



# Mixed-Motive Claims Under the Age Discrimination in Employment Act: A Legal Analysis of the Supreme Court's Ruling in *Gross v. FBL Financial Services, Inc.*

-name redacted-

Legislative Attorney

June 9, 2010

Congressional Research Service

7-....

[www.crs.gov](http://www.crs.gov)

R41279

**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

This report discusses *Gross v. FBL Financial Services, Inc.*, a recent case in which the Supreme Court evaluated a mixed-motive claim under the Age Discrimination in Employment Act (ADEA), which prohibits employment discrimination against individuals over the age of 40. In *Gross*, the plaintiff alleged that his employer's decision to reassign him was motivated at least in part by his age, while the employer claimed that its decision was based on other legitimate factors. The question at trial was what types of evidence the parties must present and who bears the burden of proof in such mixed-motive cases, which generally involve employment actions that are based on both permissible and impermissible reasons. Sidestepping the evidentiary question presented, the Court determined that an employer never bears the burden of persuasion because the traditional mixed-motive burden-shifting framework is not applicable to the ADEA. Instead, based on its conclusion that the ADEA does not authorize the type of mixed-motive claims that are available under a similar employment discrimination law, the Court held that an employee bears the burden of establishing that age is the decisive cause of the challenged employment action. This standard is likely to make it more difficult for plaintiffs to succeed in age discrimination cases in which age is only one of several factors behind the adverse employment decision. Currently, several bills that would supersede the *Gross* decision by amending the ADEA have been introduced in the 111<sup>th</sup> Congress, including H.R. 3721 and S. 1756.

## **Contents**

Background .....	1
Disparate Treatment and Mixed-Motive Claims.....	2
The Supreme Court’s Decision .....	4
Effect of the Decision.....	5

## **Contacts**

Author Contact Information .....	6
----------------------------------	---

In June 2009, the Supreme Court issued its decision in *Gross v. FBL Financial Services, Inc.*,<sup>1</sup> a case in which the Court evaluated a mixed-motive claim under the Age Discrimination in Employment Act (ADEA),<sup>2</sup> which prohibits employment discrimination against individuals over the age of 40. In *Gross*, the plaintiff alleged that his employer’s decision to reassign him was motivated at least in part by his age, while the employer claimed that its decision was based on other legitimate factors. The question at trial was what types of evidence the parties must present and who bears the burden of proof in such mixed-motive cases, which generally involve employment actions that are based on both permissible and impermissible reasons. Sidestepping the evidentiary question presented, the Court determined that an employer never bears the burden of persuasion because the traditional mixed-motive burden-shifting framework is not applicable to the ADEA. Finding instead that the ADEA does not authorize the type of mixed-motive claims that are available under a similar employment discrimination law, the Court, in a 5-4 ruling, held that an employee in a mixed-motive case bears the burden of establishing that “age was the ‘but-for’ cause of the challenged adverse employment action,”<sup>3</sup> meaning that the employee must show that age was the deciding factor, rather than just one of several motivating factors, behind the employer’s action. This standard is likely to make it more difficult for plaintiffs to succeed in age discrimination cases in which age is only one of several factors behind the adverse employment decision.

## Background

In 1971, Jack Gross began working for FBL Financial Group, Inc. as a claims adjuster. In 2003, after several promotions, Gross was reassigned to a new position, while some of his job responsibilities were transferred to a newly created position that was given to a younger employee. Believing his reassignment to be a demotion, Gross sued his employer, claiming the company had intentionally discriminated against him on the basis of age. Although FBL denied that its decision was based on age, the company argued that even if it had considered age, its reassignment of Gross was based on other reasons that were lawful.<sup>4</sup>

At trial, the district court instructed the jury that if Gross proved by a preponderance of the evidence—direct or circumstantial—that age was a “motivating factor” in the company’s decision to demote him, then the burden of persuasion would shift to FBL to prove it would have taken the same action even if the company had not considered Gross’s age. Finding for Gross, the jury awarded him \$46,945 in lost compensation.<sup>5</sup> FBL, however, challenged the district court’s jury instruction, and the Court of Appeals for the Eighth Circuit reversed. In its decision, the Court of Appeals for the Eighth Circuit held that the jury instructions were flawed and that the precedent established by the Supreme Court’s decision in *Price Waterhouse v. Hopkins* allows “a shift in the burden of persuasion only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision.”<sup>6</sup> The Supreme Court granted

---

<sup>1</sup> 129 S. Ct. 2343 (2009).

<sup>2</sup> 29 U.S.C. §§ 621 et seq. See also, CRS Report RL34652, *The Age Discrimination in Employment Act (ADEA): A Legal Overview*, by (name redacted).

<sup>3</sup> *Gross*, 129 S. Ct. at 2352.

<sup>4</sup> *Id.* at 2346-47.

<sup>5</sup> *Id.* at 2347.

<sup>6</sup> *Gross v. FBL Fin. Servs.*, 526 F.3d 356, 360 (8<sup>th</sup> Cir. 2008).

review in order to determine “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>7</sup> or whether the burden of proof in a mixed-motive ADEA case shifts to the employer regardless of whether the evidence of bias presented by the employee is direct or circumstantial.

## Disparate Treatment and Mixed-Motive Claims

When bringing a civil case alleging employment discrimination, there are two types of claims that a plaintiff can make: disparate treatment and disparate impact.<sup>8</sup> Disparate treatment, which was at issue in *Gross*, occurs when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat or affect the employee differently from others because of the employee’s age. Such disparate treatment claims require proof that the employer intended to discriminate against the complaining party when it took the challenged employment action. Intent, the critical element of a disparate treatment claim, may be shown directly (e.g., by discriminatory statements or behavior of a supervisor towards a subordinate) or, perhaps more likely, by circumstantial evidence.

Over the years, the courts have developed a complicated set of rules and procedures that govern how disparate treatment claims are adjudicated. Many of the cases in which these rules have emerged are cases involving Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment “because of ... race, color, religion, sex, or national origin.”<sup>9</sup> Since the ADEA is largely patterned on Title VII, the reasoning in these cases frequently applies in the ADEA context as well.

In general, plaintiffs may establish their individual disparate treatment claims under the ADEA in one of two ways, sometimes referred to as the indirect method and the direct method.<sup>10</sup> When evidence of discrimination is lacking, plaintiffs generally use an indirect method that involves the burden-shifting framework established by the Supreme Court in *McDonnell Douglas v. Green* and *Texas Dept. of Community Affairs v. Burdine*.<sup>11</sup> When the plaintiff can directly present evidence of age discrimination, use of the *McDonnell Douglas* burden-shifting model is unnecessary,<sup>12</sup> and the plaintiff can usually present either direct or circumstantial evidence that would enable a jury to conclude that discrimination occurred.

---

<sup>7</sup> *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2348 (2009).

<sup>8</sup> Disparate impact occurs when the employer’s acts or policies are facially neutral, but have an adverse impact on a class of employees and are not otherwise reasonable.

<sup>9</sup> 42 U.S.C. § 2000e-2(a).

<sup>10</sup> *Rogers v. City of Chicago*, 320 F.3d 748, 753-54 (7<sup>th</sup> Cir. 2003). Under the ADEA, plaintiffs may also bring a separate type of disparate treatment claim akin to Title VII “pattern or practice” suits, which involve habitual discriminatory actions on the part of the employer. Such class action claims carry a heavy evidentiary burden that follow different rules of proof. See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>11</sup> 411 U.S. 792 (1973); 450 U.S. 248 (1981).

<sup>12</sup> See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

Much of the confusion regarding the types of evidence plaintiffs are required to produce in mixed-motive cases, which are a variation on disparate treatment cases, can be traced to the Court's opinion in *Price Waterhouse v. Hopkins*.<sup>13</sup> Prior to the decision, it was unclear whether Title VII prohibited employment actions that were partly based on discriminatory reasons or whether the statute only covered actions that were wholly motivated by discrimination. In *Price Waterhouse*, the Court addressed these so-called "mixed-motive" cases and held, in part, that once a "plaintiff shows that an impermissible motive played a motivating part in an adverse employment decision," the burden shifts to the employer "to show that it would have made the same decision in the absence of the unlawful motive."<sup>14</sup> This is the framework that currently applies to Title VII mixed-motive claims. However, the Court also held that employers could avoid liability if they made this showing.<sup>15</sup> Subsequently, Congress enacted the Civil Rights Act of 1991,<sup>16</sup> which formally established mixed-motive claims under Title VII by clarifying that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>17</sup> The 1991 amendments also partially overruled *Price Waterhouse* by altering the rules regarding employer liability in mixed-motive cases.<sup>18</sup> Despite making these amendments to Title VII, Congress did not add similar language to the ADEA recognizing mixed-motive claims, nor did Congress address another apparent holding of the divided *Price Waterhouse* Court, as expressed in Justice O'Connor's concurring opinion, that plaintiffs must present "direct evidence" of discrimination in order to pursue a mixed-motive claim.<sup>19</sup> Further adding to the confusion, the Court later held in *Desert Palace, Inc. v. Costa* that plaintiffs are not required to present direct evidence of discrimination in order to obtain a mixed-motive jury instruction under Title VII.<sup>20</sup>

Ultimately, the Court granted review in *Gross* in order to determine what types of evidence plaintiffs were required to present in order to receive a burden-shifting jury instruction in an ADEA mixed-motive case. Citing *Desert Palace*, *Gross* argued that plaintiffs in mixed-motive cases should be entitled to present both circumstantial and direct evidence.<sup>21</sup> Rather than focusing on the question presented, FBL argued that *Price Waterhouse* should be overruled and that the burden of proof in ADEA mixed-motive cases should fall on the employee.<sup>22</sup> In a highly unusual move, the Court's ruling focused on the issue raised in FBL's merit brief rather than on the question presented, thus meaning that interested parties were not given a full opportunity to address the issue in the briefs they submitted to the Court.

---

<sup>13</sup> 490 U.S. 228 (1989).

<sup>14</sup> *Id.* at 250.

<sup>15</sup> *Id.* at 258.

<sup>16</sup> P.L. 102-166, § 107(a).

<sup>17</sup> 42 U.S.C. § 2000e-2(m).

<sup>18</sup> If an employer demonstrates that it would have taken the same action even in the absence of the discriminatory motive, the employer is subject to lesser damages. *Id.* at § 2000e-5(g)(2)(B).

<sup>19</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989).

<sup>20</sup> 539 U.S. 90, 92 (2003).

<sup>21</sup> Reply Brief for Petitioner, *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009) (No. 08-441).

<sup>22</sup> Brief for Respondent, *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009) (No. 08-441).

## The Supreme Court's Decision

In *Gross*, the Court ultimately ruled 5-4 in favor of FBL. According to the Court, the ADEA does not authorize the type of mixed-motive claims that are available under Title VII. As a result, even though an employee may still bring a claim whenever an employer has mixed motives for the adverse employment action, the Court held that an employee must show that “age was the ‘but-for’ cause of the challenged adverse employment action.”<sup>23</sup> Because the Court found that the burden never shifts to an employer in such a case, there was no reason to determine what types of evidence a plaintiff must present in order to receive a burden-shifting jury instruction, thus rendering moot the question presented. In contrast to the Court’s decision, the appellate courts that had previously considered the issue had unanimously applied the *Price Waterhouse* mixed-motive framework to the ADEA.

In reaching its decision, the Court focused on the textual differences between Title VII and the ADEA. Unlike Title VII, the ADEA does not contain a provision allowing a plaintiff to establish discrimination by showing that age was a motivating factor. Indeed, the Court found it significant that Congress amended Title VII to add such a provision but did not choose to make a corresponding change to the ADEA. As a result, the Court held that because “Title VII is materially different with respect to the relevant burden of persuasion,” the *Price Waterhouse* burden-shifting framework, in which an employer bears the burden of proof once an employee establishes that his membership in a protected class played a motivating part in an employment decision, does not apply to ADEA claims.<sup>24</sup>

Turning to the language of the ADEA, the Court examined the statutory text and determined that the ADEA does not authorize the traditional type of mixed-motive claim available under Title VII.<sup>25</sup> Instead, the ADEA prohibits an employer from taking an adverse employment action against an individual “because of such individual’s age.”<sup>26</sup> Reasoning that “because of” age must mean that age is the reason behind the employer’s action, the Court concluded that an employee seeking to establish a disparate treatment claim under the ADEA must establish that age is the “but-for” cause of the employer’s action. Thus, the plaintiff, not the employer, bears the burden of persuasion.<sup>27</sup> According to the Court:

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motive cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the “but-for” cause of the challenged employer decision.<sup>28</sup>

In other words, employees can still bring mixed-motive ADEA claims in the sense that they can sue if an employer cites both permissible and impermissible reasons for their actions. However, now the employee has to prove that the impermissible reason—age—was the decisive factor, whereas under traditional Title VII mixed-motive claims, an employee must simply demonstrate

---

<sup>23</sup> *Gross*, 129 S. Ct. at 2352.

<sup>24</sup> *Id.* at 2348-49.

<sup>25</sup> *Id.* at 2350.

<sup>26</sup> 29 U.S.C. § 623(a)(1).

<sup>27</sup> *Gross*, 129 S. Ct. at 2350-51.

<sup>28</sup> *Id.* at 2351.

that the impermissible reason was only one of several motivating factors, at which point the burden shifts to the employer to prove it would have made the same decision in the absence of the discriminatory motive. Based on its decision, the Court remanded the case for a new trial.

Meanwhile, two separate dissents were filed in the *Gross* case. In the first dissent, Justice Stevens argued that the “because of” age language in the ADEA should be interpreted to prohibit employment actions motivated either in whole or in part by age. Specifically, the dissenting opinion noted that prior to the 1991 amendments that added the “motivating factor” language to Title VII, the Court in *Price Waterhouse* had interpreted identical “because of” language in that statute to encompass claims based on both permissible and impermissible reasons and should therefore apply the same interpretation to the ADEA.<sup>29</sup> Moreover, Justice Stevens was highly critical of the Court’s decision to issue an opinion based on a question that had not been presented or briefed by the parties. Therefore, he would have based his decision on the question presented and would have held that a plaintiff was not required to present direct evidence of age discrimination in order to obtain a mixed-motive jury instruction.<sup>30</sup> In the second dissent, Justice Breyer, who also joined the first dissenting opinion, wrote separately to highlight potential problems with extrapolating a “but-for” causation standard from tort law and applying that standard to the discrimination context.<sup>31</sup>

## Effect of the Decision

Ultimately, the *Gross* decision makes it harder for an employee to successfully prove an ADEA claim whenever an employer has both legitimate and illegitimate reasons for an employment action. There are two primary reasons for this. First, the new “but-for” causation standard established in *Gross* means that an employee now has to show that age was the deciding factor in an employment decision, not just one of several motivating factors. Second, after *Gross*, the employee always retains the burden of persuasion with respect to proving discrimination because the burden no longer shifts to the employer to prove that nondiscriminatory motives led to the employment decision, as it does under the *Price Waterhouse* burden-shifting mixed-motive framework that exists for Title VII.

It is also important to note that the *Gross* decision could potentially affect claims brought under statutes other than the ADEA. For example, several other employment discrimination statutes are patterned on Title VII, including the Americans with Disabilities Act and the Rehabilitation Act of 1973. Like the ADEA, these two statutes, which, among other things, prohibit employment discrimination on the basis of disability, were not amended as Title VII was to include language authorizing mixed-motive claims. Therefore, these statutes appear to be susceptible to the same interpretation that the Court applied to the ADEA. Although it is unclear how far the logic of *Gross* may extend, it is also conceivable that such an analysis could be applied to other non-discrimination statutes in which employees may sue employers, such as labor or whistleblower laws.

---

<sup>29</sup> Id. at 2353.

<sup>30</sup> Id.

<sup>31</sup> Id. at 2358-59.



In addition, the *Gross* decision may spur congressional efforts to overturn the ruling. Since *Gross* was decided on statutory grounds, several legislators who disagree with the Court's interpretation have introduced legislation that would amend the ADEA to clarify that a plaintiff establishes an unlawful employment practice under the ADEA or any other federal law prohibiting employment discrimination if the plaintiff demonstrates that the employment action was motivated by an impermissible factor.<sup>32</sup> Under this legislation (H.R. 3721/S. 1756), which would apply retroactively to all claims that were pending on or after the date of the *Gross* decision, a plaintiff would be able to rely on any form of circumstantial or direct evidence to establish such a claim, at which point the burden would shift to the employer to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor. Such congressional action is not uncommon. For example, in the wake of the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,<sup>33</sup> Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, which superseded the *Ledbetter* decision by amending Title VII to clarify that the time limit for suing employers for pay discrimination begins each time they issue a paycheck.<sup>34</sup>

## Author Contact Information

(name redacted)  
Legislative Attorney  
/redacted/@crs.l...g7-....

---

<sup>32</sup> The amendments would, with certain exceptions, also apply to any employment discrimination law forbidding retaliation or other laws that prohibit "retaliation against an individual for engaging in, or interference with, any federally protected activity, including the exercise of any right established by Federal law (including a whistleblower law); or any provision of the Constitution that protects against discrimination or retaliation." See also, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

<sup>33</sup> 550 U.S. 618 (2007).

<sup>34</sup> P.L. 111-2. For more information on the case and subsequent legislation, see CRS Report RS22686, *Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court's Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by (name redacted).

# EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.