

## Service

Labor & Employment

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# Supreme Court Adopts "But For" Rule for ADEA Cases

On June 18, 2009, the U.S. Supreme Court ruled in a 5-4 decision that plaintiffs claiming disparate-treatment discrimination under the Age Discrimination in Employment Act (ADEA) must prove that their age was "the reason" the employer took adverse action against them. *Gross v. FBL Financial Services, Inc.*, Case No. 08-441.

Prior to this decision, courts typically construed the framework for suing under the ADEA as identical to that under a Title VII claim. This has now been rejected by the Supreme Court. In *Gross*, the Supreme Court ruled that the ADEA is not tied to the framework of a Title VII suit. Specifically, under Title VII, a plaintiff may prevail if he/she establishes that the protected status was "a motivating factor" for the adverse employment action. In a Title VII case, the employer may defend by claiming it had "mixed motives" for the decision, and would have taken the same action even in the absence of the unlawful motivating factor. In *Gross*, the Supreme Court held that the ADEA does not have a mechanism for a "mixed motives" case. A plaintiff suing under the ADEA must prove, by a preponderance of the evidence, that the adverse employment action of the employer occurred "because of" the age of the employee. The plaintiff must show that age was the "but for" cause of the adverse action and not simply one of the motivating factors in the employer's decision making. In practical terms, it is more difficult for a plaintiff to establish that a protected factor is "the reason" for a decision, as compared to "one of the reasons" for a decision.

Furthermore, as the Supreme Court ruled that ADEA claims cannot include a mixed-motives case, the Supreme Court also concluded that the burden of persuasion never switches to employers in a disparate-treatment case under the ADEA. In a mixed-motives case under Title VII, the burden of persuasion shifts to an employer, to show that it would have taken the same employment

action regardless of the impermissible factor. The Supreme Court concluded that the plaintiff's burden under the ADEA is more stringent than under Title VII, and the plaintiff retains the burden of persuasion at all times. This interpretation of the ADEA strengthens employers' defenses to employees' claims of age discrimination under the ADEA. Employers must keep in mind, however, that most states have anti-discrimination statutes, and the state courts' interpretations of those laws may not follow *Gross*. Additionally, employers may expect some action by Congress to amend the ADEA, as it recently amended the pay discrimination statute by passing the Ledbetter Fair Pay Act, in an effort to be more employee-friendly. Regardless of the standard for discrimination, however, employers should continuously strive toward policies and practices not predicated on the age of employees, and should continue prompt investigation into all claims of age discrimination by its employees.

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If you have any questions about this or any other labor & employment matters, please contact your Husch Blackwell Sanders attorney.

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