

**LABOR & EMPLOYMENT LAW SECTION OF THE
COLORADO BAR ASSOCIATION**

***GROSS V. FBL FINANCIAL SERVICES, INC.*
RESOLVING THE BURDEN OF PROOF IN AGE DISCRIMINATION CASES**

Thursday, September 17, 2009 12:00 to 1:30 p.m.

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Abstract: *In a 5-4 decision, the Supreme Court has ruled that Title VII's burden-shifting analysis for mixed-motives cases does not apply to Age Discrimination in Employment Act (ADEA) claims. The ADEA plaintiff must prove that his or her age was the "but-for" cause of the adverse employment action. Thus, even if there is some evidence that age was a factor in the challenged employment decision, the plaintiff must still prove that, but for his or her age, the employer would not have taken the challenged action.*

I. Precedent and Legal Background

1. The *McDonnell Douglas-Burdine* Proof Paradigm Outside of Title VII

In *McDonnell Douglas Corp. v. Green*, the Supreme Court set out a tripartite burden-shifting framework for claims of discrimination arising under Title VII. 411 U.S. 792, 802 (1973). First, the plaintiff must establish a prima facie case of discrimination. The plaintiff may do this by showing:

1. plaintiff is a member of a protected class;
2. plaintiff was qualified for the position in question;
3. plaintiff was subjected to adverse action by the defendant; and
4. similarly situated members of other classes were not subjected to the same adverse action.

Second, the defendant has the burden of production to put into evidence a legitimate, nondiscriminatory reason for the allegedly discriminatory termination or demotion. If the defendant produces a legitimate reason, the presumption of discrimination disappears. Finally, the plaintiff has the opportunity to prove that the supposed reason for the employment decision was in fact a pretext for discrimination. The Supreme Court reaffirmed this proof paradigm in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981),

Because the ADEA, the Americans with Disabilities Act (ADA), Title VII retaliation claims, 42 U.S.C. § 1981, and the Family and Medical Leave Act (FMLA) contain language analogous to language found in Title VII, the Supreme Court has assumed that the *McDonnell*

Douglas burden-shifting framework applies to claims of discrimination under these related statutes. *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 45 (2003) (applying the *McDonnell Douglas* framework to an ADA claim); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (assuming that the *McDonnell Douglas* framework applies to ADEA suits); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming that the *McDonnell Douglas* framework applies to 42 U.S.C. § 1983 claims).

2. Into the Mixed-Motives Abyss of Direct Evidence and Causation

[M]aintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, nondiscriminatory employment decisions.

EEOC v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160, 164 n.2 (4th Cir. 2004).

Mixed-motive refers to cases in which an adverse employment decision results from "multiple factors, at least one of which is legitimate." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (White, J., concurring).

In *Price Waterhouse v. Hopkins*, the Supreme Court established an affirmative defense for employers in mixed-motive cases but also generated tremendous uncertainty as to the kind of evidence required to obtain a mixed-motive instruction. In that case, the partners in *Price Waterhouse's* accounting firm refused to re-propose Ann Hopkins for partnership after they had postponed the decision the previous year. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-32 (1989) (Brennan, J., plurality opinion), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

Although Hopkins was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff," *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1113 (D.D.C. 1985), the *Price Waterhouse* partners also criticized her because she was a woman. *Price Waterhouse*, 490 U.S. at 235 (Brennan, J., plurality opinion). One partner told Hopkins that, in order to improve her chances of making partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Thus, the partners had both legitimate concerns about Hopkins's interpersonal skills and "an impermissibly cabined view of the proper behavior of women." *Id.* at 236-37.

In a fractured opinion, the Supreme Court held that a defendant-employer may completely avoid liability by proving by a preponderance of the evidence that it would have made the same employment decision regardless of the plaintiff's protected trait. *Id.* at 258; *id.* at 260 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring). A majority of the Justices, however, disagreed on the kind of evidence required for a plaintiff to obtain a mixed-motive instruction. Writing for a plurality of four Justices, Justice Brennan stated that a plaintiff must prove that her protected trait was a motivating factor in an employment decision; *Id.* at 258 (Brennan, J., plurality opinion) Justice Brennan did not, however, "suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision."

Id. at 251-52. Justice White, concurring in the judgment, believed that the Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) governed the case and, therefore, that the burden shifts to the defendant only when a plaintiff “show [s] that the unlawful motive was a substantial factor in the adverse employment action.” *Price Waterhouse*, 490 U.S. at 259.

Justice O'Connor, however, announced a new evidentiary standard in her concurring opinion. In order to shift the burden of persuasion to the defendant, Justice O'Connor stated, a plaintiff must show “by direct evidence that an illegitimate criterion was a substantial factor in the decision.” *Id.* at 265. This shows and allows a finder of fact to “conclude that absent further explanation, the employer's discriminatory motivation 'caused' the employment decision.” *Id.* at 265. Although Justice O'Connor did not define “direct evidence,” she noted that it does not extend to “statements by nondecisionmakers, ... statements by decisionmakers unrelated to the decisional process itself,” or “stray remarks in the workplace.” *Id.* at 277.

After *Price Waterhouse*, lower courts treated Justice O'Connor's concurring opinion as controlling because it appeared to represent the narrowest rationale for the Court's decision. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (“[W]hen no single rationale commands a majority, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’”) (*quoting Marks v. United States*, 430 U.S. 188, 193 (1977)).

Two years after *Price Waterhouse*, in 1991, Congress amended Title VII to provide additional remedies for acts of intentional discrimination in the workplace. The Civil Rights Act of 1991 (“1991 Act”) responded to *Price Waterhouse* in two ways. First, the 1991 Act amended section 703 by adding subsection (m), which provides that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Second, the 1991 Act amended section 706(g) by adding subparagraph (B), which retained the “same-decision defense” --*i.e.*, an allegedly discriminatory decision is permissible if the same decision would have occurred due to a legitimate consideration--as a limitation on a plaintiff's remedies in mixed-motive cases. But even if an employer demonstrates that it would have taken the same employment action absent an impermissible motive, the court may award the plaintiff declaratory and injunctive relief, as well as attorney fees and costs, but not damages, reinstatement, hiring, or a promotion.

Following this amendment, the main issue was “whether a plaintiff [was required to] present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII ... as amended by the Civil Rights Act of 1991.” In *Desert Palace, Inc. v. Costa*, Justice Thomas, writing for a unanimous Court, held that a Title VII plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction. In *Desert Palace*, the Supreme Court declined to address whether Justice O'Connor's opinion establishes binding precedent. *See, Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (“Like the Court of Appeals, we see no need to address which of the opinions in *Price Waterhouse* is controlling: the third step of petitioner's argument is flawed, primarily because it is inconsistent with the text of 42 U.S.C.A. § 2000e-2(m).”). Justice Ginsburg, however, has expressed concern with the

position taken by most lower courts, stating that to infer a direct evidence requirement from *Price Waterhouse* is “a lot to load on two words in a concurring opinion.”

In the wake of *Desert Palace*, a split emerged among the circuits as to the kind of evidence required in non-Title VII mixed-motive cases. The Fifth, Seventh, Ninth, and Tenth Circuits, as well as the District of Columbia, have not required direct evidence in mixed-motive claims arising under federal anti-discrimination statutes. *See, e.g.,* *Reilly v. TXU Corp.*, 271 F. App'x. 375, 380 (5th Cir. 2008) (noting that direct evidence is not required in mixed-motive cases arising under 42 U.S.C. § 1981); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008) (holding that to bring an ADEA claim under a mixed-motive analysis, a plaintiff must prove discrimination by direct proof, which can be satisfied by either circumstantial or direct evidence); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (noting that a plaintiff can establish retaliation under *Price Waterhouse* through direct or circumstantial evidence); *Sellie v. Boeing Co.*, 253 F. App'x 626, 627 n.2 (9th Cir. 2007) (assuming, without deciding, that *Desert Palace* and the 1991 Act apply to the ADEA); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203-04 (D.C. Cir. 1997) (noting that even if Justice O'Connor's concurring opinion in *Price Waterhouse* establishes binding precedent, it does not disqualify circumstantial evidence).

The First, Second, Third, Fourth, Sixth and Eighth Circuits have taken the contrary view. *See, e.g.,* *Rios-Jimenez v. Principi*, 520 F.3d 31, 39 (1st Cir. 2008) (noting that a plaintiff must offer direct evidence of discrimination under a mixed-motive analysis); *Baqir v. Principi*, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (noting that since Congress did not amend the ADEA, *Price Waterhouse* continues to apply to ADEA cases); *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 187 (2d Cir. 2006) (noting that since the plaintiff did not present direct evidence of age discrimination, his case is governed by *McDonnell Douglas*); *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) (noting that direct evidence is required under the ADEA in mixed-motive cases); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 2003) (finding *Price Waterhouse* inapplicable where the plaintiff failed to present direct evidence of discrimination).

Adding to the confusion, courts have not been in agreement on what constitutes direct evidence of bias. BLACK'S LAW DICTIONARY defines “direct evidence” as “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” “Indirect Evidence” is defined as “evidence based on inference and not on personal knowledge or observation.” BLACK'S LAW DICTIONARY 596 (8th ed. 2007). Under the traditional definition, direct evidence is that which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption. *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390, 75 Fair Empl. Prac. Cas. (BNA) 1063, 72 Empl. Prac. Dec. (CCH) ¶45190 (11th Cir. 1997); *Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago*, 104 F.3d 1004, 19 A.D.D. 712, 6 A.D. Cas. (BNA) 725, 73 Fair Empl. Prac. Cas. (BNA) 1007, 69 Empl. Prac. Dec. (CCH) ¶44516 (7th Cir. 1997). In other words, direct evidence would be what an employer and its employees said or did in the specific employment decision in question. *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 73 Fair Empl. Prac. Cas. (BNA) 1575, 69 Empl. Prac. Dec. (CCH) ¶44495 (7th Cir. 1997).

Some courts have held that a statement reflecting a stereotype or a negative personal opinion about a protected class, without evidence that the employer relied on the stereotype or opinion, does not constitute direct evidence of discriminatory intent, even though it may be indirect evidence from which discriminatory intent may be inferred. Other courts were more sympathetic to the use of general statements as direct evidence. In *Fernandes v Costa Brothers Masonry, Inc.*, the First Circuit categorized the courts' various approaches into three general schools of thought: (1) *The "Classic" Position* (adopting the traditional approach and defined direct evidence as evidence that, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence); (2) *The "Animus Plus" Position* (includes evidence, both direct and circumstantial, of conduct or statements that: (1) reflect directly the alleged discriminatory animus; and (2) bear squarely on the contested employment decision); and (3) *the "Animus" Position* (adopting the view that, as long as the evidence, whether direct or circumstantial, is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision to qualify as direct evidence).

3. The ADEA Construct in Mixed Motive and Direct Evidence Litigation

The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer to take adverse action against an employee “because of such individual's age,” 29 U.S.C. § 623(a). Under the ADEA, it is “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.” 29 U.S.C. § 623(a)(1). When an employee alleges disparate treatment “because of” age in violation of the ADEA, “liability depends on whether the protected trait actually motivated the employer's decision.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Hence, a plaintiff must prove that his age “actually played a role in the employer's decision-making process and had a determinative influence on the outcome.” *Id.* (quoting *Hazen Paper*, 507 U.S. at 610).

In *Rachid v. Jack in the Box, Inc.*, Ahmed Rachid sued his employer under the ADEA, alleging that he was terminated from his managerial position because of his age. 376 F.3d 305, 307 (5th Cir. 2004). Jack in the Box contended that Rachid violated company policy by failing to properly record employee time; however, Rachid's supervisor regularly criticized Rachid and made belittling comments about his age. *Id.* In that case, the Fifth Circuit held that direct evidence of discrimination is not required to obtain a mixed-motive instruction for claims arising under the ADEA. *Id.* at 311.

A unanimous Supreme Court clarified in *Desert Palace* that a mixed motive instruction may be proper in cases involving either direct or circumstantial evidence. There remains, however, a significant split of authority in ADEA cases involving what causation standards apply to which disparate treatment claims, who bears the burdens of proof and persuasion in certain contexts, and what constitutes “direct evidence.” For example:

Faas v. Sears, Roebuck & Co., 532 F.3d 633, 641 (7th Cir. 2008) (holding that to bring an ADEA claim under a mixed-motive analysis, a plaintiff must prove discrimination by direct proof, which can be satisfied by either circumstantial or direct evidence);

Sellie v. Boeing Co., 253 F. App'x 626, 627 n.2 (9th Cir. 2007) (assuming, without deciding, that *Desert Palace* and the 1991 Act apply to the ADEA);

Baqir v. Principi, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (noting that since Congress did not amend the ADEA, *Price Waterhouse* continues to apply to ADEA cases);

Graves v. Finch Pruyn & Co., 457 F.3d 181, 187 (2d Cir. 2006) (noting that since the plaintiff did not present direct evidence of age discrimination, his case is governed by *McDonnell Douglas*);

Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004) (noting that direct evidence is required under the ADEA in mixed-motive cases, refusing to extend the 2003 *Desert Palace* ruling to ADEA).¹

II. The Gross Decision

Facts: Gross was born in 1948. He began working at FBL Financial Group ("FBL") in 1987 and received promotions in 1990, 1993, 1997, and 1999. In 2001, during a company reorganization, FBL reassigned Gross from the position of Claims Administration Vice President to Claims Administrator Director. Although Gross's job responsibilities did not change, Gross viewed the reassignment as a demotion because it reduced his salary. In 2003, at the age of fifty-four, FBL reassigned Gross yet again, this time to the position of Claims Project Coordinator.

¹ The Eighth Circuit decision in *Gross* similarly held that *Price Waterhouse* controls ADEA claims, holding:

§ 2000e-2(m) does not apply to claims arising under the ADEA. By its terms, the new section applies only to employment practices in which "race, color, religion, sex, or national origin" was a motivating factor. When Congress amended Title VII by adding § 2000e-2(m), it did not make a corresponding change to the ADEA, although it did address the ADEA elsewhere in the 1991 Act. See *Lewis v. Young Men's Christian Assoc.*, 208 F.3d 1303, 1305 & n.2 (11th Cir. 2000) (per curiam). Accordingly, the Third Circuit has held that "the Civil Rights insofar as summary judgment is concerned, *Rachid* is inconsistent with our circuit precedent. The Fifth Circuit in *Rachid* concluded that *Desert Palace*, which involved jury instructions in a Title VII case, dictated a change in the standard for Act of 1991 does not apply to ADEA cases," and it continues to apply the *Price Waterhouse* framework in that context. *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 n.3 (3d Cir. 2004). The Eleventh Circuit concluded that the 1991 Act did not supersede *Price Waterhouse* as applied to ADEA retaliation claims. *Lewis*, 208 F.3d at 1305. The Fourth Circuit has reasoned that "ADEA mixed-motive cases remain subject to the burden-shifting rules of *Price Waterhouse*," *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.2 (4th Cir. 2004), and has suggested (without holding) that the requirement of direct evidence still applies, noting that "maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, nondiscriminatory employment decisions." *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004). See also *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (observing that "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination," and holding that "the Court's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA" insofar as the scope of disparate-impact liability is concerned); cf. *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000) (holding that the 1991 Act does not apply to retaliation claims).

FBL transferred many of Gross's former responsibilities to the Claims Administration Manager, a position held by an employee in her early forties. Although Gross's new position was paid the same salary as Kneeskern's position, Gross viewed the reassignment as a demotion "because Kneeskern assumed the functional equivalent of Gross's former position, and his new position was ill-defined and lacked a job description or specifically-assigned duties."

In April 2004, Gross sued FBL alleging that FBL violated the ADEA by demoting him because of his age. During the trial, the district court instructed the jury that Gross had the burden to prove that (1) FBL demoted Gross and (2) Gross's age was a motivating factor in FBL's decision to demote him. The court noted, however, that the jury must find in favor of FBL if FBL proved by a preponderance of the evidence that it would have demoted Gross notwithstanding his age. At the close of trial, and over FBL's objections, the District Court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The jury found in favor of Gross and awarded him \$46,945 in lost compensation. FBL appealed and argued to the Eighth Circuit Court that the district court's mixed-motive instruction was erroneous.

The Court of Appeals for the Eighth Circuit reversed and remanded the case for a new trial, holding that the final jury instruction improperly shifted the burden of persuasion to FBL by allowing Gross to obtain a mixed-motive instruction without presenting direct evidence of discrimination.

The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, for cases under Title VII of the Civil Rights Act of 1964 when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations-*i.e.*, a "mixed-motives" case.

Held: A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Pp. 2348 - 2352.

(a) Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95, 123 S.Ct. 2148, 156 L.Ed.2d 84. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki*, 552 U.S. ----, ----, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse action, see 42

U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally, see *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274, and “negative implications raised by disparate provisions are strongest” where the provisions were “considered simultaneously when the language raising the implication was inserted,” *Lindh v. Murphy*, 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481. Pp. 2348 - 2349.

(b) The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338. To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the “but-for” cause of the employer's adverse decision. See *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ----, ----, 128 S.Ct. 2131, 170 L.Ed.2d 1012. It follows that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that “but-for” cause. This Court has previously held this to be the burden's proper allocation in ADEA cases, see, *e.g.*, *Kentucky Retirement Systems v. EEOC*, 554 U.S. ----, ---- - ----, ---- - ----, 128 S.Ct. 2361, 171 L.Ed.2d 322, and nothing in the statute's text indicates that Congress has carved out an exception for a subset of ADEA cases. Where a statute is “silent on the allocation of the burden of persuasion,” “the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.” *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387. Hence, the burden of persuasion is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. Pp. 2350 - 2351.

(c) This Court rejects petitioner's contention that the proper interpretation of the ADEA is nonetheless controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. It is far from clear that the Court would have the same approach were it to consider the question today in the first instance. Whatever *Price Waterhouse*'s deficiencies in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. The problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47, 97 S.Ct. 2549, 53 L.Ed.2d 568. Pp. 2351 - 2352.

III. The Impact of the Decision

The Court has significantly raised the burden of proof for age discrimination plaintiffs, holding that a plaintiff must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the adverse employment action. This represents a striking departure from the Court’s prior holdings that a Title VII plaintiff met his or her initial burden by demonstrating that an employer’s adverse action was motivated *in part* by an unlawful consideration. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In doing so, the Court relied heavily on the differing language of Title VII and the ADEA, noting

that Congress has amended Title VII to explicitly authorize mixed motive cases. 42 U.S.C. §2000e-2(m). Following well established tenets of statutory interpretation, the Court reasoned that had Congress intended the ADEA to permit a lessened burden of persuasion via a mixed motives theory, it would have amended the ADEA as well. Thus, the majority concluded that the mixed motives burden shifting adopted by all of the Circuit Courts has no place in ADEA cases.

Second, as noted by Justice Stevens in his dissent, the *Gross* decision may address a question on which the Court did not grant *certiorari*. The question presented -- whether a plaintiff must first present direct evidence of discrimination before obtaining a mixed motives jury instruction in an ADEA case -- seems to have been disregarded. Instead, Justice Thomas invoked Rule 14.1, which provides that the Court may consider any “subsidiary question fairly included” within the question presented by the parties. Sup. Ct. R. 14.1. While the question actually addressed is arguably antecedent to the subject to the cert petition, and, therefore within the ambit of Rule 14.1, Justice Stevens urges that the decision appears to represent “unnecessary lawmaking.” Putting the outward appearances aside, the Court also went out of its way to cast doubt on the ongoing viability of *Price Waterhouse* even as it relates to common law civil rights precedent. *Gross*, at 10 (“it is far from clear that the Court would have the same approach were it to consider the same question today in the first instance”; “even if *Price Waterhouse* were doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework”).

Third, the net effect of this decision going forward remains unclear. On one hand, the reasoning behind the Court’s decision -- strict statutory interpretation highlighting Title VII’s express language permitting the mixed motives theory -- opens the door for a broader application of this higher burden beyond the ADEA context. Plaintiffs bringing suit under Federal statutes that are modeled or legally analogous to Title VII, such as the ADA², may be foreclosed from utilizing the *Price Waterhouse* mixed motives theory on the reasoning that the ADA does not contain the express language Congress added to Title VII in the 1991 Civil Rights Act. On the other hand, by singling out Congressional intent and legislative action as its basis for such a resounding change in the enforcement of Federal discrimination laws, the Court may be tempting (baiting?) Congress into reactive legislation as it may have done with the Lily Ledbetter Act or the currently pending Arbitration Fairness Act.

² The ADA requires but/for proof. 42 U.S.C. Section 12112 (prohibits discrimination "because of" disability). This may be determined to be a higher standard than the Title VII “motivating factor” analysis.

APPENDIX A

U.S. SENATOR PATRICK LEAHY

CONTACT: Office of Senator Leahy, 202-224-4242

VERMONT

Comment Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Supreme Court's 5-4 Ruling In

Gross v. FBL Financial Services, Inc.
June 18, 2009

“In the Supreme Court’s decision today, five justices acted to disregard precedent and ignore the plain reading and common understanding of the statute that Congress passed to protect Americans from discrimination based on their age. It is even more troubling that these five justices decided to go further than the question presented to the Court. This overreaching by a narrow majority of the Court will have a detrimental effect on all Americans and their families. In these difficult economic times, American workers need to be protected from discrimination.

“The decision today reminds me of the Court’s wrong-headed ruling in *Ledbetter*. In fact, it was these same five justices who misconstrued an employment discrimination statute in that case, and also overturned a jury verdict in favor of the employee. As Justice Stevens wrote in dissent today, the Court’s overreach is ‘unnecessary lawmaking. . . . the majority’s inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress’ intent.’ By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections.”

High Court Ruling on Age Discrimination Decides Juror Rights Case

Jordan Weissmann
08-24-2009
Law.com

In a sign of just how far a recent Supreme Court decision on age discrimination could reach into labor law, a federal judge on Friday cited the opinion as she ruled against a woman who had sued Washington, D.C., under the city’s juror protection law.

LilliAnn Williams-Jackson, a former guidance counselor at J.O. Wilson Elementary School, filed suit against the city in 2007, alleging she was transferred out of her job at the school because her principal was angry that Williams-Jackson had spent four months serving on a jury.

In ruling against Williams-Jackson, Judge Rosemary Collyer of the U.S. District Court for the District of Columbia cited the Supreme Court's decision in *Gross v. FBL Financial Services*, in which the justices

ruled that plaintiffs filing age discrimination suits were required to prove that they would not have been fired "but for" their age.

Collyer found that the language used in the D.C. Jury Systems Improvement Act, which Williams-Jackson sued under, closely mirrored that of the Age Discrimination in Employment Act, the law which was the subject of *Gross*. Therefore, she wrote, the standard should be interpreted as the same, requiring Williams-Jackson to prove that she would not have been transferred but for her jury service.

"The Court has no doubt that Dr. Jackson's jury service was a motivating factor behind [the principal's] acceptance of the loss of a guidance counselor," Collyer wrote. "What is lacking is any evidence that her jury service was 'the 'but for' cause."

According to the opinion, Williams-Jackson, a Ph.D. from Michigan State University, had worked as a teacher and guidance counselor at J.O. Wilson for more than 20 years before she was transferred. In 2007 she spent four months serving as a juror on a death penalty case.

J.O. Wilson's principal, Cheryl Warley, "made it clear that she was unhappy with Dr. Jackson's absence," announcing that the counselor had "volunteered to serve on a jury, suggesting she was not dedicated to her job." She also lowered Williams-Jackson's performance evaluation from "exceeds expectations" to "meets expectations," until a union representative called to complain.

At the end of the school year, a committee led by one of Warley's alleged proteges met to discuss moving some of its employees to other schools -- a process called "excessing" -- because J.O. Wilson was over its budget. The committee settled on Williams-Jackson.

While Collyer showed little sympathy for Warley in her opinion -- she called her an "unconvincing witness" and noted that the school's committee had been wrought with problems -- she said that the school's budget provided a legitimate rationale for transferring Williams-Jackson.

"The Court has wrestled with this case for much longer than it wished because of the credibility differences between Dr. Jackson and Ms. Warley," Collyer wrote. But the *Gross* case, she concluded, clarified her decision.

APPENDIX B
RELEVANT AUTHORITIES

U.S. Supreme Court

PRICE WATERHOUSE v. HOPKINS, 490 U.S. 228 (1989)
490 U.S. 228

PRICE WATERHOUSE v. HOPKINS
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT
No. 87-1167.

Argued October 31, 1988
Decided May 1, 1989

Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held:

The judgment is reversed, and the case is remanded.

263 U.S. App. D.C. 321, 825 F.2d 458, reversed and remanded.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. The courts below erred by requiring petitioner to make its proof by clear and convincing evidence. Pp. 237-258.

(a) The balance between employee rights and employer prerogatives established by Title VII by eliminating certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice is decisive in this case. The words "because of" in 703(a)(1) of the Act, which forbids an employer to make an adverse decision against an employee "because of such individual's . . . sex," requires looking at all of the reasons, both legitimate and illegitimate, contributing to the decision at the time it is made. The preservation of employers' freedom of choice means that an employer will not be liable if it can prove that, if [490 U.S. 228, 229] it had not taken gender into account, it would have come to the same decision. This Court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a

motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive. Here, petitioner may not meet its burden by merely showing that respondent's interpersonal problems - abrasiveness with staff members - constituted a legitimate reason for denying her partnership; instead, petitioner must show that its legitimate reason, standing alone, would have induced petitioner to deny respondent partnership. Pp. 239-252.

(b) Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that the parties need only prove their case by a preponderance of the evidence. Pp. 252-255.

(c) The District Court's finding that sex stereotyping was permitted to play a part in evaluating respondent as a candidate for partnership was not clearly erroneous. This finding is not undermined by the fact that many of the suspect comments made about respondent were made by partners who were supporters rather than detractors. Pp. 255-258.

JUSTICE WHITE, although concluding that the Court of Appeals erred in requiring petitioner to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 , which sets forth the proper approach to causation in this case, also concluded that the plurality here errs in seeming to require, at least in most cases, that the employer carry its burden by submitting objective evidence that the same result would have occurred absent the unlawful motivation. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof, and there is no special requirement of objective evidence. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. Pp. 258-261.

JUSTICE O'CONNOR, although agreeing that on the facts of this case, the burden of persuasion should shift to petitioner to demonstrate by a preponderance of the evidence that it would have reached the same decision absent consideration of respondent's gender, and that this burden shift is properly part of the liability phase of the litigation, concluded that the plurality misreads Title VII's substantive causation requirement to command burden shifting if the employer's decisional process is [490 U.S. 228, 230] "tainted" by awareness of sex or race in any way, and thereby effectively eliminates the requirement. JUSTICE O'CONNOR also concluded that the burden shifting rule should be limited to cases such as the present in which the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. Pp. 261-279.

(a) Contrary to the plurality's conclusion, Title VII's plain language making it unlawful for an employer to undertake an adverse employment action "because of" prohibited factors and the statute's legislative history demonstrate that a substantive violation only occurs when consideration of an illegitimate criterion is the "but-for" cause of the adverse action. However, nothing in the language, history, or purpose of the statute prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Such a rule has been adopted in tort and other analogous types of cases, where leaving the burden of proof on the plaintiff to prove "but-for" causation would be unfair or contrary to the deterrent purposes embodied in the concept of duty of care. Pp. 262-269.

(b) Although the burden shifting rule adopted here departs from the careful framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 , and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 - which clearly contemplate that an individual disparate treatment plaintiff bears the burden of persuasion throughout the litigation - that departure is justified in cases such as the present where the plaintiff, having presented direct evidence that the employer placed substantial, though unquantifiable, reliance on a forbidden factor in making an employment decision, has taken her proof as far as it could go, such that it is appropriate to require the defendant, which has created the uncertainty as to causation by

considering the illegitimate criterion, to show that its decision would have been justified by wholly legitimate concerns. Moreover, a rule shifting the burden in these circumstances will not conflict with other Title VII policies, particularly its prohibition on preferential treatment based on prohibited factors. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 , distinguished. Pp. 270-276.

(c) Thus, in order to justify shifting the burden on the causation issue to the defendant, a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision. Such a showing entitles the factfinder to presume that the employer's discriminatory animus made a difference in the outcome, and, if the employer fails to carry its burden of persuasion, to conclude that the employer's decision was made "because of" consideration of the illegitimate factor, thereby satisfying [490 U.S. 228, 231] the substantive standard for liability under Title VII. This burden shifting rule supplements the McDonnell Douglas-Burdine framework, which continues to apply where the plaintiff has failed to satisfy the threshold standard set forth herein. Pp. 276-279.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., post, p. 258, and O'CONNOR, J., post, p. 261, filed opinions concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, post, p. 279.

Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were Paul M. Bator, Douglas A. Poe, Eldon Olson, and Ulric R. Sullivan.

James H. Heller argued the cause for respondent. With him on the brief was Douglas B. Huron.

HAZEN PAPER CO. v. BIGGINS, 507 U.S. 604 (1993)

507 U.S. 604

**HAZEN PAPER CO., ET AL. v. BIGGINS
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

No. 91-1600

Argued January 13, 1993

Decided April 20, 1993

Petitioners fired respondent Biggins when he was 62 years old and apparently a few weeks short of the years of service he needed for his pension to vest. In his ensuing lawsuit, a jury found, inter alia, a willful violation of the Age Discrimination in Employment Act of 1967 (ADEA), which gave rise to liquidated damages. The District Court granted petitioners' motion for judgment notwithstanding the verdict on the "willfulness" finding, but the Court of Appeals reversed, giving considerable emphasis to evidence of pension interference in upholding ADEA liability and finding that petitioners' conduct was willful because, under the standard of *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, they knew or showed reckless disregard for the matter of whether their conduct contravened the ADEA.

Held:

1. An employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait - under the ADEA, age - actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the ADEA's passage - inaccurate and stigmatizing stereotypes about older workers' productivity and competence - disappears. Thus, it would be incorrect to say that a decision based on years of service - which is analytically distinct from age - is necessarily age-based. None of this Court's prior decisions should be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect. The foregoing holding does not preclude the possibility of liability where an employer uses pension status as a proxy for age, of dual liability under the Employee Retirement Income Security Act of 1974 and the ADEA, or of liability where vesting is based on age, rather than years of service. Because the Court of Appeals cited additional evidentiary support for ADEA liability, this case is remanded for that court to reconsider whether the jury had sufficient evidence to find such liability. Pp. 608-614. [507 U.S. 604, 605]

2. The *Thurston* "knowledge or reckless disregard" standard for liquidated damages applies not only where the predicate ADEA violation is a formal, facially discriminatory policy, as in *Thurston*, but also where it is an informal decision by the employer that was motivated by the employee's age. Petitioners have not persuaded this Court that *Thurston* was wrongly decided or that the Court should part from the rule of *stare decisis*. Applying the *Thurston* standard to cases of individual discrimination will not defeat the two-tiered system of liability intended by Congress. Since the ADEA affords an employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons, an employer could incorrectly but in good faith and nonrecklessly believe that the statute permits a particular age-based decision. Nor is there some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful." The distinction between the formal, publicized policy in *Thurston* and the undisclosed factor here is not such a difference, since an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut against imposing a penalty. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision. Pp. 614-617. 953 F.2d 1405, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, post, p. 617.

U.S. Supreme Court

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977)

Mt. Healthy City Sch. Dist. v. Doyle

No. 75-1278

Decided January 11, 1977

429 U.S. 274

Respondent, an untenured teacher (who had previously been involved in an altercation with another teacher, an argument with school cafeteria employees, an incident in which he swore at students, and an incident in which he made obscene gestures to girl students), conveyed through a telephone call to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The radio station announced the adoption of the dress code as a news item. Thereafter, petitioner School Board, adopting a recommendation of the superintendent, advised respondent that he would not be rehired, and cited his lack of tact in handling professional matters, with specific mention of the radio station and obscene gesture incidents. Respondent then brought this action against petitioner for reinstatement and damages, claiming that petitioner's refusal to rehire him violated his rights under the First and Fourteenth Amendments. Although respondent asserted jurisdiction under both 28 U.S.C. § 1343 and § 1331, the District Court rested jurisdiction only on § 1331. The District Court, which found that the incidents involving respondent had occurred, concluded that the telephone call was "clearly protected by the First Amendment" and that, because it had played a "substantial part" in petitioner's decision not to rehire respondent, he was entitled to reinstatement with backpay. The Court of Appeals affirmed. Petitioner, in addition to attacking the District Court's jurisdiction under § 1331 on the ground that the \$10,000 jurisdictional requirement of that provision was not satisfied in this case, raised an additional jurisdictional issue after this Court had granted certiorari and after petitioner had filed its reply brief, claiming that respondent's only substantive constitutional claim arises under 42 U.S.C. § 1983, and that, because petitioner School Board is not a "person" for purposes of § 1983, liability may no more be imposed on it where federal jurisdiction rests on § 1331 than where jurisdiction is grounded on § 1343.

Held:

1. Respondent's complaint sufficiently pleaded jurisdiction under 28 U.S.C. § 1331. Though the amount in controversy thereunder must exceed \$10,000, even if the District Court had chosen to award only compensatory damages, it was far from a "legal certainty" at the time of suit that respondent would not have been entitled to more than that amount. *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, 303 U. S. 288-289. Pp. 429 U. S. 276-277.
2. Petitioner, in making its belated contention concerning § 1983, failed to preserve the issue whether the complaint stated a claim upon which relief could be granted against it. Because the question involved is not of the jurisdictional sort which the Court raises on its own motion, it is assumed without deciding that respondent could sue under § 1331 without regard to the limitations imposed by § 1983. Pp. 429 U. S. 277-279.
3. Since, under Ohio law, the "State" does not include "political subdivisions" (a category including school districts), and the record shows that a local school board like petitioner is more like a county or city than it is an arm of the State, petitioner is not immune from suit under the Eleventh Amendment. Pp. 429 U. S. 279-281.
4. Respondent's constitutional claims are not defeated because he did not have tenure. *Perry v. Sindermann*, 408 U. S. 593. Pp. 429 U. S. 283-284.
5. That conduct protected by the First and Fourteenth Amendments played a substantial part in the decision not to rehire respondent does not necessarily amount to a constitutional violation justifying remedial action. The proper test is one that protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights. Since respondent here satisfied the burden of showing that his conduct was constitutionally protected and was a motivating factor in the petitioner's decision not to rehire him, the District Court should have gone on to determine whether petitioner had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Pp. 429 U. S. 284--287.

REHNQUIST, J., delivered the opinion for a unanimous Court.

**DESERT PALACE, INC., d/b/a CAESARS PALACE HOTEL & CASINO
v. COSTA**

No. 02-679. Argued April 21, 2003

Decided June 9, 2003

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer ... to discriminate against any individual ... , because of ... sex." 42 U. S. C. § 2000e-2(a)(1). In *Price Waterhouse v. Hopkins*, 490 U. S. 228, this Court considered whether an employment decision is made "because of" sex in a "mixed-motive" case, i. e., where both legitimate and illegitimate reasons motivated the decision. Although the Court concluded that an employer had an affirmative defense if it could prove that it would have made the same decision had gender not played a role, it was divided on the question of when the burden of proof shifts to an employer to prove the defense. JUSTICE O'CONNOR, concurring in the judgment, concluded that the burden would shift only where a disparate treatment plaintiff could show by "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Id.*, at 276. Congress subsequently passed the Civil Rights Act of 1991 (1991 Act), which provides, among other things, that (1) an unlawful employment practice is established "when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice," 42 U. S. C. § 2000e-2(m), and (2) if an individual proves a violation under § 2000e-2(m), the employer can avail itself of a limited affirmative defense that restricts the available remedies if it demonstrates that it would have taken the same action absent the impermissible motivating factor, § 2000e-5(g)(2)(B). Respondent, who was petitioner's only female warehouse worker and heavy equipment operator, had problems with management and her co-workers, which led to escalating disciplinary sanctions and her ultimate termination. She subsequently filed this lawsuit, asserting, inter alia, a Title VII sex discrimination claim. Based on the evidence she presented at trial, the District Court denied petitioner's motion for judgment as a matter of law and submitted the case to the jury. The District Court instructed the jury, as relevant here, that if respondent proved by a preponderance of the evidence that sex was a motivating factor in the adverse work conditions imposed on her, but petitioner's conduct was also motivated by lawful reasons, she was entitled to damages unless petitioner proved by a preponderance of the evidence that it would have treated her similarly had gender played no role. Petitioner unsuccessfully objected to this instruction, claiming that respondent had not adduced "direct evidence" that sex was a motivating factor in petitioner's decision. The jury awarded respondent backpay and compensatory and punitive damages, and the District Court denied petitioner's renewed motion for judgment as a matter of law. A Ninth Circuit panel vacated and remanded, agreeing with petitioner that the District Court had erred in giving the mixed-motive instruction. The en banc court, however, reinstated the judgment, finding that the 1991 Act does not impose any special evidentiary requirement.

Held: Direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under Title VII. The starting point for this Court's analysis is the statutory text. See *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253-254. Where, as here, the statute's words are unambiguous, the judicial inquiry is complete. *Id.*, at 254. Section 2000e-2(m) unambiguously states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to any employment practice. On its face, it does not mention that a plaintiff must make a heightened showing through direct evidence. Moreover, Congress explicitly defined "demonstrates" as to "mee[t] the burdens of production and persuasion." § 2000e-2(m). Had Congress intended to require direct evidence, it could have included language to that effect in § 2000e-2(m), as it has unequivocally done when imposing heightened proof requirements in other circumstances. See, e. g., 42 U. S. C. § 5851(b)(3)(D). Title VII's silence also suggests that this Court should not depart from the conventional rule of civil litigation generally applied in Title VII cases, which requires a plaintiff to prove his case by a preponderance of the evidence using direct or circumstantial evidence. This Court has often acknowledged the utility of circumstantial evidence in discrimination cases and has never questioned its adequacy in criminal cases, even though proof beyond a reasonable doubt is required. Finally, the use of the term "demonstrates" in other Title VII provisions tends to show that § 2000e-2(m) does not incorporate a direct evidence requirement. See e. g., § 2000e2(k)(1)(A)(i). Pp.98-102.

THOMAS, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, post, p. 102

HUNTER v. VALLEY VIEW LOCAL SCHOOLS

--- F.3d ----, 2009 WL 2601863 (6th Cir.(Ohio)), 15 Wage & Hour Cas.2d (BNA) 321
(Cite as: 2009 WL 2601863 (6th Cir.(Ohio)))

Decided and Filed: Aug. 26, 2009.

Background: Employee brought Family and Medical Leave Act (FMLA) retaliation action against employer, alleging that employer impermissibly considered employee's prior use of FMLA leave in deciding to place her on involuntary leave.

Holding: FMLA, like Title VII, authorizes claims based on an adverse employment action motivated by both the employee's use of FMLA leave and also other, permissible factors.

Excerpt: We have often relied on Title VII precedent to analyze FMLA retaliation claims. ... *Gross* thus requires us to revisit the propriety of applying Title VII precedent to the FMLA by deciding whether the FMLA, like Title VII, authorizes claims based on an adverse employment action motivated by both the employee's use of FMLA leave and also other, permissible factors. We conclude that it does.

Congress delegated authority to the Secretary of the Department of Labor to prescribe regulations to implement the FMLA. *See* 29 U.S.C. § 2654. Among those regulations is the following:

The [FMLA]'s prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, *employers cannot use the taking of FMLA leave as a negative factor in employment actions*, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

29 C.F.R. § 825.220(c) (emphasis added). Thus, the implementing regulations explicitly forbid an employer from considering an employee's use of FMLA leave when making an employment decision. The phrase "a negative factor" envisions that the challenged employment decision might also rest on other, permissible factors. *Cf.* 42 U.S.C. § 2000e-2(m) (authorizing claim under Title VII where a protected characteristic such as race or sex is "a motivating factor" in adverse employment decision); *see also* *GROSS*, 129 S.Ct. at 2349. We have already held that § 825.220(c) is a reasonable interpretation of the FMLA entitled to deferential judicial review. *See* *Bryant*, 538 F.3d at 401- 02. We therefore conclude that the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors.

In light of our reading of the FMLA through the lens provided by *GROSS*, we continue to find *Price Waterhouse's* burden-shifting framework applicable to FMLA retaliation claims. Accordingly, if Hunter has presented evidence to establish that Valley View discriminated against her because of her FMLA leave, then the burden shifts to Valley View to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.