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***Mt. Healthy*, Causation, and Affirmative Defenses**

by Joseph Z. Fleming*

I. CAUSATION—THE THEORY OF EVERYTHING

In *Mt. Healthy City School District Board of Education v. Doyle*,¹ the Supreme Court established a rule of causation to distinguish between a result caused by a constitutional violation and one not so caused by establishing “the proper test . . . which likewise protects against invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.”² Reconciling such inconsistencies is similar to the type of situation that has confounded physicists trying to achieve a unified field theory—a theory capable of describing nature's forces within a single, all-encompassing, coherent framework.³ Physicists since Einstein have sought such a “unified field theory” or a “theory of everything” to fashion the ultimate theory of the universe and to answer questions as to causation and how the universe arose (and to explain the universe from the “big bang” to the end, or the “cosmic implosion”).⁴ However, they encountered a major causation problem:

The problem is this: There are two foundational pillars upon which modern physics rests. One is Albert Einstein's general relativity, which provides a theoretical framework for understanding the universe on the largest of scales: stars, galaxies, clusters of galaxies, and beyond to the immense expanse of the universe itself. The other is quantum mechanics, which provides a theoretical framework for

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1. 429 U.S. 274 (1977).

2. *Id.* at 287.

3. See BRIAN GREENE, *THE ELEGANT UNIVERSE* 3 (1999).

4. *Id.* at 4, 234.

understanding the universe on the smallest of scales: molecules, atoms, and all the way down to subatomic particles like electrons and quarks. Through years of research, physicists have experimentally confirmed to almost unimaginable accuracy virtually all predictions made by each of these theories. But these same theoretical tools inexorably lead to another disturbing conclusion: As they are currently formulated, general relativity and quantum mechanics *cannot both be right*. The two theories underlying the tremendous progress of physics during the last hundred years—progress that has explained the expansion of the heavens and the fundamental structure of matter—are mutually incompatible.⁵

On a less universal scale, courts have struggled with causation issues that can answer the following questions: (1) whether rights have been violated and, (2) if so, whether the violations are the cause of decisions or should be used to negate, or end, decisions. Just as physicists must try to reconcile inconsistent theories, courts must determine whether various laws have been violated and must preclude various decisions when mixed motives are present—one legitimate and one unlawfully discriminatory—and when both may have caused an unfavorable employment action. This has been a major problem in connection with labor and employment matters, and the resolution of the mixed-motive problem came from the framework established in *Mt. Healthy*.⁶

In *Mt. Healthy* the Court held that an employee can be legally terminated if the employer can prove that it would have fired the employee absent the discriminatory motivation.⁷ In that case an untenured teacher contended that but for his participation in an exercise of a First Amendment broadcast over a radio station, the school board would have renewed his contract. The district court held that the teacher was entitled to reinstatement with back pay, and the Sixth Circuit affirmed.⁸ However, the Supreme Court vacated and remanded.⁹ The Supreme Court accepted the district court's finding that the communication was protected by the First and Fourteenth Amendments.¹⁰ However, the fact that the communication might have played a "substantial part" in the board's decision not to renew the teacher's contract was not a constitutional violation justifying remedial action if

5. *Id.* at 3.

6. Joseph J. Ward, Note, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 635 n.57 (1997).

7. 429 U.S. at 287.

8. *Id.* at 282-87.

9. *Id.* at 287.

10. *Id.* at 284.

the board would have reached the same decision anyway.¹¹ The Court vacated and remanded because it was unable to determine how the proper test would have been applied.¹²

While *Mt. Healthy* implicated the First Amendment insofar as the employee asserted that his exercise of his First Amendment rights caused the discriminatory terminations, the Court, in *NLRB v. Transportation Management Corp.*,¹³ extended its holding beyond constitutional issues connected with employment matters to traditional labor law issues.¹⁴ The NLRB adopted the theory established in *Mt. Healthy* in connection with its interpretation of the National Labor Relations Act.¹⁵ The Court approved what is known as the "*Wright Line*" test, which allows a termination to stand even if the employer was motivated by either a desire to punish the plaintiff or other improper reasons, so long as the employer can show it would have otherwise terminated the employee or reached the same termination decision.¹⁶ Relying on *Mt. Healthy*, the court stated,

The [NLRB's] allocation of the burden of proof is clearly reasonable in [a mixed-motive] context, for the reason stated in *NLRB v. Remington Rand, Inc.*, a case on which the Board relied when it began taking the position that the burden of persuasion could be shifted. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

In *Mt. Healthy City Board of Education v. Doyle*, we found it prudent, albeit in a case implicating the Constitution, to set up an allocation of the burden of proof which the Board heavily relied on and borrowed from in its *Wright Line* decision. There, we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish

11. *Id.* at 285.

12. *Id.* at 287.

13. 462 U.S. 393 (1983).

14. *Id.* at 403.

15. *Id.*

16. *Id.* at 403-04.

plaintiff for exercising his First Amendment rights. The analogy to *Mt. Healthy* drawn by the Board was a fair one.¹⁷

The causation analysis in *Mt. Healthy* has been adopted in other circumstances as well. In *Price Waterhouse v. Hopkins*,¹⁸ the Supreme Court noted it would follow *Mt. Healthy* when deciding mixed-motive cases under Title VII:

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In *Mt. Healthy City Bd. of Ed. v. Doyle*, . . . [w]e . . . held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision.¹⁹

The plurality in *Price Waterhouse* specifically rejected the dissent by Justice Kennedy,²⁰ which Chief Justice Rehnquist and Justice Scalia joined and which attempted to find that analogies to the decisions in *Mt. Healthy* and *Transportation Management Corp.* were not appropriate because "these cases were decided in different contexts."²¹ The dissent contended that *Mt. Healthy* was a First Amendment case and not controlling as to Title VII.²²

17. *Id.* at 403 (citations omitted); see also Joanne S. Marchetta, Note, NLRB v. Transportation Management Corp.: Allocation of the Burden of Proof in Section 8(a)(3) Mixed Motive Discharge Cases, 33 CATH. U. L. REV. 279, 288 (1983) (describing the approach of the NLRB in resolving motivational issues by using the Court's rationale in *Mt. Healthy*).

18. 490 U.S. 228 (1989).

19. *Id.* at 248-49 (plurality opinion) (quoting *Mt. Healthy*, 429 U.S. at 287) (citations omitted) (alteration in original).

20. *Id.* at 247.

21. *Id.* at 289 (Kennedy, J., dissenting).

22. *Id.* at 289-90.

Closer analogies to the plurality's new approach are found in *Mt. Healthy City Bd. of Ed. v. Doyle* and *NRLB [sic] v. Transportation Management Corp.*, but these cases were decided in different contexts. *Mt. Healthy* was a First Amendment case involving the firing of a teacher, and *Transportation Management* involved review of the NLRB's interpretation of the National Labor Relations Act. The *Transportation Management* decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. Neither case therefore tells us why the established *Burdine* framework should not continue to govern the order of proof under Title VII.

The plurality rejected the dissent's argument:

At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in *Mt. Healthy City Bd. of Ed. v. Doyle* has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.²³

The foregoing type of affirmative defense, based on analysis of the causation concept articulated in *Mt. Healthy*, was disapproved by Congress in the Civil Rights Act of 1991, which was Congress's reaction to the Court's decisions in *Price Waterhouse* and other cases. While some maintain that *Price Waterhouse* heightened the employee's burden and made it more difficult for the employer to rebut a plaintiff's prima facie case and that the Civil Rights Act of 1991 "adopted the plurality test,"²⁴ the Civil Rights Act of 1991 plainly states 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."²⁵

Other approaches to legal causation and analysis have used the mixed-motive approach²⁶ and the causation type of analysis from *Mt. Healthy*.²⁷

Id. (citations omitted).

23. 490 U.S. at 247 n.12 (citations omitted).

24. Ward, *supra* note 6, at 643 n.5.

25. Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1992) (codified at 42 U.S.C. § 2000e-2(m) (1994)).

26. See Mary Teresa Sobnosky, Note, *Wright Line and Wrongful Discharge Actions: A Uniform Standard of Review*, 33 CASE W. RES. L. REV. 404, 425 n.159 (1983).

27. See Pamela M. Martey, Note, "The Last Temptation Is the Greatest Treason: To Do the Right Deed for the Wrong Reason": After-Acquired Evidence in Employment Discrimination Claims: *McKennon v. Nashville Banner Publishing Co.*, 28 CREIGHTON L. REV. 1031, 1044 (1995) (noting that *Mt. Healthy* was a formulation of a "test of causation which distinguished between a result obtained, following a constitutional violation and one not occurring incident to a constitutional violation"). The quote in the foregoing casenote title is attributed to T.S. Eliot:

The Supreme Court seems to have created a concept in *Mt. Healthy* that can be applied in a way that federalizes, or constitutionalizes, causation issues in the same fashion as in certain other areas of the law.²⁸

As noted, while the causation test in *Mt. Healthy* was adopted by the Court in *Price Waterhouse*, it has been changed by congressional amendment of Title VII, and the change appears to be a restriction on the use of the causation rule. However, that does not prevent the Court from using the causation concept from *Mt. Healthy* to create other substantial affirmative defenses, as demonstrated by a trilogy of 1998 decisions.

First, in *Gebser v. Lago Vista Independent School District*,²⁹ the Court precluded sex discrimination suits under Title IX against a school district.³⁰ Justice Ginsburg's dissent, joined by Justices Souter and Breyer, noted that dimensions of a claim are determined not only by plaintiff's allegations, but also by "allowable defenses."³¹ The dissent further stated,

In line with the tort law doctrine of avoidable consequences, I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct. School districts subject to Title IX's governance have been instructed by the Secretary of Education to install procedures for "prompt and equitable resolution" of complaints, and the Department of Education's Office of Civil Rights has detailed elements of an effective grievance process, with specific reference to sexual harassment.

The burden would be the school district's to show that its internal remedies were adequately publicized and likely would have provided

In warning of the moral hazards which confront humanity, T.S. Eliot stated, "The last temptation is the greatest treason: To do the right deed for the wrong reason." [T.S. ELIOT, *MURDER IN THE CATHEDRAL* pt. 1.]. Judge Morris Sheppard Arnold appropriately cited T.S. Eliot in his eloquent dissenting opinion in *Welch v. Liberty Machine Works Inc.* See *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1406 (8th Cir. 1994) (Arnold, J., dissenting).

Id. at 1031 n.1. For reasons of poetic justice there is more about T.S. Eliot later.

28. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 283 (1963) (using the actual malice rule to set a standard for defamation cases based upon a constitutional theory, which has the effect of federalization); see also *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 154-55 (1983) (borrowing of six-month limitation period to restrict suits under various labor laws that actually do not have such explicit limitation periods for purposes used by the Supreme Court).

29. 524 U.S. 274 (1998).

30. *Id.* at 292-93.

31. *Id.* at 306-07 (Ginsburg, J., dissenting).

redress without exposing the complainant to undue risk, effort, or expense. Under such a regime, to the extent that a plaintiff unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suffered avoidable harm, she would not qualify for Title IX relief.³²

In the second case, *Faragher v. City of Boca Raton*,³³ some of the Justices who dissented in *Gebser* were in the majority. They concluded that at least an affirmative defense could be available when no "tangible employment action is taken."³⁴ However, when an employee is victimized by a supervisor in an actionable hostile environment case, the court stated,

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.³⁵

32. *Id.* at 307 (citations omitted).

33. 524 U.S. 775 (1998).

34. *Id.* at 807.

35. *Id.* at 807-08 (citations omitted).

The third related case, *Burlington Industries, Inc. v. Ellerth*,³⁶ also involved the opinion of the Justices who dissented in *Gebser*. The Court approved the affirmative defense, using precisely the same language it used in *Faragher*.³⁷ These three cases used similar affirmative defense concepts, emerging not only from a public sector case involving a school district, which started the dialogue as to defenses in a dissent, but also a public sector case and a private sector case that reaffirmed these types of allowable defenses in majority opinions.

Initially, commentators' evaluations of these decisions suggested that they would apply only in cases in which there was no "tangible employment action," which was defined as an unfavorable action such as discharge, demotion, negative transfer, or failure to receive an increase or bonus.³⁸ However, it was noted that while the employee in *Ellerth* who was sexually harassed was promoted, she ultimately resigned, and the resignation could have been regarded as a constructive termination.³⁹

The decisions are in a state of fluctuation. For example, Chief Judge Becker's opinion in *Durham Life Insurance Co. v. Evans*⁴⁰ rejected the affirmative defense that liability for supervisory acts should be eliminated under *Ellerth* and *Faragher* in cases in which the plaintiff resigned.⁴¹

We conclude that Durham is not entitled to the affirmative defense that Evans unreasonably failed to use an available effective sexual harassment policy because the defense is only available in the absence of tangible adverse employment action, and Evans suffered such adverse action. The concept of a tangible adverse employment action is not limited to changes in compensation, although Evans's pay was certainly affected by the actions taken against her. "Tangible adverse employment action" includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job; that Evans suffered such loss is detailed [in the record].⁴²

36. 524 U.S. 742 (1998).

37. *Id.* at 764-65.

38. See Jay W. Waks & Dina L. Bakst, *Employment Law: Sexual Harassment*, NAT'L L.J., Mar. 22, 1999, at B6.

39. *Id.*

40. 166 F.3d 139 (3d Cir. 1999).

41. *Id.* at 144.

42. *Id.*

Durham Life Insurance is an interesting case because it shows the judges' differing thoughts as to whether tangible adverse employment actions are necessary.⁴³ The court noted,

Although Judge Garth concurs in the result reached by Chief Judge Becker, he cannot agree that the discussion of when and how the affirmative defense provided by the holdings in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, and Chief Judge Becker's attempted clarification of that defense, have a place in the opinion.⁴⁴

The court in *Scott v. Ameritex Yarn*⁴⁵ allowed the use of an affirmative defense, even though there was a constructive discharge: "The court holds that a constructive discharge does not rise to the level of a tangible employment action in violation of 42 U.S.C. § 2000e-2(a)(1). Alternative-

43. *Id.* at 149 n.5.

44. *Id.* (citations omitted). The court further explained,

As Judge Garth reads the Supreme Court decisions, their holdings are unequivocal and are directly applicable to this appeal without extending the analysis beyond the facts of this case. Ms. Evans provided proof of a tangible adverse employment action (*i.e.*, she was made to leave her job), and this action was on the basis of her supervisors' behavior. Here, Ms. Evans was the subject of a tangible adverse employment action, the District Court found that her supervisors were responsible for her constructive discharge and the District Court returned a verdict compensating her for the damages she suffered.

This being so, the initial holding in *Faragher* and *Ellerth* attaches and binds us: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Judge Garth believes that is all the Court is called upon to review through the lens of *Ellerth* and *Faragher* and he agrees that the District Court properly entered judgment in favor of Ms. Evans.

However, Judge Garth takes no position and disassociates himself from the discussion in Section III.A of Chief Judge Becker's opinion involving situations and examples where no tangible adverse employment action was taken, matters that concern the second holding of *Ellerth* and *Faragher*. This second holding provides that "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages," and specifies the elements that must be established for the defense to prevail. (To the extent that Judge Weis in his concurring opinion would make an affirmative defense available even when a tangible adverse employment action resulted, Judge Garth rejects his analysis as being contrary to and in derogation of the explicit holdings of *Ellerth* and *Faragher*).

Id. (citations omitted).

45. 72 F. Supp. 2d 587 (D.S.C. 1999).

ly, the court holds that Scott was not constructively discharged because she did not seek redress from Ameritex prior to resigning.⁴⁶

II. NOT WITH A BANG BUT A WIMPER⁴⁷

Returning to the big bang issue that plagues physicists seeking to determine the origins of the universe and reasoning therefrom, it is equally difficult to ascertain where the Supreme Court will go next in determining whether to apply the affirmative defenses. But it is quite clear that the Court is leaning in favor of affirmative defenses, which have surfaced in judicial rulings that modified the statutes they interpreted, in the same way the *Mt. Healthy* causation rule seems to have arisen. The Court is not involved in a dramatic creation, but rather seems to be very subtly articulating a series of constitutional affirmative defenses. This was the case in its recent ruling in *Kolstad v. American Dental Ass'n*.⁴⁸ While *Kolstad* seems to be most widely commented upon because of its ruling that punitive damages would be available even if an employer's conduct was not "egregious,"⁴⁹ the Court in *Kolstad* was faced with a dilemma. If it used the traditional Restatement of Agency rule, then when employers undertook good faith efforts to educate themselves and their employees about Title VII's prohibitions, any violation by the employers could be inferred to have been committed with malice or reckless indifference.⁵⁰ As a result, although in *Kolstad* plaintiff was denied a promotion, the Court adopted the affirmative defense approach and remanded.⁵¹ The Court's remand decision is instructive because it addressed the "good faith efforts to comply with Title VII":

Applying the Restatement of Agency's "scope of employment" rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. In fact, such a rule would likely exacerbate concerns among employers that § 1981a's "malice" and "reckless indifference" standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's "primary

46. *Id.* at 594.

47. This title taken from T.S. ELIOT, *THE HOLLOW MEN* (1925), quoted in JOHN BARTLETT, *BARTLETT'S FAMILIAR QUOTATIONS* 669 (Justin Kaplan ed., 16th ed. 1992).

48. 119 S. Ct. 2118 (1999).

49. *Id.* at 2123.

50. *Id.* at 2128-29.

51. *Id.* at 2129-30.

objective" is "a prophylactic one;" it aims, chiefly, "not to provide redress but to avoid harm." *With regard to sexual harassment, "[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."* The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.

In light of the perverse incentives that the Restatement's "scope of employment" rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII. Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII."⁵²

The Court noted that it might be necessary, on remand, to determine whether the employer made good-faith efforts to enforce an antidiscrimination policy.⁵³ It is important to highlight the reference in *Kolstad* to the decision in *Burlington*, following the statement that "[w]ith regard to sexual harassment, '[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.'"⁵⁴ The Court in *Kolstad* suggested a variety of affirmative defenses, including the type of grievance process that had been discussed in the trilogy.⁵⁵

It appears that the Court may be moving very carefully toward allowing these defenses for the following reasons. First, the original concept of a civil rights law was to correct injustices that were quite obvious, and as a result, litigants were regarded as private attorney generals. The case law favored their ability to obtain standing and access to courts and to achieve remedies for public policy reasons. For example, in *New York Gaslight Club, Inc. v. Carey*,⁵⁶ the Court noted, "Because Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority,' a

52. *Id.* at 2129 (emphasis added) (citations omitted) (alteration in original).

53. *Id.*

54. *Id.*

55. *Id.* at 2128-29. See *supra* notes 29-38.

56. 447 U.S. 54 (1980).

prevailing plaintiff 'ordinarily is to be awarded attorney's fees in all but special circumstances.'⁵⁷

The second reason the Court should move carefully toward these defenses is because the success of the civil rights movement and explosion of employment laws has caused everyone to be protected in the workforce today. All individuals have civil rights, the infringement of which is sufficient to give standing to complain of employment decisions, even in termination-at-will jurisdictions.⁵⁸

Another factor, the expansion of litigation in this area, ensures that employees will have access to the courts, and because of the universality of individual rights—a dilemma created by the scope of the various protective laws—the legal profession is adapting to this area of the law, resulting in a litigation increase.

If one adds up the foregoing factors and reviews the recent commentaries on legal practice, the synergy created is an explosive element, and it gives plaintiffs a "big bang" for their buck. To illustrate, a recent report describes the conversion of personal injury lawyers into civil rights attorneys because of tort reform:

A voice blares over the radio, "Are you the victim of sexual harassment? Have you been fired or denied advancement because you're a woman? Don't suffer in silence anymore. Call me, William J. Berger, for a free consultation."

Six years ago, Berger was a personal injury lawyer representing accident victims. These days Berger seeks out aggrieved employees looking for some type of compensation from their current or former employer. He's joined by a crowd of civil trial lawyers who see this area of law as their next bonanza.

"Typically I get close to 100 calls after the ad runs," Berger says.

They're buying ads on radio and television, advertising in the Yellow Pages, sending out direct mail and spreading their names through offices to drum up sexual harassment or discrimination cases. The reason for the sudden shift: legislation called tort reform threatens

57. *Id.* at 63 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416, 417 (1978)).

58. Peter Panken, a management labor lawyer, concluded that "[o]ne act by an employee can give rise to 36 or more causes of action. Fire a 42-year-old minority woman shop steward with a bad back and 4 years 11 months seniority, and you may face at least 36 different litigations . . ." Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, in II AIRLINE AND RAILROAD LABOR AND EMPLOYMENT LAW, C941 ALI-ABA 553, 553 (1994); see also Joseph Z. Fleming, *Labor and Employment Law: Recent Developments—At-Will Termination of Employment Has Not Been Terminated*, 20 NOVA L. REV. 437 (1995) (illustrating cases and circumstances in which the termination-at-will doctrine has been utilized).

personal injury lawyers and the prospect of making big money from fighting corporations over employee issues.

In the past five years, the number of lawyers who belong to the employment law section of the Florida Bar has more than doubled from 600 to nearly 2,000. The increase has been primarily plaintiffs lawyers, those who represent individuals rather than defend businesses.

....
The Civil Rights Act of 1991 opened the door for large jury awards in employment cases. Victims of discrimination or sexual harassment can collect for pain and suffering or seek punitive damages. That change could turn an average case into one worth half a million dollars.

What's more, the act also created a provision for attorneys' fees. So even if a plaintiff receives only \$50,000, his attorney could receive as much as \$150,000.⁵⁹

As a result, there are many continued reasons to expand the causation test in *Mt. Healthy* and other affirmative defenses. This is not because discrimination should be approved in any specific case, but rather because virtually all employees are protected; therefore, a motive to do something positive as to one employee may result in a negative impact on another employee or group of employees. A determination of prejudices and motives becomes part of a very complex situation. Similar causation issues have troubled not only physicists, but also artists. Even T.S. Eliot, whose verse entitled this section, was not immune to criticism. Although T.S. Eliot was the "greatest living poet from 1940 on," there were protests against his anti-Semitism, and, as one of his biographers noted, "Hatred is common; perfection rare. In him, the two were interfused."⁶⁰

59. Cindy Krischer Goodman, *Lawyers Catch Labor Law Fever*, MIAMI HERALD, Feb. 17, 2000, at 1C.

60. LYNDALE GORDON, T.S. ELIOT: AN IMPERFECT LIFE 475 (1999). In his classic commentary, Anthony Julius concludes his analysis of this complex situation by noting, In or about 1950, the Jewish poet and man of letters Emanuel Litvinoff read to a London audience his poem 'To T.S. Eliot'. Eliot was present. When Litvinoff had finished:

Most of the audience began to clap . . . but Stephen Spender rose angrily and shouted that Litvinoff had grossly insulted Tom Eliot who was the most gentle of men. He continued with great emotion and spoke with great rapidity. Perhaps I did not hear Spender properly but he seemed to say something like: 'As a poet I'm at least as much a Jew as Litvinoff, and Tom isn't anti-Semitic in the least.' In the confusion of anger, Spender was not entirely coherent but there was no mistaking his gutsy aggression towards Emanuel Litvinoff's attitude as it was forcibly expressed in the poem addressed to Eliot. For his part, Eliot, in the chair behind me, his head down,

As a result, just as with T.S. Eliot, cases are complex, and motivation must be evaluated. Do we throw out the work of T.S. Eliot because he was a bigot? Do we try to evaluate mixed motives and look at results and achieve a pragmatic type of case-by-case analysis? *Mt. Healthy* is of tremendous assistance because it instructs us to use a causation test that can be applied to specific facts. In a sense, it enables us to resolve the mixed-motive issues in an appropriate way.⁶¹

muttered generously, 'It's a good poem, it's a very good poem.'

Eliot was right. The poem is accurate about his reputation and impressive in its outraged adoption of the language of his poetry. It is a work divided by love and dismay, in which Litvinoff wrestles to find in the language of his despiser the means by which he may both honour and challenge him. Eliot made poetry out of anti-Semitism; Litvinoff made a poem out of Eliot's poetry of anti-Semitism, countering Eliot's texts with his own. 'To T.S. Eliot' is a work of resistance as well as respect. I wish my book to be regarded as another such work.

ANTHONY JULIUS, T.S. ELIOT, ANTI-SEMITISM, AND LITERARY FORM 217-18 (1995) (endnote omitted).

61. This is appropriate because the issues are more complex. See, e.g., Joseph Z. Fleming, *Back to the Future: The Role of Historic Preservation in Assigning a Minor Part to the Taking Issue in the Land Use Drama*, 17 STETSON L. REV. 689, 717-21 (1988) (noting conservative justices may have very liberal interests in the police powers when it comes to regulating pornography, but not when it comes to "taking cases"); see also *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074-75 (2000) (per curiam) (applying a strict test of motivation to a city's action that was motivated solely by a spiteful effort unrelated to any legitimate objective). The ability to find a hard and fast rule does not exist; this may be wimping out, but it has recently been reported that a "weakly interacting, massive particle, or WIMP" could enable us to "account for all the known forces and particle behaviors in nature—marrying quantum theory and gravity, for example." James Glanz, *Evidence of Mystery Particles Stirring Excitement and Doubt*, N.Y. TIMES, Feb. 19, 2000, at A1.