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Supreme Court Changes Standards For Employment Discrimination

The Supreme Court ended its most recent term with two significant employment law decisions involving age and race. On June 18, 2009, the Supreme Court decided how an employee must prove intentional age discrimination under the Age Discrimination in Employment Act. On June 29, the Supreme Court decided whether an employer can violate Title VII of the Civil Rights Act of 1964 by discarding promotional test results that disproportionately favor non-minority employees. These decisions have far-reaching implications for employers.

Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination on the basis of age. Both Title VII and ADEA prohibit intentional employment discrimination (disparate treatment) and, in some cases, facially neutral employment practices that are not intended to discriminate but disproportionately affect minorities or individuals who are age 40 or older (disparate impact).

Although Title VII expressly allows "mixed-motive" discrimination claims (i.e., when an employment action is motivated by both a legally permissible reason and a discriminatory reason), ADEA has no parallel provision. Nonetheless, courts have allowed mixed-motive age discrimination claims, often in the context of reductions-in-force and business restructurings. The Supreme Court has now confirmed in *Gross v. FBL Financial Services* that ADEA does not authorize such claims.

In *Ricci v. DeStefano*, the Supreme Court considered reverse discrimination under Title VII. In *Ricci*, the Court discussed steps employers should take before discarding a facially neutral test or employment practice that appears to adversely and disproportionately affect a protected class.

Gross v. FBL Financial Services

Unlike ADEA, Title VII allows an individual to establish an employment discrimination claim by showing that race or some other protected characteristic was a motivating, but not the only, factor in the employer's decision. To avoid liability for its actions, the employer must then show that its decision was based on a legitimate reason other than race or another protected characteristic.

At age 54, Jack Gross was reassigned to a different position with no reduction in pay, and some of his prior job responsibilities were reassigned to a new position, occupied by a younger employee (also over age 40). Gross sued his employer under ADEA, claiming that he had been demoted in part due to his age. The trial court instructed the jury to rule in favor of Gross if he proved that FBL demoted him and "age was a motivating factor" (i.e., played a part) in FBL's decision, and to rule in favor of the employer if it determined that FBL would have demoted Gross regardless of his age. The jury ruled in favor of Gross but, on appeal, the court reversed this decision on the basis of faulty jury instructions. Gross appealed to the Supreme Court.

In a 5-to-4 decision, the Supreme Court held that ADEA does not authorize mixed-motive discrimination claims. Going forward, individuals claiming age discrimination will have to prove that age was not just a factor – but was the determinative factor – in the challenged employment action. To succeed, an individual must now prove that the employer would not have taken the action "but for" his or her age, and thus will have to produce direct evidence that the employer's action was based only on age.

> ***BUCK COMMENT.*** *In public comment, Senator Patrick Leahy (D-VT), chairman of the Senate Judiciary Committee, likened this decision to the court's 2007 "wrong-headed ruling" in* Ledbetter v. Goodyear Tire & Rubber Co., Inc. *Notably, that ruling was reversed by the current Congress. (See our February 5, 2009* For Your Information.*) In a subsequent comment, Senator Leahy also took aim at the* Ricci v. DeStefano *decision discussed below. Whether Congressional leaders will seek to overturn either – or both – of these decisions remains to be seen.*

Ricci v. DeStefano

In its June 29 decision in the New Haven, Connecticut firefighter case, the Supreme Court sought to reconcile the disparate treatment and disparate impact prohibitions of Title VII. In *Ricci*, the city refused to certify promotional test results for firefighters because too few minorities would have qualified for advancement. New Haven defended its action by saying it was trying to comply with Title VII's disparate impact provision.

A divided Court held that employers can violate Title VII when they take race-conscious actions to address statistical imbalances in the workforce, even if those actions are well-intentioned. Under the new standard announced by the Court, race-based remedial actions will be allowed only when there is "strong evidence" that the employer would have been liable for disparate impact discrimination had the actions not been taken. Although this case involved so-called reverse discrimination in public employment, the decision applies equally to private employers. For a more detailed discussion of this case, click here.

In light of this decision, employers that use appropriate exams in making employment decisions generally can expect to face less risk of liability, even if the selection rate for minority (or other protected class) applicants is less than anticipated. However, basing selection on an employment test or other criteria that is not adequately job-related, and adversely affects minorities or other protected groups, may still subject an employer to liability under Title VII.

BUCK COMMENT. *On July 22, 2009, a federal district court judge in Brooklyn ruled that New York City discriminated against black and Hispanic applicants to the Fire Department in entrance exams used in 1999 and 2002, finding that the content of the exams had only a minimal relationship to the job of firefighter and adversely impacted minority applicants. It distinguished* Ricci in which the *exams were racially neutral, appropriately tested for job-related skills and were consistent with business necessity.*

When seeking to invalidate tests results after testing has occurred, simply showing unequal passing rates will not satisfy the new standard adopted by the Court. Rather, an individual challenging selection criteria will now have to produce clear evidence that a particular test or other employment practice unlawfully impacts minorities or other protected classes.

BUCK COMMENT. *By trying to avoid disparate impact liability, an employer can find itself liable for disparate treatment. Particular care should be taken in downsizing or restructuring business operations, as changes in layoff decisions based on adverse impact analyses may increase the risk of reverse discrimination claims from non-minority employees later selected for layoff.*

Conclusion

The *Gross* decision is potentially helpful to employers. At least in the short term, the decision may have a moderating effect on the filing of age discrimination claims, particularly in the context of reductions-in-force and business restructurings. The current economic downturn, which has precipitated frequent layoffs and terminations, has produced a significant spike in age discrimination charges. Especially during these challenging times, employers should ensure that they evaluate planned personnel actions in light of objective business needs and properly document related employment decisions.

After *Ricci*, employment actions taken to avoid potential disparate impact claims will be subject to greater scrutiny. On the other hand, increased intentional discrimination claims alleging reverse discrimination may well follow.

Although *Ricci* put some legal limits on how far employers can go in trying to achieve racial diversity before they unlawfully discriminate on the basis of race, it provides little practical guidance to employers as to how to reconcile the competing interests of different employee groups. Thus, employers may still have difficulty determining when race can be considered, when concerns over potential disparate impact claims will allow them to change course, or when doing so would open them up to reverse discrimination claims.

Buck's consultants are available to discuss the impact of these decisions on your employment strategies.