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Hoisted by their own Petard: Struve Applies Pretext Analysis to the Court, Finds Justices' Motives Questionable

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Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. Rev. 279 (2010).

Things we like (lots): Irony.

In 1973, the Supreme Court gave us *McDonnell Douglas*, the ubiquitous framework for proving discrimination under disparate treatment statutes such as Title VII. *McDonnell Douglas* has been widely criticized – often for good reason. *McDonnell Douglas* places the full burden of proving discriminatory causation on the party least equipped to prove it: the plaintiff. Additionally, most courts have read *McDonnell Douglas* as requiring but-for causation for liability, which provides an unjustified windfall to defendants in many cases where multiple motives are at play. Yet, despite these flaws, *McDonnell Douglas* does one thing well: It allows us to ascribe unsavory, and possibly discriminatory, motives to defendants who dissemble – those who provide non-credible reasons for their actions.

There are alternatives to *McDonnell Douglas*, including the Court's 1989 *Price Waterhouse* framework. *Price Waterhouse*, too, was vulnerable to criticism. But at least that case permitted burden-shifting on the issue of causation. Yet, in *Gross*, the Court repudiated *Price Waterhouse* – at least in ADEA cases. In such cases, the Court held, plaintiffs bear the full burden of proving but-for causation.

In her new article, Catherine Struve questions the Court's motives in *Gross*. And she does so using a pretext analysis that is deliciously reminiscent of a *McDonnell Douglas* pretext analysis.

Like the skilled employment lawyer she is, Professor Struve divides and conquers each of the arguments advanced by the Court for its action. First, she considers the Court's argument that the Civil Rights Act of 1991 does not apply to ADEA claims. While she concedes that this argument might be correct, she also notes that it is irrelevant. Then, she considers the Court's textual argument: that there is no reference to burden-shifting in the ADEA. But she points out that the *Price Waterhouse* Court, reading virtually identical language in Title VII, found that burden-shifting was appropriate. Thus, Professor Struve concludes: The lynchpin of the Court's reasoning in *Gross* was its repudiation of *Price Waterhouse.*

Professor Struve next attacks the Court's reasoning for repudiating *Price Waterhouse*. Perhaps surprisingly, the only reason offered by the Court for this repudiation was that *Price Waterhouse* had proven "difficult to apply" – or, as Professor Struve puts it, "confusing." She argues, persuasively, that this is simply not true: There is nothing inherently confusing about *Price Waterhouse* burden-shifting. Her Exhibit A is two jury instructions, one using a *Price Waterhouse* burden-shifting instruction, and the other a simple determinative factor/but-for instruction. The conclusion: Any reasonable reader (at least, any reasonable reader with a JD – and likely those with much less education) would see that the *Price Waterhouse* instruction is only slightly more complicated than the determinative factor instruction, and hardly confusing. And, as Professor Struve's adept analysis shows, the authorities cited by the Court for its "difficult to apply" argument do not help the Court demonstrate "confusion."

Finally, Professor Struve looks at other types of "confusion" that might arise from *Price Waterhouse* (e.g., when to apply *Price Waterhouse* under the ridiculously confusing "direct evidence" test). She argues, persuasively, that none of these other forms of "confusion" would justify repudiating *Price Waterhouse* – and some might in fact counsel in

favor of retaining it.

So, we have a classic case of pretext. The Court says that it acted to avoid confusion. But Professor Struve shows that there is no real confusion. Based on this fact, she argues, we can infer that not only that the Court did not act for the stated reason (to avoid confusion); we can infer that the Court was disingenuous – that it was hiding some less savory motive. Perhaps, Professor Struve argues, the Court acted based on policy considerations. Specifically, she argues, the *Gross* majority may have based its holding on concerns about employment discrimination litigation generally, and age discrimination litigation specifically.

While we could debate under *Reeves* whether pretext alone is sufficient for liability, Professor Struve does not argue for imposing liability upon the Court for its apparent dissembling. Instead, she hopes that Congress will accept the "invitation" that the Court seems to have provided for engaging in a policy debate about burden-shifting in antidiscrimination law. And in case Congress is inclined to accept this invitation, she provides an excellent guide to the policy questions involved in this debate.

I hope that Professor Struve is right; that the Court will see the Court's apparent dissembling in *Gross* as an invitation to revise and unify its employment discrimination laws. But whatever Congress does, it was great fun to see Professor Struve apply *McDonnell Douglas* style pretext analysis to the Court's opinion in *Gross*, which went out of its way to entrench the more problematic aspects *McDonnell Douglas*. Turnabout, after all, is fair play.

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