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Sixth Circuit Applies "But For" Causation to ADA Claims (But Does it Matter?)

More than a year ago, the 6th Circuit upheld its use of a "sole reason" causation standard in ADA cases, but invited the full 6th Circuit to revisit (and overrule) this issue. That *en banc* panel issued its ruling last Friday, and, expectedly, it overruled the Court's prior use of the "sole reason" causation standard. Unexpectedly, however—in *Lewis v. Humboldt Acquisition Corp.* (6th Cir. 5/25/12) [pdf]—the Court replaced it with a similarly restrictive "but for" causation standard.

Relying on the linguistic similarities between the ADA and the ADEA, the Court looked to the Supreme Court's decision in *Gross v. FBL Financial Services* for the appropriate causation standard:

> [W]hat standard should trial courts use in instructing juries in ADA cases? *Gross [v. FBL Financial Services]* points the way. The ADEA and the ADA bar discrimination "because of" an employee's age or disability, meaning that they prohibit discrimination that is a "'but-for' cause of the employer's adverse decision."

Case closed. Or is it? As one of the dissenting opinions points out, the 6th Circuit is very much in the minority in its interpretation of the ADA's causation standard. "Significantly, a majority of our sister circuits have embraced the motivating factor standard in reviewing ADA claims." (citing to the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, and 11th Circuits). Could this conflict among the circuits now head to the United States Supreme Court for resolution?

Or, is this issue a mere academic exercise? The ADA Amendments Act changed the ADA's operative causation language. Pre-amendments, the ADA provided: "No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual." The ADAAA, however, changed the "because of" causation standard to a "discriminate … *on the basis of* disability" standard. This alteration is significant, because it changes the key language in the ADA that had mirrored the ADEA, and upon which the 6th Circuit based its opinion that the rationale of *Gross* also applies to ADA claims. Is is splitting hairs to say that "because of" is materially different than "on the basis of?" Maybe. But, it is not insignificant that the ADAAA altered this key phrase.

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As you can see, these issues are complex and, despite the *en banc* ruling, are far from settled. For employers, you are infinitely better off making reasonable accommodations and avoiding disability discrimination claims, so that you do not place yourselves in positions to have to worry about proper burdens of proof and causation standards. In other words, if you don't put yourself in a position to be sued, because-ofs and but-fors simply don't enter the equation.