Tenth Circuit Holds Five Year Age Difference Sufficient to Satisfy Prima Facie Proof Requirement in ADEA Cases.

By Lawrence Peikes

Creating a potential split among the Circuit Courts, the U.S. Court of Appeals for the Tenth Circuit held, in Whittington v. Nordam Group, Inc., that a five year age difference between a laid-off employee and a similarly situated colleague who survived the downsizing was not so insignificant as to preclude a finding that the employer violated the Age Discrimination in Employment Act ("ADEA").

The Nordam Group, Inc. ("Nordam") employed Milton Whittington, Sr. as a supervisor in its Transparency Division from the time it purchased his previous employer in 1993 until it laid him off as part of a reduction-in-force ("RIF") on January 11, 2002. Using performance evaluations and disciplinary records as their selection criteria, Nordam's management team initially produced a list of fifteen or sixteen vulnerable Transparency Division employees. Although Whittington's name was not on that list, as it turned out he was one of seventeen employees ultimately laid off. A human resources spreadsheet documenting the RIF listed two reasons for Whittington's inclusion: "restructuring organization due to low sales in product line" and "position eliminated." At the time of his termination, Whittington was 62 years of age.

Claiming discrimination on the basis of age, Whittington sued Nordam. After a mistrial, Whittington sued a second time. During this second trial, Nordam's General Manager, Gregg Miner, presented testimony markedly different from that given at his deposition, and in contradiction of answers supplied by Nordam to interrogatories propounded by Whittington during discovery. Nordam's interrogatory responses stated that "the level of management occupied by Whittington was eliminated" due to the introduction of "Lean Manufacturing" concepts, and further suggested that Whittington's selection for lay-off was based at least in part on performance deficiencies. When asked at deposition to explain his understanding of the basis for the decision to lay-off Whittington, Miner said he could not recall the particulars. At trial, however, Miner testified that he chose to lay-off Whittington over Herb Overbey, who occupied a similar position in the same department, because although the comparators had similar performance and disciplinary histories, Overbey had a longer tenure with the company.

The second jury found for Whittington, and the district court awarded him damages constituting his lost wages from the date of his termination up to his 65th birthday, rejecting Whittington's testimony that he planned to continue working until age 70. Asserting that the evidence presented by Whittington was insufficient to support the jury's verdict, Nordam filed a motion for judgment as a matter of law, which the trial judge denied. Both Nordam and Whittington appealed.

On appeal, the Tenth Circuit rejected Nordam's claim that Whittington failed to establish a prima facie case of age discrimination under the McDonnell Douglas burden-shifting paradigm, observing that a jury is not charged with applying the McDonnell Douglas framework, but is merely responsible for determining which party's explanation of the employer's motivation to believe. Viewing the record in the light most favorable to the prevailing party, namely Whittington, the Court held that the jury could easily have found a discriminatory pretext for Whittington's lay-off based on both procedural irregularities inherent in his inclusion in the RIF as well as Nordam's inconsistent rationales for Whittington's selection.

The Court also rebuffed Nordam's argument in favor of applying a bright-line rule that a five year age difference between Whittington and Overbey is insignificant as a matter of law and hence could not support a prima facie showing of age discrimination. In so concluding, the Tenth Circuit declined to follow the Sixth and Seventh Circuits, both of which have established a rebuttable presumption that an age gap of five years is insufficient to generate an inference of age discrimination. To rebut this presumption, the Sixth and Seventh Circuits require an ADEA plaintiff to adduce direct evidence of age-base animus. Reasoning that circumstantial evidence of discrimination is every bit as compelling as direct evidence, and believing that a jury should weigh all of the available evidence, the Court declined to adopt the rigid rule advocated by Nordam.

Turning to Whittington's appeal, the Court held that the district court reasonably relied on Whittington's admission during the first trial that he planned to retire at age 65 in awarding front pay damages. Whittington testified that had he remained at Nordam his plan was to work until age 70 but at the time of the first trial he had recently been injured on his new, more physically demanding job and as result decided he would retire at 65. It was Whittington's contention, therefore, that but for his lay-off he would not have been injured and would have retired from Nordam at 70. The Tenth Circuit refused to overturn the award, however, recognizing that the trial court was not bound to accept Whittington's testimony regarding his planned retirement date.

Whittington v. Nordam Group, Inc., 429 F.3d 986 (10th Cir. 2005).

***Professional Pointer*:** Whittington provides a wealth of useful guidance on a variety of issues that commonly arise in ADEA litigation born of a reduction-in-force. Most notably, the Tenth Circuit's decision demonstrates that an age difference as small as five years may suffice to generate an inference of age discrimination; underscores the fact that employers must be sure to carefully choose, and follow, non-discriminatory criteria for selecting employees to be impacted by a lay-off; and highlights the need to contemporaneously, and accurately, document the basis for each RIF selection. The Whittington decision is yet another example of the heightened exposure to legal liability faced by employers when a downsizing is poorly executed and inadequately documented.

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