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Supreme Court Deals a Victory to Employers in Age Discrimination Cases

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In what is being viewed as a significant victory for employers, the United States Supreme Court yesterday made it more difficult for plaintiffs to prove claims of age discrimination.

The sharply divided Court, in a 5-4 decision (*Gross v. FBL Financial Services, Inc.*), held that the Age Discrimination in Employment Act (ADEA) requires employees to prove that age was the *decisive* factor in the employer's adverse employment action, not simply one of several contributing factors to the employer's action. The majority decision, written by Justice Clarence Thomas, eliminates so-called "mixed motive" claims on the basis of age, stating that an employee alleging age discrimination bears the full burden of persuasion to show that age bias or discrimination was the employer's deciding factor in taking adverse action against the employee.

The Supreme Court noted that, unlike Title VII, which was amended to prohibit employment actions where membership in a protected category was a "motivating factor" in the adverse employment decision, the ADEA prohibits discrimination "because of" the individual's age. Due to the distinction between the language of Title VII and the ADEA, the Court declined to apply the "mixed motive" standard applicable in Title VII cases. The Court further eliminated the use of the Title VII burden-shifting framework in age discrimination cases, noting that even if the employee presents some evidence that age was a motivating factor in the adverse action, the burden of persuasion does not shift to the employer to show that it would have acted regardless of the employee's age.

The plaintiff in *Gross* sued for age discrimination under the ADEA, claiming that he was demoted at age 54 because of his age and replaced

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with a younger female employee in her forties. The plaintiff's employer, FBL Financial Services, contended that the reassignment arose from a corporate restructuring.

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During the original trial, Gross presented circumstantial evidence that his age played a role in the demotion, and the jury was instructed that it must return a verdict for the plaintiff if it found that "age was a motivating factor" in the reassignment. The jury found in favor of Gross. On appeal, the Eighth Circuit reversed the decision, finding that the jury instructions were erroneous. The Eighth Circuit held that because Gross did not present any "direct evidence" of discrimination, the District Court should not have utilized a "mixed motive" jury instruction. Yesterday, the Supreme Court held that a plaintiff bringing a disparate treatment claim under the ADEA must prove by a preponderance of the evidence that age was the "but-for" cause of the employment action, and that the burden of persuasion does not shift to the employer "even when the plaintiff has produced some evidence that age was one motivating factor in that decision." Therefore, the Supreme Court vacated the Eighth Circuit decision, remanding the case for further proceedings consistent with its opinion.

Although the *Gross* decision now makes it more difficult for employees to prove age discrimination under the federal ADEA, it remains to be seen what effect this will have on age discrimination claims brought under the California Fair Employment and Housing Act (FEHA), which typically follows federal precedent. In addition, there is already talk of a bill being introduced in Congress to amend the ADEA to reverse the effect of the *Gross* case.

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