The Impact of *Gross*: Is It Too Much to Stomach?

By Anthony M. Rainone

On my birthday this past year, the U.S. Supreme Court decided *Gross v. FBL Financial Services, Inc.*,[1] which held that the Age Discrimination in Employment Act (ADEA), unlike Title VII, does not provide a cause of action for mixed-motive age discrimination. Although this decision was not first on my wish list, it was a welcome decision for employers. The U.S. Supreme Court reiterated an old rule of statutory construction. That is, Congress's intent is expressed in the plain language of the statute. That rule's continued validity may be debatable in more humorous legal circles (if there is such a thing) given the admission by several elected officials that they have not read some of the legislation adopted over the past few years. But what is not debatable is that less than a year later, *Gross*'s reach may not stop with the ADEA. Left open by the *Gross* decision is the continued viability of the *McDonnell Douglas* burden shifting to ADEA claims.

In its 1989 *Price Waterhouse v. Hopkins* decision,[2] the Supreme Court addressed the allocation of the burden of persuasion in mixed-motive cases under Title VII. A mixed-motive claim under Title VII arises when the employee alleges an adverse employment action occurred because of both permitted and prohibited considerations (i.e., "mixed-motives"). If the employee could show that illegal discrimination under Title VII was a motivating or substantial factor for the adverse action, the burden of persuasion then shifted to the employer to show it would have taken the same action regardless of the discriminatory reasons.

In *Gross*, the Court held that this mixed-motive framework was unavailable in ADEA actions. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[3] In *Gross*, the Eighth Circuit construed that provision and held that direct evidence—not circumstantial evidence—consists only of the evidence that shows a specific link between the discriminatory animus and the adverse action. Absent direct evidence, the employee could not obtain a mixed-motive jury instruction. Rather, the jury should be instructed to decide whether the employee met the of proving that age was the determining factor for the adverse action.

On appeal to the Supreme Court, the parties in *Gross* framed the issue as whether the plaintiff must present direct evidence of discrimination to obtain a mixed-motive jury instruction in an ADEA VII case. The Court, however, took a different view, framing the issue as whether the burden of persuasion *ever* shifts to the employer defending a mixed-motive claim under the ADEA. In the end, the Court decided that due to the absence of statutory support, the burden of persuasion *never* shifts to the employer in a mixed-motive claim under the ADEA.

The Court found that Title VII and the case law thereunder materially differ from the ADEA. The Court discussed the 1989 birth of the mixed-motive instruction in *Price Waterhouse* and Congress's subsequent Title VII amendments in 1991, which incorporated a mixed-motive claim under Title VII. The amendment authorized discrimination claims where race, color, sex, or national origin was a "motivating factor" for an adverse employment action.[4] However, in those amendments, Congress also limited the remedies available for a successful mixed-motive claim.[5]

Significantly, Congress did not make similar amendments to the ADEA in 1991—even though Congress amended the ADEA contemporaneously. The Supreme Court, moreover, had never held that the *Price Waterhouse* burden-shifting framework applied to the ADEA. The Court wrote that it would not ignore the fact that Congress declined to amend the ADEA as it amended Title VII. Instead, the plain language of the ADEA prohibits an adverse action "because of" age, which the Court construed to require that age be the but-for cause of the adverse employment action. In the absence of a mixed-motive provision similar to Title VII, the Court refused to extend the ADEA by allowing a plaintiff to succeed by simply showing that age was a motivating factor, rather than the but-for cause.

The *Gross* decision strengthens the role statutory construction plays in limiting the protection of employment statutes to that for which Congress has expressly provided and nothing more. Therefore, the burden of persuasion in a mixed-motive claim under the ADEA is the same as in any other ADEA claim. That is, the employee must prove—by either direct or circumstantial evidence—that age was the but-for cause of the adverse action, not simply that it was a factor.

What Remains of the *McDonnell Douglas* Burden Shifting

One important aspect of *Gross* is the majority's footnote that the Court still has not decided whether the *McDonnell Douglas* burden-shifting framework employed in Title VII cases applies to ADEA cases. The Court noted that neither Title VII nor the ADEA addresses the *McDonnell Douglas* framework. And the absence of statutory support in the ADEA was the basis for the Court's refusal to allow a mixed-motive claim under the ADEA.

Despite the uncertainty on this issue, the lower courts continue to apply the *McDonnell Douglas* burden-shifting analysis. Following *Gross*, the Sixth Circuit in *Geiger v. Tower Automotive*[6] concluded that its precedent has long found *McDonnell Douglas* useful in analyzing circumstantial-evidence claims under the ADEA and stated it will continue to use *McDonnell Douglas* unless the Supreme Court rules to the contrary. Several other district courts have also continued to apply *McDonnell Douglas* to ADEA claims, in part because the parties in the cases have not disputed its continued application.

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One court, however, modified the *McDonnell Douglas* test for ADEA claims in light of *Gross*. In *Bell v. Raytheon Co.*,[7] the district court stated it would not shift the burden to the employer to articulate a legitimate nondiscriminatory reason for an adverse action unless the plaintiff showed that age was the but-for cause of the adverse action. In *Bell*, the court found that the plaintiff could not establish that the adverse action was because of his age and, therefore, the burden never shifted to the employer in spite of the plaintiff establishing a prima facie claim of discrimination under the classic *McDonnell Douglas* test—namely, establishing that the adverse action occurred under circumstances giving rise to an inference of discrimination. Also, in *Woehl v. Hy-Vee, Inc.*,[8] in what can be interpreted as a "belt and suspenders" approach, the district court analyzed an ADEA claim both with and without the *McDonnell Douglas* burden shifting. The court concluded that the plaintiff could not establish but-for causation under either approach.

Beyond the ADEA

Not surprisingly, *Gross* has already impacted several other federal employment laws, a trend that may very well continue. On the same date the Court decided *Gross*, the Sixth Circuit heard argument in *Hunter v. Valley View Local Schools*[9] involving the federal Family and Medical Leave Act (FMLA). The employee asserted a retaliation claim under the FMLA, arguing that her employer illegally considered her FMLA leave in deciding to place her on involuntary leave. The district court granted summary judgment for the employer, but the Sixth Circuit reversed.

The Sixth Circuit analyzed the language of the FMLA in light of *Gross*'s dicta that Title VII jurisprudence does not automatically control the interpretation of other employment statutes. The FMLA provides that "[i]t shall be unlawful for any employer to *interfere* with, restrain, or deny the exercise or the attempt to exercise, any right provided under [the FMLA]."[10] That language, on its own, did not appear to support a mixed-motive claim under the reasoning in *Gross*. But the court turned to the FMLA regulations, which state that the phrase "interfere" prohibits an employer from discriminating or retaliating against an employee "for having exercised or attempted to exercise FMLA rights."[11] The regulation also states that "employers cannot use the taking of FMLA leave as a *negative factor* in employment actions. . . ."[12]

Contrary to *Gross*, the *Hunter* court held that mixed-motive claims were viable under the FMLA. In so holding, it relied upon the FMLA regulations prohibiting the employer from considering FMLA leave as a negative factor when making employment decisions. Therefore, the Sixth Circuit will continue to apply the *Price Waterhouse* burden-shifting framework to FMLA retaliation claims. Because the employee had presented direct evidence that her use of FMLA leave was a motive for an adverse employment action, the burden of persuasion shifted to the employer to prove that it would have made the same decision absent the impermissible motive.

Gross has also been applied to reject a mixed-motive claim under the Jury Systems Improvement Act (Juror Act).[13] This federal law provides, "[n]o employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee *by reason of* such employee's jury service . . . ."[14] In *Williams v. District of Columbia*,[15] a guidance counselor claimed she was transferred to another school as a result of her four-month absence from work because of her service on a capital-case jury. Although the court found, after trial, that the plaintiff was credible and a testifying school representative was not, the court nonetheless held that, at best, the plaintiff presented a mixed-motive claim, which did not exist under the Jury Act in light of the *Gross* decision. The court compared the ADEA's language ("because of") and the Jury Act's language ("by reason of") and found them to mean the same thing (i.e., that the guidance counselor needed to show that her jury service was the but-for cause of her transfer). Although the court had no doubt that the jury service was a motivating factor for the transfer, there was no evidence that it was the but-for cause. Therefore, the court dismissed the claim.

Price Waterhouse: Down but Not Out

One often overlooked aspect of the *Price Waterhouse* decision is that, if an employer proves that it would have taken the same action in the absence of the discriminatory factor, it constitutes a complete bar to liability. But when Congress amended Title VII in 1991, it overruled this aspect of *Price Waterhouse*. Employers no longer had a complete bar to liability in a mixed-motive claim. Even if the employer established that the same action would have occurred absent the illegal factor, an employee would still be entitled to recover attorney fees and certain limited declaratory and injunctive relief (excluding damages, reinstatement, hiring, promotion, or payment) if he or she established that an illegal consideration was a motivating factor.[16]

Gross left unresolved the case law applying the *Price Waterhouse* framework to employment statutes that were not amended when Congress amended Title VII in 1991. For example, some circuit courts have held that the 1991 Title VII amendments do not apply to section 1981, while the Ninth Circuit has held to the contrary.[17] As such, also unresolved is whether or not *Price Waterhouse*'s original decision, which includes an employer's absolute defense to liability in a mixed-motive claim, still applies to other employment statutes.

The Second Circuit had previously applied *Price Waterhouse* to section 1981 claims.[18] Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."[19] One week after the *Gross* decision, the district court in *Hardy v. Town of Greenwich*[20] revisited the issue of whether the Title VII amendments or the *Price Waterhouse* decision still applied to section 1981 claims. Complicating this determination is the fact that section 1981's language is not remotely analogous to either Title VII or the ADEA.

In *Hardy*, several patrol officers claimed they were disciplined, demoted, and denied promotions because of their race, in violation of section 1981. The court, faced with several in limine motions before trial, found that the Title

VII amendments did not apply to section 1981. Rather, the court found that Second Circuit precedent holds that *Price Waterhouse* still applies to section 1981 claims, in part because the but-for language in *Gross* does not exist in section 1981. The court, therefore, questioned whether *Gross* even applied. In the end, the district court found that the employer was subject to a mixed-motive claim but still had available to it an absolute defense to liability as set forth in the *Price Waterhouse* decision.

Employers will hail the *Gross* decision as a well-reasoned decision that limits age-discrimination claims to that for which Congress has provided. Congress is free to overrule the Supreme Court by simply amending the statute to provide for a mixed-motive cause of action similar to Title VII. Unless and until that happens, however, employers have gained a valuable defense in the expanding arena of age-discrimination claims.

Endnotes

1. 129 S. Ct. 2343 (2009).
2. 490 U.S. 228, 109 S. Ct. 1775 (1989).
3. 29 U.S.C. § 623(a)(1) (emphasis added).
4. 42 U.S.C. § 2000e-2(m).
5. 42 U.S.C. § 2000e-5(g)(2)(B).
6. 579 F.3d 614 (6th Cir. 2009).
7. 2009 WL 2365454 (N.D. Tex. Jul. 31, 2009).
8. 637 F. Supp.2d 645 (S.D. Iowa 2009).
9. 579 F.3d 688 (6th Cir. 2009).
10. 29 U.S.C. § 2615(a) (emphasis added).
11. 29 C.F.R. § 825.220(c).
12. *Id.* (emphasis added).
13. 28 U.S.C. § 1875.
14. 28 U.S.C. § 1875 (emphasis added).
15. 646 F. Supp.2d 103, (D.D.C. 2009).
16. 42 U.S.C. § 2000e-5(g)(2)(B).
17. *Compare* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n. 5 (3d Cir. 2009); Mabra v. United Food and Commercial Workers Union Local Union No. 1996, 176 F.3d 1357, 1357–58 (11th Cir. 1999) *with* Metoyer v. Chasman, 504 F.3d 919, 934 (9th Cir. 2007).
18. *See, e.g.*, Gant v. Wallingford Bd. of Educ., 195 F.3d 134 (2d Cir. 1999).
19. 42 U.S.C. § 1981.
20. 629 F. Supp.2d 192 (D. Conn. 2009).