

11th Circuit Affirms Summary Judgment in ADEA case where Plaintiff used “Cat’s Paw” Theory

4 min read

Jan 23, 2013

By: Ambrose V. McCall

Not all well-designed plans succeed. In the area of employment terminations, however, the practice of having termination decisions made independently by someone other than the employee’s immediate supervisor increases the odds of obtaining summary judgment and avoiding trial.

In *Sims v. MVM, Inc.*, Case No. 11-11481 (11th Cir. Jan. 17, 2013), the employee filed suit against his employer, claiming that his termination at age 71 was due to his age. The employer countered, claiming that a reduction in force, (“RIF”), led to the discharge from employment. When granting summary judgment, the trial court ruled that no reasonable fact finder could decide that the employee would have stayed in his job “but-for his age.”

The defendant employer provided prisoner transport services for the U.S. Marshals Service. Though the employee was hired for a supervisory position in January 2008, his immediate supervisor soon found that the employee committed more errors than other supervisors providing the contracted work. The immediate supervisor also found that the employee did not fully understand his duties, and that his performance had not improved over time. Financial figures showing the need to decrease hiring costs and expenses led to a senior manager deciding that two supervisors in the employee’s category would have to be let go. The senior manager already had the employee in mind for the RIF of supervisors even before discussing this with other supervisors and personnel. The senior manager made his decision based on his own personal observations of the employee’s discomfort with computers and slow production of paperwork when compared with the other supervisors. The senior manager testified that he sought and obtained input from the other supervisors, but proclaimed that he had already made up his mind to include this particular employee in the RIF. In addition, all the supervisors other than the employee recommended that he be included in the RIF.

In his charge of discrimination, the employee cited comments by his immediate supervisor that he was “too slow” doing his job, that he would recommend the employee’s termination if there were cutbacks, while also saying “age has nothing to do with it.” Outside of his charge, the employee also claimed that his immediate

supervisor said he was “old and slow.” Later on, the employee conceded that no one other than his immediate supervisor made discriminatory comments about his age.

The 11th Circuit Court of Appeals began its analysis by citing the standard under the Age Discrimination in Employment Act (ADEA) which requires plaintiffs to prove that age discrimination was the “but-for” cause of the complained of adverse employment action (relying upon [Gross v. FBL Financial Services, Inc.](#), 557 U.S. 167, 176 (2009)). Under this framework, plaintiffs can use direct or indirect evidence to demonstrate age discrimination occurred. The 11th Circuit viewed the employee as trying to use circumstantial evidence to establish age discrimination was behind his termination. The employer asserted that budgetary reasons were behind the RIF, and led to the inclusion of this employee and another person in the cutbacks of supervisory personnel. The Court then focused on the weakness of the evidence of “pretext”, meaning that what evidence was in the record showed no evidence of age bias at all by the decision-maker senior manager, or an inference far too weak to satisfy the “but-for” proof burden under the ADEA.

So, the employee changed course. He next contended that the senior manager was no more than a “cat’s paw” or supervisory agent who expressed the alleged discriminatory age bias of his immediate supervisor, citing [Staub v Proctor Hospital](#), 131 S.Ct. 1190 (2011). After much discussion of how and whether to apply the “cat’s paw” theory as alleged by the employee, the court in *Sims* concluded that even with that theory, the employee’s case still faltered. The reason the employee still came up short was the “but-for” standard that governs age discrimination cases.

The senior manager in *Sims* not only was free of any accusations of age-derogatory comments, but his undisputed testimony detailed that he had foreknowledge of the RIF for 5 months, and during that time he had regularly evaluated supervisory personnel, including the employee, and their performance. The senior manager’s decision to include the employee in the RIF arose from “his own observations and evaluations.” This meant that the senior manager could point out that his decision to place the employee in the RIF was his own decision, regardless of whether the employee’s immediate supervisor shared the same opinion of his job performance. Moreover, the other supervisors had also agreed that the employee should be part of the RIF. Ultimately, the employee lacked anything to contradict the testimony of the senior manager. As a result, the Eleventh Circuit concluded that no reasonable juror could rule in favor of the employee given the absence of “but-for” causation evidence. Furthermore, the employee lacked any showing that the alleged age-biased conduct of his immediate supervisor created any “determinative influence” on the decision of the senior manager to place him in the RIF.

The *Sims* opinion underscores the benefits of having someone other than an immediate supervisor of personnel involve themselves and make their own evaluations of job performance and accompanying discharge decisions.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution,

and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

ADEA, Age Discrimination