**10. CIVIL RIGHTS—TITLE VII—EMPLOYMENT DISCRIMINATION; HARASSMENT; RETALIATION**

**Instruction**

Introductory Comment

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10.3 Civil Rights—Title VII—Disparate Treatment—“Motivating Factor”**—**Elements and Burden of Proof

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**Introductory Comment**

 Employment discrimination law under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*., and 42 U.S.C. § 1981a is complex and evolving.

 Prior to the 1991 amendments to the Civil Rights Act, jury trials were not available in Title VII cases. The Civil Rights Act of 1991 now permits Title VII cases to be tried by jury. 42 U.S.C. § 1981a(c). The plaintiff may recover on a showing that the alleged discriminatory employment practice was based on an individual’s race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). It should be noted that “paramour preference” does not constitute discrimination on the basis of sex. *Maner v. Dignity Health*, 9 F.4th 1114, 1116 (9th Cir. 2021). *The* plaintiff may prevail by showing that the discrimination was “a motivating factor” in the employment decision even though other factors also motivated the decision.  *Washington v. Garrett*, 10 F.3d 1421, 1433 n.15 (9th Cir. 1993); *see also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853-59 (9th Cir. 2002) (en banc), *aff’d,* 539 U.S. 90 (2003) (“Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played ‘a motivating factor.’”); *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (explaining that phrase “because of” “typically imports, at a minimum, the traditional standard of but-for causation,” but Title VII relaxes this standard “to prohibit even making a protected characteristic a ‘motivating factor’ in an employment decision”). *See* Instruction 10.1 (Civil Rights—Disparate Treatment—When Evidence Supports “Sole Reason” or “Motivating Factor”). In retaliation claims, however, the correct standard in determining causation is the “but-for” standard and not the “motivating factor” standard. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517 (2013).

 Prior to 1991, Title VII provided only equitable remedies. *See* 42 U.S.C. § 2000e-5(g)(1) (providing for reinstatement, back pay and “any other equitable relief as the court deems appropriate”). The 1991 amendments added the legal remedies of compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1). Title VII plaintiffs may now recover injunctive and other equitable relief, compensatory and punitive damages and attorneys’ fees. 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1), (k). However, recovery of compensatory and punitive damages under Title VII is limited by the statutory caps provided in 42 U.S.C. § 1981a(b)(3). The level at which damages are capped depends on the size of the employer. 42 U.S.C. § 1981a(b)(3)(A)–(D). A jury must not be advised of these limitations. 42 U.S.C. § 1981a(c)(2). Because awards of back pay are not an element of compensatory damages, they are not subject to the statutory caps. 42 U.S.C. § 1981a(b)(2). The Supreme Court has extended this rationale to exclude front pay from the statutory caps. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001) (holding that 1991 amendments did not alter nature of front pay as equitable remedy provided for in 42 U.S.C. § 2000e-5(g)). While the Supreme Court has declined to address definitively whether a Title VII plaintiff has a right to a jury trial on the issue of back pay, *see Landgraf v. USI Film Prods.,* 511 U.S. 244, 252 n.4 (1994), the Ninth Circuit has held that there is no such right.  *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069 (9th Cir. 2005). The holding in *Pollard* that front pay is excluded from the statutory caps because it is an equitable remedy suggests that there is similarly no entitlement to a jury trial on front pay.  *See Pollard*, 532 U.S. at 848. The court, however, may consider submitting questions of front and back pay to the jury for advisory findings pursuant to Fed. R. Civ. P. 39(c). If advisory findings are sought, the court should recognize on the record that it is not bound by them, and make a record of independent findings pursuant to Fed. R. Civ. P. 52(a). *See* Chapter 5 (“Damages”) and Comments to Instructions 5.2 (Measures of Types of Damages) and 5.5 (Punitive Damages) discussing the special damage rules that apply to Title VII cases.

 A plaintiff’s remedies may be limited in so-called “mixed motive cases” when the plaintiff establishes liability by proving that a protected characteristic was a “motivating factor” in an employment action. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). In such cases, if the employer can prove that it would have made the same employment decision for lawful reasons, the plaintiff’s relief is limited to declaratory relief, attorneys’ fees and costs. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *O’Day v. McDonnell Douglas Helicopter Co*., 79 F.3d 756, 760 (9th Cir. 1996).

 No *McDonnell Douglas* burden-shifting instruction should be given in Title VII cases. *Costa*, 299 F.3d at 855 (“it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury”); *see also Sanghvi v. City of* *Claremont*, 328 F.3d 532, 540 (9th Cir. 2003) (“it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case”). Cases discussing pretext and burden shifting arise in the summary judgment and directed verdict context. *See*, *e.g.*, *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

*Organization of Instructions*

 The instructions in this chapter are arranged in accordance with the three theories of liability that are most frequently asserted in Title VII cases. Instructions 10.1 through 10.3 pertain to a claim of disparate treatment (intentional discrimination). Instructions 10.4 through 10.7 pertain to a claim of harassment or hostile work environment. Instruction 10.8 relates to a claim of retaliation. Finally, because there are certain terms and defenses that are common to Title VII employment cases, they are set forth and defined in Instructions 10.9 through 10.16.

 The Committee recommends that the court first identify the theory under which the plaintiff has asserted a Title VII claim, and then refer to the relevant group of instructions. The basic instructions set forth in Instructions 10.1 through 10.7 may be used regardless of a particular plaintiff’s protected status. Thus, depending on whether the claim is based on race, color, religion, sex or national origin, Instructions 10.1 through 10.7 can be adjusted to reflect the protected trait at issue in the particular case.

 No instructions have been provided for a claim of disparate impact under Title VII, although such an instruction has been provided for a disparate impact claim for age discrimination under the ADEA. *See* Instruction 11.4 (Age Discrimination—Disparate Impact—Elements). For a detailed discussion of a disparate impact claim arising under the Fair Housing Act, *see Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507 (2015) (relying on cases interpreting Title VII and the ADEA).

 In some cases when the employer is a public entity, the plaintiff also has the option of suing under 42 U.S.C. § 1983. However, the general elements of such a claim are the same as under Title VII. Accordingly, in addition to the essential elements of a 42 U.S.C. § 1983 claim, the court may wish to refer to Instructions 10.1 through 10.7 whenever the § 1983 claim is based on disparate treatment or harassment.