The U.S. Equal Employment Opportunity Commission

EEOC	DIRECTIVES TRANSMITTAL	Number 915.002
		1/16/09

1. SUBJECT: Effect of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), on Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992).
2. PURPOSE: This guidance conforms the "Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory" (July 14, 1992) to the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The Supreme Court unanimously held that a plaintiff need not present direct evidence of discrimination to receive a mixed-motives instruction under section 703(m) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(m).
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment, § a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 604 of Volume II of the Compliance Manual, Theories of Discrimination.

1-16-2008 /s/

Date

Naomi C. Earp
Chair

In *Desert Palace, Inc. v. Costa*,[1] the Supreme Court addressed the question whether a plaintiff must prove discrimination through direct evidence for the mixed-motives analysis of section 703(m) of Title VII to apply.[2] It held that direct evidence was not necessary and that circumstantial evidence can prove that an adverse employment action was motivated by discrimination. The Court concluded that it should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." ... The 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."[3]

In July 1992, the Commission issued the Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory ("1992 Enforcement Guidance") to explain the significance of section 107 of the Civil Rights Act of 1991.[4] It stated that "most appellate court decisions ... since Price Waterhouse have agreed .. . that direct evidence is required for the mixed motives framework to apply."[5] It also stated that, "[a]s of the date of the drafting of this enforcement guidance, no courts have analyzed whether [section 703(m)] is restricted to direct evidence cases."[6] Since the issuance of the document, the Supreme Court has analyzed section 703(m) and, as the *Costa* decision makes clear, determined that direct evidence is not required in mixed-motives cases.

The 1992 Enforcement Guidance's statements about the need for direct evidence in mixed-motives cases are contrary to the *Costa* holding and rationale. Those statements, therefore, are no longer in effect.

Footnotes

1. 539 U.S. 90 (2003).

2. Cases in which the evidence shows that respondent acted on the basis of both lawful and unlawful reasons are known as "mixed-motives" cases.

Section 703(m) provides that:

> an unlawful employment practice is established when the 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).

3. 539 U.S. at 99-100 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) and *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

4. Pub. L. No. 102-166, §107, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. §2000e-2(m)).

5. 1992 Enforcement Guidance at 13.

6. *Id.* at 15 n.18.

EEOC	DIRECTIVES TRANSMITTAL	Number 915.002
		7/14/92

1. SUBJECT. Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory.

2. PURPOSE. This enforcement document is intended to provide guidance on the evaluation of indirect evidence, direct evidence and evidence of mixed motives under the disparate treatment theory of discrimination in light of the Civil Rights Act of 1991. This document supersedes the Policy Guidance of March 7, 1991 on Disparate Treatment.

3. EFFECTIVE DATE. 7/14/92.

4. EXPIRATION DATE. As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR. Title VII/EPA Division, Office of Legal Counsel.

6. INSTRUCTIONS. File after Section 604 of Volume II of the Compliance Manual, Theories of Discrimination.

7. SUBJECT MATTER.

I. Introduction

This Enforcement Guidance provides general information on the evaluation of charges involving circumstantial evidence of

intentional discrimination, and provides detailed guidance, in light of the 1991 Civil Rights Act and recent case law, on analyzing charges involving direct evidence of discrimination and evidence of mixed motives. Section II sets forth general background information on the standard for finding liability and the appropriate remedies in charges that involve circumstantial evidence of discrimination. Section III addresses the evaluation of charges involving direct evidence: subsection IIIA defines and describes direct evidence; subsection IIIB explains how liability is established when direct evidence proves that discrimination was the sole motive or one of a mixture of motives for the challenged action; and subsection IIIC discusses the appropriate remedies to pursue in direct evidence cases. Section IV discusses whether the mixed motives section of the new Civil Rights Act applies to affirmative action plans. Finally, section V outlines the information in the other sections, to provide guidance for charge processing.1

II. Proving Disparate Treatment Through Circumstantial Evidence

A. Establishing Liability Through Circumstantial Evidence

A plaintiff in a Title VII action is not required to provide direct proof of disparate treatment. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714, 31 EPD Par. 33,477 (1983). In most disparate treatment cases, intent to discriminate is established inferentially, through circumstantial evidence. In such cases, the initial step in proving intent is to make out a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 25 EPD Par. 31,544 (1981). This simply means that the plaintiff must provide sufficient evidence from which a legal inference of discrimination can be drawn; if such inference is left unexplained, it can be concluded that the adverse action complained of was more likely than not motivated by unlawful bias. Teamsters, 431 U.S. at 358.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 EPD Par. 8607 (1973), the Supreme Court created a template for establishing a case by inference. It stated that a plaintiff can establish a prima facie case of discrimination by showing:

1. (s)he belongs to a protected group under Title VII;

2. (s)he applied and was qualified for a job for which the employer was seeking applicants;

3. despite his/her qualifications, (s)he was rejected; and

4. after his/her rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

Id. at 802.2

If the plaintiff establishes a prima facie case through the four-part approach set out in McDonnell Douglas, (s)he will have raised an inference that the employer acted with a discriminatory motive.3 This is because, as stated by the Court in Furnco Construction Co. v. Waters, 438 U.S. 567, 579-580, 17 EPD Par. 8401 (1978), a prima facie showing "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." But this prima facie showing only establishes a presumption of discriminatory motive, which the employer may rebut by articulating a legitimate nondiscriminatory reason for its action. This burden is relatively light because all the plaintiff has done in his/her prima facie case is create an inference through circumstantial evidence.4 If the defendant succeeds in articulating a legitimate nondiscriminatory reason for its action, the plaintiff can prevail by demonstrating that the defendant's articulated reason was not the true reason for the challenged employment decision. (S)he may make this showing "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Aikens, 460 U.S. at 716, quoting Burdine, 450 U.S. at 256.5 The ultimate "burden of persuasion" rests with the plaintiff.

B. Remedies in Circumstantial Cases

When discrimination is proved through circumstantial evidence, a full range of remedies is available.6 These remedies include a commitment by the respondent to cease engaging in the unlawful discrimination; the posting of notices alerting all respondent's employees of their right to be free of discrimination; corrective or preventive action designed to ensure that similar violations will not recur; nondiscriminatory placement of each identified victim; expungement of negative comments or adverse actions from employee's records; back pay for each identified victim; and attorney's fees. In addition to these remedies, Section 102 of the 1991 Civil Rights Act, P.L. No. 102-166, 105 Stat. 1071 (1991), provides for the award of compensatory damages for pecuniary and non-pecuniary losses resulting from the discrimination, and the award of punitive damages when the respondent engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."7

III. Proving Disparate Treatment Through Direct Evidence

A. What is Direct Evidence?

Direct evidence of discriminatory motive may be any written or

verbal policy or statement made by a respondent or respondent official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action. For example, in Grant v. Hazelett Strip Casting Corp., 880 F.2d 1564, 1569, 51 EPD Par. 39,245 (2d Cir. 1989), the court found direct evidence of age discrimination where the company president said in a memo that he wanted a "young man ... between 30 and 40 years old," and verbally that "I want a young man and that's what I want and that's what I'm going to have." Evidence that an adverse action was taken on the basis of stereotyped attitudes about the charging party's class would also constitute direct evidence of discrimination. As the Supreme Court said in Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 49 EPD Par. 38,936 (1989), "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." In Grant, 880 F.2d at 1569, the court found direct evidence of age discrimination in that "the company's asserted justifications for preferring a younger worker abound with age stereotypes, such as the belief that older workers are less productive or would not want [the company's president] telling them what to do." For a further discussion of types of direct evidence, see Volume II of the Compliance Manual, § 604.3(c).

> Example 1 - Charging Party (CP) alleges that she was denied a promotion because of her sex. In particular, she alleges that she was rejected because the selecting official believed that her child care responsibilities would interfere with her ability to work the long hours required in the new job. CP asserts that she made clear in her interview that child care would pose no problem. Two of R's employees testify that they heard the selecting official say that a woman with young children would not be able to fulfill the requirements of the job that CP sought. The investigation further reveals that no inquiry was made of male applicants as to whether they had children and, if so, whether their child care arrangements could accommodate the demands of the job.

In the above example, the evidence that CP's rejection was based on a stereotyped attitude as to the ability of a woman with young children to perform a demanding job constitutes direct evidence of discrimination.

In contrast, direct evidence of bias, standing alone, does not necessarily prove that a discriminatory motive was responsible for a particular employment action. As the Supreme Court stated in Price Waterhouse:

> [r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.

Price Waterhouse v. Hopkins, 490 U.S. at 251. In other words, direct evidence of "discrimination in the air" will not by itself prove discriminatory motive for an action; rather, the discrimination must be shown to have been "brought to ground and visited upon an employee." Id. See also Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569, 50 EPD Par. 39,074 (7th Cir. 1989) (direct evidence must speak not only to intent but also to the specific employment decision in question).

Thus, a link must be shown between the employer's proven bias and its adverse action. For example, evidence that the biased remarks were made by the individual responsible for the adverse employment decision or by one who was involved in the decision, along with evidence that the remarks were related to the decisionmaking process, would be sufficient to establish this link.8 In Price Waterhouse, the evidence showed that the employer invited partners to submit comments on the plaintiff when she was proposed for partnership; some of the comments stemmed from sex stereotypes; an important part of the decision whether to promote was an assessment of the submitted comments; and the employer did not disclaim reliance on the sex-linked evaluations. 490 U.S. at 232-237. The Court found that this evidence was sufficient to establish that discrimination infected the partnership decision. Id. at 250-251.

Accordingly, whenever there is proof of unlawful bias, the investigator must make a factual determination whether evidence establishes a link between the proven bias and the adverse action that is close enough to constitute direct evidence of discrimination.9 If it is not, the evidence should still be considered along with any other indirect evidence, and analyzed under the framework for circumstantial cases.

Example 2 - Respondent (R) supervisor orally states that he did not hire Charging Party (CP) because she is a woman. This statement is the clearest example of direct evidence of discriminatory motive.

Example 3 - CP (female) files a charge with the Commission alleging that R's dress code discriminates against women. Specifically, CP claims that R's policy of requiring females to wear mini skirts is discriminatory and also constitutes sexual harassment. Records indicate that R has no specific dress code policy for men in its employ. The Commission' investigation further reveals that R's dress policy for women does not have any relationship to its business. This is an example of direct evidence of discrimination which manifests itself in the form of an overt policy instituted and maintained by R.

Example 4 - CP files a charge alleging discriminatory discharge on the basis of sex (female). In her charge, CP states that she was told by one of R's supervisors that he did not think that women could or should perform construction work and he would never allow a woman to work

for him. CP, however, did not work for this particular supervisor, and he had no authority over CP regarding her work with R. The supervisor admits that he made the biased statement to CP but asserts that the statement was his own opinion, expressed in a private conversation with CP. Evidence shows that CP was terminated because of excessive absenteeism and that she had been treated in the same manner as other male employees who had similar problems while working for R. The statement made by R's supervisor would constitute direct evidence of bias on his part, but since it neither represented R's policy toward CP or women in general, nor had an adverse effect on CP's employment, it would not constitute direct evidence of discriminatory motive in her discharge.

In the above example, the biased statement may be relevant in circumstantially showing discriminatory intent and would be considered with all other available evidence to determine whether respondent's defenses are pretextual. If, for example, there is evidence that the employer hires disproportionately few women for construction jobs and fires a disproportionately large number of women from such jobs, and there is evidence that the biased supervisor has some input in all hiring and firing decisions, this may be sufficient to prove pretext. In addition, if, in the course of investigating CP's charge, evidence is uncovered showing that the biased supervisor discriminated against other women under his authority, the Commission would pursue individual relief on their behalf and injunctive relief to prevent such discrimination from reoccurring in the future. (See cases cited in n. 24, below.)

Example 5 - Same facts as in Example 4, except that CP did work for the biased supervisor and he decided to fire her soon after becoming her supervisor. Furthermore, the supervisor made his comment to CP about women's inability to perform construction work at the time of the firing. The supervisor's biased statement is sufficiently linked to the adverse action as to constitute direct evidence that CP was unlawfully discharged because of sex.

In the foregoing examples, the supervisors admitted making the biased statements. Without such an admission, the investigator would have to determine whether the direct evidence of discrimination is believable. Like all evidence, its credibility cannot be presumed but must be evaluated. For example, if the direct evidence consists solely of CP's statement that the supervisor said that he would never promote a woman, the investigator must evaluate the statement for bias, plausibility and consistency with other available information. Where the reliability of the direct evidence might be questioned, the district office should consider whether the case can be analyzed not only as one involving direct evidence, but also as one of circumstantial evidence under McDonnell Douglas/Burdine. This assures that the investigation is complete enough to permit litigation under an alternative analysis should a court disagree

with the district office's credibility determination.

> Example 6 - Charging Party asserts that his supervisor said, "I didn't promote you to one of the available 'troubleshooter' jobs because clients would not be comfortable dealing with an Hispanic." Respondent denies that any such statement was ever made and states that CP's qualifications were not as good as those of the selectee. The investigator talks to both the CP and the supervisor and, based on a credibility determination, concludes that the CP's version of events is more convincing. Based on the credible direct evidence, the office can find reasonable cause.10 However, because a trier of fact might not credit CP's version of events, it is also necessary to look at the charge under the McDonnell Douglas/Burdine framework for circumstantial evidence; i.e., is there evidence that CP is qualified for a job which was available (yes); if so, has R articulated a legitimate non-discriminatory reason for its actions (lesser qualifications); and is there evidence of pretext (in addition to CP's testimony about the supervisor's statement, determine, for example, the relative qualifications of CP and the selectee, and whether there is evidence concerning numbers of Hispanics in similar jobs or statements from other witnesses that R is biased against Hispanics).

B. Establishing Liability Through Direct Evidence

1. Cases Where Discrimination is the Sole Motive

If there is credible direct evidence that discrimination was the sole motive for an adverse employment action, "cause" should be found. The complainant in such circumstances is not required to proceed through the steps of McDonnell Douglas/Burdine.11 Thus, for example, if a plaintiff who was denied a promotion into upper management produces credible direct evidence that the promotion denial was based solely on an explicit policy of excluding women from upper management positions, she has proved a violation. Unless the defendant can impeach that evidence, e.g., by proving that the policy was no longer in effect at the time that the plaintiff's promotion was considered, or can establish an affirmative defense,12 liability will be established.

2. "Mixed Motives" Cases

In some cases, the evidence shows that the employer acted on the basis of both lawful and unlawful reasons. These are known as "mixed motives" cases. Section 107 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, adds section 703(m) to Title VII, to make clear that a Title VII violation is established

> when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor13 for any employment practice, even though other factors also

motivated that practice.14

The Act reverses the Supreme Court's holding in Price Waterhouse v. Hopkins,15 490 U.S. 244-45, that an employer can avoid liability for intentional discrimination in mixed motives cases if it can demonstrate that it would have made the same decision in the absence of discrimination.

The Civil Rights Act does not specify the sort of evidence required to establish that discrimination was a "motivating factor" in an employment decision. It only states that complainants must "demonstrate[]" that race, color, religion, sex, or national origin was a motivating factor, and the term "demonstrates" is defined in section 104 of the Act as "meets the burdens of production and persuasion." Though the plurality in Price Waterhouse did not specify the type of evidence needed for the mixed motives framework to apply, Justice O'Connor stated, in her concurrence, that direct evidence is required.16 To date, most appellate court decisions that have addressed the question since Price Waterhouse have agreed with Justice O'Connor that direct evidence is required for the mixed motives framework to apply.17 Nothing in Section 107 alters this aspect of the Supreme Court's decision.

As a practical matter, in most cases, direct evidence, as defined in Section IIIA of this enforcement guidance, will be needed to establish that both legal and illegal motives were present. Typically, where the evidence is circumstantial, a mere inference of discrimination is created, which can be rebutted by evidence of a legitimate motive. A complaining party will prevail only if s/he proves that the asserted reason is unworthy of belief or is a pretext for discrimination. This process helps to sift through allegations of wrongdoing and defenses of legitimate motive to determine whether there was discrimination. On the other hand, direct evidence of discrimination proves that discrimination was a motivating factor for the challenged action, without need of the inferences or burden shifting of the McDonnell-Douglas/Burdine paradigm. Thus, where there is direct evidence of discrimination, additional proof of a legitimate motive does not disprove the discriminatory motive; rather, it shows that a mixture of motives was present.18

Thus, in investigating a mixed motives charge, if there is credible direct evidence that discrimination was a motivating factor for the challenged adverse action, Section 107 of the new Act applies, and "cause" should be found. As set forth in Section III(C)(2), below, however, the relief due the charging party will be significantly limited if there is credible evidence that the respondent would have taken the same action regardless of the discrimination.

Example 7 - CP alleges that she was not promoted to a management position because of her sex. The investigator

interviews witnesses who state that a company official who was influential in evaluating candidates for promotion told them that he did not believe a woman could effectively manage men, and that CP was no exception. The investigator finds no evidence of bias in these witnesses and concludes that they are credible sources. Respondent is unable to impeach this direct evidence, but it establishes that CP had less job-related experience than all the other candidates for promotion, and that this was a primary factor in the decision to reject her. The investigator concludes that discrimination was a motivating factor in denying CP the promotion. He therefore recommends "cause."19

C. Remedies in Direct Evidence Cases

1. Cases Where Discrimination is the Sole Motive

Where direct evidence proves that discrimination was the sole motive for an adverse employment action, the complainant is eligible for the full range of available remedies, as set forth in Section IIB, above.20

2. "Mixed Motives" Cases

The 1991 Civil Rights Act makes clear that if a complainant proves that discrimination was a motivating factor for an employment action, (s)he will, at a minimum, be eligible for declaratory and injunctive relief, and attorney's fees.21 Thus, where there is direct evidence that discrimination was a motivating factor for an employment action, the Commission will pursue, at a minimum, a commitment by the respondent to cease engaging in the challenged discrimination,22 the posting of notices and, if appropriate, attorney's fees.

Once a complainant proves that discrimination was a motivating factor for an adverse employment action, the burden of proof shifts to the employer to establish that it would have taken the same action absent the discrimination. If the employer can make this showing, the new Act makes clear that it will not be required to pay compensatory or punitive damages,23 or be subject to any order requiring admission of the complainant to a union, reinstatement, hiring, promotion, or payment of back pay.24

Example 8 - CP alleges that he was fired from his salesclerk position because of his national origin (Iranian). Co-workers tell the investigator that some customers had complained to the store manager that the store should not employ Iranians. Two co-workers further testify that the manager told them that having an Iranian salesclerk was "bad for business," and that CP would therefore be let go. This direct evidence shows that discrimination was a motivating factor for the firing. R maintains that while the customers' complaints may have contributed to the decision to fire CP, the primary reason for his termination was that it discovered shortly before the termination that CP had

lied about his experience on his employment application. The investigation bears out R's claim about its discovery of CP's application falsification. R has an absolute policy of firing anyone who is discovered to have lied about his credentials. The investigator concludes that R is liable for unlawful discrimination, but that it would have taken the same action in the absence of discrimination. The investigator therefore determines that "cause" should be found, but that CP's remedies are limited to declaratory and injunctive relief, the posting of notices and, if appropriate, attorney's fees.

To avoid an order requiring reinstatement and the payment of back pay and damages, the respondent must offer objective evidence that it would have made the same decision even absent the discrimination.25 In making this showing, the employer must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. Moreover, a mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have produced the same result, would not be sufficient.26 The employer must prove "that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same action." Price Waterhouse, 490 U.S. at 276-77 (O'Connor, J., concurring). The employer's alleged legitimate explanation for the action will be undercut if there is evidence that this reason would also have justified taking the same action against another similarly situated employee, but the employer declined to do so.

Example 9 - CP alleges that she was denied a promotion due to sex discrimination. Two co-workers testify that the selecting official stated to them at the time he was considering candidates for the promotion that he did not believe that a woman could effectively perform the duties of that job. R is unable to refute that testimony, but establishes that CP had less job experience than the other candidates. Respondent argues that this legitimate motive also factored into the promotion denial and would have induced the selecting official to make the same decision regardless of the discrimination. However, the investigator discovers that R has awarded comparable promotions to individuals with less job-related experience than CP, and that CP's other qualifications were equal or superior to those of her competitors. The investigator therefore concludes that R would not have made the same decision with regard to CP's promotion in the absence of discrimination, recommends a cause determination and the full range of appropriate remedies.

3. Cases Where Evidence of a Legitimate Basis is Discovered After-the-Fact

In order for a case to be considered one of "mixed motives," to which Section 107 of the new Act applies, both the legitimate and discriminatory motives must have been operating at the time of

the decision. If an employer terminates an individual on the basis of a discriminatory motive, but discovers afterwards a legitimate basis for the termination, then the legitimate reason was not a motive for the action. See EEOC v. Alton Packaging, 901 F.2d at 925 (where subsequent to an employer's decision not to promote plaintiff a candidate with superior qualifications applied and was selected for the position, the fact that the plaintiff was less qualified than the selectee could not have motivated the employer's failure to promote him at the time that the decision was made).

Nevertheless, if the employer produces proof of a justification discovered after-the-fact that would have induced it to take the same action, the employer will be shielded from an order requiring it to reinstate the complainant or to pay the portion of back pay accruing after the date that the legitimate basis for the adverse action was discovered, and the portion of compensatory damages (in charges based on post-1991 Act conduct) that would cover losses arising after that date. If the date of the discovery is unknown, then an appropriate percentage reduction should be made, based on an assessment of the approximate date of the discovery.27 Thus, if a complainant is terminated for discriminatory reasons, but the employer discovers afterward that she stole from the company, and the employer has an absolute policy of firing anyone who commits theft, then the employer would not be required to reinstate the charging party or to pay compensatory damages for injuries arising after the date that the theft was discovered, or back pay accruing after that date. As the Seventh Circuit stated in the context of an ADEA case in which the plaintiff was discovered, after the allegedly discriminatory termination, to have falsified his resume, "it would hardly make sense to order Smith reinstated to a job which he lied to get and from which he properly could be discharged ... the same would be true regarding any back pay accumulation after the fraud was discovered." Smith v. General Scanning, 876 F.2d at 1319 n.2.28

Under Section 102 of the 1991 Civil Rights Act, a complainant is entitled to punitive damages if he or she establishes that the employer engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." If a complainant makes this showing, but the employer proves that a lawful reason which actually motivated it at the time of the decision would have induced it to take the same action, then the case is one of mixed motives and, according to Section 107 of the Act, above, punitive damages may not be awarded.29 However, if the employer's sole motivation was discriminatory and it acted with "malice or with reckless indifference" to the victim's rights, proof of an after- the-fact justification would not shield an employer from an order requiring it to pay punitive damages.

> Example 10 - CP (Hispanic) produces direct evidence that R refused to hire her for a management position pursuant to a company policy not to hire or promote any Hispanics for

> management positions. R is unable to refute the evidence of the discriminatory policy, but asserts that CP had lied on her application when she stated that she had earned a Masters in Business Administration. The investigation confirms that CP lied on her application, but that R first discovered this in the course of gathering information to respond to the EEOC charge. The Commission, in these circumstances, would find that R has violated Title VII by discriminating against CP because of her national origin. It would seek injunctive and declaratory relief to prevent R from discriminating in a similar fashion in the future,30 and attorney's fees, if appropriate. The Commission would also seek back pay accruing prior to the date on which the application falsification was discovered, and compensatory damages for any losses that arose prior to that date.31 Punitive damages could be sought if the charge is based on post-1991 Act conduct and if it is determined that respondent's conduct was sufficiently egregious to merit such relief. However, because after-the-fact lawful reasons would have justified the same action, the Commission will not pursue reinstatement or the remainder of the back pay or compensatory damages to which CP would have been entitled had she not falsified her application. If other individuals are identified in the course of the investigation who were qualified for other positions but were denied them because of their national origin, the Commission would seek, in addition to the relief described above, other appropriate relief for those individuals.

IV. Affirmative Action

There have been suggestions that voluntary affirmative action plans are not lawful under Section 703(m)'s provision that Title VII is violated whenever race, gender or national origin is a "motivating factor" in an employment decision. Proponents of this argument note that, where an employer's selection decision is made under such a plan, race, gender or national origin are factors in the decision. Based on the language of the new Act and its legislative history, however, the Commission has concluded that the new law does not affect long-standing principles concerning voluntary affirmative action.

Section 703(m) begins with a qualifying phrase: "Except as otherwise provided in this title ..." Another provision, Section 116, specifies that:

> Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

Thus, so long as affirmative action measures comply with the requirements set forth by the Supreme Court and lower federal courts, they should not violate Section 107.32

It has been asserted that the "savings" clause of Section 116 only protects court-ordered affirmative action plans, because the phrase "court-ordered" in the section could be read to modify not only the word "remedies," but also the phrase "affirmative action." If the phrase "court-ordered" modifies more than the word "remedies," however, it would have to modify all three of the subsequent phrases, including "conciliation agreements." This interpretation seems unlikely, since conciliation agreements by definition are not "court-ordered"; rather, they are reached prior to a lawsuit, in order to avoid litigation. Thus, the Commission concludes that the phrase "court-ordered" only modifies "remedies," and does not limit the forms of affirmative action that the section protects.

Furthermore, the legislative history of the 1991 Act compels the Commission's interpretation. First, with regard to the "savings" clause, Senator Robert Dole (R-Ka.) and Representative Henry Hyde (R-Ill.) submitted statements to the legislative record asserting that the legislation

> makes no change in this area [court-ordered remedies, affirmative action, conciliation agreements] to Title VII of the Civil Rights Act of 1964 ...
>
> ... In particular, this legislation should in no way be seen as approval or disapproval of [Weber or Johnson], or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.

Cong. Rec. S15477-78 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde). Second, the legislative history makes no mention that Congress intended to overturn the Supreme Court decisions upholding the legality of voluntary affirmative action plans, Steelworkers v. Weber, 443 U.S. 193 (1979), and Johnson v. Transportation Agency, 480 U.S. 616 (1987).

Finally, with regard to Section 107 of the Act, the mixed motives section, an interpretive memorandum submitted by Representative Edwards, chairman of the House subcommittee that considered H.R.1, a precursor of the final Act, stated:

> It is our clear understanding and intent that this section is not intended to provide an additional method to challenge affirmative action. As Section 116 of the legislation makes plain, nothing in this legislation is to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law. This understanding has been clear from the time this legislation was first proposed in 1990, and any suggestion to the contrary is flatly wrong.

Cong. Rec. H9529 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). In addition, the statements of Senator Dole and Representative Hyde assert that Section 107 "is equally

applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences." Cong. Rec. S.15476 (daily ed. Oct. 30, 1991) and H. 9547 (daily ed. Nov. 7, 1991) (emphasis added). Having explicitly focused on the issue of affirmative action plans, if there was any intent to apply the provision to otherwise lawful affirmative action plans, Senator Dole and Representative Hyde would have said so.33

V. Charge Processing

After gathering all relevant evidence in a charge alleging intentional discrimination in employment, the investigator should determine whether there is direct evidence (as defined and described in section IIIA), above, that discrimination was the sole motive or one of a mixture of motives for the challenged action. (Note that this sort of evidence is rare.) If there is such direct evidence, follow the steps outlined in subsection A, below. If there is only indirect evidence of discrimination, or direct evidence of bias without evidence connecting the bias to the specific challenged action, proceed according to the McDonnell Douglas framework, as outlined in subsection B, below.

A. Direct Evidence (Section III of this enforcement guidance):

1. If there is direct evidence that discrimination was the sole motive for the challenged action, find "cause." See Section III(B)(1).

a. Pursue a commitment by the respondent to cease engaging in the proven discriminatory practices; to post notices; to expunge negative comments or adverse actions from CP's records; to provide appropriate reinstatement, back pay, attorney's fees and compensatory damages for all identified victims if the charge is based on post-1991 Act conduct. If the conduct was undertaken with malice or reckless indifference to CP's rights, and if the conduct took place after the 1991 Act, punitive damages are available.

b. However, if a justification for the challenged action is discovered by the respondent after-the-fact, and this justification would have induced the respondent to take the same action regardless of the discrimination, then the charging party will not be eligible for reinstatement, back pay accruing after the date on which the legitimate justification was discovered, or compensatory damages for losses arising after that date. If the action was undertaken with malice or reckless indifference to CP's rights, and if the conduct took place after the 1991 Act, punitive damages are available. See Section III(C)(3).

2. Consider whether the evidence shows that the adverse action was based on both lawful and unlawfulmotives, and whether the legitimate motive was operating at the time of the decision.

a. If the legitimate motive was not operating at the time of the decision, it is an "after-the-fact" motive. Find "cause," but limit relief as described in subsection V(A)(1)(b), above.

b. If both motives were operating at the time of the decision, find "cause." With regard to remedies, do the following:

1. At a minimum, pursue a commitment by the Respondent to cease engaging in the challenged discrimination, post notices advising employees that the challenged discrimination will not affect employment decisions, and provide attorney's fees, if appropriate. See Section III(c)(2).

2. If the legitimate reason would have induced the respondent to take the same action even in the absence of discrimination, do not pursue reinstatement, back pay, or compensatory or damages. Punitive damages also are not available. See Section III(c)(2).

B. Indirect Evidence (Section II of this enforcement guidance):

1. Determine whether the evidence supports a prima facie case of discrimination, as follows:

a. CP belongs to a protected class;
b. CP applied and was qualified for a job for which the employer was seeking applicants;
c. CP was rejected;
d. After CP's rejection, the position remained open.

(Note that this framework is not rigid, and can be adapted appropriately for non-hiring cases.)

2. Determine whether there is evidence of a legitimate nondiscriminatory reason for the employer's action.

3. If there is evidence of a legitimate reason, determine whether this reason is in fact a pretext for discrimination.

4. If there is no evidence of a legitimate reason, or if a legitimate reason is shown to be pretextual, find "cause," and pursue remedies, including a commitment by the respondent to refrain from engaging in future discrimination; to post notices; to expunge negative comments or adverse actions from CP's records; to provide appropriate reinstatement, back pay, attorney's fees, and compensatory damages. If the conduct was undertaken with malice or reckless indifference to CP's rights, and if the conduct took place after the 1991 Act,

punitive damages are available.

5. Consider whether this is the unusual case in which there is evidence of a legitimate basis for the adverse action that was not known at the time of the decision but that, had it been known, would have induced the respondent to take the same action. If so, CP will not be eligible for reinstatement, back pay accruing after the date that the legitimate justification was discovered, or compensatory damages for losses arising after that date. See discussion in Section III(C)(3), above.

Date: 7/14/92 Approved: -s-
Evan J. Kemp, Jr.
Chairman

1. The material in this Enforcement Guidance is intended to supplement the general discussion of disparate treatment theory in Section 604.2 of Volume II of the Compliance Manual (Theories of Discrimination), pp. 604-4 to 604-5, and the discussion of direct evidence in Section 604.3(c), pp. 604-11 to 604-13. The discussion focuses on employers, but is intended to cover all persons and entities covered by Title VII.

A separate Compliance Manual section on Theories of Discrimination under the ADEA will be released at a future date.

2. The McDonnell Douglas Court qualified these four elements by stating that they may vary depending upon the facts in each case. 411 U.S. at 802 n.13. Similarly, the Court in Burdine explained that the paradigm set forth in McDonnell Douglas "is not inflexible" and that "[t]he facts necessarily will vary in Title VII cases...." 450 U.S. at 253 n.6. Citing McDonnell Douglas, 411 U.S. at 802 n.13, the Court further stated that the proof required of a plaintiff under the formula set out in that case is not "necessarily applicable in every respect in differing factual situations." Burdine, 450 U.S. at 254 n.6.

The McDonnell Douglas framework, as well as other, substantive Title VII law applies equally to the federal sector. Morton v. Mancari, 417 U.S. 536, 7 EPD Par. 9431 (1974).

3. Burdine requires that a plaintiff establish a prima facie case by a preponderance of the evidence. 450 U.S. at 252-3. The term "preponderance of the evidence" refers to evidence which is more convincing than the opposing evidence due to its quality, reliability and credibility. See Section 604.6 of the Compliance Manual at 604-19.

4. While the employer's burden is relatively light, its evidence "must be clear, reasonably specific, and legally sufficient to

justify a judgment for the defendant if not disproved by the plaintiff." Tye v. Board of Education, Polaris Joint Vocational School District, 811 F.2d 315, 318, 42 EPD Par. 36,821 (6th Cir.), cert. denied, 484 U.S. 924, 44 EPD Par. 37,462 (1987), citing Burdine, 450 U.S. at 255. The employer's proffered reason for an employment decision must "be sufficient, on its face, to 'rebut' or 'dispel' the inference of discrimination that arises from proof of the prima facie case." Loeb v. Textron, 600 F.2d 1003, 1011-12 n.5 (1st Cir. 1979).

5. The Supreme Court's statement in Aikens and Burdine is clear: a plaintiff can prevail either by proving that discrimination more likely motivated the decision or that the employer's articulated reason is unworthy of belief. See, e.g., Bruno v. W.B. Saunders Co., 882 F.2d 760, 766, 51 EPD Par. 39,244 (3d Cir. 1989) (simply disproving defendant's reason is enough), cert. denied sub nom., CBS, Inc. v. Bruno, 493 U.S. 1062 (1990); MacDissi v. Valmont Industries, 856 F.2d 1054, 1059, 47 EPD Par. 38,261 (8th Cir. 1988) (once fact finder is persuaded that proferred reason for challenged action was not the true reason, plaintiff need not also prove intentional discrimination; such an approach "unjustifiably multiplies the plaintiff's burden"). See also EEOC Amicus Brief at 8-19, Hicks v. St. Mary's Honor Center, No. 91-1571 (8th Cir.) (plaintiff who proves that defendant's reasons for adverse actions were false has established Title VII violation), appealing 756 F. Supp. 1244 (E.D. Mo. 1991). Thus, the Commission disagrees with those courts that have held that it is not enough to prevail for a plaintiff to disprove the employer's articulated reason. See, e.g., Galbraith v. Northern Telecom, 944 F.2d 275, 282-83, 57 EPD Par. 40,956 (6th Cir. 1991) (proof that employer's explanation for discharge was a fabrication, and thus a pretext for the true reason, was insufficient to prove that plaintiff was victim of intentional discrimination); Mesnick v. General Electric, 950 F.2d 816, 824, 57 EPD Par. 41,143 (1st Cir. 1991) (plaintiff must not only show that defendant's reason is a sham, but that it is a sham to cover discrimination).

For a detailed discussion of methods for determining whether an employer's articulated reason for an action is pretextual, see Section 604.4 of Volume II of the Compliance Manual, pp. 13 - 19.

6. However, as discussed in section III(C)(3), below, if there is evidence of a legitimate, nondiscriminatory basis for the challenged action that was not known at the time of the adverse decision but that, had it been known, would have induced the employer to take the same action, then the complainant will not be eligible for reinstatement, the portion of back pay accumulating after the date on which the legitimate basis for the adverse action was discovered, or compensatory damages (in charges based on conduct post-dating the 1991 Civil Rights Act, as discussed in n.7, below) for losses arising after that date. See Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 704-705, 48 EPD Par. 38,543 (10th Cir. 1988) ("McDonnell Douglas clearly presupposes a 'legitimate,

nondiscriminatory reason' known to the employer at the time of the discharge" and does not apply where a legitimate justification is discovered after-the-fact); Smith v. General Scanning, Inc., 876 F.2d 1315, 1319, 50 EPD Par. 39,107 (7th Cir. 1989) (plaintiff's resume fraud, discovered after allegedly discriminatory termination, is not relevant to McDonnell Douglas formula for determining liability, but would be relevant to determining appropriate remedies if violation is established). But see Benson v. Quanex Corp., Daily Lab. Rep. 4/15/92 (E.D. Mich. 3/24/92) (suit dismissed where after acquired evidence showed plaintiff would have been discharged even without the discriminatory motive).

7. For a detailed discussion of the damages provisions in the new Act, see Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (_____, 1992).

The Commission does not apply the damages provisions in the new Act to charges based on conduct that occurred prior to the Act's effective date, November 21, 1991. See Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (12/27/91).

8. A link between the evidence of bias and the challenged employment action could also be shown if the biased statements were made by the decision maker or one who was involved in the decision, at or around the time that the decision was made, even if the biased remarks were not specifically related to the particular employment decision at issue. See, e.g., EEOC v. Alton Packaging Corp., 901 F.2d 920, 924, 53 EPD Par. 39,932 (11th Cir. 1990) (manager's statement that if it were his company, "he wouldn't hire any black people" constituted direct evidence of discrimination in his failure to promote Black plaintiff; argument that statement related to hiring, and therefore did not prove discrimination in failure to promote, rejected); Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 n.9, 54 EPD Par. 40,158 (11th Cir. 1990) (decision maker's statement that he refused to hire females for an entire class of positions constituted direct evidence of discrimination in his refusal to hire female plaintiff for one of the positions in that class).

9. Direct evidence, then, is not limited to evidence from which no inferences need be drawn; rather it is evidence that "relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of." Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555, 54 EPD Par. 40,088 (11th Cir. 1990).

10. However, if R shows that it would have refused CP the job even absent the discrimination, CP will not be eligible for reinstatement, back pay or damages. See Section III(C)(2), below.

11. See TWA v. Thurston, 469 U.S. 111, 121, 35 EPD Par. 34,851 (1985) (ADEA) ("the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination"); Terbovitz v. Fiscal Court of Adair County, Ky., 825 F.2d 111, 43 EPD Par. 37,288 (6th Cir. 1987) ("[d]irect evidence of discrimination, if credited by the fact finder, removes the case from McDonnell Douglas because the plaintiff no longer needs the inference of discrimination that arises from the prima facie case"); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556-57, 32 EPD Par. 33,831 (11th Cir. 1983) ("It should be clear that the McDonnell Douglas method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking"), cert. denied, 467 U.S. 1204, 34 EPD Par. 34,399 (1984); Ramirez v. Sloss, 615 F.2d 163, 168 n.9, 22 EPD Par. 30,802 (5th Cir. 1980) ("In the rare situation in which the evidence establishes that an employer openly discriminates against an individual it is not necessary to apply the mechanical formula of McDonnell Douglas to establish an inference of intentional discrimination; the showing has already been made directly").

12. Affirmative defenses under Title VII are set forth in Volume II of the Compliance Manual, Section 604.10.

13. The phrase "motivating factor" is not defined in the Act. In Price Waterhouse, the plurality stated:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

490 U.S. at 250 (emphasis added).

14. Although Section 107 does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission's long-standing rule that it will find liability and pursue injunctive relief whenever retaliation plays any role in an employment decision. See Volume II of the Compliance Manual, Section 614.3(3), p. 614-10. The Commission has a unique interest in protecting the integrity of its investigative process, and if retaliation were to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination. Id. at Section 614.1(f), p. 614-7. See also General Telephone Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 326, 22 EPD Par. 30,861 (1980) (although the Commission acts at the behest of the charging party, "it acts also to vindicate the public interest in preventing employment discrimination"); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1519, 51 EPD Par. 39,250 (9th Cir. 1989) ("this court has recognized that EEOC has a right of action that is independent of the employees' private rights of action ... By seeking injunctive relief, the

EEOC ... seeks to protect aggrieved employees and others similarly situated from the fear of retaliation for filing Title VII charges ... [and] 'promotes public policy to vindicate rights belonging to the United States as a sovereign'"). Thus, the Commission will find cause when retaliation is a motivating factor in an employment decision, and evidence showing that the employer would have taken the same action even absent its retaliatory motive would pertain only to whether the charging party is eligible for individual relief. (See Section III(C)(2), below.)

15. In Price Waterhouse, the plaintiff alleged that her employer discriminated against her on the basis of sex in its consideration of her candidacy for partnership. Several partners had told the firm's Admissions Committee that the plaintiff had trouble with "interpersonal skills," but the plaintiff proved that some of the partners reacted negatively towards her because she was a woman and submitted comments on her candidacy that stemmed from sex stereotypes.

16. Senator Dole and Congressman Hyde, in submissions to the Congressional Record, also described the holding in Price Waterhouse as relying on direct evidence. However, they did not specify whether direct evidence is required in order for Section 107 of the Act to apply. See 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991) (section-by-section analysis submitted by Senator Dole); id. at H9547 (daily ed. Nov. 7, 1991) (legislative history submitted by Representative Hyde).

17. See, e.g., Wilson v. Firestone Tire & Rubber, 932 F.2d 510, 514, 56 EPD Par. 40,858 (6th Cir. 1991) (direct evidence required for Price Waterhouse mixed motives framework to apply); Jackson v. Harvard University, 900 F.2d 464, 466, 53 EPD Par. 39,822, cert. denied 111 S.Ct. 137 (1990) (Price Waterhouse framework applies where plaintiff provides direct evidence of discrimination); EEOC v. Alton Packaging Corp., 901 F.2d 920, 925 (same); Gagne v. Northwestern National Insurance Co., 881 F.2d 309, 315, 51 EPD Par. 39,208 (6th Cir. 1989) (same); Grant v. Hazelett Strip Casting Corp., 880 F.2d at 1568 (same); Jones v. Gerwens, 874 F.2d 1534, 1539 n.8, 50 EPD Par. 39,089 (11th Cir. 1989) (same). Cf., Tyler v. Bethlehem Steel, ___ F.2d ___, 58 EPD Par. 41,361 (2d Cir. 1992) (in case decided under New York law, but analyzing Title VII and ADEA by analogy, court, while rejecting argument that direct evidence was necessary for a "mixed motive" analysis to apply, acknowledged that the evidence in the case was "not the stuff of a McDonnell Douglas-Burdine prima facie case ... Tyler's proof consisted of more than 'stray remarks,' 'statements by non- decisionmakers,' and evidence 'unrelated to the decisional process ... If there is no 'smoking gun'... there is at the very least a thick cloud of smoke, which is certainly enough to require [the employer] to 'convince the factfinder that, despite the smoke, there is no fire'") (citations omitted). But see White v. Federal Express Corp., 929 F.2d 157, 160, 56 EPD Par. 40,837 (4th Cir. 1991) (per curiam) (plaintiff may carry burden in mixed motives case "by any

sufficiently probative direct or indirect evidence").

The Seventh Circuit, in two 1989 cases, held that direct evidence is required for the Price Waterhouse mixed motives framework to apply. Holland v. Jefferson National Life Insurance Co., 883 F.2d 1307, 1313 n.2, 51 EPD Par. 39,287 (7th Cir. 1989) (same); Lynch v. Belden and Co., Inc., 882 F.2d 262, 269 n.6, 51 EPD Par. 39,248 (7th Cir. 1989) (same), cert. denied, 110 S. Ct. 1134, 52 EPD Par. 39,634 (1990). More recently, the en banc court commented that, in applying the Price Waterhouse framework, "[t]he proverbial "smoking gun" is not required." It concluded, however, that the plaintiff had also failed to prove that discrimination was a substantial factor in the challenged action via circumstantial evidence. Visser v. Packer Engineering Associates, 924 F.2d 655, 658, 55 EPD Par. 40,578 (7th Cir. 1991) (en banc). This is not a clear statement of whether the court requires direct evidence in a mixed motive case, especially because it was not essential to the resolution of the case. The majority found no evidence, direct or otherwise, that discrimination played any role in the decision. One dissenter clearly stated that "one may get into mixed motive analysis [through] direct or circumstantial evidence". (Cudahy, J.). However, the other two clearly assumed that direct evidence was required and gave no hint that -- on that point -- they were at odds with the majority. (Flaum, J. and Bauer, J.)

18. It is conceivable that a case may arise in which indirect evidence of an illegitimate motive is so compelling that the trier of fact is persuaded to apply the mixed motives framework. However, the few decisions in which the mixed motives framework has been applied to circumstantial evidence have generally lacked sound analysis for this approach. As of the date of the drafting of this enforcement guidance, no courts have analyzed whether Section 107 of the Civil Rights Act is restricted to direct evidence cases. For example, in Nichols v. Acme Markets, 712 F. Supp. 488, 51 EPD Par. 39,368 (E.D. Pa. 1989), aff'd mem., 902 F.2d 1558 (3d Cir. 1990), the court applied the Price Waterhouse framework to a case in which a Black plaintiff was fired after she punched a customer who had slapped her and made a racial insult. There was no direct evidence that the firing was on racial grounds. The employer contended that it terminated her for assaulting a customer. The ultimate finding of discrimination was based on the fact that a White co-worker who engaged in far more violent behavior with less provocation had merely been suspended. The court applied Price Waterhouse without addressing the issue of whether direct evidence was necessary. In the Commission's view, Nichols should have been analyzed under the traditional McDonnell Douglas/Burdine analysis, i.e., although hitting customers could be a legitimate motive for firing someone, the fact that it did not lead to firing a White employee showed that it was pretextual and that the firing was motivated by race.

In Tyler v. Bethlehem Steel, discussed in n.17, the Second Circuit found that the lower court judge had not committed

reversible error when he instructed the jury that if the evidence gave rise to an inference that age was a motivating factor in the plaintiff's discharge, then the burden of proof shifted to the employer to prove that it would have taken the same action regardless of the discrimination. Although the type of circumstantial evidence that supports an inference of discriminatory animus does not shift the burden of proof to the employer, in this case there was direct evidence of bias by decision makers, namely that the company was concerned about the aging of its sales force, and that it valued employees that were known as "Young Tigers." In the Commission's view, discrimination would have been found under either the McDonnell-Douglas or mixed motives analysis. The bottom line was that the employer's justification of tight economic conditions did not hold up because CP was soon replaced by a much younger man and there were several new, young hires. Coupled with the evidence of bias, this evidence of pretext or of the illegitimacy of the proffered explanation enabled the plaintiff to prevail. In such a case, investigators should apply the McDonnell-Douglas/Burdine framework.

19. However, as discussed in Section III(c)(2), below, the relief due the charging party will be limited if the investigator concludes that the respondent would have made the same decision in the absence of the discrimination.

20. However, as discussed in subsection C(3), below, if the respondent produces evidence of an after-the-fact justification that would have induced it to take the same action, the charging party will not be eligible for reinstatement, back pay accruing after the date on which the legitimate justification was discovered, or compensatory damages for losses arising after the date when the legitimate reason was discovered.

21. The remedies provisions pertaining to mixed motives cases under the new Act are incorporated in Section 706(g) of Title VII.

Section 107 of the Act limits the award of attorney's fees to those that are "directly attributable" to the pursuit of the mixed motives claim.

22. The Supreme Court has held that injunctive relief is foreclosed if "there is no reasonable expectation that the wrong will be repeated," United States v. W.T. Grant, 345 U.S. 629, 633 (1953), or where interim events have "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631, 19 EPD Par. 9027A (1979). Courts have held that a plaintiff who establishes a violation of Title VII cannot obtain an injunction if (s)he is no longer employed by the defendant and does not seek or is not eligible for reinstatement, because the discrimination cannot possibly recur and because the plaintiff would not personally benefit from such relief. See, e.g., Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136, 35 EPD Par. 34,587 (11th Cir.

1984) (injunctive relief inappropriate where Title VII plaintiff did not seek reinstatement nor showed other way in which he would personally benefit from injunctive relief); Miller v. Texas State Board of Barber Examiners, 615 F.2d 650, 654, 22 EPD Par. 30,839 (5th Cir.) (injunction inappropriate where this was not class action and plaintiff had no possibility of reinstatement), cert. denied, 449 U.S. 891, 24 EPD Par. 31,256 (1980). If this approach were applied to post- Civil Rights Act mixed motives cases, then where a plaintiff establishes that discrimination was a motivating factor for an employment action, but the employer proves that it would have taken the same action in the absence of discrimination, the plaintiff would be ineligible for injunctive relief because she would not be entitled to reinstatement. Section 107 would thus lose much of its deterrent effect, since the plaintiff could only obtain declaratory relief and attorney's fees in such circumstances.

It is the Commission's view, however, that when it brings suit on behalf of a charging party and establishes unlawful discrimination under Section 107, the Commission will usually be able to obtain injunctive relief even if the charging party is no longer employed by the respondent. This is because it often cannot be shown that "there is no reasonable expectation that the wrong will be repeated." First, if any of the offending parties remain in the workforce, including those who failed to correct the discrimination once it was discovered, then the discrimination might resume. As the D.C. Circuit has stated, a suit for injunctive relief does not become moot simply because the offending party has ceased the discrimination, "since the offending party might be free otherwise to renew that conduct once the court denied the relief." Bundy v. Jackson 641 F.2d 934, 946 n.13 (D.C. Cir. 1981). Second, others in the plaintiff's class may have been subjected to discrimination, and if they are still employed, they could face a recurrence of the discrimination. Although the plaintiff might not personally benefit from an injunction when (s)he is no longer in the workforce, the Commission "acts also to vindicate the public interest in preventing employment discrimination." General Telephone Co. of Northwest, 446 U.S. at 326.

23. If the respondent fails to prove that it would have taken the same action absent the discrimination, but the conduct pre- dated the 1991 Act, the Commission will not seek compensatory or punitive damages. See n.7, above.

24. Where discrimination is shown to have been a motivating factor for an employer's adverse action, but the charging party is not entitled to reinstatement, back pay or damages because the employer shows that it would have made the same decision in the absence of discrimination, the Commission still can pursue such individual relief for any other discrimination victims who are identified in the course of the investigation. See EEOC v. General Telephone Company of the Northwest, Inc., 446 U.S. 318, 331, 22 EPD Par. 30,861 (1980), citing EEOC v. General Electric Co., 532 F.2d 359, 373, 11 EPD Par. 10,627 (4th Cir. 1976) ("Any

violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable"); Sanchez v. Standard Brands, 431 F.2d 455, 2 EPD Par. 10,252 (5th Cir. 1971) ("the Commission will seek relief from those unlawful employment practices which are like or related to the charge filed with the Commission and which grow out of proceedings before the Commission") (quoting EEOC's amicus brief). See also Commission's Policy Statement on Enforcement and Relief, dated February 5, 1985; Commission Decision No. 72-0591, CCH EEOC Decisions (1973) Par. 6314.

25. See Price Waterhouse, 490 U.S. at 252 ("[I]n most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive").

26. Cf., Hopkins v. Price Waterhouse (on remand from Supreme Court), 53 EPD Par. 39,922 (D.C.D.C. 1990), aff'd, 920 F.2d 967, 972-74, 55 EPD Par. 40,413 (D.C. Cir. 1991) (violation found where employer failed to present evidence separating discriminatory and non-discriminatory motives and proving that non-discriminatory motive would have induced same decision).

27. In Milligan-Jensen v. Michigan Technological Univ., 767 F. Supp. 1403 (W.D. Mich. 1991), the plaintiff produced direct evidence that the defendant discriminated against her on the basis of sex in her employment and in its decision to dismiss her. However, after the termination, the defendant discovered that the plaintiff had made a material fabrication on her employment application that would have justified the dismissal. The court ruled that the application falsification did not bar all relief to plaintiff, but did justify an appropriate limitation of back pay and elimination of front pay. The court decided that it would be futile to guess when the defendant had discovered the falsification, and therefore decided instead to reduce the back pay by fifty percent. See also Smith v. General Scanning, 876 F.2d at 1319 n.2 (where plaintiff's resume falsification was discovered after termination, it would not make sense to award back pay accumulating after the fraud was discovered). But see cases discussed in n.28, below.

28. Some courts seem to have denied all monetary relief where an after-the-fact justification for the action was discovered. See, e.g., Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, 705 (plaintiff ineligible for relief where evidence that he falsified numerous company records was discovered after termination); Smallwood v. United Air Lines, Inc., 728 F.2d 614, 33 EPD Par. 34,185 (4th Cir.), cert. denied, 469 U.S. 832, 35 EPD Par. 34,663 (1984) (while the airline's policy of not processing applications of persons over age 35 for the position of flight officer was a violation of the ADEA, the airline was not compelled to grant full relief to the plaintiff, since the airline proved that had it considered plaintiff's application, it would not have hired him on the basis of other lawful reasons); Benson v. Quanex Corp., Daily Lab. Rep. 4/15/92 (E.D. Mich.

3/24/92) (suit dismissed where after-acquired evidence showed plaintiff would have been discharged even without the discriminatory motive); Churchman v. Pinkerton's, Inc., 756 F. Supp. 515, 56 EPD Par. 40,742 (D. Kan. 1991) (plaintiff ineligible for relief on claim of constructive discharge due to harassment where "after-acquired evidence," in form of material omission on her employment application forms, would have resulted in employer's discharge of her or refusal to hire her); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 994-5, 51 EPD Par. 39,347 (D. Kan. 1989) (material omissions on plaintiff's employment application discovered after termination preclude relief on her Title VII claims).

The court in Milligan-Jensen, discussed in n.27, above, distinguished Summers, Churchman and Mathis on the grounds that in each of those cases, no discrimination had been established. The Commission agrees with the approach taken in Milligan-Jensen.

29. The complainant will also be ineligible for compensatory damages, back pay and reinstatement. See Section III(c)(2), above.

30. Such relief might include requiring the respondent to: (i) post a notice advising its employees that national origin will not affect its employment decisions and, specifically, that national origin will not be taken into account in making promotions; and (ii) counsel and/or discipline the offending officials and agree not to consider national origin in making promotions.

31. If the exact date of the discovery cannot be discerned, an appropriate percentage reduction should be made based on an assessment of the approximate date of the discovery.

32. The argument has been put forth that Section 116 protects only those affirmative action measures that "are in accordance with [Title VII]" as it has been amended by the new Civil Rights Act. Under this interpretation, Section 116 would not protect affirmative action plans if they violate Section 107. This interpretation seems unlikely: for if Section 116 saves only those affirmative action measures that are consistent with the new amendments, then it in fact saves nothing at all, and is rendered useless. For the section to serve any purpose, it would have to be read to protect affirmative action plans that are in accordance with the law as it exists without reference to Section 107. Officers for Justice v. Civil Service Commission of the City and County of San Francisco, et al, No. C-73-0657 RFP and C-77-2884 RFP (N.D. Cal. March 3, 1992) (1992 U.S. Dist. LEXIS 3098).

33. It is the Commission's view that its Guidelines on Affirmative Action, at 29 CFR 1608 (1979), have not been affected by the new Act.

This page was last modified on January 23, 2009.


Return to Home Page