PUBLICATION

Sixth Circuit Declines to Follow the Supreme Court On Mixed Motive Cases Under the FMLA

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The United States Supreme Court recently held that in order to prevail on a claim under the Age Discrimination in Employment Act (ADEA), a plaintiff must show that age was the primary factor in the contested employment action. While an employer may have taken the action due to multiple reasons or "mixed motives," in order to prevail under the ADEA, the employee must show that but for his or her age, the action would not have occurred. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009). The 5-4 holding in Gross distinguished the ADEA from Title VII of the Civil Rights Act, which, pursuant to its 1991 amendments, specifically allows mixed motive claims by Plaintiffs. In doing so, the Court held that, unlike Title VII, Congress had not amended the ADEA to include mixed motive cases as cognizable claims.

Since the *Gross* ruling on June 18, 2009, many have wondered whether this same standard now applies to claims under other non-Title VII employment related statutes. On August 26, 2009, the Sixth Circuit answered that question as it relates to the Family and Medical Leave Act (FMLA). In *Hunter v. Valley View Local Schools*, No. 08-4109 (6th Cir. 2009), the Sixth Circuit ruled that the *Gross* standard is not applicable to cases brought under the FMLA. In distinguishing FMLA claims from this new standard, the Sixth Circuit analyzed the regulations promulgated by the United States Department of Labor to implement the FMLA. Specifically, the Court looked to 29 C.F.R. § 825.220(c), which says:

The [FMLA]'s prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

The Court noted that "[t]he phrase 'a negative factor' envisions that the challenged employment decision might also rest on other, permissible factors." *Hunter* at 7. Accordingly, it concluded "that the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors." *Id*.

Having established that mixed-motive cases were permissible under the FMLA, the facts in *Hunter* rendered the ruling quite simple. In *Hunter*, the plaintiff was a school janitor who had taken various periods of leave over a four-year period under the FMLA due to non-job related injuries. She sued her employer under the FMLA for placing her on involuntary unpaid leave after she had returned to work from her most recent FMLA leave. The record clearly established that the decision to place the plaintiff on the involuntary leave was based upon two grounds: (1) given her medical restrictions, the plaintiff was unable to perform the essential functions of her job; and (2) her excessive absenteeism due to her FMLA-protected leave. The employer initially prevailed on summary judgment when the trial court found that it would have taken the same employment action, regardless of the absenteeism. After announcing that it would not be following the *Gross* standard, because the FMLA-protected leave was part of the calculus used by the employer in making its decision, the Sixth Circuit reversed.

Do not be surprised to see the *Hunter* case appealed to the Supreme Court. Of particular focus in such an appeal may be the Sixth Circuit's reliance in *Hunter* upon an administratively-promulgated regulation—rather than Congressional intent like the Supreme Court did in *Gross*—to buttress its holding. Baker Donelson can assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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