

PUTNEY, TWOMBLY, HALL & HIRSON LLP

ESTABLISHED 1866

COUNSELORS AT LAW
521 FIFTH AVENUE
NEW YORK, NEW YORK 10175
(212) 682-0020
TELEFAX: (212) 682-9380
PUTNEYLAW.COM

DANIEL F. MURPHY, JR.
MICHAEL T. McGRATH
THOMAS A. MARTIN
WILLIAM M. POLLAK
JAMES E. McGRATH, III
CHRISTOPHER M. HOULIHAN
THOMAS M. LAMBERTI
STEPHEN J. MACRI
HARVEY I. SCHNEIDER
MARY ELLEN DONNELLY
JOSEPH B. CARTAFALSA
GEOFFREY H. WARD
ANDREA HYDE
E. PARKER NEAVE
MARK A. HERNANDEZ
JAMES M. STRAUSS
PHILIP H. KALBAN
SEAN H. CLOSE
LANSING R. PALMER
JEROME P. COLEMAN
BARBARA M. MAISTO

120 WOOD AVENUE SOUTH
SUITE 600
ISELIN, NEW JERSEY 08830
(732) 632-2505
TELEFAX: (732) 632-2506

1205 FRANKLIN AVENUE
GARDEN CITY, NY 11530
(516) 746-0070
TELEFAX: (516) 746-0599

2500 NORTH MILITARY TRAIL
SUITE 200
BOCA RATON, FLORIDA 33431
(800) 935-8480
TELEFAX: (561) 613-4100

COUNSEL
CHARLES J. GROPPE
ALEXANDER NEAVE
DUSTAN T. SMITH
SPECIAL COUNSEL
JUDITH M. BANDLER

June 23, 2009

CLIENT ALERT

U.S. Supreme Court Puts Age Bias Burden of Proof on Plaintiffs

On June 18, 2009, the United States Supreme Court ruled that an employee cannot prove discrimination under the Age Discrimination in Employment Act (“ADEA”) by merely demonstrating that age was a motivating factor in the employer’s adverse employment action, and then requiring the employer to prove it would have made the same decision regardless of age. The Court held that because the ADEA specifically prohibits employers from discriminating against employees “because of” age, it is the employee who must prove that the employer would not have taken the same action were it not for employee’s age. Gross v. FBL Fin. Servs. Inc., (Docket No. 08-411).

Facts

Plaintiff alleged that he was reassigned because of his age (54), and therefore the employer had violated the ADEA. The District Court instructed the jury to find discrimination under the ADEA if the employee proved that “age was a motivating factor” in the reassignment and the employer failed to prove that it would have taken the same action if not for the employee’s age. The Court of Appeals for the Eighth Circuit reversed and remanded for a new trial. It held that the employee was required to produce some direct evidence that age was a factor in the action and that, once such direct evidence was produced, the burden of persuasion shifted to the employer.

Background

In Price Waterhouse v. Hopkins, the Supreme Court created a burden shifting structure for mixed-motive discrimination cases under Title VII of the Civil Rights Act of 1964 (“Title VII”). Under this framework, after the employee demonstrates that an impermissible consideration (such as race or gender) was a motivating factor, the burden of persuasion shifts to the employer. The employer must then prove that it would have taken the same action irrespective of the impermissible consideration. In subsequent

decisions under Title VII, the Supreme Court ruled that an employee did not need to produce direct evidence of discrimination in order to shift the burden to the employers in a Title VII case.

The Supreme Court, however, had never held that the Price Waterhouse burden-shifting framework applied to ADEA claims.

The Decision

In Gross v. FBL Fin. Servs. Inc., the Supreme Court explicitly addressed whether burden shifting is permitted in a mixed-motive ADEA action. The Court found that no mixed-motive method exists for proving disparate treatment under the ADEA.

Writing for the majority, Justice Thomas contrasted Title VII's language, which explicitly allows employees to prove discrimination by showing that the impermissible characteristic was a motivating factor, with the language of the ADEA that requires showing that an employer took the adverse action "because of" an employee's age. The Supreme Court interpreted this language to mean that, in order to prove disparate treatment, it is not sufficient for an employee to merely demonstrate age was a substantial factor in an employment action, instead, the employee must prove that the employer would not have taken the adverse employment action were it not for the employee's age.

"A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action," wrote Justice Clarence Thomas. "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."

Significance for Employers

This ruling makes it more difficult for employees to show that an employer discriminated against them based on their age. Two words of caution, however. First, this ruling should impact procedural defenses in litigation, and should not impact an employer's duty not to discriminate on the basis of age. Second, this ruling is limited to claims under the ADEA; claims under Title VII still allow evidence of mixed-motive, without requiring direct evidence of discrimination, to shift the burden of persuasion to the employer.

If you should have any questions regarding the Supreme Court's decision in Gross, please contact us.

PUTNEY, TWOMBLY, HALL & HIRSON LLP