



PROUD TO MAKE AMERICA WORK

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

THE EEO Advocate

A Newsletter for Litigators

WINTER 2009

NATIONAL VICE PRESIDENT'S MESSAGE

"Discrimination is still alive and we need to do more to address it. The federal and D.C. workforce deserves better." – NVP Augusta Y. Thomas

If you think the federal government is a model employer who protects equal rights in the workplace, think again. More than 10,000 federal workers who feel they have been discriminated against go to hearings before Equal Employment Opportunity Commission (EEOC) judges every year. These men and women press charges against their agencies or supervisors for discriminating against them based on their disability, race, color, religion, age, sex, and nation of origin.

AFGE membership has its privileges!

Representation through Litigation, Education and Training, and Member Mobilization are the free services the Women's and Fair Practices (WFP) Departments provide to empower our members.

AFGE members seek help from WFP, which has EEO Attorneys who specialize in representation of EEO matters before EEOC, MSPB and arbitrators. Members can expect to receive professional representation and/or consultation assistance that meet their needs.

Our representation services include:

- 1) Direct Representation, in which an EEO Specialist will be assigned as your designated representative in your complaint against the Agency;
- 2) Co-Representation, in which an EEO Specialist/ Attorney will enter an appearance as your designated representative along with your Local Representative; and
- 3) Consultation, in the event that direct or co-representation is not feasible, we will still provide sound guidance to you and your AFGE representative regarding your case.

Since January 2009, WFP received more than 80 requests for representation, and we currently have 140 active cases. Since 2005, WFP has closed more than 175 cases, been awarded more than hundreds of thousand dollars in attorney fees, and won hundreds of thousands of dollars of back pay, and close to a million dollars in compensatory damages for our members!

We also offer EEO training year-round: Basic EEO, Intermediate EEO and Advanced EEO. WFP and members of AFGE's Human Rights Committee, which is comprised of 24 National Women and Fair Practices Coordinators, provide EEO training at AFGE's annual Human Rights Training Conference, council-sponsored training, District Coordinator/EEO Institute, district training, and multi-district conferences, upon request.

Let's work together to eliminate discrimination in the Federal and D.C. governments!!

Happy and Safe Holidays!

In Solidarity,
Augusta Y. Thomas, National Vice President WFP

Your Age, Your Full Age, And Nothing But Your Age.

The Supreme Court strikes a blow to age discrimination complaints under the Age Discrimination in Employment Act (ADEA) under 29 USC 6323(a) (1).¹ Gross v. FBL Financial Services, Inc., 08-441 (June 18, 2009). The

¹ The ADEA states in pertinent part: "it shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such an individual's age." 29 U. S. C. § 623(a) (1).

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(YOUR AGE, YOUR FULL AGE, AND NOTHING BUT YOUR AGE. *cont.*)

Court rules it is not enough for employees to show age is a motivating factor in a “mixed motive” adverse employment. Rather, workers must prove it is the deciding factor in a disparate treatment claim under ADEA.

Jack Gross worked for FBL for more than 30 years. In 2003, as part of a corporate restructuring plan, Gross, 54 years old, was reassigned to claims administration manager. While Gross still retained some of his previous claim administration director responsibilities, most were transferred to a newly created position given to another employee. The employee was in her early forties and, prior to the reassignment, had been supervised by Gross.

In April 2004, Gross filed suit alleging age discrimination under the ADEA. At trial, Gross presented evidence that his reassignment was based at least in part on his age. The district court instructed the jury that they had to return a verdict for Gross if age was a “motivating factor” in the reassignment meaning that age “played a part or a role” in FBL’s decision to demote him. The jury returned a verdict for Gross and awarded him \$46,945 in lost compensation.

FBL Financial appealed the verdict. The U.S. Court of Appeals for the Eight Circuit reversed and remanded the case, citing the District Court’s incorrect jury instructions under the “mixed motives” standard established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Supreme Court, in a 5-4 opinion, vacated the judgment and held that a plaintiff can never prevail in an ADEA case when age was merely a motivating factor in the employment action. Instead, a plaintiff must prove that age was the “but-for” cause of the employer’s adverse action to establish a disparate treatment claim under the ADEA.

Justice Thomas, writing for the majority, departed from the Court’s usual practice of relying on Title VII case law to guide its interpretation of the ADEA and found that the plain language of the ADEA does not authorize a “mixed motives” age discrimination claim. The Court noted that, unlike Title VII, the ADEA text does not provide for a “mixed motive” claim. Also, Congress failed to add such a provision when it amended Title VII in the Civil Rights Act of 1991. Thus, the majority felt bound to the ordinary, albeit narrow, meaning of “because of” in the ADEA’s requirement that an employer take adverse action “because of” the plaintiff’s age.

Justice Stevens, joined by Justices Ginsburg and Breyer, dissented. They disagreed with the majority’s “utter disregard of our precedent and Congress’ intent” and concluded that the decision will put employers in a stronger position to succeed in court.

WHAT THIS MEANS

The Supreme Court reversed every Circuit Court that has taken up this question and made age discrimination harder to prove for private sector complainants suing under 29 USC 623(a) (1). Now, unlike discrimination claims under Title VII for race, national origin, and other categories, the burden of proving that age, and only age, motivated the employer’s decision, lies with the plaintiff.

However, the impact of the Court’s decision is unclear for federal employees, who are governed by 29 USC 633a. Section 633a requires personnel decisions to be “free from discrimination based on age.” Thus, unlike section 623(a) (1), section 633a prohibits discrimination when age played any part of the personnel decision.

WHAT YOU SHOULD DO

Representatives for federal employees should be aware of the burden for “mixed motive” cases. Although there are few mixed-motive age discrimination cases brought by federal employees, it is unclear whether the *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973) standard will continue to be used in age discrimination cases.

There is at least one anti-bias bill that is pending in Congress to counter this significant recent Supreme Court decision. AFGE advocates should support any legislation for Congress to overturn this ruling, just as we did recently to overturn other disfavored Supreme Court decisions with amendments to the Americans with Disabilities Act and passage of the Lily Ledbetter Fair Pay Act.

EEOC Issues ADA Amendment Act Rule Making Notice

In the EEO Advocate Spring 2009 issue, we informed you of the enactment of the ADA Amendments Act in January 2009. Also, we explained EEOC was charged with drafting regulations implementing the Act.

On September 23, 2009, EEOC issued proposed rules implementing the ADA Amendment Act. 74 Federal Register 48431 (9/23/09). WFP submitted AFGE’s written comments on this important regulatory change.

Disparate Impact Analysis Bows To Disparate Treatment Claims

The Supreme Court, in a 5-4 decision, held that before an employer could engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a “strong basis in evidence” to believe it will be subject to disparate impact liability. *Ricci v. DeStefano*, 555 U.S. ____ (June 29, 2009) No. 07-1428. In *Ricci*, the Court ruled that the city could not meet this new “strong-basis-in-evidence” standard and granted the firefighter’s motion for summary judgment.

In 2003, the Fire Department in New Haven, Connecticut, administered oral and written examinations to determine who within its ranks qualified for promotions to the ranks of lieutenant and captain. The written examination accounted for 60 percent of an applicant’s total score and the oral examination accounted for the remaining 40 percent. For each promotion, the total scores for African American and Hispanic candidates were substantially lower than the total scores for white candidates. After long deliberations and public hearings, the city threw out the test because it believed certification would have resulted in a violation of the Civil Rights Act of 1964 Title VII’s disparate impact provision.²

Following this decision, 17 white firefighters and one Hispanic firefighter filed suit in District Court. They alleged discrimination on the basis of race in violation of Title VII’s disparate treatment provision and the Fourteenth Amendment’s Equal Protection Clause. The District Court ruled in favor of the city in a motion for summary judgment and the U.S. Court of Appeals for the Second Circuit affirmed. The Supreme Court, in a 5-4 decision, reversed the judgment and held that before an employer could engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a “strong-basis-in-evidence” to believe it will be subject to disparate impact liability.

Justice Kennedy, writing for the majority, examined the apparent conflict between Title VII’s disparate impact provision and the law’s mandate that employment decisions cannot be made on the basis of a person’s or group of people’s race. Justice Kennedy compared the issue before the Court to the line of Equal Protection cases in which the Court held that certain race-based government actions to remedy past racial discrimination are constitutional only where there is a “strong basis in evidence” that the remedial actions were necessary.

Justice Ginsburg, in her dissent, noted that “an employer who discards a dubious selection process can anticipate costly disparate treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic.” She predicted that the Court’s decision would not have “staying power.”

WHAT THIS MEANS

While the Court did not alter an employee’s rights to legally challenge employment practices that have a disparate impact, the decision did restrict an employer’s freedom to voluntarily abandon discriminatory practices.

WHAT YOU SHOULD DO

Representatives should be aware that an agency cannot alter its promotion or other employment policies simply because it believes that a protected class has a prima facie case of disparate impact. The agency must show that there is a strong basis in evidence that its current policy violates Title VII before it acts in a race-based manner. However, advocates should keep in mind that regardless of the agency’s decision to voluntarily alter its policy, the agency could still be liable under Title VII’s disparate treatment provision.

It’s BRAGG Time!

Fighting Discrimination One Case at a Time

The Advocate is a quarterly publication with the specific purpose of providing information on, and insight into, recent court decisions and emerging issues that will impact the field of employment law. Furthermore, in our pursuit to protect employees’ rights, we want to provide a forum where AFGE representatives will receive an acknowledgment for their continued effort in combating employment discrimination, by allowing them the opportunity to publicize their recent victories and for others to learn about strategies that have been successful.

² Title VII states in pertinent part: “An unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U. S. C. §2000e-2(k)(1)(A)(i).

(Continued on page 4)

(Fighting Discrimination One Case at a Time, *cont.*)

If you have any local victories that will strengthen AFGE's legal posture and ability to fight for civil, human, women's, and workers' rights, SEND THEM IN. We are looking for legal issues that are educational and of interest to our members and cases that are precedent setting achievements. Please submit a summary of your case to us at eeo@afge.org. It's time for you to be recognized and acknowledged for your skills, knowledge, and hard earned victory!

Local's Corner

AFGE Preserves Rights for the Disabled

AFGE Local 2014 in Fort Lauderdale, Florida, prevailed in an arbitration hearing involving a disabled Social Security teleservice employee, who was unjustly suspended. He was suspended for two days for "discourteous telephone conduct." The employee had a debilitating medical condition which is relieved by medicine. Management was aware of the employee's condition. During a service call, he suffered an episode of acid reflux and put a caller on hold while he took his medication. A supervisor put the employee on suspension for keeping the caller on hold too long. The supervisor did not adequately investigate the matter prior to taking this action. There was not just cause to discipline the employee. The arbitrator noted, "Supervisors are not qualified to nor expected to make a medical determination of whether an individual is ill or not, however any reasonable person can make a lay person's observation that the individual appears to be ill or in distress." "This is only one of the many techniques that management is using to harass the disabled employees said Local President, Janet Winghart. An arbitrator agreed and restored the employee's pay and ordered the employee record expunged.

Great Job! Local # 2014 Local President Winghart strongly advises advocates to hold agencies responsible when they are not humane to their own employees, but yet profess to be compassionate to the public they serve.

American Federation of
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REMINDER– WFP INTAKE PROCESS

WFP'S CASE EVALUATION CRITERIA

We take cases that involve unlawful discrimination issues such as age, race, sex, religion, disability, and national origin. To receive representation, the case must be meritorious, precedential and/or substantially significant to the AFGE as a whole.

We ask that the Local investigate the case to see if it meets the criteria beforehand and provide the National Officers (i.e., national vice president, national women's coordinator, or national fair practices coordinator, council president) with a completed a file. National Officers must recommend the Local's request for representation from WFP.

HOW TO SEEK THE ASSISTANCE

STEP 1

Complete the Request for Women's/Fair Practices Department to Represent an Employee in a Discrimination Case form. The form can be obtained from WFP's Web site at wfp.afge.org.

- a. Send the form and all documentation to the national vice president, council president, national women's coordinator, or national fair practices coordinator.
- b. A copy of the completed Report of Investigation (ROI) should be forwarded to WFP as soon as it is received, if it was not sent along with the WFP request form.
- c. Send a copy of all relevant documents, such as orders and motions filed agency and administrative judge decisions issued, and documents included in the evidence and/or grievance file to WFP.
- d. State the name and contact information for any representative assisting the member in this matter.

STEP 2

Once WFP has received the request form and the relevant documents, including the ROI, WFP will send a letter of acknowledgement to the Local and member. Evaluating the case could take only a few days or up to six weeks, depending on existing case commitments.

STEP 3

WFP will contact the member to let them know whether or not we can provide representation.

Note: We review all cases by order of receipt of a complete case file. Request for representation for a hearing scheduled for less than 60 days does not give us the necessary time to properly develop, analyze, and prepare the case for representation.

WHAT MEMBERS AND OFFICERS THINK OF OUR PROGRAMS

"For all the people of AFGE improving life for employees like myself, I would like to thank you. A special and sincere thank you goes out to the Women and Fair Practices Department; if it was not for [its] support, I would have given up and done what so many people have done before me: resign."

- Inge Ogden, member of AFGE Local 2924

"If you had not come along and assisted when you did, this case would not have prevailed. I am proud to belong to such a prestigious organization."

- Donald Evans, member of an AFGE TSA Local

IF YOU HAVE QUESTIONS, PLEASE CALL (202) 639-6417.

WFP VICTORIES

TSA'S DENIAL OF A RELIGIOUS ACCOMMODATION VIOLATES LAW

An AFGE member in Syracuse, New York and working for the Transportation Security Administration (TSA), requested to change his schedule so that he could attend Mass on Sundays. TSA denied the request even though it was not a burden on the agency to oblige his request.

An EEOC AJ agreed and found that TSA's management made no effort to accommodate the member's attendance at Mass. The Federal Security Director and supervisor testified that allowing the member to come in two hours late on Sundays would not have posed undue hardship on the operations of the agency. The AJ held that TSA failed to provide a reasonable accommodation to the member's religious beliefs and awarded attorney fees and \$12,000 in compensatory damages for the member.

DOD MOTION FOR SUMMARY JUDGMENT BACKFIRES; JUDGE FINDS FOR AFGE IN HARASSMENT CASE

An ALJ ruled in AFGE's favor in a sexual harassment case in which the Department of Defense (DoD) thought it was off the hook. DoD filed a summary motion because the employee didn't come forward until after the harassment ended. But AFGE filed another motion pointing to weaknesses in the DoD's case, including failure to assure employee confidentiality. The ALJ granted AFGE's motion for summary judgment against the agency. The ALJ sided with AFGE and ordered a hearing only to determine the extent of the employee's damages. Prior to the hearing, DoD and AFGE submitted a joint stipulation agreeing to resolve the damages claim for \$37,500, 100 hours of back pay, \$7,700 of attorney's fees, and a revision to the Agency's anti-harassment policy.

DOUBLE TROUBLE

Complainant, an Immigration Enforcement Agent with Department of Homeland Security Immigration and Customs Enforcement, filed a discrimination complaint alleging gender discrimination when she was not selected for either of two positions. She applied for, was certified as qualified, and was interviewed for the positions. Complainant alleged that her initial interview scores were higher than the males selected for the positions at issue and that her scores were later lowered to mask the discrimination that occurred.

The AJ concluded that the interview panel and rating process was a sham. The AJ awarded Complainant placement in the position of her choice retroactive to 2006, back pay with interest, and \$15,000 in compensatory damages as well as attorney fees and costs.

AFGE WOMEN'S AND FAIR PRACTICES ATTORNEYS WIN MORE THAN \$300,000 FOR MEMBERS IN SEPARATE EEOC CASES

In June and July 2009, WFP attorneys aggressively settled and were instrumental in working with Local officers to settle EEOC cases for AFGE members. The settlements resulted in AFGE members obtaining more than a quarter of a million dollars in compensatory damages and AFGE getting about \$50,000 in attorney fees. Go WFP!