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Comment

The Mixed-Motives Defense in Workplace Discrimination Actions and Its Procedural Issues in the Eleventh Circuit

I. INTRODUCTION

Being fired from one's place of employment is an unfortunate incident that many Americans face on one or more occasions during their lifetimes. Discharged employees obviously experience some degree of economic loss by losing salaries and benefits. Even when rightfully discharged, employees may suffer emotional and psychological harm because of their perceived failure. This harm may be magnified when the employee has been discharged for wrongful, illegal reasons.

However, in some cases an employer may have legitimate, legal reasons to terminate an employee and simultaneously have illegal, discriminatory reasons. In such a "mixed-motives" situation, employers may be able to limit their liability or avoid liability altogether. This Comment discusses federal legislation promulgated to deter workplace discrimination and the background of the mixed-motives defense. In addition, it examines certain procedural issues and the nature of the mixed-motives defense in the Eleventh Circuit.

II. CONSIDERATIONS IN EMPLOYMENT DISCRIMINATION LAW

A. *Federal Legislation*

Congress has promulgated federal legislation to protect employees' rights and to deter workplace discrimination. Employees who believe that they have been discharged for illegal, discriminatory reasons generally have the option of basing their actions on one or more federal statutes.

Title VII of the Civil Rights Act of 1964[1] ("Title VII") provides that employers, in both the private and public sectors, cannot "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2] In addition, an employer may not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[3]

Congress responded to age and disability discrimination in the workplace by enacting both the Age Discrimination in Employment Act of 1967 ("ADEA")[4] and the Americans with Disabilities Act of 1990 ("ADA").[5] The ADEA provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[6] The ADA provides that covered entities are prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[7]

In addition, employees in the public sector may also be able to include 42 U.S.C. § 1983 as a basis for their actions. Section 1983 prohibits

1. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999).
2. *Id.* § 2000e-2(a)(1).
3. *Id.* § 2000e-2(a)(2).
4. 29 U.S.C.A. §§ 621-634 (West 1999 & Supp. 1999).
5. 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).
6. 29 U.S.C.A. § 623(a)(1).
7. 42 U.S.C. § 12112(a).

employers acting under the authority of state or federal law from using their authority to deprive employees of federally guaranteed rights. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .[8]

Another avenue to pursue damages in both the private and public sectors is 42 U.S.C. § 1981, which secures an employee's right to enter into contracts without discrimination based on race or ancestry. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[9]

Nevertheless, workplace discrimination resulting in employee discharge is commonplace in American society, and this discrimination has created much legislation and court cases protecting employees from unfair labor decisions. There are, however, means that exist by which an employer is completely shielded from liability or is protected from unlimited employee damage awards.

B. *Mixed-Motives Cases*

Over twenty years ago, the courts began to address situations in which an employee was discharged for both legal and illegal reasons. In *Mt. Healthy City School District Board of Education v. Doyle,*[10] an untenured teacher lost his job because the school district did not renew his employment contract. Fred Doyle taught for the school board under one-year contracts during his first two years and under two-year contracts thereafter. Eventually, the school board decided it did not want to rehire Doyle to teach in its district. The school board considered several factors in deciding not to renew Doyle's employment contract. The school board argued that during Doyle's employment, he (1) was involved

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8. 42 U.S.C. § 1983 (Supp. III 1997).
9. 42 U.S.C. § 1981(a) (1994).
10. 429 U.S. 274 (1977).

in an argument with another teacher that resulted in the other teacher slapping Doyle, and Doyle refused to accept an apology; (2) was involved in an argument with school cafeteria employees over the size of his serving; (3) referred to students as "sons of bitches"; (4) made an obscene gesture to two female students who did not obey his instructions when he was supervising the cafeteria; and (5) telephoned a local radio station to criticize a school memorandum regarding the faculty dress code.[11]

After the school board determined that it would not rehire Doyle, Doyle requested that the school board explain its decision.[12] The school board's response was a statement that Doyle demonstrated "a notable lack of tact in handling professional matters."[13] The school board's statement also specifically mentioned Doyle's conversation with the radio station and his use of obscene gestures directed at students as reasons for his termination.[14]

Doyle sued the school board, arguing that the telephone call to the radio station was protected by the First Amendment and that the decision not to rehire him violated his First Amendment right to free speech.[15] Both the district and the circuit courts found that the First Amendment protected Doyle's conversation with the radio station.[16] The Supreme Court agreed that the burden was properly placed upon Doyle to prove that the conversation was protected speech and that the conversation was a "substantial" or "motivating" factor in the decision not to rehire him.[17] However, the Court remanded the proceedings to determine whether the school board could have shown by a preponderance of the evidence that "it would have reached the same decision as to [Doyle's] reemployment even in the absence of the protected conduct."[18] In effect, the Court in *Mt. Healthy* provided a complete defense to section 1983 violations when the employer proves that the same decision to fire the employee would have been reached for legally permissible reasons.[19]

The mixed-motives defense arose again in *Price Waterhouse v. Hopkins*,[20] which involved a claim of discrimination based on a statute rather than the Constitution. Hopkins, a female senior manager for

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11. *Id.* at 281-82.
12. *Id.* at 282.
13. *Id.* at 283 n.1.
14. *Id.*
15. *Id.* at 276.
16. *Id.* at 283.
17. *Id.* at 287.
18. *Id.*
19. *Id.* at 285-86.
20. 490 U.S. 228 (1989).

Price Waterhouse, was nominated for partnership in 1982.[21] Hopkins had worked for Price Waterhouse in its Washington, D.C., Office of Government Services for five years. At that time only 7 of the firm's 662 partners were women. Hopkins was the only woman nominated for partnership in a group of eighty-eight nominees that year. Upon evaluation the company decided neither to offer nor deny her admission to the partnership. Her nomination for partnership was suspended for reconsideration the following year. However, the partners in her office decided to withdraw their support before her candidacy was reviewed.[22]

Hopkins sued Price Waterhouse, alleging that the partners violated Title VII by discriminating against her on the basis of sex when considering her for partnership. Hopkins offered evidence of her impressive accomplishments as senior manager. She had assisted in securing a $25 million contract and received praise for her "outstanding performance" that was carried out "virtually at the partner level." In addition, Hopkins presented evidence that many of the partners had praised her efforts in the past with words including "professional" and "extremely competent." Furthermore, the trial court judge determined that none of the other employees nominated for partnership had comparable accomplishments regarding securing large contracts for the company.[23]

Hopkins also produced evidence that some of the partners had negative reactions to her personality because of her sex. Some of the employees referred to Hopkins as "macho" and objected to her use of foul language because they deemed it to be unbecoming of a woman. However, the evidence also indicated that Hopkins was often abrasive and difficult to work with. Hopkins had been described as universally disliked, annoying, and irritating.[24]

The trial court found that Price Waterhouse had indeed violated Title VII by discriminating against Hopkins on the basis of sex. The court noted that Price Waterhouse could have avoided equitable relief if it had proven by clear and convincing evidence that Hopkins's partnership candidacy would have been suspended even absent the gender discrimi-

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21. *Id.* at 231-33. To be considered for partnership at Price Waterhouse when this litigation commenced, the partners in the local office had to submit the candidate's name. At that point, the existing partners could comment on the candidate's performance, and an Admissions Committee would make a recommendation to the Policy Board. The recommendation could have been to offer or deny a partnership position or to hold the candidacy for review the following year. *Id.* at 232.

22. *Id.* at 233 & n.1.

23. *Id.* at 233-34.

24. *Id.* at 234-35.

nation. The court determined that Price Waterhouse had not met this burden.[25]

The court of appeals affirmed the trial court's general conclusion, but determined that the employer could avoid all liability, not just equitable relief, if it could prove the same decision would have been made absent the discrimination.[26] The Supreme Court agreed with the court of appeals approach, but disagreed with the standard of proof.[27] The appropriate standard, according to the Court, was a preponderance of the evidence.[28] Therefore, through this affirmative defense,[29] an employer may avoid liability altogether when legal and illegal reasons for termination coexist and when the employer can prove by a preponderance of the evidence that the same decision would have been made absent the unlawful discrimination.[30]

In response to *Price Waterhouse* and other cases, Congress amended Title VII in 1991 to allow a plaintiff to recover declaratory and injunctive relief and attorney fees and costs, but not relief related to the loss of an employee's position, in mixed-motives situations.[31] Statutory unlawful employment practices are established when an employee can show that race, color, religion, sex, or national origin was a motivating factor for the employment practice, "even though other factors also motivated the practice."[32] When a plaintiff can demonstrate a Title VII violation by proving an unlawful employment practice, the defendant still has an opportunity to demonstrate by a preponderance of the evidence that it "would have taken the same action in the absence of the impermissible motivating factor."[33] In this event the court "may grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable" to the claim.[34] However, the court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[35]

25. *Id.* at 237.
26. *Id.*
27. *Id.*
28. *Id.* at 258.
29. The Court examined the burdens on both parties and subsequently deemed the employer's burden to be an affirmative defense. *Id.* at 246.
30. *Id.* at 258.
31. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b), 105 Stat. 1071, 1075 (1992) (codified at 42 U.S.C.A. § 2000e-5(g)(2)(B)).
32. 42 U.S.C.A. § 2000e-2(m).
33. *Id.* § 2000e-5(g)(3)(B).
34. *Id.* § 2000e-5(g)(3)(B)(i).
35. *Id.* § 2000e-5(g)(3)(B)(ii).

The Supreme Court recently revisited the mixed-motives defense in a nonworkplace situation in *Texas v. Lesage*.[36] Francois Lesage, a white male, unsuccessfully applied for admission to the Ph.D. program in counseling psychology in the Department of Education at the University of Texas. Lesage's application was 1 of 223 that the school received for the 1996-1997 academic year. These prospective students were competing for about twenty seats.[37] During the selection process, the school "considered the race of its applicants at some stage during the review process."[38] After Lesage received notification that his application was rejected, he filed a lawsuit alleging that the school violated section 1981, section 1983, and Title VII by "establishing and maintaining a race-conscious admissions process."[39]

The school moved for summary judgment and offered evidence that Lesage's application would not have been selected for admission because many of the applicants had superior qualifications. Eighty applicants had superior undergraduate grades, almost twice that number had higher Graduate Record Examination scores, and seventy-three applicants were superior with respect to both factors. In addition, a member of the admissions committee stated that Lesage had substandard letters of recommendations. Also, Lesage's personal statement indicated that he possessed only a limited capacity to communicate his interests and ideas. One member of the admissions committee testified in an affidavit that these factors alone led to an early rejection of Lesage's application.[40]

The district court granted summary judgment for the school because racial considerations did not have an effect on Lesage's rejection, and the uncontested evidence indicated that the students who were accepted had credentials that the admissions committee considered to be superior to Lesage's.[41]

Lesage appealed, and the circuit court dismissed the district court's conclusion that the school would have rejected Lesage's application even if there had been no racial considerations. The court reasoned that Lesage was unable to compete on an equal footing and had suffered an "implied injury" because of the racial considerations. The factual dispute concerning whether there were any racial considerations involved in the

36. 120 S. Ct. 467 (1999).
37. *Id.* at 467.
38. *Id.*
39. *Id.*
40. *Id.* at 467-68.
41. *Id.* at 468.

application review process was sufficient to render summary judgment inappropriate. Therefore, the circuit court reversed and remanded.[42]

The Supreme Court determined that the circuit court's decision concerning the section 1983 action was inconsistent with the well-established framework of *Mt. Healthy*.[43] That the Court's previous decisions on this damages issue under section 1983 for past injury usually involved retaliation for exercising First Amendment rights, as opposed to racial discrimination, was immaterial to the analysis.[44] The basic premise is that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983."[45] Therefore, the State was entitled to summary judgment on the section 1983 claim and the Court reversed on that issue.[46]

C. The Impact of the Mixed-Motives Affirmative Defense on Discrimination Claims

The mixed-motives defense can obviously be a good friend to employers. In many cases it completely abrogates an employee's right to damages when an employer is guilty of some degree of illegal discrimination. This result leaves no remedy to an employee who suffers economic and psychological harm resulting from being fired for at least partly discriminatory reasons. The defense thus undermines the remedial purposes of the legislation that purports to protect minorities from the detrimental effects of unlawful discrimination.

Although the defense potentially allows entities to avoid remedial orders for illegal discrimination, it provides the most workable result under the current state of discrimination law. If the mixed-motives defense did not exist, it would be virtually impossible for an employer to terminate employees in a protected class without risking the serious threat of costly, time-consuming lawsuits and devastating financial liability, regardless of how unproductive or disruptive the employee became. Unfortunately for some, there must be a method of safeguarding employers from a floodwater of litigation and liability. Therefore, the bar that an employee must hurdle has to be set at some height, and the current level is a preponderance of the evidence of illegal motive. However, even if this hurdle is overcome, the employer may still avoid

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 469.

liability if it can show by a preponderance of the evidence that it had one lawful, decisive motive.

III. FEDERAL PROCEDURAL ISSUES PRESENT IN THE MIXED-MOTIVES DEFENSE

Wrongful discharge cases bring up several procedural issues that may affect an attorney's tactics in drafting pleadings, presenting evidence at trial, drafting the pretrial order, and requesting jury instructions. As discussed earlier, the mixed-motives defense has been referred to as an affirmative defense, requiring the employer to prove by a preponderance of the evidence that at least one lawful reason was present in the decision to terminate the employee and that the same decision would have been made based on that reason even absent the discriminatory factor.[47]

A. Pleading

The Federal Rules of Civil Procedure provide that when a party answers a complaint, it must affirmatively plead defenses that constitute avoidance or affirmative defenses.[48] The purpose of Rule 8(c) is to eliminate surprise by requiring adequate notice to the opposing parties so as not to prejudice their position in the case.[49]

Although an affirmative defense is ordinarily deemed waived if it is not asserted in a responsive pleading,[50] other Rules may ameliorate this harsh effect. A party is often able to obtain permission of the court to amend the pleading, with such permission to be "freely given when justice so requires."[51] Another Rule that can salvage an initial waiver is Rule 16, which provides that issues covered in pretrial conferences that are present in the pretrial order control the course of action.[52] A defendant who fails to plead an affirmative defense both initially and in an amended answer may nevertheless use the pretrial order to put the opposing party on notice that the defense will be utilized at trial.[53]

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47. *See supra* notes 28-31; *see also* Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1083 (11th Cir. 1996).

48. FED. R. CIV. P. 8(c). Specifically listed are "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, [and] waiver." *Id.*

49. *See* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 350 (1971).

50. *See* Day v. Liberty Nat'l Life Ins. Co., 122 F.3d 1012, 1015 (11th Cir. 1997).

51. FED. R. CIV. P. 15(a).

52. FED. R. CIV. P. 16(e).

53. *See* Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 763 (11th Cir. 1995).

B. Use of the Pretrial Order to Salvage the Defendant's Pleading Waiver

Although the mixed-motives defense has been referred to as an affirmative defense, some decisions have relaxed the procedural requirements for its assertion. Consider how the mixed-motives defense functioned in *Pulliam v. Tallapoosa County Jail*.[54] While working as a correctional officer at the jail, Pulliam, a black male, filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), alleging racial discrimination and retaliation for voicing his complaints about such discrimination. Soon after officially filing the charge with the EEOC, Pulliam was terminated. Pulliam then sued Tallapoosa County for unlawful termination, alleging that the County retaliated against him, in violation of Title VII and section 1981.[55]

The County defended on the grounds that Pulliam was terminated for the legitimate reason of poor work performance and that Pulliam's EEOC charge was not a factor in the decision. The County produced testimony and documentation regarding Pulliam's poor work record. Pulliam attempted to prove that the County's reasons were merely a pretext for a Title VII violation.[56]

The trial court submitted special interrogatories to the jury asking if, by a preponderance of the evidence, the County (1) fired Pulliam in retaliation for the EEOC complaint that alleged discrimination and retaliation; (2) considered the retaliation as a determining factor in the decision to fire Pulliam; and (3) would have made the same decision to fire Pulliam even if he had not filed the EEOC complaint. The jury responded "yes" to each interrogatory, and the court entered judgment for the County.[57]

On appeal Pulliam argued that the County had failed to assert the mixed-motives defense in its answer or at any time before the close of evidence. The mixed-motives affirmative defense was thus waived, according to Pulliam, and it was error for the court to submit the third interrogatory to the jury.[58] Although the County failed to plead the affirmative defense, the court rejected this argument and determined

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54. 185 F.3d 1182 (11th Cir. 1999).

55. *Id.* at 1183. Pulliam also named the jail, the jail administrator, a supervisor at the jail, the county sheriff, and the county personnel board in the complaint, but Pulliam dismissed those defendants and continued only against the County at trial. *Id.* at 1183 n.1. The retaliation claim was the only claim that went to the jury. *Id.* at 1183.

56. *Id.* at 1183-84.

57. *Id.* at 1184.

58. *Id.*

that such an omission is not a complete waiver if the defense is included in the pretrial order.[59]

The pretrial order did not specifically use the express term "mixed-motives affirmative defense." However, the district court determined that the order discussed the County's position that Pulliam was terminated because of his unsatisfactory employment record. The district court concluded that the mention of Pulliam's poor work record was sufficient warning that the County had properly asserted a mixed-motives defense. The court of appeals reviewed the district court's interpretation of the pretrial order for abuse of discretion and was unwilling to conclude that the court had in fact abused its discretion.[60] The court of appeals noted that although the mixed-motives defense is an affirmative defense that places the burden of proof on the defendant, no previous Eleventh Circuit case had decided whether this defense must be pleaded explicitly or if it could be implied.[61] The pretrial order clearly warned that "it would be impossible to determine . . . whether [the County's] retaliatory acts caused [Pulliam's] discharge without considering [Pulliam's] own acts."[62] Therefore, the County's motives for terminating Pulliam were properly at issue and did not unfairly surprise him.[63]

The court also determined that assertion of a mixed-motives defense did not require the County to admit a discriminatory motive, even in the alternative.[64] The burden is properly placed on the plaintiff to prove that a discriminatory motive was a factor in the decision to terminate the employee.[65] When the plaintiff presents evidence that a discriminatory motive was a motivating factor in the decision, the defendant can (1) argue that the plaintiff failed to establish that the impermissible reason was a motivating factor; (2) prove that the same action would have been taken for solely legal reasons; or (3) take the second position as an alternative to the first.[66]

In the Eleventh Circuit's view, defendant's argument that Pulliam was fired for lawful reasons also supported the argument that the same decision would have been made even had there also been evidence of unlawful reasons for termination.[67] Therefore, the court did not find

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59. *Id.* at 1185.
60. *Id.*
61. *Id.* at 1185 n.4.
62. *Id.* at 1185.
63. *Id.*
64. *Id.* at 1186.
65. *Id.*
66. *Id.*
67. *Id.*

that the trial court abused its discretion in interpreting the pretrial order.[68]

Is this evidence that the mixed-motives defense is not treated like a typical affirmative defense and is permitted to be implied by the employer, or is there some other procedural explanation? One might determine that this result was achieved because the Eleventh Circuit applied Rule 16(e) in a relaxed manner. After all, the court determined that although the pretrial order made no explicit mention of the use of the mixed-motives affirmative defense, the language was sufficient to imply that such a defense could be asserted at trial.[69] However, the court of appeals did not state that it subscribed to that interpretation of the order, but merely that it was unwilling to overturn the district court's interpretation as an abuse of discretion.[70]

However, there are also cases that would support the proposition that the Eleventh Circuit interprets pretrial orders harshly. For example, in *Olmsted v. Taco Bell Corp.*,[71] a Taco Bell assistant manager, Olmsted, observed apparent racial discrimination at his restaurant and reported his observations to his superiors. Olmsted claimed that soon after he made the complaint, Taco Bell supervisors began to treat him differently, and he was eventually suspended.[72]

Olmsted filed suit against Taco Bell under Title VII and section 1981. At trial, although Taco Bell argued that Olmsted's new manager knew nothing about Olmsted's complaint of racial discrimination and was the sole decisionmaker in the determination to discharge Olmsted, the jury found for Olmsted. Olmsted received a judgment of $10,000 in back pay, compensatory damages of $450,000, and punitive damages of $3 million.[73]

The district court, however, issued an order limiting the damages award to the amount provided by 42 U.S.C. § 1981a(b)(3) for Title VII actions.[74] The district court determined that Olmsted, in the pretrial

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68. *Id.* at 1187.
69. *Id.* at 1185.
70. *Id.*
71. 141 F.3d 1457 (11th Cir. 1998).
72. *Id.* at 1459.
73. *Id.* at 1459-60.
74. *Id.* at 1461. Section 1981a limits damages awards for Title VII violations depending on the size of the company (the smaller the size of the company, the smaller the amount of the cap). This section provides that, as to punitive damages and certain kinds of compensatory damages, a company with more than 14, but fewer than 101 employees cannot be liable for more than $50,000; a company with more than 100, but fewer than 201 employees cannot be liable for more than $100,000; a company with more than 200, but fewer than 501 employees cannot be liable for more than $200,000; and a company with

order, had abandoned his section 1981(a) claim that would have no statutory cap on damages.[75]

Upon review the court of appeals examined the pretrial order and found that section 1981(a) was not specifically mentioned.[76] The pretrial order mentioned the Civil Rights Act of 1991, which amended both Title VII and section 1981, but only section 1981a was specifically mentioned in the order, not section 1981(a).[77] The court decided that although it was "reluctant to engage in an overly technical reading of a pleading when the dispositive factor is the apparent absence of a set of parentheses, these parentheses unfortunately control our decision."[78] Although the court "appreciat[ed] the potential for confusion in pleading causes of action based on both Title VII and § 1981, [it] believe[d] that the district court acted within its discretionary authority in construing the pretrial statement as evincing an abandonment of the § 1981 claim."[79] Because the complaint correctly cited to section 1981 and Title VII, the court assumed that "the drafter of both the complaint and the pretrial stipulation knew the difference between the two statutory avenues of relief."[80]

The Eleventh Circuit's decision in *Pulliam* allowed a defendant to use the affirmative defense and to receive jury instructions on it even absent any specific reference to the defense in the pretrial order, effectively allowing the same-decision affirmative defense to be implied.[81] In *Olmsted* the trial court reduced a jury award of $3,460,000 for plaintiff to $300,000 because of the apparent omission a set of parentheses that would have allowed unlimited damages.[82]

Would it not seem fair to assume that in *Pulliam* the employer knew that the nature of an affirmative defense required it to be identified clearly at some point prior to trial and that failure to do so could lead to abandonment of that defense for failing to give adequate notice to the opposing party? Although these results may seem difficult to reconcile, it could also be argued that both are consistent with the policy of providing sufficient notice to the opposing party as to pretrial stipulations because it is the trial court that is present throughout the entire process. Instead of merely applying Rule 16(e) broadly, the Eleventh

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more than 500 employees cannot be liable for more than $300,000. 42 U.S.C. § 1981a(b)(3).

75. 141 F.3d at 1461.
76. *Id.* at 1462.
77. *Id.*
78. *Id.*
79. *Id.* at 1463.
80. *Id.* at 1462.
81. 185 F.3d at 1185.
82. 141 F.3d at 1460, 1462.

Circuit appears to give considerable deference to the trial court on this Rule. The court of appeals allows these decisions to be made by the district courts because trial judges have access to all the information and are in the best position to make a ruling on the issue, which theoretically ensures sufficient notice to the opposing party and avoids unnecessary and unjust surprise.

C. Evidence Offered at Trial and Jury Instructions

Other procedural issues that arise in mixed-motives employment discrimination cases concern placement of the burden of persuasion, types of evidence offered at trial, and how the jury is to be instructed.

Initially, the employee bears the burden of proving that the employer had an unlawful reason that was a motivating factor in the decision to discharge the employee.[83] Once such evidence has been presented, the employer may (1) argue that the employee has failed to prove that an illegal reason was a motivating factor, (2) present evidence and prove that the employer would have arrived at the same decision to terminate the employee in the absence of the illegal motivating factor, or (3) use both approaches.[84]

However, as in *Pulliam*, the employer is not required to admit that any of its motives were discriminatory or unlawful to argue the mixed-motives affirmative defense.[85] The employer is not even required to argue in the alternative that even if there was an illegal motive, the same decision would have been reached and the employee would have been terminated in either situation.[86]

Thus, the employer may take full advantage of the affirmative defense to limit liability while possibly avoiding the risk of alienating the jury by admitting that discrimination may have been a factor. Even when the employer denies the existence of any discriminatory or unlawful motivating factor, the jury can still be instructed on the same-decision affirmative defense. The employer fulfills the evidentiary requirements necessary to warrant the same-decision instruction merely by presenting evidence of a lawful factor sufficient by itself to explain the discharge. As the Eleventh Circuit in *Pulliam* explained, even though it is improper for "a court to instruct on a proposition of law about which there is no evidence," a party is entitled to an instruction on "'the theory of the defense, as long as it has some basis in the evidence and has legal

83. *Pulliam*, 185 F.3d at 1186.
84. *Id.*
85. *Id.*
86. *Id.*

support.'"[87] In effect the jury is instructed on an affirmative defense that the employer has never actually presented at trial. Of course, the jury should be instructed that the burden of proof is on the employer to prove by a preponderance of the evidence that there actually was at least one lawful reason that would have led the employer to reach the same decision independent of any unlawful reason.[88]

Therefore, if an employer believes the employee has not met the burden of proof by proving one unlawful motivating reason, the employer can refrain from requesting the instruction and avoid accepting the burden of proof on the same-decision issue. Conversely, if the employer believes that the employee has met its burden of proof by establishing an unlawful, discriminatory motivating factor, it has the option of requesting the same-decision instruction to limit liability (in Title VII cases) or to avoid liability for damages altogether (in section 1983 cases). This is an issue to be resolved by evaluating the circumstances involved in each case.

If the employer opts not to request the instruction on the affirmative defense, can the employee successfully request it to shift the burden? After all, the evidence is apparently properly before the jury so that the employer may request the instruction.

In *Ostrowski v. Atlantic Mutual Insurance Cos.*,[89] the Second Circuit determined that a plaintiff was entitled to the burden-shifting instruction "where the evidence is sufficient to allow a trier to find both forbidden and permissible motives."[90] The evidence must be directly connected to the unlawful discharge (statistical evidence and scattered remarks by persons not involved in the decisionmaking process would be insufficient to warrant the instruction).[91] However, when the plaintiff is entitled to the instruction, the "jury must be told that the mixed-motive issue does not arise unless it first determines that the plaintiff

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87. *Id.* at 1187 (quoting United States v. Morris, 20 F.3d 1111, 1115 (11th Cir. 1994)).

88. To avoid liability altogether, the employer must show it would have made the same decision based on what it knew at that time, not on what it learned later. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359-60 (1995). Interestingly, in *Pulliam*, when the same-decision interrogatory was submitted to the jury, the court failed to instruct the jury that the employer had the burden of proof for the affirmative defense. 185 F.3d at 1188. Although it was error, the court determined on appeal that not every error is reversible error. *Id.* Because Pulliam failed to object to the instructions, Pulliam was faced with overcoming the plain error doctrine's burden of proving that the error was "'so fundamental as to result in a miscarriage of justice.'" *Id.* (quoting Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408, 1414 (11th Cir. 1986)). The court did not determine that "proper instructions would probably have altered the outcome." *Id.* at 1189.

89. 968 F.2d 171 (2d Cir. 1992).

90. *Id.* at 181.

91. *Id.* at 182.

has carried the burden of proving a forbidden motive but has failed to prove that the employer's explanations were pretextual."[92] In *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*,[93] plaintiff did not present any "'policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory' intent," and, therefore, was not entitled to the instruction.[94]

When the plaintiff has failed to present sufficient evidence to be entitled to the same-decision instruction, the defendant can cause the burden of proof to remain on the plaintiff. In *Pulliam*, had the County determined that it did not want to accept the burden of proof and had it not requested the affirmative defense instruction, Pulliam should not have been able to get the instruction to shift the burden to the County.

IV. CONCLUSION

Although in *Pulliam* the employer did not suffer adverse consequences from failing to plead the mixed-motives affirmative defense and failing to include it in the pretrial order, it is advisable to do both if the defendant anticipates requesting the same-decision jury instruction. The district court in *Pulliam* could have very easily interpreted the pretrial order to preclude the use of the mixed-motives affirmative defense. An employer that fails to include it at the proper juncture in the case is taking that risk. The Eleventh Circuit seems likely to reverse the district court's interpretation of the pretrial order only for abuse of discretion, which is normally a difficult standard to prove.

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92. *Id.* at 181.

93. 115 F.3d 116 (2d Cir. 1997).

94. *Id.* at 124 (quoting *Ostrowski*, 968 F.2d at 182); *see also* Thomas v. Denny's, Inc., 111 F.3d 1506, 1512 (10th Cir. 1997) (concluding that "a plaintiff is entitled to a mixed-motives instruction upon a proper evidentiary showing even if the defendant does not request one").