

SHAKING *PRICE WATERHOUSE*: SUGGESTIONS FOR A MORE WORKABLE APPROACH TO TITLE VIII MIXED MOTIVE DISPARATE TREATMENT DISCRIMINATION CLAIMS

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INTRODUCTION

In 1968, Congress enacted Title VIII of the Civil Rights Act of 1968 for the express purpose of providing fair housing and eliminating discrimination in housing on the basis of race, color, religion, and national origin.¹ In applying Title VIII, courts often have looked to Title VII of the Civil Rights Act of 1964² for interpretation as mandated by the Supreme Court; thus, developments and applications of employment discrimination law have a great effect on Title VIII housing discrimination law.³

Bringing a claim of discrimination for employment or housing can be a cumbersome undertaking. Not only has the plaintiff suffered the indignity of being denied employment or housing through little or no fault of her own, but she also faces the daunting task of proving that her employer, landlord, or lender had an impermissible reason for depriving her of a home or livelihood. This task becomes even more difficult when the defendant can point to a legitimate reason to justify its course of action, yet still has an underlying impermissible reason for making its ultimate decision. For example, a landlord may have a legitimate concern about a prospective tenant's ability to make rental payments, but ultimately decide not to rent to the tenant because she has children, or because she is a minority. Such action constitutes mixed motive discrimination.

This particular area of housing and employment discrimination law has experienced much change and development in recent years. The main source of the debate over how to analyze cases of mixed motive discrimination has been

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1. 42 U.S.C. § 3604 (2003). A provision making discrimination on the basis of sex illegal was added in 1974; provisions for handicap and familial status were added in 1988 by the Fair Housing Amendments Act of 1988.

2. 42 U.S.C. § 2000e-17 (2003).

3. The Supreme Court and several lower courts have relied on Title VII precedents to interpret Title VIII. *See* *DiCenso v. H.U.D.*, 96 F.2d 1004, 1008-09 (7th Cir. 1996); *Huntington Branch of the N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). *See generally* ROBERT SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION* § 7:4 (2001).

the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*.⁴ In this Title VII case, the Court in a plurality opinion determined that a defendant employer could avoid liability for discrimination under Title VII by proving that it would have made the same decision even if it had not taken the plaintiff's status as a member of a protected group, in this case gender, into account.⁵ Although Congress responded to this "liability loophole" through a provision in the 1991 Civil Rights Act dealing with mixed motive discrimination under Title VII,⁶ there has still been a question as to whether and how *Price Waterhouse* applies to mixed motive claims in employment and housing discrimination law.

One particular area of concern deals with Justice Sandra Day O'Connor's concurring opinion in *Price Waterhouse* and how "direct evidence" factors into a plaintiff's evidentiary burden. According to Justice O'Connor's opinion, a showing of direct evidence would be necessary to trigger a mixed motive analysis and shift the burden of persuasion to the defendant to show that he would have made the same decision absent the discriminatory motive.⁷ If the plaintiff fails to meet this evidentiary threshold, a court would then analyze the case under the *McDonnell Douglas/Burdine*⁸ pretext analysis in which the defendant has the burden of production and must articulate a legitimate reason for its adverse employment decision, and the plaintiff retains the burden of persuasion to convince the finder of fact that the defendant's proffered reason is pretextual.⁹ Justice O'Connor's analysis has been viewed as the concurrence issued on the narrowest grounds, and thus has been viewed as part of the "rule" from *Price Waterhouse*.¹⁰

There has been much debate, and therefore inconsistency, in how the different courts interpret and apply this "direct evidence" requirement, given that Justice O'Connor did not define in her concurring opinion what constituted "direct evidence."¹¹ Some courts have stated that it is of a certain type, such as noncircumstantial, while others have interpreted it as being of certain intensity, such as blatant or substantial.¹² In August 2002, the Ninth Circuit in *Costa v. Desert Palace, Inc.*¹³ decided to take an alternative approach to the question of whether *Price Waterhouse* is applicable to Title VII mixed motive claims.

4. 490 U.S. 228 (1989).

5. *Id.* at 258.

6. 42 U.S.C. § 2000e-(2)(m) (2003); *id.* § 2000e-5(g)(2)(B).

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

8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

9. *Price Waterhouse*, 490 U.S. at 270-71 (O'Connor, J. concurring).

10. Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 648 (1997).

11. Christopher Chen, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motive Discrimination Claims*, 86 CORNELL L. REV. 899, 908 (2001).

12. *Id.* at 908-13.

13. 299 F.3d 838 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003).

Instead of weighing in on the debate as to how to apply the “direct evidence” requirement from Justice O’Connor’s concurring opinion in *Price Waterhouse*, the Ninth Circuit took a major departure and determined that *Price Waterhouse* had no bearing on the new statutory scheme as amended by the 1991 Civil Rights Act. The Ninth Circuit held that the Title VII amendment places no special or heightened evidentiary burden on the plaintiff in mixed motive cases.¹⁴ While this case is only one viewpoint amongst the other twelve circuits, it is an interesting development in that the Ninth Circuit chose not to enter the debate over different evidentiary approaches, but rather sidestepped what it called “a quagmire that defies characterization.”¹⁵ The court determined that Congress never intended to impose a heightened evidentiary burden on plaintiffs, and that the courts should simply adhere to the statutory language of the 1991 amendment.¹⁶

The Ninth Circuit’s decision in *Costa* raises interesting questions not only regarding how *Price Waterhouse* should apply to Title VII jurisprudence, but also how it should apply to Title VIII mixed motive cases. The Supreme Court has addressed mixed motive discrimination in the context of the Equal Protection Clause of the Fourteenth Amendment; however, it has yet to address the issue of “mixed motive” discrimination in a disparate treatment case under Title VIII.¹⁷ There is a discrepancy between how Title VIII mixed motive cases were analyzed prior to and post-*Price Waterhouse*, and also discrepancy over what impact the 1991 Civil Rights Act had on Title VIII mixed motive cases. This Note sets forth the proposition that the Ninth Circuit in *Costa* has taken the correct approach in fully abandoning *Price Waterhouse* in mixed motive employment discrimination cases, and conversely this approach should also apply to Title VIII mixed motive cases. The Supreme Court’s affirmance of the Ninth Circuit’s decision in *Desert Palace, Inc. v. Costa*¹⁸ further bolsters this proposition and sets the stage for a

14. *Id.* at 851.

15. *Id.*

16. *Id.*

17. See SCHWEMM, *supra* note 3, § 10-22. The Supreme Court considered mixed motive discrimination in housing based on the Equal Protection Clause of the Fourteenth Amendment in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (Arlington Heights I). While the court held that proof of discriminatory intent is required to make out a violation of the Equal Protection Clause, the Court’s opinion acknowledged that a defendant may act with more than one purpose—both discriminatory and non-discriminatory. In these instances, proof that the defendant was motivated in part by a discriminatory purpose was to shift the burden to the defendant to show that the same decision would have been made absent consideration of the impermissible purpose. If the defendant could meet this burden, there would be no violation of the Equal Protection Clause and the defendant would prevail. This two step approach to mixed motive discrimination cases under the Equal Protection Clause was suggested by two Justices in *Price Waterhouse*, Justice O’Connor and Justice White, but neither the plurality opinion nor the dissent agreed with this approach. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

18. 123 S. Ct. 2148 (2003).

change in the approach to Title VIII mixed motive cases.

Part I of this Note discusses the development of mixed motive discrimination analysis under Title VII, from *Price Waterhouse* to the application of the new statutory scheme under the Civil Rights Act of 1991. Part II discusses the development of mixed motive discrimination under Title VIII, both prior to and after *Price Waterhouse*. Part III describes the Ninth Circuit's approach to mixed motive discrimination in *Costa v. Desert Palace, Inc.* and explains why this is a more workable approach to mixed motive discrimination analyses than the framework established by *Price Waterhouse*. Finally, Part IV addresses how mixed motive claims should be resolved under Title VIII in light of the Ninth Circuit's approach in *Costa*.

I. THE MIXED MOTIVE "QUAGMIRE"

In the years since *Price Waterhouse* and the 1991 Civil Rights Act, circuit courts of appeal have been struggling to apply a mixed motive analysis in light of the *Price Waterhouse* decision and the 1991 Act. Much of the problem has arisen from Justice O'Connor's concurring opinion in which she refers to "direct evidence" as being the standard for triggering a mixed motive analysis, as opposed to analyzing the claim under a *McDonnell Douglas/Burdine* pretext analysis.¹⁹ The resulting jurisprudence has thus been described as "a quagmire that defies characterization"²⁰ and has resulted in an inconsistent application of mixed motive claims under Title VII.

A. Development of Mixed Motive Under Title VII— *Price Waterhouse v. Hopkins*

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, a Title VII employment discrimination case. The plaintiff, Ann Hopkins, was a senior manager at Price Waterhouse, a nationwide professional accounting partnership.²¹ Hopkins was the only female candidate proposed for partnership in 1982 out of the eighty-eight persons proposed for partnership.²² Hopkins received mixed reviews concerning her candidacy for partnership—she was praised for being instrumental in securing a \$25 million contract with the Department of State, for being an "outstanding professional," and for being "extremely competent [and] intelligent."²³ However, she was also criticized about her interpersonal skills, being described as "unduly harsh, difficult to work with and impatient with staff."²⁴

The Court found, however, that part of the impetus for the negative evaluations was the fact that Hopkins was a woman. Some of the comments from

19. *Price Waterhouse*, 490 U.S. at 278.

20. *Costa*, 299 F.3d at 851.

21. *Price Waterhouse*, 490 U.S. at 232-33.

22. *Id.* at 233.

23. *Id.* at 234.

24. *Id.* at 235.

partners considering her candidacy stated that she acted “macho,” that she “overcompensated for being a woman,” and that she was advised to “take a course in charm school.”²⁵ The comment that the Court called the *coup de grace* came from the partner charged with informing Hopkins of the decision to place her candidacy on hold until the following year: she was told that, in order to improve her chances for partnership, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁶

In analyzing Hopkins’ case, the Court made the distinction between two types of intentional discrimination cases for purposes of Title VII.²⁷ The first involves “pretext” discrimination cases, analyzed according to the Supreme Court’s opinions in *McDonnell Douglas Corp. v. Green*²⁸ and *Texas Department of Community Affairs v. Burdine*,²⁹ in which a defendant has offered a legitimate rationale for the allegedly discriminatory act. In these types of cases, the issue is whether the unlawful consideration or legitimate consideration was actually the basis for the action.³⁰ Under this analysis, it is presumed that there was a single reason motivating the employment action, and it is left to the jury to determine whether the plaintiff’s proffered reason or the defendant’s was the true reason for the employment decision.³¹

“Mixed motive” discrimination, on the other hand, deals with situations in which the evidence shows that the defendant used *both* legitimate and illegitimate considerations in making a decision.³² The Court determined in *Price Waterhouse* that the prima facie approach to “pretext” cases under the *McDonnell Douglas/Burdine* framework was not appropriate for evaluating “mixed motive” cases.³³ Under the “mixed motive” analysis articulated by the plurality opinion in *Price Waterhouse*, the plaintiff’s burden of proof is satisfied if the evidence shows that the employer relied on any unlawful considerations in making its decision,³⁴ and consideration of the employee’s gender played a motivating part in the employment decision.³⁵ The burden of persuasion then shifts to the defendant to show that the employer would have made the same

25. *Id.*

26. *Id.*

27. See SCHWEMM, *supra* note 3, at 10-21.

28. 411 U.S. 792 (1973).

29. 450 U.S. 248 (1981).

30. SCHWEMM, *supra* note 3, at 10-20.

31. Ward, *supra* note 10, at 635.

32. *Id.*

33. SCHWEMM, *supra* note 3, at 10-21. Under *McDonnell Douglas* and *Burdine*, once the plaintiff established the prima facie case, the defendant employer had the burden of production to articulate a legitimate, non-discriminatory reason for the adverse employment action. The burden of persuasion remained with the plaintiff to show that the proffered reason was merely pretext. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) (O’Connor, J., concurring).

34. *Price Waterhouse*, 490 U.S. at 241-42 (1989) (plurality opinion).

35. *Id.* at 244.

decision if it had not taken the illegitimate factor into account.³⁶ The employer would not be held liable if it satisfied its burden of persuasion on the “same decision” issue, which the plurality characterized as an affirmative defense.³⁷

The basic difference between the *McDonnell Douglas/Burdine* pretext framework and the *Price Waterhouse* mixed motive framework is the shift of the burden of persuasion to the defendant. The mixed motive framework has been characterized as more “plaintiff friendly” because “[P]laintiffs enjoy more favorable standards of liability in mixed motive [employment discrimination] cases than in pretext cases.”³⁸ The plaintiff does not have to prove that the legitimate reason proffered by the defendant is not the true reason for the adverse employment decision, but instead is only required to prove that a discriminatory reason motivated the employer’s decision in order to satisfy its burden.

Essentially, *Price Waterhouse* allowed employers to escape liability in mixed motive discrimination cases by showing that a legitimate reason motivated the employment decision, regardless of whether the employer also took race, gender, or any other impermissible reason into account. While the plaintiff could have proven that the employer did have an illegitimate and illegal reason under Title VII for making the employment decision, the legitimate motive served to defeat the plaintiff’s claim.

B. Congress’s Response to Price Waterhouse—The Civil Rights Act of 1991

The Supreme Court’s decision in *Price Waterhouse* limited the remedies available to plaintiffs who had been wronged by discrimination. Although the Court acknowledged that an illegitimate discriminatory factor motivated the employer’s decision, it nevertheless provided a way for the employer to avoid liability altogether despite proof of its discriminatory action. In response to this limitation on the redressability of civil rights violations, the Civil Rights Act of 1990 was introduced, which eventually became the Civil Rights Act of 1991.³⁹ This amendment to Title VII of the Civil Rights Act of 1964 overruled the basic premise that an employer could avoid liability by showing that it would have made the same decision absent the consideration of an unlawful factor.⁴⁰ The amendment was introduced in response to the *Price Waterhouse* and other Title VII decisions in order to target “the Supreme Court’s recent decisions by restoring the civil rights protections that were dramatically limited by those

36. *Id.* at 242-45.

37. *Id.* at 246. Although the plurality characterizes this burden as an affirmative defense, there is no practical difference between what the plurality calls an “affirmative defense” and what the concurring and dissenting opinions call a “burden shift.” *Id.* at 269 (O’Connor, J., concurring), 286 (Kennedy, J., and Scalia, J., dissenting) (characterizing the “affirmative defense” description as “nothing more than a label”).

38. Ward, *supra* note 10, at 637-38 (citing *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995)).

39. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 850 (9th Cir. 2002).

40. *Id.*

decisions.”⁴¹

The Civil Rights Act of 1991 was not a complete rejection of the analysis articulated in *Price Waterhouse*, but rather altered what the employer would be held liable for if there were a showing of discriminatory and non-discriminatory factors motivating its action. The Civil Rights Act of 1991 codifies the “motivating factor” test of *Price Waterhouse*,⁴² but changed its liability component.⁴³ Section 107(a) of the 1991 Civil Rights Act Amendment provides 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 motivated the practice.”⁴⁴ Section 107(b) presents the appropriate remedy where a defendant successfully proves that it would have made the same decision absent the discriminatory motivation.⁴⁵ A showing that the employer would have made the same decision absent the discriminatory factor affects only the scope of remedies, not liability.⁴⁶ If the employer can show that it would have made the same decision regardless of consideration of the illegitimate factor, the plaintiff would be limited to the remedies of declaratory relief, injunctive relief, and attorney’s fees;⁴⁷ but may not be awarded damages or an order requiring admission, reinstatement, promotion, or payment.⁴⁸ Thus, the Civil Rights Act of 1991 expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing that it would have made the same decision absent the discrimination.⁴⁹

C. The “Direct Evidence” Evidentiary Trigger

Congress’s swift action to “overturn *Price Waterhouse*” with the Civil Rights Act of 1991 did not completely render the opinion irrelevant to the application of employment discrimination law under the revised statutory scheme. One issue that is not specifically addressed in the Title VII amendment is in what

41. H.R. CONF. REP. NO. 101-856, at 1 (1990).

42. The plurality opinion stated that “[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.” *Price Waterhouse*, 490 U.S. at 250.

43. 42 U.S.C. § 2000e-2(m) (2003); *id.* § 2000e-5(g)(2)(B).

44. *Id.* § 2000e-2(m).

45. *Id.* § 2000e-5(g)(2)(B).

46. *Costa*, 299 F.3d at 850. 42 U.S.C. § 2000e-5(g)(2)(B) (2003), which are the enforcement provisions, modified the liability component so that the court “may grant declaratory relief, injunctive relief . . . and attorney’s fees and costs,” *id.* § 2000e-5(g)(2)(B)(i), despite employer’s showing that it “would have taken the same action in the absence of the impermissible motivating factor,” *id.* § 2000e-5(g)(2)(B). *See also* Chen, *supra* note 11 at 907.

47. 42 U.S.C. § 2000e-5(g)(2)(B)(i).

48. *Id.* § 2000e-5(g)(2)(B)(ii).

49. *Costa*, 299 F.3d at 850.

circumstances should courts apply a mixed motive analysis versus a pretext analysis. To answer this question, courts have looked to *Price Waterhouse*, and until recently there was great discord amongst the circuits as to how to make this determination.

Price Waterhouse did not have a majority opinion, and thus what is binding precedent from the case was determined by joining the plurality opinion with one of the two concurring opinions issued by Justice O'Connor and Justice White.⁵⁰ Justice O'Connor's concurrence discussed the level of proof that a plaintiff would be required to show in order to proceed under a mixed motive framework more directly than Justice White's concurrence; thus, the "rule" from *Price Waterhouse* includes Justice O'Connor's evidentiary trigger requirement.⁵¹

1. *Justice O'Connor's Mixed Motive Analysis: The Origin of "Direct Evidence"*.—Making the determination of whether to apply a *McDonnell Douglas/Burdine* pretext analysis or a *Price Waterhouse* mixed motive analysis lies in the type of evidence that the plaintiff is required to produce to support a claim of discriminatory intent⁵² and determines whether the burden of persuasion shifts to the defendant or remains with the plaintiff. In a mixed motive case, the plaintiff is required to produce "direct evidence" of discrimination, which is a higher evidentiary standard than is required in a pretext analysis.⁵³ The requirement of direct evidence stems from Justice O'Connor's concurring opinion in *Price Waterhouse*.⁵⁴ Justice O'Connor's view was that the basic framework from *McDonnell Douglas* should be retained, but supplemented by a presentation of "direct evidence of discriminatory animus in the decisional process."⁵⁵ The burden of persuasion would then shift to the defendant to prove that it had a legitimate, non-discriminatory reason for the employment decision.⁵⁶

According to Justice O'Connor, the trial court would not have to determine at the outset of the case whether the claim should be analyzed as a pretext case or a mixed motive case; rather, once all the evidence has been presented by the plaintiff and defendant, at this point the court would determine whether the *McDonnell Douglas* or *Price Waterhouse* framework should apply.⁵⁷ If the plaintiff fails to meet the heightened standard of direct evidence required for a mixed motive analysis, the case would be decided under the *McDonnell Douglas/Burdine* pretext framework, which would leave the defendant with a lower burden—the burden of production—in offering a non-discriminatory reason for its decision.⁵⁸ The plaintiff would be left with the burden of persuasion as to the ultimate issue of whether the employer's decision was based

50. Ward, *supra* note 10, at 648.

51. *Id.*

52. *Id.* at 636.

53. *Id.*

54. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276-78 (1989) (O'Connor, J., concurring).

55. *Id.* at 278.

56. *Id.*

57. *Id.*

58. *Id.*

on a discriminatory factor.⁵⁹ If the plaintiff does successfully meet its burden of persuasion to warrant the application of a *Price Waterhouse* mixed motive analysis—that is, she produces direct evidence of a discriminatory purpose—the burden of persuasion shifts to the defendant to show that “sufficient business reasons would have induced it to take the same employment action.”⁶⁰

Since the determination of whether a case is a mixed motive or pretext case hinges upon whether the plaintiff can produce direct evidence of discriminatory purpose or whether the plaintiff is left to rely on proving the prima facie case under *McDonnell Douglas*, the characterization of a case as either of these two types is somewhat misleading.⁶¹ A “single motive” pretext case may actually involve multiple considerations, both legitimate and illegitimate; conversely, a case analyzed under a “mixed motive” framework may actually only involve one motive that turns out to be discriminatory. Individuals, and particularly multi-person decision making bodies, rarely make a decision based upon only one consideration; thus it would be reasonable to presume that most discrimination cases do involve mixed motives. However, based on *Price Waterhouse*, a case is analyzed under one of these two frameworks solely based on whether the plaintiff has been privy to information that will constitute direct evidence of discriminatory motive.⁶²

2. *Application of the “Direct Evidence” Requirement Under the 1991 Civil Rights Act.*—Although the 1991 Civil Rights Act overruled the basic premise of *Price Waterhouse* in its approach to determining employer liability when discriminatory reasons were a factor in an employment decision, Justice O’Connor’s direct evidence requirement had been used by many courts as the threshold for triggering a mixed motive analysis⁶³ and a finding of liability under Title VII as amended by the 1991 Civil Rights Act.⁶⁴ Justice O’Connor’s opinion concerning the requirement that direct evidence be presented in order to trigger a mixed motive analysis was relevant under the 1991 Act because her concurrence in *Price Waterhouse* specifically addressed the level of proof

59. *Id.* at 278-79.

60. *Id.* at 276-77.

61. Ward, *supra* note 10, at 637.

62. *Id.*

63. Chen, *supra* note 11, at 908. There are some courts that disagree with the requirement of direct evidence to trigger a mixed motive analysis. The Eighth Circuit, stated that:

there is no restriction on the *type* of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision.

Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 202 n.1 (8th Cir. 1993). *See also* *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183-85 (2d Cir. 1992) (“direct evidence” was not a requirement imposed by the majority, and requiring direct evidence “as a precondition to shifting into the mixed-motives analysis runs afoul of more general evidentiary principles”).

64. 42 U.S.C.A. § 2000e-2(m) (2003).

necessary before a plaintiff may proceed under a mixed motive framework.⁶⁵ However, the problem faced by the lower courts lies in the fact that Justice O'Connor failed to clearly define what constitutes direct evidence.

In her analysis, Justice O'Connor stated that the plaintiff in *Price Waterhouse*, Ann Hopkins, did show by direct evidence that "decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."⁶⁶ However, it is possible to characterize this evidence as somewhat circumstantial, particularly considering that part of the evidence included testimony from a social psychologist regarding her opinion of Hopkins' evaluations.⁶⁷ The social scientist testified that the sharply critical remarks in Hopkins' evaluations were likely the product of sex-stereotyping, although "she could not say with certainty whether any particular comment was the result of stereotyping."⁶⁸ How "direct" this evidence is may be open to debate, thus the uncertainty as to what Justice O'Connor meant by "direct evidence" has resulted in inconsistent applications of mixed motive employment discrimination claims.

a. Three approaches to "direct evidence".—There are three main positions that the various circuits have taken in defining what constitutes "direct evidence" for employment discrimination cases—the "classic" position, the "animus plus" position, and the "animus" position.⁶⁹ The "classic" position derives its definition of "direct evidence" from the dictionary.⁷⁰ "[T]he term signifies evidence, which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence."⁷¹ The Fifth and Tenth Circuits consistently use the approach, and other circuits use it periodically.⁷²

The "animus plus" position defines "direct evidence" as "evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision."⁷³ Essentially, the triggering of the mixed motive analysis depends on the strength of the plaintiff's case.⁷⁴ This requirement to trigger a mixed motive analysis is more than what would be ordinarily required for an inference of discrimination to be permissible.⁷⁵ This position has been utilized

65. Ward, *supra* note 10, at 648.

66. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

67. *Id.* at 235-36.

68. *Id.* at 236.

69. *Fernandez v. Costa Bros. Masonry*, 199 F.3d 572, 582 (1st Cir. 1999).

70. *Id.*

71. *Id.* See *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas v. ADVO Sys., Inc.*, 168 F.3d 1508 (5th Cir. 1999).

72. *Fernandez*, 199 F.3d at 582. See *Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996).

73. *Fernandez*, 199 F.3d at 582. See *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999).

74. *Fernandez*, 199 F.3d at 582. See *Fuller v. Phipps*, 67 F.3d 1137, 1143 (4th Cir. 1995).

75. *Costa*, 299 F.3d at 852.

by the First, Fourth, D.C., Ninth,⁷⁶ and Third Circuits.⁷⁷

The “Animus” position states that “as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision.”⁷⁸ This position has been utilized by the Second Circuit, and the Eighth Circuit has intermittently taken this stance.⁷⁹

b. Intra-circuit splits.—The confusion over what constitutes “direct evidence” goes beyond disputes amongst the various circuits. In addition to the inter-circuit splits concerning what defines “direct evidence,” there have also been intra-circuit splits.⁸⁰ The First Circuit in 1999 in *Fernandez v. Costa Bros. Masonry*⁸¹ utilized the “animus plus” position, yet three years later applied the “classic” position in *Weston-Smith v. Cooley Dickinson Hospital*.⁸² The Eleventh Circuit originally allowed “‘broad statements’ of discriminatory attitude” to satisfy the requirements of “direct evidence,”⁸³ but later determined that only statements related to the decision making process were sufficient to satisfy the requirements of “direct evidence.”⁸⁴ Another intra-circuit split has occurred in the Second Circuit, which held shortly after the 1991 Civil Rights Amendment in *Tyler v. Bethlehem Steel Corp.*,⁸⁵ that direct evidence meant evidence sufficient to permit the trier of fact to conclude that an illegitimate factor was a motive in the challenged decision.⁸⁶ Yet, a few months later the same court held that the plaintiffs are required to present “evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude.”⁸⁷ Finally, the Tenth Circuit initially declined to impose a heightened “direct evidence” requirement,⁸⁸ but six months later the court did impose a “direct evidence” requirement.⁸⁹

76. However, the Ninth Circuit in *Costa v. Desert Palace, Inc.* rejects Judge Selya’s characterization of the Ninth Circuit’s approach as “animus plus.” *Id.* at 852 n.3.

77. *Fernandez*, 199 F.3d at 582.

78. *Id.* See *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).

79. *Fernandez*, 199 F.3d at 582. See *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999).

80. *Costa*, 299 F.3d at 852. See also *Wright v. Southland Corp.*, 187 F.3d 1287, 1294 (11th Cir. 1991) (in which the court recognized intra-circuit splits).

81. 199 F.3d 572, 580 (1st Cir. 1999).

82. 282 F.3d 60, 64 (1st Cir. 2002).

83. *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 125 F.3d 1390, 1394 n.7 (11th Cir. 1997).

84. *Bass v. Bd. County Comm.*, 256 F.3d 1095, 1105 (11th Cir. 2001). See also *Costa*, 299 F.3d at 853.

85. 958 F.2d 1176, 1185 (2d Cir. 1992).

86. *Id.*

87. *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992).

88. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 553 (10th Cir. 1999) (“A mixed motive instruction is . . . appropriate in any case, where the evidence is sufficient to allow a trier of fact to find both forbidden and permissible motives.”) (quoting *Ostrowski*, 968 F.2d at 181).

89. *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (imposing the

Needless to say, the only conclusion that can be drawn from comparisons of the positions of the various circuits is that the courts have not been able to determine a satisfactory definition of "direct evidence" for employment discrimination, which has resulted in inconsistent applications of Title VII. Although most courts require direct evidence to determine whether a mixed motive analysis should apply, the differing definitions of what constitutes direct evidence have rendered the standard meaningless.

II. MIXED MOTIVE CLAIMS IN TITLE VIII JURISPRUDENCE

The confusion concerning how to apply *Price Waterhouse* to mixed motive claims under Title VII has also had an impact on mixed motive claims under Title VIII. Title VIII has long been interpreted in light of Title VII precedents.⁹⁰ The burden of proof analysis articulated in *McDonnell Douglas* and *Burdine* have been widely applied in Title VIII pretext cases and is virtually identical to the analysis under Title VII.⁹¹ One method of establishing a prima facie case under the Fair Housing Act is for the plaintiff to show that (1) she is a member of a racial minority or other protected class; (2) she applied for and was qualified to rent an apartment or townhome of the defendant; (3) she was denied the opportunity to rent, inspect, or negotiate for the rental of the unit; and (4) the housing opportunity remained available.⁹² The specific elements of *McDonnell Douglas* are not required to make out the prima facie case, and a plaintiff may meet its burden by offering evidence adequate to create an inference that an adverse decision was based on a discriminatory criterion illegal under Title VII or Title VIII.⁹³ Once the plaintiff proves her prima facie case, the burden of production shifts to the defendant to show that the refusal to rent or negotiate was motivated by legitimate considerations.⁹⁴ Once the defendant brings forth evidence of non-discriminatory reasons for its decision, the burden of production

classic position and excluding "statements of personal opinion, even when reflecting a personal bias"). See also *Costa*, 299 F.3d at 853.

90. SCHWEMM, *supra* note 3, at 7-7. See, e.g., *Trafficante v. Metro. Live. Ins. Co.*, 409 U.S. 205 (1972); *Dicesno v. HUD*, 96 F.3d 1004, 1008-9 (7th Cir. 1996); *Pfaff v. HUD*, 88 F.3d 739, 745 & n.1 (9th Cir. 1996); *Huntington Branch of the N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Metropolitan Hous. Dev. Corp. v. Vill. of Arlington Heights*, 588 F.2d 1283, 1288-89 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221, 226-27 (5th Cir. 1971).

91. *Ashbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989). See also *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979).

92. *Ashbury*, 866 F.2d at 1279.

93. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (Title VII decision); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990) (Title VIII decision) (holding where discrimination is proved directly, the *McDonnell Douglas* test is inapplicable).

94. *Ashbury*, 866 F.2d at 1279.

shifts back to the plaintiff to show that the proffered reasons were pretextual.⁹⁵

In the context of mixed motive discrimination, Justice O'Connor's concurring opinion in *Price Waterhouse* interpreting the term "because of . . . sex" in 42 U.S.C. § 2000e(a)(2) has been used in interpreting the language "because of [protected status]" in the Fair Housing Act.⁹⁶ "Both Title VII and Title VIII proscribe conduct which is taken 'because of' listed prohibited factors,"⁹⁷ so courts have found it proper to interpret the statutes similarly. In addition, the direct evidence mixed motive trigger articulated by Justice O'Connor also applies to Title VIII mixed motive claims.⁹⁸ Thus, courts looking to Title VII precedent to interpret when to apply a mixed motive framework in a Title VIII claim will have to contend with the inconsistencies and confusion existing amongst the various circuits.

A. Title VIII Jurisprudence Prior to Price Waterhouse

Price Waterhouse caused a sharp departure from previous mixed motive housing discrimination claims. In the two decades preceding *Price Waterhouse*, the lower courts had developed a strong consensus that the Fair Housing Act is violated even if only one of the factors that motivated the defendant was unlawful.⁹⁹ Appellate decisions after 1970 agreed that a defendant need not be motivated by unlawful considerations, and by 1980 there were no Title VIII claims rejected where it was established that race was a partial reason for an adverse housing decision.¹⁰⁰

One of the earliest decisions regarding this point is *Smith v. Sol D. Adler Realty Co.*,¹⁰¹ where the Seventh Circuit held a defendant liable where he had a valid, nonracial excuse for rejecting the plaintiff as a tenant, but also did not want to rent to her based on her race.¹⁰² The *Adler* opinion held that "race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination."¹⁰³ The case was brought under the Civil Rights Act of 1866¹⁰⁴ and the Fair Housing Act, but was decided on the basis of the former.¹⁰⁵ The Seventh Circuit later applied this legal standard to Title VIII, stating in *Moore v.*

95. *Id.* Under the *McDonnell Douglas/Burdine* analysis, the burden of persuasion always remains with the plaintiff.

96. *Blaz v. Barborton Garden Apartments*, 972 F.2d 346 (6th Cir. 1992).

97. *H.U.D. v. Denton II*, 1992 WL 406537, at *8 (H.U.D.A.L.J.).

98. *H.U.D. v. Denton I*, 1991 WL 442794, at *8 (H.U.D.A.L.J.).

99. SCHWEMM, *supra* note 3, at 10-22.

100. *Id.* §§ 10-23, 10-24.

101. 436 F.2d 344 (7th Cir. 1970).

102. *Id.* at 349.

103. *Id.* at 349-50.

104. 42 U.S.C. § 1982 (2003).

105. *Adler*, 436 F.2d at 349.

*Townsend*¹⁰⁶ that “it need only be established that race played some part in the refusal to deal.”¹⁰⁷

All appellate decisions after *Adler* and prior to *Price Waterhouse* held that a violation of the Fair Housing Act may be established where race is but one consideration relied on by the defendant.¹⁰⁸ While the appellate decisions did not state the standard exactly the same way as the Seventh Circuit in *Adler*, there was a general consensus that a plaintiff did not have to show that the defendant was motivated solely by unlawful considerations to establish discrimination.¹⁰⁹

B. Effect of Price Waterhouse on Title VIII Mixed Motive Claims

Only after the decision in *Price Waterhouse*, an “employment” discrimination case, did a change occur to limit the liability imposed on defendants who considered discriminatory reasons in making housing decisions. The application of the *Price Waterhouse* analysis for determining liability in mixed motive cases essentially allowed defendants in housing discrimination cases to avoid liability where they could show that the illegitimate factor was only a partial reason for the denial of housing, so long as they could show that they would have made the same decision absent the illegitimate factor.¹¹⁰ These post-*Price Waterhouse* decisions regarding mixed motive housing discrimination marked a departure from previous Title VIII litigation that followed the general consensus that the Fair Housing Act was violated even if only one of the factors that motivated the defendant’s housing decision was unlawful.¹¹¹

C. Effect of the Civil Rights Act of 1991 on Title VIII

The *Price Waterhouse* mixed motive analysis still remains fully applicable for Fair Housing Act cases despite the 1991 amendment to Title VII.¹¹² However, unlike its application under the new statutory scheme of the 1991 Civil

106. 525 F.2d 482 (7th Cir. 1975).

107. *Id.* at 485.

108. SCHWEMM, *supra* note 3, at 10-23. *See, e.g.*, *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (Title VIII is violated if race “was a consideration and played some role in the real estate transaction”); *Jordan v. Dellway Villa, Ltd.*, 661 F.2d 588, 594 (6th Cir. 1981) (plaintiff should recover if race “played a part” in his rejection of housing); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042-43 (2d Cir. 1979) (Title VIII is violated if race “is even one of the motivating factors,” and considerations of race must not “play any role in the decision to deny [plaintiff’s] application”); *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 443 (5th Cir. 1973) (race need only be “one significant factor” that the defendant considered in order to find liability).

109. SCHWEMM, *supra* note 3, at 10-24.

110. *Cato v. Jilek*, 779 F. Supp. 937, 944 (N.D. Ill. 1991).

111. SCHWEMM, *supra* note 3, at 10-22.

112. *Cato*, 779 F. Supp. at 943 n.19 (acknowledging that the “undiluted *Price Waterhouse* standard continues to control in Title VIII ‘mixed-motive’ cases” despite the Civil Rights Act of 1991).

Rights Act, courts have allowed this analysis to reach the same result in *Price Waterhouse*, not only requiring direct evidence to trigger a mixed motive analysis, but allowing the defendant to escape liability upon a showing that a legitimate factor motivated a housing decision.¹¹³

This point is illustrated in *HUD v. Denton I*, in which the administrative law judge (“ALJ”) determined that showing that an illegal consideration, such as race or gender, played a motivating part in the defendant’s decision must be based on direct evidence, and the framework for examining such evidence is established by *Price Waterhouse*.¹¹⁴ The ALJ went on to determine that the defendant may avoid liability altogether by proving that it would have made the same decision even if it had not allowed the illegitimate factor to play a part in the housing decision.¹¹⁵ The ALJ in *Denton II* further explained that this was due to the fact that “because of” language in the Fair Housing Act should be interpreted similar to its interpretation in *Price Waterhouse*.¹¹⁶ The ALJ in *Denton II* dismissed the argument that the Civil Rights Act of 1991 overruled *Price Waterhouse* and effectively rendered the law under Title VII irrelevant to Title VIII, instead determining that section 107(m) of the Civil Rights Act of 1991 amends only Title VII, not Title VIII.¹¹⁷

Although Congress overruled the result of *Price Waterhouse*, the ALJ stated that “the Civil Rights Act of 1991 did not address the *Price Waterhouse* Court’s analysis for determining liability in a mixed motive case where the language of a statute proscribes conduct ‘because of’ certain unlawful factors.”¹¹⁸ Thus, although Congress sought to remedy the perceived evils of *Price Waterhouse*, courts in applying Title VIII are still using this case to determine liability in mixed motive housing discrimination cases. The inconsistent applications of *Price Waterhouse* to Title VII and Title VIII should be a major concern to civil rights advocates, and goes against the widely accepted principle that the two statutes should be interpreted similarly.

III. *COSTA V. DESERT PALACE INC.*—A MORE WORKABLE APPROACH TO TITLE VII MIXED MOTIVE CASES

In an August 2002 decision, the Ninth Circuit decided an employment discrimination case which effectively abandoned the direct evidence requirement for Title VII disparate treatment cases, thus effectively abandoning all traces of *Price Waterhouse* from mixed motive disparate treatment analyses for Title VII.

113. *Id.* at 944.

114. *H.U.D. v. Denton I*, 1991 WL 442794, at *8 (H.U.D.A.L.J.).

115. *Id.* See also *Cato*, 779 F. Supp. at 933-44 (stating “[T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same [housing] decision even if it had not taken the plaintiff’s gender into account.”).

116. *H.U.D. v. Denton II*, 1992 WL 406537, at *8 (H.U.D.A.L.J.).

117. *Id.* See *Cato*, 779 F. Supp. at 943 n.19.

118. *Id.*

In *Costa v. Desert Palace, Inc.*,¹¹⁹ the employer, Caesars Palace Hotel and Casino, terminated Catharina Costa, the only woman in her bargaining unit.¹²⁰ The employer cited disciplinary problems, including tardiness, absences, and altercations with fellow employees.¹²¹ However, Costa proved that she was disciplined more harshly and more often than her male counterparts for similar infractions: that she was singled out for reprimand; that she was assigned a disproportionately lower amount of overtime; and that she was penalized for failure to conform to “sexual stereotypes.”¹²² The jury determined that sex had been a motivating factor in Costa’s termination and, because Caesars did not establish that she would have been terminated without consideration of her gender, awarded back pay and compensatory and punitive damages.¹²³

On appeal, Caesars argued that Costa should have been held to a special, higher standard of “direct evidence” in order to trigger the mixed motive analysis, as established by the Supreme Court in *Price Waterhouse*, and claimed that she did not meet this threshold.¹²⁴ However, the Ninth Circuit disagreed with Caesars and determined that “Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called ‘mixed-motive’ case.”¹²⁵

A. Reasons for Abandoning “Direct Evidence” for Title VII

The Ninth Circuit Court of Appeals in *Costa* criticized the applicability of Justice O’Connor’s reference to “direct evidence” to the Civil Rights Act of 1991, noting the inconsistent characterization of the term by various courts and commentators.¹²⁶ Instead of adopting one of the three approaches to direct evidence—“classic,” “animus plus,” or “animus”¹²⁷—the Court looked to the language of the statute and the congressional intent of the 1991 Act to determine that there is no requirement of direct evidence or any other special or heightened proof burdens for mixed motive discrimination cases.¹²⁸

1. *Statutory Interpretation.*—The Ninth Circuit in *Costa* reasoned that the best way to resolve the problems associated with characterizing “direct evidence” was to return to the language of the statute, which does not impose any special evidentiary requirements for mixed motive claims¹²⁹ and does not reference “direct evidence.”¹³⁰ In other words, the debate over what constitutes “direct

119. 299 F.3d 838 (9th Cir. 2002).

120. *Id.* at 844.

121. *Id.* at 845-46.

122. *Id.*

123. *Id.* at 846.

124. *Id.* at 844.

125. *Id.*

126. *Id.* at 851.

127. *See supra* notes 69-79 and accompanying text.

128. *Costa*, 299 F.3d at 851.

129. *Id.* at 844.

130. *Id.* at 853.

evidence” for the purpose of Title VII is irrelevant because the statute does not require direct evidence.

The Ninth Circuit took the approach that “no special . . . proof hurdles may be [judicially] imposed on Title VII plaintiffs.”¹³¹ The most relevant case cited by the Court of Appeals is *Onacle v. Sundowner Offshore Services, Inc.*,¹³² in which the Supreme Court determined that the same methods of proof used in opposite sex sexual harassment claims could also be used in same sex sexual harassment claims, rejecting the heightened evidentiary requirement that lower courts had imposed on the latter type of cases.¹³³

2. *Congressional Intent and Legislative History of the Civil Rights Act of 1991.*—Another important factor that the Ninth Circuit utilizes to determine that there should be no “direct evidence” requirement is congressional intent in passing the 1991 Civil Rights Act.¹³⁴ In the House Report accompanying the 1991 Civil Rights Act, the Committee determined that recent decisions of the Supreme Court, including *Price Waterhouse*, had “cut back dramatically on the scope and effectiveness of civil rights protections” and that “existing protections and remedies under Federal law [were] not adequate to deter unlawful discrimination or to compensate victims of such discrimination.”¹³⁵ The stated purpose of the Civil Rights Act of 1991 was to “restore civil rights protections” that had been limited by the recent Supreme Court decisions and to “strengthen existing protections and remedies available under federal civil rights laws” in order to provide “more effective deterrence and adequate compensation for victims of discrimination.”¹³⁶ The House Report specifically includes a section discussing Section 203 of the Act entitled “The Need to Overturn *Price Waterhouse*.”¹³⁷ Although the House Report primarily discusses the dramatic limitation that *Price Waterhouse* imposed in finding liability where an employer had a discriminatory reason for an employment decision, the report also stresses the important interests at stake in proper enforcement of Title VII. The House Report further declares that “[i]t is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.”¹³⁸ The report also states that limitations on liability for mixed motive disparate treatment discrimination would greatly hinder effectuation of the purpose of Title VII ban on discrimination on the basis of race, color, religion, sex, or national origin, because mixed motive factual scenarios are quite common.¹³⁹

131. *Id.* at 851.

132. 523 U.S. 75 (1998).

133. *Id.* at 80-81.

134. *Costa*, 299 F.3d at 850.

135. H.R. REP. NO. 102-40(I), at *4 (1991), reprinted in 1991 U.S.C.C.A.N. 549.

136. H.R. REP. NO. 102-40(II), at *1 (1991), reprinted in 1991 U.S.C.C.A.N. 549 (emphasis added).

137. H.R. REP. NO. 102-40(I), at *45.

138. *Id.* at *47.

139. *Id.*

In the report's explanation of Section 203¹⁴⁰ and Section 703(1),¹⁴¹ there was no mention of a requirement that the plaintiff show "direct evidence" of discriminatory purpose. Specifically, the Committee states "[t]o establish liability under proposed Section 703(1), the complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or action. . . . [T]he Committee intends to restore the rule applied in many federal circuits *prior to the Price Waterhouse decision*."¹⁴² It appears from the House Report that Congress did not intend to incorporate any portion of the *Price Waterhouse* opinion into the new statutory scheme and intended to restore the rule concerning mixed motive discrimination that existed "*prior to*" *Price Waterhouse*, not "*in light of*" *Price Waterhouse*. In addition to Congress's desire to restore protections limited by *Price Waterhouse*, the legislature also sought to strengthen such protections.¹⁴³ Placing the additional requirement of a showing of "direct evidence" of discriminatory motive on the part of the employer seems inapposite to the desire of Congress to strengthen and restore protections to victims of employment discrimination.

B. Evidentiary Framework Used by the Ninth Circuit for Mixed Motive Cases

The evidentiary framework utilized by the Ninth Circuit to determine whether there has been a violation of Title VII's ban on mixed motive discrimination employed an analysis that was devoid of the "direct evidence" requirement. The court required only that "the plaintiff in any Title VII case may establish a violation through a preponderance of the evidence (whether direct or circumstantial) that a protected characteristic played a 'motivating factor.'"¹⁴⁴ The court noted that "circumstantial evidence is not inherently less probative than direct evidence"¹⁴⁵ and that circumstantial evidence may be weighed on the same scale and may be put before the jury in the same manner as direct evidence.¹⁴⁶ The Ninth Circuit's view is that determinations of liability should be left to the jury, no matter what the characterization of the evidence may be.

The Ninth Circuit's notion that direct evidence is not required to trigger a mixed motive analysis seems to collapse the distinction between mixed motive claims and pretext claims. Rather, the court makes the persuasive argument that "all of these concepts coexist without conflict."¹⁴⁷ The court notes that the *McDonnell Douglas* analysis is a separate inquiry that occurs at an earlier stage involving summary judgment, while a mixed motive analysis arises later in the

140. 42 U.S.C.A. § 2000e-2(m) (2003).

141. *Id.* § 2000e-5(g).

142. H.R. REP. NO. 102-40(I), at *48 (emphasis added).

143. *See supra* note 136 and accompanying text.

144. *Costa v. Desert Palace Inc.*, 299 F.3d 838, 853-54 (9th Cir. 2002).

145. *Id.* at 854 n.4 (citing *United States v. Cruz*, 536 F.2d 1264, 1266 (9th Cir. 1976)).

146. *Id.* (citing *United States v. King*, 552 F.2d 833, 845 (9th Cir. 1976)).

147. *Id.* at 854.

litigation at the jury instruction phase.¹⁴⁸ The Ninth Circuit insists that the two inquiries are separate and may coexist. The *McDonnell Douglas* analysis is necessary only to survive the summary judgment phase, and evidence found during discovery and produced at trial may lead to the conclusion that the case is actually one involving mixed motives.

According to the Ninth Circuit, the proper method for determining whether to provide a mixed motive instruction to the jury would be left to the discretion of the trial judge based on all of the evidence presented at trial. If the trial court

determines that the only reasonable conclusion a jury could reach is that the discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played no role at all . . . then the jury should be instructed to determine whether the challenged action was taken “because of” the prohibited reason.¹⁴⁹

If the jury determines that the employer acted because of discriminatory intent, and this was the only reason for the adverse employment decision, the employee would prevail and would receive the full remedies afforded under Title VII,¹⁵⁰ including injunction, reinstatement or hiring of employees, without or without back pay, or any other appropriate equitable relief.¹⁵¹ If the jury finds that the employer did not act because of discriminatory intent, the employer will prevail.¹⁵²

In contrast, if the trial judge determines that the evidence, whether direct or circumstantial, could support a finding that discrimination is but one of multiple factors in the challenged employment decision, it would be proper for the trial judge to give a mixed motive instruction to the jury. The trial judge should then instruct the jury to determine whether the discriminatory reason was a motivating factor in the challenged employment action.¹⁵³ If the jury finds that the discriminatory reason was a motivating factor, then the employer has violated Title VII.¹⁵⁴ However, the jury must then determine whether the employer would have made the same decision absent the discriminatory factor. If the jury determines that the employer has proved by a preponderance of the evidence that it would have made the same decision absent the discriminatory reason, the employer will be still be held liable under Title VII, but the remedies available to the plaintiff will be limited to “attorney’s fees, declaratory relief, and an order prohibiting future discriminatory actions.”¹⁵⁵

The Ninth Circuit’s analysis in *Costa* also resolves the problem of characterizing cases according to “mixed motive” versus “single motive.” As

148. *Id.* at 865.

149. *Id.* at 856.

150. *Id.*

151. 42 U.S.C. § 2000e-5(g)(1) (2003).

152. *Costa*, 299 F.3d at 856.

153. *Id.*

154. *Id.*

155. *Id.* at 857. See 42 U.S.C. § 2000-e(g)(2)(B).

noted above, in following the distinction established by *Price Waterhouse*, the determination of whether a case was single motive or mixed motive hinged primarily on whether the plaintiff could produce direct evidence of discrimination, not whether the defendant was actually motivated by a single motive or multiple motives.¹⁵⁶ Under the Ninth Circuit's method of analysis, determining whether a case is single motive or mixed motive depends on the type of evidence offered and whether that evidence could support a finding that a single reason motivated the employment decision, or whether it is plausible that the employer had multiple considerations weighing on its decision. This is a more logical approach to mixed motive claims since it is more relevant to what actually occurred in the employment decision—the employer took legitimate and illegitimate considerations into account—and is not based on an ambiguous “direct evidence” requirement.

The Supreme Court affirmed the Ninth Circuit's judgment in *Desert Palace, Inc. v. Costa*, holding that direct evidence of discrimination is not required for a plaintiff to obtain a mixed motive jury instruction under Title VII.¹⁵⁷ The Court agreed with the Ninth Circuit's determination that no heightened evidentiary showing is required under Title VII,¹⁵⁸ and that the starting point for such an analysis begins—and ends—with the statutory text.¹⁵⁹ “In order to obtain an instruction under § 2000e-2(m), 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.’”¹⁶⁰ Justice O'Connor even wrote in a separate concurring opinion, emphasizing the Civil Rights Act of 1991 codified a new evidentiary rule for mixed motive cases under Title VII, and agreeing that the District Court did not abuse its discretion in giving a mixed motive instruction to the jury.¹⁶¹ However, like the Civil Rights Act of 1991, this case is only binding precedent for Title VII employment discrimination cases, and does not change the courts' application of the “direct evidence” requirement for Title VIII cases, thus leaving courts deciding Title VIII mixed motive housing discrimination cases in the morass of “direct evidence” and determining when a mixed motive instruction should be given to the jury.

IV. RESOLVING THE MIXED MOTIVE QUESTION FOR TITLE VIII

Currently, a disparity exists in how to address mixed motive claims under Title VII and Title VIII. Under Title VII mixed motive claims, if the defendant can prove that he would have made the same adverse employment decision absent consideration of discriminatory factors, he will still be held liable for

156. See *supra* notes 61-62 and accompanying text.

157. 123 S. Ct. 2148, 2155 (2003).

158. 42 U.S.C. § 2000e-2(m).

159. *Desert Palace, Inc.*, 123 S. Ct. at 2153.

160. *Id.* at 2155.

161. *Id.* (O'Connor, J., concurring).

violation of Title VII. However, under Title VIII, if the defendant can prove that she would have made the same adverse housing decision absent consideration of discriminatory factors, she will avoid liability altogether. Considering that Title VII and Title VIII are so closely related and interpreted in a similar manner, this disparity should be resolved in order to properly effectuate the purpose of the Civil Rights Acts of 1964 and 1968.

A. Three Alternatives to Addressing Title VIII Mixed Motive Claims

Three possible alternatives exist for dealing with mixed motive disparate treatment claims under Title VIII in light of *Price Waterhouse* and the 1991 Civil Rights Act. The first alternative is to maintain the status quo and continue to apply the *Price Waterhouse* analysis to Title VIII claims. The second alternative is to interpret the 1991 Civil Rights Act as applying to Title VIII claims as well as Title VII. The third option is to return to pre-*Price Waterhouse* Title VIII jurisprudence and interpret the statute consistent with those opinions.

1. *Continue to Apply Price Waterhouse.*—One possible alternative to the approach to analyzing mixed motive housing discrimination under Title VIII would be to maintain the status quo and continue to apply the *Price Waterhouse* framework. However, continuing to apply *Price Waterhouse* to Title VIII mixed motive claims is an unacceptable alternative. Under this approach, plaintiffs face a higher evidentiary standard when a landlord's actions are motivated by both legitimate non-discriminatory and illegitimate discriminatory purposes in making a housing decision. Not only does the plaintiff have the burden of showing direct evidence of discrimination in order to trigger a *Price Waterhouse* mixed motive analysis, but her claim may then be defeated if the defendant can meet its burden of persuasion of showing that it would have made the same decision absent the discriminatory consideration.¹⁶² Since the definition of "direct evidence" can range from anything from evidence requiring no inferences that have a direct relation to the housing decision, to circumstantial evidence bearing only a slight relation to the adverse housing decision,¹⁶³ it is uncertain exactly what type of evidence would trigger a mixed motive analysis. Considering real-world circumstances and the variety of criteria that go into qualifying a tenant for housing, evictions, sales, services, and loans, defendants have a plethora of legitimate factors to point to that would justify their denial of housing or services to prospective tenants or purchasers. Thus, even if a prospective tenant were able to prove by the higher standard of "direct evidence" that the landlord had a discriminatory motive, her efforts are ultimately in vain when the defendant produces evidence of the legitimate factor that would have justified rejection anyway. If the plaintiff does not produce sufficient evidence to trigger a mixed motive analysis, her claim will probably also fail under the *McDonnell Douglas/Burdine* pretext analysis, since the legitimate reason offered by the defendant most likely would be a valid, non-pretextual reason, and the plaintiff

162. *Cato v. Jilek*, 779 F. Supp. 937, 944 (N.D. Ill. 1991).

163. See *supra* notes 69-79 and accompanying text.

would still have the burden of persuasion that the legitimate reason is pretextual. Allowing the *Price Waterhouse* analysis to govern Title VIII mixed motive cases essentially blocks all remedies to plaintiffs harmed in part by discriminatory motives.

2. *Apply the 1991 Civil Rights Act to Title VIII.*—Another alternative to resolving the problems of mixed motive analyses under Title VIII is to interpret the 1991 Civil Rights Act as applying to Title VIII. Some commentators have suggested that *Price Waterhouse v. Hopkins* is no longer applicable to the Fair Housing Act by virtue of the fact that the Civil Rights Act of 1991 overturned the Court's decision by amendment of Section 703 of Title VII.¹⁶⁴ John P. Relman stated that the section "essentially adopts the approach found in the pre-*Hopkins* Title VIII case law, providing that 'an unlawful employment practice is established when the complaining party demonstrates that [a prohibited factor] was a motivating factor . . . even though other facts also motivated the practice.'"¹⁶⁵ However, while this argument is somewhat plausible, it is easily countered by the argument that the Civil Rights Act of 1991 amended only specific provisions of Title VII, not Title VIII.¹⁶⁶ Courts often have refused to apply statutes by implication, and instead prefer to rely on the express intent of Congress.¹⁶⁷ The congressional record makes no mention of Title VIII, and only addresses desired changes to Title VII. Thus, the Civil Rights Act of 1991 cannot be solely relied upon to effectuate a change in Title VIII mixed motive analyses.

3. *Abandon Price Waterhouse for Title VIII Mixed Motive Claims.*—The third approach to resolving the problems with analyzing Title VIII mixed motive claims is to abandon the *Price Waterhouse* analysis altogether. This is the most logical resolution in light of the close relationship between Title VII and Title VIII and the congressional intent and purpose of the respective Civil Rights Acts. Congress already has resolved part of the injustice created by *Price Waterhouse* by striking a compromise and allowing reduced damages where the defendant proves that he would have made the same adverse employment decision absent the discriminatory motive.¹⁶⁸ In *Costa*, the Ninth Circuit has further suggested a way to remove an additional barrier to plaintiffs' recovery by abandoning the requirement that direct evidence trigger a mixed motive analysis,¹⁶⁹ an approach

164. JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2.6(1)(b). This was also the argument by the appellants in *HUD v. Denton II*, 1992 WL 406537, at *7 (H.U.D.A.L.J.). This argument was swiftly rejected by the ALJ. See also *Cato*, 779 F. Supp. at 943 n.19 ("[T]he undiluted *Price Waterhouse* standard continues to control in Title VIII 'mixed motive' cases.").

165. RELMAN, *supra* note 164.

166. *Cato*, 779 F. Supp. at 943 n.19. See also *Denton II*, 1992 WL 406537, at *8.

167. *Denton II*, 1992 WL 406537, at *7. Cf. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.").

168. 42 U.S.C. § 2000e-5(g)(2)(B) B (2003).

169. *Costa v. Desert Palace Inc.*, 299 F.3d 838, 853 (9th Cir. 2002).

affirmed by the Supreme Court.¹⁷⁰ The Ninth Circuit's approach in *Costa* provides an interesting suggestion for remedying the injustice caused by applying *Price Waterhouse* in Title VIII mixed motive claims.

B. Complete Abandonment of Price Waterhouse Should Likewise Occur for Title VIII

The Ninth Circuit in *Costa* presents interesting possibilities for the application of *Price Waterhouse* to Title VIII mixed motive claims. First is the suggestion that the liability component of a mixed motive claim should be altered so that a plaintiff proving that a defendant acted with discriminatory animus will have some type of remedy. Second, the analysis of such claims should no longer follow the framework established by Justice O'Connor in *Price Waterhouse* to determine when a mixed motive analysis is appropriate. The abandonment of the requirement of "direct evidence" in the context of housing discrimination under Title VIII should occur for the same reasons articulated by the Ninth Circuit in *Costa*, as well as based on historical interpretation and application of Title VIII. A heightened evidentiary requirement for mixed motive claims had not been imposed on Title VIII plaintiffs prior to *Price Waterhouse*, and defendants were still found liable for actions that were motivated in part by discrimination. Such a heightened evidentiary standard and method for a defendant to avoid liability where there is proof of discriminatory animus is at odds both with the language and purpose of the statute.

1. *Statutory Interpretation Principles of Title VIII.*—The Ninth Circuit's focus on the statutory interpretation of Title VII to determine that there was no requirement of "direct evidence" to trigger a mixed motive analysis is not at odds with principles of Title VIII statutory interpretation and statutory interpretation in general. The starting point for statutory interpretation lies in the text of the statute.¹⁷¹ The relevant statutory provision states "it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."¹⁷² There is no indication that "because of" is limited to one motivating factor. However, the language of the statute does not shed much light on the congressional intent in analyzing mixed motive disparate treatment claims under Title VIII.

2. *Congressional Intent of Title VIII.*—The second method of statutory interpretation used when text is not sufficient is to look to congressional intent

170. *Desert Palace Inc., v. Costa*, 123 S. Ct. 2148, 2155 (2003).

171. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)) (observing that "[t]he starting point in every case involving construction of a statute is the language itself"). See also SCHWEMM, *supra* note 3, § 7:1.

172. 42 U.S.C. § 3604(a).

underlying the statute.¹⁷³ Records of congressional intent for Title VIII are somewhat sparse, consisting primarily of floor debates on the bill.¹⁷⁴ The congressional record does not include the committee reports and other documents that usually accompany major legislation due to the fact that Title VIII resulted from a relatively short and intense period of congressional consideration amidst the background of dramatic national events.¹⁷⁵ Thus, the legislative history is not very helpful in conclusively determining congressional intent for the Fair Housing Act.¹⁷⁶

3. *Trafficante Principles of Title VIII Interpretation.*—One of the most important sources in determining statutory interpretation techniques for the Fair Housing Act is the first Title VIII Supreme Court decision, *Trafficante v. Metropolitan Life Insurance Co.*¹⁷⁷ The Supreme Court's unanimous opinion in *Trafficante* "is still the most important source of judicial guidance for divining the congressional intent underlying the Fair Housing Act."¹⁷⁸ In *Trafficante*, the Court was determining the issue of whether tenants in an apartment complex had standing to sue their landlord for discriminating against minority applicants.¹⁷⁹ In finding that the tenants did have standing, the court commented that Title VIII reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."¹⁸⁰ The principle that the Fair Housing Act is to be construed broadly has been repeatedly reaffirmed by the Supreme Court.¹⁸¹

The broad interpretation of standing was only one aspect of statutory interpretation articulated by the Supreme Court in *Trafficante*. The Court

established four important tenets of statutory construction concerning the

173. SCHWEMM, *supra* note 3, at 7-2.

174. *Id.* at 5-6.

175. *Id.* Although Congress had considered a fair housing act for almost two years, Title VIII's actual passage came swiftly after the Kerner Commission Report, which discussed at length the growing problems of racial residential segregation and the resulting social disorder, the assassination of Dr. Martin Luther King, Jr., and a series of urban riots. The time from the issuance of the Kerner Report to President Johnson's signing of the Civil Right Act of 1968 occurred in the short span between March 1, 1968 and April 11, 1968. *Id.*

176. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (recognizing that "[t]he legislative history of the Act is not too helpful").

177. 409 U.S. 205 (1972).

178. SCHWEMM, *supra* note 3, at 7-2.

179. *Trafficante*, 409 U.S. at 207-09.

180. *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971) (internal quotations omitted)). See also *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (recognizing Congress's strong national commitment to the promotion of integrated housing); *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (reinforcing that the Supreme Court interprets civil rights statutes broadly).

181. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). See also *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (reaffirming *Trafficante's* recognition of Title VIII's "broad and inclusive compass" and therefore entitling the Act to a "generous construction").

Fair Housing Act: (1) that the statute should be construed broadly; (2) that integration was an important goal of the proponents of Title VIII; (3) . . . Title VII decisions can be relied on to help interpret Title VIII; and (4) that interpretations of Title VIII by the Department of Housing and Urban Development (HUD) are entitled to a good deal of weight in construing the statute.¹⁸²

The most important tenets of construction for the purpose of determining the question of how to analyze mixed motive claims are broad construction of the Fair Housing Act and interpretation in light of Title VII. The Supreme Court in *Trafficante* decided unanimously that the clear intent of Congress was that the Fair Housing Act should be construed broadly.¹⁸³ The Court's opinion stated that the language of the Fair Housing Act is "broad and inclusive"¹⁸⁴ and that the Act effectuates a "policy that Congress considered to be of the highest priority."¹⁸⁵ The Court determined that the only way to carry out this important policy of Congress would be to give "generous construction" to the statute.¹⁸⁶ Numerous lower courts have determined that the Fair Housing Act warrants the "broadest possible interpretation."¹⁸⁷

The second relevant tenet of construction for mixed motive analyses under Title VIII is the importance of judicial interpretation of Title VII. The similarity of the interpretations of the statute is warranted by the fact that they "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination [and] the Supreme Court has held that both statutes must be construed expansively to implement that goal."¹⁸⁸ Thus, principles that are related to the ultimate goal of the two Acts, eliminating discrimination, should be interpreted in a similar fashion.

4. *Statutory Construction and Title VIII Mixed Motive Cases.*—Based on these tenets of statutory construction for Title VIII, it follows that the application of *Price Waterhouse* to mixed motive claims is inconsistent with the concepts of congressional intent of broad construction and statutory interpretation in light of developments in Title VII law. First, eliminating a path of recourse for plaintiffs harmed by discriminatory motives does not follow from the intent to prevent discrimination in housing. On the contrary, if defendants know that they may avoid liability by ensuring that they can find a legitimate reason to deny a prospective tenant housing, they can just as easily build this into their selection

182. See SCHWEMM, *supra* note 3, at 7-3.

183. *Id.*

184. *Trafficante*, 409 U.S. at 209.

185. *Id.* at 211.

186. *Id.* at 212.

187. SCHWEMM, *supra* note 3, at 7-4. See, e.g., *Huntington Branch of the NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *United States v. Gilbert*, 813 F.2d 1523, 1526-27 (9th Cir. 1987); *Guider v. Bauer*, 865 F. Supp. 492, 495 (N.D. Ill. 1994).

188. *Huntington*, 844 F.2d at 935.

policy as they can build discriminatory factors into their policies.¹⁸⁹ Denying a remedy to plaintiffs who have been harmed by discrimination does not effectuate the intent that the Fair Housing Act should be broad and expansive in its scope in seeking to prevent discrimination in housing.

Secondly, requiring a heightened evidentiary standard as articulated by Justice O'Connor in *Price Waterhouse*¹⁹⁰ also goes against congressional intent that Title VIII be afforded a broad interpretation. Even if the remedy portion of a mixed motive case was altered to be more in line with Title VII as amended by the Civil Rights Act of 1991, the requirement of direct evidence in order to trigger a mixed motive analysis would still pose a great hindrance to Title VIII mixed motive plaintiffs.

In discussing the propriety of allowing a finding of disparate impact to be a violation of section 3604(a) of the Fair Housing Act, the Seventh Circuit Court of Appeals amply stated in *Metropolitan Housing Development Corp., v. Village of Arlington Heights*,¹⁹¹ (*Arlington Heights II*),

“[i]ntent, motive, and purpose are elusive subject concepts” and attempts to discern the intent of an entity such as a municipality are at best problematic A strict focus on intent permits racial discrimination to go unpunished in the *absence of evidence of overt bigotry*. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.¹⁹²

Thus, in recognizing that lack of proof of intent does not mean lack of discrimination, the Seventh Circuit noted that proof of discriminatory intent is often hard to come by. Reasons for acknowledging the need to allow a showing of disparate impact to show a violation of the Fair Housing Act also warrant a finding that a showing that a defendant relied on a permissible and impermissible reason in a housing decision would be a violation. Even though disparate treatment and disparate impact require two different methods of analysis, the comparison is still apt in showing that proof of discriminatory intent is often hard to come by. Thus, it follows that direct evidence of discriminatory intent for purposes of mixed motive claims is even more difficult to attain.

Although the Seventh Circuit was addressing the difficulty of discerning intent from municipalities' actions, the same falls true for many private landlords

189. Indeed, the Second Circuit noted in *Huntington*, 844 F.2d at 935, that “clever men may easily conceal their motivations.” (quoting *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (internal quotations omitted)).

190. 490 U.S. 228 (1989).

191. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

192. *Id.* at 1290 (citing *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam) (emphasis added) (citations omitted)).

and other entities in the housing services market who have several employees or operate through management companies. Like a municipality, there may be many individuals involved in the policy and decision making process. It may be difficult, if not impossible, for a plaintiff to pinpoint at what stage in the decision making process that the “direct evidence” of discrimination can be found. Indeed, as the Seventh Circuit pointed out, discreet acts of discrimination may be just as egregious as blatant acts of discrimination, and both deserve remedy under the Fair Housing Act. In addition, private individuals who act to perpetuate housing segregation deserve just as much, if not more, scrutiny than the actions of a governmental body.¹⁹³

Third, allowing Title VIII mixed motive cases to be analyzed using the framework established in *Price Waterhouse* ignores the mandate that Title VIII be interpreted in light of Title VII.¹⁹⁴ For the past thirteen years, Title VII has been interpreted as not allowing employers to escape liability in cases of mixed motive discrimination. Although the 1991 Civil Rights Act does not directly foreclose courts from applying *Price Waterhouse* to Title VIII claims,¹⁹⁵ courts should take note of the congressional desire to remedy the ill effects that *Price Waterhouse* had on Title VII claims. There has been wide acceptance of Title VII principles in Title VIII law, most notably the *McDonnell Douglas/Burdine* framework.¹⁹⁶ The fact that the change in Title VII law was congressionally mandated should be of no consequence. On the contrary, that Congress expressly altered Title VII law should lend more support to the proposition that a similar change should be made for Title VIII since the congressional intent for the two civil rights laws is very similar.

C. Suggestions for a More Workable Approach to Title VIII Mixed Motive Claims

Mixed motive claims under Title VIII should no longer utilize any aspects of *Price Waterhouse*, and instead should look to pre-*Price Waterhouse* mixed motive housing discrimination claims, particularly the lower courts’ decisions for Title VIII cases. The Ninth Circuit’s analysis and reasoning in *Costa* should provide a workable framework for analyzing Title VIII mixed motive claims.

1. *Return to the Pre-Price Waterhouse Cases to Decide Title VIII Mixed Motive Cases.*—Lower courts deciding cases involving multiple motive housing discrimination under Title VIII prior to *Price Waterhouse* have determined that

193. *Id.* at 1293. (“If the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be overly solicitous when the effect is to perpetuate segregated housing.”).

194. *See supra* note 188 and accompanying text.

195. *See supra* notes 166-67 and accompanying text.

196. *Pinchback v. Armistead Homes Corp.*, 689 F. Supp. 541, 553 (D. Md. 1988). The District Court in this case also accepted the “futile gesture” theory under Title VII and applied it to a housing discrimination case.

there was no room for partial discrimination under the Fair Housing Act.¹⁹⁷ The Supreme Court has never decided a mixed motive housing discrimination claim under Title VIII, so presumably the issue has not fully been settled.

Although the Supreme Court ruled in *Arlington Heights I* that there would be no finding of liability under the Equal Protection Clause if the defendant could prove a legitimate, non-discriminatory reason for making the adverse housing decision,¹⁹⁸ the same does not necessarily follow for mixed motive claims under Title VIII. First, Title VIII was meant to be a broad remedial statute, more expansive than the Equal Protection Clause. The Equal Protection Clause has been interpreted very narrowly, only allowing a showing of intentional discrimination to find liability. Conversely, there is abundant authority expressly allowing a broad interpretation and generous construction of Title VIII.¹⁹⁹ Thus, protections not necessarily afforded by the Equal Protection Clause should not constrain the protections afforded by the Fair Housing Act.

Secondly, as the Equal Protection Clause only applies to governmental actors, there are fewer justifications for allowing a private actor to escape liability upon a showing of a legitimate motivating factor than exist in allowing a municipality to escape liability upon the showing of a compelling governmental interest. Municipalities must balance many considerations in zoning and housing decisions, and courts traditionally afford great deference to legislative and administrative decisions for that reason.²⁰⁰ However, as Title VIII applies to individuals as well as municipalities, there are fewer considerations that must be taken into account, and courts do not give the same deference to individual decisions that they do to governmental decisions.²⁰¹

History, as well as practical considerations, supports the propriety of returning to pre-*Price Waterhouse* housing discrimination decisions and deciding mixed motive cases more in line with cases such as *Adler*. By not allowing discriminatory animus to play a role in any housing decision and holding a defendant liable for such is the best way to effectuate one of the primary purposes of the Fair Housing Act, which is to prevent discrimination in housing.

2. *Costa Approach to Analyzing Title VIII Mixed Motive Claims.*—A workable suggestion for analyzing Title VIII mixed motive claims may be found by looking to the Ninth Circuit's approach in *Costa v. Desert Palace, Inc.* A framework similar to that established by the Ninth Circuit's decision would provide the best means of effectuating the mandates of Title VIII in a logical and consistent manner.

First, the framework under *McDonnell Douglas* should be retained as one method of establishing the prima facie case in a Title VIII claim. The *McDonnell Douglas* framework is necessary so plaintiffs may be able to state their claim and

197. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970). *See also* SCHWEMM, *supra* note 3, at 10-23.

198. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977).

199. *See supra* notes 182-87 and accompanying text.

200. *Arlington Heights*, 429 U.S. at 256-66.

201. *See supra* note 192 and accompanying text.

survive the summary judgment phase of litigation. This allows a plaintiff to garner additional evidence during the discovery phase of litigation so that she may bolster her case against the defendant. The plaintiff should then produce evidence sufficient to warrant the inference that the discriminatory purpose was a motivating factor in the challenged housing decision.

Second, after the parties have introduced their evidence at trial, the trial judge should determine whether the case is one warranting a single motive or mixed motive jury instruction. If, based on all of the evidence, the trial judge determines that the only reasonable conclusion a jury could reach is that the defendant was motivated solely by discriminatory purpose in the challenged housing decision or that discrimination was not a factor at all, the jury should be given a single motive instruction under the *McDonnell Douglas/Burdine* framework. If the jury determines that the defendant acted because of discriminatory intent, and this was the sole reason for the challenged housing decision, the plaintiff would prevail. If the jury finds that the defendant did not act because of discriminatory intent, the employer will avoid liability under the Fair Housing Act.

Conversely, if the trial judge determines that the evidence presented by the plaintiff, whether direct or circumstantial, could support a finding that the defendant was motivated in its housing decision by multiple factors, both discriminatory and non-discriminatory, the trial judge should give a mixed motive instruction to the jury. The jury would then determine whether the discriminatory purpose was a motivating factor in the challenged housing decision. If the jury finds that discriminatory purpose was a motivating factor, though not necessarily the sole factor, the defendant would be liable under Title VIII. If the jury finds that the discrimination was not a motivating factor, there would be no Title VIII violation.

The propriety of giving a mixed motive instruction should not depend on whether the plaintiff has the ability to produce “direct evidence” of discriminatory purpose, but rather on whether the evidence shows that defendant was possibly motivated by legitimate as well as illegitimate considerations. Abandoning the requirement that the plaintiff present direct evidence of discriminatory purpose eliminates the problem of determining what constitutes “direct evidence,” and more importantly, the artificial distinction between single and mixed motive cases.²⁰²

The one question that remains open under this inquiry is what remedies would be available to a plaintiff if the defendant proves that it would have made the same decision absent the discriminatory factor. Based on prior Title VIII mixed motive cases, the defendant would still be held liable for all possible remedies under the Fair Housing Act.²⁰³ Remedies available under the Fair Housing Act include actual and punitive damages, permanent or temporary injunctions, temporary restraining orders, or other orders, including an order

202. See *supra* notes 61-62 and accompanying text.

203. See *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975) (applying Fair Housing Act legal standard to Title VIII).

enjoining the defendant from engaging in such practice or ordering such affirmative action as may be deemed appropriate by the court.²⁰⁴ The prevailing plaintiff may also be entitled to reasonable attorney's fees and costs.²⁰⁵ However, in light of the fact that Title VII and Title VIII are interpreted consistently, there is an argument that the plaintiff's remedies should be limited under Title VIII as they are under Title VII, where a defendant shows that he would have made the same decision absent a discriminatory purpose. Since the 1991 Civil Rights Act does not specifically apply to Title VIII, this is an issue that would need to be addressed by Congress.

CONCLUSION

As demonstrated by the Title VII and Title VIII jurisprudence after *Price Waterhouse*, there is much room for improvement in the framework of analysis used to evaluate mixed motive discrimination claims. The application of *Price Waterhouse* to Title VIII claims has caused a rift between how mixed motive housing discrimination claims have been analyzed prior to and after this important Supreme Court decision. In addition to altering liability for partial discrimination, the decision has also added the elusive concept of "direct evidence" to the analysis of mixed motive claims. *Price Waterhouse* has served to both create injustice as well as confusion and inconsistent application of fair housing law.

In light of changes in Title VII law, as well as the history and intent of the Fair Housing Act, this Note concludes that the injustice caused to Title VIII by *Price Waterhouse* should be remedied by altering the liability component of the mixed motive analysis to be more in line with what Congress intended in enacting the Civil Rights Act of 1991. Additionally, Justice O'Connor's legacy of "direct evidence" should no longer be allowed to determine the threshold for applying a mixed versus a single motive analysis. Rather, the determination should be made based upon the sufficiency of the plaintiff's evidence, not the type. This Note's proposal for a more workable approach to Title VIII mixed motive claims follows the Ninth Circuit's analysis in *Costa* and adopts the rationale that all impermissible housing discrimination should be eliminated in a consistent and rational manner.

204. 42 U.S.C. § 3613(c)(1) (1995).

205. *Id.* § 3613(c)(2).