Ohio Northern University Law Review

Volume 36 | Issue 2 Article 7

Gross v. FBL Financial Services, Inc.129 S. Ct. 2343 (2009)

Jesse T. Moseer

Gross v. FBL Financial Services, Inc.
129 S. Ct. 2343 (2009)

I. INTRODUCTION

In *Gross v. FBL Financial Services, Inc.*,[1] the United States Supreme Court held that the burden of proof could be placed on the plaintiff in claims under the Age Discrimination in Employment Act of 1967 ("ADEA"),[2] even when there is some evidence that age was a motivating factor in the adverse action.[3] The ruling represented a shift in how the Court looks at the burden of proof in employment discrimination actions.[4] The Court had previously held, in *Price Waterhouse v. Hopkins*,[5] that defendants in discrimination claims under Title VII[6] – which then shared pertinent language with the ADEA – would be relieved of the burden of proof if able to "prov[e] 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."[7]

II. STATEMENT OF FACTS

A. The Factual History

Jack Gross started working for FBL Financial Group, Inc. ("FBL") in 1971.[8] By 2001, Gross had assumed the title of claims administration director.[9] In 2003, at the age of fifty-four, Gross was reassigned to the position of claims project coordinator, and many of his job responsibilities were shifted "to a newly created position."[10] The new position was filled by Lisa Kneeshern, a woman who had previously supervised Gross and was in her early forties.[11] While Gross and Kneeshern received the same amount of compensation, Gross viewed the job as a demotion because most of his responsibilities were stripped from him.[12] Gross then filed suit, claiming his reassignment was in violation of the ADEA, which barred any adverse action against an employee because of age.[13]

B. The Procedural History

---

[1] 129 S. Ct. 2343 (2009).
[2] 29 U.S.C.S. § 621 (LexisNexis 2010).
[3] *Gross*, 129 S. Ct. at 2352.
[4] *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[5] *Id.*
[6] 42 U.S.C.S. § 2000e-2(m) (2010).
[7] *Price Waterhouse*, 490 U.S. at 258.
[8] *Gross*, 129 S. Ct. at 2346.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 2346-47.
[12] *Id.* at 2347.
[13] 29 U.S.C.S. § 621(a); *Gross*, 129 S. Ct. at 2347.

In 2004, Gross filed suit in the Federal District Court for the Southern District of Iowa and the case went to trial.[15] At the end of the trial, the court instructed the jury that it must return a verdict for Gross if it found that FBL had demoted him and that "age was a 'motivating factor'" in the decision.[16] The jury was also told that age would be a "motivating factor . . . if it played a part or role" in the decision to demote Gross.[17] Conversely, the jury was told that it must find for FBL if FBL "proved by a preponderance of the evidence that FBL would have demoted Gross regardless of his age."[18] The jury found for Gross and awarded him $46,945 in lost wages.[19]

"FBL challenged the appropriateness of the jury instructions on appeal, and the Court of Appeals for the Eighth Circuit agreed, finding that the trial court had improperly instructed the jury under the standard set by the United States Supreme Court in *Price Waterhouse*.[20] In *Price Waterhouse*, the Court ruled that the burden of proof shifts to the employer if the plaintiff can show that discrimination was a "motivating" or "substantial" factor in the adverse action.[21] But, the appellate court, following circuit precedent, held that the plaintiff must present "direct evidence" that the action was motivated by age before the burden of proof would shift to the employer.[22]

The United States Supreme Court granted certiorari to decide if direct evidence is required to shift the burden of proof to the employer in an ADEA claim.[23] However, the Court never reached the question presented, finding instead that the language of the ADEA forbade the burden of proof from ever shifting to the employer.[24] The Court then vacated and remanded the decision of the court of appeals.[25]

III. DECISION AND RATIONALE

A. The Majority Decision of the Court

The Court began by warning that it would never actually reach the question presented on certiorari.[26] Gross wanted the Court to decide if direct evidence of discrimination was required to shift the burden of proof to employers in ADEA claims; however, the Court decided that it should first examine the statute to determine if the burden of proof was allowed to shift at all.[27]

---

[15] Gross v. FBL Fin. Servs., Inc., No. 4:04-CV-60209-TJS, 2006 U.S. Dist. LEXIS 98081, at *2 (S.D. Iowa June 23, 2006).

[16] *Gross*, 129 S. Ct. at 2347.

[17] *Id.*

[18] *Id.* (quoting Gross v. FBL Fin. Servs., Inc., No. 4:04-CV-60209-TJS, 2006 U.S. Dist. LEXIS 98081, at *10)).

[19] *Id.*

[20] *Id.*

[21] *Gross*, 129 S. Ct. at 2347 (citing *Price Waterhouse*, 490 U.S. at 258).

[22] *Id.* at 2348.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 2352.

[26] *See Gross*, 129 S. Ct. at 2348.

[27] *Id.*

Gross relied on the Court's previous rulings on Title VII discrimination claims and argued that the burden of proof could be shifted in ADEA claims.[28] The Court, however, took the position that the ADEA and Title VII were "materially different" and that any rulings on Title VII were not controlling in this case.[29] In *Price Waterhouse*, a plurality of the Court decided that after a plaintiff showed discrimination was a motivating factor in the adverse action, employers in Title VII claims could only prevail by proving that they would have made the same decision regardless of discrimination.[30] Shortly after the Court's decision in *Price Waterhouse*, Congress amended Title VII to allow claims where discrimination was a "motivating factor."[31]

Because this "motivating factor" standard had never been explicitly applied to the ADEA, the Court refused to include the standard in its statutory analysis.[32] In fact, the Court took special notice that Congress amended Title VII as it did without making similar amendments to the ADEA.[33] The Court reasoned that such congressional action was not without purpose and that the ruling in *Price Waterhouse* could not apply to the ADEA.[34]

The Court then examined the ADEA under the reasoning that legislative intent is best interpreted by relying on the ordinary meaning of the statute's language.[35] The ADEA requires that no employer discriminate against an employee "because of" the employee's age.[36] Using a common dictionary, the Court determined the phrase "because of" to mean "by reason of: on account of."[37] The Court took this phrase to mean that age must be the "reason" for the adverse action against the employee.[38] The Court also read the ADEA to require claimants to show that age was a "but-for" cause of the adverse action against them.[39]

Because nothing in the statute gave reason to depart from the standard burden of proof, the employee should be left to bear the risk of proving his or her claim.[40] The Court ruled that an employee in an ADEA claim must prove by a preponderance of the evidence – direct or circumstantial – that age was a "but-for" cause of the adverse action.[41]

The Court used the end of its opinion to address the status of the *Price Waterhouse* decision, saying not only that it does not apply to ADEA claims but also that it might be overturned for Title VII claims if addressed again.[42] The Court ruled that

---

[28] *Id.*
[29] *Id.* at 2348.
[30] *Id.* at 2349 (citing *Price Waterhouse*, 490 U.S. at 258).
[31] *Gross*, 129 S. Ct. at 2349; 42 U.S.C. § 2000e-2(m) (amending 42 U.S.C. § 2000e-2 (1964)).
[32] *Gross*, 129 S. Ct. at 2349.
[33] *Id.* at 2349.
[34] *Id.* (citing E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).
[35] *Id.* at 2350 (citing Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).
[36] 29 U.S.C.S. § 623(a)(1) (2010).
[37] *Gross*, 129 S. Ct. at 2350 (quoting 1 WEBSTER'S NEW INTERNATIONAL DICTIONARY 194 (3d ed. 1966)).
[38] *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).
[39] *Id.* (citing Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2141 (2008)).
[40] *Id.* (citing Schaffer v. Weast, 546 U.S. 49, 56 (2005)).
[41] *Id.* at 2351 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-43 (2000)).
[42] *Gross*, 129 S. Ct. at 2351-52.

Price Waterhouse had been a burden on many courts, creating confusion when explaining to a jury how the burden of proof had shifted.[43]

After restating its holding that the burden of proof never shifts to employers in ADEA cases, the Court vacated the judgment of the court of appeals and remanded the case for further proceedings.[44]

B. The Dissenting Opinion of Justice Stevens

Justice Stevens began his dissent by labeling the majority's "natural" reading of the ADEA as anything but natural.[45] The most natural reading, Stevens argued, was that which prohibits adverse employment actions motivated by age – "in whole or in part[.]"[46] The majority's "but-for" standard was proposed in Justice Kennedy's dissenting opinion in *Price Waterhouse*, but was rejected by that Court.[47] Justice Stevens argued that, at the time of *Price Waterhouse*, the pertinent language of Title VII was identical to that of the current ADEA.[48] For that reason, the Court should have interpreted the ADEA in the same way it interpreted Title VII in *Price Waterhouse*.[49]

Justice Stevens also faulted the majority for not simply answering the question to which the Court granted certiorari, calling it "unnecessary lawmaking."[50] In fact, the notion of overruling *Price Waterhouse* with respect to the ADEA was only first mentioned in a brief filed by FBL.[51] Justice Stevens worried that such a practice did not allow parties who might be affected to file an amicus curiae brief.[52]

Justice Stevens then addressed the majority's statutory analysis, arguing that it disregarded Court precedent and ignored congressional intent.[53] The language in the ADEA barred adverse treatment of an employee "because of" age.[54] In *Price Waterhouse*, the language of Title VII barred adverse treatment of an employee "because of" various discriminatory factors.[55]

In *Price Waterhouse*, the Court ruled that the words "because of [a discriminatory factor]" meant the factor "'must be irrelevant to employment decisions.'"[56] Justice Stevens argued that this ruling meant that, under the "because of" language, an employee need only prove discrimination was a "motivating factor" in the adverse action and that the employer can present the affirmative defense that their action would have been the

---

[43] *Id.* at 2352.
[44] *Id.*
[45] *Id.* at 2353 (Stevens, J., dissenting).
[46] *Id.*
[47] *Gross*, 129 S. Ct. at 2353 (citing *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting)).
[48] *Id.* at 2353 (citing 42 U.S.C. § 2000e-2(a)(1)).
[49] *See id.*
[50] *Id.*
[51] *Id.* (citing Brief for Respondent-Appellee, at 26, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, (2009) (No. 08-441)).
[52] *Gross*, 129 S. Ct. at 2353.
[53] *Id.*
[54] *Id.* (citing 29 U.S.C. § 623(a)(1)).
[55] *See id.* at 2353-54 (citing 42 U.S.C. § 2000e-2(a)(1)).
[56] *Id.* at 2354 (quoting *Price Waterhouse*, 490 U.S. at 240).

same regardless of discriminatory factors.[57] The majority, Justice Stevens argued, completely ignored this precedent.[58]

In attacking the majority's cited authority, Justice Stevens pointed out that several of the cited cases are not as authoritative as the majority stated.[59] The majority took *Hazen Paper Co. v. Biggins*[60] to mean that age must be the determinative factor in successful ADEA claims.[61] Justice Stevens noted, however, that *Hazen Paper Co.* also ruled that employers must "ignore" age in employment decisions.[62] Furthermore, the majority used *Reeves v. Sanderson Plumbing Products, Inc.*[63] to show that employers must show "but-for" causation to prove ADEA claims.[64] Justice Stevens argued, however, that *Reeves* focused on a non-mixed motive ADEA claim in which the burden of proof would not shift to the employer.[65] *Reeves* showed instead that the ADEA should conform to Title VII standards, since a non-mixed motive ADEA case was decided by the guidelines of non-mixed motive Title VII cases.[66]

Justice Stevens also argued that the majority undermined Congress's actions toward Title VII after the Court's ruling in *Price Waterhouse*.[67] After the Court interpreted Title VII to bar discrimination as a "motivating factor" in employment decisions, Congress codified the Court's rationale.[68] While Justice Stevens agreed that the standards of Title VII should not be arbitrarily assigned to the ADEA, he reasoned that *Price Waterhouse* did not rule on Title VII specifically, but rather on its "because of" language.[69] Since the "because of" language was identical in the ADEA, *Price Waterhouse* should have been controlling in *Gross*.[70]

In support, Justice Stevens turned to *Smith v. City of Jackson*,[71] which held that a Title VII decision made before pertinent amendments to Title VII – but not to the ADEA – was controlling in handling a similar situation under the ADEA.[72]

Justice Stevens then attacked the majority's conclusion that Congress's codification of *Price Waterhouse* showed legislative intent that the ADEA should be construed opposite of *Price Waterhouse*.[73] Justice Stevens argued that, by codifying how the Court viewed the "because of" language, Congress encouraged the Court to rule in a similar fashion on the ADEA.[74]

---

[57] *Gross*, 129 S. Ct. at 2354 (citing *Price Waterhouse*, 490 U.S. at 241, 244-45).
[58] *Id.*
[59] *See id.* at 2355.
[60] 507 U.S. 604 (1993).
[61] *Gross*, 129 S. Ct. at 2350 (majority opinion) (citing *Hazen Paper*, 507 U.S. at 610).
[62] *Id.* at 2355 (Stevens, J., dissenting) (citing *Hazen Paper*, 507 U.S. at 612).
[63] 530 U.S. 133 (2000).
[64] *Gross*, 129 S. Ct. at 2351 (majority opinion) (citing *Reeves*, 530 U.S. at 141, 143).
[65] *See id.* at 2355 (Stevens, J., dissenting) (citing *Reeves*, 530 U.S. at 141-43).
[66] *See id.*
[67] *Id.*
[68] *Id.* at 2355-56 (citing 42 U.S.C. § 2000e-2(m)).
[69] *Gross*, 129 S. Ct. at 2356.
[70] *See id*.
[71] 544 U.S. 228 (2005).
[72] *Gross*, 129 S. Ct. at 2356 (citing *Smith*, 544 U.S. at 240) (discussing Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989)).
[73] *Id.*
[74] *See id.*

Furthermore, Justice Stevens argued that, since Congress had adopted the "mixed motive" approach under Title VII, the majority's fears of jury confusion were misguided.[75] Justice Stevens even went so far as to suggest that the majority's holding would cause even more confusion, particularly in cases that involve both Title VII and the ADEA.[76]

Finally, Justice Stevens addressed the question for which the Court granted certiorari and found that a plaintiff need not show direct evidence of age discrimination to obtain a mixed-motives instruction.[77]

The court below had focused on Justice O'Connor's concurring opinion in *Price Waterhouse* and decided that a mixed-motive instruction required direct evidence.[78] This opinion was not controlling, Justice Stevens argued, because when five Justices join no single rationale, as in *Price Waterhouse*, the opinion based on the narrowest grounds is controlling.[79] Justice Stevens argued that Justice White's concurring opinion fit this description because it agreed only with the plurality that a mixed-motive instruction was appropriate, but ignored the question of what type of evidence would bring it about.[80]

Furthermore, Justice Stevens relied on *Desert Palace, Inc. v. Costa*[81] to show that mixed-motive instructions can be awarded based on direct or circumstantial evidence.[82] Through *Desert Palace*, Justice Stevens argued that the Court has established a clear precedent of allowing both direct and circumstantial arguments to establish employment discrimination.[83]

C. The Dissenting Opinion of Justice Breyer

Justice Breyer began his dissent by echoing the sentiments of Justice Stevens.[84] In addition, Justice Breyer rejected the majority's assertion that the phrase "because of" requires a showing of "but for" causation and argued that such a finding would require a trial court to read minds.[85] While normal tort plaintiffs are required to show "but for" causation in dealing with physical forces, claimants under the ADEA would be asked to show a "but for" relation between their firing and the employer's thoughts.[86]

Justice Breyer argued that, in mixed-motive cases, even after showing evidence that age played at least some role in the adverse action, the claimant could not possibly prove "but for" causation because the proof only existed in the employer's mind.[87] For that reason, Justice Breyer advocated shifting the burden of proof after the plaintiff showed evidence that age played at least a role in the adverse action.[88] This course of

---

[75] *Id.* at 2356-57.
[76] *Id.* at 2357.
[77] *Gross*, 129 S. Ct. at 2357.
[78] *Id.* (citing *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring)).
[79] *Id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977)).
[80] *Id.* (citing *Price Waterhouse*, 490 U.S. at 261 (White, J., concurring)).
[81] 539 U.S. 90 (2003).
[82] *Gross*, 129 S. Ct. at 2358 (citing *Desert Palace*, 539 U.S. at 99-100).
[83] *See id*.
[84] *Id.* (Breyer, J., dissenting).
[85] *See id.*
[86] *Id.* at 2358-59.
[87] *Gross*, 129 S. Ct. at 2358-59.
[88] *Id.* at 2359.

action would also place the burden of proof on the employer, as the party best able to establish its own thoughts.[89]

Justice Breyer finished by approving the jury instructions given by the district court.[90]

IV. ANALYSIS

A. Introduction

Gross represents a curveball to plaintiffs who, after years of only needing to establish a prima facie case, must now bear the entire burden of showing a "but for" causal link in age discrimination claims. This analysis will focus on how *Gross* differed from previous jurisprudence, the effects it may have on ADEA claims, and how Congress is likely to respond.

B. Discussion

Prior to *Gross*, it was largely accepted that the burden of proof could be shifted to employers after some evidence of age discrimination was given in an ADEA claim. In *Anderson v. Consolidated Rail Corp.*,[91] the Court of Appeals for the Third Circuit allowed the burden to shift once the plaintiff showed prima facie evidence of age discrimination.[92] In *Anderson*, the court ruled that the evidence did not show prima facie discrimination since the fired employees were not let go in favor of sufficiently younger employees.[93] In *EEOC v. Warfield-Rohr Casket Co.*,[94] the Court of Appeals for the Fourth Circuit ruled that an employer stating an employee was "getting too . . . old" constitutes enough direct evidence of age discrimination to shift the burden to the defendant. [95] Furthermore, the court ruled that this evidence did not need to be corroborated since the jury would weigh its credibility.[96] In *Woodman v. WWOR-TV, Inc.*,[97] the Court of Appeals for the Second Circuit also applied the burden-shifting framework for a prima facie showing of age discrimination.[98] Though a sixty-one-year-old news anchor was fired in favor of a forty-three-year-old, the court ruled that a prima facie case was not established since the employer was not aware of the age difference.[100] In *Maldonado v. U.S. Bank*,[101] the Court of Appeals for the Seventh Circuit applied the *Price Waterhouse* framework to pregnancy discrimination in the workplace.[102] The court even took it a step further, ruling that a plaintiff can establish a prima facie case through a

---

[89] *Id.*
[90] *Id.*
[91] 297 F.3d 242 (3d Cir. 2002).
[92] *Id.* at 248 (citing Connors v. Chrysler Financial Corp., 160 F.3d 971 (3d Cir. 1998)).
[93] *Id.* at 250.
[94] 364 F.3d 160 (4th Cir. 2004).
[95] *Id.* at 163-64.
[96] *Id.* at 164 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).
[97] 411 F.3d 69 (2d Cir. 2005).
[98] *See id.* at 76.
[100] *Id.* at 78, 80.
[101] 186 F.3d 759 (7th Cir. 1999).
[102] *Id.* at 763 (citing Geier v. Medtronic, Inc., 99 F.3d 238, 241 (7th Cir. 1996)).

mixture of direct and indirect evidence.[103] In *Medlock v. Ortho Biotech*,[104] the Court of Appeals for the Tenth Circuit also allowed a mixture of direct and circumstantial evidence to shift the burden of proof.[105] In that case, the court applied the framework to a statute outlawing retaliation by an employer against an employee who cooperates in a hiring discrimination investigation against said employer.[106] The court ruled that a prima facie case was shown by the proximity of the employee's firing to the employee testifying against the employer in a race discrimination claim.[107]

Despite this precedent, the Court still decided to strike down any process that would shift the burden of proof to employers in ADEA claims.[108] One odd point in this decision is that previous interpretation of the ADEA largely coincided with Title VII, pushing the many previously-mentioned courts to utilize the burden-shifting policy of *Price Waterhouse* in ADEA claims.[109] The Court, however, had never officially applied the *Price Waterhouse* framework to the ADEA and gave itself a clean slate, despite the similarities between the two.[110]

As Justice Stevens pointed out in his dissent, the Title VII language interpreted in *Price Waterhouse* was virtually identical to the ADEA language interpreted in *Gross*.[111] While the majority dismissed *Price Waterhouse* as a Title VII case, it wrongfully ignored the Court's previous definition of "because of."[112] *Price Waterhouse* should not have been viewed as controlling on merely its interpretation of Title VII, but rather on its interpretation of the phrase "because of."[113] The majority did attempt to explain its rejection of *Price Waterhouse* at the end of its opinion, reasoning that, even if it applied to the ADEA, burden-shifting practices as a whole are difficult to apply.[114] While not going so far as to overturn *Price Waterhouse*, the majority warned that it might not establish a burden-shifting policy if asked again.[115] While the majority may have concerns about the efficiency of *Price Waterhouse*, to define a phrase in the ADEA differently than the same phrase in Title VII is nothing more than tossing precedent out the back door instead of the front. Regardless of the reasoning, *Gross* hinders the goals of employment discrimination statutes laid out in *Price Waterhouse*.[116] At least one of these goals – pushing employers to eliminate any semblance of discrimination in the workplace – loses many of its litigious teeth after *Gross*.[117]

---

[103] *Id.*

[104] 164 F.3d 545 (10th Cir. 1999).

[105] *Id.* at 550.

[106] *Id.* at 549-50 (citing 42 U.S.C. § 2000e-3(a)).

[107] *See id*. at 550.

[108] *Gross*, 129 S. Ct. at 2352.

[109] *See id.* at 2348-49.

[110] *Id.* at 2345.

[111] *Id.* at 2354 (Stevens, J., dissenting).

[112] *See id.* at 2356.

[113] *Gross*, 129 S. Ct. at 2356.

[114] *Id.* at 2352 (majority opinion).

[115] *Id.* at 2351-52.

[116] *See* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 86 (2010) (citing *Price Waterhouse*, 490 U.S. at 264-65).

[117] *See id.* at 108 (the court's decision makes the proof of age discrimination more difficult to establish, thereby reducing an employer's incentive to achieve a work place free of discrimination).

Furthermore, the majority ignored the reality of the situation by viewing Congress's codification of *Price Waterhouse* in Title VII as reason to change its interpretation in the ADEA.[118] In *Price Waterhouse*, the Court ruled that "because of" did not mean a plaintiff must prove "but for" causation.[119] Congress then codified that interpretation.[120] Since the pertinent language was virtually identical, it stands to reason that Congress understood that the Court would interpret the ADEA the same as it had just interpreted Title VII. Therefore, if Congress had altered the ADEA in any fashion, it could have altered the interpretation just assigned to it by the Court.

Instead, the majority used Congress's approval of *Price Waterhouse* to justify assigning different meanings to the same phrase, just because they appear in two different statutes.[121] Under such reasoning, the phrase "because of" has been redefined wherever it appears in the United States Code. Such a precedent also assigns Congress the burden of pondering the effects of new legislation on old legislation, even if the courts have already interpreted the language of old legislation.

Gross also represents a giant shift from the practice of interpreting employment discrimination laws in the plaintiff's favor. By forcing plaintiffs to prove "but for" causation in age discrimination cases, the Court ignored the fact that large parts of age discrimination are hidden as cognitive bias.[122] Failing to account for an employer's internal biases can make a showing of "but for" causation next to impossible.[123] These internal biases were seen as a key reason for enacting the ADEA, but will now be largely ignored after *Gross*.[124] In *Moses v. Falstaff Brewing Corp*.,[125] the Court of Appeals for the Eighth Circuit ruled that an ambiguous procedural requirement should be construed in favor of the claimant so as to fulfill the spirit of the ADEA.[126] Despite the majority's best efforts, the phrase "because of" can hardly be said to have a definitive meaning. This fact is especially true considering the Court's previous rulings on the issue.[127]

One of the most recent examples of this trend is *Ledbetter v. Goodyear Tire & Rubber Co., Inc*.[128] In *Ledbetter*, the Court examined reduced wages in the present as a result of past discriminatory actions outside the statute of limitations and did not consider the more recent paychecks to be separate discriminatory acts.[129] As a result, Ledbetter

---

[118] *Gross*, 129 S. Ct. at 2349 (holding that Congress' decision to amend Title VII's proof of age discrimination requirements, but neglecting to do so for the ADEA, raises a presumption that interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse*).

[119] *Price Waterhouse*, 490 U.S. at 258.

[120] *See* 42 U.S.C. § 2000e-2(m).

[121] *See Gross*, 129 S. Ct. at 2349.

[122] Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Deferential Treatment*, 46 AM. BUS. L.J. 607, 626 (2009) ("cognitive basis" in this context refers to unconscious bias).

[123] *See* R. Henry Pfutzenreuter IV, *The Curious Case of Disparate Impact Under the ADEA: Reversing the Theory's Development into Obsolescence*, 94 MINN. L. REV. 467, 488 (2009) (citing *Gross*, 129 S. Ct. at 2352) (stating that age discrimination claims are burdened by a lack of explicit evidence, thereby precluding the possibility of a successful claim for disparate treatment under the ADEA).

[124] *See* Tracey, *supra* note 122 at 626.

[125] 525 F.2d 92 (8th Cir. 1975).

[126] *Id.* at 93-94.

[127] *See, e.g., Price Waterhouse*, 490 U.S. at 259; *Hazen Paper Co*., 507 U.S. at 612.

[128] 550 U.S. 618 (2007).

[129] *Id.* at 628-29, 631.

was not able to recover for lower pay because of past discriminatory acts.[130] While the situation in *Ledbetter* differs in that it deals with procedural issues, it represents the Court's refusal to construe an aspect of Title VII in the claimant's favor.

Ledbetter also represents a tendency of the Court to overturn administrative norms, choosing instead to apply its own definition of how agencies should interpret claims.[131] Just as the majority in *Gross* turned to a dictionary to interpret the ADEA, the *Ledbetter* majority placed an overly strict definition on administrative practices.[132] These tendencies show a dangerous trend that, if continued, would skew anti-discrimination statutes in such a way that will make discrimination difficult to stop.

It remains unclear how *Gross* will affect the scope of ADEA claims. Following *Ledbetter*, the number of Title VII claims actually experienced its largest annual jump in a decade.[133] *Ledbetter* focused on a procedural issue; however, the Court's decision might have actually encouraged employees to file claims sooner than they would have. In contrast, *Gross* altered the standard of proof that an employee must meet to succeed in a discrimination claim.[134] Such a ruling could have a chilling effect on the number of claims filed. Strong evidence will likely not be available until after 2010 and will be difficult to gauge, as the number of ADEA claims has grown exponentially over the last four years.[135] However, there was a slight drop in ADEA claims in 2009.[136] Another factor could be the faltering economy, forcing many employees to extend their work years while many jobs are cut.[137] The need to delay retirement could naturally conflict with an employer's need to downsize employees, leading to a jump in ADEA claims.

Ledbetter also provides a strong predictor for how Congress will react to *Gross*. Following the *Ledbetter* decision, Congress took action to amend Title VII and effectively invalidate the majority's findings.[138] It appears likely that similar action will be taken to counter *Gross*. Senator Patrick Leahy, chairman of the Senate Judiciary Committee, has issued a statement describing *Gross* as an "overreaching" decision that will strip employees of "important protections."[139] Representative George Miller,

---

[130] *See id.* at 628-29.

[131] *See* Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court & Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 259-60 (2008).

[132] *See id.*

[133] U.S. Equal Employment Opportunity Commission, *Title VII of the Civil Rights Act of 1964 Charges*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Feb. 3, 2010) (showing the number of claims rising from 61,159 in 2007 to 69,064 in 2008).

[134] *Gross*, 129 S. Ct. at 2351-52.

[135] U.S. Equal Employment Opportunity Commission, *Age Discrimination in Employment Act (ADEA) Charges*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Feb. 3, 2010) (showing the number of claims rising from 16,585 in 2005 to 24,582 in 2008).

[136] *Id.* (showing a drop in the number of claims from 24,582 in 2008 to 22,778 in 2009).

[137] Steven Greenhouse, *Working Longer as Jobs Contract*, N.Y. TIMES, Oct. 23, 2008, at F8.

[138] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 2000e-5(e)).

[139] Press Release, Office of Sen. Patrick Leahy, Comment of Sen. Leahy On The Supreme Court's Ruling in Gross v. FBL Financial Services, Inc., (June 18, 2009), *available at* http://leahy.senate.gov/press/200906/061809c.html.

chairman of the House Committee on Education and Labor, has promised to hold a hearing on *Gross* and to consider Congress acting to "clarify the law's intent[.]"[140]

Based on these statements, it appears that whatever influence *Gross* has on the ADEA might be short-lived.

V. CONCLUSION

The decision in *Gross* represents a blow to employees in age discrimination suits, particularly in mixed-motive cases where it is nearly impossible to prove that age was the "but for" cause of the adverse action. The decision also indicates that the Court will strictly construe future employment discrimination statutes, placing steep burdens of proof on plaintiffs absent explicit statutory language. While current ADEA claims may face an uphill battle, it seems likely that Congress will amend the ADEA to conform to the Title VII standard and greatly reduce a plaintiff's burden of proof.

[140] Press Release, House Committee on Education and Labor, Congress to Hold Hearing on Supreme Court's 'Gross' Ruling Regarding Age Discrimination, says Chairman Miller (June 30, 2009) *available at* http://edlabor.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml.