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**DESERT PALACE, INC. V. COSTA,
123 S. CT. 2148 (2003)**

FACTS

Desert Palace, Inc. employed Catharina Costa as a warehouse worker.¹ Costa was the only woman on the job and in her local Teamsters bargaining unit.² She experienced a number of problems with management and co-workers that led to an escalating series of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension.³ Desert Palace terminated Costa after she was involved in a fight with a co-worker.⁴

Costa filed suit against Desert Palace in the U.S. District Court for the District of Nevada, alleging sex discrimination and sex harassment under Title VII.⁵ Costa claimed that: (1) a supervisor stalked her, (2) she received harsher discipline than men, (3) she was assigned less overtime than men, and (4) supervisors intentionally added adverse information to her disciplinary record and often tolerated sex-based slurs against her.⁶

The trial court gave two instructions to the jury.⁷ First, the court instructed the jury that Costa had the burden of proving by a preponderance of the evidence that she suffered adverse work conditions.⁸ Desert Palace did not challenge this instruction.⁹ Second, the court instructed the jury to consider whether gender was a motivating factor in Desert Palace's treatment of Costa.¹⁰ The court stated that if the jury found gender to be a motivating factor, it would have to find for Costa even if the jury also found that lawful reasons motivated Desert Palace's decision.¹¹ If the jury found that Desert Palace's treatment of Costa was motivated both by gender and lawful reasons, the jury had to determine whether Costa was entitled to damages.¹² Costa was entitled to damages unless Desert Palace proved by a preponderance of the evidence that it would have treated Costa the same even if Costa's gender played no role in the employment decision.¹³ Desert Palace unsuccessfully challenged the latter instruction, claiming that Costa failed to adduce direct evidence that gender was a motivating factor in her dismissal or in any of the other adverse employment actions taken against

¹ Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2152 (2003).

² *Id.*

³ *Id.*

⁴ *Id.* The co-worker had a clean disciplinary record and received only a five-day suspension.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

her.¹⁴ The jury found for Costa and the Court of Appeals for the Ninth Circuit affirmed.¹⁵ Desert Palace then appealed.¹⁶

HOLDING

The Supreme Court affirmed the judgment for Costa.¹⁷ The Court held that in order to obtain a mixed motive instruction under Title VII a plaintiff need only present sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."¹⁸

ANALYSIS

In *Price Waterhouse v. Hopkins*,¹⁹ the Supreme Court held that in a mixed-motive case, the employer could avoid liability by proving by the preponderance of evidence that it would have made the same decision absent gender discrimination.²⁰ The Court split, however, on the question of when the burden of proof shifts to an employer to prove the affirmative defense.²¹ Four Justices would have held that the burden shifts to the employer once a plaintiff proves that her gender played a motivating part in an employment decision.²² In contrast, Justice O'Connor would have shifted the burden to the employer only when a plaintiff "showed that the unlawful motive was a substantial factor in the adverse employment action."²³ Justice O'Connor would have further required a plaintiff to show by direct evidence that the employer's decisional process was substantially affected by discrimination.²⁴

Because it was arguably the narrowest ground for the decision, some circuits had applied Justice O'Connor's concurrence in their decisions.²⁵ Additionally, Justice O'Connor's reference to "direct evidence" had spawned much litigation over the effect and meaning of the phrase.²⁶ In response, Congress passed the 1991 Civil Rights Act Amendments to Title VII (1991

¹⁴ *Id.*

¹⁵ *Id.* at 2153.

¹⁶ *Id.*

¹⁷ *Id.* at 2155.

¹⁸ *Id.*

¹⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁰ *Id.* at 258.

²¹ *Id.* at 259.

²² *Id.* at 258.

²³ *Id.* at 259.

²⁴ *Id.* at 261.

²⁵ *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 865 (9th Cir. 2002). *See also Deneen v. Northwest Airlines*, 132 F.3d 431, 436 (8th Cir. 1998); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997).

²⁶ *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002).

Act),²⁷ providing that an employer's same-decision evidence could serve as an affirmative defense with respect to the scope of remedies, but not as a complete bar to liability.²⁸ Circuit courts had then split over whether a plaintiff must prove by direct evidence that an illegitimate criterion was a motivating factor in an adverse employment action.²⁹

The Court held that direct evidence is not required in order to obtain a mixed motive instruction under Title VII.³⁰ The Court began its analysis by examining the statutory text.³¹ The Court asserted that where the words of the statute are clear, the judicial inquiry is complete.³² Here, § 2000e-2(m) unambiguously stated that a plaintiff need only "demonstrate" that an employer used a forbidden consideration with respect to any employment practice.³³ The Court stated that § 2000e-2(m) did not, on its face, require a plaintiff to meet a heightened standard through direct evidence.³⁴ The Court further stated that Congress would have clearly expressed a higher evidence standard if it had intended to enact a higher standard.³⁵ For example, Congress explicitly defined the term "demonstrates" in the 1991 Act to exclude a special evidentiary requirement.³⁶ Additionally, Congress had unequivocally established heightened proof requirements in other statutes.³⁷

Next, the Court stated that absent a congressional directive, traditional civil litigation rules requiring that a plaintiff prove her case by a preponderance of the evidence, either direct or circumstantial, apply to Title VII cases.³⁸ The Court asserted that the weight of circumstantial and direct evidence should be treated alike.³⁹ Additionally, the Court stated that circumstantial evidence extends beyond civil cases and is sufficient in the criminal context.⁴⁰ The Court further added that courts instruct juries that the law makes no distinction between the weight or value assigned to direct or

²⁷ *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2151 (2003).

²⁸ See 42 U.S.C. § 2000e-5(g)(2)(B) (2003).

²⁹ *Desert Palace*, 123 S. Ct. at 2151.

³⁰ *Id.* at 2148.

³¹ *Id.* at 2153.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2154.

³⁶ *Id.*

³⁷ *Id.* See 8 U.S.C. § 1158(a)(2)(B) (stating that an asylum application may not be filed unless an alien "demonstrates by clear and convincing evidence" that the application was filed within one year of the alien's arrival in the United States); 42 U.S.C. § 5851(b)(3)(D) (providing that "[r]elief may not be ordered" against an employer in retaliation cases involving whistleblowers under the Atomic Energy Act where the employer is able to "demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of such behavior").

³⁸ *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2154 (2003).

³⁹ *Id.*

⁴⁰ *Id.*

circumstantial evidence.⁴¹ Finally, the Court explained that the use of the word "demonstrate" in other Title VII provisions did not incorporate a direct evidence standard.⁴² Absent some congressional indication to the contrary, the Court would read § 2000e-2(m) in a similar manner.⁴³

CONCLUSION

Costa v. Desert Palace, Inc. makes clear that "single-motive" and "mixed-motive" cases are not two separate types of Title VII cases.⁴⁴ Rather, they are separate inquiries that occur at separate stages of the litigation.⁴⁵ The single-motive or *McDonnell Douglas Corp. v. Green*,⁴⁶ framework is invoked at earlier stages of the proceedings, such as the summary judgment phase.⁴⁷ *McDonnell Douglas* applies a four-factor burden-shifting paradigm.⁴⁸ The plaintiff has to establish a prima facie case of discrimination.⁴⁹ The burden then shifts to the defendant to provide a legitimate nondiscriminatory reason.⁵⁰ If the defendant does so, the plaintiff has the final burden of proving that the defendant's reason is pretext.⁵¹

The mixed-motive inquiry occurs at the trial phase.⁵² The question in mixed-motive cases is whether both lawful and unlawful reasons motivate the employer's employment decision.⁵³ It is generally not appropriate to introduce the mixed-motive inquiry at pre-trial proceedings because the defense is available to employers only at the remedy stage.⁵⁴

Desert Palace Inc. v. Costa is significant because, in addition to affirming *Costa*, it resolves the conflict and confusion present in mixed-motive employment discrimination cases. Prior to this case, circuit courts had split on what evidence the plaintiff needed to produce in order to receive a mixed-motive jury instruction.⁵⁵ Some courts concluded that Justice O'Connor's *Price Waterhouse* concurring opinion of requiring direct

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 2155.

⁴⁴ *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002).

⁴⁵ *Id.*

⁴⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴⁷ *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003).

⁴⁸ *See McDonnell Douglas*, 411 U.S. at 802.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.* at 804.

⁵² *Costa v. Desert Palace, Inc.* 299 F.3d 838, 857 (9th Cir. 2002).

⁵³ *Id.* at 862.

⁵⁴ *Id.* at 857.

⁵⁵ *See, e.g., Wright v. Southland Corp.*, 187 F.3d 1287, 1294 (11th Cir. 1999); *Fernandes v. Costa Bros., Masonry, Inc.* 199 F.3d 582 (1st Cir. 1999).

evidence that an illegitimate criterion was a substantial factor in the decision was controlling.⁵⁶ Other courts applied a different standard.⁵⁷

Desert Palace will bring uniformity to subsequent proceedings. This case holds that direct evidence is not required in order for a plaintiff to obtain a mixed-motive instruction. In essence, plaintiffs have two choices as to what type of instruction they want presented to the jury. Plaintiffs may choose to have the mixed-motive instruction introduced to the jury or plaintiffs may opt not to obtain this instruction. A plaintiff will choose the latter if he does not want the jury to know that the same decision would have been made in the absence of the discriminatory reason. Defendants, on the other hand, will be impacted by the decision. In order for defendants to be successful in Title VII cases, they will have to overcome plaintiffs circumstantial or direct evidence.

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⁵⁶ See, e.g., *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 294 (D.C. Cir. 1997).

⁵⁷ See, e.g., *Randle v. La Salle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989).

