

Your Monthly Legal Update – July 2009
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WHAT IS THIS RECENT SUPREME COURT DECISION ALL ABOUT? *Gross v. FBS Financial Services, Inc.*

It appears that this is the year for the United States Supreme Court to rule on employment discrimination cases. This ruling was issued on June 18, 2009. This case deals with the burdens of proving age discrimination.

This case determines that employees who sue employers for age discrimination must prove that age was the cause of an adverse employment decision. This is different from having proof that age was a cause in the adverse decision.

Jack Gross sued his employer claiming that he was demoted because of his age in violation of the ADEA. The federal trial court instructed the jury to return a verdict for the employee (Gross) if he proved by a preponderance of the evidence (in English, that the claim was more likely than not was true – if that helps) that he was demoted and his age was a motivating factor in the decision. The federal trial court further instructed the jury that a “motivating factor” is an act that played a part in the demotion. The trial court also instructed the jury to enter a verdict in favor of the employer if it proved that it would have demoted Gross regardless of his age (a legitimate nondiscriminatory reason).

The jury found in favor of Gross. However, the Eighth U.S. Circuit of Appeals reversed the jury’s decision finding that the jury had not been properly instructed consistent with past precedent.

The Supreme Court held that any employee who files an ADEA disparate treatment claim must provide, by a preponderance of the evidence that age was the “but for” cause of an adverse employment action. This means that the employee must prove that age was the “but for” cause of his demotion in this case. That he would not have been demoted but for his age.

The Supreme Court separated prior precedent interpreting Title VII from the ADEA, holding that Title VII is significantly different from the ADEA regarding the legislated burden of persuasion. Title VII has been specifically amended to expressly authorize discrimination claims when an improper consideration was a “motivating factor” in an adverse employment action. The ADEA does not contain this amendment. Will this be another case that Congress responds to?

The Supreme Court looked at the language of the ADEA and its statutory requirement that a plaintiff must prove that an employer took an adverse action “because of” age. The Supreme Court believes that a plaintiff must prove that age was the reason for the employer’s action.

This decision is favorable to employers as it communicates a higher burden for age discrimination plaintiffs. Age discrimination in the federal courts is not defined as a “motivating factor” but now must be the cause of the decision. This decision was highly controversial for the Court with a 5-4 split and dissenting opinions. It is very possible that Congress will amend the ADEA to make it identical to the Title VII amendments. No employer should change their practice based upon this decision.