

Instructing the Jury in an Employment Discrimination Case

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Abstract

[a.1] Employment discrimination cases often present federal trial judges with emotionally charged cases in which the stakes are high for all parties. These facts, coupled with the current state of the law in this arena make the crafting of jury instructions a particular challenge for the federal judiciary. This article summarizes the general procedures used by federal trial judges in preparing jury instructions, explores sources for jury instructions, and then considers in detail difficult jury instruction issues that often arise in employment discrimination trials.

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1. INTRODUCTION

[1.1] Juries in civil cases are charged with the duty of determining whether a plaintiff has proven all the elements of his cause of action by a preponderance of the evidence, and, if so, what the appropriate damages should be. The trial judge generally instructs the jury on the law after the closing arguments are given, and thus, has the final word before the jury begins its deliberations. The timing and function of the jury instructions, coupled with the authority of the judge, make the instructions a crucial part of a trial.

[1.2] The stakes are high in all employment discrimination cases. The simplest of cases requires at least thousands of dollars in pretrial discovery and attorneys fees. Each side has chosen to risk losing all rather than accept the opposing side's settlement offer. The parties have strong emotions about the merits of their respective positions. A directed verdict is unlikely because the case has already survived summary judgment and therefore the judge has already decided that there is sufficient evidence to raise a material issue of fact. Most cases contain a claim for damages for emotional / psychological harm (elements of compensatory damages) which authorizes the jury to award large monetary damages. Such damage awards are unlikely to be reversed because of the wide range of discretion accorded to the jury in this area.⁽¹⁾ This discretion is reflected in the standard damage charge, which instructs the jury that they may

award damages for any pain, suffering or mental anguish that Plaintiff experienced as a consequence of the Defendant's actions. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

3 Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, [§104.05](#) (1997 Supp.). Moreover, compensatory damages for pain and suffering are often higher than the amount necessary to compensate the plaintiff for lost wages or other monetary harm.⁽²⁾ Finally, an employer also risks verdicts for punitive damages, the amounts of which need not be related to the amount of harm suffered by the plaintiff.

[1.3] It is difficult to draft clear and accurate instructions in discrimination cases. Through statutory changes and numerous Supreme Court decisions refining the law, the area has become exceedingly (and unnecessarily) complex. Such issues as defining the precise causes of action and adverse actions, whether and how to instruct the jury on the McDonnell Douglas, [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), tripartite formula, whether to instruct on the employer's "same decision" affirmative defense, what words to use in describing the necessary causal connection that plaintiff must prove, whether to instruct on punitive damages, how to instruct on other types of damages, whether to instruct on various inferences that may be drawn, and whether to instruct on an employer's business judgment defense all have been the subject of debate and require thoughtful analysis by the attorneys and the judge.

[1.4] The verdict form should be given as much attention as the instructions. Special verdict forms are often required because of the affirmative defense authorized under the 1991 Civil Rights Act that limits, but does not eliminate, an employer's liability. Where a jury is instructed on the affirmative defense, it must specifically state whether a defendant has met its burden of proof so that the judge will know what remedies are authorized. In addition, there are good arguments for requiring special verdicts on separate claims or separate adverse actions or separate items of damages, e.g., back pay, compensatory damages, or punitive damages. On the other hand, when verdict forms contain a number of different sections and instructions, the possibility for misunderstanding or confusion by the jury is heightened.

[1.5] Because so much is at stake and the issues are so complex, judges and attorneys must put a great deal of time and effort into drafting accurate and understandable jury instructions and verdict forms. Attorneys should begin thinking about the jury instructions and verdict form from the time they begin drafting their complaints and answers; and they should continue thinking about jury instructions throughout discovery. Indeed, focusing on basic jury instructions such as the elements of the cause of action and the nature of the adverse actions for which the plaintiff is seeking compensation should help guide the parties throughout every step of the pretrial proceedings, including discovery, working with expert witnesses, and settlement conferences. Considering at each step what the plaintiff must prove to prevail not only will help in drafting accurate instructions, but also will aid in conducting efficient and cost-effective discovery and promoting fair settlements. The time spent in this important part of the trial should not be a last minute effort or an afterthought.

[1.6] In the sections which follow, I will discuss some of the issues I have identified as the more troubling in the area of jury instructions in an employment discrimination case.

2. PROCEDURE

[2.1] Both the Federal Rules of Civil Procedure and the Local Rules of most District Courts have provisions relating to the submission of proposed jury instructions. Fed. R. Civ. P. 51 provides:

[2.2] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

[2.3] Generally, I will require proposed jury instructions and objections to proposed jury instructions to be submitted well in advance of trial. I recognize, however, that by the time the evidence is closed, the issues that are submitted to the jury may differ from what the parties originally anticipated. Therefore, it is my practice to give the parties an opportunity to revise or supplement their proposed instructions prior to the final conference on the jury instructions.

[2.4] The Federal Rules of Civil Procedure give the judge the option of instructing the jury before or after argument or both. Fed. R. Civ. P. 51. Although the rules do not cover instructions before the start of the evidence, most judges will also give some form of preliminary instructions before the attorneys give their opening statements.

[2.5] Chapter 70 of Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions (4th ed. 1987) contains suggested general pre-trial instructions for civil cases. Federal judges generally will give this type of instruction, which covers the nature of the case, how the case will proceed, the role of the jury, the counsel and the court, and the conduct of the jury during the trial. These instructions will usually include a description of the claims and the defenses as in the following excerpt from a preliminary instruction in a recent trial over which I presided:

[2.6] Plaintiff, H. D., brings this action against the Board of Regents of the University System of Georgia and against Dr. R. W. Mr. D. was employed with the Board of Regents as a professor at Georgia State University. This is a civil rights case in which the plaintiff alleges that the Board of Regents decided not to renew his employment contract as a full-time instructor and Dr. W. decided not to offer him part-time teaching positions because of his race, color, and national origin. The plaintiff is Iranian and has darker skin than the average Caucasian. The Board of Regents and Dr. W. dispute plaintiff's claims and contend that his employment contract as a full-time instructor was not renewed because he was only hired to temporarily replace another employee who took a year off, and when that employee returned there was no longer a position for plaintiff. They also contend that Dr. W. did offer plaintiff part-time teaching positions, but he did not accept them.

[2.7] Supreme Court Justice Sandra Day O'Connor is a strong advocate for thorough preliminary instructions. In an article published in the June 1997 edition of the *Federal Lawyer* she suggested that trial judges should thoroughly charge jurors on the substantive law of the case before the evidence is presented. Justice O'Connor stated:

[J]urors should be given general instructions on the applicable law before the case begins. How are they to make sense of the evidence and the mass of information the parties will put before them, unless they know in advance what they are looking for? Jurors are not vessels in which

information can be stored, to be retrieved intact when the jurors finally are told what to do with it. Jurors are people, and people organize information as they receive it, according to their existing frames of reference. Unless jurors are given proper frames of reference at the beginning of a case, they are likely either to be overwhelmed by a mass of unorganizable information, or to devise their own frames of reference, which may well be inconsistent with those that the law requires. Sandra Day O'Connor, Juries: They May Be Broken, But We Can Fix Them, 44-JUN Fed. Law. 20, *23-24 (1997) (footnote omitted).

[2.8] Even a non-substantive preliminary instruction, such as the one quoted above, is not without some risk. As stated before, claims may change during the course of the trial and the final version may differ somewhat from the description given in the preliminary instruction. To minimize the risk of a misleading instruction, I typically read the preliminary description of the case to counsel and the parties before reading it to the jury to ensure that it comports with the lawyers' understanding of the contentions in the case.

[2.9] While all federal judges give instructions orally from the bench, the judge must decide whether also to give the jury a written copy of the instructions. In the previously mentioned article, Justice O'Connor makes a strong pitch for giving the jurors a written copy of the instructions. She argues as follows:

[W]hen jurors do get their detailed instructions at the end of the trial, we should not simply assume that they can remember, with perfect clarity, what is likely to be a fairly long discussion of unfamiliar principles. Rather, each juror should be given a written copy of the instructions to use during deliberations. That way, jurors who learn better by listening can rely on the judges spoken instructions, while those who learn better by reading can rely on their written version. O'Connor, supra at 24. While I have not, in the past, provided jurors with a written copy of the instructions, I may consider giving written copies in the future.

3. SOURCES FOR JURY INSTRUCTIONS

[3.1] There are many excellent sources for jury instructions in employment discrimination cases. For instance, the Eleventh Circuit pattern instructions are helpful for general principles such as burdens of proof and witness credibility. They do not, however, contain instructions specifically tailored for Title VII employment discrimination cases. The closest they come is the instruction for age discrimination cases.⁽³⁾ Devitt, Blackmar and Wolff have added a chapter on employment discrimination cases.⁽⁴⁾ Their instructions incorporate the changes brought about by the 1991 Civil Rights Act, which significantly changed the law in the area of employment discrimination. The Equal Employment Opportunity Commission (EEOC) has also drafted model instructions for employment discrimination cases.⁽⁵⁾ Lawyers might also want to consider Employment Litigation: Model Jury Instructions, American Bar Association, Section Of Litigation, 1994 which has received favorable reviews.

[3.2] Counsel may, of course, draw from appellate court holdings in drafting jury instructions. Those opinions which affirm instructions given in comparable cases are the most persuasive. In addition, numerous CLE manuals and practice guides are published on Westlaw and Lexis and are often an excellent source for sample instructions. Finally, lawyers might want to consider reviewing instructions from comparable cases before the same or other judges in the district. These are available in the transcripts contained in the court files in the Clerk's office.

4. PARTICULAR ISSUES IN TITLE VII CASES

Nature Of The Claim

[4.1] I am often surprised to see the lack of specificity in a Title VII complaint. Sometimes, I cannot tell from reading a complaint exactly what cause of action a plaintiff is asserting. For example, while a complaint might clearly charge sex discrimination in connection with a particular adverse action, it might also contain allegations that sound like retaliation or that hint at a hostile work environment; yet these causes of action are not set forth in separate and distinct counts or paragraphs. Because the elements of an employment discrimination claim vary depending on the precise nature of the cause of action, this lack of precision, if not eliminated before the trial, can create difficulties in drafting jury instructions.

[4.2] Similarly, it is not always clear to the court what adverse actions the plaintiff is asserting in her cause of action. Often, there will be a narrative recitation of all the alleged wrongs committed by the employer ranging from the trivial to the serious. If the plaintiff does not specify which of these wrongs she contends entitle her to compensation, as opposed to the ones which are merely evidence that support her claims, the court will not know how to properly instruct the jury.

[4.3] For these reasons, I will routinely ask plaintiff's counsel to state on the record at the pretrial conference exactly what are the claims and adverse actions, and then inquire as to whether defendant's counsel agrees that those are the issues to be submitted to the jury. The parties then must focus on the specified claims and causes of action in drafting their proposed jury instructions and verdict forms.

Whether To Use The McDonnell Douglas Tripartite Formula In Jury Instructions

[4.4] The tripartite formula used to resolve claims of circumstantial individual disparate treatment, first established by the Supreme Court in [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is by now very familiar to practitioners in the area of employment discrimination. Under this formula, the allocation of burdens and order of presentation of proof are as follows: (1) plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence; (2) if the plaintiff proves the prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action taken against the employee; and (3) if the defendant carries this burden, plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext for discrimination. [McDonnell Douglas](#), 411 U.S. at 802-04, 93 S. Ct. at 1824-25. A prima facie case of discriminatory termination is generally made by showing that the plaintiff is a member of a protected class, was qualified for the position, was terminated, and that others outside the protected class who were similarly situated were retained. [Nix v. WLCY Radio / Rahall Communications](#), 738 F.2d 1181, 1185 (11th Cir. 1984).

[4.5] In Title VII jury trials, the issue often arises as to whether to instruct the jury along the lines of this tripartite formula. The EEOC model instructions include the tripartite formula. The Devitt, Blackmar and Wolff pattern instructions do not. The Circuit Courts of Appeals are split on the question; and decisions within the respective Circuits often conflict.⁽⁶⁾ I outline below some of the many good reasons not to include the tripartite formula in the jury instructions.

[4.6] First, judges should strive to use language that jurors can understand. The phrase "prima facie case," the concept of shifting burdens, and the distinction between the burden to "articulate" and the "burden of proof" are not easily understood by the lay person. See [Cabrera v. Jakabovitz](#)

24 F.3d 372 (2nd Cir. 1994) (criticizing use of [McDonnell Douglas](#) framework in jury instructions). Secondly, once the case is tried and about to be submitted to the jury, the [McDonnell Douglas](#) formulation is no longer relevant. At that point, the plaintiff has made out a prima facie case and the defendant has articulated a legitimate non-discriminatory reason for its actions; if they had not done so, the case would have been resolved by a directed verdict. [Texas Dept. Of Community Affairs v. Burdine](#), 450 U.S. 248, 255-56, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981) (if the employer meets its burden of production, the presumption raised by the prima facie case is rebutted and "drops from the case"). Finally, cases are not presented to a jury in the order envisioned by [McDonnell Douglas](#). In reality, a plaintiff does not simply present a prima facie case in his case in chief. A plaintiff anticipates the legitimate nondiscriminatory reasons given by the defendant and attempts to show that they are not valid. Similarly, a typical defendant does not limit its proof at trial to an "articulation" of its legitimate nondiscriminatory reason for the employment action. Rather, it puts on as much evidence as it can muster to attempt to prove that it had legitimate nondiscriminatory reasons for its actions. Because the [McDonnell Douglas](#) formulation does not accurately reflect the conduct of a typical employment discrimination trial, reciting the formula would simply serve to confuse the jury.

[4.7] While it might not be error to instruct the jury on the tripartite formula, it is clear that such an instruction is not required, at least in the Eleventh Circuit. In [Spanier v. Morrison's Mgmt. Servs., Inc.](#) 822 F.2d 975 (11th Cir. 1987), an Eleventh Circuit panel affirmed a jury charge that did not include an instruction to analyze the evidence according to the [McDonnell Douglas](#) scheme. The court reasoned that, "when the court has allowed both parties to develop their full proof, the analysis of the evidence should look to whether plaintiff has met the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination." 822 F.2d at 980.

Causation And The "Same Decision" Affirmative Defense

[4.8] The basic language of Title VII applicable in most discrimination cases is simple. [Title 42, U.S.C. §2000e-2\(a\)\(1\)](#) makes it an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex or national origin." Despite its simplicity, the Supreme Court, in [Price Waterhouse v. Hopkins](#), 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) in sixty-seven pages, and four separate opinions, only one of which was joined by four justices, struggled with the meaning of the phrase "because of" in a sex discrimination case. What emerged as the holding (from reading Justice O'Connor's separate decision together with the plurality) was that a plaintiff could, in cases involving direct evidence of discrimination, shift the burden to the employer by showing that a prohibited factor (in [Price Waterhouse](#), sex) motivated an employer in an employment decision even if the employer was also motivated by legitimate factors. The employer could then prevail by proving, by a preponderance of the evidence, that the same decision would have been made based on legitimate non-discriminatory reasons.

[4.9] Congress enacted the following two provisions of the Civil Rights Act of 1991 in response to [Price Waterhouse](#): (1) Title 42, U.S.C. [§ 2000e-2\(m\)](#) provides, in relevant part: 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;

(2) [Title 42, U.S.C. §2000e-5\(g\)\(2\)\(B\)](#) provides, in relevant part:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court - (I) may grant declaratory relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment, described in subparagraph (A).

[4.10] In effect, Congress enacted into law the [Price Waterhouse](#) plurality's interpretation of Title VII that a plaintiff prevails by proving that the prohibited factor was a motivating factor even if other factors also motivated the employer. However, Congress overruled that portion of [Price Waterhouse](#) that held that an employer can escape all liability if it proves that it would have made the same decision even in the absence of discrimination. Instead, the 1991 Act allows a plaintiff to obtain limited declaratory relief, attorneys fees and costs, even if an employer succeeds in persuading the jury on its "same decision" affirmative defense. In addition, the 1991 Act eliminated any distinction between "direct evidence" and "circumstantial evidence" cases, a distinction created by Justice O'Connor's concurring opinion in [Price Waterhouse](#).

[4.11] The 1991 Act raises the following two important issues with respect to jury instructions: (1) Can an employer be motivated by a prohibited factor and at the same time be able to prove that it would have made the same decision even if it had not been motivated by the prohibited factor?; and (2) Should the instruction on shifting the burden to the employer be given even if the employer has not pled an affirmative defense or even claimed that it would have made the same decision anyway? I will address each of these issues below.

Is There An Internal Inconsistency In The Price Waterhouse Formulation?

[4.12] Devitt, Blackmar and Wolff suggest that the jury be instructed as follows with respect to the [Price Waterhouse](#) formulation as codified in the 1991 Act:

In showing that plaintiff's [race] [color] [religion] [sex] [national origin] was a motivating factor, plaintiff is not required to prove that [his] [her] [race] [color] [religion] [sex] was the sole motivation or even the primary motivation for defendant's decision. The plaintiff need only prove that [race] [color] [religion] [sex] [national origin] played a part in the defendant's decision even though other factors may also have motivated the defendant.

If you find from the evidence that [race] [color] [religion] [sex] [national origin] was, more likely than not, a motivating factor in the defendant's employment decision . . . you should so indicate on the verdict form.

[Defendant _____ claims that even if [race] [color] [religion] [sex] [national origin] were motivating factors in [his] [her] [its] decision, the defendant would have taken the same action concerning the plaintiff in the absence of the unlawful motive.

If you find that Defendant _____ would have, more likely than not, made the same employment decision . . . concerning the plaintiff even if the unlawful motive was not present, you should so indicate on the verdict form.]

3 Devitt, Blackmar and Wolff, [Federal Jury Practice and Instructions](#), [§104.03](#) (1997 Supp.).

[4.13] Justice Kennedy, in his dissenting opinion in [Price Waterhouse](#) (joined by Chief Justice Rehnquist and Justice Scalia), raises the troubling possibility that there is an internal

inconsistency in the plurality's proposition (now codified in the 1991 Act and embodied in the above instruction) that an employer can be motivated to act by a prohibited factor (let's say sex for simplicity) and still be able to prove that it would have made the same decision even if sex had not been a factor. He points to the use of the language "because of" in Title VII and notes: "By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech." [Price Waterhouse](#), 490 U.S. at 281, 109 S. Ct. at 1807. He explains that "because of" means that the event would not have occurred but for the prohibited factor. Justice Kennedy continues:

[4.14] The most confusing aspect of the plurality's analysis of causation and liability is its internal inconsistency. The plurality begins by saying: "When ... an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations--even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." . . . Yet it goes on to state that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." . . . Given the language of the statute, these statements cannot both be true."

490 U.S. at 285, 109 S. Ct. at 1809 (internal citations omitted).

[4.15] Using Justice Kennedy's reasoning, if, in a sex discrimination case, "motivating factor" means that the plaintiff's sex *played a part* in the employer's decision, then doesn't it mean that the fact that she was female made a difference in the outcome? If so, how can it also be true that the same decision would have been made even if plaintiff had been male? The only way I can reconcile the two propositions is by assuming that the employer's determination that the plaintiff would have been terminated anyway is based on an after-the-fact analysis similar to the one an employer must conduct if it wishes to rely on after-acquired evidence of misconduct to prove that an employee is not entitled to certain types of damages. See [McKennon v. Nashville Banner Publishing Co.](#) 513 U.S. 352, 115 S. CT. 879, 130 L. Ed. 2d 852 (1995) (holding that when an employer acquires evidence of an employee's misconduct after an employee has been terminated and it proves that it would have terminated the employee for that misconduct, the employer may not be found liable for back pay from the date the new information was discovered).

[4.16] The inconsistency was noted in a dissenting opinion in the Seventh Circuit by a judge who objected to the phrase "determining factor":

Thus, if a jury accepts the plaintiff's contention that age was a "determining factor" in his discharge, it has necessarily rejected the employer's contention that it would have terminated the plaintiff regardless of his age; both cannot simultaneously be true.

[Mayall v. Peabody Coal Co.](#), 7 F.3d 570, 575 (7th Cir. 1993) (Rovner, dissenting).

[4.17] The inconsistency was also noted in an article by Rutgers Law School Professor Alfred W. Blumrosen. Referring to [Price Waterhouse](#), he stated:

Six Justices decided that an employer may 'prove' a matter that was inconsistent with the facts found in the same case. An employer who included discriminatory considerations in a personnel decision could nevertheless prevail if it 'proved' that it would have made the same decision without a discriminatory intent. It is impossible, however, to prove a matter that is inconsistent with facts judicially established in the same case.

Alfred W. Blumrosen, [Society In Transition II: Price Waterhouse And The Individual Employment Discrimination Case](#), 42 Rutgers L. Rev. 1023, 1044 (1990)(footnote omitted).

Professor Blumrosen reconciled this inconsistency by assuming that the Justices did not really

mean "prove" in its common meaning, i.e. "the establishment of past events by testimony or other evidence." *Id.* Rather, he suggests that the most probable interpretation of the wording is that the employer may prevail if the factfinder finds that the employer would have been justified in taking the action in the absence of a discriminatory motive. *Id.* He goes on to conclude that the [Price Waterhouse](#) affirmative defense would make it difficult, if not impossible, for a plaintiff to prevail.

[4.18] Even assuming that a jury could logically find that an employer who was motivated to act by the plaintiff's sex would have made the "same decision" if the plaintiff had been the opposite sex, it seems highly unlikely that they would do so. As one commentator has stated with respect to "direct evidence" cases:

If the jury chooses to believe the plaintiff's "direct evidence" against the defendant's denials, the chances are extremely remote that the defendant's "same decision" evidence will be believed. If the defendant has lost the initial battle on direct evidence, where the burden of proof is not yet imposed on him, how can it hope to prevail on the 'same decision' issue, when it does carry the burden?"

Stephen W. Smith, [Title VII's National Anthem: Is There a Prima Facie case for the Prima Facie Case ?](#), Vol. 12, No. 3 *The Labor Lawyer*, ABA Section of Labor and Employment Law, p. 389 (Winter/Spring 1997).

[4.19] The same reasoning applies to circumstantial cases. Asked another way, if a plaintiff, who has the burden of proof, convinces a jury that the employer was motivated to fire her because of her sex, is the defendant likely to be able to convince the jury, when it has the burden of proof, that it would have made the same decision if the plaintiff had been male?

[4.20] In spite of the logic of Justice Kennedy's argument, the confusing nature of the instruction, and the unlikelihood of a defendant being able to prevail on this defense, the law of the land now is that in the appropriate case, the court must give the "same decision" instruction. The question then becomes: what is the appropriate case?

When Should The "Same Decision" Instruction Be Given?

[4.21] In the typical employment discrimination case, the employer understandably does not claim that even if a prohibited factor was a motivating factor in its decision, it would have taken the same action in the absence of the unlawful motive. Such a statement may send the message to the jury that the employer may have discriminated. The employer usually takes the position that it had legitimate reasons for its actions and did not discriminate. In the typical case, the evidence might support a finding that both legitimate and illegitimate factors motivated the employer. The dilemma for the court is then whether to give the "same decision" instruction in the absence of an express claim that the employer would have made the same decision in the absence of the illegal motivation.

[4.22] Often, neither party will request the "same decision" instruction. The defendant may not want it because it shifts the burden of proof to the defendant and it may be confusing. The defendant may prefer to rely on the position that the plaintiff has not proven that discrimination was a motivating factor rather than add an affirmative defense of what the employer would have done in the absence of discrimination. A plaintiff, however, sometimes wants to impose the burden of proof on the defendant and therefore requests that the instruction be given over the defendant's objection. See [Fields v. New York State Office of Mental Retardation and Developmental Disabilities](#), 115 F.3d 116, 121-122 (2nd Cir. 1997) (discussing cases in Second

Circuit where affirmative defense instruction was given when requested by only the plaintiff).

[4.23] The plurality in [Price Waterhouse](#) said that the employer's burden to show that it would have made the same decision anyway is "most appropriately deemed an affirmative defense". 490 U.S. at 246, 109 S. Ct. at 1788. If the trial court treats the employer's burden as an affirmative defense, the decision of what to do when the employer doesn't want the instruction is easy: the instruction is not given because affirmative defenses must be asserted by a defendant. I am aware of no other area of law where an affirmative defense may be imposed on an unwilling defendant. Of course, if a defendant pleads the "same decision" affirmative defense and presents evidence and argument on it, the decision is also easy: in that case the instruction will be given.

[4.24] The difficulty arises when the defendant requests the instruction, yet has not pled an affirmative defense, presented evidence that it would have made the same decision anyway, or even argued that it would have made the same decision in the absence of discrimination. The defendant has simply defended on the basis that it had legitimate non-discriminatory reasons for its actions and did not discriminate. If "deeming" something as an affirmative defense means treating it just as any other affirmative defense, then a strong argument can be made that if an employer does not assert that it would have made the same decision in the absence of its discrimination as an affirmative defense in its answer, then it is waived. The general rule on affirmative defenses is that "[a]n affirmative defense not pleaded in the defendant's answer is waived." [Troxler v. Owens-Illinois, Inc.](#), 717 F.2d 530, 532 (11th Cir. 1983) (citing Fed. R. Civ. P. 8(c), which requires a defendant to set forth affirmatively in its answer any matter constituting an affirmative defense). The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. [Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.](#), 402 U.S. 313, 350, 91 S. Ct. 1434, 1453, 28 L. Ed. 2d 788 (1971). The Eleventh Circuit has found one type of affirmative defense to alleged employment discrimination to have been waived when not expressly pleaded and included in the pretrial order. [Grant v. Preferred Research, Inc.](#), 885 F.2d 795 (11th Cir. 1989) (holding defendant waived the bona fide seniority system affirmative defense to Title VII by failing to assert it until three days prior to trial).

[4.25] Moreover, it may not be sufficient just to assert the affirmative defense. The general rule is that, "Where a party presents no evidence to support a particular theory of his case, he has no right to a jury instruction on that point." [Pierce v. F.R. Tripler & Co.](#), 955 F.2d 820, 826 (2d Cir. 1992). Why should the rule be any different on this issue? It may be confusing to a jury to be instructed on a claim that an employer has never made. These issues are yet to be resolved.

Should The Court Instruct On Permissible Inferences?

[4.26] A circumstantial case by definition requires the jury to draw inferences. The most often discussed inference in employment discrimination cases is the inference that a jury may draw if it disbelieves the employer's proffered reason. In [St Mary's Honor Center v. Hicks](#), 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), the Supreme Court held that a jury may, but is not required to, infer that an employer unlawfully discriminated if it disbelieves the employer's stated reason for taking an adverse action against an employee. 509 U.S. at 511, 113 S. Ct. at 2749.

[4.27] The question often arises as to whether the court should instruct the jury that it is permitted to draw this inference. Generally, the trial court does not instruct the jury on permissible inferences because there are any number of inferences that can be argued in a particular case. For example, a plaintiff may argue that an inference of discrimination may be

drawn from stray remarks in the work place, disparate treatment of other employees, or statistics on the composition of the workforce. A defendant may argue that an inference of no discrimination should be drawn from the fact that the decisionmaker is the same race or sex as the plaintiff, or that the decisionmaker had been the one who hired the plaintiff shortly before the adverse action was taken. Singling out a particular inference for instruction by the judge may give it undue emphasis. Also, it is likely that a jury will understand, without being told by the judge, that if an employer is lying about its real reason for its employment actions, it may be trying to cover up an unlawful reason, and that unlawful reason may be the discriminatory reason asserted by the plaintiff. A judge need not instruct a jury on something that jurors can glean from everyday experience and that is likely to be argued by the lawyers. See Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994)(noting that a district court "need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory inference. Many an inference is possible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel"); see also Grebeldinger, supra at 413.

[4.28] Finally, the pattern instructions on employment discrimination in Devitt, Blackmar and Wolff do not include instructions on permissible inferences. Despite these arguments for not giving an instruction on this inference, an inference instruction might be given to balance a business judgment instruction, as discussed below.

Should The Court Give A Business Judgment Instruction?

[4.29] Usually a defendant will request an instruction that informs the jury that it cannot be found liable for exercising its business judgment, even if the jury disagrees with the manner in which it did so, as long as its reasons were not discriminatory. This idea is expressed in the oft-quoted paragraph from Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason"). At least one Circuit Court has found that it is error not to give some type of business judgment instruction. See Stemmons v. Missouri Dept. of Corrections, 82 F.3d 817, 819 (8th Cir. 1996).

[4.30] Devitt, Blackmar and Wolff's pattern instruction for Age Discrimination cases contains the following language:

You should not find that the decision is unlawful just because you may disagree with the defendant's stated reasons or because you believe the decision was harsh or unreasonable, as long as the defendant would have reached the same decision regardless of the plaintiff's age.

3 Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, § 106.03 (1997 Supp.).

[4.31] The court will often allow evidence to be admitted that tends to show that the employer's action was unreasonable or unjustified. This evidence comes in because it may support an inference in favor of the plaintiff that the employer's stated reason for its action was not its true reason. However, once this evidence comes in, there is a risk that a jury may misunderstand its purpose and believe that it may base its verdict on what it believes to be improper or unreasonable, but not necessarily discriminatory, actions on the part of the employer. It may not be obvious to a jury that the employer may not be found liable just for unreasonable or unjustified actions. For this reason, I may be favorably disposed to giving a business judgment

instruction. I have given instructions as follows:

Federal laws that prohibit discrimination in employment do not take away an employer's right to take action against its employees. Rather, these laws address, in this case, discrimination because of an employee's race. The laws against race discrimination are not a shield against harsh treatment in the work place. Nor do these anti-discrimination laws require the employer to have good cause for its decisions. An employer may take actions against an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all as long as its decision is not based on a discriminatory reason -- that is, as long as it is not because of the employee's race. Even if the employer's judgment or course of action seems poor or erroneous to outsiders, the proper question in this case is simply whether the given reasons for the employer's decision were a pretext for race discrimination against Plaintiff.

[4.32] At the same time, I would consider balancing such an instruction with an instruction explaining the permissible inference that may be drawn if a jury disbelieves an employer's proffered legitimate reason for its actions.

5. Conclusion

[5.1] Jury instructions in employment discrimination cases are important and should be given careful thought from the earliest stages of case preparation. The parties must be thoroughly familiar with the applicable procedural rules, the contentions in their case, and the case and statutory law relevant to those contentions. Counsel and the trial judge should have as their ultimate goal instructions that accurately describe the parties' contentions and the legal principles to be applied, and that are easily understood by lay persons. Achieving this goal requires careful consideration by counsel and the trial judge of many issues, many of which have not yet been fully resolved by the higher courts.

Articles

Alfred W. Blumrosen, Society In Transition II: Price Waterhouse And The Individual Employment Discrimination Case, 42 Rutgers L. Rev. 1023 (1990).

Susan K. Grebeldinger, Instructing The Jury In A Case Of Circumstantial Individual Disparate Treatment: Thoroughness Or Simplicity?, Vol. 12, No. 3 The Labor Lawyer, ABA Section of Labor and Employment Law, p. 399 (Winter/Spring 1997).

Sandra Day O'Connor, Juries: They May Be Broken, But We Can Fix Them, 44-JUN Fed. Law. 20 (1997).

Stephen W. Smith, Title VII's National Anthem: Is There a Prima Facie case for the Prima Facie Case ?, Vol. 12, No. 3 The Labor Lawyer, ABA Section of Labor and Employment Law, p. 371 (Winter/Spring 1997).

1. The Civil Rights Act of 1991 establishes the following caps for compensatory and punitive damages combined: (a) \$50,000 for an employer with 15 to 100 employees; (b) \$100,000 for an employer with 101 to 200 employees; (c) \$200,000 for an employer with 201 to 500 employees and (d) \$300,000 for an employer with more than 500 employees. A separate cap applies for each distinct claim and the caps do not cover back pay and prejudgment interest. 42 U.S.C.

§1981a(b)(3). The court does not instruct the jury on the caps but must reduce any verdict that exceeds them. [42 U.S.C. §](#)1981a(c)(2).

2. The Eleventh Circuit pattern jury instructions provide, in relevant part, "compensatory

damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of the injury -- tangible and intangible. They are an attempt to restore the Plaintiff, that is, to make him whole or as he was immediately prior to his injuries." Pattern jury Instructions (Civil Cases), U.S. Eleventh Circuit District Judges Association, Damages Instruction No. 1.3 and 1.4 (1990).

3. See Pattern Jury Instructions (Civil Cases), U.S. Eleventh Circuit District Judges Association, Federal Claim Instruction 7.1 (1990).

4. See Devitt, Blackmar & Wolff, 3 Federal Jury Practice and Instructions, §104.01 et seq. (1997 Suppl.).

5. See EEOC General Counsel's Memorandum on Supreme Court's Hicks Decision, Fair Empl. Prac. Manual (BNA) 405:7151, 7156-58 (March 1994).

6. See Susan K. Grebeldinger, Instructing The Jury In A Case Of Circumstantial Individual Disparate Treatment: Thoroughness Or Simplicity?, Vol. 12, No. 3 The Labor Lawyer, ABA Section of Labor and Employment Law, p. 399 (Winter/Spring 1997) (collecting cases).