

---

**NOT  
^ JUST ANOTHER  
DAY AT THE OFFICE**

Recent Changes in the Laws Affecting the Workplace

Mark D. Downey  
October 2, 2009

# Three Elements Of Change

---

**Three elements are converging to change the laws governing the workplace:**

- The EEOC
- The Courts
- Congress/President Obama

---

# FIRST ELEMENT: THE EEOC

# EEOC Processes Discrimination Claims

## Statistics for all charges of discrimination filed with the EEOC in 2008:

- 95,402 Charges of Discrimination received by EEOC in 2008
- Represents a 15.2% increase over Total Number of Charges from 2007
- EEOC recovered \$274.4 million based on these charges

# EEOC Processes Discrimination Claims

---

## Race Discrimination:

- Of the 95,402 total number of charges in 2008, 33,973 were charges based on claims of Race Discrimination
- Up from 2007 when only 30,510 Race Discrimination charges were filed

# EEOC Processes Discrimination Claims

---

## Gender Discrimination:

- Of the 95,402 total number of charges in 2008, 28,372 were charges based on claims of Gender Discrimination
- Up from 2007 when only 24,826 Gender Discrimination Charges were filed

# EEOC Processes Discrimination Claims

## Gender Discrimination:

- Interestingly, this jump between 2007 and 2008 in Gender Discrimination claims was the first significant jump in the number of gender related charges going back to 1997
  - Total number of Gender Discrimination charges had generally been around 24,000-25,000

# EEOC Processes Discrimination Claims

---

## Age Discrimination:

- Of the 95,402 total number of charges in 2008, 24,582 were charges based on claims of Age Discrimination
- Up from 2007 when only 19,103 Age Discrimination charges were filed

# EEOC Processes Discrimination Claims

## Age Discrimination:

- Next to claims of Retaliation, Age Discrimination represents an area that has seen the largest increase in the number of charges filed over the last eleven years
  - In 1997 only 15,785 charges were filed claiming Age Discrimination

# EEOC Processes Retaliation Claims

## Retaliation:

- In 2007 the EEOC received 26,663 charges of retaliation discrimination
- Resolved 22,265 retaliation charges
- Represented about a 22% increase over the number of Retaliation charges filed in 2006
- *Along with Age Discrimination, retaliation claims had the largest increase in the number of charges filed over the last eleven years*

# EEOC Processes Retaliation Claims

## Retaliation:

- EEOC received close to 33,000 charges of retaliation in 2008
  - Represents a 22.6% increase over 2007
  - Represents 34% of all charges received by the EEOC in 2008
- In 1997 Retaliation claims only accounted for about 22% of all charges received by the EEOC

---

# SECOND ELEMENT: THE COURTS

# The Courts

- The EEOC is only the first element
- Courts have also been active:
  - ❖ United States Supreme Court:
    - *Ricci v. DeStefano* (Race)
    - *Gross v. FBL* (Age)
    - *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.* (Retaliation)
  - ❖ Other Federal Courts

# United States Supreme Court: *Ricci v. DeStefano (Race)*

## Factual Background

- Test administered to group of firefighters eligible for advancement
- City analyzed results and found Caucasians had significantly outperformed Latino and African-American applicants
- The City understood that such a result could be interpreted as illegal discrimination under Title VII (disparate impact)
- City decided that they would avoid a lawsuit if they would throw out all test results

# United States Supreme Court: *Ricci v. DeStefano (Race)*

---

## Case History

- Eighteen of the high performing test takers (primarily Caucasians) sued the City
- Claimed Race Discrimination under Title VII
- Lower Court granted the City summary judgment – there is no factual dispute that the City did *NOT* illegally discriminate based on race in violation of Title VII

# United States Supreme Court: *Ricci v. DeStefano (Race)*

---

## United States Supreme Court Decision

- Decided in a 5-4 split
- Not only reversed lower court but also granted summary judgment for Plaintiff firefighters – there is no factual dispute that the City *DID* illegally discriminate based on race in violation of Title VII

# United States Supreme Court: *Ricci v. DeStefano (Race)*

## **United States Supreme Court Decision:**

- Relied on Equal Protection Clause case analysis
- Only where there is a “strong basis in evidence” that an employer’s race-conscious policy is necessary to avoid disparate impact liability for the employer can such a policy be instituted
- Majority of the Court determined that a mere fear/threat of a lawsuit does not and cannot constitute a “strong basis in evidence”

# United States Supreme Court: *Ricci v. DeStefano (Race)*

---

## United States Supreme Court Decision (the Dissent):

- Majority decision would discourage employers from undertaking voluntary steps to correct perceived statutory violations

# New Rules For Claims of Race (and other) Discrimination

- ✓ Be aware of the potentially discriminatory impact of reversing course or changing practices that are found to have a disparate impact on a certain protected classification
- ✓ If an employer encounters a practice that does appear to have a disparate impact, the employer needs to analyze more than just statistics and take action based on fear of litigation
  - Instead, the employer must analyze whether the practice in question is job related and consistent with business necessity
  - If both of these are shown, then the employer must determine if an equally valid, less discriminatory alternative is available that meets the employer's needs
    - Only when this analysis clearly shows liability for use of the particular practice should the employer take action to reverse or change a practice that has already been undertaken

# United States Supreme Court: *Gross v. FBL Financial Services, Inc. (Age)*

---

## Factual Background

- Gross sued his employer for illegal Age Discrimination under the Age Discrimination in Employment Act (“ADEA”)
- Case went to trial and was decided by a jury
- During trial evidence was presented of both a non-age related reason for the employer’s action and an age related reason (generally referred to as a “mixed-motive”)

# United States Supreme Court: *Gross v. FBL Financial Services, Inc. (Age)*

---

## Factual Background

- Because the evidence presented at trial showed both a legitimate business reason for the employer's action and an illegal reason (i.e. Gross's age) the Jury was instructed as follows:

“If Gross showed that his age was a factor in FBL's actions, then Gross must prevail, unless FBL showed that Gross's age was not the determining factor in its decision.”

# United States Supreme Court: *Gross v. FBL Financial Services, Inc. (Age)*

---

## United States Supreme Court Decision:

- The instruction on the law that was given to the Jury was not correct.
- Correct standard is:

“Under the ADEA the Plaintiff must show that age was a ‘but-for’ cause of their employer’s action”

# United States Supreme Court: *Gross v. FBL Financial Services, Inc. (Age)*

---

## United States Supreme Court Decision:

- Consequently, the instruction to Jury should have been something like:

“If Gross showed that ‘but-for’ his age that FBL would not have acted, then Gross must prevail.”

# New Rules For Claims of Age Discrimination

In cases where the evidence shows both a legitimate business reason and an age based reason for the action, so long as age cannot be shown to be “the” reason for the employer’s action, the employer will generally not be liable for age discrimination.

An employer will still have problems when the facts show:

- ✓ Statements by supervisors/management/decision-makers of a bias against older workers
- ✓ A policy or practice that statistically shows a greater impact on older workers
- ✓ Application of a policy that does not have legitimate business purpose

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **Question before the Supreme Court:**

- Whether Title VII's anti-retaliation statute protects a worker from being dismissed because she responded to questions by her employer during her employer's internal investigation of a sexual harassment complaint

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **Significant point of the issue:**

- Plaintiff was *not* the one making the complaint
- Plaintiff did *not* proactively take action to protect her rights

*INSTEAD:* Plaintiff merely responded to questions by the employer about conduct in the workplace

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **United States Supreme Court Decision:**

- Supreme Court said that the Plaintiff's firing soon after this interview *could* constitute retaliation under Title VII
- Employee was in a protected classification as contemplated by the anti-retaliation provisions of Title VII even though she merely answered questions

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **What this ruling did:**

- Again emphasized and further protects the duty of the employer to investigate complaints in the workplace

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **What this ruling did:**

- Also emphasized the duty to protect employees who participate in that investigation
  - even though an employee did not initiate the delivery of the information and merely responded to questions, she is protected

# *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn. (Retaliation)*

---

## **What this ruling did:**

- Indicates a move by the Supreme Court away from reading of employment laws too narrowly
  - Emphasizing a more pro-employee view of statutes
  - Even though “oppose” is not defined, the Court applied ordinary meaning which is more expansive than the definition given by many lower courts

# New Rules Regarding Claims of Retaliation

## **An employee need not show that the employer intended the retaliation**

- Rather, what matters is the impact on the employee
  - ✓ How would a reasonable employee react? (would a reasonable person in the plaintiff's position be discouraged from making a complaint?)
  - ✓ Negative impact on the employee is not limited to harm in the workplace
  - ✓ Potential claimants is no longer limited to persons who take proactive steps to complain of illegal conduct, the focus needs to be much broader
  - ✓ Practitioners must now also consider individuals involved in an investigation and/or provide information to the employer about conduct that could violate the law

# Federal Courts

---

- 6<sup>th</sup> Circuit – Inconsistent discipline was evidence of Age Discrimination – *Morgan v. New York Life Ins. Co.*
- 2<sup>nd</sup> Circuit – Termination 10 weeks into FMLA leave was not violation of FMLA when doctor stated that the employee would not be able to return to work until well after the expiration of the full 12 weeks of leave – *Roberts v. The Health Assoc.*

# Federal Courts

---

- 8<sup>th</sup> Circuit – Employee’s failure to show a causal connection between complaint and termination caused his retaliation claim to fail – *Davenport v. Univ. Ark. Bd. Of Trustees*
- 4<sup>th</sup> Circuit – Even though discrimination claim failed does not mean that the retaliation claim also goes away – *Jones v. Calvert Group Ltd.*

---

**THIRD ELEMENT:  
CONGRESS/PRESIDENT  
OBAMA**

# Congress/President Obama

---

- The EEOC and the Courts are only two elements affecting the changes in the laws of the workplace
- Congress/President Obama have also been an element of change

# Lilly Ledbetter Fair Pay Act

Amended the Civil Rights Act of 1964 and other anti-discrimination laws and overturned U.S. Supreme Court Precedent

- Redefined the time when a discriminatory act occurs to include each time an individual is impacted by the discriminatory practice (e.g. each time the employee receives a paycheck, etc.)
- Reverses Supreme Court's decision in *Lilly Ledbetter v. Goodyear*

# COBRA

---

## Part of the American Recovery and Reinvestment Act of 2009

- Created a 65% subsidy toward a qualified individual's health care coverage premium for 9 months
- Gave employees that had not previously elected COBRA a 60 day period to elect if terminated between Sept. 1, 2008 and February 16, 2009

# FMLA Amendments

---

FMLA Amendments clarified prior laws and added new leave rights and protections for military families

- Clarified definition of “serious health condition”
- Added leave rights for situations involving exigent circumstances arising out of active military duty or call to duty
- Added leave rights for situations involving care for a servicemember
- Increased employer notice requirements

# ADA Amendments

## Amendments clarified certain rights and protections provided by the Americans' with Disabilities Act

- Redefines “disability” to remove “substantially limits” requirement and eliminate consideration of “mitigating measures” (except for glasses/contacts)
- Definition of “major life activity” is expanded
- Redefines “regarded as” protections of the ADA
- Expands the number of persons covered by the Act
- Expands the number of persons entitled to reasonable accommodation
- Gives EEOC authority to issue guidance and instructs Courts to give proper deference and authority

# On The Horizon

- Employee Non-Discrimination Act (“ENDA”) -- prohibit sexual orientation bias
- Employee Free Choice Act (“EFCA”) – eliminate private ballot election of union representation
- Healthy Families Act (“HFA”) – require employers to give 7 days paid sick time
- Health Care Reform – ????
- Immigration Reform -- ????
- Other Possible Changes Coming –
  - Amending the WARN Act (“FOREWARN”)
  - Removal of damage caps in employment lawsuits
  - Limiting use of Arbitration in Employment law matters
  - Independent Contractor Proper Classification
  - ???

# THE END

---

Thank you for participating!

**Mark D. Downey**

(214)855-7596

Munsch Hardt Kopf & Harr, P.C.

3800 Lincoln Plaza

500 N. Akard St.

Dallas, Texas 75201