

GROSS v. FBL FINANCIAL SERVICES, INC.: DETERMINING THE EVIDENTIARY REQUIREMENTS FOR BRINGING A NON-TITLE VII MIXED-MOTIVE CASE

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I. INTRODUCTION

Imagine the following hypothetical situation: a man (“Walter”) in his early sixties works as a sales representative for a pharmaceutical company. Unfortunately, Walter is inefficient, frequently late when completing reports, unprepared for meetings, short with customers, and disruptive at his workplace. After countless opportunities to correct his behavior, the pharmaceutical company fires Walter for unsatisfactory work performance. His employer (“Employer”), however, has an additional reason for his termination: Walter’s supervisor believes that Plaintiff is too old for the job. Soon after being fired, Walter sues Employer arguing that he was fired because of his age.

On these facts, Walter has a mixed-motive¹ discrimination claim. But there is a catch: Walter cannot offer direct evidence² of discrimination. He never heard the Employer’s admission that he was fired due to his age. Rather, Walter can point only to circumstantial evidence³—disparaging comments, unpleasant reassignments, and instances of social exclusion—from which a trier of fact could infer

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1. Mixed-motive refers to cases in which an adverse employment decision results from “multiple factors, at least one of which is legitimate.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (White, J., concurring).

2. “Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *BLACK’S LAW DICTIONARY* 596 (8th ed. 2007).

3. “Evidence based on inference and not on personal knowledge or observation.” *Id.* at 595.

age-based discrimination. The question thus arises whether Walter can bring a mixed-motive suit against Employer without presenting direct evidence of discrimination? The answer to this question turns upon whether amendments to Title VII of the Civil Rights Act of 1964 (“Title VII”) also apply to other federal anti-discrimination statutes.

The Age Discrimination in Employment Act (ADEA) prohibits an employer from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”⁴ On May 14, 2008, the Eighth Circuit decided that in mixed-motive cases arising under the ADEA, the burden of persuasion shifts to the defendant “only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision.”⁵

On December 5, 2008, the United States Supreme Court granted a writ of certiorari⁶ to review the Eighth Circuit’s holding that the plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.⁷ The implications of the case are clear. A direct evidence requirement would preclude all non-Title VII plaintiffs from obtaining a mixed-motive instruction where only circumstantial evidence of discrimination is available.

II. FACTS

Although Walter is a hypothetical employee used to exemplify mixed-motive age-discrimination claims, Jack Gross is a real man, who was really fired potentially due, in part, to his age.

Gross was born in 1948.⁸ He began working at FBL Financial Group (“FBL”) in 1987 and received promotions in 1990, 1993, 1997, and 1999.⁹ In 2001, during a company reorganization, FBL reassigned Gross from the position of Claims Administration Vice President to

4. 29 U.S.C.A. § 623(a)(1) (West 2009). To state a valid disparate treatment claim under the ADEA, a plaintiff must prove that his or her age “actually played a role in [the employer’s decision-making] process and had a determinative influence on the outcome.” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). The ADEA applies only to individuals who are at least forty years of age. 29 U.S.C.A. § 631(a) (West 2009).

5. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008).

6. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 680 (2008) (mem.).

7. Brief for Petitioner at i, *Gross v. FBL Fin. Servs., Inc.*, No. 08-441 (U.S. Jan. 26, 2009).

8. *Gross*, 526 F.3d at 358.

9. *Id.*

Claims Administrator Director.¹⁰ Although Gross's job responsibilities did not change, Gross viewed the reassignment as a demotion because it reduced his salary.¹¹ In 2003, at the age of fifty-four, FBL reassigned Gross yet again, this time to the position of Claims Project Coordinator.¹² FBL transferred many of Gross's former responsibilities to the Claims Administration Manager—a position held by Lisa Kneeskern, an employee in her early forties.¹³ Although Gross's new position was paid the same salary as Kneeskern's position, Gross viewed the reassignment as a demotion "because Kneeskern assumed the functional equivalent of Gross's former position, and his new position was ill-defined and lacked a job description or specifically-assigned duties."¹⁴

In April 2004, Gross sued FBL alleging that FBL violated the ADEA by demoting him because of his age.¹⁵ During the trial, the district court instructed the jury that Gross had the burden to prove that (1) FBL demoted Gross and (2) Gross's age was a *motivating factor* in FBL's decision to demote him.¹⁶ The court noted, however, that the jury must find in favor of FBL if FBL proved by a preponderance of the evidence that it would have demoted Gross notwithstanding his age.¹⁷ The district court overruled FBL's objections to these instructions, and the jury found in favor of Gross and awarded him \$46,945 in lost compensation.¹⁸ FBL appealed and argued to the Eighth Circuit Court that the district court's mixed-motive instruction was erroneous.¹⁹

The Court of Appeals for the Eighth Circuit reversed and remanded the case for a new trial, holding that the final jury instruction improperly shifted the burden of persuasion to FBL by allowing Gross to obtain a mixed-motive instruction without presenting direct evidence of discrimination.²⁰

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 360 (emphasis added).

17. *Id.*

18. *Id.* at 358.

19. *Id.*

20. *Id.* at 362.

III. LEGAL BACKGROUND

In *McDonnell Douglas Corp. v. Green*, the Supreme Court set out a tripartite burden-shifting framework for claims of discrimination arising under Title VII.²¹

First, the plaintiff must establish a *prima facie* case of discrimination.²² The plaintiff may do this by showing:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.²³

Second, the defendant has the burden of production to put into evidence a legitimate, nondiscriminatory reason for the allegedly discriminatory termination or demotion.²⁴ If the defendant produces a legitimate reason, the presumption of discrimination disappears.²⁵

Finally, the plaintiff has the opportunity to prove that the supposed reason for the employment decision was in fact a pretext for discrimination.²⁶

Because the ADEA, the Americans with Disabilities Act (ADA), Title VII retaliation claims, 42 U.S.C. § 1981, and the Family and Medical Leave Act (FMLA) contain language analogous to language found in Title VII, the Supreme Court has assumed that the *McDonnell Douglas* burden-shifting framework applies to claims of discrimination under these related statutes.²⁷

In *Price Waterhouse v. Hopkins*, the Supreme Court established an affirmative defense for employers in mixed-motive cases but also generated tremendous uncertainty as to the kind of evidence required

21. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

22. *Id.* at 802.

23. *Id.* The Court explained, however, that the elements of a *prima facie* case depend on the factual circumstances of a case. *Id.* at 802 n.13.

24. *Id.* at 802.

25. *Id.* at 803.

26. *Id.* at 804.

27. *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44, 45 (2003) (applying the *McDonnell Douglas* framework to an ADA claim); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) (assuming that the *McDonnell Douglas* framework applies to ADEA suits); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) (assuming that the *McDonnell Douglas* framework applies to 42 U.S.C. § 1983 claims).

to obtain a mixed-motive instruction. In that case, the partners in Price Waterhouse's accounting firm refused to re-propose Ann Hopkins for partnership after they had postponed the decision the previous year.²⁸ Although Hopkins was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff,"²⁹ the Price Waterhouse partners also criticized her because she was a woman.³⁰ Indeed, a partner told Hopkins that, in order to improve her chances of making partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."³¹ Thus, the partners had both legitimate concerns about Hopkins's interpersonal skills and "an impermissibly cabined view of the proper behavior of women."³²

In a fractured opinion, the Supreme Court held that a defendant-employer may completely avoid liability by proving by a preponderance of the evidence that it would have made the same employment decision regardless of the plaintiff's protected trait.³³ A majority of the Justices, however, disagreed on the kind of evidence required for a plaintiff to obtain a mixed-motive instruction. Writing for a plurality of four Justices, Justice Brennan stated that a plaintiff must prove that her protected trait was a motivating factor in an employment decision;³⁴ Justice Brennan did not, however, "suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision."³⁵ Justice White, concurring in the judgment, believed that the Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*³⁶ governed the case and, therefore, that the burden shifts to the defendant only when a plaintiff "show[s] that the unlawful motive was a *substantial* factor in the adverse employment action."³⁷

Justice O'Connor, however, announced a new evidentiary standard in her concurring opinion. In order to shift the burden of

28. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989) (Brennan, J., plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

29. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1113 (D.D.C. 1985).

30. *Price Waterhouse*, 490 U.S. at 235 (Brennan, J., plurality opinion).

31. *Id.*

32. *Id.* at 236–37.

33. *Id.* at 258; *id.* at 260 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

34. *Id.* at 258 (Brennan, J., plurality opinion).

35. *Id.* at 251–52.

36. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

37. *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring).

persuasion to the defendant, Justice O'Connor stated, a plaintiff must show "by *direct evidence* that an illegitimate criterion was a substantial factor in the decision."³⁸ This showing triggers "the deterrent purpose of the statute"³⁹ and allows a finder of fact to "conclude that absent further explanation, the employer's discriminatory motivation 'caused' the employment decision."⁴⁰ Although Justice O'Connor did not define "direct evidence," she noted that it does not extend to "statements by nondecisionmakers, . . . statements by decisionmakers unrelated to the decisional process itself," or "stray remarks in the workplace."⁴¹

After *Price Waterhouse*, most lower courts⁴² treated Justice O'Connor's concurring opinion as controlling because it appeared to represent the narrowest rationale for the Court's decision.⁴³ In fact, Justice Kennedy prefaced his dissenting opinion in *Price Waterhouse*, in which Chief Justice Rehnquist and Justice Scalia joined, by stating that the Court's holding requires a Title VII plaintiff to present "direct and substantial evidence of discriminatory animus" in order to shift the burden of persuasion to the defendant in mixed-motive cases.⁴⁴ The Supreme Court has since declined to address whether Justice O'Connor's opinion establishes binding precedent.⁴⁵ Justice Ginsburg, however, has expressed concern with the position taken by most lower courts, stating that to infer a direct evidence requirement from

38. *Id.* at 265 (O'Connor, J., concurring) (emphasis added).

39. *Id.*

40. *Id.*

41. *Id.* at 277 (O'Connor, J., concurring). In Justice O'Connor's view, Hopkins presented direct evidence of discrimination. "As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid." *Id.* at 273.

42. See *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (noting that Justice O'Connor's direct evidence rule is one of "two different models for analysis of employment discrimination cases"). *But see* *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) ("[D]irect evidence' was *not* a requirement imposed by the majority in *Price Waterhouse*.").

43. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) ("[W]hen no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds.'") (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

44. *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting).

45. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) ("Like the Court of Appeals, we see no need to address which of the opinions in *Price Waterhouse* is controlling: the third step of petitioner's argument is flawed, primarily because it is inconsistent with the text of 42 U.S.C.A. § 2000e-2(m).").

Price Waterhouse is “a lot to load on two words in a concurring opinion.”⁴⁶

Two years after *Price Waterhouse*, in 1991, Congress amended Title VII to provide additional remedies for acts of intentional discrimination in the workplace.⁴⁷ The Civil Rights Act of 1991 (“1991 Act”) responded to *Price Waterhouse* in two ways.⁴⁸ First, the 1991 Act amended section 703 by adding subsection (m), which provides 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.”⁴⁹ Second, the 1991 Act amended section 706(g) by adding subparagraph (B), which retained the “same-decision defense”—*i.e.*, an allegedly discriminatory decision is permissible if the same decision would have occurred due to a legitimate consideration—as a limitation on a plaintiff’s remedies in mixed-motive cases.⁵⁰ But even if an employer demonstrates that it would have taken the same employment action absent an impermissible motive, the court may award the plaintiff declaratory and injunctive relief, as well as attorney’s fees and costs, but not damages, reinstatement, hiring, or a promotion.⁵¹

Following this amendment, the main issue was “whether a plaintiff [was required to] present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII . . . as amended by the Civil Rights Act of 1991.”⁵² In *Desert Palace, Inc. v. Costa*, Justice Thomas, writing for a unanimous Court, held that a Title VII plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction.⁵³

46. Transcript of Oral Argument at 13, *Desert Palace*, 539 U.S. 90 (No. 02-679).

47. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). In addition, Congress amended Title VII “to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)” as well as “to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII.” Civil Rights Act of 1991.

48. Civil Rights Act of 1991.

49. 42 U.S.C.A. § 2000e-2(m) (West 2009) (emphasis added).

50. 42 U.S.C.A. § 2000e-5(g)(2)(B)(i–ii) (West 2009).

51. *Id.*

52. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003).

53. *Id.* at 101–02.

The Court advanced four reasons in support of its decision. First, section 2000e-2(m) of the 1991 Act “does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.”⁵⁴ Second, Congress had defined “demonstrates” in the 1991 Act as meeting “the burdens of production and persuasion.”⁵⁵ The Court reasoned that had Congress wanted to impose a heightened proof requirement, it could have explicitly stated that it intended to require direct evidence.⁵⁶ Third, absent an affirmative directive from Congress, the Court refused to depart from the conventional rule of civil litigation that a plaintiff may prove her case using either direct or circumstantial evidence.⁵⁷ According to the Court, “The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’”⁵⁸ Indeed, direct evidence is often difficult to obtain in employment discrimination cases because “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”⁵⁹ Finally, the use of the term “demonstrates” in other provisions of Title VII shows that section 2000e-2(m) does not require direct evidence.⁶⁰ Under § 2000e-5(g)(2)(B), for instance, a plaintiff is entitled to limited remedies if the defendant “*demonstrates* that [it] would have taken the same action in the absence of the impermissible motivating factor.”⁶¹ The Court found that this related provision does not require a showing of direct evidence.⁶² Thus, after *Desert Palace*, a Title VII plaintiff may present either circumstantial or direct evidence that an illegitimate criterion was a motivating factor in an adverse employment action.

The Court’s decision in *Desert Palace* is based on the 1991 Act, which amended Title VII. The 1991 Act, however, did not explicitly amend the ADEA, ADA, Title VII retaliation claims, 42 U.S.C. § 1981,

54. *Id.* at 98–99.

55. *Id.* at 99.

56. *Id.*

57. *Id.*

58. *Id.* at 100 (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)). For instance, in *Reeves v. Sanderson Plumbing Prods, Inc.*, the Court allowed a plaintiff to use circumstantial evidence to impugn an employer’s reason for an alleged discriminatory practice. 530 U.S. 133, 147 (2000).

59. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

60. *Desert Palace*, 539 U.S. at 100.

61. 42 U.S.C.A. § 2000e-5(g)(2)(B) (West 2009) (emphasis added).

62. *Desert Palace*, 539 U.S. at 101.

or the FMLA. In the wake of *Desert Palace*, a split emerged among the circuits as to the kind of evidence required in non-Title VII mixed-motive cases. While the Fifth, Seventh, Ninth, and Tenth Circuits, as well as the District of Columbia,⁶³ have not required direct evidence in mixed-motive claims arising under the federal anti-discrimination statutes, the First, Second, Third, Fourth, Sixth and Eighth Circuits⁶⁴ have taken the contrary view.

IV. HOLDING

Finding the 1991 Act inapposite, the Eighth Circuit in *Gross v. FBL Financial Services, Inc.* applied the evidentiary standard announced in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*. The Eighth Circuit held that in mixed-motive cases arising under the ADEA, the burden of persuasion shifts to the defendant "only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision."⁶⁵ Because Gross conceded that he did not present direct evidence of discrimination, the Eighth Circuit found that Gross could not obtain a mixed-motive instruction and, therefore, that the *McDonnell Douglas Corp. v. Green* burden-shifting framework governed the case.⁶⁶ Thus, the Eighth Circuit stated, "[T]he jury should

63. See, e.g., *Reilly v. TXU Corp.*, 271 F. App'x 375, 380 (5th Cir. 2008) (noting that direct evidence is not required in mixed-motive cases arising under 42 U.S.C. § 1981); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008) (holding that to bring an ADEA claim under a mixed-motive analysis, a plaintiff must prove discrimination by direct proof, which can be satisfied by either circumstantial or direct evidence); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (noting that a plaintiff can establish retaliation under *Price Waterhouse* through direct or circumstantial evidence); *Sellie v. Boeing Co.*, 253 F. App'x 626, 627 n.2 (9th Cir. 2007) (assuming, without deciding, that *Desert Palace* and the 1991 Act apply to the ADEA); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203–04 (D.C. Cir. 1997) (noting that even if Justice O'Connor's concurring opinion in *Price Waterhouse* establishes binding precedent, it does not disqualify circumstantial evidence).

64. See, e.g., *Rios-Jimenez v. Principi*, 520 F.3d 31, 39 (1st Cir. 2008) (noting that a plaintiff must offer direct evidence of discrimination under a mixed-motive analysis); *Baqir v. Principi*, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (noting that since Congress did not amend the ADEA, *Price Waterhouse* continues to apply to ADEA cases); *Graves v. Finch Pruyun & Co.*, 457 F.3d 181, 187 (2d Cir. 2006) (noting that since the plaintiff did not present direct evidence of age discrimination, his case is governed by *McDonnell Douglas*); *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) (noting that direct evidence is required under the ADEA in mixed-motive cases); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 2003) (finding *Price Waterhouse* inapplicable where the plaintiff failed to present direct evidence of discrimination).

65. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008).

66. *Id.*

have been charged to decide whether [Gross] proved that age was the determining factor in FBL's employment action."⁶⁷

Gross argued that the 1991 Act and the Court's subsequent holding in *Desert Palace, Inc. v. Costa* superseded Justice O'Connor's direct evidence rule in *Price Waterhouse* with respect to ADEA claims.⁶⁸ The Eighth Circuit acknowledged that the 1991 Act repudiated the direct evidence requirement for claims arising under Title VII, but determined that the 1991 Act did not apply to ADEA claims.⁶⁹ In reaching its decision, the Eighth Circuit first relied on a textual interpretation of the 1991 Act. Section 2000e-2(m) applies only to cases in which race, color, religion, sex, or national origin is a motivating factor in an adverse employment action.⁷⁰ Thus, because section 2000e-2(m) does not include adverse employment actions taken due to an employee's age, *Price Waterhouse* continues to apply to mixed-motive cases arising under the ADEA.⁷¹

In reaching its decision, the Eighth Circuit distinguished a Fifth Circuit case taking the contrary view. In *Rachid v. Jack in the Box, Inc.*, Ahmed Rachid sued his employer under the ADEA, alleging that he was terminated from his managerial position because of his age.⁷² Jack in the Box contended that Rachid violated company policy by failing to properly record employee time; however, Rachid's supervisor regularly criticized Rachid and made belittling comments about his age.⁷³ In that case, the Fifth Circuit held that direct evidence of discrimination is not required to obtain a mixed-motive instruction for claims arising under the ADEA.⁷⁴ Nevertheless, the Eighth Circuit called into question the Fifth Circuit's reasoning, noting that *Rachid* involved a motion for summary judgment while *Desert Palace* concerned jury instructions after trial.⁷⁵

Furthermore, the Eighth Circuit stated that *Desert Palace* did not modify a mixed-motive analysis under the ADEA because *Desert*

67. *Id.* at 360.

68. *Id.*

69. *Id.* at 360–61.

70. *Id.* at 361.

71. *Id.*

72. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 307 (5th Cir. 2004).

73. *Id.*

74. *Id.* at 311.

75. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 361 n.2 (8th Cir. 2008). The Eighth Circuit has consistently held that *Desert Palace* does not apply on motions for summary judgment. *Carraher v. Target Corp.*, 503 F.3d 714, 716 n.3 (8th Cir. 2007).

Palace dealt only with the effects of the 1991 Act.⁷⁶ The Eighth Circuit acknowledged that “some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse*”⁷⁷ but found that *Desert Palace* did not “speak directly to the vitality of the previous decision, and it continues to be controlling where applicable.”⁷⁸ The Eighth Circuit concluded, therefore, that the direct evidence rule set out in Justice O’Connor’s concurring opinion in *Price Waterhouse* continues to apply to mixed-motive cases arising under the ADEA.⁷⁹ Applying the direct evidence rule to the facts of *Gross*, the Eighth Circuit found that the district court’s final jury instruction was erroneous.⁸⁰

V. ANALYSIS

A. *The Eighth Circuit’s Decision*

The Eighth Circuit’s holding in *Gross v. FBL Financial Services, Inc.* that a plaintiff must present direct evidence of discrimination in order to shift the burden of persuasion to the defendant in mixed-motive cases arising under the ADEA rests on two justifications.

The first justification—that section 2000e-2(m) of the 1991 Act applies only to cases in which race, color, religion, sex, or national origin is a motivating factor in an adverse employment decision—is a straightforward textual interpretation of the 1991 Act. Because Congress amended Title VII but did not explicitly amend the ADEA, the *Price Waterhouse v. Hopkins* rule continues to apply to mixed-motive cases arising under the ADEA. Nevertheless, the legislative history of the 1991 Act undermines this conclusion. The House Report states:

The Committee intends that . . . other laws modeled after Title VII [, including the ADA and the ADEA, should] be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII.⁸¹

76. *Gross*, 526 F.3d at 362.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. H.R. REP. No. 102-40, pt. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

This language suggests that courts should apply the “motivating factor” standard set forth in the 1991 Act to mixed-motive cases arising under the ADEA.⁸²

The second justification—that *Desert Palace, Inc. v. Costa* did not modify a mixed-motive analysis under the ADEA because it dealt only with the effects of the 1991 Act on jury instructions in mixed-motive cases—is not entirely persuasive. In *Desert Palace*, the Court’s decision was based, in part, on the relationship between Title VII and the 1991 Act. But *Desert Palace* also rested on a rationale independent of the 1991 Act—namely that the conventional rule of civil litigation permitting a plaintiff to prove her case using either direct or circumstantial evidence is generally applicable to Title VII cases. Thus, although the ADEA does not contain “motivating factor” language akin to that found in the 1991 Act, the Court could use its *Desert Palace* reasoning to apply the conventional evidentiary rules of civil litigation to ADEA cases.

B. Strengths and Weaknesses of Gross’s Case

There are three strengths of Gross’s case. First, Title VII and the ADEA are similar in both text and purpose.⁸³ In *Smith v. City of Jackson*, the Supreme Court stated that to determine whether the ADEA allowed disparate impact claims, “we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”⁸⁴ In that case, the Court noted that it had “consistently applied that presumption to language in the ADEA that was ‘derived *in haec verba* from Title VII.’”⁸⁵ Therefore, the kind of evidence required in order to obtain a mixed-motive instruction in a Title VII case should apply equally to ADEA mixed-motive cases as it does to Title VII mixed-motive cases.

82. *But see* *Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 n.25 (3rd Cir. 1997) (rejecting this argument).

83. *See* *Strauch v. Am. Coll. of Surgeons*, 301 F. Supp. 2d 839, 844 n.10 (N.D. Ill. 2004) (“Given the similarities in text and purpose between Title VII and [the] ADEA, . . . this Court considers it likely that whatever doctrinal changes emerge as a result of *Desert Palace* in the Title VII context will be found equally applicable in the ADEA arena. . . .”) (citations omitted).

84. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

85. *Id.* at 233–34 (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

Second, the plain language of the ADEA weighs against a direct evidence requirement. In *Desert Palace*, the Court stated that “[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.”⁸⁶ The same argument can be made for the ADEA, which does not require a plaintiff to show direct evidence to obtain a mixed-motive jury instruction.

Finally, there is no compelling reason to depart from the conventional rule of civil litigation in a non-Title VII case. As the Court in *Price Waterhouse* noted, “Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual.”⁸⁷ Because Congress has not indicated otherwise, an ADEA plaintiff should be able to prove her case using either circumstantial or direct evidence.

The principal weakness of Gross’s case is that Justice O’Connor’s concurring opinion in *Price Waterhouse* appears to represent the Court’s most recent precedent on non-Title XII mixed-motive claims.⁸⁸ Because the 1991 Act amended Title VII but did not explicitly amend the ADEA, there is a strong argument that Justice O’Connor’s direct evidence requirement controls outside of Title VII.

C. *Strengths and Weaknesses of FBL’s Case*

Assuming that Justice O’Connor’s concurring opinion in *Price Waterhouse* establishes binding precedent, the principal strength of FBL’s case is that the 1991 Act amended Title VII but did not explicitly amend the other anti-discrimination statutes. A well-established canon of statutory construction is that the starting point for interpreting a statute is the language of the statute itself. The

86. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–99 (2003).

87. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (Brennan, J., plurality opinion).

88. It appears that Justice O’Connor’s concurring opinion represents the narrowest rationale for the Court’s decision. While Justice Brennan stated that a plaintiff must show that an unlawful motive was a motivating factor in an employment decision, and Justice White noted that a plaintiff must prove that an unlawful motive was a substantial factor in the employment decision, Justice O’Connor required a plaintiff to prove by direct evidence that the unlawful motive was a substantial factor in the decision. Therefore, Justice O’Connor’s direct evidence requirement—the narrowest position taken by those Justices concurring in the judgment—should represent the holding of the Court. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 764 n.9 (1988).

Court has held that “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”⁸⁹ In light of the plain language of the 1991 Act, FBL has a strong argument that the 1991 Act applies only to Title VII. A decision along these lines would promote the principle of separation of powers among the legislative and judicial branches of government because courts are reluctant to interfere with Congress’s chosen statutory language implemented pursuant to its lawmaking responsibilities.

The principal weakness of FBL’s case is that there is no compelling reason to impose a heightened standard of proof in non-Title VII mixed-motive cases. It seems odd to sacrifice consistency and uniformity in the law—contrary to the plain language of the statutes, congressional intent, and the conventional rule of civil litigation—based on a fleeting reference to “direct evidence” in a concurring opinion of a splintered Supreme Court decision.

VI. DISPOSITION/CONCLUSION

The Supreme Court likely will reverse the holding of the Eighth Circuit and find that a plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case. Even if the Court finds that Justice O’Connor’s concurring opinion in *Price Waterhouse v. Hopkins* establishes binding precedent, the Court will likely hold that the 1991 Act—with a legislative history that stressed consistency in interpreting the anti-discrimination statutes—as well as the reasoning in *Desert Palace, Inc. v. Costa* abrogated Justice O’Connor’s direct evidence rule. Absent some affirmative directive from Congress, the Court has never, and should never, limit a plaintiff to the presentation of direct evidence.⁹⁰ Thus, applying a conventional rule of civil litigation, the Court will likely hold that a plaintiff can present either circumstantial or direct evidence in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.

89. *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

90. See *Desert Palace*, 539 U.S. at 100 (“It is not surprising, therefore, that neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.”).