



Supreme Court Changes the Rules for Age Discrimination Cases, Holding Plaintiffs to a Heightened Proof Standard

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The United States Supreme Court, in a 5-4 decision issued on June 18, 2009 in the case of *Gross v. FBL Financial Services, Inc.*, 557 U.S. ___ (2009), held that plaintiffs in Age Discrimination in Employment Act (“ADEA”) cases alleging disparate treatment always have the burden of proving that they were terminated or subject to another adverse employment action “but for” their ages. In so doing, the Court refused to apply a “mixed motive” standard to ADEA cases, which would have required many employer/defendants to carry the burden of proving that the plaintiffs would have been subject to adverse action anyway because of other, non-age related reasons, provided that the plaintiffs presented proof that age was a “motivating factor” for the adverse action. The Court drew a sharp distinction between cases arising under Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits, gender, national origin, race and religion-based discrimination and has since 1989 been subject to the “mixed motive” proof rules, and claims under the ADEA to which, until now, all of the courts of appeals that considered the application of “mixed motive” analysis to ADEA cases have applied it due to the identical operative statutory language in Title VII and ADEA.

FACTS

The plaintiff in *Gross* was reassigned by his employer to a different job while retaining the same pay rate. Plaintiff considered the job reassigned to be a demotion and alleged that the employer violated the ADEA by making the change on account of his age (54). In the trial of this action in the District Court, the plaintiff presented evidence that his age was a reason for the reassignment, at least in part, although there was no “smoking gun” evidence to that effect, such as a supervisor expressly stating so. The employer’s evidence was to the effect that the reassignment was the result of a reorganization and consideration of the plaintiff’s job skills.

THE DECISIONS OF THE LOWER COURTS

The District Court instructed the jury that the plaintiff should win if he proved that age was a “motivating factor” in the decision to change his job, with the term “motivating factor” to be understood as a factor that played a part or a role in the decision”. However, applying the “mixed motive” analysis, the District Court further instructed that the employer should prevail nonetheless if it proved by a preponderance of the evidence that it would have changed plaintiff’s job anyway, without regard to his age.

After the jury found for the plaintiff, the employer appealed to the Court of Appeals for the Eighth Circuit. The Court of Appeals reversed the judgment and held that the District Court incorrectly instructed the jury on the “mixed motive” issue.

The Court of Appeals based its decision on a construction of the lead “mixed motive” case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which was decided by the Supreme Court in the Title VII context. No one opinion in *Price Waterhouse* (there were four) spoke for a majority of the Court, and as a result there has been considerable litigation in the following two decades about the quantum and/or character of evidence of discrimination that must be presented by the plaintiff before the burden of proof shifts to the employer to prove that it would have made the same decision even in the absence of a discriminatory motive. A majority of the Justices in *Price Waterhouse* did agree that the burden of proof shifts to the employer if the Title VII plaintiff presents evidence that a prohibited characteristic under Title VII was a “motivating factor” for the adverse action.

All nine of the eleven courts of appeals that have addressed whether the “mixed motive” analysis, first applied in Title VII cases, should be used in ADEA cases as well have found that the “mixed motive” analysis is equally applicable to age discrimination claims, including the Eighth Circuit. Many (but not all) courts have further held, as the Eighth Circuit did in considering the *Gross* appeal, that the burden of proof shifts to the employer only if the plaintiff presents “direct evidence” of unlawful discrimination as having been a motivating factor, and the plaintiff in *Gross* conceded that he had not presented such direct evidence.

THE SUPREME COURT DECISION

The Supreme Court accepted the *Gross* case for review to answer a limited and specific question, *i.e.*, whether an ADEA plaintiff must present “direct evidence” of discrimination (a term used but not defined by Justice O’Connor in her Concurrence in *Price Waterhouse*) before being entitled to a “mixed motive” jury instruction and shifting the burden to the employer to prove that it would have taken the same adverse action even if there had been no discriminatory motivation at work. The Supreme Court in *Gross*, however, decided instead to go far beyond this limited question and held that the entire “mixed motive” burden-shifting analysis is inapplicable to cases under the ADEA, with ADEA plaintiffs always bearing the burden of proving that age was the “but for” reason for the adverse employment action.

As a justification for its holding that the “mixed motive” burden shifting is inapplicable to the ADEA, the Court noted that two years after the *Price Waterhouse* decision Congress amended Title VII to expressly recognize the “mixed motive” analysis as proper while not, at the same time, similarly amending the ADEA. Thus, the Supreme Court held that the statutory amendments to Title VII after *Price Waterhouse* created a strong implication that the doctrine should not apply to the ADEA.

The Supreme Court further held that the operative prohibitory language of the ADEA, *i.e.*, that an employer may not discriminate against an individual in employment “because of such

individual's age" (emphasis added) was properly interpreted to mean that age must be the "but for" cause of the adverse employment action. Thus, under this interpretation, there can never be a mixed motive ADEA case: either the plaintiff proves that age is the "but for" reason for the discharge, or there is no liability whatsoever. The Court noted because that the "mixed motive" doctrine has been difficult for courts to apply and articulate in jury instructions, it is no longer useful in ADEA litigation, if it ever was.

THE DISSENT

The Dissent by Justice Stevens, which was joined in by three other Justices, criticized the majority for having changed the ADEA rules well beyond the question on which *certiorari* was granted by the Court and without full briefing by the parties. It stressed that the operative prohibitory language of the ADEA ("because of...") is identical to the prohibitory language of Title VII which formed the basis for the "mixed motive" doctrine contained in the *Price Waterhouse* opinions. This Dissent noted that the 1991 amendments to Title VII which in part recognized and adopted the *Price Waterhouse* "mixed motive" analysis were supported by legislative history emphasizing that this analysis was consistent with the original intention of Congress in enacting Title VII. The Stevens Dissent further observed that a major purpose of the 1991 amendments was to make it clear that the "mixed motive" burden shifting would only limit a plaintiff's *remedies* under Title VII if an employer proved that it would have made the same decision regardless of the presence of an illegal consideration, and that such a showing by the employer did not have the effect of avoiding *liability* altogether as had been suggested in the *Price Waterhouse* opinions.

CONCLUSION

Although unexpected by lawyers representing both employers and individuals in age discrimination litigation, the *Gross* decision is highly favorable for employers. No longer may employees in ADEA litigation escape the burden of proving that age was the determinative factor in an adverse employment action, with the ability heretofore in many cases to shift the burden of proof to the employers to prove by a preponderance of the evidence that their stated reasons. Employers now will defend by stating alternative reasons beside discriminatory animus for the adverse action, without having to carry the ultimate burden of proving the fact of those reasons being the motivation for the adverse action. ADEA cases presently pending that would have implicated the "mixed motive" analysis and thus would have required a trial may now be suitable for summary judgment and dismissal. Employer/defendants should evaluate that possibility carefully.

Although the Supreme Court majority criticized the unwieldy nature of the "mixed motive" analysis in practice, the outcome in *Gross* will raise additional complicated and confusing jury instruction issues in those cases in which the plaintiff raises claims under both Title VII and the ADEA.

Finally, there is Congressional interest in overturning the *Gross* decision and restoring the essence of the *Price Waterhouse* analysis to ADEA litigation just as Congress did earlier this year in overturning the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, ___ U.S. ___ (2008). Should Congressional action be taken to negate the *Gross* holding, the ADEA would likely be amended to be in accord with Title VII "mixed motive" standards.

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