

Supreme Court Bolsters Federal Employees' Protections Against Age Discrimination

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In a nearly unanimous decision, the U.S. Supreme Court bolstered the protections that federal government employees enjoy against age-based discrimination.

The Court's decision in the *Babb v. Wilkie* case, issued on April 6, 2020, addressed the standards that federal employees must satisfy to establish prohibited age-based discrimination under the Age Discrimination in Employment Act of 1967 (ADEA). The government argued that "but for" discrimination is required—meaning, in other words, that a federal employee must prove that the government made an adverse personnel decision that it would not have made but for the employee's age. The plaintiff (a pharmacist at a Veterans Affairs hospital), however, argued that the federal government commits prohibited age-based discrimination whenever age is a consideration in the decision-making process, irrespective of whether age is the "but for" cause of the ultimate decision.

To illustrate the difference, the Court's opinion offered this example:

Suppose that a decision-maker is trying to decide whether to promote employee A, who is 35 years old, or employee B, who is 55. Under the employer's policy, candidates for promotion are first given numerical scores based on non-discriminatory factors. Candidates over the age of 40 are then docked five points, and the employee with the highest score is promoted. Based on the non-discriminatory factors, employee A (the 35-year-old) is given a score of 90, and employee B (the 55-year-old) gets a score of 85. But employee B is then docked 5 points because of age and thus ends up with a final score of 80. The decision-maker looks at the candidates' final scores and, seeing that employee A has the higher score, promotes employee A.

In that scenario, employee B's age was not the "but for" cause of the employee losing out on the promotion, because employee B would have lost out on the promotion irrespective of the employee's age. But, by docking 5 points from employee B's score, age was most certainly a factor in the decision-making process. Was employee B a victim of prohibited age discrimination under ADEA?

Yes, the Supreme Court held. Grounding its decision in the broad text of the ADEA statutory provision at issue—which states that federal personnel decisions “shall be made free from discrimination based on age” (29 U.S.C. § 633a(a))—the Court concluded the federal government commits unlawful discrimination whenever age is considered in the decision-making process.

Under the Court’s decision, which was joined by all Justices but Justice Thomas, who dissented, it will now be easier for employees of the federal government to establish age-based discrimination. The Court’s decision did not affect the standards applicable to discrimination claims by private sector employees.

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