

**Reflections on *Gross v. FBL Financial Services* –  
Age Really Is Different**

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There is no dispute as to the Supreme Court’s holding in its 2009 *Gross v. FBL Financial Services, Inc.*<sup>1</sup> decision: the plaintiff in an ADEA case at all times bears the burden of persuasion to “prove that age was the ‘but-for’ cause of an employer’s adverse decision” and, accordingly, a “mixed-motives” instruction shifting the burden of proof to the employer under the “splintered” decision in *Price Waterhouse v. Hopkins*<sup>2</sup> never is appropriate. Numerous commentators have addressed the relative merits of the various arguments in the majority and dissenting opinions in *Gross*,<sup>3</sup> and this paper will touch upon those issues only tangentially.

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<sup>1</sup> *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).

<sup>2</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>3</sup> See, e.g., Jon D. Bible & Donald Sanders, *Gross v. FBL Financial Services, Inc.: Supreme Court Radically Changes the Ground Rules for Proving ADEA Claims*, CCH EMP. L.J. (2009); Michael C. Harper, *The Causation Standard In Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motive Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399 (2009); Michael Newman & Faith Isenhath, *Supreme Court Gives Mixed-Motive Analysis A Mixed Review*, 56-AUG FED. LAW. 16 (2009); Robert G. Haas, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor Standards Act Criteria to Rest*, 55 GEO. WASH. L. REV. 382 (1986-87); Kelli A. Webb, *Learning How to Stand on Its Own: Will the Supreme Court’s Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?*, 66 OHIO ST. L.J.1375 (2005); Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination As Differential Treatment*, 46 AM. BUS. L.J. 607 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010); Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279 (2010).

Rather, in light of the difficulty employers (and others) have in keeping up with the ever-more-Byzantine edifice of employment discrimination laws and the uncertainty created by differing standards applicable to particular such laws, the questions posed here are as follows: Does age differ significantly from other protected characteristics in employment discrimination laws? Do any such differences justify a distinct quantum of proof in ADEA cases than that which applies to discrimination laws based on other characteristics? If so, does the “but-for” standard enunciated in *Gross* achieve the right result? And, finally, a year after *Gross*, what has the effect of the decision been for employers and in the courts?

My conclusions concerning these issues are that the legal standard for ADEA claims set forth in *Gross* both makes sense and that its practical effect in the courts (for claimants and for employers) has been vastly overstated. Likewise, based on the differences between age and other types of protected characteristics and the available data relating to the application of *Gross* in the lower courts, I believe that changes to the standards enunciated in *Gross* are unwarranted and that Congress should resist the urge to address *Gross* in a discrete and reactive fashion.

## **I. A Brief Overview of the *Gross* Opinions**

In *Gross*, the Supreme Court was presented with a case in which the district court had instructed the jury that it should find for the plaintiff, Jack Gross, if Gross proved that age was a “motivating factor” in the employer’s decision to demote him, but also had instructed the jury that it should find in favor of the employer if it would have demoted Gross regardless of his age. The jury found for Gross. The Eighth Circuit, relying on *Price Waterhouse*, held that the jury should not have given a mixed-motives jury instruction because Gross failed to present direct evidence that age was a motivating factor. The Court of Appeals, therefore, determined that the burden of proof should not have shifted to the employer. The Supreme Court granted certiorari to determine whether direct evidence was required to obtain a mixed-motives jury instruction in an ADEA case.<sup>4</sup>

Before reaching the question on which certiorari was granted, the Court concluded that it first was required to decide whether the burden of persuasion ever shifts to a party defending an alleged mixed-motives case under the ADEA. The Court declined to apply Title VII case law to the ADEA, observing that “[u]nlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age simply was a motivating factor.”<sup>5</sup> Noting that the ADEA provides that “[i]t shall be 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,”

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<sup>4</sup> *Gross*, 129 S. Ct. at 2346-48.

<sup>5</sup> *Id.* at 2349.

the Court determined that this language has its “ordinary meaning” – that “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”<sup>6</sup>

In reaching this conclusion, the Court reasoned that Congress had “neglected to add such a provision to the ADEA when it amended Title VII to add [the motivating factor and remedies language], even though it contemporaneously amended the ADEA in several ways . . . .”<sup>7</sup> The Court, therefore, held that a mixed-motives jury instruction “is never proper in an ADEA case.”<sup>8</sup>

Writing for four Justices in dissent, Justice Stevens claimed that the majority had “engage[d] in improper lawmaking” by improperly adopting an interpretation of the ADEA that was at odds with the Court’s previous interpretation of identical language in Title VII in *Price Waterhouse* and with the same interpretation employed by Congress when it amended Title VII in 1991. Justice Stevens simply would have held that an ADEA plaintiff “need not present direct evidence of age discrimination to obtain a mixed-motives instruction,” which was the question presented in the certiorari petition.<sup>9</sup> While the dissent agreed that the Civil Rights Act of 1991 change to the same-action defense (from one of defense to liability to one of defense to damages) did not apply to the ADEA, the dissent simply reasoned that this meant that Congress intended

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<sup>6</sup> *Id.* at 2350 (emphasis in original), citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (protected trait must actually have a “determinative influence on the outcome”). The Court also commented that the “burden-shifting framework [of *Price Waterhouse*] is difficult to apply,” and that the lower courts have found it “particularly difficult to craft an instruction” for the framework in a jury trial. *Id.* at 2352. Thus, even if *Price Waterhouse* originally had been “doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.” *Id.* Justice Thomas did not directly address the Court’s interpretation in *Price Waterhouse* of the same statutory language in Title VII, other than to observe that the Court previously has declined to interpret Title VII and the ADEA uniformly and that the textual differences between the two statutes preclude application of *Price Waterhouse* and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), to federal age discrimination claims. See also text related to n. 7, *infra*.

<sup>7</sup> Justice Thomas, writing for the Court, described the holding of *Price Waterhouse*, indicating that once a Title VII plaintiff establishes that his membership in a protected class “played a motivating part in the employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account.” 129 S. Ct. at 2349. The Court found it significant that Congress subsequently had amended Title VII in the Civil Rights Act of 1991 explicitly to authorize the “motivating factor” language and to permit certain remedies even when the employer is able to prove the same-decision defense. *Id.*

<sup>8</sup> *Id.* at 2346.

<sup>9</sup> *Id.* at 2353 (Stevens, J., dissenting).

that the original construction of the “because of” language and the mixed-motives construct from *Price Waterhouse* to apply to ADEA cases.<sup>10</sup>

## **II. Age And Age-Based Claims Are Different Than Other Protected Characteristics And The Claims Based On Those Characteristics.**

As an initial matter, age is different in many respects than other types of characteristics serving as the basis for statutory protections. In *Massachusetts Board of Retirement v. Murguia*,<sup>11</sup> the Supreme Court declined to treat age as a suspect classification under the Equal Protection Clause, noting that

. . . even *old* age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage that each of us will reach if we live out our normal span.<sup>12</sup>

Indeed, those over 40 years of age generally are better off economically than the population as a whole and may well be the most politically powerful group in our nation. Even without citing supporting statistics, there can be little doubt that workers over 40 have a statistically larger percentage of higher-level positions and above-average compensation than do those under 40

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<sup>10</sup> *Id.* at 2356. Justice Stevens relied in large measure on the Court’s analysis in *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). In that case, the Court applied the disparate-impact framework from *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), largely on the basis that Congress had not amended the ADEA when it amended Title VII to “flatly repudiate[]” the *Wards Cove* approach. *Id.* Consequently, the Court had applied the pre-1991 interpretation of Title VII’s language to the ADEA. Despite his insistence that the original construction and application of *Price Waterhouse* was the appropriate outcome, however, Justice Stevens was willing readily to jettison the “direct” evidence requirement Justice O’Connor had fashioned in that case. It is important to recall that the direct evidence aspect of Justice O’Connor’s opinion was intended to ensure that the highly unusual step of shifting the burden of proof to the employer was – and would remain – rare. See *Price Waterhouse*, 490 U.S. at 261 (O’Connor, J., concurring).

<sup>11</sup> 427 U.S. 307 (1976).

<sup>12</sup> 427 U.S. at 313-14 (emphasis added).

years of age.<sup>13</sup> Unlike Title VII or the Americans With Disabilities Act, both of which were intended to protect groups that traditionally had been disadvantaged victims of discrimination, the ADEA protects a characteristic that is ubiquitous and inevitable absent some intervening illness or event, as aging is a universal process.

In addition, any number of decisions affecting our lives are based, at least in part, on age. The ADEA itself incorporates various exceptions recognizing this fact, particularly relating to insurance, benefit, and retirement plans.<sup>14</sup> Moreover, as Professor George Rutherglen has recognized in discussing generalizations based on age:

[F]irst, everyone's physical and mental abilities decline at some point with age, more steeply for some individuals than others and more steeply in some jobs than others; second, the countervailing benefits of age, such as experience and judgment, do not invariably outweigh the loss of these abilities; third, the period over which older workers can gain and utilize new skills necessarily is shorter than for younger workers; and fourth, more accurate methods of evaluation, such as individualized testing, may cost enough to outweigh the gain in accuracy that they achieve.<sup>15</sup>

While all of these observations may not be applicable in any specific instance, they apply with sufficient frequency to differentiate age from other discrete groups provided statutory anti-discrimination protection.

**A. Empirical and Statistical Data Reveal Key Differences Related To Age-Based Claims**

Beyond the differentiating factors of wealth, power, and the aging process itself that distinguish age from other protected characteristics, the empirical data relating to age and to age-

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<sup>13</sup> See U.S. Census Bureau, Current Population Survey, 2008, *available at* [www.census.gov/population/socdemo/gender/2008gender\\_table19.csv](http://www.census.gov/population/socdemo/gender/2008gender_table19.csv) (setting forth distribution of earnings of full-time workers by age) (Annual Social and Economic Supplement). In view of the fact that almost 64 million U.S. workers were age 45 or over in 2008 (out of a workforce of approximately 154 million), the earnings statistics plainly reflect that – as a whole – those protected by the ADEA have higher earnings and more household income and wealth than those not in the protected group. See, e.g., U.S. Bureau of Labor Statistics, “Employment and Earnings Online,” January 2009, Table 578 – “Civilian Labor Force – Percent Distribution by Sex and Age: 1980 to 2008,” *available at* [www.bls.gov/opub/ee/home.htm](http://www.bls.gov/opub/ee/home.htm).

<sup>14</sup> See 29 U.S.C. § 623(f), (g) & (i).

<sup>15</sup> G. Rutherglen, *From Race To Age: The Expanding Scope Of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 499 (1995) (discussing statistical theory of age discrimination and implausibility of balance of efficiency prohibiting generalizations related to age) (hereafter cited as “Rutherglen”).

based claims confirm and further support that age is different from various other characteristics protected by federal and state statutes prohibiting discrimination in important ways. There are two significant sources of comparative information about different types of discrimination claims – the most recent American Bar Foundation (“ABF”) study of almost 2000 employment discrimination cases filed in seven federal judicial districts<sup>16</sup> and the annual EEOC statistics relating to Charges of Discrimination filed with the agency.<sup>17</sup> These data sets provide revealing information about age discrimination claims and those bringing them.

The 2008 ABF Study covers the period from 1987-2003, and follows an earlier ABF study covering the period from 1972-1987. Both studies evaluated a large sample of randomly selected federal employment discrimination cases over the study period, determining information regarding the percentage of cases by type of discrimination asserted, the nature of challenged employment practices, and the demographic characteristics of plaintiffs in those cases.<sup>18</sup> In the 2008 ABF Study, age discrimination claims accounted for almost a quarter of the sample cases, exceeded only by cases alleging race and sex discrimination.<sup>19</sup> While employment discrimination cases as a whole involve allegations of illegal termination slightly less than 60 percent of the time, this rate is even higher in age discrimination cases, in which unlawful firing claims approximate 70 percent.<sup>20</sup>

Even more notable than the percentage of claims alleging unlawful termination, however, is the demographic make-up of the plaintiffs in age discrimination cases. The vast majority of age claimants are male (63 percent) and a significantly greater proportion are white (well in excess of 50 percent) than in other types of cases. In fact, in terms of the race of plaintiffs bringing age cases, the claims filed by whites are more than double the next nearest demographic

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<sup>16</sup> L. Nielsen, et al., *Contesting Workplace Discrimination in Court – Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003* (American Bar Foundation 2008) (available at [www.americanbarfoundation.org/publications/195](http://www.americanbarfoundation.org/publications/195)) (hereafter cited as “2008 ABF Study”); see also L Nielsen, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (June 2010) [hereafter cited as “*Individual Justice*”]; see J. Donohue, et al., *The Changing Nature of Employment Discrimination Litigation*, 43 STANFORD L. REV. 983 (1991) (discussing previous study).

<sup>17</sup> EEOC Charge Statistics Report, 1997-2009.

<sup>18</sup> See 2008 ABF Study at 1-2, 48; *Individual Justice*, 7 J. EMPIRICAL LEGAL STUD. at 181-84.

<sup>19</sup> 2008 ABF Study at 4; cf. U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 Through FY 2009 (showing that ADEA-based charges accounted for approximately 23% of the total charges filed over the period 2000-2009), available at [www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (hereafter cited as “FY 2009 EEOC Charge Statistics”).

<sup>20</sup> *Id.* at 6, 8. Virtually all of the asserted claims are single-plaintiff, disparate treatment cases. *Id.* at 11-12.

group, African-Americans.<sup>21</sup> Further, almost two-thirds of the age cases are ADEA-only cases and do not have other types of discrimination claims associated with them.<sup>22</sup>

Yet another striking difference between those asserting age discrimination and certain other types of claims is the place that the plaintiffs in those cases occupy in the workforce. Almost half of all age discrimination plaintiffs (45 percent) are (or were) in managerial or professional positions, with another 39 percent in sales, service or administrative positions; a mere 16 percent of age cases involve blue collar workers.<sup>23</sup> By comparison, the 2008 ABF Study found that only 30 percent of race discrimination plaintiffs and only 29 percent of disability plaintiffs had managerial or professional jobs.

An interesting aspect of the 2008 ABF Study relates to the role of EEOC determinations. In the almost 2000 cases assessed, the ABF Study found that only 23 percent of the cases were ones in which the EEOC had made a finding before the lawsuit was filed; almost 80 percent of the cases – including age claims – were cases with no EEOC determination. Of the 23 percent of court cases in which the EEOC issued a determination, 21 percent of the findings were “probable cause” findings (i.e., 4.83 percent of the court cases had probable cause findings), whereas the remaining 79 percent were determinations that the EEOC was unable to conclude that the statute at issue had been violated.<sup>24</sup> This finding is virtually identical to the Charge Statistics data from EEOC, which shows that EEOC makes reasonable cause findings in ADEA cases only at about a 3-to-4 percent level over a long period of time.<sup>25</sup> At the same time, the EEOC data show that, while it has not occurred in a straight-line progression, the number of ADEA-based Charges has

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<sup>21</sup> *Id.* at 25-26. While the 2008 ABF Study data indicate that 49% of age claimants are white, this appears to significantly understate the percentage of white claimants since 21% are categorized as “other,” seemingly because it was not possible to discern from the court filings the race of the plaintiff in each of the age discrimination cases. Undoubtedly, a significant portion of this “other” category consists of white claimants, thus driving the percentages of white claimants up by at least as much as another 10%. In fact, Professor Rutherglen observed based on the data from the previous ABF study covering 1972-87 that “Plaintiffs under the ADEA are typically white . . . . It is correspondingly easier for them to obtain a jury largely of the same race and age and from the same economic class.” Rutherglen, *supra* n. 8, at 502 (data showed that 74% of plaintiffs in ADEA-only cases were white). The comparative rates from the 2008 ABF Study in regard to sex discrimination claims also is interesting and informative, as the claims made by whites and African-Americans are much closer to parity: 41% of claims are made by whites and 35% by African-Americans. *Id.* at 24.

<sup>22</sup> Only about one-third of the cases in the 2008 ABF Study involved more than one type of claimed discrimination. 2008 ABF Study at 5 (Figure 2.3).

<sup>23</sup> *Id.* at 26.

<sup>24</sup> *Id.* at 14. The “no probable cause” cases in court amounted to slightly over 18% of the total cases.

<sup>25</sup> FY 2009 EEOC Charge Statistics for ADEA Charges.

increased to a level in FY 2009 that is almost 50 percent greater than the number of Charges received by the EEOC in FY 2000.<sup>26</sup> This undoubtedly is in large measure due both to the substantial increase in older workers as the Baby-Boom generation ages and to unfavorable economic conditions, particularly in 2008 and 2009; it will bear watching to determine whether this trend is economics-driven, if there are other underlying motivators, and if it continues.

Thus, considering the foregoing information, one might legitimately ask, does this information have implications for how we evaluate age-based discrimination claims? The empirical data relating to age discrimination plaintiffs strongly suggest that an age plaintiff is far more likely than other kinds of employment discrimination plaintiffs to be both white and male, as well as being more likely to hold a managerial, professional, or service position. As noted above, older workers tend to have higher-level incomes in any event than do younger demographic groups, and employees filling predominantly managerial or service jobs (particularly the white males doing so) are not particularly known for their lack of political power, social helplessness, or economic disadvantage. The higher compensation levels also make these employees more likely candidates for termination by companies trying to cut costs in a poor economic environment, particularly when the high compensation is accompanied by poor or average performance. These facts alone distinguish age claimants as a group in important ways from the traditional victims that statutory provisions prohibiting discrimination have sought to protect.

## **B. Congressional Recognition of Differences And How *Gross* Makes Sense**

None of the discussion above, of course, suggests that it is wrong to protect older workers from discrimination on the basis of age. It does, however, require us to evaluate whether these particular features of age, age discrimination claims, and the plaintiffs who bring them may warrant a somewhat different level of proof, although not necessarily a different analytical paradigm, than other types of discrimination claims.

In *Lorillard v. Pons*,<sup>27</sup> the Supreme Court considered whether a trial by jury was available in private civil actions under the ADEA. Justice Thurgood Marshall, writing for a unanimous Court, reviewed the legislative history preceding passage of the ADEA. Noting that there were multiple legislative proposals prior to the passage of the ADEA (one that was modeled after the National Labor Relations Act, one that would have made age discrimination unlawful under the Fair Labor Standards Act, and one that was patterned after Title VII), the Court observed that the bill ultimately enacted was a “hybrid,” incorporating components of both the FLSA and Title VII. While the substantive prohibitions of the ADEA were derived from Title VII, the remedies and procedures were those of the FLSA. Accordingly, since the right to a

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<sup>26</sup> *Id.*

<sup>27</sup> *Lorillard v. Pons*, 434 U.S. 575 (1978). Justice Blackmun took no part in the consideration or decision of the case.

jury trial long had been recognized under the FLSA, the Court concluded that Congress had provided, unlike in Title VII, a right to jury trial for ADEA claims.<sup>28</sup>

In passing the ADEA, Congress recognized that the problems it was considering in the ADEA were similar to but in some ways different from those addressed in Title VII; accordingly, Congress intentionally created different enforcement mechanisms. As indicated in *Lorillard*, Congress incorporated the right to a jury trial as part of the ADEA's statutory scheme; prior to the Civil Rights Act of 1991, Title VII did not include a right to a jury trial.<sup>29</sup> There are numerous other differences between Title VII and the ADEA, even though some of the original distinctions have been eliminated by Congress. Title VII permits a successful plaintiff to recover compensatory and punitive damages, subject to "caps" specified in the statute, while the ADEA does not provide for compensatory or punitive damages, instead authorizing liquidated damages equal to the plaintiff's losses. The procedural mechanisms by which collective actions may be pursued differ between Title VII, which permits a plaintiff to seek class certification under Rule 23 of the Federal Rules of Civil Procedure, and the ADEA, which employs the procedural components of opt-in actions under the FLSA. Other procedural differences continue to exist in areas such as exhaustion of administrative remedies.<sup>30</sup>

The foregoing discussion relating to differences between age and most other types of discrimination perhaps largely accounts for the substantial differences between Title VII and the ADEA. Regardless of the reasons, it was this setting into which the Supreme Court's decision in *Price Waterhouse v. Hopkins*<sup>31</sup> arrived. It is worth noting, in particular, that in 1989 when *Price Waterhouse* was decided, there still was no right to jury trial under Title VII; cases under Title VII at that point were decided by judges, not by juries. The question presented in the case was how to resolve the situation in which an employer may have both a legitimate and an illegitimate (i.e., discriminatory) reason for an employment decision. The Supreme Court, to put it mildly, simply was unable to reach a coherent view that could be adopted by a majority, instead generating multiple opinions requiring close parsing to determine what view garnered a majority of the justices.

Most courts and commentators subsequently concluded that Justice O'Connor's opinion was the prevailing opinion. In short, Justice O'Connor's opinion suggested that mixed-motives

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<sup>28</sup> *Id.* at 578, 584. In fact, the ADEA was an amendment to the FLSA.

<sup>29</sup> See generally H.R. Rep. 102-40 (I) & (II), reprinted in 1991 U.S.C.C.A.N. 549, relating to the Civil Rights Act of 1991 and prior practices.

<sup>30</sup> See generally B. Lindemann & P. Grossman, *Employment Discrimination Law* (4th ed. 2007) (Chapter 12 – Age; Chapter 25 – EEOC Administrative Process); see also *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1168 (10th Cir. 2003) (discussing Title VII cap under 42 U.S.C. § 1981a(b) and damages under 29 U.S.C. § 626(b)); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096, 1109-10 (11th Cir. 1996) (addressing administrative procedures and opt-in collective actions under 29 U.S.C. § 216(b) for age claims).

<sup>31</sup> 490 U.S. 228 (1989).

analysis was proper only when a plaintiff had “direct” evidence that an improper motive had been involved in an adverse employment decision. In that unusual case, Justice O’Connor found that it made sense for the burden of proof – not simply the burden of production – to shift to the employer. At that point, the employer could prevail only if it could establish what was essentially an affirmative defense, namely that it would have taken the same action in any event, notwithstanding the impermissible consideration; otherwise, the plaintiff would win.<sup>32</sup>

Justice Kennedy dissented, lamenting the confusion and uncertainty that *Price Waterhouse* was sure to create:

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in [*McDonnell Douglas* and *Burdine*] is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar . . . .<sup>33</sup>

One appellate judge commented not long after *Price Waterhouse* that Justice Kennedy’s dissent aptly had predicted that “formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.”<sup>34</sup> The concerns of the dissenters have been borne out for over two decades now, as practitioners and the lower courts have struggled mightily to apply the confusing directives of the Court and of Congress in the mixed-motives context. The doctrinal difficulties and practical complexities of administration far outweigh the benefit, if any, from this construct in a jury context. While Congress may have mandated this approach in the Title VII arena (whatever its limited utility), there is no sound reason to extend it to age cases.

Ultimately, neither the opinion of the Court nor the dissenting opinion in *Gross* is very satisfying. Efforts to discern congressional intent are freighted with uncertainty. Congress in 1991, however, certainly did not legislatively codify an amended version of *Price Waterhouse* as part of the ADEA. Thus, left with the statutory “because of” language, the Court’s approach in *Gross* reaches the right result. Plaintiffs still will be able to prove that they were discriminated against because of their age, using either direct or circumstantial evidence. The courts, practitioners, and litigants will not face the daunting prospect of trying to fashion acceptable (and understandable) mixed-motives jury instructions under *Price Waterhouse*, assuming that one can divine the appropriate type of evidence to warrant such an instruction.<sup>35</sup> The slightly higher

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<sup>32</sup> *Id.* at 278-79 (O’Connor, J., concurring).

<sup>33</sup> *Id.* at 279 (Kennedy, J., dissenting).

<sup>34</sup> *Visser v. Packer Eng. Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting).

<sup>35</sup> The author never has encountered plaintiffs’ counsel that has much interest in the mixed-motives approach authorized by the Civil Rights Act of 1991 in Title VII cases, and suspects that plaintiffs have even less interest in the concept than do their counsel, given the remedies provided for by the statute.

standard of proof, which primarily will have relevance only at the summary judgment stage (and, as noted below, even that has at most a minimal impact), is fully warranted given the differing nature of age-based claimants than those asserting other types of claims. Unlike claimants who are economically deprived, often have low-level occupations, and have difficulty obtaining a jury that is similar to them, the usually white, male, age-based plaintiff who likely is complaining about his termination from a managerial position simply doesn't have those problems. Requiring claims of this nature to meet a "but-for" test is not only reasonable, but makes perfectly good sense unless what we really want is for the courts to become "super personnel boards" (a role that they specifically have disclaimed) and for the anti-discrimination laws merely to become a law of wrongful discharge, separate and apart from the underlying evils that they were designed to prevent.

### **III. Gross Has Had Minimal Impact On The Outcome Of Age Claims**

Despite dire predictions that *Gross* virtually presaged the demise of age discrimination claims and that such claims almost never would survive summary judgment, the facts simply do not support such contentions. Slightly more than a year having passed since *Gross* was decided, the lower courts have continued to evaluate age discrimination claims applying the traditional *McDonnell Douglas* burden-shifting framework in the absence of direct evidence of discrimination.<sup>36</sup> More significantly, *Gross* has not had any discernible effect on the rate at which summary judgment is granted and denied in cases under the ADEA.

*Gross* was decided on June 18, 2009. A Westlaw search of summary judgment opinions in ADEA cases citing *Gross* (through July 11, 2010) yielded a total of slightly over 300 decisions. Further analysis of those results established that summary judgment was granted in approximately 68 percent of the cases and was denied about 31 percent of the time.<sup>37</sup>

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<sup>36</sup> See, e.g., *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106 (2nd Cir. 2010) (no reason to jettison the framework because of *Gross*); *Smith v. City of Allentown*, 589 F.3d 684, 691 (3rd Cir. 2009) (same); *Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009) (same); cf. *Gross*, 129 S. Ct. at 2349 (noting that Court has left open whether *McDonnell Douglas* evidentiary framework "is appropriate in the ADEA context").

<sup>37</sup> While the Westlaw search methodology employed admittedly may not yield every opinion or decision addressing summary judgment in the post-*Gross* ADEA context, the search methodology produced a sufficiently large sample to believe that the results are fairly representative. A search for all cases citing *Gross* produced approximately 380 results. These results were further refined by search for "motion" within three words of "summary judgment" (producing 305 results), and then narrowed further by determining whether the court in each case had granted or denied the motion. These searches resulted in summary judgment being granted in 206 out of 305 cases (68%) and denied in 95 out of 305 cases (31%), with four cases not falling into either category. A similar search in LEXIS provided almost the same outcome.

By comparison, a search of summary judgment decisions in ADEA-only cases covering the one-year period from June 1, 2008 through June 1, 2009, immediately before *Gross* was decided, produced almost identical results. Out of a total of 188 cases produced by a similar search request, the percentage of cases in which summary judgment was granted varied hardly at all, amounting to 64 percent of the cases, a number almost indistinguishable from the post-*Gross* search results.<sup>38</sup> Likewise, empirical analysis of case outcomes in employment discrimination cases generally (i.e., not limited to age-only cases) has generated numbers similar to those from these Westlaw searches of ADEA-summary judgment cases. Specifically, data compiled in the 2008 ABF Study established that summary judgment motions in the cases in that study were granted approximately 57 percent of the time, a number that certainly is not widely divergent from the ADEA summary judgment numbers resulting from the Westlaw search.<sup>39</sup>

Thus, the broad picture from these findings is that *Gross* has had at best a negligible effect on the outcome of summary judgment motions in age discrimination cases. To the extent that there is an effect, it is likely only to involve the case that truly was one which previously might have survived summary judgment only by the narrowest of margins. Otherwise, the results strongly suggest that plaintiffs bringing ADEA claims still are able to use direct and circumstantial evidence to show that age was a “but-for” cause of the adverse event at issue at about the same rate as they did before *Gross*.

Similarly, a review of those lower court decisions having the greatest amount of discussion of *Gross* further reflect the minimal impact that the decision has had. Those cases, across all of the federal circuits, routinely and widely reflect that analysis of claims in post-*Gross* ADEA cases is no surprise. Plaintiffs who present evidence of discrimination, whether through discriminatory statements or through evidence of pretext, resist summary judgment; Plaintiffs who fail to raise a legitimate factual issue regarding the employer’s stated reason(s) for the adverse action suffer summary judgment being granted.<sup>40</sup>

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<sup>38</sup> Using the temporal limitation noted in the text, this search included the term “ADEA” and “motion” within three words of “summary judgment,” but excluded terms such as “Title VII” and “ADA.” This produced 188 results, of which 120 (64%) involved summary judgment being “granted” and 34 (19%) in which summary judgment was “denied.”

<sup>39</sup> *Individual Justice*, 7 J. EMPIRICAL LEGAL STUD. at 184-87. Moreover, one might reasonably anticipate that a somewhat higher proportion of age discrimination cases will result in summary judgment than other types of discrimination cases for, among other reasons, the nature of age as a protected characteristic as discussed above.

<sup>40</sup> See, e.g., *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 379 (5th Cir. 2010) (affirming summary judgment, finding plaintiff’s own conclusory assertions that he behaved appropriately are irrelevant; no evidence offered that employer acted in bad faith by relying on two investigations concluding plaintiff engaged in sexual harassment); *Mora v. Jackson Memorial Foundation*, 597 F.3d 1201, 1203-04 (11th Cir. 2010) (reversing summary judgment granted under mixed-motive analysis by district court, concluding that statement that “I need someone younger that I can pay less” raised a jury issue); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 108-09 (2nd Cir. 2010) (reversing summary judgment on basis that poor performance evaluation given after supervising plaintiff for only a week, statements that (*con’t.*)

#### IV. Conclusion

*Price Waterhouse* was intended to be an unusual departure from the historical construct that plaintiffs bear the burden of proof; it also was intended to apply only in extremely limited circumstances in any event. The application of the concepts in the case proved more difficult in practice than in theory. This was ameliorated to some extent in the Title VII context by the changes Congress made when it codified, at least in part, and modified the mixed-motives approach of *Price Waterhouse*. There is no good reason that this approach should be extended to the age discrimination context. The current statutory language requiring that a plaintiff prove that an adverse employment decision occurred “because of” the plaintiff’s age strikes the right balance. Age discrimination claimants are perfectly capable of producing sufficient evidence to survive summary judgment under the standard described in *Gross*, a standard that comports with the significant differences attendant to age-based claims than exist for other types of alleged discrimination. Despite warnings that the Supreme Court’s interpretation of the statutory language in the ADEA would decimate age discrimination cases and preclude those with meritorious claims, these warnings appear to lack any real basis, either derived from an evaluation of the approaches actually used in cases in the post-*Gross* era or from the statistical results in the summary judgment context, which essentially have continued along the same trajectory as before *Gross*. All of these elements coalesce to demonstrate that Congressional revision to the age-discrimination framework, both substantive and procedural, is entirely unnecessary. The ADEA should be left alone, lest Congress create something far worse for litigants and the courts than the perceived but absent evil it might seek to address.

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<sup>40</sup>(*con’t.*) supervisor was “out to get” plaintiff, supervisor’s admissions that stated basis for discipline was inaccurate, and more favorable treatment of younger crewmembers for rule violations were sufficient to raise fact issue as to pretext); *Smith v. City of Allentown*, 589 F.3d 684, 692 (3rd Cir. 2009) (affirming summary judgment because mere reference to plaintiff’s age was insufficient to overcome long history of performance concerns, Manager’s review of personnel file, discussion of performance with supervisor, and lack of differential treatment of others); *Brown v. Wal-Mart Stores East, L.P.*, 2009 U.S. Dist. LEXIS 81454 (D.S.C. Sept. 4, 2009) (granting summary judgment on basis that failure of plaintiff to show that store’s method of assigning hours was not accurate, even if plaintiff never received adequate explanation or understood process, demonstrates she cannot establish “but-for” causation); *Roberts, et al. v. USCC Payroll Corp.*, 635 F. Supp. 2d 948, 968-69 (N.D. Iowa 2009) (Bennett, J.) (granting summary judgment largely on basis that statements referring to age by store manager were not the type of stereotypical comments related to decline with old age that could support finding of pretext given evidence that others treated same as plaintiffs and lack of evidence that poor investigation was motivated by discrimination).