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EMPLOYER UPDATE

AGE DISCRIMINATION CLAIMS: WHAT IS THE EXPOSURE FOR EMPLOYERS?

By Kara L. Heikkila

The U.S. Supreme Court ruled in favor of employers in the last several weeks in an important case asserting individualized or disparate treatment age discrimination claims under the Age Discrimination in Employment Act ("ADEA"). Age discrimination claims currently make up nearly 26% of charges filed with the Equal Employment Opportunity Commission ("EEOC") each year. Filing a charge with the EEOC is a mandatory prerequisite to filing a lawsuit under the ADEA, a federal law prohibiting discrimination against individuals who are 40 years of age and older. The number of age discrimination charges with the EEOC is up nearly 10% in the last decade and is predicted to continue to increase as the U.S. working population ages. According to EEOC statistics in the last year, a complaint of age discrimination is now nearly as common as a claim for sex discrimination. While this recent U.S. Supreme Court decision is good news

for employers in light of the trend of increased claims, it may be a short-lived victory as the Democratic Congress has suggested it will respond by changing or amending the ADEA. A review of the impact of the decision in *Gross v. FBL Financial Services, Inc.* follows.

Background on the ADEA

The ADEA is a federal law that covers private employers with 20 or more employees. It also applies to political subdivisions within states, employment agencies, and labor unions. This law prohibits discrimination against individuals who are 40 years of age and older in a broad range of areas, including hiring and discharge decisions, advertising, and provision of employee benefits. Under the ADEA, it is unlawful to fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to

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compensation or other terms of employment *because of that person's age* (40 or over). The phrase *because of that person's age* is language taken directly from this federal statute and is important in understanding the decision just made by the U.S. Supreme Court.

There are certain permissible practices that are exceptions to this general rule under the ADEA, including forced retirement in limited occupational categories including firefighters and law enforcement officers. Under the ADEA, an employer may take action against an employee in this age protected status "based on reasonable factors other than age" or for "good cause." This is of course consistent with the practice of at-will employment, which is the law in Idaho. Employees in Idaho may alternatively file a charge with the Idaho Human Rights Commission and assert a claim of age discrimination in employment under Idaho's Human Rights Act. Employers with five (5) or more employees are subject to this law. The Idaho Human Rights Act adopts the same standards set forth in the ADEA prohibiting certain actions against individuals age 40 or over.

An employee who successfully makes a claim for age discrimination is entitled to pay from the time the action was taken until trial, pay for a reasonable time into the future, payment of their attorney fees and costs in bringing the action, and potential double damages for willful violations of the law by an employer.

What an Employee Must Prove under Title VII Discrimination Law

In Title VII cases, the burden is on an employee who claims discrimination against their employer to prove that the action taken against them (for example, fail to hire, fail to promote, or termination) was because of a protected status or activity. Under Title VII of the Civil Rights Act, legislation passed in the 1960s, employees may assert claims of sex, race, national origin, color, or religious discrimination. Age discrimination was not covered by Title VII to the Civil Rights Act. As

a result, the ADEA was later enacted to specifically address age discrimination claims.

A specific procedure developed over time with respect to what an employee must show to prevail in employment discrimination cases under Title VII. It in effect is a burden-shifting process. The employee first has to establish a basic fact pattern to support such a claim. The burden then shifts to the employer to establish that it had a legitimate, nondiscriminatory reason for the action taken. If the employer establishes this reason, the burden shifts back to the employee to ultimately show that the legitimate, nondiscriminatory reasons offered by the employer for the action were simply "smoke and mirrors" (or pretextual) and that sex, race, or some other protected status was the real basis for the decision.

Importantly, Title VII claims (for sex, race, religious, color or national origin discrimination) allow the employee to ultimately succeed by proving that the status at issue was "a motivating factor" for the employment decision taken against them. For example, in a race case, the employee must prove that race was a motivating factor for a termination decision. The employer may have had other motivations including, importantly, a performance or attendance issue. Under Title VII, this employee need only prove that race was one motivating factor. This is also called a "mixed motive" analysis.

Because the ADEA is a separate statute from Title VII, it has been unclear whether this burden-shifting framework and "mixed motive" analysis would apply in an age discrimination case. That unanswered question provided the background for the U.S. Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc.*

What an Employee Must Now Prove under the ADEA after *Gross v. FBL Financial*

Jack Gross worked for FBL as a claims administration manager. When he was 54 years old, his job responsibilities were in part transferred to a younger,

female employee in her early 40s. Although they received the same level of compensation, Gross considered the reassignment a demotion and, after filing a charge with the EEOC, filed a lawsuit in federal court under the ADEA. The case went to trial, where Gross asserted that the reassignment was based at least in part on his age. His employer introduced evidence that the reassignment was part of a corporate restructuring program and that his new position was better suited to his skills. The jury was instructed that Gross was required to prove that age was “a motivating factor” in the demotion decision and that age could qualify as “a motivating factor” *if it played a part or role* in FBL’s decision to reassign him. A jury returned a verdict in favor of Gross.

The employer appealed, asserting that the jury was improperly instructed on a number of issues including what type of proof the employee must offer in this circumstance. The case made its way to the U.S. Supreme Court. Before deciding the issue of the type of proof required, the Court first asserted it had to determine whether, as a threshold matter, the burden *ever* shifts to an employer defending an age discrimination case, as it does in a Title VII case. The Court ultimately determined that it does not.

In its opinion, the U.S. Supreme analyzed the language of the ADEA, which it recognized is different than that of Title VII. Title VII specifically allows for a “mixed motive” analysis and ultimately an easier burden on employees to prove discrimination. The Court found that the ADEA has no such language. Instead, under the ADEA, the statute requires an employee to prove that the adverse action was taken simply “because of their age.” While evidence of other suggested reasons for the action will still be introduced at trial, the burden never shifts to the employer in an age case to produce evidence. In summary, the employee must establish that age was “the reason” the employer decided to act.

What Employers Should Consider with Respect to Potential Age Claims

The *Gross v. FBL Financial Services, Inc.* decision was indeed a positive development for employers. This decision in effect means that employees will have a more difficult time proving an age discrimination case, at least compared to other types of discrimination claims. Unfortunately, Congress may respond as it has in the past by amending the ADEA to conform to the lighter burdens for employees under Title VII of the Civil Rights Act.

Irrespective of how successful an employee might be in making such a claim, employers should still be aware of the sheer increased risk of an age discrimination case now and into the future. Employers should consider this risk in hiring, promotion, termination or even demotion cases like *Gross v. FBL*, where the employee’s compensation remained the same as that of the comparator employee, even after the restructuring. Notably, the comparator herself in *Gross* was in the age-protected status over 40, but the law has established that discrepancies in age even within the over 40 group, here 14 years, can still form the basis for an age discrimination claim. An employer should be prepared to support its legitimate decisions other than age for taking any adverse action. And employers should always make the reasons for those decisions clear to the employee to prevent the employee from speculating that age was in fact the reason for the decision.

As always, we welcome your questions on employment matters.

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Bagels & Briefs



Note for Your Calendar:

Watch for our next Bagels & Briefs Seminar, scheduled for July 30, 2009.