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# 60-Second Memo

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### Litigating After *Gross*: One Plaintiff - Two Burdens?

By Julie L. Tomka, Esq.

In June 2009, the United States Supreme Court held that a plaintiff bringing an ADEA disparate treatment claim must prove by a preponderance of evidence that age was the 'but-for' cause of the challenged employment action and that the burden of persuasion does not shift to the employer to show it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was a motivating factor in the decision. *Gross v. FBL Financial Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009).

From a practical standpoint, the *Gross* decision appears to make it more challenging for an employee to successfully prove an ADEA claim because the employer will not have to prove that a non-discriminatory reason was the actual reason for the adverse employment decision. However, for those of you facing both state and federal claims by a single plaintiff, the analysis of the claim may not end there.

This is the very issue facing a company in Iowa that is defending a claim of age discrimination under both the ADEA and the Iowa Civil Rights Act (ICRA). In this case, *Schott v. Care Initiatives*, 2009 WL 3297290 (N.D. Iowa), defendant Care Initiatives moved for summary judgment. In their briefs, both parties argued that the ICRA claim was also governed by the 'but for' standard of *Gross*. Not so fast, said the Court, as it noted that both parties had ignored that the ADEA and the ICRA might have substantive differences, requiring different analyses.

The district court went on to note that, while the ICRA also contains 'because of' language, just as the ADEA, the Iowa

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Supreme Court had *not* interpreted this language to mean 'but for' that protected characteristic. The district court also noted that the Iowa Supreme Court had just weighed in on this issue, as it ruled approximately six weeks after the Supreme Court's decision in *Gross*. As the judge in *Care Initiatives* noted, "Notwithstanding that the Iowa Supreme Court did not mention *Gross* in its analysis, this court believes that it could not be clearer that the Iowa Supreme Court does *not* impose a 'but for' causation standard in any [employment discrimination case under Iowa state law], based on age or any other protected characteristic, and that the appropriate causation standard in such cases is 'motivating factor.'" *Schott*, 2009 WL 3297290 at \*4. Thus, while the plaintiff has to meet the 'but for' standard for her federal claim, she has a lighter burden - that of showing that discrimination is a 'motivating factor' - in order to succeed on her state claim.

Meanwhile, another court applying federal discrimination laws has held that the reasoning in *Gross* has been extended from age discrimination to disability discrimination under the ADA. In Wisconsin, Kathleen Serwatka claimed that she was terminated by Rockwell Automation in Milwaukee because she was perceived as disabled. The jury found that Rockwell had mixed motives for firing her - Rockwell fired her because it perceived her as disabled, but it would have done so even without that perception. As a result, the trial judge concluded she was entitled to recover attorney fees and costs, even though she could not recover any damages. *Serwatka v. Rockwell Automation, Inc.*, 583 F.Supp.2d 994 (E.D.Wis. 2008). But just two weeks ago, the Seventh Circuit (governing Illinois, Wisconsin, and Indiana) reversed, relying significantly on the Supreme Court's opinion in *Gross*.

Both the age and disability discrimination statutes prohibit discrimination 'because of' the employee's age or disability, respectively. And, unlike Title VII, which deals with discrimination based on race, national origin, or gender, neither the ADA nor the ADEA contain an express provision permitting recovery based on termination with mixed motives. Accordingly, the *Serwatka* court concluded that, as with age discrimination, an employee claiming disability discrimination cannot recover anything, unless she proves that she would have been terminated 'but for' her disability.

In a footnote, however, the court acknowledged that its holding may not be correct in cases involving future discrimination. The ADA was amended, effective Jan. 1, 2009, changing "because of disability" to "on the basis of disability." Employees will likely argue that this amendment now permits them to recover in mixed-motive cases.

As a result, employers addressing ADEA, ADA, and state claims for discrimination must understand that different standards may apply, depending sometimes on the nature of the claim and depending, in other times, on the applicable law. Of course, in order to best prevent litigating during these nebulous times, employers should never consider protected-class standing when making an employment decision. Employers should always be able to identify a legitimate nondiscriminatory reason for

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making the adverse employment decision and be able to substantiate that reason with objective evidence.

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