



SHIFTING THE BURDEN IN DISCRIMINATION CASES

'Mixed motive' provisions can sometimes give edge to plaintiffs

By **ROBERT B. MITCHELL**

Under the well-known *McDonnell Douglas Corp. v. Green* disparate treatment employment discrimination evidentiary construct, the plaintiff has the initial burden to make out a *prima facie* case. If a *prima facie* case is established, the defendant must articulate a legitimate non-discriminatory reason for its action.

Assuming the defendant does this successfully, the burden shifts back to the plaintiff to show that the defendant's stated reason is a pretext to disguise a discriminatory reason for the adverse action taken against the plaintiff. If that pretext is shown, the jury may infer an illegal discriminatory motive. The burden of producing evidence thus shifts back and forth between plaintiff and defendant, but the ultimate burden of persuasion remains with the plaintiff at all times.

In 1989, the Supreme Court introduced another concept into the *McDonnell Douglas* construct. In *Price Waterhouse v. Hopkins*, the court concluded that even if a defendant's actions were shown to have been motivated by racial animus, the defendant could still defeat Title VII liability by proving that it would have taken the same adverse action even in the absence of the illegal animus. This "mixed-motive" affirmative defense was a complete bar to defendant Title VII liability. It was extended to §1981 cases by the federal circuit courts.

The Second Circuit has ruled that in some

limited circumstances a *plaintiff* might be entitled to have mixed-motive instruction given and, thus, shift the burden of persuasion to the defendant to show that it would have taken a disputed action even in the absence of racial animus. To shift the burden of persuasion to the defendant, the plaintiff must initially show that "an impermissible criterion" was in fact a "motivating" or "substantial" factor in the employment decision. The types of evidence that suffice in a pretext case to make out a *McDonnell Douglas prima facie* case do not suffice, even if credited, to warrant a *Price Waterhouse* burden shift. Evidence poten-



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smoke" to support his allegations of discriminatory treatment. This "thick cloud of smoke" has been called the "circumstantial-plus" standard. The Second Circuit has cautioned that purely statistical evidence would not warrant such a charge, nor would evidence merely of the plaintiff's qualification for and the availability of a given position, nor would "stray" remarks in the workplace by persons who are not involved in the pertinent decision-making process.

The Second Circuit has also noted that, in some cases, a dual motivation charge would be inappropriate where, on the particular evidence, no reasonable trier could find that two motives could have simultaneously coexisted. It gave the example of a case in which an accountant plaintiff established a *prima facie* case that age discrimination played a role in the defendant's decision to fire him, but in which the defendant also established that the plaintiff had

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tially warranting a *Price Waterhouse* burden shift includes such things as documents and evidence of statements or actions by decision-makers that may be viewed as *directly reflecting* the alleged discriminatory attitude.

'Cloud Of Smoke'

The plaintiff must be able to produce a "smoking gun" or at least a "thick cloud of

embezzled company funds.

There the trier would have to believe one or the other, and a finding of mixed motive simply would not be possible. The evidence would be unlikely to permit a reasonable

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finding that the employer was determined to discharge only elderly embezzlers.

Congress enacted Section 107 of the Civil Rights Act of 1991 to reverse *Price Waterhouse's* grant of an absolute affirmative defense to Title VII liability. Under CRA §107, an employer's showing that the same "objected to" action would have occurred absent an unlawful discriminatory motive affects only the scope of relief that a plaintiff could recover. If the employer demonstrates that it would have taken the same action in the absence of an impermissible motivating factor, the court may grant declaratory relief, injunctive relief (in certain circumstances), attorney's fees and costs, although the court cannot award damages or issue an order requiring any reinstatement, hiring, promotion or payment.

Circuit Court Conclusions

Ever since the Civil Rights Act was passed, questions have arisen as to whether its "mixed motive" provision was limited only to Title VII or should be extended to other civil rights statutes including §1981.

Although the act did modify portions of §1981, it did not address the issue of the *Price Waterhouse v. Hopkins*, mixed-motive defense in such cases. Application of the CRA §107 Title VII's "mixed motive" provisions outside the Title VII context has been the subject of several circuit court decisions.

The Second Circuit has not spoken directly to the §1981 issue; however, the Eleventh and Sixth circuits have. They have concluded that the mixed-motive amendments do not apply to §1981 claims. The Eleventh Circuit has also held that the mixed-motive amendments do not apply to §1983 cases. The Seventh Circuit has acknowledged the Eleventh Circuit's refusal to apply the 1991 mixed-motive amendments to §1981 cases, but it has not directly decided the issue. It has, however, declined to apply other Title VII 1991 amendments to §1983 cases. The Third Circuit, although not directly addressing the question, has indicated *in dicta* that the Civil Rights Act 1991 amendments are not applicable to §1981 claims. Only the Ninth Circuit has applied the 1991 act's mixed-motive amendments to discrimination claims brought under §1981.

While the Second Circuit has not explicitly ruled on the issue of applying the CRA "mixed motive" rule to §1981 discrimination claims, the §1981 decisions that have come down from the court since the passage of the CRA appear to ignore it altogether. This very strongly suggests that the Second Circuit would not apply CRA §107's mixed-motive amendments to §1981 claims.

More tellingly, the Second Circuit has refused to extend other aspects of the CRA's Title VII amendments to ADEA cases on the grounds that "Congress could have amended

the ADEA along with Title VII, but did not." Finally, it should be noted that the majority of circuits, including the Second Circuit, have declined to extend 42 U.S.C. §2000e-2-(m) to retaliation cases on the grounds that Congress explicitly addressed retaliation claims in other sections of the 1991 Civil Rights Act. It is unlikely that the Second Circuit would judicially craft a CRA §107-type amendment to §1981 on its own.

Judicial refusal to apply CRA §107 to §1981 claims was given additional support recently by the U.S. Supreme Court's opinion in *Gross v. FBL Financial Services Inc.* The *Gross* court held that the 1991 CRA §107 *Price Waterhouse* amendments do not apply to the Age Discrimination in Employment Act. Indeed, that decision appears to go further than the circuits have, at least with respect to §1981 cases, by not even applying the plaintiff-favorable, motivating factor test to ADEA cases. This seems to require that age discrimination plaintiffs meet the unvarnished *McDonnell Douglas* "pretext" standard. While it is impossible to tell whether the "raw" *Gross* rule will be applied to cases outside of the ADEA context, or if Congress will act to reverse or modify *Gross*, the Supreme Court's decision strengthens the contention that CRA §107 does not apply to §1981 claims. ■