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## *Client Advisory*

### **U.S. Supreme Court Issues Two Important Decisions on Employment Discrimination**

The United States Supreme Court recently issued two important decisions regarding discrimination lawsuits in the workplace, and more specifically, the type of evidence that employees need to show in order to succeed on their claims. The first decision, *Gross v. FBL Financial Services, Inc.*, will make it more difficult for employees to win a federal age discrimination lawsuit, as long as the employer can prove that something other than age was part of the decision-making process. In the second case, *Ricci v. DeStefano*, the Court set a high standard for an employer who wishes to overtly favor minorities when it overturns a previous decision out of a fear of a discrimination lawsuit.

In the *Gross* case, the Court dealt with a specific evidentiary issue faced in a claim of age discrimination under federal law. An older employee sued his employer alleging he was demoted because of his age. At trial, evidence showed age may have been a factor in the demotion, but other evidence indicated the decision was also based on factors other than age. The trial court, using the same standard that applies to other federal discrimination claims under Title VII of the Civil Rights Act (i.e., claims of race, gender, religion, etc.), instructed the jury under what is known as a “mixed motive” test. Under that test, employers can be liable even though age was not the sole reason for the demotion, as long as age was a “motivating factor”. As a result of this mixed motive test, the jury ruled in favor of the employee.

On appeal, the Supreme Court overturned the verdict and sent the case back to the trial court, finding that the judge had committed legal error when he instructed the jury under this mixed motive test. The Supreme Court held that the employee needed to show that the demotion would not have occurred “but for” his age. In other words, in federal age discrimination claims, age must be the reason for the employment decision for a lawsuit to succeed. The Court relied on the federal age discrimination law, which does not contain express language recognizing the “mixed motive” test, in contrast to other discrimination laws such as Title VII, which do. The Supreme Court therefore clarified that an employee who is suing for age discrimination must show that age was the true cause of the decision; it is not sufficient to show that age was simply a part of the decision.

Although this case is significant for employers facing age discrimination cases, certainly employers must always be cautious when making any adverse employment decisions so as not to include age in any part of this process. Further, this case is limited to federal age discrimination laws. Any claims of other types of discrimination under federal law will not get the benefit of this decision. More importantly, this case will not impact any claims under New Jersey’s Law Against Discrimination, which will still use the mixed motive analysis.

In the second decision, the Supreme Court in *Ricci* dealt with a public employer in a difficult predicament. The New Haven City Fire Department was in the process of promoting a number of firefighters to captain and lieutenant positions. As required by its union contract, the City at significant expense authorized the hiring of a consultant to prepare a written examination and an oral examination. After reviewing and approving the examinations, numerous applicants took the test. Out of 118 applicants, 56 passed the examinations, including 9 African-Americans. However, the City only had 19 openings. Using the test results, the positions were tentatively awarded to the top 19 successful applicants, but all 19 were either Caucasian or Hispanic.

Before the individuals were notified, the City decided to ignore the examination results and re-do the process. The City’s decision was based on the racial disparity of the results, given that no African-Americans were selected for promotion. Before doing so, the City was faced with pressure from both fronts — by African-Americans who felt the test must be discriminatory because it adversely affected African-Americans, as well as by non-African-Americans who felt that it would have been reverse race discrimination to disregard these objective examination results. Faced with threatened lawsuits either way, the City decided to invalidate the results, and the non-African-American candidates who would have gotten the promotions sued.

Following a series of appeals, the Supreme Court in a 7-2 ruled that the City had overstepped its bounds in ignoring the examination results. The Supreme Court held that any employer who wished to directly use race as a factor in its decision-making process -- even if the decision was to counter a perceived fear of adverse impact on a minority -- must have a “strong basis in evidence” to support its position. So, the City needed to have a strong basis to conclude that the test was either discriminatory or that there were other equally valid and less discriminatory

alternatives available to administer the test. In essence, the City was forced to defend its decision to ignore a test that it initially developed with the full intent of it being fair and objective. The Supreme Court ultimately rejected the City's arguments and found that an objectively-developed test, which was not unfairly weighted toward non-minorities, must be upheld. The Court also expressly noted that a fear of litigation alone could not justify reliance on race to the detriment of other individuals who legitimately passed the test and qualified for the promotion.

The Supreme Court's decision shows that employers need to be extremely cautious when making any decisions based on race or minority status, even if the decision was reached based upon a fear of a claim of discrimination by minority employees. Employers are especially exposed to reverse discrimination claims if the decision favoring a minority simultaneously impacts non-minorities in some way, as happened in the Ricci case. Employers should only do so if there exists strong (perhaps overwhelming) evidence that discrimination was the cause of the initial decision.

If you have any questions about these two important case decisions, or discrimination claims in general, please contact a member of Archer & Greiner's Labor Employment Department at (856)-795-2121.

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