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Employment Discrimination—Age

Federal Employee Can Prove ADEA Liability By Showing Age Was Factor in Disputed Act

Federal employees who challenge a personnel action under the Age Discrimination in Employment Act need only show that consideration of age ''was *a* factor'' in the disputed decision, the U.S. Court of Appeals for the District of Columbia Circuit held Dec. 10 (*Ford v. Mabus*, D.C. Cir., No. 09-5041, 12/10/10).

In *Gross v. FBL Financial Services Inc.*, 77 U.S.L.W. 4531 (U.S. 2009), the U.S. Supreme Court applied a but-for test for private employees under Section 623 of the ADEA. The D.C. Circuit, in an opinion by Judge David S. Tatel, said that the broad language of Section 633a, which applies to public employees, required adoption of a different test.

Michael G. Kane, Cashdan & Kane, Westfield, N.J., who represented the employee in this case, told BNA Dec. 15 that the opinion is important because the court applied an easier burden for public employees under Section 633a than the Supreme Court crafted in *Gross* for private employees under Section 623. He explained that the appellate court found that the language in the two statutes is different, and that the standard it applied in this case ''is an easier burden for plaintiffs because they can prevail if they show that age was 'a' factor and not necessarily a 'but for' factor'' in the personnel decision.

Kane also suggested that the case is important because it is possible to argue that the court's analysis can be applied to federal employees' rights under Title VII of the 1964 Civil Rights Act in regards to gender, race, and national origin discrimination, because 42 U.S.C. § 2000e-16 has similar language to Section 633a.

Kane said that attorneys pursuing similar claims by federal employees in the future should make sure that the judge understands the correct standard ''that liability attaches when age is a factor in the personnel action.'' He said that the attorneys should ''[m]ake it clear that *Gross* does not apply.''

An attorney for the government did not respond to BNA's request for comment.

Promotion Denied. Richard Ford was born in 1940. He began working for the Department of the Navy in 1964, took a two-year hiatus from 1984 to 1986, came back and retired in 1997. In 2005, Ford returned to work for the Navy as a full-time employee. In 2006, he applied to be branch head of NAVSEA, a position that includes oversight of the SEMCIP program, which he had helped develop.

Ford did not get the job. It was given to Mark Johnson, who was 25 years Ford's junior. Ford was told that he did not get the job because of a lack of ''topside design experience,'' and because of a statement he made that he had trouble dealing with bureaucracy. He was also told that his references were negative.

There was also evidence that one of the hiring officials had previously forced a NAVSEA employee to leave because of his age. That employee, Edward Wallace, said that the official had made comments about the negative impact of an aging workforce on the health of the organization and about the need for younger employees.

Ford sued under Section 633a. Applying the burden-shifting test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court found that age was not the but-for cause of the Navy's hiring decision. Ford made a factual challenge to this decision on appeal, but the D.C. Circuit found no reason to disturb it.

Mixed-Motives Analysis. The district court also ruled, however, that Ford failed to prove that age was a motivating or substantial factor in the Navy's personnel decision, as required by the mixed-motives analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, the U.S. Supreme Court said that once an employee shows that discriminatory animus ''played a motivating part in an employment decision, the [employer] may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [discriminatory animus] to play such a role.''

The Navy argued on appeal that the Supreme Court's decision in *Gross*, that a mixed-motives analysis does not apply under Section 623 of the ADEA, which prohibits age discrimination by private employers, foreclosed application of the analysis to suits under Section 633a. The court disagreed.

The appellate court noted that Section 623 prohibits personnel decisions made ''because of'' a person's age, and that the Supreme Court explained that the ''ordinary meaning of . . . 'because of' age is that age was the 'reason' that the employer decided to act.'' The high court concluded that Section 623 requires that ''a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.''

The D.C. Circuit noted that Section 633a provides that ''[a]ll personnel actions . . . shall be made free from any discrimination based on age,'' while Section 623 states that ''it shall be unlawful for an employer to [take a personnel action] because of such individual's age.''

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The Navy argued that the two sections are sufficiently similar to be interpreted to require a but-for test. It cited Section 633a's use of the phrase ''based on'' and pointed out the Supreme Court has interpreted it to mean ''because of'' or ''but for.'' The court said that this ''argument ignores the very different functions of the parallel phrases—'because of' and 'based on'—play in the two provisions. In section 623, 'because of' modifies 'to fail or refuse to hire . . . .' By contrast, in section 633a 'based on' modifies 'discrimination.' ''

The court explained that ''while a section 623 plaintiff must, as *Gross* holds, show that the challenged personnel action was taken because of age, a section 633 plaintiff must show that the personnel action involved 'any discrimination based on age.' ''

The court said that ''section 633a's more 'sweeping' language . . . requires us to interpret it differently than section 623.'' It added''To be faithful to that 'sweeping' language, we hold that plaintiffs may also prevail by proving that age was *a* factor in the employer's decision.''

The court emphasized, however, that ''the consideration of age must have some connection to the challenged personnel action.'' Furthermore, it said ''that nothing in section 633a prohibits the Secretary from considering age when evaluating the overall health of the workforce, so long as that consideration does not bleed into particular personnel decisions.''

Shifting Burden. The *Gross* court also held that ''[w]here the statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that the plaintiffs bear the risk of failing to prove their claims.'' Nothing in the language of Section 623 gave the Supreme Court ''warrant to depart from the general rule in this setting.''

Looking at this question, the court here said that the plaintiff ''has the burden to show that age was *a* factor in the challenged personnel action,'' and it remanded to give Ford a chance to show age was a factor in the decision not to promote him.

The court also said, however, ''that although Ford may establish section 633a liability by proving that age was a factor in the Navy's decision, thus entitling him to declaratory and possibly injunctive relief, it is insufficient to merit instatement and backpay. For those types of remedies, a but-for standard of causation is necessary because, after all, if the Navy would have made the same decision absent consideration of age, Ford would have no right to the job.''

The court left for another day a determination of who will bear the additional burden of proof to show that the Navy would have made the same personnel decision but for a consideration of age.

Chief Judge David B. Sentelle joined the opinion.

Judge Karen LeCraft Henderson concurred in the judgment, but wrote separately to express several concerns, including that the opinion should not be read ''to lessen an ADEA plaintiff's burden to show that age discrimination affected 'the particular employment decision' challenged and not 'the mere existence of other, potentially unrelated, forms of discrimination in the workplace.' '' She also expressed her reluctance ''to agree that the Congress intended, simply by dint of section 633a's different phrasing, to set up a legal framework for the federal government so totally at odds with that for a private employer.''

Kane argued for Ford. Assistant U.S. Attorney Christian A. Natiello argued for the government.

By Bernard J. Pazanowski

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