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Re: *Desert Palace, Inc. d/b/a Caesars Palace Hotel & Casino v. Costa*

Attached please find a copy of the recent United States Supreme Court decision in *Desert Palace, Inc. d/b/a Caesars Palace Hotel & Casino v. Costa*.¹ Although the case addresses the standard of proof required in sex discrimination cases asserting a violation of federal law, we believe that it may have far reaching effects and ultimately dictate the type of evidence that the plaintiff must present in race discrimination cases alleging a violation of federal statutes.

I. Background of the Litigation

Catharina Costa was employed by Desert Palace, Inc. ("Desert Palace") as a heavy equipment operator. She was the only woman working in the company's warehouse and was the only female member of her local union. After a number of problems at work, including an altercation with a co-worker, Ms. Costa was terminated. She filed suit against Desert Palace, alleging that her termination was motivated by sex discrimination.

At trial, Ms. Costa presented evidence that she was singled out by her supervisors, that she received harsher discipline than her co-workers for similar infringements, that she was treated unfavorably in the assignment of overtime hours and that she was subjected to sex-based remarks. Based on the evidence presented at trial, the United States District Court for the District of Nevada instructed the jury that the plaintiff had the burden to prove by a preponderance of the evidence that her sex was a motivating factor in any adverse work conditions imposed. The District Court also provided the jury with a mixed motive instruction. Under this instruction, if the jury found that the employment decision was based on a mixture of unlawful gender considerations and lawful reasons, the defendant would be given the opportunity to prove by a preponderance of the evidence that even if gender had played no role in the employment decision, the plaintiff would

¹ 02-679, __ U.S. ____ (June 9, 2003)

have been subject to the same determination. Based on these instructions, the jury found in favor of Ms. Costa.

On appeal, the Court of Appeals for the Ninth Circuit held that it was inappropriate for the District Court to provide the jury with the mixed motive instruction as the plaintiff had not presented direct evidence of statements by her employer that demonstrated a discriminatory animus. The Court of Appeals remanded the case. The District Court then reheard the case *en banc*. They reinstated the original judgment. According to the District Court, the Civil Rights Act of 1991² does not require that a plaintiff provide direct evidence to establish that sex was a motivating factor in an employment decision.

II. The Supreme Court Decision

Justice Clarence Thomas delivered the unanimous opinion. The starting point for his analysis was the text of the Civil Rights Act of 1991. The statutory text requires that the plaintiff demonstrate that an employer used an impermissible factor in making an employment determination. The statute is silent as to the type of evidence that must be presented to make that showing. In Justice Thomas' opinion, if Congress had intended to require direct evidence to sustain the plaintiff's burden of proof in a civil rights action, it could have clarified its intent in the statutory language.

Without a clear showing of Congressional intent that direct evidence must be used to demonstrate discriminatory animus, the Court should not stray from the long held principles that direct and circumstantial evidence should be treated alike and that both can be used to prove a case under the preponderance of the evidence standard. Accordingly, a plaintiff is not required to meet the heightened evidentiary showing of using direct evidence to place a discrimination case in front of a jury.

III. Impact of the Decision

Prior to this decision, the United States Circuit Courts were split as to whether the plaintiff was required to make a showing of direct evidence in a sex discrimination case to avoid a defendant prevailing on a motion for summary judgment. Those courts requiring a showing of direct evidence relied on Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*.³ In that case, Justice O'Connor held that the burden to demonstrate that the plaintiff would have been subject to same employment decision even without consideration of gender only shifted to the defendant when the "plaintiff [could] show by direct evidence that an illegitimate criterion was a substantial factor in the decision."⁴

With the passage of the Civil Rights Act of 1991, the Court has now indicated that it can no longer demand this more stringent evidentiary requirement in cases asserting violations of federal discrimination laws. The Court's decision will affect not only sex

² The Civil Rights Act of 1991 served as an amendment to Title VII of the Civil Rights Act of 1964.

³ 490 U.S. 228 (1989).

⁴ *See, id.*

discrimination cases, but will reach much farther. The Civil Rights Act of 1991 addresses discrimination based on race, color, religion, sex, and national origin. In all cases alleging discrimination based on these factors, the plaintiff now needs only to demonstrate sufficient evidence for a jury to conclude that one of these impermissible factors acted as a motivating force in an employment decision.

It remains to be seen how this ruling will affect cases brought under state discrimination laws. Plaintiffs are increasingly filing actions for discrimination in state courts, as a number of the state statutes do not impose caps on compensatory damages, and establish a lower standard for awarding punitive damages as compared to the federal laws.

If you have any questions regarding this information, please do not hesitate to call.

Very truly yours,

Elizabeth A. Pitrof
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Enclosure