An attorney undertakes a balancing act when deciding whether and when to assert this defense, which can limit damages, yet appear as an admission to some wrongdoing.

What happens when an employer makes an adverse employment decision for both legitimate and discriminatory reasons? When discrimination did not play a dispositive role but did play a motivating part in an employment decision? Courts apply a mixed-motive analysis. But which party would choose to advance this rubric? Would the plaintiff, who wants to prove discriminatory animus but does not want to acknowledge that the employer has a legitimate basis for its reprisal? Would the defendant, the employer, which wants to prove that it has a legitimate rationale without conceding that it had an improper rationale for its actions, choose to do so? Whether to advance the mixed-motive argument, and if so, when, are strategic issues to consider when the facts in a case suggest both legitimate and discriminatory reasons for an employment action.

This article will address the evolution of mixed-motive liability and how courts today address these cases at the pleading stage, on summary judgment, during trial, and when awarding damages. In a case involving discriminatory animus, a defendant can still avoid liability for money damages by showing that the same decision would have been made even without the impermissible motivating factor. To better understand this defense, we must examine its origin.

Evolution of Title VII Mixed-Motive Liability
Title VII was enacted as part of the Civil Rights Act of 1964. As enacted, Title VII made it illegal for employers to “discriminate against any individual… because of such individual’s race, color, religion, sex, or national origin.” For years, the statute’s “because of” language has sparked debate in federal courts around the nation. In 1973, the U.S. Supreme Court decided McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). That decision established the familiar burden-shifting framework, for which a plaintiff bears the initial burden.
of showing that his or her employer discriminated against him or her based on a protected trait. A prima facie case creates a presumption of discrimination and shifts the burden to the employer to articulate a legitimate, nondiscriminatory basis for the employment action. If the employer successfully rebuts the presumption, the burden shifts back to the plaintiff to show by the preponderance of the evidence that the employer’s proffered nondiscriminatory reason is a pretext for discrimination. The McDonnell Douglas framework assumes that the “because of” language requires the employer’s action to be solely discriminatorily motivated.

Over a decade later, in 1989, the Supreme Court revisited the statutory language in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In a plurality opinion, the Court established the mixed-motive framework. The Court held that an employee could meet the “because of” standard by showing that the employee’s protected trait—race, color, religion, sex or national origin—was a “motivating” or “substantial” factor in the employer’s decision. In other words, an employer could still be held liable for discrimination even if it had a legitimate reason for its decision as long as the employer also considered a protected trait.

Two years later, Congress codified the motivating or substantial factor analysis espoused in Price Waterhouse, enlarging employer liability and lessening the causation standard, in the Civil Rights Act of 1991. The act limited available damages, however, in cases involving mixed motives. Specifically, the Civil Rights Act of 1991 specifies that an “unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. §2000e-2(m) (emphasis added). In addition, a claim in which an individual proves a violation under 2000e-2(m) of this title and a respondent demonstrates that a 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 (iii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)].

42 U.S.C. §§2000e–5(g)(2). While section 2000e-2(m) expands employer liability, section 2000e-5(g)(2) limits the damages available to a plaintiff when an employer can demonstrate that it would have made the same employment decision notwithstanding the illegal motivating factor. These two sections create separate burdens—one that falls on the plaintiff to establish that a protected trait was a motivating factor in an employer’s decision and one that falls on the defendant to prove that even though it considered a protected trait, it would have made the same decision without the unlawful consideration. The burdens created by these sections probably have caused the conflict among the lower courts regarding which party bears the burden to establish a mixed motive, which is discussed later in this article.

In addition to the ambiguity in the Civil Rights Act of 1991 about which party must establish a mixed motive, the act does not mention the type of evidence that the proponent must use to meet its burden. For more than a decade after the passage of the Civil Rights Act of 1991, courts grappled with this issue. Initially, Justice O’Connor’s concurring opinion in Price Waterhouse limited the mixed-motive framework to cases in which a plaintiff could present direct evidence that a protected trait was a motivating or substantial factor in the employment decision. For approximately 14 years after the Price Waterhouse opinion, many courts followed Justice O’Connor’s opinion and required plaintiffs to establish discrimination through direct evidence in mixed-motive cases. See, e.g., Mohr v. Dustrol, Inc., 306 F.3d 636, 640–41 (8th Cir. 2002); Fernandez v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Bd. of Trs. of Univ. of Ala., 91 F.3d 1449, 1453–54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995).


The Ninth Circuit, however, departed from some of its sister circuits in Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), holding that a plaintiff may establish mixed motive through either direct or circumstantial evidence. The Supreme Court granted certiorari and agreed with the Ninth Circuit. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). The Court reasoned that the statute’s silence on the issue was telling. If Congress wanted to “depart from the conventional rule of civil litigation that generally applies in Title VII cases,” which “requires a plaintiff to prove his case by a preponderance of the evidence, using direct or circumstantial evidence,” Congress would have included language in the statute to that effect. Id. at 100 (citations omitted).

Despite congressional and Supreme Court efforts to clarify the mixed-motive analysis, it remains confusing for courts and practitioners alike.

Comparing Mixed-Motive and Single-Motive Cases

After the Desert Palace decision, the distinction between the mixed-motive and the single-motive analyses under Title VII has blurred. Under both analyses, the burden remains with a plaintiff to establish discrimination. The circuit courts have

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taken varied approaches on how a plaintiff meets his or her burden under the two frameworks. For example, the Fifth Circuit adopted a multistage, “modified McDonnell Douglas approach” that borrows from both the single-motive and the mixed-motive frameworks: After a plaintiff establishes a prima facie case, a defendant must come forth with a legitimate, nondiscriminatory reason for its action. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2005). The burden then shifts back to the plaintiff to demonstrate that the defendant’s reason is a pretext for discrimination (single-motive framework) or that the defendant’s reason is one of the reasons for its action and the plaintiff’s protected trait is another motivating factor (mixed-motive framework). Rachid, 376 F.3d at 312. Under this approach, if the plaintiff successfully establishes that his or her protected trait was a motivating factor, the defendant must prove that it would have taken the same action regardless of its discriminatory motive. Id.

In contrast, the First Circuit’s burden-shifting framework in mixed-motive cases is distinct from that in single-motive cases. To establish a prima facie case of mixed motive, a plaintiff must establish that his or her protected trait was a motivating factor for the employment action; the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action regardless of its discriminatory motive. Díaz v. Jiten Hotel Mgmt., Inc., 671 F.3d 78 (1st Cir. 2012). Understanding the treatment of a plaintiff’s burden in the applicable circuit is particularly important for practitioners at the pleading, summary judgment and jury instruction drafting stages of litigation. This article will address these issues in the sections that follow.

**Pleading Mixed Motive**

The ultimate issue in any employment discrimination case is whether a plaintiff can prove that an adverse employment decision was motivated at least in part by a discriminatory reason. Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities, 115 F.3d 116, 119 (2d Cir. 1997). A plaintiff may meet his or her burden by using a mixed-motive analysis or by proving pretext. Stratton v. Dep’t for the Aging for City of N.Y., 132 F.3d 869, 878 (2d Cir. 1997). A court will apply a mixed-motive analysis when a plaintiff gives notice of such a claim. Spees v. James Marine, Inc., 617 F.3d 380, 390 (6th Cir. 2010). See also Bartlett v. Gates, 421 F. App’x 485, 488 n.1 (6th Cir. 2010) (holding that mixed-motive standard “only applies when plaintiffs provide notice of mixed motive claims”).

Notice can be express, by invoking the mixed-motive analysis, or implied, through use of the motivating factor test in the complaint or responsive pleadings. See Spees, 617 F.3d at 390 (finding that the plaintiff gave adequate notice of mixed-motive claim by alleging pregnancy was a motivating factor and specifying she was bringing mixed-motive claims in a footnote in her motion for a summary judgment). Cf. Hashem–Younes v. Danou Enters. Inc., 311 F. App’x 777, 779 (6th Cir. 2009) (affirming application of the McDonnell Douglas framework when the plaintiff failed to raise a mixed-motive claim in her complaint or in her response to the defendants’ summary judgment motion, and the record was “utterly silent as to mixed motives”).

A plaintiff “need not expressly allege in the complaint that the action is either a ‘pretext’ or a ‘mixed-motives’ case” and “may ultimately decide to proceed under both theories of liability.” Ponce v. Billington, 679 F.3d 840, 845 (D.C. Cir. 2012). In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion), the Court explained:

> Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a “pretext” case or a “mixed-motives” case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery will often be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her.

Id. at 247 n.12. Thus, a plaintiff need not choose in the complaint whether the action is either a “pretext” or a “mixed-motives” case since the plaintiff may need to conduct discovery to properly categorize his or her claim.

As a corollary, a defendant may allege “mixed motive” as a defense: “[T]he employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff.” Desert Palace, Inc., 539 U.S. at 94. To use the affirmative defense, an employer must “demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.” 42 U.S.C. §2000e-5(g)(2)(B). An employer will escape damages and an order of reinstatement, hiring or promotion but could still be liable for attorney’s fees and declaratory relief and possibly face an order prohibiting future discriminatory actions. Therefore, a mixed-motive defense, even if proved, does not establish a basis for a summary judgment. See Dominguez-Curry v. Nev. Transp. Dep’t, 424 F.3d 1027, 1041–42 (9th Cir. 2005).

Labels matter. How plaintiffs and defendants label their cases will affect how courts interpret them and which standard—pretext, mixed motive or both—they choose to apply. Not explicitly mentioning mixed motive in the pleadings may result in a court overlooking the argument. See EEOC v. Aldi, Inc., No. 06-01210, 2009 WL 3183077, at *12 (W.D. Pa. Sept. 30, 2009) (noting that the plaintiff specifically mentioned section 2000e-2(a) rather than section 2000e-2(m) in her complaint before deciding to refuse a mixed-motive jury instruction). Some courts appear not to require parties to frame their cases as mixed or single motive in their pleadings. See, e.g., Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007). But the better practice may be to do so.

**Raising Mixed Motive at Summary Judgment**

But what about at the summary judgment stage? If the parties mentioned mixed
motives in their pleadings, then courts should apply the mixed-motive analysis. But what if the parties have not? Generally the parties must raise the issue in their motions for summary judgment for courts to consider it. See Ginger v. District of Columbia, 527 F.3d 1340, 1344–46 (D.C. Cir. 2008) (holding that the plaintiffs needed to have argued at summary judgment that the case involved mixed motives to benefit from that framework). Some courts will address the single-motive and mixed-motive frameworks in the alternative. Fye v. Okla. Corp. Comm’n, 516 F.3d 1217, 1226 (10th Cir. 2008) (analyzing a claim under both frameworks because the plaintiff argued in the alternative). Some will apply only one standard. E.g., Over-all v. Univ. of Pa., No. 02-1828, 2003 WL 23095953, at *5 (E.D. Pa. Dec. 19, 2003) (holding that because the plaintiffs argued their case was a mixed-motive case, they waived evaluation of their claim using a pretext analysis). Some courts let the evidence guide them on which standard to use. Sallis v. Univ. of Minn., 408 F.3d 470, 475 (8th Cir. 2005) (finding the mixed-motive framework unsupported by the evidence). It is important to know how a particular court will approach this issue.

The Summary Judgment Standard
Because Desert Palace concerned a jury-instruction challenge, the Supreme Court did not consider whether the McDonnell Douglas burden-shifting framework should apply to the summary judgment analysis of mixed-motive claims. See Tysinger v. Police Dept of City of Zanesville, 463 F.3d 569, 577 (6th Cir. 2006). Since Desert Palace, federal courts have developed different approaches to analyzing summary judgment motions in mixed-motive cases. For example, the Eighth Circuit has held that the McDonnell Douglas burden-shifting framework applies to the summary judgment analysis of mixed-motive claims. See Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). (“[W]e conclude that Desert Palace had no impact on prior Eighth Circuit summary judgment decisions.”). The Eleventh Circuit agrees. See Burstein v. Entel, Inc., 137 F. App’x 205, 209 n.8 (11th Cir. 2005) (unpublished opinion) (suggesting that the McDonnell Douglas analysis continues to apply in mixed-motive cases).

The Fourth and Ninth Circuits permit a mixed-motive plaintiff to avoid a defendant’s motion for a summary judgment by proceeding either under the “pretext framework” of the traditional McDonnell Douglas analysis or by “presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated [at least in part,] the adverse employment decision.” Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGin est v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (finding that a mixed-motive asserting plaintiff “may proceed using the McDonnell Douglas framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated” the employment decision). The D.C. Circuit has taken a similar approach. See Fogg v. Gonzales, 492 F.3d 447, 451 & n* (D.C. Cir 2007) (indicating that “a plaintiff can establish an unlawful employment practice by showing that ‘discrimination or retaliation played a motivating part or was a substantial factor in the employment decision’” but noting that a “plaintiff may also, of course, use evidence of pretext and the McDonnell Douglas framework to prove a mixed-motive case”).

The Sixth Circuit has held that in a mixed-motive claim the McDonnell Douglas burden-shifting analysis does not apply. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008). To survive summary judgment in a mixed-motive case, “the plaintiff must have evidence sufficient to create a genuine issue of fact that: (1) the defendant took an adverse employment action against the plaintiff; and (2) ‘race, color, religion, sex, or national origin was a motivating factor’ for the defendant’s adverse employment action.” White, 533 F.3d. at 400. A plaintiff may prevail with his or her mixed-motive claim merely by proving by a preponderance of the evidence that the defendant’s consideration of his or her race “was a motivating factor for any employment practice, even though other factors also motivated the practice.” Id. at 401. To reach a jury, “the plaintiff is not required to eliminate or rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory ani-

Labels matter. How plaintiffs and defendants label their cases will affect how courts interpret them and which standard—pretext, mixed motive or both—they choose to apply.

at 400. Finally, in the Sixth Circuit “[t]he ultimate question in a mixed-motive analysis is simply whether there are any genuine issues of material fact concerning the defendant’s motivation for its adverse employment decision, and, if none are present, whether the law… supports a judgment in favor of the moving party on the basis of the undisputed facts. Spees v. James Marine, Inc., 617 F.3d 380, 390 (6th Cir. 2010).

In contrast, the Fifth Circuit in Rachid v. Jack in the Box, Inc., 376 F. 3d 305 (5th Cir. 2004), has adopted a “modified McDonnell Douglas approach” for the summary judgment framework in mixed-motives cases. Rachid, 376 F.3d. at 312. Similar to the McDonnell Douglas analysis, the Fifth Circuit’s mixed-motive analysis involves three steps. The first two steps in this mixed-motives approach, which require a court finding a prima facie case and legitimate, nondiscriminatory reason, mirror the traditional McDonnell Douglas pretext analysis. However, in the final step, the Rachid court held that the plaintiff must... offer sufficient evidence to create a genuine issue of mater-
rial fact either (1) that the defendant’s reason is not true, but is instead pretext for discrimination (pretext alternative) or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff’s protected characteristic. Id.

Some courts allow either party to request a mixed-motive jury instruction but require evidence to have been presented in support of the instruction.

Jury Instructions

A mixed-motive jury instruction relieves plaintiffs from having to prove pretext and allows defendants to limit their damages. But when would it apply? Courts have developed instructions charging juries that they must find a defendant liable but cannot award damages if a plaintiff proves that a discriminatory animus motivated an adverse action but the defendant demonstrates that it would have taken the action anyway. See Seventh Cir. Pattern Jury Instruction §3.01 cmts. B and C. Several circuits now provide a mixed-motive instruction in all Title VII cases. See 8th Cir. Model Civil Jury Instructions §5.0; 9th Cir. Model Civil Jury Instructions §10.1 & cmt.; 11th Cir. Pattern Jury Instructions (Civil Cases) §4.5. See also Hartley v. Dillard’s Inc., 310 F.3d 1054, 1059–60 (8th Cir. 2002) (holding that as long as evidence introduced during a trial supports each theory, it is appropriate for a court to instruct a jury on both theories).


Some courts allow either party to request a mixed-motive jury instruction but require evidence to have been presented in support of the instruction. Griffith v. City of Des Moines, 387 F.3d 733, 736 n.2 (8th Cir. 2004) (“[I]f the plaintiff presents sufficient evidence of intentional discrimination solely by reason of pretext or other circumstantial evidence, and if the defendant presents sufficient evidence that it would have taken the same adverse action in any event, either party is entitled to a mixed-motive jury instruction.”). Defendants may choose to request a mixed-motive instruction because of the effect it has on limiting damages. See Boyd v. Ill. State Police, 384 F.3d 888, 901 (7th Cir. 2004).

But if a plaintiff requests a mixed-motive instruction, does it mean that he or she has acknowledged some of a defendant’s stated reasons for an adverse employment action? As one court decision explained, “[n]ot necessarily…. [T]he mixed-motive framework does not require the plaintiff to concede the legitimacy of an employer’s stated reasons—it is the jury’s task to decide between two competing theories.” Rapold v. Baxter Intern., Inc., 718 F.3d 602, 611 (7th Cir. 2013).

When will a court resolve which instruction to apply? Some courts have held that whether the evidence presented supports only a single-motive or a mixed-motive theory or both need not be finally resolved until after both sides have presented their cases to a jury and a court has evaluated the evidence. See Smith v. Xerox Corp., 602 F.3d 320, 333 (5th Cir. 2010). As long as a plaintiff has a good-faith evidentiary basis for asserting both theories, he or she need not characterize his or her case as a single-motive or a mixed-motive case before a trial begins “because evidentiary showings during discovery and at trial will affect the classification of the case.” Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 556 (4th Cir. 1999).

There are tactical reasons either to pursue or not to pursue a mixed-motive instruction. A jury given both a mixed-motive and a but-for instruction may, after weighing the evidence, decide to split the baby and determine that although discrimination was a ‘motivating factor,’ the employer ‘would have taken the same action in the absence of the impermissible motivating factor.’ By contrast, a party who proceeds solely under a but-for theory gives the jury an all-or-nothing choice: either find for the plaintiff, in which case the remedy would include monetary damages, as well as injunctive and declaratory relief; or find against the plaintiff, in which case the plaintiff would receive nothing. Ponce v. Billington, 679 F.3d 840, 845 (D.C. Cir. 2012).

Viability of the Mixed-Motive Framework in Other Employment Contexts

Mixed-motive liability is not viable in all types of employment claims. For example, the U.S. Supreme Court, in University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013), held that it is not viable in Title VII retaliation claims. In a 5–4 decision, the U.S. Supreme Court clarified that an employee alleging unlawful retaliation must prove that a retaliatory motive was the “but-for” cause of an adverse employment action. Stated otherwise, an employee must prove that the unlawful retaliation would not have occurred in the absence of the alleged wrongful actions of the employer. In so ruling, the Court found that the plain language of §2000e-2(m) shows that Congress intended to limit the mixed-motive analysis to only status-based discrimination claims involving race, color, religion, sex, and national origin. Id. at 2532.

The Supreme Court in Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009), held that the mixed-motive framework available in Title VII discrimination cases is not available in discrimination cases brought under the Age Discrimination in Employment Act (ADEA). The Court focused on the statutory language of the ADEA, which provides that “[i]t shall be unlawful for an employer “because of such individual’s age.” Gross, 557 U.S. at 176 (quoting 29 U.S.C. §623(a)). The Court found “the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer
decided to act,” and, therefore, “the plaintiff retains the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action.” Gross, 577 U.S. at 177.

The same analysis applies to the Americans with Disability Act (ADA), “which makes unlawful ‘discriminat[ion]… because of’ a person’s disability, and which says nothing about allowing a plaintiff to prevail because a disability was a ‘motivating factor’ in the adverse employment decision.” Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 318 (6th Cir. 2012) (quoting 42 U.S.C. §12112(a), (b)(1)). See also Serrwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010). C.F. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Buchanan v. City of San Antonio, 85 F.3d 196, 200 (5th Cir. 1996); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); McNely v. Ocala Star–Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995); Parker v. Columbia Pictures Indus., 204 F.3d 326, 336–37 (2d Cir. 2000).

Also, a mixed-motive analysis does not apply to a hostile work environment claim because an employer can never have a legitimate reason for creating a hostile work environment. Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994).

Damages

While damages in a single-motive case generally include reinstatement, back pay, compensatory and punitive damages, equitable relief and attorney’s fees and costs, damages in mixed-motive cases are limited to declaratory relief, injunctive relief and attorney’s fees and costs. 42 U.S.C. §2000e-5. Courts are specifically prohibited from awarding damages or issuing orders “requiring any admission, reinstatement, hiring, promotion, or payment” in mixed-motive cases. 42 U.S.C. §2000e-5(g)(2). Accordingly, an employer can avoid significant damages, which can add up, depending on the number of employees involved, because compensatory and punitive damages alone can amount to $300,000, if the employer successfully establishes that despite its impermissible consideration, it would have made the same decision.

Attorney’s Fees and Costs

Sections §2000e-5(k) and §2000e-5(g)(2) (B) of Title VII, as amended, provide that attorney’s fees “may” be awarded. Section 2000e-5(k) states that “the court, in its discretion, may allow the prevailing party… a reasonable attorney’s fee (including expert fees) as part of the costs…” Section 2000e-5(g)(2)(B) provides that when a plaintiff establishes mixed motives and an employer demonstrates that it would have made the same decision despite an impermissible consideration, a court “may grant limine attorney’s fees and costs.” Unlike section 2000e-5(k), section 2000e-5(g)(2) (B) does not explicitly state that an award of attorney’s fees and costs is discretionary. However, courts have interpreted the statute’s use of the word “may” to mean that a court has discretion in awarding attorney’s fees and costs. Norris v. Sysco Corp., 191 F.3d 1043, 1052 (9th Cir. 1999); Akrabawi v. Barnes Co., 152 F.3d 688, 695-96 (7th Cir. 1998); Gudenkauf v. Stauffer Commcns., Inc., 158 F.3d 1074, 1080 (10th Cir. 1998); Canup v. Chipman-Union, Inc., 123 F.3d 1440, 1442 (11th Cir. 1997); Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1333–34 (4th Cir. 1996). These two sections have resulted in numerous court opinions. The obvious questions that arise in a mixed-motive case are “Who is the prevailing party?” and “Who is entitled to fees and costs?”

Courts have determined that “defendants should receive fees in Title VII cases only in fairly extreme circumstances.” Akrabawi, 152 F.3d at 697. Indeed, the Supreme Court has held that a prevailing defendant is only entitled to fees when a court finds that a plaintiff’s case was “frivolous, unreasonable, or without foundation.” Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). In contrast, without special circumstances, a prevailing plaintiff ordinarily is entitled to attorney’s fees. Id.

When determining whether to award a plaintiff attorney’s fees or how much, a court should consider the relationship between the degree of the plaintiff’s success and the fees, the public purposes served and whether an employer’s action demonstrates a “widespread or intolerable” animus. Sheppard, 88 F.3d at 1336; Garcia v. City of Houston, 201 F.3d 672, 678 (5th Cir. 2000); Akrabawi, 152 F.3d at 696. See Norris, 191 F.3d at 1052 (finding the factors useful but not comprehensive, exclusive or required in every case); Canup, 123 F.3d at 1444. But see Gudenkauf, 158 F.3d at 1080. Because mixed-motive cases permit only nonmonetary damages awards, courts ordinarily consider whether injunctive or declaratory relief was granted and the reasons why. Sheppard, 88 F.3d at 1336. Some courts also consider other factors, such as whether a plaintiff rejected a settlement offer. Sheppard, 88 F.3d at 1336; Canup, 124 F.3d at 144. They also sometimes consider a plaintiff’s own conduct. Canup, 123 F.3d at 1444. But see Keelan v. Denver Merch. Mart, 182 F. App’x 806, 808 (10th Cir. 2006) (refusing to consider the plaintiff’s rejection of a settlement offer in determining the amount of the plaintiff’s fee award). Practitioners should become familiar with the factors that the courts within their jurisdictions consider so that they can properly prepare their cases.

Conclusion

Mixed-motive jurisprudence has evolved and continues to do so. It offers a means by which defendants can limit their damages, though they may appear to be admitting to some wrongdoing by taking such an approach. An attorney undertakes a balancing act when deciding whether and when to assert a mixed-motive defense and how best to couch it to a judge and a jury.