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It's Unanimous: Supreme Court Reduces Plaintiff's Burden, Says Direct Evidence Not Necessary to Reach a Jury in Mixed Cases

By Bennett Pine and Marisa Mead[1]

On June 9, 2003, in *Desert Palace, Inc. v. Costa*, the United States Supreme Court issued a unanimous decision reducing the burden of proof for plaintiffs pursuing "mixed-motive" employment discrimination cases. In an opinion written by Justice Clarence Thomas, the Supreme Court ruled that when defendants articulate legitimate reasons for their employment actions, plaintiffs do not have to produce "direct" evidence of discrimination to reach a jury. Without a direct evidence requirement, employers will have a more difficult time succeeding on summary judgment motions, and plaintiffs are more likely to get their cases before juries, with the opportunity for significant monetary recoveries.

In the case before the Court, Catharina Costa sued her employer, Caesar's Palace Hotel & Casino, after she was terminated from her job as a warehouse worker and heavy equipment operator. The employer asserted that Costa was terminated because she had a fight with a male employee and had a prior disciplinary record of problems on the job. The male employee was only suspended for five days because he had a clean disciplinary record. Costa, however, claimed that as the only female at the job, she had been "singled out" for disciplinary actions, subjected to numerous "sex-based slurs," stalked by her supervisor, and treated less favorably than her male counterparts in the assignment of overtime.

The District Court found Costa's evidence sufficient to challenge her employer's claimed legitimate reasons for her termination and gave the jury a "mixed-motive" instruction. A "mixed motive" instruction applies to cases in which employers take both lawful and impermissible factors into account when making employment decisions. Subsequently, the jury awarded Costa over $364,000 in back-pay, compensatory damages and punitive damages. The U.S. Court of Appeals for the Ninth Circuit initially vacated the decision, finding that Costa had not presented "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus." An *en banc* panel later reinstated the verdict, however, holding that Costa's evidence was sufficient to warrant a mixed-motive jury charge.

By affirming the *en banc* decision, the Supreme Court resolved

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New York Governor Pataki Signs Statewide Ban on Workplace Smoking

By Bennett Pine

New York Gov. George E. Pataki on March 26, 2003 signed a bill to establish a statewide ban on smoking in virtually all workplaces, including bars and restaurants (S. 3292). The bill, which is effective 120 days later, expands the state's Clean Indoor Air Act of 1989 to include most public places and places of employment, including most restaurants and bars.

Among the few areas exempt from the law are private homes, automobiles, hotel and motel rooms, retail tobacco businesses, cigar bars, outdoor areas of restaurants with no roofs, and volunteer organizations without employees such as American Legion halls. A waiver may be granted if an applicant can prove that complying with the law would cause "an undue hardship" or "other factors exist which would render compliance unreasonable."

The bill, which was introduced and approved in five days, was put on a fast track by legislative leaders. Similar bills passed the New York Assembly in each of the last two years, but died in the Senate.

The law creates a statewide ban similar to those already in effect in New York City and three of its surrounding counties. New York now joins Delaware and California as the states with the toughest smoking restrictions. ■

"It's Unanimous..." continued

a long standing conflict between the circuit courts of appeals generated by the Supreme Court's plurality decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Some circuits, relying on Justice Sandra Day O'Connor's concurring opinion in *Price Waterhouse*, required plaintiffs to produce "direct evidence" of their employers' discriminatory motivations to secure mixed-motive jury instructions. Although these circuit courts often differed on the precise definition of "direct evidence," they agreed that mixed-motive plaintiffs should be held to a higher burden of proof than is normally required in civil cases. In *Price Waterhouse*, Justice O'Connor wrote that plaintiffs should be required to produce direct evidence that an illegitimate consideration was a "substantial factor" in the employment decision. On the other hand, the plurality of four justices ruled that plaintiffs should only be required to prove that an impermissible consideration was a "motivating factor."

In *Costa*, however, the Supreme Court looked directly to the Civil Rights Act of 1991, which was enacted in part to resolve the *Price Waterhouse* plurality decision. Section 107 of the 1991 Act states that the complaining party succeeds at the first stage of the litigation if she "demonstrates that race, color, religion, sex, or national origin was a *motivating factor*" (emphasis supplied) for the employment decision, even if other legitimate factors also were taken into account. Justice Thomas found that the use of the word "demonstrates" indicated that direct evidence was not required to get to a jury: "On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."

Furthermore, the *Costa* court noted that Congress explicitly defined the word "demonstrates" as meeting "the burdens of production and persuasion." Justice Thomas concluded that Congress's failure to include in its definition any requirement of direct evidence was "significant" because Congress is often explicit when it imposes heightened proof requirements in other circumstances. The *Costa* Court concluded that given the "utility of circumstantial evidence in discrimination cases," there was no reason to depart from the general rule of civil litigation which allows plaintiffs to prove their cases using either direct or circumstantial evidence.

Practical Effect

The Supreme Court's holding in *Costa* reinforces the value of circumstantial evidence in employment discrimination cases. Because it is often difficult to obtain direct evidence (e.g., employer statements of discriminatory motive or animus), the *Costa* decision will likely benefit plaintiffs by allowing them to prove their cases with more readily available circumstantial evidence. Justice Thomas stressed that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"

While scholars will debate the precise meaning of the *Costa* decision, employers should be aware that the Supreme Court has likely made it easier for plaintiffs to get their cases before juries. *Costa* highlights the litigation risks inherent in employers' termination decisions and underscores the advisability of having such decisions reviewed in advance by employment counsel whenever possible. ■

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Employers Who Fail to Give Health Care Continuation Notices May End up with a Nasty "Cobra" Bite

By John Hess

COBRA is the name generally given to the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 which require that most employers sponsoring group health plans offer employees, their spouses and their dependent children the opportunity for a temporary extension of health coverage at group rates in certain instances where coverage under the plan would otherwise end. The Act requires that a notice of COBRA rights be given to employees and covered spouses when they commence participation under the employer's health care plan. This notice is usually contained in the plan's Summary Plan Description. Furthermore, employees, their covered spouses and dependent children must be given notices of their rights under COBRA at the time coverage under the employer's health care plan would otherwise end due to termination of employ-

ment or certain other specified events such as, for example, divorce or loss of dependent child status.

Failure to provide timely and accurate notices to plan participants as required by COBRA can result in a court imposed civil penalty on the plan administrator of up to $110 per day which would be payable to *each* affected plan participant for the period of noncompliance (Section 502(c)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA")). This penalty would be in addition to any damages imposed on the employer for failure to provide the medical coverage mandated by COBRA, including attorney's fees and court costs expended to enforce these rights under COBRA. The penalties for noncompliance with the COBRA notice requirements should not be taken lightly. In a number of cases the federal courts have imposed these civil penalties in order to stress the importance of compliance with the COBRA notice requirements even when the plan participant did not suffer actual harm or the violation was unintentional. See, e.g., *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223 (11th Cir. 2002) and *Chenoweth v. Wal-Mart Stores, Inc.*, 159 F. Supp. 2d 1032 (S.D. Ohio 2002).

The most extreme example of the enthusiasm of some federal courts to impose this civil penalty appears in an unpublished opinion of the Fourth Circuit Court of Appeals where it affirmed the district court's imposition of this civil penalty even though the notice *wasn't required*. *Shade v. Panhandle Motor Services Corporation*, 91 F.3d 133 (4th Cir. 1996). This case involved a claim for unreimbursed medical expenses incurred by an employee who was on a medical leave of absence when his name was erroneously omitted from coverage at the time the employer changed from an insured to a self-insured medical plan. The claim does not appear to be one that was primarily based on the specific continuation coverage requirements of COBRA, but one based on the fiduciary duty of the employer under ERISA to provide medical benefits that the employee was entitled to receive under the plan. The district court found a breach of that fiduciary duty by the employer and imposed damages of $122,808 for reimbursement of medical expenses and $18,151 for attorneys' fees. The district court also assessed a civil penalty of $4,035 (incorrectly referred to by the Fourth Circuit as "punitive damages") for failure by the employer (as plan administrator) to provide the COBRA notice. The facts in this case indicate that the employer had mistakenly *believed* that the employee had terminated employment which would require it to issue a COBRA notice. However, the employer failed to send the COBRA notice to the affected employee. Thus, this penalty was imposed because, as noted by the Fourth Circuit, "..the district court found it appropriate to impose a penalty to impress upon [the employer] the importance of compliance with COBRA notice requirements." It should be noted that the penalty was based on a $5 per day assessment beginning on the date the employee went on the medical leave of absence and ending on the date of the filing of the lawsuit. The reduced assessment was due to the finding by the district court that the employer had not acted in bad faith and had corrected its COBRA notice procedures. Therefore, the district court could have imposed a maximum penalty (in 1996) of $100 per day or $80,700. The Fourth Circuit Court of Appeals, in effect, held that the determination by the district court to impose the civil penalty was not clearly erroneous.

Finally, the failure to provide the required continuation coverage under COBRA can also result in the imposition by the Internal Revenue Service of an excise tax on the employer (or, in certain instances, the insurance carrier) of up to $100 per day for each affected person during the period of noncompliance (Section 4980B(b) of the Internal Revenue Code of 1986).

Therefore, an employer must be particularly careful to provide COBRA notices when participants lose coverage under its health care plan. This is especially true when there is the sale of a division or subsidiary that results in some participants losing coverage under the seller's health care plan. Failure to provide these notices can result in an employer receiving a very nasty "COBRA" bite! ■

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Union Membership at Two-Decade Low

Union membership dropped last year to the lowest level in almost two decades as manufacturing companies hemorrhaged traditional Union jobs faster than organizers could build new membership in service, information technology and other areas. Some 13.2 percent of the U.S. work force belonged to unions in 2002, down from 13.4 percent in 2001, according to the U.S. Department of Labor. The rate of union membership has dropped steadily since the data first was recorded in 1983, when 20.1 percent of the work force belonged to a union. In private industry, only 8.5% of all workers belong to unions. In the public sector, which includes traditionally high union membership among teachers, firefighters and police, union membership held steady at 37.5%.