MAKING SENSE OF THE “MIXED-MOTIVES” MORASS
by
Michael C. Subit

On June 9, 2003, the U.S. Supreme Court unanimously held in Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003), that, at least in “mixed-motives cases,” a plaintiff may prove a defendant violated Title VII of the Civil Rights Act of 1964, as amended, by demonstrating that discrimination was “a motivating factor” in the employment action at issue. While Costa is a significant victory for plaintiffs, the Court’s brief and narrow opinion leaves a number of important and controversial questions unanswered. The lower courts’ resolution of these open issues will determine just how sweeping an impact the Costa decision ultimately has on the face of employment discrimination law.

I. THE SUPREME COURT CREATES TWO FRAMEWORKS.

Title VII prohibits discrimination “because of” race, color, religion, sex or national origin.1 As simple as those two words “because of” may sound, it is still not clear what they mean and how they may be proven. The U.S. Supreme Court’s first effort to deal with these questions came in the form of the McDonnell Douglas-Burdine framework. Its basics are familiar to most employment discrimination practitioners.2 First, the plaintiff establishes what is called a prima facie case of discrimination. The prima facie case eliminates the most common possible non-discriminatory explanations for the defendant’s conduct.3 If the employee establishes a prima facie case, then a rebuttable presumption of unlawful discrimination arises. The defendant must produce evidence of a legitimate non-discriminatory reason for its actions, or the plaintiff is entitled to judgment as a matter of law. If the defendant does

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2 The following describes the framework as it applies to trial proceedings (as opposed to dispositive motions where the plaintiff need establish only a genuine issue of material fact as to each element). The McDonnell Douglas-Burdine framework was originally designed for use at bench trials to help plaintiffs avoid an adverse judgment under Fed. R. Civ. P. 52(c) at the close of their cases. There was no right to a jury in Title VII cases until the passage of the 1991 Civil Rights Act.

3 Although the elements of the prima facie case will vary depending on what kind of employment action is at issue (e.g., hiring, promotion, discipline or discharge), the plaintiff generally has to prove (1) membership in a statutorily protected class; (2) possession of the basic qualifications for the position at issue; (3) an adverse employment action; and (4) either the employer’s continuing need for the position or more favorable treatment of someone outside the protected class.
so, then the presumption of discrimination dissipates. At that point, the employee must create an inference of discrimination to prevail. The plaintiff may do so either by showing the defendant’s explanation is unworthy of credence and a mere pretext for discrimination, or by otherwise proving the defendant acted “because of” an unlawful reason. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). Proof that a defendant has given false reasons for its actions does not always permit a reasonable factfinder to make the inference of unlawful discrimination. *Id.*

It is often said that *McDonnell Douglas-Burdine* was designed to allow a plaintiff without “direct evidence” of the defendant’s discriminatory motive to prevail at trial. That is only partially accurate. Because competent counsel will always articulate a legitimate non-discriminatory reason for the defendant’s actions, the presumption of discrimination that arises from the *prima facie* case is of little practical import. The importance of the *McDonnell Douglas-Burdine* framework is that it allows the plaintiff to shift the immediate target from whether defendant has acted “because of” a discriminatory motivation to whether the defendant has lied about the reasons it took action. It is usually much easier to show mendacity than bigotry. That is why cases analyzed under *McDonnell Douglas-Burdine* are often (misleadingly) called “pretext” cases.

In 1989 the U.S. Supreme Court decided there was more than one way to litigate an employment discrimination case. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), was both a landmark of Title VII jurisprudence and a fertile source of legal confusion. Writing for a plurality of four Justices, Justice Brennan concluded that “because of” as used in Title VII did not mean “but-for” causation. 490 U.S. at 240. Instead, the plurality read the prohibition on acting “because of” a discriminatory motive to prohibit an employer or other defendant from even taking an illegal criterion into account, *i.e.*, from making it “a motivating factor.” However, the plurality decided that a defendant who had acted in part upon an unlawful bias would avoid *all* liability if it

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4 A defendant’s explanation for its actions can be pretextual in three ways. The proffered reason may (1) be factually false; (2) have played no role in the employment action at issue; or (3) have not been the “but-for” cause of the action. *E.g.*, *Wolf v. Buss (Am.) Inc.*, 77 F.3d 914, 919 (7th Cir 1996); *Dews v. A.B. Dick Co.*, 231 F.3d 106, 1021 (6th Cir. 2000). To illustrate: Assume a defendant asserts that it fired the plaintiff, who claims sex discrimination, because she was late to work every day for two weeks. The plaintiff can prove this explanation is pretextual by showing (1) she was on-time every day; (2) she was late, but the defendant did not consider her lateness in firing her; or (3) the defendant considered her lateness, but would not have fired her if she had been a man. In all three situations, the defendant’s explanation that it took the action it did *solely* because of lawful motivations would be a pretext.
proved by a preponderance of the evidence that it would have taken the same action without that bias. *Id.* at 242.

This became known as the “same action defense.”

In *Price Waterhouse*, Justice Brennan created what is called the “mixed-motives” framework. Justice Brennan distinguished this framework from the scheme the Court had created in *McDonnell Douglas-Burdine*. He asserted that *McDonnell Douglas-Burdine* applied only to cases where the defendant’s motives were, in fact, either wholly legitimate or wholly illegitimate. By contrast, the premise of the *Price Waterhouse* case was that the employer had actually considered both legitimate and illegitimate factors in its decision. Justice Brennan was deliberately vague as to the kind of evidence a plaintiff could use to prove the employer had taken unlawful bias into account. *Id.* at 251-52. The plurality suggested, however, the employer should ordinarily “be able to present some objective evidence as to its probable decision in the absence of an impermissible motive” to discharge burden of its persuasion on the “same action defense.” *Id.* at 252 (emphasis added).

The *Price Waterhouse* plurality opinion is hard enough to understand by itself. The situation became only more complicated in practice. Justice Brennan’s opinion had received only four votes. Therefore, it was not the holding of the Court. Justices White and O’Connor both concurred only in the judgment. Both concurring Justices, however, recognized the utility of the “mixed-motives” framework Justice Brennan had created. Justice White disagreed with the plurality in two respects. First, he argued the plaintiff should have to show unlawful bias was “a substantial factor” in the adverse employment action, and not just “a motivating factor,” to shift the burden of persuasion to the employer. Second, he rejected the plurality’s suggestion the employer ordinarily discharge its burden of persuasion by objective evidence. *Id.* at 261. Justice White otherwise agreed with the plurality’s approach.

Justice O’Connor’s concurrence parted ways with the plurality more fundamentally. In contrast to the plurality, she concluded the words “because of” in Title VII meant “but-for” causation. *Id.* at 262-63. Like Justice White, she required the plaintiff to show unlawful bias was a “substantial factor,” and not just “a motivating factor,” in the employment action to shift the burden of persuasion. But she also imposed upon the plaintiff a direct

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5 Until *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 508 (1993), if the plaintiff proved the defendant’s articulated reason(s) for its actions were pretextual, the plaintiff automatically prevailed. Justice Brennan’s categorization was correct before *Hicks* was decided, but not thereafter.
evidence requirement. *Id.* at 275-76. In Justice O’Connor’s view, the burden of persuasion shifted to the employer only where the plaintiff showed “by direct evidence that an illegitimate criterion was a substantial factor in the employment decision.” *Id.* at 276. The three dissenting Justices agreed with Justice O’Connor that a plaintiff must show “but-for” causation to prove a defendant “because of” discrimination. 490 U.S. at 282-83 (Kennedy, J., dissenting). The dissenters also liked her “direct evidence” requirement.

Fifteen years later, lawyers and judges are still confused about what *Price Waterhouse* means. Part of the problem is that Justice White refused to take a position on whether “because of” in Title VII meant “a motivating factor” or “a but-for cause.” *Id.* at 259. That left the Court split 4-4 on this important question of statutory interpretation. Certain things were clear however. In *Price Waterhouse*, six members of the Court agreed that there were now at least two ways for a plaintiff to prove a discrimination case. Six members of the Court also all agreed that, under the “mixed-motives” framework, if the defendant proved that its unlawful bias was not a “but-for” cause of its actions with respect to the employee, the plaintiff lost the case. This is where the law stood for two and one-half years.

**II. THE CIVIL RIGHTS ACT OF 1991.**


> Except as otherwise provided in this title, 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.

Section 107(a), codified at 42 U.S.C. § 2000e-2(m) (emphasis added). Second, Congress explicitly defined “demonstrates” as “meets the burdens of production and persuasion.” 42 U.S.C. § 2000e(m). Third, Congress disagreed with the *Price Waterhouse* Court that the defendant could avoid all liability by proving it would have taken the same action even without any discriminatory motivation. Instead, Congress gave the employer an opportunity to limit the plaintiff’s remedies in disparate treatment cases by providing that

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor the court–

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).


The Costa case provided the U.S. Supreme Court with its first opportunity to explain the impact of these three statutory amendments upon employment discrimination law.

III. THE COSTA DECISION.

The precise issue presented in Costa was whether a plaintiff needed to have “direct” evidence of discrimination to take advantage of section 107 of the 1991 Civil Rights Act. Most Circuits had said “yes.” In Costa, the Supreme Court unanimously said “no”, at least in “mixed-motives cases.”

Both the parties and the Court confused what are, in fact, three distinct issues: (1) the level of causation required to establish liability under Title VII; (2) whether the defendant had a single motive or mixed motives for taking the employment action at issue; (3) whether the defendant can prove it would have taken the same action even in the absence of an unlawful motive. Because Justice Thomas conflated questions (1) and (2), he erroneously framed the issue as “whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction.” 123 S. Ct. at 2150. Part of the problem the Supreme Court faced in deciding Costa was that at trial the defendant had failed to object to the jury instruction that stated a plaintiff proves liability by showing discrimination was “a motivating factor.” Instead, Desert Palace objected to the instructions that told the jury it should not award damages if it found the Company had more than one motive for its actions and that it would have taken the same action based on lawful motives alone. Arguably, Desert Palace had waived its objection to the issue at the heart of the case. This may explain in part why the Supreme Court did not draw a careful distinction between the standard for liability, which is set forth in section 107(a) (42 U.S.C. § 2000e-2(m)), and the “same action defense” to damages, which is set forth in section 107(b) (42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii)).

Despite some imprecise language in the opinion, the true holding of Costa is that a plaintiff does not need direct evidence to take advantage of the “a motivating factor” causation standard set forth in section 107(a) of the Civil Rights Act of 1991. The Justices correctly reasoned that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” Id. at 2154 (citing Rogers v. Missouri
The Court explicitly stated that the *Costa* case did not require it “to decide when if ever, § 107, applies outside of the mixed-motives context.” 123 S. Ct. at 2151 n.1.

*Costa* is a very short opinion. The parties and amici had spent a lot of time briefing such questions as whether section 107 applies to all disparate treatment cases; whether there is a “direct evidence” requirement in cases unaffected by section 107; and whether section 107 eliminates or modifies the McDonnell Douglas-Burdine framework. The Court declined to reach any of these interesting and difficult issues. Apparently, the Justices decided that unanimity was more important than clarity in this case. For better or for worse the Court chose to let the lower courts and practitioners grapple with these challenging questions in subsequent cases, without providing much in the way of guidance.

IV. THE UNANSWERED QUESTIONS.

2. Does Section 107 Apply to All Title VII Disparate Treatment Cases?

In *Costa*, the Supreme Court explicitly decided not to decide whether section 107 applies to all disparate treatment cases under Title VII, or just ones involving “mixed motives.” As several courts have now expressly found, section 107 applies to all cases of disparate treatment discrimination under Title VII, either by its terms or because any case can be framed as involving “mixed motives.”

The Ninth Circuit’s en banc decision in *Costa* held that the Civil Rights Act of 1991 sets “a motivating factor” as the causation standard for all cases of Title VII disparate treatment discrimination. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 850-51 & n.2 (9th Cir. 2002) (en banc). After the Supreme Court’s decision in *Costa*, a number of courts have followed suit. *E.g., Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp.2d 987 (D. Minn. 2003); *Dunbar v. Pepsi-Cola Bottlers of Iowa*, 285 F. Supp. 2d 1180 (N.D. Iowa 2003). They have persuasively reasoned that when Congress wrote in section 107(a) 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,” Congress meant any disparate treatment case, and not just ones with “mixed-motives.” (The provision’s “[e]xcept as provided elsewhere in this subchapter” language refers to the different standard of causation for disparate impact cases set forth in 42 U.S.C. § 2000e-2(k)).
The textual argument against application of section 107(a)/42 U.S.C. § 2000e-2(m) to all Title VII disparate treatment cases comes from the “even though other factors also motivated the practice” language at the end of the section. In *Costa* both the defendant and the Government argued that this language shows Congress intended to limit section 107 to mixed-motives cases. But to reach that result one would have to read “even though other factors also motivated the practice” to mean “but only when other factors also motivated the practice.” The more likely reason for Congress’s inclusion of the final clause of section 2000e-2(m) was to remove any doubt that a plaintiff could establish an unlawful employment practice by proving illegal bias was “a motivating factor” in the defendant’s decision-making, regardless of whether other factors motivated the defendant as well.

The contention that section 2000e-2(m) does not apply to single motive cases also leads to absurd results. Under this argument, a plaintiff must show “but-for” causation to prevail in a single motive case, but need show only that discrimination was “a motivating factor” in a “mixed-motives” case to establish the employer’s liability. This argument necessarily assumes that Congress intended a plaintiff to have a higher burden of proving causation when the defendant is motivated solely by illegal discrimination than when the defendant has both lawful and unlawful motives. It is hard to imagine that anyone, even Congress, would have created a proof scheme so contrary to common sense. It seems evident that section 107 applies to all Title VII disparate treatment cases.

Even if one limited the textual reach of section 107 to only “mixed-motives” cases, as a practical matter it would still cover all disparate treatment claims. At oral argument in *Costa*, one of the Justices asked Ms. Costa’s counsel whether, in the real world, don’t all cases involve a mixture of motives on the part of the defendant? When Ms. Costa’s counsel agreed, several of the Justices nodded their heads as well. As a practical matter, all cases involve “mixed-motives,” or can be litigated on that premise. The Ninth Circuit en banc court had recognized that “single motive” and “mixed-motives” cases are not fundamentally different categories of cases.” *Costa*, 299 F.3d at 857. Many cases will simply be litigated by both parties as involving “mixed-motives.” Sometimes the plaintiff will frame the case as “single motive,” but the defendant will frame it as “mixed-motives,” or *vice versa*. There will be some cases where the defendant argues that all of its motives were non-discriminatory but, as a second line of defense, contends it would have made the same decision in any event. Where the defendant offers multiple reasons for its actions, the plaintiff may initially argue that all of them are pretexts for discrimination. As a fall-back
position, the plaintiff may contend that even if some of the defendant’s given reasons are factually true, discrimination was at least “a motivating factor” in the employer’s actions. Even if the plaintiff claims the defendant had one illegal motive, and the defendant claims it had one legal motive, the jury could decide the truth was somewhere in between. *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995).

In the end, it really does not matter whether section 107(a)/ 42 U.S.C. § 2000e-2(m) literally applies to “mixed-motives” cases alone. In almost every discrimination case, a reasonable jury could decide that the employer was motivated by a combination of legal and illegal reasons, even if the parties themselves both argue it was one or the other. The bottom line is that under section 107 a plaintiff should be able to establish liability in *all* Title VII disparate treatment cases by proving that discrimination was “a motivating factor” in the employment practice at issue.

2. **Is 42 U.S.C. § 2000e-2(m) a Separate Statutory Claim?**

As noted earlier, 42 U.S.C. § 2000e-2(a) provides that an “employer” violates Title VII when it acts “because of” a discriminatory motive. (Similar prohibitions on unfair employment practices by employment agencies, labor organizations, and training programs are set forth in sections 2000e-2(b), (c) & (d), respectively.) One of the Desert Palace’s arguments in favor of a “direct evidence” requirement was that, without it, plaintiffs could always bring their cases under section 107(a)/ 42 U.S.C. § 2000e-2(m). Desert Palace asserted that no plaintiff would try to prove that the defendant acted “because of” discrimination in violation of subsections 2(a), (b), (c), or (d), when the plaintiff could prevail just by showing that discrimination was “a motivating factor” in the defendant’s conduct under section 2(m).

Of course, the Supreme Court rejected the argument that section 2(m) contains a direct evidence requirement. Where does that now leave 2000e-2(a),(b), (c) & (d)? The short answer is: right where they have always been. The premise for Desert Palace’s argument was that section 107 established a separate and distinct cause of action from those already in the statute. Even some of those appearing on Ms. Costa’s side of the case explicitly or implicitly bought into this argument. I believe that, properly understood, section 107 does not create a separate cause of action, but merely serves as an interpretive gloss on the causes of action that predated the 1991 Civil Rights Act.
The language of section 107 of the 1991 Civil Rights Act (42 U.S.C. § 2000e-2(m) & 2000e-5(g)(2)(B)(i)-(ii)) is not a thing of beauty. It could be read as providing for a cause of action separate from sections 2(a)-(d). The strongest support for this interpretation is found in two clauses found in section 107(b): “On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)]” and “pursuit of a claim under section 2000e-2(m) of this title.” The textual question is whether “under” in these clauses means “in violation of” or “by means of.” (For those who took Latin in school, the issue can framed as whether the phrase “2000e-(2)(m) of this title” in these clauses should be in the genitive or ablative case.) If the former is correct, then section 2000e-2(m) is a separate cause of action. If the latter is correct, then it is not a separate species of claim. I come down in favor of the latter construction.

Under that textual interpretation, section 2000e-(2)(m) defines when a defendant has acted “because of” discrimination within the meaning of sections 2000e-2(a)-(d). Remember that in Price Waterhouse the Justices were split 4-4 whether “because of” in sections 2000e-2(a) through (d) meant “a but-for cause” or “a motivating factor.” The most logical explanation for the function of section 2000e-2(m) is that it constitutes nothing more than Congress’ endorsement of Justice Brennan’s plurality opinion that Title VII does not require the plaintiff show “but-for” causation to prove that a defendant acted “because of” discrimination in violation of the statute. In other words, section 2(m) now tells us that a defendant has acted “because of” discrimination in violation of sections 2(a), (b), (c), or (d) when discrimination is “a motivating factor.”

3. What About Cases Unaffected by the Civil Rights Act of 1991?

Section 107 of the Civil Rights Act of 1991 clearly applies to disparate treatment discrimination cases under Title VII. Because the Americans with Disabilities Act (“ADA”) expressly incorporates the remedies and procedures of Title VII, it would seem that section 107 applies in ADA cases as well. Due to a drafting error, section 107 arguably may not apply to retaliation cases brought under those statutes. But see Stegall v. Citadel Broadcasting Corp., 350 F.31061, 1072 (9th Cir. 2003) (suggesting “a motivating factor” standard of liability applies to Title VII retaliation cases). Section 107 definitely does not apply to Age Discrimination in Employment Act (“ADEA”) cases, or any of the other federal civil rights laws such as section 1981 or 1983. What rules apply to them? The short answer is that they are subject to the rule of Price Waterhouse. The problem is that courts still
disagree as to what the rule of that case is.

For some reason, most courts have ruled that Justice O’Connor’s opinion governs *Price Waterhouse*, because it was allegedly the “narrowest ground” of decision. Although neither the Ninth Circuit en banc nor the U.S. Supreme Court addressed this question in *Costa*, a careful examination of *Price Waterhouse* shows that Justice White’s opinion, and not Justice O’Connor’s, controls. In *Price Waterhouse*, five Justices (Brennan, Marshall, Blackmun, Stevens and White) agreed that a plaintiff did not have to introduce “direct” evidence of discrimination to shift the burden of persuasion to the defendant. A different set of five justices (White, O’Connor, Kennedy, Rehnquist and Scalia) agreed that the plaintiff must show discrimination was “a substantial factor” in the employment action to shift the burden of persuasion to the employer. The following table illustrates the breakdown of the opinions in that case as to these two issues:

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<td>Type of Evidence Needed</td>
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Therefore, the holding of *Price Waterhouse* is that if a plaintiff proves, by direct or circumstantial evidence, that unlawful bias was a substantial factor in the defendant’s actions, the burden of persuasion shifts to the defendant to show it would have made the same decision in any event.

Does *Costa* affect cases under the ADEA? Yes, but only to a limited extent. Given *Costa*’s rejection of any “direct evidence” requirement, and its ringing endorsement of the power of “circumstantial evidence,” plaintiffs should be able to argue that they do not need “direct evidence” to shift the burden of persuasion even in cases technically unaffected by the Civil Rights Act of 1991. *See Estades-Negroni v. The Associates Corporation of N.A.*, 345 F.3d 25 (1st Cir. 2003) (ADEA); *CalMat Co. v. U.S. Dep’t of Labor*, 364 F.3d 1117,1123 n.4 (9th Cir. 2004) (retaliation). But the plaintiff may be required to show discrimination was “a substantial factor,” and not just “a motivating factor,” to shift the burden of persuasion. Moreover, in cases unaffected by the Civil Rights Act of 1991, the defendant will prevail on liability if it establishes a “same action” defense.

4. **What about *McDonnell Douglas-Burdine*?**

Desert Palace and its amici vigorously argued that if the Court failed to impose a “direct evidence”
requirement in mixed-motives cases, it would signal the death knell for the familiar *McDonnell Douglas- Burdine* framework. Ms. Costa and her amici argued that this was untrue. The Supreme Court appears to have agreed with the plaintiffs’ community. The Court’s subsequent decision in *Raytheon Company v. Hernandez*, 124 S. Ct. 513 (2003), shows that it thinks *McDonnell Douglas-Burdine* is alive and well after *Costa*. The Court reaffirmed that *McDonnell Douglas* and *Reeves* “set forth a burden-shifting scheme for disparate treatment cases.” *Id.* at 518 n. 3. The Court in no way suggested that its decision in *Costa* had wiped away thirty years of employment discrimination jurisprudence.

*McDonnell Douglas-Burdine* and section 107 of the Civil Rights Act of 1991 play different, although complementary roles, in helping the plaintiff prove the defendant acted “because of” discrimination. The former helps a plaintiff with little or no (direct or circumstantial) evidence of the defendant’s actual motive to prove the existence of unlawful bias through the use of pretext evidence. Section 107 establishes the legal consequences that flow from the plaintiff’s proof of an unlawful motivation, which depend on the causal role that the illegal motive played in the adverse action at issue. Thus, there is no contradiction between section 107 and *McDonnell Douglas-Burdine*.

Courts have reached conflicting conclusions about the relationship between *McDonnell Douglas-Burdine* and *Costa*. Some courts simply ignore *Costa* altogether. In *Bodett v. CoxCom, Inc.*, a Ninth Circuit panel erroneously stated that “[d]isparate treatment claims must proceed along the lines of the praxis laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny.” 366 F.3d 736, 743(9th Cir. 2004). A month earlier, a different panel of the Ninth Circuit had correctly concluded that “although the McDonnell-Douglas burden shifting framework is a useful tool to assist plaintiffs at the summary judgment stage so that they may reach trial, nothing compels the parties to invoke the McDonnell Douglas presumption. Rather the plaintiff is presented with a choice regarding how to establish his or her case.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004).

The following section illustrates how section 107 affects both summary judgment and jury instructions in disparate treatment cases, and outlines the choices the plaintiff faces.

**V. LITIGATING A TITLE VII/ADA CASE AFTER COSTA.**
*Costa* was a case about jury instructions. But the most significant impact of the decision may be at summary judgment. To prevail at trial in a case to which section 107 applies, the plaintiff must show only that discrimination was “a motivating factor” in the defendant’s actions. Therefore, at summary judgment, the plaintiff need only create a genuine issue whether discrimination was “a motivating factor” in the defendant’s conduct. The plaintiff can rely on direct evidence, circumstantial evidence, and/or the *McDonnell Douglas-Burdine* framework. If all of the evidence in the record (including any pretext evidence), taken in the light most favorable to the plaintiff, permits a reasonable jury to infer that discrimination was “a motivating factor” in the defendant’s conduct, the trial court should deny summary judgment, even if the defendant can establish a “same action” defense as a matter of law.

In the past, courts have viewed “mixed-motives” and “pretext” cases as distinct categories. This was wrong, even before section 107 was enacted. The Ninth Circuit has noted that “[p]retext evidence is just as useful whether the defendant has offered one or more than one legitimate reason for its actions.” *Costa*, 299 F.3d at 857. “One of the employer’s purportedly legitimate explanations may be pretextual. On the other hand, another may not.” *Id.* In a “mixed-motives” case (under section 107 or otherwise), the plaintiff will want to convince the factfinder that the reasons the defendant now claims would have caused it to take the same action even absent discrimination are themselves unworthy of belief and pretextual. The Ninth Circuit correctly held in *Costa* that “*McDonnell Douglas* and ‘mixed motive’ are not two opposing types of cases. Nor are “single motive” and “mixed motive” cases fundamentally different categories of cases.” *Id.* The U.S. Supreme Court implicitly recognized the same principle when it held that “pretext evidence” is just one form of circumstantial evidence a plaintiff may use to show discrimination was “a motivating factor” in the defendant’s actions. *Costa*, 123 S. Ct. at 2154 (citing *Reeves*).

As Judge Bennett recognized in *Dunbar*, 285 F. Supp. 2d at 1195-98, *Costa* has a significant impact on what the plaintiff’s “pretext” evidence need show. Under the Civil Rights Act of 1991, a plaintiff establishes liability, and may obtain some relief, even where discrimination was not a “but-for” cause of the defendant’s conduct.1 For this reason, on summary judgment (or at trial) the plaintiff need not prove that all of the defendant’s

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1In *Hill v. Lockheed Martin Logistics Mgt., Inc.*, the Fourth Circuit contradictorily stated at one point in its opinion that a plaintiff need prove only that discrimination was “a motivating factor” to prevail and at another that the plaintiff must prove that discrimination was “a determinative influence.” *See* 354 F.3d 277, 284 & 286 (4th Cir. 2004) (en banc). These statements are irreconcilable.
proffered explanations are pretextual, as long as a reasonable jury could find that discrimination was “a motivating factor.” *Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 121-22 (2d Cir. 1997). Prior to *Costa*, several circuits had misleadingly stated the defendant prevails at the summary judgment stage if the plaintiff does not have sufficient evidence from which a jury could find that all of the articulated reasons are pretexts for discrimination. *E.g., Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994); *Wilson v. Am. Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1243 (11th Cir. 2001). This reasoning contradicts the plain language of 42 U.S.C. § 2000e-2(m), which imposes liability even where a defendant had some legitimate reasons for its action.

*Costa* obviously has a big impact on the proper jury instructions for a Title VII case. *Costa* upheld the Ninth Circuit’s Pattern Jury Instructions as a correct statement of Title VII law after the Civil Rights Act of 1991. The Ninth Circuit has only one set of jury instructions for Title VII disparate treatment cases. It does not have one set for plaintiffs who invoke *McDonnell Douglas-Burdine* and another for those who don’t. On the other hand, the Eighth Circuit has one set of pattern instructions for “single motive cases” and another for “mixed-motive cases.” Unfortunately, a district court in the Eighth Circuit would have to give these two different set of pattern instructions in just about every case. A judge will almost never be able to decide as a matter of law that a case involves a single motive rather than mixed-motives.

Justice Brennan’s plurality opinion in *Price Waterhouse* correctly states that the factfinder will ultimately have to categorize a particular case as involving a “single motive” or “mixed-motives” before reaching its final decision. 490 U.S. at 247 n.12. But *Price Waterhouse* involved a bench trial. (There were no jury trials in Title VII cases when *Price Waterhouse* was decided in 1989.) The Ninth Circuit, however, erred when it asserted that the trial judge will be able to decide whether a case involves a single motive or mixed-motives before submitting it to the jury. *Costa*, 299 F.3d at 856-57. Whether a defendant had a “single motive” or “mixed-motives” is a factual question just like any other. Properly drafted jury instructions will also permit the plaintiff and/or the defendant to argue “single motive” or “mixed-motives” in the alternative. *Cf. Stegall* 350 F.3d at 1067 (“the significance of the distinction between ‘single motive’ and ‘mixed motive’ is most often seen towards the end of a trial when the
district court must instruct the jury.”

As discussed below, it is an open question whether the court must give an “a motivating factor” instruction in a case subject to section 107 of the Civil Rights Act of 1991. *Costa* directly holds that the court may give that instruction. Assuming the court proceeds down this path, the judge should give the jury a definition of “a motivating factor.” The *Price Waterhouse* plurality opinion provides a correct one: whether discrimination was “a factor in the employment decision at the moment it was made.” 490 U.S. at 241 (plurality opinion; emphasis deleted). If the jury answers “no” to this question, the plaintiff loses the case. If the jury answer is “yes” to this question, then defendant is liable for unlawful discrimination.

The jury should next decide whether the defendant has shown by a preponderance of the evidence that lawful motivations also played a part in its conduct. (Despite what the U.S. Supreme Court said in *Costa*, this is the “mixed-motives instruction.” The “a motivating factor instruction” based on 42 U.S.C. § 2000e-2(m) is not the “mixed-motives instruction.” Contrary to what Desert Palace did at trial, the defendant will almost always want the true “mixed-motives” instruction if the plaintiff requests an “a motivating factor” causation instruction.) If the jury answers “no” to this second question, then the case is a “single motive” situation, and the plaintiff is entitled to damages. If the jury answers “yes” to the second question, a “mixed-motives” case has arisen.

The fact that a defendant had “mixed-motives” says nothing about the relative causal role each motive played in the adverse action at issue. For this reason, even after the jury decides the employer had “mixed-motives”, the jury must still decide whether the employer has shown it would have reached the same decision based upon lawful reasons alone. If the answer to the third question is “no,” the plaintiff is entitled to damages because, by definition, discrimination was a factor that made a difference, *i.e.*, a “but-for” cause. If the response is “yes,” the plaintiff is not entitled to damages. Thus, the same jury instructions may be given in both “single motive” and “mixed-motives” cases.

Where the plaintiff invokes *McDonnell Douglas*, additional instructions may be required. It is clear that the jury should not be instructed on the framework’s shifting burdens of productions and presumptions. *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 508, 509-10 & n.3 (1993). The *McDonnell Douglas* framework is, however, relevant to certain factual issues the jury may have to decide. If a plaintiff relies on that framework, she must
factually establish all of the elements of her prima facie case. Reeves, 530 U.S. at 142. There will be cases where there is a genuine dispute whether the plaintiff has proven one or more of the elements of her prima facie case. If so, the jury must decide these facts, like any others. The court should always inform the jury of the employer’s articulated nondiscriminatory reason(s) for its actions. In accordance with Reeves, as modified by 42 U.S.C. § 2000e-2(m), the jury should be told that if it disbelieves one or more of the defendant’s asserted reasons for its actions, then it may, but is not required to, find that discrimination was “a motivating factor” in the conduct at issue.

Three circuits have held this so-called “pretext instruction” is mandatory if the plaintiff requests it: Townshend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002); Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998); Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994). Two circuits have held to the contrary: Palmer v. Bd. of Regents of the Univ. Sys. of Ga., 208 F.3d 969 (11th Cir. 2000), and Gering v. Case Corp., 43 F.3d 340 (7th Cir. 1994). In dicta, two circuits have expressed doubt that instruction is mandatory: Moore v. Robertson Fire Prot. Dist., 249 F.3d 786 (8th Cir. 2001) and Fite v. Digital Equip. Corp., 232 F.3d 3 (1st. Cir. 2000). Plaintiffs’ attorneys will almost always want to ask the court to give the jury some form of a pretext instruction, even if they have not specifically invoked the McDonnell Douglas-Burdine framework.

Some attorneys (both plaintiff and defendant) may prefer the pre-Civil Rights Act of 1991 jury instructions that were developed for ADEA cases (plus a pretext instruction, if applicable) to the instructions the U.S. Supreme Court approved in Costa. These alternative instructions simply ask the jury whether the plaintiff has proven that discrimination was “a determining factor” in the employment action at issue, i.e., whether discrimination was a “but-for” cause. If the jury answers “yes,” the plaintiff wins the case and is entitled to whatever damages the jury awards. If the jury answers “no,” the defendant wins. Because the “a determining factor” instruction recognizes that there can be more than one “determining factor” in the employer’s decision, it applies equally to single motive and mixed-

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2 In many cases, the elements of the prima facie case will be undisputed, or the court can find them established as a matter of law. Where the elements of the prima facie case are undisputed, or have been established as a matter of law, the jury instructions need not discuss its elements.

3 In Cassino v. Reichold Chem. Inc., 817 F.2d 1338, 1344 (9th Cir. 1987), the court rejected a defendant’s argument that the jury should be instructed that it must find both that discrimination was a “but-for” cause of the defendant’s conduct and that the employer’s reason was unworthy of belief, because such an instruction would have improperly required the jury to find that discrimination was the sole reason for the defendant’s actions.
motives cases. A court, however, should never give a “same action defense” instruction along with the “a determining factor” instruction. There reason is simple. If the jury finds discrimination was a “determining factor,” then, by definition, the employer would not have taken the same action based on legitimate motives alone.

Plaintiffs’ attorneys will need to think carefully whether they want the jury to answer one liability question (“a determining factor”) or three (“a motivating factor”/ “mixed-motives”/ “same action”). There are tactical advantages to each approach. Whether a trial judge must give the jury the instructions upheld in Costa in cases to which section 107 of the Civil Rights Act of 1991 applies, if one party demands them, is another question Costa does not begin to answer. There is no reason why plaintiffs should be forced to use section 107—which was designed to help employees by lowering the standard of liability in Title VII cases and shifting to the defendant the burden of disproving “but-for” causation--any more than they should be forced to invoke McDonnell Douglas-Burdine. If a plaintiff wants to shoulder the entire burden of proving that discrimination was “a determining factor,” i.e., a “but-for” cause of the adverse action at issue, it is hard to see how the defendant suffers any prejudice. The fact that a plaintiff might choose at the summary judgment stage to rely on the “a motivating factor” standard to establish liability should also not preclude the plaintiff from asking for an “a determining factor” jury instruction at trial (unless the defendant has proven a “same action defense” as a matter of law). However, if the plaintiff requests an “a determining factor” instruction at trial, and wins before the jury, the court should review the defendant’s post-trial Rule 50 motion under that standard of causation, rather than under the “a motivating factor” standard.

VI. CONCLUSION

There was a reason that in Costa the U.S. Chamber of Commerce, the Bush Administration, and employer groups all lined up on Desert Palace’s side insisting on a “direct evidence” requirement and that civil rights groups all lined up on Ms. Costa’s side rejecting one. Costa was a major win for employees because it properly implements the Civil Rights Act of 1991, which was itself a big victory for plaintiffs. That being said, neither that Act nor the Supreme Court’s decision makes employment discrimination cases a “slam-dunk” for employees. Section 107 does make it easier for plaintiffs to get to trial, but provides them with some difficult strategic choices once they get there.