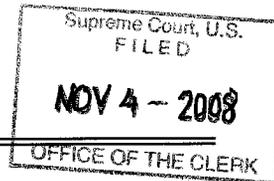


No. 08-441



In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

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

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

FRANK HARTY*
DEBRA L. HULETT
NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, Iowa 50309-3899
(515) 283-3100

**Counsel of Record*

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Whether a plaintiff must present evidence showing a link between 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 in order to obtain a mixed-motive jury instruction at trial of an ADEA disparate treatment claim.

II. Whether the method of allocating the burden of proof regarding causation applicable to 42 U.S.C. § 2000e-2(m) of Title VII should be applied to the ADEA.

III. Whether the petitioner has failed to show a true conflict regarding the circuits' application of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to the standard for use of a mixed-motive jury instruction that would merit this Court's review.

CORPORATE DISCLOSURE STATEMENT

FBL Financial Group, Inc. does not have a parent corporation and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Jack Gross, born in 1948, began working in the claims area of the predecessor to FBL Financial Group, Inc. ("FBL") in 1987. (App. 2a). He rose through the ranks, and in 1999 was promoted to Claims Administration Vice President. (App. 2a). During a company reorganization in 2001, he was reassigned to the position of Claims Administration Director. (App. 2a). Gross's job responsibilities did not change with the reassignment. (App. 2a). Gross nevertheless considered the change a demotion because his points were reduced under the company's point system for determining salary grades. (App. 2a).

In 2003, the company eliminated Gross's position and reassigned him to a new position, Claims Project Coordinator. (App. 2a). Some responsibilities associated with his former position of Claims Administration Director were transferred to a new position, Claims Administration Manager. (App. 2a). An employee in her early forties, Lisa Kneeskern, was assigned to the new Claims Administration Manager position. (App. 2a).

Gross's new Claims Project Coordinator position had the same salary points and pay grade as Kneeskern's position. (App. 2a). Gross nevertheless contended 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." (App. 2a-3a).

Gross brought suit against FBL, alleging that in making the 2003 reassignment, the company demoted him because of his age. (App. 3a). After a five-day trial, the trial court used a mixed-motive jury instruction, charging the jury “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.” (App. 6a). The trial court further charged the jury that the “verdict must be for FBL . . . if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.” (App. 6a). The jury returned a verdict in favor of Gross, awarding lost compensation in the amount of \$46,945, consisting of \$20,704 for lost past salary and \$26,241 for lost past stock options. (App. 46a) and declining to award Gross any damages for emotional distress.¹ (App. 46a). The jury found FBL’s conduct was not willful.²

After the entry of judgment, FBL filed a Renewed Motion for Judgment as a Matter of Law or in the Alternative, Motion for New Trial. (App. 15a). FBL did not raise the issue of jury instructions in its

¹ Gross’s claims were tried under the ADEA and the Iowa Civil Rights Act, Iowa Code ch. 216 (2007). (App. 15a). Under the Iowa Civil Rights Act, a plaintiff may seek damages for emotional distress. *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm’n*, 394 N.W.2d 375, 383 (Iowa 1986).

² See Docket No. 125, No. 4:04-cv-60209 (S.D. Iowa) (Jury Verdict, Nov. 4, 2005).

post-trial motion. Gross nevertheless directly quotes a statement from the trial court's ruling denying FBL's Renewed Motion for Judgment as a Matter of Law (Petition 3), in which the trial court concluded the circumstantial evidence presented at trial was adequate to establish FBL intentionally discriminated against Gross because of his age.³ (App. 25a). The material quoted by Gross does not reflect the trial court's comments relating to the disputed mixed-motive jury instruction; indeed, the trial court analyzed FBL's Renewed Motion for Judgment as a Matter of Law using a single-motive pretext analysis, rather than a mixed-motive analysis. (App. 18a).

On appeal, FBL argued in part that the trial court had erred in giving the mixed-motive instruction.⁴ The Eighth Circuit held the mixed-motive jury instruction was not correct because it shifted the

³ FBL raised and argued the judgment as a matter of law issue on appeal, but the Eighth Circuit declined to decide the issue. (App. 14a).

⁴ Gross argued on appeal that the mixed-motive instruction was proper because he had presented "direct evidence" age was a motivating factor in the decision to assign him to the Claims Project Coordinator position. Appellee's Brief at 52, Nos. 07-1490 and 07-1492 (Eighth Circuit). He contended the "direct" evidence supporting the mixed-motive instruction was that "he was replaced by a much younger subordinate and that he was not even considered to remain in or allowed to apply for his former position." *Id.* The Eighth Circuit recognized, consistent with the evidence produced at trial, that Gross had previously acknowledged he failed to present at trial "direct" evidence of age discrimination. (App. 7a).

burden of persuasion on a central issue in the case. (App. 12a). The Eighth Circuit reversed the judgment and remanded for a new trial. (App. 12a).

The Eighth Circuit's decision was consistent with its prior holdings. The court of appeals reviewed its precedent interpreting *Price Waterhouse* and articulating the standard for a mixed-motive jury instruction

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. . . .

(App. 5a). The court of appeals explained the meaning of "direct evidence" as follows:

"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."

(App. 5a). Using this “direct evidence” standard,⁵ the Eighth Circuit determined the mixed-motive instruction was improper, reasoning

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 . . . Gross conceded that he did not present “direct evidence” of discrimination . . . 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

⁵ The Eighth Circuit described its application of *Price Waterhouse* as follows:

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.” . . . 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.” . . . 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.

(App. 5a-6a).

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.

(App. 6a-7a).

◆

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING NEED FOR THE COURT'S GUIDANCE ON THE QUESTION PRESENTED.

The ADEA makes it unlawful to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of*” an impermissible consideration. 29 U.S.C. § 623(a)(1) (emphasis added). This Court has repeatedly recognized that under the ADEA, to establish liability for disparate treatment, a plaintiff must establish the plaintiff's age was determinative as to the adverse employment decision at issue. *See, e.g., Ky. Ret. Sys. v. EEOC*, 128 S.Ct. 2361, 2366 (2008) (“whatever the employer's decisionmaking process, a plaintiff alleging disparate treatment cannot succeed unless the employee's age actually played a role in that process and had a determinative influence on the outcome”); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (under the ADEA, “the plaintiff's age must have ‘actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome”); *Hazen Paper Co. v.*

Biggins, 507 U.S. 604, 610 (1993) (the plaintiff must prove that age “actually motivated the employer’s decision”).

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court interpreted 42 U.S.C. § 2000e-2(a), a Title VII provision, which prohibits discrimination in employment decisions “because of” an impermissible consideration such as gender. *Price Waterhouse* set forth a standard for analyzing causation where the evidence shows an employer was motivated by both permissible and impermissible factors. Under the *Price Waterhouse* rule, the burden of persuasion shifts to the defendant if the plaintiff produces evidence sufficient to show a 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 decision at issue. Since *Price Waterhouse*, the courts of appeals have recognized a mixed-motive jury instruction requires the plaintiff to establish a lesser standard of causation. See, e.g., *Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988).

In contrast to the ADEA, 42 U.S.C. § 2000e-2(m) of Title VII states a plaintiff can establish an unlawful employment practice if he “demonstrates” an impermissible consideration “was a motivating factor

for any employment practice.”⁶ Gross nevertheless contends this Court’s decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003),⁷ which involved a straightforward application of section 2000e-2(m), presents a reason to reconsider the vitality of *Price Waterhouse*. The substantive legal issue decided by the Eighth Circuit in the decision at issue is consistent with the statutory text of the ADEA and this Court’s precedent. There is no compelling reason for the Court to accept review.⁸ For the reasons discussed herein, the Court should decline to consider the question presented.

⁶ Section 2000e-2(m) states: “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 origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m).

⁷ In *Desert Palace*, 539 U.S. 90, this Court interpreted the effect of 42 U.S.C. § 2000e-2(m), an amendment to Title VII that was part of the Civil Rights Act of 1991, on jury instructions in a mixed-motive case under Title VII.

⁸ The Court has previously declined to consider a similar question raised in the summary judgment context. See *Bolander v. BP Oil Co.*, 546 U.S. 926 (2005). See Petition for Writ of Certiorari, *Bolander v. BP Oil Co.*, No. 04-1534 (May 11, 2005), available at 2005 WL 1182273, at *21-*24. Gross cites the Sixth Circuit’s decision in *Bolander v. BP Oil Co.*, 128 F. App’x 412 (6th Cir. 2005) (per curiam) (nonprecedential), in support of his argument that the Sixth Circuit has expressed uncertainty as to the question presented. Petition at 10. In *Bolander*, the court of appeals affirmed a ruling granting summary judgment in favor of the defendant. The plaintiff argued he was entitled to have the evidence reviewed under the mixed-motive test as clarified or modified by *Desert Palace*. 128 F. App’x at 417. The court

(Continued on following page)

II. THERE IS NO GENUINE CIRCUIT CONFLICT REGARDING THE ISSUE DECIDED BY THE EIGHTH CIRCUIT.

A. A Circuit Conflict Regarding the Summary Judgment Analysis Applicable to a Mixed-Motive Theory under the ADEA Is Irrelevant to the Question Presented, which Relates to Jury Instructions.

Gross attempts to create the appearance of a circuit conflict by citing numerous appellate decisions analyzing summary judgment standards.⁹ Although the circuits articulate differently the framework for analyzing a non-Title VII claim proceeding under a mixed-motive theory, the variation is not relevant. The outcome would be the same on a given factual record, regardless of which method is used.

Moreover, this case does not present a question regarding the standard for evaluating a disparate treatment age discrimination claim at the summary judgment stage. The analysis a court uses to determine whether a plaintiff has generated a genuine

declined to consider the issue because there was insufficient evidence that age was a “motivating factor” in the adverse employment decision. *Id.*

⁹ The Sixth Circuit recently recognized the variety of approaches the courts of appeals have adopted since *Desert Palace* in analyzing summary judgment appeals in mixed-motive cases under Title VII and in non-Title VII cases. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 398-99 (6th Cir. 2008).

issue of material fact for trial necessarily differs from the analysis a trial court uses to determine whether a plaintiff has presented sufficient evidence at trial to support a mixed-motive instruction that shifts the burden of persuasion to the defendant. The multiple summary judgment decisions cited by Gross are simply not useful in examining the question presented, which relates to jury instructions.

The most striking example of Gross's reliance on summary judgment decisions, rather than jury instruction decisions, is his discussion of *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), which Gross cites as a significant conflicting decision. *Rachid* is limited to the summary judgment context. *Rachid* articulated a unique "modified *McDonnell Douglas* approach" for analyzing motions for summary judgment. 376 F.3d at 312 (modifying final prong of *McDonnell Douglas* analysis to permit plaintiff to establish a genuine issue of material fact by offering evidence to show either the defendant's proffered explanation is a pretext for discrimination, or evidence "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic"). See also *Reilly v. TXU Corp.*, 271 F. App'x 375, 380 (5th Cir. 2008) (nonprecedential) (applying *Rachid's* modified *McDonnell Douglas* analysis where the plaintiff failed to bring forward direct evidence of discrimination).

Gross accurately states the Eighth Circuit discounted the Fifth Circuit's decision in *Rachid* as

inconsistent with Eighth Circuit precedent. Yet Gross conspicuously omits discussion of the Eighth Circuit's reasoning. The Eighth Circuit recognized *Rachid* involved an appeal of a ruling granting summary judgment, and for that reason, determined *Rachid* was inconsistent with the Eighth Circuit's summary judgment precedent, stating

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.

(App. 10a).¹⁰

¹⁰ The Eighth Circuit has repeatedly taken the position that *Desert Palace* had no impact on a summary judgment analysis. See *Carraher v. Target Corp.*, 503 F.3d 714, 716 n.3 (8th Cir. 2007); *Simpson v. Des Moines Water Works*, 425 F.3d 538, 542 n.4 (8th Cir. 2005); *Johnson v. AT&T Corp.*, 422 F.3d 756, 760-61 n.4 (8th Cir. 2005); *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). The Eighth Circuit's standard regarding the analysis applicable to a mixed-motive claim at summary judgment is not the same as the Eighth Circuit's standard regarding the evidence a plaintiff must present to justify a mixed-motive jury instruction at trial of an ADEA claim.

In the summary judgment context, the Eighth Circuit has held, consistent with many circuits, that a plaintiff may support a mixed-motive claim with circumstantial evidence. The Eighth Circuit has recognized that its use of the term “direct” evidence in the mixed-motive context does not refer to evidentiary law terminology, stating, “‘direct’ refers to the causal strength of the proof, not whether it is ‘circumstantial’ evidence.” *Griffith*, 387 F.3d at 736. *See also Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007). Indeed, if Gross had attempted to rely on the Eighth Circuit’s decisions articulating the standard for analyzing a motion for summary judgment in a mixed-motive disparate treatment case (which he has done with the other circuits), he would have to concede the Eighth Circuit recognizes both direct and circumstantial evidence generate a genuine issue of material fact for trial.

Additionally, the summary judgment appeal decisions Gross cites from other circuits do not provide compelling support for his argument that there is a circuit split regarding the evidence a plaintiff must produce at trial of a non-Title VII disparate treatment claim in order to justify a mixed-motive jury instruction.

The First Circuit’s post-*Desert Palace* standard for analyzing mixed-motive claims at summary judgment is inconsistent and apparently unsettled. One summary judgment appeal decision cited by Gross, *Estades-Negróni v. Associates Corp. of North America*, 345 F.3d 25 (1st Cir. 2003), was withdrawn

for panel rehearing in a March 25, 2004 order. *Estades-Negroni v. Assocs. Corp. of N. Am.*, 362 F.3d 874 (1st Cir. 2004). The First Circuit's decision on panel rehearing omitted discussion of *Desert Palace* and did not address the evidence a plaintiff must produce at trial of an ADEA claim to justify a mixed-motive instruction. *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58 (1st Cir. 2004). In *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003), also involving an appeal of a summary judgment ruling, the court of appeals cited the first *Estades-Negroni* decision before that decision was withdrawn for panel rehearing. Whether *Hillstrom* represents precedential authority on this issue in the First Circuit is therefore not clear. Furthermore, in a more recent First Circuit decision, *Rios-Jimenez v. Principi*, 520 F.3d 31, 39 (1st Cir. 2008), the court of appeals returned to its pre-*Desert Palace* standard for analyzing a mixed-motive theory at summary judgment, stating

A mixed-motive analysis is appropriate where direct evidence exists that an employer, in making an adverse employment decision, considered a proscribed factor, e.g. race or disability, as well as one or more legitimate factors, e.g., competence or performance.

At summary judgment, the Second Circuit requires a plaintiff pursuing a mixed-motive theory to proffer evidence of conduct or statements that reflect directly the alleged discriminatory intent and bear

directly on the contested employment decision. See *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 173 (2d Cir. 2006). In *Sista*, a summary judgment decision, the Second Circuit discussed in dictum the evidence a plaintiff must produce at trial to receive a mixed-motive jury instruction, stating

Evidence potentially warranting a *Price Waterhouse* burden shift includes, inter alia, policy documents and evidence of statements or actions by decisionmakers that may be viewed as directly reflecting the alleged discriminatory attitude.

Sista, 445 F.3d at 173 (citations and internal quotation marks omitted).

To survive summary judgment, the Third Circuit requires a plaintiff pursuing a mixed-motive theory to present “direct” evidence of discrimination. “Direct” evidence is defined as

To be “direct” for purposes of the *Price Waterhouse* test, evidence must be sufficient to allow the jury to find that the decision makers placed a substantial negative reliance on the plaintiff’s age in reaching their decision. . . . That means [the plaintiff] must produce evidence of discriminatory attitudes about age that were causally related to the decision to fire her.

Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004).

The Fourth Circuit has determined that at summary judgment, courts should evaluate a mixed-motive theory under the *Price Waterhouse* standard. See *Baqir v. Principi*, 434 F.3d 733, 744, 745, n.13 (4th Cir. 2006); see also *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163-64 (4th Cir. 2004). A plaintiff pursuing a mixed-motive theory under the ADEA may survive summary judgment by producing “at most, evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.” *Baqir*, 434 F.3d at 744 (quoting *Warfield-Rohr Casket Co.*, 364 F.3d at 163).

In the Sixth Circuit, a plaintiff asserting a mixed-motive theory under the ADEA may survive summary judgment by presenting “direct evidence” the employer considered an impermissible factor in making the challenged decision.¹¹ *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 2003) (en banc). The Sixth Circuit defines “direct” evidence

¹¹ The Sixth Circuit recently articulated how a summary judgment motion should be analyzed when the plaintiff asserts a theory under section 2000e-2(m) of Title VII. *White*, 533 F.3d at 398-99. Under the standard, a plaintiff should survive summary judgment if the plaintiff produces evidence that (1) the defendant took an adverse employment action against the plaintiff, and (2) a factor prohibited by Title VII was a motivating factor for the adverse action. *Id.* at 400. The court of appeals stated its holding was limited to claims under section 2000e-2(m) and the analysis was inapplicable to Title VII claims proceeding under the “because of” theory associated with 42 U.S.C. § 2000e-2(a)(1). *Id.* at 400 n.10.

in this context as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.* at 570. Relevant factors include, “whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination.” *Allen v. Highlands Hosp. Corp.*, ___ F.3d ___, 2008 WL 4629518, at *5 (6th Cir. Oct. 21, 2008) (citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994)).

In performing a summary judgment analysis, the Seventh Circuit distinguishes between the “direct” and “indirect” methods of proof. *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999). “The focus of the direct method of proof thus is . . . whether the evidence ‘points directly’ to a discriminatory reason for the employer’s action.” *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008). This analysis does not appear to be used at trial in determining proper jury instructions. See *Boyd v. Ill. State Police*, 384 F.3d 888, 895 (7th Cir. 2004).

The Ninth Circuit has not expressly decided the proper analysis for an ADEA claim under a mixed-motive theory at the summary judgment stage. In *Sellie v. Boeing Co.*, 253 F. App’x 626, 627 n.2 (9th Cir. 2007) (nonprecedential), a decision affirming the grant of summary judgment, the Ninth Circuit

recognized the issue is unresolved (“For purposes of this appeal, we assume (without deciding) that *Desert Palace* and the 1991 amendments to Title VII are applicable to the ADEA.”).

The well-established legal standards for analyzing whether a plaintiff has generated a genuine issue of material fact for trial regarding a mixed-motive theory of discrimination in a non-Title VII case present no conflict of consequence.

B. Speculation Regarding the Impact of *Desert Palace* Has Largely Faded.

Gross cites a number of federal district court and state court decisions that express uncertainty as to the impact of *Desert Palace* on non-Title VII claims, or discuss a purported circuit split regarding whether *Desert Palace* is applicable to the ADEA. Petition at 22-23. The “uncertainty” expressed by a handful of lower courts regarding the impact of *Desert Palace* appears to have been stimulated in large part by the considerable attention academicians gave to *Desert Palace*, opining the decision had a sweeping impact.¹²

¹² See, e.g., Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 Fla. St. U. L. Rev. 859, 861 (2004); T.L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 S. Tex. L. Rev. 137 (2004); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 Emory L.J. 1887 (2004); William R. Corbett,

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Such insecurity has faded since the opinion was first issued in 2003. Left to their own devices, courts have been capable of resolving the question Gross contends was generated by *Desert Palace*. See, e.g., *Inman v. Klockner Pentaplast of Am., Inc.*, 2008 WL 3193431 (W.D. Va. Aug. 6, 2008); *Benko v. Portage Area Sch. Dist.*, 2006 WL 1698317 (W.D. Pa. June 19, 2006). The courts of appeals are certainly well-equipped to decide the question when squarely presented, to the extent any question lingers.

C. There Is No Circuit Conflict Regarding the Use of a Mixed-Motive Jury Instruction at Trial of a Non-Title VII Discrimination Claim.

Gross cites only a handful of cases that decide the evidence a plaintiff must present at trial of an ADEA (or any other non-Title VII) claim to justify shifting the burden of persuasion to the defendant by using a mixed-motive jury instruction. Ultimately, there is no significant conflict among the circuits regarding the standard for using a mixed-motive jury

McDonnell Douglas, 1972-2003: May You Rest in Peace?, 6 U. Pa. J. Lab. & Emp. L. 199 (2003); Jeffrey A. Van Detta, *Le Roi Est Mort; Vive Le Roi!: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case*, 52 Drake L. Rev. 71, 76 (2003). Some even reasoned *Desert Palace* established the end of the longstanding *McDonnell Douglas* burden shifting analysis often used by courts in the summary judgment context.

instruction under the ADEA or any other non-Title VII case. The outcome would be the same in any circuit on a given factual record.

Gross characterizes the Eighth Circuit's decision as requiring a heightened direct evidence standard, predicated on a distinction between direct and circumstantial evidence. Evidentiary law has defined "direct" evidence as "evidence which, if believed, proves the fact in issue without the aid of an inference." 1A Wigmore, Evidence § 25 (Tillers rev. 1983) (citing *Privette v. Faulkner*, 550 P.2d 404, 406 (Nev. 1976)).

The standard articulated by the Eighth Circuit is broader than the evidentiary law standard. The Eighth Circuit decision defined "direct evidence" as 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. (App. 5a). As used by the Eighth Circuit and other courts of appeals,¹³ "direct evidence" is not the same as the evidentiary law term.¹⁴

¹³ It is notable that in *Costa v. Desert Palace*, 299 F.3d 838, 853 (9th Cir. 2002), the Ninth Circuit relied on and adopted a standard articulated by the Eighth Circuit.

¹⁴ The term "circumstantial" is not once used in the challenged Eighth Circuit decision. (App. 3a-12a).

It is not clear how the Fifth Circuit will apply *Rachid* to jury instructions, if at all. However, *Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005), a case involving a Title VII retaliation claim, suggests the Fifth Circuit may apply the same analysis as the Eighth Circuit. In *Septimus*, the Fifth Circuit held erroneous a district court's use of a "motivating factor" jury instruction instead of a "but for" jury instruction because the plaintiff did not present "direct" evidence of retaliatory intent. 399 F.3d at 607-08. The Fifth Circuit determined the trial court committed plain error by charging the jury with mixed-motive jury instruction instead of the "but for" standard of causation, and reversed and remanded the case for a new trial. *Id.* In *Septimus*, as in the instant case, the trial court recognized the case was a pretext case rather than a mixed-motive case. (App. 18a-19a, 24a-25a). 399 F.3d at 607-08.

The Tenth Circuit has stated that the jury should be charged with a mixed-motive instruction if a plaintiff demonstrates through the production of direct or circumstantial evidence the alleged unlawful motive "actually relates to the question of discrimination in the particular employment decision." *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (citation, quotation marks and emphasis omitted). The Tenth Circuit has qualified the circumstantial evidence aspect of this standard, however, to effectively establish the same standard applied by the Eighth Circuit and others, stating

Although circumstantial evidence is sufficient to establish that the employer was motivated by retaliatory animus, that circumstantial evidence must be tied “directly” to the retaliatory motive. See *Thomas v. Denny’s, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997) (“A plaintiff will be entitled to the burden-shifting analysis set out in *Price Waterhouse* upon presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [retaliatory] attitude.”)

Fye, 516 F.3d at 1226.

To support a mixed-motive jury instruction, the D.C. Circuit requires a plaintiff to present evidence of conduct or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision. *Thomas v. Nat’l Football League Players Ass’n*, 131 F.3d 198, 203 (D.C. Cir. 1997). *Thomas* clarified that such evidence may be direct or circumstantial in nature. 131 F.3d at 204. Yet this standard is effectively the same standard articulated by the Eighth Circuit in the challenged decision (stating “[d]irect 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”). (App. 5a).

Gross offers no other circuit decisions analyzing the evidence a plaintiff must produce to support use of a mixed-motive jury instruction. Given Gross's inability to establish a circuit conflict, there is no compelling reason for the Court to accept review.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ALLEGED CONFLICT.

A. A Decision by This Court Would Have No Practical Significance.

A decision by this Court would have no practical impact on the outcome of this case. Regardless of outcome, the Eighth Circuit will likely remand the case and order a new trial. If the Court were to accept review and ultimately reverse the Eighth Circuit, the case would by no means be concluded. The Eighth Circuit would need to determine whether the mixed-motive jury instruction was supported by the evidence at trial. Indeed, the Eighth Circuit recognized this issue would need to be resolved, stating, "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." (App. 12a).

B. There Are Other Legal Grounds for Reversing the Trial Court.

The Eighth Circuit's decision left open the question of whether the trial court should have denied FBL's Renewed Motion for Judgment as a Matter of Law. The court of appeals declined to decide the issue in favor of remanding the case to the trial court to conduct a new trial, using the proper jury instruction, stating

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.

(App. 14a). Given the question left open by the Eighth Circuit, a decision by this Court reversing the court of appeals would not resolve the case. In fact, if the Eighth Circuit were to hold the trial court should have granted FBL's Renewed Motion for Judgment as a Matter of Law, the case could very well be finished with the entry of judgment against Gross.

C. The Court Should Wait for a More Suitable Vehicle for Deciding the Question Presented.

Even if the question presented merits review, the Court should wait for a case that is a more suitable vehicle, where the failure to use a mixed-motive jury instruction prejudiced the plaintiff. In the instant case, there is no question that Gross failed to produce

at trial any evidence that FBL's decision was motivated by age. Any discussion as to the evidence a plaintiff must produce to support using a mixed-motive jury instruction is therefore entirely academic.

IV. THE EIGHTH CIRCUIT WAS CORRECT AND APPLIED A STANDARD CONSISTENT WITH THIS COURT'S PRECEDENT.

The decision below is correct regardless of how the Court would resolve the question presented. Gross was not entitled to a mixed-motive jury instruction because he failed to present evidence at trial to support a finding by a reasonable fact finder that age actually motivated FBL's decision.

Gross's suggestion that the Court grant review on the question presented and ultimately hold that a plaintiff should not be required to present "direct evidence" would leave courts without any standard for evaluating whether a plaintiff has presented evidence sufficient to support a mixed-motive instruction. The standard articulated by the courts of appeals requires nothing more than some evidence an illegitimate criterion actually motivated the decision.

The Eighth Circuit's decision was legally correct and entirely consistent with this Court's precedent.



CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari filed by Petitioner Jack Gross.

Respectfully submitted,

FRANK HARTY*

DEBRA L. HULETT

NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.

700 Walnut Street, Suite 1600

Des Moines, Iowa 50309-3899

Telephone: (515) 283-3100

Facsimile: (515) 283-3108

Counsel for Respondent

**Counsel of Record*