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### **Supreme Court Opens Door To "Mixed-Motive" Discrimination Claims**

On Monday, June 9, 2003, the United States Supreme Court in Desert Palace v. Costa held that a plaintiff pursuing a "mixed-motive" discrimination claim need only establish that race, color, religion, sex, or national origin played a motivating factor in the discriminatory employment practice in order to prevail. The Court specifically rejected the requirement imposed by a number of courts that a plaintiff must produce direct evidence of the discriminatory conduct in order to proceed under a mixed-motive theory.

A "mixed-motive" claim occurs where there exists evidence of both unlawful and lawful reasons for the adverse employment action. In 1989, the Supreme Court held that an employer could avoid liability for discrimination by proving that it would have made the same decision based on legitimate, non-discriminatory factors.

Two years later, Congress passed the Civil Rights Act of 1991 in large part because of the Supreme Court's earlier decision regarding mixed-motive cases. Under the Act, an unlawful employment practice is established if a plaintiff 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*. After a plaintiff makes this showing, an employer may then attempt to prove that it would have taken the same action in the absence of the impermissible motivating factor. However, unlike the prior Supreme Court decision, an employer who successfully establishes a mixed-motive defense is still liable for discrimination under the Act. Rather than eliminate liability entirely, the Act limits the available remedies to declaratory relief, certain types of injunctive relief, and attorneys' fees and costs.

Since passage of the Act, a number of courts have required that in order to get a mixed-motive jury instruction, a plaintiff must first produce "direct" evidence of discrimination. Because direct evidence requires proof based on personal knowledge or observation, it is rarely available in discrimination cases. The result of this court imposed requirement was that plaintiffs generally were unable to proceed to verdict on a mixed-motive theory.

In Desert Palace v. Costa, the Supreme Court rejected the direct evidence requirement. The Court based its decision on the plain language of the Act which contains no limitation on the type of evidence necessary. Accordingly, as long as a plaintiff has evidence (direct or circumstantial) which establishes that race, color, religion, sex, or national origin was a motivating factor in an employment decision, a plaintiff may proceed to trial under a mixed-motive theory.

As a consequence of this decision, marginal discrimination claims will have an easier time making it to a jury because even where an employer can prove that it had legitimate reasons for an employment action, the plaintiff will now be able to go to trial (and prevail) as long as the plaintiff can convince the trier of fact that race, color, religion, sex, or national origin was a motivating factor in the decision. Accordingly, employers will now be faced with one more Hobson's choice: settle questionable discrimination claims or risk going to trial, proving legitimate reasons for the employment action, and still losing under a mixed-motive instruction.

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