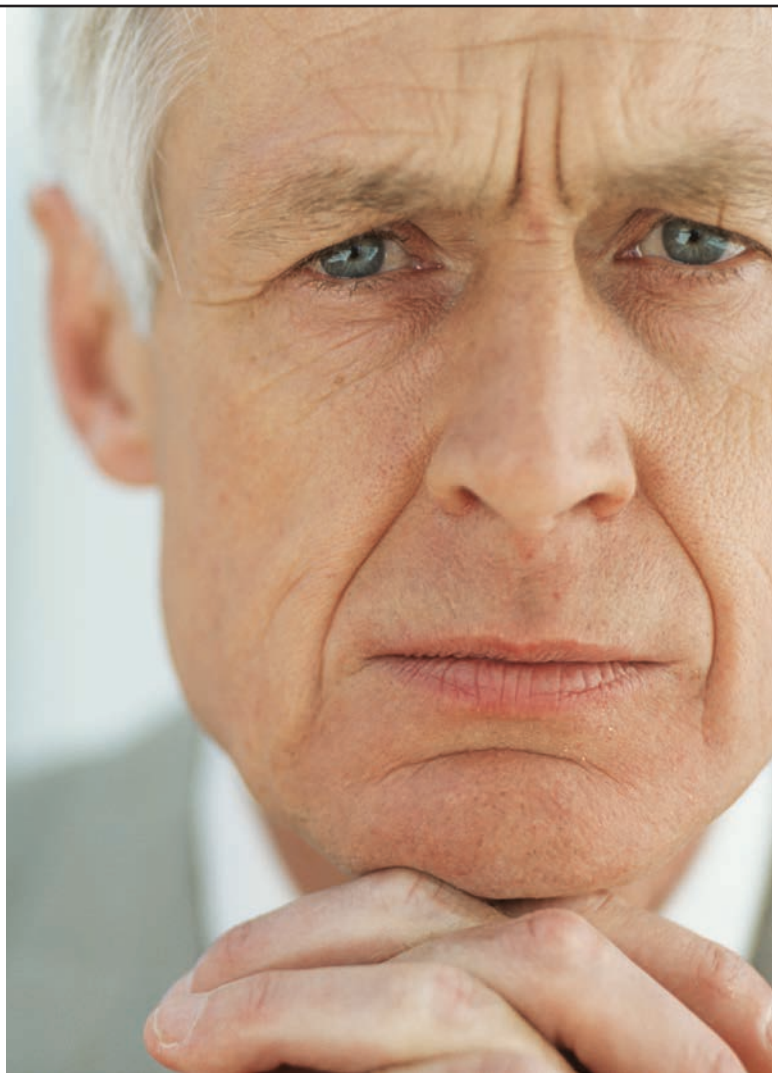
Employment Law Briefing



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Is that enough?

How an age discrimination claim can move forward

Two lauded employees, each with over 20 years of experience, are passed over for higher positions. A lawsuit is filed and the resulting decision, *Leal v. McHugh*, speaks volumes about how such claims can move forward through the courts.

Open positions

In 2009, two new positions with greater responsibilities and higher salaries opened up at the Corpus Christi Army Depot (CCAD). The two aforementioned employees applied, but the positions went to other candidates, one of whom was substantially younger than the two applicants. The promoted individual also had a close personal relationship with the selecting official's supervisor.

Believing the decision to choose the younger employee was pretext for age discrimination, the two applicants filed suit in federal court. They alleged that they were clearly better qualified than the younger candidate, which supported an inference of discrimination in violation of the Age Discrimination in Employment Act (ADEA). They also alleged that the selecting official's supervisor influenced the decision because of a friendship with the younger candidate.

Nonactionable and actionable claims may be pled together in one complaint without rendering it susceptible to dismissal.

The district court granted the defendant's motion to dismiss the claims, ruling that the plaintiffs had presented a "mixed motives" case that defeated their age discrimination claim pursuant to the U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services*. In *Gross*, the Court had held that ADEA plaintiffs must prove that age was a "but-for cause" of, rather than a "motivating factor" in, the adverse employment action. Because the plaintiffs introduced the idea that personal friendship played a

role in choosing the younger candidate, they were unable to show but-for causation. The plaintiffs appealed.

Plausible claim

The U.S. Court of Appeals for the Fifth Circuit also looked to *Gross*. Per that precedent, to establish a prima facie case of discriminatory treatment based on age, plaintiffs must prove:

- They're within a protected class,
- They're qualified for the position,
- They suffered an adverse employment action, and
- "They were replaced by someone younger or treated less favorably than similarly situated younger employees, [that is] suffered from disparate treatment because of membership in the protected class."

This last point comes from the Fifth Circuit's decision in the 2003 case *Smith v. City of Jackson*.

In *Gross*, the Supreme Court determined that "because of" age equated to "but-for cause." This makes the pleading standard more difficult for plaintiffs, because they must show that employee age played a role in an adverse

employment action and, as stated in the Court's 1993 *Hazen Paper Co. v. Biggins* decision, "had a determinative influence on the outcome."

Departing from the district court's analysis, the Fifth Circuit held that the plaintiffs stated a claim for which relief *could* be granted despite the introduction of evidence that a close personal relationship played a role in the decision not to hire them. Selection based on a personal relationship isn't actionable. But nonactionable and actionable claims may be pled together in one complaint without rendering it susceptible to dismissal. The court found that, as long as the complaint states a plausible claim for relief on the actionable claim, that claim will withstand a motion to dismiss.

Actionable grounds

Employers may feel a certain security in believing that the but-for cause standard in age discrimination cases makes it more difficult for plaintiffs to prevail. But, as *Leal* demonstrates, even if an employee alleges age discrimination based on multiple factors, a court may allow the claims to survive summary judgment if there's a plausible claim for relief on actionable grounds. This means that, even though the employee may not ultimately prevail, employers will still incur the high costs of defending against the claims. ♦

A little more about *Gross* … and the ADEA

The U.S. Supreme Court's 2009 decision in *Gross v. FBL Financial Services*, which played a central role in *Leal v. McHugh* (see main article), warrants further exploration. In *Gross*, the Court ruled that the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of an individual's age," requires plaintiffs to prove that age was the "but-for" cause of the challenged action. This position contrasted with Title VII's causes of action — such as race, color and religion — which require that plaintiffs show only that the impermissible consideration was a *motivating* factor.

The Court reached this interpretation by looking to the text of the ADEA, which provides:

> … [i]t shall be unlawful for an employer…to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Noting that "because of" was defined in the dictionary as "by reason of: on account of," the Court determined that the ordinary meaning of the phrase leads to an inference that age is the "reason" that the employer decided to act. "By reason of," the Court determined, required a showing of at least "but-for" causation.

Under this interpretation of the ADEA, the burden of persuasion doesn't shift to the employer to show that it would have taken the action regardless of age — even when a plaintiff has produced some evidence that age was one motivating factor. Thus, the Supreme Court seemingly made it more difficult for employees to allege age discrimination against employers. Nonetheless, as we see in *Leal,* plaintiffs might still survive summary judgment — leading to expensive attorneys' fees in defending against a claim.

Intent to retire

Decision maker looms large in ADEA case

In *Harris v. Powhatan County School Board*, a school board eliminated the position of an African-American janitor who'd worked for the district for 52 years. The board attributed the decision to the employee's stated intent to retire, as well as a budgetary shortfall.

Believing the board's reasons to be pretextual, however, the plaintiff sued the school district for age and race discrimination under the Age Discrimination in Employment Act (ADEA) and Title VII. At issue was whether the board believed that the plaintiff had really indicated he was ready to retire.

Matters in dispute

The plaintiff's employment contract was renewed annually. Each fall, he filled out an "Intent to Return" form for his supervisor to review. In 2008, the plaintiff completed his form as usual, representing that he wanted to remain with the district for the 2009–2010 school year. But his supervisor, instead of submitting the form as usual, held on to it in order to discuss the possibility of the plaintiff's retirement. During that meeting, the supervisor informed him that, even if he wished to return, his position might be eliminated.

The parties disputed whether the plaintiff had actually indicated that he wanted to retire. Also in dispute was the issue of unused annual leave. The plaintiff stated that he had an agreement with the district that entitled him to additional compensation for annual leave accrued during the summer months when he wasn't permitted to take vacation because of his responsibilities in readying the schools for the start of each academic year. He estimated that he'd lost $19,500 over the years.

In January 2009, the plaintiff sent a letter to the district's current Division Superintendent stating that he was "considering retirement in the near future and would like to check into the recovery of the amount of annual leave that I have lost over my tenure." In February, his supervisor wrote a letter to the superintendent claiming that the plaintiff had informed him of an intent to retire and that he (the supervisor) was waiting for the plaintiff to complete the necessary paperwork.

In March, the superintendent informed the school board that, though the plaintiff had expressed an intent to retire, he wouldn't leave voluntarily unless he received a large sum of money. Later that month, the supervisor met with the plaintiff, who reiterated his intention to return to work the following year unless he was paid for leave time. His position was later eliminated, and his duties were reassigned to a younger, Caucasian man already employed by the school system. Two other members of the maintenance department also assumed certain duties.

District decision

The plaintiff then filed his lawsuit. Because he had no direct evidence of discrimination, the district court used the *McDonnell Douglas* burden-shifting framework to render its decision. The plaintiff could show that he was replaced by a younger, white employee — making his prima facie case. So the burden then shifted to the board to articulate a legitimate, nondiscriminatory motivation for its adverse employment action.

The board's position was that it had been informed by the plaintiff's supervisor, through the superintendent, that he intended to retire. Therefore, its decision was based on this good-faith belief. The district court granted the board's motion for summary judgment on the basis that, regardless of the supervisor's knowledge or intent, the board genuinely — even if mistakenly — believed that the

plaintiff wanted to retire. As the ultimate decision maker, the board's view was the only material one.

Appellate assessment

The U.S. Court of Appeals for the Fourth Circuit saw things differently. Overruling the district court, it found that the board's good-faith belief in the plaintiff's intent to retire wasn't enough to prevent liability. This was because the actual decision maker was the superintendent, whose discriminatory animus could be imputed to the board because of her influence on its adverse employment action.

The superintendent recommended that the plaintiff's position be eliminated. As the day-to-day supervisor of the school system, she carried significant authoritative weight when making recommendations on the needs of the district and the allocation of its funds. The Fourth Circuit found that an imposition of liability can be found so long as the plaintiff presents sufficient evidence to establish that the discriminatory subordinate was the one "principally responsible" for, or the "actual decision maker" behind, the adverse action.

Independent investigation

Harris demonstrates how, when making a seemingly neutral business decision, an employer can be held liable for an adverse employment action if the choice to take that action was tainted by a significant decision maker's discriminatory animus. This presents a dilemma for employers who rely on supervisors' recommendations and may not have direct knowledge of the problem at hand. In such situations, independent investigation can help limit or avoid exposure — but only if properly conducted. ♦

Seventh Circuit puts finer point on adverse employment actions

In *Lavalais v. Village of Melrose Park*, a police officer charged his employer with race discrimination and retaliation. The decision handed down by the U.S. Court of Appeals for the Seventh Circuit puts a finer point on what might qualify as an adverse employment action.

Midnight shift

The plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) on three separate occasions. In 2010, he alleged race discrimination. Next, in January 2011, he alleged that he'd been disciplined in retaliation for filing his first EEOC charge and again discriminated against because of his race. The following month, the plaintiff was promoted to sergeant and placed on the midnight shift. Over one year later, he requested a different shift and was denied.

In July 2012, the plaintiff filed his third EEOC discrimination charge. This time he alleged that the police department treated similarly situated officers who weren't in a protected class more favorably and that his shift change request was denied because of his race. One month later, the EEOC issued a right-to-sue letter.

After receiving that letter, the plaintiff sued the Village and the Chief of Police in federal court. He alleged employment discrimination based on his race and retaliation for having filed EEOC charges. The defendants moved to dismiss all claims, and the district court granted their motion.

The plaintiff's Title VII claims regarding placement on the midnight shift were time-barred, because the plaintiff failed to file the charge within three hundred days of the discriminatory conduct. The retaliation claim was dismissed on procedural grounds, as the court found that it varied from the contents of the 2012 EEOC charge. The plaintiff appealed.

Amended complaint

In his original complaint, the plaintiff specifically alleged that he'd been denied a shift change because of his race. That allegation was omitted in his amended complaint. The defendants argued that, by omitting reference to the

request to change shifts, the plaintiff failed to allege specific facts indicating an adverse employment action.

The Seventh Circuit disagreed. The plaintiff made reference to being forced "to work midnights indefinitely," which "causes him to be virtually powerless." He also asserted that the midnight shift comes with significantly diminished job responsibilities. The court found that both assertions sufficiently suggested a denial of transfer claim.

Furthermore, the Seventh Circuit explained, a plaintiff can still bring claims not included in an EEOC charge as long as they're "like or reasonably related" to an EEOC charge and have arisen from such allegations. Citing its own *Cheek v. W. & S. Life Ins. Co.*, the court elaborated that, to be like or reasonably related, the relevant claim and the EEOC charge must, at minimum, describe the same conduct and implicate the same individuals.

Once the Seventh Circuit determined that the plaintiff's allegations of a denial of transfer were still in play, it assessed whether a denial of transfer constitutes an adverse employment action. Under *Oest v. Ill. Dep't of Corrs.*:

> … a materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

The plaintiff's amended complaint alleged that he was given diminished job responsibilities that left him "virtually powerless" as a sergeant after being transferred to the midnight shift. Thus, the court found that the allegations were sufficient to plead that a denial of transfer was a materially adverse employment action in this instance.

Employee responsibilities

Most employers probably know the risks of terminating, demoting, refusing to promote or refusing to hire someone — particularly if that individual belongs in a protected class. As *Lavalais* demonstrates, however, significantly reducing an employee's responsibilities is also considered an adverse employment action, regardless of whether an employee's title and salary remain the same. ♦

Taking a contractual approach to an FMLA claim

Many employers find themselves in the sensitive situation of granting an employee leave under the Family and Medical Leave Act (FMLA) because of a substance abuse issue. As the recent decision of *Ostrowski v. Con-Way Freight, Inc.* demonstrates, taking a contractual approach to that employee's return can provide an effective means of legal defense.

Driven to terminate

The plaintiff was a Driver Sales Representative for Con-Way Freight Inc. Part of his responsibilities included driving a tractor-trailer. As a trucking company, Con-Way was subject to federal motor carrier safety regulations issued by the U.S. Department of Transportation. Those

regulations required the company to maintain strict drug and alcohol screening programs for its employees.

In May 2009, the plaintiff was granted FMLA leave to enter a rehabilitation program to treat his alcoholism. Con-Way placed no restrictions on his leave and granted him the same wages, hours and working conditions upon his return from treatment. The plaintiff was, however, required to sign a Return to Work Agreement (RWA). This contract stipulated that he remain "free of drugs and alcohol (on company time as well as off company time) for the duration of [his] employment."

A Third Circuit precedent explicitly endorsed agreements that bar employees from consuming alcohol, even if consumption takes place outside of the workplace and off company time.

Less than one month after signing the RWA, the plaintiff relapsed and re-entered a rehabilitation center — again for the treatment of alcohol abuse. A couple of weeks later, Con-Way terminated his employment, citing solely his violation of the RWA.

Violation of terms

The plaintiff filed suit in federal court, alleging:

- Discrimination, retaliation and failure to accommodate in violation of the Americans with Disabilities Act (ADA), and
- Retaliation, interference and illegal denial of FMLA-protected leave.

The district court granted summary judgment in favor of Con-Way on all claims, and the plaintiff appealed.

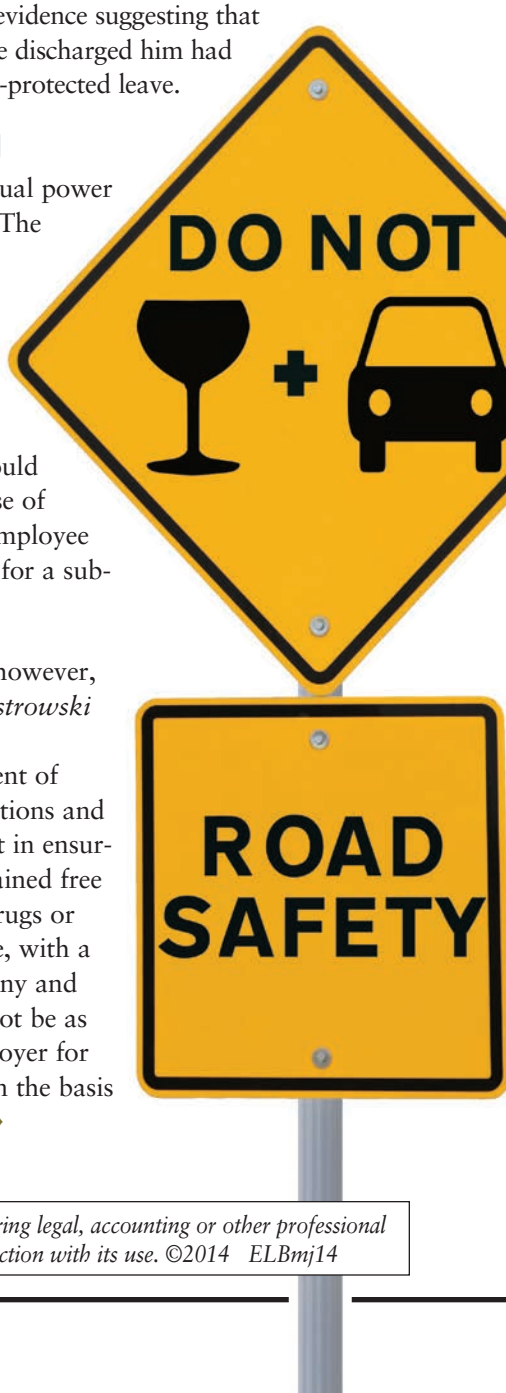
The U.S. Court of Appeals for the Third Circuit first analyzed the plaintiff's claims under the *McDonnell Douglas* burden-shifting analysis. It noted that there were factual disputes precluding summary judgment on the basis of this analysis. The court, however, still ruled in the employer's favor based on the RWA. A precedent in the Third Circuit itself, as well as those in other circuits, explicitly endorsed agreements that bar employees from consuming alcohol — even if the consumption takes place outside of the workplace and off company time.

The Third Circuit noted that the plaintiff failed to show how Con-Way used his RWA violation as a pretext for discrimination. In addition, the court found that the plaintiff wasn't subject to standards different from those governing other employees and wasn't discriminated against in violation of the ADA. Rather, his termination resulted not from his disability, but from his violation of the RWA's terms.

Furthermore, the RWA didn't forbid individuals who suffer from alcoholism from working at Con-Way. It simply prohibited employees subject to its terms from consuming alcohol. The Third Circuit also disposed of the FMLA retaliation claim, finding no evidence suggesting that Con-Way wouldn't have discharged him had he not requested FMLA-protected leave.

Defense successful

In the end, the contractual power of the RWA prevailed. The employer here was able to successfully defend against the plaintiff's ADA and FMLA claims. Thus, as the Third Circuit's ruling suggests, employers should strongly consider the use of an RWA any time an employee returns from treatment for a substance abuse problem.



It's important to note, however, that the employer in *Ostrowski* was required to adhere strictly to the Department of Transportation's regulations and had a legitimate interest in ensuring that its drivers remained free from the influence of drugs or alcohol. In another case, with a different type of company and position, a court may not be as sympathetic to an employer for terminating someone on the basis of an RWA violation. ♦

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