Kramer Rayson LLP

Employment Law Conference

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Employment Law Update

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Supreme Court Update

2008-2009 Supreme Court Term

Gross v. FBL Fin. Servs., 129 S. Ct. 1456 (2009)

- 54 year old employee was "demoted" and his former job duties were given to a younger subordinate female. Presented *circumstantial* evidence.
- District court gave "motivating factor" and mixed motive instructions shifting burden to employer.
- Eighth Circuit reversed, holding employee failed to present *direct* evidence.
- Supreme Court held ADEA claims are **not** subject to mixed motive analysis.
- Under ADEA employee must prove that age was the "but-for" cause of the challenged adverse employment action.

14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009)

- Jobs of 20 night watchmen represented by SEIU were eliminated; they grieved transfers to new positions as violating ADEA.
  - Union withdrew grievance.
- CBA prohibited discrimination and provided for mandatory arbitration. Great language in CBA.
- Employees filed suit; lower courts refused to compel arbitration.
- Supreme Court held CBA can, if sufficiently clear, require bargaining unit employees to arbitrate discrimination claims.
- Employers with CBAs should consider this potentially valuable option in the next negotiations.

Crawford v. Metro. Nashville, 129 S. Ct. 846 (2009)

- Plaintiff asked to give statement to employer regarding concern about coworker's sex harassment.
  - She reported the male co-worker's sexually harassing conduct and was later fired.
- Plaintiff sued for Title VII retaliation.
- Supreme Court reversed Sixth Circuit which had held "opposition" requires "active" behavior.
- Opposition clause may be used by employee who only describes a discriminatory practice when asked.
- Passive participants in internal investigation can engage in protected activity.

AT&T v. Hulteen, 129 S. Ct. 1962 (2009)

- Females sought additional pension credit for pre-PDA pregnancy leave. Plan refused.
- Ninth Circuit held employees claims were timely.
- Supreme Court held no current violation of Title VII when employer refused to give credit.
- At time of leave, plan could lawfully deny pension credit. PDA not retroactive.

Ricci v. DeStefano, 129 S. Ct. 2658 (2009)

- City spent $100,000 developing promotion tests then threw out results when African Americans fared poorly on it as compared to whites and Hispanics.
- White firefighters sued for reverse discrimination.
- Supreme Court held
  - City had made illegal race-based decision.
  - Employer must have "strong basis in evidence" for concluding test created disparate impact on minorities before it can reject results.

The Current Supreme Court Term

Lewis v. Chicago, 528 F.3d 488 (7th Cir. 2008), *cert. granted*, ___ U.S. __ (Sept. 30, 2009).

- Firefighter applicants took written test and were scored by "well qualified", "qualified" and "not qualified."
- Black applicants in the "qualified" category filed disparate impact charge 420 days after notice of test results sent to them but within 300 days of when city began to hire applicants from the well qualified list.
- Seventh Circuit held suit untimely because the written test was the discriminatory act; hiring from the test was simply an effect.
- Seventh Circuit called *Bouman v. Block*, *940 F.2d 1211*, *1221 (9th Cir. 1991)*, "mistaken" in reasoning that until plaintiff was not promoted she could not be "certain" that the discriminatory list would have a consequence.
- Sixth Circuit agrees with Seventh Circuit: *Cox v. Memphis*, 230 F.3d 199 (6th Cir. 2000).

Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287, 546 F.3d 1169 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2865 (2009)

- After local members allegedly ratified CBA, but Int'l and Local leaders told workers not to report to work. Union made more demands; strike continued.
- Ninth Circuit:
  - held Int'l not a party to CBA could not be sued.
  - Ordered contract formation issue to arbitration.
- S. Ct. to decide:
  - whether court or arbitrator decides whether CBA ratified.
  - Can Int'l be sued under section 301 when it did not sign agreement by causes a strike in breach of CBA.

Frommert v. Conkright, 535 F.3d 111 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2860 (2009).

- Employees retired, drew lump sum pension payment, but later, returned to work. Company administratively reduced pension benefits using an earnings factor.
- Some employees signed releases when they retired.
- Second Circuit held recalculation violated ERISA but that releases were valid.
- S.Ct. to decide
  - Whether requirements of OWBPA apply to ERISA claims.
  - Must court defer to plan administrator interpretation of plan even if it is not making a decision on a benefit clam.

Sixth Circuit Update

Race Discrimination

Barrett v. Whirlpool Corp., 556 F.3d 502 (6th Cir. 2009)

- White employees complained about racial epithets toward blacks, retaliation.
- Court of appeals held Title VII prohibits "associational discrimination" and "advocacy discrimination."
- Plaintiff need only show association; the degree of association is irrelevant.
- Harassment claim requires showing harassment tied to association or advocacy, can't rely only general racial comments or epithets.

Madden v. Chattanooga City Wide Serv. Dep't.
549 F.3d 666 (6th Cir. 2008)

- Black employee fired for setting off firecrackers at work.
- White supervisor reported plaintiff – but not white employees.
- District Court ruled for *pro se* plaintiff in bench trial. Whites had engaged in same conduct; the supervisor selectively reported plaintiff.
- Cat's Paw case – employer held liable for its poor investigation.

Gender Discrimination

Sybrandt v. Home Depot, U.S.A., Inc.
560 F.3d 553 (6th Cir. 2009)

- Assist. Mgr. fired for violating self-service policy. 18 others fired for same reason.
- Employee argued Home Depot's strict interpretation of its policy was so unreasonable it was pretextual.
- Sixth Circuit applied honest belief rule, and held "overly strict interpretation" of policy was not alone enough. Employer showed it honestly believed she had violated the policy.

Risch v. Royal Oak Police Dep't, 2009 U.S. App. LEXIS 20980 (6th Cir. Sept. 23, 2009)

- Female officer repeatedly sought promotion. Despite scores, passed over while slightly lower-ranked male employees promoted.
- Numerous comments made by co-workers about “women should not be police officers.” None by decisionmaker and only one by a Sgt.
- Sixth Circuit reversed summary judgment for employer.
- Held plaintiff “arguably better qualified” and that sex-based remarks were evidence of discriminatory atmosphere.
- Very troubling decision with vigorous dissent.

Age Discrimination

Martin v. Toledo Cardiology Consultants, Inc., 548 F.3d 405 (6th Cir. 2008)

- Lab tech fired for making racial slur. Signed statement admitting to slur but recanted it, alleging coercion. Motion for summary judgment for employer.
- Sixth Circuit reversed in split decision – ruling honest belief inapplicable because employer "did not conduct reasonable investigation."
  - Failed to interview employee who supported plaintiff.
- Lesson learned: talk to all the witnesses in an investigation.

Morgan v. New York Life Ins. Co., 559 F.3d 425 (6th Cir. 2009)

- Insurance sales manager fired for poor performance.
- Ratings were higher or as good as younger managers who had been retained; employer bent rules for younger managers but fired older managers.
- July awarded $6 million compensatory, $10 million punitive.
- Sixth Circuit upheld liability, remanded punitive damages not to exceed $6 million.
- Lesson Learned: (1) Know when to settle; (2) treat similar employees similarly.

Owens v. Wellmont, Inc., 2009 U.S. App. LEXIS 18764 (6th Cir. 2009)

- After RIF employer offered transfer to 54 year old technician, who turned down offer.
- Employee “expressed an interest” in PTT job after leaving, but did not formally apply.
- Sixth Circuit affirmed on termination and all rehire claims except PTT job.
- Court held general expression of interest was enough where employer had not previously required formal application.

Disability Discrimination

Milholland v. Sumner County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009)

- Teacher had inflammatory arthritis. Promoted to vice-principal but later demoted.
- Alleged she was "regarded as" having disability.
- Court of appeals affirmed dismissal, holding:
  - ADA Amendments of 2008 **not retroactive.**
  - Teacher failed to show employer regarded her substantially limiting major life activity.
  - Different result under ADAAA.

Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099 (6th Cir. 2008)

- Cashier with back impairment asked for stool to use at cash register. Co-workers complained. Stool taken away.
- Supervisor refused to read doctor's note. Employee is fired, "job abandonment."
- Sixth Circuit reversed summary judgment:
  - employer denied reasonable accommodation, and
  - refused to discuss stool when employee brought doctor's note.
- Lesson Learned: Employers must engage in interactive process.


TINA, YOU CAN'T WORK AT HOME ANYMORE BECAUSE THE ADMINS CAN'T DO IT, AND THEY'RE JEALOUS.
I'M A TECHNICAL WRITER. WHY DON'T YOU EXPLAIN TO THE ADMINS THAT MY JOB IS DIFFERENT FROM THEIRS.
WHEN YOU FIND A BIG KETTLE OF CRAZY, IT'S BEST NOT TO STIR IT.
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Harassment

Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263 (6th Cir. 2009)

- Harassment claim where most conduct was not directed at female.
- Pervasively sex based hostile environment with foul language, pornography and worse.
- Employee complained to branch manager who did little to stop conduct.
- Sixth Circuit reversed MSJ for employer:
  - Female could show harassment based on sex even though most conduct **not** directed at her. Conduct was explicitly sexual and degrading to females.
  - Complaint to branch manager was enough to put employer on notice of co-worker harassment – policy designated branch manager as person to receive harassment complaints.

Retaliation

Thompson v. North American Stainless, LP, 567 F.3d 804 (6th Cir. 2009), pet. cert. filed September 3, 2009.

- Plaintiff's fiancée and co-worker filed EEOC charge. Shortly thereafter, Employer fired plaintiff.
- Sixth Circuit initially held employee could maintain retaliation claim.
- *En banc* court held plain language of retaliation provision required employee to have personally engaged in protected activity.
- Fiancée, however, could claim firing employee was retaliation directed *at her*.

Hamilton v. GE, 556 F.3d 428 (6th Cir. 2009)

- Union employee fired and reinstated twice under LCA. Filed EEOC charge while suspended for misconduct.
- On return, alleged "increased scrutiny" of work. Fired third time but employee denied incident that led to firing.
- Sixth Circuit held "increased scrutiny" after filing of charge established causation.
- Impact – this can have negative impact on managing troublesome employees after protected activity, including PIP's.

Family and Medical Leave Act

Allen v. Butler County Comm'r, 2009 U.S. App. LEXIS 18773 (6th Cir. 2009)

- Plaintiff, on an LCA, failed to follow Employer's daily call in requirement under sick leave policy.
- Plaintiff called in sick day one, was out on FMLA-qualifying leave but failed to follow daily call-in requirement. He was fired.
- Held: Termination did not violate FMLA.
- Nothing in FMLA prevents Employers from enforcing call-in rules under sick leave policy even during FMLA leave.

Dobrowski v. Jay Dee Contrs., Inc., 571 F.3d 551 (6th Cir. 2009)

- Epileptic employee informs employer he is having elective surgery four months hence.
- Employer gives FMLA paperwork and tells employee he will be granted 12 weeks of FMLA leave.
- Upon return, terminated because employer not covered by FMLA at that location.
- Held: equitable estoppel applies, but employee failed to show detrimental reliance, i.e. that he **would** have rescheduled if he had known.

Employer Investigations

Allen v. Highlands Hosp. Corp., 545 F.3d 387 (6th Cir. 2008)

- Two hospital employees fired for disclosing medical file of one's granddaughter without written permission.
- Employees disputed violating confidentiality policy and employer extensively investigated.
- Court affirmed summary judgment, holding investigation demonstrated employer had honest belief employees had violated policy.

Clack v. Rock-Tenn Co., 304 Fed. Appx. 399 (6th Cir. 2008)

- Employee was insubordinate to shop foreman. Company investigated, calling employee to get employee's story. Employer fired employee.
- Employee's evidence showed the foreman's racial bias and Employer was aware of it.
- Court, applying honest belief rule, held that investigation where employee was interviewed neutralized bias by foreman.

Legislation

Lilly Ledbetter Fair Pay Act of 2009

- Effective January 29, 2009, amends Title VII, ADEA, ADA and Rehabilitation Act.
- Reverses *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
- In pay discrimination cases, each paycheck is a discriminatory event triggering statute of limitations.
- Back pay for pay discrimination capped at two years before filing of charge.
- Tennessee law is even more favorable for plaintiffs.

Tennessee Developments

Columbus Med. Servs., LLC v. David Thomas & Liberty Healthcare Corp., 2009 Tenn. App. LEXIS 543 (Tenn. Ct. App. Aug. 13, 2009)

- Plaintiff staffing agency sued therapists employees and defendant agency for breach of non-competition clause and interference with contract.
- Trial court ruled for plaintiff against all defendants, awarded treble damages.
- Court of Appeals recognized legitimate business interest to avoid “opportunistic disintermediation.”
- But it was outweighed by severe hardship on employees and because it was “inimical to the public interest.”

Gossett v. Tractor Supply Co., 2009 Tenn. App. LEXIS 135 (Tenn. Ct. App. Mar. 2, 2009)

- Plaintiff allegedly ordered by CFO to manipulate inventory figures and refused, but did not complain. He was then terminated. Sued claiming the order was illegal.
- Based on Western Section decision, *Collins v. AmSouth*, 241 S.W.3d 879 (Tenn. Ct. App. 2007), trial court dismissed common law retaliatory discharge claim because plaintiff did not complain.
- Held: Common law retaliatory discharge can be maintained based solely on refusal to participate in illegal activity.

Questions?