

# ***Babb v. Wilkie*: The Age Discrimination in Employment Act and Mixed Motives**

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Can a federal employee claim age discrimination whenever age bias is one factor in an employment decision, or must she show that the employer would have made a different decision but for her age? The Supreme Court is to take up this question in *Babb v. Wilkie* as the latest turn in a decades-long legal debate on what qualifies as “discrimination” “because of” or “based on” an impermissible motive. A Supreme Court decision will likely resolve a circuit-court spit on the meaning of the [Age Discrimination in Employment Act](#) (ADEA), and a Court ruling could affect courts’ application of other, similarly worded antidiscrimination laws. This Sidebar discusses motive requirements in antidiscrimination cases, summarizes the litigation in *Babb*, and presents key considerations for Congress.

## **The ADEA, “Mixed-Motives” Discrimination, “But-for” Discrimination, and Federal Workers**

Several federal statutes prohibit various forms of discrimination in the employment context. The most comprehensive of these, [Title VII](#) of the Civil Rights Act of 1964, prohibits many employment practices that treat workers differently on the basis of race, color, religion, sex, or national origin. A similar statute, the ADEA, bars discrimination against workers over 40 on the basis of age.

Both the [ADEA](#) and [Title VII](#) also have separate provisions for federal and non-federal employees. Congress added these provisions as amendments and used language different from the non-federal-sector text, and courts must consider whether federal and non-federal workers should be treated the same under the two statutes. Differences in the ADEA’s text and history also raise questions about whether courts should follow rules developed to implement Title VII.

In *Babb*, the Supreme Court may clarify the ADEA’s requirements for federal-sector employees, including, perhaps, whether courts should interpret the statute in line with Title VII. The issue before the Court is how to assess an employer’s age-related motive under this provision when faced with evidence of other motives unrelated to age that also informed an employer’s treatment of a worker.

Courts have struggled to decide discrimination cases when confronted with evidence of an employer’s mixed motives—both a discriminatory motive prohibited by the statute and another, permissible motive. The Supreme Court has repeatedly wrestled with the problem. In *Price Waterhouse v. Hopkins*, a majority

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of Justices recognized that Title VII would not afford liability if discriminatory animus “played a motivating part” in a workplace action, provided the employer proved that it would have made the same decision even without the improper factor. The Court thus held that Title VII required discrimination to be the determining factor, or the “but-for” cause of an employee’s mistreatment. In response to *Price Waterhouse*, Congress amended Title VII so that an employee could raise a claim, although for partial relief, by showing an impermissible factor “was a motivating factor for any employment practice, even though other factors also motivated the practice.”

Yet Congress did not amend the ADEA to add similar allowance for “mixed-motives” claims, even though it made other changes to the ADEA around the same time. Thus, the High Court has since held (at least for non-federal employment) that ADEA claimants must show the employer would have treated them more favorably but for their age.

On top of the confusion over whether ADEA and Title VII share causation requirements, adjudicators have encountered another difficulty: Whether the two statutes establish the same rules for federal and non-federal workers. The problem arose because the ADEA and Title VII have separate, differently worded provisions for federal and non-federal employees, complicating causation analysis. This textual difference is at the core of the parties’ dispute in *Babb*. For non-federal employees, the ADEA bars “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” The federal-sector provision mandates that “all personnel actions ... shall be made free from any discrimination based on age.” Title VII uses similar language in its federal and non-federal provisions. Do these differences matter in deciding whether the statutes require but-for rather than mixed-motives causation?

Courts have split in considering the motive requirement for the federal-sector portion of the ADEA. The Eleventh and Ninth Circuits have held that the federal-sector provision, like the ADEA’s main provisions, requires that age be the but-for cause of the employee’s harm. If the record shows that the employer had mixed motives, and would have taken the same action regardless of age, the employer would prevail. The D.C. Circuit, in contrast, has held that a showing of mixed motives—proof age was “a factor,” but not the deciding factor—will suffice. The court pointed to the federal-sector ADEA’s “sweeping language”—instructing that employees be free from “any” age-based discrimination—in distinguishing it from the non-federal provision.

Against this background, *Babb* asked the Supreme Court to review her ADEA and Title VII claims and the United States agreed that the issues called for high court review. The Court granted review limited to the ADEA question. The key question for the Court is how to construe the federal-sector ADEA’s use of the phrase “shall be made free from any discrimination based on age.”

## Background of *Babb v. Wilkie*

Norris Babb, a pharmacist for the Department of Veterans Affairs (VA), alleged that the VA denied her and all other women pharmacists over age 50 training and certification they needed to advance. Men and other, younger women, she asserted, received these benefits. After Babb helped women coworkers over age 40 to file discrimination complaints, the VA denied her promotion in favor of younger women. Babb filed a discrimination claim based on the ADEA (claiming age discrimination) and Title VII (alleging discrimination based on sex and retaliation for her participation in other employees’ complaints).

A federal district court granted summary judgment to the VA. On appeal, Babb argued that the court should have considered her claim that the VA acted out of mixed motives—that is, it impermissibly denied her promotion in part because of age and retaliation, even if other, non-actionable factors also contributed to the decision. The Eleventh Circuit upheld the decision against Babb. It would not be enough that age bias or retaliation factored into the decision, the court held, so long as the VA would have

denied Babb's promotion without considering age or retaliation. In Babb's case, managers explained that she lacked relevant experience and had criticized other employees during her interview.

The circuit court noted with concern, though, the textual differences in the ADEA's [federal-sector provision](#), pointing out the language was "[quite unlike](#)" that governing other, non-federal employees and that this might suggest federal employees could prevail with a showing of mixed motives. The court [acknowledged](#), however, that its prior precedent required federal and non-federal ADEA claimants meet the same standard; each must show that age was the deciding factor or but-for cause of an unfavorable workplace decision.

In her briefing to the Supreme Court, Babb [emphasized](#) the federal-sector ADEA provision's use of the phrase "shall be made free from any discrimination based on age," language absent from the text governing other employers. She argued that the language allowed federal workers like her to prove discrimination when an employer uses age or retaliation as a motivating factor. Being "free from any discrimination," she posited, means barring age from the workplace "[decision-making process](#)," not merely its outcome.

Others have read ADEA's federal-sector provision this way, Babb pointed out. The [D.C. Circuit](#) has held that Congress deliberately provided federal employees with broader protection than private employees under the act. The [Equal Opportunity Employment Commission](#) (EEOC) and the [Merit Systems Protection Board](#) similarly allow federal employees to claim mixed-motive discrimination in agency adjudication. Agencies' assessment that the imprecise statutory language in the ADEA calls for mixed-motive analysis in assessing federal-sector age discrimination claims, Babb's counsel contended, warrants the Court's [deference](#).

In response, the government [argued](#) that "discrimination" in personnel actions typically describes making a less favorable decision for an impermissible reason, rather than merely considering an impermissible factor along the way. The Supreme Court has repeatedly [held](#) that statutory phrases like "[based on](#)" and "[because of](#)" in anti-discrimination statutes require that a discriminatory motive be decisive—an unsurprising interpretation, the government explained, given that but-for causation is "[the default rule](#)" in tort law. The government [urged](#) the Court to resist introducing "anomalies in federal anti-discrimination law." Congress would have used more deliberate language, in the government's view, had it wanted to create a separate standard for federal employees under the ADEA. As for deference to agencies' interpretation, the government contended that agency [regulations](#) did not provide the relief Babb sought and administrative [guidance](#) and agency decisions did not effectively apply the statutory language.

At [argument on January 15](#), Justice Ruth Bader Ginsburg suggested that the government's reading of the ADEA's federal-sector provision would render its "extra words" mere "surplus." Justices concentrated on the distinction between an employer's decision-making process versus its outcome, asking if the "actions" the statute governed included deliberations or only the final result. Chief Justice John Roberts asked if a plaintiff could prevail whenever a deciding official made a comment on age, such as "OK, Boomer." If so, the Chief Justice suggested, the statute might devolve into "a regulation of speech in the workplace."

After the argument, the Justices ordered supplemental briefing on whether other laws, including civil service laws, offered relief on a mixed-motive theory. In the supplemental brief, Babb's counsel [stated](#) that civil service laws are not "directly enforceable," meaning that the laws set up rules governing internal policies, but individual workers cannot sue to enforce those rules. The government [emphasized](#) that civil service and other administrative and oversight mechanisms "provide the same basic prospective relief by preventing agencies from adopting or continuing impermissible age-based policies." The Court will likely decide the case by late June.

## Potential Outcomes and Legislative Implications

The call for supplemental briefing may signal the Justices' wish to decide the case on grounds specific to the federal-employment context, perhaps by concluding that Congress drafted the federal-sector ADEA with preexisting merit-systems protections in mind. Those protections generally prevent government officials from including any non-merit factor, including age, in employment decisions, practices, and policies whether or not age amounts to a but-for cause of any employment decision. The fact that the federal government already mandated merit systems principles may explain why Congress would set a different standard for federal employers in litigation.

Whatever the result, the Court's decision will likely reconcile a circuit split, resolving how lower courts will construe the ADEA's federal-sector provision, and clarify whether federal and non-federal claims have the same causation requirement. Even though the Court has elected not to address the similar federal-sector retaliation language in Title VII, its reasoning in *Babb* will likely influence that provision's application. So far courts have concluded that the Title VII federal-sector retaliation provision requires a showing of but-for causation, while the EEOC has taken the opposite approach and applied a mixed-motive analysis.

*Babb* may more broadly clarify when courts should apply a but-for causation standard in antidiscrimination measures. The Court could, for example, emphasize but-for causation as a default rule, as it did in a similar decision on March 23, *Comcast Corp. v. National Association of African American-Owned Media*. In that case, the Court took up the causation question under Section 1981 of the Civil Rights Act of 1866, which bars racial discrimination in contracts. The nineteenth-century statute used language unlike modern antidiscrimination measures, affording "[a]ll persons" the "same right ... to make and enforce contracts ... as is enjoyed by white citizens." Though *Comcast* concerns Section 1981, the question presented in the case was largely the same as often arises under modern antidiscrimination statutes; it required the Court to decide whether the plaintiff must allege that race was *the* reason Comcast refused to broadcast his independent TV channels, or if it is enough that race was a "motivating factor." The *Comcast* Court concluded that a plaintiff must allege "but-for" causation and emphasized this as the "typical[]" default rule. *Babb* will thus provide the Court's second opportunity to clarify antidiscrimination causation requirements. The Court's holdings in the two cases may inform interpretation of existing measures and drafting of future ones.

Whichever way *Babb* comes out, it may prompt Congress to amend the ADEA, Title VII, or both. Congress could, for example, clarify whether federal and non-federal employees are subject to the same causation standard. It may elect to add federal employees into the statutes' main provisions if uniformity is preferable. Congress may also consider amending the ADEA, portions of Title VII, and other, similar antidiscrimination statutes to apply uniformly the mixed-motives standard it added to Title VII in 1991. Under that standard, an employee may prevail if discrimination played a role in her mistreatment, even if other factors determined the outcome. The employee's remedies in this circumstance, however, are limited to declaratory relief, injunctive relief, and attorney's fees. Back pay and reinstatement are unavailable.

Recent proposals along these lines, H.R. 1230 and S. 485, would extend the mixed-motives analysis and limited remedies to ADEA claimants generally. They would also apply the standard to retaliation claims, including those under Title VII, for both federal and non-federal employees. The bills further propose similar changes to two statutes reaching disability discrimination, the Americans with Disabilities Act and the Rehabilitation Act. One stated purpose of S. 485 is to reject the Court's conclusion that prior failure to amend statutes other than Title VII suggests an intent to disallow mixed-motive claims.

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