Finds Employee Must Prove Age Was “But For” Cause Of Adverse Action

In a 5-4 decision, the U.S. Supreme Court held that an employee alleging a disparate treatment claim under the Age Discrimination in Employment Act (ADEA) must prove that age was the “but for” cause of the challenged adverse employment action. Justice Clarence Thomas, writing for the majority, ruled that even where the employee has produced evidence that age was one motivating factor in that decision the burden of persuasion does not shift to the employer to show that it would have taken the action without regard to age. Gross v. FBL Financial Services, Inc., No. 08-441, U.S. Supreme Court (June 18, 2009).

Factual Background

Jack Gross, an employee of FBI Financial Group, filed a lawsuit in April 2004 alleging that his reassignment to a “claims project coordinator” position was a demotion. Gross claimed that this demotion was due to his age, 53, as demonstrated by the fact that many of the responsibilities of his former position were transferred to a new position held by a woman in her early forties.

At trial in the district court, Gross presented circumstantial evidence demonstrating that he was highly qualified for the position given to the younger employee, that the younger employee was less qualified than Gross for the position, that Gross was never offered an opportunity to interview for the position, and that FBI’s explanations for his demotion were false. A jury awarded Gross $46,945 in lost compensation for his “illegal demotion” claim.

On appeal, however, the Eighth Circuit Court of Appeals overturned the judgment and returned Gross’ ADEA claim to the lower court for a new trial. The Eighth Circuit held that the trial judge improperly gave the jury an instruction on mixed-motive discharge, which switched the burden of proof to the employer, given that Gross failed to present any direct evidence of age discrimination.

A split among circuit courts existed on the question of whether direct evidence of age discrimination is required in mixed-motive cases. The First, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits have rejected the argument that direct evidence of age discrimination must be provided before a mixed-motive instruction is appropriate. On the other hand, the Second and Third Circuits have agreed with the Eighth Circuit, finding that direct evidence of age bias is a prerequisite to a mixed-motive instruction.
The "split" among the circuit courts stems from their interpretation of the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins, the impact of Congress' changes to the law in the 1991 Civil Rights Act, and the Supreme Court's 2003 decision in Desert Palace Inc. v. Costa. Under Price Waterhouse, before the burden of proof shifts to the employer in a mixed-motive case, the employee must show direct evidence that an illegitimate factor played a substantial role in the adverse employment decision. The circuits agree that the 1991 Civil Rights Act changed this rule with regard to mixed-motive cases brought under Title VII.

Further, in Desert Palace, the Supreme Court held that a mixed-motive instruction was appropriate in a Title VII case in which a jury had to evaluate evidence that an employer's decision was motivated by more than one factor, one prohibited by the statute and another which was not unlawful. However, how these rules are to be applied to the federal age discrimination law was the question presented by the Gross case to the Supreme Court.

**Legal Analysis**

Justice Thomas first considered whether the burden of persuasion ever shifts to the employer in an alleged mixed-motive discrimination claim brought under the ADEA. Arguing that Title VII and the ADEA are "materially different with respect to the relevant burden of persuasion," the majority reasoned that its analysis of this issue is not governed by Title VII decisions such as Price Waterhouse and Desert Palace. In arriving at this conclusion, the Court considered the fact that unlike Title VII, which Congress amended to authorize discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision, the ADEA does not allow employees to establish discrimination by showing that age was simply a motivating factor. The Court also found it relevant that when Congress amended Title VII it neglected to add such a provision to the ADEA. Presuming that Congress acted intentionally in amending Title VII but not the ADEA, the Court held that in a mixed-motive discrimination case brought under the ADEA, the burden of persuasion does not shift to the employer.

Justice Thomas next turned to the text of the ADEA to decide whether it authorizes a mixed-motive age discrimination claim. The Court interpreted the ADEA's requirement that an employer took an adverse action "because of" age to mean that age was the "reason" that the employer decided to act. Thus, to establish a disparate treatment claim under the ADEA, an employee must show that age was the "but for" cause of the employer's adverse decision.

Moreover, the Court found that Congress has not carved out any exceptions to this rule for a subset of ADEA cases. The Court thus concluded that to establish employer liability in mixed-motive cases, the employee retains the burden of persuasion to prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but for" cause of the employer's adverse decision.

Finally, the Court declined to find that the proper interpretation of the ADEA is controlled by Price Waterhouse. Finding that the burden-shifting framework established in Price Waterhouse is difficult to apply, the Court concluded that "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." As a result, the Supreme Court vacated the judgment of the Eighth Circuit and remanded the case for further proceedings.

**Practical Impact**
According to Gregg Lemley, a shareholder in Ogletree Deakins' St. Louis office:

"This well-reasoned decision is a resounding victory for employers' rights. What began as a question of when a burden-shifting analysis is appropriate became a referendum on whether it is ever appropriate. At least in the ADEA context, the Court answered that question with a resounding no; and the Court gave strong indication they may not stop there, calling into question the Court's earlier splintered decision in Price Waterhouse (which most courts have construed as establishing a mixed-motive analysis that shifts the burden of proof to employers in certain Title VII claims)."

Lemley continues, "This opinion is important for employers, who can now, at least in the ADEA context, rely on their ability to defend a decision that was not the result of age discrimination without the difficult burden of having to prove a negative. The case also continues a trend by the Court of recognizing both the inherent and the statutory differences involved in proving age bias as compared to other forms of discrimination. Particularly in today's workplace, where workforce reductions are the rule rather than the exception, and legitimate, non-discriminatory decisions can involve criteria that naturally correlate with age, or be muddied by facts unrelated to the ultimate decision, this is an important distinction. As a result, the Gross case is a key decision for employers."

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