

## **N.J. Human Resources Law Alert, July 2009**

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### **AGE DISCRIMINATION: EMPLOYEE HAS BURDEN TO PROVE AGE WAS THE "BUT FOR" CAUSE OF ADVERSE EMPLOYMENT ACTION**

The U.S. Supreme Court recently refined the burden of proof in a "mixed motive" age discrimination case under the Age Discrimination in Employment Act, holding a an employee plaintiff bringing a "disparate treatment" claim must prove not simply that age was a motivating factor in the adverse employment action, but that age was the "but for" cause of the challenged adverse employment action. Unlike race and gender discrimination cases under Title VII of the Civil Rights Act of 1964, the burden of persuasion in an age case under the ADEA does shift to employer to show it would have taken action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor. ( , U.S. Sup. Ct. June 19, 2009) Heretofore, the burden of proof under the ADEA had been identical to that of Title VII cases. makes it more difficult for an age discrimination plaintiff to survive a summary judgment motion, let alone win a trial verdict. not Gross v. FBL Financial