



Alert

Labor & Employment Client Service Group

To: Our Clients and Friends

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The Supreme Court's Recent *Gross* Ruling Has Generally Not Made It Easier For Defendants To Win Summary Judgment Rulings In Age-Discrimination Cases Under The ADEA

On June 18, 2009, the Supreme Court issued its controversial ruling in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). That ruling requires plaintiffs in Age Discrimination in Employment Act ("ADEA") cases to prove that age was the "but-for" cause of the employer's adverse employment action. Congress may act soon to override this statutory ruling. In the meantime, recent appellate court rulings demonstrate that *Gross* has generally not made it easier for defendants to win summary judgment in ADEA cases.

Gross v. FBL Financial Services

In *Gross v. FBL Financial Services*, the Supreme Court ruled that in "mixed-motive" situations (where there are both permissible and discriminatory motives for an employer's adverse action toward an employee), an ADEA plaintiff may not shift the burden to an employer to show that the adverse action would have occurred for non-discriminatory reasons alone. Instead, in each case, the plaintiff must prove that the adverse employment action was the "but-for" cause of the employer's adverse action. The employee therefore always retains the burden of proof that the adverse action would not have occurred but for the plaintiff's age. Unlike claims under Title VII, an ADEA claim will fail if a plaintiff can only show that age discrimination was a "motivating factor," but not the decisive factor.

Application of *Gross*

Many believe that the *Gross* ruling will make it harder for plaintiffs to prevail in ADEA cases. While that may be true, post-*Gross* rulings by most of the federal circuits indicate that *Gross* will generally not make it easier for employers to obtain early dismissal of ADEA claims through summary judgment. The *Gross* "but-for" standard has simply not been a factor in most recent appellate rulings that either affirmed or reversed the award of summary judgment in ADEA cases. Instead, the courts have generally

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looked to see if the plaintiff has sufficient evidence for a jury to conclude that the employer's stated rationale was a pretext for age discrimination. The question whether age was the "but-for" factor, or simply a non-decisive factor, is one that is left for trial.

Post-*Gross* ADEA appellate rulings that reversed the award of summary judgment in favor of an employer include: *Leibowitz v. Cornell University*, 584 F.3d 487 (2nd Cir. Oct. 23, 2009) (there was sufficient evidence for a rational fact-finder to conclude that the employer's stated reasons for non-renewal of a contract were a pretext for age discrimination); *Velez v. Thermo King de Puerto Rico, Inc.*, Case No. 08-1320, 2009 U.S. App. LEXIS 22718, 92 Empl. Prac. Dec. (CCH) ¶ 43,711 (1st Cir. Oct. 16, 2009) (employer's shifting explanations, and more lenient disciplinary treatment of younger employees, was sufficient for a fact finder to conclude that age was the "determinative factor" for the employee's dismissal); *Baker v. Silver Oak Senior Living Management Co.*, 581 F.3d 684, 688-89 (8th Cir. Sept. 14, 2009) (there was sufficient evidence from the employer's ageist comments and shifting explanations for a jury to conclude that age discrimination accounted for the adverse employment action). None of these turned on whether there were "mixed motives" in which age discrimination was the "but for" factor for an adverse employment action.

Post-*Gross* ADEA appellate rulings that affirmed the award of summary judgment to the employer include: *Cervantez v. KMGP Services Co., Inc.*, No. 08-11196, 2009 U.S. App. LEXIS 20702, 107 Fair Empl. Cas. (BNA) 369 (5th Cir. Sept. 16, 2009); *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. Sept. 4, 2009); *Guinto v. Exelon Generation Co.*, No. 08-2191, 2009 U.S. App. LEXIS 18447 (7th Cir. Aug. 18, 2009); *Wellesley v. Debevoise & Plimpton LLP*, No. 08-1360, 2009 U.S. App. LEXIS 20843 (2nd Cir. Sept. 21, 2009). In these cases, the courts found that the employee had not produced sufficient evidence to show that the employer's stated reasons were a pretext for age discrimination. None of the rulings turned on whether the employee had failed to show that age was the "but-for" cause of an adverse employment action.

The Third Circuit has applied the "but-for" standard established in *Gross* to support the award of summary judgment to the employer, but there was overwhelming evidence that legitimate factors were the primary reasons for the employee's termination. *Kelly v. Moser, Patterson and Sheridan, LLP*, 2009 U.S. App. LEXIS 22352, 107 Fair Empl. Cas. (BNA) 777 (3^d Cir. Oct. 9, 2009).

Congressional Response

Many in Congress wish to override the Supreme Court's ruling in *Gross* by amending the ADEA to align it with the standards governing Title VII claims. On October 6, 2009, Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, introduced H.R. 3721, a bill to "amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate standard of proof."

The House bill provides that a plaintiff may establish an ADEA violation by showing either that (a) the adverse action would not have occurred absent age discrimination (essentially the "but-for" standard), or (b) that age discrimination was a "motivating factor . . . even if other factors also motivated that practice." In the latter case, if the employer demonstrates that it would have taken the same action in the absence of the discriminatory age motive, the plaintiff would not be entitled to an award of damages but only declaratory and injunctive relief (excluding reinstatement, hiring, or promotion), and

an award of attorney's fees and costs. The plaintiff could rely on any form of admissible or direct evidence to show that either type of violation occurred.

H.R. 3721 was referred to the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions on November 16, 2009, and has also been referred to the House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties. If passed, the bill would apply to any lawsuit pending on or after June 17, 2009 when the Supreme Court issued the *Gross* ruling.

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