On June 18, 2009, the United States Supreme Court issued a decision easing the burden on employers who defend against claims under the Age Discrimination in Employment Act ("ADEA").

In *Gross v. FBL Financial Services, Inc.*, No. 08-441, the Supreme Court issued a bitterly divided 5-4 decision that adopts a standard known as "but-for" causation for age discrimination claims brought under the ADEA. This means that in order for an employee to prove that an adverse employment action was discriminatory, the employee must show that the action would not have occurred "but-for" the employee's age. In adopting this standard, the Court has eliminated the less stringent mixed-motive standard previously applied to age discrimination claims by some courts. This will make it much easier for employers to defend against these types of claims.

The Court also held that the burden of proof under the ADEA always remains with the plaintiff, even in situations where the plaintiff is successful in producing evidence that age was a part of the motivation for the challenged decision.

The case involved claims by Jack Gross, a 54 year old employee of FBL Financial Group, Inc. Gross alleged that his employer discriminated against him because of his age. He used evidence of his reassignment to a new position and simultaneous transferring of many of his responsibilities to a younger woman. At trial, Gross introduced circumstantial evidence suggesting that his reassignment was motivated, at least in part, by his age. The jury found in Gross's favor and awarded him $46,945 in lost compensation.

The Eighth Circuit Court of Appeals reversed and remanded the case for a new trial, holding that the trial court gave an improper jury instruction. The instruction at issue was based upon a legal theory of discrimination known as "mixed-motive."

The Supreme Court first recognized the mixed-motive theory of discrimination under Title VII in its 1989 decision in *Price Waterhouse v. Hopkins*. The mixed-motive theory switches the burden of proof to the employer in cases where the plaintiff can show that age was at least one of the factors motivating the challenged employment decision. The Eighth
Circuit held that Gross was not entitled to such an instruction because he had introduced only circumstantial evidence of age discrimination. The Eighth Circuit concluded that direct evidence of age discrimination was required before a mixed-motive analysis and instruction were proper.

Gross appealed the Eighth Circuit's decision to the Supreme Court. Justice Clarence Thomas authored the Court's majority opinion. The Supreme Court took a different approach than that taken by the Court of Appeals. The Court first addressed the question of whether the burden of proof ever shifts to the employer in the analysis of a claim under the ADEA. In answering the question, the Court distinguished ADEA claims from Title VII discrimination claims and declared that the burdens of proof and persuasion in each are "materially different."

The Court took special note of the fact that, after the *Price Waterhouse v. Hopkins* decision, Congress amended Title VII to specifically authorize mixed-motive claims under that statute. Unlike Title VII, however, Congress never amended the ADEA to include similar mixed-motive language. The *Gross* Court seized upon this fact as support for its conclusion that Congress did not intend the burden-shifting framework applicable to Title VII mixed-motive claims to be applicable to claims under the ADEA. The Court concluded that under the ADEA, the burden of proof always remains with the plaintiff.

The Court next addressed the more fundamental question of whether the ADEA ever authorizes mixed-motive age discrimination claims. Here again, the Court looked to the plain language of the statute.

The ADEA states that an employer may not discriminate "because of" age. The *Gross* Court interpreted this language to mean that the ADEA does not provide for mixed-motive claims. According to the Court, the ADEA requires that plaintiffs seeking to prove age discrimination demonstrate that age was "the reason" the employer decided to act, not just one factor. Under the Court's decision in *Gross*, an employee alleging age discrimination must prove by a preponderance of the evidence that age was the "but for" cause of the challenged employment decision.

By eliminating mixed-motive claims under the ADEA and ensuring that the burden of proof in age discrimination claims always remains with the plaintiff, the Supreme Court's decision in *Gross* will make it much easier for employers to defend against such claims. Former or current employees making claims of age discrimination will now carry the full burden of proving that age was the "but for" cause of the challenged adverse employment action, not just one motivating factor in that action.

Please contact Andrew R. Kaake, Gerron McKnight, or any other member of Frost Brown Todd's Labor and Employment Practice Group with any questions regarding this significant Supreme Court decision.