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# Mixed Motives After *Desert Palace v. Costa*

**by**

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## A. Sec. 107 of the Civil Rights Act of 1991

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e- 2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

> "(m) Except as otherwise provided in this title, 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."

(b) ENFORCEMENT PROVISIONS.--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

> "(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> > "(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and
> >
> > "(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

## B. The Decision

*Desert Palace, Inc. v. Costa*, 539 **U.S.** 90, 123 S. Ct. 2148, 91 FEP Cases 1569 (2003), unanimously affirmed the Ninth Circuit, cited *Reeves*, and held that § 703(m) of the Civil Rights Act of 1964, added by the Civil Rights Act of 1991, allows plaintiffs to obtain mixed-motives analysis if they show that race, color, national origin, sex, or religion was one of the factors motivating the challenged decision. The Court held that circumstantial evidence is sufficient, and is not disfavored in employment discrimination cases. This decision will make mixed-motives analysis available generally in intentional-discrimination cases, and will eliminate the

requirement that plaintiffs show pretext as to each nondiscriminatory reason proffered by a defendant. It will make it harder for defendants to obtain summary judgment, but may give defendants two bites at the apple in the minds of jurors. It is critical for plaintiffs to emphasize deceit, in cases in which defendant has misrepresented its reasons to the plaintiff, to co-workers, to enforcement agencies, or to the courts. The Court did not address the critical question whether defendants as well as plaintiffs can trigger mixed-motives analysis.

### C. Survival of *McDonnell Douglas*

There is a strong but not uniform consensus in the courts that *McDonnell Douglas* survives *Costa*. See also the next section.

*Watson v. Southeastern Pennsylvania Transportation Authority*, 207 F.3d 207, 212–20, 82 FEP Cases 520 (**3d Cir.** 2000), *cert. denied*, 531 **U.S.** 1147 (2001), affirmed the judgment in a jury verdict for the defendant on the Title VII plaintiff's gender and disability discrimination claims. The court rejected plaintiff's argument that § 107 of the 1991 Act eliminated the differences in causation between "pretext" cases and mixed-motives cases, and allowed plaintiffs to prevail merely by showing that an impermissible motive was a substantial motivating factor in the challenged decision, rather than a "but for" determinative factor. The court relied on the facts that Justice O'Connor's concurrence in *Price Waterhouse* expressly preserved the distinction between "pretext" cases and mixed-motives cases, and that the language of § 107 was tailored to apply to cases subject to the *Price Waterhouse* rule. Sec. 107 contains the phrase "even though other factors also motivated the practice," which the court found specifically tailored to the set of cases subject to *Price Waterhouse* but unnecessary if § 107 had been intended to apply to ordinary "pretext" cases. *Id.* at 216–17. The statute uses the word "demonstrates," which Justice O'Connor used time and again in her concurrence, and the court found the word appropriate to describe the subset of cases covered by *Price Waterhouse* but "not the most apt choice" if it had been intended to apply to "pretext" cases. *Id.* at 217–18. The court also found it significant that § 107(b) applies to the remedies in cases brought under § 107(a), not the remedies in all cases brought under Title VII. *Id.* at 218. The court found the legislative history on § 107 meaningful although it had been drafted prior to the Danforth amendment, because the language of § 107 did not change materially from the time of that legislative history to the time of enactment. *Id.* at 218 n.8. The legislative history referred to the section only as changing part of the standards of *Price Waterhouse*. *Id.* at 218–19. To the extent that the Eighth and Ninth Circuit model jury instructions embraced a different view, the court found them unpersuasive "in light of the text of § 107 and its legislative history." *Id.* at 220 n.9. The court stated that the Second and Fourth Circuits had reached similar positions, *id.* at 219–20, and pointed out that a contrary reading of § 107 would not simplify the law of employment discrimination because it would result in different interpretations of the words "because of" between Title VII discrimination cases and Title VII retaliation cases, and between Title VII cases and ADEA cases. Given the frequency with which both statutes are invoked, the court foresaw substantial confusion if it gave § 107 the construction favored by the plaintiff. *Id.* at 220.

*Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17, 94 FEP Cases 1854 (**11th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination

defendants. The court rejected plaintiffs' argument that *Desert Palace* overruled *McDonnell Douglas*.

*Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 991–92 (**D. Minn.** 2003), held that *Desert Palace* effectively abolished the *McDonnell Douglas* approach in all cases. The court stated at 991: "The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational." It held that the "same decision" test would work best in all cases.

### D. The Role of Pretext in a Mixed-Motives Case

*Rose v. New York City Board of Education*, 257 F.3d 156, 161–62, 86 FEP Cases 380 (**2d Cir.** 2001), reversed the judgment on a jury verdict for the ADEA defendant. Plaintiff was a principal, and her supervisor repeatedly threatened to replace her with someone "younger and cheaper." The court held that this was direct evidence of discrimination entitling plaintiff to a burden-shifting jury instruction under *Price Waterhouse*. The court rejected defendant's argument that plaintiff waived her entitlement to a burden-shifting explanation by challenging defendant's asserted nondiscriminatory reasons as pretextual. The court explained:

> We see no reason why a plaintiff's claims of pretext should preclude a jury's consideration of mixed motives under proper instructions, where, as here, the employer has produced sufficient evidence to allow the jury to find that the employer's decision was motivated by permissible factors. Thus, where a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendants proffered motives as pretextual, a jury must be instructed, if requested, to apply the *Price Waterhouse* burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff's claims of pretext.

*Id.* at 162. Finally, the court rejected defendant's argument that the failure to give a burden-shifting explanation was harmless error in light of the jury's finding that age was a determinative factor. It held that plaintiff was entitled to a new trial with a jury instruction that defendant bears the burden of persuasion. *Id.* at 162–63.

*Nicholas v. Pennsylvania State University*, 227 F.3d 133, 143–45 (**3d Cir.** 2000), affirmed the dismissal of the plaintiff's First Amendment retaliation claim based on the jury's determination that the plaintiff's protected speech was a substantial or motivating factor in his discharge, but that the defendants would have made the same decision in any event. The court rejected plaintiff's argument that the verdict was inconsistent, and rejected plaintiff's argument that the jury should have been given an instruction on pretext. The court held that the Title VII burden-shifting approach does not govern First Amendment retaliation claims. "As the Seventh Circuit has noted, Title VII concepts have no applicability in the First Amendment context." *Id.* at 144–45.

*Allen v. Iranon*, 283 F.3d 1070, 1074–75, 18 IER Cases 830 (**9th Cir.** 2002), affirmed the judgment for the First Amendment retaliation plaintiff after a bench trial. The court held that the *Mt. Healthy* analysis applies to First Amendment claims, and rejected the argument that plaintiff

was required to show retaliation by direct evidence. The court held that the lower court's discussion of pretext "does not mean that it strayed from a proper application of *Mt. Healthy*. "Courts determining whether a plaintiff has met his burden under Mt. Healthy often look to evidence that the employer's proffered reasons for the challenged decision were pretextual." *Id.* at 1075 (citations omitted). The court similarly held that the lower court's reference to negligence did not mean that it used a negligence standard. *Id.* at 1075–76.

### E. Application of *Desert Palace* to Summary Judgment Practice

*Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352, 95 FEP Cases 152 (**5th Cir.** 2005), reversed the grant of summary judgment to the ADEA defendant. The court stated: "Under this integrated approach, a plaintiff relying on circumstantial evidence has two options for surviving summary judgment in an ADEA case: (1) the plaintiff may offer evidence showing that the defendant's proffered nondiscriminatory reasons are false; or (2) the plaintiff may offer evidence showing that his age was a motivating factor for the defendant's adverse employment decision."

*Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, held that *Costa* applies to ADEA cases, and described the difference *Costa* makes:

> Our holding today that the mixed-motives analysis used in Title VII cases post-Desert Palace is equally applicable in ADEA represents a merging of the McDonnell Douglas and Price Waterhouse approaches. Under this integrated approach, called, for simplicity, the modified McDonnell Douglas approach: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).'"

(Citations omitted.)

*Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017–18, 16 AD Cases 801 (**8th Cir.** 2005), reversed the grant of summary judgment to the ADA defendant. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that *Desert Palace* made no difference to Eighth Circuit summary-judgment practice, because Circuit case law already allowed a plaintiff to prevail "notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action." (Citations omitted.)

*Griffith v. City of Des Moines*, 387 F.3d 733, 735, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and Iowa Human Rights Act defendant on plaintiff's claim of discriminatory discipline. The court held that *Costa* did not affect

summary-judgment practice: "At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues. Thus, *Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents." The court continued:

> We have long recognized and followed this principle in applying *McDonnell Douglas* by holding that a plaintiff may survive the defendant's motion for summary judgment in one of two ways. The first is by proof of "direct evidence" of discrimination. Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. . . . Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext. . . . This formulation is entirely consistent with *Desert Palace*. Thus, we conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.

*Id.* at 736 (footnote and citations omitted). Judge Magnuson concurred specially. *Id.* at 739–48.

*Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, 285 F.Supp.2d 1180, 92 FEP Cases 1424 (**N.D. Iowa** 2003), granted in part and denied in part defendant's motion for summary judgment. The court stated at 1197–98:

> Thus, the *McDonnell Douglas* burden-shifting paradigm must only be *modified* in light of *Desert Palace*, § 2000e-2(m), and *only in its final stage*, so that it is framed in terms of whether the plaintiff can meet his or her "ultimate burden" to prove intentional discrimination, rather than in terms of whether the plaintiff can prove "pretext." Under such a modified framework, to prevail after the defendant produces a legitimate, nondiscriminatory reason for its conduct, the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative) . . . or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive alternative). . . . The latter showing may be made with either "direct" or "circumstantial" evidence. . . . If the plaintiff prevails under the second alternative, then if the defendant is to limit the remedies available to the plaintiff to injunctive relief, attorney's fees, and costs—i.e., to escape liability for damages—the

> burden shifts back to the defendant to prove the affirmative defense stated in § 2000e-5(g)(2)(B), which is that the defendant "would have taken the same action in the absence of the impermissible motivating factor."

(Citations and footnote omitted; emphases in original.)

*Skomsky v. Speedway SuperAmerica, L.L.C.*, 267 F.Supp.2d 995, 1000, 14 AD Cases 910 (**D. Minn.** 2003), held that plaintiff pleaded a mixed-motives case by initially pursuing claims under the ADEA as well as under the ADA.

### F. Application of *Desert Palace* Outside of Title VII

*Estades-Negroni v. Associates Corp. of North America*, 345 F.3d 25, 14 AD Cases 1478 (**1st Cir.** 2003), *leave to file for rehearing denied*, 359 F.3d 1 (**1st Cir.** 2004), affirmed the grant of summary judgment to the ADEA, ADA, and Puerto Rican law defendant. Without discussion, the court considered *Desert Palace* in conjunction with plaintiff's ADEA claim, and held that it made no difference.

*Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 285 n.2, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), *petition for cert. dismissed*, __ **U.S.** __, 125 S. Ct. 1115 (2005), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court assumed without deciding that the *Price Waterhouse* burden-shifting model still applies to ADEA cases, but held the evidence insufficient under either the § 703(m) model or the *Price Waterhouse* model. *Accord*, *Mereish v. Walker*, 359 F.3d 330, 340, 93 FEP Cases 608 (**4th Cir.** 2004) ("And maintaining the higher evidentiary burden in Price Waterhouse for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non- discriminatory employment decisions."); *Trammel v. Simmons First Bank of Searcy*, 345 F.3d 611, 615, 92 FEP Cases 1061 (**8th Cir.** 2003) ("But even if we assume, without deciding, that the holding in *Costa* applies to ADEA claims, we do not believe that this helps Mr. Trammel because he has presented insufficient evidence to support a finding that his age was a 'motivating factor' in the decision to discharge him."). Judge Michael dissented, joined by Judges Motz, Judge King, and Judge Gregory. *Id.* at 299–305.

*Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, and held that the standards of *Desert Palace* apply to ADEA mixed-motives claims. "Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim." (Footnotes and citations omitted.) The court added: "Unlike Title VII which explicitly permits mixed-motives cases, the ADEA neither countenances nor prohibits the mixed-motives analysis. Because we base our holding on the absence of a heightened direct evidence requirement in the ADEA, we do not find the statute's silence on the mixed-motives analysis to be dispositive." *Id.* at 311 n.8.

*Calmat Co. v. U.S. Department of Labor*, 364 F.3d 1117, 1123 n.4 (**9th Cir.** 2004), denied the employer's petition for review in a whistleblower case, citing *Costa* for the

proposition that direct evidence of retaliation is not required to invoke mixed-motives analysis in whistleblower cases.

*Lewis v. Young Men's Christian Association*, 208 F.3d 1303, 1305–06, 82 FEP Cases 1018 (**11th Cir.** 2000), affirmed the grant of summary judgment to the ADEA retaliation defendant. The court held that ADEA retaliation cases are not covered by § 107 of the Civil Rights Act of 1991, 42 U.S.C. §§ 2000–e(2)(m), because such claims are not among those enumerated in the statute.

### G. Application of Mixed-Motive Analysis Outside of Title VII

The courts of appeals have treated mixed-motives analysis as applicable to claims arising under the ADA, the ADEA, under Title IX of the Education Amendments of 1972, under §510 of ERISA, under Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act"), 42 U.S.C. §§3601 *et seq.*, under §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), and under various statutory protections for employee "whistleblowers."[1] The Whistleblower Protection Act now specifies the burdens of proof for retaliation in violation of whistleblowing provisions governed by the Act. 5 U.S.C. § 1221(e).

*Pennington v. City of Huntsville*, 261 F.3d 1262, 1269, 88 FEP Cases 227 (**11th Cir.** 2001), affirmed the grant of summary judgment to the Title VII and § 1983 retaliation defendant. The court held that the mixed-motives defense is available in § 1983 cases and in Title VII retaliation cases.

### H. A Special Case: The ADA and the Rehabilitation Act

*Hedrick v. Western Reserve Care System*, 355 F.3d 444, 454, 15 AD Cases 1 (**6th Cir.**), *cert. denied*, __ **U.S.** __, 125 S. Ct. 68, 160 L. Ed. 2d 25 (2004), affirmed the grant of summary judgment to the ADA defendant, and held that mixed-motives analysis is not available for ADA claims.

*Peebles v. Potter*, 354 F.3d 761, 767 n.5, 15 AD Cases 146 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Rehabilitation Act defendant. The court stated that plaintiffs are required by the language of the Act to show that the challenged action was motivated solely by the disability.

### I. Meaning of "Motivating Factor"

*Boyd v. Illinois State Police*, 384 F.3d 888, 894–95, 94 FEP Cases 839 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII defendants. The court disapproved of the lower court's supplemental instruction defining "motivating factor" as a "catalyst" without which something different would have happened. The court held that term was not used in Title VII, and imposed a burden on plaintiffs higher than it should have been. In the circumstances of the case, however, it was harmless error.

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[1]See the Summer 1996 and Spring 1998 editions of Seymour and Brown, EQUAL EMPLOYMENT LAW UPDATE..

## J. Required Quantum of Evidence

*Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 81–82, 86 FEP Cases 305 (**2d Cir.** 2001), vacated the grant of summary judgment to the defendant on plaintiff's Title VII retaliation claim. The lower court rejected plaintiff's claim because plaintiff did not show that defendant's proffered reason for her termination was false. In reversing, the lower court held that such a showing is not necessary where, as here, there is sufficient circumstantial evidence to allow a reasonable jury to find retaliation. The court stated: "A rational jury could conclude from the circumstances of her termination—the fact that it grew directly out of a dispute that may have been related to her complaints of sexual harassment, and the evidence that the persons who made the decision to terminate Holtz may have known of those complaints—that retaliation for protected activity "was *a* substantial motivating factor" for the adverse employment action." *Id.* at 81 (citation omitted; emphasis in original). Judge Straub dissented in part. *Id.* at 85–86.

*Matima v. Celli*, 228 F.3d 68, 80–81, 83 FEP Cases 1660 (**2d Cir.** 2000), affirmed the judgment on a jury verdict for the Title VII retaliation defendant. The court held that the defendant adequately showed that it would have discharged plaintiff even if there had not been a retaliatory motive, because of plaintiff's repeated disruptions of his own works and of others. The court stated that the evidence did not compel a finding that plaintiff's behavior was provoked by the defendant's inadequate responses to his complaints. "Ayerst provided Matima with ample avenues for internal complaint. When Matima was dissatisfied with the results of those complaints, he was not content to pursue administrative and legal remedies; instead, he repeatedly confronted and antagonized his supervisors in inappropriate contexts in a way that was designed to force the company's hand or make it pay a price in reduced productivity, focus and morale." *Id.* at 81.

*Vance v. Union Planters Corp.*, 209 F.3d 438, 442, 82 FEP Cases 1199 (**5th Cir.** 2000), affirmed the judgment of liability on the jury verdict for the Title VII gender discrimination plaintiff, who had not been selected for the position of branch bank president. The court held that the male decisionmaker's statement that he wanted a "mature man" in the position—made to a man he tried to recruit for the job, who turned it down and recommended the plaintiff—was direct material evidence of discrimination. This case is described in more detail in Chapter 17 (Direct Proof and Stray Remarks), in Part B ("Explanations of the Standard Used to Decide If a Statement or Other Evidence is 'Direct Proof' or a 'Stray Remark'").

*Cockrel v. Shelby County School District*, 270 F.3d 1036, 1056, 18 IER Cases 65 (**6th Cir.** 2001), *cert. denied*, 537 **U.S.** 813 (2002), reversed the grant of summary judgment to the First Amendment retaliation defendants. Based on the evidence of manipulation of normal procedures or failure to follow normal procedures, the court held that this was enough to shift the burden of persuasion to defendants that they would have fired plaintiff even without the retaliatory motive. Judge Siler concurred. *Id.* at 1060.

*Ross v. Douglas County, Nebraska*, 234 F.3d 391, 397, 84 FEP Cases 791 (**8th Cir.** 2000), affirmed the judgment on a jury verdict for the Title VII racial discrimination plaintiff. The court held that plaintiff had shown direct evidence of discrimination and retaliation through the testimony of Arthur Marr, an Administrative Assistant for Inmate Services, that plaintiff was given an unprecedented permanent assignment to a high-stress position called the "bubble," as a

means of forcing him to quit, *id.* at 393, and that plaintiff was not allowed to rescind his letter of resignation because of the decisionmaker's belief that he was a "black radical" who would stir up the other black correctional officers. *Id.* at 394.

*Wexler v. White's Furniture*, 317 F.3d 564, 571–72, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that mixed-motives analysis is proper: "Criticism of an employee's performance, even if true, which is linked to stereotypes associated with a plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis. . . . The association of these stigmatizing beliefs with an adverse employment decision creates a genuine issue of material fact as to whether the employer was motivated, at least in part, by discriminatory intent based on those stereotypes." (Citation omitted.) Judges Krupansky and Boggs dissented. *Id.* at 578–97.

*EEOC v. Liberal R-II School District*, 314 F.3d 920, 90 FEP Cases 1032 (**8th Cir.** 2002), reversed the grant of summary judgment to the defendant, holding that there was direct evidence of discrimination. The EEOC brought suit when the defendant failed to renew the bus-driving contract of George Trout, who was then 70 years old. He had been hired at the age of 66. Superintendent Gretlein recommended renewal, but the Board refused, at a closed meeting at which Gretlein was present but did not participate. Charged with the responsibility of explaining Board actions to employees, Gretlein told Trout that the Board felt he was too old to continue as a driver. Both Gretlein and the Board members denied that age was discussed at the meeting, and Gretlein claimed that the contention was libelous. In his letter of opposition to Trout's claim for unemployment benefits, however, Gretlein stated:

> *On behalf of the Liberal R-II School District,* I wish to protest the payment of benefits to the above individual. Mr. George Trout had served as a bus driver for the district. *The fact that Mr. Trout is now 70 1/2 years of age* and that the public had voiced concerns about his driving safety, *his continuation as a bus driver for the coming year was not approved by the Board of Education.* The Board cited student safety as their reason for Mr. Trout's noncontinuation as a bus driver.

*Id.* at 921 (emphasis added by the court). The court described "direct evidence" in a manner simpler than that used by some other Circuits:

> The Supreme Court has defined direct evidence in the negative by stating that it excludes "stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process itself." . . . This circuit has stated that "direct evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude." . . . In addition, "[c]omments which demonstrate a 'discriminatory animus in the decisional process' ... or those uttered by individuals closely involved in employment decisions may constitute direct evidence within the meaning of Price Waterhouse." . . . As we recently stated, "[t]he direct evidence required to shift the burden of proof is evidence of conduct or statements by persons involved in making the employment decision directly manifesting a discriminatory attitude, of a sufficient quantum and gravity that would allow the factfinder to conclude that attitude more likely than not was a motivating factor in the

> employment decision." . . . Finally, the EEOC "must present evidence showing a specific link between the discriminatory animus and the challenged decision."

*Id.* at 923 (citations omitted). See the discussion of the "actual decisionmaker" below.

### K. No Need for Corroboration

*EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163–64, 93 FEP Cases 952 (**4th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, citing *Costa* and holding that there was no need for corroboration before invoking mixed-motives analysis.

### L. Can Defendants Invoke Mixed-Motives Analysis?

*Donovan v. Milk Marketing Inc.*, 243 F.3d 584, 586, 85 FEP Cases 65 (**2d Cir.** 2001), affirmed the judgment for the ADEA defendant on a jury verdict after the trial court had delivered a mixed-motives instruction. The court of appeals held that "when the jury might reasonably conclude on the evidence that both illegal discrimination and legitimate non-discriminatory reasons were present in an employer's decisionmaking process, the court may charge the jury on mixed-motivation in accordance with *Price Waterhouse*." The court rejected plaintiff's challenge to the defendant's invocation of the mixed-motives theory where it had not pleaded the theory as an affirmative defense, holding that there is no special pleading requirement. *Id.* The court stated, however: "We do not foreclose the possibility that there may be situations in which a defendant's failure to refer to the mixed-motive analysis prior to the charge may cause prejudice to the plaintiff. This is not such a case." *Id.* at 586 n.2. It noted that the theory had been discussed in both sides' pre-trial memoranda. *Id.* The court stated that, in nay event, an Answer stating that the defendant had been motivated by lawful reasons implicitly incorporates a mixed-motives defense. *Id.* at 586.

## G. Defendant's Need to Prove Actual Motivation by the Asserted Reason

The Supreme Court has made clear that the employer must prove it was in fact motivated by the asserted nondiscriminatory reason, not just that it might have made the same decision for that reason. *McKennon v. Nashville Banner Publishing Co.*, 513 **U.S.** 352, 360, 66 FEP Cases 1192 (1995), stated:

> The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason. Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law. See *Price Waterhouse v. Hopkins*, 490 **U.S.** 228, 252 (1989) (plurality opinion) (employer's legitimate reason for discharge in mixed-motive case will not suffice "if that reason did not motivate it at the time of the decision"); *id.*, at 260–261 (White, J., concurring in judgment); *id.*, at 261 (O'Connor, J., concurring in judgment). As we have observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Id.*, at 252 (plurality) (internal quotation marks and citations omitted); see also *id.*, at 260–61 (White, J., concurring in judgment).

The plurality in *Price Waterhouse v. Hopkins*, 490 **U.S.** 228, 252, citing earlier cases, stated: "An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."

*Gonzales v. Dallas County*, 249 F.3d 406, 412–13 (**5th Cir.** 2001), reversed the denial of qualified immunity to the individual defendants. Although plaintiff had testified before a county grand jury that his boss was corrupt, and claimed that he was fired in retaliation, he had also assertedly pulled his gun on a shoplifter who had stolen $30 in socks, used the gun as a club, and maced the customer twice, once while the customer was handcuffed and on the floor, where the customer assertedly did not try to resist arrest, and where the customer was accompanied by his seven-year-old son. The court held that defendants had produced substantial evidence that they would have fired plaintiff regardless of the grand jury testimony. *Id.* at 413.

*Cockrel v. Shelby County School District*, 270 F.3d 1036, 1057–58, 18 IER Cases 65 (**6th Cir.** 2001), *cert. denied*, 537 **U.S.** 813 (2002), reversed the grant of summary judgment to the First Amendment retaliation defendants. Plaintiff was a teacher who invited Woody Harrelson to her classroom to speak to students on the uses of industrial hemp to replace wood pulp and reduce logging, and to pass around seeds whose possession was unlawful under Kentucky law. The court held that plaintiff's speech was protected. *Id.* at 1048–55. The court held that there was sufficient evidence that defendants decided to fire plaintiff at least in part because of her speech, in light of their departure from past practices and standards in order to do so. Defendants offered 17 reasons for firing plaintiff, but the court held that defendants' departures from ordinary practices all occurred in connection with the visits.

> There is no evidence in the record that any news of the improper conduct alleged in Cockrel's termination letter, much of which occurred well before Harrelson set foot on the grounds of Simpsonville Elementary, had ever been relayed to the Superintendent before the decision to investigate Cockrel had been made, nor is there any evidence that Cockrel had been disciplined by any school administrator for this conduct before Harrelson arrived on the scene. While many of the allegations made against Cockrel would, if true, amount to serious misconduct on her part, the fact that she was not disciplined for any of this behavior, nor did the Superintendent know of it, until after Harrelson visited and various members of the school community voiced their displeasure with the presentation, leads to a genuine issue of material fact concerning the defendants' assertion that Cockrel would have been fired regardless of her decision to speak on the environmental benefits of industrial hemp.

*Id.* at 1057–58.

*Ross v. Douglas County, Nebraska*, 234 F.3d 391, 397, 84 FEP Cases 791 (**8th Cir.** 2000), affirmed the judgment on a jury verdict for the Title VII racial discrimination plaintiff. The court held that plaintiff had shown direct evidence of discrimination and retaliation, and held that the fact that the defendant had presented evidence that it would have reached the same decision even in the absence of an impermissible motive, this was not enough to overturn the verdict. "While a reasonably [sic] jury could, perhaps, have accepted Douglas County excuses, this one did not."

*Stanley v. City of Dalton*, 219 F.3d 1280, 1292–94 (**11th Cir.** 2000), reversed the denial of qualified immunity to First Amendment retaliation defendant Police Chief Chadwick. The court, however, held that the plaintiff former police officer had presented enough evidence to

show a jury question on whether the defendant would have fired him if it had not been for his speech protected by the First Amendment. It emphasized that the test was not whether there was a basis for taking the same action, but whether the same action would have been taken in light of the defendant's knowledge, perceptions, and policies at the time. *Id.* at 1293. Here, the plaintiff had still been disputing internally two of the incidents on which the defendant assertedly relied in firing him, so the court discounted those. The plaintiff's deceptive response on his polygraph "can alone be sufficient to support termination," but the questions on which the deception response was noted did not involve criminal activity or sexual harassment, but whether the plaintiff used profanity and lost his temper with another officer. *Id.* at 1294. "While the deception alone was an adequate lawful basis to terminate Stanley, we cannot say as a matter of law that *Chadwick* necessarily would have done so absent Stanley's having accused him of theft." *Id.* (emphasis in original). The court held that a mixed-motives defendant can be entitled to qualified immunity even if there is a jury question about his improper intent. Citing *Foy v. Holston*, 94 F.3d 1528 (**11th Cir.** 1996), the court stated: "We explained that '[w]here the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful *and* unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity.'" 219 F.3d 1280, 1295. The court continued: "A defendant is entitled to qualified immunity under the *Foy* rationale only where, among other things, the record indisputably establishes that the defendant in fact was motivated, *at least in part*, by lawful considerations." *Id.* at 1296 (emphasis in original).

### M. Effect of Curing the Discrimination

*Taylor v. Small*, 350 F.3d 1286, 92 FEP Cases 1785, 15 AD Cases 25 (**D.C. Cir.** 2003), held that, while denial of a bonus because of a delay in providing an employment evaluation may be actionable, the employer may cure this kind of violation prior to suit and thus avoid liability:

> We agree with the four other circuits to have addressed the question: An employer may cure an adverse employment action—at least one of the sort here alleged—before that action is the subject of litigation. *See White v. Burlington Northern & Santa Fe Railway Co.*, 310 F.3d 443, 452 (**6th Cir.** 2002) (reinstatement that "puts the plaintiff in the same position she would have been in absent the suspension constitutes the 'ultimate employment decision,' thereby negating a potentially adverse intermediate employment decision"), *reh'g en banc granted and judgment vacated*, 321 F.3d 1203 (2003); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267-68 (**11th Cir.** 2001) (no adverse employment action where plaintiff initially denied but shortly thereafter received promotion); *Brooks v. San Mateo*, 229 F.3d 917, 929-30 (**9th Cir.** 2000) (retaliatory lowering of performance evaluation not adverse employment action where evaluation was "on appeal" and might have been corrected if plaintiff had not quit her job while appeal was pending); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (**5th Cir.** 1998) ("We need not address whether a mere delay in promotion constitutes an adverse employment action because [plaintiff] received the promotion with retroactive pay and seniority"); *cf. Page v. Bolger*, 645 F.2d 227, 233 (**4th Cir.** 1981) (en banc) ("there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII").

*Ezell v. Potter*, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005), reversed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's claim of disparate treatment. The court held that the Notice of Termination issued to plaintiff was an adverse employment action even though it was withdrawn after plaintiff filed a grievance. The court explained that "to hold otherwise would allow harassing supervisors to demote employees who rejected their advances with impunity, so long as they later reversed the demotion and restored the employees to their former positions." (Citation omitted.) The court held that plaintiff was damaged "from the time it was issued until it was reversed through the union grievance process." The court continued: "Thus, the Supreme Court's decision in Desert Palace, to the extent relevant, merely reaffirms our prior holdings by indicating that a plaintiff bringing an employment discrimination claim may succeed in resisting a motion for summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation." *Id.* at 1018 (footnote omitted).

*Pennington v. City of Huntsville*, 261 F.3d 1262, 1269–71, 88 FEP Cases 227 (**11th Cir.** 2001), affirmed the grant of summary judgment to the Title VII and § 1983 retaliation defendant. The court held that the defendant would have made the same decision in the absence of the retaliatory motive. The City did in fact rescind the tainted decision and engaged in a new selection process, excluding everyone who had participated in the original decision. "Where a decisionmaker conducts his own evaluation and makes an independent decision, his decision is free of the taint of a biased subordinate employee." *Id.* at 1270 (citations omitted).

## N. Pattern Jury Instructions in "Mixed Motives" Cases

### 1. Sources of Pattern Jury Instructions

The Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have pattern jury instructions on their web sites. The Fifth Circuit pattern instructions do not include mixed-motives cases,

### 2. Who Wins the Verdict if Both Sides Make their Respective Showings?

If plaintiff shows that a forbidden characteristic was a motivating factor but defendant carries its burden of showing the "same decision" defense, the Seventh Circuit Draft Model Instruction 3.01(c) says in the context of Title VII that the verdict should be for plaintiff, but no damages should be awarded.

The Eighth Circuit pattern instructions cover ADEA, § 1991, and § 1983 mixed-motive cases, and correctly state that the verdict must be for the defendant if the jury finds that the same decision would have been made anyway. There is no Title VII discrimination mixed-motive instruction, and the notes under the mixed-motives instructions do not state that Title VII discrimination cases must be treated differently. This creates the risk that someone, somewhere in the states within the Circuit will use one of these instructions in a Title VII mixed-motive case.

### 3. Should Jurors Know Who Has the Burden of Proving the "Same Decision"?

The Eighth Circuit instruction system for mixed-motives cases is elaborate, but flawed. In each instance, its mixed-motive instructions fail to inform the jury that, once the plaintiff has proven that an impermissible factor formed part of the defendant's motivation for the challenged decision, it is the defendant that has the burden of proving that it would have made the same decision in the absence of discrimination, not the plaintiff having the burden of showing defendant would not have made the same decision. The wording of the instruction might even lead a legally unsophisticated jury to think that the plaintiff somehow bears the burden of showing the "same decision."