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DISABILITY DISCRIMINATION CLAIMS FACE STRICTER STANDARD IN THE FOURTH CIRCUIT

The Americans with Disabilities Act (ADA) became law over 20 years ago. But until last month, the Fourth Circuit Court of Appeals, which includes North and South Carolina, had never specified a plaintiff's burden of proving a claim for discrimination under the act. Indeed, lower courts are split over whether a plaintiff must show that his or her disability was a "motivating factor" in the employment decision at issue or that "but for" the disability, the personnel action would not have occurred. In a recent case, however, the Fourth Circuit determined that a plaintiff must meet the more demanding standard and show that "but for" the disability, the employer would not have taken action. *Gentry v. East West Partners Management Co., Inc.*, et al., No. 14-2382, 2016 WL 851673 (4th Cir. 2016).

Background of Case

Judith Gentry worked as an executive housekeeper for the Maggie Valley Club and Resort. In September 2008, East West Partners Club Management Co. was hired to run the club's day-to-day operations, with Jay Manner as the general manager. After a workplace injury to her left foot and ankle, Gentry filed for and received workers' compensation benefits. In October of 2008, she had her ankle surgically repaired.

Gentry returned to work in January 2009, and although she initially had no work restrictions, she was later found to have a 30 percent permanent impairment to her ankle. In November 2010, she settled her workers' compensation claim. One month later, she was terminated. Gentry filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and subsequently sued the club and East West, alleging a variety of claims, including disability discrimination under the ADA.

According to the club, Gentry's termination was part of a cost-cutting restructuring. However,

Gentry testified at trial that when she met with a company executive after her termination, he informed her that Manner, the general manager, admitted to terminating Gentry because of issues with her ankle and because she could be a liability to the club. Notably, Gentry presented testimony from the EEOC investigator on her charge of discrimination, confirming that during his interviews, the company executive reiterated the statements by Manner that Gentry was “let go due to her disability and her liability to the club.”

Ultimately, the jury found for Gentry on some of her claims, but found for the club and East West on the claim for disability discrimination. Gentry appealed to the Fourth Circuit Court of Appeals.

The Appeal

The issue on appeal was the burden of proof for a disability discrimination claim. Gentry argued the trial court improperly instructed the jury that she had to prove that “but for” her disability, she would not have been terminated. Gentry asserted that the trial court should have used the standard for Title VII discrimination claims and that her disability need only have been a “motivating factor” in the termination decision.

The Fourth Circuit disagreed, refusing to apply the more lenient “motivating factor” standard from Title VII to ADA claims. The court determined that the relevant language from Title VII – which states that “motivating factor” is the appropriate standard for claims alleging race, color, religion, sex, or national origin discrimination – is inapplicable in ADA cases. The ADA bars discrimination “on the basis of” a disability.

According to the court, the U.S. Supreme Court’s reasoning in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), a case involving a claim under the Age Discrimination in Employment Act (ADEA), supports using the more exacting standard of proof for claims under the ADA. Specifically, the ADEA bars discrimination “because of” an individual’s age. In *Gross v. FBL Financial Services, Inc.*, the Supreme Court held that the “because of” language means an ADEA plaintiff must prove age was the “but for” cause of the employer’s decision. 557 U.S. 167, 176 (2009).

Similarly, in Gentry’s case, the Fourth Circuit explained there is “no meaningful textual difference” between “because of” and “on the basis of.” Thus, ADA plaintiffs, like ADEA plaintiffs, must meet the higher “but for” standard of proof. Consequently, the Fourth Circuit found the trial court’s jury instructions to be correct and upheld the verdict on Gentry’s ADA claim.

Going Forward

The *Gentry* case provides a modest victory for employers. Going forward, employees with disability-based discrimination claims will have a tougher path if they were terminated for reasons entirely unrelated to a disability or if their alleged disability played only a minor role in the employer’s adverse decision. Importantly, however, “but for” does not mean “the only” or “sole” reason. In other words, ADA plaintiffs do not have to show that their alleged disability was the *only* reason they were terminated or otherwise discriminated against.

Perhaps of equal importance, this case illustrates again that employers faced with an EEOC charge should retain experienced employment counsel. A company’s first statements to the EEOC

– like those made by the executive in the *Gentry* case – are critically important in shaping the company’s defense. Mistakes made during the initial stages of an EEOC investigation can and do haunt employers years later when the case finally winds its way to trial. Avoiding those mistakes, and the resulting consequences, can make the difference between courtroom success and failure.

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