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The Conflicting Legal Standards for Mixed-Motive Employment Discrimination Claims

A Comparison of the ADEA and Title VII

By **Harvey S. Mars**

When it comes to statutory construction and interpretation, language means everything. As one would expect, statutes that contain variant language are interpreted and applied by courts differently even if their objectives, such as the eradication of employment discrimination, are identical. There are a great many federal, state, and local laws that prohibit employment discrimination on the basis of statutorily protected classifications – such as gender, race, color, disability, national origin, religion, and age. Nonetheless, the legal standards these anti-discrimination statutes require a plaintiff to satisfy in order to prove an employment discrimination claim can, and often do, differ. This is due to a variety of factors. Federal laws provide basic legal protections that states and localities are free to statutorily enhance. However, occasions do occur when

federal statutes with similar or even identical language are interpreted differently. Nothing illustrates this more aptly than the legal standards that now apply to “mixed-motive” employment discrimination claims under the Age Discrimination in Employment Act (ADEA),¹ which prohibits employment discrimination of individuals 40 years of age or older, and Title VII of the Civil Rights Act of 1964, as amended (Title VII),² which prohibits employment discrimination on the basis of race, national origin, gender, and religion.

Title VII and the ADEA

Courts now utilize different standards to ascertain whether legally sufficient mixed-motive discrimination claims have been established under these laws. A mixed-motive Title VII claim may be successfully litigated if the plaintiff can show

that discrimination was a “motivating” or “substantial” factor in the employer’s decision to take an adverse employment action against her or him. However, a mixed-motive employment discrimination claim under the ADEA can only succeed if the litigant proves that age was the “but-for” or only cause of the adverse decision. This distinction is confounding because the language contained in these two laws largely parallels one another. How and why did the courts come to interpret these two very similar statutes so differently? The objective of this article is to trace the origin of how different legal standards developed for Title VII and the ADEA, offer observations as to why this occurred, and then propose ways this may be remedied.

The McDonnell Douglas Framework

Before doing so, however, it is necessary to understand what a mixed-motive employment discrimination claim actually is. The United States Supreme Court has developed two approaches under Title VII by which a litigant may prove disparate impact (intentional) employment discrimination. The first approach is for the plaintiff to follow a burden-shifting analysis articulated in the Court’s decision in *McDonnell Douglas Corp. v. Green*.³ Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case (initial case) of discrimination. To set forth a prima facie case, plaintiffs must show (1) they are a member of a protected class, (2) they were qualified for the job, (3) they suffered an adverse employment action, and (4) such adverse employment action arose under circumstances giving rise to an inference of discrimination.⁴ If a plaintiff is able to establish a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the alleged adverse employment action. The burden then shifts back to the plaintiff to demonstrate that the employer’s articulated reason was merely a pretext masking a discriminatory motive. This burden-shifting approach is utilized in the vast majority of employment discrimination claims⁵ and is employed when a litigant is asserting that discrimination was the actual cause of an unfavorable employment action to which he or she was subjected. Suits employing this analysis are known as “single motive” cases.⁶

Price Waterhouse v. Hopkins

In 1989, the Supreme Court considered another line of discrimination claims in which both an impermissible discriminatory motive as well as a lawful motive played some role in the disputed employment action. That action, *Price Waterhouse v. Hopkins*,⁷ held that when a plaintiff in a Title VII case proves that gender (or any other characteristic or classification protected under that statute) played a motivating role in an unfavorable employment decision, the employer may avoid liability only by proving as an affirmative defense that it would have taken the same action had the impermissible consideration of gender not played a role.

This approach was presented as an alternative to *McDonnell Douglas*’s rather cumbersome and overly analytical burden-shifting analysis. After all, a multitude of considerations often play a role in employment determinations. To believe that a single motive to the exclusion of all others underlies any particular employment decision is overly simplistic and ignores reality.⁸ The *Price Waterhouse* Court developed a framework that took into consideration how employers actually make employment decisions.

It should be highlighted that while the Court’s majority agreed that an employer could assert an affirmative defense that it would have taken the same action even in the absence of impermissible considerations, it was divided on the question of when the burden would shift to require the employer to prove that defense. Justice Sandra Day O’Connor wrote a concurring opinion, concluding that the affirmative defense would only need to be asserted when a plaintiff demonstrated by “direct evidence that an illegitimate criterion was a substantial factor in the decision.”⁹ According to her view, if a plaintiff was incapable of presenting direct evidence, the suit should fail.

Civil Rights Act of 1991

Prior to 2003, Justice O’Connor’s concurring opinion – that direct evidence was required for a plaintiff to establish liability in a mixed-motive action – was followed by many circuit courts in this country, since there was no majority ruling on that issue in *Price Waterhouse*.¹⁰ However, in 1991, Congress passed the Civil Rights Act of 1991 (Civil Rights Act), to codify the *Price Waterhouse* mixed-motive ruling as well as to clarify the employer’s burden in defending such actions, since the Court’s decision failed to do so. It is the enactment of this amendment to Title VII and its subsequent interpretation that inadvertently resulted in the development of conflicting legal standards for Title VII and the ADEA.

The Civil Rights Act provides, in pertinent part, 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.”¹¹ This statute further provides that if a plaintiff proves a violation of this provision, the employer can then assert an affirmative defense that it would have taken the same action even in the absence of the illegal motivating factor.¹² The establishment of this affirmative defense will then restrict the plaintiff’s possible remedies.

As a result of enactment of the Civil Rights Act, the Supreme Court held, in *Desert Palace, Inc. v. Costa*,¹³ that Congress had now codified a new evidentiary standard for Title VII cases, one that did not require the plaintiff to present direct evidence that discriminatory motive was a substantial impetus for the employment decision. Even Justice O’Connor, whose concurrence created the need for a statutory amendment in the first place, acknowledged that the Civil Rights Act had created a new standard that the

Court was obliged to follow.¹⁴ The Civil Rights Act liberalized the process by which a litigant could prove a Title VII discrimination claim, and it was heralded as a huge step forward toward the eradication of civil rights violations against employees. Ironically, however, it also spelled the demise of mixed-motive federal age discrimination claims.

Other than the Civil Rights Act amendments to Title VII, Title VII and the ADEA contain comparable language. The ADEA provides that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual’s age.”¹⁵ Title VII has nearly identical language: “It shall be unlawful employment practice for an employer to fail or refuse to hire or discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color, religion, sex, or national origin.”¹⁶ In *Price Waterhouse*, the Court held that the words “because of” simply meant that gender (or any other statutorily protected category) must not be involved in the employment decision. Thus, to prove a mixed-motive discrimination claim, one need only prove that membership in a protected category was a motivating factor in the adverse employment decision.¹⁷

Due to the fact that these laws had comparable language, under long-standing judicial precedent they were interpreted in the same way. The Supreme Court has held that since the relevant language in the two statutes is identical, its interpretation of Title VII’s language applies “with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived *in haec verba* from Title VII.’”¹⁸ Hence, as a result of *Price Waterhouse*, the Supreme Court plurality’s mixed-motive analysis was applied by the courts to ADEA claims as well.¹⁹ Litigants could prove that they had been discriminated against by their employers on the basis of their age if they could demonstrate that age played a motivating role in the discriminatory action.

Gross v. FBL Financial Services, Inc.

However, all that changed in 2009, when the Court rendered its decision in *Gross v. FBL Financial Services, Inc.*²⁰ In this case, the Court was originally tasked with rendering a determination on whether an age discrimination plaintiff needed to present direct evidence of the employer’s impermissible motive in order to prove her or his case, as the O’Connor concurrence in *Price Waterhouse* suggested. This remained an open issue under the ADEA since the Civil Rights Act addressed only Title VII claims. Rather than answering this question, however, the Court, with Justice Clarence Thomas writing the majority opinion, inexplicably went much further and ruled that the mixed-motive concept simply did not apply in ADEA cases and, hence, a mixed-motive jury instruction was entirely improper.

Unlike the Court in *Price Waterhouse*, the *Gross* Court construed the ADEA’s language extremely narrowly. Justice Thomas held that the statute’s words “because of” meant that in order to prove a claim of age discrimination, the plaintiff had to demonstrate that age was the exclusive cause of the adverse employment action. Age had to be the “reason” for the decision. Contrary to its *Price Waterhouse* ruling, the Court held that ordinary usage of the words “because of” meant that “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”²¹

As suggested earlier, the enactment of the Civil Rights Act opened the door to this ruling. In its opinion, the Court correctly noted that the Civil Rights Act language, which codified the mixed-motive standard, applied only to claims of employment discrimination based upon Title VII protected categories: gender, race, religion, national origin, and color. Age was not included within its purview.²² Thus, the Court ruled that its analysis could only be based upon the actual language contained in the ADEA, clearly holding that, for all intents and purposes, the Civil Rights Act had totally nullified *Price Waterhouse*.

One can’t help but wonder what truly motivated this ruling. Are age discrimination claimants any less entitled to utilize the more liberal mixed-motive analysis than Title VII claimants are? Is ageism any less invidious than racism? Even more perplexing is Congress’ failure to include within the Civil Rights Act any mention of the ADEA or age discrimination claims. Was its failure to include age a conscious choice or was it simply an oversight?²³ Did Congress believe that based upon already existing case law *Price Waterhouse* would continue in full force and effect for age discrimination claims? An examination of the legislative history of the Civil Rights Act may be instructive in this regard but that is beyond the scope of this article. One can surmise, however, that the failure of the *Gross* Court to refer to the legislative history of that statute in its decision may mean that there is none. It is possible that age discrimination was never considered by Congress when it was developing the statute.

Regardless, it is clear that the Court that decided *Gross* was far more conservative and employer-friendly than the one that determined *Price Waterhouse*. In fact, the *Gross* Court questioned not only the soundness of the *Price Waterhouse* decision but also whether, given the problems associated with the shifting burdens created under the mixed-motive analysis, if presented anew with the question it would still make the same ruling it had in *Price Waterhouse*.²⁴ It is obvious that it would not.

In this author’s estimation the dissenting opinion in *Gross* is the correct one and the one that should have prevailed.²⁵ There, the dissenting Justices noted that *Price Waterhouse* was not directly overruled by the Civil Rights Act and that based upon the fact that Title VII and the ADEA contained comparable language, under applicable precedent, the mixed-motive analytical framework still

should exist for age discrimination claims. It makes no sense legally or morally to have different approaches for these claims. Unfortunately, the *Gross* dissent is not the law of the land.

New York City Human Rights Law

The question remains: What may an age discrimination plaintiff do to prosecute his or her claim given this unfavorable legal landscape? The short answer is that, at least in New York, age discrimination claims under the New York City Human Rights Law (NYCHRL)²⁶ must be construed independently and more liberally than its state and federal counterparts. In 2005, the New York City Council passed the Restoration Act, which amended the NYCHRL to require a liberal construction of that law “for the accomplishment of the [NYCHRL’s] uniquely broad and remedial purposes . . . regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL] have been so construed.”²⁷ Given that a more liberal construction of this law is required, it is clear that mixed-motive analysis may still exist under its terms. It is obvious that age-based employment discrimination claims should be pursued under this statute in state court, rather than in federal court.²⁸

The fact that age discrimination claims brought under the New York City Administrative Code are entitled to an independent legal analysis distinct from that employed under the ADEA and the New York State Human Rights Law was recently made clear by the United States Court of Appeals for the Second Circuit in *Velazco v. Columbus Citizens Foundation*.²⁹ There, the Second Circuit reversed a district court summary judgment ruling dismissing both an ADEA claim and a NYCHRL age discrimination claim on the grounds that the plaintiff had failed to present evidence that age was the “but-for” cause of the adverse employment action. The court remanded the NYCHRL claim back to the district court, which had decided to exercise pendent jurisdiction, for consideration of that claim in light of the Restoration Act.

Ultimately, the correction of this legal dichotomy rests in the hands of Congress. Congress must enact legislation comparable to the Civil Rights Act specifically for the ADEA so that claimants can pursue federal age discrimination claims based upon a mixed rather than a single-motive theory.³⁰ It should be noted that this goal is not unachievable. In 2009, Congress enacted the Lilly Ledbetter Fair Pay Act, correcting the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,³¹ which held that the plaintiff’s Equal Pay Act claim was time barred because the discriminatory acts she had complained of (pay inequity) occurred more than 180 days prior to her filing a complaint with the Equal Employment Opportunity Commission. Given the huge inequity here in the standards applied to ADEA and Title VII employment discrimination claims, similar corrective

legislative action is warranted and necessary. Whether and when that will occur remains to be seen. ■

1. 29 U.S.C. § 623.
2. 42 U.S.C. §§ 2000e *et seq.*
3. 411 U.S. 792 (1973).
4. *Id.* at 802–03.
5. The *McDonnell Douglas* burden-shifting analysis has been applied to ADEA cases, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), as well as cases under the Americans with Disabilities Act, *Doe v. Bd. of Educ. of Fallsburgh Cent. Sch. Dist.*, 63 Fed. App’x 46 (2d Cir. 2003).
6. *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003); *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002).
7. 490 U.S. 228 (1988).
8. *Dare*, 267 F. Supp. 2d at 991–92. The *Dare* court stated in *dicta*: “The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on the basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational.” *Id.* at 990.
9. *Price Waterhouse*, 490 U.S. at 276.
10. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003).
11. 42 U.S.C. § 2000e-2 (emphasis added).
12. *Id.*
13. 539 U.S. 90.
14. Thus, she concurred with the Court’s ruling that the district court did not abuse its discretion by permitting a mixed-motive jury instruction in the absence of direct evidence that discrimination had played a substantial role in the challenged employment decision. *Id.* at 101.
15. 29 U.S.C. § 623(a)(1) (emphasis added).
16. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).
17. *Price Waterhouse*, 490 U.S. 228.
18. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575 (1978)).
19. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004); *Equal Emp’t Opportunity Comm’n v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160 (4th Cir. 2004).
20. 557 U.S. 167 (2009).
21. *Id.* at 176.
22. *Id.* at 174. Justice Thomas wrote: “Unlike Title VII, the ADEA’s text 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 amended Title VII to add [the Civil Rights Act], even though it contemporaneously amended the ADEA in several ways.” *Id.*
23. Justice Thomas also held that “[w]hen Congress amends one statutory provision, but not another it is presumed to have acted intentionally.” *Id.*
24. *Id.* at 181–82.
25. As in many important Supreme Court decisions, the Court’s approach is often decided by one vote. Such was the case in *Gross*, where Justice Kennedy’s vote was the deciding one based upon the known political proclivities of that bench.
26. N.Y.C. Admin. Code §§ 8-101 *et seq.*
27. See Restoration Act § 7.
28. The same cannot be said for age discrimination claims brought under New York State Human Rights statutes, which parallel federal analysis. *D’Annunzio v. Ayken, Inc.*, 25 F. Supp. 3d 281, 293 (E.D.N.Y. 2014).
29. 2015 WL 613035 (2d Cir. Jan. 14, 2015).
30. Legislative reparation is also needed for the anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a), whose language was not modified by the Civil Rights Act either. As a result of *Gross*, the Supreme Court recently held in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), that the “but-for” legal standard also applies to Title VII retaliation claims. Like ADEA claims, Title VII retaliation suits should be permitted the benefit of mixed-motive analysis.
31. 550 U.S. 618 (2007).