



# HIRE PERSPECTIVES

Fall 2009

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

## Supreme Court Issues Employer-Friendly Age Discrimination Ruling in *Gross v. FBL*

by [MEGAN J. ERICKSON](#)

A recent U.S. Supreme Court ruling has the practical effect of making it more difficult for plaintiffs to establish a case of age discrimination under the Age Discrimination in Employment Act (“ADEA”). In *Gross v. FBL Financial Services, Inc.*, the Court held that as opposed to a Title VII plaintiff who must show discrimination was “a motivating factor” behind an employment action, an ADEA plaintiff always bears the ultimate burden of proving age was the “but for” cause of the challenged employment decision. Even if the plaintiff produces some evidence age was a motivating factor in the employment action, the burden of proof never shifts to the employer to show it would have made the same employment decision regardless of the plaintiff’s age.

### Refresher on Order and Allocation of Proof in Employment Discrimination Cases

It is the plaintiff’s job to prove discrimination in employment – that is, a plaintiff must show he suffered an adverse employment action because of his protected class (such as race, sex, age, or so on). A plaintiff may use either direct or circumstantial evidence. Although the line is not always clear, direct evidence of discrimination is evidence that, in and of itself, shows a discriminatory animus motivated the adverse action. It is some piece of knowledge or an observation that, if true, proves a fact without inference or presumption. Circumstantial evidence, on the other hand, is evidence that is not based on personal knowledge or observation that directly proves a fact, and instead relies on inferences.

In 1973, the Supreme Court established in *McDonnell Douglas Corp. v. Green* a burden-shifting framework for evaluating discrimination claims where there is no “direct” evidence of discrimination. Under this framework, a plaintiff must first establish a *prima facie* (or initial) case of discrimination using circumstantial evidence. This creates a rebuttable presumption of discrimination. If the employer produces a legitimate, non-discriminatory reason for its action, then the presumption disappears, and the only issue is whether or not the employee can prove the ultimate issue of discrimination (for example, by proving the employer’s reason is just an excuse to discriminate). Through the entire analysis, the plaintiff always has the ultimate burden of proving discrimination.

In 1989, the Supreme Court’s *Price Waterhouse* plurality decision described the causation analysis when an employer was motivated by *both* a permissible consideration and an impermissible consideration (a “mixed-motive” case). Under *Price Waterhouse*, if a plaintiff shows by direct evidence that an unlawful motive played a substantial role in the employment decision, the burden of persuasion on the issue of causation shifts to the defendant employer. At this point, the employer can only avoid liability if it proves it would have made the same decision even absent discrimination.

The 1991 Civil Rights Act (“1991 Act”) amended Title VII – and now a Title VII plaintiff establishes liability by proving an unlawful motive was a *motivating or substantial factor* in the employment decision. The Supreme Court then explained in *Costa v. Desert Palace* this showing can be made by using *either direct or circumstantial* evidence. After the 1991 Act, once a Title VII plaintiff shows the impermissible consideration was a motivating factor, the employer is liable. The employer may try to prove the “same decision” defense, but it only limits remedies – it will not preclude liability.

After these developments, the question remained: Will *Price Waterhouse* still apply outside the context of Title VII? The Eighth Circuit weighed in on the issue last year in an age discrimination case, *Gross v. FBL Financial Services, Inc.*, and the U.S. Supreme Court further clarified in an opinion handed down this summer.

### **Background Facts in *Gross v. FBL Financial Services, Inc.***

Jack Gross, born in 1948, started at FBL Financial Group in 1987. He worked his way up the ranks, receiving promotions in 1990, 1993, 1997, and 1999.

In 2001, however, he felt like he began working his way back *down* the ranks. During a company re-organization that year, FBL reassigned Gross to a different position. His job responsibilities did not change, but Gross viewed the reassignment as a demotion because it reduced his “points” under the company’s system for salary grades. In 2003, FBL reassigned Gross again, this time transferring many of his responsibilities to a new position which was assigned to a younger employee. Although his reassignment had the same salary points and pay grade, Gross believed the reassignment was a demotion because the new position was given to a younger employee who assumed the functional equivalent of his former position. Additionally, his new position lacked a job description or specifically assigned duties.

Gross sued in April of 2004 under the ADEA, claiming FBL demoted him because of his age. The jury found in favor of Gross, and FBL appealed.

The employer argued, in part, that *Price Waterhouse* still applies to ADEA cases, and because Gross did not offer direct evidence of discrimination, the mixed-motive jury instructions improperly shifted the burden of proof to the employer.

Gross countered that the 1991 Act and *Desert Palace* superseded the *Price Waterhouse* requirement of direct evidence before receiving a mixed-motive jury instruction. He argued that in a mixed-motive case of age discrimination, a plaintiff must only demonstrate an illegitimate basis was a *motivating* factor in the decision – and then the burden of proof shifts to the defendant to prove it would have made the same decision even if it had not discriminated.

### **Eighth Circuit Weighs In**

The Eighth Circuit rejected Gross’s argument. The Circuit reasoned that although the 1991 Act and *Desert Palace* changed the causation analysis in the context of Title VII, the *Price Waterhouse* framework – including the direct evidence requirement – still applies in the context of age discrimination cases (and presumably, any other non-Title VII cases). The appellate court reversed the district court, explaining that if a plaintiff does not have “direct evidence” of discrimination, the case must be decided under the *McDonnell Douglas* framework – and the ultimate burden to prove discrimination remains with the plaintiff at all times. According to the Eighth Circuit, if Gross would have shown direct evidence that age discrimination actually motivated FBL’s decision to demote him, the burden of persuasion would have shifted to FBL to prove it would have made the same decision even without considering his age. Because Gross did not present direct evidence of discrimination, *McDonnell Douglas* should have governed the analysis, and the burden of persuasion should have remained with Gross.

### **Supreme Court Further Clarifies**

In its June 18, 2009 opinion, the United States Supreme Court took an unexpected approach. The Court recognized that the parties framed the issue as presenting the question of whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive instruction in non-Title VII discrimination cases. The Court did not even reach that issue, however, because it held that the burden of persuasion *never* shifts to the defendant in a mixed-motive discrimination claim under the ADEA. Instead, the plaintiff always retains the burden of proving age was the “but for” cause of the adverse employment action.

### **Bottom Line for Employers**

Although the case turns upon procedural matters, the Supreme Court’s decision represents a significant substantive victory for employers. It specifically protects employers against ever shouldering the burden of persuasion to prove the “same decision” issue in ADEA cases, and it casts doubt on the continuing validity of the *Price Waterhouse* framework altogether in disparate treatment cases under other anti-discrimination statutes. The Court explained that while Congress amended Title VII to allow employer liability when discrimination was “a motivating factor” for an employment decision, the text of the ADEA requires a plaintiff to go further. A plaintiff must prove, through direct or circumstantial evidence, he suffered an adverse employment action “because of” his age – meaning age was not just a motivating factor, but the “but for” cause of the employment action.

If you have questions regarding discrimination claims, please contact a member of the Firm's [Employment and Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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