Office of Congressional Workplace Rights

CAA STANDARDS OF CAUSATION AFTER *BABB V. WILKIE*
MAY 20, 2020

I. Introduction

On April 6 of this year, the Supreme Court issued its decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), clarifying that the standard of causation under the Age Discrimination in Employment Act (ADEA) is much more favorable to federal sector plaintiffs than the private sector's "but-for" causation standard. In an 8-1 opinion authored by Justice Alito, the Court held that the plain language of the statute "demands that personnel actions be untainted by any consideration of age." *Id*. at 1171. This holding is based on the language of 29 U.S.C. § 633a(a), which provides that in the federal government, with limited exceptions, "All personnel actions affecting employees or applicants for employment who are at least 40 years of age… shall be made free from any discrimination based on age."

The holding in *Babb* is important for the legislative branch because the ADEA applies to covered employees through the Congressional Accountability Act (CAA). Its significance goes beyond that, however, because the language in section 633a(a) is effectively identical to that of section 201(a) of the CAA, 2 U.S.C. § 1311(a), which provides that "All personnel actions affecting covered employees shall be made free from any discrimination based on" not just age under the ADEA (section 201(a)(2)), but also race, color, religion, sex, or national origin within the meaning of Title VII of the Civil Rights Act of 1964 (section 201(a)(1)), as well as disability within the meaning of the Rehabilitation Act and the Americans with Disabilities Act (ADA) (section 201(a)(3)), and possibly genetic information under the Genetic Information Nondiscrimination Act (GINA) (see section 102(c)(1)).

II. Babb v. Wilkie

Babb came to the Supreme Court on appeal from the 11th Circuit, which affirmed – albeit reluctantly – the district court's decision in favor of the employer.

A. Background

Facts: Noris Babb, the plaintiff in the original case and the petitioner before the Supreme Court, was a clinical pharmacist over the age of 40, working for the U.S. Department of Veterans Affairs (the VA). She sued the VA for employment discrimination in 2014, alleging that she suffered several adverse personnel actions – including non-selection for a new position, denial of training opportunities, removal of an "advanced scope" designation that would have made her eligible for promotion on the GS scale, and reduction of holiday pay – and claiming (among other things) that these decisions were the result of unlawful age discrimination in violation of the ADEA.

District Court: The District Court for the Middle District of Florida granted summary judgment in favor of the VA. *Babb v. McDonald*, No. 8:14-CV-1732-T-33TBM, 2016 WL 4441652 (M.D. Fla. Aug. 23, 2016). Applying the traditional *McDonnell Douglas* burden-shifting framework, the district court found that, although Babb had established a prima facie case, the VA had proffered legitimate reasons for the challenged actions, and Babb had failed to raise a genuine issue of material fact that could allow a jury to conclude that the VA's reasons were pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Specifically, even though Babb produced evidence that the position for which she had applied was filled by two younger candidates, the court found that the VA had produced sufficient evidence to show that the selecting officials reasonably believed those younger individuals had better relevant experience. Nor was Babb's testimony that one manager had made age-related comments sufficient to establish pretext.

Circuit Court of Appeals: On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's decision, but made clear that it did so because it was bound by Circuit precedent, not because it necessarily agreed with that precedent. *Babb v. Sec'y, Dep't of Veterans Affairs*, 743 F. App'x 280 (11th Cir. 2018). Babb argued on appeal that the district court erred in applying the *McDonnell Douglas* framework to her ADEA claim, because that framework applies in cases involving "but-for" causation, and the language in the provision applying ADEA to the federal sector, 29 U.S.C. § 633a(a), applies a more lenient standard, providing that personnel decisions affecting employees over the age of 40 "shall be made free from any discrimination based on age." Addressing this argument, the court said, "If we were writing on a clean slate, we might well agree." 743 F. App'x at 287. However, in a previous similar case, another panel within the Eleventh Circuit had applied *McDonnell Douglas* in analyzing ADEA claims, and the *Babb* panel felt constrained under the court's "prior-panel-precedent rule" to do the same.

B. SCOTUS Majority

In a decision authored by Justice Alito, joined by all except Justice Thomas (and with Justice Ginsburg declining to join in one footnote), the SCOTUS reversed and remanded the Eleventh Circuit's decision, agreeing with Babb's interpretation of the statutory language.

"Free from any" means "untainted by": The federal-sector provision of the ADEA requires that "All personnel actions affecting employees or applicants for employment who are at least 40 years of age… shall be made free from any discrimination based on age." The Court focused on this wording – specifically the phrase "free from any" – and decided that "The plain meaning of

the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation of § 633a(a)." 140 S. Ct. at 1172. Citing to several dictionaries, the Court explained that "The phrase 'free from' means 'untainted' or '[c]lear of (something which is regarded as objectionable).'" *Id*. at 1173 (citations omitted). Further, "the addition of the term 'any' ('free from *any* discrimination based on age') drives the point home." *Id*. (emphasis in original). The Court additionally clarified that when considering ADEA cases, because the ADEA does not define the term "personnel actions," the Court follows the Civil Service Reform Act, which "broadly defines a 'personnel action' to include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews." *Id*. (citing 5 U.S.C. § 2302(a)(2)(A)).

"Free from any" vs. "based on": The government had argued that the key language in section 633a(a) was not "free from any" but rather "discrimination *based on* age" (emphasis added). The Court rejected this argument, focusing on the grammatical syntax of the sentence:

> First, "based on age" is an adjectival phrase that modifies the noun "discrimination." It does not modify "personnel actions." The statute does not say that "it is unlawful to take personal actions that are based on age"; it says that "personnel actions… shall be made free from any discrimination based on age." § 633(a). As a result, age must be a but-for cause of discrimination – that is, of differential treatment – but not necessarily a but-for cause of a personnel action itself.

140 S. Ct. at 1173. In other words, in order for an employer to be liable under the ADEA, a plaintiff must show that the differential treatment she experienced would not have happened but for her age, but she does *not* need to show that the ultimate employment decision would not have been made if not for her age.

The example given in the decision is of two employees eligible for promotion. Employee A is younger than 40, while employee B is over 40. They are given numerical scores based on non-discriminatory factors, with the older employee being docked an additional 5 points for her age. That docking of extra points is clearly differential treatment based on age, and if the promotion is based on the numerical scores, then the decision was "tainted" by discrimination based on age. However, in this hypothetical, the employer would still be liable for violating the ADEA *even if* the older employee's score was more than 5 points lower than the younger employee's score *before* the age-based adjustment – i.e., even if the younger employee would have gotten the promotion anyway based on the non-discriminatory factors alone. As the court explained:

> It is true that this difference in treatment did not affect the outcome, and therefore age was not a but-for cause of the decision to promote employee A. Employee A would have won out even if age had not been considered and employee B had not lost five points, since A's score of 90 was higher than B's initial, legitimate score of 85. But under the language of § 633a(a), this does not preclude liability.

140 S. Ct. at 1174.

Ultimate decision vs. decision-making process: In footnote 3 of the majority opinion,[1] the Court addressed the phrase "shall be made" – as in, "All personnel actions… *shall be made* free from any discrimination based on age." 29 U.S.C. § 633a(a). The Court referenced the government's argument "that the term 'made' refers to a particular moment in time, *i.e.*, the moment when the final employment decision is made. We agree, but this does not mean that age must be a but-for cause of the ultimate outcome. If, at the time when the decision is actually made, age plays a part, then the decision is not made 'free from' age discrimination." 140 S. Ct. at 1174 n.3.

It is perhaps surprising that the Court found this point to merit only a footnote, because it could certainly be a significant point in many cases. The hypothetical offered in the footnote illustrates why: In this example, a subordinate tries to influence the decision-maker to promote an under-40 employee rather than one who is over 40, in part because of the employees' ages; the decision-maker ignores the suggestion that age should play a role, and indeed "rebukes the subordinate for taking age into account, disregards the recommendation, and makes the decision independently." The Court explained that even though age discrimination was involved along the way, "age played no role whatsoever in the ultimate decision," and it would be too expansive a reading of the ADEA to hold the employer liable under these circumstances. In fact, as the Court pointed out, under too broad a reading, the employer could be held liable even if the older employee got the promotion.

Interestingly, this footnote is the only part of the majority opinion in which Justice Ginsburg did not join, although she did not write separately to explain her disagreement with this part of the holding.

Liability vs. remedy: In the final key piece of the decision, the Court distinguished between *liability* under the ADEA – for which the plaintiff need only show that the decision was tainted by age-based discrimination – and the *remedies* available to plaintiffs, which could be considerably different depending on how significant a role the age-based discrimination played in the decision. Because the relief must appropriately redress the injury, if an employment decision would have been made even in the absence of the unlawful discrimination, then there is no cognizable injury entitling the plaintiff to damages. 140 S. Ct. at 1177-78. "Thus, § 633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employing decision. To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome." *Id*. This makes sense in light of traditional legal principles, under which relief is meant to put the plaintiff in the position she would have been in if not for the unlawful conduct. "Remedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination. But this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result." *Id*. at 1178.

However, the Court noted that other types of relief may still be available, as plaintiffs "are not without a remedy if they show that age was a but-for cause of differential treatment in an

[1] In the Westlaw version of the opinion, this is labeled as footnote 4; in the Supreme Court's original decision, available at https://www.supremecourt.gov/opinions/19pdf/18-882_3ebh.pdf, it is footnote 3.

employment decision but not a but-for cause of the decision itself. In that situation, plaintiffs can seek injunctive or other forward-looking relief." *Id*. If a plaintiff establishes that the ADEA was violated, it is up to the district court to decide what relief, if any, would be appropriate. *Id*.

C. Concurrence and Dissent

Justice Sotomayor, in a short concurring opinion joined by Justice Ginsburg, observed that the majority's opinion "does not foreclose § 633a claims arising from discriminatory processes." 140 S. Ct. at 1178. Her example: if an employer administers a computer-aptitude test to applicants over the age of 40, then even if an older applicant passes the test and is hired, "clearly a question could arise as to whether the hiring decision was 'made free from' differential treatment." *Id*. She also pointed out that this could allow for some damages remedies even if the age-based discrimination was not the but-for cause of the employment decision, such as in a situation where out-of-pocket costs were incurred for preparing for the discriminatorily-administered computer aptitude test.

Justice Thomas was the lone dissenter in the *Babb* case. In essence, his dissent boiled down to his disagreement with the rest of the Court that the plain language of the statute is clear. He explained that the "default rule" for federal anti-discrimination claims is but-for causation, and he does not believe that the language in the ADEA is sufficiently clear to overcome that default rule. Id. at 1179-80. Rather, he believes that the language in section 633a(a) is ambiguous, and that this provision "is also susceptible of the Government's interpretation, *i.e.*, that the entire phrase 'discrimination based on age' modifies 'personnel actions.'… Because the only thing being 'made' in the statute is a 'personnel action,' it is entirely reasonable to conclude that age must be the but-for cause of that personnel action." *Id*. at 1180. Justice Thomas also expressed concern over the "sweeping nature" of the Court's "novel 'any consideration' rule" because the ADEA does not contain the remedial scheme envisioned by the majority – i.e., there is no statutory basis to distinguish between "tainted by" causation for liability and "but-for" causation for damages.

Notably, Justice Thomas pointed out that this same standard of causation could presumably apply to federal-sector Title VII claims – which we discuss in more detail below – and he went on to speculate that this could call into question the legality of many federal affirmative action programs, which may result in hiring that is not free from differential treatment based on several of Title VII's protected characteristics. 140 S. Ct. at 1181-82.

III. CAA Section 201(a) and Title VII

To date, the OCWR Board has not yet had occasion to address the issue of whether a "but for" or "motivating factor" standard of causation is required for claims arising under section 201(a) of the CAA. In many of the cases that have come before it, the Board has found that there was no evidence that the plaintiff's membership in a protected class played any role at all in the decision-making process, and consequently, the Board did not have to reach the issue of whether a "but for" or "motivating factor" analysis would be more appropriate.

Should the issue arise in future cases, however, it is likely that the Board would follow the standard set forth in *Babb v. Wilkie*, as the CAA requires that federal precedent under the laws made applicable by section 201 must guide hearing officer decisions. *See* 2 U.S.C. § 1405(h). This is likely true for OCWR claims arising not only under the ADEA, but also under Title VII and ADA Title I, because, as noted above, the CAA in section 201(a) provides that "All personnel actions affecting covered employees shall be made free from any discrimination based on" the protected characteristics defined in those statutes: age, race, color, religion, sex, national origin, and disability. It might also apply to claims under GINA, which are subject to the same provisions as claims brought under section 201(a), *see* 2 U.S.C. § 1302(c)(1). Thus the language of the CAA indicates that, in the wake of *Babb*, personnel decisions must not be tainted by discrimination based on any of those factors, and evidence that those decisions would have been made anyway will not save employing offices from liability.

Meanwhile, to the extent that the Board often follows the federal courts in analyzing Title VII claims brought via section 201(a) of the CAA, the *Babb* decision could have implications for future such cases. The federal-sector provision of Title VII, which was added to the Civil Rights Act through the Equal Employment Opportunities Act of 1972, provides that "All personnel actions affecting employees or applicants for employment… **shall be made free from any discrimination** based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–16(a) (emphasis added). This language, like that of CAA section 201(a), is identical to the ADEA language that the Supreme Court analyzed in *Babb*.

Although Title VII claims are not at issue in *Babb*, the Court's analysis of the "free from any discrimination" language could potentially open the door to future arguments regarding whether Title VII claims against federal employers must be analyzed using the same standard of causation as federal-sector ADEA claims. Indeed, there is language in the *Babb* opinion that could readily support a more plaintiff-friendly standard of causation under Title VII for federal government employees. After noting that the ADEA (like Title VII) originally applied only to private employers, and was later expanded to reach federal, state, and local governments, the Court explained:

> To cover state and local governments, Congress simply added them to the definition of an "employer" in the ADEA's private-sector provision, and Congress could have easily done the same for the Federal Government. Indeed, the first proposal for expansion of the ADEA to government entities did precisely that.
>
> But Congress did not choose this route. Instead, it deliberately prescribed a distinct statutory scheme applicable only to the federal sector, and in doing so, it eschewed the language used in the private-sector provision. We generally ascribe significance to such a decision…
>
> That Congress would want to hold the Federal Government to a higher standard than state and private employers is not unusual.

140 S. Ct. at 1177 (internal quotations and citations omitted). The same argument could be made with respect to Title VII, and thus the "free from any" language in section 2000e–16 could be viewed as applying a "tainted by" standard to federal-sector claims under Title VII. Justice Thomas says as much in his dissent in *Babb*: "Because § 633a(a)'s language also appears in the

federal-sector provision of Title VII, 42 U.S.C. § 2000e–16(a), the Court's rule presumably applies to claims alleging discrimination based on sex, race, religion, color, and national origin as well." 140 S. Ct. at 1181.

IV. Retaliation

The *Babb* decision did not directly address retaliation under the ADEA. However, the decision does have potential implications for retaliation claims under the CAA.

First, the decision confirmed that the language "because of" indicates but-for causation. In distinguishing the federal-sector and private-sector provisions of the ADEA, the Court discussed the latter as follows:

> Section 623(a)(1) makes it "unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Thus, **the but-for causal language in § 623(a)(1)—"because of such individual's age"—is an adverbial phrase modifying the verbs ("to fail or refuse to hire," etc.) that specify the conduct that the provision regulates.** For this reason, the syntax of § 623(a)(1) is critically different from that of § 633a(a), where, as noted, the but-for language modifies the noun "discrimination."

140 S. Ct. at 1176 (emphasis added). This is significant because the language in section 207 of the CAA, although not identical to the but-for language in the ADEA, similarly includes the word "because":

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee **because** the covered employee has opposed any practice made unlawful by this chapter, or **because** the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1317(a). This suggests that the standard of causation for retaliation claims under CAA section 207 could be subject to a but-for causation standard – i.e., a claimant would have to show that the allegedly retaliatory action would not have been taken but for the claimant's protected activity. Indeed, the language in section 207 is essentially identical to that of Title VII's anti-retaliation provision, 42 U.S.C. § 2000e–3(a), which also prohibits retaliation "because" an employee has opposed an unlawful practice or participated in proceedings under Title VII; in *Babb* the Court cited to its previous decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), in which it held that private-sector Title VII retaliation claims are subject to a but-for causation standard. *Babb*, 140 S. Ct. at 1176.

However, at the same time, the *Babb* decision could support a less restrictive standard of causation for federal-sector Title VII retaliation claims. As discussed above, *Babb* could have implications for the standard of causation in Title VII cases, including claims for violations of Title VII brought via CAA section 201(a). The courts have consistently held that the federal-

sector provision of Title VII encompasses retaliation claims as well as discrimination claims, even though it does not mention retaliation. *See Komis v. Sec'y of U.S. Dep't of Labor*, 918 F.3d 289, 294 (3d Cir. 2019) (every Circuit Court of Appeals to consider the question has held that federal employees may bring claims of retaliation under Title VII even though the federal-sector provision does not mention retaliation, because Congress intended to give federal employees the same rights as private-sector employees); *cf. Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (federal employees may bring retaliation claims under the ADEA even though the statutory language does not mention retaliation). If, as posited in the previous section, *Babb* ultimately leads the courts and the Board to analyze federal-sector Title VII claims under a "tainted by" causation standard, this could also relax the burden on federal-sector plaintiffs to establish liability for Title VII retaliation.

In any event, until the OCWR Board of Directors has occasion to decide the issue, the effect of *Babb* on CAA retaliation claims – if there is any such effect at all – will remain an open question.