

Age Discrimination Plaintiffs May Prefer State Law

FEDERAL CASES HAVE DIFFERENT STANDARD OF PROOF, RULES REGARDING DAMAGES

By **ROBERT B. MITCHELL** and
MARGARET M. SHEAHAN

Connecticut courts generally interpret the state's Fair Employment Practices statute in light of federal anti-employment discrimination law. So, for example, the shifting burdens of proof and persuasion will be analyzed within the *McDonnell Douglas* construct set out by the U.S. Supreme Court to govern federal discrimination cases over 30 years ago.

There are areas, however, where significant differences remain between the federal and state laws. In the age discrimination area there are at least two such points of departure — the applicability of the federal substantive “but for” standard to liability questions, and the proper measures of damage.

Wherever it applies, a “but for” standard requires the plaintiff to prove that “but for” the defendant's unlawful conduct, the plaintiff's injury would not have occurred. In employment discrimination cases, application of a “but for” standard requires a showing that an adverse employment decision was taken because of an employee's protected class trait. Absent the unlawful motive, there would have been no adverse action and so no harm.

By contrast, where a “mixed motive” analysis is applied, once the plaintiff shows that illegal discrimination was a “motivating” or a “substantial” factor in an adverse employment decision, the burden of persuasion shifts to the employer to show that it would have taken the same action against the employee even absent the impermissible consideration.

The U.S. Supreme Court applied this “mixed motive” formulation to Title VII in the *Price Waterhouse v. Hopkins* sex discrimination case in 1989 and found that employer proof that other factors besides sex discrimination led to the adverse employment action properly resulted in a no liability finding. An issue of continuing discussion after the ruling was the nature and quality of evidence necessary to trigger this shift in the burden of persuasion. The *Price Waterhouse* ruling seemed to indicate that direct, as opposed to circumstantial, evidence was required.

‘Motivating Factor’

Following *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991, which authorized discrimination findings when an illegal discriminatory consideration was a “motivating factor” in making an adverse employment decision. However, the act limited damages in such mixed motive cases. (Even after the 1991 act, however, the 1973 *McDonnell-Douglas* “pretext” formula still dominates Title VII cases. The *McDonnell Douglas* test really amounts to a “but for” standard, as the successful pretext argument leads to a conclusion that discrimination was the “real” reason for the adverse action — yet one more level of confusion.)

Federal court debate after *Price Waterhouse* and the 1991 act centered on whether direct or circumstantial evidence was sufficient to advance the plaintiff's case and so shift the burden of persuasion to the defense. In *Desert Palace Inc. v. Costa* the Supreme



Robert B. Mitchell



Margaret M. Sheahan

Court resolved that debate when it held that to apply a mixed motive analysis; circumstantial evidence is sufficient.

In 2009, the Court's *Gross v. FBL Financial Services Inc.*, ruling held that the “mixed motive” discrimination theory was not available for federal age discrimination claims. It concluded that a “but for” test was to be applied to Age Discrimination in Employment Act cases. It said that this should be so first, because of differences between Title VII and ADEA language and, second, because the 1991 act, while addressing the “mixed motive” question under Title VII, as well as a number of other discreet ADEA issues, did not incorporate the “mixed motive” standard into the age statute. Since the *Gross* decision, ADEA plaintiffs have been required to meet that “but for” test to establish liability.

Differing Statutes

The question arises whether the *Gross* “but for” standard should be applied to age discrimination claims pursued under Connecticut's Fair Employment Practices Act. While the Connecticut courts often borrow federal law to interpret the state law, the federal and state statutes are not identical and the age discrimination burden of proof may

Robert Mitchell and Margaret M. Sheahan are partners in Mitchell & Sheahan P.C. in Stratford, which represents employers and employees in labor and employment law cases.

present one important instance of difference between them.

Unlike the federal legislative model where two different statutes address age discrimination on the one hand and race, color, sex, national origin and religion discrimination on the other, Connecticut's statutory scheme addresses age in the same statute as other prohibited bases of discrimination. Connecticut's courts have repeatedly recognized the applicability of the "mixed motive" proof formulation in cases arising under our state fair employment practices statute.

The same types of differences that exist between the Connecticut and federal discrimination statutory constructs also exist in several other states, including Michigan, Iowa, New York, Texas and Missouri. Courts in these jurisdictions have held in the post-*Gross* era that "mixed motive" analysis should be applied in age discrimination cases governed by state law. While the issue has not been addressed by Connecticut's high court, it would seem that the "but for" standard is likely also to be rejected here in favor of continued reliance on the "mixed motive." Of course, this presents a far more favorable situation for the age discrimination plaintiff than he will find under federal law.

Damage Awards

A second point of departure between federal and Connecticut law concerns available damages. Connecticut's FEPA provides an administrative process for investigating, conciliating and adjudicating age discrimination, and other protected class, employ-

ment claims.

The remedies authorized to be prescribed by the Commission on Human Rights and Opportunities are limited to awarding back pay and benefits and injunctive relief, such as reinstatement or some monetary substitute. The commission cannot grant compensatory damages, punitive damages or attorneys' fees awards.

A complainant who obtains a commission release of jurisdiction and takes his case to court, however, may seek "such legal and equitable relief which [the court] deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs." Included in these potential damages are awards for emotional distress as well as lost wages and other compensatory items. Defendant "willfulness" will allow punitive damages. It is also within the court's discretion to award pre-judgment and post-judgment interest.

The federal ADEA offers a successful age discrimination plaintiff the possibility of a back pay award, injunctive relief, attorneys' fees, liquidated damages of twice the back pay amount upon a finding of "willful" misconduct, and an appropriate interest payment. Compensatory and punitive damages are not permitted; liquidated damages are said to take their place. The Connecticut law's allowance of unlimited compensatory damages, without any "willfulness" requirement may offer a plaintiff able to demonstrate real, substantial harm beyond a loss of wages a higher and sometimes more easily proven prospective award than the more

limited federal liquidated damages formula.

There has been some confusion over the interplay of the federal and state awards rules in a case brought under both. For example, while federal law affords an award of reasonable attorneys' fees to compensate counsel for efforts expended by way of the private attorneys general/public policy doctrine, a Connecticut state law punitive damages attorneys' fee award is supported by a policy of punishing the malefactor and thus deter future illegal actions.

What happens when a federal "reasonable" attorneys' fees award is made for less than the full amount of fees incurred, but the jury has said that punitive damages are appropriate? Does the plaintiff obtain a second, punitive, attorneys' fee award for that portion of fees not granted under the federal statute, because of the differing public policies that support each type of grant? Should a large state compensatory damages award be reduced by the amount of federal liquidated damages, even though the threshold "willfulness" finding required to support the federal award is not necessary to the state law compensatory damages grant? These are just two possible points of confusion that arise out of the differing damages provisions of the federal and state acts. Case law offers other examples of such discord.

Counsel should be wary of federal and state age discrimination law differences and should be prepared to address them with the court, his opponent and his own client. He should be cognizant of the practical impact these differences might have on outcome. ■