Worker Bias Claims Bolstered By High Court Criminal Case

By **Ben James**

Law360, New York (March 31, 2014, 8:03 PM ET) -- Workers pursuing age discrimination and Title VII retaliation cases have found ammunition for their claims in an unlikely case — a U.S. Supreme Court ruling that struck down a drug dealer's criminal conviction for selling heroin that resulted in a drug user's death.

The nation's highest court in January reversed Marcus Burrage's conviction for selling heroin that resulted in a user's April 2010 death, a charge that carried a 20-year mandatory minimum sentence. Burrage was also convicted on a different heroin distribution count that was not before the Supreme Court.

In its ruling, the high court said its prior interpretation of "statutes that prohibit adverse employment action 'because of'" a worker's age or complaints about workplace discrimination were "instructive" when it came to analyzing the Controlled Substances Act's edict that a minimum 20-year sentence is in order when a death "results from" a covered drug.

"Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality," the high court said, going on to point to its June 24 Nassar Title VII **retaliation ruling** and its June 2009 **ruling in** Gross v. FBL Financial Services, an age discrimination case.

In a move plaintiffs' lawyers say provides welcome clarity regarding the "but for" standard, the Burrage opinion swapped in the word "a" for "the" when quoting language from Nassar and Gross.

Those decisions said that age, or the desire to retaliate, had to be "the" but-for cause of a challenged employment action, which left the door open for employer-defendants to argue that retaliatory motivation or age bias had to be the sole, or determinative, reason for an adverse employment action, Van Kampen Law PC's Joshua Van Kampen said.

"What the Supreme Court clarified in Burrage was that the discriminatory animus can be one of many causes," he said. Under the rationale of Burrage, a plaintiff can acknowledge that an alternative, nondiscriminatory reason offered up by an employer — like performance problems — for discipline or termination exists without compromising the argument that "but for" the bias, the disputed employment action wouldn't have occurred.

The Burrage opinion didn't rewrite any laws, but it did affirm the proper interpretation of the but-for standard, Outten & Golden LLP's Paul Mollica said.

"I'd say it's new law in the sense that it clarifies, or underscores, that 'because of' should not be interpreted to mean that age, or Title VII retaliation, has to be the sole or necessarily even the primary reason, as long as it was a legal cause," Mollica said.

As far as the notion that a plaintiff must show that discrimination was the sole cause of a challenged employment decision to sustain a federal age bias or Title VII retaliation claim, the Jan. 27 ruling "should put the final nail in the coffin of that argument," he added.

No federal appeals court had agreed with the theory that there was a sole motive requirement, and the only reason that argument enjoyed any traction was the "unfortunate" language chosen by the high court majority in Jack Gross' Age Discrimination in Employment Act case, according to Mollica.

"This opinion seems to recognize that they may have misdrafted Gross," he said.

In Gross, the Supreme Court determined that the Age Discrimination in Employment Act calls for proof that age was the "but-for cause" of an adverse employment action, so an employer is not liable if it would have taken the same action for other, nondiscriminatory reasons.

Though the argument that workers had to show that age or retaliatory bias was an employers' sole motive — or the but-for cause — to pursue an ADEA or Title VII retaliation case was never really correct, plaintiffs lawyers say that employers had made that claim with some success at the district court level.

"While our interpretation of 'but for' has always been that there could still be multiple reasons for an adverse employment action, I don't think in practice, that was how the standard was applied by many of the district courts," Wigdor LLP's Douglas Wigdor said.

"Hopefully now, district courts will realize that there isn't this heightened level of proof that plaintiffs have to put forward in order to survive summary judgment, even where employers have a separate nondiscriminatory basis for the adverse employment action."

It's that summary judgment context where lawyers said they expected the Burrage decision to have the most impact and serve as an arrow in the quiver of workers looking to keep their claims in court, lawyers said.

BakerHostetler's Dennis Duffy, however, cautioned against reading too much into the opinion's wording and said he was skeptical that it reflected any meaningful change in the legal landscape

"I don't think Burrage should lead to a barrage of reinterpretations of Nassar or Gross," he said.

Exactly how courts will interpret the criminal ruling is an open question, but there's no doubt that employment plaintiffs will be citing it in the near future, according to Van Kampen.

"You can see it at the motion to dismiss stage, but I think you're going to see it more at the summary judgment stage, where you have a richer factual record for the court to rule on," he said. "Any time the Gross or Nassar decisions are quoted to suggest that the but-for cause means the sole cause, the plaintiff is going to be rebutting that with Burrage."

--Editing by Jeremy Barker and Edrienne Su.