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U.S. Supreme Court Increases Employee Burden of Proof in Age Bias Cases

The Ruling

In *Gross v. FBL Financial Services, Inc.*, decided on June 18, 2009, a deeply divided U.S. Supreme Court imposed a heightened proof burden on employees to establish age discrimination against their employers. In a 5-4 decision, the Court concluded that the literal text of the Age Discrimination in Employment Act (“ADEA”) does not allow a worker to prove discrimination by demonstrating that age was one “motivating factor” for the employer’s adverse employment action. Rather, in the majority’s view, workers must prove that age was the decisive factor or “but for” cause underlying the employer’s adverse job action. Unlike the burden shifting ping pong match in Title VII cases, the burden of persuasion in an ADEA case does not shift to the employer to show that it would have made the same employment decision regardless of age, even when a worker has produced some evidence that age was one motivating factor in the employer’s decision.

The Underlying ADEA Claim

In 2004, Jack Gross sued FBL Financial Services, Inc. (“FBL”) under the ADEA, alleging that he was demoted because of his age. At trial, Gross introduced indirect evidence that FBL had reassigned him to a different position based at least in part on his age, namely, FBL had transferred many of his previous job responsibilities to a younger coworker who Gross had previously supervised and who was then in her early 40s. Denying that age played any role in its decision, FBL insisted that the company had reassigned Gross as part of a corporate restructuring and his new position was better suited for his skill set. The trial court submitted an instruction to the jury that effectively placed the burden of persuasion upon FBL to show that it would have demoted Gross regardless of his age. The jury ultimately ruled in favor of Gross.

FBL challenged the jury instruction on appeal to the Eighth Circuit, and the appeals court reversed and remanded for a new trial (citing a Title VII decision). As the appeals court reasoned, Gross did not submit *direct* evidence that his age was a motivating factor in his demotion. Accordingly, the appeals court concluded that Gross was not entitled to a jury instruction that placed the burden of persuasion upon FBL to demonstrate that it would have made the same decision to demote Gross without considering his age.

Supreme Court Analysis and How it May Affect Employers

Contrary to both lower courts, the U.S. Supreme Court interpreted the ADEA’s language in isolation and refused to apply Title VII’s burden-shifting framework to ADEA claims, regardless of whether a discrimination plaintiff presents *direct or indirect* evidence of discrimination. Recognizing that Title VII’s language is materially different regarding the relevant burden of persuasion, the Court observed that Congress amended Title VII to allow, for example, a sex or race discrimination plaintiff to prove discrimination when sex or race was “a motivating factor” for the adverse employment action. The ADEA, by contrast, has not been so amended. Moreover, the Court observed that the ADEA’s plain language requires a discrimination plaintiff to prove that the employer made its adverse employment action “because of” age. Applying the ordinary meaning to the words “because of”, the Court held that to establish a disparate-treatment claim under the ADEA’s literal text, a plaintiff retains the burden of persuasion to establish that age was the “but for” cause of (or the decisive reason for) the employer’s adverse decision.

The *Gross* opinion is a refreshing break from the Supreme Court's recent pro-employee trend in employment cases. Given the Court's refusal to apply the Title VII burden-shifting framework to ADEA claims, the burden of persuasion remains with the plaintiff-employee at all times. Thus, employers have greater leverage in litigating disparate treatment age discrimination claims. For instance, an age bias plaintiff may produce evidence demonstrating that age was one motivating factor in the employer's adverse employment decision; however, the employer will not be required to prove that it would have made the same decision regardless of the employee's age. Instead, the employee will succeed only if she proves that "but for" her age, the employer would not have made the challenged adverse employment decision.

Despite the *Gross* Court's ruling, and in view of the aging American population, employers should continue to (i) maintain and consistently apply anti-age discrimination policies and procedures; (ii) educate their employees about company anti-age discrimination policies; and (iii) conduct proper and thorough investigations into age discrimination complaints and claims.

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