Kramer Rayson LLP

Employment Law Conference

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Employment Law Update

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Supreme Court Update

2009-2010 Supreme Court Term

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Rent-A-Center, W., Inc. v. Jackson, 2010 U.S. LEXIS 4981 (U.S. June 21, 2010)

- Arbitration agreement covered ***all disputes arising out of employment***, including ***validity***.
- Plaintiff sued for discrimination, claimed agreement was "unconscionable." Employer moved to compel arbitration under FAA.
- D. Ct. ordered arbitration; Ninth Circuit reversed.
- Supreme Court held where agreement ***specifies arbitrator decides enforceability*** of the agreement as a whole, arbitrator decides challenges.
- Where a party challenges the validity of the ***arbitration clause itself,*** the court considers the challenge.

City of Ontario v. Quon, 130 S. Ct. 2619 (U.S. 2010)

- SWAT team members sued City under **Fourth Amendment** for reviewing text messages on City-owned pagers.
- City policy diminished privacy expectation; practice arguably created such expectation.
- D. Ct. held ***plaintiffs had privacy expectation*** **-** and legality turned on ***"purpose"*** of the search. ***Jury*** found it was for ***legitimate*** purpose.
- Ninth Circuit agreed on privacy expectation but held search not "***reasonable in scope***," because "***less intrusive ways"*** existed to answer work-related question.
- Supreme Court reversed, assumed privacy expectation, found search reasonable based on ***legitimate purpose*** and ***limited scope*** of the search.
- Rejected the ***"least intrusive search practical"*** approach.

Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847 (U.S. 2010)

- Union strikes, ***Local U.*** ratifies settlement, then ***IBT*** continues strike.
- Employer sues Local under LMRA § 301 for violating no-strike clause and IBT for "intentional interference with contract."
- D. Ct. (a ***jury***) decided contract formation issues for employer; Ninth Circuit reversed, ordered ***arbitration of formation issue***.
- Supreme Court held arbitration must ***"arise under"*** the contract, formation issue cannot arise under the contract, thus its for the court.
- Affirmed dismissal of IBT under tort theory.

Conkright v. Frommert, 130 S. Ct. 1640 (U.S. 2010)

- Plaintiff sued plan administrator under ERISA over benefit evaluation (they had ***retired, drew lump sum*** and ***were rehired***).
- Plan administrator's first interpretation ("***phantom account***") rejected.
- Administrator's second interpretation ***rejected*** by D. Ct. which refused to apply "deferential standard." Second Circuit affirmed.
- Supreme Court reversed: plan administrator's interpretation entitled to ERISA-required deference, despite previous erroneous decision.
- Court rejects, "One strike and you're out" under ERISA and trust law. The ***deference must be given unless*** administrator acts in "***bad faith***."

Lewis v. Chicago,
130 S. Ct. 2191 (U.S. 2010)

- Chicago ***announced*** firefighter **eligibility list** based on test with **disparate impact**.
- Black applicants filed EEOC charge alleging Title VII disparate impact **420 days after *implementation***.
- Seventh Circuit held **charge untimely –** the only discrimination was using test to develop the list.
- Supreme Court reversed: **disparate impact** claim can be based on "**use"** of unlawful practice, regardless of when the practice was implemented. 7th Cir. conflated disparate treatment and disparate impact cases.

New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (U.S. 2010)

- Circuit split developed after the NLRB, which normally has five members, spent 27 months (over 600 cases) issuing decisions as a ***two-member body***.
- Seventh Circuit held that the two-person Board was a valid quorum of the three-person group delegated hearing authority.
- Supreme Court (5-4) reversed, invalidating over 600 decisions made by the NLRB under current administration.
- Lesson learned: our government at work! How to untangle this mess not discussed.

Hardt v. Reliance Std. Life Ins. Co., 130 S. Ct. 2149 (U.S. 2010)

- Plaintiff sued for ***long term disability benefits*** under ERISA.
- D. Ct. ***denied her MSJ***, but found ***"compelling evidence"*** in her favor. Remanded to insurer for "reconsideration."
- On remand, insurer agreed, awarded benefits.
- Plaintiff filed motion for attorneys fees.
- Fourth Circuit held Plaintiff ***not "prevailing party***."
- Supreme Court reversed, holding attorney's fees can be awarded if claimant achieved "***some degree of success on the merits***."

The Current Supreme Court Term

***Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 5525 (U.S. June 29, 2010)**

- Plaintiff was fired after *fiancée* charged race discrimination. He sued for Title VII retaliation.
- D. Ct. granted MSJ. Plaintiff did not ***"oppose"*** or ***"make a charge, testify, assist or participate"*** as required by § 704 (a).
- Sixth Circuit panel reversed; *en banc* court affirmed. Plaintiff not within scope of ***clear language*** of § 704 (a).
- Supreme Court to decide:

  Does § 704(a) prohibit retaliation against a third party spouse, family member, fiancé, "***closely associated***" with complainant? Can the ***third party sue*** under § 704(a)? Limits?

***Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009), *cert. granted* 130 S. Ct. 2089 (U.S. 2010)**

- Supreme Court to address ***"cat's paw"*** theory, i.e. biased supervisor exerts influence on unbiased decisionmaker.
- Plaintiff brought USERRA discrimination, claimed biased supervisor convinced decisionmaker to fire him. Jury agreed.
- Seventh Circuit reversed. Though biased supervisor had input, she did not have "***singular influence***" over decision-maker who had ***no animus*** and ***conducted reasonable investigation.***
- Supreme Court will finally decide standards for employer liability for non-decisionmaker bias.

Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. Wis. 2009), *cert. granted* 130 S. Ct. 1890 (U.S. 2010)

- FLSA retaliation case. Plaintiff complained ***orally*** over perceived FLSA violation; was terminated for refusing to clock in. Sued under FLSA for retaliation.
- District court granted motion for summary judgment for employer. § 215(a)(3) requires plaintiff to "file a complaint."
- Seventh Circuit affirmed. Employee did not "***file a complaint***" which requires "***submission of some writing***."
- Supreme Court to decide whether ***oral complaint*** suffices under § 215(a)(3).

Nelson v. NASA, 530 F.3d 865 (9th Cir. Cal. 2008) *cert. granted* 130 S. Ct. 1755 (U.S. 2010)

- "***Informational privacy***" case. NASA required all Caltech employees to undergo standard background checks.
- "Low risk" scientists sued claiming breach of "informational privacy" per ***Whalen v. Roe***, which established "***individual right in disclosure of private matters***."
- Ninth Circuit found ***privacy invasion*** in questions about ***recent drug/alcohol treatment,*** and asking ***references*** about financial integrity, drug and alcohol use, mental stability.
- Supreme Court to decide: can government constitutionally ask these questions ***solely for employment purposes*** with Privacy Act protection.

Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. Cal. 2009), *cert. granted*, 130 S. Ct. 3322 (U.S. 2010)

- California state law making class action waivers "unconscionable" collides with arbitration agreement governed by FAA.
- Plaintiff brought class action suit for deceptive trade practice charging tax on: "free" cell phones; contract had arbitration clause and "class action waiver clause."
- D. Ct. and Ninth Circuit denied employer's motion under FAA to refer ***individual claims*** to arbitration. Held FAA does not preempt state law prohibition.
- Supreme Court to decide: does FAA preempt California's state "unconscionability law."

Amara v. CIGNA Corp., 348 Fed. Appx. 627 (2d Cir. 2009), *cert. granted* 2010 U.S. LEXIS 5324 (U.S. June 28, 2010)

- Addresses standard to be applied under ERISA to prevail where ***SPD plan description*** conflicts with the ***plan***. Second Circuit holds plaintiffs must show "***likely harm***" to prevail.
- 1st, 4th, 7th, 8th, 10th and 11th Circuits require "***some degree of reliance***" to prevail.
- 3rd, 5th and 6th Circuits require only a "***clear and material conflict***."
- Supreme Court to resolve conflict between circuits.

Sixth Circuit Update

Race Discrimination

Younis v. Pinnacle Airlines, Inc., 610 F.3d 359 (6th Cir. 2010)

- Arab-American Muslin pilot filed an EEOC charge alleging religion and national origin discrimination.
- His lawsuit ***added*** hostile work environment and retaliation.
- D. Ct. granted MSJ, holding Plaintiff ***failed to exhaust remedies*** on harassment claim and lacked *prima facie* case on balance of claims.
- Sixth Circuit affirmed, plaintiff failed to exhaust remedies on hostile work environment claim, listing only a few disparate examples of biased statements, and on retaliation, citing no retaliatory facts and omitting checking retaliation box.

Thompson v. UHHS Richmond Heights Hosp., Inc., 2010 U.S. App. LEXIS 7439 (6th Cir. 2010)

- Black plaintiff's "Food Production Supervisor" job was eliminated in a reorganization shell game. Replaced by less experienced white in re-titled "Chef 1" job. Employer did not tell plaintiff either that her job was being eliminated or about the Chef 1 job.
- Sixth Circuit reversed MSJ, holding: facts support inference that reorganization conducted to eliminate plaintiff's job and discourage her from applying for new job.
- Key evidence: decision maker told her successor to get rid of three black "troublemakers," and had also called plaintiff "troublemaker."

Age Discrimination

Schoonmaker v. Spartan Graphics Leasing, LLC, 595 F.3d 261 (6th Cir. 2010)

- RIF case. Plaintiff alleged age discrimination due to age differential (58 to 29) and that decisionmaker did not follow the layoff RIF criteria.
- D. Ct. dismissed, plaintiff failed to establish *prima facie* case.
- Sixth Circuit affirmed in primer on RIF law. Plaintiff's *prima facie* case failed because age ***differential alone not enough***. She was not "***replaced***," and she adduced no "***additional circumstantial, direct or statistical evidence***."
- Supervisor was ***unaware*** of the RIF guidelines, thus his failure to strictly follow them not evidence of discrimination.

Religion Discrimination

EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010)

- Plaintiff considered a ***"called" teacher*** and ***"commissioned minister"*** at religious school. She was diagnosed with narcolepsy and terminated. Sued alleging ADA discrimination and retaliation.
- Under First Amendment, courts have no jurisdiction over selection of "ministers" - - the "***ministerial exemption.***"
- D. Ct. granted Motion for Summary Judgment, plaintiff was a "ministerial employee."
- Sixth Circuit, Judge Clay, reversed. Plaintiff's primary duty was secular, based largely on ***amount of time spent*** teaching secular courses, despite teaching religion 45 minutes daily.
- Other Circuits only require position to be "important to spiritual mission of the church," irrespective of time.

Disability Discrimination

Spees v. James Marine, Inc., 2010 FED App. 0236P (6th Cir. 2010)

- Pregnant plaintiff welder with ***history of difficult pregnancies*** is told to get "light duty" restrictions. She complies and is transferred to tool room and then to night shift. Doctor subsequently orders bed rest and she is terminated. Sues - - Title VII and ADA.
- D. Ct. held: transfer to tool room **not** an adverse action, termination **not** due to pregnancy, and pregnancy **not** a disability.
- Sixth Circuit affirms on **termination,** reverses on **transfer** to tool room. It **was an adverse action** based on less desirable (to plaintiff) duties and shift.
- Court also reversed on ADA, holding plaintiff had established a "***regarded as***" claim. Pregnancy is not a disability, but ***abnormalities with pregnancy*** can be a disability, and can support "regarded as" claim.

James v. Goodyear Tire & Rubber Co., 354 Fed. Appx. 246 (6th Cir. 2009)

- Functional capacity test approved.
- Plaintiff with ***multiple sclerosis*** ordered to submit to FCE - - co-worker complaints increasing difficulty doing job and safety concerns. Plaintiff took a medical retirement instead and sued under the ADA.
- Sixth Circuit affirmed dismissal: (1) a valid FCE is ***not*** an adverse employment action; (2) Goodyear had ***right*** to require FCE to determine if he was a "direct threat" of harm to himself or co-workers; and (3) plaintiff could not challenge scope of FCE because he ***refused*** to take it, no evidence of scope.

Harassment

West v. Tyson Foods, 2010 U.S. App. LEXIS 7863 (6th Cir. 2009)

- Complete lack of responsiveness to sexual harassment complaint creates million dollar liability.
- Bad facts, serious sexual harassment over ***only 5 weeks***, plaintiff complains to designated supervisor. He moves her but does not advise HR or take action against the harassers. Plaintiff quits two weeks later.
- Sixth Circuit affirms ***$1.8 million verdict*** - $65,000 back pay, $65,000 front pay, $750,000 emotional distress and $400,000 punitive damages.
- Lessons learned abound. Policy alone not enough, **must train employees** and **supervisors**, and **enforce the policy**. Here Tyson tolerated pervasive sexual harassment by Hispanic males. Policy ignored by everyone, including HR.

Fair Labor Standards Act

Franklin v. Kellogg Company, 2010
U.S. App LEXIS 8134 (6th Cir. August 31, 2010)

- ***Key donning*** and ***doffing*** case where Sixth Circuit slaps down DOL's new interpretation of "clothing" under **§203(0)** of Portal to Portal Act.
- Ununionized employer had 18-year practice **not** paying for donning/doffing ***"uniforms"*** and ***"standard safety gear"*** (hair and beard nets, safety glasses, ear plugs and caps). Employee sued under FLSA.
- Sixth Circuit held: action for donning/doffing "**uniform**" and "**required safety gear**" constituted "changing clothes" under §203(0).
- §203(0) is a ***"definition"*** - - not a narrowly construed "***exemption***."
- Declined to follow **DOL's June 16, 2010 Interpretation**. Department's shifting opinions entitled to less deference. Rejected Department's position that dictionary definition of clothes did not apply. Webster says "clothes" are anything "covering the body."

Franklin v. Kellogg Company, cont.

- Court also addressed whether walking from locker room to clock in was "working time," ruling here in favor of plaintiffs.
- During a "***continuous work day***" ***walking*** between first "***principal activity***" and before last "***principal activity***" is compensable.
- Held: activities deemed excluded under §203(0) ***may still be "principal activities***." Principal activities must be "***integral and indispensable***" to employees' work.
- ***Changing clothes is integral and indispensable,*** thus a "principal activity." It follows that walking from locker room to time clock is compensable. Remanded for ***de minimus*** analysis.

Family and Medical Leave Act

Branham v. Gannett Satellite Info. Network, Inc., 2010 U.S. App. LEXIS 18328 (6th Cir. 2010)

- Plaintiff claimed she was ill and missed several weeks of work. Her employer informed her ***orally*** that she would need to fill out an FMLA medical certification.
- Her doctor provided a ***negative certification*** and she was terminated. On 15th day, she submitted certification covering her absences.
- D. Ct. granted defendant MSJ; Sixth Circuit reversed.
- The defendant's ***oral request*** "never properly triggered the [plaintiff's] duty to provide a medical certification." The negative certification was not sufficient basis to deny leave because the ***required 15 days had not elapsed***.

Cutcher v. Kmart Corp., 364 Fed. Appx. 183 (6th Cir. 2010)

- Plaintiff Kmart employee on FMLA leave was terminated in a RIF. Her scores on RIF evaluation dropped from those on her performance appraisal issued 20 days earlier -- just enough to put her on RIF list.
- "LOA" was noted next to her name on RIF evaluation form.
- D. Ct. granted Kmart MSJ; Sixth Circuit reversed.
- A jury ***could*** conclude the proffered reasons were pretextual, including ***reduced scores right after her appraisal***, admission that no new incident or issue had occurred causing the reduction, and ***"LOA" notation on RIF form***.

Uniformed Services Employment and Reemployment Rights Act ("USERRA")

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Escher vs. BWXT Y-12 LLC
No. 09-6054 (6th Circuit Aug. 18, 2010)

- Escher was Navy Reserve Captain and highly paid manager. He complained to Y-12 Compensation in July 2005 that his military leave was being accounted for in violation of USERRA.
- August 17, 2005, anonymous e-mail resulted in investigation of Escher's e-mail use. Results shocking (3,200 e-mails, 240 folders, hundreds of Navy documents on Y-12 computer system).
- Escher was terminated after *thorough investigation*, just like 10 prior terminations for violation of strict computer-use policy.
- Sixth Circuit affirmed Judge Jordan's decision. Plaintiff failed to establish retaliatory motive, employer met burden of proving it would have made the same decision anyway.
- Applies "modified honest belief rule."

Tennessee Developments

Gossett v. Tractor Supply Co., 2010 Tenn. LEXIS 869 (Tenn. 2010)

- Plaintiff ***refused to falsify an inventory report,*** believing it was illegal. Promptly terminated allegedly to reduce the workforce.
- Plaintiff sued pursuant to common law retaliatory discharge for violation of public policy .
- The trial court granted summary judgment because it was undisputed that plaintiff did not report the allegedly illegal activity to anyone. The Court of Appeals reversed.
- The Tennessee Supreme Court affirmed, holding:
  - the *McDonnell Douglas* framework is ***inapplicable*** at the summary judgment stage because it is incompatible with Tennessee's summary judgment jurisprudence.
  - ***"refusal to participate does not require that silence be broken for a claim to exist."***
- Very unfortunate case.

Hamilton-Ryker Group, LLC v. Keymon,, 2010 Tenn. App. LEXIS 55 (Tenn. Ct. App. Jan. 28, 2010).

- How ***not*** to leave your employer case.
- Plaintiff sued its former manager for breaching noncompetition covenants and violating the Tennessee Uniform Trade Secrets Act ("TSA").
- While on paid leave, defendant ***e-mailed herself 56 key documents***, allowing her immediately compete on major contract. The trial court found Keymon was liable on all claims, awarded actual damages of $ **477,178, doubled** as **exemplary damages to $954,356** under the TSA based on Keymon's willful and malicious violation.
- Court of Appeals' decision is primer on (1) enforcement of covenant to solicit employees, (2) broad scope of TSA (which really protects "confidential information 'beyond' trade secrets,") and (3) damages.

VanCleave v. Reelfoot Bank, 2009 Tenn. App. LEXIS 724 (Tenn. Ct. App. Oct. 30, 2009)

- Common law and TPPA retaliatory discharge case. Plaintiff fired by bank for refusing to open questionable account for major customer.
- Trial Court held the purported banking law violation did not implicate "significant public policy or illegal activities" and plaintiff's intent was to protect the bank, not the public.
- Judge Holly Kirby reversed. The Bank Security Act regulations evidence clear and ***important public policy***. In ***refusing to participate in illegal activity***, plaintiff not required to show subjective intent to further public good.

Lamore v. Check Advance of Tenn., LLC, 2010 Tenn. App. LEXIS 56 (Tenn. Ct. App. Jan. 28, 2010)

- Plaintiff ***reported suspected child abuse*** by her manager and was fired for pretextual reason. She was protected by TCA §37-1-410(b).
- Jury unloaded: $9,000 back pay, $10,000 front pay, and $500,000 punitive (where defendant was only worth $600,000). Punitive damages were appealed on due process grounds.
- Judge Susano writes thorough and thoughtful summary of applicable federal law and limits punitives.
- Court affirmed reduction of $500,000 award to $250,000, which is still ***40% of net worth*** and ***13.5 times compensatory***.

Harman v. Univ. of Tenn., 2010 Tenn. App. LEXIS 387 (Tenn. Ct. App. June 16, 2010).

- Plaintiff was ***UT Chattanooga department head***. He gave a bad evaluation to a professor up for tenure, and refused to change it at the Dean's direction, was then removed as department head but retained as professor.
- Sued under Tennessee Public Protection Act which prohibits "***termination or discharge***" for "refusal to participate in or remain silent about illegal activity."
- The trial court dismissed because plaintiff had not been discharged or terminated and had not refused to participate in or remain silent about illegal activities.
- The Court of Appeals affirmed, holding that plaintiff "wasn't discharged or terminated," rather he had only been "***demoted***."

Legislation

FEDERAL LEGISLATION

- **GINA**
  - Prohibits discharging, refusing to hire, or otherwise discriminating on the basis of ***genetic information***, and ***intentionally acquiring genetic information*** about applicants and employees, and establishes strict confidentiality requirements regarding genetic information.
- **FMLA**
  - Expands those for when employees may take "***qualified exigency leave***" from Guard and Reserve to "all members of Armed Forces" ***and*** "***expands military care giver"*** leave to cover veterans for up to five (5) years.
- **PPACA**
  - Patient Protection and Affordability Care Act 2010, requires employers to provide "reasonable break time for nursing mothers" to express breast milk.

TENNESSEE LEGISLATION

- **SB 2753**
  - Allows employers to require their employees to speak English on the job whenever there is a "legitimate business or safety necessity."
- **SB 2633**
  - Allow employers to ***require*** employees to be paid by direct deposit or, if the employee does not want direct deposit, by a prepaid debit card.
- **SB 0682**
  - Clarifies that the civil cause of action for the retaliatory discharge of an employee for reporting illegal activities applies to ***state employees, private employees,*** and ***certain persons paid by the federal government.***