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Assessing the Impact of 'Gross' On Employment Discrimination Cases

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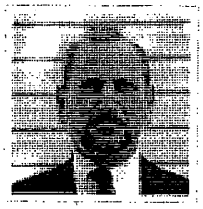

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Last year, in *Gross v. FBL Financial Services*,[1] the U.S. Supreme Court ruled that the Age Discrimination in Employment Act (ADEA) does not permit a plaintiff to prove discrimination using the mixed-motive analysis. Under the mixed-motive method, an employee may establish an employer's liability for unlawful discrimination by showing that while both legitimate and illegitimate considerations motivated an adverse employment action, illegitimate ones were decisive. The Court's decision came as something of a shock because by 2009 the mixed-motive analysis was a well-established way of proving discrimination under the federal equal employment opportunity laws, including the ADEA. Already, legislation has been introduced in both Houses of Congress to retroactively reverse the decision.

After a year, what has been *Gross*' impact, and if not overridden by Congress, what will the decision's future effect be on employment discrimination litigation? This article addresses three questions arising out of *Gross*: One, will prohibition on using the mixed-motive method be extended to other statutory claims? Two, will scrapping the mixed-motive theory make proving employment discrimination harder? And three, does dicta in *Gross* requiring that discrimination be the "but-for" cause of an adverse employment action substantially tighten the causation standard?

History

Broadly speaking, courts have recognized two ways of proving employment discrimination in disparate treatment cases. Under the framework articulated by the Supreme Court in *McDonnell Douglas v. Green*,[2] the plaintiff focuses his or her proof on showing that the employer's professed reason for the challenged decision was false and a pretext for discrimination. The pretext method involves shifting evidentiary burdens and presumptions that, in the final analysis, drop out of the case, leaving the trier of fact with the ultimate question of whether the plaintiff has proven "that the defendant intentionally discriminated against him or her because of a protected trait."[3]

In 1989, a plurality of the Supreme Court, in *Price Waterhouse v. Hopkins*,[4] set out an alternative way of proving discrimination, the mixed-motive method. The Court had used the mixed-motive analysis to decide constitutional claims,[5] but not until *Price Waterhouse* had the Court approved the method for proving discrimination under Title VII of the Civil Rights Act of 1964. In a mixed-motive case, both legitimate and illegitimate reasons motivated the employer to take adverse action against an employee. The plaintiff has the burden of proving that bias was a motivating, but not necessarily the only reason for the employer's decision.

In accordance with Justice Sandra Day O'Connor's concurring opinion, which proved influential among the lower courts, a plaintiff needs to present "direct evidence" of discrimination to demonstrate that it played a motivating factor in the employer's decision. If the plaintiff makes such a showing, the burden of persuasion shifts to the defendant to prove that it would have made the same decision for legitimate reasons. Only if the defendant establishes that it would have taken the same action regardless of any discriminatory motive, is it relieved of liability.

In 1991, Congress amended Title VII to codify *Price Waterhouse's* holding that an employment practice is unlawful if discrimination was a "motivating factor," "even though other factors also motivated the practice."[6] Unlike *Price Waterhouse*, where the employer is absolved of liability upon proving that it would have made the same decision for legitimate factors, under the amended Title VII the employer remains liable, but liability is limited. The plaintiff is entitled only to declaratory and injunctive relief as well as attorney's fees, but not to money damages or reinstatement.[7]

In 2003, the Supreme Court modified somewhat the mixed-motive analysis in *Costa v. Desert Palace Inc.*[8] *Desert Palace* considered whether, in a Title VII mixed-motive case, a plaintiff had to prove that discrimination was a motivating factor through "direct evidence," as Justice O'Connor's concurrence in

Price Waterhouse suggested. In *Desert Palace*, the Supreme Court jettisoned the direct evidence requirement, and held that, at least under Title VII, a plaintiff could demonstrate that discrimination was a motivating factor through circumstantial evidence as well as direct evidence.

Direct vs. Circumstantial

Gross was expected to be the sequel to *Desert Palace*. In *Gross*, the Court was presented with the related question of the kind of evidence of discrimination, under the ADEA, the plaintiff needed to present to prove that age discrimination was a "motivating factor": must it be direct or, as in *Desert Palace*, did circumstantial evidence suffice? *Gross*, however, proved to be no *Desert Palace II*. The five-member *Gross* majority made moot the issue of direct versus circumstantial evidence by holding, as a threshold matter, that the ADEA did not authorize the dual motivation theory. The Court reasoned that, unlike Title VII, Congress had not amended the ADEA to make unlawful employment practices only partially motivated by discrimination.

While *Gross* was undoubtedly correct that the ADEA, unlike Title VII, did not explicitly authorize the mixed-motive analysis, neither was it proscribed. The dual motivation theory, as crafted in *Price Waterhouse* (and before that, in cases involving constitutional claims), was a judge-made doctrine, not grounded in specific statutory language and pre-dating the 1991 Civil Rights Act. *Gross* could have recognized the mixed-motive method's viability under the ADEA simply by extending *Price Waterhouse's* rationale.

The *Gross* majority, however, showed little regard for *Price Waterhouse*, questioning its basic "doctrinal soundness." The Court rejected out of hand the idea that the burden of persuasion ever shifts onto the employer in a discrimination case. The Court also found that *Price Waterhouse's* "motivating factor" standard set the bar too low for establishing liability. The Court declared that in an ADEA disparate treatment action the plaintiff has the burden of persuasion that "age was the 'but-for' cause of the challenged decision."

It is fair to say that an uproar greeted *Gross* for disturbing 20 years of case law applying the mixed-motive method to the ADEA. Justice John Paul Stevens, writing for the dissent, objected to the majority's "unnecessary lawmaking" in addressing a question for which certiorari had not been granted and was raised for the first time in the respondent's brief. The New York Times editorial page called the decision "dreadful," stating that the Court "rewrote the rules litigating age-discrimination cases in favor of employers."[9] Within a few months of the decision, the "Protecting Older Workers Against Discrimination Act," reversing *Gross* retrospectively, was introduced into the Senate and House of Representatives.[10]

After 'Gross'

In the wake of *Gross*, will the courts invalidate the mixed-motive method for other anti-discrimination statutes? Before *Gross*, courts generally applied the mixed-motive analysis to other employment statutes even if, like the Americans with Disabilities Act and the Family Medical Leave Act,[11] they lacked explicit language authorizing its use. After *Gross*, courts have divided on whether the mixed-motive theory is still viable under those laws. Some courts, following *Gross*, have invalidated use of the mixed-motive method in connection with the ADA, Title VII retaliation claims, and other statutes not amended by the Civil Rights Act of 1991.[12]

By contrast, a number of courts have refused to jettison dual motivation liability so long as *Price Waterhouse* has not been overturned.[13] As for the U.S. Court of Appeals for the Second Circuit, when interpreting Title II of the ADA (prohibiting disability discrimination by state and local governments), it expressed doubt that ADA mixed-motive liability survives *Gross*.[14]

Deprived of the mixed-motive method, will plaintiffs find it more difficult to win ADEA claims, and depending on how widely *Gross* is extended, other types of discrimination suits? It is doubtful that the unavailability of dual motivation liability will make proving discrimination any harder. This is so because the mixed-motive jury instruction is equally, if not more, helpful to defendants than to plaintiffs. The instruction, to the detriment of plaintiffs, requires the trier of fact to train its focus on the ultimate question of whether the employer had reason enough to fire or not hire the employee, regardless of prejudice—effectively making discrimination a secondary issue. It is no surprise, then, that as the Second Circuit observed, "[u]sually it is the defendant who wants the jury instructed on an affirmative 'dual motivation' defense."[15]

'But-For' Causation

Finally, with *Gross*, plaintiffs must show that under the ADEA (and possibly, other statutes in the future) discrimination was the "but-for" cause of the challenged employment decision. Where formerly some circuits, including the Second, held that under the pretext or *McDonnell Douglas* framework, a plaintiff established ADEA liability by showing that discrimination played a "motivating part," or "made a difference," now "but-for" causation is required.

In *Gorzynski v. JetBlue Airways Corporation*, the Second Circuit stated, "*Gross* makes clear that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove...that age was the 'but-for' cause of the challenged adverse employment action and not just a contributing or motivating factor."[16]

What is "but-for" cause and how different is it from the causation standard current before *Gross*? At least for purposes of proving discrimination, the term has not been defined with any precision, and the difference between "but-for" and "motivating factor" remains elusive. *Gross'* cursory discussion of "but-for" causation was not very illuminating.

The Court observed that the ADEA makes it unlawful to discriminate "because of" age. Relying upon the dictionary, *Gross* defined "because of" as "by reason of" or "on account of," and from there made the linguistic leap of equating "because of" with "but-for" cause. The Court cited approvingly another ADEA case, *Hazen Paper Co. v. Biggins*,[17] where it described "cause" as, "the employee's protected trait actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome." The language quoted from *Hazen Paper* was as close as *Gross* got to defining "but-for" cause.

After *Gross*, concerns were raised that under the "but-for" cause standard plaintiffs would need to show that age discrimination was the "sole" reason for the adverse treatment.[18] These fears, however, were overblown. *Hazen Paper* required only that the illicit motive play "a role"—not "the role"—and be "a determinative influence"—not "the determinative influence."

In his dissent in *Price Waterhouse*, Justice Anthony Kennedy further distinguished "but-for" cause from the sole or primary cause: "[S]ex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, i.e., but-for cause."[19]

"But-for" could not mean sole or predominant cause without making the discrimination laws unworkable. Take the recurrent situation of a plaintiff suing an employer for terminating his or her employment as part of a reduction-in-force (RIF). Ordinarily, the plaintiff will not contest the legitimacy of the employer's decision to carry out the RIF. Instead, the plaintiff will try to prove that he or she was chosen for the layoff because of a protected trait or because the employer's selection process was biased. Even if the plaintiff were successful in showing that the RIF's selection process was discriminatory, the primary cause of the termination nevertheless would be the RIF itself. Yet one would be hard pressed to deny that an employer should be held liable for using a discriminatory RIF to fire an employee, even if it were not the predominant cause of the layoff.

As interpreted by the Second Circuit, the meaning of "motivating factor" is not very different from "but-for" cause. The definitions of "but-for" cause found in *Hazen Paper* ("a determinative influence") and Justice Kennedy's *Price Waterhouse* dissent ("ma[king] a difference to the decision") are virtually indistinguishable from the Second Circuit's formulations of "motivating factor": "motivated at least in part;"[20] "a determinative factor;"[21] "a motivating factor;"[22] "a substantial factor"[23] and played a "substantial role" that "made a difference" to his employer's actions.[24]

Luciano v. Olsten Corp., a Second Circuit decision, underscores the basic similarity between "but-for" and "motivating factor." In *Luciano*, the defendants argued that the trial court erred when it instructed the jury that discrimination must be "a motivating factor," contending that the proper standard was a "determinative" reason. The Second Circuit upheld the trial court's instructions, noting that the court had explained "motivating factor" as meaning the same thing as "determinative factor." The appeals court stated, "[A]ny divergence between the meaning of 'motivating' and 'determinative' as used by the district court in its jury charge was merely a distinction without a difference."[25] As noted, "determinative influence," which the Second Circuit found synonymous with "motivating factor," was *Hazen Paper's* definition of cause, cited approvingly in *Gross*.

There is no meaningful difference between "but-for" cause now required by the Supreme Court and "motivating factor" used by the Second Circuit before *Gross*. If there is a difference, no court has articulated one. At least in the Second Circuit, therefore, *Gross* will not have a significant impact on the causation requirement in disparate treatment cases.

Conclusion

The *Gross* Court is certainly vulnerable to criticism for deciding an issue not properly before it and going out of its way to reverse 20 years of case law recognizing the mixed-motive method in ADEA cases. However, in terms of its impact on plaintiffs in bringing age and possibly other statutory claims, it is likely that the decision is less momentous than initially feared (or hoped for).

Moreover, as shown by passage of the Lilly Ledbetter Fair Pay Act of 2009, overturning the Court's construction of Title VII's statute of limitation provisions in *Ledbetter v. Goodyear Tire & Rubber Co.*,[26] and the ADA Amendments Act of 2008, reversing a series of restrictive ADA rulings, Congress has proven itself ready to overturn what it considers the Supreme Court's cramped interpretations of the civil rights laws. A statutory repeal of *Gross* may likewise be in the offing.

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Endnotes:

1. 129 S.Ct. 2343 (2009).

2. 411 U.S. 792 (1973).

3. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

4. 490 U.S. 228 (1989).

5. See, e.g., *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977).

6. 42 U.S.C. §2000e-2(m).

7. 42 U.S.C. §2000e-5(g)(2)(B).

8. 539 U.S. 90 (2003).

9. New York Times Editorial, "Age Discrimination," July 7, 2009.

10. See H.R. 3721 and S. 1756.

11. See Moar, D. and Budzinski, S., NYSBA Labor and Employment Law Journal, "Mixed Motive Causation under the Americans with Disabilities Act," Spring 2010, at 30-31. Even before *Gross*, courts generally held that Title VII retaliation claims could not be proven through the mixed-motive method because the Civil Rights Act of 1991 established "motivating factor" liability only for Title VII discrimination claims, not retaliation claims.

12. See *Serwatka v. Rockwell Automation Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (ADA); *Awad v. National City Bank*, 2010 WL 1524411 (N.D. Oh. April 15, 2010) (retaliation); *Williams v. Dist. of Columbia*, 646 F. Supp.2d 103 (D.D.C. 2009) (Jury Systems Protection Act).

13. See *Smith v. Xerox Corp.*, 2010 WL 1052837 (5th Cir. 2010) (Title VII retaliation claim); *Hunter v. Valley View Local Schools*, 579 F.3d 688, 692 (6th Cir. 2009) (FMLA); *Fuller v. Gates*, 2010 WL 774965 (E.D. Tex. March 1, 2010) (ADEA's federal employer provision); *Doe v. Deer Mountain Day Camp Inc.*, 2010 WL 181373 8 n.40 (Jan. 13, 2010) (ADA); cf. *Brown v. J. Kaz Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009), (42 U.S.C. §1981).

14. *Bolmer v. Oliveira*, 594 F.3d 134, 148 (2d Cir. 2010).

15. *Fields v. New York State*, 115 F.3d 116, 122 (2d Cir. 1997).

16. 596 F.3d 93,106 (2d Cir. 2009) (inner quotations omitted).

17. 507 U.S. 604, 610 (1993).

18. "Age Bias Is Harder to Prove," Wall Street Journal, Nov. 22, 2009 (quoting AARP attorney that "but-for cause" is "widely interpreted as meaning sole cause"), http//online.wsj.com.articles.

19. 490 U.S. 228, 284 (Kennedy, J., dissenting); see also *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976) (plaintiff need not prove that he would have been rejected or discharged "solely on the basis of his race...; no more is required to be shown than that race was a 'but for' cause").

20. *Tomassi v. Insignia Financial Group Inc.*, 478 F.3d 111,114 (2d Cir. 2007).

21. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983).

22. *Parker v. Sony Pictures Entertainment Inc.*, 260 F.3d 100, 109 (2d Cir. 2001).

23. *Owen v. Thermatool Corp.*, 155 F.3d 137, 139 & n.1 (2d Cir. 1998).

24. *Fields*, 115 F.3d 116 at 120.

25. 110 F.3d 210, 219 (2d Cir. 1997).

26. 550 U.S. 618 (2007).