

Supreme Court Rejects Mixed Motive Analysis for Age Claims Under the Age Discrimination in Employment Act

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On June 18, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. ___ (2009), the U.S. Supreme Court declined to apply the “mixed motive” framework to age discrimination claims under the Age Discrimination in Employment Act (ADEA), ending—at least for now—years of confusion about the meaning and application of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), beyond Title VII. Employers with pending age claims are encouraged to review this decision with counsel, because it may seriously undercut at summary judgment or trial existing age claims premised upon a “mixed motive” theory.

History of Mixed Motive

The “mixed motive” standard in employment discrimination litigation originated with the Supreme Court’s decision in *Price Waterhouse*, a case that resulted in four opinions, none of which commanded a majority of the Court. In short, a plurality of the *Price Waterhouse* Court concluded that a plaintiff in a Title VII action may prove his or her case by showing that his or her membership in a protected class played a motivating part in an employment decision. An employer could avoid liability only if it could prove that the company would have made the same decision absent a discriminatory motive.

Although *Price Waterhouse* and its progeny involved Title VII, courts began to apply the “mixed motive” standard to other discrimination statutes, such as the ADEA. The “mixed motive” application under the ADEA was an important weapon for the would-be plaintiff. Instead of debunking directly an employer’s legitimate business reason for an employment action, plaintiffs could argue instead that the employer had both legitimate and illegitimate reasons for reaching its decision.

The *Gross* decision ends that practice.

Gross Decision

In *Gross*, the plaintiff was employed as a claims administration director until, at age 54, he was reassigned by his employer to the position of claims project coordinator. The plaintiff considered the reassignment a demotion, and accordingly, filed suit against his employer. He alleged, *inter alia*, that the company violated the ADEA because his demotion was based, at least in part, on his age.

The case proceeded to trial and, despite objections by the plaintiff's employer, the judge issued a "mixed motive" instruction to the jury, asking them to return a verdict in favor of the plaintiff if they found that age was "a motivating factor" in the employer's decision to demote the plaintiff. The jury was also instructed that "motivating factor" meant that age "played a part" in the employer's decision to demote the plaintiff. Adhering to the *Price Waterhouse* standard, the judge also instructed the jury to find in favor of the employer only if the company proved by a preponderance of the evidence that the employer would have demoted the plaintiff "regardless of his age." The jury returned a verdict for the plaintiff, and awarded him almost \$47,000 in damages.

The employer appealed. The U.S. Court of Appeals for the Eighth Circuit reversed and remanded, holding that the district court improperly interpreted *Price Waterhouse*.

The Supreme Court vacated the Court of Appeals' decision. Reaching beyond the questions presented on appeal by the parties, the Court specifically declined to hold that its *Price Waterhouse* framework applied to ADEA claims. Although the Court acknowledged a considerable overlap between the jurisprudence of Title VII and the ADEA, the Court suggested that textual differences between Title VII and the ADEA prevented the Court from applying *Price Waterhouse* to age claims. Specifically, the Court found persuasive that Title VII was amended in 1991 to explicitly authorize "mixed motive" discrimination claims, while similar changes were not made to the ADEA.

The Court concluded, after reviewing the statutory text of the ADEA, that an employee's burden of proof for age claims under the ADEA is the same in mixed motive claims or disparate treatment claims. That is, under the ADEA, a plaintiff must prove by a preponderance of the evidence (direct or circumstantial) that age was the "but for" cause of the employment decision.

Justice Stevens dissented, together with Justices Breyer, Souter, and Ginsburg, noting, among other things, that Congress endorsed the *Price Waterhouse* "mixed motive" theory when it amended Title VII in 1991.

Conclusion

The *Gross* decision will undoubtedly undercut a number of pending age claims, both at summary judgment and at trial, especially those pursued under a "mixed motive" theory. Employers with pending age claims are encouraged to review the decision and, where dispositive motions are pending, move quickly in consultation with counsel to brief the impact of *Gross*. Moving forward, the *Gross* decision may help discourage age claims, because the "but for" causation test is a higher burden on plaintiffs.

Employers need to question, however, the longevity of the *Gross* decision. Within hours of the decision, members of Congress voiced strong opposition to the ruling, comparing it to the Court's *Ledbetter* decision that Congress legislatively overturned earlier this year. Although Congress has a full legislative agenda, we expect to see increasing pressure for a legislative reversal of this decision in the coming months.

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