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US Supreme Court Slams the Door on "Mixed-Motive" Age Discrimination Claims Under ADEA

In *Gross v. FBL Financial Services, Inc.* the US Supreme Court held that a plaintiff bringing a disparate-treatment claim pursuant to the Age Discrimination in Employment Act of 1967 (ADEA) must prove that age was the "but-for" cause of the adverse employment action. The Court stated the burden of persuasion *never* shifts to the employer to show that it would have taken the same action regardless of age, even if the plaintiff produces some evidence that age was a "motivating factor" in that decision.

Pre-Existing Case Law

In *Price Waterhouse v. Hopkins* (1989), a plurality of the Supreme Court and two Justices concurring in the judgment determined that once a plaintiff in a Title VII case proves that his membership in a protected class played a "motivating part" in an adverse employment decision (i.e., that the employer had "mixed-motives" and both permissible and impermissible factors were taken into consideration), the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision had the impermissible factor not been taken into account. In Justice O'Connor's concurring opinion, she further found that to shift the burden of persuasion to the employer, the employee must present "*direct evidence* that an illegitimate criterion was a substantial factor in the [employment] decision."

In response to the *Price Waterhouse* decision, Congress amended Title VII in 1991 to expressly allow "mixed-motive" claims and eliminated the employer's ability to escape liability by proving that it would have made the same decision in the absence of the discriminatory motivation. Although the lower federal courts unanimously continued to apply *Price Waterhouse's* "mixed-motives" analysis to non-Title VII cases, the courts were split as to whether a plaintiff was required

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to present direct (rather than circumstantial) evidence in order to secure a "mixed-motives" jury instruction.

Background

The plaintiff, Jack Gross (Gross), had been employed by FBL Financial Group, Inc. (FBL) since 1971. As of 2001 Gross held the position of claims administration director, but was reassigned to a different position in 2003 when he was 54 years old. Many of his job responsibilities were transferred to a newly created position, which was given to a younger employee previously supervised by Gross. Although Gross and the younger employee received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities.

Gross filed suit in federal court, alleging that his job reassignment violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." The case proceeded to trial, where Gross introduced *circumstantial evidence* suggesting that age was at least a "motivating factor" in his reassignment. At the close of trial, and over FBL's objections, the district court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and that "age was a motivating factor" in FBL's decision to demote him. The jury was also instructed that the "verdict must be for [FBL]...if it [could] prove by the preponderance of the evidence that it would have demoted [Gross] regardless of his age." Ultimately, the jury returned a verdict for Gross, awarding him US\$46,945 in lost compensation.

FBL appealed the decision to the Eighth Circuit Court of Appeals on the basis that the jury was incorrectly instructed under the "mixed-motives" standard established by the Supreme Court in *Price Waterhouse*. FBL argued that Justice O'Connor's concurring opinion in *Price Waterhouse* was controlling and, therefore, precluded a "mixed-motives" jury instruction since Gross had only introduced *circumstantial* rather than *direct* evidence that age was a "motivating" or "substantial" factor in his demotion. The Eighth Circuit agreed with FBL and remanded the case to the lower court for a new trial. Because the circuit courts vastly differed on whether a plaintiff had to present direct evidence in order to secure a "mixed-motives" jury instruction, the US Supreme Court granted *certiorari* to resolve the issue.

The Gross Decision

Although the issue before the Supreme Court in *Gross* was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive [jury] instruction in a non-Title VII discrimination case[,]" this question was never directly decided by the Court. Instead, Justice Thomas, writing for a 5-4 majority, declared that before reaching the question presented by the parties the Court "must first determine whether the burden of persuasion ever shifts to the party

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defending an alleged mixed-motives discrimination claim brought under the ADEA." Despite the fact that this was not the question presented and was never fully briefed by the parties, the majority held that the burden of persuasion *never* shifts to the defendant in an age discrimination case because the ADEA requires "but-for" causation and does not allow employees to establish discrimination by showing that age was simply a "motivating factor."

In reaching its decision, the majority pointed out that the Supreme Court had never held that the burden-shifting framework articulated in *Price Waterhouse* was applicable to claims brought under the ADEA. Justice Thomas explained that "even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." Thus, the majority concluded that its interpretation of the ADEA was not governed by *Price Waterhouse* or other previous Title VII decisions.

The majority further pointed out that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." Indeed, when Congress amended Title VII to explicitly allow "mixed-motive" discrimination claims, it neglected to add a similar provision to the ADEA, even though it contemporaneously amended the statute. This, Justice Thomas declared, the Court could not ignore.

The majority therefore reasoned that the Court's inquiry should focus on the text of the ADEA to determine whether it authorizes age discrimination claims under a "mixed-motives" framework. After reviewing the text of the ADEA, Justice Thomas concluded that the ordinary meaning of the ADEA's requirement that an employer's adverse action must be "because of" age, is that age must be "the reason" for the employer's actions and not just a "motivating factor." As such, the Supreme Court held that proof of a "mixed-motive" is simply insufficient to make out a claim under the ADEA and, therefore, the burden of persuasion never shifts to the employer.

The Bottom Line

The *Gross* decision is a major victory for employers and completely changes the landscape of age discrimination claims under the ADEA. This is especially true at a time when employers are facing an increased risk of litigation due to the economic downturn and increased layoffs. Employees can no longer make out a disparate-treatment claim under the ADEA by simply pointing to age as a "motivating factor" amongst other permissible factors in support of an adverse employment decision. Instead, employees must demonstrate that "but for" their age the employer would not have taken the adverse employment action.

The *Gross* decision highlights the importance of meticulously documenting employee performance

issues and disciplinary problems. By clearly documenting an employee's ongoing problems, employers can protect themselves from an employee's claim that age was the sole reason for the employer's actions.

The *Gross* decision also raises important implications for disparate-treatment claims under the other federal antidiscrimination statutes, such as the Americans With Disabilities Act (ADA), as well as retaliation claims under Title VII. Unlike the specific provisions added to Title VII by way of the Civil Rights Act of 1991, the statutory text of the other federal antidiscrimination statutes and the retaliation provisions of Title VII are very similar to the text of the ADEA and do not expressly allow for "mixed motives" claims. Thus it is reasonable to conclude that the Supreme Court's decision in *Gross* goes well beyond the context of the ADEA.

It is also important to note that the *Gross* decision is not likely to have a huge effect on disparate-*impact* claims under the ADEA in light of the Supreme Court's recent decisions in *Smith v. City of Jackson* (2005) (holding that the ADEA authorizes recovery in disparate-impact cases) and *Meacham v. Knolls Atomic Power Lab.* (2008) (holding that an employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense), as well as the rationale articulated by Justice Thomas in *Gross*. Indeed, in *Gross* Justice Thomas explicitly addressed the *Smith* decision, distinguishing the Supreme Court's reliance on Title VII disparate-impact cases in deciding *Smith* as compared to its refusal to rely on Title VII "mixed-motives" cases when deciding *Gross*.

Do not be surprised if *Gross* sparks legislative action, given Senate Judiciary Committee Chairman Patrick Leahy's declaration that "[t]his overreaching by a narrow majority of the Court will have detrimental effect on all Americans and their families."

For further information regarding this decision, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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