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The Mixed Motive Instruction in Employment Discrimination Cases: What Employers Need to Know

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Abstract

In litigation regarding employment discrimination, the burden of establishing proof has continued to shift. As a result, employers and legal counsel need to be aware of the status of what they and human resources professionals should consider when an employee alleges that the employer has violated federal discrimination statutes. The original standard of proof required the plaintiff to establish that the employer discriminated against that person. Many cases still involve that approach, giving the plaintiff the burden of creating prima facie case. However, another line of rulings by the U.S. Supreme Court added an alternative method for addressing discrimination litigation, known as the mixed motive approach. The two-prong mixed motive case requires the employee to demonstrate that a protected characteristic (e.g., race, sex, national origin) was a substantial factor in an employer's adverse action. If that is established, the employer then has the burden of proving that the decision would have been made in any event, regardless of the employee's protected characteristic. As a practical matter, employers facing litigation of this type must consider whether and how to defend such a case. Even a "win" can be expensive, because in cases where there is a divided decision, the employer must pay the plaintiff's attorney fees and court costs, as well as its own. Moreover, since the Civil Rights Act of 1991 places discrimination cases in front of a jury, a divided decision is seemingly more likely. Although that presumably gives both sides a win, it still means a large expense for the employer.

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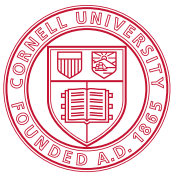

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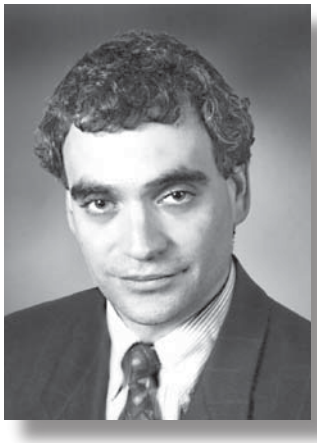

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EXECUTIVE SUMMARY

In litigation regarding employment discrimination, the burden of establishing proof has continued to shift. As a result, employers and legal counsel need to be aware of the status of what they and human resources professionals should consider when an employee alleges that the employer has violated federal discrimination statutes. The original standard of proof required the plaintiff to establish that the employer discriminated against that person. Many cases still involve that approach, giving the plaintiff the burden of creating *prima facie* case. However, another line of rulings by the U.S. Supreme Court added an alternative method for addressing discrimination litigation, known as the mixed motive approach. The two-prong mixed motive case requires the employee to demonstrate that a protected characteristic (e.g., race, sex, national origin) was a substantial factor in an employer's adverse action. If that is established, the employer then has the burden of proving that the decision would have been made in any event, regardless of the employee's protected characteristic. As a practical matter, employers facing litigation of this type must consider whether and how to defend such a case. Even a "win" can be expensive, because in cases where there is a divided decision, the employer must pay the plaintiff's attorney fees and court costs, as well as its own. Moreover, since the Civil Rights Act of 1991 places discrimination cases in front of a jury, a divided decision is seemingly more likely. Although that presumably gives both sides a win, it still means a large expense for the employer.

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The burden of proof in discrimination cases has been the subject of at least eight Supreme Court cases, hundreds of lower courts cases, and thousands of law review pages. Some might consider the time spent on this topic to be a prime example of a situation in which the Supreme Court, numerous lower court judges, lawyers, and academics are focusing too much energy on a relatively meaningless question. The issue is not meaningless to those who have found themselves the target of litigation, however. For those parties, the way that courts assign the burden of proof may, in fact, determine the probability of a damage award and the amounts of the damages awarded. Thus, a change in the allocation of the burden of proof can affect the number of cases filed, the amount of settlements agreed upon, and the fate of thousands of cases.

In contrast to the view that burden of proof is immaterial, we note the holding in *Desert Palace d/b/a Caesars Palace Hotel & Casino v. Costa.* In this opinion, the United States Supreme Court set a new standard for determining whether plaintiffs can get a "mixed motive" jury instruction in discrimination cases.[1] This case represents a major shift in the balance of power in discrimination lawsuits. In fact, as we explain below, it is possible that *Costa*'s effect will be so great that employers should rarely go to trial in discrimination cases because the cost of losing will be so high and the odds of winning so low. Knowing this, plaintiffs' lawyers will be apt to take increasingly marginal cases and will demand higher settlements. If our analysis is correct, *Costa* will have fundamentally changed the face of discrimination cases by transforming marginal cases into huge liabilities for employers.

In this report we analyze the effect of the shifting burden of proof, particularly in the wake of *Costa*. Unfortunately, as we explain below, neither an analysis of published legal opinions nor any other traditional method of legal research will answer the question. Because the precedent in *Costa* is relatively recent, a survey of lawyers is unlikely to answer this question with any certainty. Thus, to analyze the effect of *Costa*, we have developed our own data from a test sample. In addition to a discussion of the cases leading up to the *Costa* holding, this Center Report presents the results of a study that we conducted to determine the effect of *Costa* on the outcome of discrimination cases. Our discussion of *Costa* begins with an examination of burden of proof, describes the two different methods of proof in discrimination cases, clarifies how these two methods of proof have developed, and sets forth the employer's options in discrimination cases.

Understanding the Burden of Proof

To understand the two different methods for proving discrimination, it is necessary to explain how burdens of proof work. When a case reaches the trial stage, one party bears the burden of proof, and therefore must convince the factfinder that its position is correct. In contrast, the other side need not prove anything. As a result, the primary task of the party without the burden is to prevent the other side from proving its argument. To better understand the concept of burden of proof, imagine a football field. The job of the offense is to score and the defense's job is to prevent the offense from scoring. In a legal context, the side with the burden of proof is the offense, with the other side being the defense. While it would be nice for the defense to score, it does not have to. Similarly, while it would be nice for the litigant without the burden of proof to prove its case, it does not have to. It simply must prevent the other side from meeting its burden

Depending on the type of litigation, the party with the burden of proof will face one of three standards of proof. Those are **(1)** preponderance of the evidence, **(2)** clear and convincing evidence, and **(3)** beyond a reasonable doubt. Continuing the football analogy, to satisfy the preponderance standard, the "offense" must get the ball past the fifty-yard line into the other team's territory. The clear and convincing standard requires the ball to within easy field-goal range near the goal line. Last, establishing a case beyond a reasonable doubt is comparable to a touchdown, in that the factfinder must be almost certain of the facts being adduced.

An effective way to explain the operation of the burden is to look at one of more famous criminal cases of the 20th century: *People of California v. O.J. Simpson.* In *Simpson*, as in all criminal cases, the prosecution carried the burden of proving "beyond a reasonable doubt" that Simpson was guilty of murder. The defense, on the other hand, was not required to prove anything. For instance, Simpson needed neither to prove that he did not kill the victims nor did he need to prove that someone else did. Rather, Simpson simply had to prevent the prosecution from successfully proving its case by attacking the prosecution's assertions. For example, the prosecution presented blood from the crime scene, claiming it belonged to Simpson. Instead of proving that the blood did not match his, however, Simpson merely presented evidence to show that the chain of custody was

[1] *Desert Palace d/b/a Caesars Palace Hotel & Casino v. Costa*, 123 S. Ct. 2148 (2003).

broken, and therefore the evidence was unreliable. When the prosecution presented bloody gloves, Simpson discredited this evidence by demonstrating that the gloves did not fit him. Again, Simpson only needed to attack the prosecution's evidence; he never had to prove his innocence.[2]

Why a Case's Outcome May Depend on Burden of Proof

There are two methods for proving intentional employment discrimination: **(1)** the *McDonnell Douglas* method; and **(2)** the "mixed motive" method. Based on the circumstances of the case, the judge determines whether to classify a matter as being a "mixed motive" case.

McDonnell Douglas: Burdening the Plaintiff

In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth a standard of proving discrimination in which the burden of proof remained with the plaintiff at all times.[3] Under the *McDonnell Douglas* approach, plaintiffs must first prove a "*prima facie* case" by showing that they: **(1)** are members of a protected class; **(2)** were minimally qualified and either applied for or held the job; **(3)** suffered an adverse employment action; and **(4)** either the job remained open, was filled by someone outside the class, or similarly situated employees outside the protected class engaged in similar conduct and did not suffer the same adverse action. Plaintiffs that prove these four elements, which typically are not difficult to establish, create a presumption of discrimination. The defendant must then rebut this presumption.

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court "clarified" how employers may rebut the presumption created when the plaintiff proves a *prima facie* case.[4] *Burdine* held that the employer does not have to prove that it hired the best applicant or that it did not discriminate. Instead, the employer only has the burden of "articulating" a non-discriminatory reason for the employment decision. This requirement is not, however, a burden of proof. Instead, the employer's burden is merely one of production. The employer must set forth the reason for its decision, but need not prove that the reason given is true. If the employer indeed satisfies its burden of production, the employee, according to *Burdine*, could then take further steps to prove discrimination in one of two ways. First, the plaintiff can prevail by demonstrating that the real reason for the decision was discrimination (notwithstanding the reason given by the employer). Alternatively, the plaintiff could prevail by proving that the reason articulated by the employer was pretext (unworthy of belief). In either situation, the plaintiff, according *Burdine*, would prevail as a matter of law.

Mixed Motive: The Burden Begins to Shift

Seven years after *Burdine*, in *Price-Waterhouse v. Hopkins,* the Supreme Court developed a second method for proving intentional discrimination.[5] This method is referred to as the "mixed motive" method. In *Hopkins*, the plaintiff alleged she was denied partnership at Price-Waterhouse because she was a woman. To prove her case, the plaintiff presented evidence that partners made a number of discriminatory comments to her, including statements that she: **(1)** "was too masculine"; **(2)** "should wear more make-up"; and **(3)** "should go to charm school." The Court held that basing employment decisions on a failure to live up to a sexual stereotype constituted discrimination. Accordingly, the plaintiff would prevail if the employer relied on these discriminatory reasons for denying Hopkins partnership. The employer did not deny the alleged discriminatory reasons, but presented additional reasons for the decision not to promote the plaintiff. For example, the employer presented evidence that the plaintiff was disliked by staff members and had difficulty getting along with colleagues. In addition, the employer argued that it previously denied partnership to male employees with deficiencies similar to those of the plaintiff.

The *Hopkins* Court was presented with a peculiar set of circumstances. Because there were both legitimate and

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[2] In contrast, Simpson was found liable for wrongful death in a civil case where the standard was preponderance of the evidence.

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973).

[4] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

[5] *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A series of Supreme Court holdings and federal legislation have gradually shifted the burden of proof in employment discrimination cases.

illegitimate reasons for the employer's decision, the Court held that the *McDonnell-Douglas* method was not appropriate for resolving the case. In a hotly contested split decision, Justice O'Connor's concurring opinion, which most courts accept as the case's holding, set forth a new standard of proof for so-called "mixed motive" cases. Under O'Connor's opinion, the mixed motive standard of proof requires an employee to prove by "direct evidence" that the protected characteristic, such as sex, was a substantial factor in the employer's decision-making process. If the employee fails to meet this burden, the case is over. If, however, the employee satisfies the substantial factor test, the burden of proof shifts to the employer, which now has to prove (rather than merely assert) that it would have made the same decision regardless of the employee's protected characteristic. An employer who meets this burden avoids liability and precludes the plaintiff from receiving an award. Conversely, if the employer fails to prove it would have made the same decision regardless of the protected characteristic, the plaintiff receives back pay, reinstatement, attorney's fees, and litigation costs.

O'Connor's opinion emphasized that the mixed motive instruction was only available when the employee had direct evidence of discrimination. Examples of direct evidence include statements, documents, or other tangible examples of discrimination. Alternatively, circumstantial evidence, which consists of facts put together to create an inference of discrimination, did not entitle a plaintiff to a mixed motive method of proof.

How *Hicks* Confused Matters

With its shifting burdens of proof, *Hopkins* created a model that was easy to follow. Employees with direct evidence of discrimination could argue their case was a "mixed motive" case and shift the burden of proof onto the employer. On the other hand, if there was no direct evidence of discrimination, plaintiffs would be required to prevail under the *McDonnell Douglas* formula. This "nice and neat" model lost some of its appeal after the Supreme Court decided *St. Mary's Honor Center v. Hicks.*[6]

In *Hicks*, the plaintiff proved that the employer's stated reason for terminating the employee was a pretext. The Court of Appeals for the Eighth Circuit held that proving pretext entitled the plaintiff to a judgment as a matter of law. The Supreme Court, however, reversed the Eight Circuit and held that while factfinders may infer discrimination from a finding of pretext, plaintiffs are entitled to judgment as a matter of law only if they prove both that an employer's articulated reason was a pretext and also that the real reason for the decision was discrimination. Commentators refer to this standard as "pretext plus evidence," or, more simply, "pretext plus." Not surprisingly, plaintiffs' advocates were outraged by this holding, while those representing management were delighted by the decisions.[7]

Although a discussion of the merits of *Hicks* is beyond the scope of this report, its effect on discrimination litigation is profound and must be addressed. Before *Hicks*, the two different burdens of proof created a simple coherent model. Employees with no direct evidence of discrimination used the *McDonnell Douglas* formula and employees with direct evidence asked the court to consider the case to be mixed motive. After *Hicks*, cases without evidence were considered "orphan" cases.[8] Plaintiffs' lawyers did not want to invest years of time and money into a case that required a factfinder to infer discrimination. Instead, it made more sense to take on only those cases with actual evidence.[9] If there was direct evidence, plaintiffs' lawyers would contend that they were entitled to a mixed-motive instruction. Still, a model did survive: direct evidence involved *St. Mary's v. Hicks,* while circumstantial evidence invoked *McDonnell Douglas.*

[6] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

[7] In many ways *Hicks* makes sense, because employer should be found guilty of discrimination only when the factfinders believe that the employer actually discriminated against the employee. Title VII is not a truth-in-employment act, and there are times when employers, despite their best efforts, may not know why a decision was made.

[8] See: Samuel Estreicher, "Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements," *16 Ohio St. J. on Disp. Resol., 559* (2001).

[9] *Id.*

Civil Rights Act of 1991: More Complications

While the formulas of proof were important, their real effect was limited for the following two reasons. First, Title VII of the Civil Rights Act of 1964 (CRA) did not permit jury trials.[10] Second, under *Hopkins* employers could prevail in mixed motive cases by proving they would have made the same decision regardless of the plaintiff's being part of a protected class. Accordingly, even though the mixed motive method redirected the burden of proof, employers could still prevail if they were able to convince the judge that they had not discriminated. The passage of the Civil Rights Act of 1991 drastically changed the mixed motive landscape by: **(1)** allowing jury trials in Title VII cases,[11] and **(2)** changing the standards and damage scheme for mixed motive cases.

Before jury trials were permitted in Title VII cases, judges were the factfinders in cases relating to discrimination by race, sex, color, religion, and national origin. In many of these cases, the plaintiffs' lawyers would argue that the case was a mixed motive case and the employer would argue it was not. A judge who was unsure whether the case warranted applying the mixed motive method could appease the plaintiff and prevent a successful appeal by labeling the case "mixed motive" but then holding that the employer satisfied its burden.

Charging the jury. After the CRA of 1991, however, the question of whether a case warranted application of the mixed motive method had a profound effect on the matter of who would be the factfinder. From that point on, the judge's decision regarding whether the case is to be decided according to the *McDonnell Douglas* rules or the mixed motive approach manifests itself in instructions to a jury. A judge who labels a case as being a mixed motive case must instruct the jury that the employer must prove that it did not discriminate. Because of the difficulty of proving a negative, whether the judge instructs the jury with a mixed motive standard rather than a *McDonnell Douglas* standard may determine the result of the case. Placing the burden of proof on employers leads one to believe that employers will find it difficult—perhaps impossible—to prevail in mixed motive cases, especially given the perception that juries favor employees over employers.[12]

To make matters worse for employers, the CRA of 1991 made the mixed motive instruction more "plaintiff friendly" in the following two essential ways. First, the statute made it easier for a plaintiff to obtain the judge's determination that the case involved a mixed motive. Under CRA of 1991 plaintiffs no longer have to prove that the protected characteristic was a substantial factor in the employer's decision. Instead, the new standard is that the protected characteristic be a "motivating factor" in the employment decision, which is an easier test to satisfy.

Second, the act changed the damage scheme to the point where litigating these cases becomes foolish for employers. We make this conclusion because judges can now award attorney fees, litigation costs, and declaratory judgments to plaintiffs who met the "motivating factor" standard, even where the employer meets its burden of proving that the decision would have been made anyway. Thus, employers who successfully prove that the business decision would have been made regardless of discrimination are still subject to huge expenses and damages.

The effect of awarding costs and fees is profound because they are the major damage component of most discrimination cases. In large cities like New York and Chicago, management lawyers report that their fees for a discrimination case will almost always exceed $150,000 and have often been well over $500,000.[13] While plaintiffs' lawyers' fees awards are almost always less than management's fees, they are still considerable. After the CRA of 1991, mixed motive cases became costly because employers who "won"

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[10] In contrast, the Age Discrimination in Employment Act of 1967 (ADEA) always allowed for jury trials.

[11] Subsequent to the 1991 Act, Congress passed the Americans with Disabilities Act, which also allowed for jury trials.

[12] David Sherwyn, J. Bruce Tracey, and Zev J. Eigen, "In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process," *2 U. Pa. J. Lab. & Emp. L. 73.*

[13] *Id.*

Language in the Civil Rights Act of 1991 allows a discrimination plaintiff to adduce any type of evidence—making it difficult for employers to defend themselves.

still might have to pay their attorneys' fees and often the plaintiff's fees. Accordingly, it could easily cost an employer over $500,000 to "win" a mixed motive case. This figure does not include out-of-pocket litigation expenses for each side, lost employee and management time, and the bad publicity that accompanies both the trial and subsequent judgment of discrimination. As a result, after 1991 employers were well advised to settle mixed motive cases, because the costs of "winning" would almost always greatly exceed the settlement demand.

The solace for employers was that mixed motive instructions were relatively unusual. The majority of jurisdictions held that a mixed motive instruction would only be given in cases with direct evidence of discrimination, which is hard to come by. Indeed, decision makers rarely make discriminatory remarks in writing or in front of employees who might testify against the company. Thus, the mixed motive instruction was unavailable in the most discrimination cases.

How *Costa* Redefined the Landscape

Returning to the case originally known as *Costa v. Desert Palace*, the Ninth Circuit diverged from other circuits by holding that either direct or circumstantial evidence was sufficient to warrant a mixed motive instruction. To resolve the split among the circuits, the Supreme Court agreed to hear the case, issuing its decision in 2003, as *Desert Palace d/b/a Caesars Palace Hotel & Casino v. Costa.*[14] The issue in *Costa* was whether direct evidence of discrimination was required for a plaintiff to receive a mixed motive instruction or whether circumstantial evidence would suffice.

In arguing for direct evidence, the employer in *Costa* contended that Justice O'Connor's concurring opinion in *Hopkins*, which required direct evidence, was the holding of the case and still the law. The plaintiff, on the other hand, argued the CRA of 1991's language was clear and did not require any specific type of evidence. Rather, it merely stated that the plaintiff had to prove that discrimination motivated the employer.

In a unanimous decision, the Court held that the CRA of 1991's language was unambiguous and did not require direct evidence. Thus, any type of evidence of discrimination may enable a plaintiff to receive a mixed motive instruction. This decision could change the face of discrimination law because a plaintiff with any evidence of discrimination can now receive a mixed motive jury instruction, which, as we said above, may be tantamount to winning the case.

The Mixed Motive Instruction versus the Pretext Instruction

To clarify this distinction, let's compare a sample mixed motive instruction with a typical pretext instruction. Each court may fashion its own specific jury instructions, as long as they are in accordance with settled law. Some jurisdictions, however, established model jury instructions that are used in the most cases. These instructions are accompanied by what are referred to as "special jury verdict sheets." With that caveat, the sidebar on the next page gives sample instructions from the United States Court of Appeals for the Seventh Circuit and sample special verdict sheets.

The difference between the two instructions may seem minimal and meaningless, but the difference is large when one considers the contention made several years ago by film director Spike Lee, who stated that race motivates a part of every decision. Regardless of whether Lee was correct, it is possible that a substantial number of potential jurors agree with him. It is also possible that there are those who feel the same way about sex, color, national origin, religion, age, and disability. Lee's contention is important because anyone who subscribes to this theory will find that virtually any plaintiff in a discrimination case has satisfied the initial burden in the mixed motive scheme. The problem with that observation, however, is that after the CRA of 1991, the employee would receive costs and attorney fees based on that nothing more than that determination, even if the jury then decided that the employer's decision would have been the same if race or other protect class were not involved. This situation infuriates management lawyers. Jurors do not know that their belief that discriminatory factors always motivate deci-

[14] *Supra.*

A Comparison of Jury Instructions in a Failure-to-promote Case Based on National Origin

"Pretext" Instruction:

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he was denied a promotion by Defendant because of his national origin.* To determine that Plaintiff was denied a promotion because of his national origin, you must decide that Defendant would have promoted Plaintiff had he not been of his particular national origin but everything else was the same.

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

"Mixed Motive" Instruction:

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that his national origin was a motivating factor in Defendant's decision not to offer him a promotion. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proved that his national origin contributed to Defendant's decision not to offer him a promotion, you must then decide whether Defendant proved by a preponderance of the evidence that it would have not offered him a promotion even if Plaintiff was not of his particular national origin. If you find that the Defendant has proven that it would not have offered him a promotion even in the absence of discrimination, you must still enter a verdict for the Plaintiff but you may not award him damages.

Special Verdict Sheets:

Pretext Cases:

1. Did plaintiff establish by a preponderance of the evidence that defendant discriminated against him in violation of Title VII of the Civil Rights Act of 1964 on the basis of his national origin with respect to the decision not to offer him a promotion in December 2003?

Yes _____ No _____

If you answered "no" to Question 1, sign the special verdict form on the last page. If you answered "yes" to Question 1, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.

Mixed Motive Cases:

1. Did plaintiff establish by a preponderance of the evidence that his national origin was a motivating factor in the decision by defendant not to offer him a promotion in December 2003?

Yes _____ No _____

You should answer the next question *only* if you answered "yes" to Question 1. If you answered Question 1 "no," you should not answer any further questions but sign this special verdict form on the last page and return the form to the clerk.

2. Did defendant establish by a preponderance of the evidence that the defendant would have treated plaintiff the same way even if the plaintiff's national origin had not played any role in the employment decision?

Yes _____ No _____

If you answered "yes" to Question 2, sign the special verdict form on the last page. If you answered "no" to Question 2, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.

* Our example involves national origin, but it could be any of the other six protected classes: namely, sex, race, color, religion, age, or disability.

sions, means that they will unwittingly award the plaintiff costs and fees, regardless of the employer's intentions.

One "Management Lawyer's" Method for Avoiding the Unintended Fees

Considering this two-part test, coauthor Joe Baumgarten, of the law firm of Proskauer, Rose, raised another concern. He hypothesized that to suit their sense of "fair play," juries that are presented with a two-prong decision would "split the baby," as follows. They first would hold that the protected class motivated the employer. Then they would determine that the employer would have made the same decision regardless of the protected class. Once again, such a jury would have no idea that it had just awarded costs and fees to the plaintiff. Baumgarten sought to eliminate this problem by taking the issues in stepwise fashion. Rather than offer both prongs of the mixed-motive instruction, Baumgarten suggests simply having the jury determine whether the protected class motivated the employer's decision. He argues that a jury might be less inclined to find such motivation if that is the only question asked and if they knew that the finding of "yes" meant that the employer had to pay damages. Because the second prong involves an employer's defense, the employer can determine in advance whether to present it. Thus, Baumgarten proposed a third set of instructions and special jury verdict sheet. In this instruction he eliminated the second prong of the mixed motive instruction and the second question on the special verdict sheet. Thus, the instruction and the verdict sheet would appear as shown in the accompanying box.

What Does This All Mean for Employers?

Although courts are still divided on whether the pretext jury instruction is dead, it is clear that after *Costa*, more and more cases will receive mixed motive instructions. Consequently, employers need to know how to deal with this situation. Beyond that, we must examine whether the judge's instructions to the jury matter or whether certain language in the instructions has led to cases' being settled for as amount great than might otherwise occur. Then there's the question we raised at the beginning of this report, of whether employers should forget litigation and settle all mixed motive cases. If not, should employers use the Baumgarten rule and eliminate the second prong?

None of these issues can be resolved definitively, due to the pervasive problems associated with trying to use testing techniques common in social science to answer legal questions, as well as certain problems that are specific to the matter of jury instructions. Whenever legal scholars seek to answer questions using research methods from social science they battle a number of issues. First, not all cases are reported and those that are reported do not reflect a random

Alternative Jury Instruction

Mixed Motive Instruction without the "Second Prong"

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that his national origin was a motivating factor in Defendant's decision not to offer him a promotion. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proved that his national origin contributed to Defendant's decision not to offer him a promotion, you must enter a verdict for the Plaintiff, even if you believe that there were other motivating factors that would have caused the Defendant not to offer him a promotion even in the absence of any discriminatory motivation.

Special Verdict Sheet without the Second Question

1. Did plaintiff establish by a preponderance of the evidence that his national origin was a motivating factor in the decision by defendant not to offer him a promotion in December 2003?

Yes _____ No _____

If you answered "yes" to Question 1, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.

Exhibit 1

Mixed Motive (MM) versus Pretext (P) Decisions

Not promoted because of national origin or national origin not a motivating factor		Group MM	Group P	Total
No	Count	42	57	99
	Expected Count	52.3	46.8	99.0
Yes	Count	34	11	45
	Expected Count	23.8	21.3	45.0
Total	Count	76	68	144
	Expected Count	76.0	68.0	144.0

	Value	Asymp.Sig. (2-sided)
Pearson Chi-Square*	13.626*	.01
w/ Continuity Correction*	12.329	.01
Likelihood Ratio	14.167	.01
Linear-by-Linear Association	13.531	.01

Notes: Pearson Chi-Square and continuity correction are computed only for a 2x2 table; *N* of valid cases = 144.

Exhibit 1a

Mixed Motive with Affirm Defense (MM w/AD) versus Pretext (P) Decisions

Not promoted because of national origin		Group MM *w* AD	Group P	Total
No	Count	70	57	127
	Expected Count	67.0	60.0	127.0
Yes	Count	6	11	17
	Expected Count	9.0	8.0	17.0
Total	Count	76	68	144
	Expected Count	76.0	68.0	144.0

	Value	Asymp.Sig. (2-sided)
Pearson Chi-Square*	2.364*	.124
w/ Continuity Correction*	1.636	.201
Likelihood Ratio	2.381	.123
Linear-by-Linear Association	2.348	.125

Notes: Pearson Chi-Square and continuity correction are computed only for a 2x2 table; *N* of valid cases = 144.

sample. Second, even if all cases were reported there is still a problem when trying to draw specific conclusions from different cases with different sets of facts and different issues of law.

The issues we discussed here face even more problems than those related to sampling and idiosyncrasy. First, most settlements are confidential, making it essentially impossible to measure the effect of *Costa* on settlement size. Second, while a large number of discrimination opinions are published, the results of jury trials are not the issues that make it into the court reports. Instead, most of the reported cases feature the judges' opinions on summary judgment motions (which occur before the case goes to a jury) and appeals. The appeals cases are only relevant if the type of jury instruction is the issue being examined (a small percentage of appeals). Finally, looking at the results of jury trials is not helpful because the jury instructions are often not available so it is often impossible to know whether the case was a mixed motive case.

Experimental Testing Methodology

Since no data are available to answer the questions we have sought to address here, we conducted an experiment. Like many large law firms, Proskauer occasionally tests a case on a mock jury before the case goes to trial. Because of the cost of a full mock trial, however, Baumgarten and his team of lawyers sometimes test their case by having the mock jury hear a statement of the case only, rather than mock testimony or other evidence. Proskauer refers to these statements, which are combinations of an opening statement and closing argument, as "clopenings." Armed with the clopenings from the plaintiff and the defense on a sample case, we were able to conduct our experiment.

First, Proskauer videotaped two of its lawyers delivering the clopenings. Next, Proskauer videotaped Baumgarten delivering the following three different jury instructions: **(1)** pretext instructions; **(2)** the two-prong mixed motive instruction, with the affirmative defense; and **(3)** the single-prong mixed motive instruction, without the affirmative defense (shown in the sidebar on the preceding page). Armed with the tapes, we had to then find potential jurors. Unfortunately, the same people who will happily watch a "Law and Order" marathon are reluctant to take part in a law-related study. Thus, we asked students attending Cornell University to be our mock court jurors.

Study Design

We designed our controlled study as follows. On three separate nights, we had between 50 and 100 students sit in a particular auditorium and watch the clopenings, for a total of 219 students. We then randomly assigned each student to one of three roughly equal groups, each of which heard one of the test jury instructions. One group of 76 students was

labeled MM, for mixed motive (the full, two-prong test); a second group of 75 students was called MMWO, for mixed motive without the affirmative defense (the single-prong idea); and the third, comprising 68 participants, was group P, for pretext. After hearing the jury instructions, each student received and filled out the designated jury verdict sheet. Like actual jurors, the MM students did not know that if they answered yes to question 1 and yes to question 2 they were awarding costs and fees. Again like actual juries, the MMWO and the P students, on the other hand, knew that they were awarding all or nothing based on their answer to the one question on their verdict sheet.

The results were remarkable. Before we discuss those results, however, we must add the caveat that we make no claim that our sample is representative of the juror pool at large. First, our pool of 18- to 22-year-olds is substantially younger than normal jury pools. Second, we like to believe Cornell students are well above average in terms of intelligence and education. Finally, most participants were students at the Cornell University School of Hotel Administration, who would undoubtedly be biased toward management when it comes to employment disputes. Even acknowledging these problems, we believe that the experiment has merit. While our 219 students may not be representative of typical pool, they are, in fact, potential jurors.

Study Results

Despite the fact that our sample is clearly skewed in the ways we just described, we found that jury instructions strongly influenced the outcome for our particular sample. The raw numbers show that a disparity did seem to exist between the findings of the different groups. Jurors found for the plaintiff and awarded damages in twenty-two of the MMWO cases (29%) and eleven of the pretext (P) cases (16%). The mixed motive instruction is more complicated, as the two prongs can lead to the following three different results: **(1)** no damages; **(2)** costs and attorneys' fees; or **(3)** full damages. This group of students awarded either costs and fees or full damages in thirty-four of the MM cases (45%); that is, they awarded only costs and fees in twenty-eight of the cases (37%), and full damages in six of the cases (8%). A quick look at these raw numbers leads one to believe that employers are better off with a pretext instruction than either of the mixed motive instructions and, depending on the amount of damages and costs and fees, better off with the single-prong mixed motive instruction (MMWO). These raw numbers are not, however, indicative of statistical significance and it is possible that the differences are just a matter of chance. To get a full and clear picture of the connection between jury instructions and the awarding of damages we conducted a statistical analysis of the data by analyzing each set of decisions against each other.

Mixed Motive versus Pretext Decisions

We began by testing whether there are differences in the jury's decision when we compare the first prong of the mixed motive (MM1) against the one-prong pretext instruction (P). Specifically, we wanted to learn whether the number of mixed motive jurors (34) who found that national origin did motivate the employer, was significantly different than the number of pretext jurors (11) who found that the employer was liable. As can be seen from the results in Exhibit 1 this differential was highly significant, at the 99-percent level of confidence.[15] In other words whether the mock jury was given a pretext instruction or mixed motive instruction produced a significant difference across the groups as to the finding of the first prong of the mixed motive instruction versus the pretext instruction.

Next, we compared the entire mixed motive instruction—comprising both prong one and prong two (MM2)—against the pretext instruction. Specifically, we wanted to find whether there was a significant difference between the six (of the 76) mixed motive jurors who found that the employer would have acted in the same manner regardless of national origin versus the 11 (out of 68) pretext jurors who found for the company. Using the same statistical tests, we found no significance between the full mixed motive finding and the pretext finding. Thus, before the law changed in 1991 we could argue that whether the judge used a pretext instruction or a mixed motive instruction was irrelevant. The change in the law, however, means that while the ultimate finding is insignificant, the costs and fees component (prong one) is significant.

Mixed Motive Without (MMWO) versus Pretext Decisions (P)

The next question we examined was whether the results of a pretext (P) instruction question differed from the results of the mixed motive instruction without the second prong (MMWO). The raw numbers were as follows: 11 of the jurors (16%) found for the plaintiff in the P cases, and 22 of the jurors (29%) found for the plaintiff the MMWO cases. The results of this analysis are seen in Exhibit 2 (overleaf). As in the last comparison we estimated both the pair-wise comparison chi -square tests and the likelihood ratio and linear-by-linear test to determine the pair-wise and individual group differences. The results show that this differential was found to be marginally significant. Specifically, we found the difference between the MMWO and P group to be signif-

[15] We first ran a Pearson chi-square test (with and without a continuity correction) to determine whether there are differences in the attribution of motivation across the two instruction sets. We then ran both likelihood ratio and linear-by-linear association tests to determine whether this difference was statistically significant.

Exhibit 2

Mixed Motive Without (MMWO) versus Pretext (P) Decisions

Not promoted because of national origin or national origin not a motivating factor		Group MMWO	Group P	Total
No	Count	53	57	110
	Expected Count	57.7	52.3	110.0
Yes	Count	22	11	33
	Expected Count	17.3	15.7	33.0
Total	Count	75	68	143
	Expected Count	75.0	68.0	143.0

	Value	Asymp.Sig. (2-sided)
Pearson Chi-Square*	3.478*	.062
w/ Continuity Correction*	2.776	.096
Likelihood Ratio	3.540	.060
Linear-by-Linear Association	3.453	.063

Notes: Pearson Chi-Square and continuity correction are computed only for a 2x2 table; *N* of valid cases = 143

Exhibit 3

Mixed Motive (MM) versus Mixed Motive Without (MMWO) Decisions

Prong-one question is the only decision for both MM and MMWO		Group MM	Group MMWO	Total
No	Count	42	53	95
	Expected Count	47.8	47.2	95.0
Yes	Count	34	22	56
	Expected Count	28.2	27.8	56.0
Total	Count	76	75	151
	Expected Count	76.0	75.0	151.0

	Value	Asymp.Sig. (2-sided)
Pearson Chi-Square*	13.626*	.050
w/ Continuity Correction*	3.207	.073
Likelihood Ratio	3.861	.049
Linear-by-Linear Association	3.813	.051

Notes: Pearson Chi-Square and continuity correction are computed only for a 2x2 table; *N* of valid cases = 151; No cells have an expected count less than 5; the minimum expected count is 27.81.

icant at the 90-percent level of confidence. This means that it is unlikely that this differential is due to chance, although an outcome by mere chance is possible. Thus, employers faced with a mixed motive instruction and who choose not to have the second prong will, all other things being equal, likely have a more difficult time prevailing under this instruction than they would under the pretext instruction.

Mixed Motive (MM) versus Mixed Motive Without (MMWO)

We also looked at how jurors answered the prong-one question in the two different instructions. Remember, question one is same in both instructions. The only difference is that the MM group faces a second question that is thought to affect the outcome. Here we are assessing the likelihood of a different decision for the two groups simply because the MM group has an option created by the existence of the prong-two question that the MMWO group never sees. MM jurors answered yes (discrimination motivated the employer) in 44 percent of the cases, while MMWO answered yes in 29 percent of the cases. As in the last comparison we estimated both the pair-wise comparison chi-square tests and the likelihood ratio and linear-by-linear test to determine the pair-wise and individual group differences. As can be seen from the results in Exhibit 3 this differential was also found to be marginally significant. Thus, the MM1 and MMWO groups made different decisions with a 90-percent level of confidence. Based on this finding, employers who are faced with low back pay, but high costs and fees should definitely think about limiting the mixed motive instruction to one prong, as suggested by author Baumgarten.

The final question we looked at is whether the MMWO jurors will provide a different final result than the MM jurors once the MM jurors hear both prongs. Based on the earlier data discussion we know that for full liability MMWO found for the plaintiff in 29 percent of the cases and MM2 jurors found for the plaintiff in 7 percent of the cases. Once again using the statistical tests, as shown in Exhibit 4, this difference was found to be highly significant. These results now provide a clear indication that the presence of the second prong in the jury's instruction will produce significantly different decisions, compared to an instruction that offers only prong one. The inclusion of the second prong in the jury instructions will likely have a significant and positive impact

on the decision from the employer's perspective. Based on this finding, employers faced with a large amount of back pay should include the second prong of the mixed motive instruction.

Conclusion

Our results point strongly to the principle that the legal theories contained in jury instructions matter. Assuming facts that could go either way, employers have a substantially equal chance of prevailing in pretext and mixed motive cases, but there is significant chance that a mixed motive instruction will result in cost and fees being awarded. Employers therefore are better off with a pretext instruction than a mixed motive instruction. If, however, the judge orders a mixed motive instruction, the employer has a difficult choice. The MMWO instruction will more likely yield a complete victory for the plaintiff than will the MM. On the other hand, the chance of the full mixed motive instruction resulting in an award of costs and fees is greater than the likelihood of the one-prong mixed motive instruction, resulting in a complete plaintiff victory. The question that arises is whether the employer should offer the second-prong defense if the judge orders a mixed motive instruction. We believe that the answer depends on the case. If the case is a "fees case" (low liability, but high attorneys fees),[16] the employer should go with the one-prong MMWO. If liability is high, the employer should stick with the full two-prong mixed motive. Both of these options, however, are worse than pretext instruction.

The CRA of 1991 made the mixed motive instruction much more detrimental to employers. *Costa* made the mixed motive instruction much easier to obtain. As plaintiffs' lawyers become more familiar with the mixed motive instruction they will request it more often. Employers should argue against that approach, but if the judge orders it, employers then need to assess the true costs of their case. It is a fees case our study suggest employer should use the MMWO. In a case where the potential for substantial back pay is high employers should present the full two-prong mixed motive defense. ■

[16] Sometimes back pay is marginal because the employee found another job, but the litigation costs may be hundreds of thousands of dollars. Other times, both the back pay and the fees are high. It is rare for a case to involve high back pay and low fees.

Exhibit 4

Mixed Motive (MM) versus Mixed Motive Without (MMWO) Decisions

Prong-one decision on both and prong-two decision for MM only		Group: MM	Group: MMWO	Total
No	Count	70	53	123
	Expected Count	61.9	61.1	123.0
Yes	Count	6	22	28
	Expected Count	14.1	13.9	28.0
Total	Count	76	75	151
	Expected Count	76.0	75.0	151.0

	Value	Asymp.Sig. (2-sided)
Pearson Chi-Square*	11.486*	.01
w/ Continuity Correction*	10.111	.01
Likelihood Ratio	12.070	.01
Linear-by-Linear Association	11.410	.01

Notes: Pearson Chi-Square and continuity correction are computed only for a 2x2 table; *N* of valid cases = 151.

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