

**About Olivia Goodkin**



[Olivia Goodkin](#)

789-1806

Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for

**Employers Should Cautiously Rejoice Over the  
*Gross v. FBL Financial Services* Case**

By Olivia Goodkin

On June 18, 2009, the U.S. Supreme Court rendered a significant opinion in the case of *Gross v. FBL Financial Services, Inc.* The Court decided that in age discrimination cases brought under the Age Discrimination in Employment Act (ADEA), the employee has the burden of proving that age was a **determinative** factor in his or her termination.

This holding is a break from the prior case law, which held that in a "mixed-motives" case---meaning one in which age was one factor in the termination---the plaintiff was required only to show that age was a motivating factor. Age did not have to be the determinative factor for a plaintiff to prevail at trial.

Now the Court has made it much harder for employees to succeed in cases under the ADEA. However, before employers breathe a sigh of relief, they should be mindful of contradictory state laws, such as in California, upon which employees may still recover damages once proving that age was merely one of several factors in the decision to terminate him or her.

**The Facts of the *Gross* Case**

Jack Gross worked for FBL Financial Group, Inc. (FBL) for over 30 years. In 2003, at the age of 54, he was reassigned to a different position, one that he considered a demotion. A younger woman was given his former responsibilities in a newly created position.

companies seeking to protect their valuable intellectual property.

**Rutter Hobbs & Davidoff:**

- Bankruptcy, Reorganization and Capital Recovery
- Business Litigation & Dispute Resolution
- Corporate & Securities
- Estate Planning & Trust Litigation
- Family Law
- Intellectual Property, Advertising & Promotions
- Internet & New Media
- Labor & Employment
- Real Estate

**[About Rutter Hobbs & Davidoff Incorporated](#)**

Rutter Hobbs & Davidoff's experienced attorneys represent middle market companies, early stage entities, large corporations and individuals in all facets of the law. From negotiation of

Gross brought suit, claiming that the reassignment violated the provisions of the ADEA. At the close of trial, the district court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of evidence, that FBL demoted him and that his "age was a motivating factor" in the decision to demote him. Another instruction stated that Gross' age would qualify as a "motivating factor" if it played a part in the decision to demote him. The jury found in favor of Gross and awarded him damages.

FBL appealed the decision, and the appellate court reversed. The decision was then appealed to the Supreme Court.

**The Burden-Shifting Rules**

In many employment discrimination cases, the plaintiff is charged with first proving, by a preponderance of evidence, certain key elements in the claim that he or she has brought. Once the plaintiff has met that test, then the burden of persuasion shifts to the party defending the case. For instance, in a retaliation case, once a plaintiff has shown that he was terminated shortly after reporting a statutory violation of law by the employer, the burden would shift to the employer to prove that the reason proffered for the termination, such as cost-cutting measures, was the real reason for the termination.

Prior to *Gross*, in a mixed-motives discrimination case the burden of persuasion would shift to the employer as soon as the plaintiff proved that age was one factor in the decision to terminate the employee. Importantly, the Court in *Gross* held that the burden of persuasion never shifts to the employer. The plaintiff must prove he or she was terminated "because of" age.

**The Language of the ADEA and What it Means**

The ADEA provides that it is unlawful for an employer to take an adverse employment action "because of" an individual's age. The question then is what the words "because of" mean.

The Court discussed this at length. The Court said that the ordinary meaning of the ADEA's language is that age was the "reason" the employer took the adverse action. Another way

critical agreements to the trials of business disputes, our clients receive thoughtful, focused legal counsel from senior attorneys for reasonable fees. For the 2nd year in a row, RHD was named one of the ["Best Places to Work in Los Angeles"](#) by the Los Angeles Business Journal.



to view it is that age must have had a "determinative influence" on the outcome of the decision. However, the simplest analysis is this, which the Court also said: The plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.

Thus, the Court concluded, the burden of persuasion necessary to establish employer liability is the same in a mixed-motives case as in any other ADEA case. The plaintiff must show, by a preponderance of evidence, that "but-for" his or her age, the adverse employment decision would not have been made.

### **The Standard under ADEA is Now Much Harder to Meet**

In the real world, there are very few mixed-motives cases where a plaintiff would be able to meet the heavy burden of proving that "but-for" his or her age, he or she would not have been terminated. Most employers do have more than one reason for terminating an employee. Age may be one of the factors in the decision. However, now under the ADEA the plaintiff must prove that age was **the** determinative factor.

The Court's decision was sharply divided (5-4) with a well-reasoned dissent. It is quite possible that Congress will respond with an amendment to the ADEA to allow a plaintiff to show only that age was a factor in the decision, causing the burden of persuasion to shift to the employer at that point to prove that age was not a key motivating factor.

### **Caution: State Law is Not Changed**

The ADEA is a federal law that applies to employers in industries affecting commerce that have 20 or more full-time or regular part-time employees for each working day, in each of 20 or more calendar weeks, in either the current or preceding calendar year. The *Gross* decision only addresses the ADEA.

Plaintiffs may still sue under applicable state laws for employment claims. For instance, the California Fair Employment and Housing Act (FEHA) prohibits discrimination on the basis of age, and applies to employers of five or more employees.

Under the FEHA, a reasonable inference of age discrimination is found when the employee shows that at the time of the adverse action he or she was 40 years of age or older; an adverse employment action was taken against the employee; at the time of the adverse action the employee was satisfactorily performing his or her job; and the employee was replaced by a significantly younger person. Once the employee offers evidence of the reasonable inference of age discrimination, the burden of persuasion shifts to the employer to demonstrate that the adverse employment action was made for a proper reason.

It is unknown if the courts in California will apply the *Gross* decision to supplant burden-shifting rules currently followed in California. Typically, the California courts have followed federal precedent in the age discrimination arena. However, it may take some time before there is a decision that alters the easier standard of proof for a plaintiff under FEHA.

#### **Advice for Employers**

While *Gross* may be seen as a victory for employers, we caution employers to continue to carefully weigh all considerations in terminations and adverse employment actions before final decisions are made. We recommend that employers first decide who should be involved in a termination decision. They should then articulate and document the business reasons for any termination and why a particular individual was selected. Having a quality decision-making process for these tough decisions is critical in preventing age or other discrimination claims.