Levelling the Playing Field: Legislative Efforts to "Fix" The Supreme Court's Reading of the ADEA

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Now more than ever, employees are working past what was traditionally considered to be "retirement age." As a result, today's employers are increasingly required to manage issues associated with an older workforce. Given these trends, employers should be aware of how potential age discrimination claims can impact their employment decisions. Moreover, employers should be aware of the Supreme Court's stance on age discrimination claims (versus other types of discrimination claims) as well as the legislative efforts being undertaken to supplant current Supreme Court precedent.

The Age Discrimination in Employment Act

The primary federal law governing age discrimination in the workplace is the Age Discrimination in Employment Act of 1967 (the "ADEA"). In enacting the ADEA, Congress expressly announced its intent to remedy situations where "older workers find themselves disadvantaged in their efforts to retain employment." *See* 29 U.S.C. § 621(a)(1). Practically and procedurally, the ADEA functions in many respects like Title VII of the Civil Rights Act of 1964 ("Title VII"). At its core, the ADEA prohibits employers from discriminating against employees who are 40 years old or older based on the employee's age. As such, where Title VII creates "protected classes" based on race, color, religion, sex, and national origin, the ADEA creates a "protected class" based on age for those who are 40 or older.

While the ADEA prohibits discrimination based purely on an employee's age, it does not take into account many real-world scenarios where an employee's age may be just one of several factors involved in an employer's decision. A classic example is where an employer has multiple non-age-related bases that would justify its termination of a 40+ year old employee but, in making its decision, the employer also takes the employee's age into account. This type of scenario was examined by the U.S. Supreme Court in the case of *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009). In that case, the Supreme Court characterized the above example as a "mixed-motive" age discrimination claim. The question before the Supreme Court in *Gross* was whether the ADEA protects older employees when the employer's action is based on a "mixed-motive," with only one of those motives relating to the employee's age.

The Effect of the *Gross* Decision on ADEA Claims: "But-For Causation" is Mandatory

In the *Gross* decision, the employee was 54 years-old and claimed that he had been "demoted" when his job duties were transferred to a younger worker. The evidence in the *Gross* decision indicated that while the employer did take the employee's age into consideration, the employer would have otherwise taken the same action it took regardless of the employee's age. In reaching its decision, the Supreme Court reviewed its prior rulings in Title VII "mixed-motive" cases where it generally held that a claimant could carry his or her initial burden under Title VII where he or she could show that impermissible "discrimination was a 'motivating' or a 'substantial' factor in the employer's action." *See Gross,* 557 U.S. at 171.

However, when the Supreme Court analyzed the specific statutory language of the ADEA on the issue of "mixed-motive" scenarios, it found that the ADEA's language in this regard was substantially different from Title VII (and, in particular, from certain amendments to Title VII which broadened that law) with respect to what an employee must show in order to carry his or her burden in establishing a claim for age discrimination. In this regard, the Court noted that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor . . . [m]oreover, Congress neglected to add such a provision to the ADEA when it amended Title VII." *Id.* at 174.

The Supreme Court in *Gross* then looked to the text of the ADEA to decide whether it authorizes a mixed-motive age discrimination claim. In its review, the Supreme Court found that, under the ADEA, a claimant must show that the employer's adverse action was taken because of age or that age was the reason that the employer decided to act. *Id.* at 176. In other words, the Supreme Court found that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Id.* In judicial parlance, "but-for causation" means that a claimant must be able to show that "but for" his or her age, the employer would not have taken the adverse employment action at issue. Thus, under this reading of the ADEA, an employer can effectively take age into account as one of several factors in its employment actions and the employer does not violate the ADEA if the employee's age is not the "but for" reason for the employer's decision in taking an employment action.

The Supreme Court's justification for its decision in *Gross* is that it was simply following the language of the ADEA as it was drafted by Congress. In contrast, Title VII had been amended over the years to specifically allow claimants to bring "mixed-motive" claims. However, the ADEA has not been similarly amended. The practical outcome of this decision effectively made age under the ADEA a weaker protected class in comparison to other protected classes, such as race or sex under Title VII. The *Gross* decision, in effect, potentially relieved employers from liability under the ADEA where they considered an employee's age in addition to other factors in making an employment decision even though that same employer would be potentially liable under Title VII if it took the same employment action with the employee's race or sex as underlying considerations.

Efforts to "Fix" the Precedent Set by *Gross*

After the *Gross* decision was issued in 2009, a variety of results followed. Primarily, this case standardized the "but-for causation" rule under the ADEA for the entire federal judiciary (some Circuits had already been

following this rule, whereas others had not). Second, upon realizing the effect of the *Gross* case, several states (including California and Connecticut) passed state age discrimination laws and/or amendments to existing laws that clearly authorized age discrimination claimants to bring "mixed-motive" age discrimination claims under state law. A third outcome, not seen until formal legislation was introduced in early 2019, involves an ongoing attempt to legislatively amend the ADEA so that the same "mixed-motive" standards seen in Title VII cases would equally apply in cases involving age discrimination.

Proposed New Legislation: The Protecting Older Workers Against Discrimination Act

This third outcome is encompassed in a proposed set of amendments to the ADEA collectively known as the "Protecting Older Workers Against Discrimination Act" ("POWADA"). The specific intent of the POWADA was to level the playing field between claims brought under Title VII and similar federal anti-discrimination laws and the ADEA by amending the ADEA "to establish an unlawful employment practice when the complaining party demonstrates that age or participation in investigations, proceedings, or litigation under such Act was a motivating factor for any unlawful employment practice, even though other factors also motivated the practice (thereby allowing what are commonly known as 'mixed motive' claims)." *See* SB 485, Summary (2019). In the promotional literature regarding the POWADA, it is expressly made clear that this law is being introduced as a direct response to the Supreme Court's ruling in *Gross*. Notably, the POWADA has received public endorsements from numerous public interest groups, including but not limited to The AARP, The American Association of People with Disabilities, The Leadership Conference for Civil and Human Rights, The National Employment Law Project, The National Employment Lawyers Association, The National Partnership for Women and Families, and The Paralyzed Veterans of America.

The POWADA was first introduced by Representative Robert "Bobby" Scott (D-VA) in the U.S. House of Representatives as H.R. 1230 in February of 2019. H.R. 1230 was approved on January 15, 2020 by the House by a vote of 261-155, mainly along party lines. The POWADA was introduced to the U.S. Senate by Senator Robert "Bob" Casey (D-PA) as Senate Bill 485 and is co-sponsored by Senators Grassley, Leahy, and Collins. However, observers note that the POWADA is highly unlikely to be approved by the Republican-controlled U.S. Senate, particularly given President Trump's January 13, 2020 public comments stating that he would veto the law if it were to pass in the Senate.

As such, in terms of efforts to ameliorate the effect of the Supreme Court's decision in *Gross* and to "level the playing field" with respect to age discrimination claims versus other types of federal discrimination claims, the POWADA currently appears to be a non-starter given the current balance of power in Washington D.C. However, neither the underlying support for the POWADA nor the precedent set by the Supreme Court's *Gross* decision are likely to change at any point in the near future. Given these facts, it appears likely that efforts akin to the POWADA legislation will be raised again by lawmakers in the coming years.

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