

HOW FIVE JUSTICES HAVE IMPACTED THE LIVES OF COUNTLESS HARDWORKING AMERICANS

A look at Gross v. FBL Financial Services, Inc. (2009)

Roberts Court Guts The Age Discrimination In Employment Act

BACKGROUND: In *Gross v. FBL Financial Services, Inc.*, just five Supreme Court Justices decided to override statutory protections and make it more difficult to prove age discrimination in the workplace. Those five Justices adopted a standard that the Supreme Court itself had rejected in a prior case, and that Congress had rejected when enacting the Civil Rights Act of 1991. It is the very definition of judicial activism when a court imposes a rule of decision rejected by its own precedent and rejected by Congress.

COURT'S DISSENTING OPINION: Justice Stevens' powerful dissent in the Gross case outlined the overreaching opinion of the five Justices. He noted, "[I]t is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement of the ADEA [Age Discrimination in Employment Act] that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition..."

Justice Stevens further concluded that the Court's opinion in fact ignored settled law, and rejected the Court's own precedent: "The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court...and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking."

DEMOCRATIC REACTION: "This overreaching by a narrow majority of the Court will have a detrimental effect on all Americans and their families. In these difficult economic times, American workers need to be protected from discrimination...By disregarding congressional intent and the time-honored understanding of the statute, a five member majority of the Court has today stripped our most senior American employees of important protections." (Senator Patrick Leahy, Press Statement, June 18, 2009)

"This past June, in *Gross v. FBL Financial, Inc.*, five Justices rewrote the rules-- indeed, effectively rewrote the law--and ruled against Mr. Gross and other older workers. In doing so, the Court made it harder for those with legitimate age discrimination claims to prevail under the ADEA...This is a serious misreading of the intent of Congress." (Senator Tom Harkin, Senate Floor, 10/8/09)

OUTCOME: Congress is trying to right this wrong, and in October 2009, the Protecting Older Workers Against Discrimination Act was introduced to reverse the Gross decision and restore the law to what it was for decades before five Justices on the Supreme Court rewrote the rule. The legislation will make clear that when a victim shows discrimination was a "motivating factor" behind a decision, the burden is properly only on the employer to show that it complied with the law.