



## High Court age discrimination decision raises questions on comp damages

By Anjali Patel, Esq., **cyberFEDS**® Legal Editor Washington Bureau

**IN FOCUS:** Practitioners are split on whether a recent U.S. Supreme Court decision enables [age discrimination](#) complainants to claim compensatory damages for the first time.

In *Babb v. Department of Veterans Affairs*, [120 LRP 11906](#) (U.S. 04/06/20), the Supreme Court [found](#) that age does not need to be the but-for cause of a challenged personnel decision because the plain meaning of Section 633a(a) of the Age Discrimination in Employment Act "demands that personnel actions be untainted by any consideration of age." However, in the decision, Justice Samuel Alito wrote that but-for causation still affects whether the employee would be eligible for "reinstatement, damages, or other relief related to the end result of an employment decision."

Some experts are interpreting the decision to mean the court is allowing compensatory damages in ADEA cases, while others believe the court cannot change the statute's text, which currently does not provide for compensatory damages.

Federal Practice Group partner Heather White previously told **cyberFEDS**® the allowance for compensatory damages "is a major new development," and said the court's decision is "a welcome update" because the ADEA "has long been a source of great frustration for employees trying to win relief for age discrimination."

### Damages were not the issue

But others, [including federal employment law experts](#) Gary Gilbert and [John Mahoney](#), believe the issue before the court did not pertain to damages, so anything discussing damages was "dicta" -- or the explanatory or informative part of a judicial opinion that does not directly address the specific issue of the case.

In *Babb*, "the court was interpreting the section of the ADEA having to do with the burden of proof, not damages" for federal employees, Gilbert said.

"The reference to damages was inadvertent," so "don't be misled that employees can recover compensatory damages in age discrimination cases," he added.

Gilbert said he is "confident that courts are not going to find the reference to damages to be a basis to award legal fees" because the Civil Rights Act of 1991, which added compensatory damages as a remedy in Title VII and disability discrimination cases, did not cover age cases.

Plus, compensatory damages were a "last minute" addition and consequently have no legislative history to clarify why age discrimination cases are or are not covered, Gilbert said.

"The decision does in no way have the effect or intent of interpreting the remedies portion of the ADEA," he said.

Mahoney agreed, saying the "Supreme Court made a mistake when they said in *Babb* that a successful complainant in a federal employee ADEA claim can be awarded compensatory damages if they prove that 'but for' the proven age discrimination, the challenged personnel action would not have occurred." Therefore, "contrary to the Supreme Court's dicta in *Babb*, compensatory damages are not available under the ADEA," he added.

### **Higher standard and additional remedies**

*Babb* is significant primarily because the court imposes different standards for obtaining different types of relief and essentially "invites" attorneys to make "novel arguments" for remedies, Gilbert said.

Under *Babb*, an employee must prove that the agency would have not have taken the personnel action had age not been taken into account -- but-for causation -- to obtain relief generally available for an ADEA violation, such as hiring, reinstatement, back pay, and compensatory damages.

"But if age discrimination played a lesser part in the decision, other remedies may be appropriate," such as injunctive or other forward-looking relief, the decision noted.

This language suggests additional remedies may be available to a prevailing party who proves that age is a factor, Gilbert said.

If an agency discharged employees older than 40 sooner to save money on retirement and benefits, the relief would reflect how much sooner the employee was terminated, he said. Other forward-looking relief related to how early a termination was effectuated may come in various forms, such as an increased pension, benefits based on up seniority, or step increases in salary the employees would have gotten if they had not been discharged, he explained.

Mahoney added that if an employee shows that the agency denied her a promotion based on age but could not show she was the best qualified candidate, other forward-looking relief may include ordering the agency provide priority consideration.

## Legal fees and settlements

Gilbert also said *Babb* may allow employees to get legal fees for cases brought in federal District Court because an employee who shows age was a factor in the agency's decision is a prevailing party, who can get attorney's fees in court under ADEA.

However, Mahoney noted, "the ADEA does not provide for attorney's fees in the administrative EEOC complaint process." So, employees who only go through the EEOC administrative process for age discrimination claims cannot get attorney's fees from an administrative judge decision or the EEOC on appeal, "absent an amendment to the ADEA," he explained.

Yet, "the precedent developed in *Babb* could be potentially used to seek an award of attorney's fees for a successful case" which is based on protected categories other than age, such as, race, color, sex, national origin, religion, disability, or prior EEO activity, Mahoney added.

Even without being able to get attorney's fees from an administrative EEOC decision, Gilbert said that employees may be able to negotiate better settlements that cover attorney's fees. Generally, an agency can settle to include legal fees even though the EEOC is powerless to grant them because the parties can settle for anything a prevailing employee would have gotten if litigation proceeded, which includes the potential relief courts could have awarded, he explained.

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