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U.S. Supreme Court Decision: "Mixed-Motive" Theory Unavailable in Age Discrimination Cases

Late last week, the U.S. Supreme Court issued a decision that will significantly impact the way employers defend claims of age discrimination in the workplace and make it more difficult for employees to prevail on claims brought under the Age Discrimination in Employment Act ("ADEA").

In a 5-4 decision issued in *Gross v. FBL Financial Services, Inc.* ("*Gross*"), the Supreme Court held that the ADEA does not allow "mixed-motive" claims of age discrimination. This means that ADEA plaintiffs will now have to prove that age was the "but-for" or deciding factor in the adverse employment action at issue rather than simply one of many factors.

Background

In an employment discrimination case, the ultimate burden of proof is on the plaintiff to show that he or she was a victim of discrimination. In the 1989 *Price Waterhouse v. Hopkins* ("*Price Waterhouse*") case, the Supreme Court established a framework for establishing a "mixed-motive" case under Title VII of the Civil Rights Act of 1964 ("Title VII"). If a plaintiff could show direct evidence that an employer used an illegitimate factor to make an adverse employment action, then an employer, to avoid liability, would need to show that it would have taken the same employment action regardless of the illegitimate factor.

In 1991, Congress amended Title VII to allow, expressly, "mixed-motive" discrimination claims. Notably, Congress did not make similar changes to the ADEA. This fact proved to be important in the *Gross* majority opinion.

The Decision in *Gross* Rejects Mixed-Motive

In *Gross*, an employee sued his employer under the ADEA, stating that he had been demoted because of his age. The employer countered that its decision to change the employee's job responsibilities was based in part on non-discriminatory considerations, including its decision to undergo corporate restructuring. Following trial, the district court instructed the jury to find that age discrimination had occurred if it determined that age played **any** part in the employee's demotion. The jury returned a verdict for the plaintiff.

On appeal, the Eighth Circuit held that the jury instructions were flawed because the mixed-motive instruction did not make clear that the plaintiff needed to proffer direct evidence of discrimination before the burden of persuasion shifted to the defendant. The issue presented to the Supreme Court was whether an ADEA plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motive jury instruction. The Supreme Court held that such an instruction was **never** proper because the ADEA does not allow for a mixed-motive claims.

The holding reflects an arguable departure from prior Supreme Court jurisprudence, which had interpreted the ADEA in accordance with Title VII because of the similar statutory language and policy considerations underlying the two acts. In its decision, the Court highlights the fact that Title VII was amended expressly to authorize claims where discriminatory animus is a motivating factor with respect to an adverse action taken against an employee. The ADEA, on the other hand, was not similarly amended. Further, the Court reasoned that text of the statute – which renders unlawful employment actions taken "because of" an individual's age – implies that age must be the "**but-for**" reason for the action, not simply a reason among others.

Implications of *Gross* for Employers

- *Gross* effectively eliminates mixed-motive cases under the ADEA, meaning that employees must show that age was the main or decisive reason for the adverse action taken against them.
- The decision is thus good news for employers as it renders it more difficult for employees to succeed on ADEA claims.
- However, since *Gross* only affects age discrimination claims under federal law, it still may be possible for employees to bring mixed-motive claims under state law.

Finally, Congress may act in response to *Gross* by amending the ADEA to include mixed-motive claims. Although there are no bills currently pending to address this issue, many labor and employment law experts believe that the Democratically-controlled Congress will respond swiftly as recently happened in reaction to the "Lilly Ledbetter" pay discrimination case discussed in a [previous E-lert](#).

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