

Employment Law Daily Wrap Up, TOP STORY—11th Cir.: Black employees get renewed chance to prove state minimum wage law was discriminatory, (Jul. 25, 2018)

[Click to open document in a browser](#)

By Brandi O. Brown, J.D.

Employees in Birmingham, Alabama, who alleged that the state's Minimum Wage Act had the purpose and effect of discriminating against the city's black citizens, in violation of the Equal Protection Clause, stated a plausible claim, the Eleventh Circuit ruled, reversing dismissal of that claim by a district court. The lawsuit came about after Governor Bentley signed the Minimum Wage and Right-to-Work Act, which mandated a uniform minimum wage throughout the state, currently sitting at \$7.25 per hour, and preempting all local labor and employment regulation, in response to a city ordinance raising the minimum wage to over ten dollars per hour. The lower court's decision was affirmed in part, reversed in part, and remanded (*Lewis v. Governor of Alabama*, July 25, 2018, Wilson, C.).

City raises minimum wage, state legislature reacts. In April 2015 the Birmingham city council passed a resolution calling on the Alabama legislature to raise the minimum wage to \$10 per hour. The request was refused, after which the city council adopted its own law. The ordinance raised the minimum wage in two steps, first to \$8.50 per hour and then to \$10.10 in 2017. A week after the ordinance was approved a white state representative from a neighboring, mostly white community introduced a bill in the state house of representatives designed to quash it. A second iteration of that bill progressed and ultimately won the approval of a majority of the House in February 2016 and quickly made its way to the Senate floor.

In the meantime, the Birmingham city council pushed forward with implementing its own minimum wage law and adopted a new ordinance that raised the minimum wage to \$10.10 per hour immediately. One day after it went into effect the Alabama Senate approved the Minimum Wage Act, which mandated a uniform minimum wage throughout the state, currently sitting at \$7.25 per hour, and preempting all local labor and employment regulation. No black senators or house members supported the Act. Governor Bentley signed it into law in less than two hours.

Black residents sue. A few months later the plaintiffs, Birmingham residents who earn less than \$10.10 per hour, along with public interest groups, sued the state governor and attorney general, claiming racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as section 2 of the Voting Rights Act. The district court granted the defendants' motion to dismiss. The plaintiffs appealed. On the merits, the appeals court reversed the district court's judgment with regard to the employees' claim that the Minimum Wage Act purposely discriminated against the city's black citizens. In order to prevail on this equal protection challenge, they had to "prove both discriminatory impact and discriminatory intent or purpose."

Evidence of impact. First, the court noted, the Minimum Wage Act denied 37 percent of the city's black wage workers a higher wage, compared to only 27 percent of white workers. This was on top of the fact that black wage workers earn, on average, \$1.41 less per hour than their white counterparts in the city and \$2.12 less than their counterparts statewide. Thus, the court found it "plausible" that the Act would bear more heavily on black workers. Nor were the statistics focusing on Birmingham workers "cherry picked" as contended by the defendants—that city was the only municipality in the state that guaranteed an hourly wage that was above the federal minimum after all.

Discriminatory purpose. A "more challenging question" was whether the employees had alleged facts that plausibly supported the conclusion that the Act had an invidious purpose. Beyond the "disproportionate effect" it had upon the city's poorest black residents and the state's history of using "state power to deny local black majorities authority over economic decision-making," the court explained, the timeline laid out by the complaint was telling. The Act was a direct response to the legislative efforts of a majority-black city council, which represents a higher number of black citizens than any other city in the state and more of whom are living in

poverty. It nullified the efforts of those council members on a matter upon which it had previously refused to act, i.e., establishing a statewide minimum wage law. Furthermore, it was introduced by a white representative from the state's least diverse area and all of the 52 other supporters of the law were white. All black members of the House and Senate objected. It also sped through the legislative process in just over two weeks, with little to no opportunity for public comment. Those facts, the court explained, "plausibly imply discriminatory motivations were at play."

Incorrect standard "recklessly" used. Most disturbing to the appeals court, however, was the "clearest proof" standard that the district court "[r]ecklessly plucked from an unrelated line of precedent," which also "runs contrary to decades of established equal protection jurisprudence." Requiring such proof of discriminatory purpose "not only ignores the history of equal protection law but also turns a blind eye to the realities of modern discrimination." Instead, the court explained, "a sensitive but thorough examination of" the detailed allegations made by the employees leads to the conclusion that they plausibly alleged a discriminatory motivation behind the Act, which was all that was required to survive a motion to dismiss.

With regards to the political process claim, the appeals court affirmed the lower court's decision, under the U.S. Supreme Court's most recent consideration of the doctrine in *Schuette v. Coalition to Defend Affirmative Action*. In light of that interpretation and precedent, the court explained, the employees failed to state a plausible political process claim. Nor did the employees state plausible voting rights claims under either the Fifteenth Amendment or section 2 of the Voting Rights Act. They failed to allege any denial, abridgement, or dilution of their voting ability as a result of the Act and the court found "no authority" for a "free-floating political process right unrelated to any vote or election" under section 2.

Standing and immunity. The court, prior to reaching the merits, however, explained that the plaintiffs had standing to sue, contrary to the lower court's decision, a conclusion it had "little trouble" making. Moreover, the injuries were attributable to the defendants. The attorney general has broad authority to interpret, enforce, and defend the laws of the state and was sufficiently connected to enforcement of the Act to satisfy *Ex parte Young's* demands. With regards to whether the plaintiffs could sue the state under section 2 of the Voting Rights Act, the appeals court concluded that section 2 validly abrogated the state's Eleventh Amendment immunity from suit, joining the Fifth and Sixth Circuits in reaching that conclusion. Indeed, that abrogation was "unmistakably clear" in the statute's language.

The case is No. 17-11009.

Attorneys: Barbara Jane Chisholm (Altshuler Berzon) for Marnika Lewis, National Association for the Advancement of Colored People and Greater Birmingham Ministries. James Uriah Blacksher (James Uriah Blacksher, Attorney At Law) for Alabama Legislative Black Caucus. Andrew Lynn Brasher, Alabama Attorney General's Office, for the Governor of Alabama and Attorney General, State of Alabama.

Companies: National Association for the Advancement of Colored People; Greater Birmingham Ministries; Greater Birmingham Ministries; State of Alabama

MainStory: TopStory MinimumWage WageHour IndividualRights Discrimination RaceDiscrimination Procedure
AlabamaNews FloridaNews GeorgiaNews