

CLIENT ALERT

Supreme Court Relaxes Proof Requirements in EEO Cases

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The much-maligned Ninth Circuit was vindicated by the Supreme Court in an important employment discrimination case decided on June 9. In *Desert Palace Inc. d/b/a/ Caesars Palace Hotel & Casino v. Costa*, U.S. No. 02-679 (June 9, 2003), the Court held that it is unnecessary for a Title VII plaintiff to present direct evidence of discrimination in order to get a "mixed motive" jury instruction.

The Court's unanimous decision resolved a dispute among lower courts as to the application of language in the Civil Rights Act of 1991. Among other things, the 1991 Act codified aspects of the burden and allocation of proof in mixed motive cases, in response to the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Section 107 of the Act states that: "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." 42 U.S.C. § 2000e-2(m). Since the 1991 Act, lower courts have split on the question of whether a plaintiff must produce direct, rather than just circumstantial evidence of discrimination in order to take advantage of the plaintiff-friendly rules applicable in mixed motive cases.

Desert Palace began when the hotel filed Catharina Costa after she got into a fight with a male employee. Costa sued alleging gender discrimination and, during trial, the district court gave the jury a mixed motive jury instruction. The hotel objected to the instruction, asserting that Costa had presented no direct evidence of discrimination. The jury returned a judgment for Costa and Desert Palace appealed. After a Ninth Circuit panel initially vacated the verdict, upon rehearing *en banc* the Ninth Circuit upheld the judgment, finding that Justice O'Connor's concurring opinion in *Price Waterhouse*, which had suggested that direct evidence would be required in such circumstances, had been "wholly abrogated" by the 1991 Act.

The Supreme Court examined the statutory language of Title VII, as amended by the 1991 Act, and determined that Section 2000e-2(m) unambiguously states that that a plaintiff is only required to "demonstrate" that the employer's decision was based upon an improper motive such as gender discrimination. This sort of "demonstration," wrote Justice Thomas, does not require the use of direct evidence. The Court noted that, unlike other statutes, which impose upon plaintiffs the heightened "direct evidence" requirement, 2000e-2(m) does not contain explicit language to that effect. The Court concluded that Congressional "silence" on this issue "suggests that we should not depart from the conventional rule of civil litigation generally applied in Title VII cases . . . , [which] requires a plaintiff to prove his case . . . using either direct or circumstantial evidence." U.S. No. 02-679, slip op. at 8-9

The significance of *Desert Palace*, according to the early returns, is that that it will make it easier for plaintiffs' lawyers to proceed at trial on a mixed motive theory of employment discrimination. In developing their litigation strategy, employers will have to give serious thought to the consequences of litigating a particular case under the mixed motive paradigm. It is likely that *Desert Palace* will be applied to the other federal employment discrimination statutes. It is probably too early to tell whether the plaintiffs' bar is correct in predicting that the Court's decision will make it easier for plaintiffs to survive a solid defense motion

for summary judgment in cases involving circumstantial evidence. Nothing in the Court's opinion suggests an inclination to alter the burden and allocation of proof paradigm articulated in *McDonnell Douglas v. Green*, at least at the summary judgment stage.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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