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A Recent Supreme Court Decision Makes it Easier for Plaintiffs to Proceed When Discrimination Is One Motive, But Not the Only One



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The federal courts of appeal have long disagreed about what to do in "mixed motive" discrimination cases - that is, cases in which an adverse employment action (such as a firing, demotion, or failure to hire) occurs for both legitimate and illegitimate reasons. Last week, in its decision in [Desert Palace, Inc. v. Costa](#), the Supreme Court provided some much needed clarity on this issue.

The bottom line of the Court's decision is this: Plaintiffs do not need a "smoking gun" to bring a mixed-motive discrimination case. Instead, less obvious evidence of discrimination can also suffice.

That's welcome news for discrimination victims. Employment decisions are rarely made for a single reason. If discrimination enters into the mix, plaintiffs should have the opportunity to sue - without facing any special, higher standards for the proof they must use. The Court rightly recognized Congress' intent on this point.

The Facts of the *Desert Palace* Case

The case was brought by Catherina Costa, who was fired from her job as a warehouse worker and heavy equipment operator - the only woman in that job. She sued under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.

Costa alleged that her firing was an act of sex discrimination. After a physical altercation with a male co-worker, she was fired. He, in contrast, only received a short suspension. Based on this disparity in discipline, other alleged acts of discrimination, and claims of sexual harassment, Costa sued.

Her employer, however, points to Costa's documented history of disciplinary problems. It says the firing was its response to this history; she was a "problem" employee, it argues.

Both Costa and her employer may be telling the truth - both Costa's history on the job, and her gender, may have played a role in her firing.

Should the jury get to decide this case? If a jury believes both sides, what should it do? How good does Costa's evidence of sex discrimination have to be for her to prevail on a theory of mixed-motive discrimination?

These are important legal questions on which the judge must instruct the jury. Unsurprisingly, the related question of exactly what form the jury instruction in a mixed-motive case should take has been intensely controversial.

Before we reach the specific jury instruction issue the Court recently resolved, however, some background relating to the complex history of Title VII precedents and amendments is necessary.

The Basis Burden-Shifting Framework In Discrimination Cases

In 1973, in [McDonnell Douglas Corp. v. Green](#), the Supreme Court made clear how burdens of proof and production work in a discrimination case. (A "burden of proof" is the standard for how persuasive the proof of a claim must be. In contrast, a "burden of production" is not a burden to persuade; rather, it is a burden to come

forward with at least some evidence.)

First, the plaintiff must make out a "prima facie" case, proving some very basic facts necessary to support an inference of discrimination. For instance, suppose - as a hypothetical - that a woman says she was not hired for a particular job due to sex discrimination. To make out her prima facie case, she must prove that she is, indeed, a woman; was qualified for, and applied for, the job; and that she was rejected. She also must prove either that a man was hired for the job, or that the employer continued to seek other applicants after rejecting her.

The employer then has a burden of production. It must articulate a legitimate, non-discriminatory reason for the challenged employment action. For instance, in our hypothetical woman's case, it might say that its interviewer was unimpressed with her educational background. It does not, however, have to persuade anyone of this reason.

Finally, the plaintiff has the opportunity to disprove the employer's articulated reason. For instance, she might show that the company hired men with very similar educational backgrounds.

Alternatively, she can offer other evidence to show that the offered reason is a pretext for discrimination. For instance, she might show the jury the interviewer's notes on her, and point out a little doodle of her in a short skirt under the heading "personality."

At the end of the case, the jury is instructed that it may find for the plaintiff if she has either disproved the employer's articulated reason or offered other evidence that the reason given is pretextual. The plaintiff retains the burden of proof, but the jury is instructed that acceptable proof to satisfy that burden can take one of several forms.

This proof structure is useful in the typical employment discrimination case in which there is no "smoking gun." (After all, most people who discriminate do not announce, or leave evidence, that they are doing so.) The *McDonnell Douglas* model gets around that problem by forcing the employer to explain its actions. In this way, it narrows the litigation so it revolves around an actual reason offered by the employer, rather than forcing the plaintiff to disprove all conceivable, legitimate justifications for the employment action. It also gives the plaintiff a chance to take issue with a decisionmaking process to which she might otherwise have little, if any, access.

Burden-Shifting In Mixed-Motive Cases: *Price Waterhouse* and the 1991 Act

The *McDonnell Douglas* model, useful as it is, has limits - and a mixed-motive case soon arose to test them. The case, [Price Waterhouse v. Hopkins](#), led to a 1991 Supreme Court decision that significantly altered Title VII litigation.

In *Price Waterhouse*, a firm denied partnership to a female candidate. There was some evidence that the decision was made both on the basis of her sex (an obviously illegitimate motive) and on the basis of her behavior at work (a legitimate motive).

Here is where *McDonnell Douglas* breaks down. The employer would satisfy its burden of production, coming forth with its legitimate reason for not making Hopkins partner: Her behavior. Then the burden would be on Hopkins to disprove that reason, or show it was a pretext. If she couldn't, she would lose - even if she could show that there were other, illegitimate reasons for the denial.

In sum, then, it seemed under *McDonnell Douglas* that Hopkins might lose even if the firm took her gender into account when making an employment decision--a clear Title VII violation. Unless the Court took action, Hopkins would thus have a right - the right not to be discriminated against - under Title VII, but no remedy for its violation. And her employer would be given a free pass despite having committed an act of discrimination.

That anomaly inspired the Supreme Court, in *Price Waterhouse*, to devise an alternative proof structure for mixed-motive cases. I will not describe the proof structure the Court set forth in *Price Waterhouse* in detail, because it is not current law. Rather, it was superseded by Congress's amendments to Title VII in the Civil Rights Act of 1991.

Those amendments made clear that discrimination with mixed motives is still discrimination: It occurs whenever a prohibited characteristic was "a motivating factor for any employment practice, even though other factors also motivated the practice."

The amendments also made clear that even if an employer can show that it would have taken the same action even without the discriminatory motive, the plaintiff cannot collect damages. But the employer is not off the hook. If that defense is proven, the plaintiff can still hold the defendant liable and obtain injunctive relief and attorneys' fees, both potentially valuable remedies.

The Lingering "Direct Evidence" Issue

As noted above, the 1991 amendments largely superseded *Price Waterhouse*. Yet one aspect of the decision remained relevant even after 1991. This is the issue that, last week, *Desert Palace* finally resolved.

The Court's *Price Waterhouse* decision had been splintered, with the main opinion garnering only a plurality of four, not a majority of five. (Justices White and O'Connor each concurred in the judgment, but did not completely agree with its reasoning.)

Justice O'Connor wrote that the burden should not shift to the employer unless and until the plaintiff could "show by direct evidence that an illegitimate criterion was a substantial factor in the decision." (Emphasis added.)

Justice O'Connor's was the only opinion to mention the "direct evidence" requirement, which led to a variety of ambiguities. First, was the mention of "direct evidence" in her concurrence sufficient to make it part of the holding? Had the other Justices agreed with her, or did standard rules of vote-counting make it the "narrowest ground" and therefore the holding? Second, had the 1991 amendments--which neither adopted nor rejected the "direct evidence" requirement--rendered her concurrence, if it had been binding on lower courts, irrelevant?

To add even more confusion, courts also disagreed as to what "direct evidence" meant. Literally, "direct evidence" means evidence that is sufficient to prove a fact without any inferences having to be drawn. In contrast, "circumstantial evidence" gives the factfinder related facts from which it might conclude the existence of a particular, central fact.

The testimony of a witness who saw a suspect commit murder is direct evidence. Evidence that a hair from the suspect's head was found in the victim's apartment near the body is circumstantial evidence from which a jury may draw an inference of guilt.

In a murder case, that's relatively straightforward. But what about a discrimination case? A few courts took "direct evidence" literally, dismissing the claims of plaintiffs who couldn't come up with evidence of a virtual confession (written or oral) by their employer.

Other courts, instead, said "direct evidence" of discrimination might simply be evidence showing animosity towards the protected class (for instance, women). In contrast, "indirect" evidence would show only that the employer's proffered reason was false. In both cases, a jury would need to draw inferences to decide the ultimate fact: whether the act was motivated by an illicit consideration of a protected characteristic.

Some courts also said that the evidence, whether technically direct or circumstantial, needed to bear directly on the decisionmaking context in particular - it needed to be direct in the sense that it was immediate. Thus, if a boss said women should be barefoot and pregnant in the kitchen at a company picnic, but not in his interview notes, he might be off the hook for later failing to hire a pregnant woman.

The Court's Decision in *Desert Palace*

In *Desert Palace*, the Supreme Court achieved a simple, neat resolution of the "direct evidence" issue. It approved a jury instruction, in a mixed-motive case, that did not even mention what kind of evidence plaintiffs must offer to carry their burden.

Its reasoning was simple, too. The 1991 amendments had codified their own proof structure - one substantially different from that of *Price Waterhouse*. The amendments never mentioned any "direct evidence" requirement. Nor did the original statute. Therefore, there was none

Justice Thomas - a former EEOC head with experience interpreting Title VII and a conservative justice with a preference for narrow interpretation of statutes - wrote the opinion. He reasoned that the amended statute plainly says that a plaintiff "need only 'demonstrate' that an employer used a forbidden consideration with respect to 'any employment practice.'" It also goes on to define "demonstrate" to mean "meet[ing] the burdens of production and persuasion." Nowhere, he pointed out, does it impose a requirement that direct evidence be offered to prove the "forbidden consideration."

The Difference This Decision Makes

The Court's decision in this case opens doors for more plaintiffs to get their cases to a jury. After *Desert Palace*, a plaintiff who has faced mixed-motive discrimination, and who can offer some proof of animus or hostility to his or her group status, may be able to win--or at least get before the jury. Prior to *Desert Palace*, in contrast, many courts would have required that proof to not only be convincing, but also "direct" in order for a plaintiff's claim to

survive summary judgment.

The change is obviously a good one: If a plaintiff can persuade a jury that there was discrimination, she should not also have to rely on a special kind of evidence to do so. Prior lower court cases on this issue - now overruled - unfairly hamstrung plaintiffs as to what kind of evidence they could present.

These decisions required "smoking guns" even at a time when, as employers become more and more wary of litigation, such evidence is less and less likely to appear. Any modern employer who fails to put together employment files with an eye toward possible litigation is a fool.

Unfortunately, however, much discrimination in the workplace continues. For instance, Costa's isolation as the only woman doing her job should itself be troubling, though it was not directly at issue in her case. Doubtless, it affected her working conditions.

Why, nearly four decades after Title VII was enacted, was Catherina Costa--a female heavy equipment operator--such an anomaly? One answer is that Title VII has been ineffective in addressing occupational segregation--the channeling of men and women into separate careers and jobs.

That is doubly a problem. Not only is such segregation itself a system of discrimination, it is also closely linked to higher levels of sexual harassment and other forms of discrimination. Ending sexual segregation in employment would be a true victory.

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