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Going Out With a Bang: At Term's End, Supreme Court Rewrites Employment Standards

In two recent cases, the U.S. Supreme Court has sharply redefined how certain types of employment discrimination lawsuits must proceed. Notably, both decisions can be characterized as “pro-employer” and, at least in theory, directly proscribe what were typical elements of employment discrimination cases brought under the Age Discrimination in Employment Act (“ADEA”), and under a Title VII disparate impact analysis.

Gross v. FBL Financial Servs., Inc.

On June 18, 2009, the Supreme Court issued a succinct yet significant employment law decision in *Gross v. FBL Financial Servs., Inc.* The case effectively separates the ADEA from Title VII in terms of how a plaintiff must prove she was the victim of illegal discrimination, and seems to set the stage for some type of intervention by Congress later in the session.

The facts are relatively straightforward. Gross was a 54 year-old claims administration director for FBL Financial Group (“FBL”). In 2003 he was reassigned to the position of claims project coordinator, and FBL transferred a number of his duties and responsibilities to a newly-created position, which was occupied by a former subordinate, a woman in her early 40s. Gross considered the reassignment a demotion (although he lost no compensation and the woman occupying the new position received the same pay), because of the loss of his former job responsibilities. He filed suit in federal court, where a jury returned a verdict for him for approximately \$47,000.

The key issue on appeal was the jury instruction. The District Court instructed the jury that it must find for Gross if he proved by a preponderance of the evidence that age was a motivating factor in FBL’s decision. “Motivating factor” was defined as a fact that played a part or a role in the employer’s decision. The District Court also instructed the jury that it must find for FBL if the jury determined that FBL would have demoted Gross regardless of his age.

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After one round of appeals, the case made it to the Supreme Court on the question of whether an age discrimination plaintiff must present direct evidence in order to obtain the so-called “mixed motive” instruction, *i.e.*, an instruction that, in response to the plaintiff’s age discrimination case, requires the employer to put on evidence that it would have made the same decision even without the illegal age component in order to escape liability.

The Supreme Court declined to answer the issue presented by the plaintiff, and instead took the case on a much broader track. Specifically, the Court determined that it needed to reach the issue of whether the burden of persuasion in an age case ever shifts to the defendant. In holding that the burden never shifts (and thus that a mixed motive instruction in an age discrimination case is never appropriate, as it is under Title VII), the Court also found that the definition of “motivating factor” in an age discrimination case is not the same as it is in a Title VII discrimination case.

Instead, the Court held that an age discrimination plaintiff must show that age is a motivating factor by demonstrating by a preponderance of the evidence that but for the employer’s determination or consideration of age, the decision would not have been made. This is a much more restrictive definition of “motivating factor” than is found in Title VII and significantly raises the bar of proof that a plaintiff has to clear before the case can go to the jury.

Under this new standard, a plaintiff must show that her age had a determinative influence on the outcome of the employer’s decision. It is not enough to find that the employer might have discussed or even considered an employee’s age in making an employment decision; *Gross* requires that the employee show that the employer’s decision was motivated by age, and without the age consideration, the decision would not have been made.

Why this is problematic for plaintiffs is fairly clear – very few employers create records showing that they decided to terminate someone on the basis of a protected factor.

Language in the Court’s opinion invites, if not challenges, Congress to change the law. In the course of enacting significant changes to both Title VII and the ADEA in the Civil Rights Act of 1991, Congress amended Title VII to allow mixed motive claims, but did not include this theory in the ADEA. According to the Court, Congress’ refusal to amend the ADEA when it had the opportunity to do so, should be interpreted as a rejection of mixed motive claims in the age discrimination context.

None of this was lost on the parties that had a particular interest in the outcome of the case, especially those filing friends-of-the-court briefs. There was an immediate reaction from Senate Judiciary Committee Chairman Patrick Leahy, implicitly threatening some type of legislative action to correct the ruling. It will be interesting to see if Congress follows its *Ledbetter* statute with a *Gross* statute designed to overturn another Supreme Court employment opinion.

Ricci, et al. v. DeStefano, et al.

In a much more widely anticipated decision, the Court in *Ricci v. DeStefano* addressed a dilemma frequently confronting employers in a hiring or lay-off situation –to avoid disparate impact liability in a workforce decision, the employer is required to make adjustments to its selection criteria that are effectively based on a protected factor.

Ricci involved a promotion test for firefighters in New Haven, Connecticut. The firefighters all took written and oral examinations developed by a third-party consultant, at a cost of \$100,000. Seventy-seven candidates – 43 white, 19 black and 15 Hispanic – completed an examination for firefighter lieutenant positions with 34 candidates – 25 whites, 6 blacks and 3 Hispanics passing the exam. Forty-one candidates completed the firefighter captain examination – 25 white, 8 black and 8 Hispanic. Twenty-two of those candidates passed – 16 whites, 3 blacks, and 3 Hispanics.

As a result of the selection criteria mandated by the City’s collective bargaining agreement and the City charter, the top scorers were eligible for the limited number of promotions for which the tests were administered. Because of their test scores, the top ten candidates eligible for immediate promotion to lieutenant were white, and the nine candidates available for consideration to promotion to captain were a mix of seven whites and two Hispanics. Faced with what it believed to be an illegal disparate impact on African Americans, the City decided that it would void the test and not promote anyone to any of the positions. The eligible firefighters, who would have been promoted based on their test scores, sued claiming race discrimination under Title VII. The District Court found for the City, and the Second Circuit Court of Appeals (with Supreme Court nominee Sonia Sotomayor on the panel) affirmed without comment. The Supreme Court took up the case and reversed in one of its last rulings in the 2009 term.

The Court noted that there was at least a facial case of disparate impact in the test results because no African Americans were eligible for the promotions. The Court then went on to examine the City’s reaction to the test, which it characterized as the discarding of test results with the intent of obtaining a preferred racial balance, something that the Court held was clearly prohibited by Title VII.

In the words of one of the Justices, the City faced a “damned-if-you-do / damned-if-you-don’t” type of situation. It believed that if it certified the examination results, it would be sued for using a test with a disparate impact on black applicants. However, its decision to strike the test results because of the racial aspect of the results involved making an employment decision based on race itself, and exposed the employer to liability from the successful test takers.

The Supreme Court resolved the issue by finding against the City and noting that where an employer makes such a decision based on race – as the decision to void the test clearly was – it can only do so where it has a “strong-basis-in-evidence” that its action in voiding the selection criteria is defensible because the selection criteria are flawed, discriminatory, or in some other way suspect under the employment discrimination statutes.

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In this case, the Court noted that the City did not have a strong basis to believe that its test, undertaken and developed at a substantial cost and which used objectively neutral criteria that had been passed on by not only the City firefighter establishment, but outside parties as well, could be challenged under a legitimate adverse impact analysis. Accordingly, the Court found that the City's decision to void the test results were impermissibly based on race.

The implication of this decision is significant, especially in current circumstances where large scale layoffs are ongoing. Employers frequently use what appear to be neutral selection criteria for reducing their workforces, only to find that the workforce selected under these criteria has a disproportionate ratio of minorities or other members of a protected class. What *Ricci* tells us is that an employer may not adjust those criteria in favor of a protected group without a significant evidentiary basis that its selection criteria are suspect.

How the courts develop this good faith belief requirement by employers will go a long way to determining how much more complicated the selection criteria process will have to be. For example, a court might hold that an employer does not have a good faith basis to believe its selection criteria are valid, absent some type of outside expert coming in and preparing those criteria. This creates the prospect of significantly more expense in terms of hiring or layoff decisions. Employers engaged in this type of process would do well to look carefully at the criteria that they are using, and begin now to develop an objective basis for the establishment and use of those criteria.

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