**11.1 Age Discrimination—Disparate Treatment—Elements And Burden of Proof**

The plaintiff has brought a claim of employment discrimination against the defendant. The plaintiff asserts the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age. The defendant denies that the plaintiff was [discharged] [*specify other adverse action*] because of [his] [her] age [[and further asserts the decision to [discharge] [*specify other adverse action*] the plaintiff was based on [a] lawful reason[s]].

In order to prevail on this claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the defendant [discharged] [*specify other adverse action*] the plaintiff;

2. the plaintiff was 40 years of age or older at the time [he] [she] was [discharged] [*specify other adverse action*]; and

3. the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age, that is, the defendant would not have [discharged] [*specify other adverse action*] the plaintiff but for [his] [her] age.

If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

**Comment**

Although a Title VII plaintiff need only prove that a protected status was “a motivating factor” for an adverse employment action, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003), an ADEA plaintiff may not proceed on a mixed-motives theory. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167(2009).

Despite the fact that both Title VII and the ADEA prohibit discrimination “because of” a specified protected status,other “textual differences between Title VII and the ADEA . . . prevent . . . [application of] *Desert Palace* to federal age discrimination claims.”  *Gross*, 557 U.S. at 175 n.2; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013). Specifically, 1991 amendments to Title VII, but not to the ADEA, provide that discrimination is “established” when a plaintiff shows the protected status was “a motivating factor” for the adverse employment actions. Without this additional language in the ADEA, the Court held in *Gross* that “a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” *Id. at* 180. Thus, earlier Ninth Circuit cases applying the same standards to disparate treatment cases under the two statutes must now be read in light of *Gross*.

In describing the “but for” standard applicable in ADEA cases, the Court in *Gross* noted:

The words “because of” mean “by reason of: on account of.” . . . Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. *See* *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim “cannot succeed unless the employee's protected trait actually played a role in [the employer’s decisionmaking] process *and had a determinative influence on the outcome* ” (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the “but-for” cause of the employer's adverse decision.

*Gross*, 557 U.S. at 176 (emphasis in original).

The Supreme Court recently clarified that federal employees are not required to meet the “but-for” causation standard to establish age discrimination. *Babb v. Wilkie*, 589 U.S. 399, 411-13 (2020) (analyzing 29 U.S. § 633a(a)). Rather, a federal employee is entitled to relief upon a showing of being “subjected to unequal consideration.” *Id.*  However, that showing will support only “injunctive or other forward-looking relief.” *Id.* at 414. To “obtain reinstatement, backpacy, compensatory damages, or other forms of relief related to the end result of an employment decision,” a federal employee must satisfy the “but-for” causation standard. *Id.* at 413.

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