

## Employment Alert

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### Does *Gross v. FBL Financial Services, Inc.* Really Change Anything?

While there is no question that the Supreme Court's June 18, 2009 decision in *Gross v. FBL Financial Services, Inc.* has garnered much publicity, it is far from clear whether, as a practical matter, the case will change the way employers approach lawsuits filed under the Age Discrimination in Employment Act ("ADEA").

Prior to the *Gross* decision, if evidence existed that age was at least one factor in an adverse employee decision, many courts held that the ultimate burden of proof shifted to the employer to show that the same decision would have been made even absent the age consideration. These cases are known as mixed-motive cases.

*Gross* eviscerated that construct. From now on, unless Congress changes the law, in ADEA cases, unlike Title VII cases, the burden of proof **never shifts to the employer**. This is true even in mixed-motive cases and even if there is direct evidence that the employer considered the employee's age in making its adverse employment decision. The holding of *Gross* is that in ADEA cases, the employee **always** retains the burden of proof to show that age was **the** determining factor, *i.e.*, the "but-for" cause, in the employment decision.

So what does this mean practically? Does it mean that it has become dramatically easier for employers to win age discrimination cases? Hardly. At best it means that in mixed-motive cases, it **may** be somewhat easier to obtain summary judgment and, if not summary judgment, a jury verdict in favor of the employer. Specifically, unlike before *Gross*, the employer can now argue that even if there is evidence that it considered age as a factor in making its decision, the employer still does not violate the law if the employee cannot show that the employer would have made a different decision absent the age consideration.

To what extent taking this position will succeed in practice is another story. Regardless of where the burden of proof lies, judges and juries expect an employer to explain its non discriminatory reasons for taking adverse actions against older employees. Therefore, although after *Gross* an employer confronting a mixed-motive case can argue that a lack of evidence allows it to prevail, to do so without also putting forth convincing evidence of a non-discriminatory reason for the decision is not a recipe for success.

Even more significantly, the vast majority of age discrimination cases do not involve mixed-motive fact scenarios. Rarely does an employer admit that age played **any role** in an employment decision. Thus, in the most common scenario, *Gross* changes little. The plaintiff has always retained the ultimate burden of proving that the reason articulated by the defendant was not the real reason, but was a pretext and that age was the real determining factor. Notably, the Supreme Court in *Gross* left alone its prior ruling in *Reeves v. Sanderson Plumbing*, 530 U. S. 133, 147 (2000), which held, in a non-mixed-motive case, that if the finder of fact does not believe the employer's non-discriminatory explanation, it may **without any other evidence**, infer that age discrimination was the real reason. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"

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For further information about this topic, please contact Paul Garry, Erika Dillon or any other MBT labor and employment lawyer at (312) 474-7900.

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