

## JULY 2009 LEGAL ALERT Notice:

### US SUPREME COURT HOLDS PLAINTIFFS IN AGE DISCRIMINATION SUIT TO HIGHER STANDARD

In an important ruling that increases the burden on plaintiffs in cases under the federal Age Discrimination in Employment Act (ADEA), the United States Supreme Court held on June 18, 2009 that plaintiffs in age discrimination cases always bear the burden of proving that an adverse employment action would not have been taken against them "but for" their age. *Gross v. FBL Financial Services, Inc.*, No. 08-441. This ruling draws a distinction between the ADEA and Title VII, under which plaintiffs need only show that their membership in a protected class was a "motivating factor" in an employer's action, and eliminates any shifting of the burden of persuasion in so-called "mixed motive" cases under the ADEA.

#### 1. Background

FBL Financial Group, Inc. (FBL) reassigned longtime employee Jack Gross to a new position when he was 54. Gross considered the reassignment a demotion, and he filed an ADEA suit in District Court. At trial, Gross introduced evidence that suggested his reassignment was at least partially based on his age. The judge instructed the jury that it should return a verdict for Gross if it found that "age was a motivating factor" in FBL's decision to demote him, and defined a "motivating" factor as one that "played a part or a role" in the decision. The judge further instructed the jury that it should return a verdict for FBL if FBL proved, by a preponderance of the evidence, that it would have demoted Gross regardless of his age. The jury found for Gross, and FBL subsequently appealed. The United States Court of Appeals for the Eighth Circuit reversed, holding that the judge had instructed the jury incorrectly under the standard established in *Price Waterhouse v. Hopkins*, a 1989 Supreme Court case that set out the burden of persuasion in "mixed-motives" cases under Title VII, where the plaintiff alleges that both permissible and impermissible considerations played a part in the adverse employment action. Although there was no majority decision in *Price*

*Waterhouse*, six Justices agreed that if a plaintiff in a Title VII case demonstrated that discrimination was a motivating factor behind the employer's action, the burden of persuasion shifted to the employer to show it would have taken the same action regardless of the plaintiff's membership in a protected class.

Justice O'Connor, a member of this plurality, found that in order to shift the burden of persuasion to the employer, the employee must present "direct evidence" that the illegitimate consideration was a substantial factor in the employer's decision. The Eighth Circuit found Justice O'Connor's opinion for shifting the burden of persuasion controlled, and held that the District Court's jury instruction was flawed because it allowed the burden of persuasion to shift to FBL if there was a preponderance of *any* evidence showing age was a motivating factor, rather than requiring *direct* evidence.

#### 2. The Supreme Court's Decision

The Supreme Court granted certiorari to answer the question of whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive instruction in a non-Title VII discrimination case. But the Court never reached this question. Instead, Justice Thomas, writing for the majority, joined by Justices Scalia, Kennedy, Alito and Chief Justice Roberts, focused on the antecedent question of whether the burden of persuasion *ever* shifts to the defendant in a mixed-motive discrimination case brought under the ADEA. The Court held it does not, based, primarily, on textual differences between the ADEA and Title VII.

Although at the time the Court decided *Price Waterhouse* the language of Title VII and the ADEA was the same (*i.e.*, making it unlawful to discriminate in terms and conditions of employment "because of" membership in the applicable protected class), the Supreme Court declined to extend the *Price Waterhouse*

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burden-shifting framework to ADEA claims. In reaching this conclusion, the Court emphasized that, after *Price Waterhouse*, Congress amended Title VII to provide for liability if discrimination was “a motivating factor” for the adverse employment decision, but it did not make a comparable amendment to the ADEA, which continues to make it unlawful to discriminate “because of” age.

The Court held that to establish that the challenged adverse employment action was “because of” the employee’s age, the employee must prove that “but for” his age, the employer would not have taken the adverse action against him. The Court went on to note the practical difficulties the lower courts have experienced in applying the *Price Waterhouse* burden-shifting framework, finding that such difficulties have eliminated any perceivable benefit to extending the framework to ADEA claims.

In an ardent dissent, which was joined by Justices Souter, Ginsburg and Breyer, Justice Stevens criticized the majority’s “unabashed display of judicial lawmaking.” The dissent stresses that the *Price Waterhouse* analysis is still valid and that the text of the ADEA requires only that age play some role in motivating a prohibited employment action, not that age be the “but for” reason for the employer’s decision.

Justice Breyer authored a separate dissent, joined by Justices Souter and Ginsburg, in which he discussed the difficulty of an employee proving an employer would not have taken an action “but for” an employee’s age because the employer is in a much better position to establish what his motives were in making a decision.

### 3. Implications for Employers

The Supreme Court’s decision is a significant win for employers defending against age discrimination claims. The decision clearly articulates the burden on plaintiffs bringing age discrimination claims, requiring them to show that “but for” their age, the employer would not have taken the adverse employment action. This standard increases the likelihood

for pro-employer decisions at summary judgment and, if necessary, trial. Although employers will still want to introduce evidence to show that adverse employment actions were motivated by factors other than age, they will no longer have the burden to persuade jurors that age was not a motivating factor in the adverse action.

The elimination of the complicated burden-shifting paradigm is a double-edged sword in some respects. While it will simplify the analysis and help reduce jury confusion in cases limited to ADEA claims, it may lead to increased confusion, as noted by Justice Stevens, in cases in which the plaintiff is asserting both Title VII and ADEA claims because Title VII cases remain subject to the “motivating factor” standard pursuant to statute.

Unfortunately, employers may not have a very long opportunity to appreciate the benefits of the Supreme Court’s decision. This decision has already piqued the interest of Senator Patrick Leahy (D-Vt.), who criticized the opinion as “overreaching by a narrow majority of the Court [that] will have a detrimental effect on all Americans and their families.” Leahy compared the decision to the Court’s ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, which was obviated by Congress this year. Indeed, the fate of *Gross* may be the same as that of *Ledbetter*: a short-lived victory for employers.

As always, if you have any questions regarding this Client Alert, please contact your Proskauer relationship attorney or any of the attorneys listed below.

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