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Sixth Circuit Adopts New Standard of Proof in ADA Claims

By Jerilyn Jacobs

Last month, the Sixth Circuit (covering Kentucky, Michigan, Ohio and Tennessee) rejected its long-held standard that a plaintiff alleging disability discrimination under the Americans with Disabilities Act (ADA) must show that his or her disability was the "sole reason" for an adverse employment action. While the court was unanimous in its rejection of the "sole reason" standard, it was divided as to what standard should be applied to ADA cases, with a majority of the court adopting a "but for" rule that requires employees to show that "but for" the discrimination, the adverse employment action would not have happened.

According to the facts of the decision, [Lewis v. Humboldt Acquisition Corporation](#), No. 09-6381, plaintiff Susan Lewis worked as a registered nurse at a retirement home until her termination in 2006. Lewis subsequently filed a lawsuit claiming that she was fired because she had a medical condition that made walking difficult and required occasional use of a wheelchair. Her former employer, on the other hand, contended that Lewis had been dismissed due to a profanity-laced outburst involving criticism of her supervisors.

At trial, the parties proposed competing jury instructions. Lewis requested that the jury be instructed that if the alleged discrimination was a "motivating factor" in her employer's decision to terminate her employment, then she should prevail.

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The employer, on the other hand, proposed an instruction that Lewis could prevail only if she could show that the fact that she was "a qualified individual with a disability was the *sole reason* for the defendant's decision to terminate [the] plaintiff." (Emphasis added.)

Consistent with long-standing Sixth Circuit law at the time, the trial court adopted the company-proposed "sole reason" instruction and, with that instruction, the jury found in favor of the employer. Lewis appealed.

In reaching its conclusion to reject the "sole reason" standard, the Sixth Circuit noted that it first adopted the "sole reason" standard in a 1995 case, *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995), that involved a claim under both the ADA and the Rehabilitation Act of 1973. The Rehabilitation Act applies to the employment practices of, among other entities, the federal government and federal contractors and expressly prohibited discrimination "solely by reason of [one's] disability." The *Maddox* court extended the Rehabilitation Act standard to the ADA, and thereafter according to the *Lewis* court, this approach "stuck."

The majority in *Lewis* also noted that in subsequent amendments to the ADA, including the ADA Amendments Act of 2008, Congress chose not to adopt any language reflecting the "sole reason" standard. The *Lewis* court further looked at the 1991 Amendments to Title VII, which added two pertinent provisions: one that established that a complaining party prevails when it demonstrates that race, color, religion, sex, or national origin (the characteristics protected under Title VII) was a "motivating factor" for an adverse employment action "even though other factors also motivated the practice"; and a second that provided limited remedies if the claimant met this "motivating factor" standard but the employer then established that it would have taken the same adverse employment action anyway. The *Lewis* court held that the effect of these two provisions was to make the "motivating factor" standard applicable only to Title VII claimants and not to claimants under other civil rights statutes, such as the Age Discrimination in Employment Act (ADEA) and ADA.

The *Lewis* court also noted the importance of the U.S. Supreme Court's 2009 decision of *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), which rejected the applicability of Title VII's "motivating factor" standard to age claims under the ADEA, holding that because the ADEA adopted language that required discrimination to be "because of" age, it meant discrimination had to be the "but for" cause of the challenged employer decision. The *Lewis* court applied the same reasoning to the ADA and remanded the case to the trial court for re-trial with a jury instruction using the "but for" standard.

While the entire Sixth Circuit agreed to reject the "sole reason" standard, the judges disagreed as to the appropriate standard. Three judges submitted separate partial dissents, in which each argued that the "motivating factor" should have been adopted instead.

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By adopting the "but for" standard, the Sixth Circuit remains at odds with a number of other circuits, including the First, Second, Third, Fourth, Fifth and Eleventh, all of which have adopted the "motivating factor" standard. The Sixth Circuit's newly adopted approach, however, is consistent with the Seventh Circuit, which adopted the "but for" standard in ADA cases in 2010. Given the split among the circuits as to the correct standard to apply to ADA claims, it would not be surprising if this issue, much like the issue of what the correct standard is for age claims under the ADEA before it, ultimately ends up before the Supreme Court.

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