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AGE DISCRIMINATION IN EMPLOYMENT ACT

Attorneys see broader impact of pending ADEA federal-sector causation ruling

By Tricia Gorman

A pending U.S. Supreme Court decision on the standard a federal employee must meet in claiming bias under the Age Discrimination in Employment Act could affect interpretations of Title VII, which has similar language, some employment law experts have predicted.

Babb v. Wilkie, No. 18-882, oral argument held, 2020 WL 230207 (U.S. Jan. 15, 2020).

In an oral argument Jan. 15 dominated by discussions of statutory language, the justices heard from attorneys for the government and a Department of Veterans Affairs employee on whether a federal worker needs to show that age was the sole cause of the alleged discriminatory action.

Two days after the argument, the high court directed the parties to submit briefs on what relief federal employees may obtain under laws other than the ADEA against age-related practices that were not the "but-for" cause of an adverse employment action. *Babb v. Wilkie*, No. 18-883, 2020 WL 254153 (U.S. Jan. 17, 2020).

Employment attorneys who have followed the case weighed in on the statutory language in the ADEA, 29 U.S.C.A. § 621, and whether the high court will say federal employees have to meet a lesser causation standard than private-sector employees.

The justices' questions centered on the differing language in two provisions of the statute.

The ADEA's provision for private-sector, state and local government employees, 29 U.S.C.A. § 623, prohibits discrimination "because of such individual's age," while the provision for federal employees, 29 U.S.C.A. § 633a, says, "all personnel actions ... shall be made free from any discrimination based on age."

The high court established the causation standard for private-sector discrimination claims a decade ago when it said in *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009), that the applicable ADEA provision requires proof that age was the "but-for" reason for discriminatory activity.

EXPERTS' THOUGHTS

Employment attorneys commenting on the oral argument noted that the federal provision's "free from any discrimination based on" phrasing is in the analogous federal-sector provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-16(a), so the ruling in *Babb* could affect how both laws are interpreted.

The decision "has the potential to create ripple effects throughout the entire Title VII discrimination analysis scheme for the approximately 2.1 million federal sector employees, and applicants, across the country," said McDermott Will & Emery partner Michelle S. Strowhiro.

Professor Deborah Widiss of Indiana University's Maurer School of Law said a less stringent interpretation of the ADEA than "but-for" causation "better promotes the law's objectives."

Reed Smith partner Lori Armstrong Halber noted the justices' focus on the differing statutory language in the two provisions and said, "A plain reading of the statute does not support 'but-for' causation."

While the oral argument was wide-ranging, involving stories and an "OK, boomer" reference by Chief Justice John Roberts when asking how significant a factor bias must be, the justices always came back to the statutory language, according to Farrell Fritz partner Domenique Camacho Moran.

"The court is likely to rely on the canons of statutory construction and precedent to determine how much age must infect the process to constitute a violation of law," Moran said.

Venable LLP partner Nicholas M. Reiter said that if the high court decides the ADEA's federal-sector provision requires only a showing that age was just one reason for discriminatory action, it will be easier for federal employees to win their cases. It could also "provide Congress a roadmap" for amending the ADEA and other laws for which courts have applied a "but-for" standard.

ALLEGED AGE BIAS AT THE VA

The case involves claims by Noris Babb, a clinical pharmacist for a VA medical center in Florida, that she had been discriminated against based on her age.

She sued the VA in federal court in 2014, alleging the medical center had reduced her duties, denied her additional training and

passed over her applications for open positions in favor of younger applicants.

The trial judge granted the VA summary judgment, saying Babb failed to refute her employer's nondiscriminatory reasons for its actions. *Babb v. McDonald*, No. 14-cv-1732, 2016 WL 4441652 (M.D. Fla. Aug. 23, 2016).

Babb appealed, arguing the judge had erred in applying the more stringent "burden-shifting" standard established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), instead of allowing her to show that age was a motivating factor in the allegedly discriminatory actions.

The 11th U.S. Circuit Court of Appeals affirmed summary judgment in the VA's favor, saying it was bound by circuit precedent. *Babb v. Sec'y, Dep't of Veterans Affairs*, 743 F. App'x 280 (2018).

It relied on *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), which involved similar claims by employees who worked at the same facility as Babb, and the panel there applied *McDonnell Douglas* in affirming summary judgment in the VA's favor.

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