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Supremes

In *Gross v FBI Financial Services, Inc.*, the U.S. Supreme Court, by a 5 to 4 decision written by Justice Thomas, in which Justice Kennedy was again the swing vote, required a more difficult standard of proof necessary for a plaintiff to prove discrimination on the basis of age in a case of alleged disparate treatment filed under the Age Discrimination in Employment Act (ADEA) as compared to any of the classes of discrimination required under Title VII of the Civil Rights Act (sex, national origin, religion, race, etc). This case involved a lawsuit under the provisions of the ADEA in which the plaintiff alleged that he was demoted because of age discrimination. The District Court instructed the jury to enter a verdict for the plaintiff if he proved by a preponderance of the evidence that he was demoted and his age was a motivating factor -- not the **only** factor, but a **motivating** factor. The judge told the jury that age was a motivating factor if it played a part in the decision to demote. The judge instructed the jury to return a verdict for the defendant if it proved that it would have demoted the plaintiff regardless of his age. The jury returned a verdict for the plaintiff. The Eighth Circuit reversed and remanded the case for a new trial, holding that the jury had been incorrectly instructed.

The U.S. Supreme Court held that a plaintiff in an age discrimination case under the ADEA must prove by a preponderance of the evidence that age was the “but for” cause of the challenged adverse employment action. This is a “mixed motive” case. The burden of proof in an age discrimination case does not shift to the employer to prove that its decision was for legitimate non-discriminatory reasons, as is required under Title VII cases if the plaintiff has produced some evidence that membership in a protected class was one motivating factor in the adverse employment decision. The burden of proof is therefore solely on the plaintiff in age discrimination cases. Whether an effort will be made in Congress to amend the ADEA to “correct” this decision remains to be seen.

In a closely watched case because U.S. Supreme Court nominee Sonia Sotomayor voted in favor of the City of New Haven Connecticut when the city discarded a promotional test after the City concluded that the test was discriminatory against minorities, the U.S. Supreme Court, by the usual 5 to 4 margin in a decision written by Justice Kennedy, decided in favor of the white firefighters who scored high on the test and who would have been promoted. The Court held that employers needed a “strong basis in evidence” that a test is deficient before discarding the results rather than just “raw racial statistics” that may indicate a subtle discrimination. [Ricci v DeStefano](#).

Settlements

Dillard’s department stores settled a lawsuit filed by the EEOC alleging same sex discrimination by paying \$110,000 and agreeing to significant remedial relief. In this case, the EEOC alleged that Dillard’s permitted a sexually hostile work environment at a store in Orlando, Florida because a male supervisor engaged in verbal and sexual harassment of a male sales associate and a young dock worker. The male supervisor exposed himself and propositioned the male workers and made explicit sexual comments. When the male workers complained to the store manager about the treatment they received from the male supervisor, the store manager allegedly ignored their complaints. In addition to the monetary

payment, Dillard's agreed to distribute policies prohibiting sexual harassment and retaliation, and conduct anti-harassment and anti-discrimination training for all employees, train employees who are responsible for investigating employee complaints and post a notice.

Providence Alaska Medical Center agreed to pay \$220,000 and provide other relief to settle a lawsuit filed by five workers who were laid off and denied rehire because of their age. The employees were between the ages of 46 and 56 and had up to 24 years of employment with the employer. The laid off employees were replaced by new hires in their twenties.

Reversal

As reported in a prior issue of *Employee Briefs*, a three judge panel of the Sixth Circuit decided in Thompson v North American Stainless that an employee may sue for retaliation when adverse actions are taken by the employer against a related employee, a close friend or a family member. The full court reversed the decision of the three judge panel after a rehearing. By reversing the decision of the panel, the Sixth Circuit is now in agreement with the Third, Fifth and Eighth Circuit courts that "associational retaliation" is not provided for in the law. The four Circuit Courts now all hold that retaliation is limited to those persons who opposed an unlawful employment practice, made a charge or testified, assisted or participated in any manner in an investigation, proceeding or hearing (protected activity). The EEOC still takes the position that "associational retaliation" constitutes protected retaliation under Title VII so this issue will come up in other circuit courts' cases.

E-Mails

The Fourth Circuit held in Vanalstyne v Electronic Scriptorium that an employer who accessed a former employee's personal e-mail account could be held liable for punitive damages and attorney's fees under the Federal Stored Communications Act (SCA) even if there were no actual damages. The SCA criminalizes unauthorized access to "electronic communications" in "electronic storage" at an "electronic communications service". The SCA authorizes a private cause of action for monetary damages, namely actual damages, punitive damages and attorney's fees. The law states "in no case shall a person be entitled to actual damages less than the sum of \$1,000." The jury returned a verdict of \$75,000 in punitive damages, \$150,000 in compensatory damages and \$135,000 in attorney's fees. The company appealed to the Fourth Circuit which, while agreeing with the judge's directions to the jury, remanded the case back to the District Court for additional consideration of the total amount of the damages.

Cubicles

The Sixth Circuit held in Gallager v CH Robinson World Wide that a plaintiff was entitled to a trial of her hostile employment claim. The plaintiff worked in one of closely grouped cubicles. After four months of employment she resigned and filed suit alleging that her co-workers in other cubicles used derogatory terms referring to women, viewed pornography on their computers and left pornographic magazines open on their desks. The comments were not directed to the plaintiff and she never complained to management. The District Court dismissed the suit. The Sixth Circuit reversed and held that the incidents were sufficiently severe and pervasive because the plaintiff was a "captive audience".

Title VII

The First Circuit held in Fantini v Salem State College that a charge of discrimination against employees may be filed against employers, but may not be separately filed against individuals employed by those employers. Although Title VII's definition of employee includes "any agent" of an employer the court held the language does not create a separate cause of action against any employee, but does impute the supervisor's or other employees' action to the employer. In this case, the director of general accounting was fired after an independent audit revealed several errors in her accounting procedures. She sued not

only the college, but several separate individuals who worked for the college, including the college president and H.R. professionals, alleging that these individuals had violated Title VII. The District Court denied her claim against the individuals and the First Circuit agreed.

Supervisors

The Third Circuit in Huston v Proctor & Gamble Paper Products Corp affirmed a District Court's summary judgment in favor of an employer. The court held that "individual team leaders" were not supervisors and even though the team leaders were aware of harassing behavior, the employer could not be held liable for the claims of harassment or stopping the harassment. Only when management is aware of alleged harassment is the employer required to promptly investigate. In this case, a female plaintiff reported to a "process coach" and to a "machine leader" that she had heard of, but had not seen, male employees exposing themselves. They did nothing about her complaint. Subsequently she filed a complaint with senior management. Senior management did investigate and while concluding that there was no proof of the exposure, there was proof that all employees, including the female employee, used vulgar language and all employees were warned to stop using such language. Because of her prior disciplinary record, the female employee could have been discharged, but was not. Several months later the female employee was discharged for admittedly fabricating data she put into her machine production logs. The female employee sued the employer asserting that there was a sexually hostile environment and that the two "managers" she reported the offensive behavior to should have stopped the behavior after her initial complaint to "supervisors". The "supervisors" were hourly, could not fire and did the same work as other hourly employees.

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