

Age Discrimination Proof Clarified

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The proof of an age discrimination claim has become more difficult under a decision of the U.S. Supreme Court, in what should be its last employment law decision of the year. In its June 18th decision in Gross v. FBL Financial Services Inc., the Court has held that an applicant or employee must show that age was the “but for” cause of the employment decision being challenged.¹ Jack Gross had challenged his demotion that was part of a corporate restructuring, which he alleged was at least in part based on his age.

The trial court had instructed the jury to rule in Gross’ favor if his age was a motivating factor in the demotion decision, and the jury had ruled in Gross’ favor. The appellate court then held that the motivating factor instruction should not have been given to the jury unless Gross presented direct evidence that age had motivated the demotion decision. Instead of reviewing the appropriateness of the instruction, the Court chose this opportunity to reject the use of the “motivating factor” test in age discrimination cases.

The Age Discrimination in Employment Act (ADEA) provides that “[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's age.”² Interpreting “because of” narrowly, the Gross Court distinguished its own decisions under Title VII. In its decision, the Supreme Court rejects its earlier interpretation of Title VII in a plurality opinion, which held that “because of such individual's sex” means that gender must be “irrelevant to employment decisions.”³

The Court relied in part on the fact that Title VII was amended in 1991 to authorize discrimination claims if the consideration of race, sex, or another protected category was “a motivating factor” for the adverse action.⁴ The dissenting opinion in Gross points out that Congress emphasized in 1991 that the motivating-factor test was consistent with its original intent in enacting Title VII. But the majority opinion relies on the fact that Congress neglected

¹ No. 08-441, 2009 U.S. LEXIS 4535 (U.S. June 18, 2009), vacating 526 F.3d 356 (8th Cir. 2008).

² 29 U. S. C. §623(a)(1).

³ Price Waterhouse v. Hopkins, 490 U. S. 228, 240(1989)

⁴ See 42 U. S. C. §§2000e-2(m) and 2000e-5(g)(2)(B).

to add such a provision to the ADEA when it amended Title VII, even though it amended the ADEA in several ways at the same time.

Under this new decision, an applicant or employee must prove by a preponderance of the evidence that age was the **but for** cause of the challenged adverse action. In other words, the adverse action would not have occurred **but for** the employer's discriminatory intent. The Supreme Court has described this standard as follows:

we begin by assuming that that factor [discriminatory intent] was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.⁵

The evidence of discriminatory intent can either be direct evidence of age bias, such as a statement about the person's age, or indirect circumstances which suggest age discrimination, such as a significant difference in the qualifications of applicants. To be successful, Justice Breyer's dissent points out that the "but for" causation standard requires "a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious...."

⁵ 490 U.S. at 240.