

Case at a Glance

Justice O'Connor's *Price Waterhouse* opinion indicated that when a plaintiff presents "direct evidence" that discrimination motivated an employment decision, the defendant employer must prove, as an affirmative defense, that it would have made the same decision in the absence of discrimination. The parties ask the Court to either abandon or clarify this litigation structure as it applies to cases under the Age Discrimination in Employment Act.



When Must an Employer Prove That Age Was Not the Deciding Factor in an Employment Decision?

by Jeannette Cox

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This case asks the Court to determine the extent to which the burdens of persuasion that govern race and sex discrimination litigation under Title VII apply to age discrimination litigation under the Age Discrimination in Employment Act (ADEA). Both statutes prohibit employers from making employment decisions that adversely affect an individual "because of" a trait that should not have an adverse influence on employment decisions. Applying these statutory prohibitions, however, has proven both controversial and difficult in "mixed motive" situations: situations in which an employment decision motivated by a prohibited reason (such as the employee's age) is simultaneously motivated by a legitimate reason, such as the employee's job performance.

Title VII, as amended by the Civil Rights Act of 1991, provides that an employer violates Title VII whenever an impermissible motive is "a motivating factor for any employment practice, even though other factors also motivated that prac-

— tice." Thus, an employer violates Title VII by considering an individual's race or gender in an employment decision even when the employer is simultaneously influenced by a legitimate consideration, such as an individual's job performance, which would have led the employer to make the same decision. An employer may avoid paying damages to a Title VII plaintiff, however, by proving that its discriminatory motive did not economically damage the plaintiff because the nondiscriminatory factors that influenced the employer's decision would have led the employer to make the same decision.

Congress's articulation of this litigation structure rejected the standard set forth by the Supreme Court in *Price Waterhouse v. Hopkins*, a 1989 decision that interpreted Title VII's original text. Since the ADEA substantially parallels Title VII's original text, most courts regard *Price Waterhouse* as applicable to ADEA litigation. In *Price Waterhouse*, the Court concluded that a Title VII violation occurs only when the prohibited criterion was the deciding factor in the employment decision. The

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Court explained that an employer may avoid all liability under Title VII by proving that its consideration of the prohibited motive was not outcome determinative.

The members of the *Price Waterhouse* Court differed, however, in their views concerning the type of evidence a plaintiff must present in order to trigger the employer's duty to prove this affirmative defense. Justice Brennan, who wrote for himself and three other members of the Court, explained that in order to place on the defendant the burden of proving the prohibited motive was not outcome determinative, the plaintiff must simply prove, by any type of evidence, that a prohibited motive "played a motivating part" in the employer's decision. Justice O'Connor's concurrence, by contrast, provided that the plaintiff must present "direct evidence" of discrimination.

In the years following *Price Waterhouse*, lower courts concluded that Justice O'Connor's opinion represented the governing rule of law because it articulated the most restrictive grounds in support of the Court's judgment. They then began the difficult task of devising standards for distinguishing between direct and indirect evidence of discrimination. The courts soon became deeply divided on the appropriate test for determining whether a plaintiff's evidence met Justice O'Connor's "direct evidence" standard.

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court held that whether the plaintiff's evidence of discrimination is "direct" is irrelevant under Title VII. Focusing on the language Congress added to Title VII in 1991, the Court concluded that a Title VII plaintiff "need only present sufficient evidence for a reasonable jury

to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" To avoid paying damages, the employer would then have to prove that it would have made the same decision in the absence of discrimination. The Court did not decide what burdens of persuasion would govern non-Title VII employment discrimination cases, such as cases arising under the ADEA.

ISSUE

Must an ADEA plaintiff present direct evidence of age discrimination in order for the employer to bear the burden of proof on whether age was the "outcome determinative" factor in the employer's decision?

FACTS

In April 2004, Jack Gross, a 54-year-old veteran of the insurance industry, sued his employer, FBL Financial Group, claiming that FBL demoted him on the basis of age. FBL owns and manages several insurance and financial services companies, including Farm Bureau Mutual Insurance. Gross began working for the Iowa division of Farm Bureau in 1987 and received four promotions culminating in his 1997 promotion to "claims administration vice president." In 2001, FBL changed Gross's job title to "claims administration director" as part of a department-wide reorganization.

In 2003, after the Iowa Farm Bureau division merged with the Kansas and Nebraska division, FBL reassigned Gross to the position of "claims project coordinator." Most of Gross's former duties went to the newly created position of "claims administration manager," which was filled by Lisa Kneeskern, an FBL

employee in her early forties. Gross viewed the reassignment as a demotion because it reduced his standing in the company's point system for salary grades, which affected his eligibility for salary increases.

Alleging that FBL had demoted him on the basis of age, Gross filed suit under the Age Discrimination in Employment Act. At the conclusion of the five-day trial, the jury found in Gross's favor and awarded him \$46,945 in lost compensation.

The trial court denied FBL's motion to overturn the jury's verdict, explaining that even though there was no "direct evidence of discrimination," there was "ample circumstantial evidence" that FBL discriminated against Gross based on his age. In making this determination, the trial court pointed to evidence that Gross "was far more experienced and qualified than Kneeskern," that Gross "was never even provided an opportunity to apply for [the job Kneeskern received]," that FBL demoted other employees in their fifties, and that FBL's stated reason for demoting Gross—namely, that his new position was a "good fit for his strengths and weaknesses"—"was not credible."

On appeal, the Eighth Circuit ordered a new trial, concluding that the trial court's understanding of the parties' burdens of proof and persuasion was incorrect. The trial court had instructed the jury that Gross had the burden of proving that his age was "a motivating factor" in FBL's decision to demote him. It further instructed the jury that if Gross met that burden of proof, FBL could then avoid liability by proving that it would have demoted FBL regardless of his age.

The Eighth Circuit held that these instructions were erroneous because Gross had not presented "direct evi-

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dence” of age discrimination. The Eighth Circuit accordingly ordered a new trial and explained that in the new trial, the trial court should instruct the jury that Gross, not FBL, bears the burden of proof on whether Gross’s age was outcome determinative in FBL’s decision to demote him.

CASE ANALYSIS

FBL first argues that the *Price Waterhouse* affirmative defense, which requires employers to prove that age was not an outcome-determinative factor in the contested employment decision, is inappropriate. FBL argues that *Price Waterhouse* unjustifiably “converts an element of the employee’s affirmative case into an affirmative defense that must be proven by the employer, even though in the usual case an employer would not have to prove an affirmative defense unless the employee had established his or her claim.” FBL contends that in all cases, regardless of the type of evidence used to show discrimination, ADEA plaintiffs should carry the burden of demonstrating that age was not only a motivating factor, but also the determining factor, in the employment decision. In making this argument, FBL emphasizes that most courts agree that the ADEA, unlike Title VII, only prohibits employment decisions in which age is outcome determinative.

FBL further notes that the ADEA contains no express provision requiring a shift of the burden of persuasion to the employer on the issue of whether age was outcome determinative. This omission is particularly notable, FBL suggests, in light of the ADEA’s express articulation of five other affirmative defenses.

Gross counters FBL’s position by arguing that an employer motivated at least in part by age should bear

the risk that a jury might erroneously conclude that age was outcome determinative. He notes that it will often be difficult for the plaintiff to demonstrate what the employer would have done in the absence of age discrimination. FBL, for example, did not have written guidelines governing the reallocation of personnel during the reorganization that led to Gross’s demotion. If the plaintiff bears the burden of proof on what the employer would have done in the absence of discrimination, employers may escape liability in situations in which age was in fact outcome determinative but the plaintiff was unable to demonstrate, with sufficient certainty, the standards that would have governed the employer’s decision in the absence of discrimination.

Gross further emphasizes a point that FBL concedes: the Court would have to disavow *Price Waterhouse* in order to hold that ADEA plaintiffs always bear the burden of proof on whether age was outcome determinative. Interpreting Title VII’s pre-1991 language, which was functionally identical to the ADEA’s current text, the *Price Waterhouse* Court had concluded that the employer would bear the burden of proving that it would have made the same decision in the absence of age discrimination in at least some “mixed motive” cases.

In the event that the Supreme Court declines to reject the *Price Waterhouse* framework, FBL argues in the alternative that the Court should follow Justice O’Connor’s opinion in *Price Waterhouse* and hold that the ADEA places the burden of proof on the employer only when the employee has presented “substantial and direct” evidence of discrimination. FBL argues that because the plurality opinion in *Price Waterhouse* represented the

views of only four members of the Court, Justice O’Connor’s concurring opinion actually states the governing rule of law.

Gross, by contrast, appeals to Justice White’s concurrence, which, like the plurality opinion, did not set out a “direct evidence” requirement. The United States’ amicus brief similarly argues that “Justice O’Connor’s separate opinion in *Price Waterhouse*, in which no other Justice joined, is simply too thin a reed on which to erect an anomalous direct evidence requirement under the ADEA.” The United States stresses that the Supreme Court’s *Desert Palace* decision “embraced an analysis that weighs heavily against adoption of a direct evidence requirement.”

Gross further argues that the Court should reject Justice O’Connor’s “direct evidence” requirement because it has created division and uncertainty among lower courts. He notes that in the Eighth Circuit alone, three distinct definitions of “direct evidence” have emerged. One definition suggests that, unlike circumstantial evidence, direct evidence is evidence that proves the existence of a fact without requiring the fact finder to make any inferences. A second definition provides that direct evidence is “strong evidence,” a standard similar to, although perhaps more demanding than, a “clear and convincing evidence” standard. A third definition, which draws more expressly on Justice O’Connor’s concurring opinion in *Price Waterhouse*, suggests that direct evidence is evidence that shows a specific link between the alleged discriminatory animus and the challenged decision.

All of these definitions, Gross notes, are difficult for ADEA plaintiffs to satisfy. Direct evidence, when defined as the opposite of circum-



stantial evidence, appears to require proof of a facially discriminatory directive, such as “fire everyone over 40.” Statements such as this, which demonstrate the prohibited motive without requiring the fact finder to draw any inferences, are rare. The direct evidence standard drawn from Justice O’Connor’s opinion extends to only a slightly broader category of evidence because it encompasses only statements uttered by a person involved in the decision-making process that (1) specifically question the work competence of persons over forty, or (2) demonstrate an ageist bias near the time at which the decision was made. Decision-makers’ statements expressing age-based animus do not constitute direct evidence if they are unconnected to job performance or not made in connection with the decisional process. Similarly, under this standard, ageist statements made by individuals not involved in the decision-making process are never direct evidence, even when they reveal a workplace culture in which such statements are tolerated.

Emphasizing the difficulty that the “direct evidence” requirement has imposed on ADEA plaintiffs as well as the administrative difficulties it has imposed on courts, Gross asks the Supreme Court to hold that when a plaintiff convinces the jury—with any type of evidence—that age discrimination was a motivating factor in an employment decision, the employer then bears the burden of proving that age was not outcome determinative.

SIGNIFICANCE

Both parties hope that the Court’s resolution of this case will reconcile the fractured landscape of ADEA precedent that interprets Justice O’Connor’s “direct evidence” standard. The Ninth Circuit Court of Appeals has described the various

“direct evidence” standards that lower courts currently apply as “a quagmire that defies characterization despite the valiant efforts of various courts and commentators.”

If the Court concludes that Justice O’Connor’s “direct evidence” standard should continue to govern ADEA litigation, one hopes the Court will provide lower courts guidance about how to determine whether a plaintiff’s evidence meets this standard. This guidance might tell lower courts that many types of evidence normally characterized as circumstantial may be treated as direct evidence for purposes of the *Price Waterhouse* burden-shifting analysis. Alternatively, the Supreme Court could conclude that burden-shifting is available only in the rare category of cases in which plaintiffs can produce “smoking gun” evidence of age discrimination. Either conclusion will affect the outcome of ADEA cases in which it is difficult for the jury to determine what the employer would have done in the absence of age discrimination.

If the Court decides to depart from Justice O’Connor’s “direct evidence” standard, it may change existing law more dramatically. Gross’s preferred standard, which would require employers to prove that age was not outcome determinative whenever the plaintiff convinces the jury—with any type of evidence—that age discrimination was a motivating factor, would shift the litigation structure slightly in the plaintiff’s favor. FBL’s preferred standard, which would always require the plaintiff to prove “but-for” causation, would have the opposite effect, shifting the litigation structure in a manner that would benefit employers. Either of these changes would significantly simplify ADEA litigation and bring uniformity to the currently disparate approaches in the various circuits.

While it is likely that this case will bring a greater degree of uniformity to ADEA litigation across the country, it is unlikely to bring ADEA litigation standards in line with Title VII. While Gross appears to resist the conventional wisdom that the ADEA, unlike Title VII, imposes liability only when the prohibited motive is the determining factor in an employment decision, he carefully explains that the Court does not need to resolve this issue in order to decide the case.

Nonetheless, the Supreme Court’s resolution of the case—as well as the breadth of its rationale—may reveal the Court’s assumptions about the extent to which the justifications for the ADEA parallel the justifications for Title VII. In constitutional cases, the Supreme Court has regarded age-based decision making as significantly less problematic than race- and gender-based decision making. Although statutory, rather than constitutional, principles govern this case, the AARP, which contributed an amicus brief, expresses concern that if the Court imposes on ADEA plaintiffs “a different and more onerous evidentiary burden” than that applicable to Title VII claimants, the Court may send a message “that age discrimination, disability discrimination, and the other forms of discrimination prohibited by the non-Title VII federal legislation are less onerous, less invidious, and, therefore, less deserving of societal condemnation than those grounds enumerated in Title VII.”

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