

To: Our Clients and Friends

July 6, 2009

Supreme Court Holds That ADEA Plaintiffs Have a Higher Burden of Proof Than Title VII Plaintiffs

The Supreme Court recently issued a decision that will make it more difficult for individuals to prove intentional age discrimination claims under the Age Discrimination in Employment Act of 1967, as amended (“ADEA”). In Gross v. FBL Financial Services, Inc., the United States Supreme Court held in a 5-4 decision that in order to prevail in an ADEA disparate-treatment case, individuals must prove, by a preponderance of the evidence, that their age was *the* reason -- the “but for” cause -- for an adverse employment action. This standard of proof is more burdensome for plaintiffs than the standard governing employment discrimination claims based on race, color, religion, sex, and national origin under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), which is that race (or any of these other factors) was a “motivating factor” in the employer’s decision. The Court’s decision in Gross represents a significant departure from lower court decisions in ADEA cases.

Writing for the Court, Justice Clarence Thomas explained that the ADEA makes it unlawful for an employer to take an adverse employment action against an individual “because of” an individual’s age. Citing dictionary references, Justice Thomas noted that the ordinary meaning of the term “because of” an individual’s age is that the individual’s age “was the ‘reason’ that the employer decided to act.” Justice Thomas then concluded that an individual claiming age discrimination under the ADEA must “establish that age was the ‘but-for’ cause of the employer’s adverse action.”

Justice Thomas further rejected applying the mixed motive analysis the Court had applied in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) to the ADEA. In Price Waterhouse, the Court addressed a Title VII mixed motives case and, through a plurality opinion and a concurring opinion, agreed that if a Title VII plaintiff can show that discrimination was a “motivating” or a “substantial” factor in an employer’s adverse employment action, then the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action regardless of the individual’s protected status. Following the Price Waterhouse decision, Congress passed the Civil Rights Act of 1991, which expressly amended the discrimination provisions of Title VII - but not the ADEA -- to establish employer liability if an individual proved that his or her protected status was “a motivating factor” for an adverse

employment action. In Gross, the Court reasoned that Congress’s action in amending Title VII, but not the ADEA, to legislatively sanction the burden shifting analysis means that Congress did not intend to “transfer the Price Waterhouse burden-shifting framework into the ADEA”. Accordingly, the Court explained that the ADEA warrants employer liability only if it takes an adverse employment action against an individual “because of” that individual’s age and rejected the burden-shifting analysis that applies in Title VII.

As a practical matter, the Court’s decision in Gross may make it easier for an employer facing a claim of intentional discrimination under the ADEA to obtain summary judgment or to warrant more favorable jury instructions, where there is undisputed evidence that at least one determining factor in an employer’s decision was not based on age. The Court’s analysis may also be used by employers to seek this higher standard of causation in applying the retaliation provisions of Title VII (which also were not amended in 1991) and other employment statutes.

For information about anything contained in this [Labor and Employment](#) Bulletin, please speak with your regular Bryan Cave LLP contact