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# Mixed Up About Mixed Motive: What Will Trigger a "Mixed Motive" Analysis in Title VII Cases? An Analysis of *Desert Palace, Inc. v. Costa*

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# Mixed Up About Mixed Motive: What Will Trigger a "Mixed-Motive" Analysis in Title VII Cases?

by Barbara J. Fick

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## ISSUE

What are the appropriate standards for courts to follow in making a determination to apply the mixed-motive model to cases under Title VII?

## FACTS

Catharina Costa was employed as a warehouse worker at Caesars Palace Hotel & Casino from 1987 to 1994. During her tenure she was disciplined on numerous occasions and eventually terminated following a fight with a co-worker.

The parties' characterization of Costa's work history is substantially different. Costa, the only female employee in the warehouse, asserts that her disciplinary record was the result of discriminatory treatment: she was reprimanded or suspended for conduct that, when engaged in by her male co-workers, was overlooked. For example, she was issued a written reprimand when she was one minute late for work, whereas men who were late for work were given overtime to make up for the

lost wages. Moreover, she was subjected to sexually harassing language. Caesars, on the other hand, attributes her disciplinary record to her inability to get along with her co-workers.

The fight that led to Costa's termination is similarly contested. Costa claims she was confronted by a male co-worker who shoved her against the wall. She reported the incident, but when she returned to work, the co-worker "came at" her again. The co-worker alleged that Costa had pushed him. Caesars states that since there were no witnesses to the fight, it disciplined both employees. Given Costa's disciplinary history, she was fired; whereas the male co-worker, who had 25 years of service and a relatively clean disciplinary record, received a five-day suspension.

Both employees grieved their discipline, but an arbitrator upheld

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DESERT PALACE, INC. v. COSTA  
DOCKET NO. 02-679

ARGUMENT DATE:  
APRIL 21, 2003  
FROM: THE NINTH CIRCUIT

# Case at a Glance

There are two litigation models for proving a violation of Title VII under the disparate treatment theory: one is the *McDonnell Douglas* pretext model and the other is the *Price Waterhouse* mixed-motive model. The Supreme Court is being asked to clarify and define the circumstances in which it is appropriate to use the mixed-motive model.





Caesars's decision. Costa then filed the present lawsuit against Caesars, alleging sex discrimination in conditions of employment and her termination in violation of Title VII.

After hearing the evidence, a jury found in favor of Costa. Caesars appealed the judgment to the Ninth Circuit Court of Appeals, claiming the jury's verdict was based on erroneous jury instructions that misstated the law. Caesars argued that the court mistakenly instructed the jury to apply the mixed-motive model; the correct instruction, according to Caesars, would have been to apply the pretext model. A panel of the Ninth Circuit agreed and vacated the judgment, remanding the case to the district court. *Costa v. Desert Palace, Inc.*, 268 F.3d 882 (9th Cir. 2001).

Costa filed a motion with the Ninth Circuit for rehearing en banc, which was granted. The court held that the jury instructions on mixed motive were appropriate and that the district court had not misstated the law in giving those instructions. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002).

Caesars filed a petition for writ of certiorari, which the Supreme Court granted. *Desert Palace, Inc. v. Costa*, 123 S.Ct. 816, 154 L. Ed. 2d 766 (2003).

## CASE ANALYSIS

The disparate treatment theory for proving sex discrimination under Title VII requires that the plaintiff prove she suffered an adverse employment action because of her sex. The "adverse employment action" element of the plaintiff's case is generally relatively easy to prove: the employer's own employment records will show that the plaintiff was, for example, fired or disciplined. Much more difficult is proving that this action was taken

"because of" the employee's sex. In effect, the plaintiff is being asked to prove what was in the employer's mind at the time it took the adverse action, i.e., the employer's motive.

Realizing the difficulty of proving the employer's state of mind, the Supreme Court, in a series of cases beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), established a framework for plaintiffs to utilize in establishing illegal motive. Under *McDonnell Douglas*, the plaintiff must prove by a preponderance of the evidence that she is a member of the protected class and must eliminate the usual reasons why an employer would take the adverse action in contention. For example, in a case involving an employer's refusal to hire the plaintiff, the plaintiff would prove that she was a member of the protected class (a woman), that she applied for a job for which the employer was seeking applicants, that she possessed the qualifications for the job, and that she was not hired and someone else was. These last three factual elements eliminate the most usual reasons why someone is not hired: the employer was not hiring anyone, the plaintiff did not ask to be hired, or the plaintiff did not possess the skills required for the job in question. Having eliminated the most usual reasons, the *McDonnell Douglas* formulation creates a *presumption* that the reason must have been based on the plaintiff's membership in the protected class. What this means is that, if the employer remains silent and presents no evidence, the fact-finder *must* draw the conclusion from the evidence presented that the employer's refusal to hire was "because of" the plaintiff's sex.

This presumption of illegal motive, however, can be overcome if the employer presents evidence of a legitimate, nondiscriminatory rea-

son for its action. The employer is *not* required to *prove by a preponderance of the evidence* that the reason it presents is the *real* reason for its action. For example, the person responsible for hiring could testify that the plaintiff was not hired because she received a bad recommendation from her previous employer. This testimony would be sufficient to rebut the presumption of discriminatory motive. The employer does not have to *convince* the fact-finder that the bad recommendation was the reason.

At this stage of the case, the plaintiff is now required to *prove*, by a preponderance of the evidence, that the employer's stated reason is a *pretext* for a discriminatory motive. If the plaintiff is not able to meet this burden of proof, she loses the case. The *McDonnell Douglas* formulation is sometimes called the pretext model, the single motive model, or the indirect evidence/circumstantial evidence model for proving disparate treatment

Sixteen years later, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court (in a plurality decision) formulated an alternative method for litigating a disparate treatment case. Ann Hopkins had been turned down for a partnership at Price Waterhouse and sued under Title VII, alleging sex discrimination. She produced evidence at trial that the partner who explained the reasons for the negative decision told her that in order to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

The Court held that this evidence did more than merely raise a presumption of discriminatory motive; it directly *proved* what the employer's motive was at the time the deci-



sion was made. Moreover, the plaintiff was not required to prove that the discriminatory reason was the sole reason for the employer's action; it was sufficient if the plaintiff proved that discrimination was a motivating factor. At this point the burden of *proof* shifted to the employer to prove that it would have made the same decision even if it hadn't taken sex into account. Unlike in *McDonnell Douglas*, it would not be enough for the employer merely to produce evidence that it would have made the same decision; in *Price Waterhouse*, the employer must *convince* the fact-finder by a *preponderance of the evidence* that it would have made the same decision. In other words, the burden of proof has shifted to the employer. If the employer is successful in carrying this burden of proof it wins the case—there is no violation of Title VII and no liability accrues.

In a concurring opinion, Justice O'Connor elucidated on her understanding of this alternative method. In particular, she noted that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."

The *Price Waterhouse* formulation is sometimes referred to as the mixed-motive model or the direct evidence model for proving disparate treatment.

Two years later, as part of the Civil Rights Act (CRA) of 1991, Congress modified the effect of the Court's holding in *Price Waterhouse*. Section 703(m) provides that once a plaintiff proves that sex was a motivating factor for an employment decision, Title VII is violated, even if other factors also motivated the

decision. Thus, even if the employer proves it would have made the same decision, it has still violated Title VII by virtue of the fact that a prohibited factor, such as sex, was a motivating factor in the decision. Section 706(g)(2)(B) mitigates the effect of this violation, however, by limiting the liability of the employer. If the employer proves it would have taken the same decision, a court may still grant injunctive relief and award costs and attorneys' fees against the employer, but a court cannot award damages or order hiring, reinstatement, or promotion.

For purposes of the present case, the key difference between the *McDonnell Douglas* model and the *Price Waterhouse* model relates to the nature of the employer's burden. Under *McDonnell Douglas*, an employer has merely a burden of production of evidence regarding the reason for its employment decision; under *Price Waterhouse*, the employer must prove by a preponderance of the evidence that it would have made the same decision based on factors other than the prohibited classification. The placement of the burden of proof can, in many cases, be outcome determinative.

In the present case, the district court's jury instructions were based on the *Price Waterhouse* mixed-motive model of the disparate treatment theory. The Ninth Circuit's *en banc* decision upheld those instructions. In so doing, it reasoned that the "single-motive" and "mixed-motive" cases are not different categories of cases. Both require the employee to prove by a preponderance of the evidence that the employer acted with discriminatory motive. The court noted that the 1991 CRA amendments to Title VII abrogated Justice O'Connor's comments regarding the need for "direct

evidence that an illegitimate criterion was a *substantial* factor in the decision." Instead § 703(m) requires proof of only a motivating factor and does not impose any special or heightened evidentiary proof burden on the plaintiff. Under § 703(m), once the plaintiff proves by a preponderance of the evidence (whether that evidence is direct or circumstantial) that sex played a motivating factor in the employment decision, she has proven a violation of Title VII.

Caesars argues that the Ninth Circuit fundamentally misunderstood the effect of the 1991 CRA on the Court's decision in *Price Waterhouse*. Initially, Caesars notes that the actual holding of the Court in *Price Waterhouse* (a plurality opinion) is found in the opinion of Justice O'Connor. When no single opinion is supported by five justices, the holding of the Court is based on the position taken by the justice(s) who concurred in the judgment on the narrowest grounds. According to Caesars, that position is the one espoused by Justice O'Connor. Thus, *Price Waterhouse* allows for the shifting of the burden of proof to the employer on the issue of motive only when the plaintiff meets a high evidentiary standard based on direct evidence of discrimination.

The CRA did not disturb that requirement of a higher evidentiary standard. It was instead aimed at that portion of the decision that allowed the employer to avoid both a finding of a violation and all liability by proving it would have made the same decision based on other factors. Indeed, most of the circuits that have considered this issue have ruled that a plaintiff can prevail under a mixed-motive theory only if she presents "direct evidence that decisionmakers placed substantial

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negative reliance on an illegitimate criterion.”

Caesars also asserts that failure to retain the direct evidence standard would result in shifting the burden of proof to the employer in most discrimination cases, contrary to both the plurality and concurrence in *Price Waterhouse*. These opinions noted the continued viability of the *McDonnell Douglas* framework as applying to most employment discrimination claims. Under the Ninth Circuit approach, however, plaintiffs will have an incentive to opt for mixed-motive instructions in almost every case, circumventing *McDonnell Douglas*.

Shifting the burden to the employer can only be justified when there is direct evidence that race, sex, religion, national origin, or color constituted a substantial factor in the decision-making process. Such direct evidence has been strictly defined by most circuit courts as requiring statements made by the decisionmaker that directly reflect discriminatory animus and relate directly to the contested employment decision. In the absence of a strict definition of direct evidence, mixed-motive instructions will inherently prejudice the jury to find in favor of the employee. Maintenance of the direct evidence standard appropriately balances the rights of both employers and employees.

Caesars concludes that since the evidence presented by Costa in this case did not meet the higher standard for direct evidence, the use of the mixed-motive jury instruction was reversible error.

The solicitor general, in an amicus brief for the United States in support of Caesars’s position, adduces additional arguments. He asserts that not only Justice O’Connor’s

concurrence in *Price Waterhouse*, but also the plurality opinion and Justice White’s concurrence, require that the mixed-motive plaintiff bear a heightened burden of proof requiring her to present evidence that the discriminatory motive played a substantial role in the employer’s decision. Until the Ninth Circuit opinion in this case, all the courts of appeals had also required plaintiffs to present direct evidence that discrimination was a substantial motivating factor.

The government notes, however, that the courts are divided over what type of evidence constitutes such direct evidence. Some courts require that the evidence must prove the fact of discriminatory motive without inference or presumption. Other courts allow the use of either circumstantial or direct evidence to establish intent. The government argues that the requirement of noninferential evidence most closely comports with the Court’s decision in *Price Waterhouse*.

Moreover, the government says, § 703(m) was meant to apply *only* to mixed-motive cases. It was not intended to apply to all Title VII cases. It does not eliminate the distinctions between pretext and mixed-motive cases or the direct evidence requirement that distinguishes the latter from the former.

Finally, the government argues that both the text and legislative history of the 1991 CRA clearly indicate that Congress intended only to overrule that aspect of the *Price Waterhouse* decision relating to the employer’s liability. It did not alter the direct evidence standard for determining the applicability of the mixed-motive model.

Costa, in her brief, directs the Court’s attention to the language of

§ 703(m). Nowhere in the text of the statute is there a requirement that the plaintiff offer direct evidence. It merely requires the plaintiff to “demonstrate[] that race, color, religion, sex, or national origin was a motivating factor. ...” The term “demonstrate” is specifically defined in § 701(m) of Title VII as meaning to “meet[] the burdens of production and persuasion.” The statute does not require that those burdens be met with any particular kind of evidence. A plaintiff who proves by a preponderance of the evidence the existence of discriminatory intent as a motivating factor has satisfied the statutory requirement regardless of the type of evidence produced.

Costa points out that when Congress wishes to create a heightened burden of proof, it explicitly states its intent. There are numerous examples throughout the U.S. Code of express provisions requiring that facts be proven “beyond a reasonable doubt” or by “clear and convincing evidence.” Nowhere in the Code, however, is direct evidence required. Indeed, the only reference to direct evidence is in federal statutes providing that such evidence is *not* required.

According to Costa, the suggestion in the government’s brief that a plaintiff must prove that sex or race was a *substantial* motivating factor is mistaken. While the Court’s decision in *Price Waterhouse* can fairly be read to contain such a standard, there is no such requirement contained in § 703(m). The statute itself requires proof only that illegal intent was a motivating factor.

Costa also disagrees with Caesars’s assertion that the holding of *Price Waterhouse* imposed a direct evidence requirement. That requirement is found only in Justice O’Connor’s concurrence, but her



opinion is not needed in order to form the holding of the case. Rather, Justice White's concurrence, which contains no reference to direct evidence, together with the plurality opinion, creates the holding of the case. The plurality opinion disavowed any limitation on the type of evidence that the plaintiff must produce in a mixed-motive case.

Applying § 703(m) as written, without engrafting a direct evidence requirement, does not conflict with, nor abnegate, the *McDonnell Douglas* model. In all disparate treatment cases, regardless of the model used, a plaintiff has the burden of proof on the issue of discriminatory motive. *McDonnell Douglas* merely provides one method by which a plaintiff may establish such a motive. Section 703(m), on the other hand, addresses the issue of allocating the burden of proof regarding causation once the plaintiff has carried its burden of proof on motive.

Costa argues that contrary to Caesars's assertion, upholding the Ninth Circuit's decision will not result in applying the mixed-motive model to almost every case. The burden of proof does not shift to the employer merely because the plaintiff has created a presumption of discrimination under *McDonnell Douglas*. Such a shift occurs only when the plaintiff has proven the illegal motive by a preponderance of the evidence.

The direct evidence requirement proposed by Caesars and the government is neither clear nor workable, Costa contends. As the government itself noted, the lower courts have not agreed on what constitutes direct evidence. Indeed, a number of circuits have defined direct evidence as including any type of evidence, whether circumstantial or direct. Defining direct evidence as

limited to noninferential testimony in effect means the only direct evidence of discriminatory motive would be the testimony of the decisionmaker himself that he made the employment decision because of the plaintiff's sex or race. Such testimony would never be available.

In addition, Costa argues, the standard of direct evidence proposed by Caesars (i.e., statements directly reflecting discriminatory animus made by the decisionmaker related directly to the employment decision) is inherently ambiguous, thereby posing practical problems in application. Determining who the actual decisionmaker is (the person with *de facto* influence as opposed to *de jure* job title), what types of statements constitute direct reflections of animus relating to the employment decision, and how close in time the statement must be to the decision all present definitional problems.

Finally, Costa notes that in no other area of law do courts make a distinction between direct and circumstantial evidence for purposes of proving contested facts. There is no rational reason to impose such a distinction for Title VII cases.

In this case, Costa reasons, she presented sufficient evidence to prove that sex was a motivating factor in the decision to terminate her. Thus the decision of the Ninth Circuit upholding the jury instruction should be affirmed.

## SIGNIFICANCE

While seemingly presenting a narrow technical issue regarding evidentiary standards, this case will have widespread impact on Title VII litigation, a category of civil cases that constitutes a good percentage of the federal court docket. If the Court adopts Caesars's position and engrafts a direct evidence requirement onto § 703(m), it will significantly limit plaintiffs' ability to pursue their claims under the mixed-motive model. The evidence necessary to meet this heightened standard would be available in a very limited number of cases. This, in turn, will limit the occasions when employers will have to bear the burden of proving that the employment decision would have been the same without regard to the plaintiffs' sex or race.

Conversely, applying the usual civil litigation standard of preponderance of the evidence to § 703(m) makes the mixed-motive model available to more plaintiffs, increasing their chances for recovery on their claims. Once a plaintiff has proven, by whatever means, that sex was a motivating factor in an adverse employment decision, the employer will be required to justify that decision by proving it would have reached the same decision regardless of the plaintiff's sex. Failure to meet that burden will result in a full recovery for plaintiff, but even if the employer meets its burden, it would still be liable for plaintiff's costs and attorney's fees, as well as injunctive relief.

As previously noted, the allocation of the burden of proof can, in many cases, be outcome determinative.

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