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AGE-BIAS BILL WOULD EASE BURDEN FOR PLAINTIFFS

Legislation seeking to overturn decision favoring employers

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WASHINGTON—Legislation that seeks to make it easier for employees to prevail in age discrimination cases looks likely to win approval, observers say.

The legislation seeks to overturn the June ruling by the U.S. Supreme Court in *Jack Gross vs. FBL Financial Services Inc.* that plaintiffs must prove age was the determinative factor in an adverse job action and not just one of several motivating factors, a decision hailed as a major victory for employers (BI, June 18).

The court held that the Age Discrimination in Employment Act of 1967, unlike the Title VII of the Civil Rights Act of 1964, does not authorize a “mixed-motives” claim. Instead, plaintiffs must prove age was the “but for” cause of the adverse job action, according to the decision.

The Protecting Older Workers Against Discrimination Act, which was introduced Oct. 6 in the House and Senate, would permit such “mixed-motives” age discrimination litigation.

“In *Gross*, the Supreme Court rewrote civil rights laws, overturning well-established precedent and making it harder for workers facing age discrimination to enforce their rights,” the three legislators who introduced the legislation—U.S. Rep. George Miller, D-Calif.; Sen. Tom Harkin, D-Iowa; and Sen. Patrick Leahy D-Vt.—said in a statement.

The House bill, H.R. 3721, has been referred to the House Judiciary Committee as well as the House Education and Labor Committee, which Rep. Miller chairs. The Senate bill, S.1756, has been referred to the Senate's Health, Education, Labor and Pension Committee, whose chairman is Sen. Harkin.

Observers note Congress' move to overturn another U.S. Supreme Court decision in an employment law case may signal the likelihood of this bill's passage as well.

In January, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009, which eases time limits on age discrimination suits. That law reversed the Supreme Court's 2007 ruling in *Lilly Ledbetter vs. Goodyear Tire & Rubber Co. Inc.*

Observers say the older workers legislation has a good chance of passage, although it is unclear precisely when that will happen, given lawmakers' preoccupation with health care and other issues.

“We now have a Congress that is more favorable towards plaintiffs in civil rights cases than we've had in quite a while,” said Thomas H. Christopher, a partner with law firm Kilpatrick

Stockton L.L.P. in Atlanta.

“It may very well have a decent chance of passing” if it remains a “modest amendment to the law,” which is how it is drafted, and Congress does not try to “Christmas-tree it” with additional changes, said Lawrence Z. Lorber, a partner with law firm Proskauer Rose L.L.P. in Washington.

Observers noted the Supreme Court ruling came as a surprise to lawyers on both sides of the issue.

“Prior to the Supreme Court ruling, most people kind of assumed that the legal framework would be what this legislation proposes.” said Philip K. Miles III, an associate with State College, Pa.-based McQuaide Blasko Attorneys at Law.

If permitted to stand, the Supreme Court's ruling will help employers in mixed-motive cases, which account for a minority of age discrimination cases, observers say.

Even if the employee establishes age discrimination was a factor in an adverse job action, “the employer could say, “We would have taken this action anyway” for other reasons. It puts a higher burden of proof on employees, Mr. Miles said of the ruling.

As a result, the ruling would make it easier for employers to win summary judgment in some cases, said Neal Mollen, a partner with law firm Paul, Hastings Janofsky & Walter L.L.P. in Washington.

“I think you'll see there will be more cases where an employer prevails on summary judgment than you have seen before Gross,” Mr. Mollen said. This is true, though, only for cases that are “at the margin,” where “the evidence is close” and standards of proof make a difference, he said.

It is not likely to have any effect in cases that go to a jury, Mr. Mollen said. “Juries tend not to pay huge amounts of attention to instructions on the burden of proof,” he said.

But if the legislation becomes law, “the standards of proof are going to swing back in a much more pro-plaintiff way,” said Franklyn C. Steinberg III, a principal with Somerville, N.J.-based Steinberg Law Offices.

Mr. Steinberg recommended that, pending the legislation's expected passage, “now would be a good time to think about getting cases either settled or maybe disposed of on motion.”

Mr. Mollen agreed. “I definitely think that it's wise for employers to see what they can do to dispose of their cases now, while the Supreme Court's rule is still in effect.”

Meanwhile, Jeffrey D. Polsky, a partner with law firm Fox Rothschild L.L.P. in San Francisco, said, “I don't think (the legislation) changes anything in terms of what employers need to do. As always, they need to make sure that they can show a legitimate, nondiscriminatory basis for any adverse employment decision.”