

ADEA Decision III-Timed in Tougher Economy

BY STEVEN D. IRWIN

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On the eve of retirement, with savings severely diminished, the burden of what is clearly the worst economic crisis since the Great Depression has fallen heavily on older workers. In order to provide for their families and for themselves, they have little choice but to remain in the workforce and postpone retirement.

With roughly 14.7 million Americans unable to find work, the national unemployment rate reached 9.5 percent this summer. Companies attempting to avoid bankruptcy have undergone significant restructuring and downsizing, and a substantial and at times disproportionate number of layoffs have involved older workers. The unemployment rate for workers aged 55 and over has increased 143 percent since the start of the recession. Never have laws prohibiting workplace age discrimination, such as the Age Discrimination in Employment Act of 1967 (ADEA), been more relevant.

The ADEA, which applies to individuals 40 years and older, prohibits employers from, among other things, discharging employees because of their age. Although damages for pain and suffering and emotional distress cannot be properly awarded in ADEA cases, if an employer violates the act, an employee can be awarded back pay and liquidated damages, as well as front pay. Therefore, the recent U.S. Supreme Court ruling changing the proof required to succeed in workplace age discrimination cases under this act has great significance.

The court in *Gross v. FBL Financial Services Inc.* held that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence (either direct or circumstantial), that age was the but-for cause of the challenged adverse employment action. In addition, the court decided when a plaintiff produces evidence that age at least was among the factors



STEVEN D. IRWIN

joined Leech Tishman Fuscald & Lampl as a partner in 2001. He chairs the firm's employment and government relations practice groups and focuses his practice on civil litigation, with an emphasis on employment, securities, construction and contract matters, unfair

competition, trademark disputes, government investigations and other business issues. He can be contacted at 412-261-1600.

motivating that decision, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age.

This new standard, which increases employees' burden of proof at trial, will make it more difficult for individuals to bring successful workplace age discrimination cases against their employers.

Before *Gross*, employers defending against allegations of age discrimination likely would have been subject to, and more vulnerable under, the standard established in *Price Waterhouse v. Hopkins* for mixed motive cases brought under Title VII of the Civil Rights Act of 1964.

Under *Price Waterhouse*, a cause of action for discrimination arises when an employee's membership in a protected class is a motivating or substantial factor in the employer's action. The burden of persuasion then shifts to the employer to prove that it would have taken the same action regardless of that impermissible consideration.

Furthermore, a number of the U.S. circuit courts of appeals (but not the 3rd) have gleaned further guidance from Justice Sandra Day O'Connor's concurring opinion in *Price Waterhouse*, which posited that in order to shift the burden of persuasion to the employer, the employee must present direct evidence that an illegitimate criterion was a substantial factor in the employment decision.

In *Gross*, a 54-year-old employee who had worked for FBL Financial Services for more than 30 years was reassigned from claims administration director to claims project coordinator. Many of Gross's job responsibilities were transferred to a newly created position and given to an employee in her early forties, whom Gross previously supervised. Although both employees received the same compensation, Gross considered the reassignment a demotion since his former job responsibilities were reassigned to the younger co-worker.

He filed suit in the U.S. District Court for the Southern District of Iowa, arguing that this reassignment violated the ADEA. At the close of the trial, the district court gave the jury a mixed motives jury instruction.

In turn, FBL appealed to the 8th U.S. Circuit Court of Appeals and challenged the district court's mixed-motive jury instruction. The 8th Circuit reversed and remanded for a new trial, holding that under the standard of *Price Waterhouse*, the jury was improperly charged.

The court reasoned that the district court's jury instructions were flawed because they allowed the burden of persuasion to shift to FBL upon a preponderance of any category of evidence showing that age was a motivating factor, not just direct evidence. The 8th Circuit defined "direct evidence" as evidence that shows a specific link between the alleged discriminatory animus and the challenged decision.

Because Gross conceded that he did not provide direct evidence of discrimination, the court of appeals held that the district court should never have given the mixed-motives jury instruction, but instead should have required Gross to prove that age was a determining factor.

In the petition for a writ of certiorari, which was granted, the Supreme Court was asked to determine whether a plaintiff must present direct evidence in order to obtain a mixed-motives jury instruction under the ADEA. Put differently, was

O'Connor's concurrence now the law of the land? However, in its opinion, the court went beyond the question presented to decide that mixed-motives jury instructions are never proper under the ADEA. Three arguments underlay its holding.

First, the court distinguished that since Congress in 1991 amended Title VII, but not the ADEA, in regard to the burden shifting framework in mixed-motives cases, such Title VII decisions as *Price Waterhouse* do not govern actions under the ADEA.

Second, the court looked to the ordinary meaning of the language of the ADEA to accurately define Congress's intent. The pertinent text states that it is "unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

The court read the term because of to mean by reason of. Hence, to establish employer liability in ADEA disparate-treatment cases the burden rests with the plaintiff to persuade the trier of fact, by a preponderance of the evidence, that age is the but-for cause of the challenged employer decision.

Third, the court noted that the difficulty juries encounter in applying the burden shifting framework counseled against extending it to ADEA cases.

With the court's adopting a more stringent standard of proof at trial for disparate-treatment claims under the ADEA, *Price Waterhouse's* motivating factor and burden shifting paradigm no longer applies to these cases. The newly implemented but-for analysis with the burden of persuasion never shifting to the employer is now controlling — an employee must prove that but for his or her age, the adverse employment action would not have occurred. This hurdle gives a significant advantage to employers in a time when employees' leverage and resources are already severely strained.

Lawyers considering whether to represent older workers will want prospective clients to present witnesses and records that show more overtly that age, above other considerations, resulted in their termination reassignment or demotion. Companies where an anti-age mindset was present, if not prevalent or institutionalized, may exhibit less flexibility in compromising disputes.

The narrow 5-4 decision in *Gross*, with Justice John Paul Stevens's strong dissent, has led to speculation that Congress may overturn this ruling. Stevens protested that not only did the court misinterpret the statute, but it engaged in unnecessary lawmaking. Whereas discrimination claims under Title VII and the ADEA, which contain the same "because of"

employment related laws as the American with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Certainly, parties found liable under the ADEA on a mixed-motive theory will have grounds for retrial.

Regardless of whether Congress legislatively overturns *Gross* or its standard and order of proof is extended to other statutes, it is clear that the decision in *Gross* is very relevant for the aging American workforce.

Melissa Krasnow, a summer associate with the firm, assisted in the writing of this article. •

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language, always have been similarly interpreted, they now have distinct applications. Title VII cases still interpret "because of" to trigger the motivating factor analysis, while "because of" under the ADEA now means a but-for approach.

It remains to be seen if this new standard of proof will have any effect on such other