The East Texas Employment Law Update

A Bi-Monthly Publication Dedicated to Discussing Employment Law Issues.

July, 2009

Recent Substantive Employment Law Case

Even though I had intended on discussing the next part of the discussion on the FMLA amendments, there was a recent case which had an impact on substantive employment law that I believe merits pre-empting this month's discussion of FMLA.

Gross v. FBL Financial Services, Inc 129 S.Ct. 2343 (2009) is a five to four decision of the supreme court which was handed down on June 18, 2009. Many employer side employment attorneys used to argue to courts that age discrimination claims did not use the all too familiar motivating factor standard but the "but for" standard of proof. The United States Supreme Court finally addressed the issue in Gross and ruled that in order for an age discrimination plaintiff to prevail he must show that but for his age the employment action would not have occurred. The ruling is significant in that it raises the burden of proof that an age discrimination plaintiff must meet to prove his case but also increases the burden he must meet to avoid summary judgment. There was always an argument from employee side employment attorneys that the burden of proof for age discrimination plaintiffs was no different than race, gender, disability or national origin which all arise from Title VII of the Civil Rights Act of 1964. Title VII only requires the employee must show the protected status (race, gender, national origin or disability) was a motivating factor in the employer's employment decision. However, there has always been an argument that the language of the ADEA was different and required the Age discrimination plaintiff to meet a higher standard. The U.S. Supreme Court finally handed employers a victory in this arena and confirmed that the standard for age discrimination plaintiff is a showing of but for their age the employment decision would not have been made. Conversely, the Title VII plaintiff need only show that the protected characteristic was a motivating factor in the employer's decision.

Comment:

What does this mean? Plaintiff's attorneys will be more reluctant to take age discrimination claims. Courts will grant summary judgment on age discrimination claims much more often. As a result, employers will have less to worry about with regard to age discrimination claims. However, employers must still be vigilant with regard to how they approach all employment decisions. What kind of cases will be filed? Those claims where an attorney can group several forty plus employees together in one suit to get more bang for his buck. Those claims where there was an age related comment made proximate in time to the employment decision. Do employers still want to invoke their arbitration agreements for age related claims? I would advise that employers continue to consider the venue, the judge and the facts of the case when making the decision to invoke arbitration. However, employers should lean toward leaving age related claims in court as summary judgment will more readily obtained than prior to the Gross ruling making arbitration a more expensive process. Besides, employers can appeal an adverse verdict to the 5th Circuit with the Gross opinion available to overturn a bad verdict. Always remember there is limited review of a bad arbitration ruling.

UPCOMING DEVELOPMENTS:

On September 8, 2009 federal contractors will be required to use E-Verify to confirm that new employees and current employees working on government contracts are authorized to work in the United States. There is growing sentiment within legislative bodies to require all employers to use E-Verify in the future.

Fenley & Bate, L.L.P.

ATTORNEYS AT LAW

224 E. Lufkin Avenue ▪ P.O. Box 450 ▪ Lufkin, Texas 75902-0450
TELEPHONE (936) 634-3346
TELEFAX (936) 639-5874

415 N. Washington, Ste B, Livingston, Texas 77351
TELEPHONE (936) 327-1100
TELEFAX (936) 327-1107

EMAIL OFFICE@FENLEY-BATE.COM