

# “What keeps you up at night?”

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## U.S. Supreme Court rules no “mixed-motive” analysis permissible for age discrimination claims

By Henry A. Platt

In a groundbreaking and closely divided decision, the United States Supreme Court ruled on June 18 that the so-called “mixed-motive” analysis sometimes used in Title VII discrimination cases has no application to age discrimination cases under the Age Discrimination in Employment Act (ADEA). In *Gross v. FBL Financial Services, Inc.*, the High Court ruled that a plaintiff in a disparate treatment age discrimination case always bears the burden of proving, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. Unlike in Title VII cases, the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of age, even when a plaintiff has produced some evidence that age was one of the motivating factors in the employer’s decision-making process.

In Title VII discrimination cases, if a plaintiff can establish that discrimination was a motivating factor in an adverse employment decision, even if there were other, legitimate reasons for the decision, the burden shifts to the employer to prove that it would have reached the same decision even in the absence of the discriminatory motive. If the employer satisfies this burden, Title VII limits the remedies available to a plaintiff, but liability remains with the employer.

In its 5-4 decision authored by Justice Thomas, the Court held that the text of the ADEA differs substantively from Title VII, which was amended in 1991 to specifically address the burden-shifting scheme in mixed-motive cases first recognized by the Supreme Court in the 1989 case, *Price Waterhouse v. Hopkins*. Unlike Title VII, the ADEA does not permit a plaintiff to establish liability merely by proving that discrimination was one of the motivating factors in the employment decision. To the contrary, the Court held that the ADEA expressly prohibits discrimination “because of” age, a phrase the Court interprets, by reference to dictionary definitions, to mean that “but for” the improper motive, the adverse action would not have been taken.

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This ruling came as a surprise to both plaintiffs' and management attorneys, as the Court had not formally agreed to address this issue when it accepted the case for review. The only formal issue before the Court had to do with the proper type of evidence a plaintiff must introduce in order for a trial court to give a “mixed-motive” instruction to the jury, requiring them to shift the burden of persuasion to the employer. In *Gross*, the Court simply jettisoned the “mixed motive” analysis entirely from cases brought under the ADEA. Justices Stevens and Breyer each filed scathing dissents, accusing the majority of engaging in “an unabashed display of judicial lawmaking.”

The practical impact of the ruling will be immediately felt in all pending disparate treatment age discrimination cases, as age plaintiffs will now have a much more difficult time establishing liability under the heightened, “but-for” causation burden of proof. Given the dramatic impact of the ruling, it is reasonable to assume that there may be some quick Congressional attempts to “reverse” the Supreme Court's decision.

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