



Labor and Employment Practice

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Supreme Court Rules “Motivating Factor” Standard Not Allowed Under ADEA

Last week, the United States Supreme Court ruled (5 to 4) that employees bringing disparate-treatment claims pursuant to the Age Discrimination in Employment Act (ADEA) must prove that age was the “but-for” cause of the challenged adverse action, rather than simply a “motivating factor”. (*Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 2009 WL 1685684 (2009). The Supreme Court further ruled that the burden-shifting framework set forth in *Price Waterhouse* does not apply to ADEA cases. (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

While the ADEA provides that an employer may not take an adverse action against an employee because of the employee’s age, *Gross v. FBL Financial Services* dealt with whether a plaintiff may produce evidence of a “mixed-motive” in an adverse employment action; thereby, shifting the burden to the defendant to prove that it would have made the decision regardless of the plaintiff’s age.

In *Gross*, plaintiff, Jack Gross, was employed by FBL as a claims administration director. After 30 years of employment, Gross, at age 54, was reassigned to another position and many of his previous responsibilities were transferred to a newly created position staffed by a younger employee. Gross filed suit against his employer and presented evidence at trial that the reassignment was at least partially due to his age. FBL defended its decision on the grounds that Gross was better suited to the new position and that the move came as the result of corporate restructuring. The district court instructed the jury to find for the plaintiff if he proved by a preponderance of the evidence that age was a “motivating factor” in the adverse action. The court instructed the jury to find for the defendant if the employer would have taken the adverse action regardless of the plaintiff’s age. The jury returned a verdict for the plaintiff awarding him lost wages. FBL appealed to the U.S. Court of Appeals for the Eighth Circuit.

The Eighth Circuit reversed and remanded the case, concluding that the jury had been incorrectly instructed that the burden of persuasion shifts to the employer upon a presentation of evidence showing that age was a motivating factor. Rather, the court held that under the *Price Waterhouse* standard established by the Supreme Court in 1989, the burden shift should only have occurred if the plaintiff had presented direct evidence showing a link between the discriminatory intent and the challenged decision. *Price Waterhouse* holds that when a plaintiff proves that a protected characteristic (such as gender or race) played a part in the challenged employment action, the burden shifts to the defendant to prove that the same decision would have been made if the characteristic had not been taken into account. Gross appealed the decision to the U.S. Supreme Court arguing that the district court properly applied the *Price Waterhouse* standard.

The Supreme Court vacated the Eighth Circuit’s decision, holding that mixed-motive jury instructions are not allowed under the ADEA and that the Court’s *Price Waterhouse*’s burden-shifting framework

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does not apply in ADEA cases. Justice Thomas, writing for the majority, explained that unlike Title VII, the ADEA does not specifically provide that an employee may prove discrimination by showing that age was a motivating factor. Furthermore, the Court found because Title VII is “materially different” from the ADEA with respect to the burden of persuasion, relevant Title VII decisions do not control the Court’s interpretation of the ADEA. Thus, the Court ruled to be successful ADEA plaintiffs must prove that if it were not for their age, the adverse action would not have been taken against them.

The Supreme Court’s decision in *Gross* may limit an employee’s ability to successfully bring discrimination claims under the ADEA. Without a mixed-motive jury instruction, plaintiffs have a more difficult time prevailing as the employee retains the burden to prove that the impermissible factor, here age, was the determining factor in the employer’s decision.

If you have questions regarding this client briefing or wish to discuss employee wage and hour audits or policy reviews, please contact one of the Winston & Strawn LLP Labor & Employment Relations partners listed below.

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