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As the ADEA turns 50, will Congress act to make it relevant again?

By Dianna D. McCarthy, Esq.

The Protecting Older Workers Against Discrimination Act, introduced by the House of Representatives (the "House") on May 25, 2017, would forever change the standard of proof in age discrimination cases under the Age Discrimination in Employment Act of 1967 (the "ADEA") if passed. The current standard was set by the United States Supreme Court in Gross v. FBL Financial Services, 557 U.S. 167 (2009), ("Gross") which made ADEA claims extremely difficult to pursue.

In *Gross*, the U.S. Supreme Court found that an employee filing an age discrimination claim had to prove "but-for" causation to prevail, not motivating factor. The Court reasoned that since Congress did not expressly amend the ADEA to include mixed motive analysis when it had the chance to do so then the Court would not either. The current language in the ADEA requires plaintiff to prove that an adverse employment decision occurred "because of" the plaintiff's age. This holding has significantly reduced the strength of the ADEA and has made it considerably more difficult to prove age discrimination cases.

To reduce the chilling effect of *Gross*, a **bipartisan group** of House Representatives have introduced H.R. 2650 or the Protecting Older Workers against Discrimination Act. This bill was introduced by the House on May 25, 2017, and was then referred to the House Committee on Education and the Workforce. The bill would amend the ADEA by changing the standard of proof from "but for" to motivating factor. If it is ultimately promulgated, it will change the way Age Discrimination cases are handled in American Courts. Under the standard proposed in the Protecting Older Workers Against Discrimination Act, an employee would only have to prove that age was a motivating factor to an adverse employment action, instead of having to prove that age was the "but-for" reason for the adverse employment action. Importantly, there is a companion legislation, S. 433, in the Senate which was introduced by Senators Bob Casey, D-Pa., Chuck Grassley, R-Iowa, Susan Collins, R-Maine, and Pat Leahy, D-Vt., on February 27, 2017. The companion legislation was referred to the Committee on Health, Education, Labor, and Pensions.

This move by the House and Senate, as well as commemoration of the 50th anniversary of the enactment of the ADEA has elevated awareness to the issue of age discrimination in the work place. On June 14, 2017 the EEOC

held a meeting entitled "The ADEA @ 50 - More Relevant than Ever" at the agency headquarters in Washington, D.C. This meeting has been held "open" for an additional 15 days to allow audience attendees and members of the public to submit written comments on any issues or matters discussed at the meeting. The press release as to what was discussed is available on the EEOC's website. Comments may be mailed to Commission Meeting, EEOC Executive Office, 131 M Street, N.E., Washington, D.C. 20507 or emailed to: Commissionmeetingcomments@eoc.gov.

If you have any questions regarding the ADEA, or any other labor or employment issue, please contact Dianna McCarthy at (212) 221-6900 or McCarthy.D@WSSLLP.com

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