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En Banc Ninth Circuit Expands Availability of "Mixed-Motive" Test

In a decision that will make it easier for plaintiffs to prevail in discrimination cases under Title VII, the Ninth Circuit Court of Appeals has ruled en banc that a plaintiff is entitled to a mixed-motive instruction without first having to provide direct evidence of discrimination. A mixed-motive instruction advises the jury that if a plaintiff can show that the employer's discriminatory motive was one of the reasons for an adverse employment action, the burden shifts to the employer to show that it would have taken the same adverse action even without the discriminatory motive.

In *Costa v. Desert Palace, Inc.,* the only female heavy equipment operator in a warehouse at Caesars Palace casino claimed she was terminated because she was a woman. Evidence at trial showed, for example, that when men came in late, there were often given overtime to make up the lost time, but when Costa was as little as one minute late, she was given a written reprimand. After an altercation initiated by a male coworker, the male instigator received only a five-day suspension, but Costa was fired—allegedly because of her already lengthy disciplinary record, which Costa claimed was largely due to the different treatment she received as a woman.

A jury found that gender discrimination was a motivating factor in the termination decision, and awarded back pay and damages because Caesars could not prove that it would have taken the same action had discrimination not been a factor—the so-called "mixed-motive" defense. Caesars appealed the verdict, arguing that Costa should have been required to show that its decision was a pretext for discrimination, and that the mixed-motive instruction should only be available when the plaintiff has "direct evidence" of discrimination—evidence that proves discrimination without inference or presumption.

A panel of the Ninth Circuit ruled in Caesars' favor, but on a rehearing, the en banc panel disagreed. The court held that where the evidence is such that the jury could only decide that discrimination is either the sole reason or played no role whatsoever in the employer's decision, the employee must show that the challenged action was taken "because of" discrimination. But if the evidence could support a finding that discrimination is one of two or more reasons for the decision (which will be the majority of cases), then all an employee must prove to establish a violation of Title VII is that gender (or some other protected characteristic) was "a motivating factor" in the adverse employment decision. If that is done, the employer may not avoid liability, but it may limit the employee's remedies to exclude damages and reinstatement (but not attorney's fees), by showing that it would have taken the action even if discrimination had not played any role in the decision.

This decision, which in now the law in the nine Western states that comprise the Ninth Circuit, is a significant victory for employee plaintiffs, and will make it more difficult for employers to avoid liability in federal employment discrimination cases. Under prior law, it was generally thought that unless there was direct evidence of discrimination, it was the plaintiff's burden to prove that the employer's non-discriminatory reason for the adverse action was a really just pretext for discrimination. Costa now seems to say that a plaintiff can prevail using only circumstantial evidence to show that discrimination played at least some role in the adverse action, and it will be the employer's burden to show it would have taken the same action anyway in order to limit the available remedies. Given the significance of the ruling and the conflict with other courts of appeal, the U.S. Supreme Court will likely review the decision. Any developments will be reported in upcoming editions of the **W.E.B. Update.**

Requiring Employee to Drive 100 Miles to Work Not an Adverse Action

The Sixth Circuit Court of Appeals has held that reassignment that requires a significant commute, without a decrease in responsibilities or pay, is not an adverse action that could support a discrimination claim. In *Policastro v. Northwest Airlines, Inc.,* the plaintiff was a sales representative for Northwest whose territory covered Cincinnati, Ohio, where she lived, and she also had to spend four to six days per month servicing cities in Northern Kentucky 100 miles away. After Northwest joined forces with another airline, Policastro's job was restructured so that she would focus exclusively on the Kentucky market. Her salary, benefits and responsibilities did not change, and the change had the potential for helping her career, because the market was seen as having significantly more growth potential than the Cincinnati market. Policastro was unhappy with her new assignment, however, because it required her to spend four days per week in Kentucky, with the corresponding long commute. The company permitted her to stay overnight in Kentucky during those periods, though, to avoid the need for a daily commute. After several months in the new position, Policastro resigned, citing the travel and the stress the new position was causing for herself and her family, and sued for gender and age discrimination. The court held that reassignments without changes in salary, title or work hours did not constitute an adverse employment action, unless it imposed conditions that would be objectively intolerable to a reasonable person. Because the company gave Policastro the option to spend the night if she found the daily drive inconvenient, the court held that a reasonable person would not find the situation so intolerable that she would be forced to quit.

Harasser's Continued Presence in the Workplace Can Be a Continuing Violation

A New Jersey state appellate court has held that the continued employment of an alleged harasser can be enough to support a continuing violation based on prior conduct even though the plaintiff

does not claim any harassing action by him in the past two years. In *Caggiano v. Fontoura,* a female sheriff's officer claimed a male officer harassed her over a period of years, including exposing himself to her and making lewd comments. Despite this conduct, the harasser continued to work with her, although the specific harassing conduct stopped. When Caggiano ultimately sued both the county and the male officer for sexual harassment, she could not identify any specific incidents of harassment by the male officer that had occurred within the statute of limitations period. As a result, the trial court granted summary judgment in favor of the male officer. The appellate court reversed, holding that a jury could find that the "mere presence" of the male officer in the workplace constituted harassment within the statute of limitations period, which would then relate back to the earlier, more egregious, pre-limitations conduct. While limited to the state of New Jersey, this decision has the potential to greatly expand the ability of employees to claim harassment for conduct that occurred years before, so long as the alleged harasser remains in the workplace.

Older Workers Can Claim Discrimination Because They Were Not Old Enough

The Sixth Circuit Court of Appeals has held that workers aged 40 to 49 who were excluded from participating in retiree health benefits can claim age discrimination under federal law. In *Cline v. General Dynamics Land Systems, Inc.,* under a new collective bargaining agreement, a company that formerly provided health benefits to retirees with 30 years of seniority, began offering those benefits to workers 50 and older. A group of workers aged 40 to 49 sued under the ADEA, claiming that the company was discriminating against them in favor of older workers. The trial court granted summary judgment in favor of the company, holding that the ADEA was designed to aid "older workers," not workers who are discriminated against because they are too young. The appellate court reversed, because the language of the ADEA clearly protected "individuals" over age 40 from discrimination, not just "older workers." This decision shows that companies should be careful not only to avoid giving preferential treatment to workers under age 40, but should also ensure they do not make decisions that benefit significantly older workers at the expense of other employees who are over age 40.