



## Victory Is Sweetest When You've Known Defeat

### *A review of the 2008-2009 Supreme Court decisions*

By Brook A. Brewer (San Francisco)

Good news for employers this year! Well . . . at least as compared to last year's Supreme Court term. The majority of the employment cases decided by the Court this term can be considered a victory for employers, and even one of the decisions siding with employees is not all bad. So, after losing all but four of the eleven employment decisions decided last year, employers can finally breathe a welcome sigh of relief. As discussed below, employers can claim victory in six cases, while only accepting defeat in one case and considering another case to be a mixed result.

#### The Victories

The large majority of the cases, thankfully, landed squarely on the side of employers. But a few of these decisions have already gained significant attention from pro-employee advocates, with some even believing that quick action by Congress may be in order to overturn some of the more significant decisions.

Perhaps the most surprising decision of the term, and the most likely to lead to potential legislative action, was the Court's divided (5-4) decision that the Age Discrimination in Employment Act (ADEA) does not authorize mixed-motive claims of age discrimination and that the plaintiff bears the burden at all times to prove that age was a "but-for" cause of the adverse employment action. *Gross v. FBL Financial Services, Inc.*

Jaw-dropping to long-time practitioners is the fact that this ruling called into question the Court's 20-year-old decision in *Price Waterhouse v. Hopkins*, which shifted the burden of persuasion to the employer in a Title VII case once a plaintiff had presented evidence that discrimination was a "motivating" or "substantial" factor in the employer's action. *Price Waterhouse* resulted in quick action by Congress to amend Title VII to specifically authorize a claim by an employee where an improper consideration was "a motivating factor" in the employer's decision. The ADEA does not contain such an express authorization and the Court refused to read that language into the statute.

Shocking to many – most likely the parties themselves – was that the Court did not answer the question as framed by the parties, but instead answered a "threshold inquiry" that it considered necessary to the decision. While the chance for legislative action is high, for now, employers should consider this decision a win.

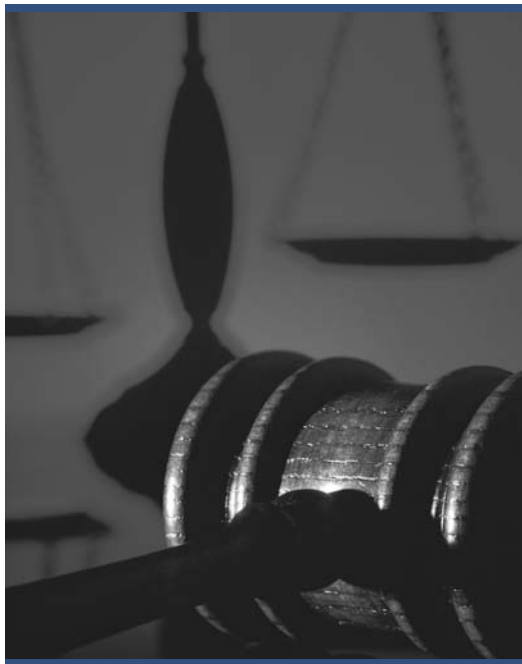
In another significant victory for employers, the Court (also split 5-4) held that a collective bargaining agreement (CBA), freely negotiated in good faith between a union and an employer, which "clearly and unmistakably" requires members of a union to submit their claims under the ADEA to arbitration *is* enforceable as a matter of law. *14 Penn Plaza LLC v. Pyett*. This is true even though the CBA is signed by a union representative—not by the individual employee seeking to vindicate his or her rights. While this case is welcome relief for employers, the Court did specify that the agreement must be clear and explicitly state the specific statutory antidiscrimination claims that are subject to the arbitration agreement.

In another employer-friendly decision, the Court held that an employer's payment of benefits which were calculated, in part, under an accrual rule that gave less retirement credit for pregnancy leave than for other general disability or medical leaves was not a violation of Title VII where such rule was applied only prior to the adoption of the Pregnancy Discrimination Act (PDA). *AT&T Corp. v. Hulteen*. This rule, part of a bona fide seniority system under Title VII, was lawful at the time it was adopted and the employer had no intent to discriminate.

And in January 2009, a unanimous Court held that a common-law waiver embodied in a divorce decree that was not a qualified domestic relations order was not

rendered invalid by the anti-alienation provision of the Employee Retirement Income Security Act (ERISA). The Court found that the plan administrator properly disregarded the waiver and distributed the decedent's benefits to his ex-wife because the administrator was required to follow the plan documents, from which the decedent had failed to remove his ex-wife as his designated beneficiary. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*.

Finally, early on in the term, the Court decided two cases dealing with union dues. In the first, the Court ruled that a local union may charge nonmembers a portion of its contribution to its national affiliate's litigation expenses as long as the national litigation "bears an appropriate relation to collective bargaining" (e.g., does not constitute political activity or lobbying) and the arrangement is reciprocal (i.e., the fee paid to the national affiliate could "ultimately inure" to the local members' benefit), *Locke v. Karass*. In the second, the Court upheld an Idaho state law that banned payroll deductions by government employers for the political activities of a union. *Ysura v. Pocatello Education Association*.



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### The Lone Defeat

Only one decision of the term sits firmly in the employees' corner, although it has the potential to cause much trouble to employers in the retaliation arena.

A persistent employee (who lost at the EEOC, district court and circuit court of appeals levels) eventually succeeded in persuading the Supreme Court to lower the bar for the "opposition" clause in a Title VII retaliation claim. The Court held that an employee who reported discrimination/harassment in answering questions during an employer's internal investigation concerning another employee's claim – not on her own initiative – was nevertheless protected from retaliation because she had "opposed" the unlawful conduct by speaking out in her interview. *Crawford v. Metropolitan Government of Nashville*.

In fact, the Court went so far as to say that a rule which protected as opposition a report of discrimination/harassment by an employee speaking on his or her own initiative, but not that of an employee who makes the same report but only when asked direct questions by his or her boss, would be a "freakish" rule.

The only good news for employers from this case is that most retaliation claims are brought under the "participation" clause of Title VII. Because the Court was able to dispose of the appeal once it had ruled on the "opposition" issue, the Court found no reason to address the parties' arguments concerning whether the employee's report might also be protected as "participation." But with the bar set so low as to allow retaliation claims when the "opposition" is merely passive, employers may see a rise in the number of retaliation claims filed in the near future.

### The Toss Up

Technically speaking, the ruling in *Ricci v. DeStefano* belongs in the win column for employees. But the decision is not entirely negative for employers and may even provide some freedom when making certain tough employment decisions.

On the last day of the term, a divided Court (again by a 5-4 margin) held that a city employer violated Title VII's disparate treatment provision when it refused to certify the results of a promotional examination it had given to firefighter employees simply because the results of the test appeared more heavily skewed against minority candidates.

The City quickly found itself in a position where it believed it was going to be sued either way – either by the minority firefighters for disparate *impact* if it certified the results, or by the white and Hispanic firefighters for disparate *treatment* if it refused to certify the results – and ultimately decided to refuse the certification, thereby denying promotions to those who had passed the examination. White and Hispanic firefighters who passed the exam brought a reverse-discrimination suit, alleging that the City had discriminated against them on the basis of their race. The City's main defense was that it acted to comply with the disparate impact provision of Title VII.

In an attempt to balance the sometimes conflicting interplay between Title VII's disparate-treatment and disparate-impact provisions, the Court adopted a "strong-basis-in-evidence standard" – previously used by the Court in cases brought pursuant to the Equal Protection Clause of the Fourteenth Amendment – stating that the application of this standard to Title VII gives effect to both provisions, and allows "violations of one in the name of compliance with the other only in certain, narrow circumstances."

In ruling for the employees, the Court stated that, "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will

be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."

*Ricci* has by far garnered the most attention, but on a practical level, may offer some comfort to employers. It is doubtful that *Ricci* will lead to a surge in reverse-discrimination cases, and the Court offered employers a great defense for defending the much more common disparate impact claims (which are bound to increase in light of the many layoffs and reductions-in-force that have taken place this year). "If, after it certifies the test results, the [employer] faces a disparate-impact suit," the Supreme Court said, "then in light of our holding today it should be clear that the [employer] would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."

### What's Next?

The Supreme Court already has five employment cases on its docket for next term, which will start in October 2009, and will likely have more by that time. The future of the Court's leanings are as yet unknown, but are not likely to change significantly despite the recent retirement of Justice Souter and Judge Sonia Sotomayor's nomination to the Supreme Court still in the works. For now, the following issues will be before the Court next term:

- Under the Railway Labor Act, can a court set aside a final arbitration award for an alleged violation of due process? *Union Pacific Railroad Co. v. Brotherhood of Locomotive*.
- Can class arbitration be imposed upon parties under the Federal Arbitration Act when the arbitration agreement itself is silent as to class arbitration? *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*
- Do disclosures made in certain audits or investigations performed by a state or its political subdivision amount to a prior "public disclosure" under the False Claims Act, so as to bar a plaintiff's action for lack of jurisdiction? *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*.
- Does a cause of action exist under the LMRA against an international union that is not a direct signatory of the collective bargaining agreement between the employer and a local union, but that caused a strike breaching the CBA for its own benefit? *Granite Rock Co. v. International Brotherhood of Teamsters*.
- Does a district court have an obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan and whether a district court has "allowable discretion" to adopt a reasonable interpretation of the terms of the plan when the issue arises as a result of an ERISA violation? *Conkright v. Frommert*.

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For more information email the author at [bbrewer@laborlawyers.com](mailto:bbrewer@laborlawyers.com) or call 415.490.9000.

# Regulating Employee Email

By Robert Ashmore and Deepa Subramanian

Considering the widespread availability of computers and email to employees, it's hardly surprising that union organizers and pro-union employees now look to an employer's email system as a prime means of organizing. Here, in the context of an important new legal decision, we discuss options for lawful and effective management and control of your e-systems, including in particular your email systems.

Many federal laws affect employer regulation of email and internet uses, such as the Federal Wiretap Act; the Electronic Communications Privacy Act; and the Stored Communications Act. In addition, state privacy laws and court decisions must be considered in preparing computer-use policies. In this article we'll focus strictly on issues arising under the National Labor Relations Act (NLRA).

## The Latest

The U.S. Court of Appeals for the District of Columbia Circuit recently issued a decision that will have a major impact on employer efforts to regulate employees' non-business uses of email systems. The Court ruled on a newspaper's policy, which provided that its communication systems "are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." *Register-Guard v. NLRB*.

The Court noted at the outset that even an employer having a valid no-solicitation rule commits an unfair labor practice if the rule is applied in a discriminatory manner. More specifically, the Court ruled that disciplining an employee was illegal since the newspaper's policy prohibited certain solicitations, but the employee's union-related emails did not include any call to action that would have made them prohibited solicitations. The discipline was also unlawful because other employees had been allowed to email about personal matters.

The Court also found that additional discipline of the same employee was unlawful, even though the employee had emailed solicitations inviting other employees to engage in union activity. The newspaper tried to distinguish discipline for union solicitation from individual solicitations that had been permitted in the past for sports tickets and the like, noting that the policy prohibited solicitations on behalf of "organizations."

The Court disagreed, noting that the policy did not distinguish between solicitations for groups and for individuals but instead only

mentioned "outside organizations" as an example of the forbidden category of "all non-job-related solicitations." In view of its findings, the Court found it unnecessary to rule on whether an employer can lawfully allow other forms of solicitation while banning solicitation on the basis of organizational status.

## What Are Your Options?

The *Register-Guard* decision fails to provide clear guidelines about how an employer may lawfully regulate its email systems to maintain a primary focus on business uses. But reviewing past Board decisions shows that there are some options you may want to consider in regulating your email system.

### **Total ban on all non-business uses of employer's email system**

While senior executives often favor this approach, it is impractical in most workplaces and can result in morale problems. For this approach to permit discipline of an individual sending union-related emails, employers would have to show that all other employees who had sent personal emails of any kind had also been disciplined. This appears unworkable except in the strictest of environments. And employers might easily generate discontent from employees unable to arrange for child care or medical appointments by email, even during their non-working times.

There is also a concern about whether such a policy would be found lawful, even if neutral on its face. Two Democratic members of the NLRB, dissenting from the NLRB's *Register-Guard* decision, stated that they would have found a ban on all non-work-related solicitations to be presumptively unlawful absent special circumstances. Since the new Administration will be able to place a majority of Democratic members on the Board in the near future, that issue will no doubt be raised again.

### **Ban of organizational solicitations only**

A second option is to impose a limit on all organizational solicitations, including union solicitations, while allowing personal solicitations. But as discussed above, the D.C. Court of Appeals has now raised at least a question about whether such a distinction would be lawful. Moreover, the Court of Appeals remanded the *Register-Guard* case to the NLRB for further decision consistent with the Court's opinion.

That may give a new Democratic majority of the Board an early opportunity to move the law of solicitations in a more pro-union direction. The Board can at least be expected to agree with the Court's rulings; the

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# New York Imposes New Penalties For Discrimination

By Chris Mills (New Jersey)

Employers operating in New York are now subject to additional liability if they're found to have violated the New York State Human Rights Law (NYSHRL). Under a recent amendment, the provision in the NYSHRL that authorizes imposition of monetary penalties – previously applicable only for housing discrimination – has been expanded to cover employment-related cases.

So, effective for actions arising on and after July 6, 2009, employers can be ordered to pay a "penalty" to the state of New York in the amount of up to \$100,000 for "wanton, willful or malicious" violations, and up to \$50,000 for violations which don't meet the higher standard. These are to

be in addition to the existing remedies, which include economic losses, pain and suffering, compensatory damages and injunctive relief.

Until now, employees have not generally focused on bringing claims under the NYSHRL, since administrative proceedings can be backed up for many years, and punitive damages and attorney's fees are not recoverable. When lawsuits were filed, plaintiffs invoked federal statutes or the very plaintiff-friendly New York City anti-discrimination code. This amendment certainly ups the ante for employers sued in New York and should prompt more serious consideration of early no-fault resolution of discrimination claims.

*For more information email the author at [cmills@laborlawyers.com](mailto:cmills@laborlawyers.com) or call 908.516.1050.*

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Board might also go beyond that to raise further questions about whether total bans on employee solicitation or on all organizational solicitation would ever be approved.

### ***Ban of all solicitations of any kind, except for a few annual events***

A further option would be to return to an approach approved by the NLRB in past cases. Under that approach, employer no-solicitation policies would be upheld if the employer consistently enforced a policy against all solicitations of any kind (except possibly for one or two annual United Way-type events).

But some companies, such as health care institutions, need to solicit for their own foundations. Others may want to show support for other community organizations. So many institutions might conclude that they would be more hurt than helped by trying to ban all charitable solicitations. That, of course, would work to the benefit of unions seeking to organize. In view of the new Court of Appeals decision, this approach to a ban on solicitation involves the least risk for employers not wanting to take a more aggressive position.

### ***“Working time is for work”***

In attempting to enforce no-solicitation policies outside the area of emails and other e-communications, inconsistent past practices or the difficulty of ensuring consistency have often led employers to focus on just what work employees are doing and not doing, rather than on the content of any non-work-related activities.

Such a neutral policy is easier to enforce and need not be exclusive of other specific policies seeking to control email solicitation. If an employee is spending excessive time sending personal emails or searching the

Internet, that will likely warrant discipline, regardless of the content involved.

## Change You Can Believe In (And Legally Defend)

The *Register-Guard* decision is a big win for unions and warrants a careful review by employers of their e-communications policies. Considering the extent of union activity with EFCA looming, delay can be costly. Despite the numerous business reasons for policies ensuring effective management of e-systems, the NLRB generally presumes that post-union-activity policy changes are motivated by anti-union animus.

Since your institution will be held accountable for your supervisors' actions (or inactions) with regard to banned employee solicitations, all supervisors must understand the importance of their role in ensuring consistent compliance and in disciplining for any violations. If and when a union begins an organizing campaign at your institution, it will test whether you are enforcing your published limits on solicitation. If the union can find inconsistencies, it will have considerable freedom to use your internal email system for its own purposes.

Any policy restricting employee solicitations should be part of a broader computer-use policy that includes other concerns, such as privacy, confidentiality, trade secrets, and security. For example, it's important to remind employees that computers, e-mail and internet systems are the company's property and are subject to monitoring; don't give employees an exclusive password that is not also accessible to the employer. In addition, you should consider requiring employees to get special authorization to send emails to groups of employees, and prohibiting employees from downloading from the Internet or emailing non-business attachments. With the rapid increase in the use of personal cell phones, PDAs, and cameras in the workplace, you should also ensure that your policies address such subjects.

## Brace Yourself

Unregulated email abuses not only disrupt your operations during union campaigns but hurt employee productivity and generate safety risks and security concerns on an ongoing basis. Employers cannot wait until union organizing starts before implementing e-policy changes, since changes made during union activity are presumptively illegal.

While recent NLRB and court decisions leave unanswered questions, we suggest that you should act early to modify e-policies that are questionable on their face and then consider what e-policies work best to ensure that e-systems are maintained for business uses to the fullest extent reasonably possible.

*For more information contact the authors at either [rashmore@laborlawyers.com](mailto:rashmore@laborlawyers.com), [dsubramanian@laborlawyers.com](mailto:dsubramanian@laborlawyers.com) or call 404.231.1400.*

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## Wage Rate Reminder

Last month, July 24 to be exact, the federal minimum wage was increased to \$7.25. That's the minimum you should be paying all your non-exempt employees. Probably. Just as important to remember is the fact that many states have higher minimums – and stricter requirements – than the federal law. In any given case, whichever law gives employees greater rights or protections is the one you must follow.

To check whether or not you're doing it right, contact your regular Fisher & Phillips attorney.