

# Case Digests

## Age Discrimination—Burden of Proof

*Gross v FBL Fin Servs*, \_\_\_ US \_\_\_, 129 S Ct 2343 (2009). Plaintiff began working for his employer in 1971 and, as of 2001, he held the position of claims administration director. In 2003, when he was 54 years old, he was reassigned to the position of claims project coordinator. At that same time, his employer transferred many of his responsibilities to a newly created position—claims administration manager. That position was given to another employee the plaintiff had previously supervised and who was then in her early forties. Although the plaintiff (in his new position) and the claims administration manager received the same compensation, the plaintiff considered the reassignment a demotion because of the reallocation of his former job responsibilities. In April 2004, the plaintiff filed suit, alleging that his reassignment to the position of claims project coordinator violated the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer to take adverse action against an employee “because of such individual’s age.” 29 USC 623(a).

At trial, the plaintiff introduced evidence suggesting that his reassignment was based at least in part on his age. The employer defended its decision on the grounds that the plaintiff’s reassignment was part of a corporate restructuring and that the plaintiff’s new position was better suited to his skills. At the close of trial, and over the employer’s objections, the district court instructed the jury that it must return a verdict for the plaintiff if he proved, by a preponderance of the evidence, that the employer demoted him to claims project coordinator and that his “age was a motivating factor” in the decision to demote him. The jury was further instructed that the plaintiff’s age would qualify as a motivating factor if it played a part or a role in the decision to demote him. The jury was also instructed regarding the employer’s burden of proof, stating that the verdict must be for the employer if it proved by the preponderance of the evidence that it would have demoted the plaintiff regardless of his age. The jury returned a verdict for the plaintiff, awarding him \$46,945 in lost compensation. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v Hopkins*, 490 US 228 (1989) (which held that if a Title VII plaintiff shows that discrimination was a “motivating” or a “substantial” factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration (the mixed motives doctrine)).

The United States Supreme Court majority noted that the Supreme Court had never held that the burden-shifting framework of a mixed-motive Title VII case applies to ADEA claims and that Congress had not amended the ADEA regarding mixed-motive cases when it did so re-

garding Title VII. The court held that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. Moreover, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in the employer’s decision. The majority opinion further noted that there is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the “but-for” cause of their employer’s adverse action (see 29 USC 623(a)), and that the court would imply none.

## Employment Discrimination—Mandatory Arbitration of Statutory Claims

*14 Penn Plaza LLC v Pyett*, \_\_\_ US \_\_\_, 129 S Ct 1456 (2009). Respondents are members of a union that is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The union has exclusive authority to bargain on behalf of its members over their “rates of pay, wages, hours of employment, or other conditions of employment” and engages in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The collective bargaining agreement (CBA) between the union and the RAB requires union members to submit all claims of employment discrimination to binding arbitration under the CBA’s grievance and dispute resolution procedures. After a dispute arose concerning job reassignments, a grievance was filed alleging, among other things, that age discrimination had occurred. Respondents later filed suit against petitioners in district court, alleging that their reassignment violated federal, state, and local laws prohibiting age discrimination. Petitioners filed a motion to compel arbitration of respondents’ claims under the Federal Arbitration Act (FAA). The district court denied the motion because, under Second Circuit precedent, even a clear and unmistakable union-negotiated waiver of the employees’ right to litigate certain federal and state statutory claims in a judicial forum was unenforceable. The Second Circuit affirmed, ruling that it could not compel arbitration of the respondents’ claims.

The U.S. Supreme Court held that a collective bargaining agreement provision that “clearly and unmistakably” provides that union members must arbitrate claims under the federal Age Discrimination in Employment Act of 1967 is enforceable. The National Labor Relations Act provided the union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the federal age discrimination act. The court also distinguished earlier authority that contained some statements that were highly critical of the use of arbitration for the enforcement of stat-

utory antidiscrimination rights, finding that this skepticism was based on a misconceived view of arbitration that the court has since abandoned.

### Employment Discrimination—Retaliation

*Hamilton v GE*, 556 F3d 428 (6th Cir 2009). Before being terminated in August 2005, the plaintiff had worked for the employer over three decades, held a variety of positions, and had a relatively clean disciplinary record. In 2004, the employment relationship took a different turn and several incidents occurred that led to the plaintiff's termination. After this discharge, the union intervened, and the plaintiff signed a Last Chance agreement ("LCA") in exchange for his agreement that he would comply with all of the employer's rules and that if he violated any he would be subject to immediate termination. The plaintiff also agreed that if, in the future, the employer discharged him for violating the LCA, any grievance protesting the discharge would not be subject to arbitration and that no legal action regarding the discharge would be filed. After another incident, the plaintiff was discharged, reinstated, and then filed an age discrimination charge with the EEOC. The plaintiff testified that scrutiny by his supervisors increased after he filed the charge and a later confrontation led to his termination. The plaintiff then filed suit alleging that he had been terminated in retaliation for filing the EEOC charge.

The Sixth Circuit held that the temporal proximity of the employer discharging the plaintiff less than three months after he filed an EEOC complaint alleging age discrimination, combined with the assertion that the employer increased its scrutiny of the plaintiff's work only after the EEOC complaint was filed, was sufficient to establish the causation element of a prima facie case of retaliatory termination. Moreover, an employer is not insulated from liability for retaliation by an intervening "favorable treatment" of an employee, such as by giving the employee another chance after an incident for which it could have discharged him or her.

### Michigan Sales Representatives Commission Act—Waiver of Rights under Act

*Reicher v SET Enters, Inc*, No 278907, 2009 Mich App LEXIS 988 (Mich Ct App May 12, 2009). In approximately 1972, the plaintiff and Jebco Manufacturing, Inc. (Jebco) entered into an oral sales representation agreement under which the plaintiff solicited orders for automotive parts manufactured by Jebco, which promised to pay sales commissions to the plaintiff for the life of the part. From 1972 through about August 1999, the plaintiff procured orders for Jebco parts, and Jebco paid the plaintiff sales commissions. By letter dated August 27, 1999, Jebco informed the plaintiff that the sales representation agreement would be terminated, except for the commission obligations assumed by Noble Metal Forming, Inc. ("Noble"), to which Jebco was selling substantially all of its assets and business. The let-

ter stated that Jebco was terminating its sales representation agreement with the plaintiff effective as of the close of business on August 31, 1999, except for the obligations assumed by Noble as described in the letter. In February 2000, Noble terminated the sales representative relationship with him, and indicated it did not intend to fulfill its obligation to pay life-of-the-part sales commissions to him. As a result, in March 2000, the plaintiff commenced an action in circuit court that was resolved by a settlement agreement in which Noble agreed to pay commissions to the plaintiff for parts listed in an exhibit to the agreement, which payments would include not only the parts listed, but any modifications or changes to the parts. The settlement agreement also contained a mutual release of all claims. Noble later changed names and allegedly made late payments in violation of the Michigan Sales Representatives Commission Act (SRCA), which led to the instant case in which, as a result of the late payments, the plaintiff sought penalty damages and attorney fees under the SRCA.

The court of appeals ruled that the prohibition in SRCA against waiving rights under the SRCA applies only to a contract between a principal and a sales representative and does not apply to a settlement agreement of claims under the act. Since the SRCA does not as a matter of law void the waiver of a claim to penalty damages and attorney fees pursuant to a settlement agreement to resolve litigation, the court ruled that the release at issue in this case barred the plaintiff's claims for penalty damages and attorney fees under the SRCA.

### Single Business Tax Act—"Person" Required to File Tax Return

*Kmart Michigan Prop Seros, LLC v Department of Treasury*, No 282058, 2009 Mich App LEXIS 989 (Mich Ct App May 12, 2009). Kmart Michigan Property Services (KMPS) was a limited liability company (LLC) formed in Michigan and wholly owned by its single member, Kmart Corporation ("Kmart"). KMPS had three employees and was responsible for winding up the business affairs of a former subsidiary, whose assets were sold to a third party. KMPS filed a single business tax (SBT) return for the fiscal year ending January 28, 1998. The Department of Treasury audited KMPS for that fiscal year in connection with an audit of Kmart and determined that KMPS should not have filed a separate SBT return but should have submitted its income, credits, deductions, assets, and liabilities with those of the parent corporation, Kmart, for the tax year at issue. The Department determined that it would not accept KMPS's SBT return for the period at issue and would disregard the entity and treat it as a division of Kmart.

The court of appeals held that, under the provisions of the Single Business Tax Act (SBTA), a Michigan LLC that was wholly owned by another entity was required to file an SBT return, regardless of its classification as a disregarded entity for federal tax purposes, because the petitioner fit within the statutory definition of a "person" conducting

business activity and the SBTA required all persons conducting business activity in the state to file an SBT return. Therefore, the SBTA did not support the requirement of Revenue Administrative Bulletin 1999-9 that an organization that is a disregarded entity for federal tax purposes for a given taxable period must also file as a disregarded entity for state tax purposes.

### **Personnel Agencies—License Requirements**

*Hudson v Mathers*, 283 Mich App 91, \_\_ NW2d \_\_ (2009). In an action alleging breach of management and partnership agreements between plaintiff and various defendants relating to one defendant's work as an artist in the entertainment and entertainment-related industries, the plaintiff qualified as a Type B personnel agency as defined in MCL 339.1001(l) and was required to be licensed under MCL 339.1003(1). The trial court properly dismissed the plaintiff's breach of contract claim against the defendant because the plaintiff was not licensed as a personnel agency, and the plaintiff could not proceed against that defendant under an equitable theory, such as unjust enrichment, because doing so would defeat the statutory requirement of a license to bring an action in Michigan courts as provided by MCL 339.1019(b).