Posted on July 17, 2012 by Epstein Becker & Green

Texas Supreme Court Now Requires Direct Proof of Age Discrimination When Replacement Employee Is Older Than the Plaintiff

by Greta Ravtisky

In a recent decision favorable to employers, the Texas Supreme Court ruled that, in most age discrimination cases, under Texas state law, terminated employees who have been replaced by older workers may not have grounds to sue, unless they can establish direct evidence of discriminatory animus.

The Fifth Circuit standard applicable to age discrimination cases provides that a plaintiff may establish a *prima facie* case of discrimination if s/he can show that s/he was replaced by someone younger *or* otherwise show that s/he was discharged because of age. Since the Texas Commission of Human Rights Act ("TCHRA") is modeled after Title VII, prior to this decision, Texas state courts followed the federal Fifth Circuit standard. On June 29, 2012, the Texas Supreme Court effectively narrowed this standard by focusing primarily on the question of whether the replacement was older than the plaintiff.

The 6-3 ruling in *Mission Consolidated Independent School District v. Gloria Garcia* dismissed a lawsuit filed by a 48-year old secretary who was terminated from a South Texas school district in 2003, and was replaced by a female three (3) years older than the plaintiff. Writing for the majority, Justice Willett stated that the Plaintiff "must demonstrate that her replacement was younger, otherwise, she is not entitled to a presumption of discrimination." While acknowledging that such instances would be rare, Justice Willett clarified that this new standard will not stop lawsuits by employees who have direct evidence of discrimination, even when replaced by an older worker.

In a strong dissent Chief Justice Jefferson opined that the new standard unfairly shifts the burden of proof to the plaintiff without requiring the employer to address the discrimination allegation beyond showing that the replacement was older. Justice Jefferson went on to state, "[t]he court is today establishing a new and oppressive burden in the employment setting: a litigant must prove her case" from the start. Doing so denies the victim of invidious discrimination any hope that a court will set

things right." The dissent, as well as the numerous critics of this decision, have also pointed out that a subsequent decision to hire an older replacement may not be indicative of a lack of a prior motive to discriminate, particularly if two different individuals are involved in the employment decisions and/or the subsequent hiring decision is made as an "ex post attempt to avoid liability."

Most significantly, the new standard outlined by the Texas Supreme Court could have far-reaching implications on race, color, disability, religion, sex, and national origin discrimination claims brought under the TCHRA. Certainly, if the age of the replacement employee is ascribed this much weight in an age discrimination claim, so could the race of the replacement employee in a race discrimination claim.

While it cannot be disputed that the age of the employee hired to replace a plaintiff is a significant factor in evaluating an age discrimination claim, the strength of this factor and the impact of this case will inevitably be tested and further defined in the coming months, as the Texas state courts entertain defendants' various efforts to dismiss discrimination claims under the TCHRA on the basis of this controversial decision.

EBG

© 2012 Epstein Becker & Green, P.C.

Employer Defense Law Blog

Epstein Becker & Green, P.C.
250 Park Avenue • New York, New York 10177 • Phone: 212.351.4500
Strategy, design, marketing and support by LexBlog™