Legal Update Article

Supreme Court: Federal Employees Can Sue Over Any Age Discrimination in Employment Decision

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Employment Litigation

The U.S. Supreme Court has ruled that federal government employees can sue for age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) when age bias taints the decision-making process, not merely when age bias plays a determinative, "but for" role in the employment decision. ***Babb v. Wilkie, Secretary of Veteran Affairs***, No. 18-882 (Apr. 6, 2020).

The Court said that reinstatement, back-pay, and compensatory damages are available only to federal employees who establish "but for" causation.

The Court's decision focused on the federal-sector provision of the ADEA, 29 U.S.C. § 633a(a), which does not apply to private employers or state and local government employers.

The Court's 8-1 decision reverses the U.S. Court of Appeals for the Eleventh Circuit's ruling in favor of the government, and resolves a circuit split on the federal-sector provision.

ADEA

The ADEA bars employers from taking adverse employment actions or discriminating against any individual "because of such individual's age." To prove age discrimination in violation of the ADEA, private sector employees and employees of state and local governments must demonstrate that the adverse employment action in question would not have occurred "but for" age bias in the decision-making process. *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009).

The federal-sector provision of the ADEA, however, applies to employees of the federal government only. It states: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age ... shall be made free from any discrimination based on age."

Background

In this case, Noris Babb, a clinical pharmacist for the U.S. Department of Veterans Affairs, sued the Department for age discrimination and retaliation after she was allegedly stripped of certain certifications, denied training and transfer opportunities, denied certain holiday pay, and subjected to age-related comments, all because she is over 40 years old.

The Department moved for summary judgment and presented legitimate, non-discriminatory reasons for the various employment actions.

The district court granted summary judgment on the grounds that Babb could not show the Department's explanations were mere pretext, nor that "but for" age discrimination on the part of the decision-makers, she would not have been subjected to the adverse

employment actions. The Eleventh Circuit affirmed this ruling.

Babb appealed to the U.S. Supreme Court, arguing that under the federal-sector provision of the ADEA, she did not need to meet the "but for" causation standard, but rather an easier, mixed-motive standard.

At the Supreme Court

At oral argument in January, Chief Justice John Roberts made headlines by asking Babb's counsel whether the term "OK, Boomer" could be evidence of age discrimination.

Writing the decision for the Court, Justice Samuel Alito analyzed the federal-sector provision (which provides, "All personnel actions affecting employees or applicants for employment who are at least 40 years of age … shall be made free from any discrimination based on age") and determined the straight-forward meaning of the provision is:

1. "age must be a but-for cause of discrimination … but not necessarily a but-for cause of a personnel action itself"; and
2. "'free from any discrimination' describes how a personnel action must be 'made,' namely, in a way that is not tainted by differential treatment based on age."

Justice Alito concluded that, based on this reading, "the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account." Thus, a federal employee can sue for age discrimination under the ADEA for differential treatment, even when the alleged age bias did not affect the ultimate employment decision. The fact that Congress decided to hold the federal government to a higher standard than state and private employers is clear, and not unusual, he wrote.

For all of these reasons, the Court ruled the Eleventh Circuit erred when it applied the "but for" causation test to Babb's ADEA lawsuit. Accordingly, the Court, reversed and remanded the ruling.

Nonetheless, the Court held that "but-for causation" is important in determining the appropriate remedy because an employee's requested relief must redress the alleged injury. Thus, federal-employee plaintiffs who demonstrate "only that they were subjected to unequal consideration cannot obtain reinstatement, back-pay, compensatory damages, or other forms of relief related to the end result of an employment decision." In such cases, the Court said, the plaintiff could seek injunctive relief or "other forward-looking relief" that the district court deems appropriate.

Jackson Lewis attorneys are available to answer any questions you may have regarding this decision or other employment issues.