

## Labor & Employment Practice Group

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## Labor & Employment Update

### Supreme Court Raises the Bar for Age Discrimination Claimants

By Nicholas Anaclerio

By 2010, more than half of U.S. workers will be over 40, thus protected from age discrimination in employment by the federal *Age Discrimination in Employment Act*.<sup>1</sup> As a downwardly spiraling economy and depleted and devalued retirement accounts have forced retirees back to work, many older workers have been compelled to defer retirement, and many others have fallen victim to massive reductions in force. One by-product has been a proliferation of age discrimination claims. But an important 5-4 U.S. Supreme Court ruling this past week made it clear that among the challenges these economically troubled times hold for age discrimination claimants is a heavy burden of proof in court.

The U.S. Supreme Court's June 18 decision in *Gross v. FBL Financial Services Inc.* made it clear that the burden always remains on the claimant/employee to show that age discrimination *alone* motivated a firing or other adverse job action.<sup>2</sup>

Before *Gross*, age discrimination claimants could sue and recover for mixed-motive age discrimination by showing that age was one "motivating factor" or "played a part" in an employer's adverse job action, even if age was not the only reason for that job action. Once such a "mixed motive" plaintiff showed that age bias was at least one factor motivating his employer, the burden shifted to the defendant/employer to prove that its job action would have been identical regardless of the plaintiff's age. But in *Gross*, the Court's majority rejected these burden-shifting principles which had previously been the law in nearly every federal circuit.

Distinguishing the ADEA from Title VII of the *Civil Rights Act of 1964* (the Supreme Court recognized the viability of "mixed motive" Title VII cases in 1989), the *Gross* Court found that the burden never shifts from the plaintiff in an ADEA case. In an ADEA case the plaintiff must always prove that age was more probably than not the reason for the defendant's discharge decision or other adverse job action. The *Gross* Court found that the ADEA's text, which prohibits discrimination "because of" age, is synonymous with a "but-for" causation requirement. Consequently, an ADEA claimant must show that "but for" age, the challenged adverse job action would not have occurred. An ADEA plaintiff's age must be *the reason* for the defendant/employer's action, not merely one reason among others. Proof that an employer acted on a combination of legitimate and unlawful motives (poor performance and age discrimination, for example) is insufficient for an age discrimination claimant to prevail.

Justice Stevens, writing for the *Gross* Court's four dissenting justices, issued an unusually strongly-worded condemnation of the majority's decision, labeling it "inappropriate,"

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“irresponsible,” “unnecessary lawmaking,” and an “utter disregard of our precedent and Congress’ intent.” His dissent also protested that “[t]he most natural reading of [the ADEA’s] statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee” (emphasis supplied). But while Congress may ultimately agree with the Gross dissenters and legislatively revive the “mixed motive” age discrimination claim, for now, workers who suffer discharges or other job discrimination based partly, but not wholly, on age no longer have winning federal age discrimination claims.<sup>3</sup>

<sup>1</sup> Ellen Mosner et al., *The Convergence of the Aging Workforce and Accessible Technology*, July 2003, <http://www.microsoft.com/enable/aging/demographics.aspx>.

<sup>2</sup> *Gross v. FBL Financial Services, Inc.*, No. 08-441, 2009 WL 1685684 (U.S. June 18, 2009).

<sup>3</sup> The average age of members of both houses of Congress at the convening of the 111th Congress was 58.2 years. Mildred Amer & Jennifer E. Manning, *Membership of the 111th Congress: A Profile*, CRS REPORT FOR CONGRESS (Cong. Res. Service, Washington, D.C.), Dec. 31, 2008, at 2. The average age of U.S. Supreme Court Justices is 68.2 years. [http://www.usatoday.com/news/washington/2008-07-12-1706900246\\_x.htm](http://www.usatoday.com/news/washington/2008-07-12-1706900246_x.htm)

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