

**ELDER LAW:
CASES AND MATERIALS**

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**ELDER LAW:
CASES AND MATERIALS**

FOURTH EDITION

2010 Supplement

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(Pub. 3039)

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Chapter 1: An Aging Population: The Challenge to the Law

P. 5

Add: after chart

As of 2010, women had a life expectancy at birth of 80.8 years; men - 75.7 years.

P. 7

Add: after chart

As of 2006, at age 65 the average woman could expect to live 19.7 years, the average man, 17.0 years.

P. 29

Add: after chart

Educational attainment plays a significant role in income for older Americans. In 2008 the average mean income for those ages 65 or older with no high school education was \$15,933; for those with a graduate degree, it was \$61,791.

Chapter 3: Age Discrimination in Employment

P. 123 Add -

Gomez-Perez v. Potter, Postmaster General

[553 U.S. 474](#) (2008)

Justice ALITO.

The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), as added, [29 U.S.C. § 633a](#) (a) (2000 ed., Supp. V). We hold that such a claim is authorized.

I

Petitioner Myrna Gómez-Pérez was a window distribution clerk for the United States Postal Service. In October 2002, petitioner, then 45 years of age, was working full time at the Post Office in Dorado, Puerto Rico. She requested a transfer to the Post Office in Moca, Puerto Rico, in order to be closer to her mother, who was ill. The transfer was approved, and in November 2002, petitioner began working at the Moca Post Office in a part-time position. Later that month, petitioner requested a transfer back to her old job at the Dorado Post Office, but her supervisor converted the Dorado position to part-time, filled it with another employee, and denied petitioner’s application.

After first filing an unsuccessful union grievance seeking a transfer back to her old job, petitioner filed a Postal Service equal employment opportunity age discrimination complaint. According to petitioner, she was then subjected to various forms of retaliation. Specifically, petitioner alleges that her supervisor called her into meetings during which groundless complaints were leveled at her, that her name was written on antisexual harassment posters, that she was falsely accused of sexual harassment, that her co-workers told her to “go back” to where she “belong[ed],” and that her work hours were drastically reduced. [476 F.3d 54, 56](#) (C.A. 1 2007).

Petitioner responded by filing this action in the United States District Court for the District of Puerto Rico, claiming, among other things, that respondent had violated the federal-sector provision of the ADEA, [29 U.S.C. § 633a](#) (a) (2000 ed., Supp. V), by retaliating against her for filing her equal employment opportunity age discrimination complaint. . . .

II

The federal-sector provision of the ADEA provides that “[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age.” § 633a(a) (2000 ed., Supp. V). The question is whether the statutory phrase “discrimination based on age” includes retaliation based on the filing of an age discrimination complaint. We hold it does.

In reaching this conclusion, we are guided by our prior decisions interpreting similar language in other antidiscrimination statutes. In *Sullivan v. Little Hunting Park, Inc.*, [396 U.S. 229](#), 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), we considered whether a claim of retaliation could be brought under Rev. Stat. § 1978, [42 U.S.C. § 1982](#), which provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.” While § 1982 does not use the phrase “discrimination based on race,” that is its plain meaning. See *Tennessee v. Lane*, [541 U.S. 509, 561](#), (2004) (Scalia, J., dissenting).

In *Sullivan*, a white man (Sullivan) held membership shares in a nonstock corporation that operated a park and playground for residents of the area in which he owned a home. Under the bylaws of the corporation, a member who leased a home in the area could assign a membership share in the corporation. But when Sullivan rented his house and attempted to assign a membership share to an African-American (Freeman), the corporation disallowed the assignment because of Freeman’s race and subsequently expelled Sullivan from the corporation for protesting that decision. Sullivan sued the corporation, and we held that his claim that he had been expelled “for the advocacy of Freeman’s cause” was cognizable under § 1982. [396 U.S. at 237](#). A contrary holding, we reasoned, would have allowed Sullivan to be “punished for trying to vindicate the rights of minorities” and would have given “impetus to the perpetuation of racial restrictions on property.” [Ibid.](#)

More recently, in *Jackson v. Birmingham Bd. of Ed.*, [544 U.S. 167](#) (2005), we relied on *Sullivan* in interpreting Title IX of the Education Amendments of 1972. Jackson, a public school teacher, sued his school board under Title IX, “alleging that the Board retaliated against him because he had complained about sex discrimination in the high school’s athletic program.” [544 U.S. at 171](#). Title IX provides in relevant part that “[n]o person in the United States shall, *on the basis of sex*, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.” § 1681(a) (2000 ed.) (emphasis added). Holding that this provision prohibits retaliation, we wrote:

“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination ‘on the basis of sex’ because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a

funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.” [Id. at 173-74, \(citations omitted\)](#).

This interpretation, we found, flowed naturally from *Sullivan*: “Retaliation for Jackson’s advocacy of the rights of the girls’ basketball team in this case is ‘discrimination’ ‘on the basis of sex,’ just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.” [544 U.S. at 176-77](#),

Following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision’s prohibition of “discrimination based on age” as likewise proscribing retaliation. The statutory language at issue here (“discrimination based on age”) is not materially different from the language at issue in *Jackson* (“discrimination” “on the basis of sex”) and is the functional equivalent of the language at issue in *Sullivan*, see *Jackson, supra*, at 177, (describing *Sullivan* as involving “discrimination on the basis of race”). And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

P. 109 Add before QUESTIONS

The holding in *Gilkerson* at the bottom of page 108 that once the plaintiff had established a prima facie case of age discrimination, “the burden of production shifts to the employer to produce evidence” of a nondiscriminatory reason for its actions, appears to be rejected in the following 2009 Supreme Court case

Gross v. FBL Financial Services, Inc.

[129 S. Ct. 2343](#) (2009)

Justice THOMAS.

The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), [29 U.S.C. § 621](#) *et seq.* Because we hold that such a jury instruction is never proper in an ADEA case, we vacate the decision below.

I.

Petitioner Jack Gross began working for respondent FBL Financial Group, Inc. (FBL), in 1971. As of 2001, Gross held the position of claims administration director. But in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator. At that same

time, FBL transferred many of Gross' job responsibilities to a newly created position-claims administration manager. That position was given to Lisa Kneeskern, who had previously been supervised by Gross and who was then in her early forties. Although Gross (in his new position) and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities to Kneeskern.

In April 2004, Gross filed suit in District Court, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which 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). The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills.

At the close of trial, and over FBL's objections, the District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and that his "age was a motivating factor" in FBL's decision to demote him. App. 9-10. The jury was further instructed that Gross' age would qualify as a "motivating factor," if [it] played a part or a role in [FBL]'s decision to demote [him]." *Id.* at 10. The jury was also instructed regarding FBL's burden of proof. According to the District Court, the "verdict must be for [FBL] . . . if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Ibid.* The jury returned a verdict for Gross, awarding him \$46,945 in lost compensation. *Id.* at 8.

FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*, [490 U.S. 228](#) (2008). In *Price Waterhouse*, this Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964, when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—*i.e.*, a "mixed-motives" case. The *Price Waterhouse* decision was splintered. . . .

The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." Pet. for Cert. i. Before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not.

A

Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

In *Price Waterhouse*, a plurality of the Court and two Justices concurring in the judgment determined that once a “plaintiff in a Title VII case proves that [the plaintiff’s membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account.” Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was “a motivating factor” for an adverse employment decision. See [42 U.S.C. § 2000e-2](#) (m) (providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice” (emphasis added)).

This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we “must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” *Federal Express Corp. v. Holowecki*, [552 U.S. 389](#) (2008). Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways.

We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. . . .

. . . The ADEA provides, in relevant part, that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” [29 U.S.C. § 623](#) (a)(1) (emphasis added).

The words “because of” mean “by reason of: on account of.” 1 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966); . . . 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](#), (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. . . .

It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the “but-for” cause of the employer’s adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. And nothing in the statute’s text indicates that Congress has carved out an exception to that rule for a subset of ADEA

cases. Where the statutory text is “silent on the allocation of the burden of persuasion,” we “begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” We have no warrant to depart from the general rule in this setting.

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the “but-for” cause of the challenged employer decision.

* * *

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. *It is so ordered.*

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting. (Opinion omitted.)

In dissent, Justice Breyer argued that to prove the plaintiff’s age was the “but-for” causation created too high a burden on the plaintiff. He claimed that the employer should have to refute the presumption of age discrimination in mixed motive cases, i.e. raise an affirmative defense, because the employer is “in a better position to establish how he would have acted” had the non-age based reason for the termination not been present.

Chapter 4: Income Maintenance

P. 154 Add -

In March 2010, over 35,000,000 individuals age 65 or older received Social Security retirement benefits. The average monthly retirement benefit in 2010 is \$1,168 or \$14,016 a year.

P. 167

In 2010, the annual earnings test limit is \$14,160. In the year the individual reaches full retirement age the limit on income earned that year before their birthday in 2010 is \$37,680.

Chapter 5: Health Care

P. 208 Medicare Finance

The Part B premium varies. Beneficiaries who enrolled in Part B before 2010, pay a monthly premium of \$96.40. Those who enrolled in 2010 pay \$110.50 per month if an individual has annual income of \$85,000 or less or a couple with \$170,000. For those with incomes that exceed the dollar limits, the monthly premium rises:

Single	Couple	Monthly premium
\$85,001 - \$107,000	\$170,001 - \$214,000	\$154.70
\$107,001 - \$160,000	\$214,001 - \$320,000	\$221.00
\$160,001 - \$214,000	\$320,001 - \$428,000	\$287.30
Above \$214,000	Above \$428,000	\$353.60

P. 213

For 2010, the deductible for the first 60 days of hospitalization is \$1,100. For days 61 – 90, the co-pay is \$275 per day. For day 91- 150, the co-pay is \$550 per day. For skilled nursing care the daily co-pay in 2010 for days 20 – 100 is \$137.50.

P. 214

For Part B medical expenses, in 2010 the beneficiary must pay a deductible of \$155.

P. 219 Medicare Part D

In 2010, the annual deductible is \$310. Beneficiaries pay a 25 percent copayment for the next \$2,520 in prescription drug costs. The next \$3,610 in drug costs must be paid by the beneficiary. This is the so-called “donut hole” for which Medicare pays nothing. After total prescription drug expenses exceed \$6,440 catastrophic coverage goes into effect. The beneficiary pays the greater of \$2.50 per generic prescription or \$6.30 per non-generic or 5% of the cost of the prescription.

By the time the beneficiary has reached the \$6,440 limit, the beneficiary will have paid \$4,550 for prescription drugs. (\$310 plus [25% x \$2,520] \$630 plus \$3,610 [donut hole] = \$4,550.) Of course, many elderly participate in Part D plans that provide some coverage of the co-pays and at least twenty percent of the plans offer some coverage of the “donut hole.” The Patient Protection and Affordable Care Act enacted in 2010, will gradually eliminate the “donut hole” by 2020. In 2010, Medicare beneficiaries who reach the “donut hole” will receive a \$250 rebate to help cover their out-of-pocket prescription drug expenses.

The number of Part D plans is in decline. In 2008 there were 1824, but in 2010 there are only 1576. Costs and coverage of the plans varies considerably. In 2010, 629 plans did not enforce the \$310 deductible. Plan premiums were as low as \$8.80/month to as high as \$1120.20 with the average monthly cost \$46.48.

The Patient Protection and Affordable Care Act (PPACA) – “Health Care Reform”

The PPACA Health Care Reform package was signed into law on March 23, 2010. It has direct and indirect implications for older clients, who may be early retirees, Medicare beneficiaries, post-retirement entrepreneurs or employees in small businesses, or in need of assistance to get long-term care services.

A general overview of the sweeping provisions of the Act is in order. Most significantly for health care coverage in the United States is an individual mandate for citizens and legal immigrants to have basic “qualifying” coverage. Most workers have employer-based benefits if they can afford the premiums for themselves and their families. Their situation is unlikely to change because of a matching mandate for all employers of fifty or more full-time-equivalent workers to “play” (i.e., provide qualifying coverage) or “pay” into a government exchange that will provide information and, for lower income workers, subsidies to help pay insurance premiums. Employers with 200 or more workers must provide qualifying coverage.

Forty-eight million people are current uninsured in the U.S. The number of workers and family members likely to be newly covered is estimated to be 32 million. This proportion is based on the compliance rate resulting from a similar mandate implemented in Massachusetts. More importantly perhaps, the default assumption is that individuals have health care coverage. This has become important not just because the insurer pays part of the cost of care, but also because insurance plans negotiate the rates their beneficiaries can be charged in return to delivering to physicians and hospitals a group of potential patients who in turn get lower copayments.

Litigation about the right of the federal government, taken up by a number of state attorneys general, relates to this basic mandate, not to other provisions in established federal programs.

All this plays out in a number of ways for older clients, who are most likely to need health care, and to be responsible for part of the cost. The following is a summary of those major initiatives.

The PPACA provides, for those not yet Medicare eligible:

- the end of insurers' right to rescind a policy because the beneficiary or a family member becomes sick (2010),
- limits on premium increases that were not previously capped, so coverage could become unaffordable (2010),
- an alternative source for coverage through extra federal funds to states to establish or upgrade state high-risk pools of beneficiaries who do not qualify for Medicare or Medicaid, from 2010 to 2014, when insurers can no longer exclude because of pre-existing conditions (2014). These high risk pools, which will become part of state exchanges, exist in a number of states already, and are available to early retirees age 55 and over. The same insurance market regulations relating to guaranteed issue, premium rating and the end of exclusions for pre-existing conditions will apply in the individual market, state Exchanges and small group markets,
- state exchanges will extend their information and assistance to small businesses by 2014, and small businesses that provide coverage are eligible for a tax credit of 35% of premiums (2010), up to 50% of premiums for coverage purchased through the state exchanges (2014),
- subsidies will be provided to qualified individuals earning up to 400% of federal poverty level to assist with insurance premiums,
- payments to employers who have retiree health benefit plans to continue to provide those benefits, and
- those mandated to purchase coverage who fail to do so can be fined \$695 annually (2013) or 2% of annual income (2016).

For Medicare A beneficiaries, the PPACA provides that nursing homes, which receive about 13% of revenues from Medicare for rehabilitative or transitional stays, will receive about \$15 billion less from the program from 2010 to 2020.

For Medicare B (physician payments), the PPACA provides:

- a freeze of the threshold for income-related increases in premiums at \$85,000 for an individual/\$170,000 couple, i.e., additional beneficiaries will not be required to pay higher premiums if their income does not rise (January 2011)

Note: Payments to physicians, triggered by formula that caps total expenditures in order to limit volume of services, remains an issue in Congress as of this writing. To date the reduction in physician fees has been suspended annually until it now would be 21% unless Congress once again intervenes.

- a waiver of copayments on preventive services including mammograms and colonoscopy

For Medicare C, Medicare Advantage plans (private sector plans offering benefits and choice of providers similar to original Medicare that have received extra government funds for their services), the PPACA provides

- cap payment rates at current levels and require plans to rebate to the government any profits from a return of premiums in cost of benefits (i.e., a loss-ratio) of less than 85% by 2014, and
- the restructuring of payment rates based on comparison with original Medicare fee-for-service rates, with bonuses for quality of care to be fully effective by 2019.

For Medicare D (prescription drugs, the PPACA provides:

- closing of the “doughnut hole”, or mid-range annual gap in Medicare Part D drug coverage, beginning with \$250 rebates (2010). The gap will be eliminated by 2020. Beneficiaries pay a deductible and 25% copayment up to \$2,830 in 2010, followed by a period of no coverage until additional out of pocket expenditures reach \$4,550 (\$6,440 in total drug related costs, and
- 50% discount on brand prescription drugs (2011). This provision is associated with new annual fees (taxes) on manufacturers of pharmaceuticals and medical devices.
Note: A 10% tax is imposed on indoor tanning for that youthful glow!

For Medicaid coverage (relating to low-income/low-asset early retirees and those “dually eligible” for Medicare and Medicaid), the PPACA provides:

- all states must cover eligible individuals with incomes up to 133% of federal poverty level (previously determined state by state). Federal funds will support 100% of this cost through 2019, though states debate the actual costs not slated for federal payment,

- Medicaid payments for primary care must equal Medicare payments. When Medicaid has paid less than Medicare, dual eligibles have often been restricted to doctors who accept Medicaid rates,
- relating to spousal impoverishment, spouses of Medicaid home services recipients will have the same financial protections as spouses of Medicaid nursing home services recipients, for five years from 2014 to 2019 only, unless extended by Congress, and
- additional federal funds for nursing home diversion, including an existing program called Money Follows the Person, which exists in 31 states, and a new program call Community First Choice Option (beginning Oct. 2011).

For long-term care, the PPACA provides for a voluntary-participation program, (the CLASS program, for Community Living Assistance Services and Supports) funded by payroll deductions, that will provide a cash benefit for those who have paid in for five years (after which benefits are vested) and who develop the need for non-medical services and supports to maintain community, assisted living, or nursing home residence. The initial premium is estimated at \$67, and the average benefit at \$50 a day, with lower benefits for those with lesser impairments. Note: All working adults will be automatically enrolled, and must opt out. (begins as of January 1, 2011).

Payments from CLASS are not to affect Medicaid eligibility, but it is unclear how they will affect the amount of payments due. CLASS participation will be treated, with regard to the tax, in the same manner as long term care insurance or other medical expenses.

Many other provisions of the PPACA affect older people just as they affect people of all incomes, a full range of health and disability, and in all walks of life.

Chapter 6: Long-Term Care

p. 289

Deduction limits for long-care insurance premiums in 2010:

Age	Maximum premium deduction
40 or less	\$320
40+ to 50	\$620
50+ to 60	\$1,230
60+ to 70	\$3,290
70+	\$4,110

P. 297 SSI income limit for categorically needy.

In 2010, the SSI monthly benefit is \$674 a month for a single individual and \$1,011 a month for a couple.

P. 299 Income test for “income cap.”

In 2010 the SSI monthly benefit for an individual is \$674, with the result that the income cap for 2010 is \$2,022.

P. 333 Treatment of spousal resources.

In 2010, the community spouse resource allowance can range from a minimum of \$21,912 to a maximum of \$109,560.