

The Effect on *McDonnell-Douglas* Burden Shifting Analysis in ADEA Cases Since the U.S. Supreme Court Decision in *Gross v. FBL Financial Services, Inc.*

I. Introduction

The Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S. Ct. 2343 (June 18, 2009), significantly reworks the analysis to be applied in age discrimination claims, and clarifies the burden of persuasion in such cases. The issue before the Court in *Gross* was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." *Id.* at 2348. In a bold move, the Court went beyond this issue and held that the burden of persuasion in an ADEA claim never shifts to the employer. Thus, as the Court concluded, the mixed-motive analysis can never apply in an ADEA case because age must be the "but for" cause of the adverse employment action, and not simply a motivating factor. In other words, *Gross* instructs that a plaintiff must prove age is the reason that the employer engaged in an adverse employment action. *Id.* at 2350.

At first blush, this holding appears to be difficult to reconcile with the application of the *McDonnell-Douglas* burden shifting analysis employed by the U.S. Court of Appeals for the Third Circuit in analyzing summary judgment motions. Several recent Third Circuit decisions have clarified how *Gross* and *McDonnell-Douglas* are to be applied at the summary judgment stage. This article is intended to summarize the holding of *Gross* and recent Third Circuit cases interpreting it to provide guidance to persons pursuing summary judgment in ADEA cases.

II. Summary of *Gross v. FBL Financial Services, Inc.*

In *Gross*, the plaintiff, Jack Gross, was employed by defendant FBL as a claims project director. When he was 54 years old, he was transferred to the position of claims project coordinator. Contemporaneously, many of his former job responsibilities were transferred to the newly-created position of claims administration manager. This new position was given to a female in her early forties, Lisa Kneeskern. Although Gross and Kneeskern received identical compensation, Gross considered his new position to be a demotion. Gross then filed an ADEA claim alleging that his demotion was based at least in part on his age. At trial, the district court gave an instruction that a verdict for Gross would be appropriate “if he proved, by a preponderance of the evidence, that FBL ‘demoted [him] to claims project coordinator’ and that his age was a ‘motivating factor’ in FBL’s decision to demote him.”

FBL appealed, arguing that such a “mixed motives” analysis was improper under the ADEA. *Id.* at 2348. The Court of Appeals for the Eighth Circuit concluded that it was improper to provide a mixed-motive jury instruction “because [it] allowed the burden to shift to FBL upon presentation of *any* category of evidence showing that age was a motivating factor, not just ‘direct evidence’ related to FBL’s alleged consideration of age.” *Id.* Rather, the Eighth Circuit opined that the proper consideration was whether Gross proved that “age was the determining factor in FBL’s employment action.” *Id.*

The Supreme Court granted certiorari and vacated the decision of the Eighth Circuit. *Id.*

The Supreme Court held that in considering Gross’s claim,

we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not.

Id. The Court noted that while a burden-shifting analysis exists for Title VII claims in which a

plaintiff can prove that her membership in a protected class “played a motivating part in an employment decision, the defendant may avoid a finding of 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.” *Id.* at 2349 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (alterations in the original)). This shifting of the burden of proof to the defendant was expressly rejected by the *Gross* Court, which held that it “has never held that the burden-shifting framework applies to ADEA claims. And, we decline to do so now.” *Id.*

Examining the statutory text of Title VII and the ADEA, the Court opined that “the Court’s interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace [Inc., v. Costa]*, 539 U.S. 90 (2003) and *Price Waterhouse*.” *Id.* The Court noted that 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.” *Id.* at 2350 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (Emphasis added)). Therefore, the Court concluded that the burden never shifts to the defendant to prove that it would have taken the challenged action even in the absence of consideration of age. *Id.* at 2351. “[T]he plaintiff retains the burden of persuasion to establish that age was the ‘but for’ cause of the employer’s adverse action.” *Id.*

The Court then summarized the appropriate test as follows:

We hold that a plaintiff bringing a disparate treatment claim pursuant to the ADEA 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.

Id. at 2352.

III. Application of McDonnell-Douglas Burden Shifting Analysis to ADEA Claims After Gross

While *Gross* speaks to the burden of persuasion and the propriety of mixed motive jury instruction, its holding has implications at the summary judgment stage as well. It has been the practice of the U.S. Court of Appeals for the Third Circuit to apply the *McDonnell-Douglas* test in cases where there is only indirect evidence of discrimination, including cases involving ADEA claims. *Heilman v. Allegheny Energy Service Corp.*, 2009 WL 3792419 at *2 (3d Cir. Nov. 12, 2009); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). The *McDonnell-Douglas* test is a burden shifting analysis that requires a plaintiff to prove a prima facie case of discrimination, whereupon the burden shifts to the defendant to show a legitimate, non-discriminatory reason for why it took an adverse employment action against the plaintiff. The plaintiff must then prove the proffered reason is simply pretext, and the true reason for the employment action was unlawful discrimination. *Id.* at *3.

The *McDonnell-Douglas* burden shifting analysis in ADEA cases appears to be at odds with the principles espoused in *Gross*. The *McDonnell-Douglas* test, in effect, shifts the burden to the defendant to show a non-discriminatory reason for the adverse employment action. *Gross*, on the other hand, holds that the burden of persuasion remains with the plaintiff at all times. But if the burden of persuasion always remains with the plaintiff to prove age was the reason for the adverse employment action, should courts ever use the *McDonnell-Douglas* test in ADEA cases at the summary judgment stage?

A review of recent Third Circuit decisions assists in answering this inquiry. The Third Circuit has held that *McDonnell-Douglas* continues to be proper in ADEA cases at summary judgment, and can be applied in conjunction with *Gross*. In *Connolly v. The Pepsi Bottling*

Group, LLC., 2009 WL 3154445 (3d. Cir. Oct. 2, 2009), the Third Circuit affirmed the grant of summary judgment in an ADEA claim. Plaintiff claimed that he had been terminated because of his age, citing comments including descriptions of him as “the old man of the group” and statements like “listen, old man, I know you are lying to me.” *Id.* at *2, n.2. The defendant, on the other hand, argued that poor job performance was the reason for plaintiff’s termination. *Id.* at *2. The defendant filed a motion for summary judgment, which the United States District Court for the Western District of Pennsylvania evaluated under the *McDonnell- Douglas* standard. *Id.* The court determined that there was not sufficient evidence to prove that the termination was pretextual. *Id.*

On appeal, the Third Circuit affirmed the grant of summary judgment. The Third Circuit cited *Gross*, noting that “[a] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action.” *Id.* (citing *Gross*, 129 S.Ct. at 2352). It noted that “[a]n act or omission is not regarded as the cause of an event if the particular event would have occurred without it.” *Id.* at *2 n.2 (citing *Gross*, 129 S.Ct. at 2350). The Third Circuit held that plaintiff did not show sufficient evidence of pretext, stating that “we do not believe plaintiff has demonstrate[d] such weaknesses, implausibilities, inconsistencies, or contradictions in the employer’s proffered reasons for its actions that a reasonable factfinder could rationally find them ‘unworthy of credence.’” *Id.* at *3 (quoting *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d. Cir 1997)). The allegedly discriminatory remarks were made outside the decisionmaking process through which plaintiff was fired. *Id.* Finally, the Third Circuit noted that given the probative weight of plaintiff’s evidence of pretext, “we do not believe that a

reasonable factfinder could conclude that plaintiff . . . would not have terminated plaintiff but for his age.” *Id.* (citing *Gross*, 129 S.Ct. at 2352).

The importance of considering *Gross* at the summary judgment stage was also affirmed by the Third Circuit in *Milby v. Greater Philadelphia Health Action*, 2009 WL 2219226 (3d. Cir. July 27, 2009), in which the Third Circuit affirmed the Eastern District’s grant of summary judgment to the defendants in an ADEA disparate treatment claim. In *Milby*, the Third Circuit observed that “to succeed on the disparate treatment claims Milby has asserted under the ADEA and PHRA, she ‘must prove, by a preponderance of the evidence . . . that age was the but for cause of defendants’ decision not to hire her.” *Id.* (citing *Gross v. FBL Fin. Servs., Inc.*, [129 S. Ct. 2343 (2009)]). Because plaintiff could not produce sufficient evidence at the summary judgment stage from which a reasonable jury could conclude that age discrimination was the “but for” reason for the adverse employment action, summary judgment was appropriate. *Id.*

The application of *Gross* at the summary judgment stage was once again affirmed by the Third Circuit in *Kelly v. Moser, Patterson And Sheridan, LLP*, 2009 WL 3236054 (3d. Cir. October 09, 2009). In affirming a district court’s grant of summary judgment in an ADEA claim, the Third Circuit reiterated that the “burden of proof remains with the plaintiff at all times” in proving that age was the “but for” cause of the adverse employment action. *Id.* at *2 (citing *Gross*, 129 S.Ct. at 2350). Furthermore, the Third Circuit observed that:

[a] plaintiff may demonstrate that a legitimate factor acts as a proxy for age, with the employer “suppos[ing] a correlation between the two factors and act[ing] accordingly.” [*Hazen Paper Co. v. Biggins*, 507 U .S. 604, 612-13 (1993)]. *But to prove a violation of the ADEA, it does not suffice to show that age played some minor role in the decision. Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2350-51 (2009). The plaintiff must show that age was the “but for” cause of the adverse employment action-that age had “a determinative influence on the outcome.” *Id.* at 2350.

Id. at *2. (Emphasis added). The Third Circuit affirmed the district court’s finding that plaintiff failed to meet his burden of proof, and affirmed the grant of summary judgment.

Finally, the Third Circuit in *Heilman v. Allegheny Energy Service Corp.*, *supra*, side-stepped the issue of whether the application of the *McDonnell-Douglas* test was appropriate in ADEA cases, and instead simply cited the Supreme Court’s note in *Gross* that it had “not definitively decided whether the evidentiary framework of *McDonnell-Douglas* . . . is appropriate in the ADEA context.” *Heilman*, 2009 WL at *2 (citing *Gross*, 129 S.Ct. at 2349, n.2). The Third Circuit held that absent specific guidance by the Supreme Court on this issue, it would continue to apply the *McDonnell-Douglas* analysis in ADEA cases. *Id.* In applying the *McDonnell-Douglas* burden shifting analysis, the Third Circuit stressed that a plaintiff, in order to overcome summary judgment, “must either present enough evidence to cast sufficient doubt on the employer’s legitimate, non-discriminatory reason to create a genuine issue of material fact as to it, or offer sufficient evidence to create a genuine issue of material fact that discrimination was the real reason for the action. *Id.* (citing *Fuentes*, 32 F.3d at 765).

IV. Conclusion

The Third Circuit’s holdings in *Heilman*, *Connolly*, *Kelly*, and *Milby* appear to demonstrate that the *McDonnell-Douglas* analysis will be applied in ADEA cases in the Third Circuit even after *Gross*, at least until the U.S. Supreme Court provides some direction on whether it is appropriate in such cases. However, the holding in *Gross* requiring the plaintiff to prove age was the reason for the employment action, and not merely a motivating factor, will certainly make it more difficult for plaintiff’s to overcome summary judgment by forcing them to show a genuine issue of material fact on the issue of pretext rather than relying on the more forgiving mixed-motive standard.

An important note for this discussion is legislation that has been proposed in the U.S. House of Representatives, H.R. 3721, 111th Cong. (2009), that would effectively abrogate the Supreme Court's decision in *Gross*, and amend the ADEA to provide the same standards of proof for claims under the ADEA as those brought pursuant to Title VII, i.e., that age need only be a motivating factor to prove unlawful discrimination. This legislation, if passed, may bring the ADEA back in line with Title VII such that there would be no question as to whether the application of the *McDonnell-Douglas* test is inappropriate. Until this issue is clarified, however, while employees have the benefit of the Court's view in *Gross*, employers in ADEA cases must continue to apply the *McDonnell-Douglas* test when defending against claims involving indirect evidence of age discrimination.

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