Tuesday, October 20
9:00 am–10:30 am

805 Update on Labor and Employment Law Developments

David Berndt
Attorney

Susanne J. Blackwell
Senior Counsel
ConAgra Foods, Inc.

Nicole Theophilus
Vice President and Chief Employment Counsel
ConAgra Foods, Inc.

Faculty Biographies

David Berndt

Dave Berndt is currently in transition and recently served as the assistant general counsel for One Communications. His responsibilities included commercial transactions, employment law, litigation management, ethics and compliance and trademarks.

Prior to joining One Communications, Mr. Berndt was engaged in the solo practice of law, supporting clients in their commercial and real estate transactions along with advising them in other areas including trademarks.

Mr. Berndt currently provides pro bono legal services to the Greater Manchester New Hampshire chapter of the American Red Cross, in addition to serving as the vice chair of the board. He also serves on the advisory board of New Hampshire Technical College's Department of Engineering.

Mr. Berndt graduated from the Brigham Young University J. Reuben Clark Law School and received a Masters from the University of Michigan. He received his BS from California State University, Fresno.

Susanne J. Blackwell

Susanne J. Blackwell is senior counsel focusing on labor and employment law matters for ConAgra Foods, Inc. in Omaha, Nebraska. Her practice focuses on human resource counseling, managing litigation, and advising the company on best practices.

Prior to joining ConAgra, Ms. Blackwell practiced law with Blackwell Sanders LLP in St. Louis, Missouri, where she defended employers in a variety of discrimination and harassment lawsuits and administrative matters, as well as in labor arbitrations, and provided day-to-day human resources advice.

Ms. Blackwell is a graduate of Northwestern University School of Law and received her BA from Saint Louis University.

Nicole Theophilus
Vice President and Chief Employment Counsel
ConAgra Foods, Inc.

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Topics to Cover

- Discrimination, ADA & Retaliation
- Unions, Arbitration, NLRB, DOL & Undocumented Workers
- ERISA, FMLA, FLSA
- Privacy, Confidentiality, Non-competes, Non-solicitation

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Reverse Discrimination
-*Ricci v. DeStefano* (S.Ct. June 29, 2009)

- City's invalidating promotional tests resulting in white and Hispanic firefighters outperforming black colleagues was held to be race-based discrimination, despite City arguing that it chose not to certify a test that had a racially disparate impact.
- "Race-based action…in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." The City of New Haven did not so demonstrate.
- Court also rejected Plaintiffs' suggestion that employers should be required to show that there is in fact a disparate-impact violation before scrapping test results.

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Hostile Work Environment
EEOC v. Central Wholesalers, Inc. (4th Cir. 2009)

- Company had a harassment prevention policy but having policy alone not enough.
- Court found that the employer's actual efforts in eliminating the conduct was ineffective and thus, the company failed to respond promptly, if at all.
- Even though employer spoke to offending employees, the harassing conduct recurred and company failed to take increasingly severe actions.
- A reasonable jury could conclude that the company failed to take remedial action designed to end harassment.

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- *DiPasquale v. State of New Jersey*, 2009 WL 1686186 (App. Div. June 18, 2009)
  - Court reversed grant of summary judgment, holding that the use of the term "psycho bitch", even though not made directly to the plaintiff, could be found to be severe or pervasive enough to create hostile work environment.

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Discrimination-Religion

- *EEOC v. Firestone Fibers & Textiles Co.*, No. 06-2203 (4th Cir. 2008)
  - Employee could not work from sundown Friday to sundown Saturday and 20 religious holidays per year.
  - After layoffs, pursuant to CBA, employee was placed on evening shift.
  - Employee exhausted shift swapping and all leave and was then terminated for not showing up to work.
  - **Employer is not required to completely accommodate an employee's religious beliefs when it would create a significant negative impact on co-workers and the employer**.

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EEOC v. Aldi, Inc., No. 06-01210 (W.D. Pa. March 28, 2008)

- Employee's religious belief prevented Plaintiff from working on Sundays or from asking other employees to swap shifts with her (which was allowed under employer's existing policy).
- Plaintiff failed to appear for work on a Sunday and was terminated.
- Court denied summary judgment for employer holding that existing shift swapping policy alone was not a reasonable accommodation.

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Discrimination-Race

Billue v. Praxair, 2d Cir, Nov. 2008

- Plaintiff, an African-American employee, was suspended after he urinated outside his truck, abandoned it for 20 minutes to go shopping and did not adhere to the employer's guidelines for securing the truck
- Plaintiff pointed to a similarly-situated Caucasian employee who left his truck unoccupied for 5 minutes, locked the back doors, was 300 feet from the employer's property and could be observed by the employer's surveillance cameras
- Conduct deemed to be "materially different."

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Discrimination-Race

Holocomb v. Iona College, 2d Cir. 2008

- Plaintiff, a Caucasian assistant basketball coach, married an African-American woman. Plaintiff and African-American coach were terminated, while the most junior coach, a Caucasian not in an interracial relationship, was retained.
- "Where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race."
- Court ruled a jury could find the employer had a racial animus against Plaintiff, and noted that even though employer hired an African-American to replace the Plaintiff, could be seen as "a way of concealing its prior discrimination."

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Discrimination-Gender

- *Drum v. Leeson Electric Corp.,* No. 08-1678 (8th Cir. May 15, 2009)
  - Gender, equal pay act, and state law claims based on pay disparity
  - Defense that male employee had simply negotiated a higher salary and was subject to a more generous compensation hiring strategy
  - Plaintiff, Human Resources Manager, had salary lower than market average, and proved that male employee performed equal work

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Discrimination—Age

Gross v. FBL Financial Services

- Lower court misstated the standard for liability under the ADEA when instructing jury to find employer liable for demoting employee if age played any part in decision.
- Plaintiff in an ADEA suit must prove that age was the determinative, or "but-for," cause of the adverse employment decision, not merely that it was a "motivating factor."
- Reversed prior case law holding burden of proof shifted in mixed motive case. Does not apply to ADEA.

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OWBPA Waivers

- *Ferruggia v. Sharp Electronics Corp.* (D. N.J. June 18, 2009)
  - Waiver of ADEA claims not valid because it did not comply with all requirements of OWBPA, including identifying group of individuals affected, eligibility factors, and which employees were selected

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Admissions to Social Security Administration

- *Marino v. Adamar of New Jersey*, 2009 WL 260799 (D.N.J. Feb. 4, 2009)
  - Summary Judgment granted for employer on ADEA, ADA and state law claims because employee swore under oath to Social Security Administration that he became disabled and unable to work on the same date he was terminated as part of a reduction in force.

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Discrimination – Military

- ***Madden v. Rolls Royce Corporation**, No. 08-1923, Seventh Circuit Court of Appeals (April 29, 2009)*
  - Madden had falsely represented that he was a Purdue graduate (he had actually flunked out) and Madden's performance "was dangerously incompetent."
  - The Court found that if an employer has two reasons for taking an adverse action against an employee, only one of which is forbidden under USERRA, and the employer can show that it would have taken the adverse action even absent the forbidden reason, the worker loses.

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Duty to Accomodate

- *Iverson v. City of Shawnee, Kansas, 10th Cir., No. 08-3264, June 17, 2009*
  - Iverson filed suit, claiming that she "could have performed numerous positions within the [City] with or without reasonable accommodation."
  - However, she did not specifically identify any position for which she believed herself to be qualified.
  - 10th U.S. Circuit court of Appeals held that "a disabled employee could not support her failure-to-accommodate claim under the ADA, because she did not present evidence of any specific vacant positions to which she could have been transferred."

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Retaliation -

- *Lockett v. Choice Hotels Int'l, Inc.*, No. CV 797-T-24, 2008 U.S. Dist. LEXIS 50927 (M.D. Fla. June 13, 2008)
- *Thompson v. North American Stainless*, No. 07-5040 (6th Cir. June 5, 2009)
- *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 08-2820 (7th Cir. June 29, 2009)

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Retaliation - *Lockett v. Choice Hotels Int'l* – Termination for Non-Retaliatory Reason

- Shortly after Lockett complained of harassment, she was called to a meeting with the human resources manager, her supervisor and the co-worker, where, the employee claimed, the co-worker called her names and acted like he was going to hit her. The plaintiff admitted that she responded, "I have a boyfriend for you," which the employer perceived as a threat against the alleged harasser. That same day, the plaintiff was terminated for threatening her co-worker, who was also terminated as a result of his conduct.
- Fed'l District Court in FL found that the plaintiff was terminated because the employer believed that she had threatened her alleged harasser, not because she complained of harassment.
- Court rejected the employee's argument that the employer incorrectly perceived her words to be a threat, stating that *the issue was whether the employer thought that the employee had threatened her co-worker*.

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Retaliation - *Thompson v. North American* Stainless – Associational Retaliation

- Miriam Regalado filed a charge with the EEOC alleging that her supervisors discriminated against her based upon her gender. Approx. 3 weeks after the employer was notified of the charge by the EEOC, Regalado's fiancé, Eric Thompson, who worked for the same company, was discharged.
- Thompson filed his own EEOC charge, claiming his termination amounted to retaliation for the filing of his fiancé's EEOC charge.
- 6th Circuit Ct. of Appeals held that, under Title VII, only a person who has personally engaged in a statutorily protected activity may bring a retaliation claim under Title VII of the Civil Rights Action of 1964 (joining the 3rd, 5th, and 8th Circuits).
- 6th Circuit, by a 10-6 majority, held definitively that the plain language of Title VII *does not* extend to associational retaliation claims.

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Retaliation - *Kasten v. Saint-Gobain Performance Plastics Corp.* – Verbal Complaints Are Insufficient

- Kasten alleged that he verbally complained to his supervisors that the location of the time clocks was illegal because it prevented employees from being paid for time spent donning and doffing their protective gear, and that he had told at least one supervisor that he was *thinking of commencing a lawsuit*.
- Kasten was subsequently terminated, and he brought a retaliation suit under the Fair Labor Standards Act (FLSA)
- Seventh Circuit Ct of Appeals held that verbal complaints about wages do not support a retaliation claim under federal law; Kasten never "filed any complaint."

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Targeting Union Emails

- *Guard Publishing Co. v. NLRB*, (D.C. Cir. July 7, 2009)
  - Employer violated NLRA by selectively enforcing email use policy against union communications and thus discriminated against protected union activity
  - Court held that employer must apply policies equally and uniformly to all non-work-related emails

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14 Penn Plaza LLC et al. v Pyett et al. No. 07-581 (April 1, 2009).

- The U.S. Supreme Court held enforceable a provision in a collective bargaining agreement that "clearly and unmistakably" compels union members to arbitrate the ADEA claims.
- Unionized Employers with strong arbitration provisions in their CBAs may be able to avoid court actions in claims brought by union members alleging discrimination under federal laws.
- The CBA provided that :
- "All such [discrimination] claims shall be subject to the grievance and arbitration procedure [in this agreement] as the sole and exclusive remedy for violations.

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- Some employees claimed that they were transferred in violation of the ADEA. The union declined to pursue their ADEA claims through arbitration and the employees filed a federal court suit claiming ADEA violations.
- The employer moved to dismiss the action and compel arbitration.
- The Court found for the employer stating that: "The NLRA . . . provided the statutory authority to collectively bargain for arbitration of workplace discrimination claims. . . . "

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NLRB Decisions In Jeopardy

- D.C. Circuit vs. 7th Circuit
- D.C.: Over 300 decisions issued by two-member panel invalid because lacked authority to act without at least three members
- 7th: same day, held that decisions were valid because plain meaning of statute permits Board to delegate and permits three-member panel to proceed as quorum despite absence of one member.

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DEPT. OF LABOR OPINION LETTERS

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FLSA – Exempt Employees & Vacation

- DOL FLSA2009-2 (Jan. 14, 2009)
- Since Employers are not required to provide any vacation time to employees, an employer may require exempt employees to use accrued vacation time for any absence, including one resulting from a plant shutdown, without affecting their exempt status, provided that employees receive a payment in an amount equal to their guaranteed salary.
- But, "an exempt employee who has no accrued [vacation] benefits . . . or has a negative balance . . . still must receive the employee's guaranteed salary for any absence(s) occasioned by the employer or the operating requirements of the business." (citing Wage and Hour Opinion Letter FLSA2005-41)

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FLSA – Compressed Work Week

- DOL FLSA2009-16 (Jan. 16, 2009)
- Appears to allow employers to "average" the workweek – employees work 44 hours one week, 36 hours the next. However, this would contradict the FLSA, which sets a single workweek as the standard length of time used to determine if an employee is due overtime. FLSA doesn't allow for the averaging of hours over two or more weeks.
- Facts: employer's workweek starts & ends mid-day on Friday and employees begin their workday that morning; the work performed on a Friday is technically split between two workweeks. Four hours fall into the 1st workweek, four hours into the 2nd. Hence, the employee is actually working only 40 hours each workweek.
- Good news: DOL did approve a workweek that was skillfully created to avoid overtime. Employers who regularly deal with substantial overtime may want to consider a similar arrangement.

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Undocumented Workers and RICO

- In 1996, Congress extended the reach of Rackateer Influenced and Corrupt Organizations Act (RICO) to violations of federal immigration law.
- So, can RICO potentially result in liability to a company that uses undocumented workers?
  - Under certain circumstances, the answer clearly seems to be "yes."
- A RICO claim might also support a class action against an employer.

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RICO & *Williams v. Mohawk Industries*

- In *Williams v. Mohawk Industries*, ___F.3d ___ (11th Cir. May 28, 2009) [Slip Opn., at 2-3] a group of current and former employees sued Mohawk (a carpet and flooring manufacturer that employed 30,000 in the state of Georgia) in 2004 alleging that the company had conspired with third-party recruiters from temporary agencies to recruit undocumented workers and thereby depress the wages of legal employees.
- "Because the employees' claim is that the hiring of illegal aliens by Mohawk depressed wages of all legal hourly workers regardless of location, whether the two class representatives worked at a few locations is irrelevant."
- Accordingly, the Circuit Court reversed the district court order denying class action treatment, and remanded for further review under Rule 23.

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FMLA

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Brady v. Wal-Mart Stores, Inc.
531 F.3d 127 (2d Cir. 2008)

- Employee had cerebral palsy and walked with a limp and had recognizably slower speech.
- He alleged that Wal-Mart failed to reasonably accommodate his disability. Wal-Mart argued that the employee never requested such accommodations.
- Court noted that Wal-Mart was obligated to engage in an "interactive process" with the employee to determine whether his disability could have been reasonably accommodated.

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Bryant v. Dollar General Corp.
538 F.3d 394 (6th Cir. 2008)

- Employer argued that, because the FMLA does not explicitly protect employees from retaliation, employees cannot bring FMLA retaliation claims
- After examining the FMLA and its regulations, the Sixth Circuit rejected the employer's argument

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Smith v. The Hope School, (7th Cir., March 30, 2009)

- Employee altered health care certification form after her doctor completed it.
- HR department confirmed with physician that form had been changed.
- DOL advised company that they could deny leave.
- Court upheld decision citing that FMLA may be denied to an employee who attempts to obtain leave fraudulently, and found in this case, there was strong inference that plaintiff intentionally submitted false paperwork.

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FLSA – Lilly Ledbetter Fair Pay Act

- Lilly Ledbetter Fair Pay Act was signed by President Barack Obama on January 29, 2009, but it was made retroactive to May 28, 2007
- EEOC then contacted individuals in closed cases who have filed charges that included a wage issue. It asked whether the individual may have been affected by the Supreme Court's decision in the Ledbetter v. Goodyear Tire case (which was reversed by the LLFPA)
- If the individual responded that he did not file a lawsuit on the charge & he/she was affected by the Ledbetter decision, then the agency determined that the individual was eligible to receive a new notice of the right to sue for the charge.
- The individual then may file a civil action within 90 days after the notice of right to sue.

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FLSA – Lilly Ledbetter Fair Pay Act

- *Richards v. Johnson & Johnson, Inc.*, 2009 WL 1562952 (D.N.J., June 2, 2009)
- U.S. District Ct for the District of New Jersey narrowly construed the LLFPA as extending workers' time to sue *only for claims based upon pay bias, and not other acts of discrimination.*
- (The Court did say, however, that time-barred acts of discrimination could still be introduced as evidence in a proceeding under any other law.)

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FLSA – Working for Multiple Affiliates

- DOL suit against Partners HealthCare Systems, Inc. (consent judgment signed by Judge on 7/21/09) (Solis v. Partners HealthCare Systems Inc., et al; Civil Action Number: 1:09-CV-10666)
- Problem: employees were working for more than one Partners-affiliated hospital or health care facility during a single workweek; but, their hours worked during those workweeks were not being combined to determine if overtime was due
- Settlement: Partners had to pay 700 employees more than $2.7 million in overtime back wages

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Privacy – Human Resources Information

- Massachusetts & Nevada – only 2 states currently mandating encryption of sensitive HR information, but other states…
- Both take effect Jan. 1, 2010
- Two key areas: (1) Electronic transmission; (2) Removal from secure company storage/database
- Failure to comply with encryption requirements will violate a statutory standard; therefore, the absence of encryption most likely would be deemed negligent
- Potential for negligence-based lawsuits…

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Privacy – Access to Personal E-Mail

- NJ Appeals Court case: *Stengart v. Loving Care Agency, Inc. et al.,* No. A-3506-08T1 (*June 26*, 2009)
- Company policy: "internet use and communication… are considered part of the company's business" and "such communications are not to be considered private or personal to any individual employee." Also, "[o]ccasional personal use is permitted."
- Court found policy ambiguous, but even if it were clear…
- Court: the employee's interest in maintaining the attorney-client privilege outweighed the company's interest in enforcing its electronic communications policy. It reasoned that a policy transforming all private communications into company property furthers no legitimate business reason.

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HIPAA

- Employers should re-evaluate their HIPAA compliance efforts.
- Recent enforcement actions by the U.S. Department of Health and Human Services (HHS) that resulted in large settlement payments signal greater efforts to enforce HIPAA's compliance requirements.
- These enforcement actions were driven by publicly disclosed security breaches that brought compliance lapses to HHS' attention.
- Recent amendments to the HIPAA Privacy Rule, effective Feb. 17, 2010, enacted as part of the federal economic stimulus legislation, will fuel this "breach-driven enforcement."

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NON-COMPETES & NON-SOLICITATION AGREEMENTS

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Softchoice Corp. v. MacKenzie, (D. Neb. 2009)

- Former employer sued to protect pricing information being used by former employee
- Court held that information was not truly trade secret because shared by customers
- Court also asserted that employer did not do enough by treating the information as private and having nondisclosure agreement
- Employer should have implemented covenant not to compete if it wanted to limit employee's ability to use information with competitors

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IBM v. Johnson (S.D.N.Y. 2009)—on appeal to 2d Cir.

- IBM sought to enjoin David Johnson from joining Dell
- Initially restrictions placed on him by Court
- Motion was denied because Johnson signed on the signature line for IBM
- IBM followed up, but never executed the agreement and did not retain original copy
- Court found that IBM could not prove that Johnson had actually agreed

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Other restrictive covenant developments

- Colorado: continued employment no longer sufficient consideration (*Lucht's Concrete Pumping, Inc. v. Horner*)

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Newsstand

Important Supreme Court decision regarding employer testing

Briggs and Morgan
Michael T. Miller, Neal T. Buethe and R. Ann Huntrods

USA
July 10 2009

Does your company use employment tests to screen candidates? If so, you should be aware that a new United States Supreme Court decision provides important guidance for employers. *Ricci v. DeStefano*, Nos. 07-1428 and 08-328 (June 29, 2009). First, employers should make sure their tests or other screening tools actually evaluate job related skills for the position in question consistent with business needs. Second, employers should be hesitant to discard out of fear of litigation valid test results that have a disproportionately adverse impact based on race, age, gender, or other protected class status.

In this much-anticipated decision, the Supreme Court held that the City of New Haven, Connecticut intentionally and impermissibly discriminated on the basis of race when failing to adopt test results used to promote city firefighters. Each candidate was scored and ranked on a written and oral examination. The City rejected the test results after determining that white and Hispanic candidates had scored disproportionately higher than black firefighters, who the City feared would file a successful claim of unintentional discrimination if the test results were honored.

Instead, after the test results were discarded, several white and Hispanic candidates who likely would have been promoted if certification had occurred, filed a race discrimination lawsuit under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. A divided 5-4 Supreme Court sought to develop a standard under Title VII to guide employers caught between potential claims of intentional (disparate treatment) and unintentional (disparate impact) discrimination. The Supreme Court did not decide the underlying Constitutional claim.

As a threshold matter, the Supreme Court determined that the City had intentionally used race as the basis for failing to adopt the firefighter test results. The Court then held that this reliance on race would be permissible only if the City had a "strong basis in evidence" to believe it would be subject to liability for unintentional discrimination if it failed to take the race-conscious action. The Supreme Court concluded that the City could not meet this standard because the record evidence demonstrated that the underlying test was racially neutral and properly tested for job-related skills. Further, the Court also held that no strong basis of evidence was presented that an equally valid, less-discriminatory testing alternative existed that the City declined to adopt. Writing for the Court, Justice Kennedy stated: "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." Accordingly, the Supreme Court reversed the Court of Appeals and granted summary judgment in favor of the petitioning firefighters.

Contrary to the Court majority, the dissenting Justices did not find any inherent conflict between Title VII's disparate treatment and disparate impact provisions. Instead, the dissent written by Justice Ginsburg disagreed with the majority's interpretation of the record evidence and concluded that the City "had ample cause to believe its selection process was flawed and not justified by business necessity."

This decision emphasizes the following steps employers should take to avoid legal liability when using tests or similar screening tools:

- Make sure the tests or similar tools are validated to test for job-related skills.
- Update job descriptions to accurately reflect the pertinent position functions.
- Consider whether the at-issue test or tool is the best assessment of such skills.
- Train managers to properly implement the test or screen.
- Monitor the test or screen results to determine any disproportionate impact.

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News

Supreme Court Rules in Reverse Bias Case

7/2/2009

In 2003, 118 firefighters in New Haven, Connecticut, took an examination to qualify for promotions into lieutenant or captain positions. The examination results showed that white candidates outperformed minority candidates, which created a rancorous public debate in the city of New Haven. Lower-scoring minority firefighters threatened lawsuits, arguing that the results should be discarded because those results showed that the tests were discriminatory. Other firefighters contended the tests were fair and neutral and threatened to bring a discrimination lawsuit if the tests were discarded. New Haven sided with the lower-scoring minority firefighters and discarded the results. As threatened, the firefighters who lost out on promotions filed a reverse discrimination suit, alleging that New Haven discriminated against them based on their race, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The U.S. District Court for the District of Connecticut granted summary judgment to the City of New Haven, and the U.S. Court of Appeals for the Second Circuit affirmed. (Included on the Second Circuit's panel was Judge Sonia Sotomayor, President Obama's choice to replace Justice David Souter on the U.S. Supreme Court.) On June 29, 2009, the U.S. Supreme Court held that New Haven's excuse for discarding the test results -- to avoid disparate-impact liability -- did not satisfy the "strong basis in evidence standard" as set forth in the Court's precedent. In particular, the majority emphasized that certain government actions to remedy actions based on race are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary.

In its opinion, the Court held that statistical disparity alone does not meet the requirement of a strong basis in evidence in order to remedy racial discrimination. The Court found substantial evidence that New Haven could have avoided disparate-impact liability by demonstrating that the exams at issue were job-related and consistent with business necessity, and the city did not show that less-discriminatory alternatives were available that it refused to adopt. Instead, the Court found that New Haven turned a blind eye toward evidence supporting the exam's validity. In the end, fear of litigation alone was not enough to justify New Haven's reliance on race, to the detriment of those firefighters who passed the examination and qualified for promotions.

What This Means to You
Employers should not rely on statistical disparities alone in analyzing the disparate impact of an exam. Employers must be able to demonstrate their examinations are job-related and consistent with legitimate business requirements. The practical effect of this decision is that employers who use qualifying exams that can be *proven* to be job-related and consistent with business necessity may do so with less legal uncertainty.

Contact Info
If you have any questions about this or any other labor & employment matters, please contact one of the following attorneys:

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Newsstand

"Psycho bitch" comment sufficient to preclude summary judgment on hostile work environment claim

Ogletree Deakins

USA
July 10 2009
DiPasquale v. State of New Jersey, 2009 WL 1686186 (App. Div., June 18, 2009) – In this case, the Appellate Division reversed a grant of summary judgment for the employer, determining that calling the plaintiff a "psycho bitch" was sufficient to send her claim to a jury. Relying specifically on the New Jersey Supreme Court's decision in *Cutler v. Dorn*, 196 N.J. 419 (2008) (see the August 2008 issue of the *New Jersey eAuthority*), the Appellate Division rejected the trial court's conclusion that the comment was not severe or pervasive enough to create a hostile work environment, and that it was not actionable because it was not made directly to the plaintiff. The term "bitch", the court said, clearly has gender-specific connotations, and it can give rise to a claim, even if not stated directly to the plaintiff, if the plaintiff can prove that it created a hostile environment that affected her.
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News

Supreme Court Adopts "But For" Rule for ADEA Cases
6/19/2009

On June 18, 2009, the U.S. Supreme Court ruled in a 5-4 decision that plaintiffs claiming disparate-treatment discrimination under the Age Discrimination in Employment Act (ADEA) must prove that their age was "the reason" the employer took adverse action against them. *Gross v. FBL Financial Services, Inc.,* Case No. 08-441.

Prior to this decision, courts typically construed the framework for suing under the ADEA as identical to that under a Title VII claim. This has now been rejected by the Supreme Court. In *Gross*, the Supreme Court ruled that the ADEA is not tied to the framework of a Title VII suit. Specifically, under Title VII, a plaintiff may prevail if he/she establishes that the protected status was "a motivating factor" for the adverse employment action. In a Title VII case, the employer may defend by claiming it had "mixed motives" for the decision, and would have taken the same action even in the absence of the unlawful motivating factor. In *Gross*, the Supreme Court held that the ADEA does not have a mechanism for a "mixed motives" case. A plaintiff suing under the ADEA must prove, by a preponderance of the evidence, that the adverse employment action of the employer occurred "because of" the age of the employee. The plaintiff must show that age was the "but for" cause of the adverse action and not simply one of the motivating factors in the employer's decision making. In practical terms, it is more difficult for a plaintiff to establish that a protected factor is "the reason" for a decision, as compared to "one of the reasons" for a decision.

Furthermore, as the Supreme Court ruled that ADEA claims cannot include a mixed-motives case, the Supreme Court also concluded that the burden of persuasion never switches to employers in a disparate-treatment case under the ADEA. In a mixed-motives case under Title VII, the burden of persuasion shifts to an employer, to show that it would have taken the same employment action regardless of the impermissible factor. The Supreme Court concluded that the plaintiff's burden under the ADEA is more stringent than under Title VII, and the plaintiff retains the burden of persuasion at all times. This interpretation of the ADEA strengthens employers' defenses to employees' claims of age discrimination under the ADEA. Employers must keep in mind, however, that most states have anti-discrimination statutes, and the state courts' interpretations of those laws may not follow *Gross*. Additionally, employers may expect some action by Congress to amend the ADEA, as it recently amended the pay discrimination statute by passing the

Ledbetter Fair Pay Act, in an effort to be more employee-friendly. Regardless of the standard for discrimination, however, employers should continuously strive toward policies and practices not predicated on the age of employees, and should continue prompt investigation into all claims of age discrimination by its employees.

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Newsstand

Release in severance agreement invalidated under OWBPA

Ogletree Deakins

USA
July 10 2009
Ferruggia v. Sharp Electronics Corp., 2009 WL 1704262 (D.N.J., June 18, 2009) – The employer in this case terminated the plaintiff as part of a reduction in force (RIF), offering him a severance package on the condition that he execute a general release and waiver of claims. The plaintiff retained an attorney, who negotiated several modifications to the release. The plaintiff thereafter executed the release and received severance of approximately $100,000. He then filed a lawsuit against his employer for age discrimination under the Age Discrimination in Employment Act (ADEA). The employer argued the claim was barred by the release which the plaintiff signed voluntarily after consultation with counsel. Even though the employee signed the release (and collected the money), the district court nonetheless refused to dismiss the ADEA claim because, while the release complied with the Older Workers Benefit Protection Act (OWBPA) in certain regards, it did not contain all of the information required by the OWBPA, and therefore was invalid. For instance, the release did not identify the group of individuals affected by the RIF or the eligibility factors for the group. Further, while the release did list the ages of the employees eligible for the RIF, it did not delineate which of those employees were selected and which were not.

This case underscores the importance of always ensuring total compliance with the many technical details of the OWBPA whenever drafting releases for employees 40 years of age and older.

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Newsstand

Employee's alteration of healthcare provider's form may invalidate FMLA application

Ogletree Deakins
Maria Greco Danaher

USA
April 16 2009

The Family and Medical Leave Act (FMLA) entitles eligible employees to 12 weeks of leave during a 12-month period under certain circumstances which include a "serious medical condition." An employer is allowed, under the regulations associated with the FMLA, to require an employee to document his or her medical condition, and further may require the employee to submit certification of that condition from a health care provider.

Recently, the 7th U.S. Circuit Court of Appeals addressed a situation in which an employee altered her health care provider's certification to add an impairment that had not been diagnosed by that provider. In that case, the Court upheld the lower court's summary judgment in favor of the employer, finding that the employee's alteration invalidated the entire application. *Smith v. The Hope School*, 7th Cir., No. 08-2176, March 30, 2009.

Tanum Smith worked for The Hope School from May 2005 until September 2006. In her position, Smith worked with developmentally challenged children as a one-on-one instructional aide. During 2006, Smith was injured on two separate occasions: first in April, when she was pushed to the ground by a student who then struck and kicked her, and then in June, when she was hit in the mouth, after which Smith suffered neck pain. During the following months, Hope School attempted to work with Smith to place her in a position without student contact, consistent with restrictions instituted by Smith's doctor.

On August 22 or 23, however, Smith went the school's HR department to complain that her job assignment was "unsafe," and that she was leaving until a safe assignment could be found for her. At that point, Smith was informed that if she failed to appear for work on August 25 as scheduled, her absence would be considered as "unexcused," putting her job in jeopardy. However, on August 24, Smith left a phone message, asking for FMLA leave.

Smith then was provided with FMLA paperwork, and was told to complete it as soon as possible. Smith took the paperwork to her physician, who completed it that same day, although Smith did not pick up the forms until September 6. At that point, Smith added to her doctor's description of her condition the words: "plus previous depression," in spite of the fact that no doctor had ever diagnosed or treated Smith for that condition. In addition, she submitted a second form that her doctor had not filled out or signed, adding more information about her "depression." She then faxed the altered paperwork to the school. Because the school suspected that the certification had been altered, the school's HR department called the physician's office to ask about the form. Upon receiving confirmation that the form had been changed, the school contacted the Department of Labor, who advised them that they could deny Smith's request for leave, which they did. Smith was then disciplined for her absences from work, and ultimately was fired.

Smith then filed a lawsuit against Hope School, alleging that the school had interfered with her FMLA rights and had retaliated against her for requesting the leave. The lower court granted summary judgment in favor of the school, finding that Smith's alteration of the provider's certification invalidated the FMLA application, and that the school's decision to terminate Smith's employment for unexcused absences was appropriate in that circumstance. That decision was upheld on appeal by the Seventh Circuit.

FMLA may be denied to an employee who attempts to receive such leave fraudulently. The Smith decision is of note, however, because Smith actually had a valid basis for FMLA leave without the "plus previous depression" language. Therefore, the question reviewed and decided by the Seventh Circuit is whether an employer can deny FMLA leave to which an employee might otherwise be entitled because that person submitted false paperwork. According to the court, it can.

While this decision is one of which employers should be aware, employers also should be advised that the court emphasized the limited nature of the ruling, pointing out the "especially strong inference" that Smith had intentionally submitted false paperwork. The court specifically stated that it did not reach the question of whether more insignificant alterations, such as "correcting a typographical error or correcting or adding to a portion of the form with the knowledge and approval of a treating physician," would result in a similar ruling. This comment by the court adds a level of difficulty for employers, who now will have to review such circumstances on a case-by-case basis to determine whether each circumstance includes the "especially strong inference" of falsity evident in Smith's case.

News

DOL Releases Opinions on Reducing Hours for Salaried Employees
3/19/2009

In these difficult economic times, many employers are looking for ways to reduce labor costs without costing employees their jobs. One option commonly considered is a reduction in hours. For hourly employees, a reduction in hours can be easily achieved. Provided all relevant benefits plans and state laws are considered and satisfied, an employer can reduce the number of hours assigned to **hourly** employees and pay them accordingly.

Unfortunately, making reductions in salary paid to salaried exempt employees (based on a reduction in hours or any other reason) is not as straightforward. To qualify as exempt under the Fair Labor Standards Act (FLSA), an employee's position must satisfy several requirements. One of those requirements is that the employee be paid on a salaried basis. According to the regulations, this means that the employee receives "a predetermined amount ... which amount is not subject to reduction because of variations in the quality or quantity of the work performed." If an employer makes improper deductions from an exempt employee's "predetermined amount" based on the "quantity" of work performed, it runs the risk of losing the exemption for that employee and all others in the same job classification.

Over the past several months, the attorneys at Husch Blackwell Sanders have been advising clients on how to lawfully achieve these reductions. On Friday, March 6, 2009, the U.S. Department of Labor (DOL) issued several opinion letters that echo some of the approaches proposed by Husch Blackwell Sanders. (FLSA2009-18; FLSA2009-14; FLSA2009-2)

In summary, these DOL opinion letters endorse the following:

1. Employers may require mandatory time off in full-**week** increments. In this situation, provided the employees perform no work during the week, employers do not need to pay or replace the employees' salaries through any wage-replacement program, like a PTO bank.
2. Employers may require mandatory or "voluntary" time off in full- or partial-**day** increments **only** to the extent the salary is replaced through a wage-replacement program. In this situation, employers can force employees to use accrued time-off provided by a wage-

replacement program, even in increments of less than one workweek, and when operating requirements dictate (i.e., when business is "slow").

3. Employers may require a reduction of hours in a normal scheduled workweek (i.e., full-**day** increments), if the reductions are made according to a "fixed schedule" and not "day-to-day or week-to-week determinations of the operating requirements of the business." In this situation, employers do not need to pay or replace the employees' salaries through any wage-replacement program. **Caution**: Employers should consult with counsel before pursuing this option. While the practice is permissible under the regulations, and specifically endorsed in the DOL's FLSA2009-18 opinion letter, even slight factual variations could result in improper deductions.

Employers should also be aware of the effect that these types of reductions could have on certain work visas, like H-1B visas. If an employer has committed to sponsoring a foreign employee, the employer is obliged to notify the government of this type of change in the terms and conditions of employment before they become effective with respect to that employee. If an employer is considering making these types of labor reductions, it should consider the impact the reductions could have on its employees with work visas.

While the reductions described above constitute some of the available means to reduce hours and salary for exempt employees, other options are not covered in the recent opinion letters. For a full and reliable analysis on the best way to reduce hours and salary for exempt employees, we strongly recommend consultation with experienced employment counsel. Of course, though persuasive in many courts, the DOL's recent opinion letters do not hold the force of law. Court opinions examining these issues and relevant state laws must always be considered as well, further supporting the notion that counsel should be involved.

What This Means To You
These opinion letters provide added support for the advice already being given to clients by the Labor and Employment attorneys at Husch Blackwell Sanders. However, they only cover a few factual scenarios. Other factors may impact how an employer can lawfully reduce hours, and other methods can be preferable to deal with those factors. If your company is considering reducing hours for salaried exempt employees, consult with legal counsel prior to doing so to avoid the significant liability associated with wage and hour litigation, which has become one of the most common claims in employment litigation today.

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Association of Corporate Counsel

Newsstand

Supreme Court affirms arbitration for union member discrimination claims

Holland & Hart LLP
Alyssa Yatsko and Tobie Ha
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USA
April 20 2009

A sharply divided U.S. Supreme Court recently ruled that provisions of a collective bargaining agreement that clearly and unmistakably require union members to arbitrate age discrimination claims are enforceable as a matter of federal law. While the decision is unlikely to impact many employers, the ruling is the latest in a series of Supreme Court decisions finding arbitration to be a legitimate means of resolving employment disputes. But before for you jump to the conclusion that arbitration is the preferred method for resolving your workplace disputes, consider legislation afoot on Capitol Hill that would ban mandatory arbitration to resolve employment claims.

Background

Stephen Pyett, Michael Phillips and Thomas O'Connell worked as night watchmen at 14 Penn Plaza, a New York City office building owned and operated by 14 Penn Plaza, LLC. The three individuals were also members of the Service Employees International Union (SEIU) and covered by a collective bargaining agreement (CBA) between the SEIU and the Realty Advisory Board, a multi-employer bargaining association in which 14 Penn Plaza was a member. Under the CBA, union members were required to submit all employment claims – and specifically, discrimination claims under the Age Discrimination in Employment Act (ADEA) and other federal and state anti-discrimination statutes – to binding arbitration. The CBA added that arbitration shall be the "sole and exclusive remedy for violations" of federal and state anti-discrimination laws.

In August 2003, 14 Penn Plaza entered into an agreement with a security contractor, whose employees were also members of the SEIU, to provide licensed security guards for the office building. As a result, Pyett, Phillips and O'Connell were reassigned to jobs as porters and cleaners. The three claimed their reassignment cost them a loss of pay and emotional distress.

The SEIU filed grievances on behalf of Pyett, Phillips and O'Connell alleging that the reassignment violated the CBA and discriminated against the three on the basis of their age in violation of the ADEA. The SEIU proceeded to arbitration on the three individual's wage issues, but withdrew its request to arbitrate the three members' ADEA age discrimination claims. The watchmen then filed charges of discrimination with the Equal Employment Opportunity Commission, and after receiving their right to sue from the EEOC, they filed a lawsuit against 14 Penn Plaza alleging their reassignment amounted to age discrimination under the ADEA.

Based on the provision in the CBA requiring arbitration of discrimination claims, 14 Penn Plaza moved to dismiss the lawsuit and compel arbitration. The trial court, however, denied the motion, holding that the employees had the right to have their claims heard in court. The Second Circuit Court of Appeal affirmed the trial court's decision, ruling that under the U.S. Supreme Court's decision in *Alexander v. Gardiner-Denver Co.* 415 U.S. 36 (1974), CBAs cannot require union members to arbitrate their statutory discrimination claims.

The Decision

By a narrow 5-4 majority, the Supreme Court reversed the Second Circuit and found that the arbitration provision at issue was enforceable. Writing for the majority, Justice Clarence Thomas began his opinion by stating that an agreement between an employer and union to arbitrate discrimination claims is "no different from the many other decisions made by parties in designing grievance machinery" and is a "condition of employment" subject to mandatory under the National Labor Relations Act. Because a union will agree to the inclusion of an arbitration provision in a CBA in exchange for other concessions from the employer, courts are not free to interfere this bargained-for exchange, and the arbitration provision applicable to age discrimination claims "must be honored unless the ADEA itself removes this particular class of grievances from the [National Labor Relations Act's] broad sweep."

According to Thomas, nothing in the language or legislative history of ADEA precludes parties from resolving federal age discrimination claims through arbitration. Indeed, the Supreme Court previously held in its 1991 decision, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that where an individual employee and his employer have entered into an agreement to arbitrate all contractual and statutory employment claims, including claims under the ADEA, a court may close the courthouse door to the employee and compel the employee to submit his ADEA claim to arbitration. Because "nothing in

the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," Thomas concluded that there was no legal basis for failing to enforce a CBA's arbitration provision, which was freely negotiated by the union and the employer, and which clearly and unmistakably requires union members to arbitrate their age discrimination claims.

Justice Thomas also said that reliance on *Gardiner-Denver* to find the arbitration provision in this case to be unenforceable is misplaced. *Gardiner-Denver* involved a CBA that required arbitration of contractual claims but was silent as to whether statutory discrimination claims were also required to be arbitrated. Because the CBA in *Gardiner-Denver* did not clearly and unmistakably require union members to arbitrate their federal discrimination claims, the Supreme Court in *Gardiner-Denver* held that compulsory arbitration of union members' federal discrimination claim was not required. This case, wrote Thomas, differs from *Gardiner-Denver* insofar as the CBA covering Pyett, Phillips and O'Connell clearly and unmistakably requires them to arbitrate their discrimination claims, including claims under the ADEA.

While not explicitly overruling *Gardiner-Denver*, Justice Thomas levels several criticisms at the Supreme Court's 1974 decision. First, Thomas stated the Court in Gardiner-Denver erroneously assumed an agreement to arbitrate statutory discrimination claims was tantamount to a waiver of the employee's rights under those statutes. "The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the right to be free from workplace age discrimination," said Thomas. Rather, an agreement to arbitrate discrimination claims like those under ADEA "waives only the right to seek relief from a court in the first instance." In other words, employees lose no substantive rights by agreeing to have their discrimination claims submitted to arbitration and simply substitute an arbitral forum for a judicial one.

Thomas also takes issue with *Gardiner-Denver's* conclusion that arbitrators are not competent to decide statutory discrimination claims. According to Thomas, this timeworn mistrust of the arbitral process harbored by the Supreme Court in *Gardiner-Denver* has long since been abandoned by the Court and is out of step with the Court's more recent cases endorsing arbitration of federal discrimination disputes. "In light of the 'radical change, over two decades, in the Court's receptivity to arbitration,' ... reliance on any judicial decision littered with ... overt hostility to the enforcement of arbitration agreements would be ill advised," said Thomas.

Addressing the concern raised in *Gardiner-Denver* that if arbitration of statutory discrimination claims is allowed under a CBA, unions, who have exclusive control over the presentation of an individual's grievance, may subordinate the interests of the individual employee to the collective interests of the bargaining unit, Thomas stated that the subordination of individual interests to those of the majority is simply a trade-off that is at the heart of the National Labor Relations Act. Thomas added that individual members are adequately protected if the union fails to pursue their discrimination claims in arbitration, as they have the ability to bring a fair representation lawsuit against the union under such circumstances.

In two dissenting opinions, Justice John Paul Stevens and Justice David H. Souter stated that the issue presented by this case is controlled by Court's decision in Gardiner-Denver, and accused the majority of "subversion of precedent to the policy favoring arbitration." However, Justice Souther concludes that the majority opinion is likely to have little effect, because it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which as Souter notes "is usually the case." *14 Penn Plaza LLC et al. v. Pyett et al.*, No. 07-581 (April 1, 2009).

Arbitration under legislative attack

While this case is another example of the Supreme Court's endorsement of arbitration as a means of resolving employment disputes, the practical impact of the case may be limited. While most CBAs have antidiscrimination provisions, few specifically list federal discrimination statutes as subject to grievance and arbitration procedures and provide that arbitration is the sole and exclusive remedy for violations of such statutes. In order for statutory claims to be arbitrable, an arbitration provision in a CBA must reference the statutes to be covered by the arbitration provision and state clearly and unmistakably that claims under those statutes shall be subject to arbitration. If employers want to require their bargaining unit employees to submit to mandatory arbitration of their statutory employment claims, employers should be prepared to make big concessions to the unions in exchange for this provision in the CBA.

Employers should also be mindful that while the Supreme Court may endorse arbitration to resolve employment disputes, many in Congress do not. In February, Rep. Henry C. Johnson (D-GA) and 36 co-sponsors introduced the Arbitration Fairness Act of 2009 (H.R. 1020). If passed, the bill would, among other things, amend the Federal Arbitration Act to invalidate all pre-dispute arbitration agreements that require the arbitration of employment disputes or any conflict arising under any statute intended to protect civil rights. Some employers may remember that similar legislation was introduced in 2007, but the legislation never left the House floor. However, with the change in the administration, the Act may now have a better chance of passage. At the time of publication, HR 1020 has been referred to the House Committee on the Judiciary.

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Newsstand

Supreme Court's holding on arbitration may create a wedge issue for employee advocates

Hunton & Williams LLP
Gregory B. Robertson and Laura M. Franze

USA
April 30 2009

A recent decision by the U.S. Supreme Court has dramatically changed the legal landscape with regard to litigation of workplace discrimination claims by employees who are subject to a collective-bargaining agreement. On April 1, 2009, the Court held that a mandatory arbitration clause in a collective-bargaining agreement can bar litigation in court of bargaining unit members' claims under the Age Discrimination in Employment Act ("ADEA"). 14 *Penn Plaza LLC v. Pyett*, No. 107-581. Justice Thomas authored the majority opinion, which was joined by Chief Justice Roberts and Justices Alito, Kennedy and Scalia. Justice Souter authored a dissent, which was joined by Justices Breyer, Ginsberg and Stevens. Justice Stevens wrote a separate dissent.

This decision drastically modifies, if not overturns, more than 30 years of case law, suggesting that unions cannot negotiate away their members' rights to pursue individual discrimination claims in court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the seminal case for that line of authority, has been widely interpreted to preclude enforcement of mandatory arbitration in discrimination claims under federal statutes.

The decision in 14 *Penn Plaza* places arbitration of claims squarely among the terms and conditions of employment on which unions generally are authorized to negotiate on behalf of their members. It potentially places unions at odds with some of their members by subordinating individual rights to collective rights, and perhaps could drive a wedge between proponents of union organizing and proponents of individual employee rights.

Facts of the Case

The three plaintiffs in the district court proceedings were members of the Service Employees International Union ("Union"). The Union was a party to a collective-bargaining agreement with the Realty Advisory Board on Labor Relations, Inc. ("RAB"), a multi-employer bargaining association within the New York City real estate industry. A provision of the agreement required union members to submit discrimination claims to binding arbitration.

14 Penn Plaza LLC ("14 Penn Plaza") was a member of the RAB and owned and operated an office building located in New York City. The plaintiffs, who were employed by Temco Services Industries, Inc. ("Temco"), worked in the office building as night watchmen. In August 2003, 14 Penn Plaza contracted with a different outside security firm, and Temco reassigned the three employees to other positions, which they claimed resulted in less desirable work, loss of income and emotional distress.

At the employees' request, the Union filed a grievance alleging, in part, that the reassignments violated their rights under the collective-bargaining agreement and under the ADEA. The matter then proceeded to arbitration. After the initial proceeding, the Union withdrew the ADEA claim.

In May 2004, the three employees filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that Temco and 14 Penn Plaza violated their rights under the ADEA. The EEOC issued a "Right to Sue" notice approximately one month later, and the employees filed suit in the U.S. District Court for the Southern District of New York. In response, 14 Penn Plaza filed a motion to dismiss or, in the alternative, to compel arbitration of the ADEA claim. The district court denied the motions, concluding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed. Citing *Alexander v. Gardner-Denver Co.*, the court concluded that it could not compel arbitration of the ADEA claims because " 'a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." The court recognized that Gardner-Denver was at odds with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that an individual could agree to waive his or her own right to a federal forum in an age claim, but reconciled the decisions by holding that, while an individual could agree in advance to compulsory arbitration to resolve all potential claims (including statutory discrimination claims), a labor union could not agree to such a provision on behalf of its members.

The Majority Opinion

The Supreme Court reversed the Second Circuit's decision and concluded that examination of the ADEA and the National Labor Relations Act ("NLRA") resulted in "a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to ... the ADEA."

The Court first noted that the Union and the RAB had bargained in good faith that employment-related discrimination claims would be resolved through arbitration, and that this "freely negotiated term" constituted a condition of employment that is subject to mandatory bargaining. The Court then expanded on *Gilmer*'s finding that the ADEA did not expressly preclude arbitration, and concluded that "nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." As such, the Court could find "no legal basis ... to strike down the arbitration clause in this [collective-bargaining agreement] ... ."

The Court distinguished the *Gardner-Denver* line of cases on the basis that it did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. It rejected Gardner-Denver's general hostility toward arbitration of statutory discrimination claims on the grounds that it "rested on a misconceived view of arbitration that [the] Court has since abandoned." The Court clarified that an agreement to arbitrate a statutory discrimination claim is not tantamount to a waiver of any substantive right, and confirmed that arbitration is an appropriate vehicle to litigate statutory discrimination claims.

The Court declined to embrace any "judicial policy concern" that "in arbitration, as in the collective-bargaining process, a union may subordinate the interest of an individual employee to the collective interests of all employees." In the Court's view, Congress, not the courts, bears responsibility for balancing the interests of the individual and the bargaining unit, and can amend the ADEA and/or the NLRA as it sees fit. The Court further concluded that Congress has accounted for potential union conflicts of interest through the duty of fair representation imposed upon labor organizations.

The Court found that the employees had waived their argument that the collective-bargaining agreement did not "clearly and unmistakably require them to arbitrate their ADEA claims" by failing to raise it in the lower courts. The Court recognized the argument that the Union not only could preclude a federal lawsuit through negotiation but could also block presentation of a claim in arbitration through exercise of its role as a representative. However, because factual issues remained on that subject, the majority concluded that it would be inappropriate to decide whether the collective-bargaining agreement operated as a prospective waiver of the employees' substantive ADEA rights, as opposed to a forum waiver.

The Dissenting Opinions

Justice Souter's dissent criticizes the majority for failing to adhere to its holding in *Gardner-Denver*, which has been "unanimously described ... as raising a 'seemingly absolute prohibition of union waiver of employees' federal forum rights.' " The dissent also observes, however, that the majority decision "may have little effect" because "it explicitly reserves the question whether a [collective-bargaining agreement's] waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration." Because this is "usually the case," the dissent observes, the majority decision may have limited application.

Justice Stevens' dissent largely follows Justice Souter's analysis, but emphasizes his belief that the holding reflects a preference for dispute resolution through arbitration at the expense of stare decisis.

Guidance for Employers

Taken at face value, the decision in 14 *Penn Plaza* could result in a significant reduction in the amount of litigation against employers who are parties to collective-bargaining agreements that contain broad mandatory binding arbitration clauses. The decision, however, could prove to have narrow application, given that it leaves open the question whether a collective bargaining agreement's waiver of a judicial forum is enforceable when a union controls access to and presentation of employees' claims in arbitration.

Within the current political climate, this decision could spark action by Congress to clarify the ADEA, Title VII or other federal employment statutes to expressly preclude waiver of the right to federal jury trials through collective-bargaining agreements. However, that approach likely would require a public debate that might well highlight the tension between organized labor and individual employee rights. Advocates for individual rights likely would argue that unions should not be able to place the interests of the collective-bargaining unit over the interests of the individual in preserving the right to a jury trial on discrimination claims. Advocates for organized labor, on the other hand, might well argue that the mandatory subjects of collective bargaining include arbitration of any and all claims arising out of the employment relationship, and that mandatory arbitration may be key to negotiating higher wages and benefits.

In the meantime, employers can welcome the decision in 14 *Penn Plaza* as a strong statement that employers should not be subjected to double jeopardy for discrimination claims when they have negotiated in good faith for mandatory arbitration of disputes in their collective-bargaining agreements.

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Newsstand

Employers may require union employees to arbitrate statutory discrimination claims under the arbitration provision of a labor contract

Duane Morris LLP

USA
April 21 2009

In a 5-4 decision, the U.S. Supreme Court held in *14 Penn Plaza LLC et al., v. Pyett et al.*, 2009 U.S. LEXIS 2497 (U.S. Apr. 1, 2009) that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable as a matter of federal law. In other words, a collective bargaining agreement with an arbitration provision that is "clear" and "unmistakable" with regard to its inclusion of ADEA claims requires the employee to arbitrate the claim rather than litigate it in a judicial forum. This decision is likely to open the door for employers to substantially decrease the time expended, expense of and potential exposure from discrimination claims asserted by union workers, provided their negotiated arbitration provisions are carefully drafted.

Facts Considered by the Court

A group of night lobby watchmen ("Employees") who were members of the Service Employees International Union, Local 32BJ ("Union"), and employed by a maintenance service and cleaning contractor at 14 Penn Plaza ("Employer"), filed a claim of age discrimination after being reassigned to jobs as night porters and light duty cleaners in other locations of the building, which they considered to be less desirable and less lucrative than their former positions. The reassignment followed the Employer's engagement, with the Union's consent, of licensed security guards of an affiliated company to staff the lobby and entrances of its building. At the Employees' request, the Union filed a grievance challenging the reassignments on the grounds that they violated the collective bargaining agreement's ("CBA") ban on age discrimination and violated seniority and overtime rules. After failing to obtain relief on any of these claims, the Union requested arbitration under the CBA. Following the first hearing, the Union withdrew its claim that the reassignments were based upon age discrimination since it had consented to the Employer's employment of the new security personnel.

Thereafter, the Employees filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that the Employer had violated their rights under the ADEA. Upon receipt of a Dismissal and Notice of Rights from the EEOC stating that the evidence failed to indicate that a violation had occurred, they commenced an action under the ADEA in federal district court, wherein they also alleged a violation of the state and city human rights laws. The Employer, and the Realty Advisory Board ("RAB"), which represents employers in New York City's building service industry for bargaining purposes, immediately filed a motion to compel arbitration of their claims based upon the arbitration provision of the CBA. The CBA provision expressly prohibited discrimination on the basis of age and other protected characteristics and provided that all claims for violations of the discrimination statutes, each of which was expressly set forth within the arbitration clause, were to be resolved through arbitration as the sole and exclusive remedy, with the arbitrator to apply the appropriate law in rendering decisions based upon claims of discrimination. Both the district court and the U.S. Court of Appeals for the Second Circuit denied the motion to compel arbitration based upon the Supreme Court's 35-year-old decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974) and its progeny, which those courts interpreted as holding that an arbitration provision of a CBA "could not waive covered workers' rights to a judicial forum for causes of action created by Congress."

The Court's Analysis

In ruling that the Employees' age discrimination claims were mandatorily arbitrable under the CBA, the Court distinguished *Gardner-Denver*, explaining that the actual holding of the case was that an arbitration provision of a CBA will not require the arbitration of statutory claims where the arbitration provision fails to clearly and specifically reference the statutory claims being subject to arbitration. In Gardner-Denver, while the agreement prohibited discrimination based upon race, the arbitration provision did not expressly incorporate the litigation of Title VII claims within the confines of the arbitration provision and, instead, addressed claims arising only under the CBA or as a result of "trouble aris[ing] in the plant."

The Court explained that under the National Labor Relations Act ("NLRA"), the Union and the RAB/Employer had the right to bargain over mandatory terms and conditions of employment, which clearly includes arbitration. Since there is nothing in the ADEA that forbids parties from agreeing that age discrimination claims shall be resolved by arbitration, and since the Supreme Court has held in *Gilmer v. Interstate/Johnson Lane Corp.* that individuals may waive their right to litigate age discrimination claims in a judicial forum, it is not appropriate for the Court to judicially limit the parties' right to negotiate arbitration

agreements that include statutory claims; any such limitation should be imposed by the legislature.

The Court dismissed the Employees' argument that the arbitration clause here is outside of the permissible scope of the collective bargaining process because it affects the Employees' statutory non-economic rights. The Court explained that parties generally favor arbitration precisely because of the economics of dispute resolution and, as in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in return for other concessions from the employer.

The Court went on to distinguish the many other concerns expressed by the Court in *Gardner-Denver* about allowing the arbitration of statutory claims pursuant to the grievance and arbitration machinery of a CBA. As a preliminary matter, the Court held that these points (discussed below) were dicta, as the Gardner-Denver case turned on the fact that the arbitration clause in the CBA did not expressly and unmistakably include the arbitration of statutory claims. With regard to the specifics, the Court first observed that the *Gardner-Denver* Court erroneously assumed that an agreement to submit statutory claims to arbitration was tantamount to a waiver of the employee's statutory claims. Rather, such agreement was a limitation only on where the claim would be litigated. Likewise, the Court explained that an agreement to arbitrate statutory claims was not a "prospective" waiver of any substantive right, but only of the right to a judicial forum. This way of thinking was "pervaded by . . . 'the old judicial hostility to arbitration," which has been repeatedly disavowed with modern judicial thought and decisions.

Second, the Court dismissed the *Gardner-Denver* concern that a union may subordinate the interests of a discriminatee to the interests of the majority of the bargaining unit, noting this argument constitutes a "collateral attack" on the NLRA. However, the Court explained that this result does not give a union the right to discriminate against members on account of protected characteristics by failing to pursue their cases to arbitration. Any member so impacted can file a claim against the union for the breach of the duty of fair representation, which occurs when a union's conduct toward a member is "arbitrary, discriminatory, or in bad faith," including the failure to enforce an agreement's non-discrimination clause on behalf of older workers. In addition, a union is subject to liability under the ADEA if it discriminates against its members on the basis of age. In any event, the Court held that any policy determination that unions should not be responsible for arbitrating an employee's statutory claims should be made by legislature, not the courts.

Finally, the Court dismissed the argument raised by the Employees that the Union has the right to block arbitration of their claims because it controls the arbitration procedure. The Court held that this fact was contested and was not fully briefed to this or the lower courts, so it was not ripe for adjudication in this case.

What This Means for Employers

While the *14 Penn Plaza LLC* decision specifically addressed claims under the ADEA, its reasoning is very likely to apply to broad calls of discrimination claims under statutes such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, as well as claims under state and local discrimination statutes and common law. Employers who wish to avail themselves of arbitration as the means for dispute resolution for a wide range of claims that could be asserted by unionized employees via the collective bargaining process, may want to obtain the union's buy-in and ensure that the arbitration provision is drafted clearly and explicitly to cover the class of claims it wishes to have included. The arbitration provision should be drafted with care to ensure that employee substantive rights are preserved and that basic procedural due-process rights are intact to comply with the host of other arbitration-related precedent that the courts have established in determining whether a particular arbitration provision is enforceable.

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News

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Unions May Substitute Arbitration For Litigation Of Discrimination Claims

4/6/2009

The U.S. Supreme Court held that *clear* and *unmistakable* arbitration provisions in collective bargaining agreements requiring mandatory arbitration of statutory age discrimination claims are enforceable as a matter of federal law. See *14 Penn Plaza LLC v. Pyett*, No. 07-581, U.S. Supreme Court (April 1, 2009). The full text of the decision can be found here. This decision has great significance to employers who would like to expand the scope of enforceable arbitration clauses in collective bargaining agreements to include statutory discrimination claims.

Historically, unions could waive an employee's right to proceed in a judicial forum on a *contractual* discrimination claim, but could not waive an employee's right to proceed in a judicial forum on a *statutory* discrimination claim. Accordingly, employers in a union environment were typically faced with arbitration for an alleged contractual violation (e.g., for age discrimination), and litigation in court for an alleged statutory violation (e.g., for violation of the Age Discrimination in Employment Act [ADEA]), even though both claims were for the same alleged conduct. More recently, as courts have become friendlier toward arbitration, a conflict arose concerning whether a union actually could waive an employee's right to proceed with a statutory discrimination claim.

The *14 Penn Plaza* case has now decided this issue. In a 5-4 decision, the Court explained that a collective bargaining agreement which is freely negotiated in good faith easily qualifies as a "condition of employment," subject to mandatory bargaining under the National Labor Relations Act. As such, a union may agree to a provision that, if clear and unmistakable, requires mandatory arbitration of contractual and statutory age-discrimination claims in return for other concessions from the employer. There is nothing in the opinion to suggest that this holding will not apply to other federal statutory claims of discrimination.

What Does *14 Penn Plaza* Mean For Employers?

Unless Congress amends the ADEA (or other federal discrimination statutes) to prohibit the mandatory arbitration of discrimination claims, this is good news for employers. For now, employers may avoid defending against the same age (and likely other) discrimination allegations in multiple forums.

Although the employee may still pursue discrimination claims with the Equal Employment Opportunity Commission and National Labor Relations Board (which may then seek judicial intervention), the unionized employer may now, in many cases, avoid the courtroom and an unpredictable jury entirely. Because arbitration is less formal than federal court, it typically decreases the amount of time-consuming and expensive discovery involved, in addition to decreasing management time and company resources. In general, the quicker and more streamlined process of arbitration means faster, more cost-effective resolutions for employers.

Before employers may benefit, however, they must successfully negotiate in good faith with the union, a provision that clearly and unmistakably waives contractual and statutory discrimination claims. The provision at issue in *14 Penn Plaza* may be found here.

Proceed With Caution
As a result of procedural issues in the case, the precedential value of *14 Penn Plaza* may be limited. The Supreme Court assumed, but did not decide, that the arbitration provision in *14 Penn Plaza* was clear and unmistakable.

Finally, employers can expect to pay a price for the "other concessions" a union is likely to request in return for such a provision. In the wake of *14 Penn Plaza*, employers will meet resistance from unions regarding the negotiation of these provisions.

14 Penn Plaza is the most recent addition to the wave of activity surrounding unions and potential legislation. Husch Blackwell Sanders' employment lawyers will keep a watchful eye on how the Obama Administration responds to this decision.

What This Means To You
If your employees are or become unionized, consider carefully the scope of the arbitration clause contained in the collective bargaining agreement. Thanks to the U.S. Supreme Court, employers can now preclude discrimination claims from being raised in court.

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Labor & Employment Seminars
Employers face unprecedented exposure to workplace regulations and legal entanglement with employees. To help your company prepare for and prevent these challenges, Husch Blackwell Sanders invites you to attend one of our 2009 Labor & Employment Seminars, where our attorneys will discuss important and timely legal updates affecting employers and human resources professionals. Seminars take place on April 29 in Springfield, MO; May 6 in Peoria, IL; and May 27 in St. Louis, MO.

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Newsstand

Employer violates the National Labor Relations Act by selectively targeting union related e-mails

Vorys Sater Seymour and Pease LLP

USA

July 10 2009

The United States Court of Appeals in Washington, D.C., recently held that an employer committed an unfair labor practice by selectively enforcing its e-mail usage policy against an employee who sent union-related e-mails. The case, *Guard Publishing Company v. National Labor Relations Board*, is a reminder that e-mail policies must be carefully drafted and consistently enforced to avoid potential legal pitfalls.

The employer, a daily newspaper, claimed that the union-related e-mails violated its policy prohibiting e-mails "used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Despite this policy, the employer routinely allowed e-mails offering tickets for sporting events and requesting services such as dogwalking.

When the Union filed its initial charge with the NLRB, it argued that the National Labor Relations Act provided employees with a statutory right to use an employer's e-mail system for certain union-related purposes. The NLRB disagreed, holding that an employer may limit non-work-related use of its e-mail system so long as it does not discriminate against protected union activity.

The NLRB defined discriminatory treatment narrowly as the "unequal treatment of equals." Applying this standard, the NLRB held that, with the exception of one e-mail that was not a solicitation, the employer did not discriminate against union-related emails. The NLRB based this decision on the theory that the employer made a distinction between personal solicitations (e.g., "My car is for sale") and group/organization solicitations (e.g., "Girl Scout Cookies for sale"). The outcome would have been different had the employer previously allowed group/organization solicitations, only to take action when those group/ organization solicitations were unionrelated.

On appeal, the Court of Appeals held that the employer had in fact discriminated against protected union activity. The Court noted that the personal/group distinction relied on by the NLRB was not contained in the employer's e-mail policy. Nor was it discussed in the employee's disciplinary notice. In fact, the notice cautioned the employee against using the e-mail system for union/personal business.

Significantly, because the Union did not appeal the issue, the Court of Appeals did not address the NLRB's holding that an employer may limit non-work-related use of its e-mail system. However, that portion of the NLRB's holding may be revisited by the NLRB itself once President Obama's appointees to the NLRB are confirmed by the U.S. Senate.

Employers should review their solicitation-distribution and e-mail policies for clarity and should train managers on the proper and uniform enforcement of those policies.

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ACC Association of Corporate Counsel

Newsstand

Two conflicting federal circuit court decisions issued today call into question all NLRB opinions issued in the past year

Porter Wright Morris & Arthur LLP
Jamie LaPlante

USA
May 1 2009
As a result of two contradictory opinions issued today, over 300 decisions issued by the National Labor Relations Board (NLRB or "Board") in 2008 are potentially in jeopardy because, according to one federal circuit, they were issued by a two-member panel without the authority to issue binding opinions.

By way of background, the NLRB is a federal agency that administers the National Labor Relations Act (NLRA), which governs the relations between private employers and unions. It is made up of five members. Yet, the NLRA allows for the five-member Board to delegate power to issue rulings and opinions to a three-member panel. On December 28, 2007, the Board had only four members. On that date, the four-member Board voted to delegate all of its power to a three-member panel. Just three days later, the terms of two of the four members that made the vote to delegate expired, leaving only two remaining members. During all of 2008 and early 2009, the Board had three vacancies for which Congress and the President clashed on the nomination of replacement Board members. Yet the two-member panel issued over 300 published and unpublished opinions in the labor relations area, proceeding as a quorum of the three-member panel—with two of the three required members of the three-member panel to whom the Board delegated its power.

The U.S. Court of Appeals for the D.C. Circuit ruled today that those decisions were invalid because the Board, including the panel to whom it delegated its power, lacked authority to act without at least three members. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162, 08-1214 (D.C. Cir. May 1, 2009). In reaching this conclusion, the D.C. Circuit relied on a provision of the NLRA requiring the Board to have a quorum of the Board itself (i.e. three members) "at all times" in order to be able to act. The D.C. Circuit held that, in order for two members of a three-member panel to act as a quorum under the statute, the Board itself must have at least three members; otherwise, the panel's power is suspended along with the power of the Board itself. This decision invalidated all of the NLRB opinions issued in 2008 and early 2009.

The U.S. Court of Appeals for the Seventh Circuit reached the opposite conclusion in another decision issued today, *New Process Steel, L.P. v. NLRB*, Nos. 08-3517, 08-3518, 08-3709 & 08-3859 (7th Cir. May 1, 2009). It held that the opinions of the two remaining members were valid because the plain meaning of the statute permits the Board to delegate power to a three-member panel and then also permits a three-member panel to proceed as a quorum despite the absence of one of the members. The Seventh Circuit ignored the quorum requirement provision for the Board itself in its reasoning.

The First Circuit also reached this same conclusion in March 2009. See *Northeastern Land Servs. Ltd. d/b/a NLS Group v. NLRB*, No. 08-1878 (1st Cir. Mar. 13, 2009). The Second and Eighth Circuits also have pending cases on this same issue. Given the split in authority and the potential impact of these decisions, it is likely that the U.S. Supreme will weigh in on this issue. In the meantime, employers should proceed with caution in relying on NLRB opinions issued in 2008 and early 2009 in taking actions.
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News

Court Limits Enforcement of Non-Union Email Policy
7/9/2009

On July 7, 2009, the U.S. Court of Appeals for the D.C. Circuit determined that an employer violated the National Labor Relations Act by inconsistently enforcing an email use policy against union communications.

In this case, the Court reviewed a decision of the National Labor Relations Board (NLRB) regarding an unfair labor practice charge filed by the Eugene, Oregon Newspaper Guild. The Guild filed the charge when one of its members (who happened to be the union's president) was disciplined for using her employer's email system to send messages to colleagues regarding union business.

The employer, The Register-Guard, had in place a policy limiting the use of company-provided email to business-related purposes. The policy also specifically prohibited the use of the email system for solicitation or discussion of political causes or outside and non-job-related organizations. Over time, employees used the email system for personal use, including solicitation of personal items, such as for event tickets. Register-Guard management was aware of the personal use of the email system, but did not impose discipline for personal use of the email system prior to this instance.

After the employer disciplined the employee responsible for sending the email about union affairs, the union filed an unfair labor practice charge. The NLRB examined the manner in which the company enforced its email policy. Three instances of email usage were scrutinized. The first involved a message from the employee/union president entitled "Setting it Straight," which commented upon a prior union rally and, more specifically, the employer's warning that the rally would be attended by "anarchists." The Board ruled that the company violated the law when it disciplined the employee for using the email system to merely comment on union issues. The reasoning was that the company had never disciplined anyone previously for private email use, and doing so now was solely because of the union-related content of the email.

The second and third emails were union-related, but did not comment on the employer's characterizations of the union rally. One message urged employees to "wear green" to show unity during contract negotiations, and the other asked for volunteers to help at the union's entry in a local parade.

The NLRB upheld the discipline imposed for these email messages, concluding that the messages constituted "solicitation." The Board concluded that the policy did not allow solicitation for outside organizations. There was no evidence that the Register-Guard had previously allowed employees to solicit on behalf of outside organizations. Since the solicitation was on behalf of the union, and not personal, the Board concluded that the employer's discipline did not run afoul of the National Labor Relations Act.

The Court of Appeals agreed with the NLRB on the discipline imposed for the first email message. The Court held that, where an employer's no-solicitation policy for email usage is not regularly enforced, the employer violates the National Labor Relations Act when it chooses to enforce that policy related to union activity. Only the application of the policy was scrutinized. The key element, according to the D.C. Circuit, was the uneven enforcement of the email policy. The Court determined that the only instance where discipline occurred regarding the company email policy was in relation to union-related emails.

The Court disagreed with the Board on the second and third emails, however. In contrast to the Board, the Court determined that those emails did not constitute "solicitation." Accordingly, the Court concluded that the Register-Guard discriminated in violation of the law when it enforced its policy only in relation to emails having *union content*, and not in any other circumstance.

What This Means to You
This ruling should encourage employers to review both their email policies and the enforcement of those policies. With an organized workforce, email messages pertaining to union business or activity cannot be prohibited if other personal emails are permitted. At workplaces without union representation, the enforcement of a no-solicitation/no-distribution policy will be compromised (at least with respect to email communication of union activity) if email solicitations for other causes are tolerated or simply ignored by the employer.

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ACC Association of Corporate Counsel

Newsstand

First Apple, now Dell: IBM pursues a departing executive

Seyfarth Shaw LLP
Michael Elkon

USA
July 13 2009

In the wake of its ultimately successful efforts to obtain an injunction against former executive Mark Papermaster following Papermaster's move to Apple, IBM recently sought to enjoin David Johnson from joining Dell. Johnson, who was IBM's Vice President of Corporate Development, recently joined Dell as its Senior Vice President of Strategy. After conducting a preliminary injunction hearing, Judge Stephen Robinson of the U.S. District Court for the Southern District of New York denied IBM's motion for preliminary injunction.

Judge Robinson issued his ruling on June 26, 2009, 22 days after Judge Karas of the Southern District issued an order authorizing expedited discovery and permitting Johnson to work for Dell, subject to a restriction that he could not advise it regarding Dell or IBM strategy. Judge Karas had also required Johnson to supply his counsel with a daily log of his activities at Dell with "reasonable specificity," including the amount of time spent on the activities and the persons involved. The log was to be made available to IBM's counsel on request, if ordered by the Court.

Judge Robinson's primary reason for denying IBM's motion was a rather basic one: he found it unlikely that IBM could show that Johnson agreed to the non-compete provision upon which IBM based its claim. Johnson worked for IBM for 27 years, the last nine of which he directed IBM's mergers, acquisitions, and divestitures strategy. In 2005, IBM asked Johnson to sign a non-competition agreement as part of a company-wide effort to have senior executives do so. Johnson was reluctant to sign the agreement without researching his future with the company, so he took the creative step of signing the agreement ***on the signature line for IBM***. When IBM learned of Johnson's tactic, it sent him a blank agreement to execute. IBM's human resources department followed up with a number of calls and e-mails to ask Johnson to sign the agreement on the employee line. IBM did not execute the version of the agreement that Johnson signed on the IBM line, nor did it retain an original copy of the agreement. IBM also provided Johnson with annual equity award for 2005-08, despite the fact that entitlement to such awards in 2005 and 2006 was dependent on executing the non-compete agreement.

The Court found that IBM faced a "daunting, if not insurmountable, task" in establishing that Johnson signed his non-compete agreement. It stated that Johnson's conduct in not agreeing to the non-compete document by signing on IBM's signature line was ambiguous, thus exposing him to the risk that IBM would misunderstand his intent not to assent. However, when IBM asked Johnson to re-sign the agreement and he refused to do so, his statement of his intentions became unambiguous. IBM's subsequent efforts to induce Johnson to sign, as well as its general counsel's raised eyebrows when Johnson disclosed the HR department's efforts indicated that IBM did not believe that Johnson had executed the agreement. The Court further found that IBM's 2005 and 2006 equity awards to Johnson were not concurrent with his "signing" of his non-compete agreement. Finally, the Court rejected IBM's argument that Johnson had intended to mislead it, concluding that Johnson instead intended to buy himself more time to clarify his position at IBM. Of no small import was the Court's conclusion that Jonson was "an extremely credible and reasonable witness."

The Court also addressed IBM's claims regarding the hardship that it would suffer without injunctive relief. In that section, the Court shifted its focus from whether Johnson signed his non-compete agreement to whether Johnson possessed (and presumably would inevitably disclose) IBM trade secrets. The Court addressed *IBM v. Papermaster* directly. It cited the technical knowledge that Papermaster possessed regarding IBM microprocessors and concluded that Johnson's business knowledge was, in comparison, not clearly proprietary to IBM. Ultimately, the Court concluded that the balance of equities tipped away from IBM because Johnson's skill-set would erode if he were enjoined from working in the industry, as would his relationships with a "large personal network" of investment bankers, consulting groups, and chief information officers. Thus, Judge Robinson denied IBM's motion for preliminary injunction and vacated Judge Karas s June 4, 2009 order.

IBM appealed Judge Robinson's decision immediately. On June 29, 2009, the Second Circuit Court of Appeals reinstated Judge Karas's order placing restrictions on Johnson's work for Dell and establishing reporting requirements. The Court of Appeals intends to hear IBM's appeal on an expedited basis.

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Nondisclosure agreement found to fall short without an accompanying non-compete

Seyfarth Shaw LLP
Eddy Salcedo

USA
July 10 2009

In the back and forth battle between companies and former employees regarding the confidential nature of customer information, the United States District Court for the District of Nebraska has just issued a decision of note in *Softchoice Corp. v. MacKenzie*, 08-cv-00249. By the decision, the Court dismissed the action as against the defendant, finding that despite plaintiff's treatment of the information as secret, had plaintiff truly wished to protect the information it should have had defendant enter into a properly tailored covenant not to compete instead of only having him sign a nondisclosure agreement.

The action was brought by Softchoice against MacKenzie, a former employee, alleging the usual panoply of claims: breach of confidentiality, misappropriation of trade secrets and confidential business information, unfair competition and tortious interference with business relations. The confidential information was alleged to be customer contact information and pricing. MacKenzie had not signed a non-compete covenant, but had signed a nondisclosure agreement.

In dismissing the action, Judge Joseph F. Batailon found that:

"The plaintiff cannot succeed on its claims for breach of contract, misappropriation of trade secrets or unfair competition without a showing that the information he allegedly misappropriated was a trade secret ... MacKenzie has [] shown that he obtained the only information that could arguably be categorized as 'secret,' that is, pricing information, from the potential customers themselves, who freely shared the information with him in hopes of obtaining a lower price. MacKenzie has also shown that his suppliers shared this sort of information ..."

This segued into the Court's interpretation of the extent nondisclosure agreements will protect customer information:

"Softchoice, or its predecessor, could have limited MacKenzie's contact with his former customers, and consequently protected its pricing information, through a narrowly drawn, valid and enforceable covenant not to compete, but id did not do so. Softchoice cannot achieve by way of a nondisclosure agreement what it could not have obtained via a non-solicitation agreement ..."

It will be interesting to watch if any other courts pick up on Judge Batailon's interpretation of nondisclosure agreements.
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ACC Association of Corporate Counsel

POWERED BY LEXOLOGY Newsstand

Exercise caution when current employees sign noncompetes

Holland & Hart LLP
Christie McCall

USA
July 13 2009

The Colorado Court of Appeals recently issued a decision addressing the enforceability of noncompete agreements. The case is significant because for the first time, a Colorado court addresses the sufficiency of consideration for noncompete agreements signed after employment begins. The Colorado Court of Appeals has now made it clear that continued at-will employment alone is not sufficient consideration to support a noncompete agreement. In order to obtain an enforceable noncompete from an existing employee , you have to give something to the employee in exchange for the employee's promise not to compete.

Employee Reneges on Promise Not to Compete

In 2001, Tracy Horner began working for Lucht's Concrete Pumping (LCP) as the company's mountain division manager. LCP viewed Horner's position of mountain division manager as key to the success or failure of its mountain division, in part because of the relationships the manager was expected to develop with customers in the region. Two years after beginning work, LCP asked Horner to sign a noncompete agreement, which Horner did. Under the agreement, Horner promised that he would not compete against LCP for 12 months following his separation from employment with company. Horner, who was an at-will employee, did not receive any pay increase, promotion, or additional benefits from LCP in exchange for his promise not to compete.

Approximately a year after signing the noncompete agreement, Horner resigned from LCP, and three days later, he began working for one of LCP's competitors. LCP claimed that its mountain division customers followed Horner to his new employer, and as a result, LCP had to close its business in the region.

LCP then sued Horner for, among other things, breach of the noncompete agreement. However, the trial court ruled for Horner, finding that the noncompete was unenforceable because of a lack of consideration. In order to have enforceable contract, the law requires that "consideration" be given by the parties to the contract. "Consideration" is something of value given in exchange for getting something from another person. In the context of a noncompete agreement, in order for an employer to obtain an enforceable promise from its employee to refrain from competing against the employer after the employee separates from employment, the employer must give the employee something of value in exchange for the employee's promise. In this case, the trial court found LCP gave Horner nothing in exchange for Horner's promise not to compete; therefore, Horner's promise lacked consideration and the noncompete agreement was unenforceable.

Continued At-Will Employment Not Enough to Support a Noncompete

LCP appealed the trial court's decision to the Colorado Court of Appeals, arguing that LCP's continued employment of Horner as an at-will employee was sufficient consideration to support the noncompete. In other words, LCP's forbearance of its right to fire Horner at any time during his employment was sufficiently valuable to support the noncompete agreement. While acknowledging that courts in other states have held that continued at-will employment is sufficient consideration to support a noncompete, the Colorado Court of Appeals declined to follow those court decisions. The Court stated that while an employer may agree to continue an at-will employee's employment if the employee agrees to sign the covenant, nothing prevents the employer from discharging the employee at any future date." Thus, the employer's promise requires nothing more than what it already promised when the employer originally agreed to hire the employee on an at-will employment basis. In other words, a promise of continued employment at-will is not really a promise at all, since the employer's promise to employ the employee on an at-will basis is entirely optional.

In reaching its decision, the Court of Appeals distinguishes prior cases holding that continued at-will employment is sufficient consideration to support changes to employment policies and procedures. Those cases typically addressed changes in employee handbooks. It is common that such changes are not accompanied by additional compensation or any other form of consideration, yet they are enforced. The Court distinguished those situations on several grounds, including that such modifications deal with a grant of benefits to the employee, rather than restrictions on the employee, as is the case with a noncompete; the policy and procedure changes in those cases were offered to a group of employees, rather than addressed to an individual; and it is the employee seeking to enforce the employer's promise in those cases, rather than the employer seeking to enforce their own policy or procedure. Lucht's Concrete Pumping, Inc. v. Horner, Case

No. 08CA0936 (Colo. App. June 11, 2009).

Lessons Learned

Unless this decision is reversed by the Colorado Supreme Court, Colorado employers must now provide employees with some sort of additional consideration whenever an employee is asked to sign a noncompete agreement after the commencement of employment. Such consideration can be in the form of additional pay, a bonus, a promotion, additional duties and responsibilities, or another form of compensation. The key is to ensure that the consideration is viewed by the employee as extraordinary – in other words, something the employee would not have received without signing the noncompete.

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News

Mid-Year Immigration Compliance Update
7/22/2009

Revival of Administrative I-9 Audits
In April 2009, the Department of Homeland Security (DHS) announced that Immigration & Customs Enforcement (ICE) would shift away from large-scale raids and toward administrative investigations of employers. On July 1, 2009, ICE issued Notices of Inspection to over 650 employers requesting production of all I-9 forms and substantial amounts of employment-related information, all within three days. Going forward, ICE is expected to routinely utilize administrative I-9 audits to target an increased number of employers. This represents a sea-change in policy because only 503 of these notices were issued in all of 2008.

The administrative audits will focus on detecting the employment of unauthorized workers and other compliance issues, including "paperwork" compliance. Significant civil penalties are possible for employing unauthorized workers and even for paperwork violations. Debarment from federal contracts is possible for violations, as are criminal penalties against the employer, management and HR personnel. Employers that receive a Notice of Inspection may be required to produce extensive documentation within three days, to include: required I-9 forms, I-9 policies and training records, payroll tax records, Social Security "no-match" letters, independent contractor and subcontractor rosters, business entity documents, and business licenses.

If an employer has received a Notice of Inspection or any other immigration-related governmental inquiry, its representatives should contact legal counsel as soon as possible.

Update on the "Expiring" I-9 Form
The Department of Homeland Security has directed employers to continue using the current version of the I-9 Form, in spite of the form's June 30, 2009, expiration date. Employers should also be aware of two related I-9 resources. The government recently published an improved, updated 65-page manual to aid with the I-9 process. Additionally, the government encourages employers to make the Spanish-language version of the I-9 Form available as a reference to aid in proper completion of the English language form.

Abandonment of the Social Security "No-Match" Regulation
In August 2007, the Bush Administration finalized a controversial regulation that required an employer to take action if notified of a problem with an employee's Social Security Number. A coalition of unlikely allies, to include the U.S. Chamber of Commerce and the AFL-CIO, brought suit in federal court. Implementation of the regulation has been delayed for almost two years.

The Obama Administration recently announced it will abandon any efforts to implement this

regulation. While this change may benefit employees, this announcement is not great news for employers. ICE has and will continue to equate knowledge of a Social Security Number no-match with constructive knowledge that an employee is not authorized to work in the U.S. The abandonment of the regulation also eliminates the effectiveness of the "safe harbor" process employers could follow to minimize liability.

Prudent employers should continue to follow up on all Social Security "no-match" situations and document their efforts to resolve these problems. Each of these instances is fact-specific, so employers should consult with legal counsel to determine appropriate courses of action.

E-Verify Updates
The "E-Verify" program was created in 1996 and provides a means for employers to perform a secondary verification of a new employee's work authorization. Private employers are not required to use E-Verify, unless subject to certain requirements under federal or state law. If subject to E-Verify, the employer must, after completing a new hire's I-9 form, make an electronic verification check over the Internet to verify Social Security Administration account and immigration service data. Employers must verify all newly-hired employees in covered work locations and must make verification inquiries within three days of the hiring. In about 5% of cases, the E-Verify electronic query does not result in a confirmation and the system generates a "Tentative Nonconfirmation." The E-Verify employer must then work closely with the employee to attempt to resolve the problem. If unable to resolve the nonconfirmation, the employer must end the employment relationship. To participate in the system, E-Verify employers are required to waive Fourth Amendment rights and grant open access to immigration and employment records.

E-Verify can impact numerous aspects of an employer's business operations, including hiring practices, training and time-off policies, and terminations. For example, if a newly-hired employee does not initially clear the E-Verify system, an employer cannot withhold training or job assignments and must grant time-off to visit the local Social Security or immigration office. The government does not mandate that an employer pay for such absences, but advises that an E-Verify employer not engage in discriminatory practices with respect to time-off policies. Federal statutes attempt to provide blanket protection for an employer that must terminate the employment based upon a "Final Nonconfirmation," but the extent of such protection has not been tested in court.

Employers should be aware of two current issues relating to E-Verify.

Federal Contractor Regulation
In November 2008, the federal government finalized its regulation requiring certain federal contractors to utilize E-Verify. Implementation of the regulation has been delayed by a lawsuit filed in federal court by the U.S. Chamber of Commerce, the Society for Human Resource Management and others to enjoin the federal government from implementing this regulation. It is difficult to predict if and when the regulation will go into effect. Although the government has agreed to another delay until September 8, 2009, DHS Secretary Napolitano stated that the regulation will be fully implemented at that time. Additionally, members of Congress are attempting to hasten and expand the implementation of the regulation legislatively.

The regulation requires affected employers to use E-Verify for newly-hired employees and to re-verify existing employees providing services under the contract. **Affected contractors will be notified of specific requirements during the process of seeking or maintaining a qualifying federal contract and will have varying periods of time to implement the requirements of the regulation.**

The regulation generally covers prime contracts exceeding $100,000 in value; involving work performed in the U.S.; involving a performance period of 120 days or greater; and for "indefinite delivery/indefinite quantity" contracts with performance periods extending beyond

September 2009, if potential exists for additional, substantial business in the remaining period. The regulation also covers subcontracts of $3,000 or greater in value for commercial or non-commercial services performed in the U.S. and construction services.

At present, the law does not require private employers to utilize E-Verify or to re-verify existing employees due to federal contracting arrangements. If an employer will be subjected to the E-Verify mandate under this regulation, it will be notified by the government. In anticipation of this requirement, an employer's I-9 forms should all be completed accurately within the first three days of employment. Once that process is in order, an affected employer should be ready to create a network of personnel who will handle the additional burdens placed upon E-Verify employers. Affected employers should have ready access to the I-9 forms of all existing employees if required to perform reverifications for those who would provide services under a covered contract.

Data Mining & Enforcement
Effective June 22, 2009, the U.S. Department of Homeland Security officially implemented efforts to use database mining tools to conduct suspicionless searches of employers' electronic E-Verify records. DHS's Monitoring and Compliance Branch will use these tools to identify perceived patterns of non-compliance. DHS employees may then conduct on-site investigations or refer matters to Immigration & Customs Enforcement to conduct covert civil or criminal investigations.

If an employer has not yet adopted E-Verify, it should be mindful of law enforcement uses of the system if considering a voluntary election. An employer that has already used E-Verify should conduct a review of its electronic records to identify any patterns or specific instances of concern and make efforts to correct those deficiencies. Corrective action may include providing additional training to company personnel, case-by-case follow-up with specific individuals, or even restructuring an employer's E-Verify network of users to insure proper oversight.

State & Local Immigration Laws
Twenty-three states, including Missouri, Nebraska, Tennessee and Colorado, have enacted some form of law relating to the employment of unauthorized workers. These laws can significantly affect employers operating in multiple states. Many of these laws have their own investigative and enforcement procedures and impose a variety of state-level penalties, such as the loss of business licenses.

Missouri's immigration law, which went into effect on January 1, 2009, empowers the Attorney General to investigate complaints and prosecute Missouri businesses that are accused of employing unauthorized workers. The Attorney General can request that an employer produce copies of an employee's identity documents, which must be produced within 15 days. Failure to produce documents in a timely manner can result in the temporary loss of business licenses. To date, little has been reported of any investigative or enforcement activities in Missouri, but we anticipate that the Attorney General's office will actively enforce the state's law this fall.

One of the common requirements of state laws is an E-Verify mandate. Any employer operating in Arizona must use E-Verify in that state. Employers with over 100 employees in either Mississippi or South Carolina must use E-Verify within the respective state. Several other state laws require that employers awarded government contracts, grants, tax credits or loans use E-Verify.

Nebraska is the latest state to adopt a state immigration law with E-Verify requirements. Effective October 1, 2009, Nebraska state agencies and political subdivisions are required to use E-Verify. In addition, E-Verify use will be required of every state or local governmental contractor and subcontractor and any applicant for state tax incentives.

The following is a general list of states that require use of E-Verify under certain circumstances:

State	State Contracts	Local Govt. Contracts	State Govt. Funds	Local Govt. Funds
Arizona	X	X	X	X
Colorado	X	X	X	
Georgia	X	X		
Minnesota	X		X	
Mississippi	X	X		
Missouri	X	X	X	X
Nebraska (as of 10/1/09)	X	X	X	
Oklahoma	X	X		
Rhode Island	X			
South Carolina	X	X		
Utah	X	X		

Prior to taking action based upon a state or local law, an employer should work with legal counsel to determine whether or not a requirement to use E-Verify is triggered, or if an alternate, less intrusive means of compliance exists. For example, Colorado provides an alternate means of certification to government agencies in lieu of E-Verify use. Similarly, if an employer receives a state or local government immigration-related inquiry, its representatives should contact legal counsel as soon as possible.

Comprehensive Immigration Reform
President Obama and key members of Congress have identified comprehensive immigration reform as one of the top three legislative priorities for 2009. Senator Charles Schumer of New York stated that he expects an immigration bill to be ready by Labor Day. Many anticipate that the 2009 bill will include many of the provisions in a bill passed by the U.S. Senate in 2006.

Three key provisions in the bill could impact employers:

(a) the grant of legal status to unauthorized workers, who constitute 5% of the U.S. workforce
(b) mandatory use of E-Verify, or a similar system, for new **and** existing employees
(c) increased penalties for employing unauthorized workers

In addition, employers and their sponsored workers may get some relief from the long waits to complete the "green card" process, but the sponsorship of new foreign workers could also become more difficult.

What This Means to You
It is uncertain if a comprehensive immigration reform bill will pass this year or be delayed until 2010 or beyond. If the government ratchets up enforcement without granting legal status to unauthorized workers, employers will bear much of the burden of identifying the millions of unauthorized workers and then terminating their employment. Employers should ensure I-9 processes and records are in order and be prepared for more change.

Employers have much at stake and should consider communicating with members of Congress about the potential impact of the immigration reform debate.

Contact Info
Husch Blackwell attorneys have represented a number of clients in ICE investigations and enforcement actions and are able to provide a unique level of service in this area. We have also assisted clients with the development and implementation of multi-state compliance plans, training for management and key employees, and self-audits of I-9 records to minimize immigration-related risks and liabilities.

If you have any questions, please contact one of our Immigration attorneys within the Labor & Employment department:

Tony Weigel - 816.983.8242
Toni Blackwood - 816.983.8152

Update on Labor and Employment Law Developments

Reference Materials

Reference Materials Provided Courtesy of ACC and Husch Blackwell Sanders regarding various cases discussed in presentation

Cases Discussed:

- *Ricci v. DeStefano,* 129 S.Ct. 2658 (2009)
- *EEOC v. Central Wholesalers, Inc.*, 2009 WL 2152348 (4th Cir. 2009)
- *DiPasquale v. State of New Jersey*, 2009 WL 1686186 (App. Div. 2009)
- *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008)
- *EEOC v. Aldi, Inc.,* 2008 WL 5429624 (W.D. Pa. March 28, 2008)
- *Billue v. Praxair*, 2008 WL 4950991 (2d Cir. 2008)
- *Holocomb v. Iona College*, 521 F.3d 130 **(**2d Cir. 2008)
- *Drum v. Leeson Electric Corp.,* 565 F.3d 1071 (8th Cir. 2009)
- *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009)
- *Ferruggia v. Sharp Electronics Corp.*, 2009 WL 1704262 (D.N.J. 2009)
- *Marino v. Adamar of New Jersey*, 2009 WL 260799 (D.N.J. 2009)
- *Madden v. Rolls Royce Corporation,* 563 F.3d 636 (7th Cir. 2009)
- *Iverson v. City of Shawnee, Kansas,* 2009 WL 1678195 (10th Cir. 2009)

- *Lockett v. Choice Hotels Int'l, Inc.*, No. CV 797-T-24, 2008 U.S. Dist. LEXIS 50927 (M.D. Fla. 2008)
- *Thompson v. North American Stainless*, 567 F.3d 804 (6th Cir. 2009)
- *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 08-2820 (7th Cir. June 29, 2009)
- *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009)
- *14 Penn Plaza LLC et al. v Pyett et al.,* 129 S.Ct. 1456 (2009)
- *Williams v. Mohawk Industries*, 568 F.3d 1350 (11th Cir. 2009)
- *Brady v. Wal-Mart Stores, Inc.,* 531 F.3d 127 (2d Cir. 2008)
- *Bryant v. Dollar General Corp.,* 538 F.3d 394 (6th Cir. 2008)
- *Smith v. The Hope School,* 560 F.3d 694 (7th Cir. 2009)
- *Richards v. Johnson & Johnson, Inc.*, 2009 WL 1562952 (D.N.J., June 2, 2009)
- *Solis v. Partners HealthCare Systems Inc., et al*; Civil Action Number: 1:09-CV-10666
- *Stengart v. Loving Care Agency, Inc. et al.,* No. A-3506-08T1 (N.J. App. Ct. *June 26*, 2009)
- *Softchoice Corp. v. MacKenzie*, 2009 WL 2003226 (D. Neb. 2009)
- *IBM v. Johnson,* 7:09-cv-04826-SCR-LMS (S.D.N.Y. 2009)—on appeal to 2d Cir.
- *Lucht's Concrete Pumping, Inc. v. Horner,* 2009 WL 1621306 (Colo. App. 2009)

ACC Extras

Supplemental resources available on www.acc.com

DOL Guidance on the Proper Classification of Workers as Independent Contractors or Employees.
Quick Reference. May 2009
http://www.acc.com/legalresources/resource.cfm?show=234603

Employment Law of In-House Counsel.
Program Material. May 2009
http://www.acc.com/legalresources/resource.cfm?show=358104

General Counsel Executive Summary of Employment Law in the 50 States (Worklaw).
InfoPak Update. September 2009
http://www.acc.com/infopaks

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.