A CHALLENGE SUPREME COURT STYLE?

Memo to Congress: If you don't like it, then fix it. That seems to be the message the 5-4 majority sent in *Gross v FBL Financial Services Inc.* We should remember this majority as they formed the majority in *Ledbetter v Goodyear* and *14 Penn Plaza v Pyett* - Chief Justice Roberts joined by Justices Thomas, Scalia, Kennedy and Alito. In today's ruling, they addressed an issued not raised, or briefed by the parties.

Justice Thomas' opinion held that under the Age Discrimination in Employment Act the parties do not need to worry about whether direct evidence of age bias shifts the burden to employers to prove they would have taken the same action had they not considered age in the employment equation. Why -- because in their view, under the age discrimination law the burden never shifts to the employer, even if age was a motivating factor for the employment decision. They explain that the employee in age cases must prove that age was the "but for" cause of the adverse employment action. The majority was explicit on this point [w]e must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed- motives discrimination claim brought under the ADEA. We hold that it does not."

The majority came to this conclusion based upon several factors. First a vague unarticulated view that proof of age bias is different than proving other types of bias. The focal point of the analysis, however, is captured in their observation "we cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." It does not really matter that Congress had no reason to address the ADEA when they amended Title VII because all the appellate courts that had addressed this issue under the ADEA had applied some type of burden shifting analysis. What matters now is that the majority was clear that if Congress wants to insure that a protected classification is to play no role in employment decisions--then Congress should say so. Further, if the protected trait does play a role, and Congress wants to shift the burden to the employer to show they would have made the same decision despite their consideration, Congress has to make it explicit in the statute.

The actual holding in *Gross* while startling because of the willingness of this majority to address an issue not presented, is not conceptually difficult. In age cases the employer must prove "but-for" causation. What is interesting is how this majority is willing to challenge Congress to correct the Court if they do not like what they read. Un-phased by Congress' quick rebuke of their opinion in *Ledbetter*, the same majority earlier this term permitted the forced arbitration of age claims by an individual who had not agreed to arbitrate his claims. There, as in this case, this majority laid the problem in Congress' lap. "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be unenforceable.'" The majority continued, "[t]his is a 'battl[e]' that should be fought among the political branches and the industry."

As Justice Ginsburg in her dissent in *Ledbetter* took this majority to task for ignoring the realities of sex-based wage discrimination, the dissent here argues that the majority's stingy opinion ignores the desires of Congress. Justice Stevens in a dissent that

was joined by Justices Breyer, Souter and Ginsburg complained "[t]he but-for standard the court adopts was rejected by this Court in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking."

Congress was quick to take up the challenge issued by Justice Ginsburg in *Ledbetter* -- that the ball was in their court. It is clear that on the issues presented by *Gross* and *Pyett* the ball is back in Congress' lap. I am confident that Congress and the Obama administration will accept this challenge, and address the alleged omissions which the majority has highlighted.