

ClientAlert

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Employment Law Roundup of the Supreme Court's 2008-2009 Term

The 2008-2009 term for the Supreme Court of the United States once again yielded decisions that should be of interest to those professionals who practice in the "employment" field (human resources professionals, internal company counsel, and employment lawyers, just to name a few). This *Client Alert* briefly summarizes four of those decisions and provides some practical considerations for employers. The four cases are:

- *Crawford v. Metropolitan Gov't of Nashville and Davidson Co., Tennessee*, which provides protection against retaliation by employers to employees who disclose discrimination and harassment issues in response to questions asked of them during an internal investigation.
- *Gross v. FBL Financial Services, Inc.*, which makes it more difficult for employees to prove age discrimination claims under the Age Discrimination in Employment Act ("ADEA") by requiring that employees establish that age was the "but for" cause of the adverse job action.
- *14 Penn Plaza LLC v. Pyett*, which upheld an arbitration clause in a collective bargaining agreement against an individual union member, and reaffirmed the Supreme Court's continuing position that private arbitrations can be an appropriate forum in which employers and employees can resolve employment discrimination claims.
- *Ricci v. DeStefano*, a complicated and confusing decision that holds, in effect, that an employer cannot engage in intentional discrimination (disparate treatment) in order to avoid liability for unintentional discrimination (disparate

impact) unless the employer has a "substantial basis in evidence" to conclude that it will otherwise be liable for unintentional discrimination.

Greater Protection Against Retaliation for Employees Who Participate in Internal Investigations

In *Crawford*, the Supreme Court unanimously held that the anti-retaliation rules of Title VII protect employees who identify discrimination or harassment issues when they are interviewed during internal investigations, *even if they do not make a formal complaint about those issues*. As a result, employers should proceed carefully when taking any adverse job action against any employee who participated, in one way or another, in an internal investigation.

In this case, the employer investigated a sexual harassment complaint made by an employee. In the course of that investigation, the employer interviewed Ms. Crawford, who was not the individual who had made the original complaint. During the interview, Ms. Crawford described incidents in which she had been harassed or was the victim of inappropriate behavior. Ms. Crawford did not previously report those actions to the employer. A short time later, Ms. Crawford was terminated for embezzling funds. She sued under Title VII, claiming that the real reason she was terminated was in retaliation for reporting harassment during her internal interview.

The Supreme Court was posed with the question of whether Ms. Crawford had "opposed" an unlawful employment practice, as required by Title VII in order to state a claim for retaliation.

The Supreme Court held that Ms. Crawford's action did constitute "opposition" to a discriminatory practice, and that Title VII's protections apply to employees who report discrimination or harassment during internal investigations, even if only in response to questions from the employer. The holding in *Crawford* should not come as a great surprise to employers, as it comports with and supports the "anti-retaliation" goals of Title VII. ***Put simply, an employee who complains about or discusses conduct that he or she reasonably believes constitutes unlawful harassment or discrimination is protected from retaliation, even if the complaint or discussion is initiated by the employer.***

The important lesson for employers to take from this decision is not a new one -- employers should have legitimate and well-documented business reasons before taking any adverse job action (e.g., discipline, termination) against an employee. Employees who engage in protected conduct under Title VII (and other similar laws) are not absolutely protected from adverse job actions. Realistically, however, the burden will fall on the employer to "prove" that its reasons for taking the adverse job action were based on legitimate business factors and wholly unrelated to the protected conduct. As such, employers conducting internal investigations should keep detailed and accurate records of employee interviews and any follow-up actions taken as a result of those interviews. Those records may be helpful if an employee complains that he or she is being retaliated against based upon statements made during an interview.

Of equal, if not greater, importance, employers should carefully document performance reviews and disciplinary issues with employees, as well as the business reasons for any adverse job action. We recommend that employers work with experienced counsel to review and

document those decisions and the reasons for them before the adverse job actions are taken. Finally, written anti-retaliation policies (and, for many reasons, all employers should have one) may need to be revised to cover the protections confirmed in *Crawford*.

Age Discrimination Claims Under Federal Law Are Now More Difficult to Prove

In *Gross*, the Supreme Court, in a narrow five to four decision, held that an employee bringing an age discrimination claim under the ADEA must prove that age was the "but for" cause of the employer's adverse job action, and not simply that age was one motivating factor (out of multiple factors) behind the adverse job action, as is permitted to establish Title VII claims. This ruling makes it more difficult for employees to prove discrimination claims under the ADEA and creates a split between how ADEA and Title VII claims can be established. As a result of this split, many practitioners believe that Congress will amend the ADEA to overturn the *Gross* decision and to bring the ADEA in line with Title VII, in which case the victory achieved for employers in *Gross* will be but a temporary one.

In *Gross*, the plaintiff sued his former employer under the ADEA alleging that he was demoted because of his age. The lower court applied the "mixed motive" standards applicable to Title VII, which only require that the plaintiff prove that age was a *motivating factor* in his demotion. The jury found in favor of the plaintiff. The appellate court reversed after finding that the plaintiff did not present direct evidence of discrimination. The Supreme Court was presented with the question of whether plaintiffs must show direct evidence of age discrimination for mixed-motive ADEA claims. The Supreme Court did not directly answer this question because it held that mixed-motive claims are not permitted by the text of the ADEA, which states that liability is imposed

only when an adverse action is taken "because of" age. The Supreme Court interpreted "because of" to mean "but for."

It remains to be seen whether the Supreme Court's interpretation of "because of" under the ADEA will be used to interpret other employment laws that use that same term (presumably as a result of attempts by employers to similarly make it more difficult for employees to establish other types of employment-related claims). ***In addition, employers must continue to be aware of their obligations under state and local anti-discrimination laws (which may be greater than those under federal law), and must understand that the holding in Gross may not protect them under those state and local laws.***

Supreme Court Reaffirms Enforceability of Arbitration Clauses

In *Pyett*, the Supreme Court held that mandatory arbitration clauses in collectively bargained agreements can serve as a bar against union members bringing ADEA claims in court against their employers. This decision is seemingly a departure from past precedent, which generally had followed the rule that a union cannot negotiate away an individual member's right to sue for discrimination, and thus precluding the enforcement of such an arbitration clause against the individual.

The plaintiffs in this case were members of a union. The union was a party to a collective bargaining agreement that contained a mandatory arbitration clause. When the plaintiffs were reassigned by their employer to other positions, which they found less desirable, they complained about age discrimination and their union filed a grievance and commenced an arbitration on their behalf. The plaintiffs later filed their age discrimination claims with the Equal Employment Opportunity Commission and

then brought suit in federal court. The employer filed a motion to dismiss or, alternatively, to compel arbitration. The district court denied the motion, and the appellate court affirmed, based on the rule that a union agreement cannot waive an individual member's rights (such as the right to sue in court under the ADEA). In reversing this rule, the Supreme Court, in another five to four decision, held that mandatory arbitration clauses in collective bargaining agreements that are "clear and unmistakable" are enforceable against the individual union members (even if the union members did not individually agree to the arbitration provision).

This decision further affirms the Supreme Court's approval of arbitration agreements, although the Supreme Court did not address the issue of whether an arbitration clause remains enforceable if the union controls the individual's access to the arbitral forum. ***Nonetheless, all employers, not just those with unionized employees, should consider the pros and cons of requiring its employees to agree to an arbitration or other alternative dispute resolution program. Employers should consult with counsel before instituting (or continuing) such a program, as there have been many judicial developments in this area in recent years, including at the state law level.*** In addition, with the new administration in place, there is once again speculation that Congress will try to enact legislation that would prohibit "pre-dispute" arbitration agreements with employees. Under such legislation, only an agreement to arbitrate that is entered into with an employee *after* the dispute arises would be enforceable.

Employers Must Use Even Greater Care When Conducting and Reviewing Disparate Impact Analyses

Ricci v. DeStefano, a recent decision in which the Supreme Court reversed the decision of the Second Circuit Court of Appeals, has been in the mainstream news not so much because it deals with a complicated employment issue, but because one of the Second Circuit judges who was reversed by the Supreme Court in this decision is Judge Sonia Sotomayor, President Obama's nominee to replace Justice Souter on the Supreme Court.

The issue in *Ricci* was whether an employer could disregard the results of a promotion examination due to fear that the employer would be subject to a disparate impact claim if it implemented those results. "Disparate impact" refers to an employment practice that is neutral on its face, but impacts a protected group more than others. In *Ricci*, the City of New Haven used objective proficiency tests to identify firefighters who deserved promotion. However, the test results showed that white candidates had generally outperformed minority candidates, and using the test results as planned meant that primarily white firefighters would be eligible for promotion. The City of New Haven discarded the test results due to the racial differences in the scores. The white and Hispanic firefighters who passed the exams sued the City of New Haven on the grounds that throwing out the test results, and thereby denying them promotions, constituted race discrimination under Title VII. The City of New Haven countered that, had it used the test results, it would have faced "disparate impact" liability under Title VII for failing to promote minority firefighters. The

district court granted summary judgment for the City of New Haven, and the Second Circuit (including Judge Sotomayor) affirmed.

The Supreme Court reversed the Second Circuit. It held that the observed racial disparity of the tests was not sufficient justification for the City of New Haven to throw out the test results. Instead, the Supreme Court held that the City of New Haven needed a "strong basis in evidence" that it would have been liable for "disparate impact" under Title VII had it used the test results. According to the Supreme Court, a "strong basis in evidence" would have existed only if (i) the tests were not job related and consistent with business necessity, or (ii) there was an equally useful, less discriminatory alternative that the City of New Haven could have used but did not. The Supreme Court found that the tests at issue in this case were job related and consistent with business necessity, and did not find any equally useful, less discriminatory alternatives that the City of New Haven refused to adopt. As a result, the Supreme Court held that discarding the test results under these circumstances was a violation of Title VII.

Employers who make personnel decisions wholly or in part based on tests should review those tests to ensure that they are job related and that there is no "better" alternative to that test before they administer those tests.

Otherwise, employers may find themselves in the same difficult position in which the City of New Haven found itself after it administered the tests. In addition, employers should be mindful that this decision could lead to a rise in reverse discrimination claims, and possibly challenges to employers' diversity practices.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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