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AGE DISCRIMINATION IN EMPLOYMENT: POLICY IMPLICATIONS

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Overview

Employment law is one body of law where the “but for factor” seems ever present—more specifically, in cases where the plaintiff claims discrimination. For example, in such cases individuals might make the following claims: While I am qualified for the job, “but for my race,” or “but for my ethnicity,” or “but for my religion,” or “but for my gender,” I would have been hired as a teacher, or promoted to assistant principal, or retained in my tenured position.

For the past several years, beginning with the United States Supreme Court’s landmark Title VII (CRA, 1964) decision in Griggs v. Duke Power (1971), employment discrimination claims involving local public school systems have made their way into a federal court. As a general rule, post-Griggs courts have focused attention on the relationship, if any, between essential job-related criteria, job performance, and job effectiveness. (Vacca and Boshier, 2012)

Test of Causation. In 1977, the United States Supreme Court created a standard of analysis that has proved important in looking for the “but for factor” in employment discrimination cases—one that has greatly conditioned school system personnel policy making and procedures. (Vacca and Boshier, 2012) In analyzing the issues in a case that involved teacher expression and the First Amendment, Justice Rehnquist offered the following three-pronged causation standard of analysis: (1) Is there present some element or exercise that is constitutionally or statutorily protected? (2) Did that element or exercise play a substantial or motivating part in the employment decision? (3) Absent that element or exercise, would the same decision have been made? This causation standard, said Justice Rehnquist, helps “distinguish between a result caused by a constitutional violation and one not so caused.” Mt. Healthy v. Doyle (1977) Subsequent courts placed the initial burden on the employee plaintiff to demonstrate questions (1) and (2). If successfully done the employer would need to demonstrate (3) by a preponderance of the evidence—*i.e.*, that the same decision would have been reached regarding this employee. Renfroe v. Kirkpatrick (N.D. Ala. 1982)

In my view, in addition to requiring more specific job descriptions and expectations, the Supreme Court’s *causation standard* highlighted the importance of and need for documentation (*i.e.*, results of procedurally fair formative and summative evaluations) of employee performance over a specified timeline. Direct evidence of employee performance would be needed to defeat an allegation of pretext.

Age Discrimination. In searching work place discrimination case law involving public school systems, it becomes apparent that issues involving plaintiff claims under the Age Discrimination in Employment Act [ADEA], 29 U.S.C. 621, *et seq.*, are few in number. While there are exceptions in the law, the statute states, in relevant part, that it shall be unlawful for an employer to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age. The statute also states that it is not unlawful for an employer to take any action where age is a “bona fide occupational qualification” (BFOQ) reasonably necessary to the normal operation of the particular business, or where the differentiation is based on “reasonable factors” other than age, or the discharge or to otherwise discipline an individual for “good cause.” However, as experts in education law caution us, “[e]mployment actions need not be based solely on objective criteria. While the use of subjective criteria may afford evidence of discrimination, since it is not conclusive, the same types of statistical analyses

apply to results of subjective and objective methods, both of which must be defensible even if they are not the best options available.” (Russo, 2004)

Recently I came across a decision from the United States Court of Appeals for the Seventh Circuit where a claim of age discrimination spawned the issue. The case involves the City of Chicago Board of Education.

Bordelon v. Board of Education of the City of Chicago (7th Cir. 2016)

Facts: In 1993, Bordelon became the principal of Kozminski Community Academy, a K-6 grade school in the City of Chicago Public Schools. Although the City of Chicago Board of Education (hereafter referred to as the Board) supervises the entire school system, a Local School Council (hereafter referred to as the Council) is responsible for hiring, evaluating, and renewing the contracts of principals in its specific area of the school system. A Chief Area Officer (hereafter referred to as CAO), employed by the Board, supervises all principals in his or her area of the school system. In October 2009, the Board hired Coates to serve as CAO of Area 15, making her Bordelon’s supervisor. According to Bordelon, Coates immediately “began taking steps to remove [him] from his position at Kozminski.”

When Coates began her job she inherited a list of five or six principals. According to Coates’ former executive assistant (Sanders), it was a list of “older black principals to be disciplined.” Bordelon’s name was on the list as one of three principals whose schools were “performing in the bottom of Area 15.” Subsequently, in February 2010, Coates and the Board fired Sanders who later testified that she “just felt that the Board wanted someone younger and brighter.” She explained that by “brighter” she meant that the replacement “has got more education, or maybe she has a field in that position, she could do a better job.”

Coates’ efforts to remove Bordelon did not begin in earnest until November of 2010. On November 16, 2010, Coates sent Bordelon notice of a pre-disciplinary hearing based on insubordination from September through November 2010. The notice contained the following allegations: (1) failing to respond to a parent issue raised on November 2; (2) failing to comply with a request from September 20 to set up a parent meeting in October; (3) failing to schedule a meeting requested in an October email regarding the arrest of several Kozminski students; and (4) failing to respond to Coates’ email from November 4 regarding resolution of the three aforementioned matters. Subsequently, as a result of the hearing, Bordelon received a five-day suspension without pay. He appealed the suspension decision. The suspension was never served.

On December 7, 2010, Coates issued an evaluation of Bordelon. The evaluation said the he “needs improvement.” In the evaluation Coates noted that Kozminski was on academic probation for the second year in a row with student test scores trending downward.

In December 2010, the Council had a meeting with five of nine members present. At the Council meeting a member testified that Coates “more or less suggested...[t]hat it was time for [Bordelon] to give it up.” However, the member clarified that he thought Coates was not referring to Bordelon’s age but rather to Kozminski’s declining test scores.

In a letter dated December 29, 2010, Coates reassigned Bordelon to home with full pay pending the outcome of an investigation into the following misconduct: (1) improperly replacing asbestos –

containing tile at Kozminski; (2) purchasing irregularities; and (3) tampering with school computers in a manner that impeded access to Kozminski's records by the Board. The Board's general counsel testified that he intended to prepare charges depending on the resolution of the investigation.

On January 20, 2011, while Bordelon was still suspended with pay, the Council voted not to renew Bordelon's contract. Three members voted against renewal, three voted in favor of renewal, and three abstained. Subsequently, the Council informed Bordelon of the Council's decision not to renew his contract. The following reasons were given for the decision: (1) failure to provide adequate principal reports to Council; (2) not being evaluated as "highly qualified;" (3) not meeting the requirements needed to have an effective and safe school environment; (4) low test scores; (5) disciplinary problems; and (6) parents do not feel you are open and receptive to them.

On February 28, 2011, Bordelon submitted his notice of retirement effective June 30, 2011, the end of his non-renewed contract.

Court Action: On November 16, 2011, Bordelon filed suit against the Board in federal district court. In his court action he alleged that the Board discriminated against him: (1) on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623; and (2) on the basis of race in violation of Title VII, 42 U.S.C. 2000e-2, and 42 U.S.C. 1981. He also alleged: (1) Board retaliation against him in violation of Title VII, the ADEA, and 42 U.S.C. and 42 U.S.C. 1981; (2) constructive discharge, and (3) deprivation of due process.

Subsequently, the court granted summary judgment to the Board on all Bordelon's claims. The district court found that the evidence he claimed was not direct proof of age discrimination—*i.e.*, the evidence did not support "a finding of discriminatory intent." Pointing to more evidence to support his age discrimination complaint, Bordelon filed a motion for reconsideration. The court excluded the evidence as "inadmissible hearsay, lacking foundation, or too conclusory to withstand summary judgment." Bordelon appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.

Seventh Circuit Court's Analysis and Decision.

Argued on February 3, 2016, the sole issue before the Seventh Circuit Court was whether the district court properly granted summary judgment to the Board on the claim of age discrimination. Reviewing the district court's decision *de novo*, and viewing the facts and all reasonable inferences drawn from these facts in the light most favorable to the appellant, the Court reiterated the principle that summary judgment is appropriate where "no issue of material fact" is present. Moreover, said the Court, "the mere existence of some alleged factual dispute" will not defeat summary judgment." Citing past Seventh Circuit decisions the Court made it clear that to void summary judgment: (1) evidence supporting a factual assertion must represent "admissible evidence;" (2) conclusory statements, not grounded in specific facts, are not sufficient; and (3) concrete facts and not bald assertion of a general truth, but specific concrete facts are required. Also, said the Court, a review of the lower court's evidentiary ruling striking certain factual allegations is conducted "under a differential abuse of discretion standard."

The Seventh Circuit Court clarified that the ADEA prohibits an employer from “discriminating against any individual...because on such individual’s age.” (29 U.S.C. 623(a)(1)) However, said the Court, in this case because Bordelon “has not sued the entity responsible for not renewing his contract—the Council,” he must point to evidence upon which a trier of fact could conclude that Coates: (1) harbored discriminatory animus based on his age, and (2) gave the Council information that influenced its decision not to renew his contract. Because Bordelon chose to proceed under a direct method of proof rather than an indirect method of proof, he must point to admissible evidence, whether direct or circumstantial, of Coates’ “discriminatory motivation based on age.” The Seventh Circuit Court lists four types of circumstantial evidence of intentional discrimination it has recognized and these are: (1) suspicious timing; (2) ambiguous statements or behavior towards other employees in the protected class; (3) evidence, statistical or otherwise, that other similarly situated employees outside the protected class systematically receive better treatment; and (4) evidence that the employer offered a pretextual reason for an adverse employment action.

The Court examined the evidence admitted by the district court and on appeal. Here Bordelon relied on several pieces of circumstantial evidence such as Coates’ statements and comments at Council meetings and to members (including their testimony), and to Sander’s (Coates’ former executive assistant) and to an assistant principal, concerning “negative remarks made about older principals and workers.” Also, the mere fact that the names of two older principals appeared on a list tied to under performing schools did not support an “inference of age discrimination” by Coates. Since most principals in Area 15 were older and Sanders subsequently had testified that she was replaced with someone who could do a better job, an inference of intentional discrimination could not be drawn.

Regarding evidence excluded by or not raised in front of the district court, Bordelon did not argue on appeal that the district court abused its discretion. However, said the Seventh Circuit, even assuming, *arguendo*, that he had not waived any argument about the exclusion being improper, the evidence still would not show that the district court abused its discretion, nor does it give rise to an inference of discriminatory motivation sufficient to withstand summary judgment. In rationalizing this position the Court, citing Seventh Circuit decisions on point, provides a comprehensive discussion of hearsay evidence and exclusions from hearsay—including statements made by employees within the scope of their employment relationship.

Finally, the Court was convinced that Bordelon did not show that Coates influenced (*i.e.*, manipulated and exercised undue influence on) the Council’s decision to non-renew his contract. Substantial evidence in the record, said the Court, demonstrated that the Council had independent reasons for choosing not to renew Bordelon’s contract.

Decision: Judgment of the district court is affirmed. The district court properly granted the Board’s motion for summary judgment.

Policy Implications

For public school officials and administrators the value and policy implications of Bordelon v. Board of Education of the City of Chicago (7th Cir. 2016) are found in the Seventh Circuit’s analysis and reasoning. The Court offers an excellent example of the judicial analysis consistently applied by federal courts in employment discrimination cases post- Griggs v. Duke Power Company (1971), where the “but

for factor” element (*i.e.*, allegation of pretext) is the focus. More specifically, in placing a burden on an employee to demonstrate, by direct evidence, an employer’s discriminatory intent, and on an employer to demonstrate reliance on job-related decision making criteria, fairness and balance are achieved.

What follow are implications for local school system policy gleaned from the Seventh Circuit’s decision. Generally stated these are:

School board policy must make it clear that:

- The personnel evaluation process is intended to improve employee job performance and in doing so enhance employee development and improve access to educational opportunities for all students in the school system.
- Board expectations for employee on-the-job performance are made clear to all employees.
- Personnel decisions are based on valid and reliable job-related criteria.
- Methods and procedures used to evaluate employees are directly related to and measure on-the-job effectiveness.
- Results of employee evaluations are shared with employees in a timely manner.

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