Case No. 20-3511

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

MELANIE PELCHA,
Plaintiff-Appellant,

v.

MW BANCORP, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division
Case No. 1:17-cv-00497

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPORTING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3511

Case Name: Melanie Pelcha v. MW Bancorp, Inc., et al.

Name of Counsel: Daniel Benjamin Kohrman

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I certify that on February 10, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Daniel Benjamin Kohrman
Daniel Benjamin Kohrman

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
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Name of Counsel: Daniel Benjamin Kohrman

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Daniel Benjamin Kohrman

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3511

Case Name: Melanie Pelcha v. MW Bancorp, Inc., et al.

Name of Counsel: Daniel Benjamin Kohrman

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s/ Daniel Benjamin Kohrman
Daniel Benjamin Kohrman

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STATEMENT OF INTERESTS OF THE AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation are dedicated to addressing the needs of older workers and strive through legal advocacy to preserve their rights. Approximately one-third of AARP's members are employed; still others are seeking employment. AARP and the Foundation are committed to assuring that the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-34 ("ADEA"), is properly

[1] No party's counsel authored this brief either in whole or in part and no party or party's counsel, or any person or entity other than Amici, their members, and counsel, contributed money intended to fund preparing or submitting this brief.

construed and vigorously enforced. This case presents issues of ADEA interpretation vital to the statute's effectiveness.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country of lawyers who represent workers in labor and employment disputes. Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground.

ARGUMENT

I. *Bostock* Reaffirmed that "But For" Does Not Mean "Sole Cause" Under Title VII and Thereby Confirmed that "But For" Cannot Mean "Sole Cause" Under the ADEA. [2]

The panel erroneously rejected clear Supreme Court precedent that most Title VII cases and all ADEA cases are governed by the same "but for" causation standard. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739-40 (2020).[3] It is long-settled that Title VII does *not* require discrimination victims to prove that their protected status was the sole cause for an employer's adverse action. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (explaining that establishing "pretext" does not require a "Title VII plaintiff [to] show that he would have . . . been rejected or discharged solely on the basis of his race . . .

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[2] Amici take no position on the second issue the petition raises: the sufficiency of Pelcha's evidence to meet the proper "but for" cause standard.

[3] The *Bostock* Court qualified this parallel by noting that Congress "supplement[ed] Title VII [but not the ADEA] in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision." *Id.*

no more is required to be shown than that [his] race was a 'but for' cause."). And in *Bostock* the Supreme Court reiterated that "the traditional but-for causation standard" applicable in Title VII cases "means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Bostock* 140 S. Ct. at 1739.[4] In doing so, the Court expressly relied on its discussion of "but for" cause in *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009), an ADEA case. *Id.*[5] The *Bostock* Court also relied on its rulings in *Burrage v. United States*, 571 U.S. 204 (2014) and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), which further explained the *Gross* Court's understanding of "but for" cause. *See Bostock*, 140 S. Ct. at 1739.

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[4] *See id.* ("Often, events have multiple but-for causes. . . if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212 . . . (2014) . . . So long as the plaintiff 's sex was one but-for cause of [a] decision, that is enough . . .")

[5] The Court explained: "causation is established whenever a particular outcome would not have happened 'but for' the purported cause. *See Gross*, 557 U.S. at 176 . . . In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."

If "but for" does not mean "sole cause" under Title VII, it cannot mean "sole cause" under the ADEA for the simple reason that the plain text of the causation language in Title VII and the ADEA are identical. Congress made no distinction between age and race or sex discrimination when it lifted the prohibitions and causation language verbatim from Title VII and placed them into the ADEA. Accordingly, the Supreme Court has commanded that "interpretation[s] of Title VII . . . appl[y] with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

Moreover, the ADEA's language disfavoring a sole cause standard is no accident. Congress specifically rejected an amendment to Title VII that would have placed the word "solely" in front of the words "because of," 110 Cong. Rec. 2728, 13837 (1964). *See Bostock*, 140 S. Ct. at 1739 ("As it has in other statutes, [Congress] could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525; 16 U.S.C. § 511.)").

Likewise, Congress could have, but didn't, place the word "solely" in section 4(a)(1) of the ADEA. In contrast, Congress required plaintiffs suing employers under Section 504 of the Rehabilitation Act of 1973 to show discrimination against them "*solely* by reason of his or her disability [.] "29 U.S.C. § 794(a) (emphasis added). *See Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 315 (6th Cir. 2012) (en banc) (distinguishing Section 504 from the Americans with Disabilities Act (ADA), noting that the ADA forbade discrimination "because of" disability without "sole cause" wording in a manner analogous to that of Title VII and the ADEA); *see also* section II, below.

Identical language in the ADEA and Title VII obligates courts to apply the same causation standard in similar cases under these statutes. *See, e.g., Miller v. CIGNA Corp.*, 47 F.3d 586, 592 (3d Cir. 1995) (stating, after noting the identical language in 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1): "Not surprisingly, the ADEA jurisprudence concerning this prohibition has followed the Title VII jurisprudence interpreting the analogous prohibition."). *Bostock*'s plain statement that this standard, in the Title VII context, is not "sole" cause, demands acknowledgment that the same is true under the

ADEA—a conclusion other circuits have already reached. *See, e.g.*, *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277 (10th Cir. 2010) (explaining that the "Circuit has long held that a plaintiff must prove but-for causation to hold an employer liable under the ADEA[,]" and that "this causal standard does 'not require[ ] [plaintiffs] to show that age was the sole motivating factor in the employment decision.'"). Other than the panel, no appellate court has concluded otherwise.

The panel erred in relying on *Gross* for the proposition that ADEA plaintiffs face a higher burden of proving but-for causation than Title VII plaintiffs despite identical statutory text. To be sure, *Gross* precluded some ADEA claims permissible under Title VII based on *similar, but not identical,* language in the two laws. *See Gross*, 557 U.S. at 174 (discussing 1991 Title VII amendments: "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination [in so-called "mixed motive" cases] by showing that age was simply a motivating factor"); *see also* n.3, supra. Yet, in this instance, no such lesser protection of age discrimination victims, based on minor differences between the ADEA and Title VII, is warranted. Here, the relevant statutory language and context are identical and the

Supreme Court has recognized as much. *Bostock*, 140 S. Ct. at 1739 (stating that Title VII's and the ADEA's identical "because of" wording "incorporates the . . . 'traditional' standard of but-for causation"). The ADEA's "but for" cause standard does not require ADEA claimants to prove that their employer was motivated solely by their age. Rehearing is needed to correct the panel's contrary ruling.

II. The Petition Should Be Granted to "Maintain Uniformity of the Court's Decisions" as the Panel's "Sole Cause" Ruling Conflicts with the En Banc Ruling in *Lewis v. Humboldt Acquisition Corp., Inc.*

This case presents a paradigm instance of "[extra]ordinar[y]" circumstances in which rehearing en banc (or panel rehearing) is appropriate, in that rehearing "is necessary to secure or maintain uniformity of the court's decisions[.]" Fed. R. App. P. 35 (a), (a)(1). The panel's embrace of a sole cause standard under the ADEA clashes irreconcilably with the en banc Court's reasoning and result in *Lewis*. There, the full Sixth Circuit rejected a "sole cause" interpretation of "but for" causation based on "because of" causation language in Title I of the ADA identical to the ADEA's text at issue here. The panel's sole cause ruling also cannot be squared with *Lewis'* reliance on *Gross*' analysis of traditional "but for" causation in the context of the ADEA.

In *Lewis*, this Court rejected a "sole cause" reading of the ADA's "because of" language, holding that these words must be interpreted to establish a "but for" causation regime in light of the inclusion of the very same words in the ADEA's analogous text: "It shall be unlawful for an employer . . . to . . . discriminate against any individual . . . because of such individual's age[.]" 29 U.S.C. § 623(a)(1). The Court explained:

> what standard should trial courts use in instructing juries in ADA cases? *Gross* points the way. The ADEA and the ADA bar discrimination "because of" an employee's age or disability, meaning that they prohibit discrimination that is a "'but-for' cause of the employer's adverse decision." . . . The same standard applies to both laws.

Id. at 321.

Congress in 2008 amended the ADA's "because of" language to forbid discrimination "on account of disability[.]" *Lewis*, 681 F.3d at 315. Yet, such "[l]ater amendments to the ADA do not change things[,]" as "the amended law . . . too says nothing about a sole-cause standard of liability. At no point, then or now, has the ADA used the 'solely' because of [the] formulation found in the Rehabilitation Act." *Id.* Further, the meaning of "on account of" is indistinguishable from "because of." *Gross*, 557 U.S. at 176 ("The words 'because of' mean 'by reason of: on account of.'"). Hence, this Court's own prior analysis of *Gross*, in addition to the

Supreme Court's, precludes the panel's sole cause construction of the ADEA's "because of" language.

Moreover, in *Lewis*, this Court strongly suggested that the ADEA should not be construed to require sole causation absent express "sole cause" language. The Court found such text absent from the ADA, but present in a related law, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). *See Lewis*, 681 F.3d at 315. The Court declined to ignore this difference between the ADA's text and the Rehabilitation Act, noting, unequivocally: "The sole-cause standard in the end is a creature of the Rehabilitation Act, and that is where we should leave it. The standard does not apply to claims under the ADA." *Id.* at 317; *cf. Soledad v. United States Dep't. of Treasury*, 304 F.3d 500 (5th Cir. 2000) (Rehabilitation Act's "solely by reason of" wording requires stricter causation standard than ADA's "because of"). *Lewis*'s clear implication is that the ADEA's "because of" text and "but for" standard similarly does *not* encompass a sole cause requirement, given this Court's reading of *Gross* as mandating a parallel construction of the ADA and the ADEA. No superficially plausible basis exists—such as the

Rehabilitation Act, in the case of the ADA—for reading a "sole cause" limitation into the ADEA.

This aspect of *Lewis* further discredits the panel's dismissal of *Bostock*. *See* Slip Op. at 3. Like *Bostock*, *Lewis* demonstrates that precedent under an analogous federal civil rights law shows that a sole cause standard does not apply to the ADEA. In particular, *Lewis* holds that *Gross*—far from providing a "controlling" construction of "because of" in the ADEA that implies a sole cause standard, Slip Op. at 4—"points the way" to a conclusion that "[t]he same standard" of "but for" cause without a sole cause feature "applies to both [the ADEA and the ADA]." *Lewis*, 681 F.3d at 321. Thus, even if *Bostock* is as limited as the panel claimed—which it is not—*Lewis* demands, at least, construing the ADEA to require a "but for" causation standard absent an express sole cause component.

III. The Panel's Sole Cause Ruling Poses an Issue of "Exceptional Importance" by Threatening to Hold ADEA Plaintiffs to an Improper Elevated Causation Standard.

The petition should be granted because rehearing the panel's "sole cause" ruling "involves a question of exceptional importance." Fed. R. App. P. 35 (a)(2). Enormous harm is threatened if the panel's ruling

remains undisturbed, as such a result would impose on all ADEA plaintiffs and potential ADEA plaintiffs an improper, elevated causation standard.

The panel telegraphed its intent to impose an elevated proof standard when it declared that meeting the ADEA's "because of" requirement is "no simple task." Slip Op. at 3. The panel provided no authority for this formulation, as none exists. Indeed, the panel simply—and misleadingly—cited *Gross*'s adoption of a "but-for" cause standard. *Id.* Yet, *Bostock* stated that "but for" "can be a sweeping standard[,]" and contrasted it with the "more parsimonious approach" of sole causation. 140 S. Ct. at 1739.

The danger posed by the panel's embrace of an elevated ADEA proof standard is severe, as all ADEA disparate treatment cases require plaintiffs to show but-for causation due to age. Thus, if a defendant employer can "avoid liability just by citing some *other* factor that contributed to its challenged employment decision[,]" *Bostock*, 140 S. Ct. at 1739, many more ADEA plaintiffs will lose despite evidence of bias strong enough that it would suffice if it supported a race or sex or disability bias claim. Other worthy plaintiffs will be forced to settle

their claims on the cheap. Worst of all, still other valid claimants will be deterred from asserting their rights altogether or will be unable to procure legal representation due to the elevated risks posed by having to prove age as a "sole cause."

CONCLUSION

For the reasons set forth above, either the panel itself or the full Court should rehear the panel's ruling that a sole cause standard applies in ADEA cases.

Dated: February 10, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because the brief contains 2,596 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

Dated: February 10, 2021

/s/ Daniel Benjamin Kohrman
Daniel Benjamin Kohrman

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I filed the foregoing Brief of Amici Curiae AARP, AARP Foundation, and National Employment Lawyers Association Supporting Plaintiff-Appellant's Petition for Rehearing and Rehearing En Banc with the Clerk of the United States Court of Appeals for the Sixth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: February 10, 2021

/s/ Daniel Benjamin Kohrman
Daniel Benjamin Kohrman