CLIENT ALERT

Supreme Court Shifts To "But For" Test In Age Discrimination in Employment Act Claims

Jun.30.2009

The Supreme Court recently made it more difficult for plaintiffs to win discrimination claims based on age. In a decision that may bring about sweeping changes in the litigation of claims brought under the Age Discrimination in Employment Act of 1997 (the "ADEA") and other non-Title VII discrimination cases, the Supreme Court decided last week in Gross v. FBL Financial Services, Inc., No. 08-441, 557 U.S. __, 2009 WL 1685684 (June 18, 2009), that plaintiffs must prove that age is the "but for" cause of the adverse employment action against them. This is a sharp departure from the previous application of a burden-shifting mechanism under which plaintiffs were required to prove by a preponderance of the evidence that age was a "motivating factor" behind the adverse employment action and then employers had the opportunity to prove that the adverse employment action would have occurred absent the illegal motivating factor.

When Petitioner Jack Gross was 54 years of age, Respondent FBL Financial Group reassigned him and redistributed many of his job duties to a younger employee in a move that Gross, employed by the company since 1971, considered a demotion. After Gross won at trial and FBL appealed, the Eighth Circuit ruled that Gross should have had to produce "direct evidence" that his age motivated the adverse employment action, at which point the burden should have shifted to FBL to prove that the adverse action would still have occurred. The Supreme Court vacated the Eighth Circuit's decision.

The majority held that (1) the burden shifting mechanism of Title VII cases does not apply to ADEA discrimination cases, and (2) the ADEA requires a showing that "but for" Petitioner's age, the adverse employment action would not have occurred. Writing on behalf of the five Justice majority, Justice Thomas wrote, "Title VII is materially different with respect to the relevant burden of persuasion" than the ADEA. Justice Thomas cited Congress's decision to amend Title VII to prohibit discrimination when one of the enumerated factors is a "motivating factor" in an adverse employment action. In comparison, he wrote, Congress did not choose to amend the ADEA in the same fashion, and the language of the ADEA which prohibits discrimination "because of" age should be read to require a showing that "but for" a plaintiff's age, the adverse action would not have occurred. Thus, the Court concluded that the text of the ADEA itself does not authorize "mixed-motive" claims.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. In his dissent, Justice Stevens argued that the Title VII burden shifting mechanism applies equally to ADEA cases, based on the language of the statute and the Court's precedent. Justice Breyer wrote a separate dissent, which Justices Souter and Ginsburg joined, arguing that the majority's "but for" analysis is untenable in the context of discrimination claims, where the employer is better situated than the employee to describe the motivation behind an adverse employment action.

It is likely, in light of the decision in Gross, that the Title VII framework articulated in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) is now limited to Title VII discrimination cases. Thus, claims brought under the ADEA as well as, for example, the Americans with Disabilities Act, will require a greater burden of proof by plaintiffs in the form of a "but for" showing. Justice Thomas seemingly invited Congress to amend the ADEA, however, to include language comparable to the "motivating factor"
language of Title VII. In the meantime, discrimination claims outside of the Title VII context may look very different going forward.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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