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Tenth Circuit Affirms that Pattern and Practice Claims are Alive Under the Age Discrimination in Employment Act

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In 2009, the United States Supreme Court in *Gross v. FBL Financial Services,* 129 S.Ct. 2343 (2009), rejected the so-called "mixed-motive" theory in age discrimination cases. Relying on *Gross*, a company recently argued that "pattern or practice" cases are no longer viable under the Age Discrimination in Employment Act (ADEA). But the Tenth Circuit Court of Appeals disagreed, concluding that *Gross* had no impact on the ability of plaintiffs to assert a "pattern or practice" of age discrimination. *Thompson v. Weyerhaeuser Co.*, --- F.3d ----, 2009 WL 2902069 (10th Cir.).

Under Title VII, the United States Attorney General is authorized to commence a civil action against any person engaged in a "pattern or practice" of discrimination in violation of Title VII. Based upon that language, and in a series of Supreme Court decisions (where the allegations were that an employer had violated Title VII by engaging in a "pattern" of discriminatory decision making), a framework for the handling of these claims developed. That framework required that a trial proceeding occur in a series of stages where the burden of proof was allocated in a manner that differs from the traditional single employee claim of discrimination. 2009 WL 2902069 *2 (citations omitted).

Cases that involve individual claims of discrimination focus on the reason(s) for the particular employment decision at issue. *Id.* In contrast, "pattern or practice" cases are typically evaluated in two phases. The first phase requires the plaintiffs "to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 360 (1977). "[A]t the initial, 'liability' stage of a pattern-or-practice suit", plaintiffs are not required to offer evidence that each person seeking relief "was a victim of the employer's discriminatory policy." *Id.* The "burden is to establish that such a policy existed." *Id.* Once established, "[t]he burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant." *Id.* "The second stage of a pattern and practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiffs' favor." *Thiessen*,267 F.3d at1106 (10th Cir. 2001), citing

Newberg on Class Actions, § 4.17 (3d ed.1992).

In reaching the conclusion that *Gross* did not limit pattern or practice claims, the Tenth Circuit noted that it has long recognized the viability of pattern or practice discrimination claims under the ADEA. *See* 2009 WL 2902069 * 4-5; *citing Equal Employment Opportunity Commission v. Sandia Corp*., 639 F.2d 600, (10th Cir. 1980), and *Thiessen v. General Electric Capital Corp*., 267 F.3d 1095 (10th Cir. 2001). In fact, the Tenth Circuit cited holdings from five other Circuit Courts of Appeals that have also recognized the use of pattern or practice framework in ADEA cases. *Id.*

In *Sandia*, the Tenth Circuit first utilized the pattern or practice model established by the Supreme Court in *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977), to provide a framework in assessing the burden of proof in an ADEA case. The *Sandia* case emphasized that the *McDonnell-Douglas Corp*. doctrine is not an inflexible formula applicable to discrimination cases and that the *Teamsters* procedure for order of proof in a pattern and practice lawsuit under Title VII is viable under the ADEA. 639 F.2d. at 621; *citing Teamsters*, 431 U.S. at 358. Twenty-one years later, in *Thiessen*, the Tenth Circuit re-affirmed *Sandia* and again noted the contrast between a pattern or practice case from the far more common case involving one or more claims of individualized discrimination (disparate treatment case). 267 F.3d at1106 (10th Cir. 2001).

The holdings of *Sandia* and *Thiessen* were not thought in doubt until the Supreme Court's opinion in *Gross*. In *Gross*, the Supreme Court rejected a mixed-motive burden shifting framework in ADEA cases. 129 S. Ct. at 2349. Essentially, the Supreme Court elevated the quantum of causation required under the ADEA, so that it was no longer permissible for a plaintiff to merely show that age was a motivating factor in the defendant's decision to terminate him/her. Instead, a plaintiff must present evidence establishing that age discrimination was the “but for” cause of the plaintiff's termination. *Id.* This change was a significant shift from the long-standing trend in the Circuit Court of Appeals to borrow the analytical frameworks--like *McDonnell-Douglas Corp.* and the mixed motive burden-shifting scheme--from Title VII and apply it to other anti-discrimination statutes like the ADEA.

In *Gross,* the Supreme Court found that the language of the 1991 Amendments to Title VII did not apply to ADEA cases because Congress did not add similar mixed motive language to the ADEA. *See* 129 S. Ct. at 2349-51. This demonstrated that mixed motive burden shifting framework is not applicable to cases under the ADEA, as codified by the 1991 Amendments to Title VII. Justice Thomas also pointed out that the Supreme Court has not “definitively decided whether” the *McDonnell-Douglas Corp.* framework applies in an ADEA case. 129 S.Ct. at 2349 n.2.

In light of the *Gross* holding and Justice Thomas' comments, a real question developed whether the pattern or practice framework from *Teamsters* could by used in the ADEA context. Unlike Title VII, the words “pattern or practice” do not appear in the ADEA. If one analyzed the justification for using the pattern or practice framework in the way that the

Supreme Court analyzed mixed motive burden shifting in *Gross*, there is a fair argument that such a framework is inapplicable to the ADEA. This was the very argument made by the employer in *Thompson v. Weyerhaeuser Co.*

The Tenth Circuit acknowledged that the words “pattern or practice” are not found in the ADEA. But unlike the mixed motive burden shifting framework (which was founded on the text of the 1991 Amendment to Title VII), the pattern or practice framework is not expressly mentioned in either statute as a burden shifting framework. There are no analogous differences between the language of Title VII and the ADEA in the context of the pattern or practice framework like that in *Gross*, so the holding of *Gross* cannot be read to overrule circuit precedent that authorizes the application of the pattern or practice framework in an ADEA case. *See* 2009 WL 2902069 * 4-5.

While this is only one Circuit Court's view of the applicability of *Gross* to the pattern or practice framework in the ADEA context, it remains to be seen how the other Circuit Courts will address this issue. What is clear, since *Gross,* is that Congressional Democrats have introduced legislation to override the holding and establish that the mixed motive burden shifting framework is applicable in the ADEA context. But given the uncertainty that remains, the issue is sure to be litigated around the country.
