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A LEGAL FRAMEWORK FOR UNCOVERING IMPLICIT BIAS

*Natalie Bucciarelli Pedersen**

Actors' implicit biases impact the law in areas ranging from employment discrimination to criminal law. Legal scholars are rightly concerned with the effects of implicit bias and have suggested a myriad of ways to counteract it. Many employment discrimination scholars, however, are pessimistic about the current law's potential to curtail the effect of implicit bias. Very little has been written about how the actual framework of an employment discrimination suit can mitigate bias. This Article fills that gap by suggesting a framework and exploring the importance of the framework at the summary judgment stage of litigation. This Article examines the way in which the framework courts use in individual disparate treatment employment discrimination cases can work indirectly to force employers to reflect upon their motives for a particular decision. It advocates using the motivating factor framework at the summary judgment phase, which will ultimately change employers' decision-making behavior. Through a review of social psychology literature on decision-making and implicit bias, as well as a comparative case analysis of the differing frameworks used to analyze individual disparate treatment cases, it demonstrates the power that the motivating factor framework holds to indirectly mitigate the effects of implicit bias in workplace decisions.

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I. INTRODUCTION

Recent advances in social psychological research have determined that people act upon implicit biases of which they are not aware. When employers act on these biases, employees suffer. However, if the biases are implicit, how can the law address them? Scholars have suggested a myriad of ways to counteract such biases in the employment discrimination context. Unfortunately, there has been little written about how the actual framework of an individual disparate treatment case can work in an indirect way to force self-reflection and, thus, recognition of such biases. This Article attempts to fill that void by suggesting a framework for evaluating such claims that forces employers to reflect upon their motives for a particular decision and, hopefully, change employer's behavior.

As an example consider, Todd White, an African-American male, who in January 2001 was enjoying success as a valued employee of Baxter Healthcare Corporation.[1] He was employed by the company and its predecessor, Ohmeda Pharmaceutical Products, Inc., for several years as a sales representative selling proprietary and generic pharmaceutical products and was recently promoted to the position of Teaching Center Specialist.[2] The previous year White was awarded membership in the company's Distinguished Sales Club, an honor reserved for the top 5% of Baxter's sales representatives.[3] Until January 2004, Richard Clark

1. The introductory narrative is based on White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2380 (2009).

2. *Id.* at 385.

3. *Id.*

was White's supervisor and White's performance reviews were quite strong.[4] For example, in his 2003 performance review, Clark raved, "I could not be happier with your results YTD . . . I know that you will finish the year at #1!"[5]

Just two months after this review, White was required to report to a different supervisor, Tim Phillips.[6] White soon began to notice signs that Phillips perhaps harbored discriminatory animus towards African-American employees.[7] For instance, Phillips would occasionally answer White's phone calls by saying, "White, Todd" instead of just calling him by his first name as was customary.[8] Additionally, Phillips commented on several occasions that "nobody wants to be around a black man" and referred to a female African-American employee as "that black girl," rather than referring to her by her name.[9]

Despite these subtle (or perhaps not so subtle) signs of prejudice, Phillips encouraged White to apply for the position of Midwest Regional manager within his division at Baxter.[10] White applied but did not receive the promotion. According to the panel of decision-makers, which did not include Phillips, White appeared "extremely aggressive" and "confrontational" in the interview.[11] The panel gave the job to a woman with fewer credentials than White including less managerial experience and no MBA.[12]

In addition to not receiving the promotion, White's 2004 performance evaluation, authored by Phillips, was considerably less favorable than the one he had received from his previous supervisor only a year earlier.[13] According to Phillips, White's quantitative sales results were very poor and actually merited a lower rating than he gave White, but Phillips increased his performance score due to White's dedication and commitment to the business. Even with this enhanced score, White did not receive as large of a pay increase as he believed he deserved.[14]

White's situation is not uncommon. How often are personal characteristics, specifically those that are irrelevant, used by another to make judgments? Research on cognitive development is replete with

4. *Id.* at 385–86.
5. *Id.* at 386 n.2.
6. *Id.* at 385.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 386.
11. *Id.* at 387.
12. *Id.* at 386.
13. *Id.*at 387–88.
14. *Id.* at 388–89.

evidence that humans learn to categorize at an early age and part of this categorization process can lead us to rely on stereotypes in decision-making as a heuristic device.[15] The question, then, is not whether this process occurs, but rather what society can do about it. Specifically, what should antidiscrimination laws do to counter the use of stereotypes in decision-making processes? The question is complicated by the introduction of additional research showing that many of these stereotypes are automatic and are not consciously activated by a decision-maker. Rather, they operate on an unconscious level such that an individual confronted with a choice between two job seekers, for example, may prefer the Caucasian applicant to the African-American applicant for reasons wholly unrelated to merit but not understand what these reasons are.[16] Much has been written about what role the law should play in ferreting out and eliminating implicit bias.[17] This was, in part, the issue confronted by the Sixth Circuit in the *White* case.

After his poor performance review, White filed a complaint with the Equal Employment Opportunity Commission and eventually filed suit alleging discrimination on the basis of gender and race in the District Court for the Eastern District of Michigan.[18] All of his claims were dismissed on summary judgment, and on appeal, White contested the dismissal of his race discrimination claims in relation to Baxter's failure to promote him and his poor performance evaluation.[19]

One issue before the United States Court of Appeals for the Sixth

15. *See, e.g.*, Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (discussing the rapid and automatic categorizations underlying stereotypes); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 126–27 (1994) ("People immediately place the things they encounter into preexisting knowledge structures of schemata. . . . Although there is some controversy over the exact nature of the categorization process, there is widespread agreement that humans are prone to quick categorization of their environment."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–88 (1995) (discussing the notion that people categorize information as they receive it as part of the central premise of social cognition theory).

16. *See infra* notes 30 and 250 (and accompanying text) describing this research.

17. *See, e.g.*, Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 980–81 (2006) (arguing that affirmative action can decrease implicit bias simply by increasing the level of diversity in the workplace); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1053, 1058 (2006) (criticizing courts' use of the honest belief rule and same actor rule because the psychological theories underpinning these rules are not aligned with how people actually behave. The author argues that these rules reflect a view of discrimination as purposeful and deliberate, while social science research has shown that many stereotypes operate at an unconscious level.).

18. White v. Baxter Healthcare Corp., 533 F.3d 381, 389 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2380 (2009).

19. *Id.*

Circuit was how to assess White's claim that his race, while perhaps not entirely responsible for Phillip's poor evaluation, at least played a part in the evaluation. The court noted that this issue was one that confronted federal courts around the country since 2003 when the Supreme Court decided *Desert Palace, Inc. v. Costa*.[20] In that decision, the Supreme Court ruled that direct evidence was not required to establish a "mixed motive" claim under Title VII.[21] Rather, relying on circumstantial evidence alone, a plaintiff could allege that race or some other prohibited category played a role in the employment decision.[22] The Sixth Circuit correctly noted that the Eighth and Eleventh Circuits rejected the application of *Desert Palace* and the motivating factor framework at the summary judgment phase and, instead, retained the standard test articulated in *McDonnell Douglas Corp. v. Green*.[23] This test requires the plaintiff to proffer evidence that could be used to infer that discrimination was *the sole* reason, not one of the reasons, for the adverse employment decision.

The Sixth Circuit in *White* declined to take that approach,[24] and joined the Fourth, Fifth and Ninth Circuits in permitting a mixed-motive plaintiff to avoid a defendant's motion for summary judgment by producing evidence that a forbidden characteristic at least played a role in the decision.[25] The court noted, "[t]his burden of producing some evidence in support of a mixed motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."[26] This decision is a step towards rooting out implicit bias because it allows a plaintiff to articulate a mixed motive case—and support it with rather minimal evidence—by demonstrating that a forbidden characteristic played a role in the decision at least at the

20. 539 U.S. 90 (2003).

21. *Id.* at 92.

22. *Id.* at 99, 101–02.

23. 411 U.S. 792 (1973). *See* Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004); Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).

24. *White*, 533 F.3d at 400 ("We do so by holding that the *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims.").

25. At the summary judgment stage, the Fourth, Fifth and Ninth Circuits have stated that a plaintiff may prevail by either providing evidence that a defendant's articulated legitimate reason is pretextual *or* by providing evidence that—in addition to legitimate reasons—defendant's actions were also motivated by illegitimate (i.e., discriminatory) reasons. *See* Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); *see also*, Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312–13 (5th Cir. 2004); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004), *cert. denied*, 552 U.S. 1180 (2008).

26. *White*, 533 F.3d at 400.

summary judgment stage. Law directly influences the decision-maker by recognizing that bad motives can sometimes be mixed with legitimate motives and that legitimate motives should not be permitted to simply mask the illegitimate motives as happens under the *McDonnell Douglas* framework. However, the direct potential of the motivating factor framework is not the focus of this Article. Courts are still reticent to attempt to get inside decision-maker's heads to figure out the rationale behind their decisions. Instead, courts, even under the motivating framework analysis, will often still look to some explicit evidence of bias either on the part of the decision-maker, other supervisors or the company in general.

This Article argues that the law in circuits, which recognize the motivating factor framework at summary judgment, may actually have a greater, though more indirect, effect on the implicit biases of decision-makers. If as the Sixth Circuit articulated, the burden that must be satisfied by plaintiffs to make it past summary judgment is low then employers will become more concerned with the potential for suit when making employment decisions. Specifically, employers, as encouraged by their counsel, will be forced to think about their real motives for making a decision. Psychological research has shown that increased attention to decision-making reasons can have a positive effect on the recognition that automatic stereotypes may be playing a role in a particular decision.[27] Therefore, forcing employers to pay more attention to the reasons behind their employment decisions, in order to avoid a law suit that may survive a summary judgment motion, is a promising step in rooting out implicit bias.

This Article examines how the framework used by courts in individual, disparate treatment employment discrimination cases can work indirectly to force employers to reflect upon their motives for a particular decision.[28] It advocates using the motivating factor

27. *See, e.g.*, Wilson & Brekke, *supra* note 15, at 133 ("There is considerable evidence, then, that forewarning and debiasing manipulations are most likely to work when . . . [t]hey make people aware of the unwanted processing, they motivate people to resist it, and people are aware of the direction and magnitude of the bias and have sufficient control over their responses to correct for it."); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 247 (2002) (concluding that "highly motivated individuals can modify the automatic operation of stereotypes and prejudice").

28. This Article focuses primarily on race and gender discrimination as prohibited by Title VII. The theory behind the paper's hypothesis could work equally well in other contexts, including age discrimination. However, the Supreme Court recently decided that the motivating factor analysis is not available for age discrimination claims brought pursuant to the ADEA because the ADEA, unlike Title VII, was not amended to reflect such a framework. *See* Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2349 (2009). Thus, although such an extension to age cases might be theoretically desirable, the Court has deemed it legally impossible, at least for the time being.

framework at the summary judgment phase; using this analysis will ultimately change employers' behavior. Although judges are hesitant to attempt to detect employers' implicit biases, through the use of the motivating factor framework, judges can encourage an employer to self-reflect when making employment decisions. As discussed *infra*, being motivated to undertake such self-reflection can help detect implicit bias by the decision-maker himself. The motivating factor framework will not empower judges to detect implicit bias in any given case; the framework will encourage decision-makers to reflect on all of their reasons for making an employment decision. This self-reflection will lead to greater detection of implicit biases by the decision-maker herself.

Part II discusses the issue of implicit discrimination and the insights cognitive psychology has had in this area. It also examines some of the legal fields that scholars feel are particularly vulnerable to implicit bias and makes some suggestions for dealing with such bias in these areas. Part III considers implicit bias in the employment context, and why the case law under Title VII has historically proven inadequate to combat such bias. It then relates other scholars' proposals for combating implicit discrimination. Next, Part III examines *Desert Palace*'s potential for combating implicit bias. Part IV discusses why using the motivating factor framework at the summary judgment stage is so crucial in employment discrimination cases. Part V analyzes how courts in two different circuits (the Eighth and the Ninth) are using the *Desert Palace* decision in completely different ways. The matched case analysis supports the proposition that seems obvious and yet has gone untested: the differing standards at summary judgment lead to different outcomes in these circuits. Part V argues that these differences will affect how well implicit bias is detected *by the employment decision-maker himself* in these circuits. Finally, Part VI sets forth an argument for why a more liberal interpretation of *Desert Palace*'s effect on the Title VII case law at summary judgment will lead to greater recognition of implicit biases by the employers themselves, which should lead to a decrease in the role that implicit bias plays in employment decisions. In sum, this Article demonstrates that Title VII can combat implicit bias, though more indirectly than has been proposed by most scholars.

II. THE PROBLEM OF IMPLICIT BIAS

A. Implicit Bias in General

In his seminal article, *The Id, The Ego and Equal Protection:*

Reckoning with Unconscious Racism,[29] Charles Lawrence argued:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.
>
> . . . .
>
> . . . To the extent that this cultural belief system has influenced us all, we are all racists. At the same time, most of us are unaware of our racism.[30]

Legal scholars often refer to such innate prejudice as "implicit bias."[31] They use this term to encapsulate the notion that everyone holds certain biases at an unconscious level, and these biases may influence our decision-making processes in ways of which we are completely unaware.[32] The notion of implicit bias is rooted in psychological research about human cognitive processes. Research in cognitive psychology shows that, from a very early age, humans are taught to categorize the world. Categorization allows humans to make sense of the new information they encounter each day.[33] For instance, children are taught the difference between colors, shapes, and sizes. This process continues as they grow, leading to more and more specific categories. A two year old may know the difference between a car and a boat, but a five year old will likely know the difference between certain types of cars (e.g., station wagon, sedan, SUV, *etc.*). This process of more sophisticated categorization continues with age. The eight year old may recognize that his parents have a Ford, whereas the sixteen year old will know the difference between the Mustang and its less impressive relative the Focus.

This mental categorization process occurs in various aspects of

29. Charles L. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

30. *Id.* at 322.

31. *See, e.g.*, Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 20 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 364–373 (2007).

32. Krieger, *supra* note 15, at 1169, 1188, 1207, 1216–17.

33. *Id.* at 1189–91. *See also* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 338 (1992) ("When faced with data and the need to make judgments derived from that data, all humans may be categorized as 'intuitive scientists.' Information is processed through beliefs, theories, propositions, and schemas. These knowledge structures enable us to label and categorize objects rapidly and, in most cases, correctly.").

human life, including in grouping of individuals encountered on a daily basis. According to psychologists, such categorization allows for more efficient processing of information, judgment-making,[34] and can also be "socially useful [by] help[ing] people interact more easily."[35] This categorization process can result in stereotypes. Despite the time-saving benefits of categorization, the process can become a problem when these categories turn into stereotypes *of which an individual may not be aware*.[36] Although stereotyping is really just another form of categorization,[37] once in place, these stereotypes may "contaminate" our intergroup decision-making with biases of which we are not aware.[38] Krieger has offered a useful and concise summary of social cognition theory's explication of the process whereby stereotypes can contaminate our mental processes:

> [O]nce in place, stereotypes bias intergroup judgment and decisionmaking. According to this view, stereotypes operate as "person prototypes" or "social schemas." As such, they function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.
>
> . . . Stereotypes, when they function as implicit prototypes or schemas, operate beyond the reach of decisionmaker self-awareness. Empirical evidence indicates that people's access to their own cognitive processes is in fact poor. Accordingly, cognitive bias may well be both unintentional and unconscious.[39]

One way in which the manifestation of these automatic stereotypes has been tested is through the development of the Implicit Association Test (IAT). This test, developed by Project Implicit, seeks to "examine thoughts and feelings that exist either outside of conscious awareness or outside of conscious control."[40] It does so by presenting subjects with a

34. *See* Blair, *supra* note 27, at 242; Fiske, *supra* note 15, at 367 (noting that studies have shown the "cognitive economy of stereotypes," such that "stereotype labels—such as doctor, artist, skinhead, or real estate agent—saved resources in an impression formation task").

35. Fiske, *supra* note 15, at 375.

36. Krieger, *supra* note 15, at 1187 (noting "that cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes"). *See also* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break The Prejudice Habit*, 83 CAL. L. REV. 733, 733–34 (1995) (defining stereotypes as "well-learned internal associations about social groups that are governed by automatic cognitive processes." The author contrasts this with prejudice, which he defines as "a set of conscious personal beliefs.").

37. Krieger, *supra* note 15, at 1187.

38. *Id*. at 1188. *See also* Wilson & Brekke, *supra* note 15, at 118–19 (recognizing mental bias as a type of "mental contamination" whereby "a person ends with an unwanted judgment, emotion or behavior because of mental processing that is unconscious or uncontrollable").

39. Krieger, *supra* note 15, at 1188.

40. *See* Project Implicit, Background Information, https://implicit.harvard.edu/implicit/

series of words and asking subjects to categorize certain words or pictures into groups. For example, subjects participating in the race IAT are asked to associate pleasant words with European Americans and unpleasant words with African-Americans. They are then asked to do the reverse. An implicit bias against African-Americans is revealed when the subject is faster at associating African-Americans with unpleasant words and European Americans with pleasant words. "The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with white faces and names than African-American faces and names—and that the same pattern will be found for other traditionally disadvantaged groups."[41] As Greenwald and Krieger have noted, over many different categories, "[t]he bias index's values for IAT measures revealed considerably higher values than for the self-report measures, indicating that implicit bias is far more pervasive than explicit bias."[42]

The operation of implicit biases has been tested in other ways. Researches often perform audit studies where an African-American and a Caucasian employee are sent into a job interview. Though both have nearly the same qualifications for the job, the testers seek to determine whether one racial group of interviewees is consistently selected over another group. The problem with these studies is the variability in the actual interaction between the employer and the candidates, which may account for some of the variation in results. To eliminate this variability, Bertand and Mulainathan conducted a field study in which they sent resumes with identical qualifications to employers in the Chicago and Boston areas. Some resumes had traditionally Caucasian-sounding names, while others were for candidates with traditionally African-American names. The authors found that the callback rate for the African-American resumes was significantly lower than the rate for Caucasian candidates, despite the nearly identical qualifications.[43]

backgroundinformation.html (last visited Aug. 18, 2010).

41. *See* Jolls & Sunstein, *supra* note 17, at 971.

42. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 957 (2006). There is currently a scholarly debate on the merits of the IAT. *See* Gregory Mitchell & Philip Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737 (2009) (questioning whether the delays reported on the IAT actually translate into "realistic settings"). *But see* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y. REV. 477, 480–81 (2007) (arguing that Mitchell and Tetlock's real target is "the normative view of antidiscrimination law as reaching beyond acts reflecting the individual fault of the discriminator").

43. *See* Marianne Bertrand & Sendhil Mulainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, (MIT Dept. of Econ., Working Paper No. W9873, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract

Although this field study indicates that signals sent by names played a role in employers' interviewing decisions, there is a possibility that race and, specifically, implicit racial bias may not motivate the findings. For instance, it is possible that socioeconomic status could be playing a role in the findings. Nonetheless, laboratory studies indicate implicit bias's importance as a causal factor in decision-making.

In another study, subjects acted as a parole board and decided whether an individual was still a menace to society. The subjects were presented with background information about the person and his or her crime. Researchers found that subjects were generally more punitive to an individual with a Hispanic name than an individual with a Caucasian name.[44] The authors concluded that "[t]ransgressions that are consistent with a cultural stereotype of the transgressor appear to be attributed to stable dispositional factors rather than to transitory or unstable ones."[45]

B. Implicit Bias and the Law

The effects of implicit bias on a decision-maker's behavior concern legal scholars. Authors have written about implicit bias in a range of areas from criminal law[46] to communications law.[47] Those studying the criminal justice system, the jury selection system, and employment law[48] in particular are acutely concerned with the consequences of decision-makers' implicit biases.

In criminal law, implicit bias is a great concern. One area of study involves a police officer's decision whether to shoot a potential criminal encountered on the street. Studies have shown that "[p]olice officers not only viewed more Black faces than White faces as criminal, they viewed those Black faces rated as most stereotypically or prototypically

_id=428367. Additionally, a recent study bolsters the gap between individual's explicit and implicit biases. The study found that "racism may persevere in part because people who anticipate feeling upset and believe that they will take action may actually respond with indifference when faced with an act of racism." Kerry Kawakami et al., *Mispredicting Affective and Behavioral Responses to Racism*, 323 SCI. 276 (2009).

44. Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY AND SOC. PSYCHOL. 267 (1985).

45. *Id.* at 279.

46. *See* R. Richard Banks et al., *Race, Crime, and Antidiscrimination*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 3 (Eugene Borgida & Susan T. Fiske eds., 2008).

47. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2004).

48. *See, e.g.*, Madeline E. Heilman & Michelle Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 127 (Eugene Borgida & Susan T. Fiske eds., 2008); Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias in* 3 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW: BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION 69 (Mitu Gulati & Michael Yelnosky eds., 2007).

Black . . . as the most criminal of all."[49] Additionally, the so-called "shooting studies" have found that "racial stereotypes create associations and expectations that may play a role in the sort of split-second decisions that may literally be a matter of life or death for police officers and suspects alike."[50] As Jerry Kang summarizes:

> Charles Judd and his colleagues performed a . . . study in 2004 to identify what types of racial meanings generate the shooter bias — negative emotional affect (negatively valenced evaluations of Blacks), cognitive stereotype (linking Blacks to guns), or some combination (stereotyping associated with a particular evaluative valence). Participants were primed with a Black or White face. The subsequent task involved categorizing a photograph as a handgun or insect. While both categories are negatively valenced, only the first category is stereotypically associated with Blacks. Researchers next asked participants to categorize objects as either sports equipment or fruits. Both categories are positively valenced, but only the first category is stereotypically associated with Blacks. If (negative) prejudice were the sole source of the shooter bias, then we would expect to see no facilitation in categorizing sports equipment after a Black prime. By contrast, if stereotypes were the sole cause, then we would expect to see facilitation with both guns and sports equipment and no facilitation with insects or fruits.
>
> Consistent with [prior studies] the experimenters discovered that participants categorized guns faster when primed with a Black face. They also found, however, faster categorization of sports equipment when primed with a Black face . . . Accordingly, the researchers concluded that stereotypes, rather than prejudice, best explain the shooter bias results.[51]

Interestingly, an individual police officer's association between Afrocentric features and harshness of treatment was not statistically related to such an individual's explicit racial attitude.[52] Automatic stereotypes, or unconscious bias, seem to play a role in an officer's decision for treatment of a potentially armed suspect.

Criminal law must confront the issue of how African-American and Caucasian defendants are treated in the courtroom. Studies have shown that the race of the accused and the victim affect the treatment of the defendant. However, the race of the victim really seems to determine the punishment. That is, studies have shown that "killing a white person is more likely to result in a death sentence than killing a Black

49. *See* Banks et al., *supra* note 46, at 5.
50. *Id*. at 7.
51. Kang, *supra* note 47, at 1527–28.
52. Banks et al., *supra* note 46, at 8.

person."[53] This issue was the subject of *McCleskey v. Kemp*,[54] where, the United States Supreme Court considered whether the imposition of the death penalty in Georgia was discriminatory. The Court examined, among other evidence, the "Baldus" study. This study included an analysis of more than four hundred variables in over one thousand Georgia homicide cases. Ultimately, the authors concluded that only race could explain the difference in punishment imposed on defendants who killed Caucasian victims.[55] Moreover, the authors concluded that, for at least a subset of cases, African-Americans who killed Caucasians were more likely to be sentenced to death than Caucasians who killed other Caucasians.[56]

As Jerry Kang summarizes, recent neurological studies have demonstrated that, when studied by functional magnetic resonance imaging (fMRI):

> [T]he amygdalas [that portion of the brain associated with the fear response] of White [study] participants 'light up' far more when they are *subliminally* shown Black faces as compared to White faces. Moreover, the degree of amygdala activation is significantly correlated with participants' IAT scores. There is, however, no correlation with explicit measures of bias, which again demonstrates dissociation between explicit self-reports and implicit measures revealed by reaction-time differentials.[57]

Such studies create concern about the likelihood that an African-American suspect will be treated fairly by an arresting officer and that an African-American criminal defendant can be treated fairly by judges and jurors, at least by Caucasian judges and jurors, when brought to trial. For, if Caucasian jurors, or at least most Caucasian jurors, are neurologically predisposed to fear African-American defendants more than Caucasian defendants, we can expect the presumption of guilt for an African-American defendant to be greater than that for a Caucasian defendant before the trial even begins.

The implicit bias of individual jurors is not the only concern in the trial process. Scholars have also expressed concern about the operation of attorneys' unconscious bias during the jury selection process. More specifically, the use of peremptory challenges has been targeted as a

53. Phoebe C. Ellsworth & Samuel Gross, *Social Science and the Evolving Standards of Death Penalty* Law, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 251 (Eugene Borgida & Susan T. Fiske eds., 2008).

54. 481 U.S. 279 (1987).

55. *Id*. at 356 (Blackmun, J., dissenting). *See also* Ellsworth & Gross, *supra* note 53, at 251.

56. Ellsworth & Gross, *supra* note 53, at 251.

57. Kang, *supra* note 47, at 1511.

likely product for the operation of implicit bias.[58] As Antony Page stated, "At best, a peremptory challenge is an educated guess, whereas at worst it is merely the expression of naked prejudice."[59] While some of this prejudice may be explicit, much is likely to be unconscious and operate outside of the awareness of the striking attorney.[60] Generally, when an attorney exercises a peremptory challenge, the attorney merely states his reason for striking the jury, and a judge must decide whether this seems plausible. Much like the *McDonnell Douglas* framework used in employment cases, the *Batson* framework operates on the assumption that the striking attorney has only one reason for the strike and is aware of this reason. As Antony Page notes, this is unrealistic in light of existing cognitive research on stereotypes. Therefore, he suggests that since the peremptory challenge likely will not be eliminated in the near future, the best remedy for prevention of the operation of implicit bias during the use of a peremptory challenge is not a change in law, but rather in procedure used by judges. Page elaborates:

> [T]here are more moderate steps that attorneys and judges should take to reduce the problem [of the discriminatory use of peremptory challenges]. These steps include judicial warnings about unconscious stereotyping before jury selection, enhancing voir dire through the use of race- and gender- blind questionnaires, and expanding the time allowed for voir dire. Although much bias is automatic, unconscious and unintentional, unconscious bias can be reduced both by raising the visibility of our society's egalitarian norms and by increasing the amount of information about potential jurors available to litigants.[61]

These examples are just a sample of the legal areas that may be affected by implicit bias. Obviously, the possibility that automatic stereotypes may affect an individual's decisions without his knowledge has implications for many other areas of the law as well. This Article focuses on the possible implications in the employment context—particularly in race and gender intentional discrimination cases.

For example, in one series of experiments:

> Michael Norton and his colleagues demonstrated [the effect of implicit bias] in simulated hiring and higher-education admissions decisions. They showed that subjects consistently altered the qualifications they deemed most relevant to the selection of a high-level construction

58. *See* Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

59. *Id.* at 158.

60. *Id.* at 159.

61. *Id.* at 161.

> manager, a stereotypically male job. When the male candidate had more education and less relevant job experience, subjects—who overwhelmingly preferred the male candidate—reported that they viewed education as more important than job experience. When the male candidate had more job experience and less education than the female candidate, subjects ranked job experience as more important than education. Either way, subjects tended to rank the criteria in a way that would justify selection of the male candidate on the grounds that he was 'better qualified' than the female candidate they were rejecting. However, when subjects were forced to rank the selection criteria before seeing the candidates' resumes, gender bias in selection largely disappeared.[62]

To illustrate the extent of the problem in the employment context, recall the conclusion of the parole board study discussed in Part II.A *supra*, that "[t]ransgressions that are consistent with a cultural stereotype of the transgressor appear to be attributed to stable dispositional factors rather than to transitory or unstable ones."[63] This conclusion has important implications for the employment context. If a manager must decide whether an employee should be fired due to a verbal altercation with a co-worker, for example, the manager may be influenced by his or her automatic stereotypes in making a decision—the manager will likely conclude that the employee whose race is perceived to be consisted with being "a trouble-maker" is consistent with that stereotype and should be fired. On the other hand, the manager may find that a person who that manager does not stereotypically group as a trouble-maker was really just acting uncharacteristically in the instance and so should be given another chance. Note that in this situation, nothing about the individual has been varied except his or her congruence with the manager's stereotyped beliefs. In the corporate world, where many managers are non-minorities, such practices could have devastating implications for minority employees.

With the increased understanding of implicit bias and its prevalence came an increased concern on the part of discrimination scholars about the ability of Title VII of the Civil Rights Act of 1964 to counteract such unconsciously held stereotypes. The next Part discusses some of the scholarship focusing on why Title VII, as interpreted by the Supreme Court and various circuit courts, is unable to confront and curtail implicit bias. The Part then discusses how Title VII could more effectively counteract such bias.

62. Krieger & Fiske, *supra* note 17, at 1037 (citing Michael I. Norton et al., *Casuistry and Social Category* Bias, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 821–22 (2004)).

63. Bodenhauser & Wyer, *supra* note 44, at 279.

III. TITLE VII AND IMPLICIT BIAS

Title VII of the Civil Rights Act of 1964 provides in pertinent 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.[64]

In *McDonnell Douglas Corp. v. Green*, the Supreme Court laid out a framework to be used when an individual plaintiff brings an employment discrimination case alleging intentional discrimination based on circumstantial evidence. First, the plaintiff must make out a prima facie case of discrimination by showing: (1) the plaintiff belongs to a group protected under the statute; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) that, notwithstanding, his qualifications, he was rejected, and (4) after his rejection, the position remained open, and the employer continued to seek applicants from persons of plaintiff's qualifications.[65] If the plaintiff does this, the burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action.[66] If the defendant meets this burden, the burden of production shifts back to the plaintiff and merges with the burden of persuasion, requiring plaintiff to prove that defendant's articulated reason is pretextual.[67] As noted by the Supreme Court, the burden on the plaintiff to prove a prima facie case and on the defendant to provide a legitimate, non-discriminatory reason is not onerous.[68] Thus, the majority of individual disparate treatment cases decided under the *McDonnell Douglas* framework are decided on the pretext prong. In

64. 42 U.S.C. § 2000e-2(a)(1) (2006).

65. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Courts have modified this four-part prima facie case in circumstances not involving hiring decisions. The more general formulation now used by many courts adapts the second and third prong to the nature of the adverse decision and replaces the fourth prong with the requirement that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *See, e.g.*, EEOC v. PVNF, L.L.C., 487 F.3d 790, 800 (10th Cir. 2007) (discriminatory failure to promote, demotion, and constructive discharge); Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046, 1055 (8th Cir. 2007) (discriminatory discipline and constructive discharge); Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005) (discriminatory termination); Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649–50 (4th Cir. 2002) (discriminatory training); Aragon v. Republic Silver State Disposal, 292 F.3d 654, 659–60 (9th Cir. 2002) (discriminatory termination).

66. *McDonnell Douglas*, 411 U.S. at 802.

67. *Id.* at 804.

68. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

subsequent cases, the Court made clear that a plaintiff, simply by showing pretext, is not automatically entitled to a favorable judgment because plaintiffs must convince the factfinder not only that the employer's proffered reason is pretext, but also that *the real reason* is discrimination.[69]

The *McDonnell Douglas* pretext framework is a source of great contention among scholars concerned with targeting implicit bias under Title VII.[70] Scholars have noted that the *McDonnell Douglas* pretext model is based upon an assumption that an employer only has one motive for making a hiring decision and that that motive is transparently clear to the employer at the time the decision is made.[71] As discussed in

69. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993) ("It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." (emphasis added)). *See also* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000) (emphasizing that the factfinder's disbelief of defendant's proffered reason does not automatically compel judgment for the plaintiff; but "'the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.'" (quoting *Hicks*, 509 U.S. at 511)).

70. *See, e.g.*, Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas – A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 986 (2004) ("'That is, the problem is not simply that courts do not understand unconscious bias or that judges themselves are hopelessly unconsciously biased. Rather, many judges quite consciously and deliberately believe that, even under Title VII, they should not interrogate the practices of the private workplace without direct evidence of mendacity.'" (quoting Chad Derum & Kren Engel, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1192–93 (2003))); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 750 (2005) (noting that an alleged "discriminator's awareness of her motivations is not a necessary element of a Title VII claim"); T.L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 150 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 107 (2003) [hereinafter Van Detta, *Le Roi Est Mort*]; Martin J. Katz, *Unifying Disparate Treatment Law (Really)*, 59 HASTINGS L.J. 643, 655 (2008); Krieger, *supra* note 15, at 1163–64; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993); Michael Selmi, *Proving Intentional Discrimination: The Reality of the Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997) (arguing that despite the Supreme Court's rhetoric concerning the importance of ferreting out unconscious or subtle discrimination, the Court, over the past twenty years, "has only seen discrimination, absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than race"); Krieger & Fiske, *supra* note 17, 1057–58.

71. *See* Hart, *supra* note 70, at 746, 758 ("By focusing the legal inquiry on the employer's intent at the moment an employment decision is made, the law fails to recognize that discrimination 'can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the ostensibly objective data set upon which a decision is ultimately based.' . . . [C]ourts applying the *McDonnell-Douglas* framework mistakenly assume that employment decisions are motivated by a single factor—either honest business judgment or dishonest discriminatory motivation." (quoting Krieger, *supra* note 15, at 1212)); *see also* Nagy, *supra* note 70, at 150 ("The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on the basis of one rationale to the exclusion of all others. Instead, most employment decisions are the

Part II, *supra*, however, many biases are held unconsciously and are perhaps not able to be easily detected by the employer at the time an employment decision is made. Thus, if courts force plaintiffs to prove that discrimination is *the sole* reason for an adverse employment decision under *McDonnell Douglas*, they are interpreting Title VII too narrowly and in a way that is out of touch with the behavioral realities of the actors Title VII targets. As Krieger and Fiske have argued, "resulting inconsistencies between the real world and the phenomenological models embedded in law can be highly problematic."[72] The need for congruence between the realities of how legal decision-makers act and the way in which the law assumes they act is a fundamental tenant behind the Behavioral Realist movement.[73] Krieger and Fiske further point out,

> [i]n the context of antidiscrimination law, behavioral realism stands for the proposition that judicial models—of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases—should be periodically revisited and adjusted so as to remain continuous with progress in psychological science.[74]

Given the apparent disconnect between the *McDonnell Douglas* sole factor theory of discrimination and the psychological developments highlighting the prevalence of implicit bias, it becomes apparent that intentional individual disparate treatment law must evolve in order to stay true to the realities of the employment decision-making process. It

result of the interaction of various factors, legitimate, and at times illegitimate, objective and subjective, rational and irrational." (quoting Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003))); Van Detta, *Le Roi Est Mort*, *supra* note 70, at 108 (noting that by focusing on the conscious intent of employers at the moment the employment decision is made, "*the McDonnell Douglas approach asks the wrong question*" (emphasis added)); Katz, *supra* note 70, at 655 (discussing why it is problematic to put the burden, as the *McDonnell Douglas* framework does, on plaintiffs to prove but-for causation in individual disparate treatment cases); Krieger, *supra* note 15, at 1164 (discussing the inadequacy of current Title VII jurisprudence in addressing the "subtle, often unconscious forms of bias that Title VII was also intended to remedy"); Oppenheimer, *supra* note 70, at 900 (advocating for a negligence standard for employment discrimination cases, such that an employer could be held liable for discrimination "when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur . . . [or] when it fails to conform its conduct to the statutorily established standard of care by making employment decisions that have a discriminatory effect, without first carefully examining its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping"); Krieger & Fiske, *supra* note 17, at 1028 ("In numerous ways, antidiscrimination law reflects and reifies a common-sense theory of social perception and judgment that attributes disparate treatment discrimination to the deliberate, conscious, and intentional actions of invidiously motivated actors.").

72. Krieger & Fiske, *supra* note 17, at 999.

73. *Id.* at 1000.

74. *Id.* at 1001.

is no longer sufficient to understand discrimination only as a product of an explicit bias that is well-recognized and understood by a decision-maker at the time a decision is made. Rather, the law must account for the fact that many employment decisions are based on reasons of which the employer may not have a conscious recognition.

To its credit, the Supreme Court made a foray into this area by recognizing that not all decisions are based on one factor. In *Price Waterhouse v. Hopkins*,[75] the Court stated:

> Moreover, since we know that the words "because of" do not mean "*solely* because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.[76]

Thus, the Court attempted to take a more realistic view of what an employer's decision-making process entails. The Court, however, limited *Price Waterhouse*'s so-called "mixed motive" framework to cases where an employee had direct evidence of discrimination.[77] After *Price Waterhouse*, there were two paths for plaintiffs claiming individual disparate treatment to take. First, those plaintiffs with direct evidence of discrimination could allege that the adverse employment decision taken against them was the result of mixed motives. Such plaintiffs could then proceed under the *Price Waterhouse* framework and attempt to show that the illegitimate factor was a substantial factor in the employer's decision-making process.[78] Alternatively, plaintiffs with only circumstantial evidence can proceed under the traditional *McDonnell Douglas* framework.

Price Waterhouse was soon modified by Congress through the Civil Rights Act of 1991. The Act amended Title VII to include Section 703(m), which now reads: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the

75. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

76. *Id.* at 241.

77. This requirement actually comes from Justice O'Connor's concurrence in the case. *See id.* at 261 (O'Connor, J., concurring). This opinion was needed to form a majority and formed the basis of how many federal courts applied the new "mixed motive" framework after *Price Waterhouse*.

78. This language also comes from Justice O'Connor's concurrence. *Id.* at 265 (O'Connor, J., concurring). Such a showing by a plaintiff was then subject to an affirmative defense by an employer: If the employer could show that it would have made the same decision regardless of the illegitimate factor, the employer would be relieved of all liability. *Id.* at 276–77 (O'Connor, J., concurring).

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."[79]

This language has been the subject of much debate. In 2003, the Supreme Court took another look at the "mixed motives" framework in *Desert Palace, Inc. v. Costa*.[80] In *Desert Palace*, Costa, the only woman employed by defendant as a warehouse worker and heavy equipment operator in its hotel and casino, filed a claim for sex discrimination.[81] Costa had numerous problems with management during the course of her employment and her record contained "an escalating series of disciplinary sanctions."[82] Desert Palace fired Costa after she was involved in a physical altercation with another worker.[83] That worker, Herbert Gerber, who had no disciplinary sanctions on his record, received only a five day suspension.[84] Costa's suit for sex discrimination went to trial and the district court instructed the jurors, in part, "If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was motivated by a lawful reason."[85] Desert Palace objected because respondent had failed to introduce direct evidence that sex was a motivating factor in her termination.[86] The circuit court sided with Costa after rehearing the case en banc.[87] The Supreme Court granted certiorari to decide whether the Civil Rights Act of 1991 abrogated the direct evidence requirement that most circuits had read into *Price Waterhouse*. The Court held that direct evidence was not required in order to receive a mixed motive jury instruction under the Act since there is no such requirement within the statutory text.[88]

At first glance, the case seemed to be a tremendous victory for employment discrimination plaintiffs. As many scholars noted, the abrogation of the direct evidence standard would transform every individual disparate treatment case into a mixed motive case, and they believed that *McDonnell Douglas* was dead.[89] If after *Desert Palace* the

79. 42 U.S.C. § 2000e-2(m) (West 2010).
80. 539 U.S. 90 (2003).
81. *Id.* at 95.
82. *Id.*
83. *Id.*
84. *Id.* at 95–96.
85. *Id.* at 96.
86. *Id.* at 97.
87. *Id.*
88. *Id.* at 97–98.
89. *See, e.g.*, Van Detta, *Le Roi Est Mort*, *supra* note 70, at 76 ("By a stroke of the judicial pen,

motivating factor standard applied in both direct and circumstantial evidence cases, what room could be left for *McDonnell Douglas*?

However, this declaration was premature. Footnote 1 in the *Desert Palace* decision stated, "This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context."[90] This footnote created some confusion among scholars and provided those courts, which were reluctant to apply the motivating factor analysis to all individual disparate treatment claims, with an excuse to avoid its application.[91] Additionally, the fact that *Desert Palace* dealt with jury instructions allowed courts to reason that *Desert Palace* does not apply to summary judgment proceedings.[92] Thus, the limited nature of the *Desert Palace* decision has caused debate among both scholars and courts as to what influence, if any, the decision actually had on the *McDonnell Douglas* framework.

For one concerned with the possibility of unconscious discrimination, the Eighth Circuit's jurisprudence is troubling. If *Desert Palace* applies to *all* individual disparate treatment claims at summary judgment, plaintiffs would have to show that the employer's decision was motivated by, but not solely attributable, to discrimination. This appears to be a much easier standard and allow more cases to move past the summary judgment phase. Such a development has enormous potential to remove society's biases through the law.[93] Part V explores the

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the unanimous Supreme Court in *Costa* has transformed every Title VII disparate treatment claim into a 'mixed motives' claim."); Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 83–84 (2004) (noting that *Desert Palace* "essentially eliminates any relevant distinctions between various types of disparate treatment cases"); Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1888 (2004) (arguing that the *Desert Palace* decision will result in almost all individual disparate treatment cases being governed by Title VII Section 703(m)); Nagy, *supra* note 70, at 144–45.

90. *Desert Palace*, 539 U.S. at 94 n.1. Section 107 of the Civil Rights Act of 1991 amended Title VII to add: "Except 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.* (quoting 42 U.S.C. § 2000e-2(m) (2006)).

91. *See* Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 512 (2008) ("*McDonnell Douglas* is as viable today as it has ever been and the limited nature of the *Desert Palace* opinion, among other things, has contributed to its continuing vitality.").

92. *See, e.g.*, Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (concluding that because *Desert Palace v. Costa* concerned the propriety of the motivating factor standard in jury instructions, the case had no effect on the court's summary judgment jurisprudence).

93. Jolls and Sunstein have suggested different ways in which antidiscrimination law can have a debiasing effect on employers. For example, Jolls and Sunstein have differentiated debiasing law from debiasing through law. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006). The authors use the phrase debiasing law to refer to "strateg[ies] for insulation"—attempting to protect legal outcomes from falling victim to bounded rationality. *Id.* at 200. They use the

differences between the Eighth and Ninth Circuits. These two circuits use *Desert Palace* at summary judgment in completely different ways. It examines cases with similar fact patterns that have come out differently in each circuit because of the standard each circuit employs at summary judgment. Part VI explains why the Ninth Circuit's approach could indirectly lead to a greater decrease in employers' implicit biases than the Eighth Circuit's approach. First, however, this Article examines why the use of *Desert Palace's* motivating factor framework at summary judgment is so crucial to uncovering implicit bias.

IV. WHY APPLY THE MOTIVATING FACTOR FRAMEWORK AT THE SUMMARY JUDGMENT STAGE?

Summary judgment is a critical phase in all litigation. The literature on summary judgment is extensive and massive debate has ensued regarding the merits of summary judgment and whether summary judgment is being used appropriately, particularly after the Supreme Court's 1986 trilogy.[94] This Part summarizes some of the current concerns with the use of summary judgment and in particular, with its

phrase debiasing through law, however, to refer to the situation where legal policy "operate[s] directly on the boundedly rational behavior and attempt[s] to help people either to reduce or to eliminate it." *Id.* In another paper, Jolls and Sunstein suggest that in order to reduce implicit bias, debiasing through law requires that the law act to "reduce people's level of bias rather than to insulate outcomes from its effects." Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 977 (2006). The authors propose that existing antidiscrimination law not only acts to debias law by insulating potential discrimination victims from the outcomes of employer's conscious discrimination, but also debiases through law by increasing population diversity in the workplace. *Id.* at 980–81. The authors argue that by increasing diversity in the workplace, the level of implicit bias is reduced as those holding such biases are introduced to and familiarized with individuals from the group against whom the bias was held. *Id.* at 981–82. The authors also suggest that current law prohibiting hostile work environments are likely also to have the effect of debiasing through law by operating on the "physical and sensory environment" of the workplace:

> Under current antidiscrimination law, hostile environments featuring negative or demeaning depictions of protected groups (including, but not limited to, depictions in posters and other visual media) are generally unlawful in workplaces, educational institutions, and membership organizations. In this way, current law governing sexual and racial harassment almost certainly produces some effect on the level of implicit bias in these institutions. Compared to an environment in which such demeaning depictions were not unlawful, the current framework is likely to have a debiasing effect.

Id. at 982–83.

94. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

use in discrimination cases. It then discusses why, with those concerns in mind, the motivating factor is the right framework to use at this critical stage in employment discrimination litigation.

Pursuant to the Federal Rules of Civil Procedure, a motion for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[95] Scholars have noted the federal courts' increased use of summary judgment since the Supreme Court's 1986 decisions in three cases involving summary judgment standards and procedures:

> In 1986, the now famous Supreme Court "trilogy"—[*Celotex*, *Matsushita* and *Anderson*]—transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation. Since then, federal courts have employed summary judgment . . . in cases that before the trilogy would have proceeded to trial, or at least through discovery.[96]

Motions for summary judgment are rarely granted in favor of plaintiffs, particularly in employment discrimination cases. In fact, about 73% of summary judgment motions in employment discrimination cases are granted and almost all of these are in favor of defendants.[97] This is problematic for several reasons. First, the granting of summary judgment denies litigants their day in court and the feeling that the judicial system has accorded them a fair result. Additionally, the denial of summary judgment shapes the settlement process. Thirdly, judges, rather than jurors, are more likely to be deferential to defendants seeking summary judgment, particularly in civil rights cases. Finally, the review of evidence on summary judgment is necessarily different than at trial and may take on a contextually different meaning for the judge.

When a plaintiff files a suit, he or she expects justice to be done. Termination of the suit in favor of the defendant before trial eliminates the opportunity to present all of the evidence, eliminates the right to go before a jury, and thwarts the plaintiff's expectation of justice—all of which leaves the plaintiff with the feeling she has been deprived of her day in court. As one scholar has noted, "the telling of the full story in a public setting can make an important difference to a plaintiff, even if she ultimately loses."[98] Leaving plaintiffs with the feeling they have

95. FED. R. CIV. P. 56(c).

96. Miller, *supra* note 94, at 984.

97. *See* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007).

98. *Id.* at 713.

somehow been treated unfairly or silenced inappropriately is a concern to the perceived legitimacy of our judicial system.

In addition to effects on the legitimacy of the system, the grant of summary judgment also affects the litigation settlement process. When summary judgment motions are filed by the defendants and denied, the balance of power shifts from plaintiff to defendant. "For plaintiffs, summary judgment is the place of 'do or die.'"[99] "The threat of summary judgment shapes settlement even in advance of a motion being filed. And when summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous settlement offers than they might have otherwise considered."[100]

Thirdly, in civil rights cases and particularly in the employment discrimination context, summary judgment rulings are made by a judge, rather than trial by jury, which often results in a ruling bias in favor of defendants. Scholars have noted the readiness of courts to defer to defendants' stated reasons for an employment action, rather than credit a plaintiff's accusations of discrimination.[101] Courts are hesitant to second-guess employers' business practices and tend to credit any seemingly legitimate reason articulated by employers for a given employment decision.[102] This is problematic in the employment context where a multitude of reasons may account for an adverse employment action.

Finally, when employment discrimination cases are decided by judges at the summary judgment stage, there is a tendency for judges to examine the evidence presented in a piecemeal fashion rather than in a holistic way.[103] This is damaging to plaintiffs because evidence of

99. *Id.* at 715–16. *See also* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L. J. 45, 48 (2005).

100. Schneider, *supra* note 97, at 716.

101. *See, e.g.*, Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891 (2006) (noting that "[s]cholars have also documented well the judiciary's failure to redress more subtle discrimination and the judiciary's readiness to defer to the defendant's stated reason for the challenged employment action"); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 231 (1993) ("Courts believe defendants when they articulate their non-discriminatory reasons for the employment decision and disbelieve plaintiffs when they attempt to prove that defendants' articulated reasons are pretextual."); Michael Selmi, *Employment Discrimination and the Problem of Proof: A Symposium: Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) ("[C]ourts are also affected by various biases that help explain their treatment of employment discrimination cases. . . . When it comes to race cases, which are generally the most difficult for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.").

102. Parker, *supra* note 101, at 891, 927.

103. *See* McGinley, *supra* note 101, at 233; *see also* Schneider, *supra* note 97, at 729 ("In ruling

discrimination does not lend itself to isolated examination, but rather, discrimination often becomes apparent only in the context provided by a holistic examination of a defendant's past acts and practices.

There are benefits to courts' increased use of summary judgment. Disposing of a case by means of summary judgment eases pressures on the judicial docket and can increase the efficiency of the litigation process.[104] Additionally, summary judgment can be a legitimate means of saving the opposing party money in otherwise frivolous litigation. However, all of this assumes that the underlying litigation is not meritorious. When summary judgment is used to control judicial caseloads, at the expense of otherwise legitimate cases, the device can be problematic.[105] This is precisely the use demonstrated in many employment discrimination cases. This issue is further complicated by the Supreme Court's recent decision in *Ashcroft v. Iqbal*.[106] In that case, the Court heightened the pleading standard for discrimination plaintiffs, noting that:

> bare assertions [that] amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" . . . are conclusory and not entitled to be assumed true.[107]

This case has left many wondering exactly what a discrimination plaintiff needs to prove in order to show the requisite intent. Therefore, it is foreseeable that in the wake of *Iqbal*, courts will be more likely to use mechanisms, such as the motion to dismiss and the motion for summary judgment, to dispose of cases.

Therefore, it becomes critical to identify ways that meritorious claims can be kept on the docket even after a summary judgment motion is filed. Using the motivating factor framework at the summary judgment level may alleviate federal courts' tendencies to simply defer to an employer once the employer has supplied some type of reason for its decision. Additionally, this framework may allow judges the freedom to view various pieces of evidence as parts of a whole because the existence of various motivations would be allowed. However, as

on summary judgment motions, judges frequently slice and dice law and fact in a technical and mechanistic way without evaluating the broad context on an arid record, a record that is limited to discovery.").

104. Bradley Scott Shannon, *Should Summary Judgment Be Granted?*, 58 AM. U. L. REV. 85, 114 (2008).

105. *Id.*

106. 129 S. Ct. 1937 (2009).

107. *Id.* at 1951 (internal citations omitted) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

discussed more fully in Part VI.B, *infra*, the use of the motivating factor framework holds the potential for even more powerful indirect deterrence of employer discrimination by setting up an incentive system whereby the employer would be motivated to discover and attempt to mitigate any effect of implicit bias. Summary judgment is a crucial phase in employment discrimination litigation and the importance of employing the correct test—one that recognizes the importance of the perceived legitimacy of our judicial system, the pivotal role of settlement power, and the tendency of judges to defer to defendants and examine evidence in isolation—is integral to ensuring correct results in these cases. Just as crucial is employing a framework at summary judgment that has the potential to modify employers' behavior, particularly behavior of which they may be unaware. The motivating factor framework holds this potential. But in reality, does it make a difference at the summary judgment stage?

V. CURRENT CASE LAW

As noted in Section III *supra*, the Eighth and Ninth Circuits have taken vastly different approaches to how, if at all, *Desert Palace* affects the *McDonnell Douglas* analysis. The United States Court of Appeals for the Eighth Circuit has held that *Desert Palace* did not affect the *McDonnell Douglas* analysis at the summary judgment phase. In *Griffith v. City of Des Moines*,[108] the court wrote:

> *Desert Palace* involved the post-trial issue of when the trial court should give a "mixed motive" jury instruction under 1991 Title VII amendments codified at 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The Court's opinion did not even cite *McDonnell Douglas*, much less discuss how those statutes impact our prior summary judgment decisions. While in general the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, the context of the two inquiries are significantly different. At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was *a* motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues. Thus, *Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this

108. 387 F.3d 733 (8th Cir. 2004).

Circuit's controlling summary judgment precedents.[109]

While this explication of *Desert Palace*'s relation to *McDonnell Douglas* at the summary judgment phase does not seem to require a plaintiff to continue to show sole factor motivation at summary judgment, the Eighth Circuit's further elaboration of its reasoning in *Gilbert v. Des Moines Area Community College*,[110] does not provide as much hope for plaintiffs. The *Gilbert* court stated:

> As an initial matter, Gilbert attacks the district court's method of analysis, arguing *Desert Palace, Inc*. v. *Costa*, modified the *McDonnell Douglas* burden-shifting analysis by clarifying Title VII only requires a showing that discrimination was *a* motivating factor in an employment decision. Gilbert contends the district court employed a more restrictive standard at the summary judgment stage by analyzing Gilbert's claim pursuant to *McDonnell Douglas* and erroneously required Gilbert to demonstrate race was the *sole* motivating factor in the challenged employment decision. We disagree. We previously have rejected the argument that *Desert Palace* modified our court's use of the three-part *McDonnell Douglas* analysis at the summary judgment stage of an employment discrimination lawsuit.[111]

While the court further noted that there was no evidence that the district court "improperly hinged Gilbert's race discrimination claim on Gilbert's ability to show race was the sole factor in [the] decision not to promote [him],"[112] the holding seems to belie this notion. In forcing Gilbert to fashion his case under the traditional *McDonnell Douglas* pretext model, the court forced Gilbert to demonstrate that discrimination was the real reason behind his denial of the promotion. For instance, although Gilbert demonstrated that he was more qualified than the candidate eventually selected for the job, the Eighth Circuit refused to rely on this finding for pretext, noting that courts defer to employers to make internal business decisions. The court stated, "although an employer's selection of a less qualified candidate can support a finding that the employer's nondiscriminatory reason for the hiring was pretextual, it is the employer's role to identify those strengths that constitute the best qualified applicant."[113] Had the court actually been using the motivating factor analysis, it would have been difficult to affirm summary judgment with such a fact on the record. Thus, it seems that the Eighth Circuit really employs the *McDonnell Douglas* sole

109. *Id.* at 735 (internal citations omitted).
110. 495 F.3d 906 (8th Cir. 2007).
111. *Id.* at 914 n.6 (internal citations omitted).
112. *Id.*
113. *Id.* at 916 (quoting Kincaid v. City of Omaha, 318 F.3d 799, 805 (8th Cir. 2004)).

factor analysis at the summary judgment stage, making it much more difficult for plaintiffs to defeat such a motion.

In contrast, the United States Court of Appeals for the Ninth Circuit has held that:

> when responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [defendant].[114]

The court subsequently clarified this standard, noting that a plaintiff "may prove either that he was not promoted 'because of' his race ('single-motive') or that race was a 'motivating factor' in the County's decision ('mixed-motive') . . . [Plainitff] need not identify in advance which type of case he is attempting to prove."[115] This standard, as opposed to that of the Eighth Circuit, seems to be much more favorable towards plaintiffs at the summary judgment phase. The remainder of Part V tests this hypothesis by examining four sets of matched employment discrimination cases, all decided after the *Desert Palace* decision. This Part examines whether these cases, with similar factual scenarios, result in a different legal outcome depending on which standard they are decided under. To locate these cases, a search of all cases in the Eighth and Ninth Circuits containing the terms "McDonnell Douglas" and "Desert Palace" was performed. It is interesting to note that there were many more cases in the Ninth Circuit reversing summary judgment in favor of the employer than in the Eighth Circuit.[116] For each matched case below, the facts and the appeals court's reasoning is discussed followed by a comparison of the two cases. The matched case approach is used as a way of comparing factually similar cases in order to compare whether different legal frameworks affect the outcome. Admittedly the cases do not have identical facts and the analysis will not be perfect in controlling for these differences. To the extent possible, however, the cases are very similar in their facts and should provide a strong mechanism of comparison.

114. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004), *cert. denied*, 552 U.S. 1180 (2008).

115. Gibson v. King County, 256 F. App'x 39, 41 (9th Cir. 2007).

116. In the six years since *Desert Palace* was decided, the Ninth Circuit ruled in favor of the employer (either upholding a grant of summary judgment or reversing a denial of such a judgment) in a mixed-motives case about as many times as it overruled such a judgment. In contrast, in those same years, the Eighth Circuit ruled for the employer (either upholding summary judgment or reversing a denial of summary judgment) about six times as often as it held in favor of the employee.

The matched cases examined are visually presented in the table that follows:

Eighth Circuit	**Ninth Circuit**
Sallis v. University of Minnesota, 408 F.2d 470 (8th Cir. 2005).	*Dominguez-Curry v. Nevada Transportation Department*, 424 F.3d 1027 (9th Cir. 2005).
Maxfield v. Cintad Corp., No. 2, 427 F.3d 544 (8th Cir. 2005).	*Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007).
Arraleh v. County of Ramsey, 461 F.3d 967 (8th Cir. 2006).	*Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006).
Montes v. Greater Twin Cities Youth Symphonies (GTCYS), 2008 WL 3927231 (8th Cir. Aug. 28, 2008).	*Gibson v. King County*, 256 Fed. Appx. 39 (9th Cir. 2007) (unpublished).

Sallis v. University of Minnesota

Facts of *Sallis*

Appellant, James Sallis, an African-American male, worked as a delivery person at the University of Minnesota.[117] He was transferred to the Fourth Street Parking Ramp as a result of reassignment caused by layoffs.[118] After his transfer, he sought, but was not hired for three other positions at the University of Minnesota.[119] The first position he applied for, third-shift general maintenance supervisor, was chosen by a panel of three interviewers.[120] They each rated Sallis lower in several categories than the applicant who received the job, although Sallis did have more supervisory experience than the candidate who received the job.[121] The second position was a mechanic position which required technical knowledge and skills.[122] Sallis possessed less training time and field experience than the other applicant.[123] The third position was that of athletic equipment worker with the University of Minnesota football

117. Sallis v. Univ. of Minn., 408 F.3d 470, 472 (8th Cir. 2005).
118. *Id.* at 472–73.
119. *Id.* at 473.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

team.[124] He was also denied this position and contended that the denial was based on his race.[125] During the time he had worked at the Fourth Street Parking Ramp, his supervisor called him "tan" in front of others, and he had also heard a parking attendant use the racial epithet "niggers" and complain "about 'all of the damn Somalians.'"[126] Sallis brought suit for racial discrimination in the United States Court for the District of Minnesota.[127] The district court granted the university's motion for summary judgment, holding that even if Sallis made a prima facie case of discrimination for failure to promote, Sallis was not able to show that the university proffered reasons for its decisions were pretextual.[128]

Eighth Circuit's Reasoning

On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment.[129] Sallis argued that the district court had misapplied *Desert Palace*.[130] The Eighth Circuit disagreed, noting that *Desert Palace* only applies to mixed motive cases, and since "Sallis produced no convincing evidence, circumstantial or direct, that race motivated UM's decisions not to promote him, [w]e therefore proceed under *McDonnell Douglas*."[131] The court concluded, in accordance with the district court, that Sallis's claim failed under *McDonnell Douglas* because he could not show that the university's proffered reasons for not hiring him were illegitimate.[132] The court noted that "Sallis failed to offer evidence in response [to UM's proffered reasons] showing that UM's qualification claim was pretextual and that the actual motivating factor was race discrimination."[133]

Dominguez-Curry v. Nevada Transportation Dept.

Facts of *Dominguez-Curry*

Sylvia Dominguez-Curry worked under the supervision of Rob Stacey in the Nevada Department of Transportation's contract compliance

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 474.
129. *Id.* at 478.
130. *Id.* at 474.
131. *Id.* at 475.
132. *Id.*
133. *Id.* at 475–476.

division.[134] According to Dominguez-Curry, Stacey often made demeaning comments to and about women.[135] For instance, Stacey had told Dominguez-Curry and other women in her department that "he wished he could get men to do [their] jobs" and "women should only be in subservient positions."[136] He also expressed concern about women with children working at the company.[137] Stacey was eventually promoted to Contract Compliance Manager, and around the same time, the department announced an opening in the division for the Program Officer III position.[138] Stacey and another employee, Elicegui, made the hiring decision and both independently chose a male candidate, Phillip Andrews, rather than Dominguez-Curry.[139] Dominguez-Curry admitted Andrews "was very qualified, and he may be more qualified than me, but that was not the—I just knew because he had the right body parts is why he got hired, in addition to being qualified."[140] Stacey contended that gender did not influence his decision and that the new hire's qualifications were simply superior.[141] Dominguez-Curry brought suit against the Nevada Transportation Department and Stacey, alleging, *inter alia*, failure to promote based on sex discrimination.[142] The district court granted defendant's motion for summary judgment, holding that Dominguez-Curry did not present evidence that the defendant's proffered legitimate reason was a pretext for sex discrimination.[143]

Ninth Circuit's Reasoning

Dominguez-Curry appealed the district court's grant of summary judgment and the Ninth Circuit reversed, holding "that appellees' decision not to hire Dominguez was motivated at least in part by her gender."[144] The court reasoned that:

> Even if it were uncontested that Andrew's qualifications were superior, this would not preclude a finding of discrimination. An employer may be held liable under Title VII even if it had a legitimate reason for its employment decision, as long as an illegitimate reason was

134. Domingues-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1031 (9th Cir. 2005).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1032.
139. *Id.* at 1033.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1033–34.

> a motivating factor in the decision . . . Here, the evidence ultimately may permit a finding that appellees had a legitimate reason for hiring Andrews over Dominguez. However, because a reasonable factfinder could conclude that the hiring decision was motivated at least in part by her gender, the district court erred in granting summary judgment in favor of the [defendant].[145]

The court cited *Desert Palace* in its reasoning and noted that: "the plaintiff in any Title VII case may establish a violation through a preponderance of the evidence . . . that a protected characteristic played 'a motivating factor.' To overcome summary judgment, a plaintiff merely must raise a triable issue as to this question. Dominguez has met this burden."[146]

Comparison of Eighth and Ninth Circuit's Reasoning

It is striking to note not only the difference in outcomes in *Sallis* and *Dominguez-Curry*, but also the difference in reasoning that led to those results. The Eighth Circuit was adamant in its refusal to even consider that Sallis's supervisor's remarks may have indicated a bias that influenced the decision-making process. Rather, the court steadfastly asserted that the case was not a mixed motive case and that there was no evidence that race played a motivating factor in the decision-making process even though the candidate hired for one of the positions may actually have been less qualified than Sallis.

In stark contrast to this logic, the Ninth Circuit in *Dominguez-Curry* held that it was possible that sex may have played a factor on the company's failure to promote the plaintiff, even though the plaintiff herself admitted that she was less qualified than the person actually hired. The Ninth Circuit used the reasoning of *Desert Palace* to conclude that the possibility of gender discrimination was not foreclosed simply because the defendant may also have had legitimate reasons for making the decision that it did.

The differences in the two circuits' interpretation of *Desert Palace* in these cases led to a difference in whether plaintiff got before a jury on his or her claims of discrimination. As discussed in Part III *supra*, such a difference can be crucial in an employment discrimination case, leading not only to a possible victory for plaintiff in court, but also greatly increasing the potential for settlement. A further exploration of other cases in which the Eighth and Ninth Circuits employed *Desert Palace* differently will help to illustrate more clearly the potential

145. *Id.* at 1040–41 (internal citations omitted).

146. *Id.* at 1042 (internal citation omitted).

impact the differing standards have on Title VII litigation.

Maxfield v. Cintas Corp., No. 2

Facts of *Maxfield*

Darold Maxfield, an African-American male, worked for Cintas Corporation as a facility outside sales representative from May 2000 until his discharge in August 2002.[147] Maxfield was also in the United States Army and was granted, several military leaves during his time at Cintas.[148] Maxfield did well at Cintas for a while.[149] Then, in May 2001, for the first time, his draw exceeded his commission.[150] This continued until July 2001.[151] At that time, he took another military leave of absence.[152] While on leave, he was transferred to a different position.[153] In January 2002, he was placed in another position, which he believed to be a demotion.[154] In August 2002, Randy Lewis, the general manager of the facility, suspended Maxfield because Maxfiled tried to take sick/emergency leave while on military leave.[155] Lewis told Maxfield that this was against company policy and that "he had stolen from the company."[156] Cintas terminated Maxfield four days later.[157] Cintas actually allowed employees to take sick leave while on military leave.[158] Maxfield brought suit against Cintas for race discrimination pursuant to Title VII as well as violations of the Uniformed Services Employment and Reemployment Rights Act in relation to his military leave.[159] The district court granted summary judgment for Cintas on both counts and Maxfield appealed to the United States Court of Appeals for the Eighth Circuit.[160]

147. Maxfield v. Cintas Corp. No. 2, 427 F.3d 544, 547–49 (8th Cir. 2005).
148. *Id.* at 547–48.
149. *Id.* at 547.
150. *Id.*
151. *Id.*
152. *Id*.
153. *Id.*
154. *Id.* at 547–48.
155. *Id.* at 549.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

Eighth Circuit's Reasoning

The Eighth Circuit affirmed the district court's grant of summary judgment on Maxfield's race discrimination claim.[161] The court assumed that Maxfield had asserted a prima facie case of racial discrimination based on his demotion and subsequent discharge.[162] The court, however, held that Cintas had articulated legitimate non-discriminatory reasons for these actions and that Maxfield had not shown those reasons to be a pretext for discrimination.[163] As to the demotion, the court held that although Maxfield offered evidence that a white employee, who ran a deficit for two months, had not been transferred, this was insufficient because Maxfield had run a deficit for four months.[164] The court affirmed the grant of summary judgment in favor of Cintas on Maxfield's claim of discriminatory termination even though Maxfield was able to show that Cintas's proffered reason for firing him—that he took sick leave concurrently with military leave in violation of company policy—was not actually true.[165] The court relied on *St. Mary's Honor Center v. Hicks*,[166] discussed *supra* note 42, to hold that even though Maxfield had discredited Cintas's proffered non-discriminatory reason, this was not sufficient to surmount a motion for summary judgment because there was no showing that discrimination was the *actual* reason for the termination.[167]

Metoyer v. Chassman

Facts of *Metoyer*

In March 1998, Patricia Metoyer, an African-American female, was hired as Executive Administrator by the Screen Actors Guild (SAG).[168] At that time, she was promised that she would shortly be elevated to the soon-to-be-created position of Affirmative Action Director.[169] Over one year later, when the promotion still had not occurred, Metoyer petitioned the SAG's Senior Staff to create the position; this request was denied by

161. *Id.* at 549–50 (The court reversed and remanded on the USERRA claim.).
162. *Id.* at 550.
163. *Id.*
164. *Id.*
165. *Id.*
166. 509 U.S. 502 (1993).
167. *Maxfield*, 427 F.3d at 550–51.
168. Metoyer v. Chassman, 504 F.3d 919, 923–24 (9th Cir. 2007), *cert. dismissed*, 553 U.S. 1049, (2008).
169. *Id.* at 924.

John McGuire, the SAG's Acting Executive National Director.[170] Linda Schick, the National Director of Human Resources, explained to Metoyer that "[t]here are no people of color on senior staff, and it's very unlikely that there will be."[171]

During the course of her employment with the SAG, Metoyer said she was approached by minority employees who had complaints of racial discrimination.[172] She alleged that the supervisors receiving her complaints responded with racist comments.[173] She was also told she was "too outspoken."[174] During the course of her time at the SAG, Metoyer became concerned about irregularities with grant money at the organization.[175] In particular, she questioned the allocation of funds on several grants which were mandated to have affirmative action components and projects in them.[176] Metoyer, however, was also the subject of an investigation into the inappropriate use of grant funds, and Metoyer eventually admitted to some of the suspected misuse.[177] After this admission, she was suspended with pay and eventually fired for inappropriate use of the funds.[178]

Metoyer brought suit under 42 U.S.C. § 1981 for race discrimination and retaliation. As the Ninth Circuit noted in its opinion, § 1981 claims are analyzed using "the same legal principles as those applicable to a Title VII disparate treatment case."[179] Thus, the court allows the plaintiff to surmount a summary judgment challenge using the *McDonnell Douglas* framework or by producing "direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]."[180] The district court granted summary judgment in favor of the employer and Metoyer appealed.[181]

Ninth Circuit's Reasoning

The Ninth Circuit reversed the district court's grant of summary

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 925.
174. *Id.* at 925–26.
175. *Id.*
176. *Id.* at 925.
177. *Id.* at 929.
178. *Id.* at 930.
179. *Id.* (quoting Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 850 (9th Cir. 2004)).
180. *Id.* at 931 (quoting Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004)).
181. *Id.* at 923.

judgment on Metoyer's wrongful termination and retaliation claims.[182] Regarding the wrongful termination claim, the court held that although the SAG claimed that Metoyer was terminated because of the audit, which showed she had misappropriated more than $30,000 in grant funds, there was also evidence of racial animus by employees at the SAG that could have influenced the decision-making process.[183] As the court wrote, "[t]he plaintiff in any Title VII case may establish a violation through a preponderance of the evidence . . . that a protected characteristic played a motivating factor. To overcome summary judgment, a plaintiff merely must raise a triable issue as to this question."[184] Thus, the court held that it was inappropriate for the district court to grant summary judgment to the defendant because the plaintiff had adduced evidence that race may have been a motivating factor in her firing, in addition to defendant's proffered legitimate reason for terminating her employment.[185]

Comparison of Eighth and Ninth Circuit's Reasoning

These cases demonstrate an interesting contrast in the outcomes to which differing standards at summary judgment can lead. In *Maxfield*, although the defendant's proffered legitimate reason was shown to be untrue and although an arguably similarly-situated white employee was not fired for the same lackluster performance, the Eighth Circuit steadfastly asserted that the plaintiff had been unable to adduce enough evidence at summary judgment to show that racial discrimination was *the* real reason for the termination. In stark contrast in *Metoyer*, the Ninth Circuit reversed the grant of summary judgment to the employer, despite the employer's truthful proffered reason that the termination was due to plaintiff's misappropriation of $30,000 of grant funds because the court could not rule out the possibility that racial animus also factored into the decision to terminate plaintiff's employment.

The importance of the legal standard in a discrimination case becomes apparent from these two cases. The use of *Desert Palace*'s motivating factor analysis at summary judgment allows cases, like *Metoyer*, to proceed to trial even where the plaintiff admittedly engaged in wrongdoing on the job because the *Desert Palace* standard is not based on the notion that there can be only one reason for an employment decision. Strict adherence to the *McDonnell Douglas* analysis results in

182. *Id.* at 942.
183. *Id.* at 939.
184. *Id.* (internal citations and quotations omitted).
185. *Id.*

the curtailment of potentially legitimate discrimination claims at summary judgment simply because a plaintiff cannot show that defendant's real reason—and the only reason allowed in the eyes of courts adhering to this standard—was discrimination.

Arraleh v. County of Ramsey

Facts of *Arraleh*

The County of Ramsey (the County) hired Rashid Arraleh, an African-American Muslim, as a temporary Employment Guidance Counselor in its Workforce Solutions Program in 2002.[186] During his employment, Arraleh often double-booked or missed client appointments.[187] He claimed that such practices were not unusual in the Workforce Solutions Program.[188] Two coworkers supported Arraleh's assertion.[189] Arraleh claimed that his supervisor, Terry Zurn, treated him differently than white employees by keeping a complaint log for Arraleh, which was not kept for white employees.[190] Arraleh claimed that he overheard coworkers use the terms "those people" and "those damn Muslims" around him and told him that people of African dissent are "emotional."[191] He also overheard a conversation between a County employee and Zurn during which the employee told Zurn that hiring Arraleh is like "raising terrorist kids."[192] Arraleh was considered for two permanent positions at the County, but was not hired for either.[193] Patricia Brady, the director of Workforce Solutions, who had previously approved Arraleh's temporary employment, made the final decision not to hire him permanently, along with Zurn.[194] Arraleh also claimed that Brady had once told African-American employees that they needed to "leave their blackness behind."[195] Arraleh sued the County for discrimination based on race and national origin due to, *inter alia*, their failure to hire him in the permanent positions for which he was considered.[196] The district court granted summary judgment in favor of

186. Arraleh v. County of Ramsey, 461 F.3d 967, 971 (8th Cir. 2006).
187. *Id.*
188. *Id.* at 972.
189. *Id.*
190. *Id.*
191. *Id.* at 972–73.
192. *Id.* at 973.
193. *Id.* at 973–74.
194. *Id.* at 971, 974.
195. *Id.* at 974.
196. *Id.* at 970–71.

the County on all counts and Arraleh appealed.[197]

Eighth Circuit's Reasoning

The Eighth Circuit affirmed the district court's grant of summary judgment on Arraleh's failure to hire claim, holding that, even if Arraleh presented a prima facie case of disparate treatment, he failed to show that the County's proffered legitimate reason—that the education and work experience of the candidate selected best fit the requirements for the position—was pretextual.[198] The court specifically noted that the fact that Zurn had previously decided to hire Arraleh, six months before, "suggests that racial and national origin discrimination were not *the* motivating factors behind the adverse employment action."[199] Additionally, the court reasoned that since the employees subsequently hired for the jobs Arraleh applied for were all minorities, with the one exception, it was not the court's job to sit as a super-personnel department and grant summary judgment.[200]

Cornwell v. Electra Central Credit Union

Facts of *Cornwell*

Electra Central Credit Union (Electra) hired Raymond Cornwell, an African-American male, as its Director of Lending in August 1993 and subsequently promoted him to Chief Operating Officer.[201] Under his supervision, Electra's loan portfolio grew dramatically until 2001, suffering somewhat of a decrease after that.[202] Cornwell was the only African-American member of the management team.[203] In September 2001, Jim Sharp became the Chief Executive Officer (CEO) of Electra.[204] After Sharp became CEO, he often excluded Cornwell from management team meetings, and allegedly made inappropriate comments about women.[205] Cornwell also alleged that Sharp made racial comments about an African-American employee at the

197. *Id.* at 971.
198. *Id.* at 976.
199. *Id.* at 977 (emphasis added).
200. *Id.* at 976–78.
201. Cornwell v. Electra Cent. Credit Union, 439 F.3d. 1018, 1022 (9th Cir. 2006).
202. *Id.*
203. *Id.* at 1023.
204. *Id.* at 1022.
205. *Id.* at 1022, 1032.

company.[206] In December 2001, Sharp informed the management team that he intended to reorganize operations, which resulted in demoting Cornwell to Vice President of Lending.[207] A Caucasian woman was hired to take over some of his duties.[208] Cornwell was the only member of the management team demoted.[209] After complaining about what he perceived to be a racially motivated demotion, Cornwell offered not to sue Electra for race discrimination if Electra offered him a severance package. Electra terminated Cornwell's employment and replaced him with an African-American female.[210] Cornwell sued Electra for race discrimination pursuant to Title VII and 42 U.S.C. § 1981.[211] The district court granted summary judgment for Electra and Cornwell appealed.[212]

Ninth Circuit's Reasoning

The Ninth Circuit purportedly analyzed this case under the *McDonnell Douglas* framework, but noted that, after *Desert Palace*:

> it is not particularly significant whether [plaintiff] relies on the *McDonnell Douglas* presumption, or whether [plaintiff] relies on direct or circumstantial evidence of discriminatory intent to meet his burden. Under either approach, [plaintiff] must produce some evidence suggesting that [the employment decision] was due *in part or whole* to discriminatory intent . . . . [213]

With regard to Cornwell's demotion, the court held that he produced sufficient evidence to create a genuine issue of material fact as to whether defendants demoted him because of his race.[214] Specifically, the court reasoned:

> [t]he truth might be that all of Sharp's management aims were legitimate and matters of prerogative and personal style. But a jury could also find on the summary judgment record that a discriminatory intention was at work, and in our view [plaintiff] presented sufficient evidence to place this issue in the jury's province for decision.[215]

206. *Id.* at 1025.
207. *Id.* at 1023.
208. *Id.*
209. *Id.*
210. *Id.* at 1022–25.
211. *Id.* at 1022.
212. *Id.*
213. *Id.* at 1030 (emphasis added, internal citation omitted).
214. *Id.* at 1032.
215. *Id.* at 1034.

Comparison of Eighth and Ninth Circuit's Reasoning

The divergence in outcomes in the cases is striking. In *Arraleh*, as in *Cornwell*, the court was presented with an employee who was not doing exceedingly well in his job. In each case, the employee alleged that discriminatory remarks had been made in the workplace and that underlying racial animus had contributed to the adverse employment decision. In fact, in *Arraleh*, the actual decision-makers partook in these racist conversations. However, the Eighth Circuit seemed to attribute great weight to the fact that the same people who hired Arraleh were the ones who fired him and thus, could not have been discriminatory in their hiring.

Although the situation differed in the Ninth Circuit case, it clear that the Ninth Circuit's motivating factor analysis would likely not afford the so-called "same decision-maker defense" dispositive weight. If one argues that the Ninth Circuit analysis is more realistic in terms of how decisions are actually made, then it is entirely possible that a decision-maker could hire a person of a certain race for a variety of reasons, including, perhaps, an affirmative action mandate on hiring, and then fire that person as soon as a seemingly legitimate reason presents itself. In that case, race would have played a motivating factor in both the hiring and discharge decisions.[216] The Eighth Circuit does not allow for this possibility, assuming instead that the decision-maker, who hires a minority worker, does not take race into account at the hiring stage and therefore, could not do so at the termination stage either. Such thinking does not comport with the realities of the employment setting. As Krieger and Fiske have noted:

> There are well-founded reasons for believing that implicit bias will express itself less readily in the hiring context than later in the employment relationship. In particular, the hiring context tends to make equal employment opportunity (EEO) norms and goals salient. As such, managers may be more vigilant about inhibiting responses based on stereotypes or other implicit attitudes. Moreover, during the hiring process, human-resources specialists or EEO managers may play a role in selecting applicants for a "short list," may be present at interviews, or may review decisions for compliance with the employer's EEO policies and goals. Where this occurs, the person who actually makes the hiring decision may be influenced in ways that blunt the effects of any implicit stereotypes he holds. However, this influence may wane as time goes on

216. Affirmative action programs of private employers are legally acceptable if they are temporary, used in a job category in which there is a manifest demographic imbalance, and do not unnecessarily trample the rights of innocent third parties. Johnson v. Transp. Agency, 480 U.S. 616 (1987).

> and equal opportunity goals become less prominent.
>
> . . . .
>
> There is, in short, little reason to believe that an implicitly biased employment decision maker who has hired a stereotyped person will necessarily succeed in keeping his or her subsequent evaluations of that person's performance free from the influence of implicit stereotypes.[217]

The notion that attitudes may change or at least manifest themselves differently according to the situation is in contrast to the notion that a person's attitudes (i.e., his or her disposition) is constant over time and context. As Krieger and Fiske note, "[P]eople, including judges, have a tendency to overestimate the role of stable traits or tastes and to underestimate the role of situational variables in shaping social perception and behavior."[218] Psychological research has shown that the former view of personality is often more consistent with the actualities of the work setting.[219] Thus, incorporating the Ninth Circuit's motivating factor analysis into the disparate treatment framework allows judges to at least entertain the possibility that the same decision-maker has both hired and fired a minority worker or woman. Therefore, it is not a foregone conclusion that racial or gender biases could not have played a factor in the decision to terminate the employee. There is simply no room for such behavioral realities in the Eighth Circuit's single factor *McDonnell Douglas* analysis.

Montes v. Greater Twin Cities Youth Symphonies

Facts of *Montes*

Greater Twin Cities Youth Symphonies (GTCYS) hired Dr. Jean Montes as its Artistic Director in July 2003.[220] Dr. Montes was born in Haiti and immigrated to the United States when he was approximately eighteen years old.[221] During the course of his employment with GTCYS, board members often characterized Montes as African-American and the president of the board, Charlie Feuss, allegedly referred to Montes on several occasions as *la bête noire* of the organization.[222] The phrase's literal translation is "the black beast," though it has been incorporated into the English language to mean "one

217. Krieger & Fiske, *supra* note 17, at 1051–52.
218. *Id.* at 1040.
219. *Id.* at 1050.
220. Montes v. Greater Twin Cities Youth Symphonies, 540 F.3d 852, 853 (8th Cir. 2008).
221. *Id.*
222. *Id.* at 854.

that is particularly disliked or that is to be avoided."[223] Montes alleged that he often felt as if he was not welcomed or supported at GTYCS, citing as examples the fact that the board once asked him to restructure the orchestra to reduce costs and approved his recommendation to reassign two conductors.[224] However, when others later opposed the decision, the board did not support Montes.[225] Additionally, a board member suggested that the board form an African-American Committee to assist Montes's transition to the community.[226]

David Ranheim, the interim Executive Director at GTCYS, often demeaned and belittled Montes, calling him "an African conductor."[227] Montes stated that he discussed Ranheim's conduct with Feuss, but nothing was done.[228] The Board reprimanded Montes for recruiting GYCYS members to attend the Allegro Music Camp, with whom Montes was also employed.[229] Montes stated that it was a tradition for GTCYS personnel to participate in the camp, and he had discussed the recruitment with the former president of GTCYS.[230] The board ultimately terminated Montes when he refused to sign a Counseling Report unless the whole board agreed he should sign it. The report basically acknowledged that he had taken the position with Allegro without board authority and that he agreed to consult with the board before taking any future outside jobs.[231] One board member actually resigned over Montes's termination, writing in his resignation letter that "certain perceptions about Dr. Montes have been based on incomplete information, inaccurate details, biases, and misunderstandings."[232] Montes sued GTYCS for racial and national origin discrimination pursuant to Title VII based on his termination; the district court granted summary judgment for GYTCS and Montes appealed.[233]

Eighth Circuit's Reasoning

The Eighth Circuit affirmed the district court's grant of summary

223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 855.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 855–56.
232. *Id.* at 856.
233. *Id.* at 856–57.

judgment for GTYCS.[234] The circuit court held that Montes was unable to show, pursuant to the *McDonnell Douglas* framework, that GYTCS's proffered reason for terminating Montes was pretextual because he was unwilling to cooperate with board and staff members.[235] The district court stated that the suggestion about the African-American committee was not evidence of discrimination because it was made in the context of Montes's hiring, not his termination, and the Eighth Circuit affirmed.[236] The circuit court concluded by noting: "While use of the phrase *la bête noire* gives us pause, we conclude that the evidence taken as a whole is insufficient to permit a reasonable jury, without resort to speculation, to draw [an] inference that the board terminated Montes's employment because of his race or national origin."[237]

Gibson v. King County

Facts of *Gibson*

John Gibson, an African-American employee of the King County fire department, brought suit against the county for discriminatory failure to promote on account of race pursuant to Title VII.[238] Gibson alleged that the Interim Assistant Fire Marshal and the Fire Marshal made discriminatory remarks to him during the course of his employment and both of these individuals had some influence in the promotion decision.[239] When he applied for a promotion to the position of Assistant Fire Marshal, the Fire Marshal told him he was more comfortable with the white candidate being promoted, and the Interim Assistant Fire Marshal told Gibson he was different, which prevented his promotion.[240] Of note, the investigation unit had not employed any African-American employees, other than Gibson, in over twenty years, and the interview panels assembled by the Fire Marshal contained no racial minorities.[241] The district court granted judgment as a matter of

234. *Id.* at 860.

235. *Id.* at 858.

236. *Id.* at 857.

237. *Id.* at 859 (internal citations and quotations omitted).

238. Gibson v. King County, 256 F. App'x 39, 40 (9th Cir. 2007). Although the opinion is unpublished, it is still pertinent to this Article because it demonstrates the difference in outcomes that may result from differing standards at summary judgment and beyond. The opinion is not being analyzed in light of any precedential value, and therefore, its publication status is of no consequence for the current purposes.

239. *Id.* at 41.

240. *Id.*

241. *Id.*

law[242] for the County and Gibson appealed.[243]

Ninth Circuit's Reasoning

The Ninth Circuit reversed the district court's grant of summary judgment in favor of the employer on the failure-to-promote claim.[244] The court set out the legal framework for analyzing whether judgment as a matter of law was appropriate: Gibson may prove either that he was not promoted:

> "because of" his race ("single-motive") or that his race was a "motivating factor" in the County's decision ("mixed-motive"). . . . Gibson need not identify in advance which type of case he is attempting to prove; rather, the district court will determine the appropriate standard on which to instruct the jury upon deciding "what legal conclusions the evidence could reasonably support."[245]

The court reasoned that viewing the discriminatory remarks made to Gibson by both the Interim Assistant Fire Marshal and the Fire Marshal in conjunction with their influence over the promotion decision and the absence of black employees in the fire department, a reasonable jury could conclude that race was a motivating factor in the employment decision.[246] Additionally, the court noted that the decision-making process was highly subjective and that "subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized."[247]

Comparison of Eighth and Ninth Circuit's Reasoning

The Eighth Circuit once again demonstrated the rigidity of the single motive analysis, noting its discomfort with the term *la bête noire*, but refusing to allow this consideration to dominate the analysis. In contrast, if the Eighth Circuit were using a motivating factor analysis akin to what the Ninth Circuit employs, it could have stated that the

242. The standard for judgment as a matter of law is similar to that for summary judgment, except that it requires a finding, by the judge that, after a party has been heard on an issue, a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a).

243. *Gibson*, 256 F. App'x at 40.

244. *Id.* at 42.

245. *Id.* at 41 (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 856 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003)).

246. *Id.* at 42.

247. *Id.* at 41 (quoting Jauregui v. City of Glendale, 852 F.2d 1128, 1136 (9th Cir. 1988)) (internal quotation marks omitted).

reason given by GYTCS was legitimate, but that the surrounding circumstances, including the *la bête noire* comment indicated that race was potentially a motivating factor. This would have allowed a jury to evaluate the claim in its entirety instead of the case being completely dismissed on summary judgment.

Additionally, it is interesting that the Ninth Circuit in *Gibson* embraced an even more liberal interpretation of the motivating factor analysis by allowing a plaintiff to refrain from asserting under which framework to pursue and to present all evidence, which allows the court to decide the more appropriate framework. Such a standard results in more cases surviving summary judgment and results in more cases going to a jury if a protected characteristic can possibly be considered to have been at least a motivating factor in the decision.

The difference in legal standards articulated by the Eighth and Ninth Circuits in disparate treatment cases leads to different outcomes. In particular, the Eighth Circuit's standard results in most cases being dismissed at the summary judgment phase while the Ninth Circuit's motivating factor analysis allows more cases to proceed to trial. Part VI discusses the importance of this implication.

VI. POTENTIAL FOR DETECTION OF IMPLICIT BIAS

As discussed in Part V, the differing approaches that the Eighth and the Ninth Circuits take in individual disparate treatment cases at the summary judgment stage have implications for the plaintiff's likelihood of success in the case. Employing the motivating factor standard at summary judgment allows greater opportunity for a case to at least survive the summary judgment phase of litigation and proceed to trial. This seemingly obvious premise is bolstered by the analysis in Part V, demonstrating the difference in outcomes that arise when a motivating factor as opposed to a single factor analysis is used at the summary judgment stage. As discussed in Part V, however, this difference in outcomes could have a potentially huge impact on the success of plaintiffs in making it past summary judgment, and on the law's ability to help uncover implicit bias. The analysis in this Part proceeds in two stages. First, this Part analyzes the literature on the automatic nature of stereotypes and the ways in which such stereotypes can be mitigated. Then, it ties these findings to the notion that if judges, under the motivating factor analysis, are more likely to deny summary judgment to defendants in employment discrimination cases, employers may be forced, *at the time the employment decision is made*, to give serious thought to all the reasons underlying the decision. If this is true, implicit

bias may be brought to the forefront and potentially counteracted, at least for some employers.

A. The Automatic Nature of Stereotypes and the Potential for Control

Wilson and Brekke have described the operation of automatic stereotypes as "mental contamination."[248] They define mental contamination as "the process whereby a person ends with an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable (again, 'unwanted' in the sense that the judgment maker would prefer not to be influenced by the mental processes in question)."[249] This automatic nature of stereotypes has been identified by other researchers as well.[250] Automatic stereotypes differ from conscious prejudices in that the decision-maker is not aware of their activation during the decision-making process.

Automatic stereotypes can operate in a number of different ways. Stereotypes can affect the way we "perceive, store and remember information."[251] For example, stereotypes about a certain group engender certain expectations about that group. This can affect perception of certain information in the following way: individuals are more likely to take in information that conforms to their expectations of a certain group—expectations caused by a stereotype they hold—than information that conflicts with those expectations. Thus, individuals are more likely to be attentive to stereotype-confirming behavior in others than to behavior that contradicts such stereotypes. This phenomenon is known as the confirmation bias.[252] This may be problematic in the employment context when a decision-maker, holding certain expectations about race or gender, seeks out the behavior of individuals in these groups in order to confirm their expectation. For example, assume that the supervisor in the *White* case discussed in Part I had an

248. Wilson & Brekke, *supra* note 15, at 118.

249. *Id.* at 119.

250. *See, e.g.*, Blair, *supra* note 27, at 242 (noting that "[p]eople may often not be aware of what they are doing . . . the operation of stereotypes and prejudice may be outside of their control"); John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 363 (Shelly Chaiken & Yaacov Trope eds., 1999) (tracing the emergence of the automatic stereotype theory); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6–7 (1989) (discussing the possibility of inhibiting automatic stereotypes); Fiske, *supra* note 15, at 357 (explaining that stereotypes, prejudice and discrimination have automatic aspects as well as "socially pragmatic aspects" which serve to sustain them).

251. Page, *supra* note 58, at 160.

252. *See, e.g.*, SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 238 (1993).

expectation, stemming from a stereotype, that African-American employees are less competent than Caucasian employees. Cognitive research indicates that the supervisor, in writing White's evaluation, would be more likely to search out information that confirms White's incompetency and disregard information that contradicts that expectation. Additionally, psychological research has also shown that the supervisor may tend to employ the fundamental attribution error in order to retain the consistency of his expectations. The fundamental attribution error is the "overreadiness to explain behavior in terms of dispositional factors," as opposed to situational factors.[253] In other words, the supervisor above would likely interpret any acts of incompetence by White as a product of his disposition (i.e., his general incompetence), and ignore any situational factors that may have contributed to these actions. Moreover, actors are more likely to attribute their own behavior and that of those in their in-group to situational factors, whereas these same actors are more likely to attribute the actions of members of their out-group to dispositional factors.[254] Additionally, ambiguous information is likely to be interpreted differently dependent upon one's expectations as influenced by the stereotypes one holds.[255]

Expectations have also been shown to influence one's memory about another individual.[256] Just as one tends to seek out information that confirms one's expectations, one also tends to better remember expectation-consistent information.[257] Again, in the *White* case, this translates to the supervisor's tendency to better remember White's less competent acts when evaluating him.

The question is whether these automatic stereotypes can be controlled in some way by the decision-maker himself. The research indicates that under certain conditions they can be controlled. Although most agree that it is difficult for these automatic stereotypes to be controlled, there is also agreement that it is possible if certain conditions are met. Specifically, researchers have found that the effects of the automatic stereotypes can be controlled by the decision-maker if: (1) the decision-maker is aware of the unconscious stereotype's operation; and (2) the decision-maker is motivated to do something about it.[258] For instance,

253. *Id.* at 180.

254. *See id.* at 181.

255. *See* Heilman & Haynes, *supra* note 48, at 130 ("One of the most robust findings in the expectancy literature is that expectations can exert a substantial impact on how information is interpreted, particularly when information is ambiguous . . . .").

256. *Id.* at 131.

257. *Id.*

258. *See* Bargh, *supra* note 250, at 371; Blair, *supra* note 27, at 247–48; Fiske, *supra* note 15, at

one study found that in completing the IAT, discussed *supra* Part II, "White participants exhibited significantly less automatic negativity toward Blacks in the presence of a Black experimenter than in the presence of a White experimenter."[259] Additionally, when the African-American experimenter instructed subjects to "be the least prejudiced you can" subjects produced lower levels of automatic prejudice.[260] It is important to remember that the IAT is based on implicit associations between positive and negative words and African-American and Caucasian and thus, measures implicit, not explicit bias. As Blair concludes, "highly motivated individuals can modify the automatic operation of stereotypes and prejudice."[261]

Aside from context-specific motivators, studies have also shown that decision-makers who are told to try to suppress their use of stereotypes can alter the effects of automatic stereotypes.[262] For instance, as Kawakami, Dovidio, Mill, Hermsen and Russin demonstrated:

> [P]articipants who had been trained to say "no" to stereotypic events and "yes" to nonstereotypic events produced significantly lower levels of automatic stereotypes, compared to that produced by participants who had received no training or who had been trained to affirm the stereotypes. In addition, this "stereotype negation" training was successful in moderating automatic stereotypes of skinheads and automatic race stereotypes . . . .[263]

The key to suppression strategies is that the goal of suppression must be "accompanied by a specific implementation intention"—e.g., to judge others fairly.[264]

Additionally, the promotion of counter-stereotypes may also ameliorate the effect of automatic stereotypes. For instance, a study by Blair, Ma, and Lenton, which asked subjects to create and think about the mental image of a counter-stereotype (e.g., the strong woman) for five minutes, was found to reduce the measure of subjects' automatic gender stereotypes.[265] Additionally, a study by Dasgupta and Greenwald found that exposure to pictures or video of admired African-

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259. Blair, *supra* note 27, at 247 (summarizing Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842 (2001)).

260. *Id.*

261. *Id.* Blair also provides a very useful summary table of research on the malleability of automatic stereotypes and the results. *Id.* at 245–46. These studies support the contention that stereotypes are malleable and can be controlled if certain conditions (e.g., motivation on the part of the decision-maker) exist.

262. *Id.* at 248.

263. *Id.*

264. *Id.*

265. *Id.* at 249.

Americans and disliked Caucasian Americans, was found to reduce subjects' automatic stereotypes towards African-Americans.[266]

In the employment context specifically, Heilman and Haynes note:

> Of relevance is a substantial body of research documenting motivation as an important factor in the application of stereotypes. Specifically, the tendency to rely on stereotype-based expectations can give way to more controlled and reasoned thought processes when the evaluator is strongly motivated to make accurate judgments. This is likely to occur when: (1) the evaluator is in an interdependent relationship with the evaluated such that his or her outcomes rely on the accuracy of the evaluation; or (2) the evaluator knows that he or she is going to have to account to others for the decisions made. In either of these instances, the influence of stereotype-based expectations on evaluations may well be tempered.
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> . . . .
>
> . . . [E]vidence that being held accountable makes individuals take action and exhibit behaviors (such as being more attentive when observing performance and taking more extensive notes when gathering information) that better prepares them to justify their ratings, which in turn produces more accurate evaluative judgments. These activities can reduce, and perhaps even eliminate, the influence of stereotype-based performance expectations on evaluations . . . .[267]

Interestingly, Russell Fazio, the creator of the MODE model of attitude-behavior processes, concluded, along with his co-author, that motivation is a function of the perceived costliness of judgmental error.[268] That is, the more a decision-maker fears that his decision-making will be perceived as wrong and possibly prejudiced, the more motivated the decision-maker is to avoid the influence of bias on his decision-making.

Thus, this research suggests that the combination of awareness by the decision-maker of the implicit stereotypes as well as motivation to eliminate them can lead to a reduction in the effect of automatic stereotypes. In the context of employment discrimination, this means that a decision-maker may be able to avoid the effect of implicit bias on his or her decisions if these two factors are present.

266. *Id.*

267. Heilman & Haynes, *supra* note 48, at 140–42 (internal citations omitted).

268. Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude-Behavior Processes*, *in* DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 114 (Shelly Chaicken & Yaacov Trope eds., 1999).

B. The Motivating Factor Framework's Potential for Controlling Automatic Stereotypes

The remaining question is what, if any effect, can the motivating factor framework have on the use of automatic stereotypes by employers? The answer is potentially a potent one. As previously discussed and demonstrated by the matched cases analysis, the motivating factor analysis places a very low burden on plaintiffs at the summary judgment stage of litigation to produce some evidence that an illegitimate motive was part of the reason for the adverse employment decision made against plaintiff. As demonstrated by the matched case analysis, in the circuits where the motivating factor framework is used at summary judgment, more cases could potentially go to trial (or at least be settled on their way). Thus, employers will likely be more concerned with the motives of decision-makers within their firms. Therefore, employers, and particularly employer's counsel, will demand that employers attempt to understand and document their thought processes *at the time the employment decision is made*.

Employment is an area of law particularly accustomed to the role of lawyers as counselors and litigators. For example, many large corporate defense firms, as part of their services in the employment field, offer seminars to their client's employees about proper workplace conduct, criteria for decision-making processes, or contents of employee handbooks.[269] It is not uncommon for a supervisor to call corporate counsel before making an adverse employment decision in order to ensure that he or she will not be inviting meritorious litigation with the decision. The area of sexual harassment law is particularly illustrative. In two cases decided on the same day, the Supreme Court ruled that an employer is subject to vicarious liability for the harassment of an employee that does not result in tangible action by that employee's

269. *See, e.g.*, Skadden, Arps, Slate, Meagher & Flom LLP, Labor and Employment Law, http://www.skadden.com/default.cfm (follow "Practices" hyperlink; then follow "Labor and Employment Law" hyperlink) (last visited Jan. 16, 2009) (noting that the firm "[a]ssist[s] clients in identifying and avoiding employment-related problems before they occur, including through use of internal employment audits"); Morgan, Lewis & Bockius LLP, Employment Counseling & Litigation, http://www.morganlewis.com/index.cfm (follow "practices" hyperlink; then follow "D-E" hyperlink; then follow "Employment Counseling & Litigation" hyperlink) (last visited Jan. 15, 2009) (noting that the firm conducts "company-wide and management training on a variety of topics, including workplace harassment, diversity, and EEO compliance"); Sullivan & Cromwell LLP, Labor and Employment Litigation, http://www.sullcrom.com/ (follow "More Practices" hyperlink; then follow "Labor and Employment Litigation" hyperlink) (last visited Jan. 16, 2009) (noting that the firm advises clients with respect to routine and complex discrimination and other employment-related issues); Ballard Spahr LLP, Labor and Employment, http://www.ballardspahr.com/PracticeAreas/Practices/LaborEmployment (last visited Jan. 16, 2009) (noting that the firm offers "[d]ay-to-day counseling on hiring, firing and other labor and employment law issues").

supervisor, but could avoid such liability if the employer could show: (1) that the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of any corrective opportunities provided by the employer or to otherwise avoid harm.[270] As a result of these decisions, corporate counsel regularly conducts training sessions on what it means for the employer to exercise reasonable care and promptly correct the behavior as well as on what corrective opportunities the employer should have in place for employees to use should they need them.[271] Former colleagues, who represent corporate clients confirmed that they spend at least as much of their time counseling and training their clients' employees about how to avoid employment discrimination litigation as they spend actually defending such litigation.

Another area where doctrine has been quickly incorporated into practice involves the contractual nature of employee handbooks. At one time, employers believed they could provide employees with a handbook detailing the employers' procedures and practices, but simply disclaim any intent to be contractually bound, rendering the practices and policies unenforceable. In most jurisdictions considering the issue, courts have held that this was not the case.[272] Rather, the courts require that the disclaimer must be in a place likely to be perceived by the employee and in language likely to be understood.[273] After such decisions throughout the United States, it has become standard for employers to incorporate prominent, plain-English disclaimers.[274] Such change is obviously a result of the interpretation of law to practice by an employer's attorneys.

Thus, in a circuit that uses the motivating factor framework, one can imagine employment counsel attempting to delineate to employers what process should be undertaken by the decision-maker, as they do in the instances of sexual harassment or employment handbooks. In a jurisdiction such as the Ninth Circuit, this would likely include an

270. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

271. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law* Practice, 26 FLA. ST. U. L. REV. 959, 961 (1999) (noting the role of defense attorneys in counseling employers so as not to run afoul of the law); Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 247 (2009) (noting that when evaluating harassment prevention programs, courts look only to the formalities of the programs). This, in turn, reinforces an employer's incentive to incorporate legal doctrine into its policies.

272. *See* Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L. J. 101, 107 (2008).

273. *Id.* at 108.

274. *Id.*

examination of the manager's actual reasons for the decision. Perhaps a manager would even be required by company policy to write down the reasons he or she would use to justify the decision should the affected employee decide to bring suit. While such a requirement may have little effect upon the knowingly biased manager, cognitive research indicates the potential effect that such requirements could have on those holding an implicit bias. If the effects of automatic stereotypes can be countered by the decision-maker's awareness of the stereotype and the decision-maker's motivation to do something about it, then requiring a managerial employee to articulate his or her reasons for making an adverse employment decision could help counter any role that implicit bias may play in employment decisions.

Additionally, outside counsel, while conducting anti-discrimination training designed to provide guidance for those in circuits using the motivating factor framework, is likely to remind decision-makers of the importance of avoiding the use of race, sex, or other prohibited characteristics in the decision-making process. One can imagine counsel repeatedly advising clients that adverse employment decisions absolutely cannot be motivated by race or any other prohibited class categorization. While such training will likely be aimed at the conscious discriminator, it is actually more likely to have an effect on the unconscious discriminator. While the conscious discriminator will simply make a list of all the pretextual reasons motivating a decision, when the unconscious discriminator makes her list with counsel's warning about avoiding race or sex-based decisions resonating in the background, that decision-maker may actually uncover the fact that such prohibited considerations had been playing a role in the decision.

As discussed *supra*, in Part VI.A, such awareness, coupled with motivation to stem implicit bias, is a key factor in mitigating the effects of such bias. In the employment setting, once the awareness is present, the motivation to avoid the effects of implicit bias would be supplied by concern over a lawsuit.[275] As noted above, Fazio and Towles-Schwen found that motivation was a function of the perceived costliness of an error in judgment. For instance, the authors discussed an experiment in which "[m]otivation to reach a valid decision was manipulated by

275. Although such warnings are a step towards rooting out implicit bias, they may not be the most productive way of going about it. Although not the topic of this Article, social psychology research seems to demonstrate that negative reinforcements about what criteria decision-makers should not be using is not as effective as other measures. Therefore, counsel and employers should be searching for the most effective ways to use "motivating factor" training to actually root out implicit bias. For instance, employers may require their decision-makers to think about counter-stereotypes before making an employment decision or even watch some type of video about implicit bias and ways to counteract it.

enhancing fear of invalidity for half the participants."[276] Specifically, the participants were asked to evaluate two department stores. The first store was described in a generally positive way, although the comments about its camera department were negative. The second store was described in a more negative way, but there were positive statements about its camera department. The participants were then asked to decide where they would choose to buy a camera. The participants were told that their score selections would be compared to those of the other students participating in the session, and that they would have to explain their decisions to the experimenter and the other participants. The results of this and other similar experiments demonstrated that motivated individuals with sufficient opportunity to reflect tended to rely on more deliberative and less automatic processes in making their judgments. Thus, the motivated individuals did not simply rely on their overall attitude toward each store, but rather "engage[d] in the more effortful processing of retrieving and evaluating their beliefs about the camera department of the two stores…"[277]

These findings highlight the potential impact that the motivating factor framework can have. If more cases make it past summary judgment and are able to be evaluated by a factfinder, decision-makers will feel pressure to make decisions that will comport with the factfinders' ultimate decisions. In other words, they will be motivated to make less prejudiced decisions in order to avoid the situation where the factfinder evaluates their decision and determines that it is biased. Additionally, the findings could have implications for the internal operation of companies. If motivation can be increased through the perceived cost of judgmental error, there seems to be an argument for firms to employ multiple, independent decision-makers for each employment decision, whose decisions can be compared to each other. This would increase motivation for each decision-maker to examine their reasons and ensure that prejudice is not playing a role in order to avoid seeming prejudiced in comparison to their counterparts.

The motivating factor framework, with its emphasis on whether bias was *a* reason and not *the* reason for an employment decision, gives an incentive for employers to require their employees to self-examine their motives before acting upon them in the employment context. Thus, not only will the motivating factor framework potentially result in more short-term victories for plaintiffs by allowing potentially meritorious cases to surmount a summary judgment challenge, it will also have a

276. Fazio & Towles-Schwen, *supra* note 268, at 101.

277. *Id.*

more lasting effect as it could prevent decision-makers from unwittingly basing their decisions on unconscious bias by forcing them to examine their reasons *ex ante*. By adopting the motivating framework, courts will, in the short-run, experience an increase in their employment discrimination litigation loads. However, in the long-term, caseloads could actually decrease as employers work to curb the problem of subconscious bias in-house through employment policies targeted at self-examination by decision-makers.

While some may be concerned that adopting the motivating factor framework at summary judgment would lead employers to be worried that they will never be able to win a motion for summary judgment because courts will likely find that discrimination could have played a role, no matter how small, in the manager's decision. However, the Supreme Court in *Desert Palace* specifically allowed for motivating factor instructions to be given at the jury phase of a trial that is based on either circumstantial or direct evidence of discrimination. Thus, the Court envisioned that an employer in either type of case could be held liable even if discrimination was only partly responsible for its employment decision.

Second, and more importantly, if an employer is held liable for employment discrimination in a mixed-motive case, the employer will be relieved of compensatory damages, punitive damages and backpay if the employer can prove that it would have made the same decision, even absent the discriminatory reason.[278] Thus, even if a plaintiff can prove that discrimination played a part in the decision, the employer can avoid monetary damages by demonstrating that it would have made the same decision regardless of discrimination. Thus, allowing the motivating factor analysis to be used at summary judgment does not necessarily mean that an employer will face certain damages. In contrast, the employer will have to demonstrate its decision-making process such that it can show that the discriminatory reason did not play a defining role in the decision.

Additionally, not every plaintiff, who has proceeded under the motivating factor framework in the Ninth Circuit, has been successful in surmounting a summary judgment motion. For instance, in *Sellie v. Boeing Co.*,[279] the Ninth Circuit held that the plaintiff had failed to raise a triable issue of fact as to whether his age resulted in his termination.[280] In that case, plaintiff, an admittedly capable employee of Boeing, was

278. 42 U.S.C. § 2000e-5(g)(2)(B) (West 2010).
279. 253 F. App'x 626 (9th Cir. 2007).
280. *Id.* at 627.

terminated as part of a reduction in force by the company.[281] He alleged that he was taken out of numerical order for the reduction in force and was terminated because of his age.[282] He also offered evidence of discriminatory remarks about age that were made by two supervisors during the reduction in force.[283] The Ninth Circuit held that, even if analyzed under the motivating factor framework, plaintiff had not adduced enough evidence that discrimination played a role in the actual decision to terminate and affirmed the district court's award of summary judgment for the employer.[284]

Furthermore, the Ninth Circuit allows the parties to choose whether to proceed under a single or mixed motive framework.[285] Thus, plaintiffs, who feel that they have a particularly strong case or those who do not want to risk being barred from recovery of monetary damages, may still proceed under *McDonnell Douglas* and face a higher barrier at summary judgment. However, because the employer will not know which framework an aggrieved employee may choose, it will be forced to make employment decisions as if it will have to confront the motivating factor standard on summary judgment. As noted earlier, this will give the decision-maker the motivation to identify and try to counter any automatic stereotypes, even if *ex post* the employer is not subjected to a lower threshold at summary judgment via the motivating framework analysis.

Finally, some may wonder why the framework under which a disparate treatment claim can be brought has to change in order to counteract implicit bias. Is it not enough to increase the potential damages, for example? While increasing the available damages to plaintiffs would increase the potential liability of employers and thus force employers to pay a bit more attention to their decision-making processes, this solution does not go far enough. Increased damages within the *McDonnell Douglas* framework still allow an employer to avoid summary judgment by articulating a legitimate reason and forcing a plaintiff to demonstrate that discrimination was *the* reason. As

281. *Id.*

282. *Id.* at 628.

283. *Id.* at 627.

284. *Id.* at 628. The court noted that it assumed without deciding that the mixed motive framework applies to discrimination statutes other than Title VII. *Id.* This issue has now been decided by the Supreme Court. *See* Gross v. FBL Fin. Servs., 129 S. Ct. 2343 (2009).

In *Adam v. Kempthorne*, 292 F. App'x 646 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 52 (2009), the court also affirmed the district court grant of summary judgment in favor of the employer, finding that there was no evidence that age was a factor at all in the employer's decision. *Id.* at 649–650. *See also* Vasquez v. County of Los Angeles, 349 F.3d 634, 640–41 (9th Cir. 2003).

285. *See supra* note 25 and accompanying text.

discussed in Part III, *supra*, such a framework does not recognize the complexities of the decision-making process. Furthermore, increased damages within the *McDonnell Douglas* framework would not lead to greater focus by the decision-maker on all of the reasons contributing to a decision. Rather, the employer will simply reinforce to the decision-maker how important it is to have *a single* documented reason for the decision. Thus, the decision-maker will still lack the motivation to become aware of unconscious bias and do something to change it.

In sum, the adoption of at least the election of proceeding under the motivating framework analysis at the summary judgment phase of employment discrimination cases will operate indirectly on employer's decision-makers motivating them to scrutinize their decisions and the reasons for those decisions before making them. This motivation can potentially counter such decision-maker's implicit biases. In this way, the law, although not able to directly root out such bias, will provide incentives for employers to do so, which can help mitigate the damage such implicit biases may have. This will, in turn, lead to the furtherance of the goal of Title VII—to eliminate employment decisions made because of a protected characteristic.

VII. CONCLUSION

As researchers discover more about the nature of implicit bias and the potential ways in which it operates to unknowingly influence individuals' decision-making processes, the law of employment discrimination needs to help counteract this phenomenon. Specifically, Title VII's mandate to eliminate discrimination because of an individual's race, sex, religion, or national origin, seems to encompass at least the vision of eradicating all forms of discrimination from the workplace—both explicit and implicit. In order to help further this goal, this Article posits that the motivating factor framework should at least be available to a plaintiff at the summary judgment stage of all individual disparate treatment cases pursued under Title VII. The availability of this framework will lead to an increase in the number of such cases that proceed to trial. However, this should also lead to employers requiring managerial employees to closely scrutinize all reasons for their decisions before proceeding with an adverse employment decision.[286] Such a mandate will provide such employees with the motivation they need to counteract their own automatic

286. In future work, I plan to undertake an empirical analysis of what employers in the Ninth Circuit are actually doing in response to the *Desert Palace* decision.

stereotypes. Thus, the law can indirectly aid decision-makers in counteracting the effects of their own implicit biases.