

The Mixed Motive Instruction

Did the Supreme Court Make Discrimination Cases Unwinnable for Employers?

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Following a 2003 U.S. Supreme Court decision, employers face the prospect of fighting employment discrimination cases that they cannot afford to win. A decision involving Caesars Palace held that based on a 1991 federal statute, a complaining employee need not give direct evidence of discrimination as part of the complaint. This is a change in the treatment formerly given to the so-called mixed motive concept, in which a personnel decision regarding an employee who is part of a protected class may be motivated by both legitimate business considerations and discrimination. In addition to apparently shifting the burden of proof, the federal law provides for jury trials in discrimination complaints. Because such trials involve considerable legal expense, employers who choose to litigate such cases may "win" but be impoverished by the resulting legal bills. The concern in such a situation

is that employers may find themselves subject to inappropriate discrimination suits.

Keywords: employment discrimination; Civil Rights Law of 1991; Caesars Palace; burden of proof; mixed motive instruction

The question of which party bears the burden of proof in employment-discrimination cases has been the subject of at least eight Supreme Court cases, thousands of lower courts cases, and tens of thousands of law review pages. To many, this topic is a prime example of too much energy being spent on a relatively meaningless question. In this article, however, we seek to show that the way in which courts

assign the burden of proof may, in fact, determine who wins an employment discrimination case. Moreover, if that assertion holds up, a change in the allocation of burden can affect the number of cases, the amount of settlements, and the fate of cases. We argue that the Supreme Court has indeed altered the balance of power in discrimination cases with its 2003 holding on "mixed motive" instructions.

In *Desert Palace d/b/a Caesars Palace Hotel & Casino v. Costa*, the U.S. Supreme Court set a new standard for determining whether plaintiffs can take advantage of a mixed motive instruction in discrimination cases.¹ To many of the participants of the Hotel School's Round-table, this case was just another example of the Supreme Court's wasting time on an irrelevant issue. To other roundtable participants, however, this case represents a major shift in the balance of power in discrimination lawsuits. As we discuss below, we believe that *Costa*'s effect will be so great that employers should almost never go to trial in discrimination cases, because the cost of winning will be so high, and their odds of winning, so low. Knowing the employers' disadvantage, plaintiffs' lawyers will be apt to take marginal cases and will demand high settlements. If we are correct, *Costa* will have fundamentally changed the face of discrimination cases by transforming marginal cases into potentially huge liabilities for employers.

The purpose of this article is to discuss *Costa* in detail and to determine its relevance to the future of employment-discrimination litigation. To understand *Costa*'s significance, however, we first must describe the burden of proof in general, identify and describe the two different methods of proof in discrimination cases, and clarify how these two methods of proof have developed in a fashion that

appears somewhat illogical. (The accompanying sidebar offers a primer on burden of proof.)

The Way the System Assigns the Burden of Proof Can Determine the Outcome of the Case

There are two methods for proving intentional employment discrimination: (1) the *McDonnell Douglas* method² and (2) the mixed motive method. Based on the circumstances of the case, the judge determines whether to classify a matter as being a mixed motive case.

McDonnell-Douglas standard. In *McDonnell-Douglas Corp. v. Green*, the Supreme Court set forth a standard of proving discrimination pursuant under which the burden of proof remained with the plaintiff at all times.³ Under the *McDonnell-Douglas* approach, plaintiffs must first prove a *prima facie* case by showing that (1) they are members of a protected class, (2) they were minimally qualified and either applied for or held the job, (3) they suffered an adverse employment action, and (4) the job remained open, was filled by someone outside the class, or similarly situated employees outside the protected class engaged in similar conduct and did not suffer the same adverse action. Plaintiffs who prove these four elements, which typically are not difficult to establish, created a presumption of discrimination. The defendant then had to rebut this presumption.

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court "clarified" how employers could rebut the presumption created when the plaintiff proves a *prima facie* case.⁴ *Burdine* held that the employer does not have to prove that it hired the best applicant or that it did not discriminate. Instead, the employer

The Burden of Proof

To understand the two different methods for proving discrimination, it is necessary to explain how burden of proof works.

When a case reaches the trial stage, one party bears the burden of proof. The party carrying this burden must convince the fact finder (i.e., the judge or the jury) that its position is correct, while the other side need not prove anything. (In a criminal trial, as we explain below, the prosecution bears the burden of proving that the defendant committed a crime. The defendant must be found not guilty absent that proof.) As a result, the primary task of the party without the burden is to prevent the other side from proving its argument. To better understand the concept of burden of proof, think of a football game. The job of the offense is to score, and the defense's job is to prevent the offense from scoring. In the legal context, the side with the burden of proof is the offense, with the other side being the defense.

Continuing with the football analogy, there are three standards of proof: (1) preponderance of the evidence (more likely than not); (2) clear and convincing evidence; and (3) beyond a reasonable doubt. To satisfy the preponderance standard, the offense must get the ball past midfield. The clear and convincing standard requires the ball to go, say, three-quarters of the way down the field, fairly near the goal line. Last, "beyond a reasonable doubt" is comparable to a score, in that the fact finder must be almost certain of the facts sought to be proven.

The best way to explain the operation of the burden of proof is to remember one of the more famous cases of the twentieth century: *People of California v. O. J. Simpson*. In *Simpson*, as in all criminal cases, the prosecution carried the burden of proving beyond a reasonable doubt that Simpson was guilty of murder. The defense, on the other hand, was not required to prove anything. For instance, Simpson needed to prove neither that he did not kill the victims nor that someone else did. Rather, Simpson simply had to prevent the prosecution from successfully proving its case by attacking the prosecution's assertions. For example, the prosecution presented blood from the crime scene, claiming it belonged to Simpson. Instead of proving that the blood did not match his, however, Simpson merely presented evidence to show that the chain of custody for that sample was broken, making that evidence unreliable. In another instance, the prosecution presented bloody gloves. Simpson discredited this evidence by demonstrating that the gloves did not fit him. Again, Simpson needed only to attack the prosecution's evidence; he never had to prove his innocence.

has only the burden of "articulating" a nondiscriminatory reason for the employment decision. This burden is not, however, a burden of proof. Instead, the employer's burden is merely one of production. The employer is required simply to set forth the reason for its decision but does not need to prove that the reason is true. If the employer satisfies its burden of production, the employee, according to *Burdine*, could then prove discrimination in one of two ways. First, the plaintiff can prevail by demonstrating that the real reason for the decision was discrimination, or second, the plaintiff could prevail by proving that the reason articulated by the employer was pretext (unworthy of belief). In either situation, the plaintiff, according to *Burdine*, would prevail as a matter of law.

Mixed motive. Seven years later in *PriceWaterhouse v. Hopkins*, the Supreme Court developed a second method for proving intentional discrimination.⁵ This method is the mixed motive method to which we have alluded. In *Hopkins*, the plaintiff alleged that she was denied partnership at a law firm because she was a woman. To prove her case, the plaintiff presented evidence that partners made a number of discriminatory comments to her, including statements that she (1) "was too masculine," (2) "should wear more makeup," and (3) "should go to charm school." The Court held that basing employment decisions on a failure to live up to a sexual stereotype constituted discrimination. Accordingly, the plaintiff would prevail if the employer relied on these discriminatory reasons for denying Hopkins a partnership. The employer did not deny the alleged discriminatory reasons but presented additional reasons for the decision not to promote the plaintiff. For example, the employer presented evi-

dence that the plaintiff was disliked by staff members and had difficulty getting along with colleagues. In addition, the employer argued that it previously denied partnership to male employees with deficiencies similar to those of the plaintiff.

The *Hopkins* Court was presented with a novel set of circumstances. Because there were both legitimate and illegitimate reasons for the employer's decision, the Court held that the *McDonnell-Douglas* method was not appropriate for resolving the case. In a hotly contested split decision, Justice Sandra Day O'Connor's concurring opinion, which most courts accepted as the case's holding, set forth a new standard of proof for so-called mixed motive cases. Under Justice O'Connor's opinion, the mixed motive standard of proof required an employee to prove by direct evidence that the protected characteristic, such as sex, was a substantial factor in the employer's decision-making process. If the employee failed to meet this burden, the employer would prevail. If, however, the employee satisfied the substantial-factor test, the burden of proof shifted to the employer, which now had to prove that it would have made the same decision regardless of the employee's protected characteristic. An employer who met this burden avoided liability and precluded the plaintiff from receiving an award. Conversely, if the employer failed to prove that it would have made the same decision regardless of the protected characteristic, the plaintiff received back pay, reinstatement, attorneys' fees, and litigation costs.

In addition to setting out the standard of proof for mixed motive cases, Justice O'Connor's opinion emphasized that the mixed motive instruction was available only when the employee had direct evidence of discrimination. Examples of

It is interesting to ponder whether the burden of proof made a difference in the Simpson case. Would Simpson have been acquitted if, for instance, he had to prove that he did not kill the victims? Would he have been acquitted if the prosecution had to prove its case only by a preponderance of the evidence?* Regardless of the answers to these questions, most legal analysts agree that it is more difficult to bear the burden of proof than to oppose it. Based on this belief, a great deal of litigation and academic discussion has developed over which side should bear the burden of proof in discrimination cases.—*D.S.S., D.W., and P.B.*

*Indeed, Simpson was found liable for wrongful death in a civil case where the standard was preponderance of the evidence.

direct evidence include statements, documents, or other tangible examples of discrimination. Alternatively, circumstantial evidence, which consists of facts put together to create an inference of discrimination, did not entitle a plaintiff to a mixed motive method of proof.

The *Hicks* Confusion

After *Hopkins*, the enunciation of two diverse burdens of proof created a model that was easy to follow. An employee with direct evidence of discrimination could argue that his or her case was one of mixed motive and shift the burden of proof to the employer. On the other hand, if there was no direct evidence of discrimination, plaintiffs would be required to proceed under the *McDonnell-Douglas* formula. What appeared to be a nice, neat model lost some of its appeal, however, after the Supreme Court subsequently decided *St. Mary's Honor Center v. Hicks*.⁶

In *Hicks*, the plaintiff proved that the employer's stated reason for terminating the employee was a pretext. The Court of Appeals for the Eighth Circuit held that proving pretext entitled the plaintiff to a judgment as a matter of law. The Supreme Court, however, reversed the Eighth Cir-

cuit's decision and held that while fact finders may infer discrimination from a finding of pretext, plaintiffs are entitled to judgment as a matter of law only if they prove both that the employer's articulated reason was a pretext and that the real reason for the decision was discrimination. Commentators refer to this standard as pretext plus evidence or, more simply, "pretext plus." Advocates for employees and employers reacted swiftly and passionately to the *Hicks* case. Not surprisingly, plaintiffs' advocates were outraged while those representing management were delighted by the decisions.⁷

While debating the merits of *Hicks* is beyond the scope of this article, the case's profound effect on discrimination litigation must be addressed. Before *Hicks*, the two different burdens of proof created the simple, coherent model that we discussed above. Employees with no direct evidence of discrimination used the *McDonnell-Douglas* formula, and employees with direct evidence asked the court to consider the case to be one of mixed motive. After *Hicks*, those cases without direct evidence were considered "orphan" cases.⁸ Plaintiffs' lawyers did not want to invest years of time and money in a case that required a fact finder to infer discrimination. Instead, it made more sense to take only those cases with actual evidence.⁹ If there was direct evidence, plaintiffs' lawyers would contend that they were entitled to a mixed motive instruction.

Civil Rights Act (CRA) of 1991 Makes a Fundamental Change

While the above formulas of proof were important, their real effect was limited for two reasons. First, the statute under which most discrimination cases were brought, Title VII of the CRA of 1964, did not permit jury trials,¹⁰ and second, under *Hopkins*, employers could prevail in

mixed motive cases by proving they would have made the same decision regardless of the plaintiff's being in a protected class. Accordingly, even though the mixed motive method flipped the burden of proof, employers could still prevail if they could convince a judge that they had not discriminated. The CRA of 1991 drastically changed the mixed motive landscape by (1) allowing jury trials in Title VII cases¹¹ and (2) changing the standards and damage scheme for mixed motive cases.

Before jury trials were permitted in Title VII cases, judges, not juries, were the fact finders in cases relating to discrimination by race, sex, color, religion, or national origin. In many of these cases, the plaintiffs' lawyers would argue that the case was a mixed motive case, and the employer would argue that it was not. A judge who was unsure whether the case warranted the mixed motive method could appease the plaintiff and prevent a successful appeal by attaching the mixed motive label to the case and then holding that the employer had satisfied its burden. After the CRA of 1991, however, the question of whether a case warranted a mixed motive approach had a profound effect on the fact finder. Now, the judge's decision regarding whether to apply the *McDonnell-Douglas* standard or the mixed motive standard is not found in a holding but instead manifests itself in the judge's instructions to a jury. A judge who labels a case as being a mixed motive case must now instruct the jury that the employer has the burden of proving that it did not discriminate. Because of the difficulty of proving a negative, the judge's decision regarding whether to give a mixed motive instruction to the jury, as opposed to instructing jurors to apply the *McDonnell-Douglas* framework, may determine the result of the case. Giving

employers the burden of proof in front of juries who, according to at least one study, favor employees over employers to begin with, leads one to believe that employers will find it difficult, if not impossible, to prevail in mixed motive cases.¹²

To make matters worse for employers, the CRA of 1991 made the mixed motive instruction more “plaintiff friendly” by (1) making it easier to obtain and (2) changing the damage scheme to the point where litigating these cases became foolish for employers.

Mixed motive instructions are easier to obtain under the CRA of 1991 because plaintiffs no longer have to prove that the protected characteristic was a substantial factor in the employer’s decision. Instead, the new standard is that the protected characteristic need only be a “motivating factor” in the employment decision, which is an easier test to satisfy.

Changing the damage scheme has an even more profound effect than the change in burden of proof. Under the CRA of 1991, judges can now award attorneys’ fees, litigation costs, and declaratory judgments to plaintiffs who meet the motivating-factor standard, even where the employer meets its burden of proving that the decision would have been made anyway. Thus, employers that successfully prove that the business decision would have been made regardless of discrimination are still subject to huge damages.

The effect of the threat of awarding costs and fees is profound because costs and fees are the major damage component of most discrimination cases. In large cities like New York and Chicago, management lawyers report that their fees for discrimination almost always exceed \$150,000 and have been well over \$500,000.¹³ While plaintiffs’ lawyers’ fees awards are almost always less than man-

agement’s fees, the plaintiffs’ fees are still considerable. After the CRA of 1991, mixed motive cases became costly because employers who won still had to pay their attorneys’ fees and often the plaintiffs’ attorneys’ fees as well. Accordingly, it would almost always cost an employer over \$250,000 to “win” a mixed motive case. This figure does not include out-of-pocket litigation expenses for each side, lost employee and management time, and the bad publicity that accompanies both a trial and the subsequent judgment of discrimination. As a result, after 1991, employers were well advised to settle mixed motive cases because the costs of winning would almost always greatly exceed the settlement demand.

The solace for employers was that mixed motive instructions were relatively uncommon because the majority of jurisdictions held that a mixed motive instruction would be given only in cases with direct evidence of discrimination, which is hard to come by. Indeed, decision makers rarely make discriminatory remarks in writing or in front of employees who might testify against the company. Thus, the mixed motive instruction was unavailable in the vast majority of discrimination cases. Unavailable, that is, until the *Costa* decision.

Costa

In *Costa v. Desert Palace* (the case that eventually went to the Supreme Court), the Ninth Circuit held that *any type* of evidence was sufficient to warrant a mixed motive instruction. To resolve the split among the circuits, the Supreme Court granted certiorari for the *Costa* case and, in June 2003, issued a decision in *Desert Palace d/b/a Caesars Palace Hotel & Casino v. Costa*.¹⁴ The issue in *Costa* was whether direct evidence of discrimination was required for a plaintiff to receive a

mixed motive instruction or whether circumstantial evidence would suffice.

In arguing for direct evidence, the employer in *Costa* contended that Justice O'Connor's concurring opinion in *Hopkins*, which required direct evidence, was the holding of the case and still the law. The plaintiff, on the other hand, argued that the CRA of 1991's language was clear and did not require any specific type of evidence. Rather, the statute

Successive Supreme Court decisions have clarified and then muddied the waters in discrimination law.

merely stated that the plaintiff had to prove that discrimination motivated the employer.

In a unanimous decision, the Court held that the CRA of 1991's language was unambiguous and did not require direct evidence. Thus, in keeping with the Ninth Circuit's holding, any type of evidence may now enable a plaintiff to receive a mixed motive instruction. The effect of this decision could change the face of discrimination law.

Our reasoning is as follows. Several years ago, Spike Lee contended that race motivates a part of every decision. Regardless of whether Lee was correct, it is possible that a number of citizens, and therefore potential jurors, agree with him. It is also possible that there are those who feel the same way about sex, color, national origin, religion, age, and disability. Lee's contention is important because anyone who subscribes to this theory will find that virtually any plaintiff in a discrimination case has satisfied the initial burden (of providing any type of evidence) in the mixed motive scheme. Thus,

these potential jurors will always vote, maybe unwittingly, to award the plaintiff costs and fees.

Lower Courts' Interpretations of *Costa*

The fallout from *Costa* was swift. In *Davis v. Emery Worldwide Corp*, the district court in Maine seemingly limited the scope of *Costa* and held that the distinction between mixed and single motive cases was still relevant.¹⁵ That court stated, "Because no possibility of a mixed motive for the defendant's actions with respect to this incident is raised by the evidence in the summary judgment record, the recent decision of the Supreme Court in *Desert Palace* [i.e., *Costa*] . . . does not apply." In contrast, several courts have held that the distinction between single and mixed motive cases is no longer relevant. These courts do differ, however, on how to read *Costa*.

In *Dare v. Wal-Mart Stores, Inc.*, the court's opinion mirrored the Cornell Roundtable presentation made by Zev Eigen.¹⁶ Eigen argued that all cases are, at one time, mixed motive cases. Eigen explained that in all discrimination lawsuits, the plaintiff claims that the reason for the employment decision at issue is discrimination. The employer, if it intends to defend the case, must argue that nondiscriminatory reasons motivated the company. If one side's position is correct and the other's is false, then the party with the correct position must prevail. On the other hand, if both sides can proffer reasons that factored into the decision, then the case is truly a mixed motive situation. According to Eigen, deciding whether the parties' positions are true or false is a question for the fact finder, and all cases can follow the mixed motive scheme. Moreover, Eigen stated that employers rarely make a decision based purely on unlawful reasons. For example, assume an employer termi-

nates a woman for an infraction. Say that the woman proves that a man committed a similar infraction and received only a suspension. In such a situation, the employer did not terminate the female only because she was a woman. Instead, the employer terminated the employee because she committed the infraction and because she was a woman. Some would say this is a mixed motive.

The *Dare* court provided judicial authority for Eigen's theory when it stated the following:

The dichotomy produced by the *McDonnell-Douglas* framework is a false one. In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational.¹⁷

The court then stated that distinguishing the schemes between mixed motive and *McDonnell-Douglas* creates a "false dichotomy." The reason for this is that when analyzing the employer's articulated reason for a decision (under *McDonnell-Douglas*), courts should not focus on pretext but, instead, should apply the "same-decision test" set forth in the mixed motive instruction. In other words, courts should ask whether the employer would have made the same decision regardless of the employee's protected class. Because this question is the key issue in all discrimination cases, *Dare* holds that *Costa* applies to all cases.

Davis and *Dare* are just two of a number of lower court opinions that have been issued since *Costa*. In the next several years, cases like *Davis* and *Dare* will make it to the various courts of appeals, and it is likely that there will be split among the

circuits as to whether *Costa* has rendered *McDonnell-Douglas* useless so that all cases will follow the mixed motive scheme. At that time, it is likely that the Supreme Court will face the issue again.

Does the Scheme Matter?

Since there are 20,000 discrimination cases filed in federal court each year, one could argue that only these 20,000 cases will be affected by the method of proving discrimination.¹⁸ However, there are more than 150,000 discrimination charges brought each year at the administrative agency level.¹⁹ Thus, it is clear that the vast majority of cases are settled or dismissed by the Equal Employment Opportunity Commission (EEOC) or a state agency. The question is, what will be the effect of *Costa* on EEOC charges? We believe that the change in the mixed motive standard could have major effects on the agencies' and plaintiffs' lawyers' decisions as to how much to accept in settlements. It is possible that the so-called cost-of-defense settlements will increase by anywhere from 50 to 100 percent. The EEOC investigators, along with plaintiffs' lawyers, will contend that the lawyers will easily satisfy the motivating-factor standard and that the employer will have to pay both sets of lawyers even if the company wins. If our analysis is correct and employers are ill advised to go to trial on any case where any type of evidence exists, plaintiffs' lawyers' leverage will increase significantly. The cost of discrimination charges will therefore rise.

Future Research

There is a chance that plaintiffs fare no better in mixed motive cases than they do in *McDonnell-Douglas* cases. Moreover, even if plaintiffs satisfy the motivating-factor standard, it is possible that judges will not award plaintiffs' costs and fees.

Finally, plaintiffs' lawyers may fear that mixed motive instructions are confusing and therefore will not ask for them. If one or more of these statements are true, the effect of *Costa* may be negligible. On the other hand, if *Costa* results in a substantial increase in mixed motive cases, as we believe it will, the world of discrimination law will have changed dramatically.

The authors, along with attorneys from the law firm of Proskauer Rose LLP, are studying the jury instructions in over five hundred discrimination cases that went to jury verdict. The research will determine the effects of mixed motive instructions in terms of (1) win-loss records, (2) damage awards, and (3) cost and fee assessments. Unfortunately, what we cannot determine now is *Costa*'s long-term effect. Will *Costa* result in more mixed motive instructions? Will it lead to more cases filed with the EEOC? Will plaintiffs file more cases in federal court? Although these questions cannot be answered now, their answers should become clear in the next few years. This research project, which arose from a discussion at the May 2003 Center for Hospitality Research Roundtable, will take place in two stages. The initial study will be performed now, with an identical study to be performed in several years. At the conclusion of the first stage of the study, we will know the effect of a mixed motive instruction versus that of a *McDonnell-Douglas* instruction. The second stage of the research project will measure *Costa*'s long-term effects on discrimination litigation as we know it.

Endnotes

1. 123 S. Ct. 2148 (2003).
2. *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973).
3. 411 U.S. 792, 793 (1973).

4. 450 U.S. 248, 256 (1981).
5. 490 U.S. 228 (1989).
6. 509 U.S. 502 (1993).
7. In many ways, *Hicks* makes sense because an employer should be found guilty of discrimination only when the fact finders believe that the employer actually discriminated against the employee. Title VII is not a truth-in-employment act, and there are times when employers, despite their best efforts, may not know why a decision was made. For example, in *Hicks*, Justice Antonin Scalia proposed a hypothetical situation where a certain minority class constituted 10 percent of the population but 40 percent of the employer's workforce. Under this hypothetical proposition, a member of that minority group is not hired and files a discrimination lawsuit. The decision maker, a person who belongs to the same minority class, is terminated before the lawsuit is filed. Because the decision maker's records are not clear and this individual will not help the employer, the company's articulated reason for its decision may be discredited at trial. Nevertheless, looking at the totality of the circumstances, the fact finder may believe there was no discrimination. Under *Burdine*, the fact finder in this hypothetical instance had to find for the plaintiff. Under *Hicks*, the fact finder is free to find for the employer.
8. See Samuel Estreicher, "Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements," 16 Ohio St. J. on Disp. Resol. 559 (2001).
9. Id.
10. This was and is not the case with the Age Discrimination in Employment Act of 1967, which always allowed for jury trials.
11. Subsequent to the 1991 Act, Congress passed the Americans with Disabilities Act, which also allowed for jury trials.
12. David Sherwyn, J. Bruce Tracey, and Zev J. Eigen, "In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process," 2 U. Pa. J. Lab. & Emp. L. 73.
13. Id.
14. 123 S. Ct. 2148 (2003). The Supreme Court had no obligation to hear *Costa*. It granted certiorari because of the split in the circuits and

because of the perceived importance of the case.

15. 267 F. Supp. 2d 109, 120 n.2 (D. Me. 2003).

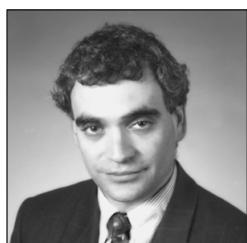
16. 267 F. Supp. 2d 987 (D. Minn. 2003). A *Quarterly* author, Zev J. Eigen, J.D., is senior coun-

sel, labor relations of Fox Entertainment Group.

17. *Dare* at 12.

18. See: Sherwyn, Tracey, and Eigen, p. 11.

19. Id.



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