



A NEW STANDARD FOR AGE DISCRIMINATION CASES?

High court ruling casts uncertainty over state employment laws

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On June 18, Justice Clarence Thomas, writing for the majority of a sharply divided Supreme Court in *Gross v. FBL Financial Services Inc.*, relied on the dictionary — rather than two decades of Supreme Court precedent — to reject the availability of “mixed motive” claims under the Age Discrimination in Employment Act (ADEA).

Although widely trumpeted as a decision favorable to employers, the court’s reasoning in *Gross* is highly questionable and casts a cloud of uncertainty over Connecticut’s state employment discrimination laws. It is also likely to generate a legislative response from Congress.

Understanding the court’s recent decision requires some history. In 1964, Congress enacted Title VII of the Civil Rights Act, which outlaws employment discrimination “because of” certain protected characteristics — sex, race, color, national origin, and religion. Just three years later, Congress passed the ADEA, which as its title suggests, prohibits employment discrimination “because of” age. Given the textual similarities between the two laws, federal courts historically construed the ADEA’s proof requirements consistent with those of Title VII, in accordance with the burden-shifting paradigm of the Supreme Court’s 1973 decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792.

The Supreme Court first recognized the



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applicability of a “mixed motive” analysis in its seminal 1989 decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228. Specifically, the court ruled that an employment decision is made “because of sex” (or another protected characteristic) when it is taken wholly or partly “because of” that protected characteristic, as long as the characteristic was a “substantial motivating factor” for the decision. *Price Waterhouse* further held that once a “plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.”

At the time the Supreme Court decided *Price Waterhouse*, Title VII’s prohibition against sex discrimination was framed in exactly the same “because of” language contained in the ADEA. Consequently, in the aftermath of *Price Waterhouse*, federal courts uniformly applied *Price Waterhouse*’s mixed-motive analysis to claims under the ADEA.

Price Waterhouse proved to be a contro-

versial decision, viewed by many civil rights advocates as diluting Title VII’s protections. As a result, in passing the Civil Rights Act of 1991, Congress modified the *Price Waterhouse* doctrine to provide that a Title VII violation occurs when an employee establishes that any of Title VII’s protected characteristics were “a motivating factor, even though other factors also motivated the practice.”

In cases where the employer demonstrates that it would have taken the same action in the absence of the impermissible Title VII factor, Congress limited the remedy to attorney’s fees, costs and injunctive relief, and expressly disallowed an order of reinstatement, admission, promotion, or back pay. Congress did not, however, similarly amend the ADEA. As a result, federal courts logically continued to apply the *Price Waterhouse* paradigm in mixed motive cases arising under the ADEA.

That changed with the Supreme Court’s decision in *Gross*. There, the court concluded that discrimination “because of” age means that age was the “reason” the employer decided to act. Thus, the court held that “to establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.” In so doing, the majority foreclosed the possibility of mixed motive cases under the ADEA, despite the fact that the ADEA’s “because of” language mirrors that of Title VII at the time *Price Waterhouse* was decided. Indeed, the majority rejected the argument

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that *Price Waterhouse* controls its interpretation of the ADEA, in direct contravention of its own precedent, which had long construed Title VII and the ADEA coextensively.

Intrinsically Tortured

Notwithstanding that the majority's reasoning in *Gross* is intrinsically tortured, it also creates a host of problems for the real-world employment litigator. As the *Gross* dissent points out, the majority decision woefully complicates the task of judges and juries in the relatively common situations where discrimination claims are brought under both Title VII and the ADEA.

For example, under *Gross*, a female plaintiff bringing age and gender discrimination claims can proceed on a mixed motive theory on her gender discrimination claim, but not her age claim. The presiding judge may instruct the jury that, with respect to the gender discrimination claim, the legal standard is "motivating factor" and the defendant has the burden of persuasion that it would have taken the adverse action regardless of the plaintiff's gender, while with regard to the age discrimination claim, the standard is "but for" the plaintiff's age and the plaintiff has the burden of persuasion. The jury would then face the task of trying to sort through these conflicting standards and burdens of proof.

Further complicating matters, many plaintiffs bring their discrimination claims under both state and federal law simultaneously. In Connecticut, all employment discrimination — age, gender, race, disability, etc. — is governed by a single statutory scheme, the Connecticut Fair Employment Practices Act, which prohibits discrimination "because of" a protected characteristic. Connecticut

courts have long interpreted FEPA's prohibitions as coextensive with their federal statutory analogues, having the same contours and proof requirements. To that end, mixed motive age discrimination claims, decided in accordance with *Price Waterhouse*, are well-established under FEPA.

Risk Of Confusion

After *Gross*, courts applying Connecticut law are in a bind. Using the simple example cited by the *Gross* dissent, where a plaintiff alleges both gender and sex discrimination, and assuming the plaintiff asserts both federal and state claims, consider the options.

If Connecticut courts reject the applicability of *Gross* to claims brought under

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FEPA, judges will have to provide juries with four distinct instructions, setting forth three distinct proof structures: a Title VII mixed motive instruction on the federal gender discrimination claim; a *Price Waterhouse* instruction on the state gender claim; a "but for" *Gross* instruction on the federal age claim; and a *Price Waterhouse* instruction on the state age claim. The danger of

serious confusion is obvious.

Conversely, following *Gross* literally and barring mixed motive cases under FEPA with respect to age claims only, while continuing to recognize other mixed motive claims under FEPA, would yield absurd results. Specifically, fact-finders would be forced to apply different standards to age discrimination claims under FEPA than to other FEPA discrimination claims (such as gender, national origin, religion, marital status, and disability discrimination claims, to name a few), even though they arise under the same statute and pursuant to the same statutory language.

The only other alternative for Connecticut courts is to accept *Gross*' reasoning in its entirety, and reject all mixed motive cases pursuant to FEPA's "because of" language. This approach would force Connecticut courts to jettison decades of precedent, without alleviating juror confusion. Under such an approach, jurors would still be faced with Title VII mixed motive claims and state "but for" discrimination claims, with dueling instructions and proof requirements.

Ultimately, the *Gross* majority's decision to narrow the protections of the ADEA, coupled with the disparity created between Title VII and the ADEA, is likely to prompt congressional action. We saw it in the Civil Rights Act of 1991 in response to *Price Waterhouse*, we saw it 2008 with the passage of the ADA Amendment Act in response to various Supreme Court decisions under the Americans with Disabilities Act, and we saw it earlier this year with the passage of the Lilly Ledbetter Fair Pay Act. There is little doubt that this activist Congress and Democratic administration will respond similarly to the *Gross* decision. ■