



ALERT

U.S. Supreme Court Limits Employees' Ability to Recover On Age Discrimination Claims; Increases Burden on Employees

By Bennett Pine and James Serritella

In a 5-4 decision on June 18, 2009, the Supreme Court held that, in order to establish a claim of disparate treatment discrimination under the Age Discrimination in Employment Act (ADEA), the plaintiff must prove by a preponderance of the evidence that the plaintiff's age was the "but-for" or decisive cause of the employer's adverse decision. In *Gross v. FBL Financial Services, Inc.*, the employee in his 50's brought a claim against his employer alleging that he was demoted because of his age. After 30 years with the company, Gross was reassigned to a different position and his former duties were given to a younger woman who was previously supervised by Gross.

The Court determined that the "mixed-motive" test, which applies to sex and race discrimination cases brought under Title VII of the Civil Rights Act of 1964, was inapplicable to age discrimination claims brought pursuant to the ADEA. Under the Title VII "mixed-motive" test, the plaintiff must prove only that discrimination was a "motivating factor" in the employer's adverse decision. The burden then shifts to the employer to prove that it would have reached the same result regardless of the impermissible consideration. In rejecting application of this burden shifting analysis to ADEA claims completely, the Court ruled that the burden of persuasion rests and remains entirely with the plaintiff to show that age was more than a motivating factor, but was essentially *the* deciding factor underlying the employer's decision.

The Supreme Court's *Gross v. FBL Financial* decision should serve as a significant victory for employers. As a result of this decision, age discrimination claims should be more difficult to prove and employers should be able to defend against such ADEA claims with more success than they have in the past.

Some observers have predicted Congressional action (akin to the Lilly Ledbetter Fair Pay Act) to reverse the Supreme Court's decision by amending the ADEA to parallel Title VII's lower burden of proof for claimants.▲

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