

Employment Law Seminars

2008-2009

Fall 2008 Employment Law Update

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FALL 2008 EMPLOYMENT LAW UPDATE

By Jeff Hollingsworth and Ben Stafford

I. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. FEDERAL DEVELOPMENTS

1. Congress Passes ADA Amendments Act, Expands Scope of ADA

On September 17, 2008, the House approved the ADA Amendments Act of 2008 (S. 3406), which would overturn a number of employer-friendly U.S. Supreme Court decisions and expand the definition of "disability" under the Americans with Disabilities Act (ADA). The bill passed by the House is the same measure that the Senate unanimously approved the previous week. President Bush signed the bill on September 25, 2008, and the ADA Amendments Act comes into effect on January 1, 2009.

ADA Background

The ADA protects "qualified" individuals against discrimination in the workplace. A qualified individual is one who has a disability and "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." As presently defined, "disability" means:

- a) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- b) a record of such an impairment; or
- c) being regarded as having such an impairment.

In general, once the employee informs an employer that he or she suffers from a disability, the parties work together to identify the precise limitations stemming from the disability and how (or whether) reasonable accommodations can allow the employee to overcome those limitations. If a reasonable accommodation would allow the employee to overcome any limitations and perform the essential functions of his or her job, the employer has a duty to make such an accommodation available.

Congress Rejects Two United States Supreme Court Cases

In passing the ADA Amendments Act, Congress was responding to a number of U.S. Supreme Court decisions that imposed a more restrictive interpretation of the ADA. The ADA Amendments Act specifically proclaims Congress' intention to overturn the U.S. Supreme Court cases of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

First, the ADA Amendments Act overturns *Sutton* by clarifying that the determination of whether an individual is disabled is generally made without consideration given to assistive devices. The Court in *Sutton* had held that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures-both positive and negative-must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."

Specifically, the ADA Amendments Act states that, when determining whether an impairment substantially impairs a major life activity, a court *cannot* consider the effects of mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids, mobility devices, oxygen therapy equipment and supplies, and other similar devices. On the other hand, the mitigating measures of ordinary vision correctives, such as eyeglasses or contact lenses, can be taken into account in determining whether an impairment substantially limits a major life activity.

Second, the ADA Amendments Act reverses the Supreme Court's decision in *Toyota Manufacturing*, which imposed a "demanding standard" on plaintiffs seeking to establish that a condition was a disability that substantially limited a major life activity. The ADA Amendments Act states that *Toyota Manufacturing* "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress." The ADA Amendments Act therefore requires "substantially limits" to be interpreted consistently with the findings and purposes of the ADA Amendments Act and "the primary object of attention in cases brought under the ADA" to be whether employers "have complied with their obligations." Thus, "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The ADA Amendments Act further states that the ADA's definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."

Congress Rejects EEOC Interpretation of "Substantial Limitation"

Consistent with its rejection of the Supreme Court's decision in *Toyota Manufacturing*, Congress also expressed its "expectation" that the Equal Employment Opportunity Commission (EEOC) would revise its regulatory definition of "substantially limits" as "significantly restricted" to conform its definition to the ADA Amendments Act's more expansive approach. Employers should expect the EEOC to begin a rulemaking process to address the impact of the Act on its implementing regulations.

Other New Definitions Also Expand the Definition of Disability

The ADA Amendments Act also includes other new definitions and interpretative guidance that will likely result in a greater number of employee medical conditions meeting the ADA's definition of disability. First, the ADA Amendments Act provides that being "regarded as" having an impairment means that an employee must establish that he or she has been discriminated against because of an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity. The Act clarifies that the "regarded as" prong of the disability definition does *not* apply to "impairments that are transitory and minor," which it defines as those impairments that have "an actual or expected duration of 6 months or less."

The Act also adds a new definition of "major life activities." The new definition mainly sets forth many of the life functions that courts have previously found to be major life activities including, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The Act also provides that a major life activity includes "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Finally, the ADA Amendments Act states that the term "disability" encompasses impairments that are episodic or in remission so long as the impairment would substantially limit a major life activity when active. This provision is primarily intended to address diseases such as epilepsy, diabetes, or cancer, which some courts have determined in specific circumstances are not disabilities because the conditions could be treated with medication or were in remission.

2. Congress Prohibits Employers from Discriminating on the Basis of Genetic Information

President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law on May 21, 2008. The bill passed unanimously in the Senate and in the House by a vote of 414 to 1. With various bills on genetic discrimination considered over the last thirteen years, many hail GINA as "the first civil rights act of the 21st century."

GINA prohibits discrimination on the basis of genetic information by health insurers and employers. GINA does *not* prevent discrimination on the basis of actual diseases and disorders. The provisions governing insurers will come into effect on May 21, 2009, and those governing employers will come into effect on November 21, 2009. By enacting GINA, Congress created a floor level of protection for genetic information. States are free to provide more protection, but any state law which provides less is preempted by GINA.

GINA applies to employers who employed fifteen or more employees for at least twenty work weeks in the preceding calendar year. Broadly, GINA precludes an employer from discriminating against employees on the basis of "genetic information," from acquiring employee's genetic information for most purposes, and for failing to keep genetic information in its possession private and confidential.

GINA defines genetic information to include information about a person's genetic tests *and* genetic tests of the person's family members *as well as* any *actual* diseases or disorders suffered by the person's family members. A "family member" is a dependent or anyone who is a first through fourth degree relative of the person.

Employers are prohibited from discriminating against any employee on the basis of genetic information in hiring and firing, compensation, terms, conditions, or privileges of employment. Employers are also prohibited from limiting, segregating or classifying individuals on the basis of genetic information so as to deprive them of employment opportunities. Finally, employers may not use genetic information to alter the conditions for enrollment or participation in a training program or apprenticeship.

An employer is prohibited from requesting, requiring or purchasing genetic information about employees or their family members. An employer may, however, acquire genetic information when:

1. the request of family medical history was inadvertent (if, for example, "an employer unwittingly receives otherwise protected genetic information in the form of family medical history through casual conversations with a worker");
2. the employee authorizes the collection of genetic information as part of health services offered by the employer, as long as only the health care provider and the employee receive individually identifiable information, and any information given to the employer is only disclosed in aggregate terms;

3. requesting information for compliance with the Family and Medical Leave Act of 1993 and state family and medical leave laws;¹
4. purchasing commercially and publicly available documents that include family history; or
5. the employee consents to the collection of genetic information for the purpose of genetic monitoring for the purpose of evaluating the effects of workplace exposure to toxic substances in order to develop a safer work environment. In carrying out the genetic monitoring process, the employer must provide written notice to the employees, provide the results to participating employees, conduct the genetic monitoring for the purpose of complying with federal or state law, and only review the results in aggregate terms.²

If an employer possesses genetic information, it is required to keep that information on separate forms and medical files that must be treated as equally as confidential as other medical records. An employer cannot disclose genetic information unless disclosure is to the employee, to a researcher in compliance with federal regulations, in specific response to a court order (provided the employee has notice of the order), to investigators looking into an issue under GINA, or for compliance with the Family and Medical Leave Act of 1993 or state family leave laws.

For the most part, the remedies and legal theories available under GINA mirror those contained in Title VII of the Civil Rights Act of 1964, including anti-retaliation provisions. However, genetic discrimination is *not* a basis for a disparate impact claim. Employees must first exhaust all state and federal administrative remedies before filing a private suit. To initiate the administrative process, an employee must file a grievance with the state equal employment agency, if any, and wait sixty days for the agency to take action before filing an action with the Equal Employment Opportunity Commission.³ If the state agency does not take action within 60 days, the employee should file the action with the EEOC, as that filing must take place no later than 300 days after the discriminatory event occurred.⁴ If no state agency exists, the action must be filed with the EEOC no later than 180 days after the discriminatory incident occurred.⁵

3. Congress Postpones Actions on Fair Pay Act and Employee Free Choice Act

Two dramatic changes in federal labor and employment law loom on the horizon, contingent on the outcome of the upcoming federal elections. The Employee Free Choice Act is designed to make it much easier for unions to gain the right to represent employees. The Lilly Ledbetter Fair Pay Act (H.R. 2831) and the Fair Pay Restoration Act (S. 1843) would amend Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to specify that the time limits for filing pay discrimination claims begin to run each time an employee receives a paycheck that manifests discrimination. Commentators suggest that it is unlikely that either bill will become law unless Barack Obama is elected president and the Democrats gain control of a filibuster-proof sixty seats in the Senate.

¹ GINA §§ 202(b)(3), 203(b)(3), 204(b)(3).

² GINA §§ 202(b)(5), 203(b)(5), 204(b)(5).

³ 42 U.S.C. § 2000e-5(d).

⁴ 42 U.S.C. § 2000e-5(e).

⁵ *Id.*

Employee Free Choice Act

Under the current framework governing union organizing efforts, unions usually conduct their organizing drives in secret. They frequently get a majority of employees to sign "authorization cards" before management becomes aware of the organizing effort. Under current law, employers have the right to insist that the National Labor Relations Board (NLRB) conduct a secret ballot election to determine if employees really want to have a union. Although elections are generally held within six weeks after the union files with the NLRB, under the current system the employer has some time to campaign against the union.

If the Employee Free Choice Act becomes law, unions will be certified by the NLRB simply on the basis of showing "majority support" by authorization cards—even though the employer was not aware of the organizing drive and had no opportunity to campaign against unionization. In other words, the Employee Free Choice Act would do away with secret ballot elections.

The Employee Free Choice Act passed the U.S. House of Representatives in 2007, but stalled in the Senate under the threat of a Presidential veto, falling short of the sixty votes needed to succeed on a cloture motion by a vote of 51-48. If the next president does not threaten to veto the Act, many predict that it will be enacted as law in 2009. If it is, unions collecting authorization cards right now may be able to use the cards to claim majority support and be certified under the new law without a secret ballot election, as the NLRB has accepted authorization cards that are up to one year old.

Fair Pay Act

Passage of the Lilly Ledbetter Fair Pay Act and the Fair Pay Restoration Act is likewise contingent on the results of the election. As stated above, the bills would amend Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to specify that the time limits for filing pay discrimination claims begin to run each time an employee receives a paycheck that manifests discrimination, not just when the employer makes a discriminatory pay decision.

The bill would overturn the U.S. Supreme Court's 5-4 decision in May 2007 in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). The *Ledbetter* court rejected the "paycheck accrual rule," holding that the time limits for filing discrimination charges with the Equal Employment Opportunity Commission begins to run when the employer *first* makes a discriminatory decision about the employee's compensation. Therefore, should the bills pass, an employee whose pay is discriminatorily low upon hire maintains a viable claim so long as he or she continues to receive a level of compensation that is lower than the counterparts outside of employee's protected class.

The House passed the measure in July 2007 by a vote of 225-199. The Fair Pay Restoration Act (S. 1843), which currently has 44 co-sponsors, fell four short of the 60 votes needed to proceed with floor debate and action on the bill.

B. WASHINGTON STATE DEVELOPMENTS

1. L&I Adopts Permanent Heat Stress Rule

On July 5, 2008, a new workplace safety rule to address heat-related illnesses in outdoor work environments filed by the Washington State Department of Labor & Industries (L&I) became effective. The new standard applies to all employees who work in an outdoor environment between May 1st and September 30th when the temperature exceeds certain specified levels based on the type of clothing an employee at a worksite is required to wear. Employers are *not* required to maintain temperature records.

The new rules do not apply to incidental outdoor work (defined as working no more than 15 minutes outdoors every hour). An outdoor environment includes vehicle cabs, tents, sheds, and other structures where environmental factors are not managed by engineering controls like air conditioning.

When the rules are applicable, employers must take various measures to protect employees from heat stress, including:

- Providing more water than at other times of year and ensuring that employees have an opportunity to drink at least one quart of water per hour.
- Relieving employees showing symptoms of heat-related illness from duty, providing them with temperature-relieving means, and monitoring employees to determine whether medical attention is necessary.
- Train employees and supervisors who may be exposed to outdoor heat at designated temperatures to recognize the signs, symptoms, and risk factors of heat-related illness, preventive measures, and appropriate responses to display of symptoms of heat-related illness.

Of final note, some employers have apparently been subject to a scam by salespersons peddling heat stress rule posters. Not only is there *no* new heat stress poster, but L&I would provide any such poster it eventually creates free of charge.

2. Washington Minimum Wage Increases

Washington's minimum wage will increase 48 cents to \$8.55 an hour, beginning on January 1, 2009. L&I recalculates the state's minimum wage each year in September as required by Initiative 688, which requires that the state minimum wage be adjusted each year according to the change in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers during the 12 months ending each August 31st. Washington's minimum wage applies to workers in both agricultural and nonagricultural jobs, although 14- and 15-year-olds may be paid 85 percent of the adult minimum wage, or \$7.27.

C. IMMIGRATION DEVELOPMENTS

1. Federal E-Verify System Temporarily Extended

On September 30, 2008, President Bush signed H.R. 2638, a spending bill that includes funding to extend E-Verify, the federal government's electronic employment verification system,

until at least March 6, 2009. The E-Verify system is a voluntary, Internet-based system that electronically compares information on employment authorization I-9 forms with records at the Social Security Administration and the Department of Homeland Security. The bill would also authorize two Government Accountability Office studies about aspects of E-Verify.

At present, roughly 64,000 employers are enrolled in the program and about 1,000 are added each week, according to DHS. President Bush issued an executive order June 6 requiring federal government contractors to use E-Verify to verify the work authorization of all new hires and existing personnel assigned to perform work on future federal contracts.

The funding provided in H.R. 2639 is intended to act as a stopgap while Congress debates a more permanent extension of the E-Verify system, which was to expire on November 30, 2008. In July 2008, the House passed a five-year extension of the E-Verify system by a vote of 407-2. That legislation would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to extend the life of the voluntary E-Verify program until Oct. 31, 2013. Rather than simply bringing H.R. 6633 to the Senate floor, the Senate is currently considering a number of bills that would append extensions of various types of visas to an E-Verify renewal.

Participation in E-Verify requires online registration, where the employer must accept an electronic Memorandum of Understanding (MOU) that sets forth the responsibilities of the federal government and the employer. Although only one person needs to accept the MOU on behalf of an employer, each person who will use E-Verify to perform employment verification inquiries must complete a Web-based tutorial. Employers using E-Verify must also post two notices that will be supplied by the Department of Homeland Security following registration. More information about E-Verify, including how to register, can be found at the Web site for the Department of Homeland Security.

2. Ninth Circuit Rejects Facial Challenge to Legal Arizona Workers Act

On September 17, 2008, the Ninth Circuit rejected a facial challenge to the Legal Arizona Workers Act, but cautioned that its opinion did not control any subsequent as-applied challenges to the Act. In the interim before any such challenges are brought, the Act continues to be enforceable and may serve as a model for other states.

The Act requires that, as of January 1, 2008, every Arizona employer is required to use the E-Verify system to verify the employment eligibility of all newly hired employees. A first violation places the employer in a probationary period and requires the employer to terminate all unauthorized aliens. A second violation during the probationary period results in the permanent revocation of the employer's business license. E-Verify cannot be used to check the employment eligibility of employees hired before the employer's registration date, nor may it be used to prescreen applicants or re-verify employees who already have temporary work authorization.

Plaintiffs first argued that the Act could not be enforced in any circumstances because it was preempted by the federal Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1324a-1324b. IRCA expressly preempts any state or local law that imposes sanctions on an employer who employs unauthorized aliens, but specifically allows "licensing laws." The Ninth Circuit rejected plaintiffs' argument that the Act was not a "licensing law," noting that because the Act did "not attempt to define who is eligible or ineligible to work under our immigration laws . . . [but] is premised on enforcement of federal standards as embodied in federal immigration law," it was a permissible licensing measure.

Plaintiffs also argued that the Act was "impliedly preempted" by the E-Verify system because the Act's mandatory requirement that employers use E-Verify conflicted with Congress' intent that participation in the E-Verify system be voluntary. The Ninth Circuit rejected this argument as well, noting that Congress did not act to expressly forbid states from requiring E-Verify participation.

Finally, the Ninth Circuit found that the Act satisfied due process requirements because it allowed employers an opportunity to dispute whether an employee was authorized to work before being deprived of their business licenses.

D. OTHER STATE DEVELOPMENTS

On August 15th, 2008, Louisiana became the tenth state to prohibit employers from enforcing any workplace policy that would prevent their employees from storing a gun in their cars on a company lot, with limited exceptions. The recently enacted Louisiana law provides that "a person who lawfully possesses a firearm may transport or store such firearm in a locked, privately-owned motor vehicle in any parking lot, parking garage, or other designated parking area" and that "[n]o . . . private employer, or business entity shall prohibit any person from transporting or storing [such] a firearm." La. Rev. Stat. § 32:292.1.

The law provides limited exemptions under the following circumstances:

- Any property where the possession of firearms is prohibited under state or federal law.
- Any vehicle owned or leased by a public or private employer or business entity and used by an employee in the course of his employment, except for those employees who are required to transport or store a firearm in the official discharge of their duties.
- Any vehicle on property controlled by a public or private employer or business entity if access is restricted or limited through the use of a fence, gate, security station, signage, or other means of restricting or limiting general public access onto the parking area, and if one of the following conditions applies: (a) The employer or business entity provides facilities for the temporary storage of unloaded firearms; or (b) The employer or business entity provides an alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately owned motor vehicles.

In enacting this new statute, Louisiana joins a growing number of states with similar laws, including Alaska, Florida, Georgia, Kansas, Kentucky, Louisiana, Minnesota, Mississippi and Oklahoma. Some employers in Oklahoma took action and filed suit for a declaratory judgment under the theory that the workplace safety requirements of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, preempted Oklahoma's guns-in-the-workplace statute. A federal district court in Oklahoma agreed with the employers and overturned the Oklahoma law; that decision is currently on appeal to the Tenth Circuit. See *Conoco Phillips Co. v. Henry*, 520 F. Supp. 2d 1282 (N.D. Okla. 2007). However, a federal district court in Florida recently rejected precisely the same argument when it was raised against Florida's newly enacted guns-in-the-workplace law. See *Florida Retail Fed'n, Inc. v. Attorney General of Florida*, Case No. 4:08cv179-RH/WCS, 2008 WL 2908003 (N.D. Fla. July 28, 2008). Thus, the legal landscape in this area is still very uncertain.

Similar legislation has recently been proposed in at least seven other states, and the National Rifle Association has made enactment of "guns at work" laws a major legislative initiative. Most of the state guns-in-the-workplace laws do provide employers with immunity from any resulting

injuries or deaths. The NRA's initiative acquired new momentum in the wake of the Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), where the Court held that the Second Amendment conferred an individual right to keep and bear arms and that statutes banning handgun possession in the home violated the Second Amendment.

Washington does not have a gun-in-the-workplace law, and no such legislation has been introduced. While employers operating solely out of Washington therefore remain able to enforce workplace firearm bans (subject to potential case law developments stemming from the *Heller* decision), employers nationwide can expect to face this issue with increasing regularity.

II. CASE LAW DEVELOPMENTS

A. WASHINGTON SUPREME COURT MAY DECIDE WHETHER NEW DEFINITION OF DISABILITY APPLIES RETROACTIVELY

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), the Washington Supreme Court adopted a narrower definition of disability. In 2007, the Legislature passed Substitute Senate Bill 5340 in response, which overruled *McClarty* and purported to act with retroactive effect. Since passage of Substitute Senate Bill 5340, state and federal courts in Washington have been inconsistent in deciding whether the statute applies retroactively. The Washington Supreme Court may be set to decide this issue once and for all.

In *Moore v. King County Fire Prot. Dist. No. 26*, No. 06-35948, 2008 WL 4330556 (9th Cir. Sept. 24, 2008), the Ninth Circuit found that it could not determine whether a former firefighter with chronic kidney disease was entitled to a new trial on his disability discrimination claim under Chapter 49.60 RCW until it determined whether the legislature's new definition of disability applied retroactively. Because this determination depended on whether the legislature overstepped its constitutional bounds, it determined that principles of federalism and comity meant that it should certify the question to the Washington Supreme Court.

The specific question certified is:

"Whether the separation of powers doctrine under the Washington Constitution prohibits the retroactive application of the 2007 legislation providing a definition of "disability" for the Washington Law Against Discrimination where the cause of action arose prior to the Washington Supreme Court's decision in *McClarty v. Totem Electric*, 157 Wn.3d 219 (2006)???"

The Washington Supreme Court must now decide whether to accept review of the certified question and, if so, whether it should reformulate the question certified.

B. U.S. SUPREME COURT CONSIDERS TWO EMPLOYMENT CASES

Crawford v. Metropolitan Gov't of Nashville & Davidson County, U.S., No. 06-1595, the U.S. Supreme Court is considering whether employees who report alleged sexual harassment by supervisors during an employer's internal investigation are protected from retaliation under Title VII of the 1964 Civil Rights Act, even if no formal harassment charge has been filed. In the *Crawford* case, the plaintiff and two other employees were terminated after they participated in an internal sexual harassment investigation and said that the target of the investigation had engaged in sexually inappropriate conduct.

Vicky Crawford, a former payroll coordinator with the Metropolitan Government of Nashville and Davidson County, Tennessee reported to an internal company investigator that her supervisor had sexually harassed her. Crawford has not initiated the investigation and never filed a harassment charge against her supervisor. The Court considered whether this report to an internal investigator could constitute either "opposition" to unlawful activity under Title VII or "participation" in an investigation within the meaning of Title VII.

The Sixth Circuit had ruled that an employee must engage in active, consistent opposition, and that "cooperating" in an internal investigation did not suffice. The Sixth Circuit also held that an employee's participation in an employer's internal investigation is not covered unless it relates to a pending EEOC charge, finding that "[b]y protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation."

In *Hulteen v. AT&T Corp.*, No. 07-543, the Supreme Court will examine how retirement benefits should have been calculated for women working at AT&T who took pregnancy leave prior to the enactment of the 1978 Pregnancy Discrimination Act, which prohibited discrimination against those who take pregnancy leave. Since the law's enactment, such leave has been counted as a credit toward retirement benefits. AT&T had previously classified pregnancy leave in such a way that gave employees less credit toward retirement. Each of the four plaintiffs would have received more favorable benefits or retirement opportunities had they been given full service credit for their pregnancy leaves at the time that they parted from AT&T.

The Ninth Circuit held that AT&T violated Title VII by refusing to give credit to the pensions and retirements of women who took time off for maternity leave prior to 1979. The Ninth Circuit held that by continuing to rely on a benefits calculation system that excluded pre-1979 maternity leave, AT&T engaged in intentional discrimination each time it calculated benefits. AT&T argues that the Ninth Circuit's decision gave the Pregnancy Discrimination Act an impermissibly retroactive effect and conflicted with Supreme Court precedents holding that Title VII is not violated every time an employer's action "gives present effect to past discrimination."

C. DISCRIMINATION

1. Ninth Circuit Holds That an Employee's Own Testimony Can Provide Sufficient Evidence of a Disability Under the ADA

The Ninth Circuit's decision in *Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166 (9th Cir. 2008) addresses the question of the quantum of proof an employee must set forward regarding a limiting condition to make it to trial.

In *Gribben*, Charles Gribben worked for United Parcel Service (UPS) as a shifter driver in the Phoenix area. Gribben was responsible for transferring UPS trailers among various sites. Although he was ordinarily assigned an air-conditioned vehicle, UPS could not guarantee that he would always have an air-conditioned cab because of varying business demands.

In 2000, Gribben was diagnosed with dilated cardiomyopathy and paroxysmal arterial fibrillation, which caused him to become light-headed, have difficulty breathing and concentrating, and have chest pain when performing activities in extreme heat for extended periods of time. His cardiologist told him not to perform certain activities for more than 20 minutes in temperatures over 90 degrees.

Gribben subsequently asked UPS to provide him with an air-conditioned vehicle at all times. When it informed him that it was unable to grant his request, he went on a one-year unpaid leave of absence, during which time he filed an ADA charge with the EEOC, which issued a "cause" finding. Upon his return, UPS provided him with an air-conditioned vehicle every day for almost a year, although it remained unable to promise him such a vehicle would always be available. Eventually, he was assigned to a vehicle without air conditioning on one day. When he refused to work, he was fired for insubordination.

Under the ADA, an employee must demonstrate that his or her condition constitutes a disability because it substantially limits the employee in a major life activity. The trial court threw out Gribben's discrimination claim because it found that Gribben was capable of performing the "major life activities" at issue (including walking and breathing). According to the trial court, Gribben had to prove that he was impaired from engaging in such activities when compared with the general populace, and UPS had argued that many average people have difficulty walking and breathing during hot Arizona weather.

The Ninth Circuit, however, noted that several earlier cases had established that employee's testimony about his limitations alone could suffice to require a trial on the issue of whether a particular condition was covered by the ADA. Both Gribben and his cardiologist testified about the ill effects suffered by Gribben in extreme heat as a result of his medical conditions. The Ninth Circuit found that this was sufficient to entitle Gribben to a trial on his ADA claim.

2. Supreme Court Decides Multiple Age Discrimination Cases

Three years ago, the U.S. Supreme Court ruled in *Smith v. City of Jackson*, 544 U.S. 228, that older workers can sue under the Age Discrimination in Employment Act (ADEA) if their employer's actions had a disparate impact on them, regardless of whether the employee possessed a discriminatory intent. The Court recently clarified what an employer must do to successfully maintain that it used reasonable factors other than age (RFOA) to determine who got laid off.

In *Meachem*, a jury found that Knolls Atomic Power Laboratory had discriminated against a group of older workers when it laid off 31 workers based on supervisors' rankings of all workers by performance, flexibility, and critical skills. All but one of the workers selected for lay off were over forty. The Second Circuit reversed, finding that the employees had not proved their case because the employees had the burden of disproving an employer's proffered RFOA evidence by showing that the factors relied on were unreasonable.

The Supreme Court took up the case to determine whether the employer must prove that it acted reasonably or if the employee must, as the Second Circuit found, prove that the employer did not act reasonably. It reversed the Second Circuit, held that the employer bears the burden of proof, and remanded for a determination of whether the employer offered sufficient proof.

The Court devoted considerable space in its opinion to a discussion of how to prove and defend disparate impact ADEA cases. An employee must first point to specific employment practices that he or she claims are responsible for a disparate impact on older employees. The employer raising an RFOA defense must then offer proof of the facts used and that they were reasonable. Employers do not have to prove business necessity (i.e., that there was no other way to meet its goals without disparate impact on older workers). Instead, the employer must prove that a factor used was rationally related to some legitimate business objective. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

The Supreme Court reached a more employer-friendly outcome in *Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361 (2008), in which the court rejected, 5-4, the Equal Employment Opportunity Commission's argument that it is illegal to provide more generous retirement benefits to employees who become disabled before reaching the plan's normal retirement age than those with the same years of service who become disabled after normal retirement age.

The Kentucky plan adds unearned years of service to actual years of service for workers in certain hazardous duty positions, such as firefighters and police officers, who become disabled before reaching retirement age in an attempt to provide disability benefits on par with "ordinary" retirement benefits. The plan adds no such extra years of service to workers who become disabled after having already reached the plan's minimum retirement age. The result is that some older disabled workers receive lesser pension benefits than younger disabled workers.

The dispositive inquiry was whether Kentucky's plan was actually motivated by age bias. The Court found that it was not, and instead the disparity was simply an artifact of Plan rules that treat one set of workers more generously in respect to the *timing of their eligibility for normal retirement benefits* but which do not treat them more generously in respect to the *calculation of the amount* of their normal retirement benefits.

The EEOC, in response to the Court's decision, has noted that it will need to issue "new guidance" in light of the court's ruling, and thus the EEOC may need to revise its compliance manual.

3. Comments About Head Scarf Are Direct Evidence of Title VII Discrimination

According to the Eastern District of Washington, a restaurant owner's comments about the hijab (head scarf) worn by an African American Muslim provided direct evidence that the owner's refusal to let the employee work as a waitress during the most lucrative shifts violated Title VII of the 1964 Civil Rights Act. Further, the court rejected the employer's motion for summary judgment on the employee's constructive discharge claim, concluding that a jury could find that the owner's belated offer to let the employee work as a waitress was insincere.

Beginning in May or June 2004, the plaintiff worked lunch and weekend breakfast shifts at a restaurant and bar, the business' least profitable shifts for waitresses. In the winter of 2004, plaintiff requested to work on the more lucrative dinner shift or as a cocktail waitress. Because no positions were available at that time, her direct supervisor asked her to study the drink menu, and advised her that such positions would open in summer 2005. Between 2004 and 2005, the employer hired eight individuals to work dinner and cocktail shifts. All were white. In August 2005, plaintiff's supervisor stated that it was unfair to keep plaintiff on the lunch shift and said she was ready to work the dinner shift. The owner refused, stating that the kitchen staff did not like the plaintiff and that she appeared "frazzled" during the lunch shift. Plaintiff's supervisor responded that the lunch shift was seriously understaffed, with one employee covering several tables at once.

Plaintiff's supervisor then requested that plaintiff be assigned a cocktail shift. The owner disagreed again, stating that she wanted "really gorgeous girls to cocktail." When plaintiff's supervisor noted that plaintiff was constantly complimented on her beauty, the owner clarified that she meant that she wanted "hot white girls, like Emily." While the owner insisted she was not a bigot, she stated that she did not think that "the head dress and her being Muslim . . . [is] what we want in the bar." The owner had previously asked plaintiff what the "deal" was with the "thing on [her] head." Upon learning of the owner's comments to her supervisor, plaintiff

confronted the owner, who insisted "it's not-it wasn't about your race it was more about your scarf thing It was a business decision, it was nothing against you." The owner then offered the plaintiff a position as a cocktail server. Plaintiff considered the offer insincere, rejected it, and resigned that day.

The employer brought a motion for summary judgment on plaintiffs' discrimination and constructive discharge claims. The court denied the motion. The court first found that plaintiff had presented sufficient "direct" evidence of discrimination to proceed, in the form of the owner's stated preference for "hot white" cocktail servers and her derogatory comments about plaintiff's hijab. The court rejected the employer's attempted reliance on the *McDonnell Douglas* burden-shifting test, noting that reliance on *McDonnell Douglas* analysis is unnecessary where plaintiff presents sufficient direct evidence of discrimination without resort to inference or presumption.

The court also rejected the employer's argument that plaintiff could not demonstrate, as required for her constructive discharge claim, that her work conditions were objectively intolerable. The court found that the owner's long refusal to allow plaintiff to work the lucrative dinner and cocktail shifts, her numerous comments about plaintiff's hijab, her owner's preference for "hot white" girls, and her owner's attempt to justify her comments and actions as "business decisions" could suffice. The court further found that the owner's "after-the-fact promotion offer" could be seen as disingenuous. Because plaintiff would continue to work in the small work environment of the restaurant, with the owner as one of her supervisors, the court found that she could have felt trapped in an intolerable situation and forced to resign. *E.E.O.C. v. Starlight, LLC*, No. CV-06-3075, 2008 WL 3095254 (E.D. Wash. Aug. 4, 2008).

D. Supreme Court Affirms Right to Bring Retaliation Claim Under ADEA and Section 1981

The U.S. Supreme Court recently ruled that employees may sue for retaliation under two discrimination statutes that do not explicitly authorize employees to bring that type of claim. In both cases, the Supreme Court was upholding the position reached by a number of federal appeals courts.

In *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008), the Court held that 29 U.S.C. § 633a(a), the section of the ADEA that governs federal sector employers, authorizes retaliation claims even though, unlike the provisions governing private sector employers, the section does not explicitly prohibit retaliation. Nonetheless, the Court concluded that complaining about discrimination is merely another species of discrimination on the basis of age.

Similarly, in *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) the Court held that 42 U.S.C. § 1981 authorizes retaliation claims even in the absence of statutory language to that effect. As the Court noted, since the amendment of Section 1981 by the Civil Rights Act of 1991 that extended Section 1981 to post-hiring claims, most federal circuits (including the Ninth Circuit), have interpreted Section 1981 to allow retaliation suits. The Court adopted this approach as well, allowing plaintiff to pursue his claim.

Given their conformity with the prevailing case law, neither opinion will have a significant impact on employers. These decisions do, however, come as somewhat of a departure from the prevailing trend of pro-employer decisions from the Supreme Court.

E. EMPLOYEE PRIVACY

A recent Ninth Circuit decision highlights the growing importance of privacy concerns in the workplace brought about from employees' increasing use of employer-provided communication devices. The City of Ontario, California, contracted with Arch Wireless Operating Company in 2001 to provide text messaging support for the city and its employees. Arch provided the city with two-way pagers, one of which was distributed to police sergeant Jeff Quon. The city told users that they were limited to 25,000 characters per month and would be charged overage fees if they exceeded that amount.

The City did not promulgate a policy specific to text messaging but did have a more general "Computer Usage, Internet, and E-Mail" policy. The policy, which applied to city-owned computers and all associated equipment and programs operating on the computers, informed employees that:

- Their use of the Internet and e-mail system provided by the city was not confidential;
- They should have no expectation of privacy in their activities on the city's computer system;
- The city had the right to review any use of its computer system; and
- Electronic resources were not for personal use and could not be used to send inappropriate communications.

At a meeting attended by Quon, police lieutenant Steve Duke stated that the text messaging system was subject to the city's general policy. Duke monitored text messaging usage and was responsible for collecting overage fees. Duke told police personnel that if they exceeded the character limit, he would either audit them to find out why, or they could simply pay the overage fee. Eventually, the city's police chief asked Duke to find out why some officers were consistently exceeding the character limit. Duke obtained the messaging transcripts from Arch Wireless and found that many of Quon's messages were sexually explicit, personal in nature, and exchanged with other police personnel. Quon and these other individuals filed suit against the city and Arch Wireless, claiming that the city violated their constitutional right to be free from unreasonable searches and seizures and that Arch Wireless violated the federal Stored Communications Act (SCA), which forbids certain providers of communications services from divulging private communications to other entities or individuals.

Whether Arch Wireless violated the SCA turned on whether it was an "electronic communication service" (ECS) or a "remote computing service" (RCS). While both an ECS and RCS can release private information to, or with the lawful consent of, an addressee or intended recipient of an electronic communication, *only* an RCS can release such information with the lawful consent of the subscriber (e.g., the City). The difference between an RCS and an ECS is whether the service's function is to store electronic data (RCS) rather than to serve as a communication conduit (ECS). Although Arch Wireless archived the text messages, the Ninth Circuit first found that Arch Wireless was an ECS that was merely backing-up the communications rather than actually maintaining such files for storage purposes. Because it had not obtained the consent of the recipients of the text messages before turning the messages over to the City, it violated the SCA.

The Ninth Circuit also found that the City had violated Quon's constitutional rights. Although Quon acknowledged receiving the City's general computer policy and attended a meeting where he was informed that the policy applied to text messaging, the court found that Lieutenant Duke's representations that officers could pay the overage charge to avoid an audit created an "expectation of privacy" for employees who incurred and paid overage charges. The city's "search" of Quon's text messages could, therefore, only pass constitutional muster if the search itself was reasonable. In this case, the jury found that although the City had a legitimate purpose in searching the text messages (ensuring police officers did not pay an overage fee if their text messages were work-related), the City's search "went too far" because it could have learned the information it needed without looking at the *content* of text messages.

F. WRONGFUL DISCHARGE

1. Western District of Washington Rejects Handbook Claim

In *Rosen v. AT&T Mobility LLC*, No. C07-360RSL, 2008 WL 2230768 (W.D. Wash. May 29, 2008), the Western District of Washington reaffirmed the general rule in Washington that employment is "at will," refusing to find that general statements of AT&T constituted written promises of "specific treatment in specific situations" that fit into the narrow exception to the at-will doctrine first recognized by the Washington Supreme Court in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984). Under the *Thompson* exception, an employee must demonstrate that (1) a written statement in an employee handbook or similar document constituted a promise, of specific treatment in specific situations, (2) the employee justifiably relied on the promise and (3) the employer breached the promise.

Laurel Rosen was an upper-level IT manager. When Rosen was hired, she signed an offer letter and a separate employment agreement, both of which stated that her employment was at will. When she was laid off three years later, she pointed to a number of AT&T "promises" that she alleged altered her at-will status and which she alleged that AT&T broke:

- AT&T promised to use its Performance Plan & Review process for all significant employment decisions.
- AT&T promised to complete a performance improvement plan before terminating her employment for deficient performance.
- AT&T promised her that she could transfer to another position within the company after she was identified for layoff.
- Statements contained in a PowerPoint presentation constituted promises regarding who would be assessed in a skill assessment review and the method by which the assessment would be conducted.

In support of her claims, Rosen submitted evidence that largely consisted of general company policies. None of the documents used by Rosen as support for her claims contained specific written promises that would alter Rosen's at-will status. Further, Rosen admitted during the course of the litigation that she understood herself to be an at-will employee.

With respect to Rosen's claim that she would have the benefit of progressive discipline before she was terminated, the court noted that at-will status cannot be altered by promises of progressive discipline where the employer retains discretion to determine what offenses merit

termination—the employer instead must make an explicit promise with respect to certain kinds of misconduct. The court also refused to extend the *Thompson* exception to promises contained in PowerPoint presentations, finding that this would "stretch the *Thompson* exception beyond its limits."

2. Washington Supreme Court Finds Public Policy Protects Domestic Violence Victims From Termination

Prior to the enactment of Washington's new domestic violence leave, Roberta Danny requested and was granted time off to move and to seek assistance in prosecuting her abusive husband. Upon her return to work, she was demoted and then laid off for a purported falsification of payroll records. She sued her employer in federal court, claiming that it terminated her because she had requested time off to deal with the domestic violence issue and such termination was in violation of public policy.

To prevail on a claim of wrongful discharge in violation of public policy, an employee must prove three elements (1) that a clear public policy exists (the "clarity" element), (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy (the "jeopardy" element), and (3) that the employee's public-policy-related conduct caused the dismissal (the "causation" element). The employer can still prevail if it demonstrates an overriding justification for the dismissal. To satisfy the "jeopardy" element, an employer must show that her or his "conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy," (internal quotation marks and citation omitted) which requires a showing that other means for promoting the policy are inadequate.

The federal district court asked the Washington State Supreme Court to determine whether "the State of Washington established a clear mandate of public policy of protecting domestic violence survivors and their families and holding their abusers accountable?" Five of the eight participating justices agreed that such a policy was manifested in numerous legislative, judicial, constitutional, and executive expressions of public policy. The same number of justices agreed that such a policy existed regardless of whether, strictly speaking, the employer discharged the employee because of absenteeism arising from his or her status as a domestic violence victim.

The justices agreed, however, on little else in the case. Two justices would have held that, in the absence of legislation to the contrary, an employer *could* discharge an employee for missing work regardless of the reason (although they agreed that a clear public policy would prohibit discharge based on domestic violence victim status). The same two justices would further hold that where a public policy does not directly relate to the employment relationship, the court must balance the employer's interest in operating its business, the employee's interest in job security, and society's interest in protecting the public policy at stake before it determines that protecting the public policy forbids an employer from discharging the employee for a particular reason. One justice would have found that, although there *was* a clear public policy of protecting domestic violence victims and punishing their abusers, the actual inquiry was whether there was a clear public policy forbidding employers from firing employees for missing work due to domestic violence. *Danny v. Laidlaw Transit Servs., Inc.*, 193 P.3d 128 (2008).

G. PROCEDURAL BARS TO SUIT

In *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044 (9th Cir. 2008), the Ninth Circuit clarified that the statute of limitations begins to run on an employee claim of discrimination on the date that the employee learns of an adverse employment action taken

against him or her and not when the employee learns of the alleged discriminatory intent behind the action.

In *Lukovsky*, a group of unsuccessful applicants for positions with the San Francisco Municipal Transportation Agency brought suit, alleging that they were discriminated against due to preferential hiring treatment being given to Asian and Filipino workers. The unsuccessful applicants claimed that they did not learn of their legal injury until years after they were not hired, when a MUNI employee informed them that allegedly unqualified Asians and Filipinos had been hired instead. The district court judge dismissed the lawsuit, ruling that the statute of limitations had run on the claims.

The Ninth Circuit began by noting that where federal civil rights statutes do not contain their own statute of limitations, federal courts borrow the forum state's limitations periods for personal injury torts. As numerous other circuits had noted, the statute of limitations begins to run when the plaintiff becomes aware of his or her actual injury (in this case, an adverse employment action) rather than the legal basis of his or her claim (the discriminatory basis for the action). Accordingly, the court found that the statute of limitations barred plaintiffs' claims.

H. BENEFITS

1. Unemployment Benefits

Over the years, the Washington Employment Security Department (ESD) and the courts have struggled with how to define situations in which an employee who voluntarily quits his or her job is still eligible for unemployment benefits. By statute, an employee who has "good cause" to quit a job is eligible for benefits, while one who lacks good cause is ineligible. Over the years, the legislature has added eleven specific circumstances that constitute good cause that does not disqualify an employee from receiving benefits. Washington courts historically held that good cause reasons are limited to those specifically enumerated by statute, and ESD, accordingly, has concluded that it lacked authority to recognize additional good cause exceptions.

In *Spain v. Employment Security Department*, 185 P.3d 1188 (Wash. 2008), the Washington Supreme Court reversed this position and held that the eleven specifically enumerated good cause reasons did not "do double duty" by acting as an exclusive list of good cause reasons. The court found instead that the legislature did not expressly say what "good cause is" or state that the eleven reasons listed were the only good cause reasons recognized.

Unfortunately, the court provided little guidance as to what other circumstances may provide an employee with good cause for voluntarily quitting his or her employment. Therefore, there is now a broad and undefined category of "good cause" undefined by statute and subject to the interpretation of the ESD.

2. Retirement Benefits

On October 16, 2008, a sharply divided Washington Supreme Court ruled that the Port of Seattle must provide retiree health benefits to a group of retirees who were eligible to receive such benefits at the time the port terminated its collective bargaining agreement with the International Longshore and Warehouse Union Local 9. The agreement provided that employees who retired after the age of 62 who had sufficient years of service would be provided with retiree health benefits. In a 5-4 decision, the court found that the retiree health benefits at

issue were a form of deferred compensation that vested during the time the collective bargaining agreement was in effect. Thus, the court essentially ordered the Port to treat health care benefits for its employees like pension benefits and pay them into retirement.

The Port had promised in the collective bargaining agreement to “maintain the current level of medical, welfare, dental and related benefits during the duration of this contract and . . . continue to provide the same level of coverage currently provided to eligible employees, eligible retirees, and dependents” (internal quotation marks and citation omitted). The Port further agreed to be party to the ILWU Local 9 Warehouse Welfare Trust Fund, and was the principal participating employer making contributions to the fund.

The court first rejected the Port's reliance on case law interpreting ERISA. The Port urged the court to follow ERISA's approach and look to the collective bargaining agreement to see if the parties had intended the benefits to be vested. The retirees argued, on the other hand, that ERISA's vesting principles were inapplicable because the welfare trust fund at issue was a governmental plan exempt from ERISA regulation. The court agreed with the retirees.

The court noted that under its precedent, retirement benefits vest at the time they are created if they are considered “compensatory.” In determining whether benefits are “compensatory,” the focus is on the expectation of the employee at the time the retirement benefits are conferred, rather than the express language of the contract. The court reasoned that retiree benefits are simply a form of deferred compensation, stating that welfare benefits “make up part of the core compensatory benefits package” that employers offer to employees. Thus, employees have a “legitimate expectation” that retirement benefits vest when conferred as compensation through a bargaining agreement. Upon an examination of the specific terms of the collective bargaining agreement, and because an employee would reasonably expect that negotiated retirement benefits would continue beyond the current agreement, the court found that the plaintiffs' retiree health benefits had vested. The court added that the benefits provided to these retirees must be comparable to the level of benefits provided at the time the agreement was signed.

The court rejected the Port's argument that the right to benefits conferred in the bargaining agreement could not have vested because the welfare trust fund established as part of the agreement specifically reserved the right to alter such benefits. The Port's argument failed, according to the court, because it incorrectly assumed that the terms of the trust fund agreement could define the Port's underlying obligation to provide welfare benefits conferred in the agreement. Instead, the court held that the conferral of compensatory retirement welfare benefits through a collective bargaining agreement creates a vested right for eligible retirees absent express language in the agreement specifically limiting the right to such benefits.

Four justices dissented, arguing that retiree health benefits are not deferred compensation. The dissent argued that the majority's ruling “would impose a vesting requirement on all employment relationships where health care coverage is provided to employees, thereby usurping the parties' right to address retirees' coverage by private contract.” The dissent further cautioned that the majority's ruling would result in many employers simply ceasing to provide any similar retiree health care benefits to avoid the possibility of incurring an obligation to provide benefits for life. Finally, the dissent noted that while the plan in question was exempt from ERISA, the court could still look to case law interpreting ERISA. According to the dissent, an examination of ERISA would have been relevant because in ERISA, Congress decided not to impose a vesting

requirement for health and welfare benefits to avoid the “onerous burden” it would place on employers. Because the collective bargaining agreement did not contain “clear and express language” demonstrating the intent to vest rights to lifetime health care benefits, the dissenters would have found for the Port. *Navlet v. Port of Seattle*, No. 78866-9, 2008 WL 4595162, at *1 (Wash. Oct. 16, 2008).