

IN THE SUPREME COURT OF TEXAS

No. 99-1042

QUANTUM CHEMICAL CORPORATION, PETITIONER

v.

RALF TOENNIES, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued on October 11, 2000

JUSTICE HECHT, joined by JUSTICE OWEN, dissenting.

I respectfully dissent. The several reasons why Section 107(a) of the Civil Rights Act of 1991¹ did not eliminate the United States Supreme Court's requirement in *Price Waterhouse v. Hopkins*² that a plaintiff in an employment discrimination "pretext" case must prove that an illegitimate consideration was a determinative factor in an employer's decision have been thoroughly and convincingly explained by the United States Court of Appeals for the Third Circuit in *Watson v. Southeastern Pennsylvania Transportation Authority*.³ No one questions that Section

¹ Pub. L. No. 102-166, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)).

² 490 U.S. 228, 277-278 (1989) (O'Connor, J., concurring).

³ 207 F.3d 207, 217-220 (3d Cir. 2000), *cert. denied*, 69 U.S.L.W. 3410 (U.S. Feb. 20, 2001).

21.125(a) of the Texas Labor Code,⁴ first adopted in 1995, was copied from Section 107(a) of the 1991 federal statute,⁵ or that the state law is to be construed consistent with federal law.⁶ Accordingly, I would conclude that in “pretext” cases under state law plaintiffs must satisfy the “determinative factor” test.

When the Civil Rights Act of 1991 was passed, the Supreme Court had established the law governing employment discrimination claims under Title VII of the Civil Rights Act of 1964. Cases were in one of two groups: “mixed motive” cases, “in which both legitimate and illegitimate considerations played a part” in an adverse employment decision,⁷ and “pretext” cases, in which the plaintiff contended that the employer’s stated reason for an adverse decision was pretextual.⁸ Generally, in a “mixed-motive” case a plaintiff must have direct evidence of discrimination, while in a “pretext” case a plaintiff may have only circumstantial evidence.⁹ A plurality of the Supreme

⁴ “Except as otherwise provided by this chapter, an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice” Act of April 25, 1995, 74th Leg., R.S., ch. 76, § 9.05, 1995 Tex. Gen. Laws 458, 624, *amended by* Act of May 26, 1997, 75th Leg., R.S., ch. 1126, § 1, 1997 Tex. Gen. Laws 4278.

⁵ “Except as otherwise provided in this subchapter, 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.” Pub. L. No. 102-166, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)).

⁶ *See* TEX. LABOR CODE § 21.001(1) (“The general purposes of this chapter are to . . . provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. Section 2000e et seq.)”); *NME Hospitals, Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999) (“The Act purports to correlate ‘state law with federal law in the area of discrimination in employment.’” (quoting *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991))).

⁷ *Price Waterhouse*, 490 U.S. at 247 (plurality opinion).

⁸ *Id.* at 246 n.12.

⁹ *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1217 (5th Cir. 1995).

Court in *Price Waterhouse* held that in a “mixed motive” case, when the plaintiff proves that an impermissible factor played a motivating part in an adverse decision, the burden of persuasion shifts to the employer to show that he would have made the same decision if the illegitimate factor had not been considered.¹⁰ If the defendant is successful, the plaintiff takes nothing. In a separate opinion, Justice O’Connor explained that the plurality’s rule should not apply absent sufficiently direct evidence of the illegitimate factor’s motivating role, and thus should not apply in “pretext” cases, in which the evidence is circumstantial.¹¹ Because Justice O’Connor supplied the fifth vote for the result in *Price Waterhouse*, her concurrence in effect limited the plurality’s rule and became the holding of the case.

As explained in *Watson*, Section 107(a) of the 1991 Act codified the rule as stated by Justice O’Connor, which applied only in “mixed-motive” cases.¹² Section 107(a) provided that an unlawful employment practice is established when an impermissible consideration “was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹³ The last phrase describes “mixed-motive” cases but not “pretext” cases. Had Congress intended Section 107(a) to apply to all employment discrimination cases, it would not have included a phrase descriptive of only “mixed-motive” cases. By Section 107(b) of the Act, Congress modified *Price Waterhouse* to allow a plaintiff to obtain relief other than damages if the defendant proves his

¹⁰ 490 U.S. at 244-245, 260 (plurality opinion).

¹¹ 490 U.S. at 275, 277-278 (O’Connor, J., concurring).

¹² 207 F.3d at 217.

¹³ 42 U.S.C. § 2000e-2(m).

affirmative defense.¹⁴ Section 107(b) expressly refers only to cases under Section 107(a) in which the defendant shows that he “would have taken the same action in the absence of the impermissible motivating factor”.¹⁵ This language is consistent with “mixed-motive” cases but inconsistent with “pretext” cases. Thus, while it can fairly be said that Section 107 does not “speak[] with unmistakable clarity,”¹⁶ it appears to be addressed solely to “mixed-motive” cases.

One justification the Court gives for its refusal to follow *Watson* is that federal law is unsettled. But of the four circuits that have addressed the issue, only one has clearly construed the statute as this Court does. The Court acknowledges its disagreement with two circuits — the Third Circuit in *Watson* and the Fourth Circuit in *Fuller v. Phipps*.¹⁷ The Court claims support from the Second Circuit’s view in *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*,¹⁸ but that circuit’s view is far from clear. In *Hayden v. County of Nassau*, it explained that Section 107(a) “was plainly included to benefit plaintiffs in ‘mixed motive’ employment discrimination cases”, citing *Fuller*.¹⁹ The Court dismisses a similar statement by the United States Supreme Court in *Landgraf v. USI Film Products*²⁰ as “dicta”. The Court also ignores the Supreme

¹⁴ Pub. L. No. 102-166, 105 Stat. 1071, 1075-1076 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)).

¹⁵ *Id.*

¹⁶ *Watson*, 207 F.3d at 217.

¹⁷ 67 F.3d 1137, 1143 (4th Cir. 1995).

¹⁸ 115 F.3d 116, 121 (2nd Cir. 1997).

¹⁹ 180 F.3d 42, 53 (2nd Cir. 1999).

²⁰ 511 U.S. 244, 251 (1994) (“§ 107 responds to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), by setting forth standards applicable in ‘mixed motive’ cases”).

Court's reference without disapproval to a jury instruction in a pretext case requiring the plaintiff to prove that an improper consideration was a "determining" factor and "the real reason" for the employer's action, made in its latest opinion on employment discrimination, *Reeves v. Sanderson Plumbing Products, Inc.*:²¹

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether plaintiff was the victim of intentional discrimination. . . . The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; and 2, that age discrimination was the real reason for [petitioner's] discharge."²²

In sum, the Court rejects the clear positions of two circuits and two suggestions from Supreme Court opinions to follow an ambiguous Second Circuit and the Eleventh Circuit's decision in *Harris v. Shelby County Board of Education*.²³

The Court touts its view as the "plain meaning" of the "unambiguous language" of the statute. In other words, the split in the circuits is not really a serious dispute; the Second, Third, and Fourth Circuits simply cannot (or perhaps will not) read plain English. If Congress had intended what these three courts think it did, the Court says, it could "easily" have said so. The obvious flaw in this argument is that the drafters may have thought it perfectly clear that they were not affecting "pretext" cases and thus had no reason to want to frame the text differently, regardless of whether

²¹ 530 U.S. 133, ___, 120 S.Ct. 2097, 2111-2112 (2000).

²² *Id.* (emphasis in original; record citations omitted).

²³ 99 F.3d 1079, 1084-1085 (11th Cir. 1996).

it would have been easy to do so. Moreover, the opposite argument can be made just as well, as the Third Circuit did in *Watson*: “[i]f the drafters of Section 107(a) had wanted to reach all disparate treatment cases against employers, they could have simply said [as much].”²⁴ The truth is, the drafters’ intent in Section 107 cannot be inferred, one way or the other, from the fact — if indeed it is a fact — that if they had meant something else they could “easily” have been clearer.

We do not yet know how our own federal circuit will construe Section 107(a), but if it follows the developing trend in the other circuits, as it may well do, then until there is some resolution by the Supreme Court the result in Texas will be that it is better for the plaintiff to file an employment discrimination claim in state court than in federal court. This incentive for forum-shopping defeats an express purpose of the Texas statute.

Finally, the Court dismisses Quantum’s argument that there was no evidence that Toennies’ age played any role in its decision to terminate him. The Court cites evidence of occasional support from co-workers and ignores the undisputed fact that two supervisors had given Toennies unsatisfactory job evaluations over a two-year period. The court of appeals summarized this evidence as follows:

Toennies’s evaluations from 1987 to 1992 showed him consistently ranked as “competent” (an average ranking) in virtually all areas. Two different supervisors in Quantum evaluated Toennies in 1992 and 1994 by ranking his performance in a variety of areas on a scale from one to five [with “5” being “unacceptable performance”]. In 1992, he received only threes and fours, with an overall rating of four. In March 1994, his evaluation was much poorer. He received only fours and fives, with an overall rating of five. As a result, his tenure was endangered.²⁵

²⁴ 207 F.3d at 217.

²⁵ 998 S.W.2d 374, 375 (Tex. App.—Houston [1st Dist.] 1999).

In October 1994 he was warned that he would be terminated if his performance did not improve, and two months later he was terminated. In effect, the Court holds that an employer who terminates an employee for two years' consistently poor performance may be liable for discrimination if the employee's performance was ever satisfactory at any time, or if co-workers have sometimes been supportive. Even assuming that age need only have been *a* factor in Quantum's decision after two years of poor performance, nothing but sheer surmise shows that it was.

I would reverse the judgment of the court of appeals and affirm the judgment of the trial court rendered on the verdict of the jury.

Nathan L. Hecht
Justice

Opinion delivered: March 8, 2001