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## A “Gross Situation”: Age Discrimination Claims Just Became More Difficult For Employees

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*Employees across the country are liable to think that the Supreme Court’s recent age discrimination decision is just plain gross. For businesses looking to institute cost efficiency measures such as restructuring, downsizing, or layoffs, a fiercely divided Supreme Court recently made it more difficult for employees to prove age discrimination lawsuits. On June 18, 2009, the Supreme Court issued its opinion, a 5-4 decision, in *Gross v. FBL Financial Services, Inc.*, ruling that an employee bringing an age discrimination case must prove that age was the “but for” cause of the alleged adverse employment action. In other words, the employee must prove that the employer would not have taken the action “but for” the employee’s age. In addition, the Court held that the burden of persuasion no longer shifts to the employer to show that it would have taken the action regardless of age, even when an employee has produced evidence that age was one motivating factor in that decision.*

*The Gross decision is particularly important for employers in today’s economic climate. Employers are forced to search for any reasonable cost-cutting measures in these tough economic times. At the same time, the U.S. workforce is aging. The “Baby Boomer” generation represents 46% of the workforce. In five years, or by 2014, more than half the U.S. population will be age 45 years or older. Companies all over the country are “downsizing” in an attempt to eliminate middle management positions which are mostly filled with veteran employees. As a result, age discrimination claims are on the rise. Age discrimination claims currently make up nearly 26% of charges filed with the Equal Employment Opportunity Commission (“EEOC”) each year. The number of age discrimination claims filed with the EEOC is up nearly 10% in the last decade and is predicted to continue to rise as the U.S. working population ages. According to EEOC statistics in the last year, age discrimination complaints are now nearly as common as sexual discrimination complaints.*

### **Federal Anti-Discrimination Statutes: The ADEA and Title VII**

The Age Discrimination in Employment Act of 1967 (“ADEA”) is a federal law which applies to political subdivisions within states, employment agencies, labor unions, and private employers with 20 or more employees. It prohibits discrimination against individuals who are 40 years of age or older. Under the ADEA, it is unlawful to fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or other terms of employment *because of* that person’s age (40 or over).

The ADEA should not be confused with Title VII of the 1964 Civil Rights Act (“Title VII”). While both are anti-discrimination statutes, Title VII prohibits discrimination based upon sex, race, national origin, color, or religion. Age discrimination is not covered under Title VII. As a result, the ADEA was enacted just three years after Title VII to specifically address age discrimination. The ADEA is not an amendment to Title VII, but is a separate law. This proved important in the Supreme Court’s analysis in *Gross*.

Idaho also has anti-discrimination statutes entitled the Idaho Human Rights Act (“IHRA”) which parallels Title VII and the ADEA. However, the IHRA applies to an even broader range of employers: it includes those with only 5 or more employees rather than the federal threshold of 20 or more. The Idaho courts have stated that

they will follow federal ADEA cases in interpreting Idaho's age discrimination law, meaning that decisions like the Gross case are of great importance.

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

Jack Gross worked for FBL as a claims administration director. When he was 54 years old, Gross was reassigned to the position of claims project coordinator. At the same time, many of his job responsibilities were transferred to a newly created position – claims administration manager. That position was given to a female employee in her early 40's who had previously been supervised by Gross. Although they both received the same compensation, Gross considered the reassignment a demotion.

After pursuing a charge of age discrimination through the EEOC administrative process, Gross filed a lawsuit in federal court under the ADEA. The case went to trial, where Gross asserted that his reassignment was based at least in part on his age. FBL argued, however, that the reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. The jury was instructed to return a verdict for Gross if he proved that age was "a motivating factor" (i.e. merely one factor among others) in the demotion. The jury was further instructed that age would qualify as "a motivating factor" if it played a part or role in FBL's decision to reassign him. Conversely, the jury was instructed to find for FBL if FBL proved that it would have reassigned Gross regardless of his age. Using these so-called "mixed motive" instructions, the jury returned a verdict in favor of Gross.

The District Court's instructions shifted the burden of persuasion in this case to FBL after Gross produced evidence to show that age was merely one of the motivating factors in FBL's decision to demote him. FBL appealed, asserting that the jury was improperly instructed.

On appeal, the U.S. Supreme Court was asked to decide whether an employee must present "direct evidence" of discrimination in order to obtain a mixed-motive instruction in an age discrimination case. Mixed-motive means the employer had non-discriminatory reasons for the employment decision mixed with discriminatory reasons. A mixed-motive instruction is one that shifts the burden of persuasion to the employer after the employee proves that a discriminatory reason was one of the motivating factors of the employment decision. Before deciding the question, the Court asserted it first needed to determine whether the burden of persuasion *ever* shifts to the employer in a mixed-motive case under the ADEA. The Court decided that it does not.

The Court reasoned that while Title VII explicitly authorizes the burden-shifting mechanism in mixed-motive cases, the ADEA is a distinct and separate law. The court found nothing to suggest that Congress intended the burden-shifting mechanism to apply to the ADEA. The Court also explained that it had never ruled that the burden-shifting framework applies to ADEA claims and declined to do so in this case. The Court said that under the ADEA, an employee must prove that the adverse action was taken "because of" the employee's age. The Court held that this language requires an employee to prove that age was the actual reason for the decision. In other words, an employee must prove that but for the employer's age discrimination, no adverse action would have been taken against the employee.

### **What Does the Gross Decision Mean for Employers?**

The *Gross* decision means that it will be more difficult for an employee to prove an age discrimination charge under the ADEA, as compared to other types of discrimination claims. Instead of simply showing that age was one of the factors considered by the employer and then shifting the burden of proof (i.e. to the employer to demonstrate it would have made the same decision in spite of the employee's age), the employee now must prove that age was *the* motivating factor behind the employment decision. Without some documentation (i.e. meeting minutes, notes, email, etc.) explaining the employer's rationale or reason for taking an adverse

employment action, the *Gross* decision effectively requires the employee to prove what was in the mind of the employer at the time of making the decision. Obviously, this information is more readily available to the employer, which is why courts have applied the burden-shifting mechanism in Title VII cases. It's not hard to see how much more difficult it will be for an employee to try and prove the mindset of the employer and that age was the actual, predominant, and motivating reason for an adverse employment action.

Since the IHRA is patterned after both Title VII and the ADEA, it will be interesting to see how Idaho courts treat age discrimination claims under the IHRA. Title VII and the ADEA are separate statutes with different amendments, which is what the Supreme Court seized upon in justifying its decision. However, the IHRA is a single law which attempts to incorporate "the policies embodied in the federal Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967, as amended..." Idaho courts have historically followed the federal courts in using burden-shifting in employment discrimination cases. The question now becomes whether Idaho courts will continue to apply burden-shifting to all claims brought under the IHRA, or will separate age discrimination claims from other types of discrimination claims in order to follow the precedent set by the *Gross* decision.

Congress may very well respond to this decision by amending the ADEA to conform to Title VII. Until that time, it will be difficult for employees to prove age discrimination claims under the ADEA. As a result, fewer age discrimination claims may be filed in the future. This should allow employers to breathe a collective sigh of relief as they search for cost cutting measures in these difficult times.

How Do Employers Prevent Age Discrimination Claims in Light of the *Gross* Decision?

Employers can take steps to avoid age discrimination claims by doing the following:

- Making all employment decisions based on job performance rather than extraneous issues, such as age;
- Carefully documenting the reason for employment actions (such as terminations, discipline or demotions), to clearly show that job performance, and nothing else, was the basis for the action;
- Analyzing proposed reductions in force and large lay-offs to determine whether such will have a greater impact on older workers: and
- Training managers and supervisors to avoid "ageism" in their words, actions and management styles.