

U.S. SUPREME COURT *GROSS* AGE DISCRIMINATION CASE

by

Lee Hornberger

This article briefly reviews the recent U.S. Supreme Court decision of *Gross v FBL Financial Services, Inc*, ___ US ___ (June 18, 2009).

In *Gross*, the issue was whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in an Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 *et seq*, lawsuit. The ADEA is the Federal discrimination law that proscribes age discrimination by covered employers. A mixed-motives jury instruction basically means that, if there is evidence of several reasons for the adverse employment action, of which one reason is illegal, the burden of persuasion then shifts to the employer to show that it would have taken the adverse employment action even without the presence of "a" proscribed motivating reason. McNamara and Southerland, *Federal Employment Jury Instructions*, §§ 3.272 - 3.273, pp 3-53 to 3-55 (James Publishing).

Justice Thomas wrote the majority decision, joined by Chief Justice Roberts and Justices Alioto, Kennedy, and Scalia. The majority decision held that a mixed-motives jury instruction is never proper in an ADEA case. Because the majority decision held that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, the majority decision did not address whether plaintiffs must present direct, rather than circumstantial, evidence to obtain a burden-shifting instruction. Citing *Desert Palace, Inc v Costa*, 539 US 90, 99 (2003), the majority decision concluded that there is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the "but-for" cause of the employer's

adverse action.

Plaintiff relied on decisions construing Title VII, 42 USC 2000e, for his interpretation of the ADEA. Title VII is the Federal discrimination law that proscribes color, national origin, race, religion, and sex employment discrimination by covered employers. The majority decision held that Title VII is materially different concerning the relevant burden of persuasion, and Title VII decisions do not control the interpretation of the ADEA.

According to the majority decision, Congress amended Title VII in 1991 to clearly allow discrimination claims in which a proscribed consideration was "a motivating factor" for the adverse employment action. 42 USC 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

Unlike Title VII, according to the majority decision, the ADEA's wording does not provide that a plaintiff may establish discrimination by showing that age was simply "a" motivating factor. Congress did not add such a provision to the ADEA when it amended Title VII to add §§2000e-2(m), even though Congress at the same time amended the ADEA in several ways.

The ADEA provides that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 USC 623(a)(1).

Using dictionary definitions of "because," the majority decision concluded that under 623(a)(1), the plaintiff keeps the burden of persuasion to establish that age was the "but-for"

cause of the employer's adverse action.

The majority decision held that a plaintiff in an ADEA disparate-treatment case must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced evidence that age was one of the motivating factors for the adverse employment action.

Justice Stevens dissented, with Justices Breyer, Ginsburg, and Souter joining. Justice Stevens' viewpoint was that the majority decision's "resurrection of the but-for causation standard is unwarranted. *Price Waterhouse [v Hopkins]*, 490 U. S. 228 (1989) repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today."

Justice Breyer dissented, with Justices Souter and Ginsburg joining. It was Justice Breyer's viewpoint that the words "because of" do not inherently require a showing of "but-for" causation, and he saw no reason to read them to require such a showing.

Lee Hornberger, Arbitration and Mediation Office of Lee Hornberger, www.leehornberger.com, can be contacted at leehornberger@leehornberger.com or 231-941-0746.

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