IN THE SUPREME COURT OF THE UNITED STATES

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DESERT PALACE, INC., DBA :

CAESARS PALACE HOTEL & :

CASINO, :

Petitioner :

v. : No. 02-679

CATHARINA F. COSTA. :

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Washington, D.C.

Monday, April 21, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

MARK J. RICCIARDI, ESQ., Las Vegas, Nevada; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

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

C O N T E N T S

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

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

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

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

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

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

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

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

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

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

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

MR. RICCIARDI: Well, I think maybe --

QUESTION: -- pinning it on a decisionmaker somehow.

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

QUESTION: Yes.

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

QUESTION: Of your brief?

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

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

The second part of the text that evidences this

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

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

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

employer.

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

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

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

MR. RICCIARDI: Absolutely, Your Honor.

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

MR. RICCIARDI: Price Waterhouse --

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

QUESTION: Concurring opinion.

MR. RICCIARDI: Well --

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

(Laughter.)

MR. RICCIARDI: That is correct, Your Honor.

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

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

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

MR. RICCIARDI: I -- I --

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

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

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

were sufficient to have a mixed-motive burden shift.

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

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

QUESTION: Where does it say that?

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

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

about that or not?

MR. RICCIARDI: That is correct, Your Honor. And the plaintiff --

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

MR. RICCIARDI: I -- I --

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

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

QUESTION: Did -- did the defendants in those

two cases put on any evidence?

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

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

MR. RICCIARDI: That is correct, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

easier for him.

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

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

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

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

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

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

MR. RICCIARDI: Your Honor, I believe --

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

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

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

direct evidence rule, or did they come later?

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

Your Honor, may I reserve?

QUESTION: Yes, Mr. Ricciardi.

We'll hear from Mr. Gornstein.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONER

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

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

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

MR. GORNSTEIN: It -- the --

QUESTION: And in theory, it could apply across

the board.

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, then would you tell me --

QUESTION: Why would you have that background?

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

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

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

MR. GORNSTEIN: That's correct.

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

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

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

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

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

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

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

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

period, isn't that enough?

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

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

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

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

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

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

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

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

MR. GORNSTEIN: If it's just --

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

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

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

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

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

MR. GORNSTEIN: Well --

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

MR. GORNSTEIN: No.

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

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

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

QUESTION: Yes, it is.

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

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

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

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

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

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

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

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

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

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

If the Court has nothing further.

QUESTION: Thank you, Mr. Gornstein.

Mr. Peccole, we'll hear from you.

ORAL ARGUMENT OF ROBERT N. PECCOLE

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

a plaintiff merely has to demonstrate.

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

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

QUESTION: So you -- you accept that argument.

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

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

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

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

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

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

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

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

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

approach.

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

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

QUESTION: And as I understand --

QUESTION: Am I right --

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

MR. PECCOLE: I -- I agree with you

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

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

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

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

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

MR. PECCOLE: The relationship between the two statutes?

QUESTION: Between the two sections, yes.

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

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

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

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

QUESTION: Right.

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

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

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

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

QUESTION: Does it matter?

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

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

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

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

MR. PECCOLE: I believe it does.

QUESTION: Okay.

MR. PECCOLE: I -- I think --

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

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

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

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

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

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

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

MR. PECCOLE: No.

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

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

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

QUESTION: Well, you don't suggest the defendant

always admits liability, do you?

MR. PECCOLE: No.

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

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

MR. PECCOLE: Yes.

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

MR. PECCOLE: Yes.

QUESTION: Yes.

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

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

MR. PECCOLE: Yes.

(Laughter.)

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

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

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

QUESTION: But if you -- if you --

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

circuits right now, it's just unbelievable.

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

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

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

MR. PECCOLE: Yes.

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

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

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

QUESTION: Thank you, Mr. Peccole.

Mr. Ricciardi, you have 2 minutes left.

REBUTTAL ARGUMENT OF MARK J. RICCIARDI

ON BEHALF OF THE PETITIONER

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

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

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

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

(Laughter.)

QUESTION: Did you think it was a mixed-motive

case or not?

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

QUESTION: I see. Okay.

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ricciardi.

The case is submitted.

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