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Babb v. Wilkie — Lower causation standard for federal sector age bias claims means fewer remedies for federal employeese

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INTRODUCTION

On April 6, 2020, the Supreme Court of the United States issued its opinion in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), setting out an easier path for federal employees to succeed on an age discrimination claim.

Prior to the *Babb* decision, because of the Supreme Court's decision in *Gross v. FBL Financial Services,* 557 U.S. 167 (2009), age discrimination plaintiffs had to prove that age was the "but-for" causation of the adverse employment action. This is a more stringent causation standard than other discrimination claims, such as those based on race or sex under Title VII.

The *Babb v. Wilkie* case does not change the landscape for private sector employees, as it holds that the federal-sector provision of the Age Discrimination in Employment Act (prohibiting age-based discrimination for any agency employees age 40 or older) requires a federal employee need not prove that age was a but-for cause of the challenged employment decision in order for the federal government to be held liable.

FACTS AND ORAL ARGUMENT

Plaintiff Norris Babb worked as a pharmacist at a VA Medical Center in Bay Pines, Florida. Following the VA's implementation of a nationwide program affecting its pharmacies, Babb and other pharmacists were not permitted to transition to the new program (with an accompanying promotion and raise), but two pharmacists who were under 40 years of age were transitioned.

Babb disagreed with the decision and filed suit in the Middle District of Florida alleging miscellaneous claims, including age and gender discrimination. The district court granted summary judgment to the VA.

On appeal, the Eleventh Circuit overturned summary judgment as to Babb's gender discrimination claim but affirmed summary judgment on the age discrimination claim.

Babb then petitioned the U.S. Supreme Court for review, arguing that the but-for causation standard applicable to ADEA claims disadvantaged federal employees.

The Supreme Court heard oral argument on Wednesday, January 15, 2020. During oral argument, Chief Justice Roberts and Justices Gorsuch and Kavanaugh indicated their skepticism that the standard needed to be relaxed.

Chief Justice Roberts, for example, asked whether a one-off statement such as "Okay, Boomer" to a job applicant would amount to actionable age discrimination. He further expressed concern that a relaxed causation standard would amount to regulated speech in the workplace.

> Prior to the *Babb* decision, age discrimination plaintiffs had to prove that age was the "but-for" causation of the adverse employment action.

The other justices, however, suggested that they were more inclined to relax the but-for causation standard.

OPINION

In an 8-1 opinion written by Justice Alito, the Supreme Court reversed and remanded the Eleventh Circuit ruling, holding that the federal-sector provision of the Age Discrimination in Employment Act required that personnel actions may not include any consideration of age, but that the but-for causation remains important in determining the remedy available to the aggrieved employee.

In other words, to obtain reinstatement, damages, or other relief related to an adverse employment action, a federal employee must still show but-for causation. If age discrimination played a lesser part, however, other remedies such as injunctive relief may be appropriate.

The *Babb v. Wilkie* opinion holds the federal government to a stricter standard in the age discrimination context than private employers. The federal sector provision states that "personnel actions" affecting individuals over 40 "shall be made free from any discrimination based on age."

The court was asked to decide whether this imposes liability only when age is a "but-for cause" of the employment decision, or else imposes liability when age discrimination is a factor to any extent.

The court's analysis began with the meaning of "personnel actions." The court reviewed the definition of "personnel action" in the Civil Service Reform Act of 1978, which defined it broadly to include most employment decisions including appointment, promotion, work assignment, compensation, and performance reviews.

The court assumed the Age Discrimination in Employment Act, at issue here, carried the same meaning.

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The court next considered the phrase "free from" discrimination, which it reasoned means "untainted," "exempt or released from," or "clear of." The broader clause states that the decision must be made "free from *any* discrimination," and the word "any" has "an expansive meaning," of "some, regardless of quantity or number."

Taken as a whole, the court reasoned that the clause prohibits the decision from being subject to "differential treatment" at all, and thus age cannot be a factor at all in the employment decision at issue.

In its analysis, the court gives an example of two candidates applying for a position, one of whom is 35 years old and scores a cumulative 90 points in an interview, and another candidate who is 55 years of age and scores 85 points, but is docked 5 additional points because of his age and ends up with a score of 80.

Although the score differential was not the but-for cause that the 55-year-old candidate was not selected for the promotion, the employment decision was not made "free from any discrimination."

The court finally ruled that a federal sector plaintiff who establishes age discrimination short of but-for causation may seek injunctive or other forward-looking relief, although the substantive remedies available to a plaintiff successful in establishing but-for causation would not be available.

With this in mind, the court remanded the case to the District Court to decide whether the *Babb* plaintiff had succeeded in showing that the federal sector provision was violated, and what relief, if any, would be appropriate.

TAKEAWAYS

Employers should remember that while a change in the age discrimination causation standard is significant from an academic standpoint, the standard is a legal rather than a practical concern. For private sector employers, the standard does not change at all.

For the federal government, the standard does not really come into play unless an age discrimination claim gets to a jury. Moreover, the opinion does not change attorneys' fees available to counsel for aggrieved employees, which can be a large driver of employment litigation.

Either way, the applicable summary judgment standard remains the *McDonnell-Douglas* burden shifting framework to determine whether a claim should be dismissed as a matter of law or reach a jury. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Most importantly, when you are making a decision about how to treat an employee in the protected age group, you want to focus on business needs and what is (and appears) fair rather on whether the employee could prove "but-for" causation rather than merely a preponderance of the evidence.

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