

2011 Lancaster/Berks County Court Rules
 Click Here or call 877-256-2472 *The Legal Intelligencer*



The Legal Intelligencer
 THE OLDEST LAW JOURNAL IN THE UNITED STATES

This Site [Law.com Network](#)
[Legal Web](#)

[Contact Facebook](#) [RSS](#) [Twitter](#)

[Home](#) [News](#) [Firms & Lawyers](#) [Courts](#) [Judges](#) [Surveys/Lists](#) [Columns](#) [Verdicts](#) [Public Notices](#) [Advertise](#) [Subscribe](#)

Home > *Gross* Decision May Result in More Older Workers Being Fired

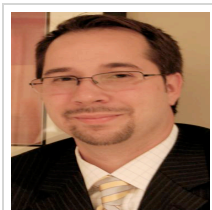
Employment Law

Font Size: [+](#) [-](#)

Gross Decision May Result in More Older Workers Being Fired

[Jeffrey Campolongo](#) [Contact](#) [All Articles](#)
 The Legal Intelligencer | June 26, 2009

[Print](#) [Share](#) [Email](#) [Reprints & Permissions](#) [Write to the Editor](#)



Jeffrey Campolongo

Last week, the U.S. Supreme Court made it a whole lot harder for victims of age discrimination to get relief under the Age Discrimination in Employment Act of 1967, or ADEA. In *Gross v. FBL Financial Services Inc.*, the question presented by the petitioner was whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction in a suit brought under the ADEA.

The advantage to a mixed-motive instruction for the plaintiff is that the ultimate question is whether prohibited discrimination was "a motivating factor," which is a facially looser standard than non-mixed-motive cases. In non-mixed-motive cases, or "pretext" cases, the ultimate jury question is whether unlawful discrimination was "the determinative factor," which is a stricter and typically more difficult showing for the plaintiff.

Despite the mixed-motive/direct evidence question presented by the petitioner, however, the court, at its own initiative, answered a different question: whether the burden-shifting analysis associated with mixed-motive discrimination claims is ever appropriate under the ADEA. The court held that the mixed-motive instruction is not applicable to ADEA claims. The National Employment Lawyers Association, or NELA,

has already called on Congress to overrule what it perceives to be an unjust decision, and some employment lawyers even believe that this decision effectively eliminates a degree of age discrimination protection formerly offered by the ADEA.

In *Gross*, the petitioner worked for FBL Financial Services, or FBL, for more than 30 years when his position changed and he was replaced with someone he had formerly supervised — a woman about 10 years younger than him. At trial, Gross presented evidence that the change in position — which he considered a demotion — was because, at least in part, of his age. FBL defended the changed position on the grounds that it was simply part of corporate restructuring, and Gross was put in a position that was better suited to his skills.

At trial, the district court gave jury instructions in accordance with *Price Waterhouse v. Hopkins*, concerning Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e et seq. The district court therefore instructed the jury that Gross should win if he proved that age was "a motivating factor" in the employment decision. The jury was further instructed that age was a motivating factor "if [it] played a part or a role in [FBL]'s decision to demote [him]." The district court also instructed the jury that FBL should win, however, if it would have demoted Gross regardless of his age. With these instructions, the jury found in Gross' favor and awarded him nearly \$50,000.

On appeal to the 8th U.S. Circuit Court of Appeals, the circuit court reversed and remanded for a new trial on the

Advertisement

ScanSnap
 The ScanSnap S1500 document scanner
 Click to see it
FUJITSU Tell us how you'll ScanSnap You could win a Gift Card

Find similar content

Key categories

Most viewed stories

Same-Sex Marriage Fight at Heart of Cozen O'Connor Benefits Case

E-Discovery Drives \$576K Costs Levied on Plaintiffs

Drinker Biddle's Melinson to Serve as HP's Deputy GC

Prosecutors: Stradley Ronon Shouldn't Represent Archdiocese

The 2011 Lawyers on the Fast Track

Advertisement

Autonomy **eDiscovery Webinar Series**
Embracing

basis that the *Price Waterhouse* instructions should have been given only if Gross had presented "direct" evidence of age discrimination. Since Gross had not presented direct evidence of discrimination, the district court concluded that the jury should have been given instructions applicable to non-mixed-motive claims. This would leave Gross with the burden of persuasion that age was "the determinative factor" in the employment decision, rather than "a motivating factor" in mixed-motive cases.

On certiorari, the Supreme Court never answered whether an ADEA plaintiff must present direct evidence of discrimination to receive a mixed-motive jury instruction. Instead, it held that mixed-motive jury instructions should never be given in an ADEA case. The court based its decision largely upon the history of the statutory amendments.

Following *Price Waterhouse*, wherein Justice Sandra Day O'Connor wrote a concurring opinion, treated by many courts as controlling for both Title VII and ADEA cases, stating that a Title VII plaintiff should be required to present direct evidence of discrimination before receiving the mixed-motive jury instruction, Congress amended Title VII. In 1991, Title VII was amended to explicitly authorize discrimination claims in which an unlawful consideration was "a motivating factor" in the adverse employment decision. In other words, under the 1991 amendments, race, color, religion, sex or national origin can never be even part of any adverse employment decision.

In the *Gross* case, the Supreme Court decided that "a motivating factor" instruction does not apply to ADEA cases because Congress failed to similarly amend the ADEA, even though it made other ADEA amendments at the same time. The court therefore assumed that since Congress did not amend the ADEA the same way as Title VII that it did not intend for age as "a motivating factor" in an adverse employment action to be enough for a plaintiff to obtain relief under the ADEA.

The 5-4 majority then proceeded to analyze what the term "because of age" means under the ADEA. Here, the court sifted through three different dictionaries to attempt to define the term "because of." In examining just the words "because of," the court held that the test is not whether age is "a motivating factor" but rather whether there is a "but-for" causal relationship between age and the adverse employment action.

Curiously, as Justice John Paul Stevens points out in his dissenting opinion, in *Price Waterhouse*, the court interpreted the identical words "because of" found in Title VII, and it did not construe them to require a "but-for" standard. As a matter of fact, Justice Anthony Kennedy had advanced the "but-for" approach in his dissenting opinion in *Price Waterhouse*. This was explicitly rejected by the court in *Price Waterhouse* when it stated "[t]o construe the words 'because of' as colloquial shorthand for 'but-for' causation is to misunderstand them." As Stevens' dissent in *Gross* also highlights, the but-for standard has obviously been rejected by Congress, since it did not use it when drafting the 1991 amendments to Title VII.

The new but-for standard is also contrary to the long-established framework for non-mixed-motive cases established in *McDonnell Douglas Corp. v. Green*. In non-mixed-motive cases, the *McDonnell Douglas* pretext analysis is used. The plaintiff has the burden of making a prima facie case of discrimination, making a low threshold showing that she is a member of a protected class, she suffered an adverse employment action and others not belonging to that protected class did not suffer the adverse employment action. The burden of persuasion shifts to the defendant-employer to show that there is a legitimate, non-discriminatory reason, or LNDR, for the adverse employment action, which could be any reason besides the statutorily protected class asserted in the plaintiff's complaint. An LNDR, then, is anything ranging from discrimination based on a statutorily protected class not asserted in the plaintiff's complaint to discrimination based on the plaintiff's new haircut on the day of the adverse employment decision. After the defendant asserts an LNDR, the burden shifts back to the plaintiff to prove that the LNDR is pretext for prohibited discrimination or, in other words, that the LNDR is not the real reason for the adverse employment action and that the protected class is.

In his dissent in *Gross*, Stevens points out that in non-mixed-motive ADEA cases, such as *Reeves v. Sanderson Plumbing Products Inc.*, the court followed the same standard set forth in non-mixed-motive Title VII cases, which is the *McDonnell-Douglas* pretext analysis described above. (See also *Hazen Paper Co. v. Biggins*.) Based on this history and the previous rejection of the but-for analysis for Title VII, it is incomprehensible why the court has now decided that ADEA standards should not be the same as Title VII standards.

Even more baffling, one of the reasons the court rejected the *Price Waterhouse* framework for the ADEA is because the burden-shifting analysis is not worth the difficulty for judges to formulate instructions and for jurors to apply them. It would seem that the majority now believes that it would somehow be less difficult to apply different standards to each anti-discrimination statute.

In this case, the court took it upon itself to change the question presented from whether direct evidence is needed to get a mixed-motive instruction to whether a mixed-motive instruction is ever available in ADEA cases. This is despite prior decisions that analyzed the ADEA the same way as Title VII and no definite evidence that Congress intended there to be different standards for each discrimination statute, which shows that the majority here clearly took the opportunity to legislate from the bench. To that end, Stevens' dissent labeled the majority's decision as "an unabashed display of judicial lawmaking."

Now that the court has established this new but-for test for ADEA claims, some employment attorneys fear that there is nothing left to protect an ADEA plaintiff. This decision certainly raises the burden for ADEA plaintiffs and

eDiscovery as a Business Process
Tuesday, August 9, 2011
11:00AM PT / 2:00PM ET

[Register Today>>>](#)

TOP JOBS
PH-Sr. Litigation Associate/ Counsel
CONFIDENTIAL SEARCH
Philadelphia, PA

Lease Administrator / Paralegal / Law Clerk / Attorney
Colliers International
Philadelphia, Pennsylvania

MORE JOBS
POST A JOB

Advertisement

there is no indication that Congress ever intended the ADEA to be less important than Title VII or the ADA or for age to be less protected than race, color, religion, sex, national origin or disability. Hopefully, Congress will act quickly to give older Americans the protection they deserve in the workplace. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at jjcamp@jcampplaw.com or 215-592-9293.

[Subscribe to The Legal Intelligencer](#)

Print Share Email Reprints & Permissions Write to the Editor

From the Law.com Network

New York Law Journal



Few Sex Offenders Are Choosing Trial Before Confinement

New Law Expected to Accelerate Pace of E-Filing Across the State

The Legal Intelligencer



Drinker Biddle's Melinson to Serve as HP's Deputy GC

Phila. Judge: City Council Calendars Are Not Public Records

Connecticut LawTribune



How Legitimate Is The Latest Labor Vote?

Injured Woman Floored By Pro-Religion Decision

lawjobs.com



The Careerist: News Roundup, Including Consequences of Seeking Sexy Assistant

Shale Boom Keeps Firms Busy With Fracking Deals

TEXAS LAW



Hearing Held on 'Imposed By Judge McBryde

Former Silicosis (Sue Lawyers, Firm Insurer

THE LEGAL INTELLIGENCER

HELP & INFORMATION CENTER [Customer Service](#) | [Submit An Article](#) | [Submit A Verdict](#) | [Letters to the Editor](#) | [PICS Order Form](#)

THE LEGAL INTELLIGENCER.COM [About Us](#) | [Contact Us](#) | [Privacy Policy](#) | [Terms & Conditions](#)

SUBSCRIBE [Click Here For Subscription Options](#)

ADVERTISE [Place An Ad](#) | [View Jobs](#) | [View Real Estate Listings](#) | [View Experts](#) | [Professional Announcements](#) | [Editorial Calendar](#)

OTHER RESOURCES [Events](#) | [Reprints & Permissions](#) | [Legal Products](#) | [Retail Marketplace](#) | [Public Notices](#) | [RSS Feed](#)

the LAW.COM network

LAW.COM

[Newswire](#)
[Special Reports](#)
[International News](#)
[Small Firms](#)
[Lists, Surveys & Rankings](#)
[Legal Blogs](#)
[Site Map](#)

ALM NATIONAL

[The American Lawyer](#)
[The Am Law Litigation Daily](#)

ALM REGIONAL

[Connecticut Law Tribune](#)
[Daily Business Review \(FL\)](#)
[Delaware Law Weekly](#)
[Daily Report \(GA\)](#)
[The Legal Intelligencer \(PA\)](#)
[New Jersey Law Journal](#)
[New York Law Journal](#)
[GC New York](#)
[New York Lawyer](#)
[The Recorder \(CA\)](#)
[Texas Lawyer](#)

DIRECTORIES

[ALM Experts](#)
[LegalTech® Directory](#)
[In-House Law Departments at the Top 500 Companies](#)
[New York's Women Leaders in the Law](#)
[Corporate Counsel: Best Lawyers® Annual Guides](#)
[The American Lawyer: Best Lawyers® Annual Guides](#)
[The National Law Journal Leadership Profiles](#)

BOOKS & NEWSLETTERS

[Best-Selling Books](#)
[Publication E-Alerts](#)
[Law Journal Newsletters](#)
[LawCatalog](#)
[Law Journal Press Online](#)

RESEARCH

[ALM Legal Intelligence](#)
[Court Reporters](#)
[MA 3000](#)
[Verdict Search](#)

EVENTS & CONFERENCES

[ALM Events](#)
[LegalTech®](#)
[Virtual LegalTech®](#)
[Virtual Events](#)
[Webinars & Online Events](#)
[Insight Information](#)

REPRINTS

[Reprints](#)

ONLINE CLE

Corporate Counsel
Law Technology News
Minority Law Journal
The National Law Journal

ALM Experts
Legal Dictionary
Smart Litigator

CLE Center
CAREER
Lawjobs

[About ALM](#) | [About Law.com](#) | [Customer Support](#) | [Reprints](#) | [Privacy Policy](#) | [Terms & Conditions](#)
Copyright 2011. ALM Media Properties, LLC. All rights reserved.

