

Supreme Court Ruling Increases Burden on Employees in Age Discrimination Cases

On June 18, 2009, the U.S. Supreme Court issued a ruling substantially increasing the evidentiary burden imposed on plaintiffs in federal age discrimination cases. Whereas plaintiffs could previously establish age-based disparate treatment claims by showing their age was a “motivating factor” in the challenged employment decision (e.g., termination, demotion, failure to hire or promote), plaintiffs must now demonstrate their age was the “but for” cause of the challenged decision. In other words, employees must now prove their age was the reason why their employer took the disputed action, and not merely a reason that motivated the employer in making the disputed employment decision.

The case, *Gross v. FBL Financial Services, Inc.*, was filed by Jack Gross, a 54-year-old employee transferred to a new position he considered to be a demotion because, even though his compensation remained the same, some of his former duties were allocated to a younger employee. Gross sued under the Age Discrimination in Employment Act (ADEA), the federal law prohibiting discrimination against employees age 40 and older. Gross was successful at trial, but FBL challenged the trial court’s instructions to the jury regarding the burden of proof. Specifically, FBL objected to the trial court’s instruction that the jury must find in Gross’ favor if they determined that he was demoted and that his age was a “motivating factor” in the demotion, that is, if his age played some role in the employer’s decision.

The Supreme Court held that, based on the statutory language of the ADEA, a plaintiff in a federal age discrimination case must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse action. Moreover, in cases where a plaintiff establishes some evidence that age was a motivating factor (commonly referred to as a “mixed-motives” case), the employer is no longer required to respond by demonstrating that it would have taken the same action regardless of the employee’s age. The Court eliminated a

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plaintiff’s ability to prove an ADEA claim based on mixed motives.

This decision is good news for employers defending federal age discrimination claims. However, the Court noted that this decision does not have broader application for other discrimination claims, such as those under Title VII barring discrimination on the basis of race, color, religion, sex and national origin, because Title VII’s statutory language is distinct from that of the ADEA. For similar reasons, the decision may not affect age discrimination claims under state anti-discrimination laws as the Court’s analysis was based on particular language in the ADEA that may not be present in the law in effect where a given company operates.

Given the significance of this case in the context of age discrimination jurisprudence, Congress may take legislative action to overturn the Court’s decision. In the meantime, as a result of this decision employers will most likely be more successful in defending federal age discrimination claims at trial, and fewer age discrimination claims are expected to survive pre-trial motions for summary judgment. Still, although this decision provides welcome relief to employers generally, employers should continue to

ensure that employment decisions are based on legitimate nondiscriminatory reasons and, where appropriate, confer with counsel regarding difficult personnel decisions involving employees protected by the ADEA.

Author:

Russell E. Adler
212.808.2750
adlerr@pepperlaw.com

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Pepper Hamilton LLP

Attorneys at Law

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