An Official Publication of the New Hampshire Bar Association
NEW HAMPSHIRE BAR NEWS
New Hampshire Bar Association NHBA Equal Justice Under Law
As seen in the BAR NEWS - September 18, 2009

Employment Law:
U.S. Supreme Court Report: Employers Win Big Time

Editor's note: This is the seventh Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both Fellows of the College of Labor and Employment Lawyers. Here they discuss four recent United States Supreme Court decisions:

AT&T v. Hulteen (May 19, 2009) 7-2 decision – held that the smaller pension credit given in a seniority pension plan for pregnancy leaves predating the 1978 federal Pregnancy Discrimination Act, compared to general disability leaves of the same era, does not constitute illegal gender bias. (7-2)

Gross v. FBL Financial Services (June 18, 2009) 5-4 decision – held that there can be no mixed motive claims brought under the federal Age Discrimination in Employment Act.

Ricci v. DeStefano (June 29, 2009) 5-4 decision – ruled that the City of New Haven violated Title VII when it disregarded a test whose results disproportionately disadvantaged minority firefighter candidates because it lacked "strong-basis-in evidence" that it would lose a suit brought by the minorities challenging the test as biased.

Ashcroft v. Iqbal (May 18, 2009) 5-4 decision – set aside the half-century rule that a federal complaint need only have a "short and plain statement of the claim" and now subjects complaints to an assessment by the judge whether a complaint states a "plausible claim for relief" based on a court's "judicial experience and common sense."

Nancy: It's our seventh debate, and finally YOU get to gloat on all four of these recent decisions. Civil rights plaintiffs got hammered.

Debra: Well, it's about time! While *Ricci v. DeStefano* was the most publicized employment law decision of the Court's 2008 term, there are other decisions that will have a greater impact on future employment discrimination litigation.

Nancy: On AT&T v. Hulteen, conduct which is recognized now as clear gender discrimination, but which predated the codification of that gender discrimination into Title VII, will be ignored for purposes of calculating the pensions of women whose benefit contributions were slashed during their pregnancies. Men were credited with full service regardless of the reason for their disability leave, but women who took leave for pregnancy were only credited with 30 days for decades (and later, for a maximum of six weeks until the 1979 Pregnancy Discrimination Act).

So, only women can get pregnant, women bear children; but it will be deemed retroactively okay to shaft them in their old age for having added to the American population if they went into labor (pun intended) prior to 1979! Something (like common sense) tells me that if the Supreme Court were made up of nine women, the decision would have gone the other way.

Debra: Nance, the Supreme Court, in a 7 - 2 decision, merely reaffirmed that the Pregnancy Discrimination Act would not be retroactively applied. While there is an analysis based on the new *Lilly Ledbetter* law (which reversed the U.S. Supreme Court's *Ledbetter v. Goodyear Tire & Rubber Co.*, the subject of our third debate) that each new violation of Title VII starts the running of the statute of limitations, this was not really a statute of limitations problem.

The problem for *Hulteen* was that, unlike Lilly Ledbetter, for whom each paycheck was discriminatory at the time she received it, it was not illegal to discriminate against women on the basis of pregnancy (under federal law) until the 1979 Pregnancy Discrimination Act (PDA) was enacted. The facts in this case are unique and are likely inapplicable to a large number of employers.

Nancy: See what Justice Ginsburg said about that (in her dissent). She would hold that the employer committed a current violation of Title VII when it today refuses to pay women equally with men based on the nature of their absences before the PDA.

Gross v. FBL reverses decades of settled law. Mixed motive had been recognized in common law Constitutional claims and in statutory claims. While in 1991 Congress amended Title VII to incorporate a more generous mixed-motive approach (to undo confusion sown in 1989 by *Price Waterhouse v. Hopkins*), and the ADEA was not similarly amended, ADEA claimants had (correctly) been able to rely on the 1977 case, *Mt. Healthy City Bd. of Ed. v. Doyle*. It held that that once the plaintiff showed that protected conduct [read status: age] was a "substantial" or "motivating factor," the employer then had to prove by a preponderance of the evidence that it would have reached the same decision in absence of the protected speech. But no more! Now, age discrimination must be the ONLY cause of the employment action.

Debra: In this divided 5 – 4 decision, the Court held that a plaintiff asserting a disparate-treatment claim under the ADEA must prove by a preponderance of the evidence that age was the "but for" cause of the challenged employment action. The Court correctly observed that Congress had explicitly amended Title VII in 1991 to authorize the lesser standard of liability in a mixed motive case under that statute, while choosing not to amend the ADEA in a similar fashion. The Gross case will spur considerable activity in federal courts throughout the next year.

Nancy: Yes, but it's death by a thousand cuts, Deb.

Ricci v. DeStefano, a/k/a "Sotomayor's White Firefighters Case," leaves me breathless. It has been the law since the earliest days of Title VII, that if a test scored out at a disparate impact on the basis of race or gender, it was suspect, especially when the test was not limited to the skills "actually necessary" for the job, as opposed to "arguably related" to the job. So when an employer gave a test passed by a significant number of whites and flunked by a significant number of minorities, the test was suspect; and an employer's insistence on using the test for anything would get it sued - before Ricci.

That is why the Sotomayor dustup was more intellectually dishonest than met the eye. Now, apparently, a city is not free to follow the edicts of Title VII unless it has actual knowledge that a minority plaintiff is about to file an ultimately successful suit to throw the test out. As Justice Ginsburg noted in dissent, "Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow." Plus, there was evidence that while some candidates had the study materials far in advance of the test, others had little access to the (costly) materials. Prediction: Congress will reverse *Ricci*.

Debra: There is no question that the Ricci decision is significant for public employers. But will it have much impact on private employers? Both public and private employers are likely assessing whether the Ricci decision will have broader application, and I believe this decision will generate further litigation.

Nancy: On *Ashcrot v. Iqbal*, the (heavily conservative, white male federal) judiciary's version of "common sense" will now be applied ab initio to determine whether a lawsuit's complaint describes "a plausible claim." That puts the well-documented federal courts' summary judgment bias-thinking in play even before the plaintiff can do any discovery. ARGHHHH!

As Justice Souter said in his dissent, "...the court denied Iqbal a fair chance to be heard"; and "it is eliminating Bivens" supervisory liability entirely. (*Bivens v. Six Unknown Fed. Narcotics Agents* allows personal liability for First and Fifth Amendment violations by federal officers.)

Debra: In another 5 – 4 decision, the Supreme Court simply applied the reasoning of *Bell Atlantic v. Twombly*. From an employer's standpoint, the Iqbal decision is welcome, as it requires specificity in pleadings in federal court civil actions. The Supreme Court finally made it clear that non-specific, "kitchen sink notice" pleadings will no longer be tolerated. This is a welcome decision for employers.

Nancy: Let's not rehash the debate that recently raged in the Justice Sotomayor hearings, but I do tend to agree that a Latino woman judge will have a different lens through which to view cases. And if the federal judiciary were all Latino women for one decade (as it was all Anglo men for centuries), I would not be so concerned that employment discrimination cases will be flying out of federal courts like Jiffy Pop gone wild as a result of the Iqbal pleading standards because many federal judges have never seen an employer's decision they did not cheerfully uphold.

As for the Supreme Court, hopefully Justice Souter's choice for life after the court will inspire one of the "Gang of 5" to retire, but I doubt it. After all, since Bush v. Gore, it just keeps getting easier....