

**18-882 BABB V. WILKIE**

DECISION BELOW: 743 Fed.Appx. 280

LOWER COURT CASE NUMBER: 16-16492

QUESTION PRESENTED:

Federal employees' rights are determined under statutes which require that "all personnel actions effecting employees or applicants for employment ... in executive agencies as defined in Title 5 ... shall be made free from any discrimination ... " *See* 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin) (emphasis added); 29 U.S.C. § 633a(a) (age). This Court, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), interpreted the private-sector statutory language "because" in 42 U.S.C. § 2000e-3(a), and "because of" in 29 U.S.C. § 623(a)(1), respectively, as requiring a private-sector plaintiff to prove but-for causation.

The question presented is:

Whether "shall be made free from any discrimination" permits federal-sector personnel actions that are not made free from any discrimination or retaliation, as long as discrimination or retaliation is not the but-for cause of the personnel action, or rather prohibits personnel actions where discrimination and retaliation is a factor.

A subsidiary question is whether Title VII bans retaliation in federal employment.

GRANTED LIMITED TO THE FOLLOWING QUESTION: WHETHER THE FEDERAL-SECTOR PROVISION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, WHICH PROVIDES THAT PERSONNEL ACTIONS AFFECTING AGENCY EMPLOYEES AGED 40 YEARS OR OLDER SHALL BE MADE FREE FROM ANY "DISCRIMINATION BASED ON AGE," 29 U.S.C. §633a(a), REQUIRES A PLAINTIFF TO PROVE THAT AGE WAS A BUT-FOR CAUSE OF THE CHALLENGED PERSONNEL ACTION.

ORDER OF JANUARY 17, 2020:

THE PARTIES ARE DIRECTED TO FILE SUPPLEMENTAL LETTER BRIEFS ADDRESSING THE FOLLOWING QUESTION: WHAT PROSPECTIVE ADMINISTRATIVE OR JUDICIAL RELIEF MAY A FEDERAL EMPLOYEE OBTAIN UNDER LAWS OTHER THAN THE ADEA, INCLUDING UNDER THE CIVIL SERVICE LAWS OR THE CONSTITUTION, AGAINST AGE-RELATED POLICIES, PRACTICES, ACTIONS, OR STATEMENTS THAT WERE NOT THE BUT-FOR CAUSE OF AN ADVERSE EMPLOYMENT ACTION AGAINST THE COMPLAINING EMPLOYEE?

CERT. GRANTED 6/28/2019