



Sixth Circuit Court of Appeals Applies Heightened Standard of Proof to Age Discrimination Claims Arising as Part of Reductions in Force

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The United States Court of Appeals for the Sixth Circuit recently affirmed a lower court decision rejecting an employee's age discrimination claim arising out of a reduction in force ("RIF"). In *Geiger v. Tower Automotive*, No. 08-1314, 2009 WL 2836538 (6th Cir. September 4, 2009), a 62-year old former employee of Tower Automotive ("Tower") brought claims of age discrimination under the federal Age Discrimination in Employment Act ("ADEA") and a Michigan state civil rights statute. In upholding the lower court decision, the Sixth Circuit reaffirmed its approach to analyzing age discrimination claims based on circumstantial evidence, including the application of a heightened standard of proof when such claims arise out of reductions in force.

A plaintiff may establish a violation of the ADEA by either direct or circumstantial evidence. Direct evidence of discrimination is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred.

In *Geiger*, the Sixth Circuit first analyzed whether the plaintiff had presented any direct evidence of discrimination and found that he had not. Notably, however, the Court discussed the recent United States Supreme Court decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), and acknowledged that it overruled the Sixth Circuit's ADEA precedents to the extent that they applied Title VII's burden-shifting framework when a plaintiff produced direct evidence of discrimination. Under the standard enunciated in *Gross*, even when a plaintiff provides direct evidence that age was a motivating factor in a termination decision, the plaintiff retains the burden of proving that age was the "but for" cause of the termination. In other words, even when the plaintiff provides direct evidence of discrimination, the plaintiff must show that the employer would not have fired the plaintiff if not for the plaintiff's age.

The Sixth Circuit next considered whether the plaintiff in *Geiger* had provided sufficient circumstantial evidence to support his age discrimination claim. The Court first noted that the *Gross* decision did not affect its analysis of cases based on circumstantial evidence. To succeed on such a claim, the plaintiff must first set forth a *prima facie* case. This requires the plaintiff to produce evidence that: (1) he was over 40 years of age; (2) he was discharged; (3) he was qualified for the position held; and (4) he was replaced by someone outside the protected class. If the termination arises as part of a RIF, the Sixth Circuit has modified the fourth element to require the plaintiff to provide "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons."

Based on the evidence presented, the Court found that the plaintiff in *Geiger* was not replaced and was, in fact, part of a RIF. Accordingly, the Court found that the plaintiff was required to meet the heightened standard of proof for RIFs. The Court found that none of the evidence presented by the plaintiff, which

consisted largely of statements and conduct of employees who were not involved in the decision to terminate him, was insufficient to meet this heightened standard.

This decision reminds employers that although RIFs can sometimes spawn age discrimination claims by terminated employees, in the Sixth Circuit an employee's hurdle for succeeding on an age discrimination claim under these circumstances is higher than in non-RIF situations.