A Timely Analysis of Legal Developments

ASAP®

In This Issue:

June 2009

The Supreme Court has given businesses a stronger hand in defending against federal age discrimination claims. In a 5-4 decision, the Court held that age discrimination plaintiffs bear the burden of proving that, but for their age, their employers would not have made the challenged employment decisions.

Supreme Court Decides that Title VII Mixed-Motives Analysis Does Not Apply to Age Discrimination Claims

By Gaye L. Huxoll

The U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*, No. 08-441 (June 18, 2009) has held that the burden-shifting analysis that is available in so-called mixed-motives cases under Title VII does not apply to claims under the Age Discrimination in Employment Act (ADEA). Rather, the Court held that a plaintiff bringing a disparate treatment claim under the ADEA bears the burden of proving by a preponderance of the evidence that his or her age was the "but-for" cause of the challenged adverse employment action. In other words, even if there is some evidence that age was a factor in the challenged employment decision, the plaintiff cannot prevail unless he or she can prove that, but for his or her age, the employer would not have taken the challenged action.

Case Background

Jack Gross first began working for FBL Financial Services, Inc. (FBL) in 1971. In 2001, after Gross's long-time supervisor was demoted and then retired, his new supervisor changed Gross's job title. Although his job duties remained the same, Gross believed the title change constituted a demotion because he received fewer points in the company's salary grade system. In 2003, as part of a department restructuring, Gross was moved to another position. He also viewed this reassignment as a demotion because many responsibilities associated with his former position were transferred to a newly created position that was given to a woman in her early forties whom he had previously supervised. Gross was 54 at the time.

Gross filed suit under the ADEA, claiming that the 2003 reassignment amounted to age discrimination. The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. The jury was instructed that it should return a verdict for Gross if he proved by a preponderance of the evidence that his reassignment constituted a demotion, and that his age was a motivating factor (*i.e.*, played a part or role) in the demotion decision. The jury was further instructed that if FBL proved by a preponderance of the evidence that it would

have demoted Gross regardless of his age, then its verdict should be for FBL. The jury found for Gross and awarded him $46,945 in lost compensation.

FBL appealed the jury verdict to the U.S. Court of Appeals for the Eighth Circuit. Among other things, FBL challenged the jury instructions with respect to the elements of the claim and burden of proof. The challenged instructions were based on the Supreme Court's holding in *Price Waterhouse v. Hopkins*.[1] In that case, the Court held that, if a Title VII plaintiff shows that discrimination was a motivating factor in the challenged employment action, the burden shifts to the employer to show that it would have taken the same action regardless of that impermissible consideration. The Eighth Circuit found that the jury had been improperly instructed. The Eighth Circuit ruled that the burden of persuasion in mixed-motives cases shifts to the employer only if the plaintiff has presented direct evidence of discrimination. Because Gross's case was based on circumstantial evidence, the Eighth Circuit found that the mixed-motives instruction was improper. Accordingly, the Eighth Circuit reversed and remanded for a new trial. Gross appealed the Eighth Circuit's decision to the Supreme Court.

The Supreme Court's Analysis

The Supreme Court vacated the Eighth Circuit's decision and remanded the case for further proceedings. The Court found that a mixed-motives instruction is never appropriate in an ADEA case, regardless of whether the plaintiff presents direct or circumstantial evidence. The Court reasoned that, following *Price Waterhouse*, Congress had amended Title VII to explicitly authorize discrimination claims in which a plaintiff's membership in a protected class was a "motivating factor" in the employer's decision. When Congress did so however, it did not similarly amend the ADEA to permit such claims. Therefore, the Court concluded, its decisions involving Title VII mixed-motives claims do not apply to age discrimination claims.

The Court then turned to the language of the ADEA to decide whether the statute authorizes a mixed-motives discrimination claim. The ADEA provides that it is unlawful for an employer to discriminate against an employee or applicant "because of" his or her age.[2] Based on the "ordinary meaning" of this statutory language, the Court concluded that an ADEA plaintiff must prove that his or her age was the reason for – or, in legal parlance, the but-for cause of – the employer's decision. Therefore, the plaintiff retains the burden of proving that age was the "but-for" cause of the challenged employment action.

Implications of the Decision

Although it seems at first blush to constitute a significant victory for employers, the *Gross* case is not so much about how employers should apply the antidiscrimination laws but about how job bias complaints are brought and litigated. As such, it should have little practical impact on employers. Moreover, given the current political climate, it seems likely that Congress will act to overturn *Gross* to bring standards under the ADEA back in line with Title VII. In the meantime though, and regardless of whether Congress takes any action in response to this decision, employers should bear in mind that they will have the greatest success in avoiding liability under the employment discrimination statutes if they can ensure that an employee or applicant's protected characteristics are not a factor in employment decisions.

Gaye L. Huxoll is a Shareholder in Littler Mendelson's Miami office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Huxoll at ghuxoll@littler.com.

1 490 U.S. 228 (1989).

2 29 U.S.C. § 623(a)(1).