
Supreme Court Makes It Easier for Plaintiffs To Prevail in Employment Discrimination Cases

2003-06-19

A decision issued by the United States Supreme Court last week lightened a plaintiff's burden of proof in discrimination lawsuits and made it more difficult for employers to defend themselves. Resolving a split among the federal circuits, the Supreme Court, in *Desert Palace, Inc. d/b/a Caesar's Palace Hotel & Casino v. Costa*, (U.S. No. 02-679 [June 9, 2003]), held that direct evidence of discrimination is *not* required for a plaintiff to obtain a "mixed-motive jury instruction under Title VII" where the plaintiff suffers an adverse employment action based on both a legitimate reason and a discriminatory one. The significance of a mixed-motive jury instruction is that it shifts the burden of persuasion to the employer. Stated differently, employers found to have mixed motives are considered guilty until they can prove themselves innocent. By contrast, in a non-mixed mixed-motive case, the plaintiff retains the burden of persuasion at all times.

In *Caesar's Palace*, the Supreme Court found that the Civil Rights Act of 1991, which amended Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e, et seq.), expressly overruled what many federal circuits viewed as the Court's holding in *Price Waterhouse v. Hopkins* (490 U.S. 228 [1989]), that *direct* evidence of discrimination was required in a mixed-motive case. Direct evidence is frequently viewed as the equivalent of a "smoking gun." In reaching this decision and reviewing the Civil Rights Act of 1991, the Court relied on the language of the statute, which states that "... an unlawful employment practice is established when a 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) [emphasis added]). The Court decided that the unambiguous language of the Act did not require the heightened evidentiary requirement of "direct" (as opposed to circumstantial) evidence.

The effect of the *Caesar's Palace* decision will be felt most in jurisdictions such as the First Circuit, which covers Massachusetts, where the decision reverses the law applied since *Price Waterhouse*. Prior to *Caesar's Palace*, the First Circuit considered direct evidence necessary to establish a mixed-motive case (*Fernandes v. Cost Brothers Masonry, Inc.*, 199 F.3d 572 [1st Cir. 1999]). The *Caesar's Palace* holding sends a clear message to potential plaintiffs and their counsel that a mixed-motive jury instruction is now available in any case where a plaintiff can demonstrate sufficient *circumstantial* evidence that a discriminatory factor motivated the employment decision.

From an employer's perspective, the concern arising out of the Supreme Court's decision is the ease with which a plaintiff can use circumstantial evidence to shift the burden of persuasion. In *Caesar's Place*, the employee's circumstantial evidence included that (1) she was singled out for "intense stalking" by one of her supervisors; (2) she received harsher discipline than men for the same conduct; (3) she was treated less favorably than men in the assignment of overtime; and (4) supervisors repeatedly "stack[ed]" her disciplinary record and "frequently used or tolerated" sex-based slurs against her (*Caesar's Palace v. Costa*, 299 F.3d 838, 845-46 [9th Cir. 2002]). How much circumstantial evidence is necessary, and whether it needs to be more compelling than what has traditionally been viewed as circumstantial evidence in a "pretext" or single-motive case, remains to be seen. Whether *Caesar's Palace* will effectively turn virtually every disparate treatment case into a question of mixed motive is anyone's guess right now. Perhaps even more troubling is that in mixed-motive cases, a plaintiff may still recover attorneys' fees and costs by demonstrating that a protected characteristic was a motivating factor in the employment action, even if despite the employer is's successful in proving it had a legitimate reason for its action. Consequently, plaintiffs and their counsel may perceive that they have leverage in negotiating settlements in mixed-motive cases because of the prospect of attorney's fees even in a losing cause.

What Employers Should Do

In light of the uncertainties raised by the *Caesar's Palace* decision, employers should exercise increased caution in making personnel decisions that may result in a discrimination charge. First, prior to taking disciplinary action including termination, an employer should review its applicable personnel policies, such as discipline and termination procedures, to ensure compliance in all circumstances. Second, an employer must consider its treatment of other employees under similar circumstances and make sure that the discipline is consistent in its severity and nature. Third, employers should check with employment counsel before initiating adverse action, in order to properly calibrate any potential risk of a discrimination claim. Finally, and perhaps most importantly, an employer should conduct management training through employment counsel to educate its supervisory and managerial employees about the company's policies and laws against employment discrimination and to provide practical guidance in managing a diverse workforce.

Hale and Dorr LLP's training offerings are available to help employers minimize the likelihood of liability for employment discrimination claims while enhancing the managerial capabilities of its supervisors and managers. In this day and age, it will take more than an ounce of prevention to defend against costly and disruptive employment discrimination claims.

Jonathan Rosenfeld

jonathan.rosenfeld@haledorr.com

Karen Schneck

Karen.schneck@haledorr.com

Authors



Jonathan Rosenfeld

RETIRED PARTNER

 jonathan.rosenfeld@wilmerhale.com

 +1 617 526 6000