

United States Supreme Court Makes Proof of Age Claims More Difficult for Employees But Effect in Minnesota is Limited

It appears that not all discrimination is created equal. Discrimination based on race, gender, or religion was forbidden by Title VII of the Civil Rights Act in 1964 ("Title VII"), and discrimination on the basis of age was prohibited under the Age Discrimination in Employment Act of 1967 ("ADEA"). Although Title VII and the ADEA are worded differently and have different legislative histories, federal and state courts have generally applied them identically.

But no longer. In Gross v. FBL Financial Services, Inc., ___ U.S. ___ (June 18, 2009), the United States Supreme Court held that the ADEA, unlike Title VII, does not recognize "mixed motive" cases, where the discriminatory motive might be one of several factors behind an adverse employment action. In a mixed-motive case, an employee must show only that the discriminatory motive was "a motivating factor," but need not show it was the only factor.

In the case before the Supreme Court, Jack Gross alleged that his employer, FBL Financial Services, Inc., demoted him from a "director" to a "manager" because of his age. The trial court had instructed the jury that they must find for Gross if age "played a part or a role" in the demotion, and that they must find for FBL if it proved the demotion would have occurred regardless of Gross' age. The jury found for Gross. FBL appealed, and the Eighth Circuit Court of Appeals reversed, holding that the "mixed motive" instruction was available only when the employee could introduce direct evidence of discrimination - such as a statement indicating bias against Gross because of his age. Because Gross had only introduced circumstantial evidence, he was not entitled to the instruction.

Without addressing the direct/circumstantial distinction, the United States Supreme Court instead held

that ADEA claims were never entitled to a "mixed motive" instruction. Relying on the language of the ADEA, the Supreme Court held that an employee must show that the discriminatory action occurred "because of age" - meaning that age was the reason the employer took the action. In practice, this means that once an employee has stated a claim for age discrimination, employers are no longer required to show that there was a legitimate reason for the adverse employment action in order to avoid liability. Rather, the burden always remains with the employee to show that age alone caused the action.

However, the lightened burden for employers may not mean much in the long run. Most discrimination claims are brought under both state and federal law. The Minnesota Human Rights Act ("MHRA"), unlike Title VII, prohibits discrimination on the basis of age as well as gender, race and religion. Applying state law, Minnesota courts have always treated age discrimination cases the same as other forms of discrimination. They will probably continue to do so. But if a claim is brought only under the ADEA and not the MHRA, Minnesota courts would be required to follow Gross and hold a plaintiff to a higher burden of proof. While it is possible to require an employee to submit any ADEA claim to arbitration, this requires a binding contract between the employee and employer prior to the termination. See 14 Penn Plaza LLC v. Pyett, ___ U.S. ___ (April 1, 2009).

Age discrimination claims remain a unique area of the law for another reason - the Older Workers Benefit Protection Act ("OWBPA"). Enacted in 1990, the OWBPA requires very specific information and notices be given to employees, age 40 and older, as part of a settlement of ADEA claims. See 29 U.S.C. § 626(f). The law applies to all employers, and

requires - in part - compensation for release of the claim, an explanation of the employee's rights, mandatory consideration and rescission periods, and, in the case of a group termination or multiple-employee exit incentive program, a thorough explanation of the eligibility factors for the program and information about the individuals eligible for the program. Moreover, the waiver must be "written in a manner calculated to be understood" by the employee. 29 U.S.C. § 626(f)(1)(A).

If any of the technical requirements of the OWBPA are not met, the release of ADEA claims is invalid. This is particularly true in Minnesota, where federal courts have held that an employer must strictly comply with the law, and the absence of even one of the OWBPA's requirements invalidates a waiver. See Peterson v. Seagate US LLC, 2008 WL 2230716 (D.Minn. May 28, 2008) (waivers which contained inaccurate information or unexplained job codes, or failed to include ages of eligible employees, are invalid as a matter of law). This emphasizes the crucial need for competent legal advice when negotiating a release of claims from any departing employee. Properly drafted, an ADEA waiver will be upheld.

Although the Gross decision makes it more difficult for an employee to prevail on an ADEA claim, the OWBPA means that this area remains a quagmire for unwary employers.



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