Legal Update Article

EEOC Argues for Broader Causation Standard and Provides a Peek into the EEOC's Future Focus

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February 26, 2021

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Litigation

Legal precedent, including language from the U.S. Supreme Court, requires federal courts to take a broad view of the "but-for" causation standard for determining unlawful age discrimination in the workplace, Equal Employment Opportunity Commission (EEOC) said in support of rehearing in a bank teller's case

Causation Standard

Cases are won and lost based on the causation standard applied to any discrimination case. The U.S. Supreme Court made clear in *Gross v. FBL Financial*, 557 U.S. 167 (2009), that the appropriate causation standard under the Age Discrimination in Employment Act (ADEA) was the stricter "but-for" causation standard. Under this standard, the plaintiff must prove that "but-for" their age (over 40), the employment action at issue would not have taken place.

Four years later, in *University of Texas, Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), the Supreme Court further clarified that courts must use the "but-for" causation standard in retaliation claims brought under Title VII of the Civil Rights Act of 1964, even though the less stringent "motivating factor" standard applies to Title VII disparate treatment claims based on race, color, religion, sex, and national origin.

Given the critical importance of the causation standard to establishing liability in a discrimination or retaliation case, employers and employees are closely monitoring developments, including the positions that the EEOC takes in litigation brought by the agency. In a friend-of-the-court brief filed on February 10, 2021, in *Pelcha v. MW Bancorp, Inc.* (No. 20-3511) pending before the U.S. Court of Appeals for the Sixth Circuit, the EEOC provided rare insight into its view of the "but-for" causation standard and an area the Commission may focus on in the foreseeable future.

EEOC's Argument

In *Pelcha v. MW Bancorp, Inc.*, a panel of three judges on the Sixth Circuit previously decided that the district court appropriately granted summary judgment to the employer in an age discrimination claim. A portion of the Sixth Circuit's decision discussed the appropriate way to apply the "but-for" causation standard to the claim at issue. According to the Sixth Circuit, the focus should be on whether age was *the* "but-for" cause of the action. Relying on *Gross*, the Sixth Circuit stated that, under the ADEA, a plaintiff "must show that age was *the* reason why they were terminated, not that age was one of multiple reasons."

In its brief, the EEOC took issue with the Sixth Circuit's formulation of the "but-for" causation standard. The EEOC argued that by focusing on whether age was the reason someone was fired, the Court had applied a "sole cause" causation standard. Instead, according to the EEOC, the correct standard was whether age was *a* "but-for" cause of the action, rather than the Sixth Circuit's focus on if age was *the* "but-for" cause.

Essentially, the EEOC argued that there can be multiple "but-for" causes of an action. In support of its argument, the EEOC cited the Supreme Court's *Burrage v. United States*, 571 U.S. 204 (2014), in which the EEOC argued the Court deliberately replaced the phrase "the but-for cause" (in *Gross*) with "a but-for cause." The EEOC also cited the Supreme Court's 2020 decision in *Bostock v. Clayton County*, 140 S. Ct. 1731. *Bostock* contained a lengthy discussion of the appropriate way to apply the "but-for" causation standard under Title VII. While the Sixth Circuit's decision considered *Bostock* and found its discussion of causation was limited to Title VII, the EEOC's brief argued that *Bostock* provided further support for the contention that the Sixth Circuit had incorrectly formulated the "but-for" causation standard. The EEOC also argued that other Circuit Courts supported its framing of the "but-for" causation standard.

Implications

After the EEOC filed its brief, on February 19, 2021, the Sixth Circuit panel issued an amended opinion that appeared to address the EEOC's points. In the Amended Opinion, the Sixth Circuit altered some of the language in its "but-for" causation analysis, but these changes do not appear to satisfy the EEOC's objections, since the Court's focus was still on whether age was *the* cause of the action. For example, on the language quoted on age being "*the* reason" was changed to state, "This requires showing that age was *the* determinative reason they were terminated; that is, they must show 'that age was the "reason" that the employer decided to act.'"

Prior to the Amended Opinion, the appellant sought a rehearing *en banc,* before the entire Sixth Circuit. The appellant likely will continue to seek a rehearing after the Amended Opinion. Should the Sixth Circuit grant a rehearing, it is questionable whether it will adopt the EEOC's formulation of what it views as the broader "but-for" causation standard. However, the EEOC's brief provides insight into the agency's position on this issue. All employers facing age discrimination claims, and any other claims that rely on the "but-for" causation standard, should be aware of the EEOC's position.

It is also interesting that since a majority of Commissioners must approve the filing of a friend-of-the-court brief, it is clear that at least three Commissioners (out of the five) agree with the argument in the brief. Given this apparent consensus, issues concerning age discrimination and, specifically, the EEOC's view of the appropriate application of the "but-for" causation standard may be areas of future focus for the EEOC.

Jackson Lewis attorneys will continue to monitor developments relating to the causation standards for the ADEA, Title VII, and other laws enforced by the EEOC, such as the Americans with Disabilities Act.

If you have any questions about the appropriate causation standard in a case or the EEOC's position on causation standards, please contact your Jackson Lewis attorney.