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Supreme Court Makes It More Difficult for Employees to Prove Age Discrimination Claims

The U.S. Supreme Court held in a 5-4 decision that a plaintiff bringing a disparate treatment claim under the Age Discrimination in Employment Act of 1967 (ADEA) must prove, by a preponderance of the evidence, that age was the “but-for” cause of the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, No. 08-441 (June 18, 2009). The Court’s adoption of a but-for causation standard is a departure from the burden of persuasion that courts had used when analyzing ADEA claims. Before *Gross*, courts typically required an employee to establish an ADEA claim by showing that age was merely a motivating factor in the employer’s action, applying the mixed-motive burden-shifting framework under Title VII cases. Now, ADEA plaintiffs will be subjected to a higher burden of persuasion and, unlike in Title VII cases, the burden will not shift to employers on ADEA claims.

What happened?

Jack Gross brought an age discrimination claim against his employer, FBL Financial Services, Inc., alleging that he was reassigned to a new position and his former job responsibilities were transferred to a younger employee. Gross considered the reassignment a demotion based on his age and brought suit under the ADEA against his employer in the United States District Court for the Southern District of Iowa.

At trial, Gross presented evidence that his reassignment was based, at least in part, on his age. The employer responded that the employee’s reassignment was part of a corporate restructuring and that his new position was better suited to his skills. Over the employer’s objections, the District Court instructed the jury that it must return a verdict in favor of Gross if he proved, by a preponderance of the evidence, that “age was a motivating factor” in the employer’s decision to demote him and, additionally, if the employer could not prove, by a preponderance of the evidence, that it would have taken the same action regardless of the employee’s age. The jury returned a verdict for Gross and the employer appealed, challenging the jury instructions.

The U.S. Court of Appeals for the Eighth Circuit reversed and remanded, holding that the jury was improperly instructed. In rejecting the jury instructions, the Eighth Circuit relied on the standard established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), requiring direct evidence of discrimination in Title VII cases involving employment actions based on both permissible and impermissible considerations (e.g., mixed-motive cases). *Price Waterhouse* held that if a Title VII plaintiff presents direct evidence that an impermissible consideration was a factor in an adverse employment decision, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that consideration. Relying on *Price Waterhouse*, the Court of Appeals found that Gross needed to present direct evidence showing a specific link between his age and the alleged adverse employment action before the burden shifted to the employer. Gross petitioned the Supreme Court for review.

What did the Supreme Court decide?

On appeal, the Supreme Court vacated the Court of Appeals’ decision based on its finding that Title VII is “materially different” from the ADEA with respect to the burden of persuasion, obviating the question of whether direct evidence is required under the ADEA. Specifically, the Court held that the burden-shifting

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framework applied in Title VII cases does not apply to ADEA claims. The Court noted that in 1991 Congress amended Title VII to allow plaintiffs to prove discrimination in mixed-motive cases by establishing that an improper consideration was a “motivating factor” for the adverse employment action. Congress did not, however, make a similar amendment to the ADEA. Based on this incongruity, the Court reasoned that because Congress failed to make a similar amendment, and because the ADEA specifically requires plaintiffs to establish that age is the but-for cause of the adverse employment action, the burden of proof is upon the employee exclusively.

What does this decision mean for employers?

The *Gross* decision may increase the likelihood that summary judgment motions on ADEA claims will be granted with greater frequency if employers can demonstrate that there is no question of material fact that an adverse employment decision was predicated upon at least one legitimate, nondiscriminatory reason. In other words, *Gross* will make it much more difficult for employees to succeed on ADEA claims without evidence establishing that an adverse action was motivated exclusively by age.

This decision has already sparked a reaction from Congress. In a strongly worded statement issued the same day as the Supreme Court’s decision in *Gross*, Senator Patrick Leahy (D-Vt.) accused the Court of disregarding precedent and the plain reading of a statute, and of ignoring Congressional intent. Leahy said that the decision has “stripped our most senior American employees of important protections.” Whether Congressional action in response to the decision is forthcoming remains to be seen, but, unless and until the statute is amended to harmonize it with Title VII, *Gross* will present a significant obstacle to ADEA plaintiffs.



If you are interested in more information about these developments, please contact any of the following attorneys or the Sutherland attorney with whom you regularly work.

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