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Caught in the Judicial-Congressional Tug of War: Making Sense of Recent and Upcoming Supreme Court Decisions and Congressional Legislation

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When it comes to employment law in 2010, it may be an understatement to say that we live in "interesting times," an oft-quoted expression to describe times of change, challenge, and unpredictability. The Obama White House and the Democrat-controlled Congress hold open the promise of greatly expanded employee rights. The Supreme Court—with the addition of Chief Justice Roberts and Justice Alito in 2005 and 2006 respectively—has a slim but definitive majority vocally resistant to any perceived encroachment into corporate interests. The substitution of Justice Sotomayor for Justice Souter does not, at least in theory, appear to shake up the pro-business orientation of the court.

As we catch the first glimpses of the showdown between the pro-business Roberts Court on one side and the employee-leaning Congress and the Obama White House on the other, the greatest challenges faced by the U.S. employer today are not only surviving these tumultuous economic times, but also navigating the delicate, volatile, ever-changing balance between business interests and employee rights. As the nation's ultimate law deciders and its law makers engage in an incessant tug of war, understanding what the law presently means and divining what the law may become is a fleeting exercise in crystal-balling. What is the besieged employer to do?

The Roberts Court

Led by Chief Justice John Roberts, the U.S. Supreme Court in recent years handed down multiple cases affecting the employer-employee balance. Despite the 5-4 conservative majority, however, the Roberts Court has not steadfastly lived up to its pro-business calling. Some would consider the court's approach to employment law balanced. Others call it unpredictable—perhaps slightly schizophrenic.

To get the proper context, let us start with 2006 and 2007. During that period, the Supreme Court handed down a couple of major employment decisions that reflected the extreme polarity of the Court and the unpredictability of its outcomes. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), a unanimous Court loosened the standards for employees to bring retaliation claims under Title VII. In this case, White complained about being subjected to sexist comments and attitudes. She alleged that, as a result of her complaints, she suffered adverse actions by

being reassigned to less desirable work duties (even though they fell within her general job description) and was suspended without pay for more than a month (even though she subsequently received full back pay from her employer). A divided 6th Circuit panel held that White had not suffered actionable adverse employment actions, a decision that was later vacated by an *en banc* Court of Appeals.

The Supreme Court held that Title VII's *retaliation* standard for establishing an adverse employment action does not mirror the rules under the *discrimination* prong of Title VII. Instead of having to prove a material change in the terms and conditions of employment or an ultimate adverse employment action, as is required for a Title VII discrimination claim, employees alleging retaliation may simply show that the employer, out of a retaliatory motive, took any kind of material, although not necessarily employment-related, action that would dissuade a reasonable person from making complaints of discrimination. This new standard makes it much easier for employees to bring retaliation claims and more difficult for employers to get those claims dismissed on summary judgment. It also sets up intra-statutory disharmony: two different standards for establishing what constitutes an adverse employment action. In the wake of *Burlington Northern*, a plaintiff alleging Title VII discrimination still has to meet the higher threshold of showing job relatedness, whereas a Title VII retaliation plaintiff does not. This more liberal standard for establishing adverse employment actions has been imported to retaliation cases under the Family and Medical Leave Act.

In 2007, the Supreme Court pendulum swung sharply toward the employer in the *Ledbetter* case—a case that subsequently epitomized the head-on collision between the left-leaning political branches and the slightly conservative judicial branch. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), Lilly Ledbetter claimed that she was subjected to discriminatory evaluations, which in turn resulted in her receiving lower compensation than her male counterparts. The jury found for Ledbetter. Reversing the judgment, the 11th Circuit concluded that Ledbetter's claim was time-barred because the pay-setting decisions occurred outside the limitations period even though she received regular paychecks, each of which reflected the pay disparity, within the limitations period.

The Supreme Court began with the proposition that a discrimination claim accrues when the discriminatory act first occurs. This general principle applies to any discrete act of discrimination, including termination, failure to promote, denial of transfer, and failure to hire. The Court rejected the view that pay disparity claims are different because each paycheck bearing disproportionate compensation is a separate and new instance of discrimination, and held that the limitations period begins to run when the employer first makes the challenged compensation decision regardless of the continuing effects of that decision. Two years later, with a new president and Congress, the Lilly Ledbetter Fair Pay Act repudiated the Supreme Court decision, and made each disparate paycheck based on gender a new discriminatory event.

Gross v. FBL Financial Services Inc.

In the 2008-09 term, the Supreme Court's docket has been heavy on significant employment cases. One of its landmark employment cases—and perhaps its most controversial— was *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009). The Court was presented with the question of whether a plaintiff must present *direct* evidence of discrimination to sustain a mixed motives age discrimination claim under the Age Discrimination in Employment Act (ADEA). Previously recognized by the Court in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), a Title VII case, the mixed motives theory recognizes that an employer may be simultaneously motivated by permissible and impermissible considerations when it takes an adverse action against an employee, and the employee may maintain a Title VII claim as long as a prohibited characteristic was a motivating factor in the employment decision. Based on *Price Waterhouse*, many courts assumed that the mixed motives theory was also available in age discrimination cases.

In *Gross*, Jack Gross suffered a diminution of responsibilities, which he considered a demotion, and brought an ADEA lawsuit. He presented evidence at trial that his employer was motivated at least in part by his age. The trial court instructed the jury that it must find for Mr. Gross if age was a motivating factor in the demotion, unless the employer proved that it would have taken the same action even without the age factor. The jury found for Gross. The 8th Circuit Court of Appeals reversed because the trial court failed to require the plaintiff to present *direct* evidence that age

was a motivating factor before allowing the burden of persuasion to shift to the employer to prove that it would have taken the same action irrespective of age. According to the 8th Circuit, absent direct evidence of discrimination, a mixed motives instruction was not warranted; rather, Gross should have been held to the same burden of persuasion applicable to typical single-motive cases where the plaintiff must prove that age was the determining factor in the decision.

The Supreme Court, in a 5-4 decision authored by Justice Thomas, went beyond the question posed by the parties—whether direct evidence is required in a mixed motives ADEA case—to answer what it considered an implicit threshold inquiry: whether the mixed motives theory is even viable under the ADEA. The Court held that it is not. Setting up a direct conflict with Title VII jurisprudence, which definitively recognizes mixed motives claims, the *Gross* majority held that an age discrimination plaintiff must do more than prove that age was a motivating factor; he must prove that age was the "but for" cause—in other words, the sole, determinative cause—of the adverse action. A necessary corollary of the *Gross* holding is that, unlike Title VII, the burden of persuasion in ADEA never shifts to the defendant to prove that it would have taken the same action regardless of the impermissible factor.

The Court's rationale is rooted in an amendment made by Congress to Title VII in 1991, which explicitly authorizes employer liability when a protected characteristic is a "motivating factor," even though the employer is also influenced by legitimate factors. Congress did not make a similar change to ADEA even though it amended the statute in other respects at the same time, leading the Supreme Court to conclude that Congress could only have intended to confine the mixed motives theory to Title VII. The Court invited Congress to amend the ADEA if it desires a different result.

Gross has far-reaching consequences. The "but for" standard eliminates all claims alleging that age played a role in, but was not the sole reason for, the adverse employment decision. The mixed motives theory has been especially popular in the age context because employers frequently claim that they were motivated by seniority or cost-containment, both of which are legitimate factors. Plaintiffs often have to concede that those legitimate factors played *a* role in the decision; they simply contend that age also

tainted the decision. Those plaintiffs are now barred from bringing an ADEA disparate treatment claim.

Gross is, I suspect, not long for this world. Spurred by labor unions and advocacy groups, there is congressional activity afoot to repudiate the decision, and bring the mixed motives theory back to the ADEA. From a public policy standpoint, it may be incongruous to have two different sets of standards for Title VII and ADEA in an area as fundamental as the standard of proof. After all, the ADEA is widely acknowledged to have been modeled after Title VII, and courts have routinely borrowed Title VII principles in interpreting the ADEA. Then again, incongruity is no stranger in discrimination law. In *Burlington Northern*, for example, the Court created a lower threshold for showing an adverse employment action for Title VII *retaliation* claims—making it sufficient simply to show that the employer's actions would create a chilling effect on reporting discrimination—while leaving intact the more stringent requirement that an employee in a Title VII *disparate treatment* case establish a material change in the terms and conditions of employment: two different standards for proving the same element within the same discrimination statute.

Until *Gross* is legislatively abrogated, defense attorneys will be filing summary judgment motions on all disparate treatment ADEA cases except where age is sufficiently shown to be the sole motivating factor. Alternatively, at trial, whereas defendants used to argue exclusively that age played no part in the decision, they now have a solid fall-back position: that if age were found to have factored into the decision, it was simply one consideration among others.

If *Gross* is repudiated, there is the question of retroactivity, an issue that commonly arises when Congress dismantles a Supreme Court decision. Will Congress restore the status quo to such an extent as to nullify all effects of the *Gross* decision? In other words, will cases that have been dismissed on summary judgment based on *Gross* and pending on appeal be able to take advantage of the congressional abrogation? Probably not. Under well-established standards articulated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), a statute has no retroactive effect unless Congress expressly so provides and it attaches no new legal consequences or detriments to previously completed events. Congress has rarely decreed retroactivity in its employment-related legislation.

Crawford v. Metropolitan Government of Nashville and Davidson County

From *Burlington Northern*, we are instructed that a Title VII retaliation plaintiff only needs to show that the adverse employment action is material under the circumstances and would deter a reasonable person from engaging in protected activities. But what activities are protected under Title VII retaliation? In 2009, the Supreme Court provided the answer. It defined Title VII retaliation to include not only overt acts of opposing discrimination, but also the passive act of answering questions in an internal company-conducted investigation. In *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), the Court recognized that Title VII's non-retaliation protection extends to an employee who "speaks out" about discrimination not on her own initiative, but in responding to questions posed by her employer during an internal investigation. Specifically, although she never reported discrimination, Crawford recounted incidents of supervisory discrimination against herself during the company's internal investigation into a co-worker's complaints. Writing for a unanimous court, Justice Souter rejected the 6th Circuit's holding that the opposition clause demands "active, consistent, 'opposing' activities" instigated or initiated by the employee, instead of merely answering questions at the employer's initiative.

In light of *Crawford*, employers should be on alert that an employee who communicates a belief that the employer has engaged in discrimination, even if only in the context of an internal investigation, has effectively expressed his opposition to the activity. The Court was not persuaded by policy arguments that lowering the retaliation threshold would provide a disincentive for employers to dredge up discriminatory activity on their own accord.

Note that *Crawford* dealt with the "opposition clause." Title VII also prohibits retaliation for an employee's *participation* in discrimination investigations and proceedings. Here, Crawford may also have been shielded under the "participation" clause. The 6th Circuit, however, limits that protection to investigations related to a pending EEOC charge. *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003). The Supreme Court sidestepped this issue, upon finding that the employee was protected by the "opposition" clause. Thus, it is an open question whether Title VII's anti-

retaliation protections encompass employees who participate in internal investigations unconnected with a pending EEOC charge—regardless of whether they relayed any incidents of discrimination.

Ricci v. Destefano

Of the employment cases handed down by the Supreme Court during the 2008-09 term, the one that enjoyed the greatest fanfare was perhaps *Ricci v. Destefano*, 129 S. Ct. 2658 (2009). The *Ricci* case dealt with the interplay between Title VII's dual prohibitions of disparate treatment and disparate impact. New Haven's fire department utilized objective examinations to identify the best candidates for promotions to lieutenant and captain positions. Although developed and administered at great expense to the city, the results of the written and oral examinations revealed significant statistical disparities along racial lines. A disproportionate number of African-American and Hispanic candidates scored substantially lower than their white counterparts. Fearing that the test results would subject New Haven to disparate impact claims, the city decided not to certify the results.

Seventeen mostly white firefighters who passed the examinations but were denied promotional opportunities sued the city, claiming that the city's decision not to certify the test results was a form of disparate treatment based on race, in violation of Title VII. (The plaintiffs also sued under the Equal Protection Clause of the Constitution, but the Court found it unnecessary to address that claim.) New Haven asserted that it had a "good faith belief" that certifying the test results would have violated Title VII's disparate impact provision, which prohibits employers from using examinations or other facially-neutral objective criteria that produce a disparate impact based on race or other protected characteristics, unless justified by job-relatedness and business necessity. At bottom, the city argued that it could not be held liable under Title VII's disparate treatment prohibition for attempting to ensure compliance with Title VII's disparate impact proscription.

In a 5-4 decision, the *Ricci* Court started with the premise that the city's non-certification decision was motivated by racial considerations and, as such, would violate Title VII absent some valid defense. At issue, then, was whether the intent to avoid disparate-impact liability absolves a practice that

would otherwise constitute disparate treatment. The court rejected the city's assertion that a good faith belief of liability can excuse the race-conscious practice; it likewise rejected the plaintiffs' overly restrictive formulation that only an actual, provable violation would suffice. Taking the middle road, the Court adopted the "strong-basis-in-evidence" standard, borrowed from Equal Protection jurisprudence, and held that an employer's race-based conduct can be justified on grounds of avoiding or remedying an unintended disparate impact only where it has a strong basis in evidence to believe that it will be exposed to disparate-impact liability if it fails to engage in the race-conscious conduct.

Although the facts in *Ricci* center on municipal action, the Court decided the case on Title VII, not equal protection, grounds. Thus, the principles articulated in *Ricci* have equal application to public and private employers. Beyond that, the practical impact of *Ricci* is unclear. The Court declared that it was not disturbing an employer's affirmative efforts to provide fair employment opportunities for all. This suggests that employers may continue to embark on programs aimed at ensuring a diverse workforce—as long as they do not go too far. How far is too far? At least in *Ricci*, it is when these affirmative efforts upset employees' "legitimate expectation not to be judged on the basis of race." In practical terms, does this spell the end of the employer's ability to engage in disparate impact analyses? Employers often review preliminary layoff and compensation decisions to determine if certain employee groups are disproportionately affected; if so, employers may revisit their decision-making processes and standards. Is this practice prohibited by *Ricci* since it entails subsequent adjustments in neutral decision-making processes? Or is it unlawful only when the employees' expectations have been implicated, such as when results have been announced? As is evident, *Ricci* provides more questions than answers.

14 Penn Plaza v. Pyett

In yet another 5-4 decision, the Supreme Court narrowed employees' rights to a judicial adjudication of ADEA claims in the face of a union-negotiated mandatory arbitration clause. The plaintiffs in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) complained of discriminatory work assignments based on age and other violations of their union contract. The union withdrew the age discrimination claims but took the contract claims to

arbitration. The plaintiffs subsequently filed ADEA claims in federal court. The employer moved to compel arbitration of the ADEA claims based on language in the collective bargaining agreement proscribing discrimination and requiring all discrimination claims to be submitted to the grievance and arbitration procedures. Relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the lower courts concluded that, no matter how clear and unmistakable, union-negotiated waivers of the right to judicial adjudication of statutory discrimination claims are unenforceable.

In *Gardner-Denver*, the Supreme Court had held that an employee's individual right to litigate Title VII claims in federal court may not be waived through the collective bargaining process. Over the years, the Court's apprehension of the arbitral process waned, and in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court recognized that an employee who had entered into an individual agreement to waive his right to a federal forum could be compelled to arbitrate his statutory age discrimination claim. Reconciling the two Supreme Court precedents, the 2nd Circuit concluded that an employee's individual decision to elect mandatory arbitration to vindicate his ADEA rights is enforceable, but a labor union could not impose such a waiver upon its members collectively.

The *Pyett* majority disagreed, holding that an employee who has consented to arbitrate his ADEA claims shall be bound by that agreement, even if it was secured collectively by the union on his behalf. According to the Court, any nullification of a clear agreement to arbitrate statutory claims must be supported by congressional intent to preserve a judicial forum for those claims. Finding that neither the ADEA's text nor its legislative history evinces any congressional intent to preclude arbitration, the Court concluded that the union-negotiated mandatory arbitration must be honored. Notably, the Court interpreted *Gardner-Denver* as upholding only the employee's substantive right to be free from discrimination, not a right to litigate statutory claims in a federal forum.

Pyett's strong inclination toward abdicating judicial powers over statutory discrimination claims has drawn severe criticism. Its implicit invitation—some may call it dare—to Congress to amend the ADEA and other anti-discrimination statutes to specify a preference for judicial adjudication has been accepted by some members of the legislative branch (as discussed below).

Looking Ahead: Upcoming Supreme Court Decisions

In the upcoming Supreme Court term, the Court will issue at least two key employment decisions. One of these cases comes from the 9th Circuit Court of Appeals, and again focuses on the arbitrability of employment cases. In *Granite Rock Co. v. International Brotherhood of Teamsters et al.*, 546 F.3d 1169 (9th Cir. 2008), contract negotiations between Granite Rock and Local 287 had faltered, and a labor strike ensued. The parties subsequently reached a tentative agreement, subject to ratification by the union membership, which contained a no-strike clause as well as a broad arbitration provision requiring all disputes under the agreement to be submitted to arbitration. Days later, talks broke down, and Local 287, with the aid of the International Brotherhood of Teamsters (IBT), instituted a strike in violation of the no-strike clause in the new agreement. The company sued Local 287 and IBT for breach of the collective bargaining agreement and tortious interference with contract, respectively. Both causes of action were brought under section 301(a) of the Labor Management Relations Act (LMRA), which authorizes "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . . ." 29 U.S.C. § 185(a) (West 2009). Local 287 contended that the new contract was not formed because it was never ratified; yet it invoked the contract's arbitration clause to move to compel arbitration of the entire case. IBT argued that section 301(a) does not reach non-signatories to a collective bargaining agreement.

The Supreme Court granted certiorari to consider two issues: (1) does section 301(a) of the LMRA, which generally pre-empts state law causes of action, countenance a tortious interference claim against an entity that is not a signatory to the collective bargaining agreement; and (2) what is the effect of an arbitration clause when the very formation of the agreement containing that clause is being challenged?

The 9th Circuit held that, while a non-signatory may come within the purview of section 301(a) of the LMRA, tortious interference claims do not arise under a collective bargaining agreement and, therefore, are not envisioned under that statutory provision. With respect to the second issue, the 9th Circuit reversed the trial court's holding that the question whether the contract was breached had to be arbitrated, but the threshold question

whether the contract was formed must be decided by the court. Acknowledging prior intra-circuit disharmony, the 9th Circuit concluded that the entire dispute, including the threshold issues of contract formation, had to be submitted to arbitration.

The 9th Circuit used a simple rationale: if a party sues under a contract containing a broad arbitration clause, the arbitration clause must be enforced unless the other party demonstrates that it never agreed to arbitrate. The court found that both parties in this case had consented to arbitration: Granite Rock *implicitly* consented by suing for alleged violation of the no-strike clause of a contract containing an arbitration clause; Local 287 *explicitly* consented by invoking the arbitration clause and moving to compel arbitration.

The practical effect of the 9th Circuit decision is that, to avoid enforcement of a broad arbitration clause, the party contesting contract formation must also resist arbitration. Thus, an employer, like Granite Rock, who sues to enforce a contract containing an arbitration clause, will leave itself vulnerable on the arbitrability of its claim unless the other party (who challenges the validity of the contract) also desires to stay in court. On the other hand, if the opposing party, like Local 287, argues that the contract is not valid but, even if the contract were found to be valid, the arbitration clause must be honored, then the entire case will be submitted to arbitration, including the threshold question of whether a contract was formed between the parties in the first place. Presumably, if the contract were adjudged to be invalid by an arbitrator (thereby also invalidating the arbitration clause), the fact that the resisting party lost its right to a judicial forum is to be viewed simply as an insignificant collateral injury, justified by that party's own effort to enforce that contract.

Notably, the 9th Circuit rejected Granite Rock's argument that, while the arbitration clause was generally valid, it did not cover a dispute over contract formation. Employing language likely to find favor with the current Supreme Court, the 9th Circuit stated that arbitration clauses should be "construed very broadly," and Granite Rock's very act of suing under the contract supports an interpretation that the arbitration clause captures even the threshold issue of contract formation.

Another major employment case to be reviewed by the Supreme Court in the 2009-10 term is *Lewis v. City of Chicago*, 528 F.3d 488 (7th Cir. 2008), with facts generally similar to the *Ricci* case. The city of Chicago required applicants for jobs as firefighters to take a written test. The test scores determined if applicants were placed in the "well qualified," "qualified," or "not qualified" categories for hiring purposes. When the scores came in, they revealed that a large number of applicants scored in the "well qualified" category; this meant that those who scored in the "qualified" category would effectively be precluded from being selected for the positions. The mayor publicly announced that the city was disappointed that the test scores were not consonant with the city's desires to improve racial and other forms of diversity. At this point, *Lewis'* factual similarities with *Ricci* end. Instead of decertifying test scores that showed a disparate racial impact, as occurred in *Ricci*, the city of Chicago honored the results—perhaps saving itself a reverse discrimination lawsuit from the predominantly white applicants who scored in the "well qualified" category. That decision, however, brought about a twelve-year lawsuit by African-American applicants who claim that the test disproportionately and impermissibly classified them in the "qualified" category, and foreclosed their opportunity to be selected for those firefighter jobs.

At issue is the timeliness of filing charges of discrimination. The city contended that the lawsuit was untimely because the plaintiffs filed their charges of discrimination later than the 300-day limitations period after receiving notice of the test results. However, the charges were filed within the limitations period after the city began to hire applicants from the "well qualified" list.

The district court found that the lawsuit was timely because the city committed a fresh violation of Title VII each time it hired an applicant from the "well qualified" list.

The 7th Circuit disagreed. In a holding reminiscent of the Supreme Court's now-abrogated decision in *Ledbetter*, the 7th Circuit concluded that the limitations period was triggered when the city made its allegedly discriminatory decision to honor the test results. According to the Court of Appeals, because the crux of the plaintiffs' theory is that the test scores had a racially disparate impact that alleged discrimination was complete when

the tests were scored, and the plaintiffs discovered the discrimination when they learned the test results. Their failure to be hired when hiring decisions were actually made was simply an "automatic consequence" of the challenged test scores.

In so holding, the 7th Circuit parted company with the 9th Circuit, which held in *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991) that a plaintiff could not be certain that eligibility lists had discriminatory consequences until she was actually denied a promotion. The 7th Circuit cushioned the impact of its holding by reasoning that any plaintiff who after expending reasonable diligence, is unable to determine whether she has been injured, may avail herself of the doctrine of equitable tolling. In this case, however, the plaintiffs had reason to know after the announcement of their test results that they would be deprived of the job opportunities; thus, their charge was not timely filed.

The *Lewis* case may be an instance of *Ledbetter* revisited. The *Ledbetter* Court had held that a pay disparity claim accrued when the allegedly discriminatory decision was made, and each disparate paycheck merely reflected the continuing effects of past discrimination rather than a separate and distinct instance of discrimination. Congress undid the *Ledbetter* decision by enacting the Lilly Ledbetter Fair Pay Act of 2009. In accepting certiorari, the Supreme Court may be seeking to restore the general principles promulgated in the *Ledbetter* case—without transgressing the Ledbetter Act, which deals only with pay disparities. Since the *Lewis* case addresses non-pay issues, the Court is not bound to follow the Act. Recall that the Supreme Court in Ledbetter enunciated the general principle that discrimination claims, such as the failure to hire at issue in *Lewis*, begin to run when the discriminatory act first occurs, not when the consequential effects emerge. Is this the Roberts Court's attempt to salvage *Ledbetter* in its ever-present tug of war with Congress?

While Congress' enactment of the Lilly Ledbetter Pay Fair Act does not reach the issue of discriminatory hiring, the parallels are apparent: if Congress intended Title VII claims to accrue each time a plaintiff receives an allegedly discriminatory paycheck due to previously adopted compensation decisions, why should the result be different when an applicant receives word that someone else has been hired instead of him

due to previously adopted eligibility criteria? If the Court affirms the 7th Circuit decision, will this lead to another showdown with Congress?

Legislative Initiatives in 2009 and Beyond

With the Obama White House and the Democrat-controlled House and Senate, 2009 has seen ambitious legislative agenda to expand employee rights. Seemingly undaunted by the nation's current economic woes, advocacy groups have scored major victories on the legislative front to create greater employee protections, and are looking for more. Here are some of the key recently enacted and pending pieces of legislation.

Genetic Information Nondiscrimination Act of 2008

Starting with legislative enactments in President Bush's last year in office, the Genetic Information Nondiscrimination Act (GINA), initially proposed by Representative Louise Slaughter (D-NY) as H.R. 493, 110th Cong. (2007) in January 2007, was signed into law on May 21, 2008. Heralded as legislation that will blaze a trail for people to take full advantage of personalized medicine without fear of discrimination, the cornerstone of GINA is the prohibition of discrimination by employers and health insurance companies based on genetic information. For example, an employer may not refuse to hire or promote an employee based on information that the employee is genetically predisposed to certain diseases. Nor is an employer permitted even to require or request an employee to submit to genetic testing.

Critics have called GINA "a solution in search of a problem." Hon. Louise M. Slaughter, Speech Library of Congress (Jan. 16, 2007). Sponsors of GINA draw parallels to the 1970s when African-Americans were denied jobs, educational opportunities, and insurance, based on their carrier status for sickle cell anemia. Id.

It is unclear, however, whether GINA will truly have a substantive impact. As a practical matter, given the difficulty and cost in accessing such information, it is unlikely that many employers would engage in the practice of requiring or requesting genetic testing, let alone take adverse actions based on those results. Thus, perhaps the most meaningful impact of

GINA, in the short-term, is its confidentiality requirements. While the EEOC has now begun enforcing Title II of GINA, it has yet to promulgate final regulations regarding the legislation.

ADA Amendments Act of 2008

H.R. 3195, 110th Cong. (2007), otherwise known as the ADA Amendments Act of 2008, was introduced by the House Majority Leader, Representative Steny Hoyer (D-MD), on July 26, 2007. The legislation became law over one year later, on September 25, 2008, signed by President Bush. Its purpose was to overturn a series of Supreme Court decisions interpreting the ADA in an overly restrictive manner that made it difficult to prove that an impairment is a covered disability. The legislation emphasizes that the definition of disability should be construed expansively. Additionally, the ADA Amendments Act broadened the definition of major life activities.

The practical effect of the ADA Amendments Act is that employers are now stripped of their ability to challenge effectively a plaintiff's claim to a covered disability. Except in unusual cases, the battle now is not whether the plaintiff has a protected disability (which accounted for a good number of summary dismissals in the past) but whether the challenged decision was taken because of the individual's disability. Because the latter issue is often fact intensive, more ADA cases will proceed to jury trials.

Lilly Ledbetter Fair Pay Act

In 2009, under President Obama, the most significant employment legislation passed by Congress was an amendment to nearly all federal anti-discrimination statutes (including Title VII, the ADEA, the ADA, and the Rehabilitation Act), titled the Lilly Ledbetter Fair Pay Act of 2009. The Ledbetter Act was introduced on January 6, 2009 in the U.S. House of Representatives by Representative George Miller (D-CA) as H.R. 11, 111th Cong. (2009). Its counterpart in the Senate, S. 181, 111th Cong. (2009), was introduced by Senator Barbara Mikulski (D-MD) on January 8, 2009. Just twenty days later, the bill became law, signed by President Obama on January 29, 2009.

Quite simply, the Ledbetter Act broadens employees' rights under the employment discrimination statutes by extending the filing period for wage discrimination claims. It does so by defining an "unlawful employment practice" to include any occurrence when "an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages" are paid. Thus, claims of pay discrimination accrue not only when a discriminatory compensation decision or practice is adopted, but also whenever an employee receives a discriminatory paycheck. The Act constitutes a direct rebuke to the Supreme Court's *Ledbetter* case. Is it any wonder that the Court may be relishing a rematch in the upcoming *Lewis* decision?

The Employee Free Choice Act

Perhaps no proposed legislation has been more controversial than the Employee Free Choice Act (EFCA) of 2009. The EFCA was introduced on March 10th, 2009 as H.R. 1409, 111th Cong. (2009) by Congressman George Miller of California's 7th Congressional District. The EFCA currently has 227 House co-sponsors, and thus, while the bill remains in the House Subcommittee on Health, Employment, Labor, and Pensions, it will likely earn the votes needed for final House approval. In the U.S. Senate, however, the EFCA faces a much more cumbersome and precarious road to final passage. The Senate counterpart to H.R. 1409, S. 560, 111th Cong. (2009), was introduced by the late Senator Ted Kennedy of Massachusetts on March 10, 2009. Since its introduction, it has been read twice and referred to the Committee on Health, Education, Labor, and Pensions.

The EFCA is described as a bill to amend the National Labor Relations Act (NLRA) by enabling "employees to form, join, or assist labor organizations." As a practical matter, however, the EFCA does much more. First, the EFCA strengthens remedies for violations of the NLRA by including back pay, liquated damages, and civil penalties. Additionally, the EFCA adds a new binding arbitration provision to the NLRA, 29 U.S.C. § 158(h)(3), which effectively invites the government into private contract negotiations, contrary to the non-governmental-interference policy espoused in the National Labor Relations Act.

The primary controversy surrounding the EFCA, however, concerns the addition of a "card-check" provision. More precisely, the EFCA revises the NLRA by requiring the National Labor Relations Board to "certify a bargaining representative without directing an election if a majority of the bargaining unit employees have authorized designation of the representative (card-check) and there is no other individual or labor organization currently certified or recognized as the exclusive representative of any of the employees in the unit." 29 U.S.C. § 159(c)(6) (West 2009).

This new provision may appear complicated, but its application is quite straightforward: it will allow unions to bypass the secret ballot and require only signatures on a petition to organize a company's work force. Thus, the EFCA will render the secret ballot election process of the NLRA irrelevant, as more and more employees will likely turn to the easier card-check process when attempting to unionize. This may well subject employees to harassment and intimidation. The EFCA's economic ramifications are also troublesome. Andy Stern, the president of the Service Employees International Union (SEIU), has allegedly predicted "that passing EFCA would lead to 1.5 million new [union] members per year for the next ten years." Many business associations, including the U.S. Chamber of Commerce, have vehemently opposed the EFCA bill, claiming, "if Andy Stern's prediction were to come true then 'unemployment is predicted to rise between 5.3 and 6.2 million.'"

Importantly, the EFCA has been proposed during the last three sessions of Congress, but each time, it has failed to garner the necessary sixty votes in the Senate. The EFCA may again meet a similar fate in the U.S. Senate in this session, as it currently has only forty-seven Senate co-sponsors. For that reason, it is unlikely that the EFCA has enough support in its current form to defeat an imminent filibuster in the U.S. Senate. Revisions to the current language of the EFCA could generate additional support. In fact, Senator Arlen Specter of Pennsylvania has already begun drafting a revised version of the EFCA that does not include the card-check provision. Whether the EFCA or Senator Specter's compromise bill will achieve the broad consensus needed for final passage, however, remains to be seen.

Employment Non-Discrimination Act of 2009

On June 24, 2009, Representative Barney Frank of Massachusetts introduced H.R. 3017, 111th Cong. (2009), otherwise known as the Employment Non-Discrimination Act of 2009 (ENDA). The legislation "prohibits employment discrimination on the basis of actual or perceived sexual orientation or gender identity by 'covered entities.'" Covered entities are defined broadly, including employers, employment agencies, and labor organizations. Closely modeled after Title VII and other civil rights laws, the ENDA prohibits retaliation and provides a private right of action for aggrieved individuals to file disparate treatment claims.

Passage of the ENDA seems likely, as it is touted as a top legislative priority for the Obama Administration. Thus far, the bill has generated 190 co-sponsors in the House of Representatives. The Senate version of ENDA, S. 1584, 111th Cong. (2009), was introduced on August 5, 2009 by Senator Jeff Merkley of Oregon. It too has earned broad support, and has a total of forty-three Senate co-sponsors. Both bills are being heard in various committees, including the Senate Health, Education, Labor, and Pensions Committee and four different House committees.

Much like the Employee Free Choice Act, ENDA has been defeated by the U.S. Congress several times before, and was first introduced in 1994. Unlike the EFCA, however, supporters of ENDA have claimed that the legislation is supported by much of the business community, including Hewlett-Packard Co., Chevron Corp., and Coca-Cola Co.

Fair Pay Legislation

This year has been a very busy year for advocates of "fair pay" legislation, with two substantively distinct proposals slated for debate in the coming months. The Paycheck Fairness Act was the first fair pay legislation to be introduced in the 111th Session of Congress, presented as H.R. 12, 111th Cong. (2009) by Representative Rosa DeLauro of Connecticut's 3rd Congressional District on January 6, 2009. The Senate version of H.R. 12, S. 182, 111th Cong. (2009),, was introduced three days later, on January 9, 2009, by former Senator Hillary Clinton of New York. The Paycheck Fairness Act amends the Fair Labor Standards Act of 1938 to provide more

effective remedies to victims of discrimination in the payment of wages on the basis of sex.

In practice, the legislation seeks to limit the defense that the pay disparity was based on factors other than sex, by imposing the requirement that such factors be "bona fide." Thus, if enacted, the legislation will excuse pay differentials for men and women only where the employer can show that the disparity is truly caused by a bona fide factor other than sex. Additionally, the legislation would make private employers liable in a civil action for compensatory and punitive damages. Worth noting, H.R. 12 was quickly approved just three days after being introduced in the House of Representatives by a substantial margin of 256 to 163. The Senate version of the Paycheck Fairness Act, however, remains trapped in a quagmire in Congress.

In addition to the Paycheck Fairness Act, the House and Senate versions of the Fair Pay Act were also introduced, on April 28, 2009. These bills, H.R. 2151, 111th Cong. (2009) and S. 904, 111th Cong. (2009), amend the FLSA by "establishing equal pay for equivalent work." Perhaps the National Committee on Pay Equity describes it best, asserting that under the legislation, "employers could not pay jobs that are held predominately by women less than jobs held predominantly by men if those jobs are equivalent in value to the employer."

Unlike the Paycheck Fairness Act, both versions of the Fair Pay Act remain in Committee. Furthermore, though both the Paycheck Fairness Act and the Fair Pay Act have earned widespread support, neither bill is without its detractors. The U.S. Chamber of Commerce, for example, opposes both bills.

The FMLA Restoration Act

Introduced by Representative Carol Shea-Porter of New Hampshire on April 29, 2009, H.R. 2161, the Family and Medical Leave Restoration Act (FMLRA), seeks to make several technical but substantive revisions to the Family and Medical Leave Act of 1993. More precisely, the legislation directs the U.S. Secretary of Labor to reverse several regulations promulgated under the FMLA, including the removal of regulatory

requirements for a specific number of periodic treatments by a health care provider in order to qualify for leave for a serious health condition. Moreover, the legislation repeals certain eleventh-hour regulations promulgated by the Bush Administration.

Given that no Senate counterpart to H.R. 2161, 111th Cong. (2009) has been introduced, final passage of the FMLRA seems unlikely. However, several organizations have called on U.S. Department of Labor Secretary Hilda Solis to rescind the regulations targeted by H.R. 2161, rather than waiting for the legislation to be enacted. Hence, while the FMLRA might not become law this year, the changes contemplated by the legislation may nonetheless be implemented through regulatory amendments.

The Arbitration Fairness Act of 2009

On February 12, 2009, Representative Henry C. Johnson of Georgia's 4th Congressional District introduced H.R. 1020, 111th Cong. (2009), the Arbitration Fairness Act (AFA) of 2009. The AFA's Senate counterpart, S. 931, 111th Cong. (2009), was introduced a little over two months later on April 29, 2009 by Senator Russ Feingold of Wisconsin. The central function of the AFA is to "declare that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, or franchise, or civil rights dispute." This proposed legislation appears to be Congress' response to the *Pyett* decision and the pervasive nature of arbitration clauses in everyday contracts.

Both the House and Senate versions exempt labor organization contracts. Both bills currently remain in committee: the Senate Judiciary Committee and the House Subcommittee on Commercial and Administrative Law respectively.

Importantly, when the AFA was introduced by Senator Feingold in 2007, it was often called a "trial lawyer's dream" because it presumably would channel thousands of disputes from arbitration into more expensive, more protracted court litigation. Opponents claimed that the legislation would affect hundreds of millions of existing agreements, wreaking havoc on the judicial system.

These criticisms were apparently persuasive, as neither the House nor Senate versions of the AFA of 2007 ever made it out of committee (although H.R. 3010, 110th Cong. (2007) was approved by a House subcommittee). Given the increased Democratic majorities in Congress since 2007, however, these same arguments may prove less effective in defeating the AFA of 2009.

Conclusion

In this chapter, I have highlighted many, although not all, of the recent and upcoming key employment decisions and congressional actions, with a particular emphasis on those that showcase the inherent tension between our various governmental branches, and with an eye toward distilling the practical significance of those decisions and actions to the employer. In the push and pull between Congress and the Supreme Court, as employee rights expand and contract, employers—and the lawyers advising them—are hard-pressed to chart a course through these choppy waters. Understandably, many employers simply want to know what it is they can and cannot do; and what changes they should expect in the near future.

Employment law, however, has never been static. It has always ebbed and flowed with each changing administration, each changing congressional majority, and each changing Supreme Court composition. Now, perhaps more than ever, employment law is in its most dynamic, unpredictable state. It is certainly, shall we say, "interesting."

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