

HBA CONTINUING LEGAL EDUCATION

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TYPE OF CASES AND THEIR VALUES

Presented By

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I. SCOPE OF PAPER

II. CASE SELECTION IN EMPLOYMENT CASES

From the plaintiff's perspective in employment cases, the case selection process is probably the most important part of the practice. No matter what your skills are as a lawyer, if you take the wrong cases, you will not have a successful practice.

A. Client Interview

During an initial interview with a client, you should obtain some basic information about the case. First, find out what the client is claiming the employer has done. Second, you should learn why the employee thinks what the employer did was wrong. At this point, it is critical to separate actions which the employee considers "unfair" from actions that can be considered unlawful. You should also learn whether the employer gave the employee a reason for the action taken, and whether the employee believes that the reason given by the defendant is false. If so, you should obtain all information supporting the employee's reason why he or she believes the reason to be false. You should also question the employee on what he or she thinks the real reason is for the action taken.

During the initial interview, you should be considering a number of different wrongful discharge claims which may be available:

- Discrimination under Title VII;
- Discrimination under the Texas Labor Code;
- Section 1981 race discrimination
- Age Discrimination;
- Disability Discrimination;
- Retaliatory Discharge, including Title VII retaliation, workers' compensation retaliation, and FMLA retaliation;
- Breach of Contract;
- *Sabine Pilot* wrongful discharge
- *A Sarbanes-Oxley* whistleblower cause of action
- ERISA interference claim
- FLSA claims

In evaluating a claim for wrongful discharge, however, you should also keep in mind that allegations of unlawful job discrimination may also give rise to common law causes of action apart from wrongful discharge such as:

- Assault
- Intentional infliction of emotional distress
- Invasion of privacy
- Defamation
- The Violence Against Women Act, 42 U.S.C. §13931

1. Obtain Background Information.

In addition to obtaining information regarding the defendant's liability, you should also obtain some background information about the client, including an educational background and a complete work history. You should also inquire into whether the client has ever been terminated from any previous jobs. Also, you should ask whether the client has ever filed any previous lawsuits. Finally, you should obtain a complete criminal history from the client.

During this interview it is important to obtain relevant documents, including:

- Any employment agreement the client had with the employer
- Client's diary or notes regarding his or her employment
- Client's tax returns
- EEOC documents
- Unemployment compensation documents
- Personnel file
- Employee evaluations
- Employee handbook
- Arbitration Agreement
- Company Dispute Resolution Program
- Company benefit package
- All company policies regarding applicable employment protection laws.
- Emails
- Tape recordings.
- Medical records
- Psychological records

B. Conduct Witness Interviews

In addition to information obtained from the employee, you should obtain the names of witnesses with their addresses, telephone numbers, and what knowledge the witness may have concerning the case. Witness interviews are critical since employment cases are seldom won by the Plaintiff's testimony alone. Generally, in an employment case, if a witness cannot verify what your client says, you have an uphill battle. It is not unusual for a potential client will tell me that a certain witness will provide supportive testimony, when in fact the witness does the opposite. On the other

hand, sometimes witnesses provide facts that the client did not know, and which may be helpful to the client's case.

There are of course limitations on contacting witnesses. Generally the ethical rules prohibit a lawyer from contacting an opposing party without the consent of that party's lawyer. *See* Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct. With a company, the question is who is the party? Some defendants will claim that contact with any employee of the defendant is prohibited. Certainly, the prohibition applies to managerial employees or other employees who may make the company vicariously liable for their actions. Unless the employee is a low level employee (non-management), however, I usually will not contact current employees of the company. Contact with former employees, on the other hand, is rarely prohibited and can provide valuable information and assistance. *See* Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, cmt. 4.

III. EVALUATION OF THE MERITS OF THE CASE

Evaluation of the merits of an employment case is complicated. First, you must look at the case not only through the eyes of the judge in evaluating the legal merits and analyzing all potential laws that would apply to the case. You must also be able to evaluate the case through the eyes of the jury in evaluating disputed facts regarding the case. Because this is a particularly difficult analysis, care must be taken to be very thorough and spend enough time to evaluate the client, the case law applicable to the client's claim, and the facts. The mistake that most plaintiff lawyers probably make when they take the wrong case is not spending enough time evaluating the case, and more specifically, not spending enough time with the potential client.

A. The Client

The client is Exhibit A in any employment case. I have never seen an employment case where the jury did not like the client, but still found in favor of the client. More importantly, if you don't like the client, don't take the case. The relationship between the client and attorney is absolutely critical. Employment cases are particularly emotionally charged. If you take the case, you will spend many hours, if not days, with this client. If you don't like the client, you will be miserable. If you don't like the client, you won't be able to make an effective and sincere presentation on behalf of the client. Finally, if you don't like the client, how can you expect the jury to?

B. Proving Causation

Under recent developments from the United States Supreme Court in the Fifth Circuit there are now three ways for proving causation in discrimination cases. Also, because the causation analysis in discrimination cases has typically been employed in

other wrongful discharge cases, these new developments will likely find their way to other wrongful discharge cases as well.

There is, however, no easy way of proving discrimination. As the Seventh Circuit has explained:

Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.

Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987).

1. Direct Evidence - the Hardest Way

Traditionally, the plaintiff has always had the opportunity to prove discrimination directly. Direct evidence is such “evidence, which, if believed, proves the fact [of causation] without inference or presumption.” *Brown v. Ismus Electric Power Assn.*, 989 F.2d 858, 861 (5th Cir. 1993). In discrimination cases, direct evidence includes any statement or written document showing a discriminatory motive on its face. *Portis v. First Nat. Bank of New Albany, MS*, 34 F.3d 325, 329 (5th Cir. 1994). *Cf. Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 402 (5th Cir. 2000).

Most of the time this would involve a comment by one involved in the process of making the challenged decision.¹ In such cases, the test for direct evidence is particularly strict. In order to constitute direct evidence, there must be evidence of a remark “(1) related to the plaintiff’s protected class, (2) close in time to the employment decision at issue, (3) made by an individual with authority over the specific

¹ There are other, less typical, instances of direct evidence. For example, an affirmative action plan or “balanced workforce program” can constitute direct evidence of discrimination. *See Horn, et al. v. Xerox*, 347 F.3d 130 (5th Cir. 2003) (balanced workforce program); *Bass v. Bd. Of County Comm’rs, Orange County, Fla.*, 256 F.3d 1095, 1110 (11th Cir. 2001) (affirmative action plan).

employment decision challenged, and (4) related to the employment decision at issue. See *Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). See also *Lowe v. FDIC*, 846 F.Supp. 557 (S.D. Tex. 1994); *Brown v. Ismus Electric Power Assn.*, 989 F.2d 858, 861 (5th Cir. 1993).

The standard that the remark had to be about the specific decision at issue often meant that otherwise highly probative evidence did not constitute direct evidence. For example, racial epithets, while certainly probative of discrimination, rarely constitute direct evidence because they were usually made in a vacuum and not with reference to a specific employment decision. See *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995) (gender slur did not constitute direct evidence of discrimination); *Rubinstein v. Administrators of Tulane Educ. Fund*, 218 F.3d 392, 400-01 (5th Cir. 2000) (ethnic and religious slurs and stereotypical remarks insufficient to prove discrimination); *Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (comment by decisionmaker that the school had “a problem . . . with past black coaches, and if there was another problem, no matter what it was, that he would do his best to get rid of me, from day one” too remote in time and not specific enough on the decision not to renew plaintiff’s contract to demonstrate discrimination).

2. Pretext - the Traditional Method

Traditionally, to prove causation circumstantially in a wrongful discharge case, the Plaintiff’s attorney had to focus on the reason given to the employee for the discharge. Under such analysis, the attorney should carefully review in detail any information that the client has that the reason for discharge is false. Moreover, you should find out if the defendant has replaced the client, and obtain as much information about the client’s replacement as you can.

a. Whether Pretextual Proof of All of Employer’s Stated Reasons Is Necessary

There has been some issue with respect to whether a plaintiff needs to disprove all of the employer’s reasons for the adverse employment action. As one court has noted, generally the employee has the burden of demonstrating that each reason is pretextual. See *Ramirez v. Landy’s Seafood Inn & Oyster Bar*, 280 F.3d 576, 577 (5th Cir. 2002); *Pratt v. City of Houston*, 247 F.3d 601 (5th Cir. 2001). However, other courts have noted that when the plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find that the employer lacks credibility and therefore not believe the employer’s remaining reasons. *Chapman v. AI Transport*, 229 F.3d 1012, 1049-51 (11th Cir. 2000); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000). For example, the Fifth Circuit has noted that a jury could infer pretext from a materially false statement provided by the employer in an affidavit four months before trial. *West v. Nabors Drilling*, 330 F.3d

379, 390 (5th Cir. 2003). It now appears clear that while under *Desert Palace* and *Rachid* a case can be proven circumstantially without evidence that every reason is pretextual, to prove a case the traditional pretextual way it still requires proof that each and every reason posited is false. *See Machinchick v. PB Power*, 398 F.3d 345, 351 (5th Cir. 2005) (“plaintiff relying upon evidence of pretext . . . falters if he fails to produce evidence rebutting all of a defendant’s proffered nondiscriminatory reasons”). *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

b. General Methods of Proving Pretext

Generally, a plaintiff can show pretext by showing that the proffered reason: (1) has no basis in fact; or (2) did not actually motivate defendant’s conduct; or (3) was insufficient to warrant challenged conduct. *Dews v. A.B. Dick Co.*, 231 F.3d 1016 (6th Cir. 2000); *Freeman v. Madison Metropolitan School Dist.*, 231 F.3d 374, 379 (7th Cir. 2000). Generally, it is inappropriate for the court to second guess the employer’s business decisions. In other words, as long as the proffered reason might motivate a reasonable employer, it is not, without other evidence, automatically pretextual. *See Chapman v. AI Transport*, 229 F.3d 1012, 1030-31 (11th Cir. 2000). More specific methods of showing pretext are outlined below.

c. Inconsistent Explanations by Employer

One classic way of showing pretext is demonstrating that the employer is giving conflicting reasons for the adverse employment action. *Tolbert v. Queens College*, 242 F.3d 58, 70 (2nd Cir. 2001). *See also Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2001) (showing of pretext made where employer argues that plaintiff was rejected because of qualifications, but decision maker testified that qualifications were not the main priority); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) (stating that when a company, at different times, gives different explanations, a jury may infer that the articulated reasons are pretextual). *See also Yelverton v. Graebel/Houston Movers, Inc.*, 121 F.Supp.2d 604, 611 (E.D. Tex. 2000) (the contradictions in employer’s explanation of its motivations is evidence that jury could consider in determining whether real motivation was plaintiff’s age).

As one court noted, the shifting and belated articulation of Defendant’s rationale for an adverse employment action makes that rationale suspect. *Sheehan v. Department of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001) (court noted that “discrimination is seldom open or notorious” and that discrimination may be reasonably inferred by inconsistencies regarding the proffered reason). *But see Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000) (inconsistency between decision-maker’s testimony as to layoff selection criteria, and what his supervisor believed were the decision-maker’s criteria was not probative of discrimination particularly when

there was no evidence to discredit the decision-maker's stated criteria).

On a similar note, if the employee is fired for violating some standard or policy and yet the employer provides inconsistent explanations of the definition of a violation of the policy or standard, there is some evidence of pretext. *See also Gordon v. United Airlines*, 246 F.3d 878 (7th Cir. 2001).

d. After the Fact Explanations by Employer

Creating evidence, such as a job description emphasizing the qualities of the promoted candidate, after a complaint of discrimination is made can constitute some evidence of pretext. *Durley v. APAC, Inc.*, 236 F.3d 651, 656-57 (11th Cir. 2000). *See also Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000), *supra*; *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001) (where defendant created documentation of performance problems after the fact, and back dated her demotion so it would not look retaliatory, court found evidence of pretext).

In *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674(5th Cir. 2001), the plaintiff claimed that he was not promoted to lead detailer because of discrimination. *Id.* The employer countered that he was not promoted because of poor performance. *Id. at 683.* The Fifth Circuit found that this reason was pretext, relying in part on the fact that the incidents of poor performance occurred after the promotion decision. *Id.*

e. Disparity in Qualifications

Disparity in qualifications of the applicants for a promotion can be evidence of pretext when qualifications are reasons proffered by the employer for the promotion decision. *Durley v. APAC, Inc.*, 236 F.3d 651, 656 (11th Cir. 2000). *See also Pratt v. City of Houston*, 247 F.3d 601 (5th Cir. 2001) (noting that plaintiffs were "facially more qualified" and had "better resumes" than the white applicant that received the promotion as proof of discrimination); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808 (10th Cir. 2000) (evidence indicating that an employer misjudged an employee's performance or qualifications is relevant to the question of whether its stated reason is a pretext masking prohibited discrimination).

For example, in *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000), plaintiffs claimed that they were unlawfully denied promotions because of race and/or national origin. The defendant argued that they were not promoted because they were not the best qualified candidates. The plaintiffs demonstrated, however, that they had seniority, had received service awards, and had been rated perfectly and/or highly in preliminary candidate rankings. There was also an internal memo suggesting that some of the plaintiffs were more qualified than those selected. The appellate court concluded that a jury could reasonably conclude that the employer was dishonest when it concluded

that the selectees were more qualified, and reversed summary judgment on that claim.

f. Challenges to Layoffs

With respect to layoff decisions, some courts hold that the business need for a layoff cannot be challenged. *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 956 (8th Cir. 2001) (holding that a company need not provide evidence of financial distress in order to establish it made a “legitimate” reduction in force). Furthermore, challenging the selection decisions in a layoff can likewise be difficult to the extent that challenges have to be made to the evaluations of the employees. For example, in *Evers*, the Court noted that it was not unlawful for a company to make personnel decisions based on erroneous evaluations. *Id.* at 957. With respect to the rating process and the company’s many layoffs, in order for pretext to be shown on the basis that the employee’s rating contradicts the employee’s job evaluations, one court has held that the plaintiff must show an actual conflict between the layoff rankings and the job evaluations. *Id.* at 957. Subtle or implicit contradictions, according to the court in *Evers*, will not suffice. *Id.* Furthermore, plaintiffs’ difference of opinion with respect to their ratings, by itself, will not establish pretext. Plaintiff would have to establish that the decision-maker believed that the plaintiff had skills beyond the rating given, but chose to give the plaintiff a lower rating. *Id.* See also *Abdu-Brisson v. Delta Airlines, Inc.*, 239 F.3d 456, 470 (2nd Cir. 2001) (holding that plaintiff failed to show that the employer’s stated financial rational was pretextual where there was no evidence that employer was not concerned with containing costs or that shareholders would have been willing to accept reduced profits).

Some courts have found such layoff criteria to be age-biased in part based on evidence of the plaintiff’s merit bonuses, raises, and other documentation of their skills, experience, and past job performance. *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 429 (7th Cir. 2000) (noting that such evidence indicated that in the comparative ratings that are required in a layoff, plaintiffs could have survived if the criteria had been age-neutral).

g. Rebuttal of Poor Performance

Evidence that plaintiff received favorable evaluations from a previous supervisor does not demonstrate pretext when the employer claims poor performance based upon a more recent supervisor’s evaluations, or when the employer includes the plaintiff on a preferential hiring list where past performance is not a criteria. *Dammen v. Uni Med Medical Center*, 236 F.3d 978, 982 (8th Cir. 2001). *But See Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000), *supra*, where plaintiff’s merit bonuses, raises, and other documentation of their skills, experience, and past job performance was considered relevant.

h. Statistical Evidence

Statistical evidence, formal or informal, may be probative evidence of pretext, but rarely is enough standing alone. *Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (statistics can be very useful in a disparate treatment case, but rarely sufficient by itself); *Bogren v. Minnesota*, 236 F.3d 399, 406 (8th Cir. 2000) (evidence that plaintiff was the only black female trooper to be hired by defendant not probative of pretext because there was no evidence challenging the defendant's reasons for discharge). Moreover, it is often difficult to get a sample size large enough for statistical evidence to be probative because some courts require that the statistical evidence analyze only the treatments of comparable employees. *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 958 (8th Cir. 2001). However, the same courts sometimes recognize that company wide statistics can be probative as to as presence of a general climate of age bias. *Id.*

i. Similarly Situated Employees Treated Differently

One way of demonstrating pretext is to show that similarly situated employees outside the protected class were treated better than the plaintiff. *See Graham v. Long Island R.R.*, 230 F.3d 34,43 (2nd Cir. 2000). However, the test for "similarly situated" can be rigorous. *See Palesch v. Missouri Com'n on Human Rights*, 233 F.3d 560, 568-69 (8th Cir. 2000); *Bogren v. Minnesota*, 236 F.3d 399, 404-06 (8th Cir. 2000) (other employees must be similarly situated in all relevant respects and alleged misconduct must be of comparable seriousness); *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507 (5th Cir. 2001) (to show disparate treatment, plaintiff must show that misconduct for which plaintiff was discharged was "nearly identical" to that engaged in by other employees). For example, if the plaintiff is a probationary employee, nonprobationary employees are not similarly situated. *Bogren*, 236 F.3d at 405. Similarly, supervisors are not similarly situated with nonsupervisors. *Romo v. Texas Department of Transportation*, 48 S.W.3d 265 (Tex. App. - San Antonio, 2001, no writ). In *Clearwater v. Independent School Dist. No. 166*, 231 F.3d 1122 (8th Cir. 2000), the plaintiff argued that white teachers were equally failing in relation to punctuality as she was. However, since she failed to indicate when and how often other teachers were late, or that the decision-makers were aware of those tardies, her proof was insufficient to show more favorable treatment over others.

To determine whether someone is similarly situated, there should be a reasonably close resemblance of facts and circumstances, but not necessarily a complete identity. *See Graham v. Long Island R.R.*, 230 F.3d at 40. Determining if acts are of comparable severity requires looking at the act, the context and the surrounding circumstances. *Id.* There is no requirement that the employees engage in the exact same offense to be similarly situated, as long as the two acts are of comparable seriousness. Of course, the fact that one outside the protected class was

treated better despite engaging in a more serious offense is relevant as well. *Id.* In any event, the determination of whether employees are similarly situated is generally a fact issue for the jury. *Id.* at 39.

Also, in *Freeman v. Madison Metropolitan School Dist.*, 231 F.3d 374 (7th Cir. 2000), the Plaintiff tried to show disparate treatment by comparing himself to white workers who received more favorable treatment after receiving disabling injuries about ten months after the challenged action. The District Court concluded that because this alleged disparate treatment occurred outside the time of the alleged acts of discrimination, the employees were not similarly situated. *Id.* at 382. The Seventh Circuit reversed, noting that the policy and decision-maker were the same for both sets of decisions, and no change in circumstances was suggested. *Id.* Accordingly, the court concluded that such employees could be considered similarly situated. *Id.* at 382-83. *See also Gordon v. United Airlines*, 246 F.3d 878 (7th Cir. 2001).

j. Subjective Criteria

In *Chapman v. AI Transport*, 229 F.3d 1012, 1034-1036 (11th Cir. 2000), the Court noted that subjective rationale applied to lower level workers is not sufficient without a clear and reasonably specific explanation so that the Plaintiff can attack the legitimacy of the subjective reason. Whether the Defendant gives a clear and specific explanation of the subjective reason, the subjective reason offered by the employer is entitled to just as much deference as any other reason. *Id.*

k. Departure from Company Policy

Departures from procedural regularity can raise a question as to the good faith of the process where the departure may reasonably affect the decision. *West v. Nabors Drilling*, 330 F.3d 379, 388-90 (5th Cir. 2003); *Machinchick v. PB Power*, 398 F.3d 345, 351 (5th Cir. 2005) (failure to follow progressive discipline policy indicative of pretext). *See also Weinstock v. Columbia University*, 224 F.3d 33, 45 (2nd Cir. 2000). However, of course, if a procedural irregularity did not affect the action complained of, then no such inference of pretext is possible. *Id.*

l. Failure to Document

When an employer would ordinarily or necessarily document events on which it bases its adverse employment action against plaintiff, the failure to so document these events constitutes evidence of pretext. In *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001), for example, the court repeatedly notes that despite the employer's promises to make documentation of all counseling regarding the plaintiff, no such notations appear in the record. Creating documentation in order to establish a checkered employment history, but only after the plaintiff engaged in a protected

activity, constitutes some evidence of pretext. As the court noted in *Evans*, “this after the fact documentation cannot be evidence to justify the demotion because of disciplinary problems.”

In *Evans*, there was a stark contrast between the documentation regarding the plaintiff before her protected activity, when she was described as “qualified and willing” to assume the new job, and after her protected activity when documents were created to attempt to justify or support a theory of disciplinary problems. This is especially notable when there is evidence that some of the documentation was backdated and appears suspicious, and which supports an argument of pretext.

m. Retaliation Cases - Timing

Negative treatment that begins soon after some protected activity of the plaintiff can be some evidence of retaliation, but is rarely enough by itself. In *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674(5th Cir. 2001), the Fifth Circuit found that the employer’s stated reason for discharging Medina, poor performance, was pretextual. *Id.* at 685. The Court noted that his work evaluations changed dramatically after he began complaining of age discrimination. Specifically, before his complaints, he had only one criticism of his performance in twenty years. However, in the few months following his complaint, he had between 8 and 10 writeups in his file.

Likewise, the Court in *Romo v. Texas Department of Transportation*, 48 S.W.3d 265 (Tex. App. - San Antonio, 2001, no writ), found it significant that plaintiff’s reprimand and probation occurred soon after he complained of his employer’s treatment of minorities. Accordingly, summary judgment on plaintiff’s retaliation claim was reversed.

3. Circumstantial Evidence of Causation – the New Way

The new method originated from the United States Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) and its progeny. On its face, *Desert Palace* says little. It simply holds that the plaintiff is entitled to a “mixed motive” jury instruction in circumstantial evidence cases as well as direct evidence ones. Previously, the only way plaintiff could get a mixed motive instruction was to have “direct evidence” of discrimination.² The Court in *Desert Palace* negates the previous distinction between circumstantial and direct evidence in general. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The court reasoned that treating circumstantial and

² For example, in *Desert Palace*, the District Court instructed the Jury that even if there were some lawful reasons for the adverse work conditions, plaintiff was entitled to damages unless the defendant proved by a preponderance of the evidence that it would have treated plaintiff “similarly had gender played no role.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 91 (2003).

direct evidence alike is both clear and deep rooted; “Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

The implication of *Desert Palace*, however, had a huge impact on Title VII jurisprudence. After all, as the Court indicated, if there was no logical distinction between direct and circumstantial evidence, then a remark which failed to meet the direct evidence test could still be strong enough, despite being circumstantial in nature, to constitute sufficient evidence of discrimination. The Fifth Circuit has so held. In *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004), the Fifth Circuit specifically changed the test. In *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004), the Fifth Circuit ruled that a discrimination plaintiff survives summary judgment by creating a genuine issue of material fact that either

“(1) . . . the defendant’s proffered reason for termination is not true, but is instead a pretext for discrimination. . . or (2) . . . 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. . .”

See also Machinchick v. PB Power, 398 F.3d 345, 352 (5th Cir. 2005). Accordingly, in some cases at least, evidence of pretext is not needed to demonstrate discrimination circumstantially. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *Machinchick v. PB Power*, 398 F.3d 345, 352 (5th Cir. 2005). Proof of a *prima facie* case, however, is still required. *Rachid*, 376 F.3d at 312; *Machinchick*, 398 F.3d at 352.

Moreover, it appears under this new test that remarks that were previously deemed inadmissible as “stray remarks” can be probative of discrimination. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004) (indirect references to age and adaptability as well as need to look “sharp” constituted evidence of discrimination); *Machinchick v. PB Power*, 398 F.3d 345 (5th Cir. 2005) (jury could infer discrimination from desire to have younger workforce and comments that plaintiff was “inflexible,” “not adaptable,” and had a “business-as-usual attitude”). Accordingly, while before, such comments by themselves were not considered sufficient to allow a jury to infer discrimination, under *Desert Palace*, arguably such comments can constitute sufficient evidence even without further evidence of pretext. In any event it is probably the best practice, if possible, for plaintiff’s lawyers to argue both pretext and other circumstantial evidence of discrimination. Courts will likely consider both the evidence of pretext as well as other circumstantial evidence, such as discriminatory remarks, in making sufficiency of the evidence rulings.

C. Constructive Discharge

In order to demonstrate that an employee was constructively discharged, you

must demonstrate that the working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *Brown v. Kinney Shoe Corp*, 237 F.3d 556 (5th Cir. 2001). In *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994), the Court set forth factors to consider in determining whether an employee would have felt compelled to resign: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. *Barrow*, 10 F.3d at 297 and n. 20.

Notably, to prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment. As a result, in evaluating a termination case in which the Plaintiff will be relying on constructive discharge, the Plaintiff's attorney should look for treatment of the plaintiff that will outrage a jury. Because of the recent tort reform movement, and widespread cynicism among jurors, this can be difficult to achieve. I think the best results can be achieved when the facts present a compelling picture of horrible treatment by the defendant. For example, in a sexual harassment setting, the Plaintiff's attorney should look for the following types of conduct to demonstrate a constructive discharge:

- physical contact (i.e. assault) or similar type conduct
- sexual advances
- threatens to take action if victim does not accede to advances
- harassment from a high level employee
- harasser who exposes himself
- the picture-taking harasser

This is only a short list of the myriad of possibilities of severe treatment which would amount to a constructive discharge.

D. Mental Anguish

In assessing a wrongful discharge claim, you should also examine any mental anguish damages to which the employee may be entitled. Questions to consider include:

- Has the client been to a doctor?
- Has the client told the doctor about any physical symptoms they have had as a result of their termination, harassment or discrimination (nausea, sleeplessness, etc.)?

- Has the client been to any kind of therapist?
- Does the client need to go to any kind of therapist?
- How has their family life been affected?
- How has their personal life been affected?

Since legal standards for mental anguish can be fairly rigid, it is important to have this documented in the medical records. The attorney will need to look at all medical records and psychological records during the relevant time. It is not unusual for a potential client to tell the attorney that he has had physical symptoms which required him to go to the doctor as a result of his harassment or termination, but the medical records reveal no documentation of the complaints.

E. Evaluating the Defendant

In addition to evaluating the client, and the merits of the case, you should also conduct an investigation of the employer in assessing whether to take a wrongful discharge case.

1. Solvency of the Defendant

No matter how good the case and the potential damages, if at the end of the day the defendant is not going to be able to pay the damages, then you and your client are probably wasting your time pursuing the case. Generally, the smaller the company, the worse in regard to both solvency and propensity to pay. For example, a typical “mom and pop” operation with very few employees is likely, of course, to be less solvent than a Fortune 500 company. More importantly, however, the damages that the jury is likely to assess against a mom and pop operation will be less than for a Fortune 500 company. The jury may be much more willing to forgive the sins of the mom and pop corporation than they are an organization with 20,000 employees.

2. Determine the Number of Employees

In order to bring a claim under Title VII, the Defendant must employ at least 15 employees. In addition, the larger number of employees a defendant has, the higher the damage caps which will apply to the case.

3. Conduct a Litigation Search

Finally, in evaluating a potential defendant, you should conduct a litigation search to determine if, and how many times, the defendant has been sued for an

employment law violation. This can lead to particularly helpful information regarding liability issues, as well as damages, including the possibility of a punitive damage award.