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Gross Interpretation? Sixth Circuit Quick to Reaffirm McDonnell Douglas' Application to ADEA Cases

By Rasheed A. Simmonds, Esq.

Last month, the Sixth Circuit affirmed summary judgment against a terminated employee's claim that his employer violated the Age Discrimination in Employment Act ("ADEA"). In *Geiger v. Tower Automotive*, --- F.3d ---, 2009 WL 2836538, the court relied upon the long-established framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), used in Title VII cases. In so doing, the court curiously distinguished a recent Supreme Court decision which held another Title VII, burden-shifting framework inapplicable to ADEA cases. *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

Title VII is a federal prohibition against employment discrimination based upon characteristics other than age and disability, including race, gender, and national origin. Twenty years ago, the Supreme Court articulated the allocation of burden of persuasion in cases under Title VII where a plaintiff alleges adverse employment action taken for both permissible and impermissible reasons, i.e. a "mixed-motives" case. In *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Court held that if a plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of

persuasion then shifts to the employer to show that it would have taken the same action regardless of the impermissible reason. The Court further held that a plaintiff must present "direct evidence that an illegitimate criterion was a substantial factor in the decision" in order to trigger the burden shift. Congress later amended the statutory language of Title VII to specifically include this burden-shifting framework. See 42 U.S.C. §2000e-2(m) and §2000e-5.

The ADEA prohibits employers from failing or refusing to hire, discharging, or discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...." 29 U.S.C. §623 (a)(1). In *Gross*, the parties asked the Supreme Court whether a plaintiff needed to present direct evidence of discrimination in order to obtain a mixed-motives jury instruction in ADEA case. Instead, the Court held that the burden of persuasion never shifts to the defendant employer in an alleged mixed-motives discrimination claim brought under the ADEA for two general reasons: (1) Supreme Court decisions construing Title VII do not control because Title VII is materially different from the ADEA as to the relevant burden of persuasion; and (2) the text of the ADEA does not authorize mixed-motives age discrimination claims. Consequently, *Gross* declared, "Because we hold that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, we do not need to address whether plaintiffs must present direct, rather than circumstantial, evidence to obtain a burden-shifting instruction." 129 S.Ct. at 2351, fn.4.

Implicit in this statement is that burden shifting in an ADEA claim cannot be based solely on circumstantial evidence, either. Another statement by the Court is more explicit: "[T]he burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. *A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision.*" (emphasis added)

Nevertheless, in *Geiger*, the Sixth Circuit concluded that *Gross* only applies to cases in which the plaintiff produces direct evidence of age discrimination, but "the *McDonnell Douglas* framework can still be used to analyze ADEA claims based on circumstantial evidence." 2009 WL 2836538 at *5. Where the framework applies, and the alleged discriminatory action is termination, an employee claiming discrimination need only show four things to shift the burden of proof to the employer: (1) that he was a member of a protected class; (2) that he was discharged; (3) that he was qualified for the position held; and (4) that he was replaced by someone outside of the protected class.

When a plaintiff meets this burden, the *McDonnell Douglas* framework, like that of *Price Waterhouse*, shifts the burden so that the employer can avoid liability only by articulating a legitimate, nondiscriminatory reason for taking the adverse employment action that cannot ultimately be proven by plaintiff to be a pretext for illegal discrimination. *Id.* at *9.

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In *Geiger*, the plaintiff worked as a buyer for one of the plants of his employer, Tower Auto. After filing for bankruptcy, Tower Auto decided to centralize purchasing responsibilities resulting in the elimination of Geiger's position and the creation of new buyer positions that had greater coverage in terms of number of plants. Those who held old buyer positions were encouraged to apply for the new buyer positions. Geiger applied for one of the new buyer positions. After interviews, Tower selected a buyer who was younger than Geiger for the position and terminated Geiger. Believing that he was the only person who was not reassigned to another position after the centralization, Geiger sued alleging age discrimination.

Ultimately, the Sixth Circuit held that Geiger was not the victim of age discrimination. Nevertheless, it employed the *McDonnell Douglas* framework in finding insufficient circumstantial evidence to shift the burden of proof to Tower. The court said that it would continue to do so until either the Supreme Court or a full *en banc* panel of the Sixth Circuit extends *Gross* to claims based on circumstantial evidence.

The result is a strange anomaly. Suppose an employer says point blank to an employee that it has many reasons for firing him: excessive absences, excessive tardiness, sleeping on the job, bad attitude, "and you're too old to do this job anymore." That last reason is called "direct evidence" of discrimination, but the employee still has the burden of proving that his age was the "real" reason for firing him.

Now suppose that there was no such statement from the employer, but an employee over the age of 40 is able to show that he was objectively qualified for the job, but was terminated and replaced with a person under 40. Despite less evidence of discrimination than in the first scenario, under the Sixth Circuit's analysis, the employer now has the burden of proving that it had nondiscriminatory reasons for the termination.

So, even if the Sixth Circuit's holding is not directly contrary to *Gross*, it is inconsistent with its reasoning. Until the courts sort it all out, though, employers need to have good policies against age discrimination in place, so that, whatever the theory of liability may be, they are well-positioned to defend their actions.

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