give a jury instruction that required the plaintiff to prove the falsity of the employer's explanation and thus the necessity of a discriminatory animus as motivation for the employer's refusal to rehire the plaintiffs. Because the owner's statements *could* be interpreted in favor of the employer movant for summary judgment, the burden-shifting jury instruction promised by the 1991 Act was not available to plaintiffs.

The lower courts' requirement that plaintiffs in some cases must use the *McDonnell Douglas-Burdine* framework, even after the 1991 Act, was in tension with two important decisions of the Supreme Court in the decade after that Act's passage. First, in *St. Mary's Honor Center v. Hicks*,[194] the Court, relying heavily on *Aikens*, held that a fact finder was not *compelled* to find the existence of actionable discrimination after finding an employer's proffered legitimate reasons to be false or insufficient.[195] The *Hicks* decision, though criticized by the dissent and numerous commentators for deflating the value of the *McDonnell Douglas-Burdine* framework for plaintiffs,[196] actually offered

193. 199 F.3d at 583-90. The court allows that the plaintiffs "might adduce further evidence at trial that would warrant the district court in concluding that mixed-motive analysis is appropriate and in framing its jury instructions accordingly." *Id.* at 590 n.9. Presumably that evidence would have to be of the unambiguous direct variety that the court requires to "unlatch the door" to applying the § 107 framework.

194. 509 U.S. 502 (1993).

195. *Id.* at 511.

196. *Id.* at 525 (Souter, J., dissenting); *see* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY. J. EMP. & LAB. L. 183, 183-84 (1997); Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1995); Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination If She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L.

promise that the Court would rein in the lower courts' misuse of the framework against plaintiffs. Justice Scalia, writing for a five-Justice majority in *Hicks,* stressed that the *McDonnell Douglas-Burdine* framework was only a model for structuring proof on the ultimate statutory question of discrimination, not an interpretation of the meaning of § 703(a)(1). Furthermore, Justice Scalia explained, in accord with *Aikens,* once "the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[197] Justice Scalia thus indicated that the purpose of the "framework" is only to require the defendant to carry a burden of production; when that has happened, the fact finder is to consider together all relevant evidence, including evidence relevant to the prima facie case and to the sufficiency of legitimate motives, but also any other evidence directly relevant to the determinative and ultimate issue–the existence of a discriminatory motive.

The *Hicks* Court's view of the limited function of the *McDonnell Douglas-Burdine* framework was repeated by a unanimous Court in *Reeves v. Sanderson Plumbing Products, Inc.*[198] In *Reeves*, the Court clarified that proof of pretext, in addition to a prima facie case, may be adequate, without further evidence of bias, to prove the existence of discrimination.[199] Justice O'Connor's opinion for the Court explained that once the defendant-employer in that case met its burden to present evidence of a legitimate reason for the challenged discharge, the "*McDonnell* framework" "disappeared" and "the sole remaining issue was 'discrimination *vel* non.'"[200] Justice O'Connor further explained that the plaintiff's "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination"—evidence that "may be quite persuasive"

REV. 159, 168 (1996). *But see* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236 (1995) (concluding that *Hicks* was correct and that *McDonnell Douglas* should be abandoned).

197. 509 U.S. at 510.

198. 530 U.S. 133 (2000).

199. *Id.* at 147-48.

200. *Id*. at 142-43.

but that is to be considered along with all of the other evidence presented by the plaintiff.[201] Then to determine whether the defendant employer was entitled to a judgment as a matter of law in *Reeves,* Justice O'Connor proceeded to consider together all of the plaintiff's evidence. This evidence, "in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation," also included evidence that the employer's decision maker expressed animus toward the plaintiff's protected status category;[202] it thus suggested the existence of a discriminatory motive, rather than merely the insufficiency of a legitimate motive.

The *Reeves* decision was thereby in tension with the lower courts' construction of § 107 of the 1991 Act. By requiring the lower courts to consider all of plaintiffs' evidence together in determining the existence of discrimination vel non, the decision seemed to question the lower courts' refusal to consider all of the plaintiffs' evidence to determine the existence of discrimination as a "motivating factor."[203] By confirming the limited function of the *McDonnell Douglas-Burdine* framework as explained in *Hicks*, the *Reeves* decision also seemed to challenge the lower courts' use of *McDonnell Douglas-Burdine* to justify the preservation of a necessary causation standard in cases lacking strong "direct evidence" of discrimination. Justice O'Connor's *Reeves* decision did not, however, directly consider the lower courts' use of her concurring opinion in *Price Waterhouse* to restrict application of the "motivating factor" causation standard adopted by Congress in the 1991 Act. That direct consideration awaited the Court in *Desert Palace.*

B. Desert Palace*: The Supreme Court Confirms Congress*

Although some panel decisions in some courts of appeals had suggested ways to avoid the "direct evidence"

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201. *Id*. at 147.

202. *Id*. at 151-52.

203. For a discussion of the significant implications of the *Reeves* decision and of the lower courts' resistance to its command to consider all of plaintiffs' evidence together, see Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577-78 (2001).

barrier,[204] it was not until the Ninth Circuit Court of Appeals' 2002 en banc decision in *Costa v. Desert Palace, Inc.*[205] that a court of appeals fully rejected the post-1991 Act relevance of Justice O'Connor's "direct evidence" language, and thereby recognized that § 107's "motivating factor" causation standard applies to all Title VII cases alleging intentional discrimination.[206] The Ninth Circuit decision reviewed a lower court's use of jury instructions that advised, in accord with § 107: (1) that the plaintiff had to show her gender was a "motivating factor" in the employer's imposition of adverse working conditions, and (2) if the plaintiff made such a demonstration, the defendant could avoid the assessment of damages if it proved that it would have treated the plaintiff the same, even if gender had played no role in its decisions. The employer argued that the plaintiff should not have been granted this so called "mixed-motive" jury instruction because her evidence did not satisfy a "direct evidence" standard. The Ninth Circuit held that "the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.'"[207]

In a unanimous decision affirming the Ninth Circuit, the Supreme Court revived the promise of the 1991 Act by rejecting the lower courts' use of Justice O'Connor's "direct evidence" dicta to limit the application of the "motivating factor" standard.[208] The Court, in an opinion also by Justice Thomas, held that to obtain a jury instruction under § 107, a plaintiff need not make any "heightened showing" based on "direct evidence;" instead, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that '"race, color, religion, sex, or national origin was a motivating factor for any employment practice."'[209] Justice Thomas explained that the Court did not need to determine the meaning of the *Price*

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204. *See* Wright v. Southland Corp., 187 F.3d 1287, 1293-1303 (11th Cir. 1999); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183-87 (2d Cir. 1992).

205. 299 F.3d 838 (9th Cir. 2002).

206. *Id.* at 853.

207. *Id.* at 853-54.

208. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

209. *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m) (1964)).

Waterhouse holding on causation or whether Justice O'Connor's opinion and thus her "direct evidence" dicta was controlling, because *Price Waterhouse*'s teaching on the proof of discrimination was "abrogate[d]" by the 1991 Act.[210] Justice Thomas stressed that the language of the Act required only that plaintiffs "demonstrate" a forbidden "motivating factor," and defined "demonstrate" only to meet "the burdens of production and persuasion" without any limitation on the kind of evidence that can be relevant in doing so.[211] Justice O'Connor joined Justice Thomas's opinion and also offered a separate concurrence in which she expressly acknowledged that the 1991 Act "codified a new evidentiary rule" for the type of mixed-motive cases for which she advanced her "direct evidence" standard in *Price Waterhouse*.[212]

The Court's rejection of the lower courts' efforts to use the "direct evidence" standard in order to preserve their control of disparate treatment litigation through the *McDonnell Douglas-Burdine* framework raised the issue of whether the framework was necessary or would survive. As noted above,[213] the Court in *Hicks* had already indicated that the framework served no additional purpose after a defendant had carried its burden of producing a legitimate explanation for an adverse decision challenged with a prima facie case of discriminatory intent. Moreover, a number of academics, assuming that most defendants do not need to be impelled to try to justify challenged decisions, both predicted and advocated the eventual full demise of the framework.[214] The Court in *Desert Palace* did state in a

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210. *Id*. at 98. Justice Thomas also noted that since the Court rejected any evidentiary limitation on the applicability of § 107, it did not need to address the second question on which it had granted certiorari: the appropriate reading of any "direct evidence" standard. *Id.* at 101 n.3.

211. *Id*. at 99-101 (quoting 42 U.S.C. § 2000e-2(m) (1964)).

212. *Id*. at 102 (O'Connor, J., concurring).

213. *See supra* text accompanying note 197.

214. *See, e.g.,* Henry L. Chambers Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 84 (2004); William R. Corbett, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212-13 (2003); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859 (2004). For pre-*Desert Palace* advocacy of the view that § 107 should supplant the *McDonnell Douglas* framework, see Michael

footnote that it need not "decide when, if ever, § 107 applies outside of the mixed-motive context."[215] Yet if plaintiffs, as the Court held, can use any evidence to prove contributing causation under § 107, why would they fashion their case as one that required proof of single motivation and thus sole causation? The Ninth Circuit's en banc decision in the case had suggested that mixed-motive cases warranting jury instructions based on § 107 are ones "in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision."[216] but the court did not explain how evidence could not support such a finding and still warrant sending a case to a jury. After all, where the evidence is insufficient to support the existence of a discriminatory reason, summary judgment should be granted to the defendant, and in the rare case where the evidence is so compelling as to exclude the possibility of any other reason but discriminatory motivation, summary judgment should be granted to the plaintiff.[217]

There is in fact, however, a good explanation for the Ninth Circuit's distinction of mixed-motive cases from single-motive cases based on "the type of evidence offered."[218] If all of a plaintiff's evidence is probative of the existence of a discriminatory motive only by demonstrating the absence of any other motive, including any legitimate motive proffered by the defendant, then that evidence

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J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 601-06 (1996). Professor Zimmer adhered to this view after *Desert Palace*. Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L. J. 1887, 1927-29 (2004). For a dissenting view, see Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 42-51 (2005) (contending that *McDonnell Douglas-Burdine* cases should be treated differently, at least where plaintiffs' proof is primarily of pretext).

215. 539 U.S. at 94 n.1.

216. Costa v. Desert Palace, Inc., 299 F.3d 838, 856 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

217. *Cf.* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 935 (2005) ("In any discrimination case that gets to the jury, including a purely circumstantial evidence case, the jury can find the presence of both factors, rather than deciding that one party is entirely correct and the other wrong.").

218. *Desert Palace*, 299 F.3d at 857.

cannot "support a finding that discrimination is one of two or more reasons for the challenged decision."[219] In such cases, as a matter of logic, a plaintiff can prove contributing causation only by proving at least the insufficiency of alternative causation and thus the necessary causation of the discriminatory motive.

This does not mean that where a plaintiff has proof only of the insufficiency of alternative causation, the plaintiff must prove necessary causation because the contributing causation standard of § 107 does not apply; it simply means that the plaintiff proves necessary causation by proving contributing causation. As suggested by the Ninth Circuit in *Desert Palace*, this may affect jury instructions, including obviating any instruction on the employer's "same decision" affirmative defense, as in these cases it would be logically inconsistent for a jury to find both that discrimination was a "motivating factor" and that the employer would have made the same decision but for discriminatory bias.[220] As the Ninth Circuit also stressed, however, this does not mean that mixed-motive cases and single-motive cases are "fundamentally different" or that a jury's consideration of the latter is to be controlled by complicated instructions explaining the *McDonnell Douglas-Burdine* framework.[221] *Desert Palace* should be read to confirm that § 107 sets the causation standard for all Title VII cases, that any "direct evidence" limitation on this standard has been abrogated, that the function of the *McDonnell Douglas-Burdine* framework is only to require defendants to offer specific justifications for adverse employment actions, that this framework does not define a separate cause of action from that of § 107, and that jury instructions are to be based on § 107 except possibly in those cases where the plaintiffs' evidence could not support "a finding that discrimination is one of two or more reasons for the challenged decision."[222]

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219. *Id.* at 856.

220. *Id.* at 856-57.

221. *Id.* at 857.

222. *Id.* at 856.

C. *The Lower Courts Resist*

Unfortunately, some lower courts have read *Desert Palace* much more narrowly. By cleaving to the *McDonnell Douglas-Burdine* framework, several courts of appeals have continued to pronounce doctrine that allows trial courts to deny plaintiffs the opportunity to use all kinds of evidence to prove illegal discrimination to juries using the "motivating factor" causation standard.

The Eighth Circuit Court of Appeals, the court issuing the decision reviewed in *Gross*, has rendered the most narrow, and most obviously incorrect, express interpretation of *Desert Palace.* In *Griffith v. City of Des Moines*, this court pronounced that since *Desert Palace* concerned jury instructions, the decision did not require the abrogation of a "direct evidence" standard to determine whether a plaintiff could avoid summary judgment without use of the *McDonnell Douglas-Burdine* framework.[223] The court stated that while *Desert Palace* controls jury deliberations, plaintiffs could still be required to have "strong (direct) evidence that illegal discrimination motivated the employer's adverse action" as a condition of not using "the three-part *McDonnell Douglas* analysis to get to the jury."[224] As explained by Judge Magnuson in a decision concurring because of plaintiff's generally weak evidence, however, this distinction of the standard for summary judgment from that for jury deliberations "is absurd"; it "requires the plaintiff to prove at summary judgment that an invidious characteristic was the but-for cause of the employment action, but then at trial only requires the plaintiff to prove that this characteristic was a motivating factor in the employment decision."[225] This cannot be what the *Desert Palace* Court intended when it determined that the 1991 Act had abrogated the teaching of *Price Waterhouse* on causation in Title VII disparate treatment cases and that all forms of evidence should be considered together to determine the existence of discrimination as a motivating factor. Although the *Griffith* court used "direct evidence" not as "the converse of circumstantial evidence," but rather, as did the Court in

223. 387 F.3d 733, 735-36 (8th Cir. 2004).

224. *Id.* at 736.

225. *Id.* at 739, 745 n.9.

Burdine, to refer to evidence directly linking a challenged adverse decision to discriminatory bias, the court's approach would allow trial courts considering motions for summary judgment to consider only "strong" *Burdine*-type "direct" evidence when evaluating the existence of discrimination as a "motivating factor."[226]

The Eleventh Circuit Court of Appeals, without offering an express interpretation of *Desert Palace*,[227] has seemed to join the Eighth Circuit in continuing to use a "direct evidence" test in its analysis of summary judgment motions. For instance, in *Burstein v. Emtel, Inc.,*[228] the court upheld a trial court's grant of summary judgment against Burstein because he had only "circumstantial evidence of discrimination" and he could not prove that Emtel's "many legitimate reasons" for refusing to renew his employment contract were "a pretext" for religious discrimination.[229] Since the court did not consider Burstein's testimony about anti-Semitic comments from his supervisor to be "direct evidence" of discriminatory bias—as the comments were not

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226. The *Griffith* court claimed that its refusal to find *Desert Palace*'s holding relevant to its analysis of a summary judgment motion was justified by the Court's use of the *McDonnell Douglas* framework to consider the grant of summary judgment in a case, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003), alleging intentional discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12103 (2006). *Griffith*, 387 F.3d at 735. The Court in *Raytheon*, however, did not suggest that its holding in *Desert Palace* rejecting Justice O'Connor's "direct evidence" standard was not relevant to the analysis of summary judgment motions. The *Raytheon* Court held only that a neutral business policy, such as Raytheon's rule against hiring previously terminated employees, that has been adopted for non-discriminatory reasons, can be challenged only under disparate impact analysis, which in this case the plaintiff had failed timely to raise. The Court used the *McDonnell Douglas* framework because the lower courts had done so and to highlight how the Ninth Circuit Court of Appeals panel had blended *McDonnell Douglas* improperly with disparate impact analysis. *Raytheon*, 540 U.S. at 49-53. The Court gave no consideration, even in dicta, to whether the *McDonnell Douglas* framework offers a separate cause of action with a different causation standard than that offered by § 107 of the 1991 Act. *Id.*

227. *See, e.g.*, Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) ("[A]fter *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases.").

228. 137 F. App'x 205 (11th Cir. 2005).

229. *Id.* at 208-09.

probative "without inference"[230]—the court required Burstein to prove the absence or at least insufficiency of the legitimate reasons and thus that religious bias was a necessary cause of his non-renewal.[231]

The post-*Desert Palace* approach of the Fifth Circuit Court of Appeals to the analysis of summary judgment motions in disparate treatment cases, while more consistent with the *Desert Palace* decision than the approach of the Eighth and Eleventh Circuits, also could allow trial court judges to continue to thwart the full promise of the 1991 Act by forcing a plaintiff's evidence into the *McDonnell Douglas-Burdine* framework. In *Rachid v. Jack in the Box, Inc.*, a pre-*Gross* ADEA decision, the Fifth Circuit held that *Desert Palace* signals or at least permits a "merging of the *McDonnell Douglas* and *Price Waterhouse* approaches."[232] The Fifth Circuit's merged framework conditions a plaintiff's access to the jury on his or her demonstration, as in the *McDonnell Douglas* approach, of "a prima facie case

230. *Id.* at 208 n.6. The court stressed that Burstein had no proof to question Emtel's claims that the supervisor did not participate in the decision not to offer Burstein a new contract. *Id.* at 208. There was testimony, however, that both Burstein and the supervisor discussed with the decision makers the argument in which the anti-Semitic comments were made, and that Burstein's "[a]nger and hostility" in that argument, but apparently not the comments, concerned the decision makers. *Id.* at 207.

231. *Id.* at 207. For another example of the Eleventh Circuit's retention of a necessary causation standard in cases lacking evidence that fails to meet a strict "direct evidence" standard, see *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006). In *Ash*, the court found that the decision maker's frequent reference to the African American plaintiffs as "boys" was not "direct evidence" of discrimination because the references were "too remote in time" from the contested decisions not to promote plaintiffs. *Id.* at 533. Then analyzing the case as one in which the plaintiffs were required to prove necessary causation through proof of pretext, the court also found Ash's evidence of pretext to be inadequate, applying standards on which Ash's lawyer convinced the Supreme Court to provide clarification. *See Ash*, 546 U.S. at 457 (holding that use of the word "boy" without modification is not "always benign" and that "jumping off the page to slap you in the face" is an imprecise standard for inferring pretext from comparative qualifications of candidates for jobs). Upon remand the court of appeals adhered to its determination that Ash had not proved pretext, and thus necessary causation, because "[t]here was insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for [the plant manager's] decision." Ash v. Tyson Foods, Inc., 190 F. App'x 924, 926 (11th Cir. 2006).

232. 376 F.3d 305, 312 (5th Cir. 2004).

of discrimination," and then if the defendant "articulate[s] a legitimate, non-discriminatory reason," on the creation of a genuine issue of material fact "either" that the defendant's reason is a pretext for discrimination or that plaintiff's protected characteristic was another "motivating factor."[233]

There are two problematic aspects of the *Rachid* court's attempt to retain a central role for *McDonnell Douglas* through its "merged" framework. First, the requirement that all plaintiffs must prove a *McDonnell Douglas*-type prima facie case is inconsistent with the Court's holding in *Aikens*, as confirmed in *Hicks*, that the function of the prima facie is only to require a defendant to articulate a legitimate reason. Applied strictly, the requirement could prevent a plaintiff who could not, say, establish basic qualifications for a job for which he unsuccessfully applied, to convince a jury, based on evidence of comments from decision makers, that he was not even considered because of his race.

Second, and probably pertinent to more cases, is the path provided by the *Rachid* framework for trial courts to more easily grant summary judgment against plaintiffs by treating their cases as those requiring proof of pretext, and thus necessary causation, rather than as those requiring proof only of discrimination as a motivating factor. The path is provided by the suggestion that proof of pretext is an alternative to proof of discrimination as a "motivating factor," rather than one type of evidence, to consider with other types, to determine whether the plaintiff can prove the existence of discriminatory motivation. In the *Rachid* case, the court did not take this path. The court instead considered together evidence of comments demonstrating Rachid's supervisor's discriminatory animus and evidence challenging the employer's legitimate purported reason for Rachid's termination, and reversed the trial court's grant of summary judgment without specifying that the plaintiff could only be successful at trial through a mixed-motive, or alternatively, through a single-motive theory by proof of pretext.

Since the *Rachid* decision, however, courts in the Fifth Circuit have not always applied its merged framework so flexibly. Consider, for instance, the analysis in *Gillaspy v.*

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233. *Id.*

Dallas Independent School District.[234] In that case, the court reviewed a district court's grant of summary judgment against Gillaspy on her claims that she was subjected to gender discrimination by several decisions of her employer to not promote her to better supervisory posts.[235] Gillaspy's evidence included her testimony that one of the managers who interviewed her just before her first rejection for a promotion had told her that "only men" would be hired for the position she sought.[236] In direct conflict with *Desert Palace* and probably with *Rachid* as well, the court first held that Gillaspy had no viable "direct-evidence claim" because her testimony about the manager's comment was not probative of discriminatory motivation "without inference" of how that manager might have influenced the employer's decision.[237] The court acknowledged that *Rachid* had held that plaintiffs can use circumstantial evidence within the *McDonnell Douglas* framework to prove discrimination as a "motivating factor" as well as to prove the pretext of the employer's proffered legitimate motivations,[238] but stated that the plaintiff had to prove pretext because she "ha[d] not sufficiently not [sic] argued that . . . her gender was a motivating factor in the challenged employment decisions."[239] Ultimately, based on the plaintiff's additional evidence of pretext, the court found that summary judgment should not have been granted on the plaintiff's claims of gender discrimination on two of the three promotions considered by the court.[240] It did so, however, based only on the evidence being adequate to support a conclusion that the employer's proffered reasons for these two failures to promote Gillaspy were inadequate and thus that discriminatory motivation was necessary.[241]

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234. 278 F. App'x 307 (5th Cir. 2008).

235. Gillaspy v. Dallas Indep. Sch. Dist., No. 3:04-CV-2055-K, 2006 U.S. Dist. LEXIS 69211 (N.D. Tex. Sept. 26, 2006), *rev'd in part*, 278 F. App'x 307 (5th Cir. 2008).

236. *Gillaspy*, 278 F. App'x at 309.

237. *Id.* at 311-12 (quoting Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2002)).

238. *Id.* at 312-13.

239. *Id.* at 313 n.3.

240. *Id.* at 314.

241. *Id.*

For the third non-promotion, the court found no adequate rebuttal of the existence of the legitimate motivation and thus a proper dismissal of the plaintiff's claim.[242]

Other circuit courts of appeal after *Desert Palace*, by preserving the *McDonnell Douglas* framework as an alternative cause of action requiring the full proof of pretext and necessary causation rather than only as a residual tool to assist plaintiffs in the proof of motivating factor causation, have also left the door open for trial courts to continue to require some plaintiffs to prove necessary causation. For instance, in *Fogg v. Gonzales*, the District of Columbia Court of Appeals held that the *McDonnell Douglas* framework for proving pretext and thus single discriminatory motivation or sole causation was not only a separate methodology of proof, but also an entirely separate cause of action, as provided in § 703(a)(1) of Title VII.[243] The court, through somewhat tortured circular reasoning that avoided close analysis of the statutory text or of the legislative history of the 1991 Act, read § 107 to provide an alternative cause of action that requires proof of only a motivating factor in cases litigated under a "mixed-motive" theory.[244] The Sixth Circuit Court of Appeals in an otherwise

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242. *Id.* The court cited *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003), for the proposition that a "plaintiff must rebut each nondiscriminatory reason articulated by the employer." *Gillaspy*, 278 F. App'x at 314. For other post-*Rachid* decisions of panels of the Fifth Circuit that have upheld motions of summary judgment against plaintiffs because they failed, despite having evidence of discriminatory bias, to offer adequate proof of necessary causation by eliminating an employer's proffered justification, see, for example, *Ajao v. Bed Bath & Beyond Inc.,* 265 F. App'x 258 (5th Cir. 2008); and *Bugos v. Ricoh Corp.,* No. 07-20757, 2008 U.S. App. LEXIS 18311 (5th Cir. Aug. 21, 2008).

243. 492 F.3d 447 (D.C. Cir. 2007).

244. *Id.* at 452-54. The *Fogg* court argued that reading § 703(m) to provide meaning to § 703(a)(1), rather than to provide an alternative cause of action would effect a disfavored implied repeal of a cause of action formerly available to plaintiffs. *Id.* This reasoning is circular because it assumes that § 703(m) provides a new cause of action, rather than a clarification, through specification of a causation standard, of the causes of action provided for in other Title VII provisions, including § 703(a)(1). *Id.* As explained above, this assumption is in tension with the language of § 703(m) and the clear intent of Congress to reject the causation standard provided these provisions by the Court in *Price Waterhouse*. *See supra* text accompanying notes 95-97. Furthermore, if § 703(m) provided a cause of action separate from that of § 703(a)(1), rather than a causation standard governing § 703(a)(1), then *Price Waterhouse* would stand as a governing precedent for § 703(a)(1) actions. The *Fogg* court seems to be

excellent opinion, *White v. Baxter Healthcare Corp.*, also expressly treated § 703(a)(1) and § 703(m) as separate causes of action that require use of methodologies of proof and of different standards of causation.[245]

It might be argued that interpreting § 107 to allow plaintiffs' lawyers to choose in each case whether to use the *McDonnell Douglas* framework to prove a single or at least necessary discriminatory cause or rather to use all relevant probative evidence to prove discrimination as a "motivating factor" cannot deny the promise of the 1991 Act, because plaintiffs' lawyers can and always will choose to gain the benefit of the latter, more liberal causation standard. This argument seems particularly applicable to the choice offered by the Sixth Circuit panel in *White*, as the court there made clear that choice of the "mixed-motive" cause of action and the accompanying motivating factor causation standard does not preclude plaintiffs from using *McDonnell Douglas* to present at least some of their evidence of discriminatory bias through evidence of employer pretext.[246] Indeed, in *White*, to support its finding that the plaintiff presented

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concerned that plaintiffs not be denied use of the *McDonnell Douglas* framework without an express directive from Congress. Reading § 703(m) as Congress intended to provide a causation standard, however, does not effect a repeal of the judicially fashioned *McDonnell Douglas* framework as an aid to plaintiffs in proving discriminatory motivation; rather, it insures that the framework is used only as such an aid, rather than as a means to continue to impose a burden on some Title VII plaintiffs to show necessary causation. The *Fogg* decision used its specious implied-repeal analysis to reject an effort by the defendant to litigate a "same decision" defense to limit remedies after a jury had already found discriminatory motivation, apparently primarily on the basis of evidence of pretext. 492 F.3d at 454. The court presumably could have reached the same conclusion by finding that the defendant had waived its defense by not asking for a jury instruction that allowed it to prove the absence of necessary causation.

245. 533 F.3d 381, 400 n.10 (6th Cir. 2008) ("[T]he *McDonnell Douglas/Burdine* framework continues to guide our summary judgment analysis of single-motive discrimination claims brought pursuant only to Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2(a)(1), and not pursuant to 42 U.S.C. § 2000e-2(m)."); *see also* Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

246. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008). The court in *White* stated that, "A Title VII plaintiff may certainly find parts of the *McDonnell Douglas/Burdine* framework to be useful in presenting a mixed-motive claim." *Id.* at 401 (relying on *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring)).

sufficient evidence for a reasonable jury to find that race was a motivating factor in the employer's issuance of the plaintiff's downgraded performance evaluation, the court considered evidence that the defendant's reason for using a particular evaluation "grid" was pretextual, as well as evidence of the evaluator's discriminatory bias.[247]

Yet interpreting the 1991 Act to provide plaintiffs a choice between proving necessary causation through pretext and contributing causation through general "mixed-motive" proof ultimately is not faithful to the statute's promise. Some plaintiffs' attorneys might choose, or be compelled by their clients to choose, to carry the burden of proving the insufficiency of the employer's legitimate reasons by expressly claiming to litigate their case as a "single-motive" or pretext case under *McDonnell Douglas* in order to deny juries the compromise option of finding the employer liable for illegal discrimination, but not for significant legal or equitable remedies. The option to so gamble may seem attractive from the perspective of plaintiffs and their attorneys, but it is not the compromise struck between the deterrent and compensatory goals of Title VII by Congress in § 107 of the 1991 Act.[248]

More significantly, however, courts that recognize two causes of action for disparate treatment under Title VII may not allow plaintiffs to choose the "mixed-motive" option in cases where the plaintiffs argue that the employer's proffered motive was pretextual. For instance, in a District of Columbia Circuit panel decision written by the same judge who authored *Fogg*, the court upheld a summary judgment against plaintiffs because they argued that the defendant's proffered legitimate motives were intended to cover up discriminatory motives, even though the court acknowledged that the plaintiffs might have had a "compelling case" had they argued only that race was one motivating factor.[249] Courts recognizing two disparate

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247. *Id.* at 404-06.

248. *See supra* text accompanying notes 243-44. Thus, in any case in which the jury conceivably could find discrimination to be a "motivating factor" without also finding it to be a necessary cause, defendants as well as plaintiffs should be able to obtain a jury instruction like that given in *Desert Palace*. *See supra* text accompanying notes 106-07.

249. Ginger v. Dist. of Columbia, 527 F.3d 1340, 1345 (D.C. Cir. 2008) (Ginsburg, J.).

treatment causes of action—including future panels in the Sixth Circuit diverging from the *White* court's analysis—might also treat common cases where a plaintiff's strongest evidence of discrimination is evidence of pretext as having been litigated as single-motive cases, regardless of the express arguments or claims of the plaintiffs. Doing so would enable the court to require adequate evidence to prove the insufficiency of each of the employer's justifications and thus the existence of discriminatory motivation as a necessary, rather than only contributing, cause.

In sum, lower court decisions after *Desert Palace*, like earlier decisions after passage of the 1991 Act, teach the lesson that the message sent by Congress through § 107 was not sufficiently clear. Given the confusion and the split in the circuits over the meaning of *Desert Palace*, absent a Congressional response to *Gross* for Title VII as well as for the ADEA, the Court probably would have to again grant certiorari to explain what plaintiffs must prove to establish discriminatory motivation in a disparate treatment employment discrimination case. It would have to do so to clarify that the premise of its holding on jury instructions in *Desert Palace* applies to the analysis of motions for summary judgment as well as to motions for judgments as a matter of law. Another decision on causation under Title VII would ideally also clarify that § 703(m) does not provide an alternative cause of action for something termed "mixed-motive" cases, but instead provides the standard of causation for all Title VII cases in which illegal intentional discrimination is alleged. This decision, despite the preference shown by five Justices in *Gross* for a necessary causation standard, ideally would also reject any suggestion that the lower courts can apply such a "but-for" standard in cases in which the courts determine that the plaintiff's arguments and evidence are primarily directed toward showing that the employer's justifications for the challenged decision are pretextual.[250]

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250. The Court could accomplish these clarifications, for instance, in a case like *Ash v. Tyson Foods*, 190 F. App'x 924 (11th Cir. 2006). See *supra* note 231 in which a plaintiff seeking to avoid summary judgment has supplemented some circumstantial evidence of discriminatory bias with use of the *McDonnell Douglas* framework to advance evidence of employer pretext, but unlike the plaintiff in *Ash*, argues that he needs to prove only that discriminatory bias was one motivating factor rather than the single motivating factor in producing the

IV. FULFILLING THE PROMISE

A. *An Effective Legislative Response*

In responding to the Court's decision in *Gross*, Congress should appreciate both the confusion created by § 107 and the unlikelihood of that confusion being fully resolved by a Court assertively allegiant to necessary causation as a strong default standard. Such appreciation should insure that a Congress that wants to maintain the policy compromise expressed in § 107 as the default standard for employment law generally,[251] not do so by simply inserting a provision like § 107 into the ADEA and other employment statutes. Congress instead can better insure the judicial implementation of a motivating factor causation standard supplemented with a same decision affirmative defense to limit remedies in one of two alternative ways.

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challenged decision. The Court could also do so by confirming the post-*Desert Palace* position of a Ninth Circuit Court of Appeals' panel that in a case where a plaintiff has evidence both of an employer's proffered legitimate motive being pretextual and also of discriminatory intent, "it is not particularly significant" whether a plaintiff first relied on the "*McDonnell Douglas* presumption" to impel the defendant to produce evidence of the legitimate motive. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1123 (9th Cir. 2004). Regardless of the plaintiff's use of *McDonnell Douglas* to frame the case, as explained by the Ninth Circuit, the plaintiff "must produce some evidence suggesting that [the employer's] failure to promote him was due *in part or whole* to discriminatory intent." *Id.* (emphasis added). Confirming this position of the Ninth Circuit, like reversing the Eleventh Circuit's use of *McDonnell Douglas*, would resolve the residual ambiguity left by the first footnote in *Desert Palace*, reserving the applicability of the holding "outside of the mixed-motive context." It would make clear that "motivating factor" is the correct causation standard, regardless of the kind of evidence presented by the plaintiff.

251. A Congress supportive of the § 107 compromise presumably would want to extend it to other employment law prohibitions. The balance between a concern with under enforcement and a concern with over compensation should not differ depending on the type of discrimination or retaliation prohibited. Since plaintiffs in all types of intentional discrimination cases confront the same difficulty in proving a wrongful state of mind, all such cases pose the same concern that many, perhaps most, meritorious cases will not be provable if typical plaintiffs with imperfect employment records must prove necessary causation. A concern that undeserving plaintiffs not receive compensatory relief in cases where they would have been treated the same but for the employer's discriminatory motive also is relevant to any type of discrimination prohibition.

First, the motivating factor causation standard could be woven into the text of the statutory provisions upon which disparate treatment prohibitions are based, such as § 703(a)(1) of Title VII or § 623(a)(1) of the ADEA, rather than added as a supplementary provision, such as § 703(m) of Title VII. For instance, Congress could amend both § 703(a)(1) and § 623(a)(1) by substituting "when" for "because of" and adding at the end of the provision, "was a motivating factor." The provisions thus would read in pertinent part: "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . when such individual's race, color, religion, sex, or national origin [or age, in the case of § 623(a)(1)] was a motivating factor." The defendant's "same action" affirmative defense to avoid significant remedies through demonstration of the absence of necessary causation could remain in the statute's provisions on remedies, as the § 107(b) affirmative defense was added to § 706(g) of Title VII.[252] Such an amendment would make clear that contributing cause is the standard for liability for illegality in all disparate treatment cases under the respective statute, and also that defendants who can demonstrate that they would have made the same decision absent consideration of a forbidden factor have the right to avoid specified remedies, such as back-pay, reinstatement, and legal damages.

Alternatively, Congress could simply add a definition of "because" to any employment statute—like Title VII or the ADEA, or the ADA or FMLA—for which it determined a contributing causation standard and a same-decision defense for remedies were appropriate. The definition could simply read: The term "because" includes being "a contributing cause, even if not a necessary or sufficient cause." The affirmative defense could remain, or be placed, in the remedial provisions of the statute.

The latter alternative would have the benefit of obviating the need to amend multiple provisions of the relevant employment statutes. Section 703 of Title VII, for instance, as noted above, contains separate provisions proscribing discrimination by employment agencies and by

252. *See* 42 U.S.C. § 2000e-5(g)(2)(A)-(B) (2006). The cognate provision covering remedies in the ADEA is 29 U.S.C. § 626(b) (2006).

labor organizations.[253] Section 623 of the ADEA has similar separate provisions.[254] The definitional alternative could also be expanded easily to reach the separate treatment in § 717 of Title VII,[255] and of § 15 of the ADEA,[256] of discrimination by federal government employers "based on" one of the Title VII categories or age.[257] Furthermore, § 703(a)'s and § 623(a)'s proscriptions of discrimination by employers both include an alternative definition of discrimination as "to limit, segregate, or classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of" a protected status.[258] The causation standard for this provision could be clarified more directly and with less redrafting simply by adding the new definitional section.[259] Similarly, a new

253. 42 U.S.C. § 2000e-2(b) (2006) (employment agencies); 42 U.S.C. § 2000e-2(c) (labor organizations).

254. 29 U.S.C. § 623(b), (c) (2006).

255. 42 U.S.C. § 2000e-16 (2006). Subsection (a) states that "[a]ll personnel actions affecting employees or applicants for employment" with covered units of the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin."

256. 29 U.S.C. § 633a (2006).

257. The expansion could be effected either by having the contributing cause definition apply to "based on" as well as "because," or by changing the "based on" phrase to "because of."

258. Each provision states that it "shall be unlawful for an employer—to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" protected status.

259. The Title VII disparate impact cause of action was originally based on this provision, before the codification of this action in § 703(k) by § 105 of the 1991 Act. The age-based disparate impact cause of action continues to be based on a similar provision in § 623(a)(2) of the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 233-35 (2005). The issue of causation generally is less salient in disparate impact cases than in disparate treatment cases because the former turn on the effects and justifications of particular employment practices and thus do not require untangling complicated subjective motivations. Contributing rather than necessary causation, however, is the more appropriate standard for disparate impact cases because plaintiffs have to prove only that a particular, and unjustified, employment practice disproportionately disadvantages their protected class, regardless of the relative ultimate success of the class in the challenged decision-making process. *See* Connecticut v. Teal, 457 U.S. 440, 451 (1982) (employer cannot compensate for the discriminatory effects of an employment practice by reaching a non discriminatory "bottom line" through

definition of "because" would provide the most direct and most simple route to clarification of the causation standard for the more complicated definition of discrimination in the ADA, which includes both a general prohibition of discrimination using the "because of" phrase,[260] and some more specific prohibitions that use the same phrase.[261]

Finally, providing a contributing cause definition of "because" in employment discrimination statutes would clarify that anti-retaliation provisions such as § 704 in Title VII,[262] and § 623(d) of the ADEA,[263] are to be governed by the

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other practices). This holding, and its implicit adoption of a contributing cause standard, is not affected by § 703(k)(1)(B)(i) now requiring plaintiffs to demonstrate "that each particular challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2006).

260. 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

261. *See* 42 U.S.C. § 12112(b)(1), (4) (2006). The list of specific prohibitions in the ADA is presented as non-exclusive constructions. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006), which prescribes the exclusion from participation in "any program or activity receiving Federal financial assistance" of any individual "solely by reason of her or his disability" is an example of a statutory provision that sets a specific causation standard other than the one that Congress embraced in § 107 of the 1991 Act. § 12112(b)(1), (4). Most courts of appeals, however, have not imported this "sole" causation standard into cases charging disability discrimination under the ADA, as the latter statute uses the "because of" language of section 703(a)(1) of Title VII rather than the "solely by reason" language of the Rehabilitation Act. *See, e.g.*, Head v. Glacier Nw. Inc., 413 F.3d 1053, 1063-64 n.55, 1065 (9th Cir. 2005) (collecting cases from other circuits). As noted above, the Court's use of the *McDonnell Douglas* framework in its decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), does not establish any particular continuing role for this framework in disparate treatment litigation, whether under the ADA or in employment discrimination litigation more generally. *See supra* note 226.

262. 42 U.S.C. § 2000e-3(a) (2006) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or

same causation standards that govern anti-discrimination provisions.[264] Provisions that proscribe discrimination against employees because they oppose illegal status discrimination or participate in processes established to eliminate such discrimination do not pose different considerations for causation than do provisions directly prohibiting the status discrimination. Anti-retaliation provisions are not less important than are anti-discrimination provisions, as the former typically are adopted to protect the latter. The primary purpose of anti-retaliation provisions in any employment statute is to secure the underlying rights promised by the statute by protecting those who assert or assist in the implementation of these rights.[265] Indeed, the Court has interpreted several

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participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

263. The wording of the anti-retaliation provision in the ADEA, 29 U.S.C. § 623(d) (2006), does not vary in substance from that of Title VII.

264. Such clarification is necessary even for retaliation claims under § 704 of Title VII because the terms of § 703(m) apply only to discrimination on the basis of one of the five Title VII protected status categories, not to discrimination against opposition to status discrimination or for participation in Title VII processes. Thus, some courts have applied the direct evidence distinction to § 704 claims. *See, e.g.*, Imwalle v. Reliance Med. Prods., 515 F.3d 531, 543-544 (6th Cir. 2008) (distinguishing between direct and circumstantial evidence for Title VII and ADEA retaliation claims). Other courts, in less persuasive opinions, have applied a more stringent standard. *See, e.g.*, Kant v. Seton Hall Univ., 279 F. App'x 152, 159 (3d Cir. 2008) (plaintiff's burden in Title VII retaliation case includes proving that retaliation "had a determinative effect on the outcome" of decision-making process); Van Horn v. Best Buy Stores, L.P., 526 F.3d 1144, 1148 (8th Cir. 2008) (retaliation claim under Title VII requires proof that retaliation was a "'determinative–not merely motivating–factor'" (quoting Carrington v. City of Des Moines, 481 F.3d 1046, 1053 (8th Cir. 2007))). *But cf.* Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1225 n.5 (10th Cir. 2008) (declining to decide whether § 107 framework applies to retaliation claims under Title VII).

265. This is true regardless of whether the anti-retaliation provision is limited to protecting individuals only for invoking or participating in formal processes under the statute, or like § 704(a) of Title VII, which also protects individuals for reasonable opposition to the denial of an anti-discrimination right or other benefit under the statute. *See, e.g.*, Fair Labor Standards Act § 15(a)(3), 29 U.S.C. § 215(A)(3) (2006) (protecting individuals only for invoking or participating in formal processes under the statute). It is also true regardless of whether the range of employer actions covered by an anti-retaliation provision is more broad or narrow than that covered by an anti-discrimination guaranty

anti-discrimination provisions in federal statutes to encompass an implied prohibition of retaliation against opposition to the prohibited discrimination.[266]

Moreover, there is no reason to assume that a subjective retaliatory motive for an employment decision is ultimately easier to prove than is a discriminatory motive. Just as the minority status of an adversely treated and objectively qualified employee can raise the suspicion of discrimination, the temporal proximity between an adverse employment action and the assertion of a statutory right can raise the suspicion of retaliation. In both situations, however, an employer can dispel the suspicion with evidence of some other reason for its employment action. Indeed, it seems more likely that employers can fashion ex ante credible justifications against imperfect employees in reaction to their assertion of statutory rights than they can find ex post credible justifications for discriminatory decisions taken by some of their managers. Some may not wish to condemn an employer's agent's proven consideration of an employee's charge of discrimination or other assertion of a statutory right in cases where it is unclear whether the employer would have taken the challenged adverse action but for the consideration. If the employer, because of a "same decision" defense to remedies, cannot be forced to change the decision or pay any form of compensation in a case where it can prove the sufficiency of its justification, however, why would reasonable legislators want consideration of an employee's protected assertion of statutory rights to be treated as more acceptable than discriminatory animus that ultimately

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that it protects. *Cf.* Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 63-67 (2006) (interpreting, in dicta, § 704(a) of Title VII to cover a broader range of potentially adverse employer actions than those concerning "employment and the workplace" covered by § 703(a)).

266. *See, e.g.*, Crocs West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) (confirming that race discrimination prohibition in 42 U.S.C. § 1981 encompasses anti-retaliation prohibition); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008) (finding anti-retaliation prohibition implicit in age discrimination prohibition against federal government employers in § 633a(a) of the ADEA); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (finding anti-retaliation prohibition implicit in the prohibition of sex discrimination in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)); *see also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (finding that race discrimination prohibition in 42 U.S.C. § 1982 encompasses claim of third party who opposed discrimination).

made no difference in a challenged adverse employment decision?

Similar considerations extend to anti-retaliation provisions—like those in the FMLA,[267] the Employment Retirement Income Security Act (ERISA),[268] the Fair Labor Standards Act (FLSA),[269] or the Occupation Safety and Health Act (OSHA),[270]—that protect the assertion of employee rights other than not being subjected to status discrimination. Whether such provisions protect general reasonable opposition to practices that their statute otherwise prohibits, or instead only protect employee participation in the formal processes established to implement the statute, Congress also can and should clarify the applicability of contributing causation, either by simple amendments to the provisions or by a definition of operative words such as "because" or "for."[271]

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267. 29 U.S.C. § 2615(a)(2), (b) (2006).

268. 29 U.S.C. §1140 (2006).

269. 29 U.S.C. § 215(A)(3) (2006).

270. 29 U.S.C. § 660(c)(1) (2006).

271. Legislation was introduced in October, 2009, in both Houses of Congress "to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and *other anti-discrimination and anti-retaliation laws* is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991." S. 1756, 111th Cong. § 2(b) (2009); H.R. 3721, 111th Cong. § 2(b) (2009) (emphasis added). The legislation would adopt a "motivating factor" causation standard not only for age discrimination, but also for retaliation proscribed by the ADEA. Moreover, it extends this standard to "any Federal law forbidding employment discrimination" or "forbidding . . . retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law)." The legislation would also prevent any judicial reinvigoration of the direct evidence distinction by clarifying that a "plaintiff may rely on any type or form of admissible circumstantial or direct evidence and need only produce evidence sufficient for a reasonable trier of fact to conclude that a violation . . . occurred." S. 1756, 111th Cong. § 3 (2009); H.R. 3721, 111th Cong. § 3 (2009). In order to ensure adequate incentives to private attorneys to press cases based on contributing causation, Congress also should clarify in any provisions offering employers "same decision" defenses to monetary or reinstatement remedies that the award of attorneys' fees to prevailing plaintiffs is not discretionary. *See supra* note 11 and cases cited therein. For a proposal to impose additional penalties for employers and add additional incentives for plaintiffs to bring cases, see Martin J. Katz, *The Fundamental Incoherence of Title VII: Making*

B. *Pretext Evidence and Contributing Cause*

Some reasonable skeptics, though supportive of the § 107 policy balance, might oppose the enactment of a comprehensive contributing causation standard because of doubts that it fits well with proof through pretext evidence. Such skeptics might argue that contributing cause is an inappropriate standard for cases in which the plaintiff's evidence of the existence of discriminatory bias is inadequate to convince a reasonable jury that such bias was a factor in the challenged adverse employment decision. If such evidence is inadequate, then the plaintiff must depend on pretext evidence demonstrating that the employer's proffered justification was false or at least insufficient, and such pretext evidence is only convincing if adequate to prove that there was some other necessary cause of the decision.[272]

This argument, however, by bifurcating the assessment of the adequacy of a plaintiff's evidence, ignores the possibility that the two types of proof could be adequate together, but each insufficient alone, to convince a reasonable jury that discriminatory bias was a motivating factor in an employment decision. Assume that a plaintiff's evidence of the existence of discriminatory bias could convince a reasonable jury that it was only forty percent likely that such bias played any role in a challenged employment decision. This may be the case, for instance, because of uncertainties about what a supervisor meant by her references to the plaintiff's ethnicity and about whether the supervisor had any influence on the decision. Assume further that the plaintiff also has evidence to call into question the employer's justification for the decision. Say, for instance, the employer's justification is the employee's attendance record, and the plaintiff shows that another employee with a different ethnicity but a similar attendance record was treated differently. Assume, however, that this evidence of pretext is flawed because the other employee's attendance record was somewhat better or because the

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Sense of Causation in Disparate Treatment Law, 94 GEO. L.J. 489, 537-49 (2006). Adoption of Professor Katz's proposal of course would change the balance struck by Congress in § 107 of the 1991 Act.

272. *See* Kaminshine, *supra* note 219, at 42-47 (presenting an argument for retaining the *McDonnell Douglas-Burdine* framework as a separate method of proof after *Desert Palace*).

other employee was in a somewhat different position of responsibility, so that a reasonable jury could conclude that it was only forty percent likely that the employer's attendance-related justification was pretextual. In this case, although each type of evidence is inadequate alone to convince a reasonable jury that discriminatory bias was a motivating factor, together they could be sufficient to convince a reasonable jury that it is likely that discriminatory bias was a motivating factor.

Understanding why this is true requires understanding what each type of evidence has demonstrated. A reasonable jury's calculation that plaintiff's evidence of discriminatory bias made the existence of discriminatory motivation only forty percent likely does not mean that this evidence necessarily would make the absence of such motivation at least sixty percent likely to a reasonable jury. Given the plaintiff's burden of proof on the existence of discriminatory motivation, it may only mean that nothing could be determined from this evidence about the other sixty percent. Since the plaintiff's evidence concerning the likelihood of pretext applies to the unknown sixty percent, however, as well as the proven forty percent chance, the plaintiff's evidence of pretext can be interpreted by a reasonable jury to add a twenty-four percent (forty percent times sixty percent) likelihood that the challenged decision had some other cause such as discriminatory bias.[273]

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273. The reasonableness of such an interpretation in many cases is supported by an inference that the employer's offer of a pretextual justification indicates that the employer was trying to cover up something illegitimate like the discriminatory bias suggested by other evidence. Professor Katz indeed has argued that proof of pretext alone, even when not supplemented by evidence of discriminatory bias, can prove contributing causation without proving but-for causation because such proof disproves only the justification(s) offered by the defendant, not other possible non-discriminatory contributing motivations. *See* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 134-38 (2007). This argument, however, goes too far. Any proof of pretext, including proof that the employer is lying intentionally, only is a basis *alone* for an inference of the existence of another particular motivation to the extent that it tends to prove the insufficiency (though not the total absence, contrary to Professor Katz) of all other plausible motivations, and where all other motives are insufficient, as a matter of logic the remaining motive of discrimination must be necessary (though again contrary to Professor Katz, not sufficient alone). *See id.* at 141. A plaintiff may be able to convince a reasonable fact finder of the necessary existence of a discriminatory motive by proving only that the defendant has lied about one of several proffered legitimate motives, but only

This example of course does not demonstrate that evidence of discriminatory bias close to being adequate alone to prove discriminatory motivation to a reasonable jury is always adequate to do so in conjunction with evidence that is almost adequate alone to prove pretext to a reasonable jury. In some cases, for instance, plaintiff's evidence of discriminatory bias is inadequate not only because of the kind of uncertainties noted above, but because of defendant's countervailing evidence, such as of its disproportionately good treatment of members of plaintiff's protected class or of other favorable decisions from the challenged decision maker, that indicate the actual absence of discriminatory motive, rather than merely show that its presence has not been proven. In such cases, as acknowledged by the Court in *Reeves*, even evidence of pretext that is adequate to convince a reasonable jury that the employer's proffered reason was false might be insufficient to convince such a jury of the existence of discriminatory motivation.[274]

The example does demonstrate, however, that Congress must respond carefully to the *Gross* decision to ensure that the courts do not use a distinction between the two types of plaintiffs' evidence identified by the Court in *Burdine* as a basis for weighing the types of evidence separately. Congress should prevent this bifurcation by clarifying under Title VII, as well as under other employment laws, that there are not two separate kinds of disparate treatment causes of action. A bifurcation of evidence, when assessing

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through the inference that the lie regarding the one motive proves the insufficiency of the others. Thus, in cases where plaintiffs have only evidence of pretext and do not have even weak evidence of discriminatory bias, it is appropriate to avoid unnecessary burden-shifting instructions to the jury.

274. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000). The Court stated:

> [T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id.

either a defendant's motion to deny a trial or jury consideration or a defendant's motion to reject a jury's verdict, may deny at least some plaintiffs the benefit promised by the 1991 Act and confirmed by *Desert Palace*—the benefit of being able to demonstrate disparate treatment by proving motivating factor causation to juries.[275]

The example also confirms that the adoption of the § 107 policy balance for any statute should mean that whenever a plaintiff survives summary judgment and offers some evidence of an illegal bias, requests for the kind of jury instruction upheld in *Desert Palace*—including an instruction on the defendant's opportunity to limit remedies by showing the absence of necessary causation—should be granted. Even if a plaintiff's evidence of pretext is sufficiently strong alone to convince a reasonable jury of the existence of a proscribed motive, a judge cannot be certain that any additional evidence of a proscribed discriminatory or retaliatory bias was not critical to a jury's finding of liability against a defendant. Given the plaintiff's burden of proof, evidence sufficient to convince a reasonable jury that there was a ninety percent chance of pretext does not force a jury to find pretext and, by inference, illegal motivation. Thus, it is logically consistent for a jury presented with evidence both of pretext and of illegal bias to find contributing causation but no necessary causation.

As acknowledged above,[276] where the plaintiff's relevant evidence, including any evidence that the court deems part

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275. Apparently because he does not appreciate how proof that may not be adequate to demonstrate pretext nonetheless may help convince reasonable people of the existence of a discriminatory motive, Professor Kaminshine supports the bifurcation of plaintiffs' evidence in his defense of the courts' use of a but-for causation standard through the *McDonnell Douglas-Burdine* framework. *See* Kaminshine, *supra* note 214, at 51-60. Although he acknowledges that *Reeves* requires the consideration of evidence of bias to prove pretext under a necessary causation standard, he claims that elements of evidence "which are insufficient by themselves to establish an unlawful motive . . . have no probative value" combined with pretext proof under the motivating factor, contributory causation standard. *Id.* at 51, 59. Contrary to Professor Kaminshine's concerns, combining all evidence under the causation standard chosen by Congress in § 107 does not "risk[ ] a finding of unlawful motive on insufficient evidence," because reasonable jurors can infer the existence of a discriminatory motive from the combination of different types of evidence that would be insufficient if considered alone. *Id.* at 59-60.

276. *See supra* text accompanying notes 218-22.

of some prima facie case, only concerns the absence of legitimate justifications for the challenged decision, rather than the bias of the decision makers, the *Desert Palace* instruction appropriately can be modified to require the proof of necessary causation through pretext, thus obviating the need of any employer proof of the absence of such causation. In such a case, and only in such a case, a court might instruct the jury that the plaintiff must prove that discriminatory bias, rather than the employer's proffered legitimate motive, caused the challenged adverse employment decision. A court in such a case might also deny a motion from either the plaintiff or the defendant for a "same decision" instruction regarding remedies.[277]

Allowing courts such discretion, however, does not require limiting the reach of a § 107 policy balance. The policy balance, and the motivating factor causation standard for liability under that balance, still applies even in cases where all of plaintiff's evidence is only relevant to the proof of pretext. The modified jury instruction simply recognizes the logical impossibility in such cases of proving contributing causation without also proving necessary causation.

CONCLUSION

Congress should meet the challenge to federal employment law posed by the Court's decision in *Gross*, not as it met the Court's *Price Waterhouse* decision two decades earlier, by enacting a reactive provision for only the statute addressed in the decision. Instead, Congress should consider broadly the issue of causation for all employment law provisions, including those in Title VII, that prohibit conduct based on motivation. Such consideration should include weighing the difficulty of untangling complicated

277. As stated in the Ninth Circuit's en banc opinion in *Desert Palace*, if the "trial court determines that the only reasonable conclusion[s] a jury could reach is that discriminatory animus is the *sole* cause . . . or that discrimination played *no role* at all," then the jury should be instructed to determine whether the plaintiff has proven that the challenged action was taken "'because of' the prohibited reason," and the defendant "does not benefit from the 'same decision' defense." Costa v. Desert Palace, Inc., 299 F.3d 838, 856 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003). Otherwise, a mixed motive instruction that specifies both the motivating factor causation standard and the "same decision" defense is required.

and intertwined motivations and of proving the existence of conscious and unconscious bias. It also should include consideration of the purpose and limitations of the pretext proof facilitated by the *McDonnell Douglas-Burdine* framework, especially in light of the reality of employees with imperfect records. Perhaps most importantly, the consideration must include a review, like that provided in this Article, of the resistance of the courts to a full replacement of a contributing causation standard and to a reduction of the role of the *McDonnell Douglas-Burdine* framework.

Such broad consideration should lead a Congress committed to the goals of the federal employment anti-discrimination statutes to clarify the causation standard for disparate treatment litigation in all these statutes, not just for the ADEA interpreted in *Gross*. Given the courts' resistance to a broad interpretation of § 107, this clarification must encompass Title VII. To be comprehensive, it should also encompass the anti-retaliation provisions in the full range of federal employment statutes. Whether through clarifying modifications of the provisions expressing mandates against intentional discrimination or retaliation, or through new definitions of "because" and related terms, Congress should make its voice resonate loudly to a judiciary that has resisted dialogue.