

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

**U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,**

Plaintiff,

v.

RENT-A-CENTER EAST, INC.,

Defendant.

No. 16-CV-2222

Magistrate Judge Eric I. Long

**DEFENDANT RENT-A-CENTER EAST, INC.'S TRIAL BRIEF REGARDING THE
CAUSATION STANDARD FOR TITLE VII DISCRIMINATION CLAIMS**

In accordance with the Court's order at the Final Pretrial Conference, Defendant Rent-A-Center East, Inc. ("RAC") files its briefing on the proper standard of causation for Title VII discrimination claims. The Court requested briefing on this issue following the Court's colloquy with the parties at the Final Pretrial Conference concerning the proper language to use in the Court's General Employment Discrimination instruction and accompanying jury question. RAC contends that the proper standard is whether RAC terminated Megan Kerr "because of" her transgender status, while the EEOC contends that the proper inquiry is whether Kerr's transgender status was a motivating factor in RAC's decision to terminate Kerr's employment.

A. "BECAUSE OF" IS THE STANDARD USED BY THE SEVENTH CIRCUIT COMMITTEE ON PATTERN INSTRUCTIONS.

The Seventh Circuit Federal Civil Jury Instructions clearly and unequivocally set forth the "because of" standard of causation in the General Employment Discrimination Instructions:

Plaintiff claims that he was [*adverse employment action*] by Defendant **because of** [*protected class*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he was [*adverse employment action*] by Defendant **because of** his [*protected class*]. To determine that Plaintiff was [*adverse employment action*] **because of** his [*protected class*], you must

decide that Defendant would not have [*adverse employment action*] Plaintiff had he been [*outside protected class*] but everything else had been the same.

Seventh Cir. Civil Jury Instructions 3.01 (2017 rev) (emphasis added).¹

The Seventh Circuit Committee drafting the instructions specifies this language in the general instruction while noting the other circuits use a mixed-motive instruction: “The Committee recognizes that other circuits’ instructions employ the ‘motivating factor’ language of *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003) in all title VII cases.” *Id.* at 3.01 cmt. b. However, the Seventh Circuit Committee “expects that the pattern instruction, which has the advantage of streamlining the jury’s task unto a single and easily understood sentence, ***will be appropriate in most cases.***” *Id.* at 3.01 cmt. c (emphasis added). There are no exceptional circumstances here warranting deviation from the Seventh Circuit’s pattern instruction, and accordingly the Court should instruct the jury as specified by the Committee in its pattern instruction.

B. THERE IS NO BASIS TO DEPART FROM THE PATTERN INSTRUCTIONS TO TREAT THIS CASE AS A MIXED-MOTIVE CASE.

The Committee notes that some cases may benefit from a mixed-motive instruction. There is no basis to believe such an instruction is warranted here. The EEOC clearly pleaded its Complaint under the traditional “because of” standard, stating in the preamble to its allegations that: “The U.S. Equal Employment Opportunity Commission (the “EEOC”) alleges that Defendant Rent-A-Center East, Inc. (“Defendant” or “Rent-A-Center”) violated Title VII when it discharged Ms. Kerr **because** she is transgender.” Dkt. # 1, p. 1 (emphasis added). The EEOC continued to use the “because of” standard in the numbered allegations in its Complaint:

8. More than thirty (30) days prior to the institution of this lawsuit, a charge of discrimination (EEOC Charge No. 440-

¹ Available at <http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern-jury.htm>

2015-01054) was filed with the EEOC, alleging that Defendant violated Title VII by, among other things, discharging Kerr **because of** her sex.

9. On February 18, 2016, the EEOC issued to Defendant a letter of determination finding that there is reasonable cause to believe that Defendant discriminated against Kerr **because of** her sex when it discharged her because she is transgender.

14. Since at least July 2014, Rent-A-Center has engaged in unlawful employment practices in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), when it discharged Megan Kerr **because of** her sex, specifically, **because** she is transgender and/or **because** of her gender transition:

14(x). Rent-A-Center discharged Kerr **because** the company and/or its managers disapproved of Kerr's gender transition and/or the fact that Kerr is transgender.

15. The effect of the practices complained of above has been to deprive Kerr of equal employment opportunities and otherwise adversely affect her status as an employee **because of** her sex.

Dkt. # 1, ¶¶ 8-9, 14-15 (emphasis added).

The EEOC continued with the “because of” theory through the summary judgment stage, after the vast majority of the evidence in this case had been gathered and exchanged. In its response to RAC’s Motion for Summary Judgment, the EEOC contends that “it was sex discrimination to discharge Megan Kerr **because** the gender she identifies as is different from the gender she presented as earlier in her life.” Dkt. # 42 at 5. The EEOC continued:

Whether evaluated under the direct or the indirect method of proof, there is ample evidence to permit a reasonable jury to conclude that RAC discharged Kerr **because** she is transgender. *Id.*

In this case, there is both “something close to an explicit admission,” *Diaz*, 653 F.3d at 587, as well as other, circumstantial evidence that RAC decided to end Megan Kerr’s employment **because** it disapproved of her transgender status and/or her gender transition. *Id.* at 6.

There is direct evidence that district manager Jason Carnahan decided to fire Kerr **because of** her transition to female and/or because he disapproved of having a transgender employee in the store. *Id.*

Viewed in the light most favorable to the plaintiff, as is required on summary judgment, this evidence would permit a reasonable jury to conclude that RAC discharged Kerr **because of** her gender transition and/or transgender status. *Id.* at 10-11.

Consistent with its application of the “because of” standard, the EEOC stated in its Conclusion to its summary-judgment response that: “Construed in the light most favorable to the EEOC, the evidence shows that a RAC district manager disapproved of Megan Kerr’s gender transition and asked a store manager to find a pretext to fire her, and that eventually this is precisely what happened.” *Id.* at 17. This line encapsulates the EEOC’s theory of the case, and exposes how problematic it would be to apply a “mixed motive” instruction. The EEOC claims that RAC engaged in an elaborate scheme to terminate Kerr’s employment **because** she is transgender by framing her for unauthorized use of a company truck; RAC contends it did no such thing and terminated her **because** she violated company policy by using the truck without authorization.

This is a stark, “either-or” choice that leaves no room for a subsidiary mixed-motive. In such cases, the Seventh Circuit has affirmed the rejection of a mixed-motive instruction, instructing that the proper inquiry is “whether the case overall is one where either the plaintiff or the defendant’s evidence lends itself to coexisting dual causes for an adverse employment action.” *Rapold v. Baxter Int’l Inc.*, 718 F.3d 602, 611 (7th Cir. 2013). Here, the parties agree that there was a single cause for the employment action – they simply disagree as to what that cause was. In such cases, a mixed-motive instruction is inappropriate. *Id.* at 608 (affirming rejection of plaintiff’s proposed mixed-motive instruction where the district court reasoned that plaintiff’s case “presented a binary proposition: either he was an excellent employee and

[defendant] fired him because of his national origin, or his national origin was irrelevant and the defendant fired him because of his bad behavior”).

This case, too, centers on a “binary” proposition. The EEOC’s case presents no hint of any secondary or subsidiary reason for terminating Kerr’s employment other than her transgender status – thereby warranting application of the “because of” standard.

C. CONCLUSION.

The facts of this case provide no basis to deviate from the Seventh Circuit’s pattern jury instructions, and accordingly the Court should instruct the jury as set forth in the Seventh Circuit’s Civil Jury Instruction 3.01.

Respectfully submitted,

/s/ J. Bradley Spalding

J. Bradley Spalding, Texas Bar No. 00786253

J. Bradley Spalding
Texas Bar No. 00786253
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
713.652.4731

Helene Wasserman
California Bar No. 130134
LITTLER MENDELSON, P.C.
633 West Fifth Street, 63rd Floor
Los Angeles, CA 90071
213.443.4288

Andrew Trusevich
Texas Bar No. 00785119
RENT-A-CENTER, INC.
5501 Headquarters Drive
Plano, Texas 75024
972.801.1465

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CERTIFICATE OF SERVICE

I, **J. Bradley Spalding**, an attorney, certify that I served the attorney of record named below with a copy of **Defendant's Trial Brief Regarding the Causation Standard for Title VII Discrimination Claims** via ECF (*Electronic Case Filing*) on February 1, 2018:

Miles Shultz
Justin Mulaire
James L. Lee
Gwendolyn Young Reams
Gregory M. Gochanour

U.S. Equal Employment Opportunity Commission
500 West Madison Street, Suite 2000
Chicago, IL 60661
(312) 869-8045
miles.shultz@eepoc.gov

U.S. Equal Employment Opportunity Commission
131 M. Street, N.E.
Washington, DC 20507

/s/ J. Bradley Spalding

J. Bradley Spalding