

By Tara Cummins and Louise Pennington

## Welcome News

Over the past decade, a growing volume of entities have experienced employment related litigation. These entities learned all too well that defending a lawsuit consumes valuable corporate time and resources. It can also be detrimental to a company's reputation and good will, as well as to the remaining employees' morale. As a new Administration advocates for pro-employee, pro-union, and pro-plaintiff legislation, it is therefore significantly notable when a Supreme Court opinion bucks pro-employee sentiment and refuses to extend plaintiff-friendly legal doctrine from one employment statute to another. Such is the news of *Gross v. FBL Financial Services, Inc.* (557 U.S. \_\_\_\_ (2009), Slip No 08-441), which refuses to extend legal burden-shifting to claims brought under the Age Discrimination in Employment Act (ADEA).

## A Shift in Burden-shifting

Employment litigation is notoriously complicated. In addition to the highly sensitive and personal nature of employment claims, their underlying fact patterns are rarely cut and dry. This is especially true when both permissible and illegal factors contribute to the challenged actions of an employer.

In these so-called "mixed motives" cases, once an employee-plaintiff has presented sufficient evidence of discrimination as a motivating factor, the burden of proof shifts to the employer to show that the action at issue would have occurred "but for" the discrimination. Such burden-shifting makes mixed-motives litigation onerous for employer-defendants to defend.

## Background

The litigation at issue arises out of an ADEA claim for age discrimination brought by claims administration director Jack Gross. At the age of 54, Mr. Gross was reassigned internally to the position of claims project coordinator. At the same time, Mr. Gross's employer, FBL Financial Services, created a new position, "claims administration manager," which included many of Mr. Gross's previous duties. A younger employee, who had previously reported to Mr. Gross, was posted to the new position. Mr. Gross sued for age discrimination. At the trial, the jury received instructions consistent with a mixed-motive case, explaining the shifting burden of proof.

On appeal, the critical issue is whether or not plaintiff Gross need show direct evidence of discrimination in order to receive a mixed-motive jury instruction. The Court does not answer this question directly but instead holds that the burden-shifting scheme existing in jurisprudence under Title VII does not apply to ADEA claims. Plaintiffs bringing disparate treatment claims under the ADEA, therefore, must prove by a preponderance of the evidence that age was the "but for" cause of the challenged employer decision. Mixed-jury instructions are thus inapposite. The decision was vacated and the case remanded.

## Impact

The *Gross* opinion is good news for defendants but the case must be considered within the context of its underlying statute, the ADEA. While *Gross* places a heavy evidentiary burden on ADEA plaintiffs, it does not serve to limit or change burden-shifting under Title VII. The court takes great pains to distinguish Title VII's language from that of the ADEA, noting that when Congress amended Title VII, including language concerning "motivating factors," it did not similarly amend the ADEA. Therefore, the Court's interpretation of the ADEA is not governed by cases interpreting Title VII, and in particular those cases involving shifting burdens of proof.

What remains to be seen is whether or not the current legislature, perhaps motivated by the current Administration, will look to overturn *Gross*. Indeed, the first new piece of legislation signed by President Obama was the Lilly Ledbetter Law<sup>1</sup>, which was designed to overturn a ruling denying employees the chance to bring suit for decades-old discriminatory pay practices.

## Risk-shifting

The *Gross* opinion may be labeled a pro-employer development, as placing a hearty burden of proof on ADEA plaintiffs makes it difficult for plaintiffs to sustain litigation under the ADEA.

As the economic recession continues and companies struggle with right-sizing their workforce, it is likely that older workers may raise claims for discrimination under the ADEA. Indeed, fully one quarter of the nearly 100,000 EEOC charges last year included claims of age discrimination. In this precarious environment, employment decisions must be undertaken with due care, and companies must be prepared to defend themselves from allegations of wrongful employment practices.

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<sup>1</sup> Integro discusses this development in its recent publication, "Increasing Employment Practices Liability Exposure."

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