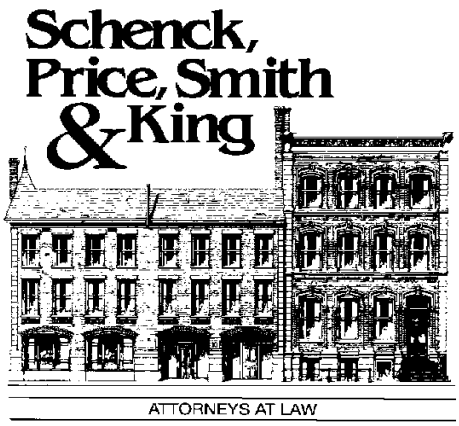

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LABOR & EMPLOYMENT LEGAL UPDATE
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Employment Practices Liability Coverage and the Supreme Court

This past term's Supreme Court calendar included several labor and employment opinions that in some cases refine, and in others, change, the legal landscape governing the employment relationship. Generally, employment practices liability insurance provides employers with coverage for claims brought by employees based on discrimination, harassment, wrongful termination, mismanagement of employee benefit plans, and breach of contract. In light of the current economic climate and the significant increase in the number of claims of discrimination, insurers should expect to see an increase in both claims and coverage issues.

(i) Discrimination in the Workplace and Employer Retaliation

In Crawford v. Metropolitan Government of Nashville, 555 U.S. ____ (2009), the Supreme Court considered Title VII's anti-retaliation provision, 42 U.S.C. § 2000(e)-3(a), in the context of employees who report race or gender discrimination in the workplace. Pursuant to the antiretaliation provision, it is, "an unlawful employment practice for an employer to discriminate against any of his employees…[1] because he has opposed any practice made an unlawful employment practice by this chapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000(e)-3(a).[1]

During the course of investigating a complaint that one of its employees engaged in sexual harassment, respondent interviewed petitioner regarding whether she had witnessed

[1] The first part of the provision is known as the "opposition clause" and the second part of the provision is known as the "participation clause."

any "inappropriate behavior" on the part of the subject employee. Petitioner provided several instances where she witnessed the employee engaging in sexual harassment. Shortly after respondent completed its investigation, it terminated petitioner from her position. Notably however, respondent did not terminate the employee whose behavior had prompted the investigation. Petitioner argued that respondent violated both clauses of the antiretaliation provision.

The district court granted respondent summary judgment finding that petitioner had not "instigated or initiated" any complaint but "merely answered investigators in an already-pending internal investigation, initiated by someone else." As to her claim under the participation clause, the Court held that precedent in the Sixth Circuit requires the investigation to occur pursuant to a pending EEOC charge. The Court of Appeals affirmed the District Court's holding on the same grounds.

The Supreme Court, in reversing the Sixth Circuit, noted that its decision conflicted with that of the other Circuits, particularly with respect to its rationale for dismissing petitioner's claim under the opposition clause. According to the Court, the Sixth Circuit's holding is essentially a catch-22 for employees. The Court, citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 775 (1998), wherein it described the employer's incentive to inquire, further noted that:

> The appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim the employer might well escape liability, arguing that it "exercised reasonable care to prevent and correct [any discrimination] promptly" but "the plaintiff employee unreasonably failed to take advantage of…preventive or corrective opportunities provided by the employer."

(ii) Age Discrimination Arbitration Under a Collective Bargaining Agreement

In 14 Penn Plaza, LLC v. Steven Pyett et. al., 556 U.S. _____ (2009) the Supreme Court grappled with the question of whether a provision in a collective bargaining agreement that ***clearly*** and ***unmistakably*** requires union members to arbitrate claims that arise under the Age Discrimination in Employment Act of 1967 (ADEA) is enforceable. Petitioner was the owner and operator of a building in New York City where respondents had been employed as night lobby watchmen. As a result of petitioner having contracted with a unionized

security company which provided licensed security guards in the building, respondents were reassigned to jobs as porters and light duty cleaners.

The Union filed grievances on behalf of respondents and asserted claims based on age-discrimination, violation of seniority rules, and failure to pay overtime. The Union withdrew respondents' age-discrimination grievance from arbitration and litigated the claim in a judicial forum on the ground that the arbitration clause concerned their individual statutory rights, which were not subject to the collective-bargaining process.

The Court of Appeals for the Second Circuit held that, "arbitration provisions in a collective bargaining agreement which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." See 14 Penn Plaza LLC v. Pyett, 498 F.3d 88, 93-94 (2d Cir. 2008). In overruling the Court of Appeals, the Supreme Court held that the parties had statutory authority to collectively bargain for arbitration of discrimination claims and further, that Congress had not terminated that statutory authority in the case of ADEA claims. Accordingly, respondents' only recourse was through the arbitration process.

(iii) ADEA and Mixed-Motive Jury Instruction

When a plaintiff demonstrates that an adverse employment decision was discriminatory or retaliatory, the employer has the burden of proof to show that it would have made the same employment decision absent the alleged discriminatory or retaliatory motive. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Thus, in a mixed-motive jury instruction, there is a presumption that the employer's conduct was motivated by an impermissible factor. The employer has the burden to rebut this presumption by showing that it would have made the same decision irrrespective of an improper motive. Id.

In Gross v. FBL Financial Services, 557 U.S. _____ (2009), the Court considered whether a plaintiff seeking to obtain a mixed-motive jury instruction in a claim under the ADEA, must present direct evidence to support his allegations. Petitioner Gross began his employment with respondent in 1971. In 2001, he was promoted to serve as the director of claims administration. In 2003, respondent reassigned Gross to the position of claims project manager and simultaneously created a new position which it assigned to one of the individuals who had previously reported to him.

According to petitioner, his reassignment was a demotion because many of the responsibilities he assumed were transferred to the individual who held the newly created position. Gross further alleged that the person who held the new position was not only an

individual whom he had previously supervised, but she was also significantly younger than him. This fact provided petitioner with a basis to assert an age discrimination claim.

At trial, Gross proffered evidence to support his allegation that his employer's act of reassigning his position was based, in part, on his age. In rebuttal, the company submitted evidence to show that Gross' reassignment resulted from corporate restructuring. The Court instructed the jury that if petitioner proved by a preponderance of the evidence that the employer demoted him by changing his position and that his age was a motivating factor in that decision, it should return a verdict in petitioner's favor. The jury ultimately returned a verdict favorable to Gross.

The company appealed the verdict arguing that the trial court's jury charge was erroneous. The Court of Appeals agreed, holding that the district court's instructions, "were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of *any* category of evidence showing that age was a motivating factor—not just 'direct evidence' related to FBL's alleged consideration of age." Pursuant to the burden-shifting analysis established in Price Waterhouse, supra, 490 U.S. at 276, when an employee produces evidence that his employer engaged in discrimination in violation of Title VII, which was a "motivating" or "substantial" factor in the employer's adverse action against him, the burden of proof then shifts to the employer to show that it would have taken the same action regardless of the alleged impermissible criteria.

In analyzing the "burden-shifting" rules, the Supreme Court noted that the burden of persuasion does not shift to the party defending allegations of discrimination based on mixed-motive under the ADEA. To support its analysis, the Court engaged in a strict constructionist approach wherein it noted that the text of the ADEA does not authorize a plaintiff to plead an age discrimination claim on the basis of mixed-motive. Accordingly, the Court held that a plaintiff who brings a disparate-treatment claim pursuant to the ADEA must prove by a preponderance of the evidence that his age was the "but for" cause of his employer's adverse employment action against him. As for the burden-shifting set forth in Price Waterhouse, the Court noted that "even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."

(iv) Promotion and Hiring Practices

Ricci v. DeStefano, 557 U.S. ____ (2009) was certainly the most high profile and controversial employment law case in the 2008-2009 Supreme Court term. In Ricci, the City of New Haven administered a promotional examination for firefighters seeking the rank of lieutenant or captain. White candidates significantly outperformed minority candidates on

the examination. Fearing a law suit alleging that the test was discriminatory, the City discarded the test results.

The Supreme Court held that the City's action was race-based and in violation of Title VII. The Court noted that the City turned a "blind eye" to evidence that supported the validity of the exams, which were designed and administered by a company which specialized in the preparation of non-discriminatory promotional examinations for fire departments. According to the Court,

> There is no evidence—let alone the required ***strong basis in evidence***—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. ***Fear of litigation*** alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. (emphasis supplied).

(v) Disability and Pregnancy Discrimination

In an appeal from the Ninth Circuit, the Supreme Court in AT&T Corporation v. Hulteen, 556 U.S. ____ (2009) reviewed the issue of whether an employer is liable for a pension plan which granted less retirement credit for pregnancy leave than for medical leave based on a non-pregnancy related disability. The Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000 (e) (k), prohibits an employer from treating pregnancy-related conditions less favorably than other medical conditions. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). Respondents argued that Petitioner violated the PDA through a system which granted less service credit for pregnancy leave than for disability leave.

During the time of Respondent's employment with AT&T, there was a policy that employees on disability leave receive full service credit for the entire period of their absence. Employees who took a personal leave, however, which included pregnancy leave, received a maximum service credit of thirty days. In 1977, Petitioner changed its policy to provide pregnant employees with disability benefits and service credit for up to six weeks of leave. If an employee's absence was greater than six weeks, the leave was treated as personal leave during which benefits and service credits would not accrue. When the PDA was enacted, petitioner changed its policy to provide the same service credit to employees on pregnancy leave as those on other temporary disability leave.

According to respondents, petitioner's failure to make retroactive adjustments to the service credit calculations of those women who received less service credit under the pre-PDA policy was discriminatory under Title VII. Following precedent in the Ninth Circuit, the Court of Appeals found in favor of respondents and held that post-PDA retirement eligibility calculations that relied on pre-PDA rules that did not treat pregnancy as a disability violated Title VII.

The Supreme Court noted that the Ninth Circuit was in conflict with the other Circuits which had addressed the issue. The Court viewed the payment of pension benefits as a function of AT&T's seniority system because, "calculating benefits under the pension plan depends in part on an employee's term of employment." The Court pointed to the "special treatment" given to such plans under Title VII and concluded that when there are differentials in benefits that arise from a bona fide seniority-based pension plan, the plan will survive unless the challenger can make a showing that there was intent to discriminate. In reversing, the Court found that AT&T's system was "bona fide" because it did not have any discriminatory terms and respondents failed to make any showing of a wrongful intent.

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