SETTING NEW STANDARDS FOR EMPLOYERS:

# THE SUPREME COURT'S RETIRING OF THE MIXED MOTIVES STANDARD FOR ADEA CLAIMS & THE RETROACTIVITY OF THE LEDBETTER ACT

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Employers won a few substantial victories during this past United States Supreme Court session. In *Gross v. FBL Financial Services, Inc*., 557 U.S. __ (2009), the Supreme Court closed its 2008 session by retiring the standard of review formerly applicable to age discrimination claims brought under the Age Discrimination in Employment Act (ADEA). And in *AT&T Corp. v. Hulteen*, 556 U.S. __ (2009), the Supreme Court explained the retroactive consequences of the Lily Ledbetter Fair Pay Act.

## *Gross v. FBL Financial Services*

Beginning, first, with *Gross*, the Supreme Court was posed with a two-fold issue: (1) whether the burden of proof ever shifts to the employer to disprove age discrimination, and (2) whether the "mixed motives" analysis traditionally used in both Title VII and ADEA claims applied to the ADEA. By a five-to-four majority, the court held that mixed motives analyses are no longer appropriate under ADEA and that, furthermore, the burden of proof never shifts to the employer.

### Background

Gross began working for FBL in 1971. In 2001, Gross' job title changed, although his job duties remained the same. Gross suspected the title change constituted an age-based discriminatory act because, due to the title change, he would receive fewer points in the company's salary grade system.

Then in 2003, Gross was moved to another position, supposedly as part of the company's department restructuring. Gross' original job duties went to a woman in her early forties whom Gross had previously supervised. Believing this, too, was an age-based discriminatory act, Gross sued FBL under the ADEA.[1]

At trial, the jury was instructed that if Gross could prove by a preponderance of the evidence that age was a motivating factor (*i.e.*, played a part or role) in his demotion, it should return a verdict in Gross' favor.[2] The jury was also instructed that if FBL proved by a preponderance that it would have demoted Gross irrespective of his age, it should return a verdict in FBL's favor. The jury returned a verdict in the amount of $46,945 in Gross' favor. FBL appealed to the Eighth Circuit, arguing the jury instructions were improper. Particularly, FBL challenged the instructions as they were based on the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhous*e, the court held that, if a Title VII plaintiff shows that discrimination was a "motivating factor," the burden shifts to the employer to demonstrate they would have taken the same action irrespective of the protected category (under ADEA, age). FBL argued that *Price Waterhouse* should not apply to ADEA claims because the ADEA was amended and did not allow for "motivating factor" theories.

Addressing this issue, the Eighth Circuit ruled that the burden of persuasion only shifts in mixed motive cases if the plaintiff has presented direct evidence of discrimination. In circumstantial cases, the burden never shifts. The Eighth Circuit thus reversed and remanded the case. Gross appealed the Eighth Circuit's decision to the U.S. Supreme Court. The Supreme Court vacated the Eighth Circuit's decision and remanded the case for further proceedings.

## The Supreme Court's Reasoning

To understand *Gross*, you have to go back to the cases that spawned this dispute.

CONTINUED ON PAGE 20 ▶

# SETTING NEW STANDARDS FOR EMPLOYERS

CONTINUED FROM PAGE 19

Specifically, *Gross* exposed the court's fractious opinion in *Price Waterhouse*. *Price Waterhouse* was decided by a plurality. In *Price Waterhouse,* four justices agreed that a plaintiff may establish a prima facie discrimination claim by proving that membership in a protected class was a motivating factor – even if that factor was mixed with legitimate factors – in an employment decision. Six justices in *Price Waterhouse* agreed that, if a plaintiff makes such a showing, the burden of proof then shifts to the defendant, who may avoid liability only by proving, by a preponderance of the evidence, that it would have made the same decision, even if it had not taken that factor into account.[3] Fourteen years after *Price Waterhouse* was decided, Congress amended Title VII by expressly authorizing discrimination claims premised on a "motivating factor," thus codifying the plurality opinion in *Price Waterhouse*. See 42 U.S.C. §2000e-2(m). At the same time, however, Congress did not amend the ADEA to permit "motivating factor" inferences. Consequently, though the two acts were previously interpreted similarly, on their faces, they differed.

Writing for the majority in *Gross*, Justice Thomas – former commissioner of the U.S. Equal Employment Opportunity Commission – bluntly noted, "we cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." Progressing in his analysis, Thomas said the court's analysis was "not governed" by Title VII decisions, including *Price Waterhouse*. At this point, Thomas quoted the ADEA's operative section, which stated: "it shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual...*because of* such individual's age. 29 U.S.C. §623(a)(1)" (italics in original). Thomas then quoted from the holy triumvirate of dictionaries – Webster's, the Oxford English Dictionary and The Random House Dictionary – for the definitions of "because of." Accordingly, Thomas held that "to establish a disparate treatment claim under the plain language of the ADEA...a plaintiff must prove that age was the 'but for' cause of the employer's adverse decision." In short, Thomas had retired the mixed motives analysis for ADEA claims. With the mixed motives analysis inapplicable, it "follows, then, that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but for" cause of the employer's adverse action."

Not surprisingly, *Gross* has left many courts confused, especially at the summary judgment stage. This confusion stems from the majority's statement in footnote 2 of *Gross*, which states "the court has not definitively decided whether the evidentiary framework of *McDonnell-Douglas*...utilized in Title VII cases is appropriate" anymore "in the ADEA context." This is the majority's not-so-subtle hint that, had it been given the chance in *Gross* to address that issue, it would have held *McDonnell-Douglas* inapplicable to ADEA claims; this just was not yet the case in which to do so.

## *Gross'* Application

Notwithstanding the court's reticence and coyness in footnote two of its opinion, at least three courts (including the Third Circuit Court of Appeals), have read *Gross* to eliminate the *McDonnell-Douglas* burden shifting framework altogether.[4] This seems logical because, after all, if a plaintiff cannot prove age was *the* reason for the employment action, it would be futile to progress any further through the *McDonnell-Douglas* analysis. Other courts – perhaps out of an abundance of caution – continue to apply *McDonnell-Douglas* and then also apply *Gross*.[5] And, yet, other courts believe *Gross* only applies at trial because it speaks of the burden of proof (*i.e*., a trial standard) and not the burden of persuasion.[6]

*Gross'* impact may be difficult to ascertain. Even though circumstantial evidence is still allowed to prove the "but for" cause, it is hard to imagine what type of circumstantial evidence could satisfy such a stringent standard. Like it did with Title VII, Congress may have the final say on this matter. In fact, there is talk in Congress of passing the "Civil Rights Act of 2009."[7] That act could overturn *Gross*, much like Congress did in January 2008 by passing the Lily Ledbetter Fair Pay Act, which overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[8] Speaking of *Ledbetter*, the court's second case to discuss – *AT&T v. Hulteen* – addressed the retroactive effect of the Ledbetter Act, which was retroactive to May 28, 2008.

## *AT&T Corp. v. Hulteen*

Though *AT&T Corp. v. Hulteen,* 556 U.S. __ (2009) was essentially a retirement benefits case, its implication to employment law arises out of the application of the Ledbetter Act.

Congress enacted the Ledbetter Act for the sole purpose of overturning the Supreme Court's decision in *Ledbetter*.[9] *Ledbetter* held that the later effects of past discrimination do not restart the clock for filing a timely charge of discrimination as required by Title VII.[10] In *Ledbetter*, that meant when the unlawful pay practice was first enacted, not when Ledbetter

discovered her discriminatory pay. The problem with this logic, Ledbetter argued, was that she did not learn of the discriminatory practice until years later and, specifically, when the statute of limitations had run to file her charge of discrimination. By a five to four majority, the Supreme Court rejected Ledbetter's arguments, thus rendering her claims time-barred.[11]

## Background

Under the Ledbetter Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory decision or practice; (3) an individual is affected by the application of the discriminatory decision or practice, including each time discriminatory compensation is paid.[12] This final trigger is called the "paycheck rule," which means the discriminatory act occurs each time someone is paid based on discriminatory practice that may have been enacted years before the statute of limitations begins (or runs) from when the plaintiff first learned of the allegedly discriminatory employment policy.

## The Supreme Court's Reasoning

The Ledbetter Act's applicability to *Hulteen* came about because of AT&T's attempt to comply with the Pregnancy Discrimination Act (PDA).[13] Particularly in *Hulteen*, AT&T was charged with violating the PDA by calculating pension benefits under an accrual rule that applied prior to enactment of the PDA. AT&T gave lesser retirement credit for pregnancy leave than for other type of leave, generally. In December 2008, the Ninth Circuit affirmed the District Court's ruling in favor of the employees, thus finding that AT&T's practice violated the PDA.

Writing the opinion for a seven-to-two majority, Justice Souter wrote one of his last opinions on the court before his retirement. Souter stated in *Hulteen* that "an employer does not necessarily violate the PDA when it pays pension benefits calculated under an accrual rule that pre-dates the PDA. Title VII's bona fide seniority system clause insulates AT&T from attack. The Ledbetter Act is

CONTINUED ON PAGE 22 ▶

# SETTING NEW STANDARDS FOR EMPLOYERS

CONTINUED FROM PAGE 21

of no consequence to this case because *Hulteen* was "not affected by the application of a discriminatory compensation decision or other practice." This caused a sigh of relief for many practitioners because many feared the Ledbetter Act – and its retroactivity in particular – would cause havoc with employment practices that were legal before Ledbetter, but arguably illegal after. Thus, the court's holding in *Hulteen* suggests the Ledbetter Act is only retroactive unto itself, not in regards to other statutes. In fact, this comports with the Supreme Court's decision in *Brazemore v. Friday*, 478 U.S. 385 (1986), which held that a pattern or practice that was not illegal prior to Title VII but that would constitute a violation of Title VII did in fact become a violation of Title VII upon Title VII's effective date. The Supreme Court distinguished *Brazemore* in *Hulteen* by noting: (1) *Brazemore* did not involve a seniority system; (2) *Brazemore* failed to eliminate the discriminatory practices at issue, which AT&T did by adopting a new compensation plan on the effective date of the PDA that complied with the PDA. That is, AT&T's calculation of pension payments (*i.e.*, allegedly discriminatory pay) was based on past, completed events that were *not* discriminatory *when* they occurred.

## Hulteen's Application

*Hulteen* protects allegedly "discriminatory" acts that were not actually illegal when they were made but, rather, were only illegal after the fact. Basically, the court is saying that if an employer made a good-faith effort to comply with the existing law (in this case the PDA) it will not retroactively apply the Ledbetter Act to find a discriminatory pattern or employment practice that was putatively legal when it was made. Conversely, and notwithstanding the Supreme Court's now-overruled decision in *Ledbetter*, the discriminatory pay practice was never actually legal in *Ledbetter*. Instead, it was only "legal" because the Supreme Court misinterpreted Congress' intent with respect to the statute of limitations for fair pay claims.

## Conclusion

*Gross*, it has been said, has little practical impact upon age discrimination claims. We think that is wrong. Until (if) Congress overrules *Gross*, the fact is that *Gross* is a blunt instrument teetering precariously over all age discrimination claims at the summary judgment stage. After all, it is highly unlikely that discovery will ever reveal that age was *the*

reason a plaintiff suffered an adverse employment decision. Further, until the Supreme Court clarifies what it meant in footnote 2 of its opinion, there is substantial confusion that the *McDonnell-Douglas* burden-shifting analysis is no longer applicable to age discrimination claims under the ADEA. To be cautious, however, counsel should analyze such a claim under both *McDonnell-Douglas* and *Gross* but note the confusion caused by *Gross*' footnote 2.

As to *Hulteen*, the practical effect is clear: an employment decision that was not discriminatory, per se, when it was made, will not be construed by the court as discriminatory after the fact. Thus, the court will not retroactively impose liability for good-faith efforts to comply with the law as it then-existed. From a practitioner's standpoint, this means the Ledbetter Act's retroactive statute of limitations statute does not run each and every time the allegedly discriminatory act occurred. Rather, the discriminatory act occurs when the act actually became illegal. NL

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1 29 U.S.C. § 623(a)(1).

2 Under the "motivating factor" theory, when a plaintiff like Gross alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

3 This burden-shifting requirement arises from the Supreme Court's decision in *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973). *McDonnell-Douglas* held that, if a plaintiff can prove a prima facie claim of age discrimination the burden shifts to the employer to prove their decisions were legitimate and not-discriminatory and they would have taken the same action irrespective of the person's protected status. If the employer meets that burden, the presumption of unlawful discrimination drops out of the picture. The plaintiff must then come forward with specific and substantial evidence demonstrating the employer's stated reasons are "pretextual." *Id.* To prove a prima facie discrimination claim, a plaintiff must prove: (1) he belonged to a protected class, (2) he was qualified for and/or performing according to the employer's legitimate expectations; (3) he was subjected to an adverse employment decision; and (4) a person not in the plaintiff's protected class received better treatment. See *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2007) (quoting *McDonnell-Douglas*).

4 *Milby v. Greater Philadelphia Health Action*, 2009 WL 2219226, *1 at fn. 3 (3rd Cir. July 27, 2009); *Frank v. Potter*, 2009 WL 2240317, *3 (W.D. Wash. July 27, 2009); *Wagner v. Geren*, 2009 WL 2105680, *4+ (D. Neb. July 09, 2009).

5 *Woehl v. Hy-Vee, Inc.*, 2009 WL 2105480, *4+ (S.D. Iowa July 10, 2009); *Martino v. MCI Communications Services, Inc.*, 574 F.3d 447, 452 (7th Cir. 2009).

6 *Misner v. Potter*, 2009 WL 1872598, *2 (D. Utah June 26, 2009); *Moultrie v. Hamilton County Dept. of Job and Family Services*, 2009 WL 2169136, *28+ (S.D. Ohio July 16, 2009); *Baron v. New York City Dept. of Educ.*, 2009 WL 1938975, *5 at fn. 1 (E.D.N.Y. Jul 07, 2009). Of all these cases, *Baron* was the most insistent that *Gross* did not change the *McDonnell-Douglas* burden shifting analysis.

7 See edlabor.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml (Rep. George Miller (D-CA) chairman of the House Education and Labor Committee announces hearing regarding *Gross*).

8 550 U.S. 618 (2007).

9 *Id.*

10 42 U.S.C. §2000e-2(a)(1) states an individual must file a charge of discrimination within 180 days "after the alleged unlawful employment practice occurred."

11 *Ledbetter*, 550 U.S. at 642-43.

12 42 U.S.C. § 2000e-5(e).

13 *Cf.* 42 U.S.C. § 2000e-(k).