No. 02-679

In The
Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE FACTS

In February, 1987, respondent Catharina F. Costa was hired by Caesars Palace as the first and then only female warehouseman.[1] Costa was a member of the International Brotherhood of Teamsters. Her job duties included operating forklifts and pallet jacks. Until Costa was hired, warehouseman had been an all male job; women held only clerical positions in the warehouse. In the years leading to her dismissal in 1993, Costa was subject to an ongoing barrage of discriminatory practices.

Harassment and Verbal Abuse

In August, 1991, a male coworker called Costa a "fucking cunt", and she responded with a gender-neutral epithet. Costa complained to her supervisor. Although the male worker admitted in writing that he had used that graphic language, Caesars did not disclose that admission to Costa. Instead, the employer responded by punishing Costa as well as the abuser.

In October, 1992, Costa was the only woman with a group of male coworkers who were eating during a non-scheduled break. A male supervisor approached Costa and demanded, "Don't you have work to do?", then walked away without saying anything to the men who were also on break. Costa complained in vain about this remark to Caesars' Labor Relations Manager.[2]

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[1] This is the job title in the collective bargaining agreement between Caesars and the Teamsters. PX 77, article 15.01. Costa referred to herself as a warehouse person.

[2] Tr. 44-45, 301-02, 312, 331.

In another incident, a male supervisor ordered Costa, against her will, to sign a United Way card. None of the men were ordered to do so. Costa complained without success to company officials, who told her there was nothing they could do about it.[3]

The Receiving Office at Caesars was officially off-limits to all employees. Despite that rule, male workers were permitted to take their breaks in that office, eating and reading newspapers. Costa was not allowed in the Receiving Office; when she attempted to go there with male coworkers, she was the only one thrown out by supervisors. Costa complained without effect about this discriminatory practice.[4]

In 1993, a then newly hired assistant manager in the warehouse, Karen Hallett,[5] at times stalked Costa at work, warning that she "was going to be on [Costa's] every move." Hallett would follow Costa into the freezer or produce box, and was repeatedly observed peeking around corners and food pallets to watch Costa. Costa, accompanied by two male coworkers, complained in vain to the Labor Relations Manager about this. The Manager responded, flippantly, "Well, she's stalking you, why don't you go file a police report."[6]

Discriminatory Discipline

On September 9, 1991, Costa was disciplined for clocking in at 6:01 A.M. when her work time was 6:00 A.M.

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[3] PX 37, Tr. 57-59, 71-73, 313-14, 597.

[4] Tr. 210-12, 300-01, 312.

[5] Hallett was hired by Caesars in July 1993, some six years after Costa. Tr. 508.

[6] Tr. 145-49, 177-78, 288-300, 304-06, 343-44, 537-39.

The discipline was for not being at her work place at 6:00 A.M. The same time sheets contained records of a male worker who had not clocked in at all for two days in a row, but had received no discipline.

On December 12, 1991, Costa was disciplined for having telephoned that she would be late for work. Male coworkers were not given warnings for calling in late, but instead, were given overtime to make up the work time they missed. But Costa was not granted overtime to make up her lost time as the men were.[7]

On April 5, 1992, Costa was disciplined for tardiness as a result of arriving at her place of work late. The same time sheets revealed that several of her male coworkers were leaving their stations early but had not been disciplined.

On May 4, 1992, Costa was suspended by her supervisor for missing work even though she had been given medical leave by the company's Vice President of Human Resources. In spite of the leave of absence, Costa was forced to file a formal grievance to have the suspension voided.[8]

On September 15, 1992, a worker who came to the warehouse for supplies was abusive to Costa. Rather than argue, Costa went to her male supervisor and asked him to intercede. The supervisor instead chastised Costa for being rude to the other worker, and when Costa complained about that response, the supervisor further disciplined her for voicing that objection.

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[7] Tr. 73-78, PX 11, PX 16.

[8] Tr. 86-89, PX 12.

In October, 1992, the same male supervisor suspended Costa for assertedly recklessly endangering a fellow employee with an electric cart. A subsequent investigation revealed that that supervisor had lied in his report. That information was withheld from Costa for several years.[9]

Costa, also in 1992, was disciplined for alleged unsafe use of a forklift, despite the fact that the men who had been driving the forklift in a similar manner were not sanctioned. When the men ran into walls with the forklift, or in one instance hit someone's car, no discipline was meted out.[10]

In the summer of 1992, Costa was suspended for 30 days for allegedly making a vulgar ethnic remark. No male had ever been suspended for 30 days for vulgar language or ethnic slurs, even though they were commonplace in the warehouse. A Teamster's official testified that he had never seen a 30-day suspension for anything at Caesars. The 30-day suspension was grieved, went to arbitration, and was overturned by the arbitrator.[11]

On August 31, 1993, Costa was disciplined for having been tardy on nine occasions in 1993. Costa filed a grievance because she had been under a doctor's care, and her supervisor had refused to consider notes from Costa's doctor. During the same period, a male worker who had missed several entire days of work and had no doctor's note at all was not disciplined. Instead he was permitted to work overtime to make up his absences. When Costa objected to this difference in treatment, she was told "he's a man and has a family to support." In addition, a male

[9] Tr. 48-51, 53, PX 51.

[10] Tr. 315-317.

[11] Tr. 40-41, 111-113, 170-171, 172, 199, 371, PX 39-41, 44-46, PX 49.

coworker testified that when he received an absentee warning, the supervisor who had issued it explained, " . . . she had to give it to me because she was beating Catharina to death with it, you know, she was giving Catharina a lot of warnings so she had to give me one."[12]

Discriminatory Denial of Overtime

Overtime, because of the higher hourly pay, was highly regarded by the workers. Costa asked her supervisors repeatedly for overtime, but was almost always passed over in favor of her male coworkers. As early as April 12, 1991, Costa was forced to file a formal grievance in an attempt to get overtime. A 1992 summary of overtime showed that of the 95.5 hours of overtime allotted, eight men received the majority of overtime hours, while Costa had received only 2 hours.[13] On September 24, 1993, Costa again filed a formal grievance stating that she had unfairly been denied overtime.

On March 24, 1994, Costa's supervisor submitted a memorandum to the Labor Relations Manager, setting forth a list of people who had refused overtime since October 1, 1993. Costa was listed as having refused overtime on March 17, 1994, despite the fact that Costa was out of the country on that date and could not have refused.[14]

Costa's supervisors subsequently changed their tactics. They began offering her overtime work only a few minutes before she was scheduled to go home. They would

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[12] Tr. 79-85, 91-95, PX 14, PX 15, PX 16.

[13] Tr. 95-96, PX 17, Tr. 63

[14] Tr. 100-103, PX 22, PX 18.

ask the men early in the morning, so the male workers could make any necessary arrangements. Costa, again, filed a formal grievance, and Caesars agreed to end this practice. Even after grievance, however, this problem continued.[15]

Costa's Dismissal

On May 24, 1994, Costa filed a complaint alleging sexual harassment and discrimination with the Nevada Equal Rights Commission and the Federal Equal Employment Opportunity Commission. She was dismissed on August 15, 1994, only three months later.

Caesars found an excuse for dismissing Costa when she was physically attacked by a male coworker in an elevator. Herb Gerber went looking for Costa to accuse her of reporting his unauthorized lunch breaks to management. Gerber entered the warehouse elevator behind Costa and trapped her in the elevator. Costa was frightened by Gerber's anger and pleaded with him "don't hit me." Gerber slammed Costa against the wall of the elevator, badly bruising her upper arm. Costa's version of the incident was corroborated by pictures of her bruised arm and by a witness who saw Gerber blocking the elevator door. After promptly reporting the attack to her supervisor, Costa returned to work, only to have Gerber seek her out and "come at" her a second time. (Pet. App. 61).

Caesars responded to the attack by firing Costa and suspending Gerber for only five days. Gerber gave conflicting accounts of what had occurred, at first denying that there had been any physical contact, then asserting that Costa had shoved (or perhaps hit) him, possibly first,

[15] Tr. 106-109, PX 23.

ultimately admitting she had done neither.[16] The suggestion that Costa might have started a physical fight with Gerber was belied by the fact, obvious to Caesars and the jury alike, that Costa, a woman of average height and weight, would obviously have been no match for the taller, heavy set Gerber.

Caesars did not conclude that Costa had started the altercation. Rather, the official responsible for the disciplinary decisions explained that he decided to punish both Costa and Gerber because he could not figure out whose account to believe.[17] Caesars claimed it had imposed the far more modest penalty on Gerber because he had not been disciplined before; to the contrary, Gerber had, in fact, been the subject of prior disciplinary action.

SUMMARY OF ARGUMENT

This case involves an unremarkable application of section 703(m) of Title VII. That provision states that an unlawful employment practice is established if the plaintiff "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice." Section 703(m) is not limited to cases involving, and does not require proof of the existence of, multiple motives. Instruction No. 9, to which Caesars has never objected, accurately paraphrased section 703(m).

Instruction No. 10, to which Caesars does object, merely sets forth the partial affirmative defense established by section 706(g)(2)(B). The jury found that Caesars acted with both a discriminatory and another (unidentified) motive in dismissing Costa, but concluded that

[16] Tr. 581.

[17] Tr. 489-91.

Caesars would not have dismissed Costa if she had been a man.

Petitioner appears to contend that a jury cannot be instructed under sections 703(m) and 706(g)(2)(B) unless the plaintiff has adduced "direct evidence" of discrimination. But nothing in the language of Title VII permits the imposition of such a limitation. Section 703(m) requires only that a plaintiff "demonstrat[e]" the existence of an impermissible motive. Section 701(m) specifically defines demonstrate to mean only that a party must meet both the burden of production and the burden of persuasion. Neither section 703(m) nor section 701(m) requires that that demonstration be made with any particular type of evidence.

The dispute regarding whether direct evidence is required by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is irrelevant to the resolution of this case. The opinions in *Price Waterhouse* concern the meaning of the phrase "because of" in section 703(a). The "a motivating factor" language of section 703(m) has effectively supplanted the "because of" requirement in section 703(a). Proof of an illicit motivating factor is sufficient to establish liability (under section 703(m)) without regard to whether the evidence also shows discrimination "because of" that factor (under the original section 703(a)).

The United States suggests that circumstantial evidence is of uncertain reliability, and that only direct evidence could give courts "a high degree of confidence." But if a criminal defendant were to suggest that only "direct evidence" could prove guilt beyond a reasonable doubt, the Solicitor General would surely, and properly, object. In an appropriate case, a jury could sentence a defendant to death on the basis of circumstantial evidence.

Petitioner's proposal that certain types of discrimination claims can only be established by "direct evidence" has no precedent in the law. In both civil and criminal proceedings circumstantial evidence is universally as acceptable as direct evidence, and would have been sufficient to support any other claim brought against, or by, Caesars. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508 n.17 (1957). Plaintiffs alleging intentional discrimination in violation of Title VII should not be obligated to adduce a special type of evidence not required in any other area of the law.

Litigation in which a plaintiff relies on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and disputes involving mixed motives are not two mutually exclusive types of Title VII cases. Rather, *McDonnell Douglas* and its progeny concern a method for proving the existence of an unlawful *motive*, while a mixed-motives analysis is a method of allocating the burden of proof regarding *causation*.

ARGUMENT

I. INSTRUCTION NO. 9 IS CONSISTENT WITH SECTION 703(m) OF TITLE VII

This case involves an unremarkable application of section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m). That section provides:

> Except as otherwise provided in this title, 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.

Section 703(m) was added by the 1991 Civil Rights Act. A limitation on the relief available for a violation of this section is established by section 706(g)(2)(B).

Instruction No. 9 in the instant case closely tracks the language of section 703(m).

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. 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.

(J.App. 32-33) (Emphasis added).[18] This instruction is essentially similar to the model instructions used in other circuits.

Petitioner has never objected to Instruction No. 9. In the district court petitioner expressly agreed to this instruction. When the trial judge reviewed the proposed instructions, counsel for petitioner remarked, "We have no objections to the Court's instructions 1 through 9." (Tr. 460). In the district court petitioner itself, expressly citing section 703(m), proposed a similar instruction that would have authorized liability on a finding that gender had

[18] In the original instructions, and thus in Joint Appendix, the number of each instruction appears *after* the instruction itself.

been "a motivating factor." (J.App. 24). Petitioner neither objected to nor even mentioned Instruction No. 9 in its briefs in the court of appeals, in the petition for writ of certiorari, or in its merits brief in this Court.

The gravamen of petitioner's argument is that a "mixed motive" instruction cannot be given in the absence of "direct evidence." It is unclear how this argument, even if sound, would bear on the propriety of Instruction No. 9; petitioner itself does not suggest that Instruction No. 9 raises any problems. Section 703(m) is not *limited* to cases in which an employer has acted with multiple motives. Under the plain language of that provision, a plaintiff can establish a violation simply by proving that gender or any other impermissible consideration was "a motivating factor" in her dismissal or any other adverse action. Where a plaintiff has done so, liability will exist "even though other factors also motivated the practice." But nothing in section 703(m) requires a plaintiff to establish that an employer did indeed also have *other* additional motives. The words "other factors also motivated the practice" are preceded by "even though", not by "provided." Liability exists regardless of whether (not if and only if) other motives are present. Where a plaintiff demonstrates that gender was "a motivating factor," an employer assuredly could not defeat that section 703(m) claim by insisting that gender was its *only* motive, so that the case did not involve "mixed motives." Even if the parties stipulated that an employer had acted with only one motive, the nature of which was in dispute, the plain language of section 703(m) would still apply.

If there is a basis for objecting to Instruction No. 9, and the verdict which rested on it, that objection would have to be that a section 703(m) claim requires not only that a plaintiff prove the existence of "a[n impermissible] motivating factor", but *also* that the plaintiff offer "direct

evidence" of the presence of that motive. It is unclear whether petitioner, or the amici urging reversal, advance such an interpretation of the language of section 703(m). It is entirely clear, however, that section 703(m) contains no such requirement.

The United States[19] appears to suggest that the term "demonstrates" in section 703(m) should be construed to mean something like "demonstrates with direct evidence." (U.S. Br. 20). But "demonstrate" means "show" or "prove" (as opposed to, for example, "allege" or "contend"). "Demonstrate" carries with it no additional meaning regarding *how* the demonstration is to occur. To the contrary, it would be paradoxical to assert that Costa demonstrated that gender was a motivating factor, in the sense that she so convinced the jury, and yet that she failed to so "demonstrat[e]" within the meaning of section 703(m).

Other provisions in Title VII emphatically preclude such a peculiar interpretation of the term "demonstrates". Section 701(m), 42 U.S.C. § 2000e-(m), contains a specific definition of this very word. "The term 'demonstrates' means meets the burdens of production and persuasion." Section 701(m) clearly does not require that those burdens be met with any particular kind of evidence. Especially where Congress has expressly defined a statutory term, the courts assuredly are not free to craft some other definition. The very purpose of such a statutory definition is to delineate the meaning of the term in question wherever it may appear in a statute. The section 701 definitions are controlling "[f]or the purposes of this title" – the entirety of Title VII.

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[19] The Equal Employment Opportunity Commission has not joined in the brief filed by the Department of Justice.

The definition of "demonstrates" in section 701(m) cannot plausibly be construed to contain a requirement that the requisite demonstration be based on direct evidence. Section 701(m) provides a single definition of the term for all of Title VII. If section 701(m) itself were construed to have an unspoken requirement of "direct evidence", that interpretation would wreak havoc in the interpretation and application of Title VII. The term "demonstrate" is used in four other provisions of Title VII in addition to section 703(m). In some instances these provisions refer to what must be demonstrated by a plaintiff; in others they describe how an employer can establish a defense or reduce its liability by demonstrating certain facts.[20] It is quite inconceivable that Congress could have intended section 701(m) to impose in all of these sections a requirement that the fact in question be established by "direct evidence." The term "demonstrates" also occurs twice in the provision enacted as part of the 1991 Civil Rights Act providing for compensatory and

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[20] Section 706(g)(2)(B) provides a partial defense to a section 703(m) claim where the employer "demonstrates" that it would have taken the same action even in the absence of the impermissible factor. If the employer does so, the plaintiff can still obtain costs and attorneys fees "demonstrated" to be directly attributable to the section 703(m) claim.

Under section 703(k)(1)(A)(i) the plaintiff in a disparate impact case must "demonstrat[e]" that an employment practice has a disparate impact on the basis of race, color, religion, sex, or national origin. If that occurs, the employer may be able to avoid liability if it can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Under section 703(k)(1)(A)(ii) the plaintiff can overcome that defense with a "demonstration" that an appropriate alternative business practice exists. Section 703(k)(1)(A)(iii) provides the employer can avoid liability altogether through a "demonstration" that the practice in question did not cause the disparate impact.

punitive damages under Title VII and the Americans With Disabilities Act. 42 U.S.C. § 1981a.[21]

The United States argues that "demonstrates" must mean "demonstrates with direct evidence" because Justice O'Connor, who favored a direct evidence requirement in *Price Waterhouse*, also used the term "demonstrate" in her opinion. (U.S. Br. 6). But the word "demonstrate" is not a newly coined term first used and explained in Justice O'Connor's opinion; it had been utilized in innumerable other opinions and statutes prior to the enactment of the 1991 Civil Rights Act. Justice O'Connor's concurring opinion in *Price Waterhouse* did not purport to establish some special meaning of the term "demonstrate" or to suggest that "demonstrate" *means* "prove with direct evidence."[22] She used the term "demonstrate" (490 U.S. at 275) interchangeably with other words, such as "show" (490 U.S. at 265, 267, 274, 276, 277), "proof" (490 U.S. at 268), and "convinc[e]" (490 U.S. at 269). The government's argument might as plausibly been made if section 703(m)

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[21] Punitive damages can be awarded if the plaintiff "demonstrates the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Conversely, in a reasonable accommodation case under the ADA or the Rehabilitation Act, a defendant can avoid liability for compensatory damages if it "demonstrates good faith efforts" to provide such an accommodation. 42 U.S.C. § 1981a(a)(3).

[22] To the contrary, Justice O'Connor's opinion endorsed shifting the burden of persuasion "where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision." 490 U.S. at 275. The additional words "by direct evidence" would have been entirely superfluous if Justice O'Connor thought that "demonstrated" *meant* "proved with direct evidence."

had required a plaintiff to "show" or "prove" that an impermissible criterion had been a motivating factor.

If the term "demonstrates" does not itself contain a "direct evidence" requirement, it is clear that such a requirement cannot simply be engrafted onto section 703(m). A plaintiff who proves the existence of an unlawful motivating factor has done all that the language of section 703(m) itself requires, regardless of what type of evidence was used. An additional "direct evidence" requirement would constitute an unwritten exception to the terms of the statute. But section 703(m) states that the specified demonstration will establish liability "[e]xcept as otherwise provided in this title." The requirement that such an exception be specified in the text of another provision of Title VII (i.e., in section 706(g)(2)(B)) precludes the courts from engrafting onto section 703(m) any other non text-based exceptions.

When Congress wishes to establish a heightened proof requirement, it does so expressly. The United States Code contains numerous such provisions, such as requirements that certain facts be proved "beyond a reasonable doubt,"[23] or by "clear and convincing evidence."[24] On the other hand, no provision in the United States Code requires "direct evidence", in either a civil or criminal case; the only references to "direct evidence" are in federal statutes which provide that such evidence is *not* required.[25] Every

[23] *E.g.*, 10 U.S.C. § 906a(c); 18 U.S.C. §§ 1467(e)(1), 1623(e), 2253(e), 3591(a)(2), 3593(c).

[24] *E.g.*, 5 U.S.C. §§ 1214(d)(4)(B)(ii), 1221(e)(2); 8 U.S.C. §§ 1154(a)(2)(A)(ii), 1158(2)(B), 1229a(c)(3)(A).

[25] *See* 21 U.S.C. § 863(e)(6) (direct or circumstantial evidence sufficient), 18 U.S.C. §§ 892(c) (court may allow use of any evidence "tending to show" facts at issue if direct evidence unavailable), 1469(a) (same).

reference to circumstantial evidence in the United States Code expressly permits its use.[26]

The United States objects that a "direct evidence" requirement should be created *because* section 703(m) has the effect of "expanding liability" under Title VII. (U.S. Br. 10). The government offers no explanation, and none is readily imaginable, for a rule of construction under which broadening the scope of Title VII should be deemed an evil to be counteracted wherever possible by judicial construction. There is, after all, no special rule of lenity for biased employers. Why legislation according greater protections to victims of invidious discrimination should be construed with such a jaundiced eye the Solicitor General does not say. Why the Civil Rights Division should endorse such an approach to the very laws which it enforces is assuredly difficult to understand.

Finally, the United States asserts that to establish a section 703(m) claim a plaintiff must show that race or gender "was a *substantial*, motivating factor." (U.S. Br. 9, 10, 29) (Emphasis added). The proposed requirement that the impermissible consideration also have been "substantial" simply is not in the text of the statute, and the government makes no effort to explain why this Court should engraft onto section 703(m) such an additional element. The decision in *Price Waterhouse* can fairly be understood to contain just such a requirement, since both Justice White (490 U.S. at 259) and Justice O'Connor (490 U.S. at 265) maintained that the appropriate standard was a "substantial" motivating factor. Because the votes of either Justice White or Justice O'Connor were necessary to create a majority, this requirement is part of the holding

[26] 5 U.S.C. § 1221(e)(1); 21 U.S.C. § 863(e)(6); 22 U.S.C. § 1319(c)(3)(B)(II); 42 U.S.C. §§ 6928(f)(2)(B), 7413(c)(5)(B).

of the Court. But section 703(m) contains no such requirement, because Congress chose not to use the word "substantial" in the language of the statute.

II. INSTRUCTION NO. 10 IS CONSISTENT WITH SECTION 706(g)(2)(B) OF TITLE VII

Section 706(g)(2)(B) provides an important partial defense to a claim based on section 703(m):

> On a claim in which an individual proves a violation under section 703(m) 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, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly applicable only to the pursuit of a claim under section 703(m),and
> >
> > (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

This partial defense was reflected in Instruction No. 10. Although subsection (ii) bars a number of different remedies if the defense is established, the only one of those remedies ordinarily awarded by a jury is damages. Accordingly, Instruction No. 10 directed the jury to withhold any award of damages if it found that petitioner would have taken the same action regardless of Costa's gender.

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of

> the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.
>
> I will provide the jury with a form so that it can report a special interrogatory on the jury's finding on this question.

(J.App. 33-34).[27]

The section 706(g)(2)(B) partial defense is contained in the second paragraph of Instruction No. 10. In his closing argument, counsel for Caesars expressly urged the jury to sustain that defense, arguing the petitioner would have taken the same actions against Costa even if she had been a man. Referring to the special verdict question regarding the section 706(g)(2)(B) defense, petitioner's attorney argued:

> [I]n question three there, it says if the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision.
>
> You put a yes there because what that's saying, if you get to that question, I don't think you have to, but if you get to that question, go through, you're saying, okay, when Caesars was

[27] In the original instructions, and thus in Joint Appendix, the number of each instruction appears *after* the instruction itself.

> dealing with Ms. Costa, whether they had their eyes open and said she was a woman, or had their eyes closed, the same result would have happened, and I believe that's what you should conclude when you're in the jury room.

(Tr. 658-59). Although the jury found that gender was not the only motive behind Costa's dismissal, it also concluded that petitioner would not have treated Costa in the same manner if she had been a man. (Pet. App. 88a-89a; J.App. 40).

The second paragraph of Instruction No. 10 (unlike Instruction No. 9) specifically addresses the mixed-motive situation. In the courts below, as here, Caesars vociferously objects to this aspect of Instruction No. 10.[28] This objection at first blush seems somewhat peculiar; the section 706(g)(2)(B) partial defense in Instruction No. 10 was to Caesars' advantage, because it permitted the defendant to avoid an award of damages if liability were found under Instruction No. 9.

Although the matter is not free from doubt, the gravamen of Caesars' objection to Instruction No. 10 seems to be that the district court should have placed on Costa (rather than on Caesars) the burden of establishing whether or not, for legitimate reason or reasons, she would have been treated in the same way even if Caesars had not considered her gender. On that view, the second paragraph of Instruction No. 10 should have been drafted something like this:

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[28] Petitioner also appears to argue that the first sentence of this instruction in effect directed the jury to find that gender had been a motivating factor. (Pet. Br. 44). The court of appeals properly concluded that any such objection had been waived. (Pet. App. 34a).

> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is *not* entitled to damages unless the *plaintiff* proves by a preponderance of the evidence that the defendant would have treated plaintiff *differently* if the plaintiff's gender had played no role in the employment decision.[29]

The simple answer to such a contention is that the plain language of section 706(g)(2)(B) is precisely to the contrary. Section 706(g)(2)(B) does not require the plaintiff to make such an additional showing in order to *obtain* damages; rather, that section places on the defendant the burden of making the opposite showing in order to *avoid* a damage award.

In the alternative, Caesars may be contending somewhat more narrowly that section 706(g)(2)(B) – or, more precisely, the allocation of the burden of proof contained in that section – does not apply in all section 703(m) cases, but only to section 703(m) cases in which the plaintiff has established a violation by "direct evidence." Again, however, such a proposed limitation on section 706(g)(2)(B) cannot be squared with the plain language of the statute itself. Section 706(g)(2)(B) applies "[o]n a claim in which an individual proves a violation under section 703(m)". Section 706(g)(2)(B) is applicable to *all* claims based on section 703(m); nothing in the text of that provision permits a court to apply a different rule because of the type of evidence that the plaintiff utilized in establishing that violation under section 703(m).

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[29] Petitioner did not actually propose any instruction of its own regarding proof of causation. *See* J.App. 22-27.

III. THE INCLUSION OF A "DIRECT EVIDENCE" REQUIREMENT IN SECTIONS 703(m) OR 706(g)(2)(B) IS NOT REQUIRED BY THE DECISION IN *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989)

Petitioner's proposed interpretation of sections 703(m) and 706(g)(2)(B) rests largely on its reading of this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse*, Caesars' claims, held that in a Title VII case the burden of proof on the issue of causation did not shift to the defendant unless the plaintiff's discrimination claim was supported by "direct evidence." (Pet. Br. 11-15). When Congress adopted the 1991 Civil Rights Act, petitioner insists, it intended to alter only one unrelated aspect of that decision, leaving the "direct evidence" requirement unchanged. (Pet. Br. 20-22).

(1) The simplest answer to this whole line of argument is that *Price Waterhouse* was not a generalized disquisition on the rationale of Title VII, but an interpretation of a specific phrase in section 703(a) of the statute. The discrimination claim in *Price Waterhouse* was brought under section 703(a), which requires a plaintiff to prove that she was discriminated against "because of" her gender. The opinions in that case were directed at construing the phrase "because of" in section 703(a). (490 U.S. at 249 (plurality opinion), 262 (O'Connor, J., concurring), 281 (Kennedy, J., dissenting)).

Section 703(m) does not purport to amend section 703(a) by clarifying the words "because of"; to the contrary, section 703(m) is a new and distinct provision which entirely supplants the phrase "because of" wherever it

appears in Title VII.[30] Section 703(a) makes an employment practice unlawful whenever a prohibited criterion was "a motivating factor", *regardless* of whether the practice occurred "because of" (as explicated by *Price Waterhouse*) that criterion. An employer could be liable under section 703(m) even if it were not liable under section 706(a) alone. That is precisely what would occur if the plaintiff proved that an unlawful consideration were "a motivating factor" (all that is required by section 703(m)), but not that it was "a *substantial* motivating factor" (as required in a section 703(a) case by the holding in *Price Waterhouse*). The fact that section 706(g)(2)(B) provides a limitation on liability in the case of "a violation under section 703(m)" makes clear that an employer can violate Title VII under section 703(m) even if there was no violation of section 703(a) by itself.

In this case, however, Instructions Nos. 9 and 10 concern liability under section 703(m) and the related defense to a section 703(m) claim that is provided by section 706(g)(2)(B). Neither section 703(m) nor section 706(g)(2)(B) use the phrase "because of". Thus the construction that the Court gave in *Price Waterhouse* to the words "because of" is simply irrelevant to the meaning of sections 703(m) and 706(g)(2)(B).

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[30] The phrase "because of" also appears in sections 703(b), 703(c), 703(d) and 704(a); section 703(m) would apply as well to claims under section 703(l) and 717(a). Congress presumably chose to enact a single provision like section 703(m), rather than insert substitute language in existing provision, because such language would have had to be added to seven different sections of Title VII.

Petitioner objects that if the interpretation of sections 703(m) and 706(g)(2)(B) are not conformed to the meaning of *Price Waterhouse*, then the method or standard of proof under Title VII would differ from that under other statutes, such as the ADEA, to which (they assume) *Price Waterhouse* would still apply. (Pet. Br. 26-27). But that is precisely the choice that Congress made in 1991 when it added sections 703(m) and 706(g)(2)(B) to Title VII alone, with no similar amendments to other anti-discrimination laws.

(2) Petitioner's proposed interpretation of *Price Waterhouse* rests on Justice O'Connor's concurring opinion, which admittedly does urge that under section 703(a) the burden of proof regarding causation cannot shift to a defendant unless the plaintiff offers "direct evidence."[31] Justice O'Connor's concurring opinion "is the holding of the Court", Caesars urges, because her vote was necessary to constitute a majority in favor of the Court's judgment. (P.Br. 14-15). Under *Marks v. United States*, 430 U.S. 188, 193 (1977), "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest ground."

The fatal defect in Caesars argument is not jurisprudential but mathematical. The total number of justices who concurred in the judgment in *Price Waterhouse* is not five but *six*. Justice White also concurred in the judgment, and his concurring opinion emphatically contains no

[31] As we explain below, petitioner's view of what would constitute "direct evidence" is far narrower than that of Justice O'Connor.

mention whatever of "direct evidence." Thus a total of five justices (the plurality together with Justice White) agreed that direct evidence was not needed to shift the burden of proof under *Price Waterhouse*.[32] Justice O'Connor's sixth vote was not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court. The outcome in *Price Waterhouse* would have been the same even if Justice O'Connor had dissented. The "narrowest ground" rule in *Marks* is applicable only to a 5-4 decision.

Both petitioner and the United States contend that the plurality opinion in *Price Waterhouse* endorsed Justice O'Connor's direct evidence proposal, relying on their interpretation of footnote 13 of the plurality opinion. (Pet. Br. 37 n.21; U.S. Br. 12, 15). There is, however, no need to tease meaning out of footnote 13 in order to ascertain the plurality's position on this issue; the plurality repeatedly addressed that issue quite specifically in the text of its opinion. The plurality expressly rejected Price Waterhouse's contention that Hopkins was required to adduce direct evidence.

> Price Waterhouse concedes that the proof in [*NLRB v.*] *Transportation Management*, [462 U.S. 393 (1983),] adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. . . . But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was

[32] *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1182-83 (2d Cir. 1992) ("[W]hat we must do is find common ground shared by five or more justices. . . . The requirement of 'direct evidence' was not . . . adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.")

> that the employer harbored a grudge toward the plaintiff on account of his union activity; *there was* contrary to Price Waterhouse's suggestion, *no direct evidence* that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U.S. at 396. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

490 U.S. at 257 (Emphasis added).[33]

Footnote 13 in the plurality opinion concerns, not what type of evidence a plaintiff must introduce, but what that evidence must prove. The text of the plurality opinion to which footnote 13 is appended reads as follows:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a

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[33] Elsewhere the plurality disavowed any limitation on the type of evidence on which a plaintiff might rely, expressly noting Justice O'Connor's view to the contrary.

> "By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But *see post*, at 277 (O'Connor, J., concurring in judgment)."

490 U.S. at 251-52. Similarly, the plurality explained that the burden of proof on causation would be shifted to the defendant if a plaintiff is able "to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision." 490 U.S. at 247 n.12. This articulation of the traditional preponderance of the evidence standard contains no special evidence requirement.

> truthful response, one of those reasons would be that the applicant or employee was a woman.

490 U.S. at 250. The relevant portion of footnote 13 states:

> After comparing *this description* of the plaintiff's proof to that offered by Justice O'Connor's opinion, concurring in the judgment, *post*, at 276-77, we do not understand why the concurrence suggests that they are meaningfully different from each other, see *post* at 275, 277-79.

490 U.S. at 250 n.13 (Emphasis added). Responding to footnote 13, Justice O'Connor explained that the difference that she (but not the plurality) thought significant was that she would have required the plaintiff to present sufficient evidence to support a finding that the decision was "because of" an impermissible factor.

> It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See *ante*, at 250 n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.

490 U.S. at 277-278. Petitioner's effort to tease out of footnote 13 an endorsement of a "direct evidence" rule is thus unavailing. Its unsuccessful attempt to do so demonstrates the wisdom of this Court's admonition that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States

Reports as though they were in the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

The United States repeatedly asserts that the plurality (as well as Justices White and O'Connor) insisted that "a plaintiff in a mixed-motive case must meet a *heightened burden of proof* by presenting evidence that discriminatory intent played a substantial, motivating role in the challenged employment decision." (U.S. Br. 11; *see id.* at 13). The normal burden of proof is by a preponderance of the evidence; a heightened burden of proof would mean that a plaintiff would have to show the existence of an impermissible motive by clear and convincing evidence, or beyond a reasonable doubt. The government, however, points to absolutely nothing in any of the opinions which favors such a heightened burden. The plurality expressly endorsed the preponderance of the evidence standard. 490 U.S. at 247.

Petitioner and the United States contend that the holding of *Price Waterhouse* can be ascertained by looking at how the dissenting opinion described the judgment to which it objected. (Pet. Br. 16; U.S. Br. 12, 15). This Court, however, has not regarded dissenting opinions as an appropriate guide to the meaning of the opinions with which they disagree. To the contrary, it is not unheard of for dissenters to seek to recharacterize the holding of the Court in a manner closer to the minority view.

In this instance the portion of the dissenting opinion relied on by petitioner and the United States is as follows:

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment action would have been

> supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 276-77 (opinion of O'Connor, J.); *ante*, at 259-60 (opinion of White, J.).

490 U.S. at 280 (Kennedy, J., dissenting). But while Justice White and Justice O'Connor would have required that the unlawful motive was "a substantial factor", only Justice O'Connor would have required "direct evidence."

Finally, the United States and petitioner contend that the legislative history of sections 703(m) and 706(g)(2)(B) indicates that Congress intended to overturn only one portion of the Court's holding in *Price Waterhouse*, the ruling that an employer would escape liability completely by showing that it would have taken the same action even in the absence of the illegitimate criterion. (Pet. Br. 21-22; U.S. Br. 14, 18, 22). This argument is unpersuasive for three distinct reasons. First, there is simply no relevant ambiguity in sections 703(m) and 706(g)(2)(B) that would justify resort to the legislative history. Second, because the holding in *Price Waterhouse* did not include any direct evidence requirement in the first place, a statute codifying *Price Waterhouse* (which sections 703(m) and 706(g)(2)(B) assuredly are not) would not codify, let alone create, such a requirement. Third, there is no indication that Congress misunderstood *Price Waterhouse* to adopt such a requirement.

The fallacy of this sort of reliance on *Price Waterhouse* is illustrated by the government's suggestion that the Court construe section 703(m) to require a showing that an impermissible consideration was not merely "a motivating factor" (the actual language of the statute), but "a

substantial motivating factor." (U.S. Br. 9, 10, 29) (Emphasis added). As we have explained, the holding of *Price Waterhouse* does indeed embody a requirement that the motivating factor be "substantial". (*See* pp. 16-17, *supra*). The legislative history evidently contains no assertion that Congress had decided to overrule (or indeed ever considered) this aspect of *Price Waterhouse*. Yet neither the holding in that decision nor the absence of such legislative history could possibly provide a basis for engrafting onto section 703(m) a "substantial[ity]" requirement that simply is not in the text of the statute.

IV. THE ADDITION OF A "DIRECT EVIDENCE" REQUIREMENT TO SECTIONS 703(m) OR 706(g)(2)(B) IS NOT NECESSARY TO AVOID ANY CONFLICT WITH THE METHOD OF PROOF ESTABLISHED BY *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 792 (1973)

(1) A literal application of sections 703(m) and 706(g)(2)(B) would not conflict in any way with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. A plaintiff might rely on the *McDonnell Douglas* methodology to establish a claim under section 703(m); petitioner itself proposed an instruction that combined the section 703(m) standard (proof of "a motivating factor") with a *McDonnell Douglas* methodology (proof of pretext.) (J.App. 24-25).

Litigation in which a plaintiff relies on *McDonnell Douglas* and disputes involving mixed motives are not two distinct, mutually exclusive types of Title VII cases. Rather, as the Ninth Circuit correctly observed, the *McDonnell Douglas* caselaw and the mixed-motives analysis each address quite distinct issues. (Pet. App. 31a).

McDonnell Douglas concerns one manner in which a plaintiff might establish the existence of an unlawful *motive*. A mixed-motives analysis (under either section 703(m) or *Price Waterhouse*), on the other hand is a method of allocating the burden of proof on *causation*, after a plaintiff, by reliance on *McDonnell Douglas* or otherwise, has demonstrated the existence of an impermissible motive.

In all cases the burden of proof as to the existence *vel non* of a discriminatory motive remains on the plaintiff. If a plaintiff demonstrates that an illegitimate consideration was "a motivating factor", that will establish liability under section 703(m). The combined effect of sections 703(m) and 706(g)(2)(B) will then be to place on the employer the burden of proof regarding causation. Because, however, motive and causation are two distinct issues, a literal application of sections 703(m) and 706(g)(2)(B) is entirely consistent with the *McDonnell Douglas* cases.[34]

Petitioner asserts that under the decision of the Ninth Circuit the mere existence of a prima facie case will shift

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[34] These two issues typically arise at different phases of the litigation. Once an employer offers "admissible evidence sufficient for the trier of fact" to find it acted for a legitimate reason, " 'the *McDonnell Douglas* framework – with its presumptions and burdens' – disappear[s], *St. Mary's Honor Center*, 509 U.S.] at 510, and the sole remaining issue [is] 'discrimination *vel non*.' [*United States Postal Service Bd. of Govs. v.] Aikens*, [460 U.S. 711] at 714." *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142-43 (2000). Thus the *McDonnell Douglas* framework will usually be of little relevance once a Title VII case has survived a motion for summary judgement. The causation issue, on the other hand, only arises if and when, following the presentation of all the evidence, the trier of fact finds that an unlawful consideration was a motivating factor.

the burden of proof with regard to causation. (Pet. Br. 29). The court of appeals did not so hold. To the contrary, the allocation of the burden of proof embodied in section 706(g)(2)(B) occurs only after a plaintiff has *demonstrated* that an impermissible consideration was a motivating factor. That burden is not shifted merely because the plaintiff has established a prima facie case. To the contrary, section 703(m) expressly requires that the trier of fact must actually *find* the existence of an unlawful motivating factor, and the district court specifically so instructed the jury in this case.

Petitioner objects that under a literal reading of sections 703(m) and 706(g)(2)(B), a jury could be given instructions under those provisions of Title VII whenever a plaintiff had a triable issue of fact under *McDonnell Douglas*. But there is nothing remarkable about that consequence. Such instructions would not suggest that the employer bore the burden of proof on the issue motivation; section 703(m) is expressly to the contrary, particularly when read in conjunction with the definition of "demonstrates" in section 701(m). Nor would such instructions mean that the burden of proof regarding causation would be placed on the employer whenever a plaintiff had a triable issue of fact regarding whether an impermissible consideration was a motivating factor. Again, both section 703(m) and section 706(g)(2)(B) make clear – as did Instruction No. 9 – that the burden of proof regarding causation falls on the employer only if the trier of fact makes a *finding* that such a motivating factor was present. Petitioner does not suggest that the instructions actually given in this case placed on defendant the burden of proof regarding motivation, or that those instructions, absent an actual finding of unlawful motivation, shifted to the defendant the burden of proof regarding causation.

The gravamen of petitioner's objection may be that, as occurred here, a court will give a section 706(g)(2)(B) instruction whenever a plaintiff has a triable claim of a section 703(m) violation. Thus a prima facie case of a section 703(m) violation, coupled with enough evidence to create a triable issue of fact, will lead to the giving of such an instruction. But that is the inevitable result of the fact that, where a jury has been requested, it will be for the jury, not the court, to decide whether gender or race was a motivating factor. It obviously would not be practicable to bifurcate a Title VII trial, with the jury first resolving under section 703(m) whether there was an impermissible motivating fact, and then, if such a violation was found, returning for separate instructions and deliberations regarding causation.

(2) It is entirely possible that in a case in which a plaintiff relied on the principles of *McDonnell Douglas*, the trier of fact might conclude that multiple motives were involved. Under *McDonnell Douglas* and its progeny, a plaintiff must first make out a prima facie case that an impermissible motive was involved. Where that has occurred, the burden shifts to the employer to articulate through admissible evidence a legitimate reason (or possibly several) for the disputed action. If the employer does so, the plaintiff has the burden of persuading the trier of fact that such an unlawful motive indeed existed. The primary function of *McDonnell Douglas* and its progeny is to compel the employer to offer evidence of that reason. Once it has done so the presumption created by the prima facie case drops from the case, and the plaintiff's burden – to demonstrate the existence of an unlawful motive – is the same as it would be in any intent case.

As this Court has repeatedly noted, an employee might rely on either or both of two distinct types of

evidence to meet this burden. The plaintiff may meet that burden "either *directly* by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer's proffered reason is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (Emphasis added); *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517 (1993) (same); *United States Postal Service Bd. of Gov's. v. Aikens*, 460 U.S. 711, 716 (1983) (same).[35]

In a case which proceeded under *McDonnell Douglas*, it would be entirely possible for the trier of fact to conclude that several motives, including but not limited to an unlawful motive, were at work. First, the trier of fact might be persuaded largely by the more direct evidence that an impermissible motive was present; in that instance the trier of fact might also believe that the employer's proffered reason, rather than being false, was in fact a consideration, although not the only one. Second, the trier of fact might be convinced by the plaintiff's evidence that the employer's proffered reason, although

[35] Both types of evidence were relied on by the plaintiff in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000). First, the plaintiff there adduced substantial evidence "that [the employer's] explanation was false." 530 U.S. at 144. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of an explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. at 147. Second, Reeves offered more direct evidence that showed (independent of the falsity *vel non* of the employer's proffered explanation) that his dismissal was the result of age discrimination. The evidence directly suggesting the existence of such an unlawful purpose included age-biased remarks by a key company official, a pattern of harassment that was not directed at younger workers, and an incident where only Reeves, but not a similarly situated younger employee, had been disciplined. 530 U.S. at 151.

present, was not sufficient by itself to account for the adverse action in question, and then infer that the alleged unlawful reason was also (but not exclusively) involved.[36] Third, even if the trier of fact concluded that the employer's proffered explanation was false (i.e., that it was not among the reasons the employer had in mind at the time), a finding that would preclude a conclusion that *that* legitimate motive was present along with some impermissible consideration, the trier of fact might nonetheless determine that some *other* legitimate reason was also present. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523 (1993).

In *Reeves* itself this Court analyzed the evidence under *McDonnell Douglas*. Yet it is entirely possible that on the record in that case a reasonable jury might have concluded not only that age was a motivating factor in Mr. Reeves' dismissal, but also that at the time of that dismissal company officials were concerned as well with low productivity in the department which Reeves managed.

Proof under *McDonnell Douglas* that there was an unlawful motivating factor would preclude the existence of mixed-motives only if the parties had stipulated that there had been one and only one motive at work, which had to be either that unlawful motive or the employer's proffered explanation. In actual litigation, however, such stipulations simply do not occur. Were such a stipulation agreed to, moreover, it would also bar a finding of mixed-motives even if the plaintiff relied exclusively on "direct evidence."

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[36] In *Reeves*, for example, the plaintiff offered evidence tending to show that the infractions of which he was accused were too minor by themselves to have led to his dismissal. 530 U.S. at 144-45.

Pretext is not some distinct type of discrimination (like a disparate impact claim), but simply one method of proving the existence of a discriminatory purpose. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Petitioner's error stems in part from the fact that the term "pretext" can have one of several different meanings.[37] *McDonnell Douglas* requires a plaintiff to respond to an employer's proffered explanation by proving that it is "pretextual". A proffered reason could be said to be pretextual if (1) the reason was not a motivating factor at the time of the disputed action, but had been invented at a later date to hide the unlawful reason, or if (2) the legitimate reason had in fact been a consideration at the time of that decision, but the employer was falsely insisting that that was its sole reason in order to hide the existence of an additional, unlawful motive. Put otherwise, a defense witness who testified that the legitimate consideration was "the reason for the action" might be lying because that consideration was not a reason at all, or be lying because it was not "the" reason, there in fact being one or more additional purposes involved.[38]

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[37] *See, e.g., Wolf v. Buss (America)*, 77 F. 3d 914, 919 (7th Cir. 1996); *Renz v. Spokane Eye Clinic*, 114 Wa. App. 611, 619 (2002).

[38] Two historical examples illustrate these distinct meanings. At the outset of World War II, Germany invaded Poland on the pretext that Polish forces had attacked Germany. This was a pretext in the first sense; no such Polish attack had ever occurred. At Munich, Hitler asserted that he wanted much of Czechoslovakia ceded to Germany so that the Sudeten Germans in that region would be in the Third Reich. That explanation was pretextual in the second sense. There were in fact Sudeten Germans in western Czechoslovakia, and Hitler undoubtedly wanted to have them within the expanded German borders, but he had other military and economic reasons for seeking to annex much of Czechoslovakia.

V. PETITIONER'S PROPOSED "DIRECT EVIDENCE" REQUIREMENT IS NEITHER CLEAR NOR WORKABLE

"As in any lawsuit, the plaintiff [in a Title VII case] may prove his case by direct or circumstantial evidence." *United States Postal Service Bd. of Gov's*, 460 U.S. 711, 713 n.2 (1963). Petitioner and the United States, however, urge this Court to create a classification system dividing Title VII discriminatory intent cases into two distinct categories with separate methods of proof and different burdens of proof regarding causation: "mixed-motive" cases and *McDonnell Douglas* cases.

(1) In its 1988 brief in *Price Waterhouse*, the United States correctly objected to the type of distinction which it now proposes:

> Congress recognized that virtually every disparate treatment case will to some degree entail multiple motives. Thus if the elements of Title VII liability or the burden of persuasion differs depending on the "proper" categorization of a case, . . . the predictable result will be pointless litigation over what label should be affixed to cases. . . . Although a number of courts have suggested that this framework [in *McDonnell Douglas* and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)] applies only to single motive cases, and that mixed motive cases must be analyzed under a different framework, we think that the *McDonnell Douglas-Burdine* framework is well suited to all disparate treatment cases.

Brief for the United States, Price Waterhouse v. Hopkins, No. 87-1167. In the instant case, however, the government now offers a complex standard for determining the

"'proper' categorization of a case", while candidly conceding that the standard for doing so "is not free from doubt." (U.S. Br. 28).

A system of categorization under which a judge must determine prior to trial whether a case involves mixed motives would be entirely unworkable. A judge could rarely if ever rule out the possibility that a jury might conclude that several motives were present. Thus petitioner and the United States propose to *define* a mixed-motive case as one in which there is "direct evidence." Thus (paradoxically) a case involving two or more motives, but no "direct evidence", would not be a mixed-motive case. Congress enacted sections 703(m) and 706(g)(2)(B) in the belief that "[v]irtually every Title VII disparate impact treatment case will to some degree entail multiple motives."[39] Because of the exceedingly narrow manner in which petitioner and the United States seek to define "direct evidence", the vast majority of cases involving multiple motives, paradoxically, would *not* be "mixed-motive cases."

The lower courts which have attempted to implement such a classification system have been unable to identify a coherent and principled definition of "direct evidence." As the First Circuit noted in *Fernandes v. Costa Bros. Masonry*, 199 F. 3d 572 (1st Cir. 1999), the lower courts have applied several quite inconsistent definitions, with conflicting decisions within a number of different circuits. "[T]he various circuits have about as many definitions for

[39] H.R.Rep. 101-644, pt. 1, p. 31 (quoting Brief for the United States in *Price Waterhouse*); H.R.Rep. 101-644, pt. 2, 26 (same); S.Rep. No. 101-315, p. 24 (same); H.R.Rep. 102-40(I), p. 47; H.R.Rep. No. 102-40(II), p. 18.

'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1183 (2d Cir. 1992).[40] The Ninth Circuit in this case correctly concluded that

> courts and commentators have had even more difficulty articulating an order to the chaos. . . . The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn into it.

(Pet. App. 21a, 24a). For this reason a number of circuits have rejected this direct evidence rule outright,[41] or have eviscerated it by defining "direct evidence" to include any evidence, including circumstantial evidence, that demonstrates the existence of an unlawful motivating factor.[42]

The failure of efforts to fashion a definition of direct evidence has several distinct causes. The various proposed definitions of "direct evidence", including the definitions proposed by petitioner and the United States, are not based on any existing body of law. These definitions emphatically are not the standard of "direct evidence" long known to evidence law, a standard which is so narrow that it could not be met in an intent case. The established

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[40] Justice Kennedy correctly foresaw this problem in *Price Waterhouse*, when he noted that if direct evidence were required to determine the allocation of the burden of proof on causation, "[c]ourts will . . . be required to make the subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." 490 U.S. at 291 (dissenting opinion).

[41] *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1183-85 (2d Cir. 1992).

[42] *Wright v. Southland Corp.*, 187 F. 3d 1287, 1295-98 (11th Cir. 1999); *Thomas v. National Football League Players Ass'n*, 131 F. 3d 198, 204-05 (D.C.Cir. 1998).

evidentiary definition of direct evidence is testimony which, if truthful and accurate, conclusively and without any inferences, demonstrates the fact in question. 1A Wigmore, Evidence § 25 (Tillers rev. 1983);[43] 1 McCormick on Evidence 641 (1999). But that type of "direct evidence" is never available to prove intentional discrimination.[44] There are no eye witnesses to a person's state of mind; even testimony by a third party that a company official said to the plaintiff "I did not hire you because you are white" would not in this sense be direct evidence of racial motive.[45]

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[43] *E.g., Provette v. Faulkner*, 92 Nev. 353, 550 P. 2d 404, 406 (1976) ("[d]irect evidence is evidence which, if believed, proves the fact in issue without the aid of inference.")

[44] The only evidence meeting this standard would be testimony at trial by the decisionmaker involved that he indeed took the action complained of because of the plaintiff's race, religion, gender or national origin. With the possible exception of certain disputes regarding affirmative action, there are assuredly no Title VII cases in which the key defense witness so testified.

[45] "The only 'eyewitness' to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated." *Wright v. Southland Corp.*, 87 F. 3d 1287, 1295 (11th Cir. 1999) (Footnote omitted).

Testimony that a company official told the plaintiff "I didn't hire you because you are white" would be direct evidence that the official *said* that, but only circumstantial evidence that race was the actual motive. *Id.* at 1295 n.9. Even if the witness to this remark were believed, the testimony would not conclusively demonstrate the existence of a gender based motive; the company official may have been lying when he made the remark, in order to cover up some other more embarrassing motive (another candidate paid a bribe to get the job) or

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On the other hand, petitioner's proposed definition of "direct evidence" is also assuredly different from the reference in *Burdine*, *St. Mary's Honor Center*, and *Aikens*, to the manner in which a plaintiff might prove "directly" the existence of a discriminatory motive. (*See* p. 33, *supra*). As used in *Burdine* and its progeny, "directly" refers to all evidence of discrimination (*e.g.*, statistics, other discriminatory acts) other than proof that an employer's particular proffered explanation was untruthful.

Petitioner and the United States seek to fashion a new, third definition of "direct evidence", slightly less demanding than the definition in evidence law, but far more stringent than the usage in *Burdine*. But the enormous and unpredictable variety in the types of evidence adduced in discrimination cases is simply too complex to fit into any such system of categorization. The rationale for the "direct evidence" rule proffered by petitioner and the United States is simply to assure that any application of a mixed-motive analysis (by which, apparently, they mean any application of sections 703(m) and 706(g)(2)(B)) will be rare. (Pet. Br. 43; U.S. Br. 29). This frankly result-oriented approach involves no neutral principle that could inform the meaning of "direct evidence."

(2) Efforts to draw a plausible distinction between direct and non-direct evidence is confounded by the fact

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because he thought the applicant would find that explanation less offensive than the truth (he was incompetent).

"Even a highly-probative statement like 'You're fired, old man' still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1185 (2d Cir. 1992).

that such a distinction would have no necessary correlation by the strength or weakness of the evidence. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508 n.17 (1957). Evidence that is "direct" – even as petitioner would define it – could be quite unpersuasive, while in some instances circumstantial evidence (or, more accurately, evidence that falls outside petitioner's proposed definition of "direct evidence"), might be virtually conclusive. "If juries can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1184 (2d Cir. 1992);[46] *see Thomas v. National Football League Players Ass'n*, 131 F. 3d 198, 204 (D.C.Cir. 1997).

On petitioner's view, for example, direct evidence would be limited to evidence that a decisionmaker, in connection with the disputed employment decision, made a statement revealing unambiguous discriminatory animus. That standard would be met if a witness testified that he overheard Costa's supervisor remark, at a meeting regarding her dismissal, "I think we should fire Costa because she is a woman." That testimony, however, would be "direct evidence" even if the witness was a convicted perjurer, and a dozen disinterested witnesses testified that that witness had not even attended the meeting in question.

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[46] Petitioner expressly agreed to Instruction No. 3, which stated: "The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence." (J.App. 30).

Conversely, it would not be direct evidence if Costa could show that on the day she was dismissed the management of Caesars systematically fired every one of its thousands of female workers and replaced all of them with men. Similarly, the fact that a supervisor was a Grand Dragon of the Ku Klux Klan would not be direct evidence that a well qualified black or Jewish job applicant had been rejected because of race or religion.

Circumstantial evidence is relied on routinely, and sometimes exclusively, in criminal prosecutions; the criminal justice system places enough confidence in circumstantial evidence that capital defendants are convicted and executed based on just such evidence. Conversely, death row inmates convicted on the basis of exceedingly direct evidence – such as testimony from a jailhouse informant that the defendant confessed, or even a confession signed by the defendant himself – have subsequently been found to be innocent.

If it were proposed by a criminal defendant in this Court that criminal convictions, which must be based on proof beyond a reasonable doubt, required "direct evidence", we assume that the Solicitor General, at the behest of the Criminal Division, would vehemently (and properly) object. We do not understand why the Solicitor General, and indeed the Civil Rights Division, insist that circumstantial evidence is insufficiently reliable in a mixed-motive case to provide a basis for imposing damages on a Title VII defendant. It simply makes sense to base the analysis of Title VII cases on a distinction between direct and circumstantial evidence that the courts would not make in other areas of the law.

(3) The criteria proposed by petitioner and the United States for defining "direct evidence" pose considerable practical problems, and in some instances cannot be

reconciled with Justice O'Connor's conclusion that the record in *Price Waterhouse* itself involved what she regarded as direct evidence.

First, petitioner suggests that a statement reflecting discriminatory animus must have been made by the actual decisionmaker. (Pet. Br. 41).[47] In *Price Waterhouse* the actual decisionmaker was the firm's Policy Board. 490 U.S. at 232. But virtually all the remarks suggesting the existence of sexual stereotyping were made by partners who were *not* on the Board. 490 U.S. at 234. This proposed limitation would inevitably lead to factual disputes about who the actual decisionmaker was, a question that may turn more on de facto influence than on the individual's nominal position. *E.g.*, *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 152 (2000). Petitioner does not indicate whether those disputes would be resolved by the judge or the jury, and does not explain whether on its view a mixed-motive analysis would be permissible if there were direct evidence regarding statements by only one of several decisionmakers involved in a particular action.[48]

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[47] The United States disagrees with this standard, suggesting that evidence would be "direct" if it concerned others who played some role in the decisionmaking process. (U.S. Br. 27 n.5).

[48] These problems are illustrated by *Fields v. Clark University*, 817 F. 2d 931 (1st Cir. 1987), one of the cases cited by Justice O'Connor in *Price Waterhouse* as an example of direct evidence. 490 U.S. at 273-74. The only remark in that case in any way connected with the employment decision in question (the denial of tenure) was made by one of the six members of the sociology department, all of whom subsequently voted against recommending tenure. The department's recommendation was then considered by the "committee on personnel", which in turn voted unanimously to recommend against tenure. The committee's recommendation in turn was forwarded to the actual decisionmaker, the board of trustees. 817 F. 2d at 932.

Second, petitioner maintains that the remark in question must reflect unambiguous bias on the basis of race or gender. (Pet. Br. 41). But in *Price Waterhouse* most of the assertedly stereotyped remarks were made by partners who *supported* Hopkins. And even those were not unambiguously misogynistic. One partner, for example, commented that Hopkins should take "a course at charm school", 490 U.S. at 234, a remark with sexist overtones but one which could have been made about a man. Several partners objected to Hopkins' use of profanity, 490 U.S. at 234, a complaint that might have been but was not necessarily related to her gender. One partner described her as "macho", a remark that could also be made (probably with critical, albeit perhaps somewhat different, meaning) about a man. *Id.* The distinction proposed by petitioner would compel the courts to deal with issues of baffling nuance and complexity.[49] In the instant case, for example, petitioner asks this Court to hold (apparently as a matter of law) that labeling a woman a "bitch" does not reflect any gender-based animus or stereotyping. (Pet. Br. 46-48).

Third, petitioner insists that the decisionmaker's unambiguous remark must be made in connection with the decision at issue.[50] (Pet. Br. 41). If a supervisor stated

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[49] For example, in *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F. 3d 572 (1st Cir. 1999), there was testimony that the relevant decisionmaker had explained his actions by remarking "I don't need minorities" and "I don't have to hire you . . . Cape Verdean people." 199 F. 3d at 578-79. The court of appeals agreed that these statements could reasonably have been interpreted "as a discriminatory explanation for DaCosta's action", but held that the remarks were not direct evidence because that was not the only conceivable interpretation. 199 F. 3d at 583.

[50] If that were correct, proof that a decisionmaker constantly referred to African-Americans as "niggers" would not constitute direct

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that "all women are incompetent workers", but did not dismiss a female employee until a few months (or perhaps weeks or days) later, that apparently would not suffice. To implement this limitation, the courts would have to fashion a sort of statute of limitations period for direct evidence, after the expiration of which such evidence could no longer be invoked. In *Reeves*, this Court disapproved the use of just this sort of objection to minimize biased remarks by company officials. 530 U.S. at 152-53.

The United States would go even further. The government asserts that even an unambiguously biased remark made by a decisionmaker at the very moment of dismissal would not be "direct evidence" absent additional proof that the animus was company "policy", rather than mere "personal opinion." (U.S. Br. 27). On this view the standard would (or at least might) not have been met even if Costa had been expressly told "I am firing you because you are a woman." If that is what "direct evidence" means, mixed-motive (i.e., section 703(m)) cases will be, not merely rare, but non-existent.[51]

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evidence, unless he did so in specific connection with the action complained of. *See Brown v. East Mississippi Electric Power Ass'n*, 989 F. 2d 858, 861-62 (5th Cir. 1993) (holding such remarks to be direct evidence despite the lack of any connection to the dismissal of the plaintiff.)

[51] The rule proposed by the United States is illustrated by *Heim v. State of Utah*, 8 F. 3d 1541 (10th Cir. 1993). In that case the decisionmaker remarked, referring specifically to plaintiff, "Fucking women, I hate having fucking women in the office." 8 F. 3d at 1546. The court of appeals held that this was not direct evidence because the remark was "on its face a statement of [the decisionmaker's] *personal opinion*." 8 F. 3d at 1547 (emphasis added); *see id.* (remark was merely the decisionmaker's "*private* negative view of women") (emphasis added).

(3) Even if such "direct evidence" were proffered by a plaintiff, that alone might not be sufficient.

There could, of course, be a dispute of fact regarding whether a particular remark had been made, or whether the person who made it was the actual decisionmaker. Would the court have to resolve those factual issues before deciding to give a mixed-motive instruction? Petitioner does not say. And even if the court resolved those factual issues in favor of the plaintiff, would it be necessary to instruct the jury that it could not implement the mixed-motive instruction unless it too reached a similar factual conclusion?

Equally unclear is whether the jury's finding of a section 703(m) violation must be connected with the "direct evidence." Petitioner appears to contend that a mixed-motive analysis would be proper only if the jury were to find, based on the direct evidence alone, that some impermissible consideration had been a motivating factor in the disputed decision. (Pet. Br. 42). This would require the jury to make two separate determinations regarding the defendant's motivation, one based solely on the direct evidence and one based on all of the evidence in the case. To permit such separate determinations, the court would have to specifically identify for the jury which evidence offered by the plaintiff was and was not "direct evidence." This is assuredly an utterly unworkable procedure.

The United States insists that a jury should be given instructions under sections 703(m) and 706(g)(2)(B) in "only those cases where *courts* have a high degree of confidence that the employer's decision was tainted by improper motives." (U.S. Br. 29) (Emphasis added). To have such confidence it would not be sufficient for a judge to conclude that the plaintiff had adduced evidence meeting the "direct evidence" standard; the judge would also have to decide

that he or she *believed* the evidence, and was confident that there was enough such evidence that, weighed against any exculpatory evidence, to demonstrate the "high" probability of the existence of improper motive. That sounds very much like a suggestion that, prior to resolving whether to approve a mixed-motive instruction, the judge would have to find that the plaintiff had by clear, convincing and above all "direct evidence" demonstrated the existence of an impermissible motivating factor. The United States points to nothing in the language of the 1991 Civil Rights Act which authorizes any such procedure, and does not explain how it could possibly be reconciled with the Seventh Amendment.

VI. THE JURY'S FINDINGS OF FACT ARE WELL SUPPORTED BY THE RECORD

The jury in this case found that gender had been a motivating factor in Caesars' decision to fire Costa, and that Caesars would not have taken that action against her if she had been a man. (Pet. App. 88a-89a; J.App. 40-41). "[T]he question of intentional discrimination . . . is a pure question of fact." *Pullman Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982). Such factual findings must be upheld if a reasonable jury could find for the prevailing party on that issue. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 122, 151-54 (2000). In determining the sufficiency of the evidence to support a jury verdict,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . [T]he court should review the record as a whole, [and] must disregard all evidence favorable to the moving party that the jury is not required to believe.

Id. at 150-51.

The district judge who presided over the trial twice rejected motions for judgment as a matter of law. At the conclusion of the trial, the district judge ruled:

> Plaintiff's burden is to show that sex played a motivating part in the decision. I think she's produced evidence to satisfy her burden with respect to that. Defendant's burden is that the decision would have been the same even if sex had played no role, and I think both sides have even thus far, if everybody stopped right now, proved a case for the jury.

(J.App. 16-17).

Following the verdict for Costa, Caesars renewed its request for judgment as a matter of law. The trial judge again concluded that Costa had adduced sufficient evidence to support the jury verdict:

> At trial the evidence showed a pattern of disparate treatment favoring male coworkers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars conduct towards plaintiff. . . . [T]here was evidence of a pattern of intentional, not merely negligent, discriminatory conduct, by plaintiff's supervisor and others in Caesars management, culminating in plaintiff's termination, which was sufficiently egregious to support an award of punitive damages.

(Pet. App. 73a-74a). The trial judge's assessment of the record, based as it is on his unique familiarity with the complex factual disputes in this case, is entitled to a degree of deference.

We set forth in the Statement of the Facts a summary of the extensive evidence supporting Costa's discrimination claim. The history of discriminatory incidents preceding her dismissal is considerably more extensive than that in *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133 (2000). In a number of important respects male coworkers corroborated Costa's testimony that she had been treated worse than the men at Caesars.[52] Caesars' merits brief, to be sure, sets out evidence which, if credited by the jury, might have led to a verdict in favor of the defendant. (Pet. Br. 2-7). In their closing arguments, counsel for each side attacked the credibility of the opposing party's witnesses.[53] But this conflicting evidence,[54] and the differing inferences which could be drawn from it, were for the jury to resolve. So long as reasonable persons could have agreed to the verdict returned by the jury, the Seventh Amendment does not authorize the courts to set aside that verdict.

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[52] Such testimony, of course, was not legally required. A plaintiff's own testimony regarding events of which he or she has personal knowledge, if credited by the trier of fact, is as probative as any other testimony.

[53] For example, commenting on a defense witness who insisted that certain information would not have altered his decision, counsel for Costa commented, "Give me a break. You and I both know it would change our minds." (Tr. 630). On the other hand, counsel for Caesars attacked the credibility of the male coworkers who testified on behalf of Costa. "But if you listen very carefully, those Teamsters did use the party line, oh, yes, yes, oh, yes, yes, Karen [Hallett] always picked on – always picked on poor Catharina; very low on detail." (Tr. 649).

[54] During his closing argument, counsel for Caesars asserted, "[I]t's really hard to decide a case like this when you have . . . differing stories from the witness stand, but the burden is on her.") (Tr. 653).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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