ONE YEAR AND COUNTING: HOW WIDE AN IMPACT HAS *GROSS* V. *FBL FINANCIAL SERVICES INC.* HAD ON THE APPELLATE COURTS?

By Michael C. Subit

It has been just over a year since a bitterly divided United States Supreme Court handed down *Gross* v. *FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). While the explicit holding of that case is narrow, the Court's conservative majority sent a broader message about how it views the burden of proof in employment discrimination cases. Since June 18, 2009, the appellate courts have been trying to predict just how far they should go in overturning previously settled legal questions in light of *Gross*. The results so far have been anything but uniform.

**The Gross Decision**

The question on which the Court had granted certiorari in *Gross* was whether direct evidence is needed in an ADEA case for the plaintiff to request a so-called "mixed motives" instruction. The Court, however, held 5-4 that a "mixed motives" instruction is never proper in an ADEA case.

The district court had instructed the jury that it should find for the plaintiff if he proved age had been "a motivating factor" in the employer's action and the employer failed to prove it would have taken the same action based in any event. The jury returned a verdict in favor of the plaintiff for $47,000. The employer appealed. The 8th Circuit reversed holding that Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), required a plaintiff in an ADEA case to proffer "direct evidence" before the mixed-motives framework could be invoked. The plaintiff sought
certiorari on whether the Eighth Circuit’s holding was correct. In its brief on the merits, the employer argued that the Court should overrule Price Waterhouse.

Writing for the majority, Justice Thomas held that the burden of persuasion never shifts to the party defending an alleged mixed-motives discrimination claim under the ADEA. 129 S. Ct. at 2348. Justice Thomas noted that six Justices in Price Waterhouse had held that a plaintiff in a Title VII case may prove a violation by showing that an unlawful reason was a motivating factor in the employment action. Congress had then amended Title VII by codifying the holding of Price Waterhouse as 42 U.S.C. § 2000e-2(m). 129 S. Ct. at 2349.

The Gross majority declined to apply the reasoning of the Price Waterhouse majority to the ADEA on the basis that “[u]nlike Title VII, the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.” Id. The majority also relied on Congress’ decision to amend Title VII but not the ADEA in the Civil Rights Act of 1991. The Court reasoned that this gave rise to the negative implication that Congress did not intend an ADEA plaintiff to be able to prove discrimination by showing age was a motivating factor. Id. The majority held that the words ‘because of’ as used in the ADEA mean “by reason of” or “on account of.” The majority held that “[t]o establish a disparate treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse action.” Id. at 2350.

The majority stated that “it is far from clear” the Court would reach the same result if Price Waterhouse came before it now. Id. at 2351-52. The majority noted that “its burden-shifting framework is difficult to apply.” Id. at 2352. The Court reasoned
that "even if Price Waterhouse was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Id. The fact that the Court had originally endorsed the framework in both NLRA and First Amendment contexts had "no bearing" in the majority's view to the correct interpretation of ADEA claims. Id. at 2352 n. 6.

Writing for four dissenters, Justice Stevens asserted that the majority had substituted the Price Waterhouse dissent for the holding of the majority. Id. at 2353. He reasoned that both the Court and Congress had previously rejected "but-for" causation as the standard for liability under Title VII, and that "the because of" language of the ADEA was identical. He accused the majority of engaging in "unnecessary lawmaking." He noted that the Government had not been given the opportunity to brief anything other than the question presented in the writ of certiorari. The dissent would have resolved the case by holding that direct evidence was not necessary to obtain a "mixed-motives" instruction. Id. at 2353.

Justice Stevens reasoned that in Price Waterhouse six Justices had concluded that the term "because of" meant less than "but-for" causation. Id. at 2354. The dissent responded to the majority's invocation of the dictionary by reasoning although "because of" means "by reason of," that does not imply that it means "solely by reason of." Id. at 2354 n.4. The dissent stated that there was no substantive difference between the Price Waterhouse plurality's "a motivating factor" standard and the concurrences' "a substantial factor" standard. Id. at 2354 n.3. (The Court had held in Mt. Healthy City Board. Of Education v. Doyle, 429 U.S. 274 (1977), that the tests were identical). The Court's recognition of the employer's affirmative same action defense did not alter the
meaning of “because of.” The ADEA used exactly the same “because of” language that
the Court had held meant less than “but-for” causation in the Title VII context. The
dissent could find no reason to interpret the words any differently in the ADEA context.
It noted that the Price Waterhouse dissent had assumed the majority’s holding did apply
to the ADEA and that in the 20 intervening years no court of appeals had held to the
contrary. Id. at 2354-55.

The dissent agreed that the 1991 amendments to Title VII that changed the
employers’ proof of the same action defense as a defense to damages rather than liability
did not apply to the ADEA. Id. at 2355. But the lesson the dissent took from that was
that Congress intended the unmodified holding of Price Waterhouse to apply to ADEA
cases. The fact that Congress endorsed in the 1991 amendments the very burden-shifting
framework the Gross majority now claimed is unworkable seriously undermined the
majority’s argument, in the view of Justice Stevens. Id. at 2356-57. Given that plaintiffs
often bring Title VII and ADEA claims together, the dissent reasoned that majority’s
holding would do nothing to eliminate juror confusion. Id. at 2357.

Turning to the question on which the Court granted certiorari, the dissent would
have ruled that direct evidence is not required for the plaintiff to obtain a mixed-motives
instruction. Id. The dissent concluded that Justice White’s opinion, rather than Justice
O’Connor’s, provided the controlling opinion in Price Waterhouse. The dissent further
relied on the Court’s rejection of a direct evidence requirement in Desert Palace, holding
that the reasoning of that case applied with equal force to the ADEA. Id. at 2358.

Justice Breyer wrote a separate dissent that Justices Ginsburg and Souter joined.
The thrust of his opinion was the difficulty of determining “but-for” causation when the
issue is human motivation. All a plaintiff can know for certain is that a forbidden motive played some role in the employer's decision. The employer is in a far better position to know the exact role that lawful and unlawful motivations played in its decision. \textit{Id.} at 2358-59.

**Did Gross Raise the Standard of Proof in “But-for” Cases?**

Prior to \textit{Gross} all circuits but the Eighth had held that in non-mixed motives cases the plaintiff had to prove an illegal motive was “a determinative factor” in or “a but-for cause” of the employer’s action. Justice Thomas’ opinion in \textit{Gross} used the term “the but-for cause.” It is unclear whether the Court was intended to create a new standard for “but-for” cases. If it did, \textit{Gross} has done even greater damage to the law. The Supreme Court had previously held that “a determinative influence” was sufficient to establish causation under the ADEA. \textit{See Hazen Paper v. Biggins,} 507 U.S. 604, 610 (1993). General tort law does not require a plaintiff to prove the defendant’s conduct was “the but-for cause” or “the proximate cause” of her injuries. Juries are routinely instructed that there may be more than one proximate cause of the plaintiff’s injury. (Sometimes they are instructed that the plaintiff need show only the defendant’s conduct was a “substantial factor”). Most events have multiple “but-for causes.” Asking a jury to find “the but-for cause” of a plaintiff’s injuries is nonsensical.

For example, assume the plaintiff is 80 years old and brings a claim of disability discrimination and a claim of age discrimination. Suppose the jury concludes that the employer discriminated against her because of both protected characteristics and each was “a but-for cause” of the employer’s actions. If the jury is asked if was disability was
“the determining factor” or “the but-for cause” of the plaintiff’s injuries, the correct answer will be “no.” Likewise, if the jury is asked whether age was “the but-for cause,” the correct answer will still be still no. Asking whether “disability or age” or “disability and age” were “the but-for cause” or “the determining factor” doesn’t help. The problem is also not solved by asking on the verdict form whether “disability and age” were “the determining factors” because that rules out the possibility that one was and one wasn’t. The only way to ask the question is whether age or disability was “a but-for cause” or “a determining factor.” The same is true where the plaintiff has alleged only one unlawful motive. It doesn’t matter how many motives, legal or illegal, the employer has. As long as an illegal one was “a but-for cause” or “a determining factor” in the employer’s actions, the employee has met her burden.

In Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010), the Seventh Circuit simply ignored Justice Thomas’s use of the term “the but-for cause” in Gross and held that “a but-for cause” was the applicable standard.

The District of Columbia Circuit has recognized that there is potential difference between the prior “a determining factor” standard and Gross’s “the but-for cause” test. See Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 376 (D.C. Cir. 2010). But the court did not resolve the issue as the plaintiff’s evidence failed to meet either standard.

Is there an ADEA Disparate Treatment Same Action Defense After Gross?

Prior to Gross, courts had uniformly held that if the plaintiff proves only that age was a “substantial factor” in the employer’s decision, the employer can raise as an
affirmative defense the claim it would have made the same decision absent the unlawful motivation and thereby defeat "but-for" causation. Does the same action defense remain viable post-Gross in ADEA cases? The Eleventh Circuit correctly said "no" in Mora v. Jackson Memorial Foundation, Inc., 597 F.3d 1201, 1204 (11th Cir. 2010).

**Gross's Impact on ADEA Pattern and Practice Claims**

*Thompson v. Weyerhaeuser Co.* 582 F.3d 1125 (10th Cir. 2009)

The plaintiffs brought a pattern and practice case under the ADEA. The employer unsuccessfully argued before the district court that pattern and practice cases are not cognizable under the ADEA. On interlocutory appeal, the company asserted that Gross provides additional support for the argument against pattern and practice ADEA cases because the Supreme Court held that the burden of persuasion never shifts in an ADEA case. The Tenth Circuit rejected the argument on the basis that there were no relevant textual differences between Title VII and the ADEA with respect to pattern and practice cases. Both were creatures of judicial construction.

**Gross's Impact upon McDonnell Douglas-Burdine Framework.**

The Gross majority noted that it had not definitively decided whether the McDonnell Douglas Burdine framework applied to ADEA claims. Prior to Gross, every circuit had that the framework did apply to ADEA claims. In the wake of Gross, every circuit faced with the question had continued to do so:

*Velez v. Thermo King De Puerto Rico, Inc.*, 585 F.3d 441 (1st Cir. 2009)

*Smith v. City of Allentown*, 589 F.3d 684 (3rd Cir. 2009)
Of these, only Smith gives the question any substantive analysis. The Third Circuit held that application of the McDonnell Douglas paradigm is not inconsistent with Gross because that framework does not shift the burden of persuasion to the employer. 589 F.3d at 691.

The Impact of Gross on Courts' Construction of State FEP Laws

Baker v. Silver Oak Senior Living Mgt. Co., 581 F.3d 684 (8th Cir. 2009)

The plaintiff brought claims for age discrimination under the ADEA and the Missouri Human Rights Act. Like the ADEA, state law prohibited discrimination "because of" age. The Eighth Circuit held that Gross does not undermine prior holding of the Missouri Supreme Court that "because of" means "a contributing factor," which is less than "but-for causation."

Gorzynski v. Jetblue Airways Corp., 596 F.3d 93 (2nd Cir. 2010).

The plaintiff brought age discrimination claims under both the ADEA and the New York Human Right Law. The court assumed "without deciding, that the Supreme Court's Gross decision affects the scope of the NYHRL as well as the ADEA." Id. at 106 n.6.

In Hadad v. Wal-Mart Stores, Inc., 455 Mass. 91, 914 N.E.2d 59 (2009), the Supreme Judicial Court of Massachusetts indicated a willingness to reconsider in some future decision "whether we will retain a mixed motive analysis under Massachusetts law." Id. at 113 n.27.
The Application of *Gross* to Other Federal Employment Discrimination Claims

**ADA**

*Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010)

This case arose under the pre-2009 version of the ADA. The jury found that the plaintiff's disability was "a motivating factor" in the employer's action. The jury also found that the employer would have taken the same action in any event. The district court awarded the plaintiff 20% of her attorneys' fees and costs. 591 F.3d at 960. The employer appealed. The Seventh Circuit held that *Gross* controlled and that in an ADA case a plaintiff cannot establish liability by proving disability was a 'motivating factor.' The panel recognized that for years courts had assumed that the "mixed-motives" framework applied to ADA claims. The court further noted that the ADA contains the following provision:


42 U.S.C. § 12117. Among the Title VII provisions that the section cross-references is the provision allowing partial relief to the plaintiff based on a mixed-motives finding. *Id.*

Despite this language, the majority found that the language of the ADA did not permit mixed-motives claims because it did not have definitional language comparable to 42 U.S.C. § 2000e-2(m). Instead, the pre-ADAAA text of the ADA merely prohibits discrimination "because of" disability. The court held that the incorporation of Title's remedies for a mixed-motives case did not mean that Congress intended there to be liability under the ADA in such cases. *Id.* at 962. Thus, an ADA plaintiff must show that
the “employer would not have fired him but for his actual or perceived of disability.” *Id.* The panel held that the plaintiff had not proven disability was “a but-for cause of her discharge. *Id.* at 963. The court noted that the ADA now uses the “on the basis of” rather than “because of” as the operative causal standard. The court did not opine whether this would change the analysis. *Id.* at 962. n.1.

**First Amendment**

*Waters v. City of Chicago*, 580 F.3d 575 (7th Cir. 2009)

The plaintiff in this case brought a Section 1983 claim for retaliation in violation of the First Amendment. The plaintiff prevailed at trial and obtained a $225,000 compensatory damages verdict. The district court denied the employer’s Rule 50 motion and awarded back pay, front pay, and lost pension benefits in excess of $1 million. The appellate court reversed, holding that there was no evidence that a final policymaker had caused the plaintiff’s alleged constitutional deprivation. As an alternative ground, the court held that there was no evidence that he was terminated in retaliation for the exercise of his First Amendment rights. Without mentioning *Mt. Healthy City Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287 (1977), the court ruled that under *Gross* a plaintiff in a First Amendment claim must establish that his speech “was ‘the reason’ that the employer decided to act.” 580 F.3d at 584.

*Smith v. City of Allentown*, 589 F.3d 684 (3rd Cir. 2009)

The plaintiff brought claims under both the ADEA and the First Amendment for discrimination on the basis of political affiliation. The employer apparently did not argue
that *Gross* changed the burden of persuasion in First Amendment cases. The Third Circuit reaffirmed that under *Mt. Healthy City Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287 (1977), a plaintiff need prove only that political affiliation was “a motivating factor” in the employer’s adverse action.

**Section 1981**

*Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009)

The plaintiff in this case brought a Section 1981 racial claim. The court asked for supplemental briefing of the impact of *Gross* on Section 1981. Both parties asserted that *Gross* had no impact. The majority agreed. It held that *Price Waterhouse* governed and that Justice O’Connor’s opinion was controlling under prior circuit precedent. 581 F.3d at 182. The panel reasoned that Section 1981 does not contain the term “because of.” Instead that statute guarantees all persons the same rights as white citizens. The majority reasoned that if race plays any role in the defendant’s actions, the plaintiff has not enjoyed the “same right” as other persons. But if the defendant proves it would have taken the same action in any event, then the plaintiff has “in effect” enjoyed the same right as white persons. 581 F.3d at 182 n.5. One judge disagreed. He asserted that because Congress did not amend Section 1981 to contain the same “motivating factor” language as Title VII, there was no reason to assume that Section 1981 required the plaintiff to prove anything less than “but-for” causation. He suggested that “given the broad language chosen by the Supreme Court in *Gross*, a critical reexamination of our precedents may be in order”. 581 F.3d at 187.
FMLA

Hunter v. Valley View Local Schools, 579 F.3d 688 (6th Cir. 2009)

The court held that Gross required it to examine whether Title VII precedent applied to retaliation claims under the FMLA. The FMLA makes it unlawful for an employer to interfere, restrain, or deny the exercise of any FMLA rights or to discriminate against any employer for opposing any practice made unlawful by the FMLA. DOL Regulations interpret this standard to forbid the use of FMLA leave as “a negative factor” in an employment decision. The court held the phrase “a negative factor” envisions that the challenged employment decision might also rest on other permissible factors. 579 F.3d at 692. Therefore, the court held that the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors. Id. The tribunal stated that if the plaintiff presents evidence to establish that the employer discriminated against her “because of” her leave, the burden of persuasion shifts to the employer to prove it would have taken the same decision absent the impermissible motive. Id.

Title VII Retaliation

Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010)

In this case the court divided 2-1 whether Gross undermined prior Fifth Circuit precedent that Title VII retaliation cases could be analyzed under a mixed-motives framework. The plaintiff had prevailed before the jury under a mixed-motives instruction. The majority held that since Gross was an ADEA case, and not a Title VII case, Gross did not affect existing circuit precedent regarding Title VII retaliation. The
majority held it would continue to apply *Price Waterhouse* to such claims and that a plaintiff need not have direct evidence to invoke that framework. *Id.* at 330-33. Judge Jolly’s dissent called the majority’s distinction between Title VII retaliation claims and the ADEA “lame.” *Id.* at 337. He is probably right about that. But it was exactly this same type of “lame” distinction that the *Gross* majority used to distinguish *Price Waterhouse* in the first place.