



Employment Law Alert

Legal developments affecting human resource management

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The United States Supreme Court makes it harder to prove age discrimination

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An employee claiming age discrimination as a result of an adverse action must now show that age was the sole or “but for” reason for the adverse action. In a 5-4 decision issued on Thursday, the United States Supreme Court made it much harder for plaintiffs in cases under the Age Discrimination in Employment Act (“ADEA”) to prove discrimination. The Court held in *Gross v. FBL Financial Servs, Inc.*, that a plaintiff in an age discrimination case must prove, by a preponderance of the evidence, that age was the “but for” cause of the challenged adverse employment action. The Court in *Gross* found that the familiar burden-shifting approach to liability set forth in *Price Waterhouse v. Hopkins*, does not apply to cases brought under the ADEA. In *Price Waterhouse*, the Court held that when an employee in a case brought under Title VII of the Civil Rights Act of 1964, proves that illegal discrimination played a part in an employment decision—even if other, legitimate factors also motivated the decision—the employer could win only by proving that it would have made the same decision even if it had not taken into account the employee’s protected trait (gender, race, etc). The Court rejected this burden-shifting approach in *Gross*. This case is welcome victory for employers to be sure, given the increased number of age discrimination charges as a result of the economic environment, but a pro-employee Congress could reverse the result before employers even finish celebrating.

FBL Financial Services, Inc. (“FBL”) reassigned Jack Gross, who had worked for more than thirty years for FBL, and transferred his duties to a younger coworker. At trial in district court, Mr. Gross presented evidence suggesting that FBL reassigned him in part because of his age. The district court instructed the jury that it should find for Mr. 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.” The court said that age was a “motivating factor if it played a part or a role in FBL’s decision.” Lastly, the court instructed the jury that FBL should prevail if it proved, by a preponderance of the evidence, that it would have demoted the plaintiff regardless of his age. After a verdict for Mr. Gross, FBL appealed to the Eighth Circuit, which ordered a new trial, holding that the jury instructions were incorrect under the *Price Waterhouse* standard. The Court of Appeals held that *Price Waterhouse* permitted burden-shifting in ADEA cases only when direct evidence of discrimination was produced.

The Supreme Court disagreed with both the district court’s jury instructions and the Eighth Circuit’s decision. The Court reasoned that because *Price Waterhouse* decided Title VII claims, and not ADEA claims, it did not control Mr. Gross’s suit. First, the Court noted that, unlike Title VII, the ADEA’s text does not permit claims in which age is a “motivating factor” in the employer’s adverse decision.

The Court noted that Congress amended Title VII and the ADEA contemporaneously, and while it added specific language to Title VII permitting mixed-motive claims, it failed to add the same language to the ADEA. This omission, the Court reasoned, demonstrated Congress' intent to preclude ADEA claims where age was simply a "motivating factor." In addition, the Court held that cases like *Price Waterhouse* and *Desert Palace, Inc. v. Costa*, which interpreted Title VII provisions, were inapplicable to ADEA claims. Thus, the burden-shifting analysis developed in *Price Waterhouse*, requiring an employer to present evidence that its decision would have been the same regardless of a discriminatory motive, did not apply to ADEA claims, even when the plaintiff presented some evidence that age played a role in the employer's adverse decision.

Citing Supreme Court precedent interpreting similar language, the Court held that "because of" an employee's age meant that a plaintiff must present "but for" evidence of causation in order to win. In other words, the plaintiff must show that the employer would not have done what it did absent age discrimination. The Court held that the burden of persuasion in any ADEA case—mixed motive or otherwise—is that a plaintiff must prove by a preponderance of the evidence (which may be direct evidence or circumstantial evidence) that age was the "but for" cause of the employer's challenged conduct or decision.

Lastly, the Court criticized the *Price Waterhouse* decision, concluding that "it is far from clear that the Court would have the same approach were it to consider the question today" and calling the *Price Waterhouse* burden-shifting framework "difficult to apply" such that "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."

The Court's decision in *Gross* makes it much harder for plaintiffs to prove age discrimination in cases in which the employer presents evidence that its decision was motivated by legitimate business considerations. Plaintiffs must now prove, by a preponderance of the evidence, that but for the plaintiff's age, he or she would not have been subject to the employer's adverse decision. Since the last elections, several pieces of pro-employee legislation, like the Lilly Ledbetter Fair Pay Act and the Employee Free Choice Act, have continued winding their way through the United States Congress. Under the current pro-employee climate in Congress, the *Gross* decision may well instigate an amendment to the ADEA's language that mirrors that of Title VII, permitting age discrimination claims to be brought in which age is a "motivating factor" for the employer's decisions.

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