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# SCOTUS LOWERS THE BOOM ON BUT-FOR CAUSATION UNDER THE ADEA FOR FEDERAL EMPLOYEES:

*Adverse Personnel Actions Involving Federal Employees Over the Age of 40 Are Actionable Under the ADEA Even When Age Is Merely a Consideration and Not the Determining Factor*

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In Babb v. Wilkie,[1] the Supreme Court of the United States determined whether the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA)[2] imposes liability only when age is a "but-for cause" of the personnel action at issue. The Court decided that it does not, and held that personnel actions affecting federal employees over the age of 40 must be wholly free from age discrimination under the ADEA. In other words, age does not have to be the determining factor under the ADEA. Rather, any consideration of age is actionable.

The Court explained, however, that not all forms of relief might be available under the ADEA when the plaintiff cannot show that a personnel action would have been different had age not been a factor. To obtain certain relief, such as job reinstatement, hiring, back pay, and compensatory damages, the plaintiff must be able to prove that age was a "but-for" cause of the employment decision at issue. Absent such a showing, the Court found that a plaintiff might be entitled only to other remedies, such as injunctive or forward-looking relief.

Noris Babb (Babb) was a clinical pharmacist at the U.S. Department of Veterans Affairs Medical Center in Bay Pines, Florida. In 2014, Babb sued the Secretary of Veterans Affairs (VA) alleging that she had been discriminated against based on her age.[3] Babb claimed that the VA took a variety of adverse personnel actions against her constituting age discrimination, including removing a special designation that made her eligible for a promotion and pay increase; denying her training opportunities; passing her over for positions; and reducing her holiday pay after placing her in a new position and higher pay grade.

At the district court level, the VA moved for summary judgment and offered non-discriminatory reasons for its personnel actions. The court granted summary judgment, finding that, while Babb had established a *prima facie* case, the VA had proffered legitimate reasons for its personnel

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[1] 589 U.S. ____ (2020).
[2] 29 U.S.C. § 633a(a).
[3] Babb brought additional claims against the VA, but only her age discrimination claim was before the Court.

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actions that no jury could reasonably conclude were pretextual. Babb appealed the lower court's decision to the Eleventh Circuit Court of Appeals.

In her appeal, Babb contended that the district court was wrong to grant summary judgment because, under the federal-sector provision of the ADEA, a personnel action is unlawful if age plays any role at all. Babb argued that even if the VA's reasons for the challenged employment decisions were not pretextual, it does not necessarily follow that age discrimination did not play a part in them. The Eleventh Circuit panel found that applicable precedent foreclosed Babb's argument but agreed that if it were "writing on a clean slate," it might have agreed with her. The Court granted certiorari to decide the Circuit split over Section 633a(a).

The relevant part of the ADEA states "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." The VA contended that this provision imposes liability only when age is a but-for cause of the personnel action.[4] According to the VA, even if age played any role in the employment decision, so long as it was not the determining factor, no liability for age discrimination exists under the ADEA. The VA argued that its interpretation comports with the rule for liability that the Court has recognized under other employment discrimination cases where recovery is permitted only where the injury would not have occurred but-for the alleged misconduct.

Babb maintained that this ADEA provision prohibits any consideration of age in the decision-making process. Babb contended that a federal employee does not need to prove but-for causation to establish liability under the ADEA. After examining the plain meaning of the statute, Justice Alito, writing for the majority, agreed.

The Court reasoned that, under the express language of Section 633a(a), personnel actions must be made "free from" discrimination. In this context, the Court instructed that "free from" means "untainted" and "the addition of the term 'any' . . . drives this point home." The Court further reasoned that "based on age" modifies "discrimination" and not "personnel action." As a result, the Court concluded that age has to be a but-for cause of discrimination (or differential treatment), but not a but-for cause of the challenged personnel action. As a result, if age discrimination played any factor in making the personnel action, an actionable claim exists under the ADEA.

The Court went on to note that its interpretation is not undermined by precedent interpreting the Fair Credit Reporting Act, the ADEA's private-sector provision, and Title VII's anti-retaliation provision because the language of those laws is markedly different than that of Section 633a(a). The Court also found that it was not anomalous for it to hold the federal government to a higher standard than private employers or state and local governments. When Congress broadened the scope of the ADEA beyond the private sector to include state and local government, it did so by

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[4] In <u>Gross v. FBL Financial Services</u>, Inc., 557 U.S. 167 (2009), the Court held that a plaintiff in the private sector must show that age was the "but for" cause of an adverse employment decision. However, as the Court notes later in the instant ruling, the language of Section 623(a) (private-sector ADEA) is very different from the language of Section 633a(a) (federal-sector ADEA).

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adding them to the existing statutory definition of "employer." However, the Court noted that, when Congress wanted to include federal employers, it created a separate statutory scheme that applied only to the federal government. Regardless, the Court instructed that the statutory language of Section 633a(a) is unambiguous, and the judicial inquiry was complete. The Court reversed the Eleventh Circuit's opinion and remanded the case for further proceedings consistent the ruling.

Justice Ginsberg joined Justice Alito's majority opinion, except with respect to footnote three where Justice Alito instructs that, to be actionable under Section 633a(a), the age discrimination must have played a part in the ultimate decision making. According to Justice Alito, it is not enough if bias played a part in the process but was not a part of the personnel action.

Justice Ginsberg also joined Justice Sotomayor's concurring opinion. In the concurring opinion, Justice Sotomayor made two observations. First, the Court's opinion does not foreclose claims under Section 633a(a) that arise from discriminatory processes versus personnel decisions. Second, Justice Sotomayor noted that some instances might exist that warrant damage remedies under Section 633a(a), such as where an applicant incurs costs to prepare for an aptitude test that is administered by the federal employer in a discriminatory manner. Justice Thomas wrote a dissenting opinion in which he warned about the possible implications for the Court's ruling. He also noted his concerns about deviating from the default rule of but-for causation in current anti-discrimination jurisprudence.

While the Court's ruling makes it clear that consideration of age cannot take any part in an employment decision affecting a federal employee or applicant over the age of 40, where age bias might creep into the process without tainting the employment decision, likely no violation of the ADEA exists. Footnote three of the Court's ruling addresses this point. Further illustrating this point, during oral argument, Chief Justice Roberts asked Babb's counsel whether a comment such as "okay boomer" made by a hiring person to an older applicant would be actionable under the statutory interpretation espoused by Babb. Chief Justice Roberts was concerned that the ADEA could be used to police workplace speech. Babb's counsel indicated that such a passing comment should not invoke liability under the ADEA absent some connection to the ultimate employment decision. Chief Justice Roberts joined the majority opinion.

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