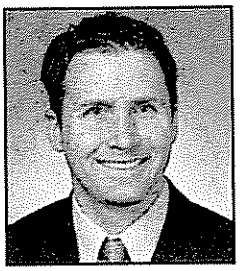

Ryan A. Haas

A Case of Mixed-Motives: Proving Employment Discrimination in Light of *Desert Palace*

by Ryan A. Haas and Roy R. Brandys

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I. Introduction

"Fair is foul and foul is fair, hovers through the fog and filthy air." William Shakespeare, *Macbeth*, Act 1, Scene 1.

In *Desert Palace, Inc. v. Costa*, the United States Supreme Court rendered a short and seemingly direct opinion on the proper jury instructions for a "mixed-motive" employment discrimination case.[1] *Desert Palace*, however, has caused a veritable sandstorm in federal courts that have tried to grapple with its meaning, impact and significance. In general, courts have developed three very different interpretations of *Desert Palace* and how it affects the standard of proof for employment discrimination cases, especially as it relates to the standard required for "mixed-motives" cases, and whether it applies beyond jury instructions.

A "mixed-motive" employment discrimination case is one in which the plaintiff alleges her employer took adverse action against her, such as suspension or termination, both for legitimate and discriminatory reasons.[2] As such, the first interpretation of the Supreme Court's opinion in *Desert Palace* asserts that the decision goes beyond the "mixed-motive" context and represents a radical departure from the traditional "shifting-burdens" approach of proving an employment discrimination case set forth in *McDonnell Douglas v. Green*.[3] That is, the first interpretation maintains that the Court's reading of § 2000e-2(m) of the 1991 Civil Rights Act[4] in *Desert Palace* effectively overturned the *McDonnell Douglas* approach.[5] In contrast, the second interpretation offers a much narrower view, holding that because the Supreme Court only addressed jury instructions in its decision and did not even mention the *McDonnell Douglas* approach at all, its opinion in *Desert Palace* had no impact at all on the shifting-burdens approach.[6] Finally, the third interpretation holds that although *Desert Palace* did not overturn the shifting-burdens approach from *McDonnell Douglas*, it did alter the method and standard of proof required for "mixed-motive" discrimination cases.[7] Federal courts in Illinois have yet to decide which interpretation, if any, to adopt.

On the surface, Justice Thomas' opinion appears quite plain and straight forward – "The question before us is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. We hold that direct evidence is not required."[8] However, this statement effectively lit the fuse to an intellectual powder keg threatening to dismantle the entire edifice of proving an employment discrimination case, both at trial and at the summary judgment stage, as established by *McDonnell Douglas* and its progeny. And, as many commentators and courts have argued, this may be a good thing, as the text of Title VII and its amendments in the 1991 Civil Rights Act do not require a shifting-burdens approach. Indeed, burden-shifting has created a "fog and filthy air" for plaintiffs seeking to prove a case of employment discrimination. Nevertheless, we assert that *Desert Palace* stopped short of overturning the shifting-burdens approach of *McDonnell Douglas* outright, and as the third interpretation asserts, merely modified the standard of proof for "mixed-motives" cases. The ramifications of this, however, may allow for plaintiffs with only indirect or circumstantial evidence of employment discrimination to turn every case of employment discrimination into a "mixed motives" case, and thereby choose a path around fog and filthy air of *McDonnell Douglas*.[9]

II. Proving Employment Discrimination – Shifting Burdens

Title VII of the Civil Rights Act of 1964 provides a federally sanctioned cause of action for discrimination. When Title VII was enacted, most courts and commentators treated "actions brought under Title VII of the Civil Rights Act of 1964" as actions "fundamentally for the redress of a tort."[10] As such, in the early days, proving employment discrimination was much like proving a tort – the plaintiff had to establish a *prima facie* case of discrimination through a variety of evidence, including circumstantial evidence, and the defendant could either establish an affirmative defense or refute the plaintiff's case by a preponderance of the evidence.[11]

However, this approach changed in 1973 when the Supreme Court rendered its decision in *McDonnell Douglas v. Green*.[12] Under this decision, when a plaintiff produces circumstantial evidence of employment discrimination, a three-step framework applies. The first step requires a plaintiff to establish a *prima facie* case by showing that: "1) the plaintiff is a member of a protected class; 2) the plaintiff applied for and was qualified for the job at issue; 3) despite plaintiff's application and qualifications, plaintiff was rejected; and 4) the position remained open and the defendant-employer continued to seek applicants from persons of the same qualifications as the plaintiff."[13] If a plaintiff establishes a *prima facie* case, a presumption is created that the defendant-employer discriminated against the plaintiff. Hence, on the second step, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment decision.[14] If the defendant satisfies her burden of production, the burden shifts back to the plaintiff to prove that the defendant's reason is merely a "pretext" for discrimination.[15]

This "shifting-burdens" approach has been criticized by many scholars as allowing procedure to prevail over substance,[16] and as leading to "unproductive, conflicting, and often quite dubious legal doctrines."[17] Moreover, many scholars agree that the *McDonnell Douglas* method of proof sets the plaintiff's case up for summary judgment because it transforms every case about discriminatory treatment into a case about the employer's veracity.[18] Further, commentators have pointed out that Title VII of the 1964 Act nowhere requires a heightened "shifting-burdens" approach to proving an employment discrimination case.[19] The statute itself does not even mention "pretext" or "intent" at all.[20] Nonetheless, the Supreme Court has consistently affirmed its decision in *McDonnell Douglas* in nearly every employment discrimination case since.[21]

III. "Mixed-Motives" and More Shifting-Burdens

In *Price Waterhouse v. Hopkins*,[22] the Supreme Court revisited *McDonnell Douglas* and, in a plurality opinion, held that for "mixed-motives" cases – cases in which the plaintiff alleges her employer rejected or terminated her both for legitimate and discriminatory reasons – an analogous proof structure was required. Under the *Price Waterhouse* approach, when a plaintiff shows that a protected characteristic was a motivating factor in the employment

(continued on page 36)

decision, the burden shifts to the defendant-employer to prove that it would have made the same decision for legitimate, non-discriminatory reasons.[23] Further, in her concurring opinion, Justice O'Connor held that in order to proceed under the "mixed-motives" method of proof, a plaintiff must produce "direct" evidence, rather than merely circumstantial evidence, of discrimination.[24]

Relying on the plurality opinion and Justice O'Connor's concurring opinion, several appellate courts held that direct evidence was required to proceed as a "mixed-motives" case of employment discrimination.[25] That is, to avoid the *McDonnell Douglas* approach and to be entitled to proceed as a "mixed-motives" case, courts held that the plaintiff must show direct evidence of discrimination, evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[26] This would require "direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[27] Such a burden, however, proved very difficult to meet in most cases.[28]

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, providing in § 2000e-2(m) a "response" to *Price Waterhouse* by "setting forth standards applicable in 'mixed motive' cases."[29] In particular, § 2000e-2(m) provides:

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice

The plain language of § 2000e-2(m) appears to provide a straight forward approach to proving a "mixed-motives" case. It does not expressly require "direct" evidence, nor does it require an employer to show legitimate, non-discriminatory reasons for its decision. Indeed, the section does not provide for any shifting burdens and appears to do away with the *Price Waterhouse* approach to proving mixed-motives cases.

IV. *Desert Palace* – A Plain Reading of § 2000e-2(m)

In *Desert Palace*, the plaintiff, Ms. Costa, was a Teamster working as a heavy equipment operator in a warehouse at Caesar's Palace casino in Las Vegas.[30] All of her co-workers and supervisors were men.[31] Her supervisors had written her up over a period of time for various disciplinary infractions.[32] She was ultimately terminated from her job when she got into an altercation with one of her male co-workers.[33] Her co-worker, however, was only suspended because he allegedly had a "clean" disciplinary record.[34] The facts, thus, presented a classic circumstantial evidence case in which courts had routinely applied a *McDonnell Douglas* analysis.[35] There was no "direct" evidence of discrimination to raise a "mixed-motives" issue. Nonetheless, over the objection of the defendant, the district court judge gave a jury instruction for a mixed-motives case based on the language of § 2000e-2(m).[36]

Justice Thomas' opinion in *Desert Palace* affirmed the mixed-motives jury instruction.[37] Justice Thomas applied a strict interpretation to § 2000e-2(m) and held that "the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[38] Moreover, Justice Thomas noted that Title VII's silence with respect to the type of evidence required in mixed-motive cases indicates that "the conventional rule of civil litigation," that a plaintiff prove her case by a preponderance of the evidence using direct, indirect or circumstantial evidence, should apply.[39] Therefore, Justice Thomas concluded that in a mixed-motives case, a plaintiff need only present sufficient evidence, direct or circumstantial, "for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[40]

As a consequence, the Supreme Court's decision in *Desert Palace* makes it clear that regardless of whether a plaintiff has direct or circumstantial evidence, she will be entitled to a "mixed-motive" jury instruction and an employer will be liable for employment decisions motivated in part by protected characteristics, even if it was also motivated by lawful reasons.[41]

V. The Aftermath

The *Desert Palace* opinion has produced a flurry of interpretations on its meaning for proving not only mixed-motive cases of employment discrimination, but for proving employment discrimination in general. Indeed, from the plaintiff's perspective, *Desert Palace* may allow for plaintiffs without direct evidence of discrimination to bypass the *McDonnell Douglas* burden-shifting framework all together, thereby turning all employment discrimination cases into "mixed-motives" cases.[42] Several courts and many commentators have embraced this notion and gone one step further, asserting that *Desert Palace* properly interpreted § 2000e-2(m) and effectively did away with the shifting-burdens approach from *McDonnell Douglas* for all employment discrimination cases and in all contexts, including summary judgment.[43]

However, other courts and commentators have asserted that *Desert Palace* had no impact at all on the *McDonnell Douglas* approach for proving employment discrimination.[44] Indeed, in a recent opinion, the Eighth Circuit held that *Desert Palace* did not affect the *McDonnell Douglas* approach nor did it at all apply to a case on summary judgment.[45] In *Griffith v. City of Des Moines,* the Court pointed out that, not only was the issue in *Desert Palace* specifically concerned with jury instructions only, but Justice Thomas did not even cite *McDonnell Douglas* in his opinion.[46] Moreover, the Court referred to a post-*Desert Palace* opinion in which the Court applied the *McDonnell Douglas* burden-shifting approach on summary judgment, *Raytheon Co. v. Hernandez.*[47]

Nonetheless, in a specially concurring opinion, Judge Magnuson entered strong objections to the majority's opinion in *Griffith*, noting that the 1991 amendments to Title VII do not require the *McDonnell Douglas* standard to be used and that *Desert Palace* "exposes the legal fiction for what it is, and in its wake, I can no longer adhere to or apply an antiquated test that has been superceded by Congress."[48] Judge Magnuson noted that neither the language nor the legislative history of Title VII nor its amendments support a distinction between "direct and indirect evidence."[49] Because *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, Judge Magnuson argued that *McDonnell Douglas* should no longer be used by any courts.[50]

Although it is the opinion of the authors, following Judge Magnuson's reasoning, that the Eighth Circuit's decision does not fully embrace the actual impact of *Desert Palace*, and in particular, Justice Thomas' plain reading of § 2000e-2(m) of the 1991 Civil Rights Act, the authors do not read *Desert Palace* as representing a complete reversal of the *McDonnell Douglas* approach. The issue really comes down to whether, under the language of Title VII and its amendments, a plaintiff must prove *discrimination* by a preponderance of any evidence, or must she prove *pretext,* when all she has is indirect or circumstantial evidence. The plain language of Title VII and its amendments seem to endorse the former, while the Eighth Circuit's opinion in *Griffith* and the Supreme Court's opinion in *McDonnell Douglas* require the latter.

A third interpretation of *Desert Palace* by the Fifth Circuit seems to have correctly comprehended the impact of the Supreme Court's decision. In *Rachid v. Jack in the Box,*[51] the parties disputed whether *Desert Palace* altered the process of proof in a discrimination case by allowing the plaintiff to proceed with a "mixed-motives" case when there is no "direct" evidence of discrimination.[52] The Fifth Circuit held that, instead of doing away with *McDonnell Douglas* all together, *Desert Palace* modified the approach for mixed-motives cases.[53] Under this "modified *McDonnell Douglas* approach," the plaintiff must still demonstrate a *prima facie* case of discrimination and the defendant must still articulate a legitimate, non-discriminatory reason for the employment decision.[54] However, under the third prong, either (1) the plaintiff must show pretext ala the traditional *McDonnell Douglas* approach, or (2) the plaintiff may show, by direct, indirect or circumstantial evidence, that "the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic."[55] Thus, the Fifth Circuit held that the actual impact of *Desert Palace* is that either to defeat summary judgment or to prevail at trial, a plaintiff is entitled to present "indirect" evidence of discrimination under a mixed-motives approach to rebut the defendant's purported non-discriminatory reason for the employment decision.[56] The Fifth Circuit's approach has been advanced and adopted by various other courts considering these issues.[57]

VI. Conclusion

Although the 1991 amendments to Title VII, in particular § 2000e-2(m), do not require a plaintiff to engage in the shifting-burdens "minuet" of *McDonnell Douglas*,[58] there is some strong support for the notion that the Supreme Court did not overturn or throw out *McDonnell Douglas* when it rendered its *Desert Palace* opinion. First, as the Eighth Circuit noted, in a post-*Desert Palace* opinion, the Supreme Court applied the shifting-burdens approach to a Title VII claim, though the case was not brought as a "mixed-motives" case. Second, Justice Thomas did not cite *McDonnell Douglas*, let alone overturn it, in his opinion. And third, Justice Thomas appeared to at least attempt to limit his decision when he wrote in a footnote that "[t]his case does not require us to decide when, if ever, § 107 [aka § 2000e-2] applies outside of the mixed-motive context."[59]

Nonetheless, the notion that *Desert Palace* did not at all affect the method of proof for an employment discrimination case, in particular a mixed-motive case, appears to run against the opinion itself. First, Justice Thomas explicitly held that § 2000e-2(m) effectively reversed *Price Waterhouse.*[60] That is, Justice Thomas held that the requirement that "direct" evidence be offered to proceed as a "mixed-motives" case was incorrect and overruled by § 2000e-2(m).[61] Further, it makes little sense to restrict the application of this rul-

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ing to jury instructions because doing so would effectively allow a plaintiff to offer circumstantial evidence and obtain a "mixed-motives" instruction at trial, while requiring direct evidence for a "mixed-motives" approach on summary judgment. Changing what kind of evidence a plaintiff must produce from summary judgment to trial makes no sense.

As such, the impact of *Desert Palace* is as the Fifth Circuit has articulated – the third prong of *McDonnell Douglas* was effectively altered by *Desert Palace* for mixed-motives cases. After all, the Court declared in *Desert Palace* that "Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to 'any employment practice.' On its face, the statue does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[62] The Supreme Court's application of *McDonnell Douglas* in the post-*Desert Palace* opinion, *Raytheon*, reaffirmed its adherence to *McDonnell Douglas*. Nonetheless, that case was not a "mixed-motives" case, and as *Desert Palace* makes clear, a plaintiff need not present direct evidence to proceed as a "mixed-motives" case.

Therefore, although the language of Title VII and its amendments may not require a "burdens-shifting" approach to proving a case of employment discrimination when all the plaintiff has is indirect or circumstantial evidence, *McDonnell Douglas* and its progeny do require such an approach. And although *Desert Palace* allows for plaintiffs to proceed as a mixed-motives case with only circumstantial evidence, *Desert Palace* did not represent such a significant "sea change" as to completely do away with the *McDonnell Douglas* approach in non-mixed-motives cases. As such, courts in Illinois should seriously consider the Fifth Circuit's approach in *Rachid*. That way, plaintiffs who seek to prove employment discrimination have another path, free from the "fog and filthy air" of *McDonnell Douglas*.

Endnotes

[1] *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

[2] *Id.* at 93 (noting that a "mixed-motive" case is one "where both legitimate and illegitimate reasons motivated the decision.").

[3] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[4] 42 U.S.C. § 2000e-2(m) (2000).

[5] *See infra* Part V.

[6] *See infra* Part V.

[7] *See infra* Part V.

[8] *Desert Palace*, 539 U.S. at 92.

[9] *See* Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa Into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 83 (2003) (asserting this argument, but contending that *Desert Palace* overturned *McDonnell Douglas*). It is the authors contention that, contrary to Van Detta and other commentators, *Desert Palace* did not overturn but rather modified the third prong of the *McDonnell Douglas* approach for "mixed-motives" cases, ala the Fifth Circuit's opinion in *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). In light of this modification, it makes sense for plaintiffs with only indirect or circumstantial evidence of employment discrimination to proceed as a "mixed-motives" case.

[10] Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa Into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 83 (2003) *quoting Pavlo v. Stiefel Labs, Inc.*, 1979 WL 105, at *1 (S.D.N.Y. Nov. 27, 1979) (further citation omitted).

[11] Van Detta, *supra* note 10, at 84 (discussing the Eighth Circuit's early approach to discrimination cases as demonstrated in *Marquez v. Omaha Dist. Sales Office*, 440 F.2d 1157 (8th Cir. 1971)).

[12] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[13] William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 201 (2003) *citing McDonnell Douglas*, 411 U.S. at 802.

[14] *McDonnell Douglas*, 411 U.S. at 802.

[15] *Id. See also* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995)(discussing the "burden-shifting" approach and advocating a different approach); Christopher R. Hedican, et. al., *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383 (2004) (discussing the "burden-shifting" approach and asserting that it is still viable).

[16] *See* Phyllis Tropper Bauman, et. al., *Substance in the Shadow of Procedure: The Integration of Substance and Procedural Law in Title VII*, 33 B.C. L. REV. 221 (1992).

[17] Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 382 (1997).

[18] Van Detta, *supra* note 10, at 101-102.

[19] *Id.* at 92-93; George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 48-49 (1993).

[20] Van Detta, *supra* note 10, at 92-95. *See* 42 U.S.C. § 2000 *et. seq.*

[21] *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). *See also* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L.

REV. 703 (1995) (discussing *McDonnell Douglas* and its progeny).

[22] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

[23] *Id.* at 258.

[24] *Id.* at 276 (holding that a "plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision").

[25] *See Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002); *Fernandez v. Cosa Bros Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Board of Trustees of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

[26] BLACK'S L. DICT. (8TH ED. 2004) (defining "direct evidence").

[27] *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) ("Thus, stray remarks in the workplace, while perhaps probative of sexual harassment cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria.") (internal citation omitted).

[28] *See* Robert A. Kearney, *The High Price of Price Waterhouse: Dealing With Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303 (2003) (discussing problems with the "direct evidence" approach).

[29] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

[30] *Desert Palace*, 539 U.S. at 95.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 95-96.

[35] Van Detta, *supra* note 9, at 131.

[36] *Desert Palace*, 539 U.S. at 96-97.

[37] *Id.* at 101-102.

[38] *Desert Palace*, 539 U.S. at 98-99 (noting further that "Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42.").

[39] *Id.* at 99.

[40] *Id.* at 101.

[41] *Id.* at 96 (quoting approved jury charge, stating "if you find that plaintiff's sex was a motivating factor ... the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason").

[42] *See* Van Detta, *supra* note 10, at 136 ("If there is no longer any need to offer 'direct evidence' to go to a jury on a section 703(m) charge, then the concept of 'mixed-motives' is no longer distinguishable from any Title VII plaintiff's evidence of discrimination offered to rebut the employer's nondiscriminatory explanation. All cases become mixed-motive cases. . .").

[43] *See Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987 (D. Minn. 2003); *Griffith v. City of Des Moines*, 387 F.3d 733, 739-748 (8th Cir. 2004) (Magnuson, J., concurring specially). *See also* Van Detta, *supra* note 9 (asserting that *McDonnell Douglas* is "dead"); Corbett, *supra* note 13, at 212-13 ("*McDonnell Douglas* is dead for Title VII claims . . . .").

[44] *Griffith v. City of Des Moines*, 387 F.3d 733, 735 (8th Cir. 2004) (holding that *Desert Palace* had no impact the approach under *McDonnell Douglas*). *See also* Hedican, et. al., *supra* note 15 (arguing that *Desert Palace* did not affect *McDonnell Douglas* and that the burden-shifting approach is "alive and well").

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

[46] *Id.* ("*Desert Palace* involved the post-trial issue of when the trial court should give a 'mixed-motive' jury instruction under 1991 Title VII amendments . . . The Court's opinion did not even cite *McDonnell Douglas*, much less discuss how those statutes impact our prior summary judgment decisions.").

[47] *Id. citing Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

[48] *Griffith*, 387 F. 3d at 739 (Magnuson J. concurring).

[49] *Id.* at 744.

[50] *Id.* at 745.

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

[52] *Id.* at 312-13.

[53] *Id.*

[54] *Id.* at 312.

[55] *Rachid*, 376 F.3d at 312 *quoting Rishel v. Nationwide Mut. Ins. Co.*, 297 F.Supp.2d 854, 865 (M.D.N.C. 2003) (*citing and quoting Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F.Supp.2d 1180, 1197-98 (N.D. Iowa 2003)).

[56] *Rachid*, 376 F.3d at 312-13.

[57] *Rishel*, 297 F.Supp.2d at 865; *Warren v. Terex Corp.*, 328 F.Supp.2d 641 (N.D. Miss. 2004); *Carey v. Fedex Ground Package System*, 321 F.Supp.2d 902 (S.D. Ohio 2004); *Oby v. Baton Rouge Marriott*, 329 F.Supp.2d 772 (M.D. La. 2004) (applying the *Rachid* approach to a Family and Medical Leave Act case). The Fifth Circuit recently reaffirmed the approach it adopted in *Rachid* and applied it in an age discrimination case *See Machinchik v. PB Power, Inc.*, 2005 WL 138708 (5th Cir., January 24, 2005).

[58] Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2236 (1995).

[59] *Desert Palace*, 539 U.S. at 94 n. 1.

[60] *Id.* at 101.

[61] *Id.*

[62] *Id.* at 98-99.

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