

National Senior Citizens Law Center

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The National Senior Citizens Law Center expresses surprise and deep concern at the Supreme Court's decision issued this morning (June 18, 2009) in *Gross v. FBL Financial Services, Inc.*, in which a 5-4 majority has radically changed and severely weakened equal opportunity protections for older workers.

The majority – with Justice Clarence Thomas writing an opinion joined by Chief Justice John Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, and Justice Samuel Alito – holds that a victim of age discrimination, in order to prevail in court, must prove that unlawful bias was a “but-for” cause of adverse treatment. Until today's decision, plaintiffs alleging violations of the Age Discrimination in Employment Act (ADEA) had the option of proving that age bias was simply a “motivating factor.” The latter remains the applicable standard for claims of discrimination based on race, gender, or other inappropriate considerations other than age, which are principally governed by Title VII of the Civil Rights Act. As a practical matter, especially since employers will always create paper trails purporting to justify adverse actions on legitimate business-related grounds, proving that age was the “but for” cause will often be tantamount to having to show that it was the *exclusive* factor in the adverse decision.

The decision compounds the extreme difficulty of making such a demonstration, by requiring that an age discrimination claimant must, him or herself, introduce all evidence of discriminatory intent that the jury sees. Till now the procedure in all workplace discrimination cases, including age discrimination cases, requires the worker to introduce a threshold amount of evidence of discrimination, but then shifts to the employer the burden of showing that some other, appropriate consideration was the “motivating factor.” As Justice Stephen Breyer pointed out in his dissenting opinion, only the employer is in a position to know his own mind and offer an explanation of why a decision that has a discriminatory effect was actually motivated by legitimate considerations. By putting on the worker the entire burden of demonstrating the absence or insignificance of such factors, the majority has effectively freed employers to discriminate against older workers, as long as they do not actually state that they are singling out an employee for adverse treatment solely because of age.

Paul Nathanson, NSCLC Executive Director, stated that “This decision presents many older workers with a cruel double-whammy – forced to work longer than they once anticipated by the shrinkage of their retirement assets, they now have to face the threat, uncertainty, and too often the reality of workplace age discrimination without the legal protection on which they have relied since Congress passed the ADEA in 1967.”

Simon Lazarus, NSCLC Public Policy Counsel, stated that “This devastating decision ignores precedent, workplace realities, the plain meaning of the language of the ADEA, and Congress' manifest purpose and intent. The practical impact for older Americans will be as devastating as was the same majority's 2007 *Ledbetter* decision for victims of pay discrimination. Congress and President Obama should act promptly to correct this latest provocation.”

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