

## SUPREME COURT RULES FOR EMPLOYER IN AGE DISCRIMINATION CASE

On June 18, 2009, the U.S. Supreme Court issued a 5-4 decision in *Gross v. FBL Financial Services, Inc.*, holding that a plaintiff bringing a disparate treatment claim under the federal Age Discrimination in Employment Act (ADEA) must prove by a preponderance of the evidence that age was the “but for” cause of the challenged adverse employment action. As a result, an ADEA plaintiff must now prove that the employer would not have taken the adverse employment action at issue “but for” the employee’s age.

The decision eliminates the availability of a “mixed motives” claim in a federal age discrimination case; this means an employee can no longer prevail by showing the employer acted with mixed motives – one of which was the employee’s age. Previously, if a plaintiff showed that discrimination was a “motivating” or a “substantial” factor in the employer’s action, many courts shifted the burden to the employer to show that it would have taken the same action regardless of the impermissible consideration.

In its June decision, the Supreme Court refused to shift this burden to the employer, thereby making it somewhat easier for employers to defend against claims under the ADEA.

### Facts of the Case

Jack Gross began working for FBL Financial Group, Inc. in 1971, and by 2001 he held the position of claims administration director. But in 2003, at age 54, Gross was reassigned to the position of claims project coordinator. At the same time, FBL transferred many of his job responsibilities to a newly created position – claims administration manager – that was given to Lisa Kneeskern, who was in her early 40’s and had been supervised previously by Gross.

Although Gross and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL’s reallocation of his former job responsibilities. He sued FBL in 2004, alleging that his reassignment violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee “because of such individual’s age.”

At trial, Gross presented circumstantial evidence suggesting his reassignment was based at least in part on his age. FBL defended its decision, saying Gross’ reassignment was part of a corporate restructuring and that the new position was better suited to his skills. At the close of the case, the trial court gave a mixed motives instruction to the jury. The court instructed the jury that it must return a verdict for Gross if he proved that his age was a motivating factor in his reassignment and that it must find for FBL if the company proved that Gross would have been reassigned regardless of his age. The jury returned a verdict for Gross.

FBL challenged the jury instructions on appeal, and the Eighth Circuit Court of Appeals reversed the verdict, holding that the trial court’s jury instructions were improper. The Eighth Circuit found that a mixed motives jury charge is improper unless the plaintiff has presented direct, as opposed to circumstantial, evidence of age discrimination.

Because Gross had failed to present any direct evidence of age discrimination, the Eighth Circuit determined that it was improper for the trial court to give a mixed motives instruction to the jury.

### Underlying Legal Issue

The Eighth Circuit joined a split among circuit courts as to whether there is a requirement for direct evidence of discrimination in a mixed motives case. Three circuits have held that there must be direct evidence of discrimination before a mixed motive jury instruction can be given; six circuit courts have rejected such a requirement. There is no reported decision on the issue from the Fourth Circuit Court of Appeals, which covers North and South Carolina.

The split among the circuit courts arose from the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*, in which the Court determined that before the burden of persuasion shifts to the employer in a mixed motives case, the employee must show direct evidence that an impermissible factor played a “substantial role” in the adverse employment decision.

The 1991 Civil Rights Act subsequently changed the rule with respect to mixed motives cases under Title VII. The Act authorized discrimination claims in which an improper consideration was a “motivating factor” for, as opposed to playing a “substantial role” in, an adverse employment decision. The Supreme Court recognized this statutory change in 2003 in *Desert Palace, Inc. v. Costa*.

However, these decisions arose in the context of Title VII and not the ADEA, thereby setting the stage for the issue before the Court in the *Gross* case.

### Supreme Court Narrows Scope of Claim

In their appeal, the parties in the *Gross* case assumed a mixed motives claim was permissible under the ADEA and petitioned the Court to determine whether direct evidence was required to establish a mixed motives age discrimination claim. However, before reaching that question, the Court decided to address the threshold issue of whether a mixed motives ADEA claim is permissible under any circumstances.

Noting that Title VII and the ADEA are “materially different” with respect to the relevant burden of persuasion, the Court reasoned that its analysis of the issues in the *Gross* case were not governed by Title VII or decisions like *Price Waterhouse* or *Desert Palace*. The Court also found that nothing in the text of the ADEA authorized a mixed motives age discrimination claim.

Ultimately, the Court concluded that the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate treatment action. Thus, 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. The Eighth Circuit’s judgment was vacated and the case was remanded for further proceedings.

## Conclusion

This decision will likely make it easier to defend against federal age discrimination claims because it effectively raises the standard for ADEA claimants. However, age is still a protected category, and employers must still take care to comply with the ADEA as well as state laws prohibiting age discrimination when taking adverse action against employees. Careful review of adverse employment decisions before they are implemented can help reduce litigation risk.

### HOT HR QUESTIONS

Our complimentary, one-hour breakfast briefing in September will focus on "Hot HR Questions." We will discuss a handful of pesky, but important, legal questions regularly encountered by HR Departments. For example, one such question may be, "How should we handle deductions from final paychecks?" We welcome your suggested questions. To contribute a question or to join our invitation list, please email: [sbegley@nexsenpruet.com](mailto:sbegley@nexsenpruet.com).

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#### **N|P** Employment and Labor Law Group

##### **CHARLESTON**

843.577.9440

Cherie Blackburn  
Molly Hughes Cherry  
Josh Ellis

##### **CHARLOTTE**

704.339.0304

Sean Phelan  
Grainger Pierce

##### **COLUMBIA**

803.771.8900

Mike Brittingham  
Jennie Cluverius  
Kristian Cross  
David Dubberly  
Vickie Eslinger  
William Floyd  
Joan Hartley  
Angus Macaulay  
Susi McWilliams  
Nikole Mergo  
Sue Odom  
Sam Painter

##### **GREENSBORO**

336.373.1600

Trudy Ennis  
Peter Pappas  
Bill Wilcox

##### **GREENVILLE**

864.370.2211

Grant Burns  
Jamie Hedgepath  
Leon Harmon  
Rusty Infinger  
Michael Pitts  
Tom Stephenson

##### **HILTON HEAD**

843.689.6277

Melissa Azallion

##### **MYRTLE BEACH**

843.213.5400

Cherie Blackburn  
Molly Hughes Cherry

##### **RALEIGH**

919.755.1800

Joe Diab  
David Garrett  
Ernie Pearson

#### **NEXSEN | PRUET**

