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APPELLATE PRACTICE CASE BULLETIN
LABOR AND EMPLOYMENT PRACTICE CASE BULLETIN

Desert Palace, Inc. v. Costa

GREATER RISK TO EMPLOYERS WHO TRY EMPLOYMENT DISCRIMINATION CASES

On June 9, 2003, the United States Supreme Court made it easier for employment discrimination plaintiffs to obtain their attorney fees at trial, even if they do not win. In *Desert Palace, Inc. v. Costa*, No. 02-679 (U.S. June 9, 2003), the Supreme Court held that a plaintiff is entitled to a "mixed-motive" instruction to the jury even if the plaintiff does not have direct evidence of discrimination.

In most employment discrimination cases that go to trial, the jury is given a single instruction that they should find discrimination if they determine that discrimination was the cause of the challenged employment action (for example, demotion or termination). The exception was in the rare case where the plaintiff had "direct" evidence of discrimination (for example, evidence that the decision-maker stated that he made the decision for discriminatory reasons). Where such direct evidence existed, the jury received a double-instruction: (1) do you find that discriminatory animus played a part in the decision?; if so, (2) do you find that the employer would have made the same decision even if it had no discriminatory animus against the plaintiff?

In *Desert Palace*, the Supreme Court held that an employee may obtain a mixed-motive instruction even without direct evidence. Instead, an employee "need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice."

Comment: This ruling will expand the employer's liability to pay the plaintiff's attorney fees. The double, mixed-motive instruction favors the plaintiff. If the jury answers "yes" to part one of the double instruction, the plaintiff may recover limited remedies, most notably her attorney fees, even if the jury answers part two in the employer's favor. In short, the *Desert Palace* ruling expands the number of cases in which employers will be liable for the plaintiff's fees, even if the employer wins at trial. That eventuality is no longer limited to the rare direct evidence case.