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Debating the viability of retaliation mixed-motive cases

By Frank J. Saibert

In a March 24, 2010 divided opinion, the 5th U.S. Circuit Court of Appeals created an apparent circuit split by affirming the availability of so-called "mixed-motive" liability theories in retaliation cases under Title VII of the 1964 Civil Rights Act ("Title VII"). *Smith v. Xerox Corp.*, 5th Cir., No. 08-11115, 3/24/10. By so ruling, the court discounted recent 7th Circuit decisions finding that the Supreme Court's 2009 decision in *Gross v. FBL Fin. Servs. Inc.*, 129 S.Ct. 2343 (2009) requires an aggrieved employee to prove "but-for causation" in all federal discrimination or retaliation lawsuits absent a contrary statutory provision. See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir 2010); *Fairley v Andrews*, 578 F.3d 518 (7th Cir. 2009). The issue is of such prominence that Supreme Court review seems likely.

"Mixed-motive" discrimination or retaliation cases are those in which an employee or former employee can prevail by demonstrating that an illicit factor, such as gender, race, retaliation, disability, or age, informed in part an employer's adverse employment decision, notwithstanding the fact that the employer also had a legitimate and lawful reason to take the adverse action. Employees claiming a mixed-motive case generally must acknowledge the employer's legitimate motive for the adverse action. Employers under the theory can avoid having to reinstate the employee, or paying damages (but not the employee's attorney's fees), by demonstrating that it would have taken the very same action even absent the prohibited factor.

Mixed-motive cases differ significantly, in both an evidentiary and burden of proof perspective, from the more traditional "but for causation" burden shifting analysis of *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under the *McDonnell-Douglas* framework, an employee prevails only if she can prove that the employer's proffered reason for its decision is a pretext, or actual lie, for unlawful discrimination or retaliation. Employers usually prefer,

Frank J. Saibert is chair of the labor and employment practice at Ungaretti & Harris LLP. He represents public and private sector employers nationwide in labor relations and employment matters. He is past president of the Chicago Chapter of the National Human Resources Association and a former Lyons Township committeeman. He can be reached at fjsaibert@uhlaw.com.

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strongly, a pretext case, because it requires the employee to prove that the employer had no legitimate reason for the adverse employment action it took. Employees of course prefer the mixed-motive theory, because it puts the burden back on the employer to show that it would have taken the adverse employment action despite the unlawful reason.

In *Smith*, Kim Smith, a 22-year employee, claimed that she was being driven out of Xerox by a new male manager because of her age and gender. After Smith complained to the Equal Employment Opportunity Commission (EEOC), Xerox fired her, citing her documented inability to meet her sales goals. Smith sued. The jury ruled against her on the age and gender claims, but, presumably following the trial court's mixed-motive instruction, found for her on her retaliation claim, awarding \$67,500 in compensatory damages and \$250,000 in punitive damages. At no time did Smith acknowledge the legitimacy of Xerox's stated reason for her firing, her failure to make her numbers.

Xerox argued to the 5th Circuit, and the dissent there agreed, that mixed-motive cases are not allowable, period, under Title VII's retaliation section. Xerox and the dissent relied heavily on the Supreme Court's *Gross* decision. The *Gross* court ruled, in a case involving the Age Discrimination in Employment Act (ADEA), that where a statute prohibits adverse employment action "because of" a prohibited factor, the plain meaning of the phrase "because of" compels the complaining employee to show "but for" causation, absent specific statutory authorization for a mixed-motive theory. The 7th Circuit applied *Gross* to preclude mixed-motive analyses under Section 1983 (*Fairley*) and the Americans With Disabilities Act (ADA) (*Serwatka*). Neither Section 1983 nor the ADA expressly allow mixed motive.

The *Smith* majority, noting the earlier 7th Circuit decisions, did not agree that *Gross* forecloses mixed-motive theories in Title VII retaliation cases. While acknowledging that "the *Gross* reasoning could be

applied in a similar manner to the instant case," the majority pointedly noted that "*Gross* is an ADEA case, not a Title VII case." On essentially that basis, it declined to apply *Gross* to the Title VII retaliation case before it. This, as the dissent noted, despite the fact that Title VII's anti-retaliation provision contains the exact same "because of" language, also contained in the ADEA, on which the Supreme Court based its *Gross* decision, and lacks any specific mixed-motive authorization. According to the dissent, the majority's attempt to distinguish *Gross* was "lame" and "the equivalent of saying that a principle of negligence law developed in the wreck of a green car does not apply to a subsequent case because the subsequent car is red ..."

Of equal concern, at least to employers who have to defend these lawsuits, is that the *Smith* majority allowed a mixed-motive jury instruction despite the fact that Smith apparently tried to the jury a pretext or "but for" case. Her proofs all went to demonstrate that Xerox's proffered reasons for her discharge were falsehoods that were pretexts for unlawful gender and age discrimination and retaliation. And significantly, she did not at trial argue or acknowledge that Xerox's stated reasons for her discharge were valid, as prior 5th Circuit precedent required in mixed-motive cases.

The strategic disadvantage for employers in this type of situation cannot be overstated. As the *Smith* dissent claimed, the *Smith* decision "allows virtually every pretext case to be given to the jury as a mixed-motive case," relieving the employee of her burden under *McDonnell-Douglas* to demonstrate but-for causation.

What does this all mean for Illinois employers? For the time being, they can continue to take comfort that, per *Fairley* and *Serwatka*, the 7th Circuit is not going to permit mixed-motive cases unless they are expressly authorized by statute. This would, for now, include Title VII's prohibitions on race, color, religion, sex, or nation origin discrimination, but would exclude age and disability discrimination and most retaliation cases. That is not a small point given the enormous recent influx of age and retaliation cases into the court system. But given the clear circuit split on the mixed-motive issue, and the issue's importance to this area of jurisprudence, it is likely that the Supreme Court will weigh in at some point.

Footnote: The *Smith* majority did reverse Smith's \$250,000 punitive damage award for lack of evidence to justify punitive damages.