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# Supreme Court Gives Mixed-Motive Analysis a Mixed Review

Not atypically, the U.S. Supreme Court has recently been making waves in the field of employment law. Judge Sonia Sotomayor is expected to be confirmed as the newest Supreme Court justice and, given her background, is likely to have some influence on rulings involving labor and employment issues. In addition, the Court closed out its 2008–2009 term by issuing a handful of decisions that have the potential to have a significant impact in the employment field.<sup>1</sup> Many observers consider one

ruling in particular—relating to how plaintiffs must go about proving claims of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA)<sup>2</sup>—a sea change in current law and might even indicate a seismic shift in the Supreme Court’s interpretation of statutes that deal with employment.<sup>3</sup> It is likely that the Supreme Court’s decision in that case will make it more difficult for plaintiffs to establish a viable case of age discrimination under the ADEA in the future, because they will no longer be able to show that their age was merely a “motivating factor” in their alleged adverse employment action. Rather, plaintiffs will be required to show that, “but for” their age, the adverse employment action would not have been made.<sup>4</sup>

The plaintiff/petitioner, Jack Gross, began working for the defendant/respondent employer in 1971 and was named the company’s claims administration director in 2001.

However, in 2003, when Gross was 54 years of age, he was reassigned from that position to that of claims project coordinator, and many of his previous responsibilities were transferred to the newly created position of claims administration manager, which was filled by a woman in her early 40s. Gross considered this reassignment a demotion and subsequently filed a suit in federal court alleging that his reassignment was in violation of

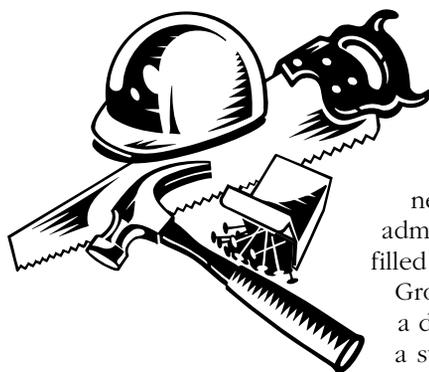
the ADEA, which, as its name suggests, makes it unlawful for an employer to take adverse action against an employee “because of such individual’s age.”<sup>5</sup> At trial, Gross presented evidence that his reassignment was based, at least in part, on his age, and the court

instructed the jury that it must return a verdict for Gross if he proved that his “age was a motivating factor” in his reassignment. The court explained that age was a motivating factor if it “played a part of a role in [the employer’s] decision to demote [Gross.]”<sup>6</sup> Accordingly, the jury returned a verdict for Gross, which the employer then appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit reversed the jury’s verdict and remanded the case for a new trial, holding that the jury instructions were incorrect under the standard established by a previous case heard by the U.S. Supreme Court—*Price Waterhouse v. Hopkins*.<sup>7</sup> The Eighth Circuit interpreted that decision as holding that the “motivating factor” analysis is appropriate only when the plaintiff has presented “direct evidence” of discrimination—a distinction that had not been presented to the jury at Gross’ trial.<sup>8</sup> In fact, because Gross conceded that he had not presented direct evidence of discrimination, the Eighth Circuit held that the instruction dealing with the motivating factor was given incorrectly. Gross appealed the appellate court’s decision to the U.S. Supreme Court, which granted certiorari on the question of “whether a plaintiff must ‘present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.’”<sup>9</sup>

This “mixed-motive” analysis reviewed by the Court was developed in the context of Title VII of the Civil Rights Act of 1964,<sup>10</sup> which made it unlawful for employers to take adverse action against an employee “because of such individual’s race, color, religion, sex, or national origin.”<sup>11</sup> In *Price Waterhouse*, the Supreme Court interpreted this “because of” standard as one that stands for the proposition that once a “plaintiff in a Title VII case proves that [the plaintiff’s membership in a protected class] played a motivating part in an employment decision, 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 even if it had not taken [that factor] into account.”<sup>12</sup>

In other words, once a plaintiff has shown that his or her membership in a protected class was a motivating factor in an adverse employment decision, the burden shifts to the defendant-employer to show that the plaintiff’s protected characteristic was not the “but for” cause of the employment decision. Subsequently, Congress amended Title VII to explicitly authorize such discrimination claims when an improper consid-



eration was a “motivating factor” in an adverse employment decision.<sup>13</sup> Accordingly, argued Gross, the “because of” language of the ADEA is identical to the standard that the Supreme Court had interpreted in *Price Waterhouse* and Congress had later grafted that language into Title VII; therefore, the Court should give its blessing to the use of mixed-motive analysis under the ADEA as well.

However, despite the fact that the question presented to the Court was centered on whether or not a mixed-motive analysis requires the existence of direct evidence, the Court, in an opinion written by Justice Clarence Thomas, engaged in a more penetrating analysis of the ADEA’s provisions, ultimately holding 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.<sup>14</sup>

Accordingly, instead of merely deciding the question of whether indirect evidence could support a mixed-motive analysis under the ADEA, the Court held that such an analysis is never appropriate under the act.

The Court based its rationale on a variety of factors. First, the Court defended its decision to interpret the provisions of the ADEA independently from those of Title VII stating that, “[w]hen conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”<sup>15</sup> Therefore, because the Supreme Court’s “approach to interpreting the ADEA in light of Title VII has not been uniform,” it is not a given that an interpretation of Title VII automatically applies to the ADEA.<sup>16</sup> Furthermore, the Court pointed out that the key provisions of the ADEA and Title VII are no longer identical, because “Congress neglected to add [an express mixed-motive analysis] provision to the ADEA when it amended Title VII ... even though it contemporaneously amended the ADEA in several ways.”<sup>17</sup> Hence, the Court claimed an inability to “ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”<sup>18</sup> Therefore, the Court held, its interpretation of the ADEA is not governed by its past decisions interpreting similar provisions of Title VII.

As a result, to decide whether the ADEA authorizes a mixed-motive claim, the Supreme Court focused on an independent inquiry into the correct interpretation of the text of the act, ultimately answering the question in the negative. Relying on the established dictionary definition of “because of”—the operative

language used in the ADEA—the Court held that the “ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act.”<sup>19</sup> Given this definition, explained the Court, it is insufficient for a plaintiff to prove that age was merely a motivating factor; the plaintiff must demonstrate that age “had a determinative influence on the outcome” of the case.<sup>20</sup> Therefore, under the ADEA, a “but for” standard is proper, and a mixed-motive analysis is not. In addition to applying the commonsense interpretation of the phrase “because of,” the Court also reasoned that its decision brings a measure of consistency to actions regulated by the ADEA, because the burden necessary to establish the employer’s liability is now “the same in alleged mixed-motive cases as in any other ADEA disparate-treatment action.”<sup>21</sup>

One major argument of the petitioner in *Gross v. FBL Financial Services* that the Court discarded in its analysis is the fact that, even though the ADEA’s language is certainly different than the language found in Title VII as amended, it is precisely the same language as that previously interpreted by the Court in *Price Waterhouse* to allow for a mixed-motive analysis. Rather than addressing this question head-on by overruling that previous decision, the Court merely acted as if it had done so, stating that “it is far from clear that the Court would have the same approach [as in *Price Waterhouse*] were it to consider the question today in the first instance,” and 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.”<sup>22</sup> Predictably, this analysis of *Price Waterhouse*’s value (or lack thereof) as a precedent provoked a scathing dissent, which was drafted by Justice John Paul Stevens, who argued that the Court’s dismissive treatment of *Price Waterhouse* was both inappropriate and unreasonable.

As a practical matter, the Court’s decision in *Gross* is a significant shift in the interpretation and application of the provisions of the ADEA, and the ruling is likely to affect the claims of a variety of potential plaintiffs claiming violations of the act. In a mixed-motive case, rather than placing the burden on the employer to show that the decision would have been made even in the absence of the employee’s protected characteristic, the burden remains on the employee to show the opposite. Given that evidence of discriminatory intent can be notoriously difficult to produce, the fact that this burden is placed on the plaintiff has the potential to be advantageous to defendants in ADEA actions.

However, as Congress recently illustrated in its response to the Court’s 2007 decision in the case of *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>23</sup> Congress clearly retains the power to counteract the Court’s

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holding through subsequent statutory enactment. In fact, Congress' 1991 amendments to Title VII—because of which Title VII is currently substantively different from the Age Discrimination in Employment Act—could provide a precise road map for what would be needed to re-establish a mixed-motive regime under the ADEA. Accordingly, even though the short-term effect of the Court's holding in *Gross* is likely to be somewhat of a hindrance to plaintiffs in their efforts to prove violations of the Age Discrimination in Employment Act, we will have to wait and see what long-term effects—if any—the Court's decision in this case will have on the field of employment law. **TFL**

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### **Endnotes**

<sup>1</sup>See e.g., *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009); *Ricci v. DeStefano*, 129 S. Ct. 2343 (2009).

<sup>2</sup>29 U.S.C. § 621 *et seq.*

<sup>3</sup>*Gross*, 129 S. Ct. 2343.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*; 29 U.S.C. § 623(a).

<sup>6</sup>*Gross*, 129 S. Ct. 2343.

<sup>7</sup>490 U.S. 228 (1989).

<sup>8</sup>*Gross*, 129 S. Ct. 2343.

<sup>9</sup>*Id.*

<sup>10</sup>42 U.S.C. § 2000e *et seq.*

<sup>11</sup>42 U.S.C. § 2000e-2(a)(1).

<sup>12</sup>*Price Waterhouse*, 490 U.S. at 258.

<sup>13</sup>See 42 U.S.C. § 2000e-2(m).

<sup>14</sup>*Gross*, 129 S. Ct. 2343.

<sup>15</sup>*Id.*, citing *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1153 (2008).

<sup>16</sup>*Gross*, 129 S. Ct. 2343.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>550 U.S. 618, 127 S. Ct. 2162 (2007).