

A recent U.S. Supreme Court ruling has raised the bar for employees hoping to prove age discrimination under the Age Discrimination in Employment Act ("ADEA").

In *Gross v. FBL Financial Services, Inc.*, No. 08-441, U.S. Supreme Court (June 18, 2009), the Court was asked to decide whether a plaintiff must submit direct evidence of discrimination in a suit filed under the ADEA in order to shift the burden of persuasion to the defendant. By a narrow 5-4 majority, the Court held the burden-shifting analysis utilized in Title VII cases did not apply to ADEA claims and, consequently, a plaintiff who brings an age discrimination claim under the ADEA must prove by a preponderance of the evidence that age was the "but for" cause of the challenged adverse employment action.

### **Factual Background**

Following a corporate restructuring, Plaintiff, a 54-year-old employee of FBL Financial Services, was reassigned to the position of claims project coordinator. Simultaneously, many of Plaintiff's job responsibilities were transferred to a new position, which was filled by an employee younger than Plaintiff. Viewing his reassignment and the transfer of his job responsibilities as a demotion, Plaintiff filed suit against FBL under ADEA.

At trial, Plaintiff introduced evidence suggesting that his age was a motivating factor in FBL's decision to reassign him. FBL defended its decision by offering evidence that Plaintiff's reassignment was part of its corporate restructuring and that Plaintiff's skill set was better suited to his new position. At the close of evidence, the district court instructed the jury to return a verdict for Plaintiff if it found by a preponderance of the evidence that his age was a "motivating factor" in FBL's decision to reassign him. The jury was also instructed to return a verdict in favor of FBL if it found by a preponderance of the evidence that FBL would have reassigned Plaintiff regardless of his age. The jury found in favor of Plaintiff and awarded him \$46,945 in lost wages.

FBL challenged the jury instructions on appeal. Holding that the district court had erroneously given a mixed-motive jury instruction even though Plaintiff had failed to offer any direct evidence of discrimination, the Eighth Circuit Court of Appeals reversed and ordered a new trial.

### **Legal Analysis**

The Supreme Court agreed with the Court of Appeals that the jury instructions were erroneous. However, the Court disagreed that the burden-shifting analysis used in mixed-motive cases should be applied in an ADEA disparate-treatment claim. Rather, the Court held, a plaintiff who brings a disparate-treatment claim under the ADEA "must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of proof does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." Pp. 4-12.

In reaching its decision, the Court refused to apply the burden-shifting analysis set forth in prior Title VII decisions such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), because "Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion." Specifically, the Court noted that when Congress amended Title VII to permit a plaintiff to establish discrimination by showing that age was simply a "motivating factor," it did not amend the ADEA to add similar language. Moreover, the Court noted, the language of the ADEA prohibits an employer from taking an adverse employment action "because of" an employee's age, and "the ordinary language of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." Based on these factors, the Court held, a plaintiff who brings a claim under the ADEA must prove by a preponderance of the evidence (which may be either direct or circumstantial) that age was the "but-for" cause of the adverse employment action. Moreover, the burden never shifts to the employer to prove that it would have taken the same action regardless of age.

### **Practical Considerations**

The *Gross* decision represents a major victory for employers. Following *Gross*, an employer sued under the ADEA will no longer be required to prove that it did not discriminate against an employee due to age. Instead, the burden of proving discrimination remains with the employee to prove that age was the "but-for" cause of the adverse employment action.

If you have immediate questions you may contact one of the members of Thompson Coburn LLP's Labor and Employment Group listed below:

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