Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims

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Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims

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I. INTRODUCTION

At a recent en banc meeting of the United States District Court for the Eastern District of Missouri, District Judge Charles A. Shaw complained about the “overabundance” of employment discrimination
Employment discrimination is one of the fastest growing areas of civil litigation, and courts report that they are being "swamped" with these claims. Motivated in part by a desire to assist litigants through the labyrinth of employment discrimination law, and in part by a need to control their dockets, district courts in the Eighth Circuit have begun to develop standardized forms for use in these cases. One of the innovations in standardization is the Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Model Instructions).

Many, if not all district courts and lawyers consult the Model Instructions when drafting the charges that will guide a jury's deliberations. Nevertheless, although they are standardized, the accuracy of the Model Instructions is not guaranteed. This no doubt will come as a surprise to some readers. Common among courts and practitioners is the misconception that the United States Court of Appeals for the Eighth Circuit plays some role in formulating or approving the Model Instructions. In fact, these pattern instructions are drafted by a committee, and no member of the Court of Appeals participates in the work of that committee. The court does not promulgate these instructions, and it "approve[s] of the model instructions only as they are individually litigated and upheld by th[e] court on a case-by-case basis." Thus, it is important that scholars and practitioners, particularly those within the Eighth Circuit, critically examine these instructions.

This Article undertakes such an inquiry, scrutinizing the charge recommended by the Model Instructions in Title VII disparate treatment claims. The examination begins with a brief review of two Title VII metaphors: pretext and mixed-motive disparate treatment discrimination claims. It then reviews the changes made to those metaphors by the Civil Rights Act of 1991. Part IV scrutinizes the disparate treatment jury charge recommended by the Model Instructions.

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2. Id.
3. See, e.g., id. (reporting the development of standard discovery requests for employment discrimination cases).
5. Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1221 n.2 (8th Cir. 1997); United States v. Ali, 63 F.3d 710, 714 n.3 (8th Cir. 1995).
6. United States v. Ali, 63 F.3d 710, 714 n.3 (8th Cir. 1995).
tions, and Part V discusses why the instructions are erroneous. Next, the Article examines cases from the Eighth Circuit Court of Appeals and other United States Courts of Appeals, concluding that the Model Instructions are inconsistent with these precedents. Finally, this Article proposes an improved formula jury instruction along with an alternative interpretation of the Civil Rights Act of 1991.

II. DISPARATE TREATMENT METAPHORS

Title VII makes it unlawful for employers to "discriminate . . . because of" an employee's "race, color, religion, sex, or national origin." The statute does not define "discriminate," so the courts have devel-

8. It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


9. Actually, all employers discriminate every day in the sense that the employer treats employees differently: some workers are given promotions, raises, or desirable work while others are demoted, fired, or disciplined. Thus, everyone has been the victim of discrimination at some point. The relevant legal question is whether the employer has engaged in prohibited discrimination. Discrimination is illegal under Title VII only when it is because of race, color, religion, sex, or national origin.

An interpretative memorandum issued by Senators Case and Clark, comanagers of the Civil Rights Act of 1964 in the Senate during the legislative debates on the Act, makes clear that "[t]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any of the forbidden criteria: race, color, religion, sex and national origin." 110 CONG. REC. 7212, 7213 (1964)(statement of Sen. Clark).
oped a sophisticated body of law designed to distinguish unlawful discrimination from legitimate employment decisions. These precedents rely on the use of different models or metaphors for illegal discrimination. As a result, this jurisprudence has resembled an amoeba: discrimination was the starting point, which Congress then split into two types—lawful and unlawful. Unlawful discrimination then itself divided into two types of prohibited conduct—disparate impact and disparate treatment. Each of those cells then split, and so on. The Model Instructions abolish the distinction between two of these "cells." To see the importance of these instructions, the categories' evolution must be traced.

The first junction of Title VII case law deals with two different kinds of alleged discrimination as created by the United States Supreme Court in *International Brotherhood of Teamsters v. United States.* The Court distinguished "disparate treatment" from "disparate impact" discrimination. An employer engages in disparate impact discrimination when it adopts policies that burden protected employees more than others. An employer engages in disparate treatment discrimination when it makes individual employment decisions based on prohibited criteria.

The most common type of Title VII litigation involves disparate treatment discrimination. As the volume of this litigation increased, courts divided approaches to the applicable theory into two classes—

10. See Model Instructions, supra note 4, at 83-86 (introductory note).
12. The Court explains the two categories as follows:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

*Id.* at 335 n.15 (citations omitted).
13. For the archetypical disparate impact case, see *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971)(holding that an employer who adopts employment tests unrelated to job performance violates Title VII when those tests operate to exclude a protected class of employees).
14. For an example of disparate treatment, see *UAW v. Johnson Controls, Inc.,* 499 U.S. 187 (1991)(holding that an employer violates Title VII when it prohibits fertile women from holding certain jobs).
It is the distinction between these two claims that the Model Instructions incorrectly addresses.

A. Pretext

Under the pretext metaphor, plaintiffs argue that they were fired because of some constitutionally protected characteristic, and any other explanation offered by the employer simply is not true. These claims, defined by the seminal case of McDonnell Douglas v. Green, proceed within a three-part framework. First, plaintiffs must prove a prima facie case by establishing that (1) they are a member of a protected class; (2) they are qualified for the job; (3) they were rejected; and (4) the job remained available and was later filled by a less qualified applicant. In proving a prima facie case, the plaintiff creates a rebuttable presumption that the employer violated Title VII. The defendant must then articulate a legitimate, nondiscriminatory

16. The terms “pretext” and “mixed motive” are used more by historical accident than because of their textual accuracy. The distinction does not depend on whether single or multiple motives inspired an employment decision. Rather, the distinction ultimately hinges on the type and strength of the plaintiff's evidence of discrimination. See infra notes 30-36 and accompanying text. For an extended discussion of the semantic flaws of these terms, see Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Tex. L. Rev. 17, 23 (1991).


18. This process has been described in various colorful terms: a “minuet,” Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 291 n.5 (8th Cir. 1982), and Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229, 2232 & n.16 (1995); a “furious tennis match,” Segar v. Smith, 738 F.2d 1249, 1268 (D.C. Cir. 1984); and a game of “ping pong,” Gudel, supra note 16, at 24.

19. The term “prima facie case” can create confusion because it is used in two different ways. A “prima facie case” may mean that there is sufficient evidence to withstand a directed verdict on an issue. McCormick on Evidence § 342, at 450 n.4 (John William Strong ed., 4th ed. 1992). In the Title VII context, however, “prima facie case” means that the plaintiff has articulated enough evidence to establish a legally rebuttable presumption of discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

20. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). These elements may be adjusted to accommodate the plaintiff's allegations (failure to hire, failure to promote, etc.).

21. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)("A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."). The assumption that unexplained adverse employment action against minorities must be the result of improper discrimination has been challenged as both inaccurate and unwise. See Malamud, supra note 18, at 2254-62.
reason for the adverse employment action\textsuperscript{22} that rebuts the presumption created by the plaintiff's prima facie case.\textsuperscript{23}

Understanding the defendant's burden at this point is crucial. The defendant merely must present admissible evidence that there is a nondiscriminatory reason for its actions.\textsuperscript{24} As the Supreme Court recently made clear in \textit{St. Mary's Honor Center v. Hicks},\textsuperscript{25} however, at no time during a pretext case does a defendant have to prove it did not discriminate.\textsuperscript{26} Thus, in a pretext claim, the fact-finder can conclude that the defendant's explanation is not the true reason it acted and yet find that the employer did not violate Title VII. The Court emphasized that no authority supports imposing liability on a defendant under Title VII unless a fact-finder determines that the employer unlawfully discriminated.

Therefore, the third step of a pretext claim is the place where plaintiffs must do their real work: proving pretext. This burden may be carried in any number of common sense ways: the plaintiff may demonstrate that when making previous decisions, the employer never relied on the offered explanation;\textsuperscript{27} the employer did not offer or explain the reason to the plaintiff at the time of the action;\textsuperscript{28} or the plaintiff had superior qualifications compared to the replacement worker.\textsuperscript{29} In sum, the plaintiff must cast sufficient doubt on the defendant's legitimate nondiscriminatory reasons to allow the fact-finder to conclude that a discriminatory motive more likely than not motivated the defendant's actions.\textsuperscript{30} If the plaintiff establishes that the true reason for the employer's action was based on a statutorily pro-

\begin{quote}
\textsuperscript{22} Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-55 (1981).

\textsuperscript{23} Id. at 255.

\textsuperscript{24} Id.

\textsuperscript{25} 509 U.S. 502 (1993).

\textsuperscript{26} Id. at 519 ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."). For an extended analysis of the \textit{St. Mary's} decision, see Ronald A. Schmidt, Note, \textit{The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Center v. Hicks}, 113 S. Ct. 2742, 73 Neb. L. Rev. 953 (1994).

\textsuperscript{27} See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Corley v. Jackson Police Dep't, 566 F.2d 994, 999 (5th Cir. 1978).

\textsuperscript{28} See Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995); Lindahl v. Air Fr., 930 F.2d 1434, 1438 (9th Cir. 1991).

\textsuperscript{29} See Norris v. Hartmarx Speciality Stores, Inc., 913 F.2d 253, 255-56 (5th Cir. 1990).

\textsuperscript{30} Ruby v. Springfield R-12 Pub. Sch. Dist., 76 F.3d 909 (8th Cir. 1996)(holding that allegedly discriminatory comments are not enough to show that the employer's legitimate, nondiscriminatory reasons for terminating his employment were pretextual); Lidge-Myrtil v. Deere & Co., 49 F.3d 1308 (8th Cir. 1995)(holding that the plaintiff had no evidence to prove that the defendant's refusal to promote was pretextual and based on race).
\end{quote}
tected characteristic of the employee, the plaintiff will prevail under the pretext metaphor.

B. Mixed Motives

Mixed-motives claims are both procedurally and factually much different than pretext claims. The "mixed-motive problem" arises when the plaintiff has "direct evidence" that an illegal factor played a role in the employer's decision, yet the employer has evidence that other, legal factors also played a role in its decision. The dilemma in a mixed-motive case is not choosing whether to believe the employee's story (religion motivated the demotion) or the employer's story (insubordination motivated the demotion). The question is what to do when religion and insubordination motivated the decision.

In *Price Waterhouse v. Hopkins*, the Supreme Court held that mixed-motives claims could not be analyzed under the pretext model,

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31. In applying *Price Waterhouse* before Congress passed the Civil Rights Act of 1991, the federal courts of appeals all agreed that some heightened evidentiary showing was required to state a mixed-motive claim. The courts split, however, on exactly what kind of evidence qualified. See Michael A. Zubrensky, Note, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959, 970-79 (1994). The debate over what a plaintiff must do to shift the burden of persuasion to the defendant is beyond the scope of this Article. Nevertheless, "direct evidence" has been interpreted by the Eighth Circuit in the mixed-motive context as follows: "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude ... sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision." *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995)(quoting *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993)(ADEA case)). *See also Browning v. President Riverboat Casino-Mo., Inc.*, No. 97-1075, 1998 WL 122276, at *16-17 (8th Cir. Mar. 20, 1998).


33. The Supreme Court's holding in *Price Waterhouse* is complicated by its four separate opinions. Justice Brennan wrote the plurality opinion (writing for himself and Justices Marshall, Blackmun, and Stevens); Justices White and O'Connor concurred separately, and Justice Kennedy wrote the dissent (writing for himself, Chief Justice Rehnquist, and Justice Scalia).
but required their own metaphor. A majority of the Court agreed that it would be unfair to force the plaintiff to prove that gender was the reason the employer acted when the plaintiff already had presented direct evidence that gender was a reason the employer acted. Instead, six Justices agreed that this stronger evidence justified shifting the ultimate burden of persuasion to the defendant to prove it did not discriminate. Thus, in mixed-motives cases, unlike pretext cases, the defendant must prove it did not violate Title VII by proving "a preponderance of the evidence that it would have made the same decision even if it had not taken the [prohibited characteristic] into account."

The dissent argued that it was unfair to create a class of discrimination claims wherein "it is not the plaintiff who must prove the existence of causation, but the defendant who must prove its absence." All of the Justices agreed, however, that an employer could avoid liability altogether if it proved that it would have made the same decision under the circumstances without considering the illegal criteria.

III. CIVIL RIGHTS ACT OF 1991

As a rule, plaintiffs fare better under a Price Waterhouse analysis because the ultimate burden of persuasion rests on the defendant.

34. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989)(plurality opinion). See also id. at 260 (White, J., concurring)(stating that "mixed-motives' cases, such as the present one, are different from pretext cases"); id. at 278 (O'Connor, J., concurring)("Once all of the evidence has been received, the court should determine whether the McDonnell Douglas or Price Waterhouse framework properly applies to the evidence before it.").
35. Id. at 278 (O'Connor, J., concurring).
36. The Supreme Court disagreed about what the plaintiff had to do to "shift" the burden to the employer. The plurality stated that the burden shifted when the plaintiff showed that "gender played a motivating part in an employment decision." Id. at 250 (plurality opinion). Justice White described the burden as requiring the plaintiff to show "that the unlawful motive was a substantial factor in the adverse employment action." Id. at 259 (White, J., concurring). Justice O'Connor's view was that the plaintiff had to present direct evidence of discrimination to shift to burden. Id. at 276 (O'Connor, J., concurring). Most courts of appeals have adopted O'Connor's direct evidence formulation. Zubrensky, supra note 31.
38. Id. at 286 (Kennedy, J., dissenting).
39. Despite the splintered Court, all unanimously agreed that an employer would be relieved of all liability upon proof that the employer would have reached the same decision without discriminatory animus. See id. at 250 (plurality opinion); id. at 261 n.* (White, J., concurring); id. at 261 (O'Connor, J., concurring); id. at 282 (Kennedy, J., dissenting).
40. See id. at 291 (Kennedy, J., dissenting)(predicting that "every plaintiff is certain to ask for a Price Waterhouse instruction").
Yet, *Price Waterhouse* was viewed as a defense decision because an employer could avoid liability altogether even when the plaintiff had direct evidence of discriminatory animus. Unhappy with this aspect of *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991.

The new law made several significant revisions to Title VII, two of which impact the Eighth Circuit's Model Instructions. First, Title VII plaintiffs may now seek compensatory and punitive damages and, if they do so, either party may request a trial by jury. Second, unhappy with the result in *Price Waterhouse*, Congress changed the structure of mixed-motive disparate treatment claims. The Civil Rights Act of 1991 added § 2000e-2(m) to Title VII: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." The 1991 Act limits the relief available to plaintiffs who establish liability under § 2000e-2(m) when the employer proves that it would have made the same decision without considering the prohibited characteristic. Under § 2000e-5, a court “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment” of backpay if the employer prevails on the same-decision defense. Nevertheless, the court may award to plaintiffs declaratory relief, injunctive relief, and attorney fees and costs. Thus, the

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41. See, e.g., Margaret E. Johnson, Comment, A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases, 1993 Wis. L. Rev. 231.

42. H.R. REP. No. 102-40(I), at 45-46, 48-49 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 552 (listing that one purpose of the Civil Rights Act of 1991 was “to respond to the Supreme Court’s recent decisions by restoring federal civil rights protections against employment discrimination”).

43. In addition to the changes discussed in the text, the 1991 Amendments (1) revised the burden of proof and the business necessity defense to disparate impact discrimination claims, 42 U.S.C. § 2000e-2(k) (1994); (2) made it more difficult for nonlitigants to challenge consent decrees, *id.* § 2000e-2(n); (3) clarified and lengthened the statute of limitations on Title VII claims, *id.* § 2000e-5(e); and (4) allowed more generous attorney's fees to successful plaintiffs, *id.* § 1988(b). For an extended discussion of the Act's revisions to Title VII, see Robert Belton, The Unfinished Agenda of the Civil Rights Act of 1991, 45 Rutgers L. Rev. 921 (1993).


45. *Id.* § 1981a(c)(1).


47. Section 107 of the Civil Rights Act of 1991 is codified at 42 U.S.C. § 2000e-2(m). Since the Act has been codified, this Article will refer generally to the United States Code section (§ 2000e-2(m)), rather than the public law section (§ 107).


50. *Id.*
Civil Rights Act of 1991 allows a mixed-motive plaintiff to recover if
the defendant was motivated by prohibited characteristics in the em-
ployment decision regardless of the legitimate reasons that also justi-
fied the adverse action.52

IV. MIXING THE METAPHRORS: MODEL INSTRUCTION 5.01

The committee charged with drafting the model civil jury instruc-
tions for Eighth Circuit district courts initially anticipated little diffi-
culty in formulating appropriate model instructions for employment
discrimination cases. This was due largely to the unavailability of
jury trials in Title VII cases when the project of drafting the instruc-
tions was first undertaken.53 The Civil Rights Act of 1991, however,
with its provision for money damages and jury trials, was passed
while the Model Instructions were being formulated.54 The committee
attempted to reflect the 1991 Amendments in its suggested instruc-
tions. The result is Section Five, which contains model elements and
damages instructions in a variety of employment discrimination cases.

The committee covered claims of disparate treatment under Title
VII;55 disparate treatment under the Age Discrimination in Employ-
ment Act;56 race discrimination claims under 42 U.S.C. § 1981;57 and
discrimination by public employers under 42 U.S.C. § 1983,58 with
special treatment for First Amendment claims.59 The committee rec-
ommends giving one “mixed motive/same decision” instruction in all
employment discrimination cases.60 It views this single instruction
approach as appropriate because of the 1991 Amendments in cases
brought under Title VII61 and preferable in cases brought under the
ADEA,62 section 1981,63 and section 1983.64

51. Id. § 2000e-5(g)(2)(B)(i).
52. The 1991 Amendments essentially adopted the Eighth Circuit’s pre-Price
Waterhouse approach to mixed-motives.
53. MODEL INSTRUCTIONS, supra note 4, at 83 (introductory note).
54. Id. at 85.
55. Id. Instructions 5.00-5.05.
56. Id. Instructions 5.10-5.15.
57. Id. Instructions 5.20-5.25.
58. Id. Instructions 5.30-5.35.
59. Id. Instructions 5.71-5.75A. The Model Instructions also have reserved sections
for other employment claims. See id. Instructions 5.40-5.49 (reserved for “sexual
harassment” cases); id. Instructions 5.50-5.69 (reserved for cases under the
Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (1995)); id. at 83 (in-
troductory note)(stating that the committee intended to develop instructions for
“disparate impact” claims).
60. MODEL INSTRUCTIONS, supra note 4, at 86 (introductory note).
61. Id. at 86 n.2.
62. See id. Instruction 5.11 & cmt.; id. Instruction 5.91 & cmt. The view that the
ADEA has been left unaltered by the Civil Rights Act of 1991 is not universal.
Compare Armbruster v. Unisys Corp., 32 F.3d 768, 777 n.10, 779 n.13 (3d Cir.
1994)(analyzing ADEA as if it was modified by the Civil Rights Act), and Tyler v.
The single charge the committee proffers for use in Title VII disparate treatment claims is contained in Model Instruction 5.01:

Your verdict must be for plaintiff if all of the following elements have been proved by the preponderance of the evidence:

First, defendant discharged plaintiff; and

Second, plaintiff's sex was a motivating factor in defendant's decision.

If either of the above elements has not been proved by the preponderance of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.

The comments to Instruction 5.01 assert that "[u]nder the Civil Rights Act of 1991, . . . the plaintiff prevails on the issue of liability if he or she shows that discrimination was a 'motivating factor' in the challenged employment decision." If the defendant presents evidence that legitimate factors alone would have justified discharge, the committee recommends giving Instruction 5.01A: "If you find in favor of plaintiff under Instruction __, then you must answer the following question in the verdict form: Has it been proved by the preponderance of the evidence that defendant would have discharged plaintiff regardless of her sex?"

The committee's reading of both Price Waterhouse and the 1991 Amendments is fundamentally flawed. That misunderstanding resulted in a set of model jury charges that constitute plain error under the law of the Eighth Circuit and most other jurisdictions.

Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992)(same), with DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993)("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."). This question is beyond the scope of this Article. For an extended discussion of the issue, see Eglit, supra note 8. Because of this uncertainty, this Article rarely will cite cases brought under the ADEA, and when it does so, the cause of action is indicated parenthetically.

63. See Model Instructions, supra note 4, Instruction 5.11 & cmt.; id. Instruction 5.91 & cmt.
64. See id. Instruction 5.31 & cmt.; id. Instruction 5.91 & cmt.
65. The committee directs the court to use language that corresponds with the burden of proof instruction given. Id. Instruction 5.01, at 89 n.4.
66. This language can be modified to accommodate the plaintiff's allegations (failure to hire, failure to promote or demote). See id. at 89 n.2.
67. Id. Instruction 5.01.
68. Id. Instruction 5.01 cmt.
69. Id. Instruction 5.01A.
70. Id. Instruction 5.01A cmt.
V. WHY THE MODEL INSTRUCTIONS ARE WRONG

Initially it is clear that the committee's use of "a motivating factor" gives plaintiffs in all Title VII cases a more lenient burden. There is a world of legal difference between proving that something is "a motivating factor" and proving it is "the motivating factor." This is not an esoteric distinction; rather, it is a difference well within the common sense understanding of a juror. If a characteristic (say, insubordination) was one reason for an employment decision, the implication is that there must have been others (say, national origin) also motivating the result. For this reason, the United States Court of Appeals for the Eighth Circuit has held that the exact language used by the Model Instructions is inappropriate in pretext claims.

_Foster v. University of Arkansas_ was heard by an Eighth Circuit panel just before the 1991 Amendments went into effect. The plaintiff argued that the pretext jury instruction given at trial was erroneous because it directed the jury to find for the plaintiff if they found that "race was the determining factor in his termination." The plaintiff wanted an instruction directing the jury to find in his favor if "race was 'a determining factor,' not 'the determining factor.'" The court rejected the plaintiff's argument, concluding that "[i]f Foster [was] correct, a pretext claim would become indistinguishable from a mixed-motive claim. If race is only a determining factor, there can be others—and then, by definition the case involves mixed motives."

Similarly, in _Williams v. Fermenta Animal Health Co._, the court held that the district court's use of an instruction using the phrase "a determining factor" was in fact a mixed-motive instruction, and therefore the plaintiff could not complain that the district court had failed to give her a mixed-motive instruction. Thus, the Model Instructions' use of "a motivating factor" gives all disparate treatment plaintiffs the benefit of the more lenient mixed-motive burden. In effect, the Model Instructions abrogate the pretext metaphor.

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71. For example, say a prospective home buyer looks at a house and then discovers the structure is not insulated. That flaw (at least during a Nebraska winter) likely will be the factor motivating the buyer's decision not to purchase the house. But, what if the same house also was painted a color the purchaser did not like? Describing the lack of insulation as a factor implies that color also influenced the buyer's decision.

72. 938 F.2d 111 (8th Cir. 1991).


74. _Foster v. University of Ark._, 938 F.2d 111, 115 (8th Cir. 1991).

75. _Id._ (first emphasis in original)(other emphasis added).

76. _Id._

77. 984 F.2d 261 (8th Cir. 1993).

78. _Id._ at 265.
A second problem with the Model Instructions is its failure to recognize the legal significance of shifting the burden of persuasion, as opposed to the burden of production. In a mixed-motive case, the risk of nonpersuasion is on the defendant. The result of the Model Instructions' approach is that if a plaintiff shows the prohibited criteria was "a motivating factor" in the employment decision, apparently no matter how slight, the plaintiff will be able to place the risk of nonpersuasion on the defendant. The Supreme Court justified placing the burden of persuasion on the defendant in Price Waterhouse because mixed-motive plaintiffs were required to make a heightened showing of discriminatory purpose in mixed-motive cases. The Model Instructions ignore the heightened evidentiary showing required by the Supreme Court after Price Waterhouse as a predicate to mixed-motive treatment.

The committee attempted to justify this departure from post-Price Waterhouse case law in a number of ways. First, the committee argued that the 1991 Act was "expressly mandating a motivating factor/same decision format." The committee misconstrues the statute on this point. The legislative history of the 1991 Amendments demonstrates that Congress enacted § 107 solely to overrule the part of Price Waterhouse that allowed an employer to avoid all liability by prevailing on the causation defense. The House Report accompanying the 1991 Amendments noted that the new section "overrules one aspect of the Supreme Court's decision in Price Waterhouse." Later, the report explained that § 107 will apply "[f]or example, where two independent contributing factors, one discriminatory and the other nondiscriminatory, were present." It is clear from these reports that Congress did not see § 107 as a fundamental reorganization of all disparate treatment claims under Title VII, but as a modification of one aspect of claims brought under the mixed-motives metaphor. Congress changed only the damages available in the subclass of mixed-motive discrimination claims in which the defendant had successfully mounted a Price Waterhouse defense.

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79. See Wolff v. Brown, 128 F.3d 682, 684 (8th Cir. 1997)("Both Price Waterhouse and the new statute [i.e., the 1991 Civil Rights Act] expressly place the[ ] burden [of persuasion] on the employer.").
81. See supra note 31 and accompanying text.
82. MODEL INSTRUCTIONS, supra note 4, at 85 (introductory note).
Additional rationales offered by the committee in support of collapsing the pretext and mixed-motive metaphors focus on the practical difficulties presented by both models. The committee observed that "there would be a significant difficulty in deciding how to classify a given case" if it recognized both metaphors.\(^8\) It also cited uncertainty over what constituted direct evidence sufficient to warrant mixed-motive treatment.\(^6\) The committee expressed skepticism about the value of classifying pretext and mixed-motive discrimination based on the direct evidence distinction, complaining that plaintiffs with weaker claims might be able to produce direct evidence and thereby "be entitled to an 'easier' burden of proof . . . under the pretext/mixed-motive distinction."\(^8\) Moreover, the committee was reluctant to force district courts to decide whether a given case alleged pretext or mixed-motive discrimination because the distinction between the two metaphors "would be . . . potentially dispositive [given the] difference in the burden of persuasion contained in these [jury] instructions."\(^9\)

Some concerns identified by the committee are valid. Difficult questions of application arise when separating the mixed-motive and pretext metaphors. These difficulties, however, do not justify distorting congressional directives and ignoring binding precedent.

Furthermore, the committee itself recognizes that the mixed-motive burden of proof is "easier"\(^9\) and acknowledges that the different instructions are "potentially dispositive."\(^9\) It is difficult to understand how these concerns justify allowing all plaintiffs the more lenient mixed-motive instruction. Simply because it is difficult to separate deserving plaintiffs from undeserving ones does not justify punishing all disparate treatment defendants.

Moreover, the Model Instructions' approach creates its own set of application problems. Under this formulation, a defendant does not know if or when it will have to carry the burden of persuading a jury that it would have made the same decision even if the prohibited factor had not been considered. Case preparation and discovery is difficult for both parties since the exact theory of liability is never settled. This change is even more striking since under the new Act, even if the employer prevails on a same-decision defense, the plaintiff may still recover attorney fees and receive other relief.\(^9\) The Model Instructions also make it difficult for district courts to determine when the plaintiff has made a case under § 2000e-2(m) (and thus possibly enti-

\(^8\) Model Instructions, supra note 4, at 84 (introductory note).
\(^6\) Id. at 85.
\(^8\) Id. at 85 n.1.
\(^9\) Id. at 84.
\(^9\) Id. at 85 n.1.
\(^9\) Id. at 84.
tled only to the limited remedies of § 2000e-5(g)) or under the pretext model of discrimination (thus entitled to full damages under the 1991 Act). Congress did not anticipate this effect when passing the 1991 Amendments. Finally, and most importantly to courts and litigants in the Eighth Circuit, this is not an interpretation endorsed by the United States Court of Appeals for the Eighth Circuit or by the majority of other federal courts.

VI. APPLYING THE METAPHORS: JUDICIAL INTERPRETATIONS OF THE CIVIL RIGHTS ACT OF 1991

A. United States Supreme Court Interpretations

The United States Supreme Court, in its only consideration of the Civil Rights Act of 1991, held that the 1991 Amendments do not apply retroactively to pre-1991 conduct.93 The Landgraf case did not interpret § 2000e-2(m), yet the Supreme Court indicated that it read that provision to apply only to mixed-motive claims. The Court observed that § 2000e-2(m) "responds to Price Waterhouse . . . by setting forth standards applicable in 'mixed motive' cases."94 Thus, unlike the Model Instructions, the Supreme Court does not interpret § 2000e-2(m) as collapsing mixed-motive and pretext into one claim.

B. Interpretations by the Eighth Circuit Court of Appeals

Since the 1991 Amendments do not apply to pre-1991 conduct,95 judicial interpretation of the Amendments is just starting to emerge. The Eighth Circuit Court of Appeals has not yet directly addressed whether the mixed-motive/pretext distinction survived the 1991 Amendments.96 There are strong indications, however, that the appeals court still regards the distinction as viable. In Brown v. Polk County,97 the en banc court tacitly recognized the continuing distinction between pretext and mixed-motive discrimination. It held that

94. Id. at 251.
when a plaintiff proves that his religion was "a factor" in [the] decision to fire [him, he has] presented enough evidence to require the application of a 'mixed-motives' analysis."98

Kris v. Sprint Communications Co.99 involved a plaintiff's claim that her 1990 termination violated Title VII. The court held that the district court had erred in applying the Price Waterhouse mixed-motive rubric to the case instead of a McDonnell Douglas pretext analysis.100

In Sargent v. Paul,101 the plaintiff claimed she had presented a mixed-motive claim about which the jury should have been instructed. The court first explained the heightened evidentiary showing a plaintiff must make to qualify as a dual motivation claim:

The plaintiff is entitled to a mixed-motives analysis under Price Waterhouse if (1) the employer concedes that [gender] was a discernible factor, but not a motivating one, for the employment decision or (2) the trial court finds that a discriminatory reason was a discernible factor in the employer's decision-making process.102

The court then held that the plaintiff had failed to meet either of these predicates, and therefore was properly denied Price Waterhouse analysis.103

In Stacks v. Southwestern Bell Yellow Pages, Inc.,104 the plaintiff challenged her 1987 termination.105 In Stacks I, the court again began by observing the heavier evidentiary burden that a plaintiff must carry before being entitled to mixed-motive treatment.

A plaintiff in a gender discrimination case can proceed under two alternative theories. If the plaintiff can demonstrate that an illegitimate criterion was a motivating factor in the employment decision, the burden shifting formula set out in Price Waterhouse v. Hopkins ... is applied ... .

If the plaintiff is unable to produce evidence that directly reflects the use of an illegitimate criterion in the challenged decision, the employee may proceed under the now-familiar three-step analytical framework described in McDonnell Douglas Corp. v. Green ... .106

98. Brown v. Polk County, 37 F.3d 650, 657 (8th Cir. 1994)(citations omitted).
99. 58 F.3d 1276 (8th Cir. 1995).
100. Id. at 1281-82. The court held that the plaintiff also would not have prevailed under McDonnell Douglas. Id. at 1282-83.
101. 16 F.3d 946 (8th Cir. 1994).
102. Id. at 948.
103. Id.
104. 996 F.2d 200 (8th Cir. 1993)(per curiam), appeal after remand, 27 F.3d 1316 (8th Cir. 1994).
105. Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1319 (8th Cir. 1994).
106. Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 201-02 (8th Cir. 1993)(per curiam)(internal citations, footnotes, and quotations omitted), appeal after remand, 27 F.3d 1316 (8th Cir. 1994).
The court then held that a trial court is required to make an explicit finding as to whether a case qualified for mixed-motive analysis. The court described the distinction as "crucial" and remanded, directing the trial court to make "specific findings concerning whether [the plaintiff] had demonstrated that her gender was a motivating factor in the challenged employment decision, and, if so, whether [the defendant] met its burden to demonstrate it would have made the same decision anyway."

These cases, if nothing else, show that the Model Instructions should not be used in cases involving pre-1991 conduct. Recently, the Eighth Circuit Court of Appeals applied the mixed-motive/pretext distinction to post-1991 conduct, casting serious doubt on Model Instructions 5.01 and 5.01A in all Title VII cases. In Title VII dual-motivation cases involving post-1991 conduct, the Eighth Circuit Court of Appeals has continued to require a heightened evidentiary showing before applying the mixed-motive metaphor.


The Eighth Circuit has applied the distinction between pretext and mixed-motive claims in numerous cases brought under the ADEA since the 1991 Amendments. See, e.g., Kneibert v. Thomson Newspapers, Mich., Inc., 129 F.3d 444, 452 (8th Cir. 1997)(holding that the plaintiff was not entitled to mixed-motive analysis in his age retaliation claims because he failed to present direct evidence in support of those claims); Buchholz v. Rockwell Int'l Corp., 120 F.3d 146, 149 (8th Cir. 1997)(holding that the plaintiff was not entitled to mixed-motive jury instructions without evidence linking the discriminatory animus and the challenged decision); Bevan v. Honeywell, Inc., 118 F.3d 603, 609 n.1 (8th Cir. 1997)(stating that "it is important to recognize at the outset that we are dealing with a pretext case, not a case of mixed motives"); Berg v. Bruce, 112 F.3d 322, 328 (8th Cir. 1997)(holding that the plaintiff's failure to show direct evidence of age-based animus "is fatal to her claim that this case should be analyzed as a mixed motives case"); Ryther v. KARE 11, 108 F.3d 832, 836 n.1 (8th Cir. 1997)(en banc)("It is imperative to recognize that under the facts submitted, this is not a ... mixed-motive case ... where different rules apply"); Thomas v. First Nat'l Bank, 111 F.3d 64, 65-66 (8th Cir. 1997)(holding that plaintiffs must produce direct evidence of discriminatory intent before being entitled to Price Waterhouse analysis). Since the Model Instructions concede that the distinction between single and dual motivation instructions survives under the ADEA, the Model Instructions conform with these cases (although the Model Instructions' recommended unified standard instructions in ADEA cases clearly are incorrect). Yet, the court's careful line-drawing between mixed-motive and pretext in the ADEA context reveals its recognition that the two claims are in fact distinct and may indicate its commitment to continuing the distinction in Title VII claims.

107. Id.
108. Id.
109. Id. On appeal after remand, the court held that the plaintiff was entitled to relief on her mixed-motive claim. See Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994).
110. The Eighth Circuit has applied the distinction between pretext and mixed-motive claims in numerous cases brought under the ADEA since the 1991 Amendments. See, e.g., Kneibert v. Thomson Newspapers, Mich., Inc., 129 F.3d 444, 452 (8th Cir. 1997)(holding that the plaintiff was not entitled to mixed-motive analysis in his age retaliation claims because he failed to present direct evidence in support of those claims); Buchholz v. Rockwell Int'l Corp., 120 F.3d 146, 149 (8th Cir. 1997)(holding that the plaintiff was not entitled to mixed-motive jury instructions without evidence linking the discriminatory animus and the challenged decision); Bevan v. Honeywell, Inc., 118 F.3d 603, 609 n.1 (8th Cir. 1997)(stating that "it is important to recognize at the outset that we are dealing with a pretext case, not a case of mixed motives"); Berg v. Bruce, 112 F.3d 322, 328 (8th Cir. 1997)(holding that the plaintiff's failure to show direct evidence of age-based animus "is fatal to her claim that this case should be analyzed as a mixed motives case"); Ryther v. KARE 11, 108 F.3d 832, 836 n.1 (8th Cir. 1997)(en banc)("It is imperative to recognize that under the facts submitted, this is not a ... mixed-motive case ... where different rules apply"); Thomas v. First Nat'l Bank, 111 F.3d 64, 65-66 (8th Cir. 1997)(holding that plaintiffs must produce direct evidence of discriminatory intent before being entitled to Price Waterhouse analysis). Since the Model Instructions concede that the distinction between single and dual motivation instructions survives under the ADEA, the Model Instructions conform with these cases (although the Model Instructions' recommended unified standard instructions in ADEA cases clearly are incorrect). Yet, the court's careful line-drawing between mixed-motive and pretext in the ADEA context reveals its recognition that the two claims are in fact distinct and may indicate its commitment to continuing the distinction in Title VII claims.

111. 49 F.3d 466 (8th Cir. 1995).
summary judgment to the defendants, the plaintiff appealed, arguing that the district court should have applied the mixed-motives metaphor under *Price Waterhouse.* The court of appeals affirmed the district court's decision because the plaintiff had made no heightened evidentiary showing entitling her to mixed-motive treatment. Likewise, in *Gartman v. Gencorp Inc.*, the challenged employment decision was made in 1993. After a jury awarded the plaintiff damages under the 1991 Amendments, the defendant appealed, claiming the district court had erred as a matter of law in denying a defense motion for summary judgment. The court of appeals agreed and reversed the jury award. In doing so, the court first examined the plaintiff's evidence under the *McDonnell Douglas* framework, concluding that the defendant's pretext argument failed. The court then examined the plaintiff's claims under the *Price Waterhouse* analysis. The court found that the plaintiff could not succeed under the *Price Waterhouse* rubric either because "from this evidence a jury could not reasonably infer that a discriminatory attitude was a motivating factor" in the employment decision.

Most recently, in *Rivers-Frison v. Southeast Missouri Community Treatment Center*, the Eighth Circuit reviewed a district court's grant of summary judgement in a case alleging only post-1991 discrimination. The appeals court eschewed the terms "mixed-motive" and "pretext," relying instead on the labels "direct evidence analysis" and "indirect analysis." Nevertheless, the court held that the plaintiff's failure to present direct evidence of racial discrimination was fatal to her claims under the *Price Waterhouse* paradigm. Although the court expressly withheld comment on the impact of the 1991 Amendments to a *Price Waterhouse* claim, its holding is a clear statement that the distinction between mixed-motive and pretext theories of recovery survive the 1991 Amendments.

*Cram, Gartman, and Rivers-Frison* indicate that the Eighth Circuit Court of Appeals continues to recognize the mixed-motive metaphor as a claim separate from the pretext metaphor even after the

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112. *Id.* at 471.
113. *Id.* Interestingly, in a footnote the court claimed it was relying on cases brought under the ADEA in a Title VII mixed-motive opinion, but explained that "we turn to cases concerning both statutes for guidance." *Id.* at 471 n.6.
114. 120 F.3d 127 (8th Cir. 1997).
115. *Id.* at 129 (involving plaintiff's argument that her 1993 transfer to another plant constituted constructive discharge).
116. *Id.*
117. *Id.* at 131.
118. *Id.*
119. 133 F.3d 616 (8th Cir. 1998).
120. *Id.* at 619.
121. *Id.*
122. *Id.* at 619 n.3.
1991 Civil Rights Amendments. Thus, it is doubtful that Model Instruction 5.01 correctly states the law of the Eighth Circuit. In continuing to recognize pretext and mixed-motive claims as analytically and factually distinct, the Eighth Circuit Court of Appeals joins the majority of its sibling circuits’ interpretation of the Civil Rights Act of 1991.

C. Interpretations by Other Circuit Courts of Appeals

Only one United States Court of Appeals has read the Civil Rights Act of 1991 as merging mixed-motive and pretext discrimination claims. In O'Day v. McDonnell Douglas Helicopter Co.,123 the Ninth Circuit concluded that “Title VII rejects any such distinction [between pretext and mixed-motive cases]. Since Congress passed the 1991 Civil Rights Act, liability in mixed-motive cases is deemed established once the employee shows that a discriminatory criterion was a motivating factor only in the employer’s decision.”124 This statement was made, however, without any meaningful discussion of the statute, and in the context of deciding what standard of proof governed an employer’s use of after-acquired evidence.125 In dissent, Judge Fletcher argued that the majority had erroneously applied mixed-motive precedent to an after-acquired evidence case.126

Although the Eleventh Circuit Court of Appeals has not yet ruled on the mixed-motives/pretext distinction,127 one district court within that circuit has concluded that the two claims have been merged. In Allen v. City of Athens,128 the United States District Court for the Northern District of Alabama reasoned that “[t]he language of § 2000e-2(m) speaks in plain, unambiguous terms, and makes no distinction between direct and circumstantial evidence. All that is required to trigger liability under § 2000e-2(m) is that the plaintiff ‘demonstrate’ that discrimination was a ‘motivating factor’ in the challenged employment decision.”129 The court’s holding is somewhat

123. 79 F.3d 756 (9th Cir. 1996). O'Day is an ADEA case and as such may be unaffected by the Civil Rights Act of 1991. See supra note 62 and accompanying text. Neither the majority nor the dissent in O'Day draws this distinction. O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761 (9th Cir. 1996).
125. Id.
126. Id. at 767 (Fletcher, J., dissenting)(stating that “mixed-motive cases are not applicable in the after-acquired evidence context”).
127. But see Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1084 (11th Cir. 1996)(applying § 2000e-2(m) after the plaintiff had presented direct evidence of discrimination).
muddled, however, because immediately after reaching this conclusion, it proceeded to examine the plaintiff's case for direct evidence, and finding none, analyzed the plaintiff's evidence under McDonnell Douglas. These two jurisdictions, however, are the only federal courts that have read the Civil Rights Act of 1991 in accord with the Model Instructions' interpretation. The majority of courts have concluded that the distinction between mixed-motives and pretext discrimination claims has survived—and even has been strengthened by—the 1991 Amendments.

One of the first courts to consider the question was the Fourth Circuit. In Fuller v. Phipps, a race discrimination plaintiff appealed the trial court's refusal to give a dual motivation instruction to the jury deciding his pretext claim. He argued that § 2000e-2(m) applied in all cases, not just those in which the plaintiff had presented direct evidence of discrimination.

The court began its consideration of this argument by observing that "[t]he distinction [between mixed-motive and pretext claims] is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motive cases, and this is even more so after the Civil Rights Act of 1991." The court explained that

[the Civil Rights Act of 1991 modified the Price Waterhouse scheme, making mixed-motive treatment more favorable to plaintiffs. Under Section 107 of the Act, an employer can no longer avoid liability by proving that it would have made the same decision for nondiscriminatory reasons. Instead, liability now attaches whenever race "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).]

The Fuller court then held that § 2000e-2(m) did not entitle all Title VII plaintiffs to this more advantageous scheme, but only those who presented direct evidence of discrimination.

To earn a mixed-motive instruction in accordance with the standards set forth in Section 107, a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion. Moreover, [n]ot all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge. Otherwise, any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish the two theories.

The court when on to conclude that

131. Id. at 1544-46.
132. 67 F.3d 1137 (4th Cir. 1995).
133. Id. at 1141 (emphasis added).
134. Id. at 1142.
135. Id. (citations and internal quotations omitted).
Fuller has misconstrued the scope of Section 107 when he seeks an instruction under that provision. Section 107 was intended to benefit plaintiffs in mixed-motive cases; it has nothing to say about the analysis in pretext cases such as this one. . . . Moreover, the language of Section 107 contemplates a mixed-motive setting, specifically referring to situations in which the plaintiff demonstrates that an illicit consideration has influenced the employment decision and in which other factors may also have played a role. . . . Consequently, only those plaintiffs who satisfy the evidentiary burden entitling them to mixed-motive treatment can qualify for an instruction under Section 107.136

The Fourth Circuit is not alone. The First,137 Second,138 and Seventh139 Circuit Courts of Appeals have held that the distinction between the mixed-motives and pretext metaphors continues after the 1991 Amendments.140 In Fields v. New York State Office of Mental Retardation & Developmental Disabilities, the Second Circuit began its treatment of the issue by describing the schism between mixed-motive and pretext claims as "a distinction that underlies all Title VII cases."141 In Fields, the plaintiff contended "that the wording of section 107(a), by recognizing that an impermissible reason might be one of multiple factors for an adverse employment decision, indicates that Congress intended to treat all cases governed by the 1991 Act as dual motivation cases."142 The court flatly rejected this argument. After noting that the legislative history fails to support the sweeping reading of § 107(a) proposed by the plaintiff, the court concluded that

> [t]hough section 107(b) of the 1991 Act modifies Price Waterhouse by altering the legal consequence of a successful showing by the defendant on its affirmative defense, the Act is silent on the separate and distinct question of when this defense must be submitted to the jury . . . . The distinction between "dual motivation" and "substantial motivation" jury instructions survives the 1991 Act.143

The weight of authority, including decisions in the Eighth Circuit, supports the conclusion that there is a difference between mixed-motive and pretext discrimination claims. By failing to recognize these

136. Id. at 1143-44 (internal citations omitted)(emphasis added).
137. See Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 750 & n.5 (1st Cir. 1996); Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 938 (1st Cir. 1995).
139. See Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1350 (7th Cir. 1995).
140. The United States Court of Appeals for the Fifth Circuit has reserved ruling on this question. See Portis v. First Nat'l Bank, 34 F.3d 325, 331 n.12 (5th Cir. 1994). The Third Circuit also has expressly left open the question whether a "determinative factor" instruction should be given in a pretext case after the 1991 Act. Hook v. Ernst & Young, 28 F.3d 366, 368, 371 (3d Cir. 1994). It has indicated, however, an initial disposition to eliminate the distinction between mixed-motive and pretext discrimination. See Woodson v. Scott Paper Co., 109 F.3d 913, 935 n.29 (3d Cir. 1997).
141. 115 F.3d 116, 119 (2d Cir. 1997).
142. Id. at 123.
143. Id. at 124 (citations and footnotes omitted).
differences, the Model Instructions fail to accurately state the law of the Eighth Circuit as well as most other circuits.

VII. RESTORING THE PRETEXT METAPHOR

By now it should be clear that Model Instruction 5.01 simply fails to accurately state the law of the Eighth Circuit. Nonetheless, many of the concerns used by the committee to justify its failure to draft separate instructions for each metaphor are legitimate. Fortunately, careful analysis of the 1991 Amendments avoids the problems identified by the committee while still maintaining the balance between mixed-motive and pretext plaintiffs.

The solution lies in Congress' express limitation of the remedies available under the modified mixed-motive metaphor. Section 2000e-5(g)(2)(B) allows the court to grant declaratory relief, injunctive relief, and attorney's fees and costs if the defendant makes a same-decision defense.144 These remedies are all equitable and therefore within the power of the court alone.145 When a plaintiff seeks both legal and equitable remedies, the jury serves as the fact-finder for all common issues of fact, but does not render a verdict on the equitable issues.146 The judge then rules on the equitable claims, but is bound by the jury's determinations regarding common issues of fact.147

So the practical effect of § 2000e-5(g)(2)(B) is that the jury does not have to be instructed on a § 2000e-2(m) claim at all. Plaintiffs normally will not seek only declaratory relief and attorney fees; instead, they will seek the full scope of relief available under the 1991 Amendments. Thus, the jury should be instructed that the prohibited characteristic must be proven as the motivating factor for the employment decision. A formula jury charge could read as follows:

Your verdict must be for plaintiff on her gender discrimination claim if all the following elements have been proved by the preponderance of the evidence:
First, defendant discharged plaintiff; and
Second, plaintiff's gender was the determining factor in defendant's decision.
You may find gender was the determining factor if you find that defendant's stated reasons for its decision are not the true reasons but are a pretext to hide discriminatory motivation. If any of the above elements have not been proved by the greater weight of the evidence, your verdict must be for defendant.

This instruction, or one like it, properly focuses the jury on the question of the real reason for the adverse employment action, which is the ultimate question in a pretext claim.148

147. See Brownlee v. Yellow Freight Sys., Inc., 921 F.2d 745, 749 (8th Cir. 1990).
If the jury returns a verdict for the defendant, the plaintiff can still prevail on a § 2000e-2(m) claim. The court would analyze this claim separately, first examining the plaintiff's submissions to see if she meets the heightened showing required for mixed-motive treatment. If so, the court sitting in equity would have to determine whether the plaintiff had established that the prohibited characteristic was a motivating factor, even if it was not the motivating factor. The court then must determine whether the defendant successfully established that it would have made the same decision even without considering the prohibited characteristic. If the employer fails to carry the burden of persuasion on this issue, the court could grant appropriate relief under the 1991 Amendments. If the employer successfully proves this same-decision defense, the court still could award the equitable remedies provided in § 2000e-5(g)(2)(B)(i).

This reading of the Act has several advantages. First, the district court need not determine before a jury trial whether the plaintiff has adduced direct evidence of discrimination. It thus allays the committee's concern that the district court's pretrial evidentiary analysis would determine the outcome before a jury is even impaneled. Second, separate jury instructions attempting to articulate the different burdens of persuasion in the mixed-motive and pretext metaphors are unnecessary. Since the equitable claims are determined by the court, there is no reason to instruct the jury about them. Third, consistent with the congressional mandate, plaintiffs with evidence of discriminatory animus but without evidence of causation can still recover the limited remedies prescribed by § 2000e-5(g)(2)(B)(i), and district courts will maintain the required discretionary control over this relief. Finally, consistent with Supreme Court and Eighth Circuit precedent, the two metaphors for disparate treatment discrimination, with their different burden-shifting approaches, remain distinct.

VIII. CONCLUSION

Standardized forms like the Model Instructions are useful tools for both courts and counsel. Pattern instructions, however, are no substitute for careful legal research and analysis. Particularly in rapidly evolving areas of the law—like employment discrimination—any standardized articulation of the law requires careful scrutiny.

By reviewing the disparate treatment metaphors of pretext and mixed-motive discrimination, examining the Model Instructions' pattern charge for Title VII disparate treatment claims, and comparing that charge to the law of the Eighth Circuit Court of Appeals, this Article demonstrates that Model Instruction 5.01 fails to accurately reflect the law of the Eighth Circuit. At the least, trial courts and counsel should no longer use Model Instruction 5.01 in Title VII disparate treatment cases.
This Article also offers an alternative interpretation of the Civil Rights Act of 1991. This construction of the Act addresses the committee's practical concerns, while remaining faithful to precedent and congressional intent by recognizing the continuing distinction between pretext and mixed-motive claims.

Although the rising tide of employment discrimination litigation is not likely to ebb soon, careful analysis by courts and counsel can insure that juries deciding Title VII claims are properly instructed on the plaintiff's claims. This modification may not stem the tide of employment cases faced by district courts of the Eighth Circuit, but it at least will assure that these courts do not face an additional wave of cases requiring retrial for proper jury instructions.