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Federal Law Update (2009): What You Need to Know

By Kristin Nealey Meier

Federal Employment Litigation Statistics

Cases Filed in Federal Court

Twelve-Month Period	Number of Employment Discrimination Cases Filed in these 12 Months
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/31/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 12/31/07)	13,107

There has been a 45.8% decline since 1997 in the number of new fair-employment cases filed in Federal district courts.

EEOC Charges

Category	FY 2007	FY 2008	Percent Change
Total charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retaliation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%
Age	19,103	24,582	28.7%
Disability	17,734	19,453	9.7%
National Origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal Pay Act	818	954	16.6%

U.S. SUPREME COURT

Answering questions during employer's internal investigation is protected against retaliation

During a school district's investigation into rumors of sexual harassment by employee Hughes, petitioner Crawford reported that Hughes had sexually harassed her. The school district did not take action against Hughes, but fired Crawford for alleged embezzlement. Crawford filed suit, claiming that the school district was retaliating for her report of Hughes's behavior, in violation of 42 U. S. C. §2000e-3(a), which makes it unlawful "for an employer to discriminate against any ... employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter" (opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (participation clause). *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S.Ct. 846 (Decided January 26, 2009).

The lower court granted summary judgment to the school district, and the Sixth Circuit affirmed, holding that the opposition clause demanded "active, consistent" opposing activities, whereas Crawford had not initiated any complaint prior to the investigation and the participation clause did not cover the school district's internal investigation because it was not conducted pursuant to a Title VII charge pending with the Equal Employment Opportunity Commission.

A unanimous court overruled the lower courts and held that the anti-retaliation provision protects an employee who speaks out about discrimination during an investigation rather than on her own initiative. The school district argued that employers would be less likely to raise questions about possible discrimination if a retaliation charge is easy to raise when things go badly for an employee who responds to inquiries. The Court disagreed and stated that employers have a strong inducement to ferret out and put a stop to discriminatory activities because of previous cases that hold an employer liable for a supervisor's discriminatory acts.

> **What this means to you:** Make sure that your employment decisions are supported by documentation and compliance with the steps you outline in your employee handbook. If you make any employment decision after an employee makes a complaint, you run the risk of a retaliation charge.

City of New Haven, Connecticut violated Title VII by discarding racially disproportionate test results

The New Haven, Connecticut Fire Department ("Department") administered civil service tests for applicants for positions as captain and lieutenant. An outside vendor created and administered the test pursuant to the requirements the Department gave, including specific types of test – weighted 60% written and 40% oral – which the collective bargaining agreement with the firefighter's union mandated. (*Ricci v. DeStafano*, 129 S.Ct. 2658 (Decided June 29, 2009).

In the past, New Haven had struggled with racial issues, including lack of minorities first in the Department ranks and then in Department leadership. The test makers testified they attempted to be over-inclusive of minorities' input while creating the test.

The examination resulted in disproportionately higher scores for white applicants than for minority applicants. The department decided not to implement the exam results for fear that doing so would put them in violation of Title VII. Therefore, positions remained unfilled. A group of white and Hispanic applicants sued, claiming a violation of Title VII and of the equal protection clause of the U.S. Constitution because the Department had unlawfully used race as the reason to refuse to certify the test. The Department responded that, had they certified the test results, they faced Title VII liability for disparate impact. The trial court granted summary judgment for the Department, and the 2nd Circuit affirmed.

The Supreme Court reversed, in a 5-4 vote, and held that the Department's refusal to certify the test results was intentional discrimination based on race. Everyone agreed that the Department was faced with a prima facie case of disparate-impact liability based on the statistics that showed disproportionately higher scores for white applicants than for minority ones. The Court said, however, that it wasn't enough for the Department to show that minority applicants would make a prima facie disparate-impact case, because the employer can defend by demonstrating that the test was "job related for the position in

question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i). If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has a less disparate impact and serves the employer's legitimate needs. 42 U.S.C. §§2000e-2(k)(1)(A)(ii) and (C).

The key, according to the Court, was whether the employer had 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. Here, the Court said there was clearly no "strong basis in evidence" because there was only statistical evidence to support the disparate-impact claim. The Court did not define or elaborate on what "strong basis in evidence" means.

> **What this means to you:** if you administer tests to screen applicants for employment or promotions, be sure that your tests reflect the actual skills the applicants need and the actual tasks the employee will be performing. If the results show a disparate impact, be very careful, as you are now between a rock and a hard place and any decision you make could have repercussions.

A provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

Under the National Labor Relations Act, the Union in this case was the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment," 29 U. S. C. §159(a), and engages in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement (CBA). The CBA requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures. *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (Decided April 1, 2009)

14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. After 14 Penn Plaza, with the Union's consent, engaged a unionized security contractor affiliated with Temco to provide licensed security guards for the building, Temco reassigned respondents to jobs as porters and cleaners. Contending that these reassignments led to a loss in income, other damages, and were otherwise less desirable than their former positions, respondents asked the Union to file grievances alleging, among other things, that 14 Penn Plaza violated the CBA's ban on workplace discrimination by reassigning respondents on the basis of their age in violation of Age Discrimination in Employment Act of 1967 (ADEA).

The Union requested arbitration under the CBA, but after the initial hearing, withdrew the age-discrimination claims on the ground that its consent to the new security contract precluded it from objecting to respondents' reassignments as discriminatory. Respondents then filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their ADEA rights, and the EEOC issued each of them a right-to-sue notice. In the ensuing lawsuit, the District Court denied petitioners' motion to compel arbitration of respondents' age discrimination claims. The Second Circuit affirmed, holding that *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, forbids enforcement of collective-bargaining provisions requiring arbitration of ADEA claims.

The Court held that the Union negotiated in good faith and agreed that discrimination claims, including ADEA claims, would be resolved in arbitration. In another contentious, 5-4 decision, the Supreme Court determined that resolving ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court.

> **What this means to you:** inclusion of an arbitration provision for employment-related age discrimination claims will ensure that ADEA claims are arbitrated. It is unclear, however, what effect, if any, this case will have on discrimination claims under other statutes.

Burden-shifting "mixed motives" instruction is never proper in an ADEA case

FBL Financial hired Jack Gross in 1971. In 2001, Gross held the position of Claims Administration Director and was responsible for overseeing claims processing units at an FBL subsidiary in several states. In 2003, FBL reassigned Gross to a new position as Claims Project Coordinator. Many of Gross' duties were transferred to a newly created position – Claims Administration Manager – which FBL gave to a woman in her early forties who Gross had previously supervised. Gross filed suit under the ADEA asserting he was demoted because of his age. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (Decided June 18, 2009).

Gross argued that the Court should apply the same burden-shifting "mixed motives" structure as courts apply in Title VII cases: if an employee proves he was demoted, and age was a motivating factor, the employer must prove that it would have demoted the employee anyway, regardless of age. The issue presented to the Supreme Court was whether the employee is required to present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.

The Supreme Court, however, analyzed whether the burden ever shifts to the employer in an alleged mixed-motive discrimination case under the ADEA. In a 5-4 vote, the Court held that the burden of persuasion never shifts to the employer, and that the employee has to prove that age was the cause of the alleged discriminatory adverse action, not just one of several reasons.

> **What this means to you:** If you are engaged in an ADEA lawsuit, the employee always bears the burden to prove that you discriminated against him or her because of age. Unlike Title VII claims, an employee must prove that you terminated or demoted (or committed some other employment action) because of the employee's age, not because of a variety of reasons, including age.

LEGISLATION AND REGULATION

Employee Free Choice Act Will Change Labor-Management Relations

Congress has been working on the Employee Free Choice Act, the so-called card-check bill, this summer. The bill would have allowed employees to unionize simply by having a majority sign a card declaring they favor a union. This process would replace the secret ballot elections that employers generally require and prefer.

In late July, several labor-friendly senators agreed to drop the card-check provision of the bill. Instead, the revised bill will likely require shorter unionization campaigns and faster elections. These expected revisions will include requirements that union elections will have to be held within five or 10 days after 30% of workers signed cards favoring having a union. Current campaigns often run several months.

Senators are also considering measures that would require employers to give union organizers access to company property and bar employers from requiring workers to attend anti-union sessions that labor supports deride as "captive audience meetings."

Labor unions are pushing aggressively to enact the bill in the hope that it will reverse labor's long decline. Currently, only 7.6 percent of private-sector workers belong to unions, just 1/5 the rate of 50 years ago.

It is possible that the National Labor Relations Board will allow employees to unionize by a card-check through a case decision, but it is too early to tell whether this will happen or when.

IMMIGRATION ISSUES

DHS Intends to Rescind 'No-Match' Rule and require all employers with federal contracts to use E-Verify

In August 2007, the U.S. Department of Homeland Security (DHS) took initial steps to finalize proposed regulations regarding employers' obligations to respond to so-called "no-match" letters originated by the Social Security Administration (SSA). The regulations indicated DHS's intent to pursue legal action against employers having "constructive knowledge" that an employee is not legally authorized to work in the United States and established that a "no-match" letter could provide such constructive knowledge. The regulations also described a method for employers to obtain a "safe harbor" from prosecution for knowingly employing an unauthorized worker.

In 2007, a federal judge enjoined implementation of the regulations, which have never been put into practice. In early July 2009, DHS Secretary Janet Napolitano announced that DHS intends to rescind the Social Security No-Match Rule in favor of using the E-Verify System. Currently, all employers with federal contracts are required to verify the employment status of their employees through E-Verify. DHS will begin to enforce this rule on September 8, 2009, at which time federal contracts will only be awarded to employers who use E-Verify to check employee work authorization.

Currently, a few states, including Arizona, require all employers – whether public or private, with federal contracts or without – to use E-Verify to verify their employees' work status. Washington does not have any such law, and it remains to be seen whether the Administration will meet its goal of having all employers use E-Verify.