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Labor and Employment Law Notes

THE UNITED STATES SUPREME COURT RAISES THE BAR ON THE BURDEN OF PROOF IN AN ADEA DISPARATE TREATMENT CLAIM

A. THE UNITED STATES SUPREME COURT MAKES IT MORE DIFFICULT FOR PLAINTIFFS TO PROVE ADEA CLAIMS

In *Gross v. FBL Sin.Servs., Inc.* the United States Supreme Court clarified the plaintiff's burden of proof where a plaintiff brings an Age Discrimination in Employment Act (ADEA) action. In an ADEA action claiming a wrongful demotion, judgment for the plaintiff was reversed where a plaintiff bringing an ADEA disparate-treatment claim must prove by a preponderance of the evidence that age was the "but for" cause of the challenged adverse action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. In so holding, the Court stated that the ADEA's text does not authorize an alleged mix-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act.

This is a victory for employers in that the plaintiffs filing an ADEA claim must prove that "but for" age the plaintiff would not have been fired. Plaintiffs must prove that age was the sole reason for a plaintiff's termination. Under Title VII, for example, if a plaintiff can prove that the protected status (race, gender, religion, age, etc.) was a "motivating factor" in the adverse employment action, the plaintiff has established a claim. Based on the decision in *Gross*, that will no longer be true for federal age bias claims. The *Gross* holdings is more likely to make it more difficult for plaintiffs to prove age discrimination claims under the ADEA.

B. THE ILLINOIS SUPREME COURT RULES IN FAVOR OF EMPLOYERS ON RETALIATORY DISCHARGE CLAIM

In *Turner v. Memorial Medical Center* the Illinois Supreme Court ruled that trial and appellate courts correctly concluded that plaintiff's complaint, alleging that he was subject to retaliatory discharge when the hospital at which he worked discharged him after he truthfully reported to a joint commission responsible for hospital accreditation, deviations between the Joint Commission guidelines and hospital practices, failed to state a cause of action. The court went on to hold that the complaint failed to sufficiently plead the existence of a clearly mandated public policy sufficient to find an exception to the general rule in Illinois of at-will employment. In Illinois a non-contractual employee is one who serves at the employer's will and the employer

may discharge such an employee for any reason or no reason. An exception to this general rule of at-will employment arises where there has been a retaliatory discharge of the employee. The Illinois Supreme Court has recognized a limited and narrow cause of action for the tort of retaliatory discharge. To state a retaliatory discharge cause of action, an employee must allege that the employer discharged the employee in retaliation for the employee's activities, and that the discharge violates a clear mandate of public policy.

In *Turner*, plaintiff contended that the hospital, by discharging him in retaliation for reporting the alleged patient charting discrepancy, violated the clearly mandated public policy of patient safety. The plaintiff asked the Illinois Supreme Court to definitively declare that patient safety is a matter of public policy in the State of Illinois and in terminating an employee who speaks out in favor of patient safety violates that public policy. The Supreme Court states that the plaintiff overlooked the basic substantive requirement of a common law retaliatory discharge action. That requirement is that the tort of retaliatory discharge seeks to achieve a proper balance among the employer's interest in operating a business sufficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out. In the absence of a clearly mandated public policy, the employer retains the right to fire workers at-will. The Supreme Court agreed with the appellate court special concurrence to the extent that the provision of good medical care by hospitals is in the public interest. They state, however, that it does not follow that all health care employees should be immune from the general at-will employment simply because they claim to be reporting on issues that they feel are detrimental to healthcare. In the common law retaliatory discharge action, the requirement of a clearly mandated public policy is essential because, in its absence, a hospital retains the right to fire non-contractual employees at-will. Adherences to a narrow definition of public policy, as an element of a retaliatory discharge/action, maintains the balance among the recognized interests.

In conclusion, the Illinois Supreme Court held that based on the narrow scope of a retaliatory discharge action in Illinois the general concept of "patient safety," by itself, is simply inadequate to justify finding an exception to the general rule of at-will employment. All the Supreme Court held was that plaintiff failed to sufficiently plead the existence of a clearly mandated public policy in this case. The message to be taken from the Illinois Supreme Court's holding is that it intends to keep the retaliatory discharge exception to the rule of law as to at-will employment very narrow in scope. More importantly, a complaint must sufficiently plead the existence of a clearly mandated public policy sufficient to find exception to the general rule of at-will employment or the case will be dismissed.

C. **BUDZILENI v. ILLINOIS DEPARTMENT OF HUMAN RIGHTS RE: CAUSES OF ACTIONS FOR UNEQUAL PAY**

In *Budzileni v. Illinois Department of Human Rights*, the plaintiff contends that chief legal counsel of the Department of Human Rights erred in sustaining the department's dismissal of her discrimination charge with respect to a count alleging unequal pay. She asserts that in dismissing her discrimination complaint the department: (1) misinterpreted prevailing Illinois law regarding sex discrimination by setting an impossibly high standard for "substantial evidence" and (2) improperly rendered credibility determinations in favor of the Illinois Department of Commerce and Economic Opportunity (IDCEO). Lastly, *Budzileni* contends that the department's final notice of dismissal of her discrimination charge was improper because it was made hurriedly and summarily only four days after the department's chief legal counsel's

second reversal of the department's dismissal of her claim, without any further investigation. The First District Court of Appeals affirmed the department's dismissal.

In holding that the sex discrimination count was properly dismissed, the first district reiterated that the Illinois Supreme Court recognized that in evaluating charges of discriminatory hiring practices brought under the Illinois Human Rights Act ("The Act"), The Department of Human Rights and the Illinois Appellate Courts have adopted the three-part test employed by the federal courts in actions for employment discrimination brought under Title VII of the Civil Rights Act. Under this three-prong test, the plaintiff must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against the plaintiff. To rebut the presumption the employer must articulate, not prove, a legitimate, non-discriminatory reason for its decision. If the employer articulates such a reason, the plaintiff must prove, again by a preponderance of the evidence, that the employer's reason was untrue and was pretext for discrimination. Under this test the ultimate burden of persuasion remains on the plaintiff throughout the proceedings.

Budzileni asked the court to implement the test found in the Equal Pay Act permitting the shifting of the burden of proof to the employer. Under this test, if the petitioner establishes by a preponderance of the evidence that an employer's paying members of one sex more than members of the other sex for similar work, the burden immediately shifts to the employer to establish, also by a preponderance of the evidence, that the differential is based upon one of the following articulated factors: (1) a seniority system, (2) a merit system, (3) a system that measures wages by the quality or quantity of production or (4) a system "based on any other factor other than sex." In so holding, the First District Court of Appeals reasoned: "There is no basis upon which to presume that our Supreme Court would impose two different standards of proof upon the same Act simply because one action involves discriminatory practices with respect to hiring and the other with respect to pay. Nor is there anything in the federal standards which would bind our Supreme Court to apply such different burdens of proof to a single statute." The Illinois Appellate Courts have treated claims of discrimination based on disparate pay brought under the Act using the three-prong analysis applied in discrimination claims brought under Title VII of the Civil Rights Act. The First District Court of Appeals, therefore, rejected plaintiff's contention that the Department of Human Rights erred when it applied the three-prong analysis to the termination of the cause at bar.

Employers can expect to see more decisions from the Illinois Appellate Courts and the Illinois Supreme Court interpreting the Illinois Human Rights Act going forward as plaintiffs may now sue directly in the state courts as opposed to being forced to pursue claims through the administrative channel of the Illinois Department of Human Rights. Recent decisions have concluded that the Illinois Human Rights Act provides a broader coverage for certain claims brought under the Act, and, as in this case, limits its protections to both under federal law.