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A REVIEW OF THE SUPREME COURT'S 2008-2009 TERM

Labor and employment-related cases figured prominently in the United States Supreme Court's recently concluded 2008-2009 term. The Court's conservative Justices continued to play a dominant role, with Justice Kennedy often casting the deciding vote. This trend will likely continue at least through the next term, despite the recent appointment of Justice Sonia Sotomayor to replace retiring Justice David Souter.

During the 2008-2009 term, the Court took the following action:

- Considered whether an employer's well-intentioned decision to disregard promotional test results and avoid claims of disparate impact discrimination violated Title VII;
- Held that "mixed motive" jury instructions applicable to cases arising under Title VII may not be given in discrimination cases pursued under the ADEA;
- Found that a pension plan qualified as a *bona fide* seniority system and did not violate the Pregnancy Discrimination Act by giving less credit for maternity leave taken before that law took effect than for other medical leave in calculating pension benefits;
- Determined that Title VII prohibits retaliation against employees who participate in an employer's harassment investigation;
- Held that a collective bargaining agreement can waive employee rights under the Age Discrimination in Employment Act ("ADEA");
- Found that a local union's charge of litigation fees to nonmember employees was constitutional;
- Addressed the constitutionality of a state law that prohibited the use of union dues deducted from public employees' paychecks for political purposes; and
- Adhered to the "plan documents" rule under ERISA requiring that plan administrators follow the express language of plan documents in all but a very few narrowly defined circumstances.

The following review summarizes these decisions and analyzes their likely impact on employers. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

Franczek Radelet P.C. represents management in all aspects of labor and employment law and employee benefits issues. The firm represents employers nationwide, with over 50 attorneys who are prepared to address specific questions and concerns regarding the impact of these recent Supreme Court decisions on your workplace, as well as any other labor or employment issue.

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Title VII Violated when City Rejected Test Results to Avoid Disparate Impact Claims

In what was certainly one of the most publicly-discussed decisions of the term, the Court held in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), that the City of New Haven, Connecticut violated Title VII when it disregarded the results of a firefighter promotional examination after white candidates scored significantly higher than minority candidates.

The Supreme Court has long held that Title VII prohibits both intentional race discrimination (often called “disparate treatment”) and facially neutral employment practices that have a disparate impact upon members of a group protected by Title VII. In 2003, the City of New Haven administered examinations to 118 firefighters seeking promotion to the ranks of captain and lieutenant. The examination results were to be used to select candidates for promotion over the next two year period. However, white candidates scored significantly better on the test than their minority counterparts, and the pass rates for minority candidates fell well below the 80% standard set by the Equal Employment Opportunity Commission as the “rule of thumb” for identifying unlawful disparate impact.

Several minority firefighters threatened a disparate impact lawsuit if the City based its promotion decisions on the tests, while others who stood to be promoted based upon the test results threatened to sue for intentional discrimination if the City threw out the test based upon the statistical racial disparity. Ultimately, the City opted to start over, discarding the scores and deferring all promotions until a new assessment process could be designed and implemented. In response, a group of white and Hispanic firefighters who likely would have been promoted based upon their performance on the test sued. The City defended its actions, arguing that they were not based upon race, but upon the City’s good faith belief that using the racially-skewed test results as a basis for promotion decisions would subject the City to liability under a disparate impact theory.

In a 5-4 decision written by Justice Kennedy, the Court recognized that the firefighter tests presented a conflict between Title VII’s ban on intentional race discrimination and its prohibition on employment practices that unintentionally, but disproportionately, affect protected groups. The Court determined that the City’s decision to disregard the test results, even if well-intentioned, amounted to intentional race discrimination because that decision was indisputably based upon the racial breakdown of the test results. Simply put, the Court held that fear of disparate impact claims in itself is not a justification for racial discrimination.

At the same time, however, the Court rejected the firefighters’ argument that avoiding unintentional discrimination would never justify intentional discrimination under Title VII. Instead, the Court subscribed to earlier cases arising under the Fourteenth Amendment’s Equal Protection Clause, which held that governmental entities can take actions that are themselves based on race for the purpose of remedying past racial discrimination as long as there is a “strong basis in evidence” that the remedial actions are necessary. Applying this standard to Title VII,

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the Court held that “before an employer can engage in intentional discrimination for the purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. In the City of New Haven’s case, the Court found that the City had not satisfied this “strong basis in evidence” standard, because the promotional examinations were carefully crafted to avoid any undue racial disparity and to ensure that they were job-related.

In a dissent joined by Justices Souter, Stevens and Breyer, Justice Ginsberg argued that the majority misread Title VII’s prohibitions on intentional discrimination and disparate impact as conflicting, rather than complimentary, directives. According to the dissent, an employer that rejects employee selection criteria that operate to the disadvantage of minority groups based upon reasonable doubts about their reliability can hardly be held to have engaged in discrimination because of race, so long as the employer has good cause to believe that the criteria would not withstand examination for business necessity. The dissent also argued that the majority erred in applying its new “strong basis in evidence” standard to the City, rather than remanding the case to allow a lower court to apply the newly-formulated rule. Further, the dissenters maintained that the City amply demonstrated that it had good cause to believe that the test results might be found to violate Title VII, as there were significant questions about the validity of the tests, and allegations of other disparities, such as white firefighters receiving earlier access to study materials than minority firefighters.

In a brief concurring opinion, Justice Scalia wrote that the Court’s decision “merely postpones the evil day” on which the Court will have to confront the question of whether, or to what extent, the disparate impact provisions of Title VII are consistent with the Constitution’s guarantee of equal protection. Justice Scalia noted that Title VII not only permits, but indeed requires, race-conscious decision-making when a disparate impact violation would otherwise result, a result he finds inconsistent with the guarantee of equal protection, which prohibits the federal government from discriminating on the basis of race. While Justice Scalia’s concurring opinion will likely be viewed by some as an invitation to further challenge the constitutionality of disparate impact claims, the Court’s balance may have to shift further to the right – unlikely, at least under the present administration – for such a challenge to succeed.

Court Nixes “Mixed Motive” Instructions in Age Discrimination Cases

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Court held that “mixed motive” jury instructions applicable to cases arising under Title VII may not be given in discrimination cases pursued under the Age Discrimination in Employment Act (“ADEA”).

In general, “mixed motive” cases are those cases where the plaintiff claims that an adverse employment action was motivated by both permissible factors and illegal discrimination. Ordinarily, the plaintiff in an employment discrimination case has the burden of proving that the employer’s actions were motivated by illegal factors, such as race or sex. However, the Court has held that when a plaintiff shows that discrimination made illegal by Title VII was a “motivating factor” in the employer’s decision, the employer is liable unless it can prove that it would have taken the same action regardless of the employee’s race, sex, or other protected status. Many courts, including the lower court in *Gross*, concluded that this logic also applied to “mixed motive” cases arising under federal employment discrimination statutes other than Title



VII – like the ADEA.

In a 5-4 opinion authored by Justice Thomas, the Court disagreed, finding that the mixed-motive framework does not apply to ADEA claims at all. In so doing, the Court highlighted the differences between Title VII, which had been amended in 1991 to specifically prohibit employment actions for which membership in a protected class was a “motivating factor,” and the ADEA, which was not similarly amended. Rather, the ADEA simply prohibits discrimination “because of” age, and the Court reasoned that an adverse employment action is taken “because of” an employee’s age only where the action would not have occurred but for the employee’s age. As such, the Court determined that it is not sufficient for an ADEA plaintiff to show that age was a “motivating,” though not exclusive, factor in a challenged employment action.

In dissent, Justices Souter, Ginsberg, Breyer and Stevens severely criticized the majority opinion, observing that the language in Title VII and the ADEA was similar, and that the majority had demonstrated its “utter disregard” both for Court precedent and Congressional intent as expressed in Title VII and the ADEA’s statutory language.

Company’s Pension Plan Qualified as Bona Fide Seniority System and Did Not Violate the Pregnancy Discrimination Act

In *AT&T Corp. v. Hulteen*, 129 S. Ct. 162 (2009), the Court ruled that AT&T did not violate the Pregnancy Discrimination Act (“PDA”) by giving less credit for maternity leave taken before the PDA took effect than for other medical leave in calculating pension benefits.

Under AT&T’s pension plan, employees’ benefits are calculated according to an employee’s term of employment, less any uncredited leave time. During the 1960s and throughout the 1970s, employees on “disability” leave received full service credit for the entire period of their absences, whereas employees who took “personal” leave received a maximum service credit of thirty (30) days. Under the plan, leave for a pregnancy was considered personal leave. In 1977, AT&T changed this practice when it adopted a Maternity Payment Plan (“MPP”), under which pregnant employees could receive disability credits and service credits for up to six weeks of leave. Absences beyond six weeks were treated as personal leave, with no further benefits or credits. Employees who remained on disability leave unrelated to pregnancy continued to receive full service credit for the duration of their absences.

In 1976, the Court held in *General Electric Co. v. Gilbert* that differential treatment of pregnancy leave was not illegal under Title VII, as the law was initially enacted. In 1978, Congress responded to *Gilbert* by enacting the PDA, which amended Title VII and made it illegal to treat pregnancy-related conditions less favorably than other medical conditions. AT&T thereafter replaced the MPP with a new plan providing equivalent benefits for pregnancy and non-pregnancy related disability leave. However, it did not make any retroactive adjustments to the service credit calculations for women who had taken leave prior to enactment of the PDA.

In the case before the Supreme Court, four female employees who took pregnancy-related disability leave prior to passage of the PDA sued, alleging that AT&T improperly calculated their pension benefits by failing to give them equal credit for their leave as that extended to employees on non-pregnancy disability leave.



In a 7-2 decision authored by Justice Souter, the Court noted that under Section 703(h) of Title VII, it is not an unlawful employment practice for an employer to apply different standards of compensation according to a bona fide seniority system so long as such differences are not the result of an intention to discriminate because of sex. The Court held that AT&T's pension system qualified as a bona fide seniority system because, although it perpetuated the effects of pre-PDA pregnancy leave policies, it did not itself contain any discriminatory terms. The majority also rejected the plaintiffs' argument that the recently-enacted Lily Ledbetter Fair Pay Act applied to their claim. That statute provides that, for purposes of Title VII, the ADEA and the ADA, an unlawful employment action occurs when an employee is affected by the application of a discriminatory compensation decision or other practice. However, the Court found this legislation inapplicable in *AT&T v. Hulteen* because AT&T's pregnancy leave policies were lawful at the time they were applied to the plaintiffs.

Justices Breyer and Ginsburg dissented, finding that AT&T committed a current violation of the PDA when it relied upon the pre-PDA policy to calculate pension benefits for the four plaintiffs.

Title VII Prohibits Retaliation Against Employees for Participating in Employer's Harassment Investigation

In *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009), the Court ruled that Title VII prohibits retaliation against an employee for disclosing a supervisor's alleged sexual harassment in response to the employer's internal investigation.

The plaintiff was a thirty-year employee of the defendant employer, which suspended and later fired her for allegedly mishandling public funds. Shortly before her termination, the employer questioned plaintiff as part of an internal investigation of sexual harassment allegedly committed by its human resources director. In response, plaintiff stated that the director had engaged in inappropriate sexual conduct towards her. Following her termination, the plaintiff filed a charge of discrimination with the EEOC and later sued, alleging that she was fired in retaliation for cooperating with the employer's internal investigation. The lower courts found that because plaintiff was merely responding to questions in the course of an already-pending harassment investigation, she had not actively "opposed" unlawful conduct under Title VII, and thus her responses were not "protected activity" under Title VII's anti-retaliation provision.

In a unanimous decision, the Court reversed, finding that "opposition" under Title VII has a broad meaning, and extends to conduct such as refusing a supervisor's order to fire someone for discriminatory reasons, or, as in plaintiff's case, disclosing sexual harassment in response to an employer's inquiries. In a concurring opinion, Justice Alito noted that the majority opinion could be read to extend Title VII protection to an employee's "silent opposition" to discrimination, or to informal "water cooler" discussions with co-workers, a result that he did not endorse.

Collective Bargaining Agreements Can Waive Employee Rights Under the ADEA

In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), the Court held that a collective



bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act (“ADEA”) is enforceable. In this case, a group of union-represented employees filed grievances under their collective bargaining agreement, arguing in part that their work assignments had been unlawfully changed because of their respective ages. After the union withdrew the age discrimination claims from arbitration, the employees filed suit in district court alleging that their employer’s conduct violated the ADEA. The employer moved to compel arbitration of these claims, which was rejected on the basis that a collective bargaining agreement could not waive employees’ rights to a judicial forum for causes of action created by Congress.

In a 5-4 opinion authored by Justice Thomas, the Court reversed, upholding the collective bargaining agreement’s requirement that the employees must arbitrate their age discrimination claims. The Court initially noted that, as the employees’ exclusive representative, the union enjoyed broad authority in the negotiation and administration of the contract under the National Labor Relations Act. This particular collective bargaining agreement provided that employment-related discrimination claims, including those arising under the ADEA, would be resolved in arbitration. Specifically, the parties agreed that, “[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures. . . .” According to the Court, this freely negotiated term qualified as a mandatory subject of bargaining, which must be honored unless the ADEA precluded the arbitration of claims brought under the statute. Since ADEA claims can be arbitrated, the Court found no legal basis upon which to strike down the arbitration clause.

Although 14 Penn Plaza LLC is largely viewed as a management victory, it is well established that waiver language in a collective bargaining agreement must be clear and unmistakable for a valid waiver to be found. A generic non-discrimination clause likely is insufficient to operate as waiver of a statutory discrimination claim.

Labor Union’s Charge of Litigation Fees to Non-Member Employees is Constitutional

In *Locke v. Karass*, 129 S. Ct. 846 (2009), the Court considered whether a state can require public employees who are not union members, but who are nonetheless included in a bargaining unit represented by the union, to pay fees for litigation expenses. In this case, the local union had a collective bargaining agreement with the State that required nonmember employees whom the union represented to pay a service fee. That fee, in turn, included a charge for litigation activities, some of which did not directly benefit the local union, but rather benefited other local unions or the local union’s national parent organization. Several nonmembers who were required to pay this fee argued that it violated the First Amendment.

In a unanimous ruling, the Supreme Court held that the fee was constitutional. It noted that, in general, the First Amendment permits the government to require both public and private sector employees who do not wish to join a union that has been designated as their exclusive bargaining representative to pay that union a service fee as a condition of their continued



employment. Throughout the years, the Court has considered the constitutionality of various elements of those fees, finding that, while the local union could charge nonmembers for activities directly related to collective bargaining, it could not charge them for political or ideological activities. In *Locke*, the Court considered for the first time the propriety of charging national litigation expenses as part of those fees.

Consistent with its precedent, the Court held that the costs of litigation were chargeable provided they met the relevant standards for charging other national expenditures: the subject matter of the national litigation must be related to collective bargaining, and the arrangement must be reciprocal. Applying that standard, the Court found that the litigation activities for which the local union charged nonmembers concerned only those aspects of collective bargaining or other matters that the courts have held chargeable. The litigation fees also were reciprocal in nature, as the payment of the fees gave the local unions general access to the national's financial resources, compiled via contributions from various local unions, which would not otherwise be available to them.

Ban on Political Payroll Deductions by Local Government Does Not Violate First Amendment

In *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009), the Court considered the constitutionality of the Voluntary Contributions Act, an Idaho law that prohibited payroll deductions for political purposes. Under that statute, public employees could elect to have a portion of their wages deducted by their employers and remitted to their unions to pay union dues. However, they could not have any portion deducted and remitted to a union political action committee. Unions that represented public employees in Idaho challenged the law, arguing that it violated their First Amendment right of free speech.

The Court rejected this argument in a 6-3 decision authored by Chief Justice Roberts. Although the First Amendment prohibits government from abridging the freedom of speech, the Court noted that it does not require that government assist others in funding the expression of particular ideas or speech, including political speech. In this context, the Court found that the Idaho law did not restrict the Unions' political speech – rather, the law simply declined to promote that speech through the use of political payroll deductions. The Court deemed this decision eminently reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. The Court concluded that this interest extends to all public employers at all levels of government, irrespective of whether they are State or local governmental entities.

In dissent, Justice Stevens and Justice Souter found that the Idaho legislation constituted an unlawful content-based restriction on speech, as they found that the statute focused exclusively on unions and was intended to target union political activity.

Court Adheres to “Plan Documents” Rule Under ERISA

In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009), the Court unanimously ruled that the ex-wife of a retirement plan participant, who was still named as the beneficiary at the time of the participant's death, was entitled to the benefits of the plan even though she had signed a divorce decree waiving her interest in the

plan's benefits. The Court adhered to the "plan documents" rule under ERISA, which requires plan administrators to follow the express language of the plan documents in all but a few narrowly defined circumstances.

In this instance, the Court determined that the plan administrator was not required to honor the divorce decree waiving the ex-wife's interest in the plan's benefits because the plan administrator was required under ERISA to pay benefits to the participant's named beneficiary. When the participant married, he designated his wife as the beneficiary; however, following their divorce, the participant never executed any documents removing his ex-wife as his plan beneficiary. Under ERISA, plan administrators must act in accordance with the documents and instruments governing the plan, including the beneficiary designation.

This decision reinforces several key principles for plan administrators and participants alike – namely, that participants must be careful to revise promptly their beneficiary designations as they experience life changes, and that plan administrators should carefully monitor current beneficiary designations in their files and always comply with the plan documents.

Looking Ahead: The 2009 –2010 Term

The Court will open its 2009-2010 term on October 5, 2009. The Court has already selected several labor and employment cases that it will hear during the next term:

- *Granite Rock Co. v. Int'l Bhd. of Teamsters*: The Court will consider (a) whether federal courts can determine in the first instance the existence of a valid collective bargaining agreement and (b) whether Section 301(a) of the Labor Management Relations Act provides an employer with a cause of action against an international union for allegedly interfering with the employer's collective bargaining agreement with a local union affiliated with the same international.
- *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*: The Court will consider whether arbitration of class claims can be required when a contractual arbitration provision does not expressly address class action arbitrations.
- *Conkright v. Frommert*: The Court will consider whether federal courts have an obligation to defer to ERISA plan administrators' interpretations of their plans if the administrators arrive at their interpretations outside the context of an administrative claim for benefits, and whether federal courts have "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

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