Desert Palace v. Costa *and* Hill v. Lockheed Martin: *One Step Forward, One Step Back*

by Ann Groninger

Ann Groninger practices civil litigation and criminal defense with Patterson Harkavy LLP in Raleigh. She is a member of the Academy's Criminal, Employment and Auto Torts Sections. Since being licensed in 1995, she has also worked as an assistant public defender and solo practitioner and has litigated and tried cases in both state and federal court.

Lawyers for employees breathed a sigh of relief last year when the United States Supreme Court issued its opinion in *Desert Palace v. Costa*, which eased the burden of proving illegal discrimination in "mixed motive" cases—those cases in which the contested employment decision was based on a mixture of legitimate and illegitimate motives.[1] Interpreting the Civil Rights Act of 1991,[2] the Court, in an unanimous decision,[3] held that plaintiffs in employment cases are entitled to mixed motive instructions when they present sufficient evidence "for a reasonable jury to conclude, by a preponderance of the evidence, that [a discriminatory factor] was a motivating factor for [the] employment practice."[4] Applying the plain language of the statute, and relying on traditional causation principles for civil cases, the Court held that plaintiffs might rely on circumstantial evidence of discrimination to prove an employer's mixed motive.

The practical effect of *Desert Palace* is potentially enormous: once an employee shows, either by direct or circumstantial evidence, that race, color, sex, religion or national origin was a "motivating factor" in an adverse employment action, the employee has met the burden of proving illegal discrimination—even if the employer had other legitimate reasons for acting against the employee. Upon proof that illegal discrimination was at least a motivating factor in the employment decision, the plaintiff may be entitled to a full range of remedies, including lost wages, compensatory damages, declaratory relief, injunction relief, and an order of hiring or reinstatement.[5]

The relief that *Desert Palace* provided was short-lived in the Fourth Circuit, however. Seven months after the Court's decision, a divided *en banc* panel in *Hill v. Lockheed Martin Logistics Management* ruled in favor of an employer whose employment decision was motivated by a biased subordinate who lacked decision making authority and was not the actual decision maker.[6] As the dissent in *Hill* noted, the decision "overlooks that statutory focus on causation, that is, whether an adverse employment action was taken because of a protected trait."[7] The Supreme Court may yet provide the final word—the plaintiff has petitioned for a writ of certiorari and the Court has invited the Solicitor General to file a brief expressing the government's views.

Desert Palace v. Costa

The female plaintiff in *Desert Palace* was a mechanic and the only woman in the collective bargaining unit at Caesars' Palace in Las Vegas.[8] Although her reviews were consistently good, she experienced conflicts with her male managers and coworkers.[9] Specifically, she was treated differently from male employees with respect to overtime and disciplinary actions, and supervisors stacked her disciplinary record with write-ups.[10] Finally, when the plaintiff was involved in an altercation with a male coworker, she was fired; the coworker, who had an otherwise clean record, was merely suspended.[11]

At trial, the court instructed the jury first that "the plaintiff has the burden of proving . . . by a preponderance of the evidence that she suffered adverse work conditions and that her sex was a motivating factor in any such work conditions imposed on her."[12] Second, the court instructed:

> 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.[13]

The jury found in the plaintiff's favor and awarded back pay, compensatory, and punitive damages.[14]

The case reached the Supreme Court on the question of whether the trial court should have required the plaintiff to present direct evidence of discrimination before granting a mixed motive instruction.[15] The Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins* established the framework for mixed motive cases, but the plurality opinion in that case left unanswered whether a plaintiff claiming mixed motive was required to offer direct evidence of discriminatory motive.[16]

Two years after *Price Waterhouse,* Congress passed the Civil Rights Act of 1991, which, among other things, "set [ ] forth standards applicable in mixed motive cases."[17] Specifically, the Act provides that "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."[18] If a plaintiff makes such a showing, an employer can limit damages awarded, but not avoid liability, by showing it would have taken the same action in absence of the discriminatory motive.[19] In such circumstances, the employer is only liable for costs and attorneys' fees.[20]

In *Desert Palace*, the Supreme Court revisited the standards of proof required in mixed motive cases in light of the Civil Rights Act of 1991. The Court's holding is straightforward: nothing in the statute requires a plaintiff to make a heightened showing through direct evidence.[21] In fact, the Court noted, "Title VII defined the term 'demonstrates' as to meet the burdens of production and persuasion."[22] In meeting those burdens, the Court said, no reason exists to depart from the "conventional rule of civil litigation that generally applies in Title VII cases"—that a plaintiff must "prove his case by a preponderance of the evidence, using direct or circumstantial evidence."[23] As an example, the Court cited *Reeves v. Sanderson Plumbing Products,* in which the Court held that a defendant's incredible explanation for an employment decision is a type of circumstantial evidence "probative of intentional discrimination."[24]

In Desert Palace, *the Supreme Court revisited the standards of proof required in mixed motive cases in light of the Civil Rights Act of 1991 . . . nothing in the statute requires a plaintiff to make a heightened showing through direct evidence.*

Hill v. Lockheed Martin

After reading *Desert Palace,* one would presume that a plaintiff could prove her employer had mixed motives for firing her when the management team that made the termination decision relied on information supplied by a blatantly biased subordinate. Under such circumstances, the management would have relied, at least in part, on a discriminatory motive; one would presume that a plaintiff would both survive summary judgment and be entitled to a mixed motive instruction.

The Fourth Circuit thought otherwise. In *Hill,* a case on appeal from the South Carolina district court's grant of summary judgment for the employer, the court, sitting *en banc,* vacated the decision of a divided panel and affirmed the district court's grant of summary judgment.[25]

However, contrary to the Fourth Circuit majority's opinion, the facts in *Hill,* taken in the light most favorable to the plaintiff, present a classic mixed-motive case. Those facts, as set forth in the dissent,[26] show that the plaintiff, Ethel Lou Hill, worked for the defendant, Lockheed Martin, for 11 years, and had worked for 25 years in her trade.[27] Prior to 1998, the plaintiff received one reprimand, which she did not dispute.[28] She began having problems, however, in 1998, when she began working with a new safety inspector.[29] The safety inspector began calling the plaintiff, the only woman on her crew,[30] a "useless old lady who needed to go home and retire," "troubled old lady," and "damn woman."[31]

Although he was not the plaintiff's direct supervisor, it was the safety inspector's job to inspect the plaintiff's work and report and correct inadequacies. The safety inspector made false reports to the plaintiff's supervisor, leading the supervisor to believe that the plaintiff had misplaced a wrench and then lied about it. The supervisor, in turn, issued the plaintiff a second written reprimand.[32]

The plaintiff complained to the same supervisor several times that the safety inspector was harassing her.[33] After one of those complaints, and after the second reprimand, the safety inspector issued a flurry of "nit-picky" and "trivial" discrepancy reports against the plaintiff and forwarded them to the supervisor,[34] who then furnished the information to the up-line manager.[35] These reports led to plaintiff's third reprimand which, along with the two prior reprimands (including the one that was justified), culminated in that manager's decision to fire her.[36]

The manager's decision to fire the plaintiff was based entirely on the information he received from the safety inspector and the supervisor. Ignoring company policy, the manager failed to talk with the plaintiff while she was being considered for termination.[37] The safety inspector prepared the plaintiff's termination statement, which declared that the plaintiff was being dismissed because the safety inspector found her work unsatisfactory.[38] The plaintiff was replaced by a younger male.[39]

The majority opinion painted an entirely different picture. Viewing the facts more favorably to the employer, the majority concluded that the second and third reprimands, prompted by the safety inspector and issued by the supervisor, were all justified.[40] As the dissent noted, however, the plaintiff offered evidence that the safety inspector intentionally set her up to appear that she was lying about a missing wrench to her supervisor, who based the second rep-

rimand on his belief that the plaintiff in fact had lied to him about the matter.[41] The majority also found that the plaintiff disputed only one of the discrepancy reports leading to the third reprimand, and that the supervisor had investigated each of the reports.[42] However, the majority dismissed the plaintiff's contention that the reports—which were trivial and which the safety inspector had the discretion to write or not to write—were discriminatory because the safety inspector was biased on account of her sex and age when he wrote them.[43] The majority also dismissed the plaintiff's contention that she complained several times to her supervisor that the safety inspector was harassing her.[44]

Fourth Circuit Rejects "Cat's Paw" Theory

The majority described the *McDonnell Douglas* and mixed motive frameworks as "two avenues of proof" by which "a plaintiff may avert summary judgment and establish a claim for intentional . . . discrimination."[45] After describing these two avenues of proof and the Supreme Court's decision in *Desert Palace*, the majority found the plaintiff failed to meet her burden of proof under either.[46] Because the safety inspector was not the "actual decision maker" or "principally responsible" with respect to the plaintiff's dismissal, and because the plaintiff did not prove or even allege that the supervisor or the supervisor's manager harbored discriminatory motive against her, the plaintiff could not show that her age or sex was a cause for her termination.[47]

The majority rejected the plaintiff's argument that age or sex was a cause because the safety inspector "substantially influenced" the dismissal decision.[48] Applying agency rules and *Burlington Industries v. Ellerth*,[49] the majority held that the safety inspector was not an agent of the employer for purposes of Title VII,[50] and therefore the safety inspector's discriminatory motive could not be imputed to the supervisor, the manager, or the employer. The court distinguished *Shager v. Upjohn Co.*,[51] a case cited approvingly by the Supreme Court in *Ellerth*, in which the Court of Appeals for the Seventh Circuit developed the "cat's paw" theory that discriminatory motive of a non-decision maker is imputed to an employer when the actual decision maker acts as a "cat's paw," or rubber stamp, for a discriminatory non-decision maker.[52]

The ultimate question, as the majority recognized in *Hill*, is "whether the plaintiff was the victim of intentional discrimination."[53] However, rather than focusing on the ultimate question, the majority's opinion focused on whether the safety inspector was an actual decision maker for purposes of Title VII and the ADEA. *Desert Palace* and the mixed-motive framework do not support such a narrow approach to resolving this ultimate question.

Problems with the Majority Opinion

The majority's opinion is troublesome in several respects:

- **Inappropriate Application of the Summary Judgment Standard**

Concerns about the majority opinion in *Hill* begin with its apparent failure to view the facts in the light most favorable to the nonmoving party. For example, because the majority dismissed the plaintiff's evidence that she complained to her supervisor about the safety inspector's harassment, it found that the supervisor had no reason to suspect that the safety inspector's reports of the plaintiff's alleged inadequacies were biased. The majority opinion also insulated the bias of the safety inspector by dismissing the factual disputes surrounding the plaintiff's second and third reprimands.

Further, despite the plaintiff's evidence to the contrary, the majority determined that the plaintiff failed to dispute the supervisor's report about the lost wrench.[54] This finding allowed the majority to distinguish the plaintiff's case from *Shager;* finding that the plaintiff failed to dispute the allegations of wrongdoing, the court held that the "cat's paw" line of cases did not apply.[55] The majority also dismissed the plaintiff's dispute about the safety inspector's role in the second reprimand, stating that the facts as they appeared to the supervisor were determinative.[56]

While disputes about how facts are actually viewed on a motion for summary judgment are not new, the disagreements between the majority and dissent in *Hill* were particularly stark. The majority arguably stretched the facts to reach the decision maker issue.

- **Inappropriate Application of Agency Principles**

In *Ellerth*, a sexual harassment case, the Supreme Court held that an employer is liable for the discriminatory acts of its agents—those acting with authority and who take adverse employment actions against an employee.[lvii] Relying on the Restatement of Torts, though, the Court found that "a master is not subject to liability for the torts of his servants acting outside the scope of their employment …"[lviii] The majority in *Hill* interpreted *Ellerth* to hold that an employer can only be held liable if the person bearing the discriminatory animus toward the employee is a managerial agent of the employer "principally responsible" for the employment decision.[lix]

The majority found its position consistent with *Shager* because, according to the majority, *Shager's* holding that an employer could be liable for the discriminatory employment actions taken by a non-decision making supervisor was based on agency principles.[lx] That finding is misplaced. The court in *Shager* discussed agency principles and stated that a supervisor's acts could be directly imputed to the employer if the supervisor himself had acted as an agent of the employer and fired the employee.[lxi] However, since a committee fired the employee in *Shager* upon a discriminating supervisor's recommendation, the court had to look more closely to determine whether the committee was simply a "cat's paw" for the discriminating supervisor.[lxii] While the supervisor did not act as the agent, he was motivated by discrimination and influenced the agent—the committee—who made the decision.[lxiii]

As the dissent in *Hill* noted, *Ellerth* held that principals are responsible for the acts of their agents—those who make personnel decisions on behalf of the employer.[lxiv] The question in *Hill*, however, was not whether the employer (Lockheed) was responsible for the decision maker's (manager's and supervisor's) action, but whether, "when a biased subordinate (safety inspector) who lacks decision making authority substantially influences an employment decision, may his bias be imputed to the formal decisionmaker who acts for the employer?"[65]

The only way to answer this question, the dissent noted, is by reference to tradi-

tional causation principles—whether the employment action was taken "because of" a discriminatory motive.[66] This brings us back to *Desert Palace.*

• Failure to Analyze Hill as a Classic Mixed-Motive Case

Although *Hill* presented the Fourth Circuit with a classic set of mixed-motive facts under *Desert Palace* and *Price Waterhouse,* the majority's reliance on agency principles and on the facts favorable to the employer allowed it to skirt a mixed-motive analysis. The plaintiff offered evidence that her termination was likely the result of intentional discrimination: the safety inspector's blatantly discriminatory comments toward her (including the statement that she was a useless old lady who needed to be retired); the flurry of write-ups from the new safety inspector after years of good service; and the safety inspector's lies about her. More than sufficient evidence existed that the plaintiff's termination was a result of the safety inspector's unlawful bias. Accordingly, the plaintiff should have survived summary judgment and obtained a mixed-motive instruction at trial.

"Cat's paw" cases such as *Hill* lend themselves particularly well to a mixed-motive analysis.[67] When management bases an employment decision, at least in part, on information received from biased subordinates, sorting out how much of the information is tainted and to what extent the management based its decision on the tainted information will often be difficult. As the original panel noted in *Hill,* "[the plaintiff] must also proffer evidence that clearly shows a nexus between [the safety inspector's] discriminatory attitude and the contested employment decision."[68] Applying the traditional causation principles of *Desert Palace* and the mixed-motive framework will assist fact finders in determining whether the decision was made "because of" the discriminatory motive.

Did Desert Palace Change the Rules of Causation?

Despite its simplicity, *Desert Palace* has generated heated disputes over the rules of causation in discrimination cases.[69] More specifically, commentators and judges have asked: What is the role of the *McDonnell Douglas* burden shifting analysis in the wake of the 1991 Civil Rights Act and *Desert Palace?* Since *Desert Palace* involved an employer's appeal of a verdict for the plaintiff, how will the case affect summary judgment, and therefore cases like *Hill?*

The lower court decision in *Desert Palace* offers one simple answer: "[T]he *McDonnell Douglas* burden-shifting analysis . . . primarily applies to summary judgment proceedings, and the terms single-motive and mixed-motive . . . primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination."[70] At summary judgment, a plaintiff may proceed indirectly under *McDonnell Douglas* or by directly persuading the court that a discriminatory reason more likely motivated the employment decision.[71]

At trial, the Ninth Circuit stated that the plaintiff must prove that the employment action was taken because of the protected characteristic.[72] The proof may be circumstantial, but the jury need not be instructed regarding the shifting burdens of *McDonnell Douglas.* With respect to the employer's defenses, the instructions depend on how many motives "the evidence reasonably supports."[73] If the only reasonable conclusion is either one cause or no cause for the employment decision, then the jury is asked only one question on liability: Was the plaintiff subjected to an adverse employment action because of her protected characteristic?[74] If the protected characteristic was a substantial motivating factor in the employment decision, then the plaintiff is entitled to prevail. If more than one possible cause exists, the jury should be instructed to determine whether the discriminatory reason was a motivating factor.[75] If the answer is yes, then the employer has violated Title VII.[76] If the jury then determines that the employer would have reached the same decision absent the discriminatory motive, then the employer's liability is limited under § 2000e-5(g)(2)(B).[77]

While the Ninth Circuit's explanation seems simple enough, questions remain. For example, how will evidence of pretext be used in a case involving mixed motives? In *Reeves,* the Supreme Court held that a plaintiff may point to an employer's incredible explanation for the employment action as evidence of discrimination.[78] Under *Reeves,* strong proof of pretext may justify a mixed motive instruction since only circumstantial evidence is required under *Desert Palace.* Another question is: How will the relaxed standards in mixed motive cases affect fact scenarios like the one in *Hill?*

Practice Pointers after Desert Palace *and* Hill

• Focus on the Ultimate Question

The Supreme Court and the majority in *Hill* have emphasized that the ultimate question in any employment action is whether the adverse employment action was taken "because of" the protected characteristic. As *Desert Palace* clarified, a plaintiff may show that the action was taken "because of" the protected characteristic if the protected characteristic was a motivating factor in the decision. Focus on the nexus between the characteristic and the employment action is therefore critical. Although the *Hill* majority disagreed, proof that a decision was substantially influenced by someone with a discriminatory motive should be sufficient to show that the discriminatory motive was a "motivating factor" in the decision.

• Know the Decision Maker

Because of *Hill's* "actual decision maker" requirement, developing strong evidence as to who made the decision to take the adverse employment action and what motivated that person is critical in the Fourth Circuit. For example, what factors did the decision maker consider? How did the decision maker learn those factors? Did he do any independent investigation? If the decision was based on reports from other subordinates, did the decision maker have the right to override those reports? This was unclear in *Hill.* If the decision was based upon information obtained from a subordinate, how many others were disciplined or terminated based on that subordinate's recommendation? If the information came from a biased subordinate, was the decision maker aware of that subordinate's bias? What were the outer limits of the subordinate's authority and was he or she actually a decision maker?

• Distinguish *Hill*

Distinguishing *Hill* factually should not be difficult. *Hill* turned on allegations of lying and misconduct by the plaintiff, and more-

over, according to the majority, the plaintiff did not dispute the fairness of the supervisor and manager at the time. The record is also unclear as to whether the plaintiff reported the exact discriminatory remarks of the safety inspector to the supervisor and whether the claim was litigated as a harassment and/or retaliation claim. Developing the facts that distinguish *Hill* is important to surviving summary judgment.

• Use the Negligent Employer Exception

The majority in *Hill* purportedly relied on agency principles, *Ellerth*, and the Restatement of Torts to determine whether a subordinate's discriminatory motive can be imputed to the final decision makers. In dealing with agency principles, one exception to the Restatement rule may be of assistance: an employer is still liable if "the master was negligent or reckless." In other words, the plaintiff in *Hill* might have argued that the supervisor was negligent or reckless in reprimanding and terminating her based on the safety inspector's reports and thereby established liability, even without convincing the court that the safety inspector was the actual decision maker.

• Be Aware of the Issue

Attorneys for plaintiffs need to be aware of *Hill's* decision maker issue and act accordingly. For example, the majority emphasized repeatedly that the plaintiff in *Hill* believed her supervisor to be innocent of any discrimination. Attorneys need to explore with clients and potential clients whether their supervisors were guilty of discrimination because they relied on the story told by the biased subordinate. And, of course, they need to explore the extent of the subordinate's authority, as discussed above.

The majority also emphasized repeatedly that the plaintiff did not dispute the accuracy of the reprimands. Reading between the lines, the plaintiff appeared to have disputed some of the reprimands, agreed they were accurate from her supervisor's point of view, and did not point out promptly that her supervisor was misled by his subordinate. Such information, of course, must be developed in discovery and presented in response to the defendant's summary judgment motion.

In *Desert Palace*, the Supreme Court set out rules for the adjudication of employment discrimination cases that help level the playing field for employees. Lawyers for employees should emphasize *Desert Palace* and cases such as *Reeves* to defeat the inevitable summary judgment motions filed by employers. Although *Hill* appears to dilute, to some extent, the 1991 Civil Rights Act and the Supreme Court's decision in *Desert Palace*, it can be distinguished and overcome. With good discovery, creative lawyering, and reliance on the precedents of the Supreme Court, advocates for employees should be able to achieve successful outcomes for their clients. ■

[1] 539 U.S. 90 (June 9, 2003).
[2] 42 U.S.C. § 2000e *et seq*.
[3] Justice O'Connor authored a two-paragraph concurrence only to clarify the role of the pre-1991 Act's burden-shifting rule in mixed-motive cases.
[4] 539 U.S. at 101-02.
[5] If the employer is able to prove it would have made the same decision absent a discriminatory motive, the employer may avoid damages. *See* note 20 *supra*.
[6] 354 F.3d 277 (January 5, 2004).
[7] *Id.* at 301.
[8] 539 U.S. at 95.
[9] 299 F.3d 838, 844 (9th Cir. 2002) (the underlying Ninth Circuit opinion contains a more detailed version of the facts).
[10] *Id.* at 844-45.
[11] *Id.* at 846; 539 U.S. at 95-96.
[12] 539 U.S. at 96.
[13] *Id.* at 96-97.
[14] *Id.*
[15] *Id.* at 98.
[16] 490 U.S. 228 (1989).
[17] 539 U.S. at 94.
[18] *Id., citing*, 42 U.S.C. § 2000e-2(m).
[19] 42 U.S.C. § 2000e-5(g)(2)(B).
[20] 42 U.S.C. 2000e-5(g)(2)(B)(i).
[21] 539 U.S. at 98-99.
[22] *Id.* at 99.
[23] *Id.* at 99-100.
[24] 530 U.S. 133 (2000).
[25] 354 F.3d at 283.
[26] *Id.* at 299-301. Judge Michael, who wrote the dissent, set forth a more detailed version of the facts in his panel opinion. 314 F.3d 657, 660-62 (2003).
[27] *Id.* at 299-300.
[28] *Id.* at 282.
[29] *Id.* at 300.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 300-01.
[36] *Id.* at 301.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 292-96.
[41] *Id.* at 300.
[42] *Id.* at 295.
[43] *Id.* at 300.
[44] *Id.* at 298.
[45] *Id.* at 284
[46] *Id.* at 285, n.2.
[47] *Id.* at 289.
[48] *Id.*
[49] 524 U.S. 742 (1998).
[50] 354 F.3d at 290-91.
[51] 913 F.2d 398, 405 (7th Cir. 1990).
[52] 354 F.3d at 289-90.
[53] *Id.* at 286.
[54] *Id.* at 293-94.
[55] *Id.* at 293-94. Although the court cited two cases for this proposition, it should be noted that the committee that acted as a "cat's paw" for the discriminating person in *Shager* was not informed of the plaintiff's allegations of discrimination.
[56] *Id.* at 293.
[57] 524 U.S. at 764-65.
[58] *Id.* at 758.
[59] 354 F.3d at 290.
[60] *Id.*
[61] 913 F.2d at 405.
[62] *Id.*
[63] *Id.*
[64] 354 F.3d at 302. Interestingly, the dissent declined to use the term "cat's paw." A review of the panel decision explains why Judge Michael found the term to be too narrow in that it would not, by definition, apply to decision makers who exercised independent judgment. He recognizes, however, that the use of the term is broader than its actual definition. 314 F.3d at 669, n.6.
[65] *Id.*
[66] *Id.* at 301.
[67] One could argue that *Price Waterhouse* was a "cat's paw" case—biased individual partners provided information to a policy board, which made the decision not to grant the plaintiff partnership with the firm. 490 U.S. at 232.
[68] 314 F.3d at 666.
[69] *See* McDonnell Douglas: Alive and Well, 52 Drake L. Rev. 383 (2004) and the many cases cited therein.
[70] 299 F.3d at 854.
[71] *Id.* at 855; by using the word "directly," the Ninth Circuit was not referring to direct evidence as required for mixed-motive cases prior to 1991, but stating that the plaintiff could show discrimination without using the indirect burden-shifting analysis.
[72] *Id.* at 856.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 856-57.
[76] *Id.* at 857.
[77] *Id.*
[78] *Id.* U.S. 133, 148 (2000).