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Employment Discrimination - Age Discrimination - The Fifth Circuit Holds a Plaintiff May Utilize the Mixed-Motives Method of Analysis in Age Discrimination Cases, Absent any Direct Evidence of Discrimination - *Rachid v. Jack in the Box, Inc.*

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EMPLOYMENT DISCRIMINATION—AGE
DISCRIMINATION—THE FIFTH CIRCUIT
HOLDS A PLAINTIFF MAY UTILIZE THE
MIXED-MOTIVES METHOD OF ANALYSIS
IN AGE DISCRIMINATION CASES,
ABSENT ANY DIRECT EVIDENCE
OF DISCRIMINATION

RACHID V. JACK IN THE BOX, INC.

*Lindsey Watkins**

IN the recent case, *Rachid v. Jack in the Box, Inc.*, the Fifth Circuit Court of Appeals altered the analysis of age discrimination cases under the Age Discrimination in Employment Act (“ADEA”) so that a plaintiff may prevail on a mixed-motives theory of discrimination absent any direct evidence of age discrimination.¹ The Supreme Court has adopted two methods of analyzing discrimination cases over the last thirty-one years: the traditional “pretext” method and the more modern “mixed-motive” method.² In *Desert Palace, Inc. v. Costa*, the Supreme Court addressed the level of proof necessary for a plaintiff to receive a mixed-motives jury instruction in employment discrimination cases.³ Based primarily upon amendments made to Title VII of the 1991 Civil Rights Act, the Court in *Costa* decided that a mixed-motives instruction could be given in Title VII cases absent direct evidence of discrimination.⁴ The circuit courts have not yet fully determined *Costa*’s impact on the traditional “pretext” method.⁵ Despite the undetermined impact of

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1. 376 F.3d 305, 316 (5th Cir. 2004).

2. *Id.* at 308.

3. 539 U.S. 90, 98 (2004).

4. *See id.* at 98-102.

5. *See* Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 *DRAKE L. REV.* 383, 403-04 (2004) (analyzing the viability of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The courts are split as to whether *Costa* completely overrules the *McDonnell Douglas* approach or merely modifies the approach, giving two methods for proof: pretext or mixed-motives. This issue is discussed to a limited extent in *Rachid v. Jack in the Box, Inc.*; however, this note will not address it.

this decision on Title VII cases, the Fifth Circuit recently applied the *Costa* decision to an ADEA case. However, the Fifth Circuit was incorrect in its decision to apply the *Costa* mixed-motive analysis to an ADEA case because of (1) the difference in statutory language between the ADEA and Title VII; (2) the fact that the ADEA was not amended as Title VII was; and (3) the fact that age may correlate with legitimate, nondiscriminatory factors more often than other factors, such as race or gender, will. Moreover, the Fifth Circuit is not the only circuit to have discussed *Costa*'s applicability on ADEA cases. Decisions from other circuits indicate that a circuit split is almost certain to arise.⁶

In October 1995, Jack in the Box, Inc. hired Ahmed Rachid as a manager.⁷ Rachid served as a manager for two Jack in the Box restaurants and Patrick Powers began supervising him in September 1999. Soon thereafter, Powers began criticizing Rachid regularly, primarily making disparaging comments regarding Rachid's age, which another Jack in the Box manager corroborated.⁸ Rachid, who was fifty-two-years-old at the time, reported the comments to Jack in the Box's human resources department and requested a transfer, fearing that Powers would fire him because of his age. Despite these complaints, Rachid was never transferred and was eventually fired in February 2001. According to Jack in the Box, Rachid was fired for violating company policy with regards to recording his employees' time.⁹

Rachid brought forth evidence that created conflict on the issue of whether he actually violated company policy. The policy in question was sent in an e-mail written by Powers, but was not found in the employee handbook.¹⁰ The e-mail concerned the proper method of altering an employee's hours for break changes during the day.¹¹ After the e-mail was sent, a Jack in the Box human resources employee investigated several time alterations at the restaurants that Rachid managed and informed Powers that someone was altering employee times and that he must determine who (Rachid or another manager) was making the improper changes. While Rachid later admitted to making the changes, he contended that Powers did not investigate who was responsible for the changes, but rather immediately terminated Rachid upon learning the information.¹²

Upon termination, Rachid filed an Equal Employment Opportunity Commission charge complaining of age discrimination under the ADEA,

6. *Mareish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004) (noting in dictum that Congress amended only Title VII and did not make any changes to the ADEA); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 n.2 (4th Cir. 2004) (same); *Chambers v. Metropolitan Prop. & Cas. Ins. Co.*, 351 F.3d 848, 855-56 (8th Cir. 2003) (applying *McDonnell Douglas* to an ADEA case without commenting on *Costa*).

7. *Rachid*, 376 F.3d at 307.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Rachid*, 376 F.3d at 308.

and he received a Right to Sue letter.¹³ Rachid then filed an age discrimination claim under the ADEA, alleging that he was terminated from his managerial position at Jack in the Box because of his age.¹⁴ Jack in the Box filed a motion for summary judgment, which the trial court granted.¹⁵ The trial court found summary judgment appropriate because Rachid had failed to establish a *prima facie* case of discrimination and had failed to rebut Jack in the Box's legitimate, non-discriminatory basis for terminating Rachid.¹⁶ As indicated by its language that "nothing in the record suggests that Jack in the Box's basis for terminating Rachid was a pretext," the district court clearly applied the traditional *McDonnell Douglas* "pretext" approach in analyzing Rachid's claim.¹⁷

Rachid appealed, arguing that the case should have been analyzed under the most recent mixed-motives method endorsed in *Desert Palace, Inc. v. Costa*. Confirmation of the age-related comments made by Powers to Rachid by another Jack in the Box manager was circumstantial evidence most likely sufficient for Rachid to withstand Jack in the Box's motion for summary judgment. Jack in the Box, however, maintained that the mixed-motives analysis was applicable only in cases where there was direct evidence of discrimination, which did not exist in this case, and that the *McDonnell Douglas* analysis used by the district court was therefore appropriate.¹⁸

Over time, the Supreme Court has created two alternative methods for proving discrimination in employment cases: the "pretext" method created in *McDonnell Douglas Corp. v. Green* (as the trial court used in *Rachid*) and the "mixed-motives" method established in *Price Waterhouse v. Hopkins*.¹⁹ Both of these analyses arose in the context of Title VII employment-discrimination cases.²⁰ Under the *McDonnell Douglas* approach, the initial burden of production rests with the plaintiff to prove a *prima facie* case of discrimination.²¹ Once the plaintiff meets this burden, the defendant must prove a legitimate and non-discriminatory reason for termination; however, even if the defendant meets this burden, the plaintiff can still prevail if he or she can demonstrate that the reason given for termination was a mere pretext.²² At all times during the burden shifting, the ultimate burden of proving age discrimination rests with the plaintiff.²³

13. *Id.*

14. *Id.* at 307.

15. *Id.* at 308.

16. *Rachid v. Jack in the Box, Inc.*, No. CIV.A. 3:01-CV-0966-K, 2003 WL 21750817, at *1 (N.D. Tex. 2003).

17. *Rachid*, 376 F.3d at 308 (quoting *Rachid v. Jack in the Box, Inc.* 2003 WL 21750817, at *1 (N.D. Tex. 2003) (internal quotations omitted)).

18. *Id.* at 310.

19. *Id.* at 309.

20. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793-94 (1973); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

21. *McDonnell Douglas Corp.*, 411 U.S. at 802.

22. *Id.* at 802-05.

23. *See Rachid*, 376 F.3d at 309.

In *Price Waterhouse v. Hopkins*, the Supreme Court created an alternative method for proving Title VII discrimination. The Court in *Price Waterhouse* focused on Congress' primary goal in creating Title VII, noting Title VII's purpose is "'to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'"²⁴ To accomplish this goal, Congress "eliminate[d] certain bases for distinguishing among employers while otherwise preserving employers' freedom of choice" in employment decisions.²⁵ In order to give weight to Congress' intent to balance the rights of the employers with those of the employees, the Court in *Price Waterhouse* promulgated the mixed-motives method stating,

[O]nce a plaintiff in a Title VII case shows that [a discriminatory factor] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the discriminatory factor] to play such a role.²⁶

Importantly, the Court noted that once the plaintiff made his or her case, the defendant-employer will prevail only by persuading the factfinder that it would have made the same decision regardless of the discriminatory factor.²⁷ The Court divided, however, on the type of evidence needed to shift the burden to the employer.²⁸ The lower courts, in trying to apply the mixed-motives analysis described in *Price Waterhouse*, primarily chose to follow Justice O'Connor's concurring opinion that direct evidence of discrimination is required for the burden to shift to the employer.²⁹

Due in large part to this confusion regarding the type of evidence needed to obtain a mixed-motives analysis, Congress amended Title VII in order to set the applicable evidence standards for "mixed-motives" cases.³⁰ The Supreme Court recently addressed these statutory changes and their impact on employment discrimination cases in *Desert Palace, Inc. v. Costa*.³¹ The Court held that when a plaintiff presents evidence that allows a reasonable jury to conclude by a preponderance of that evidence that a discriminatory factor was a motivating factor for the employment practice, then the plaintiff could obtain a mixed-motive jury instruction.³² At the foundation of the *Costa* decision was Congress' amendment of the 1964 Civil Rights Act, as evidenced by the Court's focus on its newly amended sections, sections 2000e-2(m) and 2000e-

24. *Price Waterhouse*, 490 U.S. at 244 (quoting 110 CONG. REC. 7213 (1964)).

25. *Price Waterhouse*, 490 U.S. at 239.

26. *Id.* at 244-45.

27. *Id.* at 246. The Court also noted that the defendant-employer's "burden" might more appropriately be deemed an affirmative defense. *Id.*

28. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

29. *Id.* at 96.

30. *Id.* at 94.

31. *Id.* at 92.

32. *Id.* at 101.

5(g)(2)(b).³³ Congress had amended the Act to include a specific “mixed-motives” section, section 2000e-2(m), which states that a plaintiff need only “demonstrate[]” that an illegal motive was a “motivating factor” in the employment decision.³⁴ Congress defined “demonstrate[]” as “mee[ting] the burdens of production and persuasion.”³⁵ The Court reasoned that when a heightened requirement of direct evidence was required in other cases, Congress had specifically called for it within the statute’s language.³⁶ Because no such requirement was specifically included in the amended Title VII, only a preponderance of evidence was required to obtain a mixed-motives jury instruction.³⁷ Thus, Congress’s amendments to Title VII were read as specifically delineating the existence of the mixed-motive analysis and the proof necessary to obtain such an analysis.

The importance of the Supreme Court’s decision in *Costa* cannot be underestimated. Summary judgment will be eased, enabling plaintiffs to survive because they will not have to present direct evidence of a discriminatory factor being used in the employment action or have to prove untrue the defendant’s offered reason for the employment action.³⁸ Under *Costa*, the plaintiff’s burden is much lower because he or she must show only that the defendant’s reason, even if true, is only one reason for its conduct.³⁹ Additionally, the mixed-motives method makes it more difficult for a defendant to win employment cases because the burden of proof actually shifts to the defendant. However, despite these advantages to plaintiffs, defendants also receive benefits from the *Costa* decision and the Title VII amendments. In amending Title VII, Congress also added a section that limits damages in cases where the defendant can prove the same employment decision would have been made without the discriminatory factor.⁴⁰ In those cases, the plaintiff cannot recover damages and cannot be reinstated; rather, the plaintiff may only obtain attorney’s fees and declaratory or injunctive relief.⁴¹ Thus, a mixed-motive instruction benefits both parties in an employment discrimination case because it allows plaintiffs to more easily survive summary judgment, while at the same time severely limiting the plaintiff’s remedies. For these reasons, it is entirely possible that while a plaintiff may begin by arguing under a mixed-motives theory at summary judgment, he or she will attempt to create a “pretext” case once surviving the summary judgment stage.

The ADEA is clearly an act that is separate and distinct from Title VII; nonetheless, courts have consistently applied the pretext analysis, and to

33. *Id.* at 98-102.

34. 42 U.S.C.A. § 2000e-2(m) (2003).

35. 41 U.S.C.A. § 2000e(m).

36. *Costa*, 539 U.S. at 99.

37. *Id.*

38. Mark Shwartz et al., *What Now after Desert Palace v. Costa?*, 22 No. 3 ASS’N CORP. COUNS. DOCKET 46, 52-54 (2004).

39. *See id.* at 52.

40. 42 U.S.C.A. § 2000e-5(g)(2)(B) (2003).

41. *See id.*

some extent the mixed-motives analysis, to ADEA cases.⁴² The Fifth Circuit took this one step further by applying the new mixed-motives analysis developed in *Costa* to Rachid's ADEA case.⁴³ The court began by analyzing and comparing the text of the two statutes, primarily focusing on their "core" sections. The court emphasized that both the ADEA and section 2000e-2(a) of Title VII contained the strikingly similar text prohibiting discrimination "because of" a protected characteristic.⁴⁴ While the court discussed the similarities in these "core" sections of the two statutes, it based its decision upon the fact that neither Title VII nor the ADEA has language of a heightened direct evidence standard.⁴⁵ Although some circuit courts have followed this reasoning, there has been some indication that this was neither the proper analysis nor the proper decision.⁴⁶

Congress did not amend the ADEA to include statutory language similar to that found in Title VII's mixed-motive section. Despite the Fifth Circuit's reference to the similarity of the "core" language of Title VII and the ADEA, the court was actually comparing the ADEA text with the text of the *original, unamended* Title VII language (section 2000e-2(a)), and not with the language of Title VII's amended "mixed-motives" section (2000e-2(m)). Thus, contrary to the Fifth Circuit's holding, the language of the pertinent Title VII section, section 2000e-2(m), is not strikingly similar to that of the ADEA. The ADEA still does not differentiate between "mixed-motive" cases and "pretext" cases with its "because of" language, whereas Title VII now has two separate sections for these two types of cases.⁴⁷ As stated, Title VII's "mixed-motive" section does not include "because of" language but rather says the discriminatory factor was a "motivating factor."⁴⁸ This difference in language strongly evidences that the Fifth Circuit should not have applied *Costa* to the ADEA claims. Other courts have remarked on this distinction—the lack of the "motivating factor" language in the ADEA—between the two statutes.⁴⁹

Despite focusing on the statute's "core" language, the Fifth Circuit claims its holding is based upon the lack of a heightened direct evidence standard in the ADEA, as was similarly relied upon by the Court in *Costa* with regards to Title VII; however, this argument is also weak. To maintain a higher evidentiary burden in ADEA cases, despite the statute's

42. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (acknowledging that the Court has never decided whether the *McDonnell Douglas* framework applies to ADEA cases, but assuming that the *McDonnell Douglas* framework so applies).

43. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004).

44. *Id.* at 310-11.

45. *Id.* at 312 n.8.

46. *Compare* *Estades-Negroni v. Assoc. Corp. of N. Am.*, 345 F.3d 25, 30 (1st Cir. 2003), *and* *Strauch v. Am. College of Surgeons*, 301 F. Supp. 2d 839, 844 (N.D. Ill. 2004), *with* *Mareish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004).

47. *Compare* 42 U.S.C.A. § 2000e-2(a)(1)-(2) (2003), *and* 42 U.S.C.A. § 2000e-2(m), *with* 29 U.S.C.A. § 623 (1999).

48. 42 U.S.C.A. § 2000e-2(m).

49. *Zhuang v. Datacard Corp.*, 2004 WL 1887498, *9 (D. Minn. 2004).

language, is not questionable because age often correlates with clearly legitimate, non-discriminatory employment decisions.⁵⁰ The statute itself acknowledges this point, creating a section that makes it legal for an employment decision to be based upon age if age was considered because it was “a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”⁵¹ Furthermore, when Congress amended Title VII, it made a conscientious decision not to include a heightened direct evidence standard. The ADEA has not been amended, so it cannot be conclusively stated that Congress intends for the mixed-motives analysis to apply to ADEA cases. Finally, Title VII’s legislative history states that Title VII was not to affect any other employment factors or qualifications,⁵² bringing into question how much impact Title VII cases should have even *initially* had upon ADEA cases. Thus, based upon the difference in statutory language between Title VII and the ADEA, the fact that the ADEA was not amended as Title VII was, and the fact that age may tend to correlate with legitimate, nondiscriminatory factors more often than other factors (for example, race or gender), a strong argument can be made that the Fifth Circuit over-extended the boundaries of the Supreme Court’s holding in *Desert Palace, Inc. v. Costa* by applying it to ADEA cases.

The Fifth Circuit’s decision in *Rachid v. Jack in the Box, Inc.*, provides plaintiffs the opportunity to forego the difficulty of proving that a defendant’s proffered legitimate nondiscriminatory reason for an employment decision is untrue. Instead, the plaintiff must merely show that even if the defendant’s reason is true, another “motivating factor” was the plaintiff’s age. Thus, this ruling could mean that more age discrimination cases will survive a motion for summary judgment. In deciding to expand the reach of *Costa* to ADEA cases, the Fifth Circuit is likely to clog the dockets with potentially unsupported age discrimination cases, as well as cause a split among the circuits. Despite the fact that the Supreme Court has never ruled on the applicability of Title VII analyses options to ADEA cases, if the circuits split, as seems inevitable, the Court will have to finally answer the questions of how ADEA cases should be analyzed and whether direct evidence is necessary for a mixed-motives instruction in such cases.

50. *Mareish*, 359 F.3d at 340.

51. 29 U.S.C.A. § 623(f)(1).

52. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (quoting 110 CONG. REC. 7213 (1964)).

