No. 08-_____

In The Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

PARTIES

The parties to this proceeding are set forth in the caption.

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STATUTES

Petitioner Jack Gross respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 14, 2008.

OPINIONS BELOW

The May 14, 2008 opinion of the court of appeals, is reported at 526 F.3d 356 (8th Cir. 2008), and is set out at pp. 1a-14a of the Appendix. The July 8, 2008 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 49a-50a of the Appendix. The June 23, 2006 order of the district court, which is not officially reported, is set out at pp. 15a-48a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on May 14, 2008. A timely petition for rehearing en banc was denied on July 8, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides in pertinent part:

> It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . .

STATEMENT OF THE CASE

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court held that in a Title VII case a plaintiff is not required to present direct evidence of discrimination in order to obtain a mixed-motive instruction.[1] *Desert Palace* expressly reserved decision as to whether such direct evidence would be required in a non-Title VII case. 539 U.S. at 98; see pp. 5-10 *infra*. The instant case, arising under the Age Discrimination in Employment Act, presents that question.

Petitioner Jack Gross is an employee of respondent FBL Financial Group (FBL). Gross filed suit under the Age Discrimination in Employment Act (ADEA), alleging that he had been demoted because of his age. At trial the district judge, over defendant's

[1] In this Court's decision in *Desert Palace*, as in the lower courts, "mixed-motive instruction" refers to an instruction that if the plaintiff demonstrates that an impermissible purpose was *a* motivating factor behind a disputed decision, the burden of proof shifts to the defendant to demonstrate that it would have taken the same action even absent that impermissible purpose. 539 U.S. at 92.

objection, gave a mixed-motive instruction. Under the disputed instruction Gross was required to prove that his age was "a motivating factor" in the disputed demotion. (App. 6a). If the jury concluded Gross had met that burden, it was to return a verdict for Gross unless the defendant FBL "proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." (App. 6a).

The jury found in favor of Gross, and awarded him $46,945 in lost compensation. (App. 3a). The trial judge commented that "[d]espite the lack of . . . direct evidence of discrimination, the court believes there was ample circumstantial evidence presented during the trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age." (App. 25a). FBL appealed, contending that the trial court had erred in giving the disputed mixed-motive instruction.

The Eighth Circuit overturned the jury verdict, concluding that it was error to give that mixed-motive instruction. The court of appeals held that, except in Title VII cases covered by this Court's decision in *Desert Palace*, a mixed-motive jury instruction cannot be given unless the plaintiff offers "direct evidence" of discrimination. The court of appeals insisted that well-established Eighth Circuit precedent permits

> a shift in the burden of persuasion only upon a demonstration by direct evidence that an illegitimate factor played a substantial role in an adverse employment decision . . . Gross

> conceded that he did not present "direct evidence" of discrimination . . . , so a mixed motive instruction was not warranted.

(App. 6a-7a) (emphasis omitted). The court of appeals recognized that *Desert Palace* held that direct evidence is not required to obtain a mixed-motive instruction in a Title VII case, and acknowledged that "some of the analysis in *Desert Palace* may seem inconsistent with" the imposition of a direct evidence requirement in non-Title VII cases. (App. 11a). The Eighth Circuit reasoned, however, that in non-Title VII cases direct evidence is required under Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and that this Court's later decision in *Desert Palace* "did not speak directly to the vitality of this previous decision." (App. 11a).

The Eighth Circuit emphatically disagreed with the contrary Fifth Circuit decision in *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312-13 (5th Cir. 2004). In *Rachid* the Fifth Circuit, relying on this Court's decision in *Desert Palace*, expressly rejected any direct evidence requirement in an ADEA case. The court below noted that the Fifth Circuit in *Rachid*

> applied the analysis of *Desert Palace* to claims under the ADEA. *Rachid* held that because the relevant language in the ADEA – "because of such individual's age" – is "silent as to the heightened direct evidence standard," a plaintiff need not present "direct evidence" of discrimination to receive a mixed motives analysis for an ADEA claim.

(App. 9a-10a) (emphasis omitted). The Eighth Circuit, however, disapproved the Fifth Circuit decision in *Rachid* as "inconsistent with our circuit precedent." (App. 10a n.2). "We are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA." (App. 10a).

Gross filed a timely petition for rehearing en banc. The petition was denied on July 8, 2008.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED WAS EXPRESSLY RESERVED IN *DESERT PALACE, INC. V. COSTA*, 539 U.S. 90 (2003)

This case presents an important legal issue which has divided the lower courts since this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* held that where a plaintiff in a discrimination case makes a sufficient showing that an impermissible purpose played a role in a disputed action, the burden of proof shifts to the defendant to prove "that it would have made the same decision even if it had not allowed [the unlawful consideration] to play . . . a role [in its actions]." 490 U.S. at 244 (plurality opinion); see 490 U.S. at 261 n.5 (White, J., concurring in judgment), 261 (O'Connor, J., concurring in judgment).

The Court in *Price Waterhouse*, however, was divided over the predicate issue of when the burden of proof shifts to a defendant to prove that affirmative

defense. Justice Brennan, writing for a plurality of four Justices, would have held that the burden shifts when the plaintiff proves that an unlawful purpose played "a motivating part" in the disputed decision. 490 U.S. at 258. Justice White and Justice O'Connor, in separate concurring opinions, would have required the plaintiff to show that the impermissible motive was "a substantial factor."[2] 490 U.S. at 259 (White, J., concurring), 276 (O'Connor, J., concurring). Justice O'Connor (but not Justice White) would also have required that that showing be based on "direct evidence." 490 U.S. at 276; see *Desert Palace*, 539 U.S. at 93-94.

In the years following *Price Waterhouse*, the lower courts reached conflicting conclusions as to whether – as Justice O'Connor had suggested – direct evidence is required to shift the burden of proof to the defendant. That issue arises most frequently (as in the instant case) when a plaintiff requests a mixed-motive instruction – an instruction that the jury may find a defendant liable based on a showing that an impermissible purpose was *a* purpose of (but not necessarily the only motive behind) the disputed action. The disagreement among the lower courts regarding mixed-motive instructions has often turned on differing views as to whether Justice O'Connor's

[2] The lower courts have generally attached no significance to the difference between "a motivating part" and "a substantial factor." That distinction was not at issue in the litigation in the instant case.

concurring opinion constituted the holding of the Court in *Price Waterhouse*.

Five years ago, in *Desert Palace, Inc. v. Costa*, this Court held that such direct evidence is not required in an employment discrimination claim brought under Title VII of the 1964 Civil Rights Act. 539 U.S. at 98-102. The Court held that it was proper to give a mixed-motive instruction[3] in that Title VII case regardless of whether or not the plaintiff had presented direct evidence of discrimination. The Court's decision, however, rested to a significant degree on certain provisions of the 1991 Civil Rights Act which apply only to Title VII. 539 U.S. at 98-102.

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[3] The mixed-motive instruction in *Desert Palace* was as follows:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

539 U.S. at 96-97.

The Court in *Desert Palace* expressly did not resolve the broader issue of whether under the earlier decision in *Price Waterhouse* direct evidence would be required to obtain a mixed-motive instruction in a non-Title VII case.[4]

> [The defendant's] argument . . . proceeds in three steps: (1) Justice O'Connor's opinion is the holding of *Price Waterhouse*; (2) Justice O'Connor's *Price Waterhouse* opinion requires direct evidence of discrimination before a mixed-motive instruction can be given; and (3) the 1991 Act does nothing to abrogate that holding. . . . [W]e see no need to address which of the opinions in *Price Waterhouse* is controlling; the third step of [the defendant's] argument is flawed, primarily because it is inconsistent with the text of [the provision of the 1991 Civil Rights Act that added 42 U.S.C. §] 2000e(m).

539 U.S. at 98.[5] As the court below noted regarding the separate opinions in *Price Waterhouse*, "[t]he Court in *Desert Palace* declined to address which opinion in *Price Waterhouse* was controlling." (App.

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[4] The parties in *Desert Palace* both briefed that issue. Brief for Petitioner, No. 02-679, at 11-17; Brief for Respondent, No. 02-679, at 21-29.

[5] Section 2000e(m) defines for purposes of Title VII the term "demonstrates." Under section 2000e(m) demonstrate means "mee[t] the burdens of production and persuasion." The Court in *Desert Palace* emphasized that this definition does not include any requirement of direct evidence. 539 U.S. at 99.

11a). The first two issues, expressly reserved in Desert Palace, are squarely presented by the instant case.

Because *Desert Palace* rested in part on reasoning that was not limited to the amendments to Title VII contained in the 1991 Civil Rights Act, that decision to some degree exacerbated the division among the lower courts regarding whether direct evidence is required in a non-Title VII case. The Court in *Desert Palace* pointed out that a direct evidence requirement would be inconsistent with the usual standard of proof in civil cases, and that there is nothing in the text of Title VII supporting a departure from that traditional standard.

> Title VII's silence with respect to the type of evidence requirement in mixed-motive cases . . . suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." [*Price Waterhouse*, 490 U.S. at 253 (plurality opinion)]. That rule requires a plaintiff to prove his case "by a preponderance of the evidence," *ibid*., using "direct or circumstantial evidence," *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

539 U.S. at 99-100. *Desert Palace* explained that the absence of a direct evidence requirement in the language of Title VII was particularly significant because "Congress has been unequivocal when imposing heightened proof requirements in other circumstances." 539 U.S. at 99. As a number of lower courts subsequently observed, the ADEA and other federal

anti-discrimination statutes also lack any such express direct evidence requirement.[6]

This decision in *Desert Palace* increased the uncertainty as to how to treat mixed-motive claims in non-Title VII cases. "Post-*Desert Palace* it is not clear whether plaintiffs asserting claims under the ADEA can proceed under a mixed-motive theory even if they lack direct evidence of discrimination." *Snik v. Verizon Wireless*, 2004 WL 1490354 at *2 (E.D.Pa. July 1, 2004). In *Monaco v. American General Assurance Co.*, 359 F.3d 296 (3d Cir. 2004), the Third Circuit continued to treat Justice O'Connor's opinion as the authoritative articulation of the rule in *Price Waterhouse* only because "in *Desert Palace* . . . the Court declined an opportunity to indicate which opinion in *Price Waterhouse* was controlling." 359 F.3d at 300 n.5. In *Bolander v. BP Oil Co.*, 128 Fed. Appx. 412 (6th Cir. 2005), the Sixth Circuit observed "*[i]f Desert Palace* applies to age discrimination" – a possibility that court of appeals thought unclear – "a plaintiff could state a *prima facie* case by using circumstantial evidence to show that he was terminated *at least in part* due to his age." 128 Fed. Appx. at 417 (first emphasis added).

[6] See pp. 12-15, *infra*.

II. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER DIRECT EVIDENCE IS REQUIRED TO OBTAIN A MIXED-MOTIVE INSTRUCTION IN A NON-TITLE VII CASE

Because *Desert Palace* did not announce a definitive resolution of the meaning of *Price Waterhouse*, the dispute among the lower courts about whether direct evidence is required to obtain a mixed-motive instruction in non-Title VII cases has become more entrenched. Even before *Desert Palace*, the Seventh, Ninth, Tenth and District of Columbia Circuits had already rejected such a direct evidence requirement. In the wake of *Desert Palace* the First and Fifth Circuits, which once imposed a direct evidence requirement, have now disavowed that rule. On the other hand, three other circuits, including the Eighth Circuit in the instant case, still insist that a plaintiff cannot obtain a mixed-motive instruction in a non-Title VII case without adducing direct evidence.

The Eighth Circuit direct evidence requirement rests squarely on the issue reserved in *Desert Palace* – whether Justice O'Connor's concurring opinion in *Price Waterhouse* establishes the controlling precedent.

> *Price Waterhouse* was a splintered decision. . . . We have held that Justice O'Connor's opinion concurring in the judgment is the controlling opinion that sets forth the governing rule of law. . . . According to this rule,

> to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. *Price Waterhouse*, 490 U.S. at 275 . . . (O'Connor, J., concurring in judgment).

(App. 5a). The Eighth Circuit has applied its direct evidence requirement to mixed-motive claims under 42 U.S.C. § 1981,[7] section 1983,[8] the Americans with Disabilities Act,[9] and – in the instant case – the Age Discrimination in Employment Act.

In the wake of *Desert Palace*, on the other hand, the Fifth Circuit has adopted the opposite rule, emphatically rejecting this direct evidence requirement. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). Rather than attempt to divine which concurring opinion established the controlling law in this Court's 1989 decision in *Price Waterhouse*, the Fifth Circuit applies to the ADEA[10] the same textual

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[7] *King v. Hardest*, 517 F.3d 1049, 1056 (8th Cir. 2008) (construing *Price Waterhouse*).

[8] *King v. Hardest*, 517 F.3d at 1056.

[9] *Kiel v. Select Artifacts, Inc.*, 169 F.3d 1131, 1135-36 (8th Cir. 1999).

[10] The Fifth Circuit subsequently held that direct evidence is not required to pursue a mixed-motive claim under section 1981 or the Family and Medical Leave Act (FMLA). *Reilly v. TXU Corp.*, 271 Fed. Appx. 375, 380 (5th Cir. 2008) (section 1981); *Taylor v. Peerless Industries, Inc.*, 211 Fed. Appx. 248, 250 (5th Cir. 2006) (section 1981); *Richardson v. Monitronics Int'l*, 434 F.3d 327, 333-35 (5th Cir. 2005) (FMLA).

analysis which this Court had applied to Title VII in *Desert Palace*.

> In *Desert Palace* the Supreme Court applied the mixed-motives analysis because, "[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Desert Palace*, [539 U.S. at 98-99]. Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim.

Rachid, 376 F.3d at 311 (footnotes omitted). The particular federal statutes cited by the Fifth Circuit in *Rachid* as examples of express "heightened" requirements were the very same provisions cited for that point by this Court in *Desert Palace*.[11] *Rachid* concluded that pre-*Desert Palace* Fifth Circuit precedent,[12] which had required direct evidence to obtain a mixed-motive instruction in an ADEA case, "has been overruled by . . . *Desert Palace*." 376 F.3d at 312 n.10.

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[11] *Compare Rachid*, 376 F.3d at 311 n.9 (citing 8 U.S.C. § 1158(a)(2)(B) and 42 U.S.C. § 5851(b)(3)(D)), *with Desert Palace*, 539 U.S. at 99 (same). The parenthetical summaries of these statutes in *Rachid* are taken verbatim from the summaries of the same statutes in *Desert Palace*.

[12] *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995).

That holding is precisely the opposite of the decision below in the instant case, which adhered to the Eighth Circuit's similar pre-*Desert Palace* precedent imposing a direct evidence requirement in ADEA cases[13] because "[w]e are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA." (App. 10a).

The First Circuit, which once applied a direct evidence requirement, has now held repeatedly that *Desert Palace* precludes the imposition of a direct evidence requirement in non-Title VII cases. In evaluating the ADEA claim in *Estades v. Associates Corp. of North America*, 345 F.3d 25 (1st Cir. 2003), the court of appeals noted that

> [i]n *Desert Palace* . . . decided after the district court order in this case, the Supreme Court held that "direct evidence" is not required to prove employment discrimination in a mixed-motive case. Accordingly, we must consider both "direct evidence" . . . and circumstantial evidence.

345 F.3d at 30. The First Circuit also applies *Desert Palace* to claims under the Family and Medical Leave Act, reasoning that *Desert Palace* rejected the First Circuit's earlier direct evidence requirement.

> [Plaintiff] correctly points out that the district court followed the law in this circuit at

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[13] *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 724 (8th Cir. 2001).

> that time: the rule that usually availability of a mixed-motive analysis depended on the plaintiff's producing "direct evidence" of discrimination. *Desert Palace* overruled that rule. *See . . . Estades-Nergoni v. Assocs. Corp.*

Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 30-31 (1st Cir. 2003) (FMLA).[14]

The Ninth Circuit's en banc decision in *Desert Palace* itself rejected the direct evidence requirement, based on reasoning largely entirely applicable to the ADEA and other federal anti-discrimination statutes. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (en banc). The Ninth Circuit disapproved the very methodology followed by the Eighth Circuit in the instant case, refusing to attempt to parse which of the concurring opinions in *Price Waterhouse* stated the governing law. The efforts of the lower courts to do so, the Ninth Circuit explained, had led to a "morass." 299 F.3d at 852-54.

> Like the Supreme Court, "we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they

[14] In *Burton v. Town of Littleton*, 426 F.3d 9, 19-20 (1st Cir. 2005), the First Circuit applied *Desert Palace* to claims arising under the ADEA as well as under Title VII. ("This Court . . . following the Supreme Court's command in *Desert Palace* . . . has rejected the requirement that there be direct evidence in mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive. *See . . . Hillstrom v. Best W. TLC Hotel*. . . .").

> were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 . . . (1993). The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn in.

299 F.3d at 854. Like the later Fifth Circuit decision in *Rachid*, the Ninth Circuit found dispositive the absence from the statutory text of any heightened standard of proof. "We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference 'direct evidence.'" 299 F.3d at 852. In the wake of its decision in *Desert Palace*, itself a Title VII case, the Ninth Circuit has repeatedly held that circumstantial evidence can be used to establish a mixed-motive claim under statutes other than Title VII.[15]

Like the Ninth Circuit, the Seventh Circuit too had rejected the direct evidence requirement even before this Court's decision in *Desert Palace*. In order to bring a case within the mixed-motive analysis in the Seventh Circuit, a plaintiff is required to adduce

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[15] *Bell v. Kaiser Foundation Hospitals*, 122 Fed. Appx. 880, 882 (9th Cir. 2004) (circumstantial evidence can be used to establish a mixed motive claim under Family and Medical Leave Act, Americans with Disabilities Act, and Title VII); *Calmat Co. v. U.S. Department of Labor*, 364 F.3d 1117, 1123 n.4 (9th Cir. 2004) ("The A[dministrative Review Board], like [the employer], erroneously stated that direct evidence of retaliation is necessary to apply the mixed-motive framework. *See Desert Palace, Inc. v. Costa* . . . ") (Surface Transportation Assistance Act).

what that circuit characterizes as "direct proof" of discrimination. The Seventh Circuit "direct proof" standard can be satisfied by circumstantial evidence, and expressly does not require direct evidence.

> [A] plaintiff "may present enough evidence to demonstrate that [the disputed adverse action] was a result of intentional discrimination." *Kennedy* [*v. Schoenberg, Fisher & Newman, Ltd.*], 140 F.3d [716], 722 [(1998)]. . . . Evidence of intentional discrimination can be either direct – "evidence that can be interpreted as an acknowledgement of discriminatory intent by the defendant," *Troupe* [*v. May Dept. Stores Co.*], 20 F.3d [734], 736 [(7th Cir. 1994)] . . . – or circumstantial – for example, ambiguous statement or suspicious timing. . . . "Once a plaintiff shows that an employment decision was motivated in part by [an illegitimate purpose], the defendant may avoid a finding of liability by proving that it would have made the same decision [even absent that discriminatory purpose.]" *Geier* [*v. Medtronic, Inc.*, 99 F.3d 238,] 241 [7th Cir. 1996]. . . . This method of proof is generally called a direct case.

Maldonado v. U.S. Bank, 186 F.3d 759, 763 (7th Cir. 1999). The Seventh Circuit has repeatedly emphasized that its "direct proof" standard does not require "direct evidence."

> [D]irect evidence "essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612,

> 616 (7th Cir. 2000). As such, because admissions are exceedingly rare in modern employment discrimination cases, "under the direct method we now also allow circumstantial evidence to be introduced." *Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1028 (7th Cir. 2004).

Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853, 861-62 (7th Cir. 2007).[16]

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[16] *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 593 (7th Cir. 2008) (FMLA and Title VII) ("[A plaintiff] can rely on two types of evidence in showing that [an unlawful purpose] motivated [the employer's] action under the direct method of proof: 'direct evidence' or 'circumstantial evidence.' "); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008) ("The direct method of proof involves direct evidence . . . as well as more attenuated circumstantial evidence.") (ADEA claim); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) ("The nomenclature is misleading because the phrase 'direct method' tends to imply that an employee only may proceed under the direct method with 'direct evidence.' . . . [T]hat is not the case.") (Title VII and ADEA claims); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 915 n.15 (7th Cir. 2007) ("While the terms 'direct' and 'indirect' are often used without trouble, they sometimes cause confusion when litigants believe that the 'direct' method of proof permits consideration only of direct evidence – that is, testimony concerning an employer's open admission of discriminatory intent – and not circumstantial evidence."); *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007) (" 'direct proof' of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion . . . , but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences."); *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) (ADEA and Title VII

(Continued on following page)

The Tenth Circuit had also rejected the direct evidence requirement even prior to *Desert Palace*. In the Tenth Circuit a plaintiff could then, and can now proceed under what that circuit denotes the "direct method," by introducing "direct or substantial evidence that the alleged [impermissible] motive 'actually relate[s] to . . . the particular employment decision.'" *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999) (*quoting Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C.Cir. 1997)). Once a plaintiff establishes through the "direct method" that an impermissible purpose "played a motivating part in [the] defendant's decision," the burden shifts to the employer to show that it would have made the same decision even absent that motive. 164 F.3d at 551. This Tenth Circuit "direct method" standard clearly does not require direct evidence.

> A mixed-motive case is not established, and the *Price Waterhouse* framework does not apply, unless the plaintiff presents evidence

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claim) ("[u]nder the mixed motive approach to discrimination cases, a plaintiff may rely on either direct or circumstantial evidence to establish discriminatory intent."); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d at 722 (use of circumstantial rather than direct evidence to establish mixed-motive claim by demonstrating that unlawful purpose was a motivating factor "is more usually the case"); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997) ("[u]nder the mixed motives approach, the plaintiff may rely upon either direct or circumstantial evidence to establish discriminatory intent."); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (same).

> that directly shows that [an impermissible purpose] played a motivating part in the employment decision at issue. We have referred to this method of establishing [unlawful discrimination] as "the direct method," see *Medlock* . . . , but we emphasize that . . . we do not require "direct" evidence "in its sense as antonym of 'circumstantial.'" *See Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171, 181 (2d Cir. 1992). . . . [T]hus a plaintiff can establish [unlawful discrimination] "directly" under *Price Waterhouse*, through the use of direct or circumstantial evidence.

Fye v. Oklahoma Corp. Comm'n, 516 F.3d 1217, 1226 (10th Cir. 2008). The Tenth Circuit applies the "direct method" to ADEA claims, noting that it can be satisfied by "direct or circumstantial evidence." *McCrary v. Aurora Public Schools*, 57 Fed. Appx. 362, 367 (10th Cir. 2003).

The District of Columbia Circuit rejected the direct evidence requirement more than a decade ago.

> [T]he defendant . . . argues that, under *Price Waterhouse*, the burden of persuasion shifts to the defendant only where the plaintiff has provided "direct" rather than "inferential" evidence of discriminatory animus. . . . We reject this contention. . . .
>
> [I]t is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent. Justice White's concurring opinion makes no mention of "direct evidence,"

> . . . nor does the plurality opinion written by Justice Brennan. . . .
>
> In our view, Justice O'Connor's invocation of "direct" evidence is not intended to disqualify circumstantial evidence. . . . Indeed, Justice O'Connor relies on circumstantial evidence in *Price Waterhouse* to show that the employer's discriminatory motive played a substantial role in the disputed employment decision.

Thomas v. National Football League Players Association, 131 F.3d 198, 203-04 (D.C. Cir. 1997).

Three circuits take the contrary view. Like the Eighth Circuit in the instant case, both the Second Circuit and the Third Circuit impose the direct evidence requirement that has been expressly rejected by six other circuits. In *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002), the Third Circuit held that "Justice O'Connor's opinion . . . represents the holding of the fragmented Court in *Price Waterhouse*," 308 F.3d at 338 n.2, and that direct evidence is thus required to establish a mixed-motive claim and shift the burden of proof to the defendant in an ADEA case. 380 F.3d at 337-38. The Third Circuit reiterated its adherence to the direct evidence requirement in *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) (ADEA), a year after this Court's decision in *Desert Palace*. The Second Circuit

also has repeatedly applied a direct evidence requirement in the years since *Desert Palace*.[17]

A number of lower courts have recognized this inter-circuit conflict. In *Ilozor v. Hampton University*, 2008 WL 2824952 (4th Cir. July 23, 2008), the Fourth Circuit noted

> We have not yet decided whether an ADEA plaintiff who lacks direct evidence of discrimination may proceed under the mixed motive approach. . . . Two Circuits have split on the question. *Compare Rachid v. Jack in the Box, Inc.* . . . with *Monaco v. American General Assurance Co.*, 359 F.3d 296, 300 (3d Cir. 2004).

2008 WL 2824952 at *5 n.7. A New Jersey state court, citing inter alia the conflict between *Rachid* and Eighth Circuit precedent,[18] observed that

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[17] *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 187 (2d Cir. 2006) ("[b]ecause [the plaintiff] presents no direct evidence of age discrimination, the court evaluates his ADEA claim under the *McDonnell Douglas* [*v. Green*, 411 U.S. 792 (1973)] framework.") (ADEA); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 71 (2d Cir. 2005) (same) (ADEA); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 173 (2d Cir. 2006) ("we agree with the District Court that [the plaintiff] failed to present any direct evidence of discriminatory animus based on his disability and therefore was not entitled to a *Price Waterhouse* burden shift.") (ADA and FMLA).

[18] *Myers v. AT&T*, 380 N.J.Super. 443, 459, 882 A.2d 961, 970 (App. Div. 2005):

> In *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004), for example, the Eighth Circuit . . . concluded

(Continued on following page)

> [s]ince *Desert Palace* was decided, the federal courts have split when confronted with the question of whether the effect of that ruling is limited to Title VII complaints or whether it is to be applied more broadly to all mixed motive discrimination cases.

Myers v. AT&T, 380 N.J.Super. 443, 459, 882 A.2d 961, 970 (App. Div. 2005). Several federal district courts have also recognized the existence of this conflict.[19]

> that the *Desert Palace* decision had "no impact on earlier Eighth Circuit decisions". . . . In *Rachid* . . . the Fifth Circuit concluded that the statutory language of the ADEA itself made clear that the heightened direct evidence standard did not apply. . . . As these examples demonstrate, there is no consensus among the federal courts respecting the scope of the *Desert Palace* decision.

[19] *Lawhead v. Ceridian Corp.*, 463 F.Supp.2d 856, 867 (N.D.Ill. 2006) ("The cases that have addressed the issue have diverged. *See Rachid v. Jack In The Box, Inc.*, . . . (extending *Desert Palace* to ADEA); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 (4th Cir. 2004) (*Desert Palace* does not apply to the ADEA)."); *Johnson v. Harvey*, 2007 WL 201225 at *1 (E.D.Ark. Jan. 24, 2007) ("In *Desert Palace* . . . the Supreme Court held that direct evidence is not necessary to prove employment discrimination in mixed motive cases under Title VII. . . . [T]he Supreme Court [has not] specifically ruled on whether the same standard applies in age discrimination cases. There is an apparent disagreement among the Circuits on the issue. Compare *Rachid v. Jack in the Box, Inc.* . . . (extending *Desert Palace* to ADEA) with *EEOC v. Warfield-Rohr Casket, Inc.* . . . (expressing doubt that *Desert Palace* would be applied to the ADEA)."); *Bequeath v. L.B. Foster Co.*, 367 F.Supp. 779, 785-86 n.4 (W.D.Pa. 2005) ("the Supreme Court in *Desert Palace,*

(Continued on following page)

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED

This case is an excellent vehicle for resolving the question presented. Here, as in *Desert Palace*, the case turns on the correctness of a disputed jury instruction, and thus frames a straightforward question of law unencumbered by any fact-bound controversy. The sole basis of the decision below was the Eighth Circuit's holding that direct evidence is required to obtain a mixed-motive instruction in a non-Title VII case.[20] That issue was directly addressed by both parties in the litigation below.[21]

Inc., declined the opportunity to state whether its holding in *Desert Palace, Inc.*, applied to claims in the ADEA context. . . . Consequently, the effect that *Desert Palace, Inc.* has on an analysis of discriminatory conduct continues to be a subject of debate in federal courts, with varying results."); see *Helfrich v. Lehigh Valley Hospital*, 2005 WL 1715689 at *6 n.17 (E.D.Pa. July 21, 2005) (rejecting as "singularly unhelpful" plaintiff's reliance on Fifth Circuit decision in *Rachid*, since that decision was inconsistent with controlling Third Circuit caselaw holding that direct evidence is required in an ADEA case).

[20] App. 12a ("Under our court's interpretation of *Price Waterhouse*, the final instruction in this case was not correct. Because the instruction shifted the burden of persuasion on a central issue in the case, the error cannot be deemed harmless.") The Eighth Circuit rejected a challenge by FBL to a separate jury instruction. (App. 12a-13a).

[21] Appellant's Brief, Nos. 07-1490 and 07-1492 (Eighth Cir.), at 29-35; Appellee's Brief, Nos. 07-1490 and 07-1492 (Eighth Cir.), at 33-44.

The question presented has the same practical importance for litigants as the question presented in *Desert Palace*. This Court granted review in *Desert Palace* to resolve a conflict as to whether direct evidence is required to justify a mixed-motive instruction in a Title VII case. The conflict presented in the instant case concerns whether such a direct evidence requirement should be imposed in non-Title VII cases; while the instant case arises under the Age Discrimination in Employment Act, the lower courts have consistently and correctly concluded that the same standard would apply as well to claims under the Family and Medical Leave Act, the Americans with Disabilities Act, 42 U.S.C. § 1981, the anti-retaliation provisions of the Surface Transportation Assistance Act, and other federal anti-discrimination statutes. The total number of federal claims brought under these numerous federal statutes is at least comparable to the volume of cases under Title VII alone.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 07-1490/1492

Jack Gross,	*	
Appellant/Cross-Appellee,	*	
	*	Appeals from the
v.	*	United States
	*	District Court
FBL Financial Services, Inc.,	*	for the Southern
Defendant,	*	District of Iowa.
FBL Financial Group, Inc.,	*	
	*	
Appellee/Cross-Appellant,	*	
Iowa Farm Bureau Federation;	*	
Farm Bureau Mutual Insurance	*	
Company; William Oddy,	*	
	*	
Defendants.		

Submitted: November 1, 2007

Filed: May 14, 2008
(Corrected May 14, 2008; June 3, 2008)

Before MELLOY, COLLOTON, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

FBL Financial Group (FBL) appeals a jury verdict in favor of Jack Gross, an employee who alleged that FBL violated the Age Discrimination in Employment Act (ADEA) by demoting him because of his age in 2003. FBL challenges the final jury instructions adopted by the district court, the district court's

decision to exclude certain testimony, and the court's denial of FBL's motions for judgment as a matter of law. Gross cross-appeals the district court's order denying an award of attorney's fees. Because we conclude that the jury was not instructed correctly on a material issue, we reverse and remand for a new trial.

I.

Jack Gross was born in 1948. He has worked at FBL Financial Group since 1987. He was promoted up the ranks in 1990, 1993, 1997, and 1999, arriving ultimately at the position of Claims Administration Vice President. During a company reorganization in 2001, Gross was reassigned to the position of Claims Administration Director. His job responsibilities did not change, but Gross viewed this reassignment as a demotion, because it reduced his points under the company's point system for salary grades. In 2003, FBL reassigned Gross to the position of Claims Project Coordinator. At that time, many responsibilities associated with the Claims Administration Director position were transferred to a new position, entitled Claims Administration Manager, which was assigned to Lisa Kneeskern, an employee in her early forties. Gross's new Claims Project Coordinator position had the same salary points and pay grade as Kneeskern's position, but Gross contends that the reassignment was 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.

Gross brought suit in April 2004, alleging that FBL demoted him in 2003 because of his age, in violation of the ADEA. After a five-day trial, a jury found in favor of Gross, and awarded him $46,945 in lost compensation. During trial, the district court excluded testimony from FBL's vice president of claims concerning information he had received from Gross's co-workers regarding Gross's performance. The court also overruled FBL's objections to final jury instructions, including those that set forth the elements of the claim and the burdens of proof, and denied FBL's motion for judgment as a matter of law. After trial, the district court denied FBL's renewed motion for judgment as a matter of law based on sufficiency of the evidence, and FBL's motion for a new trial based on the alleged evidentiary errors. These matters give rise to the present appeal.

II.

We consider first FBL's objection to the final jury instructions concerning the elements of the claim and the burden of proof. The ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. § 623(a). This prohibition was "derived *in haec verba* from Title VII," *Lorillard v. Pons,* 434 U.S. 575, 584 (1978), which makes it unlawful to discriminate against an individual "because of such individual's

race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

The Supreme Court, in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), addressed the burdens of proof and persuasion that apply to a plaintiff's claim that he was discriminated against "because of" an enumerated factor under Title VII. Given the similarity of language between Title VII and the ADEA, we have applied both decisions to our analysis of claims under the ADEA. *Thomas v. First Nat'l Bank of Wynne,* 111 F.3d 64, 66 (8th Cir. 1997); *see also Holley v. Sanyo Mfg., Inc.,* 771 F.2d 1161, 1164 (8th Cir. 1985) (applying *McDonnell Douglas* to an ADEA case, "[b]ecause the ADEA grew out of Title VII . . . and because much of the language of the ADEA parallels that of Title VII").

McDonnell Douglas established a burden-shifting framework for evaluating claims of discrimination. Under this framework, a plaintiff must first establish a prima facie case of discrimination, which creates a rebuttable presumption of a statutory violation, and shifts the burden of *production* to the employer. The employer must rebut this presumption by producing a legitimate, non-discriminatory reason for its actions. When it does so, the presumption disappears, and "the sole remaining issue is discrimination *vel non.*" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000) (internal quotation omitted). The burden of persuasion remains with the plaintiff throughout this analysis. *Id.*

Price Waterhouse was a splintered decision that addressed the proper approach to causation where an employer is motivated by both permissible and impermissible considerations. We have held that Justice O'Connor's opinion concurring in the judgment is the controlling opinion that sets forth the governing rule of law. *See Erickson v. Farmland Indus., Inc.,* 271 F.3d 718, 724 (8th Cir. 2001). According to this rule, to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. *Price Waterhouse,* 490 U.S. at 275 (O'Connor, J., concurring in judgment). "Direct evidence" for these purposes is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas,* 111 F.3d at 66 (internal quotation and brackets omitted). It does not extend to "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse,* 490 U.S. at 277 (O'Connor, J., concurring in judgment).

When a plaintiff makes the requisite showing of direct evidence, the "burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." *Id.* at 276. Under this approach, a district court

should receive all of the evidence in a case, and then determine "whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it." *Id.* at 278. If a plaintiff fails to present "direct evidence" that an illegitimate criterion played a "substantial role" in the employment decision, then the case should be decided under *McDonnell Douglas* framework, and the burden of persuasion should remain at all times with the plaintiff. *Id.* at 278-79.

The district court in this case charged the jury that Gross had the burden to prove that (1) FBL demoted Gross to Claims Project Coordinator on January 1, 2003, and (2) that Gross's age was "a motivating factor" in FBL's decision to demote Gross. Final Jury Instruction No. 11. The instruction continued that the jury's verdict must be for FBL, however, "if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." *Id.*

Under our court's application of *Price Waterhouse,* this instruction was not correct. The *Price Waterhouse* rule calls for a shift in the burden of persuasion only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision. *See* 490 U.S. at 275 (O'Connor, J., concurring in judgment); *Erickson,* 271 F.3d at 724. The disputed instruction, however, provided that if Gross proved by any evidence – direct or otherwise – that age was "a motivating factor" in the employment decision, then the burden shifted to FBL to prove that its decision would

have been the same absent consideration of Gross's age.[1] Gross conceded that he did not present "direct evidence" of discrimination, (Appellant's App. 596), so a mixed motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action. *See Rockwood Bank v. Gaia,* 170 F.3d 833, 842-43 (8th Cir. 1999).

Gross contends that there was no error, because the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), supersede *Price Waterhouse* and our precedents applying *Price Waterhouse* to the ADEA. Section 107 of the 1991 Act amended Title VII by adding § 2000e-2(m): "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

[1] Our court concluded in *Glover v. McDonnell Douglas Corp.,* 981 F.2d 388, 394-95 (8th Cir. 1992), that there was no material difference between the phrases "substantial role" and "motivating factor," although *Glover* was vacated on other grounds by the Supreme Court, *see* 510 U.S. 802 (1993), and our court's subsequent opinion in *Glover* did not expressly reaffirm the analysis of the previous opinion, which has no precedential value. *See Glover v. McDonnell Douglas Corp.,* 12 F.3d 845, 848 n.3 (8th Cir. 1994). It is unnecessary to consider the issue here.

origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). This section does supersede *Price Waterhouse* and its requirement of "direct evidence" in the context of Title VII claims, and it makes "motivating factor" the touchstone of the analysis for liability. To obtain a jury instruction under § 2000e-2(m), therefore, a plaintiff need only present sufficient evidence of any kind for a reasonable jury to find that one of the enumerated criteria was "a motivating factor" for an employment practice. *Desert Palace,* 539 U.S. at 101.

We conclude, however, that § 2000e-2(m) does not apply to claims arising under the ADEA. By its terms, the new section applies only to employment practices in which "race, color, religion, sex, or national origin" was a motivating factor. When Congress amended Title VII by adding § 2000e-2(m), it did not make a corresponding change to the ADEA, although it did address the ADEA elsewhere in the 1991 Act. *See Lewis v. Young Men's Christian Assoc.,* 208 F.3d 1303, 1305 & n.2 (11th Cir. 2000) (per curiam). Accordingly, the Third Circuit has held that "the Civil Rights Act of 1991 does not apply to ADEA cases," and it continues to apply the *Price Waterhouse* framework in that context. *Glanzman v. Metro. Mgmt. Corp.,* 391 F.3d 506, 512 n.3 (3d Cir. 2004). The Eleventh Circuit concluded that the 1991 Act did not supersede *Price Waterhouse* as applied to ADEA retaliation claims. *Lewis,* 208 F.3d at 1305. The Fourth Circuit has reasoned that "ADEA mixed-motive cases remain

subject to the burden-shifting rules of *Price Waterhouse,*" *EEOC v. Warfield-Rohr Casket Co., Inc.,* 364 F.3d 160, 164 n.2 (4th Cir. 2004), and has suggested (without holding) that the requirement of direct evidence still applies, noting that "maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, nondiscriminatory employment decisions." *Mereish v. Walker,* 359 F.3d 330, 340 (4th Cir. 2004). *See also Smith v. City of Jackson,* 544 U.S. 228, 240 (2005) (observing that "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination," and holding that "the Court's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA" insofar as the scope of disparate-impact liability is concerned); *cf. Norbeck v. Basin Elec. Power Coop.,* 215 F.3d 848, 852 (8th Cir. 2000) (holding that the 1991 Act does not apply to retaliation claims).

Gross argues nonetheless that the decision in *Desert Palace* shows that the *Price Waterhouse* analysis no longer should govern his ADEA claim. Gross relies in particular on a Fifth Circuit decision, *Rachid v. Jack in the Box, Inc.,* 376 F.3d 305, 312-13 (5th Cir. 2004), which applied the analysis of *Desert Palace* to claims under the ADEA. *Rachid* held that because the relevant language in the ADEA – "*because of* such individual's age" – is "silent as to the heightened direct evidence standard," a plaintiff need not present

"direct evidence" of discrimination to receive a mixed motives analysis for an ADEA claim.[2]

We are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA. *Desert Palace* did hold that the *Price Waterhouse* framework is inapplicable to claims arising under Title VII and § 2000e-2(m). But the Court began its analysis by specifying that the case presented the "first opportunity to consider *the effects of the 1991 Act* on jury instructions in mixed motive cases." 539 U.S. at 98 (emphasis added). The Court then rejected the employer's argument that the 1991 Act did nothing to abrogate Justice O'Connor's opinion in *Price Waterhouse* (assuming that opinion is controlling), because the employer's contention was "inconsistent with the text of § 2000e-2m." *Id.* The Court observed that § 2000e2m requires only that the plaintiff "demonstrat[e]" that the employer used a forbidden consideration, that the 1991 Act explicitly defines the term "demonstrates," and that the text of the new statute thus left "little doubt that no special

[2] Insofar as summary judgment is concerned, *Rachid* is inconsistent with our circuit precedent. The Fifth Circuit in *Rachid* concluded that *Desert Palace,* which involved jury instructions in a Title VII case, dictated a change in the standard for summary judgment decisions under the ADEA. Our court has held, however, that because *Desert Palace* involved jury instructions after a trial, the decision does not affect our court's analysis of motions for summary judgment under Title VII, much less under the ADEA. *See Griffith v. City of Des Moines,* 387 F.3d 733, 736 (8th Cir. 2004).

evidentiary showing" – such as "direct evidence" – is required. *Id.* at 99.

While *Desert Palace* gave weight to the fact that § 2000e-2m, on its face, "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence," *id.* at 98-99, the opinion focused on the particular text of the 1991 Act and the effects of that statute on jury instructions in mixed motive cases. When the Court previously addressed statutory text comparable to the ADEA in *Price Waterhouse* – "*because of* such individual's . . . sex," 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added) – the result was a fragmented decision from which our court adopted Justice O'Connor's concurring opinion as the controlling rule. The Court in *Desert Palace* declined to address which opinion in *Price Waterhouse* was controlling, 539 U.S. at 98, or to revisit *Price Waterhouse*'s interpretation of a statute, unadorned by § 2000e-2m, that prohibits discrimination "because of" an enumerated factor. Even if some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse,* the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable. *See Rodriguez de Quijas v. Shearson/ American Express, Inc.,* 490 U.S. 477, 484 (1989). Our cases have concluded that because *Price Waterhouse* interpreted language identical to that found in the ADEA, we should follow the *Price Waterhouse* rule in ADEA cases. *Desert Palace* does not undermine the rationale of these decisions. We thus conclude that

the *Price Waterhouse* rule continues to govern mixed motive instructions in an ADEA case.[3]

Under our court's interpretation of *Price Waterhouse,* the final instruction in this case was not correct. Because the instruction shifted the burden of persuasion on a central issue in the case, the error cannot be deemed harmless. *M.M. v. Special Sch. Dist. No. 1,* 512 F.3d 455, 459 (8th Cir. 2008); *West Platte R-II Sch. Dist. v. Wilson,* 439 F.3d 782, 785 (8th Cir. 2006). Accordingly, we reverse and remand for a new trial.

III.

We briefly address the other instructional and evidentiary issues raised by FBL, because they may recur in a new trial. *See Andrews v. Neer,* 253 F.3d 1052, 1062 (8th Cir. 2001).

FBL requested that the district court give a final instruction to the jury that included this sentence: "Defendant is entitled to make its own subjective

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[3] Even were we to accept Gross's argument that *Desert Palace* undermines the *Price Waterhouse* distinction between "direct" and other evidence for purposes of the ADEA (as opposed to Title VII), that conclusion would not necessarily support the disputed jury instruction in this case. We would be left to consider the meaning of "because of such individual's age" anew, without any distinction between direct and other evidence, but also without the "motivating factor" standard for liability set forth in § 2000e-2m, and without the corresponding partial affirmative defense of 42 U.S.C. § 2000e-5(g)(2)(B).

personnel decisions, absent intentional age discrimination, *even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority.*" The court's final instruction included only the first half of this sentence, omitting the italicized clause.

We do not think the district court's instruction on this point was an abuse of discretion. "The form and language of jury instructions are committed to the sound discretion of the district court so long as the jury is correctly instructed on the substantive issues in the case." *White v. Honeywell, Inc.,* 141 F.3d 1270, 1278 (8th Cir. 1998) (internal quotation omitted). The court's formulation allowed FBL to argue that it demoted Gross for any reason "absent intentional age discrimination." The court was not required to list examples of such reasons in a jury instruction.

FBL also appeals the district court's decision to exclude testimony from FBL's vice president of claims, Andy Lifland, about complaints that he heard from Gross's coworkers about Gross's performance in the workplace. In a post-trial order, the court agreed with FBL that our precedent allows testimony about such complaints when the employer shows that it took action on the basis of the information. *See Crimm v. Mo. Pac. R.R. Co.,* 750 F.2d 703, 709 (8th Cir. 1984). The court defended its ruling, however, on the ground that the record at trial, including FBL's offer of proof, was insufficient to establish that Lifland received and relied on the complaints. As such, the dispute now seems focused on whether FBL

laid a sufficient foundation for the presentation of Lifland's testimony, not on the legal question whether Lifland's proposed testimony would be inadmissible hearsay if there were adequate foundation for it. FBL will have a new opportunity to lay an adequate foundation in a new trial, and we do not think it would be productive to offer an opinion at this time concerning the sufficiency of the previous offer of proof.

FBL also contends that the district court should have granted judgment as a matter of law in its favor. Because we remand the case for a new trial, we need not consider whether there was sufficient evidence for a hypothetical jury, properly instructed, to return a verdict in favor of Gross. *See Dennis v. Dillard Dept. Stores, Inc.,* 207 F.3d 523, 526 (8th Cir. 2000); *Hauser v. Krupp Steel Producers, Inc.,* 761 F.2d 204, 206 n.1 (5th Cir. 1985). We also need not consider Gross's cross appeal concerning attorney's fees.

For the foregoing reasons, we reverse and remand for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JACK GROSS, Plaintiff, VS FBL FINANCIAL GROUP, INC., Defendant.	CIVIL NO. 4:04-CV-60209-TJS ORDER ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Before the court is Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial (Clerk's No. 134). Defendant requests judgment as a matter of law under Federal Rule of Civil Procedure 50, or in the alternative, a new trial under Rule 59. For the reasons that follow, the motion is denied.

I. BACKGROUND

In his complaint (Clerk's No. 1), plaintiff Jack Gross alleges FBL Financial Group, Inc. ("FBL") discriminated against him because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*., and the Iowa Civil Rights Act, Iowa Code Chapter 216. Specifically, Gross claims he was demoted because of his age in January 2003, when he was 54 years old.

A jury trial was held from October 31 through November 4, 2005. At the close of evidence, FBL submitted a motion for judgment as a matter of law which was denied by the court. (*See* Clerk's Nos. 117-19.) The jury returned a verdict in favor of Gross and judgment was entered against FBL for the total amount of $46,945. (*See* Clerk's Nos. 125-26.)

Under the present motion, FBL renews its motion for judgment as a matter of law and argues that the evidence was legally insufficient for any reasonable jury to have found FBL intentionally discriminated against Gross based on his age. In the alternative, FBL contends it is entitled to a new trial because the court excluded certain testimony by a witness and because the verdict, including the damage award, was against the clear weight of the evidence.

II. ANALYSIS

Federal Rule of Procedure 50(a) provides, in part, as follows:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

> maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). If the court denies such a motion, as in this case, the movant may renew its request for judgment as a matter of law and may, alternatively, request a new trial under Rule 59. Fed. R. Civ. P. 50(b). In ruling on a renewed motion after a verdict is returned, the court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. *Id.*

A. Defendant's Motion for Judgment as a Matter of Law

1. Standard for Judgment as a Matter of Law

A motion for judgment as a matter of law presents a legal question for the court: "'[W]hether there is sufficient evidence to support the jury's verdict.'" *Jones v. Swanson*, 341 F.3d 723, 731 (8th Cir. 2003) (quoting *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)). As instructed by the Supreme Court, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The court views

> the "evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility." The legal

> standard requires 1) all direct factual conflicts must be resolved in favor of the plaintiff, 2) all facts in support of the plaintiff that the evidence tended to prove must be assumed, and 3) the plaintiff must be given the benefit of all reasonable inferences. A grant of judgment as a matter of law is proper only if the evidence viewed according to this standard would not permit "reasonable jurors to differ as to the conclusions that could be drawn."

Jones, 341 F.3d at 731 (citations omitted); *see also Reeves*, 530 U.S. at 150 ("the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence"); *Spencer v. Stuart Hall Co.*, 173 F.3d 1124, 1127-28 (8th Cir. 1999) (applying standards in ADEA case).

In this age discrimination case, FBL presumes Gross established a prima facie case. (*See* Defendant's Brief in Support of Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial (Clerk's No. 140) p. 4.) At trial, FBL presented evidence of a legitimate, nondiscriminatory reason for demoting Gross. Consequently, the central issue is whether Gross presented sufficient evidence from which a reasonable jury could find that FBL's proffered explanation was a pretext for discrimination. *See Reeves*, 530 U.S. at 143 (applying *McDonnell Douglas* burden-shifting framework in ADEA case); *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 931 (8th Cir. 2000) (same). As in all discrimination cases, the

ultimate question is whether FBL intentionally discriminated against Gross. *See Reeves*, 530 U.S. at 143, 153; *Cherry v. Ritenour Sch. Dist.*, 361 F.3d 474, 478 (8th Cir. 2004) (race discrimination case); *Tatom*, 228 F.3d at 931 (age discrimination case).

2. Summary of Evidence

Following the applicable standard, the court will briefly summarize the evidence presented at trial in the light most favorable to Jack Gross. He was born on June 13, 1948. (Trial Tr. at 403.) In 1971, he began employment with Farm Bureau operations in Iowa as a multi-line claims adjuster in three southeast counties. (Tr. at 58, 403.) As described by Gross, he handled "auto collision claims, liability claims, hail claims, cattle in cornfield claims, bodily injury, medical claims, everything that basically happened in those three counties." (Tr. at 58.) After working as a regional manager for a couple of years, he voluntarily left his employment with Farm Bureau in 1978 and then returned as a claims adjuster in 1987. (Tr. at 58-59, 61-62, 403.) His supervisor was Tom Eppenauer who was a division claims manager. (Tr. at 63, 284.)

In 1990, Gross was promoted to a division claims manager in the West Des Moines claims office. (Tr. at 62.) At the time, the division claims manager was responsible for about eight to nine adjusters and a small clerical staff. (Tr. at 63.) In 1993, Gross moved to the main office and became a regional coordinator and training director. (Tr. at 65-66.) Eppenauer had

been promoted to claims vice president and remained Gross' supervisor. (Tr. at 66, 284.)

In 1994, Gross became director of claims administration. (Tr. at 66.) He had several units reporting to him and worked on a companywide project to make it as efficient as possible. (Tr. at 66-67.) In 1997, he was promoted to assistant claims manager. (Tr. at 67.)

He had several functional areas reporting to him and worked extensively on a package policy project for the company. (Tr. at 67-68.) The managers which reported to him included those for the workers' compensation, subrogation, first notice of loss, medical supervision, and physical damage departments. (Tr. 69-70.)

In January 1999, Gross was promoted to claims administration vice president. (Tr. at 71-72.) According to Gross, his job did not change much because he continued to be responsible for functional areas and continued to develop programs including the use of a debit card to pay claims. (Tr. at 72.) Throughout this time, Eppenauer remained Gross' supervisor and had recommended his promotions. (Tr. at 72, 288.) Gross had consistently received high scores on his evaluations by Eppenauer and has never been disciplined as a Farm Bureau employee. (Tr. at 77, 230.)

In August 2000, Eppenauer was demoted by the company's chief operating officer, Barbara Moore, to the position of claims training administrator and no longer had supervisory authority over Gross. (Tr. at 289.) Eppenauer described his new position as

follows: "I had supervisory authority over no one. I had virtually no duties." (Tr. at 289.) He retired in December of 2003. (Tr. at 279.)

Andy Lifland replaced Eppenauer as vice president of claims for the Iowa Farm Bureau in August 2000 and became Gross' supervisor. (Tr. at 403, 413.) Lifland had been the vice president of claims for Farm Bureau operations in Arizona and New Mexico. (Tr. at 83, 413.) Moore had also worked in the Arizona and New Mexico operations and hired Lifland for the Iowa position. (Tr. at 640, 647.)

In January 2001, Gross was demoted to the position of claims administration director as part of a reorganization of the claims department. (Tr. at 89-90.) He viewed this position as a demotion because his points under the company's Hay system for salary grades were reduced. (Tr. at 89-90.) His job responsibilities did not change. (Tr. at 90, 469-70.)

Gross received lower scores on his evaluations from Lifland than he had previously received from Eppenauer on prior evaluations. (Tr. at 110-11, 428, 432-33.) Gross believed that Lifland's evaluations were not fair because Lifland never spoke to him about his work or progress. (Tr. at 110-15.) In Gross' words, he had "never seen a worst example of a manager than Mr. Lifland." (Tr. at 106.)

On January 1, 2003, the Iowa Farm Bureau operations merged with the Kansas and Nebraska Farm Bureau operations. (Tr. at 121, 403-04.) As part of the merger, the claims department was

restructured by Lifland and Steve Wittmuss, who was from the Nebraska Farm Bureau and became the regional claims vice president and second in command below Lifland. (Tr. at 444-45, 529-30.) Wittmuss explained the restructure process as follows:

> [W]e were trying to find positions for everybody, what we thought best suited their talents. You know, when you have – when you're trying to put three companies together – you know, in a claims department, you have the support staff, you have the adjusters, and you have the district claims managers, and then you move up the ladder. And we still have the claims, so pretty much from the district claims level manager down, you know, we still needed those people and their jobs didn't change significantly.
>
> What happens is the people above that level, you have more people than you have jobs for the new organization, and so you're trying to find people to fit in – I mean, it's also a nice opportunity to go and review people and make sure you think they're where they should be.

(Tr. at 532.)

As part of the restructuring, Gross was demoted to the position of claims project coordinator. (Tr. at 403.) According to Gross, he was told in a meeting with Lifland and Wittmuss that "they decided [his] talents were better suited to this new job." (Tr. at 123.) Lifland and Wittmuss did not indicate that the

demotion was based on any problems with Gross' performance as claims administration director. (Tr. at 127.) Lifland told Gross he would be working with special projects. (Tr. at 124.) He was instructed to continue with the projects he was currently working on. (Tr. at 127-28.) Some time after the meeting, Gross received a job description for his new position as claims project coordinator. (Tr. at 124.)

As for his former claims administration director position, Gross was informed during the meeting "that they were going to create a claims administration manager and that most of [his] job would be going to Lisa Kneeskern." (Tr. at 126.) Kneeskern had been a subrogation supervisor who reported to Gross. (Tr. at 126.) At the time, Gross was 54 years old and Kneeskern was in her early forties. (Tr. at 126-27.)

On April 1, 2005, Wittmuss became Gross' immediate supervisor. (Tr. at 403.) Gross remains employed by FBL as a claims project coordinator. (Tr. at 403.)

3. Legal Analysis

FBL argues that no reasonable juror could have found that FBL intentionally discriminated against Gross based on his age. FBL asserts that Gross' reassignment in 2003 occurred because Farm Bureau operations in Kansas and Nebraska merged with the Iowa operation. According to Lifland and Wittmuss, Gross was assigned to the projects coordinator position because they believed it was the best fit for Gross' strengths. (Tr. at 123, 437-38, 532-33, 558.)

FBL's decision to reorganize its operations and reassign employees into different positions, by itself, does not violate either federal or state law. Employers are free to make their own business and personnel decisions so long as they do not involve discrimination. *See*, *e.g.*, *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 956 (8th Cir. 2001) ("'A company's exercise of its business judgment is not a proper subject for judicial oversight.'"); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) ("'[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.'"); *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) ("This court, moreover, may not second-guess an employer's personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully."). Accordingly, FBL presented a legitimate, nondiscriminatory reason for demoting Gross.

The jury found, however, that Gross' age was a motivating factor in FBL's decision. (*See* Final Instruction No. 11; Verdict Form.) FBL challenges the verdict by noting there was no evidence that any of Gross' superiors, including Lifland, Wittmuss and Moore, made any comments about his age. (*See* Tr. at 248-49, 441-42, 445.) All three individuals explicitly denied that age was a consideration in the decision to

place Gross in the project coordinator position. (Tr. at 412, 533, 570, 643.) Despite the lack of such direct evidence of discrimination, the court believes there was ample circumstantial evidence presented during trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age.

Gross testified that his demotion was based on his age for the following reasons:

> Well, No. 1, in Kansas everybody over 50 got bought out. They just didn't want over 50 people down there. All of the people in the Iowa operation who had been there a significant amount of time and had, you know, achieved a degree of success were getting paid well. We were all pretty much taken down at the same time, not just based on performance. The only common thread was age. And there was a merger and there was a reorganization. There's another reorganization this year, two years later, and it looks like again 55 people are going to get hurt by it.

(Tr. at 181-82.) Gross further testified: "My job was – that I had been well qualified for and handling at a very high level was taken away and given away to a much younger subordinate who had less experience and qualifications." (Tr. at 249.)

Contrary to FBL's argument, an inference of age discrimination is raised by the decision to place Kneeskern in the claims administration manager position instead of Gross. First, there was ample

evidence for the jury to find that Gross was highly qualified for the position. Gross testified that the claims administration manager position was functionally the same job he was performing before the merger. (Tr. at 129.) As stated by Gross, "some of the reporting changed, but the day-to-day real job is the same." (Tr. at 129.) Gross was never told by Lifland or Wittmuss that he was unable to perform any portion of the position. (Tr. at 135.)

Second, there was ample evidence for the jury to find that Kneeskern was not qualified for the position or, at the least, was far less qualified than Gross for the position. Gross had supervised Kneeskern for several years before the merger. (Tr. at 130-31.) During his testimony, Gross compared Kneeskern's work experience and qualifications to his and the qualifications for the claims administration manager position. (Tr. 131-34.)

In addition, Eppenauer stated explicitly that Kneeskern was not qualified for the job. (Tr. at 333, 349.) He testified that, while she was a "very good employee," her experience was limited to the subrogation department. (Tr. at 327.) As noted by Eppenauer, "[s]he did not have any field adjusting experience. She hadn't worked bodily injury claims or total loss automobile claims or work comp or any other arena of the claim department." (Tr. at 327.) In Eppenauer's opinion, Gross was much more qualified for the position than Kneeskern. (Tr. at 353-54.) In regard to Gross' job knowledge, Eppenauer testified as follows:

> It's probably as high a knowledge as we had in the department overall. There were certain areas he had extremely good insurance knowledge. There's some areas he didn't work every day which he would not have been as good as some others, but he just had superb knowledge in a number of areas.

(Tr. at 286.) When asked about Gross' interaction with the employees he supervised, Eppenauer responded, "[h]e did a great job." (Tr. at 286.)

Based on this testimony and the job descriptions admitted into evidence, the jury could have reasonably concluded that Gross was far more experienced and qualified than Kneeskern for the claims administration manager position.

An inference of discrimination is also raised by the fact that Gross was never even provided an opportunity to apply for the claims administration manager position. (*See* Tr. at 135.) As set forth above, there was sufficient evidence he had been performing the same duties for years and was far more qualified than the younger, former subordinate who was given the job. Yet, he was not provided an opportunity to apply for the position or even asked by Lifland or Wittmuss regarding the appropriateness of Kneeskern's promotion into the position. (Tr. at 134-35.) In contrast, Moore, the chief operating officer, testified that she had to reapply for her position. (Tr. at 654.)

There was also sufficient evidence for the jury to reasonably conclude that FBL's explanation for

demoting Gross was false and a pretext for discrimination. As explained by Lifland and Wittmuss, Gross was placed into the claims project coordinator position because it was a good fit for his strengths and weaknesses. Moore similarly agreed that the object was to find positions for people to fit within the new structure. (Tr. at 658.)

Wittmuss conceded, however, that at the time the decision was made the project coordinator position was ill-defined and did not have a job description or specifically assigned duties. (Tr. at 557-58.) Gross also testified that the position "was not really well defined. They said just keep on working on the projects that you're working on, which I did, but they didn't last very long." (Tr. at 167.) Consequently, the jury could have reasonably found the stated reason for Gross' demotion was not credible because there was no defined position for Gross to "fit" into. As noted by the Supreme Court, "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves*, 530 U.S. at 147.

FBL argues that uncontradicted evidence was presented which showed that Kneeskern was qualified for the claims administration manager position and that Gross was a good fit for the claims project coordinator position. FBL is correct that Gross is not entitled to " 'the benefit of unreasonable inferences, or those at war with the undisputed facts.' " *Knutson v. Ag Processing, Inc.*, 394 F.3d 1047, 1050 (8th Cir.

2005) (quoted citation omitted). Contrary to FBL's argument, however, the court does not believe the evidence supporting FBL's defenses is undisputed or uncontradicted. Instead, the jury had reasonable grounds to question the credibility of FBL's witnesses because of inconsistencies and contradictions in their testimony.

For example, Gross testified that the claims administration manager position given to Kneeskern was functionally the same job he was performing before the merger. (Tr. at 129.) Wittmuss also testified that the positions were basically the same and described them as "very similar jobs." (Tr. at 557.) Lifland, on the other hand, testified that "as it existed prior to the merger, [Gross'] position went away." (Tr. at 445.)

Lifland also testified that Kneeskern had made a complaint to him about Gross. (Tr. at 438.) Kneeskern contradicted Lifland's testimony while being cross-examined:

> Q. We've heard some discussion about concerns that you expressed to Mr. Lifland about Mr. Gross. You had a very good working relationship with Mr. Lifland; correct?
>
> A. Yes.
>
> * * *
>
> Q. You had no problems going to talk to Mr. Lifland about concerns that you had about Mr. Gross; correct?

> A. I don't recall ever approaching Andy talking about any concerns about Mr. Gross.
>
> Q. You never complained about Mr. Gross to Mr. Lifland?
>
> A. Complained?
>
> Q. Complained or expressed concerns or anything of that type?
>
> A. I think that's a pretty strong word. No.

(Tr. at 582-83.)

Based on the inconsistencies and contradictions presented by FBL's own witnesses, the jury could have reasonably decided to not believe a part, or all, of their testimony including the reason given for demoting Gross. *See Reeves*, 530 U.S. at 147 ("fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt' ") (quoted citation omitted); *Spencer*, 173 F.3d at 1128 ("Where conflicting evidence is presented at trial, it is the jury rather than this court which assesses the credibility of the witnesses and decides which version to believe.").

An inference of age discrimination was also raised by evidence regarding the demotions of other employees in connection with the 2003 merger. (*See* Tr. at 170-73, 18182; Plaintiff Ex. 15.) Eppenauer testified that

> [a] number of senior or tenured employees with a number of significant years of service

> in at Farm Bureau were isolated and demoted. And when that is done, their pension is frozen, and essentially their ascent into the company – or into other positions in the company is frozen, and all of those individuals are near the age 50 and above. To me, that's age discrimination.

(Tr. at 365.) Although FBL argues at length about the specific circumstances of the other demoted employees, those issues can only be resolved by weighing or evaluating the evidence or considering questions of credibility. Those are matters for the jury. *Reeves*, 530 U.S. at 150 (the court "may not make credibility determinations or weigh the evidence"). Giving Gross the benefit of all reasonable inferences, however, the court finds the jury could have reasonably relied on this evidence to conclude that Gross' demotion was motivated by age.

In sum, after viewing the testimony and documents submitted in the light most favorable to Gross, this court finds sufficient evidence exists to support the jury's verdict. FBL's request for judgment as a matter of law under Rule 50 is, therefore, denied.

B. Defendant's Alternative Motion for New Trial

Federal Rule of Civil Procedure 59 provides, in part, that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues

> (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

Fed. R. Civ. P. 59(a)(1). FBL believes it is entitled to a new trial for two reasons. First, FBL asserts that the court's exclusion of certain testimony by Andy Lifland was erroneous. Second, FBL contends the jury's verdict, including the damage award, was against the clear weight of the evidence. The court disagrees on both points.

1. Exclusion of Testimony

FBL argues that the court's exclusion of evidence relating to comments coworkers made to Andy Lifland about Gross was erroneous. The court excluded certain testimony by Lifland because it was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

The first portion of Lefland's testimony at issue states as follows:

> Q. At some point did anyone who was in your chain of command report to you that Jack Gross and Tom Eppenauer were undermining you?
>
> A. Yes.

Q. Just tell the jury about that briefly.

MS. TOWNSEND: Your Honor, I'm going to object to anything that calls for hearsay.

THE COURT: Sustained.

MR. HARTY: Your Honor, if I may, these evaluations have been called into question. I'm not offering it for the truth of the matter asserted but, rather, for the fact that Mr. Lifland, the evaluator, heard it.

THE COURT: I'll persist in my ruling.

(Tr. at 433.) Lifland later testified as follows:

Q. And, again, the 2003 decision to place Jack Gross into the project coordinator position, before that time had you received any complaints from coworkers concerning whether they really wanted to work with Mr. Gross?

A. I had, yes.

Q. . . . . Did you take that into account when you decided to assign Mr. Gross to the projects position as opposed to some position where he would be managing people?

A. I considered all of those factors, but I recognized that one of Jack's real strong points was handling projects. He was handling projects in his claims administration position as well. Jack excelled at projects. That was a real strong point. And so in our way of thinking, this claims project coordinator position

was perfect for jack, absolutely perfect. It's his strong point.

Q. At some point did you reach the conclusion that Jack Gross just didn't like you?

A. I did, yes.

Q. How did you react to that?

A. Well, I mean, I'm disappointed. It's not a popularity contest. You know, deep down, I want people to like me, but the company could do very well even if people didn't like me as long as they did the job that they were supposed to do. But, sure, I want people to like me, but apparently Jack did not.

Q. Before you actually assigned Mr. Gross to the projects position as opposed to managing people, did Lisa Kneeskern complain about him?

A. I recall her making –

MS. TOWNSEND: Your Honor, I'm going to object.

Q. (BY MR. HARTY) We're probably going to get an objection. If you would just respond whether or not you received a complaint.

A. Yes.

Q. Did you take that complaint into account when you placed Mr. Gross into the projects position in 2003?

A. Yes.

Q. Did Steve Liebbe complain about Mr. Gross?

A. Yes.

Q. Did Gregg Johnson complain about Mr. Gross?

A. Yes.

Q. Did Steve Wittmuss actually make some observations about Mr. Gross?

A. Yes.

Q. Did you take all those things into account when you made the decision to place Mr. Gross in the projects coordinator position?

A. Yes.

Q. Tell us what Mr. Liebbe said to you.

MS. TOWNSEND: Objection, hearsay.

THE COURT: Sustained.

(Tr. at 437-39.)

As reflected by the record, the testimony objected to by counsel and excluded by the court during Lifland's trial testimony was (1) the substance of the report that Gross and Eppenauer were undermining Lifland and (2) the substance of the complaint made by Liebbe. Lifland was not asked, in the presence of the jury, about the substance of complaints by Kneeskern, Johnson or Wittmuss. Although Gross' counsel objected as Lifland began answering the

question whether Kneeskern ever made a complaint, FBL's counsel proceeded before the court ruled on the objection. Because the substance of both the report and Liebbe's complaint were statements made out of court and, in the court's opinion, were offered to prove the truth of the matter asserted, the proffered testimony was properly excluded as inadmissible hearsay evidence. *See* Fed. R. Evid. 801(c); *Chadwell v. Koch Refining Co.*, 251 F.3d 727, 731 (8th Cir. 2001).

In its brief, FBL notes that federal courts have repeatedly allowed employers to present testimony concerning comments or reports that a manager took into account when making the employment decision at issue. *See Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703, 709 (8th Cir. 1984) (affirming admission of documents offered to demonstrate that employer had conducted an investigation and to disclose information that employer had relied on in making decision); *Cameron v. Community Aid For Retarded Children, Inc.*, 335 F.3d 60, 66, n. 2 (2nd Cir. 2003) (complaints by various employees against plaintiff are not hearsay because the statements are not used to prove truth of matter asserted but to establish decision-maker's state of mind); *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1349 (5th Cir. 1985) (holding transcript of appeal hearing before Board of Trustees was properly admitted for limited purpose of showing motive and intent of Board in deciding not to renew plaintiff's employment contract); *McKenna v. Weinberger*, 729 F.2d 783, 792 (D.C. Cir. 1984) (holding supervisors' testimony about complaints of

plaintiff's co-workers was not hearsay because it "was offered to illuminate their motives and actions as supervisors, not to prove that the coworkers had valid complaints").

The court recognizes and agrees with the principle set forth in those cases but does not believe the record supported its application at the time the testimony was presented. Again, the only testimony excluded was the substance of the report and Liebbe's statements to Lifland. Based on the record at the time, the court believes there was an insufficient foundation to determine that the proffered testimony was, in fact, complaints that Lifland relied upon in making decisions relevant to this case.

Later in the trial, Wittmuss was asked if he ever heard concerns from coworkers about whether they wanted Gross on their project teams, and he responded as follows:

> Well, as we went on with the – with working, you know, I had – we had regional claims managers that reported to me and we met and we tried to find sometimes projects for different people, and there was some concern about Jack working on some of the projects.

(Tr. at 535-36.) Wittmuss then identified by name five individuals who raised such concerns. (Tr. at 536.) Wittmuss was not asked, however, to discuss the substance of their concerns in any detail. No objections were made by Gross' counsel during this testimony.

Subsequently, FBL made the following offer of proof outside the presence of the jury:

> Q. Mr. Lifland, in making the decision to place Jack Gross in the project coordinator position, did you rely upon information that you had received from others in the Farm Bureau organization?
>
> A. Yes.
>
> Q. Did you take into account concerns or complaints that had been expressed to you about Mr. Gross?
>
> A. Yes.
>
> Q. Would you please tell the Court the nature of those concerns or complaints.
>
> A. There were a number of complaints. Some of them discussed the fact that Jack was – had his own agenda, had his own best interests at heart as opposed to the company's best interests; that he was not a people person, was not well-liked. Comments were made that he gave no guidance to his subordinates. There were a number of comments.
>
> Q. Did you take these comments into account in making the January 1, 2003 placement?
>
> A. Yes.
>
> Q. Were these comments made by more than one of your coworkers?

A. Yes.

Q. As we sit here today, do you know how many people made comments of that nature?

A. Directly to me, probably four, five, six.

Q. Can you identify those people, please.

A. Yes.

Q. Will you do so.

A. Steve Wittmuss, Lisa Kneeskern, Steve Liebbe, Greg Johnson, Lynn Miller, John Czerwonke.

Q. Let's start at the end. What did Mr. Czerwonke tell you?

A. Jack was not a team player. He was out for himself.

Q. How about Mr. Miller?

A. The same thing.

Q. How about Miss Kneeskern?

A. That he offered no guidance in terms of supervision.

Q. And Mr. Wittmuss?

A. Probably all of those things. And Wittmuss also heard from other individuals, so maybe – if I'm allowed to say that –

Q. If he told you –

A. Yes.

Q. – what he had heard from others and you took it into account in making that decision, yes, please explain what he told you.

A. He told me that his regional claim managers had commented directly to him that they did not want Jack on projects that they were involved in because he was very negative and brought everybody down.

Q. Let's make sure – I want to make sure that we're limiting your testimony to things that you heard before January 1, 2003, before the merger.

A. Not all of those were prior to the merger.

Q. Can you just identify for the Court which of those comments were made prior to the merger.

A. Mr. Liebbe and Miss Kneeskern, their comments about no guidance, no supervision were made prior to the merger.

Q. What about Mr. Miller or Mr. Czerwonke?

A. I would say that both of them commented prior to the merger.

MR. HARTY: Thank you. Your Honor, that is the testimony we would have offered had the Court not sustained plaintiff's counsels' objection.

(Tr. at 538-41.)

After the offer of proof, FBL did not request the court to reconsider its prior ruling or seek to have Lifland testify again. The court also notes that FBL's offer of proof did not specifically address the excluded testimony regarding the substance of the report to Lifland "that Jack Gross and Tom Eppenauer were undermining" him. Consequently, there was no evidence for the court to determine whether the substance of the report was being offered for the truth of the matter or was being offered as information relied upon by Lifland in making a personnel decision regarding Gross. Although counsel referred to evaluations in response to the objection made before the jury, Lifland himself never testified, either before the jury or during the offer of proof, as to any connection between the report and his evaluations of Gross. Without the substance, source and specifics of the report, the only conclusion the court could, and did, make was that the proffered testimony was inadmissible hearsay.

As for Liebbe's comment, Lifland again was not asked directly regarding the substance of his complaint. Instead, Lifland referred to Liebbe in response to counsel's inquiry as to which comments were made prior to the merger, stating as follows: "Mr. Liebbe and Miss Kneeskern, their comments about no guidance, no supervision were made prior to the merger." (Tr. at 540.) Consequently, even if FBL had asked the court to reconsider, there was still insufficient foundation as to the actual substance of Liebbe's comments to Lifland.

There was also insufficient foundation for the court to determine when Wittmuss may have communicated either his own concerns or those of coworkers to Lifland. Wittmuss did testify, after the offer of proof, that the concerns he had heard about Gross from coworkers were made after Gross' demotion. (Tr. at 553-54.) Consequently, those comments would not have been relied on by Lifland and are irrelevant to the decision to demote Gross.

Even if the court erred in its ruling, FBL must establish that it was prejudiced by the exclusion of the testimony. *See Keisling v. SER-Jobs for Progress, Inc.*, 19 F.3d 755, 762 (8th Cir. 1994); *cf. Paul v. Farmland Indus., Inc.*, 37 F.3d 1274, 1277 (8th Cir. 1994) ("[A] jury's verdict will not be disturbed absent a showing that the evidence was so prejudicial as to require a new trial which would be likely to produce a different result."); *Spencer*, 173 F.3d at 1130 ("We will only disturb a jury's verdict if the evidence is so prejudicial that its exclusion would likely produce a different result in a new trial.").

Based on FBL's offer of proof, the substance of the evidence FBL intended to offer was that Lifland heard comments prior to his decision from Czerwonke and Miller that Gross "was not a team player" and "was out for himself", and that he heard a complaint from Kneeskern that Gross "offered no guidance in terms of supervision." Even if FBL had offered this evidence, the court finds minimal, if any, prejudice to FBL if this limited testimony had in fact been excluded.

It is noteworthy that Lifland was allowed to testify that he did receive complaints about Gross and considered the complaints when deciding to place Gross in the projects coordinator position. Testimony was also elicited from Lifland that the complaints he received "were from coworkers concerning whether they really wanted to work with Mr. Gross." Lifland also confirmed that he heard a report "that Jack Gross and Tom Eppenauer were undermining" him. Consequently, the jury heard evidence regarding the general nature of the comments made and considered by Lifland. In the court's view, the additional testimony FBL believes it should have been able to present would have had minimal impact on the jury's decision in this case.

The court agrees with FBL's contention that the court's exercise of discretion in excluding evidence should not unfairly prevent a party from defending itself. In this case, however, FBL was not prevented from offering the evidence through other witnesses. As conceded by FBL in its brief, other witnesses could have testified about the complaints they made to Lifland. (*See* Defendant's Brief in Support of Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial (Clerk's No. 140) at p. 34, n. 17.)

Wittmuss, Kneeskern, and Miller all testified before the jury after the offer of proof. None, however, were asked by FBL's counsel to discuss the substance of the complaints or comments referred to by Lifland. Miller was not asked any questions regarding

whether he made any complaints about Gross to Lifland. Although Wittmuss did testify that complaints were made in general terms, he was not asked to discuss the substance of the coworkers' concerns in any detail.

Kneeskern was also not asked any questions during direct examination by FBL's counsel regarding any complaints she made to Lifland. On cross examination, however, she denied making any complaints to Lifland about Gross. (Tr. at 583.) She stated: "I don't recall ever approaching Andy talking about any concerns about Mr. Gross." (Tr. at 583.) FBL's counsel did not ask any questions regarding the matter during the redirect examination.

Given the repeated opportunity FBL had in presenting the evidence through these witnesses after the offer of proof was made, the court finds no basis to conclude that FBL was unfairly prevented from presenting the evidence.

2. Weight of the Evidence

The "court may grant a new trial on the basis that the verdict is against the weight of evidence, if the first trial results in a miscarriage of justice." *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir. 1995).

> In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence – it can "weigh the evidence, disbelieve witnesses, and grant a new trial even where

> there is substantial evidence to sustain the verdict."

White, 961 F.2d at 780 (quoted citation omitted). The Eighth Circuit has noted, however, that the district court's discretion is not boundless:

> the district court is not "'free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Id. (quoted citations omitted). Ultimately, the "court must determine if there will be a miscarriage of justice if the jury's verdict is allowed to stand." *Dominium Mgmt. Servs., Inc. v. Nationwide Housing Group*, 195 F.3d 358, 366 (8th Cir. 1999).

Relying on its own reading of the documents and testimony presented at trial, the court finds that the jury's verdict is not against the weight of the evidence. Instead, the court believes there was ample evidence to justify the conclusion that FBL intentionally discriminated against Gross based on his age. Different inferences could have been drawn, but the court finds no reason to believe that the jury's verdict results in a miscarriage of justice.

3. Damage Award

FBL contends that the damages awarded by the jury is against the clear weight of the evidence. The

jury awarded Gross the amount of $20,704 for lost past salary and $26,241 for lost past stock options. (Verdict Form (Clerk's No. 125).) The jury awarded no damages for emotional distress. FBL argues that no witness presented testimony that would support a finding of $20,704 for lost past salary damages.

Gross' expert witness testified that the total loss in salary and bonus for the back pay period was "approximately $19,800." (Tr. at 384.) In closing argument, Gross' counsel referenced this specific amount. Counsel told the jury: "Mr. Ryerson testified that his lost wages were $19,800. There's really no dispute about that." (Tr. at 706.)

In his resistance, Gross asserts that the award of lost past salary was appropriate and should not be remitted. The Eighth Circuit has instructed that this "court should grant remittitur only when the award is so excessive as to shock the court's conscience." *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir. 1996) (citing *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994)); *see also American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986) ("A district court should grant remittitur only when the verdict is so grossly excessive as to shock the court's conscience.") Here, the court does not believe the damages awarded by the jury is so excessive as to meet this standard. The court also notes that FBL did not specifically request remittitur in its motion or supporting briefs. For those reasons, the court agrees that remittitur is not appropriate in this case.

The court also finds that the award of $20,704 by the jury for lost past salary is not against the clear weight of the evidence. The expert witness testified initially that Gross' lost salary is $20,704. (Tr. at 383.) The expert witness then deducted "approximately $900" based on his assumption that "the bonus and salary is all received throughout the year." (Tr. at 384.) The jury could have reasonably rejected the witness' assumption and found Gross was entitled to the full amount of $20,704.

II. CONCLUSION

As stated by the Supreme Court, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153. After reviewing all of the evidence in the record, and drawing all reasonable inferences in favor of Gross, the court concludes there was sufficient evidence for the jury to find that FBL intentionally discriminated against Gross based on his age. The court further concludes that the exclusion of certain testimony by Andy Lifland was not error or prejudicial to FBL. After relying on its own reading of the evidence, the court concludes that the jury's verdict is not against the weight of the evidence or results in a miscarriage of justice.

Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial (Clerk's No. 134) is, therefore, denied and the

judgment entered in accordance with the jury's verdict shall stand.

IT IS SO ORDERED.

Dated June 23, 2006.

/s/ Thomas J. Shields
THOMAS J. SHIELDS
CHIEF U.S.
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 07-1490

Jack Gross,

Appellee

v.

FBL Financial Services, INC.,

FBL Financial Group, Inc.,

Appellant

Iowa Farm Bureau Federation, et al,.

No: 07-1492

Jack Gross,

Appellant

v.

FBL Financial Services, Inc.,

FBL Financial Group, Inc.

Appellee

Iowa Farm Bureau Federation, et al.,

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:04-cv-60209-TJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 08, 2008

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans