

June 2009

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If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' [labor and employment law practice](#) covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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## Supreme Court Increases Burden for Employees in Age Discrimination Cases

As a result of *Gross v. FBL Financial Services, Inc.*, issued by the U.S. Supreme Court on June 18, 2009, employees have an increased burden of proof when bringing age discrimination claims under the Age Discrimination in Employment Act ("ADEA"). Employees must prove by a preponderance of evidence that age was the "but-for" cause of the challenged adverse employment decision. This is a significant change from the previous standard in which employees merely had to demonstrate that age was a motivating factor in the adverse employment decision, often referred to as a mixed motive case. This recent decision also altered the burden of proof in ADEA cases by holding that the burden of proof remains with the employee and no longer shifts to the employer. Previously, once an employee stated a cause of action because age was a motivating factor, the burden would shift to the employer to show that it would have made the same decision regardless of age.

### *Gross v. FBL Financial Services, Inc.*

Plaintiff Jack Gross brought suit against his employer, FBL Financial Group, Inc. ("FBL") under the ADEA alleging that he was demoted due to his age. The district court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of evidence, that he was demoted and his age was a motivating

factor. Additionally, the jury was instructed to enter a verdict for FBL if it proved that it would have demoted Gross regardless of age. The court of appeals reversed and remanded, finding that because Gross did not present direct evidence of discrimination, the burden of persuasion did not shift to FBL to prove that it would have made the same decision regardless of age.

The question before the Supreme Court was whether a plaintiff must present direct evidence of age discrimination to obtain a mixed motive jury instruction under the ADEA. In a 5-4 decision, the Court held that regardless of whether the evidence is direct or circumstantial, the burden of persuasion never shifts to the party defending an alleged mixed motive claim under the ADEA. Writing for the majority, Justice Thomas explained that unlike Title VII, the text of the ADEA does not permit plaintiffs to demonstrate discrimination by showing that age was simply a motivating factor. Justice Thomas then interpreted the text of the ADEA and held that the language "because of" requires plaintiffs to show that age was "the 'reason' that the employer decided to act."

The majority went on to criticize the burden shifting analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), used for mixed motive claims under Title VII. Justice Thomas concluded the majority

opinion by stating that “the problems associated with [the] application [of the burden shifting analysis] have eliminated any perceivable benefit to extending its framework to ADEA claims.”

Both Justice Stevens and Justice Breyer wrote a dissent. Justice Stevens argued that the majority’s interpretation of the “because of” language of the ADEA contrasted Title VII’s standard reading, which established that such language prohibits adverse employment actions motivated in whole or in part by the age of the employee. Additionally, Justice Stevens felt that the majority engaged

in “unnecessary lawmaking” by not answering the question presented. Justice Stevens explained that he would have merely answered the question and found that a plaintiff need not present direct evidence of age discrimination to obtain a mixed motive instruction.

#### **A Win for Employers?**

Employers will benefit from this decision because it will be more difficult for employees to carry their burden of proof in age discrimination cases under the ADEA. First, the burden of proof has increased. Instead of

merely proving that age was a *factor* in the adverse employment decisions, employees must show that age was *the factor*. Second, the burden of proof remains with the employee and can no longer shift to the employer.

This benefit for employers, however, may be short lived. In a footnote, the Court explained that including motivating factor claims under the ADEA is a decision for Congress to make. Based on this reference, there may be future legislation to amend the ADEA and explicitly allow for such motivating factor claims.

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