

## Lawsuits on age bias take a hit

### ■ Court's 5-4 decision adds to burden of proof

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**WASHINGTON** — The Supreme Court has made it harder to prove discrimination on the basis of age, ruling against an employee in his mid-50s who says he was demoted because of his age.

In a 5-4 decision Thursday written by Justice Clarence Thomas, the court said a worker has to prove that age was the key factor in an employment decision, even if there is some evidence that age played a role. In some other discrimination lawsuits, the burden of proof shifts to the employer once a worker shows there is some reason to believe a decision was made for improper reasons.

Jack Gross had been a vice president of FBL Financial Services of West Des Moines, Iowa. But in 2001, he lost the title of vice president in a

reorganization, and two years later, some of his responsibilities were given to a colleague.

Gross sued under the federal Age Discrimination in Employment Act and a jury agreed that his age was a motivating factor in his demotion. Gross was awarded \$46,945 in lost compensation.

A federal appeals court overturned the verdict.

"We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action," Thomas wrote. "The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in the decision."

Anjana Samant, a lawyer for the [Center for Constitutional Rights](#), said this decision will have an impact

on whether workers file age discrimination lawsuits: "Whichever party doesn't have the burden of proof is more likely to win."

The court's four most liberal justices dissented.

Justice John Paul Stevens said the court and the Congress have previously rejected Thomas's "but-for" standard.

"Given this unambiguous history, it is particularly inappropriate for the court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII," Stevens said. "I disagree not only with the court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking."

Sen. Patrick Leahy, D-Vt., chairman of the Senate Judiciary Committee, compared this decision to a 2007 decision that made it more difficult to sue over past pay discrimination. That policy was later reversed by the Democrat-controlled Congress.

