

Supreme Court Rejects Mixed Motives in ADEA Cases

In a 5-4 decision, the United States Supreme Court today decided that the mixed-motives analysis may not be applied in claims under the Age Discrimination in Employment Act ("ADEA"). *Gross v. FBL Financial Services, Inc.*, No. 08-441. The Court has previously held that the mixed-motives analysis may be applied in Title VII claims. In reaching its conclusion, the Court looked primarily to the differences in language between Title VII and the ADEA. As a result, the Court held, "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA 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 some evidence that age was one motivating factor in that decision." To link to the opinion, click below:

<http://www.law.cornell.edu/supct/html/08-441.ZO.html>

The question presented to the Court by the parties in *Gross* actually focused on whether the plaintiff needed to present direct evidence of discrimination to be entitled to a mixed-motives instruction in an ADEA case. But the Court found that it did not need to reach that question, instead concluding that mixed-motives instructions are never available in an ADEA case.

The *Gross* opinion presumably overrules the Fifth Circuit's holding in *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), in which the Fifth Circuit found that the mixed-motives analysis was available in ADEA cases. However, it likely will not disturb *Rachid's* "modified *McDonnell Douglas* approach" for analyzing mixed-motives cases in Title VII cases.

Practically speaking, the decision will have little impact on day to day decisionmaking, as employers will still need to ensure they can articulate a legitimate, non-discriminatory, non-retaliatory reason for any adverse employment actions. The impact of *Gross* will primarily be felt in defending those legitimate, non-discriminatory reasons, as *Gross* prevents the employee from shifting the burden of proof to the employer.

To learn more about the *Gross* case and other recent and anticipated developments in Employment Law, please join us for our Employment Law Update Breakfast on July 28, 2009, beginning at 8 am in our offices. An invitation will be sent out shortly.

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