



U.S. Supreme Court Heightens Plaintiffs' Standard Proof In Age Discrimination Claims

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The United States Supreme Court recently issued an opinion in *Gross v. FBL Financial Services, Inc.* that greatly enhances the standard of proof plaintiffs must satisfy when asserting age discrimination actions under the Age Discrimination in Employment Act ("ADEA"). In *Gross*, the court held that, unlike in Title VII discrimination cases, a plaintiff asserting an ADEA claim must prove his or her protected characteristic was the *determinative* factor for the employer's adverse action (as opposed to just one factor among many under a "mixed-motives" theory). For this reason, plaintiffs asserting discrimination claims under the ADEA now bear a much greater burden than do those asserting Title VII discrimination claims.

Discrimination Claims: A Plaintiff's Burden of Proof

In employment discrimination cases, the burden of proof is on the plaintiff to establish that s/he was the victim of unlawful discrimination. In 1991, Congress amended Title VII to allow for "mixed-motives" discrimination cases, wherein a plaintiff need only establish that a protected characteristic was a motivating factor underlying an adverse employment action, even though *other* factors also motivated the decision. Under Title VII, the employer's reliance on the protected factor in its decision-making is sufficient to create liability. The burden then shifts to the employer to prove that it would have made the same decision even had it not taken the protected factor into account. If the employer carries this burden, it may still be subject to declaratory and injunctive relief and attorneys' fees, but it may not be required to pay damages such as back pay or, where the challenged action was termination, to reinstate the plaintiff. Before *Gross*, courts frequently applied these Title VII standards to ADEA cases.

Gross v. FBL Financial Services, Inc.

In *Gross*, the employer decided to reorganize the department in which the 52-year-old plaintiff was employed. As a result of the reorganization, the plaintiff, who had worked for the employer for over 30 years, was given a reduced title, and many of his prior job responsibilities were assigned to an employee in her early forties whom the plaintiff had previously supervised. Although he continued to receive the same compensation, the plaintiff brought suit against the employer, alleging he was demoted in violation of the ADEA.

On appeal, the Supreme Court addressed the issue of the burden of proof in mixed-motives discrimination cases under the ADEA. The Court noted that, unlike Title VII, the ADEA does not expressly allow a plaintiff to establish discrimination by showing age was "a motivating factor." Relying on the plain language of the ADEA, which prohibits discrimination "*because of*" an individual's age, the Court concluded that a plaintiff asserting intentional discrimination under the ADEA must show that age was the "but for" cause of the employer's action. In other words, the plaintiff alleging discrimination under the ADEA must prove that, regardless of other possible contributing factors, the employee's age was the *determinative* factor, without which the employer would not have taken the adverse employment action. Showing that age was *one* motivating factor in an adverse action is insufficient to satisfy the plaintiff's burden of proof and does not shift the burden to the employer to establish that it would have taken the same employment action regardless of the plaintiff's age.

How *Gross* Impacts Employers

Gross makes it significantly more difficult for plaintiffs to prevail in age discrimination claims under the ADEA. Unlike plaintiffs asserting discrimination under Title VII, ADEA plaintiffs must now show that age was the *determinative* factor behind an adverse employment action. While *Gross* is good news for employers, its standard applies only to age discrimination claims brought under federal law. In interpreting and applying the Washington Law Against Discrimination ("WLAD"), Washington courts have explicitly rejected a "but-for" standard and have required plaintiffs to prove only that their protected characteristic was "a substantial factor" in the challenged employment action. Plaintiffs asserting age discrimination claims under the WLAD will only have to meet Washington's less demanding burden of proof, and not the heightened standard *Gross* established for ADEA claims.

As always, employers should carefully consider any adverse employment action before it is taken in an effort to minimize potential exposure in ensuing employment discrimination suits. To this end, employers should continue to review all surrounding and/or comparable circumstances to eliminate, to the extent possible, any inference that age influenced an adverse employment action. Specific steps employers may take include:

- Reviewing policies and procedures to ensure they serve legitimate business purposes and are based on reasonable factors other than age
- Thoroughly documenting all employment-related decisions and actions and ensuring that each is based on legitimate business reasons
- When undertaking a reduction in force: (1) developing a selection program based on objective criteria that focus on legitimate business needs; and (2) after the initial selections but before implementing them, conducting a statistical analysis to determine whether there is a greater (i.e., "adverse") impact on age-protected employees.