

## Supreme Court Rules ADEA Plaintiffs are Not Entitled to "Mixed Motive" Instruction

Rejecting the view of many lower courts, the Supreme Court has determined, by a 5-4 vote, that under the federal Age Discrimination in Employment Act ("ADEA"), employees alleging disparate treatment must prove that age discrimination was the "but-for" cause of an adverse employment action in order to prevail. Therefore, to prove their case, it is no longer sufficient for plaintiffs to show at a minimum that age discrimination was merely a "motivating factor" or "mixed motive" in an adverse employment action. *Gross v. FBL Financial Services, Inc.*, No. 08-441 (June 18, 2009).

### The Case

Fifty-four-year-old Jack Gross was a claims administration director for FBL Financial Group ("FBL") until he was reassigned to the position of claims project administrator. Many of his previous duties were transferred to the newly-created position of claims administration manager. The new position was given to an employee in her early forties, who Gross once supervised. Gross saw this as a demotion and sued the employer for age discrimination under ADEA.

After a trial, the jury awarded Gross \$46,945 in lost compensation. On FBL's appeal, the U.S. Court of Appeals for the Eighth Circuit, in St. Louis, overturned the jury verdict and instructed that ADEA plaintiffs must present "direct evidence sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." (Internal quotation marks omitted.)

Both parties appealed to the U.S. Supreme Court on the question of whether a plaintiff must present direct evidence of discrimination in order to obtain a "mixed-motive" jury instruction in a non-Title VII discrimination case. Such an instruction, given by the trial judge, tells the jury that if it finds the plaintiff has shown that both legitimate and illegitimate reasons motivated the employment decision, he or she is entitled to shift the burden of persuasion to the employer. In order to limit or avoid liability, the employer must then demonstrate that it would have reached the same decision based on a non-discriminatory reason. This is the standard in claims brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex or national origin. Clearly, the mixed-motive theory is more advantageous to plaintiffs.

### The Decision

Instead of answering the question upon which review was sought and granted, however, a majority of the Justices decided they must first determine whether the defendant-employer ever has the burden of persuasion in a mixed-motives discrimination claim brought under the ADEA. On this, five members of the Court decided that the ADEA does not authorize a mixed-motives age discrimination claim.

Justice Clarence Thomas, joined by Chief Justice John Roberts, Jr. and Associate Justices Antonin Scalia, Anthony Kennedy and Samuel Alito, wrote, “[T]he 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.” That is, in ADEA cases, the burden of persuasion *never* falls on the employer. At all times, an employee must show that “but for” age discrimination, the alleged adverse action would not have taken place. This is a tougher standard to meet than the one facing plaintiffs bringing claims under Title VII.

### The Dissents

Justices John Paul Stevens, Stephen Breyer, Ruth Bader Ginsburg and David Souter dissented. They not only disagreed with the majority’s conclusion, but they would not have answered a question not presented. They would answer the parties’ question in the negative, i.e., “a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.”

Justice Stevens, joined by the other dissenters, wrote, “[I]t is ... inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court’s interpretation of the statute, but also with its decision to engage in unnecessary lawmaking.”

Justice Breyer, in a separate opinion also joined by the other dissenters, pointed out that the majority’s ruling makes it more difficult for plaintiffs to vindicate their rights because the employer is in a much better position to establish what its motives were in making an employment decision.

### Conclusion

The Supreme Court thus has made clear that under the ADEA employers are liable only for discriminatory conduct *actually* causing an adverse action. For employers defending ADEA claims, the absence of burden-shifting under *Gross* may prove helpful.

Senator Patrick Leahy (D-Vt.) has criticized the opinion as “overreaching.” He compared it to the Court’s ruling in *Ledbetter v. Goodyear Tire*, which Congress overturned with the Lilly Ledbetter Fair Pay Act of 2009.