Effective Legal Strategy and Litigation Tactics In the Wake of *Desert Palace v. Costa*

By Justin D. Cummins

INTRODUCTION

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Supreme Court fundamentally altered the method by which employment and civil rights claims can be proved by plaintiffs and opposed by defendants. It remains to be seen whether *Desert Palace* categorically favors plaintiffs or defendants. The answer to that question depends largely on how courts apply the ruling, which will turn in no small part on the legal strategy and litigation tactics employed by plaintiff counsel. This article outlines the strategy and tactics for plaintiff counsel, including jury instructions to use.

I. THE LEGAL LANDSCAPE BEFORE THE UNITED STATES SUPREME COURT'S LANDMARK DECISION IN *DESERT PALACE V. COSTA*

Since the Supreme Court's pivotal decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), all federal courts have recognized that a plaintiff may prove discrimination via two separate frameworks: one deals with indirect evidence, the other direct evidence. These two methods of proof have involved different legal standards and, therefore, raised critical substantive and tactical issues for litigants prior to the Supreme Court's ruling in *Desert Palace*. The impact of *Desert Palace* on the governing legal standards and litigation strategy continues to be debated within the bench and bar.[1]

A. Indirect Evidence (Pretext) Cases

As the body of anti-discrimination law first began to develop, the Supreme Court set forth how civil rights claims must be proved going forward.[2] In the seminal *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court imposed a three-stage, burden-shifting analysis on litigants:

(1) a plaintiff establishes a prima facie case of discrimination;
(2) a defendant may then rebut the inference of discrimination by offering a legitimate, non-discriminatory reason for the challenged conduct; and
(3) a plaintiff has the ultimate opportunity to show any allegedly legitimate, non-discriminatory reason is a cover for discrimination – that is, pretext.[3]

Under this approach, jury instructions have focused on the third stage of the analysis.[4]

McDonnell-Douglas and the early cases applying it did not restrict the above-outlined approach only to claims flowing from indirect evidence. Nonetheless, the *McDonnell-Douglas* test has became associated with indirect evidence cases, and it became the exclusive method in such cases after the *Price Waterhouse* decision discussed below.

Under *McDonnell-Douglas* and its progeny, plaintiffs always retain the burden of persuasion. In addition, federal courts increasingly have suggested that, in order to establish liability via this framework, a plaintiff must prove the reason offered by a defendant is false and discrimination or retaliation is the real reason. Consequently, some have concluded that trying a case under the pretext approach is less favorable to plaintiffs.

A review of the seminal Supreme Court decisions clarifies, however, that a plaintiff may prove discrimination under the pretext approach simply by showing a defendant's "proffered explanation is unworthy of credence."[5] In short, pretext cases are not "single motive" cases; that characterization overstates the evidentiary burden for plaintiffs. The central question at trial in pretext cases, instead, should boil down to whether a defendant is trying to hide something: discriminatory or retaliatory animus.

B. Direct Evidence ("Mixed Motive") Cases

In *Price Waterhouse*, the Supreme Court ruled that plaintiffs need not go through the three-step process required by *McDonnell-Douglas* when plaintiffs can produce direct evidence of discriminatory intent.[6] The Supreme Court formally recognized this alternative scheme under the following reasoning: "since we know that the words 'because of' do not mean '***solely*** because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[7] Otherwise stated, the Supreme Court has allowed plaintiffs to prove their claims through this separate framework when discrimination or retaliation was one of several admitted reasons for a defendant's conduct – that is, in "mixed motive" cases.

Within the "mixed motive" scheme, the burden of persuasion automatically shifts to defendants once plaintiffs establish discrimination or retaliation with evidence that does not require an inference by the trier of fact.[8] Because of this shift in the evidentiary burden to defendants, some believe the "mixed motive" approach is more favorable to plaintiffs.

Under *Price Waterhouse* and its progeny, however, a defendant could assert an

affirmative defense: that it would have taken the adverse action regardless of a plaintiff's protected status.[9] If a defendant successfully asserted this affirmative defense, the jury could not award damages or even find liability.[10]

By enacting the Civil Rights Act of 1991 ("CRA"), Congress modified the affirmative defense available under *Price Waterhouse* in Title VII cases.[11] This legislation provides that successful assertion of the affirmative defense precludes the recovery of damages, but not a finding of liability.[12] In other words, the limited affirmative defense codified by the CRA bars the award of compensatory and punitive damages if discrimination or retaliation was not the decisive factor in a defendant's conduct.[13] Thus, a plaintiff may recover – at most – attorney's fees and litigation costs incurred in prosecuting the Title VII claims if the defendant successfully asserts this affirmative defense.[14] In sum, the key issue at trial in "mixed motive" cases may be framed, in effect, as whether a plaintiff "deserved" the adverse action at issue.[15]

II. THE POINT OF LAW ESTABLISHED IN *DESERT PALACE V. COSTA*

Three decades after its landmark ruling in *McDonnell-Douglas*, the Supreme Court decided *Desert Palace*. Although the Supreme Court's rulings in the last 20 years have become increasingly fractured, a unanimous Supreme Court approved the ruling in *Desert Palace*. Clarence Thomas, perhaps the most conservative Justice on the Supreme Court, authored the opinion.

Desert Palace concerned the sex discrimination and harassment claims pursued by the only female warehouse worker at Caesar's Palace Hotel & Casino. The plaintiff prevailed at trial on her discrimination claims. A Ninth Circuit panel vacated judgment for the plaintiff, but the Ninth Circuit's en banc rehearing of the case resulted in reinstatement of the judgment.

The Supreme Court accepted the defendant's petition for certiorari to decide whether "mixed motive" jury instructions are available when a plaintiff's discrimination claims brought under Title VII rely exclusively on indirect evidence. *Desert Palace*'s holding provides an emphatic answer: yes. Although *Desert Palace* discusses *Price Waterhouse* and the CRA at length, the opinion does not address or even cite *McDonnell-Douglas*.

That the Supreme Court has made it easy to try Title VII discrimination claims under the "mixed motive" approach begs a crucial question: whether the "mixed motive" framework is preferable to the pretext approach for plaintiffs. As set forth more fully below, the answer generally seems to be yes at the summary judgment stage, but no at the trial stage.

III. THE EARLY APPLICATION OF *DESERT PALACE V. COSTA* BY FEDERAL COURTS

Almost immediately after the Supreme Court decided *Desert Palace*, one federal judge in Minnesota simultaneously published three opinions that sought to extend the Supreme Court's holding.[16] Collectively *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987 (D. Minn. 2003), *Skomsky v. Speedway SuperAmerica, L.L.C.*, 267 F.Supp.2d 995 (D. Minn. 2003), and *Gonzalez v. City of Minneapolis*, 267 F.Supp.2d 1004 (D. Minn. 2003) essentially asserted that all discrimination claims – including even those pursued outside of the Title VII context – must be proved via the "mixed motive" method.[17] According to this view, *McDonnell-Douglas* and more than 30 years of related precedent no longer apply either on summary judgment or at trial.[18]

As the first cases in the country to interpret the *Desert Palace* decision,

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Dare, *Skomsky*, and *Gonzalez* initially framed much of the national debate about the meaning of the Supreme Court's ruling. Both federal judges and legal scholars looked to these cases when considering how to analyze discrimination claims.[19]

The federal judge in *Dare*, *Skomsky*, and *Gonzalez* acknowledged, however, that neither *Desert Palace* nor the statutory language of Title VII specifically supports the bold proposition that plaintiffs no longer have the option – either at summary judgment or at trial – of establishing their claims by showing pretext.[20]

Accordingly, other federal judges in Minnesota and elsewhere in the Eighth Circuit have subsequently ruled that, after *Desert Palace*, plaintiffs still have the choice of proving their discrimination claims through either the pretext or "mixed motive" framework.[21]

Dunbar v. Pepsi-Cola is highly instructive because federal courts around the nation have relied on it when applying *Desert Palace*. Whereas *Dare, Skomsky*, and *Gonzalez* asserted that *Desert Palace* meant *McDonnell-Douglas* and the pretext approach were effectively dead, *Dunbar* observed as follows:

> *Desert Palace* and [the CRA] may spell the demise of the *Price Waterhouse* [and the "mixed motive"] framework, instead conflating the analysis of ***every*** discrimination case into the question of whether the plaintiff has presented sufficient evidence, direct or circumstantial, for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[22]

Put simply, *Dunbar* interpreted *Desert Palace* as modifying the third stage of the *McDonnell-Douglas* test rather than abolishing that framework outright. Therefore, *Dunbar* held that plaintiffs can prove their discrimination claims, once they establish a prima facie case, either by showing defendants' reason is not true or, even if the rationale is true, plaintiffs' protected status nonetheless motivated defendants to take adverse action. Minnesota District Courts have ruled similarly.[23]

The first Circuit Court to apply *Desert Palace* ruled in accordance with *Dunbar* and similar precedent in the Eighth Circuit.[24] In that case, *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), the Court not surprisingly reversed summary judgment.[25]

The Eighth Circuit is one of the other Circuits that promptly and explicitly considered the implications of *Desert Palace*. The first Eighth Circuit case to do so, Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004), reaffirmed that *McDonnell-Douglas* and its progeny still apply at the summary judgment stage.[26]

Interestingly, the federal judge who authored *Dare, Skomsky*, and *Gonzalez* sat on the panel that decided *Griffith*, so the Eighth Circuit had ample opportunity to adopt the holding in those three opinions. In ruling that *McDonnell-Douglas* still governs, the Eighth Circuit rejected the approach proposed by those three early cases.[27]

As in *Griffith*, the Eighth Circuit's subsequent rulings have focused on whether *Desert Palace* changes the analysis at the summary judgment stage as opposed to at trial:

> Thus, the Supreme Court's decision in *Desert Palace* to the extent relevant, merely reaffirms our prior holdings by indicating that a plaintiff bringing an employment discrimination claim may ***succeed in resisting a motion for summary judgment*** where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), ***even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation***.[28]

In Memoriam
MTLA Past President Thomas Wolf

Thomas Wolf passed away on March 29, 2007 from the effects of a stroke. Tom began the practice of law with F.J. O'Brien in 1954 after graduating from the University of Minnesota Law School. He was the University of Minnesota Law Review Editor from 1953-1954. He was certified as a Civil Trial Advocate by the National Board of Trial Advocacy and the Minnesota State Bar Association. He received a Lifetime Achievement Award in the Academy of Certified Trial Lawyers in Minnesota in 1996. Tom was also a member of the Warren E. Burger American Inn of Court.

Tom was an energetic supporter of MTLA and one of the earliest officers from greater Minnesota. He was a trial lawyer of distinction who believed in public service, having served as President of the Minnesota Trial Lawyers Association from 1977 to1978.

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In a more recent reversal of summary judgment, the Eighth Circuit effectively confirmed that the standard at trial will be analogous to the modified *McDonnell-Douglas* approach adopted by other Circuits and by District Courts in the Eighth Circuit.

> A defendant is not entitled to summary judgment if the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's action even if the defendant has brought forward evidence of additional legitimate motives.[29]

Although uncertainty persists about the precise contours of the governing legal standard, it appears that a plaintiff can prevail by demonstrating either with indirect or direct evidence (1) a defendant's purportedly legitimate, non-discriminatory or non-retaliatory reason is not true or (2) even if that defendant's rationale is true, the defendant also had a motive that was discriminatory or retaliatory.[30]

IV. STRATEGY AND TACTICS FOR SUCCESSFULLY OPPOSING SUMMARY JUDGMENT IN THE FUTURE

In theory, the pretext approach should be equally or even more helpful to plaintiffs than the "mixed motive" method when resisting summary judgment. Under binding precedent, a plaintiff defeats summary judgment merely by demonstrating a genuine fact dispute about whether a defendant's "proffered explanation is unworthy of credence."[31]

In practice, however, more federal courts are adopting an increasingly conservative perspective. These courts often grant a defendant's summary judgment motion unless a plaintiff essentially proves both that a defendant's rationale for adverse action is false and that discrimination or retaliation is the true reason.

Therefore, plaintiff counsel should seriously consider opposing summary judgment through the "mixed motive" framework pursuant to *Peterson, Strate*, and related precedent. Given the statutory language of Title VII, summary judgment should never be granted for defendants so long as plaintiffs can demonstrate a fact question about whether their protected status was a motivating factor.[32] There appears to be little disadvantage to pursuing this approach at the summary judgment stage because the deleterious affirmative defense – which bars the recovery of damages, but not the finding of liability – is basically irrelevant before trial in Title VII cases.[33]

As set forth more fully below in Part V, the pretext method appears better for plaintiffs at trial in most cases. In particular, defendants are not entitled to the affirmative defense in that context. Thus, plaintiff counsel would be well advised to employ both the pretext and "mixed motive" frameworks when opposing summary judgment motions.

In view of this overall legal strategy, litigation tactics should focus on committing defendants to a rationale for their conduct as soon as possible. Experience indicates that a defendant's rationale can morph over time. For example, a defendant may offer one reason at the time of the adverse action, a slightly different rationale when responding to an administrative charge of discrimination or retaliation, another reason during post-suit discovery, and still more permutations in support of a summary judgment motion. The Eighth Circuit has long recognized that a defendant's shifting rationale is powerful evidence of pretext and, thus, discrimination or retaliation.[34]

There are several possible ways to document a defendant's changing story. One common tactic is, before deciding whether to take affirmative legal action,

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ghostwriting a letter for the prospective plaintiff to the potential defendant(s) that asks for a written statement of the actual reason for the adverse action. The Minnesota Legislature has codified the requirement that employers comply with this request.[35]

Plaintiff counsel may also decide to refrain from making an appearance during some or all of the administrative process commenced after a potential plaintiff files an agency charge of discrimination or retaliation. In such circumstances, respondents to a charge may be more forthcoming with the administrative agency. Once the administrative process ends, plaintiff counsel can obtain many of the records generated during the investigation – including the written responses to the discrimination charge and related discovery requests.

Another important tactic relates to the gathering of comparison data. Plaintiff counsel should secure evidence in discovery, especially through depositions and written requests for admissions, that plainly demonstrates the numerous ways a plaintiff and others are virtually identical except for the protected status at issue.

This endeavor has both an offensive and a defensive dimension. Going on the offensive, plaintiff counsel should establish that a plaintiff is equally or better qualified and performing than peers – demonstrating the pretextual nature of a defendant's purportedly legitimate, non-discriminatory or non-retaliatory rationale. Plaintiff counsel should also play defense by eliciting testimony that, to the extent a plaintiff has any blemishes, the plaintiff's peers have the same or worse deficiencies than that plaintiff. With this evidence in the record, the affirmative defense has less chance of success should a plaintiff elect to prove discrimination or retaliation via the "mixed motive" scheme at trial.

V. STRATEGY AND TACTICS TO ENHANCE EFFECTIVENESS AT TRIAL GOING FORWARD

Plaintiffs self-evidently commence legal action, so they are the ultimate master of the theory of their case and the related method(s) of proof. Accordingly, plaintiffs should not have to grapple with the affirmative defense available under the "mixed motive" approach if they choose to proceed at trial only through the pretext framework.[36] Indeed, neither Supreme Court jurisprudence nor the statutory text of Title VII describes the "mixed motive" scheme as an alternative for defending against discrimination or retaliation claims.

Generally, the pretext approach is more favorable for plaintiffs at trial because of the various problems presented by the "mixed motive" method. In a nutshell, the affirmative defense triggered by the "mixed motive" framework gives defendants two bites of the proverbial apple; first, defendants can win by poking holes in the liability case and second, defendants can effectively win by precluding the award of any damages.

In addition to creating the general two-bites-of-the-apple problem, the "mixed motive" scheme could disadvantage plaintiffs in several specific ways:

(1) The affirmative defense triggers a hypothetical inquiry – whether a defendant "would have" taken adverse action anyway – that shifts the focus from defendants to plaintiffs:

* The hypothetical nature of the inquiry invites jurors to speculate about whether a plaintiff "deserved" the treatment – potentially playing into possible juror bias;

* The nature of the inquiry also obscures the fact that a defendant's story may have

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changed over time and that this shift in rationales is highly probative of discrimination and retaliation; and

* The hypothetical inquiry may open the door for greater use of after-acquired evidence of supposed misconduct by a plaintiff, giving defense counsel incentive to be much more aggressive in discovery and at trial.

Notably, the federal judge who decided *Dare, Skomsky*, and *Gonzalez* reconsidered the defendant's summary judgment motion, sua sponte, under the "mixed motive" framework. In so doing, the judge deemed after-acquired evidence admissible regarding the liability question, and he granted partial summary judgment based on that evidence.[37]

(2) Analysis of claims under the "mixed motive" scheme artificially limits plaintiff recoveries:

* The same-decision jury instruction available under the "mixed motive" approach may cause juries to split the proverbial baby, precluding the award of any damages and undermining a plaintiff's post-trial petition for an award of attorney's fees and litigation costs; and

* The resulting limit on recoveries at trial would reduce defendants' future legal exposure and, therefore, plaintiffs' leverage at the bargaining table – diluting the settlement value of cases going forward.

(3) The "mixed motive" framework poses normative and practical challenges:

* Allowing defendants to escape paying damages, as long as they "would have" taken adverse action regardless of their discriminatory or retaliatory motives, sends the problematic message to jurors and society at large (from which all future jurors come) that discrimination and retaliation are permissible as long as they are not the "decisive" factor; and

* The applicability of but-for causation in the "mixed motive" scheme is usually less readily ascertainable by jurors than the truthfulness of a defendant's stated rationale under the pretext approach.

In light of the above, "mixed motive" analysis only appears beneficial for plaintiffs in cases where defendants have produced extensive evidence of plaintiffs' misconduct or other material deficiencies. In such cases, plaintiff counsel may nonetheless be able to obtain attorney's fees and litigation costs as long as a plaintiff's protected status was "a motivating factor."[38] If a defendant has enough adverse information concerning a plaintiff, however, securing even liability will be unlikely. In short, the cases in which the "mixed motive" method seems most desirable probably are not worth pursuing in the first place.

Given the comparative advantages of proving discrimination and retaliation claims through the pretext approach, several trial tactics emerge. First and foremost, plaintiff counsel should vigorously oppose any attempt by defense counsel to obtain a same-decision jury instruction. Recitation of the controlling precedent should make clear that such an instruction is improper as a matter of law in pretext cases.[39] In addition, Plaintiff counsel should focus on impeaching the credibility of defendants' key decision-makers, in general, and defendants' rationale for taking adverse action, specifically. This evidence will dovetail nicely with the jury instructions to which plaintiffs are entitled and that appear with this article.

If defense counsel insists on the applicability of the affirmative defense and related same-decision jury instruction, plaintiff counsel could first argue that the defense has been waived if not asserted in the Answer. Moreover, Plaintiff counsel should point out that a defendant is not entitled to a same-decision jury instruction unless it ***proves*** that it would have taken the adverse action – not simply that it could

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have taken the action for a non-discriminatory, non-retaliatory reason.[40]

In any event, plaintiff counsel must highlight at trial any negative data about people comparable to plaintiffs to underscore the dubious veracity of defendants' stated reasons for taking adverse action. In other words, plaintiff counsel should try to integrate the pretext analysis into the "mixed motive" framework.

CONCLUSION

Desert Palace makes it easier for plaintiffs to try their Title VII claims through the "mixed motive" scheme. It should not be surprising that a unanimous and conservative Supreme Court has done so because the "mixed motive" approach generally seems to favor defendants at trial.

Plaintiff counsel may nonetheless use the *Desert Palace* decision to their clients' advantage by arguing that it reaffirms an axiomatic legal principle: plaintiffs defeat summary judgment simply by demonstrating their protected status was "a motivating factor." At trial, plaintiff counsel should insist that their clients, not defendants, determine the method(s) of proof. In any case, plaintiff counsel should be circumspect about electing to prove plaintiffs' claims via the "mixed motive" framework. Accordingly, defendants should rarely be allowed to invoke the affirmative defense and to obtain a same-decision jury instruction. In this context, plaintiffs' likelihood of success at trial should increase.

PROPOSED JURY INSTRUCTIONS FOR PLAINTIFFS IN EMPLOYMENT AND CIVIL RIGHTS CASES

Burden Of Proof

Plaintiffs have the burden of proving their claims by a preponderance of the evidence. To prove something by a preponderance of the evidence is to show that it is more likely true than not true. This is determined by considering all of the evidence and deciding which evidence is more believable.

EIGHTH CIR. CIVIL JURY INSTR.: CIVIL 3.04 (modified for brevity and clarity).

Inferences

In considering the evidence in this case, you are not limited only to the statements of witnesses and the contents of documents and other exhibits received by the Court. From the facts you find have been proved, you may also draw inferences in light of your own experience. An inference is a conclusion that common sense and reason lead you to make from the facts established by the evidence.

FEDERAL JURY PRACTICE & INSTR.: CIVIL § 104.20 (modified for brevity and clarity).

Disparate Treatment: Discrimination

Your verdict must be for plaintiff against defendant if the following two elements have been proved by a preponderance of the evidence:

(1) defendant _____ [*discharged, failed to hire, failed to promote, provided different terms and conditions, or took other adverse action*]; and
(2) plaintiff's _____ [*protected status*] was a determining factor in defendant's conduct.

If plaintiff has not proved the two elements by a preponderance of the evidence, your verdict must be for defendant.

EIGHTH CIR. CIVIL JURY INSTR.: CIVIL 5.01, 5.95 (modified for brevity and clarity).

Disparate Treatment: Retaliation

Your verdict must be for plaintiff against defendant if the following three elements have been proved by a preponderance of the evidence:

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The Women Lawyers Section Dinner was held on February 2, 2007 at Mission American Kitchen. Guest speaker Judge Doris Huspeni spoke on "Women in the Legal Profession". 32 Members of the Section attended the dinner.

(1) plaintiff complained of alleged _____ [*protected status*] discrimination or otherwise tried to exercise a right under the fair employment laws;
(2) defendant took unfavorable action against plaintiff; and
(3) plaintiff's complaint or other attempt to exercise a fair employment right was a determining factor in defendant's conduct.

If plaintiff has not proved the three elements by a preponderance of the evidence regarding defendant, your verdict must be for defendant.

EIGHTH CIR. CIVIL JURY INSTR.: CIVIL 5.61, 5.95 (modified for brevity and clarity).

A Determining Factor

If you find that defendant's stated reason for its conduct regarding plaintiff is not true or not believable, you may infer defendant engaged in unlawful _____ [*discrimination or retaliation*] against plaintiff.

A plaintiff is not required to prove _____ [*protected status or exercise of rights*] was the only factor in defendant's conduct. If plaintiff shows _____ [*protected status or exercise of rights*] played a part, _____ [*protected status or exercise of rights*] was a determining factor and you must find for plaintiff.

EIGHTH CIR. CIVIL JURY INSTR.: CIVIL 5.95, 5.96 (modified for brevity and clarity); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

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[1] *See generally* Henry H. Perritt, Jr., 2004 Employment Law Update (2004); Christopher R. Hedican, et al., "*McDonnell Douglas*: Alive and Well," 52 *Drake L. Rev.* 383 (2004).

[2] *See generally McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[3] *McDonnell-Douglas*, 411 U.S. at 807.
[4] *See* Eighth Cir. Civil Jury Instr.: Civil 5.95, 5.96.
[5] *Texas Dep't. of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (citing *McDonnell-Douglas v. Green*, 411 U.S. 792, 802 (1973)); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (emphasis omitted) ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (same); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986) (applying the Minnesota Human Rights Act in conformity with *Burdine*).
[6] 490 U.S. at 245-46.
[7] *Price Waterhouse*, 490 U.S. at 241 (citation omitted) (emphasis in original).
[8] *Price Waterhouse*, 490 U.S. at 244-45.
[9] 490 U.S. at 244-45.
[10] Id.
[11] Title VII, 42 U.S.C. §§ 2000e, *et seq.*, is the employment-related federal statute most commonly invoked to address discrimination, harassment, and retaliation. As such Title VII jurisprudence has largely shaped how courts apply other employment and civil rights statutes.
[12] *See* 42 U.S.C. § 2000e-5(g)(2)(B).
[13] *Id.*
[14] *Id.*
[15] Generally, the Minnesota Supreme Court analyzes state discrimination claims in conformity with federal precedent. *See, e.g., Bevan v. Honeywell*, 118 F3d603, 613 (8th Cir. 1997). Regarding methods of proof, however, the Minnesota Supreme Court has explicitly declined to adopt the pretext/"mixed motive" dichotomy fashioned by federal courts. Therefore, the *McDonnell-Douglas* test always guides the method of proving discrimination claims under the Minnesota Human Rights Act. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d619, 623 (Minn. 1988).
[16] *See Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987 (D. Minn. 2003); *Skomsky v. Speedway SuperAmerica, L.L.C.*, 267 F.Supp.2d 995 (D. Minn. 2003); *Gonzalez v. City of Minneapolis*, 267 F.Supp.2d 1004 (D. Minn. 2003).
[17] *See generally id.*
[18] *Dare*, 267 F.Supp.2d at 991-92.
[19] *See generally Christopher R. Hedican, et al.*, "McDonnell Douglas: Alive and Well," 52 Drake L. Rev. 383 (2004).
[20] *See, e.g., Dare*, 267 F.Supp.2d at 990 (citing *Desert Palace v. Costa*, 539 U.S. 90, 94 n.1 (2003)) ("[T]he Supreme Court declined to determine whether the Civil Rights Act of 1991 'applies outside o f the mixed-motive context.'").
[21] *Ordahl v. Forward Technology Industries, Inc.*, 301 F.Supp.2d 1022, 1027

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(D. Minn. 2004); *Brown v. Westaff (USA), Inc.*, 301 F.Supp.2d 1011, 1017, 1017 n.6 (D. Minn. 2004); *Dunbar v. Pepsi-Cola*, 285 F.Supp.2d 1180, 1197-98 (N.D. Iowa 2003); *see also Walker v Northwest Airlines, Inc.*, 2004 WL 114977, *5 (D. Minn. 2004); *E.E.O.C. v. Minnesota Beef Industries, Inc.*, 2003 WL 22956445, *3n.2 (D. Minn. 2003).

[22] 285 F.Supp.2d at 1196 (citations omitted) (emphasis in original).

[23] *See, e.g., Ordahl*, 301 F.Supp.2d at 1027, *Brown*, 301 F.Supp.2d at 1017; *see also Walker*, 2004 WL 114977 at *5

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

[25] *Rachid*, 376 F.3d at 312 (citation omitted) (emphasis added) ("Our holding today that the mixed-motives analysis used in Title VII cases post-*Desert Palace* is equally applicable [to the] ADEA represents a merging of the *McDonnell Douglas* and *Price Waterhouse* approaches. Under this ***integrated approach, called, for simplicity, the modified McDonnell Douglas approach***: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, 'the plaintiff must then offer sufficient evidence to create a genuine issue of material fact "either (1) that thedefendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative)."'").

[26] *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004).

[27] *Griffith*, 387 F.3d. at 735.

[28] *Strate v. Midwest Bankcenter, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2004) (citation omitted) (emphasis added); *see also Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1121 (8th Cir. 2006) (adopting the same analytical approach and reversing summary judgment).

[29] *Peterson v. Scott County*, 406 F.3d 515, 521 (8th Cir. 2005) (citation omitted).

[30] *Peterson*, 406 F.3d at 521; *Rachid*, 376 F.3d at 312; *Ordahl*, 301 F.Supp.2d at 1027; *Brown*, 301 F.Supp.2d at 1017; *Dunbar*,, 285 F.Supp.2d at 1197-98; *see also Walker*, 2004 WL 114977 at *5.

[31] *Burdine*, 450 U.S. at 256 (citing *McDonnell-Douglas v. Green*, 411 U.S. 792, 802 (1973)); *see also Reeves*, 530 U.S. at 147 (2000) (emphasis omitted) ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."); *Hicks*, 509 U.S. at 510-11 (same).

[32] *See* 42 U.S.C. § 2000e-2(m) ("[A]n 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.")

[33] *See* 42 U.S.C. § 2000e-5(g)(2)(B); EIGHTH CIR. CIVIL JURY INSTR.: CIVIL 5.01A.

[34] *See, e.g., Kobrin v. Univ. of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994) (reversing summary judgment for the defendant); *Scheidecker v. Arvig Enterprises, Inc.*, 122 F.Supp.2d 1031, 1041 (D. Minn. 2000) (denying summary judgment for the defendant).

[35] *See* Minn.Stat. § 181.933, Subd. 1.

[36] *See, e.g., Desert Palace*, 539 U.S. at 94 (emphasis added) (observing that the CRA "establishes ***an alternative for proving*** that an 'unlawful employment practice' has occurred.").

[37] *Dare*, 267 F.Supp.2d at 993.

[38] *See* 42 U.S.C. § 2000e-5(g)(2)(B).

[39] *Desert Palace*, 539 U.S. at 94; *Reeves*, 530 U.S. at 147; *Burdine*, 450 U.S. at 256; *Peterson*, 406 F.3d at 521; *Ordahl*, 301 F.Supp.2d at 1027; *Brown*, 301 F.Supp.2d at 1017; *Dunbar*, 285 F.Supp.2d at 1197-98.

[40] *See, e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636, 642 (8th Cir. 2002), abrogated on separate grounds, *Desert Palace v. Costa*, 539 U.S. 90 (2003) (reaffirming that a defendant must offer objective evidence of a non-discriminatory motivation for taking adverse action before that defendant can employ the affirmative defense); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 403 (7th Cir. 2001) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 n.14 (1989)) (ruling that the defendant's statement "that he would have fired the plaintiff solely for absenteeism is not sufficient objective proof for a mixed-motive defense.").