

# Employment, Labor and Benefits | Appellate Alert: U.S. Supreme Court Scores One for Employers in “Mixed-Motives” Age Discrimination Cases

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On June 18, 2009, the U.S. Supreme Court decided the case of *Gross v. FBL Financial Services, Inc.*, No.08-441, which significantly changes the evidence necessary to prove an age discrimination claim. The Court held that “a plaintiff must prove that age was the ‘but for’ cause of the employer’s adverse decision” to “establish a disparate-treatment claim under” the Age Discrimination in Employment Act (the ADEA). In doing so, the Court rejected case law holding that a plaintiff could prevail in an ADEA action by establishing that age played a motivating part in an adverse employment decision. This holding represents a departure from existing precedent, and favors employers by making it more difficult for employees to prevail on an ADEA claim.

## Background of *Gross*

Plaintiff Jack Gross claimed that his employer discriminated against him because of his age when it reassigned him to a new position, while transferring many of his former job responsibilities to a newly created position occupied by a younger employee. Plaintiff proceeded to trial on the theory that his employer’s decision was motivated, at least in part, by his age. The employer defended plaintiff’s claim on the ground that he was reassigned as part of a corporate restructuring. The trial court instructed the jury that it should find for the plaintiff if it believed that age played “a part or role” in the employer’s decision to reassign plaintiff.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the District Court, finding that a plaintiff in a “mixed-motives” case was required to show direct evidence that an illegitimate criterion played a part in plaintiff’s reassignment, before the burden shifted to the employer to show that the decision would have been made absent consideration of the illegitimate criterion.

## The Former Analysis in “Mixed-Motives” Cases

Mixed-motives cases are those in which employers take adverse employment actions against employees both because of their membership in a protected class and because of non-discriminatory reasons. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court held that “once a plaintiff in a Title VII case proves that [the plaintiff’s membership in a protected class] played a motivating part in an employment decision,” the burden of proof shifts to the employer to demonstrate that the decision would nevertheless have been made without regard to

the protected class membership. This burden of proof was applied to mixed-motives cases. While *Price Waterhouse* was a Title VII case, many courts applied the analysis to ADEA claims. *See, e.g., Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27 (1st Cir. 2003); *Donovan v. Milk Marketing, Inc.*, 243 F.3d 584 (2d Cir. 2001).

## Gross Changes the ADEA Landscape

The Court in *Gross* held that the Title VII analysis employed in mixed-motive cases does not apply to ADEA claims. The Court observed that Title VII expressly provides—as was the holding of *Price Waterhouse*, and as opposed to the ADEA—that an unlawful employment practice occurs if a protected category plays a “motivating factor” in taking an employment action. *See* 42 U.S.C. §2000e-2(m). Noting that the ADEA contained no such language, the Court stated that its interpretation was not governed by Title VII decisions. Instead, it 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.”

The holding in *Gross* represents a victory for employers because it raises the bar for plaintiffs to show that they suffered an adverse employment action in violation of the ADEA. We anticipate that employers will have a higher success rate in disposing of ADEA claims at trial because plaintiffs will retain the burden to show that age ultimately caused the negative employment decision.

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

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