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## U. S. Supreme Court Sets High Burden of Proof for Plaintiffs in All Federal Court Age Discrimination Cases

On June 18, 2009, the U. S. Supreme Court ruled in a 5-4 decision that in all cases under the Age Discrimination in Employment Act (“ADEA”), regardless of theory, plaintiffs have a stringent “but-for” standard of proof. Gross v. FBL Financial Servs., Inc., No. 08-441, 2009 U.S. Dist. LEXIS 4535 (June 18, 2009). The Court held that an ADEA plaintiff “must prove, by a preponderance of the evidence, that *age was the ‘but-for’ cause* of the challenged adverse employment action” rather than simply a “*motivating factor*” – the burden of proof previously applicable in so-called mixed-motive claims. Id. at \*23 (emphasis added). This uniform “but-for” burden in all ADEA cases is in contrast, as the Court ruled, to claims under other federal discrimination statutes such as Title VII.

The Gross decision clarified that unlike Title VII, the ADEA does not authorize mixed-motive claims, i.e., claims alleging that an adverse employment decision was premised on both permissible and impermissible factors. In doing so, the Court highlighted the textual differences between the ADEA and Title VII. Title VII was amended to expressly authorize discrimination claims where race, color, religion, sex, or national origin was “a motivating factor” for an adverse employment decision. 42 U.S.C. § 2000e-2(m). No comparable amendment has ever been made to the language of the ADEA. The ADEA states only that it is unlawful for an employer to make a decision “because of” an individual’s age. 29 U.S.C. § 623(a). Therefore, while mixed-motive cases are still available under Title VII, the Court held that an ADEA plaintiff must prove that the employer would not have taken the adverse employment action “but for” the plaintiff’s age.

Consequently, the Court held that plaintiffs retain the burden of persuasion to establish that “but-for” cause, and that burden never shifts to an employer in an age discrimination case – holding that “[t]he 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 motivating factor in that decision.” Id. at \*24.

### **Key Facts and Points of Law**

Plaintiff brought an age discrimination claim under the ADEA following his demotion, alleging that the adverse employment action was based, at least in part, on impermissible factors relating to his age, as well as permissible business reasons (a “mixed-motive” claim). The Eighth Circuit Court of Appeals overturned the jury verdict in favor of plaintiff, holding that the jury had been incorrectly instructed on the appropriate burden shifting standard in a mixed-motive ADEA claim. The U. S. Supreme Court held that mixed-motive claims are not available under the ADEA, that such jury instructions should not be given, that the burden of persuasion does not shift to the employer under the ADEA and that all ADEA claims are subject to the more stringent “but-for” standard of proof.

## Implications for Employers

- The Court's ruling makes it tougher for plaintiffs to recover under the ADEA because now all ADEA claims will be subject to the same standard of proof – the more stringent “but-for” standard. Plaintiffs will no longer have the option of bringing an age discrimination claim under the lower, mixed-motive standard of proof, i.e., that age was merely a “motivating factor.”
- The Gross decision will not change the burden of proof in the majority of age discrimination claims as most age cases do not involve a mixed-motive issue. For example, the Seventh Circuit (Illinois, Indiana and Wisconsin) will simply continue to use its existing jury instructions for cases not involving a mixed-motive issue (now applicable to all age discrimination claims) – which require plaintiffs to prove that they would not have suffered an adverse employment action but for their age. See, Fed. Civ. Jury Instr. of the 7<sup>th</sup> Cir. § 3.01 (2005). E.g., Miller v. American Airlines, Inc., 525 F.3d 520, 523 (7<sup>th</sup> Cir. 2008) (“To succeed in an ADEA claim, a plaintiff must establish that he would not have received adverse treatment but for his employer’s motive to discriminate on the basis of his age.”).
- As noted in the dissent, the Court’s decision may cause confusion for courts and juries where a plaintiff is asserting both Title VII and ADEA claims because Title VII claims remain subject to the motivating factor standard (and the burden shifting analysis) pursuant to statute.
- The ruling may spur Congress to modify the Gross decision through an amendment to the ADEA to make it consistent with Title VII in allowing mixed-motive claims.

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