

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DESERT PALACE, INC. , DBA :

4 CAESARS PALACE HOTEL & :

5 CASINO, :

6 Petitioner :

7 v. : No. 02- 679

8 CATHARINA F. COSTA. :

9 - - - - - X

10 Washington, D. C.

11 Monday, April 21, 2003

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:04 a.m

15 APPEARANCES:

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17 the Petitioner.

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19 General, Department of Justice, Washington, D. C. ; on

20 behalf of the United States, as amicus curiae,

21 supporting the Petitioner.

22 ROBERT N. PECCOLE, ESQ. , Las Vegas, Nevada; on behalf of

23 the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MARK J. RICCIARDI, ESQ.	
4	On behalf of the Petitioner	3
5	IRVING L. GORNSTEIN, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioner	17
8	ROBERT N. PECCOLE, ESQ.	
9	On behalf of the Respondent	26
10	REBUTTAL ARGUMENT OF	
11	MARK J. RICCIARDI, ESQ.	
12	On behalf of the Petitioner	40
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-679, the Desert Palace, doing business as
Caesars Palace Hotel, v. Costa.

Mr. Ricciardi. Am I pronouncing your name
correctly?

ORAL ARGUMENT OF MARK J. RICCIARDI
ON BEHALF OF THE PETITIONER

MR. RICCIARDI: It's Ricciardi, sir.

QUESTION: Mr. Ricciardi.

MR. RICCIARDI: Mr. Chief Justice, and may it
please the Court:

This case involves the extraordinary situation
in the law where the burden of proof is shifted to a
defendant. Courts have recognized this type of burden
shift in certain limited situations, certain torts, and in
1989 this Court recognized that burden shift in Title VII
cases.

We are here today because the court below has
held and the respondent argues that the Civil Rights Act
Amendment of 1991 shifts the burden of proof to the
defendant in virtually all Title VII disparate treatment
cases. That conclusion does not follow from the text of
the Civil Rights Act, nor does it make sense based on this

1 Court's history of fashioning the orderly presentation of
2 proof in Title VII cases.

3 The Civil Rights Act of 1991 was passed in part
4 as a response to certain decisions of this Court. One of
5 those decisions was Price Waterhouse v. Hopkins where the
6 Court recognized that in certain limited situations in a
7 Title VII disparate treatment case, when the plaintiff
8 presents direct evidence of an unlawful motive that was
9 actually relied upon in making a decision, the burden of
10 causation then shifts to the defendant.

11 The Price Waterhouse mixed-motive framework
12 applies to a narrow subset of cases. The Court recognized
13 early on in Title VII that most of these cases will be
14 circumstantial evidence cases, and as a way to deal with
15 that, the McDonnell Douglas case set up a framework for
16 considering the vast majority of those cases. In the few
17 cases where there is direct evidence of illegal animus
18 tied to an employment decision, the Court said that the
19 defendant must now prove that it would have made the same
20 decision either way.

21 QUESTION: And what is your definition of direct
22 evidence, Mr. Ricciardi?

23 MR. RICCIARDI: There's two definitions that
24 we've briefed, Your Honor. Both of them I think are
25 helpful. The first one is quoted in the SG's brief at

1 page 26, and that's from the EEOC guidance. And I'll read
2 that. Any written or verbal policy or statement made by a
3 respondent or a respondent official that on its face
4 demonstrates a bias against a protected group and is
5 linked to the complained-of adverse action.

6 We proposed, Your Honor, in our blue brief a
7 slightly different formulation, but I believe it gets you
8 to the same place. On page 41 of our blue brief,
9 borrowing from the First Circuit Febres case, a three-
10 part test which we think gets you to the same place. The
11 first is there has to be a statement by a decisionmaker;
12 second, that directly reflects the alleged animus; and
13 third, that it bears squarely on the contested employment
14 decision.

15 QUESTION: The first -- the first of those three
16 is -- goes beyond what the -- what the Government -- the
17 EEOC guideline would require, doesn't it? As I understand
18 the EEOC guideline, it doesn't require that -- that the
19 indication come from a decisionmaker.

20 MR. RICCIARDI: You're correct, Your Honor. The
21 words of the EEOC are the respondent or respondent
22 official. Yes, so it does go a bit beyond. I -- I --

23 QUESTION: Although the fact that it has to bear
24 upon the decision, it's hard to get there without --

25 MR. RICCIARDI: Well, I think maybe --

1 QUESTION: -- pinning it on a decisionmaker
2 somehow.

3 MR. RICCIARDI: What could be contemplated I
4 guess is a respondent official, who's maybe even higher
5 than the decisionmaker, makes the statement.

6 QUESTION: Yes.

7 MR. RICCIARDI: The Civil Rights Act of 1991
8 sets out a new section, and we've set it out in appendix
9 A.

10 QUESTION: Of your brief?

11 MR. RICCIARDI: Of the brief, of the blue brief,
12 Your Honor. It sets out 42 U.S.C. 2000e-2(m), which was
13 107(a) of the Civil Rights Act. And that described that
14 an unlawful employment practice would be established when
15 the complaining party demonstrates that race, color,
16 religion, sex, or national origin was a motivating factor
17 for any employment practice. And then this is the key
18 language: even though other factors also motivated the
19 practice.

20 This indicates that Congress intended for there
21 to be the distinction, recognized in Price Waterhouse,
22 between the standard McDonnell Douglas pretext case, which
23 you prove under 2000e-2(a), and the mixed-motive case
24 which was first recognized in Price Waterhouse.

25 The second part of the text that evidences this

1 distinction is section 107(b) of the Civil Rights Act
2 which is codified there in that same place at 2000e-
3 5(g)(2)(B), and that talks about where an individual
4 proves a violation under 2(m) that -- and where the
5 employer does not succeed in proving -- excuse me -- where
6 the employer does succeed in proving the affirmative
7 defense, then in that case the plaintiff is entitled only
8 to declaratory relief, injunctive relief, and attorneys'
9 fees demonstrated to be directly attributable only to the
10 pursuit of a claim under section 2000e-2(m).

11 QUESTION: Mr. Ricciardi, would that
12 demonstration by the defendant also have to be made by
13 direct evidence? The words Congress used is the same.
14 One is respondent demonstrates, and the other is the
15 plaintiff demonstrates.

16 MR. RICCIARDI: The word demonstrate is used
17 twice, Your Honor, but I do not agree that the respondent
18 or the defendant or the employer has any heightened
19 standard. And the reason I say that is because in order
20 to interpret the burdens of proof, this Court historically
21 looks at background principles. And when we look at this
22 statute, using the Court's background principles of
23 McDonnell Douglas for the standard pretext case and Price
24 Waterhouse for the standard mixed-motive case, there's no
25 heightened evidentiary standard for the respondent or the

1 employer.

2 QUESTION: Well, the question whether there is,
3 you would be suggesting a rule that, as far as I know, is
4 alien to our law, that is, to make a distinction between
5 direct evidence and circumstantial evidence. You can have
6 direct evidence by a liar and you can have highly
7 convincing circumstantial evidence. So why would the law
8 in this one area make a distinction that, as far as I
9 know, is not made elsewhere?

10 MR. RICCIARDI: Your Honor, I believe the
11 distinction is made because the shifting of the burden to
12 the defendant in employment cases is an unusual thing. It
13 does not happen in other areas of the law. Courts need a
14 bright line rule in order to --

15 QUESTION: It is -- it is unquestionably -- it
16 was unquestionably made in Price Waterhouse, wasn't it?

17 MR. RICCIARDI: Absolutely, Your Honor.

18 QUESTION: I mean, that's what it said.

19 MR. RICCIARDI: Price Waterhouse --

20 QUESTION: What -- what was it -- the it that
21 was said in Price Waterhouse? Not in the -- not in the
22 plurality opinion. The direct evidence rule doesn't come
23 out of a plurality --

24 QUESTION: Concurring opinion.

25 MR. RICCIARDI: Well --

1 QUESTION: It came out of a concurring opinion
2 that bore my name, did it not?

3 (Laughter.)

4 MR. RICCIARDI: That is correct, Your Honor.

5 QUESTION: Yes. And I don't think it appeared
6 in the plurality opinion, nor in Justice White's
7 concurring opinion, did it?

8 MR. RICCIARDI: No, it did not, Your Honor.
9 What I believe the --

10 QUESTION: I know a number of courts have
11 followed it, but I -- it's hard to extract a -- a rule
12 under those circumstances.

13 MR. RICCIARDI: I -- I --

14 QUESTION: Congress, in making its amendments in
15 1991, did not mention anything about direct evidence, did
16 it?

17 MR. RICCIARDI: No, it did not, Your Honor.

18 And -- and I think there are two things that --
19 that we have to look at. One of them is the plurality
20 opinion did in -- in note 13 state that -- that its
21 formulation was not meaningfully different from Justice
22 O'Connor's concurrence. For what -- for what that's
23 worth, that's there. And another way I think to look at
24 the direct evidence picture is that six Justices of the
25 Supreme Court all found that the facts in Price Waterhouse

1 were sufficient to have a mixed-motive burden shift.

2 QUESTION: Fine. So that's what I took the
3 statement -- I mean, far be it from me to characterize
4 somebody else's opinion, but I thought the statement was
5 simply saying, and here this is an added feature that
6 shows how right the majority is and that's true in that
7 case, but what is there that suggests that it's not just
8 an added feature showing the majority was right in that
9 case, but that you have to have it and can't have anything
10 that isn't direct evidence.

11 MR. RICCIARDI: Well, Your Honor, I think --

12 QUESTION: Where does it say that?

13 MR. RICCIARDI: I think we get that from going
14 back to background principles. The McDonnell Douglas
15 decision, which has still been followed and has been
16 referred to by this Court, is the rubric that's used for
17 circumstantial evidence cases.

18 QUESTION: But wait I didn't -- then I probably
19 am unclear about it. What I thought happened is that
20 Price -- that McDonnell Douglas governs a circumstance
21 where a plaintiff puts on a case, however he puts it on.
22 Once you show the McDonnell Douglas factors, you can get
23 to the jury unless, of course, the defendant puts
24 something on. And once the defendant puts something on,
25 McDonnell Douglas bursts and goes away. Now, am I right

1 about that or not?

2 MR. RICCIARDI: That is correct, Your Honor.

3 And the plaintiff --

4 QUESTION: All right. Then -- then I don't see
5 what McDonnell Douglas has to do with this because I would
6 think 90 percent of the cases in which there is a mixed
7 motive are going to come up because the defendant will
8 say, I did it for a different reason, and the plaintiff
9 will come back and say, you did it for both reasons. So I
10 think in 90 percent of the cases, we're not going to have
11 any McDonnell Douglas involved.

12 MR. RICCIARDI: I -- I --

13 QUESTION: It will just be -- am I right or not?

14 MR. RICCIARDI: I -- I don't agree with that,
15 Your Honor. The reason is because in -- if you look at
16 the facts on the classic mixed-motive cases -- Mt.
17 Healthy, for example, and -- and that was a case
18 specifically relied upon in Justice White's concurrence.
19 There we had a school district in a written letter making
20 an admission, yes, we considered the illegal aspect of
21 your First Amendment rights. And then we have Price
22 Waterhouse where, on the facts it's uncontested that the
23 written evaluations by those partners, which were relied
24 upon by the policy board, used sexual stereotypes.

25 QUESTION: Did -- did the defendants in those

1 two cases put on any evidence?

2 MR. RICCIARDI: I would -- I would imagine they
3 absolutely did, Your Honor.

4 QUESTION: Yes, so do I. So neither of those
5 cases does McDonnell Douglas have to do with anything,
6 because they aren't involved in the case I gather, if I'm
7 right, once the defendant put on some evidence.

8 MR. RICCIARDI: That is correct, Your Honor.

9 QUESTION: All right. So my question really is
10 since McDonnell Douglas doesn't have much to do with the
11 cases in which mixed motive comes up, why does -- why are
12 you talking about McDonnell Douglas? What has McDonnell
13 Douglas to do with the background rule? Why isn't the
14 background rule just -- well, what your opponents are
15 saying?

16 MR. RICCIARDI: Well, because, Your Honor, the
17 background rule enables us to deal with the cases where
18 there is not direct evidence of the illegal motivation,
19 and those cases will be rare. And if you look at Mt.
20 Healthy and if you look at the facts -- Price Waterhouse
21 facts, in the concurrence by Justice O'Connor in Price
22 Waterhouse, it says, the employer has created uncertainty
23 as to causation by knowingly giving substantial weight to
24 an impermissible criteria. I believe these cases will be
25 few and far between where you --

1 QUESTION: Mr. Ricciardi, can we go back to the
2 background, which I find very difficult to understand
3 because if an elevated proof standard is wanted, then
4 courts not uncommonly will say, we will require you to
5 prove something by more than a mere preponderance. We
6 will require you to prove this by clear and convincing
7 evidence. Then I can understand. But a line between
8 direct evidence and circumstantial evidence -- is there
9 any other area where direct evidence counts for more than
10 substantial evidence just by virtue of being direct?

11 MR. RICCIARDI: I have not uncovered ones, Your
12 Honor. I think that is what the Court in Price Waterhouse
13 was faced with, and I think it's a bright line rule that
14 would give our trial judges the ability --

15 QUESTION: Then how do you get it out of Price
16 Waterhouse when it's in the opinion, as Justice O'Connor
17 said? Her opinion. There were four people who didn't say
18 direct evidence. There was Justice White who said a
19 substantial factor, but didn't say direct evidence.
20 That's a lot to load on two words in a concurring opinion.

21 MR. RICCIARDI: Well, Your Honor, unfortunately
22 because of the fractured opinions there, we have had to
23 rely on, besides the actual words on the page, we had to
24 rely on, what -- the way the circuits have read the case
25 -- and they have all consistently -- almost all

1 consistently read it as having a heightened evidentiary
2 standard and --

3 QUESTION: Well, wouldn't heightened ordinarily
4 be clear and convincing evidence, whether direct or
5 circumstantial?

6 MR. RICCIARDI: Your Honor, it might ordinarily,
7 but I believe in employment cases it's very difficult to
8 do. In employment cases we have stray remarks, we have
9 rumors, we have maybe documents that are --

10 QUESTION: Sure. But doesn't -- doesn't a
11 standard like clear and convincing address that kind of
12 problem? If all you have are stray remarks that, you
13 know, cannot be taken as company policy, et cetera, then
14 you're going to have a hard time getting to the clear and
15 convincing standard. I don't see why the -- the quality
16 of evidence, direct or indirect, is -- is necessary to
17 address that problem as opposed to the -- to the quantum
18 of proof, clear and convincing versus preponderance.

19 MR. RICCIARDI: Your Honor, I think that you're
20 putting too much weight on the shoulders of the trial
21 judges. In our case, our trial judge was convinced that
22 there was direct evidence, and he was sifting through what
23 we believed amounted to nothing more than a pile of
24 circumstantial evidence. And I think had he had the
25 guidance of the bright line rule, it would have been

1 easier for him

2 QUESTION: Can you explain to me -- and you're
3 the expert on this, I'm not. You try a lot of these
4 cases. When I look at it, being naive in this area, since
5 I'm not trying a lot of them, I think, well, this -- this
6 seems to make perfectly good sense. A plaintiff comes in
7 and has to show that the bad motive was a motivating
8 factor. Well, once the plaintiff has shown that, why
9 shouldn't the plaintiff win? And if, by the way, the
10 defendant can come in and show that she would have been
11 fired anyway because she was a bad typist, well, then
12 maybe he shouldn't have to pay damages.

13 MR. RICCIARDI: Your Honor, going back to the
14 text of the statute, 2(m) defined the plaintiff's duty as
15 showing that the illegal criteria was a motivating factor.
16 But the vast majority of cases fall under 2(a)(1) where
17 the plaintiff must show that he or she was discriminated
18 against because of sex, gender, race, whatever. So that
19 is a but for standard in 2(a), which means that the
20 plaintiff has to carry the ball all the way across the
21 goal line, does not shift the burden of proof to the
22 defendant.

23 QUESTION: But the burden of proof that -- that
24 you keep referring to, in effect, is the burden of proof
25 for what under the statutory scheme is -- is a partial

1 affirmative defense. What is remarkable about saying if
2 you -- if you want to claim a partial affirmative defense,
3 you have the burden of proof on it? You always have the
4 burden of proof on an affirmative defense.

5 MR. RICCIARDI: Well, what makes this
6 extraordinary, Your Honor, is that under 2(m), the
7 plaintiff never has to prove that what this defendant did
8 caused this injury. The but for is in 2(a), but in 2(m),
9 the plaintiff can say --

10 QUESTION: 2(m) is addressing something else.
11 2(m) is -- is addressing what happens if, in fact, a -- a
12 defendant wants to raise an affirmative defense, a partial
13 affirmative defense. That's all it addresses.

14 MR. RICCIARDI: Your Honor, I believe --

15 QUESTION: Well, it isn't all it -- I mean, it
16 addresses the sufficiency of -- of liability, and then it
17 goes on to address the -- the affirmative defense.

18 MR. RICCIARDI: Well, Your Honor, my response to
19 that is I believe that the Civil Rights Act incorporated
20 2(m) as a direct response and a partial codification of
21 the Price Waterhouse decision because there was no burden
22 shift under Title VII until Price Waterhouse created it.

23 QUESTION: When that was enacted, was there
24 already a considerable body of court of appeals opinions
25 which had interpreted Price Waterhouse as establishing the

1 direct evidence rule, or did they come later?

2 MR. RICCIARDI: Your Honor, I believe these are
3 cited in the -- in the SG's brief, and I believe there
4 were five circuit courts that had, between Price
5 Waterhouse and the Civil Rights Act, recognized that.

6 Your Honor, may I reserve?

7 QUESTION: Yes, Mr. Ricciardi.

8 We'll hear from Mr. Gornstein.

9 ORAL ARGUMENT OF IRVING L. GORNSTEIN

10 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

11 SUPPORTING THE PETITIONER

12 MR. GORNSTEIN: Mr. Chief Justice, and may it
13 please the Court:

14 Since 1964, Title VII's disparate treatment
15 prohibition has required a finding that a protected
16 characteristic such as gender was a but for cause of an
17 adverse employment decision. Now, the '91 amendments
18 create a special rule of liability for mixed-motive cases
19 where proof of but for cause is not required. To qualify
20 for --

21 QUESTION: How do we know that those amendments
22 apply only to mixed-motive cases? The language in the
23 statute Congress passed is pretty broad.

24 MR. GORNSTEIN: It -- the --

25 QUESTION: And in theory, it could apply across

1 the board.

2 MR. GORNSTEIN: The text that says, even though
3 other factors also motivated the practice, make clear that
4 the amendment only applies to mixed-motive cases. It
5 doesn't say, even if, which would be regardless of
6 whether, but it says, even though, which means the factors
7 were present, but that it doesn't matter. And so the text
8 makes clear that it applies only to mixed-motive cases,
9 but it doesn't address --

10 QUESTION: Well, the text makes clear that the
11 exception does, but why does 2(m) not apply to all cases?

12 MR. GORNSTEIN: 2(m) says, even though other
13 factors also motivated the -- the practice. That's what
14 2(m) says. And that -- that limits it to mixed-motive
15 cases.

16 QUESTION: It says whether or not they -- other
17 factors motivate it.

18 MR. GORNSTEIN: No. If it -- if it was whether
19 or not, it would be even if. Even though means the
20 factors were present. Other factors were present, but it
21 doesn't matter under this statute that they were.

22 Now, the text of the law doesn't address what
23 kind of evidence is sufficient to make out a mixed-motive
24 case, and it leaves that to resolution through background
25 principles as Congress typically does. Congress typically

1 does not address what kind of evidence is sufficient. And
2 the key and most relevant and pertinent background
3 principle here was that before the amendment, direct
4 evidence was required to make out a mixed-motive case.

5 QUESTION: Do you say that because that's the
6 way a lot of court of appeals determined, or do you think
7 that was a necessity by virtue of the split in the
8 opinions on this Court?

9 MR. GORNSTEIN: Two sources for that, Justice
10 Souter. One is the court of appeals' decisions, and there
11 were five between the time of Price Waterhouse and the
12 time of the '91 amendments, and that formed an important
13 part of the backdrop against which Congress --

14 QUESTION: Were those -- were those opinions
15 based on the reading of this Court as depending upon
16 Justice O'Connor's opinion where those words were used?

17 MR. GORNSTEIN: I -- I would not --

18 QUESTION: Or did the courts independently
19 create a distinction between direct and substantial
20 evidence?

21 MR. GORNSTEIN: I think that those two -- those
22 cases, for the most part, were trying to reconcile this
23 Court's decisions in McDonnell Douglas with Price
24 Waterhouse, and that's exactly the first source for where
25 we would get the background rule as well.

1 QUESTION: Well, then would you tell me --

2 QUESTION: Why would you have that background?

3 QUESTION: -- why would the court -- if that's
4 what it was trying to do, why would it resort to something
5 as extraordinary -- now that we no longer have formal
6 rules of evidence, like you need two witnesses to prove A
7 and three witnesses to prove B, why would it resort to
8 that kind of distinction between direct and circumstantial
9 rather than a heightened burden expressed as clear and
10 convincing?

11 MR. GORNSTEIN: Because it was trying to be --
12 they were trying to be faithful to this Court's decisions
13 in McDonnell Douglas and Price Waterhouse. And let me
14 explain how those two decisions fit together because in --
15 in Price Waterhouse, there was direct evidence, and six
16 Justices said that was sufficient to shift the burden of
17 proof. Now, no opinion expressly stated that something
18 other than that would be sufficient to shift the burden of
19 proof.

20 QUESTION: But only one stated that it was
21 necessary as well as sufficient.

22 MR. GORNSTEIN: That's correct.

23 QUESTION: So you had five that did not say it
24 was necessary as well as sufficient.

25 MR. GORNSTEIN: That's correct. And five did

1 not say that it would -- that anything less would be
2 sufficient, however, and that issue is resolved by
3 McDonnell Douglas and -- and that line of cases.

4 And what McDonnell Douglas and that line of
5 cases say is that in a purely circumstantial evident case
6 -- evidence case -- the plaintiff has a very light burden
7 at the outset, but that once the employer comes back and
8 puts on a nondiscriminatory explanation, the plaintiff has
9 to carry the burden of proof all the way to showing
10 pretext and but for causation. The plaintiff under the
11 McDonnell Douglas line of cases has to show but for
12 causation.

13 So when you put the two decisions together,
14 Price Waterhouse and McDonnell Douglas, the rule that
15 emerges is in -- to get into the Price Waterhouse box,
16 where you get a shift in the burden of proof, you need
17 direct evidence.

18 QUESTION: Are there cases in which a motivating
19 factor is not but for causation when it's not a mixed-
20 motive case?

21 MR. GORNSTEIN: It -- it's a mixed-motive case
22 where it's not a but for factor. That's correct.

23 QUESTION: No. I'm asking the other -- the
24 converse of that. If there is no second motive, but
25 merely there's evidence of -- of a motivating factor,

1 period, isn't that enough?

2 MR. GORNSTEIN: No. If it's -- if it's the sole
3 motive, then it would be a violation under 2000e-2(a)(1).

4 That would be a --

5 QUESTION: Would it also not be a violation of
6 this statute?

7 MR. GORNSTEIN: No, because 2000e-2(m) is
8 designed just for cases where there's more than one
9 motive.

10 QUESTION: It's designed to create a special
11 defense and a special remedy, but it doesn't say anything
12 about what it takes to prove the case, does it?

13 MR. GORNSTEIN: It leaves that to background
14 principles. And as I was saying, that's the background
15 principle.

16 The second point that's very crucial here is
17 that if there's not a direct evidence requirement, Justice
18 Stevens, the result would be that you are going to
19 effectively render superfluous 2000e-2(1) which up until
20 now has been the principal safeguard against
21 discrimination, and the reason is that 2000e-2(a)(1)
22 requires proof of but for cause. 2000e-2(m) requires
23 proof --

24 QUESTION: But I -- I still -- maybe I'm just
25 stupid, but I don't understand the difference between a

1 but for cause and a motivating factor that is not part of
2 a mixed-motive case.

3 MR. GORNSTEIN: If it's just --

4 QUESTION: If -- if the only motivating -- if
5 there's a motivating factor and there's nothing else,
6 isn't that but for causation?

7 MR. GORNSTEIN: It -- certainly it is --

8 QUESTION: And so is it if you have two, isn't
9 it?

10 MR. GORNSTEIN: -- 2000e-2(a)(1) but not -- it
11 doesn't apply where cases where it's not a but for cause.
12 That's what --

13 QUESTION: Why not? In -- in law school, in my
14 first year in torts, I learned that there's an odd case
15 where you have two hunters shooting at the same person.
16 Now, in both cases, you know, they're not actually
17 literally but for conditions, but they fall within the
18 word because. My torts teacher used to call them co-
19 causal conditions.

20 MR. GORNSTEIN: Well --

21 QUESTION: So I'm amazed that you're reading
22 because, contrary to all tort law --

23 MR. GORNSTEIN: No.

24 QUESTION: -- to mean that if you have the co-
25 causal condition, which happens to be two motives here,

1 not two hunters, that it wouldn't fall within the
2 beginning.

3 MR. GORNSTEIN: No. That -- that's a special
4 case, Justice Breyer.

5 QUESTION: Yes, it is.

6 MR. GORNSTEIN: And -- and the ordinary rule is
7 that you have to show that it's but for cause, and the
8 Court said as much in --

9 QUESTION: All right, but it's a special case
10 we're dealing with where you have two hunters -- I'm sorry
11 -- two motives. And so in that unusual two-hunter/two-
12 motive case, what the Congress did was write 2(m) to tell
13 you treat it okay for liability, but don't award damages.
14 Now, where am I wrong in that analysis?

15 MR. GORNSTEIN: The -- the key point that you're
16 missing there is that if you interpret 2000e-2(m) in that
17 way, you would be rendering superfluous 2000e-2(a)(1)
18 which requires but for cause by virtue of the because of
19 language. And if -- if under the -- that's because in
20 order to show a violation, a plaintiff would only have to
21 show motivating factor, not but for cause. It would
22 render -- no plaintiff would ever seek to prove a 2000e-
23 2(a) case. They'd always seek to prove a 2000e-2(m) case.

24 And the result would be that what up until now
25 has been the principal safeguard in literally thousands of

1 cases under Title VII would be translated -- transformed
2 into something that is almost completely obsolete, and
3 there's just nothing to indicate that Congress intended to
4 so radically change the fabric of Title VII law. And what
5 we have is a much more modest adjustment.

6 QUESTION: Would it be a radical change in our
7 law if we said that instead of direct evidence, it's clear
8 and convincing evidence?

9 MR. GORNSTEIN: That would be a very big change
10 in this Court's law if -- if this Court said that because
11 this Court has already said, under Title VII, the
12 background understanding is more likely than not, and
13 that's what the plaintiff has to show. And so the way to
14 look at this amendment is not as a very fundamental change
15 in the basic fabric of Title VII law, but a response to a
16 particular decision. That's what Congress was responding
17 to.

18 And if you'll recall in that case, there was
19 direct evidence. An employer basically admitted that it
20 had taken gender into account, and then the Court said,
21 well, the employer can get out from all liability by
22 showing absence of but -- but for cause. And Congress
23 responded to that particular decision in doing that.

24 But that didn't mean that Congress thereafter
25 went on to undertake a complete reexamination of the law.

1 It left it where it was, and where it was is in purely
2 circumstantial evidence cases, under McDonnell Douglas,
3 once the employer introduces a nondiscriminatory
4 explanation, the plaintiff has to carry the burden of
5 proof of showing pretext and but for cause.

6 If the Court has nothing further.

7 QUESTION: Thank you, Mr. Gornstein.

8 Mr. Peccole, we'll hear from you.

9 ORAL ARGUMENT OF ROBERT N. PECCOLE

10 ON BEHALF OF THE RESPONDENT

11 MR. PECCOLE: Mr. Chief Justice, and may it
12 please the Court:

13 This case, at the very middle of it, when we're
14 trying to settle instructions, the parties involved agreed
15 to instructions 1 through 9. Instruction number 9 to the
16 jury was, in fact, the 107(a) instruction. It read -- and
17 this jury instruction is found at the joint appendix 32
18 and 33. It read, the plaintiff has the burden of proving
19 each of the following by a preponderance of the evidence.
20 One, Costa suffered adverse work conditions, and two,
21 Costa's gender was a motivating factor in any such work
22 conditions imposed upon her. Gender refers to the quality
23 of being male or female.

24 If you find that each of these things has been
25 proved against a defendant, your verdict should be for the

1 plaintiff and against the defendant. On the other hand,
2 if any of these things has not been proved against a
3 defendant, your verdict should be for the defendant.

4 What I'm trying to point out is the parties at
5 that point and at that juncture had agreed that this
6 definitely was a 107(a) case and it would go to the jury
7 as such.

8 The only objection that Caesars had to
9 instructions was instruction number 10, and instruction
10 number 10 was the same action defense that aids Caesars in
11 the fact that it actually cuts down the type of damages
12 that can be awarded. In fact, monetary damages cannot be
13 awarded. That instruction aided Caesars and in no event
14 is it easy for them to now come before this Court and say
15 they were harmed by the fact that that instruction was
16 given.

17 I would point out that this is similar to the
18 Reeves case, and the reason it is similar is in Reeves,
19 the parties in that case had basically agreed that the
20 McDonnell Douglas framework would be used, and this Court
21 said since that seems to be the position of the parties,
22 we'll accept that. Well, I would submit that the same
23 thing occurred in this case. The parties agreed that this
24 is a 107(a) case, and that's -- that's the way it was
25 presented to the jury.

1 Reading 703(m), which is Title VII 200e-2(m) --
2 and that's found at the respondent's brief, page 9 -- the
3 section specifically states, except as otherwise provided
4 in this title, an unlawful employment practice is
5 established when a complaining party demonstrates a race,
6 color, religion, sex, or national origin was a motivating
7 factor for any employment practice, even though other
8 factors also motivated the practice. That's stating any
9 employment practice that -- that takes into consideration
10 any of the things listed, and in this case, it was gender.
11 So it was a gender-motivated case.

12 I would point out that when we look at this
13 statute, it talks in terms of a plaintiff having to
14 demonstrate, and the plaintiff under that terminology
15 merely had to show and bear the burden of showing a case
16 which actually would indicate that gender was a motivating
17 factor.

18 In the case that was presented to the jury,
19 there was absolutely no question that Ms. Costa showed a
20 case every bit as strong as the case and the facts that
21 were found in Price Waterhouse. Reference does not have
22 to be made to Price Waterhouse. The statute itself does
23 not talk in terms of any heightened burden placed on the
24 plaintiff, nor does it talk in terms of substantial
25 evidence. It goes right to what it says on its face that

1 a plaintiff merely has to demonstrate.

2 QUESTION: And what do you -- what do you
3 respond to the argument made by the Government if -- that
4 if that is what it means and if it does not embody the
5 understood requirement of direct evidence, it effectively
6 supplants (a)(1). It -- nobody would -- would try to
7 prove a case under (a)(1), which is what has been the
8 traditional approach.

9 MR. PECCOLE: In our brief, Your Honor, we -- we
10 actually took the position that the language in 703(m)
11 does, in fact, supplant the language in 701(a).

12 QUESTION: So you -- you accept that argument.

13 MR. PECCOLE: 703(a). Excuse me. But --

14 QUESTION: Well, that's a massive change in --
15 in --

16 MR. PECCOLE: I -- I would like to maybe --

17 QUESTION: I mean, it just shifts the burden to
18 the employer to prove nondiscrimination effectively.
19 That's a -- that's a very big change.

20 MR. PECCOLE: I would like to backtrack just a
21 little bit on that. I think there's an explanation
22 necessary. It has to be more detailed.

23 In the Price Waterhouse case, the plurality
24 actually had said, first of all, the motivating factor was
25 the -- the motive involved.

1 The plurality also said that the -- the words
2 because of, in 703(a), really didn't mean because of. It
3 said something along the lines that it does not mean
4 solely because of. That's how the plurality basically got
5 to motivating factor. The language motivating factor of
6 the plurality ended up in 703(m), and I think you could
7 also say that it -- the definition given by the plurality,
8 to because of in 703(a), actually came over into 703(m)
9 too.

10 QUESTION: But they are still contradictory. I
11 mean, (a)(1) would require in a mixed-motive case -- okay
12 -- if -- if you apply (a)(1) to a mixed-motive case, it
13 would require the plaintiff to show that the -- the
14 improper motive was an effective cause and that the
15 employer would not have dismissed this person anyway.
16 Whereas, if the new 2(m) governs, it's just the opposite.
17 Once you show an improper motive, it is up to the employer
18 to show that if he wishes to get off, he would have taken
19 the same action anyway. So I -- the -- the two are just
20 not -- not compatible.

21 MR. PECCOLE: I think the Ninth Circuit's
22 approach is the best. The Ninth Circuit actually said
23 that if you show a single-motive type case which falls
24 under 703(a), that it goes to the jury as a because of.
25 There is just absolutely no question that is the better

1 approach.

2 The other approach is, if there is a mixed
3 motive -- and these are decisions that have to be made by
4 the judge before the instructions go to the jury. If
5 there are mixed motives, then it goes to the jury as a
6 703(m).

7 In this case, the mixed motives were there. It
8 did go to the jury as a 703(m), and it also included the
9 defense that Caesars had available under 706(g) (2) (b).

10 QUESTION: And as I understand --

11 QUESTION: Am I right --

12 QUESTION: -- as I understand (m), it isn't a
13 question of shifting the burden to the defendant. The
14 plaintiff wins at that point. If the plaintiff
15 demonstrates sex is a motivating factor, at that point
16 plaintiff wins. The affirmative defense doesn't take away
17 the plaintiff's victory. It just limits the remedy. So
18 the defendant can't get off the hook. As (m) is
19 structured, it's not that you're loading on the defendant
20 an extraordinary burden of showing nonliability. If the
21 plaintiff makes the demonstration that (m) calls for,
22 plaintiff is the winner, and the only thing that -- the
23 only function of the defense is to limit the remedy.
24 That's how I understand --

25 MR. PECCOLE: I -- I agree with you

1 wholeheartedly on that. In fact -- and that's what
2 occurred in this case. If you look at the verdict form,
3 which is at the joint appendix on page 40, you'll see that
4 what happened is the jury was instructed exactly the way
5 you just commented. If the plaintiff had established by a
6 preponderance of an evidence that gender was a motivating
7 factor, then the plaintiff proved its case and should win
8 right then and there.

9 And if you see, you will find in number 2 of the
10 interrogatories, it asks the question, do you find that
11 the defendant's wrongful treatment of plaintiff was
12 motivated both by gender and lawful reasons? And the jury
13 marked yes. But had they marked no, if you look down to
14 the next sentence, it says, if your answer was yes, answer
15 the next question. If your answer was no, proceed to
16 question number 4, which was the damage section.

17 QUESTION: Well, Mr. Peccole, what is your
18 understanding of the relationship between 2(a)(1) and
19 e-2(m)?

20 MR. PECCOLE: e-2(m), Your Honor? Let me just
21 --

22 QUESTION: The -- the one we've been talking
23 about.

24 MR. PECCOLE: The relationship between the two
25 statutes?

1 QUESTION: Between the two sections, yes.

2 MR. PECCOLE: Okay. First of all, the
3 relationship, if we're talking about 703(m), what -- what
4 happens there is the plaintiff --

5 QUESTION: Why don't you refer to the statutory
6 numbers that -- that are in the -- the appendix.

7 MR. PECCOLE: Yes. That's -- that will be a
8 little bit easier.

9 Okay. 703(m) is 42 U.S.C. 2000e-2(m).

10 QUESTION: Right.

11 MR. PECCOLE: What -- what that new statute did
12 is it placed on the burden of the plaintiff to show -- and
13 I -- and this -- this burden never changes. It never
14 changed with McDonnell Douglas. It does not change here.
15 The -- the burden is always on the plaintiff to prove by a
16 preponderance of the evidence that gender was a motivating
17 factor. So what happens is once the plaintiffs have
18 proved that, he's proved his case.

19 The problem now shifts, and it's -- it's an
20 affirmative defense. It's not a shifting of burdens. An
21 affirmative defense comes into play under 42 U.S.C. 2000e-
22 5(g)(2)(B) which -- which allows the employer to come in
23 and show that if they took the same action, even though
24 there was a gender-motivating factor, then it reduces
25 their damages or the possibility --

1 QUESTION: Well, are there any -- are there any
2 cases that are covered by e-2(m) that are not covered by
3 2(a)(1)?

4 MR. PECCOLE: My answer in that case would have
5 to be that conceivably -- the Ninth Circuit did say this,
6 that there are those cases. The cases are when you have a
7 -- a single-motive case. They got back into the
8 distinction between single and mixed-motive. If you have
9 a true single-motive case, then it would come under the --
10 the section 703(a) which is 42 2000-2(a)(1).

11 QUESTION: Does it matter?

12 QUESTION: In your view, what -- what did
13 Congress accomplish by 703(m), also known as 2000e-2(m)?

14 MR. PECCOLE: I think what they accomplished
15 was, first of all, they clarified Price Waterhouse from
16 the standpoint that there was no heightened burden, no
17 direct evidence burden, no substantial factor burden. It
18 did that for sure.

19 The next thing that it did is it -- it made it
20 so a plaintiff would bear the burden of having to
21 establish that gender played a motivating factor. And
22 that is in any employment decision, not just, you know,
23 the very limited type or anything like that. It says, any
24 employment decision. And that becomes an unlawful
25 employment action.

1 QUESTION: Is -- is this correct, that McDonnell
2 Douglas survives on your reading in a case in which the
3 defendant does not go forward with anything? The
4 plaintiff puts in enough to make a prima facie case.
5 Defendant sits mute. McDonnell Douglas controls the
6 result there. If the defendant does go forward with
7 something at that point -- and -- and here I'm not sure of
8 this, but I think -- by definition, it then becomes a
9 mixed-motive case, doesn't it? Under (m)?

10 MR. PECCOLE: I believe it does.

11 QUESTION: Okay.

12 MR. PECCOLE: I -- I think --

13 QUESTION: So McDonnell survives in the case of
14 the mute defendant. In the non-mute defendant, (m)
15 governs everything.

16 MR. PECCOLE: Let me see if I can answer.
17 McDonnell Douglas, as has been suggested -- it's used at
18 the very preliminary stage of a -- of a case. McDonnell
19 Douglas at some point in that decision then bursts. It
20 goes away. And so what you're left with is the 71 -- or
21 703(a) and the 703(m).

22 Now, I'm -- here I'm -- again I'm relying on
23 what the Ninth Circuit said. They are still giving
24 McDonnell Douglas cases some deference, but what they are
25 saying in fact is yes, once you're past that stage,

1 basically the 703(m) cases will come into play. That
2 will be the instructions to the jury.

3 QUESTION: Does it -- does it -- just for
4 clarifying in my mind, does it matter or doesn't it matter
5 whether you say (m) governs a separate set of cases? When
6 I came in, I thought the answer to that was no, it
7 doesn't, that (e) governs every case because the cause can
8 govern the two-motive cases too, and that in (m) Congress
9 was simply clarifying that there could be such cases, and
10 then they go on to say what happens.

11 But the Government made a very good point and
12 said no, I shouldn't look at it that way and I should look
13 at it as if (e) governs the single-motive case and then
14 (m) comes in to govern the dual-motive case. And that was
15 a good argument too.

16 And so what I'm asking you, who understands this
17 a little better than I do, does it matter?

18 MR. PECCOLE: No.

19 QUESTION: No, it doesn't matter. That's it.

20 QUESTION: Well, how many -- what percentage of
21 all these cases, do you think, are single-motive cases?

22 MR. PECCOLE: To guess, I would -- I would say
23 probably a vast majority of the cases are. They're -- or
24 not single. Excuse me. Those are mixed-motive cases.

25 QUESTION: Well, you don't suggest the defendant

1 always admits liability, do you?

2 MR. PECCOLE: No.

3 QUESTION: If there's only issue about one
4 motive, it's always that the defendant has some kind of
5 defense in every case.

6 QUESTION: If he stands mute, he -- he loses. I
7 mean, under McDonnell Douglas, if the plaintiff comes in
8 with -- with a claim that this was the motive and the --
9 and the defendant doesn't come up with anything, he loses,
10 doesn't he?

11 MR. PECCOLE: Yes.

12 QUESTION: So any case that goes forward is a
13 mixed-motive -- is a mixed-motive case.

14 MR. PECCOLE: Yes.

15 QUESTION: Yes.

16 MR. PECCOLE: Yes. And -- and the only thing --
17 the only time that I could see otherwise would be a -- a
18 specific instance where, for example, you have working
19 women in a -- in a department. The employer comes in and
20 says we have to make a layoff because we're -- we're in
21 dire straits. We can't afford it. They lay off that
22 whole division, and then 2 weeks later they hire a whole
23 male division. I think that you have the single motive
24 there and -- and you -- those are the only kind of cases I
25 can think of.

1 QUESTION: Yes, they settle, don't they?

2 MR. PECCOLE: Yes.

3 (Laughter.)

4 MR. PECCOLE: I -- I would entertain any other
5 further questions.

6 I think that one -- one other point I would like
7 to make is that 703(m) and the way the Ninth Circuit has
8 approached it, has made it simple and easy for the judges
9 to handle, for the trial attorneys to handle, and for the
10 jury to handle through instructions. It's a -- it's a
11 much easier way of handling these type cases.

12 It -- it's like any other civil case basically.
13 Plaintiff has to come in and show by a preponderance of
14 the evidence that it's entitled to what it's -- it's
15 saying it's entitled to, that certain things occurred.
16 Then the defense can either sit back and say, well, wait a
17 second, you didn't prove your case, or the defense can
18 say, well, maybe there's a motivating factor here. Even
19 after I presented valid reasons for the termination, for
20 example, then what they'll do is they'll say, well, maybe
21 I want this instruction that limits my damages. But it --
22 it's a simple structure, and we have got to get to that.
23 I mean, it is --

24 QUESTION: But if you -- if you --

25 MR. PECCOLE: -- so chaotic out there in the

1 circuits right now, it's just unbelievable.

2 QUESTION: If you were right, Mr. Peccole, about
3 (m) taking over the field so that every case becomes a
4 mixed-motive case, why would Congress have added not even
5 if, but even though other factors also motivated the
6 practice?

7 MR. PECCOLE: I don't think it has anything
8 actually to do with the mixed-motive. I think what it is
9 -- they're saying is even if that -- that kind of evidence
10 is present. In any event, you succeed.

11 QUESTION: Well, if they said whether or not,
12 then --

13 MR. PECCOLE: Yes.

14 QUESTION: -- I would see your point clearly.
15 But they didn't say whether or not. They said even
16 though, which seems to assume that two -- at least two
17 motivating factors have been shown: one, sex; two,
18 another motive -- another even though another motivating
19 factor existed.

20 MR. PECCOLE: I think if you read the any
21 employment practice means any. And I think what it does
22 is it takes away from that last sentence or phrase. What
23 it's done is it's basically said any employment practice
24 where you can show that gender, for example, is a
25 motivating factor, you've proven your case. It doesn't

1 make any difference whether there's other factors present,
2 whether they're legitimate or illegitimate.

3 QUESTION: Thank you, Mr. Peccole.

4 Mr. Ricciardi, you have 2 minutes left.

5 REBUTTAL ARGUMENT OF MARK J. RICCIARDI

6 ON BEHALF OF THE PETITIONER

7 MR. RICCIARDI: I'd like to call the Court's
8 attention to the joint appendix, page 17, the middle of
9 the page. It's the jury instructions colloquy. The court
10 says, all right, may I hear from the defense? And I say,
11 yes, Your Honor. We have no objections to the court's
12 instructions 1 through 9. I believe this is not a mixed-
13 motive case, and under Price Waterhouse, direct evidence
14 is required.

15 I should have said 1 through 8. There's no
16 question about that. I don't think that's fatal to this
17 appeal for several reasons.

18 There's no question that the trial judge was on
19 full notice of my position that it was not a -- it was not
20 a Price Waterhouse case.

21 QUESTION: You also should have said, I believe
22 this is a mixed-motive case, not I believe this is not,
23 shouldn't you? You had a bad morning I think.

24 (Laughter.)

25 QUESTION: Did you think it was a mixed-motive

1 case or not?

2 MR. RICCIARDI: No. No, Your Honor, it was not.
3 It was a McDonnell Douglas case. We should have gotten --
4 if you look back to the actual jury instruction that was
5 given, number 7 on page 32 --

6 QUESTION: I see. Okay.

7 MR. RICCIARDI: It was not a Price Waterhouse
8 case. That's why I'm here today. I've been living with
9 this for many years.

10 But jury instruction number 7 was the 2(a)(1)
11 because of language, and the trial judge was on notice
12 from our colloquy on my motion for judgment as a matter of
13 law, which starts on page 15, that I was objecting that
14 the prima facie case hadn't been shown. There was no jury
15 issue raised to show pretext.

16 Furthermore, the Ninth Circuit, both the panel
17 and the full en banc court, passed on the propriety of the
18 mixed-motive instruction and never once had any problem
19 with the way I had preserved the objection.

20 And then finally, in this Court, in the -- in
21 the petition for certiorari, we formulated the question,
22 and in the opposition, which I believe is an optional
23 filing, the opposition to the petition for certiorari
24 raises nothing about instruction number 9 or the 2(m)
25 formulation. And it was only for the very first time in

1 any of these many appeals was it raised in the merits
2 brief. So I believe --

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Ricciardi.

5 The case is submitted.

6 (Whereupon, at 11:55 a.m., the case in the
7 above-entitled matter was submitted.)

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