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EMPLOYMENT LAW UPDATE

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Employer Victory in U.S. Supreme Court Age Discrimination Ruling

The U.S. Supreme Court held in *Gross v. FBL Financial Services, Inc.* that plaintiffs must prove that age is a “but for” cause of an adverse employment decision under the Age Discrimination in Employment Act (“ADEA”). As a result, an employer faced with an ADEA claim is not required to show that it would have taken the same adverse action regardless of age, even if evidence indicates that age may have been a contributing factor. The Court’s 5-4 decision, written by Justice Thomas, may also signal significant developments in employment law beyond the ADEA.

Background

In 2003, plaintiff Jack Gross, a 54 year old employee of FBL Financial Group, was reassigned from his position as claims administration director to claims project coordinator. Many of his job responsibilities were transferred to a former supervisee in her early forties, and Gross interpreted the reassignment as a demotion. In 2004, Gross filed suit alleging age discrimination under the ADEA. The trial court followed the “mixed-motives” precedent of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Court ruled that if a Title VII plaintiff shows that discrimination was “a motivating” or a “substantial” factor in the employer’s action, the burden of persuasion would shift to the employer to establish that it would have taken the same action regardless of that impermissible consideration. Over FBL’s objections, the trial court instructed the jury that if Gross showed age discrimination to be a “motivating factor,” FBL would need to carry the burden of proving that it would have demoted Gross regardless of age, even if other factors also motivated the decision. The jury found that FBL had discriminated on the basis of age and awarded Gross \$46,945 in lost compensation.

FBL appealed, and the Court of Appeals for the Eighth Circuit reversed and remanded. The appeals court held that Gross needed “direct evidence” linking the alleged discrimination with his demotion in order to shift the burden to FBL. From that decision, Gross petitioned the Supreme Court.

The Supreme Court’s Ruling

First, the Court held that previous decisions interpreting the burden of persuasion under Title VII were not applicable to the ADEA. The Court noted that while Congress had codified the recognition of Title VII “mixed-motives” claims through the 1991 Civil Rights Act, it had distinctly declined to make a comparable amendment to the ADEA, even though the statute had been amended in other

ways. Applying principles of statutory interpretation, the Court reasoned that Congress was presumed to have acted intentionally where it amended one law without amending another.

Examining the text of the ADEA, the Court then concluded that the ordinary meaning did not allow for “mixed-motives” age discrimination claims. The Court found that in requiring that an employer take adverse action “because of” age, the ADEA established that age must be the “reason” for the employer’s action. Under the plain language of the ADEA, a plaintiff retains the burden of proving that “but for” the employee’s age, the employer would not have taken an adverse action.

Finally, the Court flatly rejected the contention that *Price Waterhouse* in any way controlled interpretation of the ADEA. The Court questioned whether it would have constructed a different approach had it been deciding the case today. Citing the challenge of creating workable jury instructions under *Price Waterhouse*, the Court noted that application of the burden-shifting framework was too difficult.

Justice Stevens, joined in dissent by Justices Souter, Ginsburg, and Breyer, urged the Court to apply the “mixed-motives” approach established in *Price Waterhouse* and reasoned that Title VII and the ADEA should be interpreted consistently. In a separate dissent, Justice Breyer disagreed with the “but for” standard and contended that the burden-shifting framework was both appropriate and workable.

Practical Implications for Employers

The primary significance of the Court’s ruling in *Gross* will be the increased difficulty that employees will face in establishing a claim for age discrimination. Furthermore, lower courts may hesitate to apply the “mixed-motives” approach to other, non-ADEA employment discrimination claims if there is no explicit statutory provision establishing “mixed motives” for those particular claims.

While the *Gross* decision is a positive development for employers, they should be aware that Congress may still act to legislatively overrule the Court as it did with the Americans with Disabilities Amendments Act of 2008 and the Lily Ledbetter Fair Pay Act of 2009.

Rodney B. Sorensen is a partner in the San Francisco office of Payne & Fears LLP, where he represents employers in all types of employment-related litigation, including wrongful termination, discrimination, sexual harassment, unfair competition and wage and hour class actions in state and federal court proceedings, administrative hearings, mediation and arbitration. Mr. Sorensen can be reached at (415) 277-2255.

Leila S. Narvid is an associate in the San Francisco office of Payne & Fears LLP, where she focuses on the representation of employers in all aspects of labor and employment law, including discrimination, sexual harassment, wrongful termination, retaliation, disability and wage and hour violations. Ms. Narvid can be reached at (415) 277-2253.

If you would like further information, please contact your Payne & Fears LLP attorney.

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