

EMPLOYMENT & EMPLOYEE BENEFITS

Court's 'mixed motive' decision affects job discrimination cases

BY DEAN J. SCHANER AND SCOTT M. NELSON
SPECIAL TO HOUSTON BUSINESS JOURNAL

A "mixed motive" discrimination claim exists when an employer has both discriminatory and legitimate reasons for an adverse employment action such as firing or refusing to promote an employee or refusing to hire someone. After a recent U.S. Supreme Court decision, plaintiffs' attorneys can be expected to argue that many more employment discrimination cases are mixed motive cases.

This is because the Supreme Court's recent decision (*Desert Palace Inc. vs. Costa*) lowers the proof requirement for employees who try to fit their discrimination cases under a mixed motive model. In *Costa*, the Supreme Court reasoned that plaintiffs do not need a "smoking gun" or direct evidence. They can rely on "circumstantial evidence."

Under Title VII of the 1964 Civil Rights Act, which prohibits race, color, national origin, religion and sex discrimination, the employee has the ultimate burden to prove that discrimination was a "motivating factor" in the employer's decision.

Direct evidence rarely exists. It's unlikely that anyone will come out and say, "If you weren't so old, we wouldn't have to fire you."

By contrast, circumstantial evidence does not have to be linked directly to the employment decision. It includes circumstances from which the jury can infer a discriminatory motive. For example, there might be evidence that a supervisor fired a black employee who had three unexcused absences, but did not fire a white employee with the same number of unexcused absences.

Plaintiffs' attorneys like the mixed motive model. If a plaintiff satisfies his proof burden — that discrimination was a motivating factor in the

employer's adverse employment action — the employer is liable, and the burden of proofs shifts to the employer to cut off a plaintiff's money damages. The employer must prove to the jury that it would have made the same employment decision in the absence of the discriminatory motive.

This is an unenviable task by comparison to standard "pretext" discrimination cases in which the employee must prove that the employer's stated reasons for its actions were false and unlawful discrimination was the real reason.

Before *Costa*, employees without direct evidence could still assert a circumstantial evidence discrimination claim under the traditional pretext model; however, they needed direct evidence to get a mixed motive claim to the jury. Thus, pre-*Costa*, mixed motive cases were rare in most jurisdictions, and plaintiffs were unable to submit a mixed motive instruction to the jury without smoking gun evidence.

THE COSTA CASE

Catharina Costa was a warehouse worker and heavy equipment operator for Desert Palace Inc. (Caesar's Palace Hotel & Casino of Las Vegas). Costa presented trial evidence that she was singled out for "intense stalking" by one of her supervisors, received harsher discipline than men for the same conduct, was treated less favorably than men in the assignment of overtime and that supervisors repeatedly stacked her disciplinary record and used or tolerated sex-based slurs against her.

Based on this evidence, the trial court submitted a mixed motive instruction to the jury, despite Desert Palace's objection that Costa had failed to present direct evidence that her sex was a motivating factor in the employment decisions. Desert Palace appealed, complaining that Costa did not present direct evidence of discrimination before

receiving a mixed motive jury instruction.

A 1989 Supreme Court case (*Price Waterhouse vs. Hopkins*) supported Desert Palace's position. Nevertheless, the *Costa* court held that, under Congress' 1991 amendment to Title VII, employees need not present direct evidence of discrimination to obtain a mixed motive instruction.

AFTER COSTA

Employees still have the ultimate burden to prove that discrimination was a motivating factor in the employment decision. Nevertheless, many plaintiffs' lawyers are excited about *Costa*.

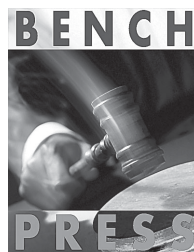
Because employees now have an easier mixed motive proof burden, plaintiffs' lawyers will be more likely to sue employers under a mixed motive theory. Defense counsel will likely object that the case does not merit a mixed motive instruction and should be tried as a traditional pretext discrimination case. Ultimately, trial judges will be important gatekeepers in deciding which cases receive a mixed motive jury instruction.

The mixed motive theory, nonetheless, may not be the best option for employees. In a mixed motive case, if the employer can demonstrate that it would have taken the same action even without the impermissible motivating factor, then the employee is not entitled to damages or an order requiring any admission, reinstatement, hiring, promotion or back pay. Instead, the employee's relief is limited to declaratory relief, injunctive relief and recovering attorneys' fees and costs.

As a practical matter, however, an employer does not want to be in a position where he is telling the jury that he would have made the same decision without the discriminatory factor.

Therefore, the plaintiff bar's excitement over *Costa* should make employers cautious.

DEAN J. SCHANER is managing partner and **SCOTT M. NELSON** is an attorney in Haynes and Boone's Houston labor and employment law section.



Schaner



Nelson