What Employers Should Note In 6th Circ. Age Bias Ruling

By **Cayman Caven** (December 10, 2021)

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On Nov. 17, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's summary judgment ruling in favor of Hewlett-Packard Enterprise Co. on a former employee's claims of age discrimination and retaliation.[1]

In Sloat v. Hewlett-Packard, the court held that, instead of allowing the district court to determine whether HP fired him and/or retaliated against him based on his age, Robert Sloat, the former employee, should be allowed to present his evidence to a jury.[2]

According to the opinion, Sloat was 54 years old when he was hired by HP. He received positive performance reviews and performance bonuses during his first five years with the company.

After turning 60, Sloat was promoted and transferred to a different group with a new manager, Steven Hagler. At the time of the transfer, Sloat was the oldest person reporting to Hagler. During the time he reported to Hagler, Sloat complained to human resources that Hagler was biased against him due to his age.

A few months before Sloat's termination, HP transferred Sloat to a new manager, Terry Flynn, as part of a plan for downsizing. After this transfer, Hagler sent a PowerPoint to Flynn in which he noted that Sloat's future with the company was unclear.[3]

Hagler and Flynn also had a telephone conversation in which Hagler said that he did not have a good relationship with Sloat. Within days of the call with Hagler, Flynn advanced the termination process against Sloat.[4]

Shortly thereafter, the first time they spoke, Flynn notified Sloat that he was being terminated.

HP took the position that Flynn was the decision maker for Sloat's termination. The termination decision came less than a year after Sloat's promotion and transfer to Hagler's team.

After he was terminated, Sloat filed an age discrimination and retaliation lawsuit in the U.S. District Court for the Eastern District of Tennessee.

Plaintiff's Evidence of Bias Due to His Age

Sloat argued to the district court that he had ample evidence of discrimination and retaliation to survive HP's motion for summary judgment. Sloat's evidence included that:

- "Hagler was cold and distant toward [him] from the start."

- Hagler reduced Sloat's performance bonus for the first time in his employment with HP because Hagler rewarded his top performers and, although Sloat had outstanding performance the year before, that time was not spent on Hagler's team.

- Hagler referred to Sloat in a meeting as "Uncle Ron," and, according to Sloat, sarcastically called him "young man" multiple times during that meeting.

- When Sloat fumbled with a laptop during a meeting while preparing to give a presentation, Hagler said, "You've got old skills."

- Hagler asked Sloat when he would retire on at least ten different occasions after that meeting.

- After Sloat complained to HR and confronted Hagler about his behavior, Hagler reassigned Sloat's responsibilities to other employees and only spoke to him seven times in four months.

- Hagler asked Sloat, "Why are you still here?"

- Hagler recommended to HP's HR team that Sloat be terminated in a one-person reduction in force that was flagged by an HR employee as needing legal attention.

- Hagler gave Sloat a rating of "stalled" on his performance review, which was the second-worst rating available.

- Sloat was included on a "plan for exit" spreadsheet emailed to Flynn.

- Hagler portrayed Sloat negatively in the PowerPoint that he sent to Flynn and in the phone conversation that he had with Flynn immediately before Sloat's termination.

What This Means for Employers

Beware of the influenced decision maker.

Here, HP emphasized in its motion for summary judgment that Flynn, not Hagler, was the manager who actually terminated Sloat. HP argued that although Sloat presented evidence regarding Hagler's potential discriminatory motives, that evidence should be disregarded since Hagler did not terminate Sloat.

Sloat, however, advanced a theory of vicarious liability, also called the cat's paw theory. Under this theory, an employer may be held vicariously liable if a supervisor discriminates against an employee by causing another actor, who may lack discriminatory animus, to take an adverse action against an employee.[5]

The court agreed with Sloat. It found that there was sufficient evidence for a jury to find that Hagler was biased against Sloat due to his age, that Hagler wanted Sloat to be terminated and that Hagler's actions "left Sloat with a profile that practically dictated Flynn's decision to terminate him."[6]

With this in mind, employers should ensure that they are not too quick to dismiss discrimination concerns just because a decision maker did not have a discriminatory animus. If the facts are such that an employee could point to a biased person who influenced the decision maker's decision, as Sloat did here, the employee may be able to survive summary judgment and present his or her claims to a jury.

Beware of emails.

This case also demonstrates the impact that emails can have on an employer's defenses.

When Hagler recommended to HR that Sloat be terminated in a one-person workforce reduction, the vice president of HR emailed an HR subordinate, Barbara Randell, flagging his request with an email that said, "There is a [workforce reduction] situation in Steven Hagler's team that needs some legal attention."[7] She also asked Randell to speak with Hagler about "'the rationale and any risks associated with' firing Sloat."[8]

Further, after Sloat received the stalled performance rating from Hagler, Hagler emailed Randell and "said that Sloat's responsibilities ... did 'not equate to a Director level position' but that his concern" about Sloat could potentially be resolved by the downsizing.[9]

Shortly after this email, Hagler's boss sent an email to Hagler warning him to be careful when referring to Sloat in emails.[10]

The court examined all of these emails when reviewing Sloat's evidence of age discrimination and retaliation. The court viewed the email from the vice president of HR about a potential workforce reduction as supportive of "an inference that even she thought the one-person 'WFR' was potentially retaliatory."[11]

Evidence of pretext may help a plaintiff survive summary judgment.

Cases with indirect evidence of discrimination, such as this one, proceed under the framework set forth by the U.S. Supreme Court's 1973 McDonnell Douglas Corp. v. Green decision.[12]

Under McDonnell Douglas, after the plaintiff establishes a prima facie case of discrimination and the employer offers a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff has the opportunity to defeat the employer's legitimate, nondiscriminatory reason with evidence that the reason is just a pretext for discrimination.[13]

Here, HP had a legitimate reason for terminating Sloat's employment — his remaining responsibilities could be handled by other employees. However, what HP did not have, according to the court, was a strong enough argument to prevent Sloat's pretext arguments from being heard by a jury.

The court held that Hagler's actions toward Sloat while Sloat reported to him, and his interactions with Flynn concerning Sloat's future with HP, were sufficient for a jury to find that HP's reason for Sloat's termination was a pretext for age discrimination.[14]

Conclusion

Overall, this case demonstrates the danger of relying on the current supervisor as the decision maker, even if there is evidence that a prior supervisor influenced the termination decision.

This case also demonstrates how plaintiffs can use emails from the employer as evidence of pretext, and how that evidence can help a plaintiff survive the summary judgment stage.

Employers in the Sixth Circuit and elsewhere should examine their current practices to ensure that they do not fall into any of these traps.

Cayman L. Caven is an associate at Burr & Forman LLP.

[1] Sloat v. Hewlett-Packard Enter. Co., No. 20-6169, 2021 WL 5351984 (6th Cir. Nov. 17, 2021).

[2] Id. at *6.

[3] Id. at *3.

[4] Id.

[5] Id. (citing Mys v. Mich. Dept. of State Police, 886 F.3d 591, 600 (6th Cir. 2018)); see also Staub v. Proctor Hosp., 562 U.S. 411, 415, 421-22 (2011).

[6] Sloat, 2021 WL 5351984 at *6.

[7] Id. at *2.

[8] Id. at *2.

[9] Id. (ellipses in original)

[10] Id.

[11] Id. at *6.

[12] Id. at *3 (citing McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973)).

[13] Id. at *3 (citing Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021)).

[14] Id.