Supreme Court Makes It Easier For Federal Workers To Prove Age Discrimination

Insights
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In an 8-to-1 decision, the U.S. Supreme Court just made it easier for federal employees and applicants to prove age discrimination by ruling that courts should not apply a heightened causation standard in such cases. By rejecting a "but-for" test in federal worker Age Discrimination in Employment Act (ADEA) claims, the Court restricted federal agencies from considering an employee's or applicant's age with respect to personnel decisions. Monday's decision in *Babb v. Wilkie* essentially means that the federal government could be liable for age discrimination any time it considers an older worker's age in making a personnel decision – even if such consideration was not dispositive of the personnel decision but was only a "motivating factor." **However, the decision should not impact private employers**, who still enjoy the heightened "but-for" standard when defending ADEA cases.

Background
Born in 1960, Petitioner Noris Babb worked as a pharmacist for the Veterans Affairs (VA) Medical Center in Bay Pines, Florida, for approximately 16 years. During the course of her employment, Babb alleged that she suffered a series of discriminatory decisions affecting her job duties, pay, and opportunities for advancement. She alleged that the decisions were the result of gender and age discrimination, as well as unlawful retaliation. Additionally, Babb alleged that the VA retaliated against her for participating in the investigation of two other female employees' EEOC complaints.

In July 2014, Babb sued the Secretary of the Department of Veterans Affairs, alleging violations of the ADEA and other statutes. The lower court and the 11th Circuit Court of Appeals ruled in the VA's favor, saying that she failed to prove that her age was a "but-for" factor in causing the adverse personnel action. The "but-for" causation test asks: "Would the employee have suffered the injury if age was not a factor considered in the employer's personnel decision?" She appealed the case to the U.S. Supreme Court, contending that she should be subject to a lower "motivating factor" test when evaluating whether the VA's refusal to promote her violated the ADEA.

The Decision
The law at the center of the dispute is the federal-sector ADEA provision that states: "all personnel actions affecting employees or applicants for employment" in executive agencies "who are at least 40 years of age … shall be made free from any discrimination based on age." This language differs from the private-sector provision, which prohibits employers from discriminating "against any individual … because of such individual's age."

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Babb argued that this distinction made all the difference. Because the statutory provision affecting federal employers regulates how personnel decisions "shall be made," the entire process of hiring federal employees should be "free from any" age discrimination, she said, whether or not that discrimination actually led to a personnel decision. She stressed that "discrimination" is often understood by both courts and the general public to include forcing people to compete on an uneven playing field. Therefore, she reasoned, the phrase "based on" simply refers to the type of discrimination prohibited rather than the degree of causation a plaintiff must establish.

In the majority opinion drafted by Justice Alito, the Supreme Court agreed with Babb and pronounced that the federal-sector provision of the ADEA does not require plaintiffs to prove that their age was the "but-for" cause of challenged employment decisions. Accordingly, from now on, a federal employee or applicant will meet their burden of demonstrating they suffered from discrimination if they can show that their age was considered as part of an employment decision, even where it was not dispositive.

In the decision, the Court found that the statute's "plain meaning" controlled the analysis. The words "shall be made free from any discrimination based on age" mean exactly that: the decision-making process for personnel actions affecting federal employees shall be untainted by any consideration of age.

However, with respect to potential remedies, a federal employee cannot obtain back pay, compensatory damages, reinstatement, or other forms of relief related to the end result of an employment decision without showing that age discrimination was a "but-for" cause of the employment action. Where the government can show that it would have made the same decision regardless of the improper factor (age), then the employee did not suffer an injury that warrants relief.

What This Means For Employers

This decision increases risk for federal employers because it gives employees and applicants an easier path for proving age discrimination in violation of the ADEA. An employee might be able to prove discrimination by pointing to the slightest ageist remark (perhaps along the lines of, "OK, Boomer"), no matter how minor, and asserting that it was a considered as part of a personnel decision. Federal employers will likely see an increase in ADEA claims, as plaintiffs' attorneys become aware of this new, lax standard of proof.

Federal employers should be sure to train all decisionmakers on the importance of remaining unbiased in all hiring decisions. In addition, federal employers should ensure they have strong antidiscrimination policies in place that prohibit consideration of age, or any other protected factor, in making employment decisions.

The good news for private-sector employers, however, is that this decision does not impact ADEA claims brought against you. Thanks to a 2009 Supreme Court decision, mixed-motive claims of age

discrimination will not survive because the plaintiff still bears the burden at all times to prove that age was a "but-for" cause of the adverse employment action.

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