

Law of the Workplace

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CLIENT ALERT

U.S. Supreme Court Rules Employees Pursuing an ADEA Disparate-Treatment Claim Must Prove that Age was the "But-For" Cause of the Alleged Adverse Action

Last week the U.S. Supreme Court issued a welcomed decision for employers facing disparate-treatment claims under the Age Discrimination in Employment Act of 1967 ("ADEA"). In Gross v. FBL Financial Services, Inc., --- S.Ct. ---, 2009 WL 1685684 (June 18, 2009), the Court held that "even when a plaintiff has produced some evidence that age was one motivating factor" in the alleged adverse employment action, the employee still "must prove, by a preponderance of the evidence, that age was the 'but-for' cause" of the adverse action.

In Gross, the petitioner sued his employer in District Court alleging that he was demoted because of his age. At the conclusion of the trial, the judge instructed the jury to find in favor of Gross "if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision." Age is a "motivating factor" if it "played a part or a role in [FBL]'s decision to demote [him]." Further, the jury was instructed to find in the employer's favor if it could prove Gross would have been demoted "regardless of his age." This was essentially a mixed-motive discrimination instruction under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Under the Price Waterhouse burden-shifting standard, once a plaintiff claiming that s/he "suffered an adverse employment action because of both permissible and impermissible considerations" can prove that the alleged discrimination was a "motivating" or "substantial" factor in the alleged discriminatory action, the burden shifts to the employer to prove "that it would have taken the same action regardless of that impermissible consideration." The jury found in favor of Gross. On appeal, the employer challenged the jury instructions. The Court of Appeals reversed and remanded finding that the jury instructions were improper not because Gross was allowed to use the Price Waterhouse burden-shifting standard, but because the instructions did not require Gross to provide direct evidence that age was a motivating factor in the alleged adverse decision.

The Supreme Court vacated the decision finding that even if an employee bringing an ADEA disparate-treatment claim produces "evidence that age was one motivating factor in the decision" unless the employee can prove "that age was the 'but-for' cause" of the adverse action, there is no discrimination. In so doing, the Supreme Court made a point of emphasizing that the text of the ADEA, unlike that of Title VII, fails to provide that a plaintiff can establish a discrimination claim by simply showing that age was a "motivating factor" in the decision. Further, the Supreme Court put stock in the fact that Congress amended Title VII to include "discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision" but failed to include such a provision in the ADEA even though both statutes were amended contemporaneously.

This decision is a major victory for employers as it will likely make it harder for employees to establish ADEA discrimination claims. Further, the Supreme Court provided hope to employers when it stated that “even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.” One may surmise from this that the Price Waterhouse burden-shifting standard may be a thing of the past. However, there is a potential downside for employers, as was the case with the Supreme Court’s employer-friendly decision in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007): one has to wonder if Congress will take action to remedy the outcome of this decision.

This material is intended to provide you with information regarding a noteworthy legal development. It should not be regarded as a substitute for legal advice concerning specific situations in your operation. If you have any questions or would like additional information on this topic, please contact our Firm at (860) 727-8900 or www.siegelconnor.com.

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