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Editor's Note

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Evidence that an employer made an adverse employment decision for more than one reason, only one of which is unlawful, is commonplace in civil rights and employment discrimination litigation. The original template for sorting out liability in such "mixed-motive" cases was supplied by the Supreme Court's decision in a First Amendment retaliation case, *Mt. Healthy City School District Board of Education v. Doyle*. That approach usually furnishes a complete defense to defendants in most kinds of section 1983 cases if they can prove that they would have reached the "same decision" for a lawful, independent reason. Employment discrimination decisions generally followed this approach until the Civil Rights Act of 1991 explicitly provided that a Title VII plaintiff prevails on liability, despite an employer's "same-decision" showing, and is eligible in such circumstances for limited prospective relief and attorney fees.

In the post-1991 Act era, divergent approaches to the mixed-motives problem emerged in both civil rights and employment discrimination jurisprudence. Contemporary equal protection doctrine, for example, assumes that a violation is complete as soon as a plaintiff is denied a race-free opportunity to compete for a government job, contract, or university admission. Correlatively, the lower federal courts held that white plaintiffs who proved they were barred from consideration pursuant to an unconstitutional affirmative action program or consent decree were eligible for limited remedies even if the government defendant proved it would not have employed, contracted with, or admitted them for an independent, lawful reason. Against this background, *Mt. Healthy* began to look like a claim-specific remedy limitation rather than a defense to all actions under section 1983. On the other hand, recent Title VII decisions afford mixed-motive plaintiffs the limited 1991 Act remedies only when their evidence of the defendant's unlawful reason is "direct," and not when they rely on the more common inferential *McDonnell Douglas* mode of proof. In cases under the Americans with Disability Act of 1990 ("ADA"), it is unclear if the complete defense approach or the limited remedy approach applies. And there is a real question whether there can logically be any "same-decision" showing in mixed-motive cases under the Age Discrimination in Employment Act of 1967 ("ADEA") if the plaintiff is required to prove prima facie that age was a "determinative" or "but for" factor in the challenged decision. Finally, with the Supreme Court's decision last November in *Texas v. Lesage* the circle may be closing. The Court appears to treat a successful "same-decision" showing as a complete defense to liability across the full spectrum of section 1983 claims.

Against this backdrop, a panel of experts in civil rights and employment discrimination undertook a "Check Up on the State of *Mt. Healthy*" at the meeting of the Association of American Law Schools ("AALS") in January 2000. Working closely with Professor Harold S. Lewis, Jr., the AALS program chair and a member of Mercer's faculty, the Mercer Law Review was fortunate to receive articles from each of the five panelists.

Professor Michael Wells of the University of Georgia School of Law confronts *Mt. Healthy* on its original ground, arguing that it was wrongly decided and should not be applied either in determining liability or in assessing damages in First Amendment cases. Instead, Professor Wells concludes that it should be replaced by a rule that allows the plaintiff to recover full damages whenever the constitutional violation was sufficient to cause them.

Professor Sheldon H. Nahmod of Chicago-Kent College of Law explores the relationship between *Mt. Healthy* and section 1983, and the effect of *Texas v. Lesage* on First Amendment and Equal Protection Clause cases. He concludes that *Mt. Healthy*'s burden-shift rule should limit only remedy and not liability, in *all* section 1983 cases.

Professor Christina B. Whitman of the University of Michigan Law School discusses whether the substantive equal protection doctrine should fit comfortably with the concept of a complete defense for the mixed-motive defendant and argues that the implications of *Lesage* go beyond questions of causation and extend to the issue of damages.

Professor Robert M. Belton of Vanderbilt Law School comments on the Title VII and ADA variations of *Mt. Healthy*, arguing that the conflict in the courts over issues in mixed-motive cases results from either the inability or refusal of federal judges to recognize the significant role that race and sex continue to play in societal decisionmaking processes.

Professor Michael Zimmer of Seton Hall University School of Law tries to reconcile the *Mt. Healthy* doctrine with causation formulas under the ADEA. He concludes that the ADEA should be interpreted, as Title VII often is, to allow the plaintiff to establish the defendant's liability upon proof that age was merely a "motivating factor" in the decision.

We are also fortunate to publish three insightful articles by practicing attorneys who join the *Mt. Healthy* debate.

Joseph Z. Fleming, a partner in the firm of Ford & Harrison LLP in Miami, Florida, treats the relationship between causation and affirmative defenses.

Thomas H. Barnard and George S. Crisci, a partner and senior associate, respectively, in the firm of Ulmer & Berne LLP in Cleveland, Ohio, survey the statutory model of mixed-motive discrimination/ retaliation litigation after the Civil Rights Act of 1991 and the conflicting doctrine that produced by the decisions.

Finally, H. Lane Dennard and Kendall L. Kelly, a partner and

associate, respectively, in the firm of King & Spalding in Atlanta, Georgia, argue that the Supreme Court's *Price Waterhouse v. Hopkins* complete defense approach still applies in ADEA cases, even though the Civil Rights Act of 1991 overruled parts of that decision as it applied to Title VII.

On behalf of the Mercer Law School and the *Mercer Law Review*, we express our sincere appreciation to each author for their dedicated effort and unselfish contribution to this publication.

Finally, I wish to thank the members and staff of the *Mercer Law Review* and Professor Harold S. Lewis, Jr., who have worked tirelessly to publish this issue.

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Articles Edition Editor