

## **Employment Law Supreme Court Year in Review 2008-2009**

Civil Litigation Law Program Agenda  
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Vail Cascade Resort & Spa  
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## The Cases

### *Locke v. Karass*, 129 S. Ct. 798 (2009)

**Disposition** Affirmed 498 F.3d 49 (1<sup>st</sup> Cir.).

**Majority:** Breyer, J., delivered the opinion for a unanimous Court.

**Concurred in Judgment:** Alito, J., filed a concurring opinion, in which Roberts C. J., and Scalia, J., joined.

Under a new collective bargaining agreement, the Maine State Employees Association required that certain non-members pay a "service fee" to the union as its exclusive bargaining agent. The service fee included an affiliation fee paid to the Service Employees International Union through a general pooling arrangement. This meant that the nonmembers were contributing funds to an affiliate for litigation not specifically for their own benefit. The nonmembers filed suit in the U.S. District Court for the District of Maine claiming that the service fee violated their First amendment rights. The District Court granted summary judgment in favor of the union. The petitioners, nonmembers of the local, brought this claim alleging, inter alia, that the First Amendment prohibits charging them for any portion of the service fee that represents litigation that does not directly benefit the local. The District Court found no material facts at issue and upheld this element of the fee. The First Circuit affirmed.

The U.S. Court of Appeals for the First Circuit, relying on the Court's decision in *Lehnert v. Ferris Faculty Assn.*, 111 S.Ct. (1950), to determine that the nonmember employees' First Amendment rights were not violated by the service fee, affirmed. Under the *Lehnert* test, activities that would infringe on first amendment rights must (1) "be substantively related to

bargaining and ultimately inure to the benefit of local union members, (2) be justified by the government's vital policy interest in labor peace and avoiding free riders, and (3) not significantly add to the burdening of free speech that is inherent in the allowance of agency."

In a unanimous decision authored by Justice Stephen G. Breyer, the Supreme Court affirmed, holding that the First Amendment permits a local union to charge nonmembers for national litigation expenses so long as 1) the subject matter is of a kind that would be chargeable if the litigation were local and 2) the charge is reciprocal in nature (the contributing local union reasonably expects other local unions to contribute similarly). The Court reasoned that the fees paid by nonmembers of the Maine State Employees Association that funded national litigation expenses satisfied this test and therefore did not violate nonmembers' First Amendment rights.

Justice Samuel A. Alito filed a separate concurring opinion joined by Chief Justice John G. Roberts. Alito noted the Supreme Court did not reach the question of what "reciprocity" means, acknowledging it was not contested by either party.

***Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee 129 S. Ct. 846 (2009)***

**Disposition** Reversed and Remanded. 211 Fed.Appx. 373, 2006 WL 3307507 (6<sup>th</sup> Cir.).

**Majority** Souter, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Scalia, Kennedy, Ginsburg, and Breyer, JJ., joined.

**Concurred in Judgment** Alito, J., filed an opinion concurring in the judgment, in which Thomas, J., joined

The case arose after the defendant Metro Government began investigating rumors of sexual harassment by the Metro School District employee relations director (Gene Hughes). The plaintiff, Vicki Crawford, during the course of the investigation, reported that Hughes had sexually harassed her. Following the investigation, Hughes was not disciplined; however, Crawford was terminated, purportedly for embezzlement.

Crawford filed a retaliation charge with the Equal Employment Opportunity Commission (EEOC), and later filed suit in federal court. The issues before the lower courts were whether Crawford's responses to the investigator's questions provided her with protection under the "opposition" and/or "participation" clauses of Title VII, which state:

"[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter ["the opposition clause"], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter ["the participation clause"]."

The District Court dismissed Crawford's claims, finding her involvement in the investigation satisfied neither the opposition clause nor the participation clause, and the Sixth Circuit Court of Appeals affirmed holding that the opposition clause "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation."<sup>4</sup>

The Supreme Court unanimously held that anti-retaliation provision's protection extends to an employee who speaks out about discrimination in answering questions during an employer's internal investigation. The Court further reasoned that because "oppose" is undefined

by statute, it carries its ordinary dictionary meaning of resisting or contending against. Thus, Crawford's Crawford's answers to the investigator's question fell within this definition, as she was clearly expressing opposition to Hughes's sexually inappropriate behavior toward her.

The Court rejected the Metro Government's policy argument that creating a low bar for retaliation claims for witnesses who merely answered investigator's questions would discourage employers from conducting investigations in the first place. The Court countered this with the policy argument that employers have a strong inducement to ferret out and put a stop to discriminatory activity in their operations. This argument is backed by the holdings of *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, and *Faragher v. Boca Raton*, 524 U. S. 775, holding "[a]n employer ... subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with ... authority over the employee." The Circuit's rule could undermine the Ellerth-Faragher scheme, along with the statute's " 'primary objective' " of "avoid[ing] harm" to employees, Faragher, supra, at 806, for if an employee reporting discrimination in answer to an employer's questions could be penalized with no remedy, responsible employees would have a good reason to keep quiet about Title VII offenses.

Because Crawford's conduct is covered by the opposition clause, this Court does not reach her argument that the Sixth Circuit also misread the participation clause. Metro's other defenses to the retaliation claim were never reached by the District Court, and thus remain open on remand.

The decision is a big win for plaintiffs as it protects the employee from discriminatory activity and encourages employees to disclose such activity honestly without retaliation.

**Kennedy v. Plan Administrator for Dupont Savings and Investment Plan, 129 S.Ct. 865 (2009)**

**Disposition** Affirmed. 497 F.3d 426 (5<sup>th</sup> Cir.)

**Majority** Souter, J., delivered the opinion for a unanimous Court.

In a unanimous decision, the Supreme Court ruled that DuPont Co. acted properly by paying a deceased worker's retirement benefits to his ex-wife even though she had previously waived her right to the benefits as part of their divorce settlement.

In this case, a participant initially completed a beneficiary form naming his wife as primary beneficiary for his savings and investment plan (SIP) benefits, but he failed to designate a new beneficiary after the divorce was finalized. Upon his death, his daughter requested that DuPont distribute the plan benefits to the Estate. DuPont paid the benefits to his ex-wife in accordance with his beneficiary form on file. The estate then sued in an attempt to recover the \$402,000 that was distributed to the ex-spouse, claiming she had waived her right to the benefits in the divorce.

The District Court ruled that the benefits were to be paid to the estate, but the Fifth Circuit reversed, holding that ERISA's anti-alienation rules had been violated. It was in their view that the ex-spouse's waiver was an assignment or alienation of her interest to the estate.

The Supreme Court, in an opinion by Souter, began with the basic Employee Retirement Income Security Act (ERISA) principle that a plan administrator is obligated to manage an ERISA plan "in accordance with the documents and instruments governing" them. Specifically,

pension plan benefits may not be alienated or assigned. A divorce decree is an exception to the anti-alienation or assignment rule.

The Court viewed this as an issue of whether the terms of the limitation on assignment or alienation invalidated the act of a divorced spouse, who happened to be the designated beneficiary under the ex-husband's ERISA pension plan. The Court held that the waiver is not rendered invalid by the anti-alienation provision. However, the Court held that the plan administrator was correct to disregard the waiver due to its being in conflict with the designation made by the former husband in accordance with the plan documents.

The DuPont plan document stated that the participant has the power both to “designate any beneficiary or beneficiaries ... to receive all or part” of the funds upon his death, and to “replace or revoke such designation.” The plan requires all authorizations, designations and requests concerning the Plan [to] be made by employees in the manner prescribed by the [plan administrator].”

Thus, the Court deemed that the plan administrator satisfied its ERISA duty by following the terms of the savings and investment plan's documents and distributing the benefits to the beneficiary on file

***Ysursa v. Pocatello Ed. Assn., 129 S.Ct. 1093 (2009)***

**Disposition** Reversed 504 F.3d 1053 (9<sup>th</sup> Cir.)

**Majority** Roberts C.J., Scalia J., Kennedy J., Thomas J., and Alito J. (Roberts C.J. delivered the opinion of the court).

**Concurred in judgment** Ginsburg J.

**Concurred in part, dissented in part** Breyer J.

**Dissent** Stevens J., Souter J.

The issue presented in this case was whether the Idaho Right to Work Act, which allows public employees to authorize payroll deductions for union dues, but not for union political activities, violates the First and Fourteenth Amendments. The District Court upheld the ban on payroll deductions for union political activities at the state level, but struck it down as it applied to local governments. The Ninth Circuit, applying strict scrutiny, affirmed the district court decision, ruling that the local government units are independent from the state government in the sense that they operate and control their own payroll deduction systems.

The Supreme Court reversed the decision of the Ninth Circuit, holding that Idaho's ban on political payroll deductions, as applied to local governmental units, does not infringe the First Amendment rights of the union. The reasoning behind the Court's ruling was that the Idaho law did not so much restrict political speech as it declined to promote that speech by allowing public employee "checkoffs" for political activities. The unions, for their part, are free to engage in such speech as they see fit, and are simply not permitted to enlist the support of the State to do so.

Unlike the Ninth Circuit below, the Court used a rational basis review, as it ruled that Idaho's actions did not violate the First Amendment. Similarly, the Court applied rational basis to review the law's application at the local government level. There, the ban was also upheld. The Court noted that local governments are mere "instrumentalities" of the state, and are thus subject to the same analysis as the state itself.

The purported public policy behind upholding the Idaho Right to Work Act is to advance the separation of the operation of government from partisan politics.

**14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009)**

**Disposition** Reversed 498 F.3d 88 (2d Cir.)

**Majority** Thomas, Roberts, Scalia, Kennedy and Alito. Thomas J. delivered the opinion of the Court.

**Dissent** Stevens, Souter, Ginsburg and Breyer. Stevens J. and Souter J. filed dissenting opinions.

This case addressed the issue of arbitration clauses in collective bargaining agreements. The question presented was whether such a clause, which had been freely negotiated by a union and an employer, which clearly waives the union members' right to a judicial forum for statutory discrimination claims, is enforceable as a matter of law. The District Court denied Petitioner's motion to compel arbitration, and the Second Circuit affirmed.

The Court then reversed the 2d Cir. Decision and upheld the enforceability of the arbitration clause in the Service Employees International Union's contract with 14 Penn Plaza. Respondents in this matter were night lobby watchmen who worked in an office building owned and operated by Petitioner. After Petitioner engaged a security contractor to provide security guards at night, Respondents were reassigned to jobs as porter and cleaners. Respondents alleged these reassignments, which were less lucrative and less desirable than the watchmen positions, were made because of Respondents' age in violation of the ADEA. The EEOC issued

a right to sue letter, and Respondents filed suit despite the provision in their collective bargaining agreement requiring that such claims be arbitrated.

The court reasoned that traditional contract principles apply in this case, and that neither the NRLA or the ADEA preclude the arbitration of claims brought under the ADEA. Thus, the arbitration clause, which is clear and unambiguous, and was freely negotiated by the parties, must be upheld. The Court also noted that the arbitration provision passes muster under the *Gardner-Denver* line of cases, as those cases did not deal with the enforceability of an arbitration clause, by rather whether the arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.

**AT&T Corp. v. Hulteen, 129 S.Ct. 1962 (2009)**

**Disposition** Reversed Hulteen v. AT&T Corp. (9<sup>th</sup> Cir.)

**Majority** Souter, Roberts, Stevens, Scalia, Kennedy, Thomas and Alito. Souter J. delivered the opinion of the Court. Stevens filed a concurring opinion.

**Dissent** Ginsburg and Breyer. Ginsburg J. filed a dissenting opinion.

The subject of this case was the Pregnancy Discrimination Act of 1978. Prior to the passage of the PDA, it was lawful to award less service credit for pregnancy leave than for other temporary disability leave. That practice was disallowed when the PDA was passed. The question presented here was whether an employer engages in a current violation of Title VII when the employer does not restore service credit that females employees lost when they took

pregnancy pre-PDA for purposes of making post-PDA eligibility determinations for pensions and other benefits.

Plaintiff in the underlying action was an employee who took pregnancy leave prior to enactment of the PDA. However, after the Act was passed, AT&T made no service adjustments for the pre-PDA personnel policies. The result for Plaintiff was that she was entitled to a small pension than she otherwise would have been entitled to. The lower courts held this violated Title VII.

The Court reversed, holding that a violation does not necessarily exist when pension benefits are calculated in part under an accrual rule, which was applied only pre-PDA. Furthermore, the Court noted that the employer's pension payments accord with the terms of a bona fide seniority system, insulating them from challenge under section 703(h) of Title VII.

The Court also ruled that the Lilly Ledbetter Fair Pay Act of 2009 did not apply in this matter because the pre-PDA decision not to award service credit for pregnancy leave was not discriminatory, and thus the Respondent was not affected by a discriminatory compensation decision as is required by the Act.

**Gross v. FBL Financial Services, Inc. 129 S.Ct. 2343 (2009)**

**Disposition** Vacated 526 F.3d 356 (8<sup>th</sup> Cir.)

**Majority** Thomas, Roberts, Scalia, Kennedy, and Alito. Thomas J. delivered the opinion of the Court.

**Dissent** Stevens, Souter, Ginsberg and Breyer. Stevens J. and Breyer J. filed dissenting opinions.

Petitioner in this matter alleged that he was demoted based on his age in violation of the ADEA. The District Court judge instructed the jury that it must find for the Plaintiff if he proved by preponderance of the evidence that he was demoted and his age was a motivating factor in the decision to demote, that is, it played a part in the demotion. The jury returned a verdict for Petitioner. The 8<sup>th</sup> Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed regarding “mixed motive” cases, where the employer takes action for both permissible and impermissible reasons.

The Court granted certiorari and held that a plaintiff bringing an ADEA disparate treatment claim must prove, by a preponderance of the evidence, that age was the “but-for” cause of the adverse employment action. The Court indicated that the burden does not shift to the employer to show that it would have taken the action regardless of age, even where the plaintiff produces some evidence that age was but one motivating factor in the decision.

The Court reasoned that the plain language of the ADEA does not authorize a mixed-motive age discrimination claim because it requires that an employer took the adverse action “because of” age. The Court interpreted this phraseology to mean that age had to be the single reason for the employer’s actions. The Court also noted that Title VII is materially different than the ADEA in terms of its burden of persuasion, and so interpretation of the ADEA is not governed by Title VII decisions.

***Ricci v. DeStafano, 129 S.Ct. 2658 (2009)***

**Disposition** Reversed 530 F.3d 87 (2d Cir.)

**Majority** Kennedy, Roberts, Scalia, Thomas, and Alito. Kennedy J. delivered the opinion of the Court.

**Dissent** Ginsburg, Stevens, Souter and Breyer. Ginsburg J. delivered a dissenting opinion.

In this highly publicized case, several Caucasian and Hispanic members of the New Haven, Connecticut Fire Department brought causes of action under Title VII and the Equal Protection Clause to challenge the City's decision not to implement the results of a civil service test administered to determine promotions within the department. The City made this decision because the examination resulted in disproportionately higher scores for white applicants than for minority applicants. The Plaintiffs in the case had passed the examination and alleged that the City's refusal to certify the test results discriminated against them on the basis of race in violation of Title VII of the CRA of 1964. The City offered the defense that it would have faced Title VII liability based on disparate impact from the minority firefighters had it certified the results. The District Court granted summary judgment for the Defendants and the Second Circuit affirmed.

The Supreme Court granted certiorari and reversed, holding that the City's actions of throwing out the exam results violated Title VII. The Court noted that an employer must have a strong basis in evidence to believe that it will be subject to disparate impact liability before it can engage in intentional discrimination to avoid that liability. The Court found that such evidence could not be deduced from the record in this case. While the Court did note that the exam results presented a prima facie case of disparate impact liability, they ruled that such is not enough of a strong basis in evidence that the City would have been liable, because such liability would only have arisen if the exams were not job related and consistent with business necessity. The Court found the City's argument to this effect untenable. Without a strong basis in evidence, the Court held that the City's actions amounted to an intentional discrimination on the basis of race.