

News from our Employment & Labor Group

New United States Supreme Court Decision *Gross v. FBL Financial Services, Inc.* Helps Employers In ADEA Cases

In a key victory for employers, the United States Supreme Court held on June 18, 2009, that a plaintiff bringing an Age Discrimination in Employment Act (“ADEA”) disparate treatment claim must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. This ruling also establishes that 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 of the motivating factors in that decision.

Facts

Jack Gross had been working for FBL Financial Group for over 30 years when, at the age of 54, he was re-assigned to the position of claims project coordinator. Many of Gross’ previous job responsibilities were transferred to a new position which was given to a woman in her early forties who had been previously supervised by Gross. Gross considered his reassignment a demotion, and filed suit in District Court alleging his reassignment violated the ADEA.

At trial, Gross introduced evidence suggesting that his reassignment was based at least in part on his age. Despite 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 and that his age was a *motivating factor* in FBL’s decision to demote him. The jury was also instructed that it must return a verdict for FBL if FBL had proved, by a preponderance of the

evidence, that it would have demoted Gross regardless of his age. The jury returned a verdict in favor of Gross and awarded him damages.

FBL appealed the ruling to the Eight Circuit Court of Appeals, arguing that these jury instructions were improper. The Eight Circuit agreed and reversed, finding that the jury had been incorrectly instructed under the *Price Waterhouse v. Hopkins* standard for so-called “mixed motives” cases (i.e., cases where the employee argues that two or more reasons led to an adverse employment action, one of which was unlawful).

In the *Price Waterhouse* decision in 1989, the U.S. Supreme Court held that if a plaintiff bringing a discrimination action under Title VII (which governs claims for types of discrimination other than age) shows, through direct evidence, that an unlawful factor was a motivating or substantial factor in the employer’s action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. In 1991, Congress appeared to adopt this standard by amending Title VII to authorize discrimination claims when the improper consideration is a “motivating factor” for an adverse employment action.

Rather than address whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motives instruction in an age discrimination case under the ADEA, the Supreme Court in *Gross* decided that it must first look at whether the burden of persuasion ever shifts to the party

defending against an alleged mixed-motives discrimination claim brought under the

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ADEA. The Court held that the plaintiff in such a case always bears the burden of proving that age was the “but for” cause of the employer’s adverse decision, and the burden of persuasion never shifts to the party defending such an action. In doing so, the Court emphasized the following:

- ▶ Unlike Title VII, the express language of the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Despite amending the ADEA and Title VII at the same time in 1991, Congress did not add this motivating factor language to the ADEA even though it was added to Title VII—a strong indication that Congress did not intend for it to apply to the ADEA;
- ▶ The plain meaning of the ADEA’s text does not authorize a mixed-motives claim; and
- ▶ The *Price Waterhouse* case does not control the Court’s interpretation of the ADEA as “it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.” The Court further remarked that “it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply.”

Practical considerations

This case is a great result for employers who have claims filed against them under

the ADEA. Thus, the decision establishes that the burden of persuasion never shifts to the party defending an alleged mixed-motives disparate treatment discrimination claim brought under the ADEA. Accordingly, employees now have a higher burden of proof to meet in order to establish disparate treatment age discrimination under the ADEA.

Employers should bear in mind that the *Gross* decision is an interpretation of the ADEA, a federal law. Many states, however, have their own discrimination statutes. Employees who cannot meet the *Gross* standard as applied to the ADEA, may nonetheless be able to establish age discrimination under their state discrimination statutes. However, employers in states where federal law is looked at to interpret analogous state law should also find some comfort in the *Gross* decision. For example, California courts often look to federal case law to interpret analogous provisions of the Fair Employment and Housing Act (“FEHA”), the California statute which serves as the basis for an age discrimination claim in California. Given the similarities between the age discrimination language of FEHA and the ADEA, California courts may apply the *Gross* standard to age discrimination claims brought under FEHA.

If you would like to discuss these issues further and/or have questions about this *Alert*, please contact one of the attorneys listed above. ■