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FOCUS ON AGE DISCRIMINATION

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U.S. SUPREME COURT DEFINES AGE-DISCRIMINATION STANDARD

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The U.S. Supreme Court, in a 5-4 opinion, has determined that an employee alleging a disparate-treatment claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, must prove that age was the “but for” cause of the challenged employment action by the defendant employer and that, in no circumstance, does the burden of persuasion switch to the employer to justify its actions. *Gross v. FBL Fin. Servs. Inc.* ____ S. Ct. ___, No. 08-441, 2009 WL 1685684 (U.S. June 18, 2009).

The *Gross* decision presents a significant change in the causation standard and analysis of disparate-treatment claims brought under the ADEA. The causation standard in effect before *Gross* permitted an ADEA plaintiff to prevail if she proved that age was a “motivating factor” in the challenged employment action and, in a mixed-motive case, if the defendant employer failed to establish that it would have made the same decision regardless of age. Under *Gross*, the standard is straightforward in all circumstances: The plaintiff employee, to prevail, must show that age was the “but for” cause of the challenged employment action.

Gross is a meaningful development for employers and for lawyers who represent employers, assuming it is not overturned or its impact mitigated by congressional action, which is a distinct possibility given the current U.S. political climate.

For now, under *Gross*, a straightforward, heightened causation standard for establishing age discrimination exists under the ADEA—“but for” cause. In most instances, the new causation standard will not alter an employer’s overall strategy and approach to defending age-discrimination lawsuits, but the new standard will be important when age-discrimination cases are before juries and will provide an effective platform from which to present and

articulate the employer's key themes.

Assumptions About Mixed-Motive Burdens Under the ADEA Before Gross

The question presented to the U.S. Supreme Court in *Gross*—whether direct evidence is needed to obtain a mixed-motive jury instruction in ADEA disparate-treatment cases—emerged from a split in the circuits as to the appropriate manner of instructing juries in mixed-motive cases, an issue that has been evolving for many years in the context of U.S. Supreme Court precedent, congressional action and lower court efforts to apply the standards. It is helpful to an understanding of these issues to analyze the origin of the mixed-motive analysis and how it came to be applied to ADEA claims.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964 when a plaintiff alleges that she suffered an adverse employment action because of both permissible and impermissible considerations—that is, “mixed motives.”

The decision was splintered, but the following controlling standard emerged for mixed-motive cases: If a Title VII plaintiff shows by direct evidence that discrimination was a “motivating” or “substantial” factor in the defendant employer’s action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. This came to be known as the mixed-motive analysis.

The U.S. Supreme Court later clarified the mixed-motive rule in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), where it held that a mixed-motive instruction is appropriate in Title VII cases in which a jury has to evaluate direct or circumstantial evidence that an employer’s decision was motivated by more than one factor, one prohibited by the statute and another that was not unlawful.

Based on *Price Waterhouse* and *Desert Palace*, most courts assumed that the mixed-motive analysis and burden-shifting framework applied to cases under both Title VII and the ADEA. A circuit court split developed, however, as to whether a mixed-motive jury instruction may be given without direct evidence of discrimination in ADEA disparate-treatment cases. While the Second, Third and Eighth Circuits held that direct evidence is a prerequisite to a mixed-motive instruction, the First, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits held that it is not.

How the Issues Teed Up Before the U.S. Supreme Court

Factual Background

Plaintiff Jack Gross, 53, claimed that FBL Financial Services demoted him due to his age, indicated largely by the fact that many of the responsibilities of his former position were transferred to a new position held by a woman in her early forties.

At trial, Gross presented circumstantial evidence demonstrating that (i) he was highly qualified for the position given to the younger employee; (ii) the younger employee was less qualified than Gross for the position; (iii) Gross was never offered an opportunity to take or interview for the position; and (iv) FBL's explanations for his demotion were pretextual. The court gave the jury a mixed-motive instruction, which stated that Gross must prevail if he had proven that age was a "motivating factor" in his demotion, unless FBL had proven by a preponderance of the evidence that it would have demoted Gross regardless.

The jury found for Gross on his demotion claim and awarded him damages. On appeal, however, the Eighth Circuit Court of Appeals overturned the judgment and remanded Gross's ADEA claim for a new trial. The Eighth Circuit held that the trial court improperly gave the jury an instruction on mixed-motive discharge, which switched the burden of proof to the employer, in a case in which Gross failed to present any direct evidence of age discrimination.

Legal Analysis

The U.S. Supreme Court reached beyond the issue that split the circuits and the question certified for appeal and addressed whether a burden-shifting framework and mixed-motive analysis apply *at all* to claims brought under the ADEA. The majority's answer was "no."

Justice Clarence Thomas, writing for the majority, first considered whether Title VII's burden-shifting framework applies to claims brought under the ADEA. Declaring that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion," the majority determined that its analysis is not governed by Title VII decisions.

To reach this conclusion, the Court considered that, unlike Title VII, which Congress amended to authorize discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision, the ADEA does not allow employees to establish discrimination by showing that age was simply a motivating factor. The Court also found it relevant that, when Congress amended Title VII, it neglected to add such a provision to the ADEA. Presuming that Congress acted intentionally in amending Title VII, but not the ADEA, the Court held that, in a mixed-motive discrimination case brought under the ADEA, the burden of persuasion does not shift to the employer.

Justice Thomas next turned to the ADEA's text to decide whether it authorizes a mixed-motive age-discrimination claim. The Court interpreted the ADEA's requirement that an employer took an adverse action "because of" age to mean that age was the "reason" that the employer decided to act. The Court also found that Congress has not carved out any exceptions to this rule for a subset of ADEA cases. The Court therefore concluded that, to establish employer liability in mixed-motive cases, the employee retains the burden of persuasion to prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but for" cause of the employer's adverse action.

Finally, the Court rejected the claim that *Price Waterhouse* controls the ADEA's interpretation. Finding that the burden-shifting framework established in *Price Waterhouse* is difficult to apply, the Court concluded that "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." Accordingly, the Court vacated the Eighth Circuit's judgment and remanded the case for further proceedings.

The majority summarized its holding as follows:

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

The Public Reacts to the Change in ADEA Law

Commentators, lawyers and the American press have identified *Gross* as an important decision for employers. It is certainly significant that it has ended the burden-shifting approach previously believed to apply to ADEA claims involving mixed motives. But, more fundamentally, it has changed the causation standard for all disparate-treatment ADEA claims, whether involving mixed motives or otherwise, from "motivating factor" to "but for" cause. This is meaningful and imposes a heightened standard on ADEA plaintiffs.

The *Gross* decision also continues a U.S. Supreme Court trend of recognizing the statutory differences between proving age discrimination as compared with other forms of discrimination under Title VII.

An important caution about the potential implications of the *Gross* decision is the potential for congressional action to overturn it. Senator Patrick Leahy (D-Vt.), Chair of the Senate Judiciary Committee, issued a public statement the day the *Gross* decision was released that provides insight into the potential response by the Democratic-controlled Congress. He said:

In the Supreme Court's decision today, five justices acted to disregard precedent and ignore the plain reading and common understanding of the statute that Congress passed to protect Americans from discrimination based on their age. It is even more troubling that these five justices decided to go further than the question presented to the Court. This overreaching by a narrow majority of the Court will have a detrimental effect on all Americans and their families. In these difficult economic times, American workers need to be protected from discrimination.

The decision today reminds me of the Court's wrong-

headed ruling in *Ledbetter*. In fact, it was these same five justices who misconstrued an employment discrimination statute in that case, and also overturned a jury verdict in favor of an employee. As Justice Stevens wrote in dissent today, the Court's overreach is "unnecessary lawmaking...the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent." By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections.

Two meaningful examples in the employment-litigation context illustrate the potential for congressional action in response to *Gross*, particularly in the present U.S. political climate.

First is the very situation referenced in Senator Leahy's comments—the *Ledbetter* decision that led to the Lilly Ledbetter Fair Pay Act, which was passed by Congress and signed into law by President Barack Obama in January 2009. The Act overturned *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and provides a greater opportunity for recovery for Title VII plaintiffs alleging pay disparities.

Second is Congress's adoption of the Civil Rights Act of 1991, which was passed in response to a series of U.S. Supreme Court decisions in the late 1980s, including *Price Waterhouse*, that were controversial and perceived as limiting the rights of employees who had sued their employers for discrimination.

These two examples are mentioned to highlight the potential for congressional action. For now, however, the decision is in place and will be followed.

Issues That Remain Open After *Gross*

Several key issues that were not addressed directly in *Gross* can be expected to develop and evolve over the next several years as the lower courts interpret and apply the decision.

First, it would appear that *Gross* will not affect the summary-judgment analysis of ADEA disparate-treatment claims and that the *McDonnell Douglas* framework will continue to be observed, but we will likely see much discussion of this issue in the coming years.

Second, although not expressly addressed, it seems that the "but for" *Gross* causation standard for ADEA disparate-treatment claims will apply equally to retaliation claims under the ADEA. This seems likely, as a retaliation claim is just a subset or type of disparate-treatment claim.

Third, employers will still have to address the differences between state anti-discrimination laws and the ADEA. In most discrimination and retaliation cases, employees allege that their employers violated both state and federal law, and the standards sometimes differ. We may see state courts

reassessing the causation standard for state age-discrimination claims in light of *Gross*, but, for now, it is important to be mindful of the differences.

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