

CLIENT ALERT: United States Supreme Court Clarifies Higher Standard of Proof for Age Discrimination Claims

On June 18, 2009, the United States Supreme Court ruled that a plaintiff's burden of proof under the Age Discrimination in Employment Act ("ADEA") is higher than it is for an employment discrimination claim on the basis of race, sex, color, religion or national origin under Title VII of the Civil Rights Act of 1964. The case, *Gross v. FBL Financial Services, Inc.* provides some clarity to employers defending claims under the ADEA, which makes it unlawful for an employer to discriminate against an employee or an applicant age 40 or older because of age.

In a 5-4 decision, the Supreme Court held that a plaintiff bringing a claim under the ADEA must show, by a preponderance of the evidence, that age was the "but for" cause of the employer's adverse employment decision. This means that the plaintiff must show that the employer would not have taken the adverse employment action but for the employee's age. Justice Clarence Thomas wrote the majority opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined.

The case itself concerned Jack Gross, who filed a claim in District Court alleging that FBL demoted him because of his age in violation of the ADEA. The jury found in Gross's favor, after being instructed by the District Court that if it found that age played a part in FBL's decision to demote him, FBL had violated the law. FBL appealed the decision.

The Supreme Court held that the District Court had incorrectly instructed the jury on the Title VII employment discrimination standard. Under Title VII, a plaintiff needs to show that a protected characteristic was a "motivating factor" in the employer's decision, not the decisive factor. The Supreme Court ruled that under the ADEA, a plaintiff must show that age is the decisive factor that led to the adverse employment action taken by the employer. The Supreme Court based its decision, in part, on the differences in the language of Title VII and the ADEA.

Gross is a good decision for employers, as it makes it more difficult for employees to succeed in age discrimination claims. Employers must remember, however, that *Gross* applies to federal law only and does not change the standards of proof for state law claims. An employee may still be able to make out an age discrimination claim under applicable state law even if the employee cannot do so under the ADEA. Employers should proceed cautiously and consult with employment counsel when considering taking an adverse employment action against an older employee protected by the ADEA or state law.>

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