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U.S. SUPREME COURT HOLDS THAT PLAINTIFF BRINGING ADEA DISPARATE-TREATMENT CLAIM MUST PROVE THAT AGE WAS THE "BUT-FOR" CAUSE OF EMPLOYMENT ACTION

*By: Jessica T. Tucci**

The U.S. Supreme Court recently held in *Gross v. FBL Financial Services, Inc.,* 557 U.S. ___ (2009), that a plaintiff bringing a disparate-treatment claim under the Age Discrimination in Employment Act of 1967 ("ADEA") must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The court stated that the burden of persuasion does not 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 in that decision.

In *Gross,* the plaintiff began working for FBL Financial Services (FBL) in the early 1970s and was promoted to the position of claims administration director in 2001. But in 2003, when the plaintiff was 54 years old, he was reassigned to the position of claims project coordinator. At the same time, FBL transferred many of the plaintiff's job responsibilities to the newly created position of claims administration manager. That position was ultimately given to another younger employee, who was then in her early forties, and had previously been supervised by the plaintiff. The plaintiff considered his reassignment a demotion and filed suit in district court alleging an ADEA disparate-treatment claim against FBL.

The district court instructed the jury that it must return a verdict for the plaintiff if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and that his "age was a motivating factor" in FBL's decision to demote him. The jury was further instructed that the plaintiff's age would qualify as a "'motivating factor' if it played a part or role in [FBL]'s decision to demote [him]." The jury returned a verdict for the plaintiff.

FBL appealed the jury instructions to the U.S. Court of Appeals for the Eighth Circuit. On appeal, the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). In *Price Waterhouse,* the court discussed the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964. The *Price Waterhouse* Court held that if a plaintiff shows that discrimination was a "motivating factor" in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the unpermitted consideration.

The U.S. Supreme Court granted certiorari and vacated the decision of the Eighth Circuit. The U.S. Supreme Court held that Title VII is materially different than ADEA with respect to

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CUYAHOGA COUNTY COURT OF APPEALS HOLDS AGE DISCRIMINATION PLAINTIFFS MUST MAKE AN ELECTION OF REMEDIES

*By: Britt J. Rossiter**

The Cuyahoga County Court of Appeals held that Ohio Revised Code ("R.C.") 4112.02 and 4112.99 age discriminations claims are not exempt from the election of remedies provisions of R.C. 4112.08. As a result, a person who files a charge alleging age discrimination with the Equal Employment Opportunity ("EEOC") or Ohio Civil Rights Commission ("OCRC") is barred from later filing an age discrimination lawsuit.

In *Neal v. Franklin Plaza Nursing Home,* the Plaintiff, a nurse's assistant, filed a lawsuit against her employer alleging wrongful termination of her employment pursuant to R.C. 4112.02 and 4112.99. The employer fired her for sleeping on the job, refusing to take a patient to the bathroom, and failing to maintain acceptable standards of respect for the residents. The Plaintiff filed an EEOC charge claiming that her employer discriminated against her because of her age, 71, and replaced her with an individual under 40 or substantially younger than her.

On appeal, the Cuyahoga County Court of Appeals cited the Ohio Supreme Court decision *Smith v. Friendship Village of Dublin, Ohio.* In *Smith,* the Ohio Supreme Court considered whether employees alleging handicap discrimination who had filed a charge with the OCRC were barred from instituting suit under R.C. 4112.99. The *Smith* Court reasoned that no election of remedies applied to a handicap discrimination suit under R.C. 4112.99 because, in contrast to age discrimination, no election of remedies scheme existed.

The Cuyahoga County Court of Appeals also cited a federal Northern District of Ohio case, *Senter v. Hillside Acres Nursing Ctr. Of Williard, Inc.* In that case, the District Court held that a plaintiff who first files an age discrimination charge with the OCRC may not later bring a civil lawsuit under any provision of R.C. 4112. Additionally, the Cuyahoga County Court of Appeals stated that the filing of a claim with the EEOC constitutes a filing with the OCRC and precludes a plaintiff from pursuing a civil action in common pleas court under R.C. 4112.99. Thus, the Cuyahoga County Court of Appeals' decision specifically rejected the Southern District of Ohio's 2001 decision in Sterry v. Safe Auto Ins. Co., which held to the contrary in 2001.

As a result of this decision, employers should recognize that the Cuyahoga Court of Appeals prohibits an employee who files an age discrimination charge with the EEOC or OCRC from bringing a private age discrimination claim under R.C. 4112.02 and 4112.99.

***Britt J. Rossiter,** has extensive experience representing employers in litigating and arbitrating workplace disputes in Ohio, California and throughout the country. For more information about age discrimination or any other employment-related tort, please contact Britt at 216.696.4441 or bjr@zrlaw.com.*

U.S. SUPREME COURT HOLDS THAT PLAINTIFF BRINGING ADEA DISPARATE-TREATMENT CLAIM MUST PROVE THAT AGE WAS THE "BUT-FOR" CAUSE OF EMPLOYMENT ACTION

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the relevant burden of persuasion. The court stated that the burden-shifting framework does not apply to ADEA claims. The text of ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a "motivating factor." Rather, the court cited to ADEA, which states in relevant part, that "[i]t shall be unlawful for an employer…to…discriminate…, *because of* such individual's age." The court emphasized that "because of" age means that age was the "reason" that the employer decided to act.

The court finally held in *Gross* that a plaintiff retains the burden of persuasion to prove that age was the "but-for" cause of the employer's adverse action. Employers should recognize that employees maintain the burden of persuasion in ADEA disparate-treatment claims when analyzing the merits of such a case.

***Jessica T. Tucci ,** practices in all areas of labor and employment law. For more information on the ADEA or any other labor or employment issue, contact Jessica at 216.696.4441 or jtt@zrlaw.com.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

NEW OHIO SUPREME COURT PREVAILING WAGE DECISION STAYS TRUE TO LONG STANDING CONSTRUCTION INDUSTRY PRACTICES

*By: Michele L. Jakubs**

The Ohio Supreme Court recently issued an important decision interpreting Ohio's prevailing wage law, *Sheet Metal Workers' International Association, Local Union No. 33* v. *Gene's Refrigeration,* 2009-Ohio-2747. The Court held: (1) that a labor organization that obtains authorization to represent a single employee does not become an "interested party" with authority to pursue prevailing wage law violations on behalf of other employees performing work for the job; and (2) that only those employees working on the job site need be paid the prevailing wage.

The appellant Gene's Refrigeration paid only its employees working on the job site the prevailing wage. It did not pay the prevailing wage to its employees working off-site fabricating items for the public project. The appellee Local 33, which was not the bargaining representative for Gene's employees, received authorization to represent a single off-site employee. Despite only receiving authorization from one employee, it brought suit on behalf of all of Gene's employees alleging it was an "interested party" under R.C. 4115.03(F)(3).

The court of appeals ruled that Local 33's authorization to represent a single employee provided standing with respect to the entire project and all of Gene's employees working on the project. The court of appeals further held that Gene's, in addition to the employees working on-site, was required to pay the prevailing wage to all employees performing work on the public project including those working off-site. In a well reasoned decision, the Ohio Supreme Court overruled the court of appeals decision.

First, the Ohio Supreme Court in holding that Local 33 only represented the interests of the one employee from which it received authorization, the Court reasoned that the authorization of a single employee, particularly one not entitled to the prevailing wage, is insufficient to permit the Union to represent all those employees working on the job. The Court further reasoned that an employee's authorization is similar to an attorney-client relationship, and the creation of such a relationship between one employee and the union cannot be imputed, without more, to all the other employees.

Revised Code 4115.05 fails to indicate specifically where the work must be performed in order to receive the prevailing wage. However, the Court determined that the legislative history of Ohio's prevailing wage law suggests it was meant to be applied only to those working on-site. The Court also reasoned that a proper statutory interpretation of Ohio's prevailing wage law leads to but one conclusion – only those employees working on the job site need by paid the prevailing wage. Importantly, the Court recognized that the construction industry since 1935 has applied "prevailing-wage laws only to workers on the project site," and that any deviation from the industry practice would result in unworkable consequences.

Employers performing work on public projects can breathe a sigh of relief. The Ohio Supreme Court upheld what employers have been doing for the last 70 years – only paying on-site workers the prevailing wage. Additionally, a union cannot impute representation over an entire labor force by receiving authorization from a single employee.

***Michele L. Jakubs,** practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning changes to prevailing wage or any other employment issue, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

THE OHIO SUPREME COURT HOLDS THAT CITIES CANNOT REQUIRE EMPLOYEES TO LIVE WITHIN CITY LIMITS

*By: George S. Crisci**

The Ohio Supreme Court recently upheld the constitutionality of a 2006 state law, R.C. 9.481 that bars a political subdivision of the state (*e.g.,* a city, county, township or school district) from requiring its employees to reside within that political subdivision as a condition of employment. Specifically, the Court determined in *Lima v. State,* 2009-Ohio-2597, that the General Assembly may enact laws pursuant to Section 34 Article II of the Ohio Constitution which provides "for the comfort, health, safety and general welfare" of all employees and no other provision of the constitution shall impair or limit this power.

In Lima, the court consolidated the appeals of *The City of Lima v. The State of Ohio* and *The City of Akron v. The State of Ohio et al.* The issue before the Court was whether R.C. 9.481 overrides any conflicting law of a political subdivision, including residency requirements. Lima's city charter required all city employees appointed by the mayor to live within the city limits. Akron's city charter similarly required all classified and unclassified city employees to reside within the city for the duration of their employment. Both cities filed court actions seeking declarations that R.C. 9.481 was unconstitutional as applied to their residency requirements.

The cities of Lima and Akron argued that the General Assembly exceeded its authority when it passed R.C. 9.481 and violated the cities' home rule authority to "exercise all powers of local self-government" under Article XVIII of the Ohio Constitution. However, the Court did not agree with the cities' arguments.

The Court held that R.C. 9.481 provides employees more freedom and allows for their comfort and general welfare. The Court stated that it has repeatedly interpreted Section 34 as a broad grant of authority to the General Assembly and not as a limitation on its power to enact legislation. In fact, the Court noted that on at least three separate occasions it has upheld the constitutionality of statutes enacted pursuant to Section 34, Article II. Justice Pfeifer concluded his opinion by stating, "R.C. 9.481 is constitutional and, therefore, …municipalities may not require their employees to reside in a particular municipality, other than as provided in R.C. 9.481(B)(2)(b)."

Interestingly, the Court failed to discuss R.C. 9.481(B)(2)(b), which acts as the only exception to R.C. 9.481 and permits municipalities to require certain employees to live no farther away than adjacent counties to "ensure adequate response times * * * to emergencies or disasters." Under the exception, cities could require certain employees to live within a particular distance from the city for safety reasons. The question then becomes what constitutes an "adequate" distance for response times.

Political subdivisions can no longer require their employees to live within city limits. However, R.C. 9.481(B)(2)(b) does grant political subdivisions the power to ensure that certain employees live close enough to the city to ensure adequate emergency response times.

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6TH CIRCUIT HOLDS: TITLE VII DOES NOT CREATE THIRD-PARTY CAUSE OF ACTION FOR RETALIATION

*By: Patrick M. Watts**

The United States Court of Appeals for the Sixth Circuit recently held, in *Thompson v. North American Stainless, LP,* U.S. App. LEXIS 12100 (6th Cir. 2009), that § 704(a) of Title VII of the Civil Rights Act of 1964 does not create a separate third-party retaliation claim for persons who have not personally engaged in a protected activity. In particular, the Court determined that the Plaintiff could not base his retaliation claim solely on the protected activity of another individual.

In *Thompson,* the Plaintiff worked as an engineer for the Defendant and began dating Miriam Regaldo shortly after the Defendant hired her in 2000. In September 2002, Regaldo filed a claim with Equal Employment Opportunity Commission (EEOC) against the Defendant alleging that her supervisors had discriminated against her based on gender. About three weeks later, the Defendant terminated the Plaintiff's employment based on his performance. The Plaintiff subsequently filed a complaint against the Defendant alleging the Defendant terminated him in retaliation for Regaldo's, then fiancée's EEOC charge.

The Plaintiff argued that the language of § 704(a) should protect claimants who are "closely related [to] or associated [with]" a person engaged in protected activity. The Court declined the Plaintiff's argument, and joined with the Third, Fifth and Eighth Circuits which all have unanimously rejected such third-party retaliation claims. The court stated; "[P]laintiff and the EEOC request that we become the first circuit court to hold that Title VII creates a cause of action for third-party retaliation on behalf of friends and family members who have not engaged in protected activity. However, we decline the invitation to rewrite the law."

Instead the Sixth Circuit held that the plain language of § 704(a) explicitly identifies those individuals who are protected – employees who "opposed any practice made any unlawful employment practice" or who "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. The Court stated that § 704(a) clearly limits the class of claimants to those who actually engaged in the protected activity. Plaintiff's claim failed because his relationship to Regaldo was the sole motivating factor in his complaint, and he did not claim that *he* engaged in any statutorily protected activity, either on his own behalf or on behalf of Regaldo.

The Court further held that it must look at what Congress actually enacted, not what it believes Congress might have passed were it confronted with the current facts. The Court held that it was not "absurd" for Congress to limit the class of persons who are entitled to sue employees who personally opposed a practice, made a charge, or assisted or participated in an investigation.

Employers should recognize it is not enough for an employee to file a retaliation claim based on an association (*e.g.,* spouse, friend) with someone engaged in a protected activity. Rather, an employee must have actually engaged in a protected activity to file a retaliation claim.

***Patrick M. Watts,** is an OSBA Certified Specialist in Labor and Employment Law. Patrick practices in all areas of employment litigation with a focus on FMLA litigation and compliance. For more information about Title VII or any other labor or employment issue, please contact Patrick at 216.696.4441 or pmw@zrlaw.com.*

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Z & R SHORTS

Jessica Tucci

Zashin & Rich Welcomes Jessica Tucci to its Employment and Labor Group

Jessica's practice encompasses all areas of public and private labor and employment related issues.

Jessica received her undergraduate degree in Labor Studies and Industrial Relations from the Pennsylvania State University. Prior to attending law school, Jessica worked as a union organizer for the Service Employees International Union Local 1199NY and as a campaign coordinator for the Prewitt Organizing Fund. Jessica then earned her law degree (J.D.) from The University of Dayton School of Law where she graduated *cum laude* and with track honors.

Jessica is admitted to practice law in the State of Ohio. She is a member of the Akron and Ohio Bar Associations.

Please join us in welcoming Jessica to Z&R!

SPEAKING ENGAGEMENTS

46th Annual Midwest Labor and Employment Law Seminar
October 15 & 16, 2009
Hilton, Easton Town Center, Columbus, Ohio
Stephen Zashin will present "The New FMLA Regulations" and George Crisci will present "Latest Developments from SERBia". To register go to www.ohiobar.org.

November 17, 2009
Patrick Watts will moderate a one day seminar presented by the Council on Education Management entitled "FMLA Hot Topics 2009" to be held in Cleveland, Ohio. For more information go to www.counciloned.com.

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.