AFTER *PRICE WATERHOUSE* AND THE CIVIL RIGHTS ACT OF 1991: PROVIDING ATTORNEY'S FEES TO PLAINTIFFS IN MIXED MOTIVE AGE DISCRIMINATION CASES

Nancy L. Lane

The Civil Rights Act of 1991 (CRA) reaffirmed the congressional commitment to oppose discrimination in the workplace. Section 107 of the CRA directly overrules the Supreme Court's decision in Price Waterhouse v. Hopkins *which denied an award of attorney's fees to an employee plaintiff who proved that her employer considered illegitimate factors in making an employment decision.* Price Waterhouse *is a mixed motive sex discrimination case brought under Title VII of the Civil Rights Act of 1964.*

Age Discrimination in Employment Act (ADEA) case law has traditionally followed the judicial model provided by Title VII. Ms. Lane argues that following the Price Waterhouse *model in age discrimination suits would undermine the objective of eliminating age-based discrimination in the workplace—the ADEA's primary goal. In order to achieve the aims of the ADEA, it is imperative that courts grant attorney's fees to plaintiffs who prove their employers improperly consider age in making employment decisions.*

The ADEA remedial structure is designed to compensate victims of age discrimination and to deter employers from such discrimination. The award of attorney's fees is consistent with the congressional and societal interest in eliminating age-based employment discrimination. The ADEA's statutory language and legislative history supports a liberal construction of its remedial provisions to realize its compensatory and social policy purposes. Thus, because Price Waterhouse *allows an employer to avoid liability—and attorney's fees—when it considers impermissible factors in an employment decision, it should not be followed in ADEA suits.*

I. Introduction

With the passage of the Civil Rights Act of 1991[1] (CRA), Congress reaffirmed its commitment to fight employment discrimination and to promote the important social interest furthered by employment discrimination litigation. The CRA illuminated the conflict between the liberal construction of civil rights legislation intended by Congress and the Supreme Court's parsimonious interpretation of those statutes during the past twenty years. In passing the CRA, Congress directly overruled four Supreme Court cases interpreting employment discrimination statutes, signaling its disapproval of the Supreme Court's position.[2]

One of the provisions of the CRA directly addressed the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[3] a *mixed motive*[4] case brought under Title VII of the Civil Rights Act of 1964[5] (Title VII). To the extent that *Price Waterhouse* denied attorney's fees to a plaintiff who proved that an employer improperly considered a proscribed factor in reaching an employment decision,[6] it was specifically overruled by section 107 of the CRA. Section 107[7] provides limited remedies, including attorney's fees, when a plaintiff proves that an

1. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075 (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)).

2. See M. DeSales Linton & Elliot M. Mincberg, *The Civil Rights Act of 1991: A Section-by-Section Analysis*, 26 CLEARINGHOUSE REV. 1317 (1993), for a brief overview of the Act. The Civil Rights Act of 1991 reversed Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (severely limiting the range of § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981); Wards Cove Packing v. Atonio, 490 U.S. 642 (1989) (shifting the burden of proving business necessity of a discriminatory policy to the employee and establishing barriers to proving claims of disparate impact discrimination); EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (holding that Title VII and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-213, did not cover U.S. citizens employed overseas); and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that an employer is not liable under Title VII when he can prove that permissible factors also motivated a discriminatory employment decision).

3. 490 U.S. 228 (1989).

4. A mixed motive case is one in which the employer is motivated by both permissible and impermissible factors in making an employment decision. *Id.* at 232.

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-17 (1988).

6. *Price Waterhouse* held that an employer who is motivated by both permissible and impermissible factors (under Title VII) does not violate Title VII. *Price Waterhouse*, 490 U.S. at 258. Because Title VII awards attorney's fees only to prevailing plaintiffs, 42 U.S.C. § 2000e-5(k), the plaintiff will be denied attorney's fees.

7. Pub. L. No. 102-166, § 1071, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-5 (Supp. 1993)).

employer used illegitimate as well as legitimate factors in its employment decision.

Section 107 of the CRA neither specifically mentions the Age Discrimination in Employment Act (ADEA)[8] nor lists age as an impermissible factor subject to the provisions of the section.[9] Section 107 overruled the denial of attorney's fees in the *Price Waterhouse* mixed motive case, but *Price Waterhouse* is a Title VII case and does not discuss the case's applicability to ADEA. As a result, section 107 seems to be limited to cases brought under Title VII. Nevertheless, ADEA case law has historically paralleled Title VII case law.

This note will explore whether judicial application of the *Price Waterhouse* mixed motive analysis to age discrimination cases requires denying a plaintiff attorney's fees or whether authority would support the award of attorney's fees in a mixed motive age discrimination case. Part II will describe the background of the ADEA and its genesis as a hybrid of Title VII and the Fair Labor Standards Act (FLSA).[10] It will discuss the history of attorney's fees in civil rights litigation, with particular emphasis on their role as a tool for effectuating the ADEA's policy. Part III reviews the current judicial and legislative treatment of mixed motive cases. Part III will also analyze the Supreme Court's recent approach to statutory interpretation which has undermined the congressional purpose of civil rights legislation in general and of the ADEA in particular. Part IV will discuss the judicial treatment of mixed motive cases brought under the ADEA using the *Price Waterhouse* model which denies plaintiff attorney's fees, and alternatives that may support attorney's fees awards in mixed motive cases.

The tension between Congress's intent in promulgating civil rights statutes and the Supreme Court's narrow reading of the statutes may be played out again in ADEA mixed motive cases. Judicial reliance on the *Price Waterhouse* model to analyze mixed motive age discrimination claims would be consistent with the Supreme Court's pattern of undermining employment discrimination protection. Unless the CRA model, with its limited remedies, can be applied to mixed motive suits brought under the ADEA, an older victim of employment discrimination will be at a decided disadvantage in pursuing an employment discrimination claim.

---

8. 29 U.S.C. §§ 621-34 (1984).
9. Pub. L. No. 102-166, § 107, 105 Stat. 1071.
10. 29 U.S.C. §§ 201-16, 217-19, 557 (1988).

II. Background

A. The Age Discrimination in Employment Act of 1967

1. HISTORY AND PURPOSE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Congress passed the Age Discrimination in Employment Act of 1967[11] during the civil rights movement in the 1960s.[12] Prior to its passage, age had been considered, along with race and sex, as a possible protected class under Title VII of the Civil Rights Act of 1964.[13] The attempt to include age as a protected class under Title VII was unsuccessful, partly due to the nature of age discrimination, which was perceived to be substantially different in quality than the other protected classes.[14] Nevertheless, as part of Title VII, Congress ordered the Secretary of Labor to study the issue of age discrimination.[15] In 1966, the Secretary presented proposals for legislation prohibiting age discrimination. This led directly to enactment of the ADEA in 1967.[16]

Although it is not the first legislative effort to protect the rights of older people,[17] the ADEA is the most comprehensive. It has both a remedial goal to compensate age discrimination victims and a broad

---

11. 29 U.S.C. §§ 621-34 (1984).

12. The ADEA was an "outgrowth of the civil rights legislation that started with the Equal Pay Act of 1963, followed by Title VII of the Civil Rights Act of 1964." JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1 (1986).

13. Members of Congress believed that there was insufficient information available to make a considered judgment about the nature of age discrimination. 110 CONG. REC. 2596-99, 9911-13, 13490-92 (1964).

14.

> Racial bigotry . . . often is generated by hatred or fear. Ill will is a component of racism. In contrast, discrimination based on age is much less emotionally charged. Ageism typically is not grounded on the perpetrator's dislike of old people generally; rather, age discrimination in most instances is the product of ignorance—the expression of an employer's ill-founded notions about the competency of older workers.

Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception*, 66 B.U. L. REV. 155, 220 (1986) (describing the 1965 report by the Secretary of Labor, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT ACT (1965), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16-41 (1981)).

15. *See* Civil Rights Act of 1964, tit. VII, § 715, 78 Stat. 265 (superseded by § 10 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111 (current version at 42 U.S.C. § 2000e-14 (1970))).

16. KALET, *supra* note 12, at 2.

17. *Id.* at 1; *see also* Eglit, *supra* note 14, at 160 n.14 (stating that efforts to prohibit age discrimination by federal statute date back to the 1950s).

social policy goal to eliminate arbitrary age discrimination in society. The ADEA prohibits discrimination across a broad range of employment activities, including hiring, discharges, decisions regarding compensation, terms, conditions, and privileges of employment, job classifications, job referrals, and exclusion from union membership.[18] In its statement of findings and purpose, Congress stated that the ADEA is intended to "promote the employment of older workers based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[19]

2. THE STRUCTURE OF THE ADEA

The ADEA relies on both Title VII[20] and the FLSA[21] for its structure. Title VII provides the ADEA's substantive structure while the FLSA provides the ADEA's remedies and procedures.

a. The ADEA and Title VII The ADEA's drafters intended to grant age the same status as a protected class that Title VII grants to sex and race.[22] However, the different characteristics of race, sex, religion, and national origin on the one hand, and age on the other,[23] have resulted in some differences between the statutes.

---

18. Eglit, *supra* note 14, at 161.
19. 29 U.S.C. § 621(b) (1988).
20. 42 U.S.C. § 2000e-5, 2000e-17 (1988).
21. 29 U.S.C. §§ 201-16, 217-19, 557 (1988).
22. KALET, *supra* note 12, at 2.
23. Then-Secretary of Labor Wirtz described the origin of age discrimination as distinct from other forms of discrimination, stating that age discrimination develops because of oversight, lack of common sense, and lack of recognition given to the capacity of an older person, whereas racial discrimination is rooted in bigotry. *Hearings on the Age Discrimination in Employment Act of 1967 Before the Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 6 (1967) (statement of Willard Wirtz). The ADEA's legislative history affirms Congress's recognition that discrimination based on age differs from discrimination based on sex or race. "Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry." 113 CONG. REC. 34,742 (1967) (statement of Rep. Burke).

The judiciary has also recognized these differences in, for example, modifying a plaintiff's burden in establishing a prima facie case. KALET, *supra* note 12, at 60; *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (stating that "[W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."); Rod-

The difference between discrimination based on age versus discrimination based on Title VII classifications is a recurring theme. Title VII makes unlawful all discrimination based on the factors listed in the statute.[24] However, rather than condemning *all* discrimination based on age, Congress viewed the ADEA as directed at the *arbitrary* use of age as a proxy for lack of ability.[25] In addition, Congress stated in the ADEA that it is not unlawful for employers to differentiate "based on reasonable factors other than age."[26] Although this distinction is implicit in the statute, its express inclusion in the ADEA "highlight[s] [Congress's] concern that older workers be evaluated objectively on the basis of their performance."[27] It is equally clear that Congress did not intend the ADEA to provide a general remedy for unemployment among older workers.

Nevertheless, Title VII's substantive provisions and proof considerations were followed extensively when the ADEA was drafted,[28] and the Supreme Court has recognized the resulting similarity between the two statutes. In *Lorillard v. Pons*,[29] the Court stated, "[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions."[30] In *Oscar Mayer & Co. v. Evans*,[31] the Court observed that the prohibitions of the ADEA were derived *in*

---

riguez v. Taylor, 569 F.2d 1231, 1236-37 (3d Cir. 1977) (stating that "[a]ge concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts.").

24. 42 U.S.C. § 2000e (1988). Title VII prohibits employers from making employment decisions because of an individual's race, color, religion, sex, or national origin.

25. The ADEA's statement of findings and purpose mentions the problems of "arbitrary age limits regardless of potential for job performance" and the need "to promote employment of older persons based on their ability rather than age." 29 U.S.C. §§ 621(a)-(b) (1988).

26. *Id.* § 623(f)(1).

27. Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1399 (3d Cir. 1984).

28. KALET, *supra* note 12, at 2. Title VII already had an established framework for enforcing the prohibition on employment discrimination. *Id.*

29. 434 U.S. 575 (1978) (an ADEA case concerning jury trial availability in actions for back pay).

30. *Id.* at 584.

31. 441 U.S. 750 (1979) (an ADEA case holding that failure to file a timely charge in a deferral state is not fatal to an ADEA action).

haec verba from Title VII.[32] As a result, courts rely heavily on judicial treatment of Title VII to interpret cases brought under the ADEA.[33]

b. The ADEA and the FLSA Although the ADEA's substantive provisions are patterned after Title VII, the ADEA follows the enforcement and remedial provisions of the Fair Labor Standards Act.[34] The Supreme Court recognized the importance of the FLSA's remedial provisions in *Lorillard*, in which the Court stated that remedies under the ADEA include those identified in existing interpretations of FLSA violations.[35]

Section 7(b) of the ADEA[36] explicitly incorporates section 11(b) and part of section 16 of the FLSA.[37] Section 7(b) authorizes a private suit for unpaid wages and an equal amount in liquidated damages and authorizes the Secretary of Labor to sue for injunctive relief, as well as the unpaid wages and liquidated damages. Section 7(b) of the ADEA[38] also authorizes "legal or equitable relief" to effectuate the

---

32. *Id.* at 755.

33. "The ADEA was patterned after Title VII . . . . The seventh circuit has held that ADEA claims should be analyzed the same way Title VII claims are analyzed, with the only difference being that protected plaintiffs are classified according to age rather than race, color, religion, gender, or national origin." Hinton v. Board of Trustees, 53 F.E.P. 1475, 1481 (N.D. Ill. 1990) (citing Golomb v. Prudential Ins. Co. of Am., 688 F.2d 547, 551 (7th Cir. 1982)); *see* Fields v. Clark Univ., 817 F.2d 931, 934 n.1 (1st Cir. 1987) (stating that "the *McDonnell Douglas* test is followed to the same extent under [the ADEA] as under [Title VII]."); *see also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (holding an interpretation of Title VII applies "with equal force in the context of age discrimination").

34. KALET, *supra* note 12, at 43. Senator Jacob Javits, one of the bill's floor managers, described the enforcement section that became part of the ADEA as follows: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 CONG. REC. 31254-55 (1967). "[T]he absence of a full remedial scheme in Title VII, apparently for political reasons, required the drafters to look elsewhere." KALET, *supra* note 12, at 89.

35. Lorillard v. Pons, 434 U.S. 575, 581-83 (1978).

36. 29 U.S.C. § 626(b) (1988). This section reads in part:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection a thereof), and 217 of this title, and subsection (c) of this section . . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . .

Id.

37. 29 U.S.C. §§ 211(b), 216(b)-(e) (1988 & Supp. 1991).

38. 29 U.S.C. § 626(c)(1) (1988). This section states, "[a]ny aggrieved person may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Chapter." *Id.*

Act's purposes.[39] The only limit placed on relief available under the ADEA is that the remedy be consistent with the ADEA's purposes.[40]

Furthermore, the FLSA, as incorporated in section 7(b) of the ADEA, expressly requires that attorney's fees shall be granted to successful plaintiffs.[41] This provision makes attorney's fees mandatory for successful plaintiffs in suits brought under the ADEA.

While recognizing that the FLSA provides the basic remedial framework for the ADEA, the judiciary acknowledges that the ADEA authorizes remedies not found in the FLSA.[42] The authority provided by the ADEA's broad grant of "legal and equitable relief" is clearly in addition to the remedial scheme provided by the FLSA[43] and is without limitation except to effectuate the ADEA's purposes.[44]

With both Title VII and the FLSA as models for the ADEA, Congress's final legislation is a "hybrid [statute], reflecting, on the one hand, Congress' desire to use an existing statutory scheme [Title VII] and a bureaucracy [provided by the FLSA] with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes."[45]

Congress has amended the ADEA several times, sometimes to reflect new policy and circumstances,[46] but more often to clarify the Act for the judicial system.[47] The need to amend the ADEA will undoubtedly continue in light of the divergent views of Congress and the judiciary.

---

39. *Lorillard*, 434 U.S. at 581-83.

40. *Id.*

41. 29 U.S.C. § 216(b). This section reads in part, "[t]he court in such action [against an employer violating the Act] *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id.* (emphasis added).

42. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard*, 434 U.S. at 581.

43. EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984).

44. *Id.* "When we read this section [29 U.S.C. § 626(b)] as a whole and construe it liberally, as we must, . . . we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA, so long as the relief is 'appropriate to effectuate the purposes of [the Act].'" *Id.* (citation omitted) (quoting 29 U.S.C. § 626(b)).

45. *Lorillard*, 434 U.S. at 578.

46. KALET, *supra* note 12, at 11.

47. *See* Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1099 (1993) (discussing congressional overruling of the Supreme Court's decisions concerning employment discrimination).

B. Attorney's Fees

The importance of attorney's fees in age discrimination litigation cannot be overstated. Without an attorney's aid, civil rights violations will often go unchallenged, and discrimination victims will very likely receive no relief.[48] The award of attorney's fees to an elderly plaintiff helps achieve both the ADEA's compensatory goal and the social policy goal of eliminating arbitrary age discrimination.

1. ATTORNEY'S FEES UNDER THE COMMON LAW

The United States judicial system is characterized by the "American Rule," which provides that each party to a lawsuit will normally pay his or her own attorney's fees, regardless of the suit's resolution.[49] Although the American Rule is firmly established,[50] there are exceptions to the rule. Generally, the circumstances under which fee shifting may occur fall into three categories: bad faith litigation, fee shifting by contract, and "public rights" litigation.[51] The last category has been called the private attorney general doctrine. This doctrine customarily allows the plaintiff to recover attorney's fees when the plaintiff has vindicated a "right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."[52] The private attorney general doctrine forms the basis for fee shifting in civil rights cases, such as employment discrimination suits.

The common-law private attorney general doctrine allows parties to shift attorney's fees "when the interests of justice so require."[53] Historically, the doctrine has been very important in civil rights litigation for several reasons. First, the rights being litigated have great societal importance. Second, because civil rights plaintiffs often are

48. David Schub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 706 (1992).

49. Daniel L. Lowery, *"Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1441, 1442 (1993).

50. In a proposed act called the Common Sense Legal Reform Act, Congress is currently considering abandoning the American Rule in favor of a system in which the losing party pays the attorney's fees of the winning party. The Common Sense Legal Reform Act is part of the GOP's Contract with America. Tony Mauro, *Contract with America—The Common Sense Legal Reform Act*, USA TODAY, Nov. 17, 1994, at 10A.

51. *See* MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 733-46 (3d ed. 1990).

52. Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1929 (1985).

53. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 272 (1975) (Marshall, J., dissenting).

not in a financial position to pursue an employment discrimination suit, including attorney's fees in the recovery gives attorneys an incentive to represent these plaintiffs. Violations often involve lower-income plaintiffs who would be unable to seek judicial relief if they had to pay attorney's fees from their own funds.[54] Third, the deterrent effect of an attorney's fees award provides an effective tool for discouraging civil rights violations.

Age discrimination in employment typifies an area where the private attorney general doctrine is especially appropriate. The employee's right to be evaluated based on ability, rather than age, is important to society. Furthermore, older employees frequently are not in a financial position to hire an attorney to oppose discriminatory treatment by an employer. Finally, it is generally recognized that requiring an employer to pay for the enforcement of an individual's civil rights acts as a deterrent to further violations.[55] Congress and the judiciary have both recognized the compelling role of attorney's fees in this context.

Prior to 1975, courts often employed the common-law private attorney general doctrine to shift fees in civil rights litigation and other public litigation.[56] The Supreme Court recognized the doctrine's importance in *Newman v. Piggie Park Enterprises, Inc.*,[57] stating that where a plaintiff obtains relief under Title II, "he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[58]

---

54. Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 299 (1990). Claimants often request injunctive relief or might be awarded only nominal damages, therefore, courts often award plaintiffs no monetary damages from which attorneys might receive compensation. *Id.*

55. *Id.*

56. Lowery, *supra* note 49, at 1444; *see, e.g.*, Fowler v. Schwarzwalder, 498 F.2d 143, 146 (8th Cir. 1974) (ordering the district court to employ private attorney general doctrine to determine whether fees should be awarded to the plaintiff); Cornist v. Richland Parish Sch. Bd., 495 F.2d 189, 192 (5th Cir. 1974) (upholding the district court's finding that plaintiff was entitled to fees under the private attorney general doctrine); Hoitt v. Vitek, 495 F.2d 219, 220-21 (1st Cir. 1974) (holding that "[a]ppropriate bases for fee awards include statutory authority for such grants, the desire to encourage settlement of cases, punishment of a losing party for misconduct or bad faith, and as here to encourage important policy enforcement through 'private attorneys general.' ").

57. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam) (holding that a plaintiff who obtains an injunction under Title II should ordinarily recover attorney's fees).

58. *Id.* at 402.

In 1975, however, judicial discretion to shift attorney's fees was severely undercut when the Supreme Court explicitly disapproved the common-law private attorney general doctrine. In *Alyeska Pipeline Service Co. v. Wilderness Society*,[59] the Court held that it would no longer recognize a common-law doctrine that public policy may suggest fee shifting "to permit meaningful private enforcement of protected rights with a significant public impact."[60] The Court claimed to be deferring to Congress in the area of attorney's fees awards when it disapproved further use of common-law fee shifting based on the private attorney general doctrine.[61]

After *Alyeska*, fee shifting was allowed only when expressly provided for by federal statute or under the "bad faith" exception to the American Rule. The bad faith exception gives courts discretion to order a party who has litigated unfairly to pay the other party's attorney's fees.[62]

2. STATUTORY AUTHORIZATION OF ATTORNEY'S FEES AND THE JUDICIAL RESPONSE

After rejecting the private attorney general doctrine in *Alyeska*, the Supreme Court requested that Congress clarify for the courts when fee shifting ought to be judicially enforced.[63] Congress has long recognized the importance of attorney's fees as a tool for fighting civil rights discrimination[64] and quickly perceived the consequences of the

---

59. Alyeska v. Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Plaintiffs sought to enjoin the government from issuing permits for constructing an oil pipeline in violation of federal environmental statutes; the Court rejected the "private attorney general" basis for recovering attorney's fees. *Id.* at 242-43, 263-68.

60. *Id.* at 283 (Marshall, J., dissenting).

61. The Court stated the matter of attorney's fees was within the province of Congress, apparently choosing to ignore the fact that the American Rule was judicially created. *Id.* at 262-64.

62. Rochelle C. Dreyfuss, Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 349 n.22 (1980).

63. *Alyeska*, 421 U.S. at 262-64.

64. As a sponsor of the Fees Act, United States Senator Tunney promoted the use of attorney's fees as a remedy, saying:

> The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16. Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.

Court's ruling. Following *Alyeska*, Congress immediately acted to reinstate the private attorney general doctrine by passing the Civil Rights Attorney's Fees Awards Act of 1976[65] (Fees Act). The Fees Act had one overriding goal: "to promote compliance with civil rights legislation by enabling citizens to bring civil rights claims and by encouraging attorneys to accept such cases."[66] The Fees Act was intended to allow fee shifting as it had occurred prior to the Supreme Court's decision in *Alyeska*, consistent with existing fee-shifting statutes.[67]

The ADEA expressly provides attorney's fees to prevailing plaintiffs.[68] Nevertheless, the Fees Act is relevant to the ADEA because of a Supreme Court ruling involving the interpretation of "prevailing." In *Hensley v. Eckerhart*,[69] the Supreme Court stated, "the standards [defining prevailing] set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "[70] Because Congress authorized attorney's fees for prevailing plaintiffs under the ADEA, the Fees Act definition of prevailing plaintiff, as interpreted by the Supreme Court, applies to the ADEA.[71] In *Hensley*, the Supreme Court went on to describe a prevailing plaintiff as one who has "succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[72] This meant a plaintiff could be awarded partial attorney's fees for "prevailing" on only part of the suit. Therefore, partial attorney's fees may be awarded to a plaintiff who succeeds on some but not all claims in an age discrimination suit.

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUB. L. 94-559, S. 2278) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 9 (Comm. Print 1976); *see* Lowery, *supra* note 49, at 1444.

65. 42 U.S.C. § 1988 (1976).

66. Lowery, *supra* note 49, at 1446.

67. *Id.*

68. 29 U.S.C. § 626(b) (1988). This section incorporates the FLSA's remedial provisions on fee shifting into the ADEA.

69. Hensley v. Eckerhart, 461 U.S. 424 (1983). Plaintiffs successfully challenged the constitutionality of the treatment and conditions of persons involuntarily confined in the forensic unit of a Missouri state hospital; the Court held that a plaintiff who wins substantial relief should recover some attorney's fees even though the plaintiffs did not prevail on *every* claim. *Id.* at 440.

70. *Id.* at 433 n.7.

71. *See* KALET, *supra* note 12, at 114.

72. *Hensley*, 461 U.S. at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

Subsequent Supreme Court decisions have narrowed the meaning of prevailing plaintiff, again undercutting the effectiveness of the ADEA and other civil rights statutes.[73] In *Hewitt v. Helms*,[74] the Supreme Court held that although a formal judgment was not necessary for a plaintiff to "prevail," the judicial process must cause the defendant to alter his behavior toward the plaintiff in some way that results in significant private relief for the plaintiff, such as paying damages, specific performance, or termination of inappropriate conduct.[75] Thus, declaratory judgments and judicial statements alone are not sufficient to indicate that a plaintiff has prevailed without some additional action by the defendant.[76]

In 1989, the Supreme Court created yet another test for determining whether the plaintiff prevailed.[77] The "legal relationship" test requires that a plaintiff "be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant,"[78] although the Court did not require that the lawsuit's central issue be resolved in favor of the plaintiff.

The most recent decision by the Supreme Court combines the two prior tests into one. In *Farrar v. Hobby*,[79] the Court stated that a plaintiff would prevail under the Fees Act "when actual relief on the merits of his claim materially alters the legal relationship between the

---

73. Lowery, *supra* note 49, at 1447. The Supreme Court has consistently contradicted Congress's specific intent to extend existing fee-shifting provisions to all civil rights legislation. According to legislative history, a "prevailing party" may include a plaintiff involved in a case when a final judgment on the merits had not been reached, when a consent decree was issued, when a case was settled out of court, when a defendant discontinued an illegal practice after a complaint was filed, or when a plaintiff successfully brought a class action suit, whether the individual plaintiff received any direct benefit, and when no formal equitable relief was given. *Id.* at 1446-47.

74. 482 U.S. 755 (1983). The plaintiff, a state prison inmate, successfully challenged a misconduct conviction on due process grounds. By the time of the decision, however, the plaintiff had already been released. Because the plaintiff received no relief, he was not a "prevailing party" for the purposes of attorney's fees. The Court held specifically that (1) a plaintiff seeking vindication for a violation of his rights under 42 U.S.C. § 1983 was not a prevailing plaintiff when he was unable to obtain damages, and (2) although the defendant subsequently changed the contested policy, the plaintiff was not a "catalyst" for the change. *Id.*

75. "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow is not a judgment, but some action (or cessation of action) by the defendant that the judgment produces." *Id.* at 761.

76. *Id.* at 761-63.

77. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989).

78. *Id.* at 792.

79. 113 S. Ct. 566 (1992).

parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[80] As a result of this ruling, a declaratory judgment or an award of nominal damages may not be sufficient to qualify a plaintiff for attorney's fees under the Fees Act. Even though the Court in *Farrar* stated that the plaintiff would technically "prevail" under those circumstances, the tangible relief was considered insufficient to merit an attorney's fees award.[81]

As a result of the Supreme Court's inclusive language in *Hensley*, these cases apply in age discrimination cases to determine when a plaintiff "prevails" under the ADEA. The effect of these cases has been to reduce the number of circumstances in which a plaintiff may recover attorney's fees, thus making it more difficult for a plaintiff to pursue an age discrimination claim.

3. COMPARING ATTORNEY'S FEES UNDER THE ADEA AND OTHER STATUTES

The language in the ADEA addressing attorney's fees differs significantly from the language in Title VII or in the Fees Act. The language of the ADEA provides mandatory attorney's fees for successful plaintiffs.[82] In contrast, the language in the Fees Act and in Title VII gives courts discretion to award attorney's fees to prevailing parties.[83]

Title VII also expressly allows an award of attorney's fees to defendants if the plaintiff 's litigation is found to be "frivolous, unreasonable, or without foundation," even though the plaintiff may have prosecuted the suit in good faith.[84] The ADEA makes no provision for frivolous or bad faith litigation, but the inherent power of the courts has been used to grant attorney's fees awards to defendants when plaintiffs prosecuted in bad faith.[85]

Finally, unlike Title VII, the ADEA does not provide a successful plaintiff the right to recover attorney's fees from a federal employer.

---

80. *Id.* at 573.

81. *Id.*

82. 29 U.S.C. § 216(b) (1988) states: "The court in such action shall, in addition to any judgement awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant."

83. Both Title VII and the Fees Act state: "[T]he court, in its discretion, *may allow* the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C. §§ 1988, 2000e-5(k) (1988 & Supp. 1991) (emphasis added).

84. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

85. *See* PLAYER ET AL., *supra* note 51, at 741; *see, e.g.*, Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985).

However, trial courts regularly grant attorney's fees to successful plaintiffs who have sued the federal government.[86]

III. Analysis

The holdings in *Alyeska*, *Hensley* and its progeny, and *Farrar* have undermined the ADEA's ability to successfully deter age discrimination in employment by reducing the number of situations in which a plaintiff may recover attorney's fees.[87] The Supreme Court's decisions regarding attorney's fees show that the Court places little value in the public interest furthered by employment discrimination litigation—a cornerstone of Congress's purpose in providing attorney's fees to prevailing plaintiffs.[88]

The judicial trend to restrict attorney's fees awards seriously frustrates the ADEA's ability to combat age discrimination. If attorneys cannot rely on compensation, the number of attorneys who are willing to take age discrimination cases will decline. As a result, older employees will have difficulty protecting their civil rights, and the deterrent effect of potential litigation will decrease.

Although the ADEA's language grants attorney's fees to successful plaintiffs, the statute does not expressly authorize recovery of attorney's fees in mixed motive cases. Yet, Congress's response to the Supreme Court's denial of attorney's fees in Title VII mixed motive cases clearly signals its continuing desire to expand, rather than contract, the use of attorney's fees as a weapon to fight employment discrimination.

A. Mixed Motive Cases

A mixed motive case is one where the employer bases an employment decision on both illegitimate and legitimate factors. The mixed motive analysis evolved as a form of disparate treatment employment discrimination.

---

86. DeFries v. Haarhues, 488 F. Supp. 1037 (C.D. Ill. 1980). In this case, in which the plaintiff sued the federal government, the court based its award of attorney's fees on the general language in § 216(b) of the FLSA, incorporated into the ADEA, 26 U.S.C. § 626(b), allowing "legal and equitable relief" to "effectuate the purposes of the Act." 488 F. Supp. at 1044-45.

87. Schub, *supra* note 48, at 721-25 (arguing that these decisions, beginning with *Hewitt v. Helms*, show the Court's trend to wholly disregard the purpose of the Fees Act, and ignore the "private attorney general" intent behind the Act).

88. *Id.*

The ADEA forbids discrimination in employment "because of" an employee's age.[89] The Supreme Court has developed two distinct concepts of what "because of" means in the context of liability for employment discrimination: "disparate treatment" and "disparate impact."[90] Disparate treatment occurs when the employer treats some employees less favorably than others because of a proscribed trait, such as age. Proof of discriminatory motive is critical to this theory.[91] On the other hand, disparate impact involves employment practices that are facially neutral, but in fact burden one group more than another.[92]

According to judicial interpretation, there are three categories of disparate treatment under the ADEA: pure discrimination, pretext, and mixed motive[93] cases. The Supreme Court established the elements of a prima facie pretext case in *McDonnell Douglas Corp. v. Green*[94] and *Texas Department of Community Affairs v. Burdine*.[95] *Price Waterhouse v. Hopkins*[96] is the seminal case discussing the judicial process in mixed motive cases. Although *Price Waterhouse* was a sex dis-

89. 29 U.S.C. § 623(a) (1988). This section states, "[i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." *Id.* (emphasis added).

90. *E.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

91. *Id.*

92. Disparate impact is not a subject of this note.

93. *But see* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991). Gudel claims that there is no such thing as a mixed motive case; instead, courts use the mixed motive analysis as an "evasion device in factually difficult discrimination cases." *Id.* at 21, 106.

94. 411 U.S. 792 (1973). A black civil rights activist engaged in disruptive and illegal activity against his employer as part of his protest that his discharge was racially motivated. When the employer subsequently rejected the plaintiff 's application for employment, the plaintiff filed a complaint with the EEOC. The EEOC found there was reasonable cause to believe that the employer's rejection violated § 704(a) of Title VII but did not address whether § 703(a)(1) had been violated. The Court held that a complainant's right to sue is not limited to EEOC charges and established the burden of proof for Title VII complainants. *Id.*

95. 450 U.S. 248 (1981). The plaintiff, a female employee, was fired during a departmental reorganization and subsequently replaced by a male employee. She filed a suit claiming sex discrimination under Title VII. The Court refined the *McDonnell Douglas* burden of proof framework, holding that when the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. *See also* Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1993) (discussing burden of proof issues for these two types of disparate treatment).

96. 490 U.S. 228 (1989).

crimination case brought under Title VII, judicial interpretation of mixed motive cases under the ADEA has historically relied heavily on Title VII interpretation.[97]

A pretext case arises once the plaintiff establishes a prima facie case that an employment decision has been improperly based on proscribed factors.[98] Establishing a prima facie case creates a presumption of unlawful discrimination.[99] The burden of production[100] then shifts to the employer who must "articulate some legitimate, nondiscriminatory reason"[101] for the employment decision. The employer is not required to show that the legitimate reason was the actual motivating reason—only that legitimate reasons also entered into the decision-making process. Once the employer establishes the existence of legitimate reasons, the employee must then prove that the legitimate reasons were just a pretext to hide the actual discriminatory motive. The employee may do this "directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unwor-

---

97. Hill v. Bethlehem Steel Corp., 729 F. Supp 1071, 1072 n.2 (E.D. Pa. 1989) (an age discrimination case in which plaintiff tried to establish mixed motives). The district court stated:

> Whereas the plaintiff in *Price Waterhouse* alleged sex discrimination pursuant to Title VII, the plaintiffs in the present case allege age discrimination pursuant to the Age Discrimination in Employment Act (ADEA). Nonetheless, the burdens of production and proof established for Title VII cases are applied to ADEA cases because of the similarity between the two statutes.

Id.

98. The employee establishes a prima facie case of age discrimination by showing, by a preponderance of the evidence, that (1) the employee belongs to a protected class; (2) the employee was qualified for the position; (3) an adverse employment decision was made despite the employee's sufficient qualifications; and (4) the employee was ultimately replaced by (or the promotion went to) a person sufficiently younger to permit an inference of age discrimination. Chipollini v. Spencer Gifts Inc., 814 F.2d 893, 897 (3d Cir. 1987).

99. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

100. Courts disagree as to precisely what burden is shifted to employers in ADEA cases. Some courts state that the employer must only produce evidence that a nondiscriminatory reason exists, while others state that the burden of proof shifts to the employer, requiring the employer to prove that the articulated reason was the real reason for the employment decision. KALET, *supra* note 12, at 68. Most courts follow the Title VII approach, requiring the employer to assume only the burden of production.

101. *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* test for pretext cases has been extended to the ADEA. *See* Massarsky v. General Motors Corp., 706 F.2d 111, 117 (3d Cir. 1983); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Schwager v. Sun Oil Co. of Pa., 591 F.2d 58, 60 (10th Cir. 1979).

thy of credence."[102] Unless there is direct proof that the decision was motivated by discriminatory intent, the process requires the court to weigh the parties' credibility to determine if the plaintiff satisfied the burden of proof.

The mixed motive theory of employment discrimination recognizes that both legitimate and illegitimate factors may contribute to discriminatory employment decisions.[103] In mixed motive discrimination cases, once a plaintiff provides evidence that an illegitimate factor played some determining role[104] in an employment decision, the burden of production[105] shifts to the employer to show that it had legitimate reasons for the employment decision.[106]

In *Price Waterhouse v. Hopkins*,[107] Ann Hopkins sued her employer, an accounting firm, for sex discrimination after it denied her promotion to partnership. The district court found that sex stereotypes played an important, motivating role in the decision. Although Hopkins billed more hours than other partnership candidates and brought in new business, Hopkins was described as needing "a course at charm school" and to "walk more femininely."[108] However, Hopkins also had been criticized for treating staff harshly.[109] As a result, the district court found that the employer denied the promotion for both discriminatory and legitimate reasons. The court held the em-

---

102. *McDonnell Douglas*, 411 U.S. at 804.

103. Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989) (plurality opinion).

104. At one time, courts disagreed about whether age (or other illegitimate factors) had to be "a" determining factor or "the" determining factor in the employment decision. This distinction will more often than not be irrelevant to liability. STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, THE LAW OF EQUAL OPPORTUNITY 14-31 (1990). The debate over how much of a role age or another illegitimate factor must play in the employment decision seems to have subsided. *Id. But see* Gudel, *supra* note 93, at 21. Gudel postulates that looking at causation is the wrong approach to take, stating that the question should be resolved by "interpretation." *Id.*

105. Some courts shift the burden of proof to the defendant. *See* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991*, 39 WAYNE L. REV. 1093, 1152 (1993).

106. Until *Price Waterhouse*, the circuits were split on how much burden shifted to the defendant. Some circuit courts required the plaintiff to prove that "but for" the plaintiff 's age (or other illegitimate consideration), the employer would have hired or promoted the plaintiff. Other circuits allowed the defendant to avoid liability, even though the plaintiff proved that discriminatory considerations were present, by proving that the employer would have made the same decision even if there was no discrimination involved. *Id.* at 1151.

107. 490 U.S. 228 (1989).

108. *Id.* at 235.

109. *Id.*

ployer liable, but denied back pay or reinstatement.[110] The U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision on liability and reversed its decision on relief.[111]

The Supreme Court reversed the appellate court.[112] The plurality opinion rejected the idea that the employer violated Title VII when it impermissibly used sex as a motivating factor in the employment decision. The Court held that if the employer can show it would have made the same decision even without considering the proscribed factor and can show the plaintiff sustained no injury from the employer's consideration of an illegitimate factor, the plaintiff has no remedy and may not recover attorney's fees.[113]

Mixed motive cases are philosophically and substantively different from pretext cases. To prevail in a pretext case, the employee must show that the employer's articulated legitimate reasons for an employment decision are not true. A traditional pretext case requires an inquiry into the employer's "real" motive—an inquiry that assumes that employment decisions are based upon either completely illegitimate or completely legitimate factors, which is not a realistic view of the decision-making process.[114] In contrast, the mixed motive theory recognizes that many factors may enter into an employment decision. When one of these factors is improper, the question of discrimination arises.

Prior to *Price Waterhouse*, courts disagreed as to what degree of causation would shift the burden and what burden would be shifted to the defendant.[115] Courts also disagreed on the appropriate remedy available to an employee who was able to prove the employer considered illegitimate factors. The Supreme Court addressed these conflicts in deciding *Price Waterhouse*, a case brought under Title VII, in which an employer used both sex-based impermissible factors and legitimate

110. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1114-19 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

111. Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

112. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

113. *Id.* at 258.

114. During the Title VII debates, Senator Case stated, "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 CONG. REC. 13, 837-38 (1964).

115. *Price Waterhouse*, 490 U.S. at 238 n.2.

business concerns in reaching its decision to bypass a female employee for partnership.[116]

Price Waterhouse was a Title VII sex discrimination case. The Court held that if a plaintiff proves that an employer improperly used a proscribed factor as a motivating reason for an adverse employment decision, the employer could avoid liability by proving that it would have made the *same decision* even without relying on the illegitimate factor. The "same decision" defense is critical to the *Price Waterhouse* analysis of mixed motive cases,[117] because it determines whether an employer has violated Title VII.[118] Unless a plaintiff can prove that the employer has violated Title VII, the plaintiff cannot recover attorney's fees.

The Supreme Court adapted the "same decision" standard for avoiding liability from *Mt. Healthy City School District Board of Education v. Doyle*.[119] *Mt. Healthy* was a mixed motive constitutional tort case involving a teacher who proved that exercising his right to free speech had played a substantial role in the board's decision to terminate him.[120] The Court affirmed the school board's right to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the constitutionally protected behavior by the teacher and remanded the case for further consideration.[121] Once the school board met its burden of proof, the district court determined that the plaintiff had not been injured and, therefore, was not entitled to recover damages or attorney's fees.[122]

The decision to relieve the employer of liability, even though the employee proves that the employer considered an impermissible factor, is based on the principle that a remedy should make a party whole, but should not provide a windfall.[123] When the plaintiff suffers no injury, there is no need to provide a remedy. Although *Mt. Healthy*

---

116. *Id.* at 228.

117. Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 942 (1993).

118. *Id.*

119. 429 U.S. 274 (1977).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; *see also* Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

was a First Amendment case, its reasoning has been applied to cases brought under both Title VII and the ADEA.[124]

Even after *Price Waterhouse*, the Supreme Court's opinion on the degree of causation required in mixed motive cases is unclear. The plurality asserted that the plaintiff must demonstrate that discrimination was a "motivating"[125] factor for the employer's actions. In concurring opinions, Justices White and O'Connor said the discrimination must play a "substantial" role in the decision.[126] Although this division has resulted in some disagreement among lower courts,[127] it is generally accepted that reconciling the opinions results in a "substantial" standard.[128]

However, the *Price Waterhouse* decision did resolve a split in the circuits on the correct burden that the defendant must shoulder in mixed motive cases. According to the standard set by *Price Waterhouse*, once the employee shows that impermissible factors played a role in the employer's employment decision, the employer must prove by a preponderance of the evidence that "it would have made the same decision even if it had not allowed [the illegitimate factor] to play such a role."[129] As a result, if the employer can satisfy this "same decision" test, it can successfully avoid liability under *Price Waterhouse, even though* the employee has proven that the employer improperly considered a factor proscribed by Title VII in the employment decision.[130] In such a situation, the employee has no remedy and cannot recover attorney's fees.

---

124. SHULMAN & ABERNATHY, *supra* note 104, at 14-32; *see, e.g.*, Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980) (an ADEA case); East Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977) (a Title VII case).

125. The Court tried to define "motivating factor," stating, "[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 v. Hopkins, 490 U.S. 228, 250 (1989).

126. *Id.* at 259 (White, J., concurring in the judgment); *id.* at 278 (O'Connor, J., concurring in the judgment).

127. *See* Crommie v. California, 840 F. Supp. 719 (N.D. Cal. 1994) (requiring the impermissible consideration to be a "motivating" factor); Hill v. Bethlehem Steel Corp., 729 F. Supp 1071 (E.D. Pa. 1989) (interpreting the causation required by *Price Waterhouse* to be "motivating").

128. Eglit, *supra* note 105, at 1152-53 (citing the explanation in Marks v. United States, 430 U.S. 188, 193 (1977), that when there is a plurality decision with no identifiable rationale followed by a majority of justices, the holding is that position taken by those justices who concurred on the narrowest grounds; in this case, the "substantial" standard). *But see supra* note 127.

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

130. *Id.*

Although *Price Waterhouse* clarified the burden of proof and the appropriate remedy for Title VII mixed motive cases, a number of ambiguities remain. The Court's decision left unclear both the degree of causation required to prove discriminatory motive[131] and whether direct or indirect evidence is required to prove discriminatory motive.[132]

However, the judicial resolution of mixed motive issues did not last long. Shortly after the Supreme Court's disposition of *Price Waterhouse* in 1989, Congress began working on legislation that would overturn the decision. In 1991, Congress passed the Civil Rights Act of 1991,[133] and much of the substance of *Price Waterhouse* was abandoned for Title VII employment discrimination claims.

Based on the ADEA's traditional reliance on Title VII precedent, the *Price Waterhouse* analysis for mixed motive cases ordinarily would apply to age discrimination cases. If mixed motive age discrimination cases follow the *Price Waterhouse* precedent, the ADEA plaintiff has a greater burden of proof than the Title VII plaintiff. Furthermore, even if the plaintiff could meet the burden of proof, the plaintiff would not be able to recover the attorney's fees. However, Congress's overruling of *Price Waterhouse* has created confusion in the courts as to how mixed motive age discrimination cases should be analyzed, and has opened up the possibility that the plaintiff may recover attorney's fees in a mixed motive age discrimination case.

B. The Civil Rights Act of 1991

1. THE EFFECT OF THE CIVIL RIGHTS ACT OF 1991 ON *PRICE WATERHOUSE*

The Civil Rights Act of 1991 (CRA) rejected the Supreme Court's interpretation of mixed motive claims under *Price Waterhouse*.[134] Section 107 of the CRA adds a new subsection to Title VII and expressly

131. The plurality described "motivating" as lying somewhere between a "but for" degree of causation and any contribution by the illegitimate consideration. *Id.* at 238. The dissent noted that the effect of the Court's decision was to retain "but for" causation as the basis of liability but to change the party who bears the burden of proving "but for" causation. *Id.* at 286 (Kennedy, J. dissenting).

132. Eglit, *supra* note 105, at 1154 n.223. The requirement of direct or indirect evidence is not a subject of this note.

133. Pub. L. No. 102-166, 105 Stat. 1075 (1991) (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)).

134. Heather K. Gerken, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824, 1837 (1993) (stating the CRA explicitly rejects the *Price Waterhouse* decision); Dennis L. Weedman, *The Civil Rights Act of 1991—Congressional Revision of the Supreme Court's Approach to Employment Discrimination Law*, 17 S. ILL. U. L.J. 381 (1993).

overrules some important aspects of the Court's decision in *Price Waterhouse*. First, the amendment clarifies the treatment of mixed motive cases under Title VII by providing that any invidious consideration of impermissible factors is improper.[135] When the plaintiff shows that an impermissible factor "motivated" the decision, the employer will be liable and the plaintiff will have available a full range of remedies.[136]

Even in cases when the employer can prove by a preponderance of the evidence that it "would have taken the same action in the absence of the impermissible motivating factor,"[137] section 107 provides remedies to the plaintiff, including declaratory relief, injunctive relief, costs, and, more importantly, attorney's fees.[138]

This amendment to Title VII reflects Congress's belief that an employee suffers a legally cognizable injury when an employer makes an employment decision based partly on illegitimate factors.[139] Congress reaffirmed its conviction that any consideration of impermissible factors is improper and should be eliminated. By establishing that consideration of a proscribed factor constitutes a violation of Title VII, and by providing attorney's fees to a plaintiff who proves that an employer considered impermissible factors, Congress penalizes the employer for its discriminatory acts and once again confirms the importance of allowing individuals to act as private attorneys general in opposing employment discrimination.

In contrast, some commentators view section 107 as ineffective,[140] impractical,[141] unclear,[142] or even detrimental to the policy un-

---

135. 42 U.S.C. § 2000e-5(g)(B)(i) (1988 & Supp. 1991). This section states in part, "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

136. *See* Linton & Mincberg, *supra* note 2, at 1322.

137. 42 U.S.C. § 2000e-5(g)(B)(i). This section states in part,

> (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs . . . .

Id.

138. *Id.*

139. Jason M. Weinstein, Note, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment-Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 316 n.252 (1994).

140. *See* Belton, *supra* note 117, at 943 (describing § 107 as a "pyrrhic victory" for employees); Gudel, *supra* note 93, at 60 (arguing that the Civil Rights Act of

derlying civil rights legislation.[143] Nevertheless, section 107 of the CRA is generally viewed as a victory for plaintiffs because the plaintiff's burden of proof has been eased,[144] and because plaintiffs bringing suit under Title VII now may recover attorney's fees when they prove that an employer considered impermissible factors, regardless of the basis of the employer's ultimate decision.[145]

2. THE EFFECT OF SECTION 107 ON THE ADEA

An attorney's fees award is a vital tool for the employee opposing illegitimate employment discrimination. However, unless the CRA applies to mixed motive suits brought under the ADEA, an older victim of employment discrimination is at a decided disadvantage in pursuing an employment discrimination claim.

Section 107 of the CRA lists race, color, religion, sex, and national origin as impermissible factors, exactly following the language in Title VII. The amendment neither includes age as an impermissible factor nor refers to the ADEA in the explanatory phrases. This has led courts and analysts to question whether section 107's provisions should be applied to ADEA cases.[146] On the one hand, Title VII has

---

1991 "will incorporate into Title VII a concept, 'motivating factor', which has [no] meaningful content").

141. *See* Weedman, *supra* note 134, at 388 (explaining that § 107 of the CRA is impractical because it creates liability for an employer who considers illegitimate factors even if the employer does *not* make an *adverse* decision).

142. *See id.* at 381. The concept of "motivating factor" is

> difficult for a trier of fact to define. It is unclear as to what degree reliance on an illegitimate factor becomes a "motivating factor." Courts may have a more difficult time applying this concept than the "because of" standard enunciated in *Price Waterhouse*. Consequently, Congress has provided the courts with an ambiguous vehicle for inconsistent adjudication.

Id. at 389. *But see* Gerken, *supra* note 134, at 845 (stating that both supporters and opponents of § 107 agree on the definition of "motivating factor").

143. David J. Shaffer, *The Civil Rights Act of 1991 Expansion of Remedies for Employment Discrimination*, 39 FED. B. NEWS & J. 100, 102 (1992) (creating liability for employers in same-decision cases, but not granting damages to plaintiff makes plaintiff's victory "symbolic"); *See* Weedman, *supra* note 134, at 402 (stating the proposition that the CRA may lead employers to abolish programs designed to enhance equal opportunity).

144. Eglit, *supra* note 105, at 1154 (explaining that the "motivating" standard is less rigorous than the "substantial" standard).

145. *See* Weedman, *supra* note 134, at 388.

146. Commentators answer this question differently. *See, e.g.*, Eglit, *supra* note 105, at 1155 (stating that there is substantial uncertainty as to the CRA's role in ADEA litigation); John M. Husband & Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881, 884 (1992) (stating that "[t]he *Price Waterhouse* mixed motive analysis may have some

historically been used as a substantive model for causes of action based on age discrimination. On the other hand, Congress expressly referred to Title VII in the CRA amendments, but did not refer to the ADEA or to age. Ordinarily, the Supreme Court's ruling in *Price Waterhouse* would have applied to claims brought under the ADEA. Since Congress clearly overruled *Price Waterhouse* for claims brought under Title VII, it is unclear whether the case holding retains viability for ADEA cases.

C. Should Section 107 of the CRA apply to the ADEA?

In considering whether section 107 of the CRA applies to the ADEA, this section begins with a look at the CRA itself, followed by a brief examination of its legislative history to search for insight into Congress's intent. Next, the Supreme Court's statutory interpretation of civil rights legislation will be examined. Finally, the judicial treatment of this issue will be explored.

1. PROVISIONS OF THE CRA

The Civil Rights Act of 1991 is a comprehensive piece of legislation. The CRA modifies Title VII, 42 U.S.C. § 1981, the Fees Act, and the ADEA. Determining whether section 107 of the CRA should apply to ADEA claims requires a consideration of statutory construction. A brief overview of the treatment of the ADEA under the CRA follows.

Congress's treatment of the ADEA in the provisions of the CRA ranges from express reference to the ADEA, to implied application of the statute to the ADEA, to a complete absence of reference to the ADEA. At least one CRA provision expressly modifies the ADEA,[147] while several other provisions implicitly apply to cases brought under the ADEA.[148] Finally, a number of changes made by the CRA's provi-

---

continuing validity in age discrimination actions which are not covered by" § 107 of the CRA of 1991).

147. Section 115 of the CRA modified the statute of limitations that previously applied to filing ADEA cases. Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1075 (1991) (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)); *see* Eglit, *supra* note 105, at 1106-07.

148. Eglit, *supra* note 105, at 1106. The Government Employee Rights Act of 1991 guaranteed Senate employees, former employees, and applicants for employment freedom from discrimination based on age, pursuant to the ADEA. Pub. L. No. 102-166, § 111, 105 Stat. 1078. Section 108 of the CRA, which authorizes post-entry challenges to consent decrees, applies to all "civil rights laws," including the ADEA by virtue of its status as a civil rights law. *Id.* § 108, 105 Stat. at 1076-77. Section 111 of the CRA directs the EEOC to begin education, outreach, and techni-

sions are silent regarding their applicability to the ADEA. Section 107 is one of these changes.

There are several possible explanations for Congress's silence regarding the ADEA in section 107.[149] Congress's failure to codify certain provisions of the CRA under the ADEA may impliedly reject the applicability of those provisions to the ADEA. It is equally plausible that the silence means nothing, or that the silence, coupled with historically parallel treatment of cases under the ADEA and Title VII, implies that Congress intended the provisions to apply equally to the ADEA.

The Supreme Court has repeatedly cautioned lower courts of the dangers inherent in attempting to infer some affirmative intention from congressional silence or inaction.[150] Nevertheless, there is support for the theory that Congress intended the CRA to cover claims brought under the ADEA as well as Title VII. One basis for the support is that the CRA's overriding aim was to respond to the most recent Supreme Court rulings interpreting civil rights laws.[151] Most of those Supreme Court decisions address Title VII issues. In its preoccupation with overturning these decisions, Congress simply did not address ADEA issues.[152]

Even though the CRA does not expressly state that section 107 applies to cases brought under the ADEA, the modifications to Title VII made by the CRA constitute "responses to Supreme Court rulings enunciating interpretations of Title VII that ordinarily would be ap-

---

cal assistance activities focusing on those who have historically been employment discrimination victims and those who are covered by other employment discrimination laws. *Id.* § 111, 105 Stat. at 1078. Section 116 provides that the amendments of the CRA do not affect remedies, conciliation agreements, and affirmative action plans previously made in accordance with the law. *Id.* § 116, 105 Stat. at 1079. In addition to the foregoing, § 118 of the CRA encourages using alternative dispute resolution methods to resolve disputes arising "under the Acts of provisions of federal legislation amended by this Title." *Id.* § 118, 105 Stat. at 1081. Because the ADEA was expressly amended by § 115 of the CRA, § 118 applies to age discrimination cases arising under the ADEA. *See* Eglit, *supra* note 105, at 1114-24.

149. *See* Eglit, *supra* note 105, at 1172-1202 (discussing alternative theories of the congressional silence with regard to the ADEA).

150. *E.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988) (citing Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381 n.11 (1969)). One district court has relied partly on this principle to conclude that the disparate impact theory is unavailable to claims brought under the ADEA. Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1076-78 (W.D. Pa. 1994).

151. *See* Hiatt v. Union Pac. R.R., 859 F. Supp 1416 (D. Wy. 1994).

152. *Id.*

plied by analogy to the age statute."[153] Nevertheless, as the following sections demonstrate, neither the CRA's legislative history nor statutory interpretation supports applying section 107 to the ADEA. As a result, an attorney's fees award in mixed motive age discrimination cases must be based on other authority.

2. LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1991 AND THE SUPREME COURT'S STATUTORY INTERPRETATION

The legislative history of the CRA of 1991 provides little information about the applicability of the CRA to the ADEA.[154] Congress's inattention to how the CRA's changes to Title VII might affect the ADEA is especially surprising, considering the universal acceptance of the Title VII paradigm as a model for analyzing ADEA cases. Section 107's potential impact on the ADEA was not discussed by Congress during deliberations on the CRA of 1991.

The Supreme Court has made it clear that it relies on the "plain meaning" of a statute in statutory interpretation. The Court has consistently rejected reliance on traditional legislative materials such as legislative debates and committee reports in interpreting statutes.[155] Perhaps for this reason, during the last fifteen years, the Court's interpretation of civil rights statutes has often been at odds with what Congress intended, and Congress has found it necessary to formally clarify its intent through legislative amendments. Since 1977, Congress has passed eight legislative provisions overturning an unprecedented number of Supreme Court decisions on federal civil rights issues.[156] This is particularly notable because prior to 1977, it was uncommon for Congress to overturn a Supreme Court decision on the

153. Eglit, *supra* note 105, at 1103.

154. *Id.* at 1158-72; *see id.* at 1106-07 (giving a detailed review of legislative history of both the CRA of 1991 and its predecessor, the CRA of 1990, which was vetoed by then-President Bush).

155. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

156. Schnapper, *supra* note 47, at 1099. Congress has rejected Supreme Court rulings in 16 cases. "The United States Reports are today littered with the corpses of short-lived opinions purporting to interpret federal anti-discrimination statutes; most were dead on arrival in the bound volumes." *Id.* at 1095. Specific cases overturned by Congress include: Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Patterson v. McLean, 491 U.S. 164 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Smith v. Robinson, 468 U.S. 992 (1984); Grove City College v. Bell, 465 U.S. 555 (1984); City of Mobile v. Bolden, 446 U.S. 55 (1980); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

ground that the Court misinterpreted the law.[157] Congress's dissatisfaction with the judicial interpretation of civil rights statutes is clearly indicated in legislative history.[158]

For example, in 1977, Congress overturned the holding in *United Air Lines, Inc. v. McMann*,[159] calling it "erroneou[s]" and inconsistent with the "clear explanation of legislative intent."[160] In 1978, Congress overturned the Supreme Court's decision in *General Electric Co. v. Gilbert*[161] when it promulgated the Pregnancy Discrimination Act.[162] The House report stated that "the dissenting Justices correctly interpreted the Act," and warned that "the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment."[163]

In addition, Congress rejected the Court's holding in *City of Mobile v. Bolden*[164] when it passed the Voting Rights Acts Amendments of 1982.[165] The Senate Committee stated that the Amendments were "consistent with the original legislative understanding of Section 2," explaining that legislative history was "the most direct evidence of how Congress understood the provision."[166] In 1985, Congress set aside the Court's decision in *Smith v. Robinson*,[167] stating that it contra-

157. Schnapper, *supra* note 47, at 1099.

158. "Even before the 1991 Civil Rights Act, Congress had made unmistakably clear that there were fatal flaws in the way in which Chief Justice Rehnquist and his conservative colleagues were interpreting these laws." *Id.* at 1096.

159. 434 U.S. 192 (1977). An employee voluntarily joined United Air Line's retirement plan, agreeing that retirement would occur at age 60. When he was subsequently retired at age 60, he brought a suit alleging age discrimination. The Court held the retirement plan was bona fide under § 4(f)(2) of the ADEA.

160. S. REP. No. 493, 95th Cong., 1st Sess. 10 (1977).

161. 429 U.S. 125 (1976). GE's disability plan was challenged as sex discrimination under Title VII because it excluded disabilities arising from pregnancy. The Court upheld the plan because exclusion based on pregnancy is not gender-based discrimination.

162. The Pregnancy Discrimination Act of 1978, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

163. H.R. REP. No. 948, 95th Cong., 2d Sess. 2-3 (1978).

164. 446 U.S. 55 (1980). This class action suit challenged the practice of electing city commissioners by at-large elections because it unfairly diluted the voting strength of African American voters in violation of the Fourteenth and Fifteenth Amendments. The Court upheld the practice.

165. The Voting Rights Act Amendments of 1983, § 2, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973b (1988)).

166. S. REP. No. 417, 97th Cong., 2d Sess. 17 (1982).

167. 468 U.S. 992 (1984). Parents of a disabled child successfully challenged the school district's denial of funding for the child's special education program, based on the Rehabilitation Act of 1973 and 42 U.S.C. § 1983. The parents then requested attorney's fees against state defendants. The Court held the parents were not entitled to fees under § 1988 or the Rehabilitation Act. *Id.*

dicted "Congress'[s] original intent."[168] Congress enacted legislation nullifying *Grove City College v. Bell*,[169] recounting in detail the legislative histories of the laws at issue, and concluding that Congress's view was "[c]ontrary to the view of the Supreme Court."[170]

The CRA of 1991 is the latest in a series of congressional promulgations that directly address recent Supreme Court decisions on civil rights legislation. The CRA overturned four Supreme Court decisions including *Price Waterhouse*.[171] Yet, Congress's patent dissatisfaction with judicial interpretation of employment discrimination statutes, indicated by the CRA's substance and in the legislative history, has apparently not struck any responsive chords in the Supreme Court.[172] The Supreme Court's interpretation of civil rights legislation during the last fifteen years has been seriously flawed.[173] The basic flaw in the Court's interpretation of civil rights legislation stems from its unwillingness to consider the legislative history of the statutes, the statutory purposes, and subsequent congressional actions.[174] As a result, Congress has regularly overturned Supreme Court decisions in the civil rights and employment discrimination areas. This legislative response is especially important because it informs the Court how civil rights legislation should be interpreted.[175] Congress, as the "master of

168. S. REP. NO. 112, 99th Cong., 1st Sess. 2 (1985).

169. 465 U.S. 555 (1984). Because some Grove City College students received federal financial aid under Basic Educational Opportunity Grants (BEOGs), the Department of Education required the college to provide an assurance of compliance with Title IX, which prohibits sex discrimination in educational activities that receive federal funding. The Court held that receipt of BEOGs by students did indeed trigger Title IX coverage but only in the financial aid program. *Id.*

170. S. REP. NO. 64, 100th Cong., 1st Sess. 5 (1988). Schnapper, *supra* note 47, at 1096-97. Schnapper explores legislative history in detail to show Congress's continuing frustration with the Supreme Court's actions—and eventually with the Justices themselves. *Id.*

171. The Civil Rights Act of 1991 overturned rulings in Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Martin v. Wilks, 490 U.S. 755 (1989); and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

172. Schnapper, *supra* note 47, at 1097-98. One astonishing example of the Supreme Court's indifference occurred six months after Congress overwhelmingly approved legislation that overturned *Patterson* and castigated the Court for misinterpreting the legislation. Nevertheless, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, later cited *Patterson* as a paradigm of interpretive methodology. Evans v. United States, 112 S. Ct. 1881, 1902 n.7 (1992) (dissenting opinion).

173. Schnapper, *supra* note 47, at 1099.

174. *Id.* at 1151.

175. *Id.*

statutory law,"[176] should be the Court's first source of methodology for statutory interpretation.[177]

The ADEA's legislative history supports a liberal construction to effectuate its remedial purpose.[178] Yet, during the last few years, the Supreme Court has taken a narrow view in deciding civil rights cases and awarding attorney's fees. Eric Schnapper, one of the CRA's drafters, predicted that the Court would ultimately find it useless to rule in opposition to Congress's intent because of the "ease and speed with which such misinterpretations might be overturned by a Democratic Congress and President."[179] Schnapper reached this conclusion before the 1994 election. Because the 1994 election resulted in a Republican majority in Congress, the Court may anticipate congressional support for its conservative rulings on civil rights issues. In such a case, the Court would probably use the Title VII mixed motive analysis in *Price Waterhouse* to limit an employer's liability in mixed motive age discrimination cases. As a result, age discrimination plaintiffs who establish that an employer had mixed motives would not be able to recover attorney's fees, thus accelerating the judicial undermining of age discrimination legislation.

3. CASES ADDRESSING THE QUESTION OF APPLYING THE CRA TO THE ADEA

Because the CRA of 1991 does not apply retroactively, case law addressing the CRA's applicability to the ADEA is not extensive. Some courts have declined to address the issue.[180] When courts have considered the question, most have taken the position that the CRA does not apply to cases brought under the ADEA because the statute does not mention the ADEA.[181] However, in one case, a federal district court expressly declined to infer that Congress's silence regard-

176. *Id.*

177. *See id.* (providing a detailed discussion of the lessons in statutory construction to be drawn from Congress's rejection of the 16 Supreme Court rulings).

178. *See, e.g.*, S. REP. No. 1011, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910-11 (stating "[i]n the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws").

179. Schnapper, *supra* note 47, at 1151.

180. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1181-82 (2d Cir. 1992); Martincic v. Urban Redevelopment Auth., 844 F. Supp 1073, 1078 (W.D. Pa. 1994); Berlett v. Cargill, Inc., 780 F.Supp 560, 562 n.8 (N.D. Ill. 1991) (concluding that Congress's failure to codify the disparate impact theory under the ADEA in the CRA was a conscious omission).

181. Morgan v. Servicemaster Co. Ltd. Partnership, 57 F.E.P. Cas. (BNA) 1423 (N.D. Ill. 1992) (ruling that because age was not mentioned in § 107, the court would not apply the CRA).

ing the ADEA implies rejection of the CRA's applicability to the ADEA.[182] In *Crommie v. California*, the district court apparently applied the "motivating" standard for causation established by the CRA to a case brought under the ADEA and also relied on federal law to interpret a state age discrimination statute.[183] When the plaintiff prevailed on both claims, the court applied the state's private attorney general statute and awarded attorney's fees.[184]

Judicial response to this issue is limited at this point because it takes time for cases to make their way through the judicial system. A recent Supreme Court case provides guidance on how courts might resolve the question of awarding attorney's fees in mixed motive ADEA suits, although it does not directly address whether the CRA should be applied to the ADEA. In *McKennon v. Nashville Banner*,[185] the employee proved that the employer improperly considered the employee's age in deciding to terminate the employee. After-acquired evidence subsequently revealed that the employee would have been subject to discharge anyway because of misconduct. The Court decided that after-acquired evidence can be used to limit a damage award but cannot operate to bar all relief under the ADEA. As a result, the Court held the employer liable for violating the ADEA.

In supporting its holding, the Court cited the important dual purposes of the ADEA: deterring discriminatory employment practices and compensating victims for injury caused by prohibited discrimination.[186] The Court emphasized the plaintiff's role in vindicating the important congressional policy against discriminatory employment practice, stating:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a

182. Hiatt v. Union Pac. R.R., 859 F. Supp. 1416 (D. Wyo. 1994) (holding that disparate impact is not cognizable under the ADEA, but for reasons other than Congress's silence in the CRA about the ADEA).

183. Crommie v. California, 840 F. Supp. 719, 722 (N.D. Cal. 1994) (stating that plaintiff must prove intentional discrimination to prevail under state law, and plaintiff could do that by showing "the unlawful discrimination was a motivating factor in the adverse employment decision (the so-called 'mixed motive' test under *Price Waterhouse*)").

184. *Id.*

185. 115 S. Ct. 879 (1995).

186. *Id.*

> misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.[187]

The Court recognized the deterrent nature of the ADEA's remedial provisions, stating that Congress designed the remedies in the ADEA to serve as a "spur or catalyst" to cause employers to examine and evaluate their employment practices and to eliminate discriminatory practices.[188] The Court also relied on the ADEA's language "grant[ing] [federal courts] such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA]."[189]

Although *McKennon* distinguishes between after-acquired evidence cases and mixed motive cases,[190] the Court stated that "a violation of the ADEA cannot be altogether disregarded."[191] This case supports the proposition that the employer is liable whenever an employee proves that the employer has engaged in improper age discrimination. The appropriate remedy may be subsequently limited depending on the circumstances.

IV. Resolution

The ADEA has two important purposes. One purpose is to provide a mechanism to compensate victims of employment discrimination based on age. The second purpose is to eliminate arbitrary age-based employment discrimination in society as a whole. Relying only on remedies that compensate individual age discrimination victims ignores the ADEA's goal of deterring discrimination. Awarding attorney's fees promotes the societal interest in eliminating age-based employment discrimination.

Attorney's fees operate in three ways to deter age discrimination. First, they encourage age discrimination victims to act as "private attorney[s] general."[192] Second, attorney's fees awards encourage attorneys to represent age discrimination plaintiffs. Third, the threat of increased litigation provides an incentive for employers to avoid discriminatory activities.

---

187. *Id.* at 885.
188. *Id.* at 884.
189. 29 U.S.C. § 626(b) (1988).
190. *McKennon*, 115 S. Ct. at 885. "[P]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Id.*
191. *Id.* at 884.
192. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

A. The "Same Decision" Analysis Is Inappropriate for Age Discrimination Cases

To deter employers from committing discriminatory acts, the employer should be penalized for committing those acts, even though the employer would have made the same employment decision in the absence of discriminatory considerations. The "same decision" analysis is inappropriate in employment discrimination cases because "[o]nce the trier of fact has found that [an impermissible consideration] was a factor 'in any way' influencing the decision, it is error to attempt to quantify [the impermissible consideration] as a minor factor."[193]

Section 107 of the Civil Rights Act of 1991 affirms this message in the context of racial and sexual discrimination and the message is equally valid for age discrimination. Even though age discrimination differs from, for example, race discrimination, because age discrimination is motivated more by ignorance or lack of consideration than by hostility, it is equally important to eliminate arbitrary age discrimination whenever it occurs.

B. *Price Waterhouse* Is an Inappropriate Model for Mixed Motive Age Discrimination Cases

Because of traditional reliance on the Title VII paradigm as an analytical model for ADEA cases, courts have an historical basis for following the *Price Waterhouse* precedent in analyzing mixed motive age discrimination cases. If *Price Waterhouse* provides the model for remedies, the ADEA plaintiff who proves that the employer impermissibly considered age in making an employment decision would receive neither damages nor attorney's fees when the employer is able to show by a preponderance of the evidence that it would have made the same decision regardless of the impermissible considerations.

Furthermore, if *Price Waterhouse* provides the pattern for analyzing mixed motive cases under the ADEA, the plaintiff has a significantly greater burden of proof than a plaintiff under Title VII. The ADEA plaintiff must prove the illegitimate reason was a "substantial" factor in the decision-making process, whereas the Title VII plaintiff must prove only that the illegitimate reason was a "motivating" factor. Even given the potential vagueness of the term "motivating," the

193. Bibbs v. Block, 778 F.2d 1318, 1327 (8th Cir. 1985) (en banc) (Lay, C.J., concurring).

"substantial" standard is clearly more stringent than the "motivating" standard.[194]

The holding in *Price Waterhouse* allowed the employer to avoid liability even though it had impermissibly considered proscribed factors in making an employment decision. As a result, *Price Waterhouse* ignored the injury to the plaintiff and to society. Thus, the *Price Waterhouse* model is inappropriate for mixed motive age discrimination cases.

Price Waterhouse relied on *Mt. Healthy* to conclude that a plaintiff suffers no injury when the employer would have made the same employment decision even without consideration of illegitimate factors. This conclusion may correctly reflect the employee's economic situation, but it wholly ignores noneconomic aspects of the injury. To conclude that an age discrimination victim has suffered no injury is to "deprecate the federal right transgressed and to heap insult ('You had it coming') upon injury."[195] Whenever an employee is judged on characteristics other than ability, the employee is injured in ways that are difficult to quantify in dollar terms.

Price Waterhouse also virtually ignores the ADEA's second remedial goal, the societal interest in eliminating arbitrary age discrimination. The language of the ADEA adequately protects the employer by expressly providing that reasonable factors other than age constitute a defense to an ADEA claim. However, when an employee proves that arbitrary age discrimination has occurred, attorney's fees should be awarded, as they are currently for mixed motive Title VII cases. The employee should not have to bear the financial burden of vindicating the societal interest in deterring age discrimination.

The *Price Waterhouse* decision overlooked these two goals: compensating the employee for the noneconomic injury sustained as a result of the employer's discriminatory acts and promoting the societal interest of eliminating age discrimination. The award of attorney's fees would further both interests.

In the *McKennon* decision, the Court recognized the importance of the plaintiff's role as a private attorney general in opposing age discrimination and demonstrated a willingness to look beyond the

194. Eglit, *supra* note 105, at 1154.

195. Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1232 (3d Cir. 1994) (an age discrimination case holding that back pay should be awarded when an employer discriminated based on employee's age, even though the employer later discovered evidence of employee's resume fraud).

statute's words to Congress's underlying policy. The Court also recognized the societal interest in deterring discriminatory employment practices which it had essentially ignored in the *Price Waterhouse* decision. As a result, the *McKennon* case provides a better basis than *Price Waterhouse* for awarding attorney's fees in mixed motive age discrimination cases.

C. Section 107 and Alternative Authority for Attorney's Fees in Mixed Motive Age Discrimination Cases

Because age discrimination is not one of the factors enumerated in section 107 of the CRA of 1991, the judiciary cannot directly apply section 107 to mixed motive age discrimination claims. Nevertheless, absent the assumption that Congress's exclusion of age in section 107 implies an affirmative rejection of the new mixed motive analysis and remedial scheme for age discrimination cases, the judiciary can find support in the ADEA's legislative history and statutory language to bypass *Price Waterhouse*'s analytical and remedial framework for analyzing mixed motive age discrimination cases.

The ADEA authorizes "such legal or equitable relief as may be appropriate to effectuate" the ADEA's goals.[196] This comprehensive language provides a basis for more extensive remedies than does Title VII. In addition, the ADEA's legislative history indicates that Congress intended that the courts should liberally construe the ADEA to further its remedial purposes. In the past, courts have adopted the expansive statutory language of section 7(b) to justify broad remedial powers under the ADEA.[197] The judiciary should support the ADEA's broad social policy goals by using the authority provided by the statute to award attorney's fees to plaintiffs who prove that age was improperly considered by the employer in mixed motive age discrimination cases.

Awarding attorney fees to mixed motive plaintiffs who prove that improper consideration of age entered into the employment decision would effectuate Congress's broad remedial intent. Unless the judiciary bypasses *Price Waterhouse* as a model for the ADEA, most age discrimination victims will have to wait for relief until Congress expressly amends the ADEA. By amending section 107 of the CRA to

196. Section 7(b) of the ADEA allows "such legal or equitable relief as is appropriate to effectuate the purposes of [the ADEA]." 29 U.S.C. § 626(b).

197. *See* Nicholas H. Hantzes, Comment, *Fourth Circuit Review: Pain and Suffering Damages Not Available Under ADEA*, 37 WASH. & LEE L. REV. 659, 667 (1980).

include age, Congress could provide that an unlawful employer practice is established when the plaintiff demonstrates that the employer's improper consideration of age was a motivating factor for any employment practice, even though other factors also motivated the practice. Employer liability under the ADEA would then support an award of attorney's fees, thus furthering the ADEA's remedial goal and deterring employers from arbitrary age discrimination.

V. Conclusion

The societal interest in eliminating age discrimination is no less important than its interest in eliminating racial or sexual discrimination. The effectiveness of attorney's fees as a tool for opposing employment discrimination is well established.

Historical reliance on Title VII analysis for ADEA cases may result in the judiciary following the *Price Waterhouse* analytical and remedial framework for mixed motive age discrimination cases. As a result, plaintiffs will not be able to recover attorney's fees when they prove the employer improperly considered age in making an employment decision. This will undoubtedly have a chilling effect on age discrimination litigation.

Support for awarding attorney's fees in mixed motive age discrimination cases derives primarily from the ADEA's expansive remedial language. The ADEA's comprehensive language[198] provides a basis for more extensive remedies than does Title VII. Furthermore, the legislative history indicates Congress intended that the courts should liberally construe the ADEA to effectuate its remedial purposes.

In the past, courts have adopted the expansive statutory language of section 7(b) to justify broad remedial powers under the ADEA.[199] They could do so again to effectuate Congress's intent. If attorneys cannot count on compensation, the number of lawyers defending civil rights will decline, resulting in an inability of older employees to protect their civil rights and frustrating the intent of Congress.

198. Section 7(b) of the ADEA allows "such legal or equitable relief as is appropriate to effectuate the purpose of the ADEA." 29 U.S.C. § 626(b) (1988).

199. *See* Hantzes, *supra* note 197, at 667.