

10.0 Introductory Comment

Employment discrimination law under Title VII of the Civil Rights Act of 1964 (Title VII), codified as Subchapter VI of Chapter 21 of title 42 of the United States Code, 42 U.S.C. § 2000e *et seq.*, is both complex and evolving.

Overview of Title VII for Employment Discrimination Claims

The Civil Rights Act of 1991 amended Title VII. Before 1991, Title VII provided only equitable remedies, and jury trials were not available. 42 U.S.C. § 2000e-5(g)(1) (providing for reinstatement, back pay, and “any other equitable relief as the court deems appropriate”). The 1991 amendments added the legal remedies of compensatory and punitive damages and the right to trial by jury for those remedies. 42 U.S.C. § 1981a(a)(1). Title VII plaintiffs now may recover injunctive and other equitable relief, compensatory and punitive damages, and attorneys’ fees. 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1), (k).

Recovery of compensatory and punitive damages under Title VII, however, may not exceed certain statutory limits under 42 U.S.C. § 1981a(b)(3). The level at which damages are capped depends on the size of the employer. 42 U.S.C. § 1981a(b)(3)(A)-(D). A jury must not be advised of these limitations. 42 U.S.C. § 1981a(c)(2). Because awards of back pay are not an element of compensatory damages, they are not subject to the statutory limits. 42 U.S.C. § 1981a(b)(2). The Supreme Court has extended this rationale to exclude front pay from the statutory limits. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001) (holding that the 1991 amendments did not alter the nature of front pay as an equitable remedy provided for in 42 U.S.C. § 2000e-5(g)), U.S.C. § 2000e-5(g)); *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016) (“Reinstatement and front pay are alternative remedies, which cannot be awarded for the same period of time.” (citing *Pollard*, 532 U.S. at 846)).

Although the Supreme Court has declined to address definitively whether a Title VII plaintiff has a right to a jury trial on the issue of back pay, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 252 n.4 (1994), the Ninth Circuit has held that there is no such right. *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069 (9th Cir. 2005). The holding in *Pollard* that front pay is excluded from the statutory limits because it is an equitable remedy suggests that similarly there is no entitlement to a jury trial for that remedy. *See Pollard*, 532 U.S. at 848. The court, however, may consider submitting questions of front and back pay to a jury for advisory findings under Rule 39(c) of the Federal Rules of Civil Procedure. If advisory findings from a jury are sought, the court should state on the record that it is not bound by any such findings and make a record of independent findings, as discussed in Rule 52(a). For a discussion of rules of special damages that apply to Title VII cases, see Chapter 5 (“Damages”), Comments to Instructions 5.2 (Measures of Types of Damages), and Instruction 5.5 (Punitive Damages). However, front pay can be awarded by a jury as a legal remedy for a state-law cause of action. *Teuscher*, 835 F.3d at 947 n.5 (noting that jury awards of front pay have been upheld where state law provides for that remedy (citing *Passatino v. Johnson &*

Johnson Consumer Prods., Inc., 212 F.3d 493, 512 (9th Cir. 2000))).

Further, a *McDonnell Douglas* burden-shifting instruction should not be given in a Title VII case. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc) (“[I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.”), *aff’d*, 539 U.S. 90 (2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir. 2003) (“[I]t is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case.”). Cases discussing pretext and burden shifting arise only in the context of summary judgment and motions for judgment as a matter of law. *See, e.g., Opara v. Yellen*, 57 F.4th 709, 721 (9th Cir. 2023); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

The Evolving Interpretation of “Because of” and But-for Causation in Title VII Cases

One of the more difficult aspects of Title VII jury instructions involves the meaning and application of the term “because of.” Indeed, in 2020, the legal landscape changed significantly. A bit of history may be helpful.

As explained by the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 347 (2013), since its passage in 1964, Title VII “has prohibited employers from discriminating against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in § 2000e-2.” Discrimination based on any one or more of these five characteristics often is referred to as status-based discrimination. “The two remaining categories of wrongful employer conduct—the employee’s opposition to employment discrimination, and the employee’s submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct. These latter two categories are covered by a separate, subsequent section of Title VII, § 2000e-3(a).” *Id.* at 347-48. Claims alleging discrimination based on these latter forms of protected employee conduct often are referred to as retaliation claims.

Section 2000e-2(a)(1) reads, in relevant part, that it shall be an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin” (emphasis added). In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court addressed what it means for an employment action to be taken “because of” an individual’s protected characteristic. The Supreme Court in *Nassar* explained the *Price Waterhouse* decision as follows:

Although no opinion in [*Price Waterhouse*] commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a “motivating” or “substantial” factor in the

employer's decision. If the plaintiff made that showing, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus.

Nassar, 570 U.S. at 348 (citations to separate opinions in *Price Waterhouse* omitted). The Supreme Court in *Nassar* continued:

Two years later, Congress passed the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. This statute (which had many other provisions) codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree. The legislation first added a new subsection to the end of § 2000e-2, *i.e.*, Title VII's principal ban on status-based discrimination. See § 107(a), 105 Stat. 1075. The new provision, § 2000e-2(m), states:

> [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

This, of course, is a lessened causation standard.

Nassar, 570 U.S. at 348-49 (emphasis added) (alteration in *Nassar*).

Nassar further explained that:

the 1991 Act substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*. Under that new regime, a plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order.

Id. at 349. The Supreme Court's opinion in *Nassar* continued its march through history, stating: "After *Price Waterhouse* and the 1991 Act, considerable time elapsed before the Court returned again to the meaning of 'because' and the problem of causation. This time it arose in the context of a different, yet similar statute," the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a). *Id.* (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009)). As *Nassar* explained: "Much like the Title VII statute in *Price Waterhouse*, the relevant portion of the ADEA provided that '[i]t shall be unlawful for an employer . . . 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.* at 349-50 (emphasis added) (alterations in original).

In its 2009 decision in *Gross*, the Supreme Court held "that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the

evidence, that age was *the* ‘but-for’ cause of the challenged adverse employment action.” *Id.* at 180 (emphasis added). The use of the definite article “the,” as opposed to the indefinite articles “a” and “an,” implied that there was only one but-for cause.

The Supreme Court in *Nassar* then applied this analysis from *Gross* when interpreting the meaning of “because of” in the antiretaliation provision of Title VII, set forth in § 2000e-3(a). After noting that the antiretaliation provision “appears in a different section from Title VII’s ban on status-based discrimination,” the Supreme Court in *Nassar*, citing *Gross*, explained:

This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee “because” of certain criteria. *Cf.* 29 U.S.C. § 623(a)(1). Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was *the* but-for cause of the challenged employment action

Nassar, 570 U.S. at 351-52 (emphasis added); *see Gross*, 557 U.S. at 176 (“To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was *the* ‘but-for’ cause of the employer’s adverse decision.” (emphasis added)).

Based on these Supreme Court decisions plus the 1991 amendments, which added § 2000e-2(m), for quite some time courts required that if plaintiff in a Title VII employment discrimination case proceeded under § 2000e-2(a), which required discrimination “because of” the plaintiff’s protected status or characteristic, that plaintiff would need to show that the protected status was *the* but-for cause, or the sole cause, of the challenged employment action. A similar test applied (and continues to apply after *Nassar*) if the plaintiff alleged retaliation in violation of § 2000e-3(a). On the other hand, a Title VII plaintiff alleging discrimination based on a protected status proceeding under § 2000e-2(m) need only show “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). *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1012 (9th Cir. 2024) (stating that plaintiff need only show race, color, religion, sex, or national origin was a motivating factor for employment practice). In that event, however, an employer could limit its liability if the employer could show, by a preponderance of the evidence, 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); *see also Comcast Corp. v. Nat’l Ass’n of Afr. Am. Owned Media*, 589 U.S. 327, 337 (2020) (stating that lack of but-for causation is an affirmative defense to stave off damages and reinstatement but not liability); *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996).

In 2002, the Ninth Circuit issued its en banc decision in *Costa*. In that case, the Ninth Circuit held that a plaintiff alleging disparate treatment could prevail under Title VII merely by

showing that the discrimination was “a motivating factor” in the employment decision, even though other factors also may have motivated the action. “Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played ‘a motivating factor.’” *Costa*, 299 F.3d at 853-54; *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772-73 (2015) (explaining that phrase “because of” “typically imports, at a minimum, the traditional standard of but-for causation,” but Title VII relaxes this standard in status cases “to prohibit even making a protected characteristic a ‘motivating factor’ in an employment decision”).

In *Costa*, the Ninth Circuit discussed jury instructions on causation in Title VII disparate treatment cases. In that decision, the Ninth Circuit stated that a district court may provide either a “single motive” or a “mixed motive” instruction. *Costa* added that “mixed” and “single” motives are not two “fundamentally different” theories of liability. *Costa*, 299 F.3d at 857. Instead, they are merely two avenues of instruction by which the plaintiff may meet the ultimate burden of proof: “to show by a preponderance of the evidence that the challenged employment decision was ‘because of’ discrimination.” *Id.*

As stated by the Ninth Circuit in *Costa*, “[a]fter hearing both parties’ evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly.” *Id.* at 856.

If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer’s decisionmaking, then the jury should be instructed to determine whether the challenged action was taken “because of” the prohibited reason. . . .

In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was “a motivating factor” in the challenged action. If the jury’s answer to this question is in the affirmative, then the employer has violated Title VII. However, if the jury then finds that the employer has proved the “same decision” affirmative defense by a preponderance of the evidence, 42 U.S.C. § 2000e–5(g)(2)(B), the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney’s fees, declaratory relief, and an order prohibiting future discriminatory actions.

Id. at 856-57. After *Costa*, the Ninth Circuit Jury Instructions Committee developed several alternative model instructions. As those model instructions explained, the proper formulation of the actual instructions depends on the trial court’s assessment of the evidence presented and what findings a reasonable jury could make.

The causation analysis, however, significantly changed after *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* is mostly known for its interpretation of the phrase “because of such individual’s . . . sex” in § 2000e-2(a) and its holding that an employer violates Title VII by taking an adverse employment action based on an individual’s sexual orientation, gender identity, or transgender status. *Id.* at 659-60, 681-82. But *Bostock* also is significant for interpreting “because of” in § 2000e-2(a) to refer to but-for causation, which courts traditionally have recognized can include more than one but-for cause. *See id.* at 656-57.

As explained in *Bostock*, “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’” *Id.* at 656 (quoting *Nassar*, 570 U.S. at 350). “In the language of law, this means that Title VII’s ‘because of’ test incorporates the ‘simple’ and ‘traditional’ standard of but-for causation.” *Id.* (citing *Nassar*, 570 U.S. at 346). “That form of causation is established whenever a particular outcome would not have happened ‘but for’ the purported cause.” *Id.* (citing *Gross*, 557 U.S. at 176). “In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Id.* “This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision.” *Id.* “When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.” *Id.* Further, “the plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action.” *Id.* at 665.

Thus, any reading of Title VII’s prohibition of discrimination based on a protected status that implies that a plaintiff must show that forbidden discrimination was the sole or primary cause of the challenged action must be carefully examined to determine if it remains good law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (“We hold that in circumstances like those presented here, where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.”). For example, to the extent *Costa* indicates that the phrase “because of” in 42 U.S.C. § 2000e-2(a) requires a trial court to determine “that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action,” 299 F.3d at 856, it would be inconsistent with *Bostock*. After *Bostock*, the Ninth Circuit Jury Instructions Committee substantially modified its Chapter 10 Introductory Comment and Instructions 10.1, 10.2, and 10.3. Indeed, current Instruction 10.3 now defines “because of” based on *Bostock*.

Organization of Instructions

The instructions in this chapter are arranged in accordance with the three theories of liability that are most frequently asserted in Title VII cases. Instructions 10.1 through 10.3

pertain to a claim of disparate treatment (intentional discrimination). Instructions 10.4 through 10.9 pertain to a claim of harassment or hostile work environment. Instruction 10.10 relates to a claim of retaliation. Finally, because there are certain terms and defenses that are common to Title VII employment cases, they are set forth and defined in Instructions 10.11 through 10.19.

The Committee recommends that the court first identify the theory under which the plaintiff has asserted a Title VII claim and then refer to the relevant group of instructions. The basic instructions set forth in Instructions 10.1 through 10.8 may be used regardless of a particular plaintiff's protected status. Thus, depending on whether the claim is based on race, color, religion, sex, or national origin, Instructions 10.1 through 10.8 can be adjusted to reflect the protected trait or characteristic at issue in a particular case.

No instructions have been provided for a claim of disparate impact under Title VII, although such an instruction is provided for a disparate impact claim for age discrimination under the ADEA. *See* Instruction 11.4 (Age Discrimination—Disparate Impact—Elements). In many instances, instructions for a disparate-impact claim under Title VII may be made with minor alterations to the instruction for a disparate impact claim under the ADEA. *Compare* Instruction 11.4 with *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002) (“To establish a prima facie case of disparate impact under Title VII, the plaintiffs must (1) show [that specific employment practice or selection criterion had] a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact.”); *see also Ricci v. DeStefano*, 557 U.S. 557 (2009).

And while Title VII plaintiffs often use statistics to meet the first element of their disparate-impact claims, they are not necessary “where a disparate impact” to a protected class “is obvious” from the face of the complaint. *See Bolden-Hardge v. Off. Cal. State Controller*, 63 F.4th 1215, 1227 (9th Cir. 2023). For a detailed discussion of a disparate impact claim arising under the Fair Housing Act, see *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (relying on cases interpreting Title VII and the ADEA).

In some cases when an employer is a state or local public entity, a plaintiff has the option of suing under 42 U.S.C. § 1983. The general elements of such a claim, however, are the same as under Title VII. Accordingly, in addition to the essential elements of a claim under 42 U.S.C. § 1983, the court may wish to refer to Instructions 10.1 through 10.8 when a claim under § 1983 is based on disparate treatment or harassment by a state or local employer.

Revised June 2025