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U.S. Supreme Court Issues Two Decisions on Causation Standard Under Anti-Discrimination Statutes

While Coronavirus was dominating headlines in March and April 2020, the U.S. Supreme issued two important decisions that will have a significant impact on employment cases long after COVID-19 is defeated. The first opinion, *Comcast Corp. v. NAAAOM*, held a plaintiff asserting race discrimination under Section 1981 of the Civil Rights Act of 1866 must prove a contract (which includes an employment relationship) would have been entered or continued "but for" the plaintiff's race. The second, *Babb v. Wilkie,* reached the seemingly opposite conclusion—a government employee asserting age discrimination under the federal-sector provision of the Age Discrimination in Employment Act of 1967 ("ADEA") need only prove that age bias crept into an employment decision.

These opinions, both of which focused on the application of causation standards under specific employment discrimination statutes, are important for private employers for several reasons. First, although limited to race discrimination claims, courts have historically applied the same standard and elements of proof to Section 1981 claims as discrimination claims asserted under Title VII. Section 1981, however, is broader and has fewer limitations for plaintiffs than Title VII in several respects.

For example, Section 1981 applies to all private employers irrespective of size, while Title VII applies to only those with 15 or more employees. In addition, the protections under Section 1981 extend not only to employees, but also to independent contractors and partners. Title VII protections are available only to employees. In addition, unlike Title VII, Section 1981 has no administrative exhaustion requirement, so plaintiffs need not file a charge of discrimination with the EEOC or similar state agency before filing a lawsuit alleging a Section 1981 violation. Moreover, while Title VII caps non-economic damages between $50,000 and $300,000 depending on employer size, Section 1981 imposes no damages cap.

Second, significant differences exist between the "but for" causation standard approved in *Comcast* (which now applies to Section 1981 claims) and other causation standards that merely require a protected characteristic to motivate or play some part in an adverse employment action. This difference has a material impact on jury verdicts. Statistics prove that juries find discrimination far less often when instructed to apply a "but for" causation standard rather than some lower standard. When a judge instructs a jury on the law, the jury listens and genuinely tries to apply the law correctly. While "but for" causation requires a plaintiff to eliminate the possibility that he or she would have been fired if Caucasian, lesser causation standards invite juries to base verdicts on implicit bias or anything the jury believes the decision-maker may have been thinking when the decision was made.

Third, *Comcast* and *Babb* build upon decades of causation-standard jurisprudence and confirm that "but for" causation is the norm in employment discrimination cases unless some basis in the language of the underlying statute commands a less rigorous standard. *Comcast* and *Babb* exemplify just how rarely that may happen.

Comcast and *Babb* further develop a line of Supreme Court precedent that began in 2009. In 2009, the Supreme Court in *Gross v. FBL Financial Services, Inc.* held a private-sector plaintiff bringing an age discrimination claim under the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the

challenged adverse employment action. By its statutory text, the ADEA prohibits adverse employment actions taken "because of" an individual's age. *Gross* compared that statutory language of the ADEA with the statutory language of Title VII, as amended by the Civil Rights Act of 1991. In 1991, Congress amended Title VII to prohibit employment practices when race, color, religion, sex, or national origin is merely a "motivating factor." Congress did not similarly amend the ADEA. "Because of" must therefore mean something other than "motivating factor." Dictionaries provide that "because" means "by reason of." *Gross* therefore applied this common definition of "because," to require that a forbidden consideration have a determinative influence on an outcome. "But for" causation is therefore a prerequisite to proving an ADEA claim, and *Gross* refused to apply a less rigorous, "motivating factor" causation standard. In so holding, *Gross* declined to "ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA."

In addition to not amending the ADEA, the Civil Rights Act of 1991 also did not amend Title VII's prohibition against retaliation, the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and any number of other federal employment law protections. *Gross,* however, did not go as far as to hold that "but for" causation governs any employment claim that is based on something other than Title VII's discrimination provision. *Gross* left such questions for future opinions. The first such opinion came in 2013, in *University of Texas Southwestern Medical Center v. Nassar*. *Nassar* applied *Gross*'s but-for standard to Title VII's prohibition against retaliation, which, like the ADEA, prohibits retaliation "because" of certain protected activity.

The combination of *Gross* and *Nassar* made "but for" causation inevitable where a statute prohibits employment actions taken "because of" an illegal consideration. This would include age discrimination claims under the ADEA and retaliation claims under Title VII. But what about statutory protections that do not include the word "because"? These include, among others, disability discrimination claims under the ADA (prohibiting discrimination "on the basis of disability") and retaliation claims under the FMLA (prohibiting retaliation "for opposing any practice made unlawful" by the FMLA). They also include race discrimination claims under Section 1981, which were addressed in *Comcast*.

Section 1981 (written shortly after the Civil War as part of the Civil Rights Act of 1866) is not constructed like most employment discrimination statutes. It provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." The Court in *Comcast* held this statutory language "directs our attention to the counterfactual—what would have happened if the plaintiff had been white?" "This focus," the Court determined, "fits naturally with the ordinary rule that a plaintiff must prove but-for causation." The Court also assumed the post-Civil War Congress "legislate[d] against the backdrop of the common law," including the common law's general requirement that a tort plaintiff must establish "but for" causation to prevail.

But most statutes—even modern ones such as the ADA and FMLA—direct the focus to the counterfactual: What would have happened if the plaintiff had no disability? or What would have happened if the plaintiff did not request FMLA leave? And the common law continues to require "but for" causation as an element of tort claims. *Comcast* therefore provided some very strong clues about how lower courts should determine causation standards applicable under the ADA and FMLA. If ever asked, this Court's current composition likely would require the plaintiff to prove "but for" causation for ADA and FMLA claims.

Babb, however, demonstrated that the present Court will not apply a "but for" causation standard to all federal employment laws. In *Babb*, the Court evaluated the ADEA's federal-sector provision, which, for purposes of interpreting a causation standard, is even more elusive than Section 1981. It provides that "personnel actions" affecting individuals aged 40 and older "shall be made free from any discrimination based on age." The Court in *Babb* determined that a personnel decision is not "made free from" discrimination simply because the result would have been the same even absent the consideration of age. *Babb* demonstrates the limits to the assumption that a plaintiff must establish "but for" causation to prevail under an employment discrimination statute.

Employers must continue awaiting a definitive Supreme Court opinion defining causation standards under frequently litigated statutes like the ADA and FMLA where the statutory language remains unclear. In the meantime, "but for" causation for Section 1981 claims is no small victory. And the combination of *Gross, Nassar, Comcast* and *Babb* will make it very difficult for lower future courts to apply some less rigorous causation standard to private employment discrimination claims falling outside Title VII.

If you wish to visit with us about the impact of these decisions, please contact your Kutak Rock attorney or a member of our Employment Law Group.