WEIL GOTSHAL

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Court Rejects Dan Rather's Claim for Breach of Fiduciary Duty Against CBS

By Teresa Chin

On September 29, 2009, the New York State Supreme Court, Appellate Division First Department, in a unanimous decision, dismissed all of journalist Dan Rather's claims against his former employer, CBS Corporation. Rather's claims against defendants Viacom Inc., CBS Chairman Sumner Redstone, CBS CEO Leslie Moonves and former CBS News President Andrew Heyward were also dismissed. This decision represents a significant victory for all employers, as well as for Weil Gotshal, who represented the defendants in this litigation.

Notably, the court vindicated CBS by clearly stating that Rather's allegation of breach of fiduciary duty against his former employer cannot stand. Adopting Weil Gotshal's arguments on appeal, the court ruled that "the law in this Department, and indeed enunciated in every reported appellate-division-level case, is that employment relationships do not create fiduciary relationships."

Rather's claims arose out of a September 8, 2004 broadcast that he narrated on the CBS *60 Minutes II* program about then-President George W. Bush's service in the Texas Air National Guard. Rather alleged that CBS disavowed the broadcast after a very public controversy ensued challenging the accuracy of the report, and that CBS fraudulently induced him to apologize personally for the broadcast on national television as well as to remain silent as to his belief that the broadcast was true. Rather further alleged that after he stepped down as anchor of *CBS Evening News*, he was assigned as a correspondent on *60 Minutes II* and then *60 Minutes*, in accordance with his contract, but that he was denied the opportunity to cover important news stories until he left CBS in June 2006.

Top Merrill Lynch Employment Litigator Joins Weil

Allan Dinkoff, formerly a Managing Director and Head of the Employment Law Group at Merrill Lynch & Co., Inc., has joined Weil Gotshal's Employment Litigation Practice Group as counsel in the New York office. Allan has nearly 30 years of experience handling employment matters and complex commercial litigation. During his 12 years at Merrill Lynch, he was the principal advisor to the Board of Directors and executive management on the firm's most complex and high-profile employment issues around the globe. He played a key role in successfully managing large reductions in force and in defending discrimination class actions, national wage and hour cases, and high-profile individual claims for discrimination, bonuses, stock rights and severance.

CBS argued on appeal that it was well-settled law that an employment relationship alone cannot give rise to fiduciary duties on the part of an employer. Rather, however, argued that his four-decade history with CBS and his universal standing as the face of CBS News constituted a special relationship giving rise to fiduciary duties. The court rejected each of these claims out of hand: "The length of Rather's tenure at CBS is irrelevant to, and does not support, this claim of a fiduciary relationship . . . nor does Rather's status as 'the public face of CBS News after Walter Cronkite retired . . . .'"

In its decision, the court also stated that Rather's allegations of breach of contract and fraud cannot stand, and that the prior dismissals of Rather's claims for breach of the covenant of good faith and fair dealing and tortious interference with contract were proper.

Legal Issues Arising out of Employees' Use of Social Network Websites

By Jeffrey S. Klein, Nicholas J. Pappas and Jason E. Pruzansky

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According to a recent study, 45 percent of employers currently use social network websites such as Facebook, MySpace, LinkedIn or Twitter to screen job candidates, more than double the number only one year earlier.[1] Approximately 35 percent of employers decided not to offer a job to a candidate as a result of information gleaned from a social network site. More than 50 percent of the employers surveyed indicated that provocative photos were the largest contributing factor to a decision not to make a job offer to a candidate, while 44 percent of employers were disturbed by candidates' references to the use of drugs or alcohol.

In addition to using social network websites in conducting background checks on prospective employees, employers increasingly are monitoring current employees' use of online social network websites, and numerous employers have discharged employees because of content posted on such sites. For example, in May 2007, the Olive Garden restaurant discharged a supervisor "after she posted photos on MySpace of herself, her [underage] daughter, and other restaurant employees hoisting empty beer bottles."[2] In October 2008, Virgin Atlantic Airlines discharged thirteen flight attendants as a result of Facebook postings in which the employees criticized the airlines' safety standards and insulted the airline's passengers.[3] More recently, the National Football League's Philadelphia Eagles fired an employee for posting on Facebook that his employer was retarded for letting a rival franchise acquire one of the Eagles' star players.[4]

In addition to using social network websites in conducting background checks on prospective employees, employers increasingly are monitoring current employees' use of online social network websites, and numerous employers have discharged employees because of content posted on such sites.

While no law prohibits employers from searching online social network sites to conduct background checks of current employees or job applicants, employers should take into account several legal risks arising from this practice. In this article we discuss the various employment laws that may be implicated when employers choose to review social network websites. Following this discussion, we analyze legal and business issues employers should consider in order to limit claims resulting from visiting employees' social network websites. Finally, we propose various policies employers may consider adopting as a way of avoiding or mitigating some of the risks of employees' use, or misuse, of social network websites.

Anti-Discrimination Laws

Employers viewing their employees' or job candidates' social network websites may provide the basis for claims under the employment discrimination statutes based on employers learning facts from such viewings that the employee or job candidate may claim was a legally protected status or activity. If an employer subsequently takes an adverse action against the employee or job candidate within a short time after acquiring knowledge of the protected status or activity, the employee or job candidate may use that information as circumstantial evidence of employment discrimination or retaliation.[5] As discussed below, employers may combat claims built upon such circumstantial evidence by implementing neutral, job-related policies and practices that provide guidance to human resources professionals as to when and how the information gained from social network websites can and cannot be used.

Another risk arising from employers' viewing social network websites of current and prospective employees is the unwitting application of different standards based on a protected classification that an employee may claim constitutes intentional discrimination. For example, in a high-profile case, Delta Air Lines dismissed a female flight attendant after discovering "inappropriate" photographs of the employee in her Delta uniform posted on her blog. The flight attendant sued Delta alleging, among other things, sex discrimination because Delta purportedly failed to discipline male employees who maintained blogs containing similar content. *See Simonetti v. Delta Air Line Inc.*, Case No. 1:05-CV-2321, Complaint filed (N.D. Ga. Sept. 7, 2005).

Legal Activities Laws

Certain states offer varying degrees of statutory protection for individuals against adverse employment actions based on certain defined lawful non-work-related conduct.[6] In New York, for instance, an employer may not discriminate against or refuse to hire employees because of their participation in "legal recreational activities" off the employer's premises during nonworking hours unless the activity "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." N.Y. Lab. Law § 201d(2)(a)(c), (3)(a).[7] The statute defines "recreational activities" as including "any lawful, leisure activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." While few courts have interpreted this statute – and none appear to have applied the statute to content made available on social network websites – thus far, courts that have analyzed the statute have declined to give "recreational activities" an expansive interpretation. *See, e.g., McCavitt v. Swiss Reins. Am. Corp.*, 237 F.3d 166, 168 (2d Cir. 2001) (dating not a "recreational activity"); *Kolb v. Camilleri*, 2008 WL 3049855 (W.D.N.Y. Aug. 1, 2008) (after-hours picketing outside of his employer's facility in protest of certain expenditures not "recreation activities").

National Labor Relations Act

Employers also should consider whether the National Labor Relations Act (the "NLRA") prohibits employers from taking adverse employment action because of content prospective or current employees may post to social network websites. To the extent an employee is using the social network site to engage in "concerted activities for the purpose of . . . mutual aid or protection" or if the site relates to a labor dispute, an employee may contend that any discipline related to the contents of the social network site would constitute an unfair labor practice. For example, in *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 US 1193 (2003), the court held that an airlines' discipline of a pilot who vigorously criticized the airline's management and labor concessions on his personal and restricted website constituted protected union organizing activity.

On the other hand, not all forms of speech that allegedly relate to concerted or collective activities are protected by the NLRA. For example, employees who engage in disloyal behavior or disparage the employer's customers or business activities may not be protected by the statute. For example, in *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), the D.C. Circuit reversed an NLRB decision holding that an employee's discharge for his public internet postings protesting recent layoffs constituted an unfair labor practice, finding instead that the employee's postings on a newspaper's public and non-password-protected internet forum "constituted 'a sharp, public, disparaging attack upon the quality of the company's product and its business policies' at a 'critical time' for the company," and were therefore not protected by the NLRA.

Terms of Service Violations

Employers also should be aware of whether they are violating a social network website's terms of service ("TOS") by using such a website to conduct background checks on prospective employees. For example, MySpace's terms of service state, *inter alia*, that "[t]he MySpace Services are for the personal use of Members only and *may not be used in connection with any commercial endeavors*. . . ."[8] Should the issue of an employer's breach of MySpace's TOS ever get litigated, employees likely will contend that an employer's conducting of background checks on prospective employees is connected with a "commercial endeavor" and therefore is prohibited under the TOS.[9] On the other hand, employers may argue that the aforementioned provision in the TOS is meant to prohibit the buying, selling, or advertising of products, but not the conducting of background checks on employees. Employers also may contend that employees cannot enforce the TOS, because it represents a contract between MySpace and its users and has no bearing on claims between MySpace's users and members of the general public.[10]

Privacy Implications

In some states, employees may seek to assert common-law breach of privacy claims based on their employers' accessing their social network websites. For example, in *Pietrylo v. Hillstone Rest. Group*, 2008 WL 6085437 (D.N.J. July 24, 2008), Plaintiff Brian Pietrylo, an employee at a Houston's restaurant in New Jersey, created a MySpace page as a forum for fellow employees to "vent" about their experience working at the restaurant. Pietrylo purportedly created the invitation-only user group on personal time and solicited invitations to join the group on personal time. The personal and password-protected webpage eventually became populated with complaints about the restaurant, its customers, and supervisors. Pietrylo's supervisors ultimately obtained a username and password from a hostess at the restaurant and were able to access Pietrylo's webpage. After visiting the webpage, the supervisors discharged Pietrylo for violating the company policy mandating "professionalism and a positive attitude."

Pietrylo and another employee discharged for similar conduct filed a lawsuit alleging, among other things, that Houston's violated New Jersey's common-law right to privacy by visiting Pietrylo's invitation-only internet discussion space. On June 18, 2009, a jury found in favor of the restaurant on Plaintiffs' claim for invasion of privacy, on the basis that Plaintiffs had no reasonable expectation of privacy in the MySpace group. However, the jury found that the restaurant's managers violated state and federal laws that protect the privacy of web-based communications, and awarded Plaintiffs $3,400 in back-pay and $13,600 in punitive damages. Specifically, the jury determined that the restaurant violated the federal Stored Communications Act, 18 U.S.C. §§ 2701-11, and the parallel state provision in the way that it gained access to the MySpace site, namely management requesting and using the hostess's password to access the site.

Business Considerations

In addition to the numerous legal risks facing employers who visit employees' social network websites, employers also should consider the public relations ramifications and unwanted media attention that they may face as a result of visiting these websites. The city of Bozeman, Montana, provides a very recent example of the type of unwanted publicity that an employer who engages in these types of background checks may encounter.[11] In June 2009, Bozeman sought to change its job application to require municipal job seekers to disclose usernames and passwords for social network websites that they visit. However, almost immediately, the city's proposed application requirement drew sharp criticism from across the nation.[12] As a result of the criticism received, the city withdrew its password requirement and the city manager apologized to the public.[13]

To avoid or mitigate the risk of employment litigation emanating from employers' viewing employees' or job candidates' social network websites, employers should consider adopting a written employment policy setting forth "rules of the road."

Practice Pointers

To avoid or mitigate the risk of employment litigation emanating from employers' viewing employees' or job candidates' social network websites, employers should consider adopting a written employment policy setting forth "rules of the road."[14] Such a policy will serve the positive function of letting employees know the kinds of comments that cross the line from private lawful activity to activity that harms the employers' legitimate business interests and, therefore, may provide a basis for adverse action. Just as importantly, such a policy will give managers and human resources personnel guidelines they may apply when using information obtained from a social network website.

Several guidelines employers may consider adopting are as follows:

- require employees whose affiliation with the company is evident to caveat their remarks on the web as reflecting only his or her own views and not necessarily the views of the company or other employees;
- remind employees that their conduct may reflect upon the company and encourage them to exercise good judgment in their web communications;
- caution employees that they may be subject to discipline up to and including discharge for making defamatory, obscene, libelous or disloyal statements pertaining to the company, its employees or customers;
- remind employees that they may not share confidential, proprietary, or private information about the company, its employees or products on the web;
- state that company trademarks may not be used on the web without prior written permission from the company;
- inform employees that they may not sell or promote products or services on the web that would compete with company products or services; and
- advise employees that they may consult with the human resources department with any questions about

the company's views with respect to the rules of the road for web communications and the employer's legitimate business interests.

1 Harris Interactive survey for CareerBuilder.com, available at http://www.careerbuilder.com/share/aboutus/pressreleasesdetailaspx?id=pr519&sd=8/19/2009&ed=12/31/2009&siteid=cbpr&sc_cmp1=cb_pr519_&cbRecursionCnt=3&cbsid=198eee63c77a46bf8f461a2161197b5b-307198217-x4-6.

2 Don Aucoin, *MySpace vs. WorkPlace*, Boston Globe, May 29, 2007, at D1.

3 *Crew Sacked Over Facebook Posts*, BBC News, October 31, 2008, available at http://news.bbc.co.uk/2/hi/uk_news/7703129.stm.

4 Toni Monkovic, *Eagles Employee Fired for Facebook Post*, NY Times, March 10, 2009, available at http://fifthdown.blogs.nytimes.com/2009/03/10/eagles-employee-fired-for-facebook-post/; *see also* Mark Cannizzaro, *No Clowney around: Ryan benched David for tweet*, NY Post, September 29, 2009, available at http://www.nypost.com/p/sports/jets/no_clowney_around_ryan_benched_david_Y2FX90thWwJfr5LnrpD45O (discussing NY Jets' head coach's decision to bench team's fastest wide receiver as punishment for sending self-centered Twitter messages following the Jets' victory over a rival franchise).

5 *See, e.g., Kennebrew v. N.Y. City Hous. Auth.*, 2002 WL 265120, at *16 (S.D.N.Y. Feb. 26, 2002); *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 91 (2d Cir. 1996).

6 *See, e.g.*, Cal. Lab. Code § 96(k); Colo. Rev. Stat. § 24-34-402.5; N.D. Cent. Code § 14-02.403.

7 *See also* Jeffrey S. Klein & Nicholas J. Pappas, *When Private Sector Employer Fires Worker For Blogging*, N.Y.L.J., February 5, 2007, P. 3, Col. 1.

8 MySpace.com Terms of Use Agreement, http://www1.myspace.com/index.cfm?fuseaction=misc.terms (last visited September 8, 2009) (emphasis added).

9 Employees also may argue that an employer who has intentionally accessed a private password-protected social network webpage without permission (e.g., by stealing an employee's password or "hacking" into the website) has violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, which prohibits intentionally accessing a "protected computer" without authorization.

10 Any legal action taken against a social network website as a result of content posted by an employee would be distinct from legal action between an employer and an employee concerning social network content and would raise separate considerations. For example, social network websites may contend that: (1) their terms of service bar any claims against them as many TOS, for example, contain various releases and limitations of liability; and (2) Section 230 of the Communications Decency Act immunizes them from liability arising from any content posted by users (with some exceptions, such as intellectual property claims, which are not barred).

11 *See, e.g.*, Amanda Ricker, *City requires Facebook passwords from job applicants*, Bozeman Daily Chronicle, June 19, 2009, available at http://bozemandailychronicle.com/articles/2009/06/19/news/10socialnetworking.txt.

12 Matt Gouras, *City asks applicants for Internet passwords*, Associated Press, June 19, 2009, available at http://finance.yahoo.com/news/City-asks-applicants-for-apf-3157638444.html?x=0&sec=topStories&pos=5&asset=&ccode=.

13 Background Check Press Release, June 19, 2009, available at http://bozeman.net/bozeman/upcoming%20events/PressRelease.aspx.

14 The NFL recently adopted a policy prohibiting players, coaches, and certain other football personnel from posting content on social network websites from 90 minutes before kickoff through the end of the post-game media interviews. The NBA unveiled its social network policy on September 30, 2009. Marc Stein, *NBA social media guidelines out*, ESPN.com, September 27, 2009, available at http://sports.espn.go.com/nba/news/story?id=4520907.

Supreme Court Rejects "Mixed-Motive" Burden-Shifting Under the ADEA

By Daniel J. Venditti

The U.S. Supreme Court recently held in *Gross v. FBL Financial Services, Inc.*[1] that a plaintiff alleging a claim of age discrimination must, in all cases, prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action. In other words, the employee always has the burden to establish that the employer would not have taken the adverse employment action were it not for the employee's age. Before *Gross*, courts across the country in "mixed-motive" cases under the Age Discrimination in Employment Act ("ADEA")[2] had adopted and applied the burden-shifting approach to liability that applied in "mixed-motive" Title VII cases prior to the enactment of the Civil Rights Act of 1991. Under this approach, a plaintiff need not establish that an employer's impermissible consideration of a protected characteristic was the only or primary reason for an adverse employment action. Instead, it was sufficient for the employee to prove that an impermissible consideration played some role in the employer's decision, even if permissible considerations also were involved. If an employee could make that showing, the employer could avoid liability if it could prove that it would have made the same adverse decision anyway. In *Gross*, the Supreme Court rejected that burden-shifting approach in "mixed-motive" ADEA cases, holding that an employer is never required to prove that a challenged employment action would have occurred regardless of the employee's age.

Background: *Price Waterhouse* and the Civil Rights Act of 1991

In 1989, the U.S. Supreme Court held in the seminal case *Price Waterhouse v. Hopkins*[3] that an employer could escape liability in a Title VII case, even if an impermissible motive was involved in an employment action, if the same decision would have been made regardless of the impermissible motive. In *Price Waterhouse*, a female candidate for partnership at an accounting firm alleged that her employer violated Title VII by denying her partnership because she was a woman. Price Waterhouse first had delayed for one year a decision on making Hopkins partner, then denied her candidacy outright. Hopkins had an aggressive personality, and at trial the company presented evidence that Hopkins' demeanor and rough dealings with company staff weighed heavily against her chance of making partner. However, there was also evidence that some partners at the firm reacted negatively to Hopkins' aggressive personality merely because she was a woman. For example, a partner at the firm explained to Hopkins that to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[4] A plurality of the Supreme Court and two concurring Justices agreed that the plaintiff had established all that she must under Title VII by showing that the employer relied upon stereotypical notions of how female employees should look or act in coming to its decision (i.e., "sex-stereotyping"). This was so even though permissible considerations – Hopkins' rough treatment of staff – also played a role.[5]

But the plaintiff's showing that Price Waterhouse relied on sex-based considerations did not end the matter. The Supreme Court went on to hold that, even though the plaintiff demonstrated that her sex influenced the partnership decision, Price Waterhouse would not be liable if it could prove that it would have come to the same conclusion had sex not been considered.[6] Writing separately in a concurrence, Justice O'Connor added, in her view, "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[7] Justice O'Connor believed that Hopkins had met this direct-evidence/substantial-factor standard because performance evaluations overtly referred to Hopkins' failure to conform to gender stereotypes as weighing against her chance at partnership.

In *Gross*, the Supreme Court rejected the burden-shifting approach in "mixed-motive" ADEA cases, holding that an employer is never required to prove that a challenged employment action would have occurred regardless of the employee's age.

In 1991, just two years after the Supreme Court decided *Price Waterhouse*, Congress passed the Civil Rights Act of 1991. The Civil Rights Act amended Title VII in two important ways. First, it amended Title VII to provide that it is sufficient to establish liability if a protected characteristic was a "motivating factor" in an adverse employment decision.[8] This marked a shift from *Price Waterhouse*, under which a plaintiff similarly had to show only that a protected characteristic was a "motivating factor" in an employment decision, but liability would not attach unless and until the employer failed to establish that it would have followed the same course anyway. Under the Civil Rights Act, even if the employer would have made the same decision absent the impermissible consideration, the decision will be found to be discriminatory.

Second, the Civil Rights Act preserved the "same-decision defense," but only as a limit on the remedies available to a plaintiff, and not as a defense to liability.[9] One issue left unresolved by the Civil Rights Act was the nature of proof required to show that an unlawful consideration motivated an otherwise lawful employment action. In *Price Waterhouse*, Justice O'Connor wrote that direct evidence was required.[10] After the passage of the Civil Rights Act, courts were divided as to whether Justice O'Connor's "direct evidence" requirement should apply to "mixed-motive" claims under Title VII. In 2003, in *Desert Palace, Inc. v. Costa*,[11] the Supreme Court resolved this issue, holding that direct evidence of an improper consideration is not required under Title VII.

Although the Civil Rights Act also amended the ADEA, Congress did not add a provision to the text of the ADEA – as it did with Title VII – providing that a plaintiff could establish a claim of age discrimination if a protected characteristic was a "motivating factor" in an adverse employment decision. Therefore, after 1991, courts across the country in ADEA "mixed-motive" cases continued to adopt and apply the burden-shifting approach to liability set forth in *Price Waterhouse*.[12] That is the background against which *Gross* was decided.

The *Gross* Case

The Petitioner, Jack Gross, began working for FBL Financial Group, Inc. ("FBL") in 1971. In 2001, Gross held the position of "Claims Administration Director." In 2003, when Gross was 54 years old, he was reassigned to the position of "Claims Project Coordinator." Although Gross did not receive a decrease in his salary, Gross considered this reassignment a demotion because many of his job responsibilities were transferred to a newly created position, which was filled by a younger employee who Gross formerly supervised. Gross sued FBL, alleging that he was reassigned because of his age in violation of the ADEA.

At trial, Gross conceded that there was no direct evidence of FBL's discriminatory motive. However, the Court found that Gross presented ample circumstantial evidence that his reassignment was motivated, at least in part, by his age. Among other things, there was evidence that (1) Gross was highly qualified for the position to which his younger colleague was assigned; (2) that the younger colleague was "far less" qualified for that job; and (3) Gross never was given the opportunity to apply for the position to which his former subordinate was assigned.[13] On the basis of this circumstantial evidence, the trial judge instructed the jury that Gross had the burden to prove that Gross's age was "a motivating factor" in FBL's decision to demote Gross to Claims Project Coordinator, but that it must return a verdict for FBL "'if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.'"[14] Applying this instruction, the jury reached a verdict in Gross's favor and awarded him lost wages.

On appeal, the Eighth Circuit held that the trial court's jury instruction was flawed. The problem with the instruction was that the trial court failed to distinguish between the types of evidence that Gross could use to support his "mixed-motive" claim. In the Eighth Circuit, Justice O'Connor's concurrence in *Price Waterhouse* is considered to be the controlling opinion. Therefore, the Eighth Circuit held that in order to be entitled to a "mixed-motive" jury instruction Gross should have been required to present "direct evidence" that a protected characteristic played a "substantial" role in FBL's decision.[15] Gross argued that *Desert Palace* – which held that direct evidence is not required under Title VII, as amended by the Civil Rights Act of 1991 – superseded the continued application of a "direct evidence" requirement in ADEA cases. The Eighth Circuit rejected that argument, holding that the trial court wrongly presented the "mixed-motive" instruction based on Gross's circumstantial evidence alone.[16]

On appeal to the U.S. Supreme Court, the parties presented the question of whether Gross, as a plaintiff in a non-Title VII discrimination case, should have been entitled to the "mixed-motive" burden-shifting jury instruction based on his presentation of exclusively circumstantial evidence of discrimination. Rather than answer that question, the Court instead addressed what it considered to be an essential question preliminary to its analysis – whether the "mixed-motive" burden-shifting approach to liability is applicable in ADEA cases at all. The Court held that it is not. Rather, in all cases, the plaintiff bringing an ADEA claim retains the burden to show by a preponderance of the evidence that age was the "but for" cause of the employer's adverse employment decision.

Although *Gross* will benefit employers during litigation, the substantive requirements of the ADEA remain unchanged.

The court offered several justifications for its conclusion. First, Title VII, as amended by the Civil Rights Act of 1991, is "materially different" from the ADEA with respect to the burden of persuasion, and therefore the Court's interpretation of the ADEA would not be governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace*. If Congress intended for Title VII and the ADEA to be decided under the same standards, Congress would have amended the ADEA in 1991 to include a burden-shifting approach.[17] Second, the Court found that the text of the ADEA did not support burden-shifting.[18] Third, the Court rejected the argument that the ADEA should be interpreted consistently with *Price Waterhouse*. The Court questioned whether it would take the same approach to Title VII if it was to consider the question today for the first time, and noted that "even if *Price Waterhouse* was doctrinally sound," the rule from that case has proved difficult to apply. "[T]he problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[19]

Conclusion

Gross is a favorable opinion for employers because it heightens the proof requirement at trial for age discrimination plaintiffs. Prior to *Gross*, courts continued to apply the *Price Waterhouse* approach in ADEA cases. Under *Price Waterhouse*, an employee could satisfy his or her burden by showing that age was one factor among several for an adverse employment action, although not the main reason. The burden then would shift to the employer to avoid liability by proving that it would have taken the same action without considering the plaintiff's age. After *Gross*, the plaintiff retains the burden to prove that age was the "but-for" cause of the challenged employment action.

In addition to making it less onerous for employers to defend age discrimination claims, the *Gross* decision may confuse juries who will be instructed to apply competing standards in cases involving both ADEA claims and Title VII "mixed-motive" claims. This potential for confusion could benefit employers if it causes the plaintiffs' bar to forego combining ADEA and Title VII "mixed-motive" claims in the same case in favor of ostensibly less complicated deliberations following a trial. This issue also may arise in cases involving claims under both the ADEA and state anti-discrimination laws (which often are interpreted consistently with their federal counterparts).

Whatever the short-term impact of *Gross* may be, the decision is expected to be short-lived. Congress already has set in motion a process that may result in an amendment to the ADEA. On June 18, 2009 – less than two weeks after *Gross* was decided – U.S. Representative George Miller (D-CA), the chairman of the House Education and Labor Committee, announced that he intends to hold a hearing which could result in legislation reversing the Gross decision. And on September 29, 2009, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) announced that the Judiciary Committee also will hold a hearing to examine *Gross*, at which Jack Gross is scheduled to testify. On October 6, 2009, both the U.S. House of Representatives and U.S. Senate introduced proposed legislation which would permit the "motivating factor" standard of the Civil Rights Act, including the "same-decision defense" only as a limit on a plaintiff's remedies, to apply to claims of age discrimination.

From a practical perspective, employers should not view *Gross* as a signal to modify existing practices. Although *Gross* will benefit employers during litigation, the substantive requirements of the ADEA remain unchanged. An employer may not take adverse employment action against an individual "because of" the individual's age. Under *Gross*, the burden of proving that an employment action was "because of" age remains at all times with the plaintiff, including where legitimate factors also played a role in the decision. Regardless of who bears this burden of proof, employers should continue to ensure that employment practices comport with legitimate business justifications.

1 129 S. Ct. 2343 (2009).

2 29 U.S.C. §§ 621-634.

3 490 U.S. 228 (1989).

4 *Id.* at 235.

5 *Id.* at 241-42.

6 *Id.* at 242. The standard adopted in *Price Waterhouse* is the approach adopted by the U.S. Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1976). *Mt. Healthy* involved a claim by an untenured teacher that the school district violated his First Amendment rights when it refused to rehire him based, in part, on comments he made to a radio program about certain school policies. But the plaintiff also had engaged in other inappropriate behavior which weighed against his continued employment with the school. The Court held that it was the plaintiff's burden to show that his conduct was constitutionally protected and that this protected conduct "was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." 429 U.S. at 287. The defendant then would be given the opportunity to avoid liability by proving by a preponderance that it would have reached the same decision in the absence of protected conduct. *Id.*

7 490 U.S. at 276.

8 42 U.S.C. § 2000e-(2)m (stating that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.") (emphasis added).

9 "On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)." 42 U.S.C. § 2000e-5(g)(2)(B).

10 490 U.S. at 276.

11 539 U.S. 90, 101 (2003).

12 *See Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995); *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160 (4th Cir. 2004); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003); *Visser v. Packer Eng. Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995); *Lewis v. YMCA*, 208 F.3d 1303 (11th Cir. 2000) (per curiam).

13 No. 4:04-CV-60209, 2006 WL 615670, at **5-6 (S.D. Iowa June 23, 2006).

14 526 F.3d 356, 360 (8th Cir. 2008) (quoting Final Jury Instruction No. 11).

15 *Id.* at 359 (citing 490 U.S. at 275 (O'Connor, J., concurring)).

16 *Id.* at 362.

17 129 S. Ct. at 2348-49.

18 *Id.* at 2350.

19 *Id.* at 2352.

New York Labor Law Amended to Require Written Notice of Pay Rates and Pay Days for New Hires

By Mark Jacoby and Emily Friedman

On July 28, 2009, New York State amended the New York Labor Law to require that employers provide additional notice to employees of certain terms and conditions of their employment. The new amendments will become law on October 26, 2009, and will apply to all employees hired on or after such date. Aimed at preventing confusion over agreed upon hourly wages, the amendments will impact the way in which many employers communicate information concerning rates of pay to newly hired employees, especially if employers did not previously have a practice of communicating such information in writing.

Currently, Section 195 of the New York Labor Law requires a New York employer to notify employees of their rate of pay and the employer's regular pay day, as designated by the employer, at the time of hire. But Section 195 does not specify how employers should communicate this information to employees. As amended, Section 195 will impose new obligations on employers to provide *written* notice to all employees hired on or after October 26, 2009 of their regular rate of pay and their pay day designated by the employer. In addition, employers now will be required to provide those employees who are eligible for overtime compensation (as established by the Commissioner of Labor's minimum wage order or otherwise provided by law or regulation) with written notice of their overtime rate of pay. The new amendments also require that the employer obtain a written acknowledgement from the employee confirming receipt of this information. The recent amendments provide that the content and form of the employee acknowledgment must conform to requirements established by the Commissioner of Labor, but those requirements have not yet been published.

An employer's noncompliance with the law may result in monetary penalties, even though the employer has not failed to pay any wages, benefits or wage supplements due. In accordance with Section 218 of the New York Labor Law, if the Commissioner of Labor determines that an employer has failed to comply with newly amended Section 195, the Commissioner may issue a compliance order to the employer and also assess monetary penalties in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation.

Existing provisions of Section 195 already require New York employers to provide written notification to employees of certain terms and conditions of their employment. Employers must notify their employees in writing (individually or by public posting) of the employer's policy on sick leave, vacation, personal leave, holidays and hours. Employers also must notify employees terminated from employment in writing of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination.

As amended, Section 195 will impose new obligations on employers to provide written notice to all employees hired on or after October 26, 2009 of their regular rate of pay and their pay day designated by the employer.

Because the new law imposes an obligation on employers to distribute written notifications to employees and also to obtain written acknowledgements from employees, employers are well advised to revise their policies and practices governing the creation and distribution of materials containing employee compensation information. Accordingly, New York employers are urged to take the following steps to ensure compliance with the law (remaining mindful that the Department of Labor is expected to issue more specific regulations regarding the content and form of employee acknowledgments):

- Distribute guidelines to all employees making hiring and compensation decisions that summarize the new legal requirements, including an instruction that each new hire must receive a written communication regarding pay rates, pay days and overtime pay, and that all such communications to new hires must be accompanied by a form acknowledgment that the new hire must sign and return to the employer to be retained in the employee's personnel file.
- Review all form offer letters, employment contracts and any other written materials regularly used for new hires to ensure that these documents conform to the new law.
- Create a standard acknowledgment form to utilize for all new hires clearly stating that the employee has received information concerning rates of pay, the employer's regular pay day and any overtime rates of pay, if applicable.
- Take care that all such new written communications concerning rates of pay or other terms of employment include appropriate disclaimers that the communication is not intended to create a contract of employment for a definite term, that the employment relationship remains "at-will" (as applicable), and that terms of employment are subject to change in the sole discretion of the employer.

Second Circuit Holds That ERISA Duty to Diversify Applies to Plan as a Whole

By Millie Warner

The U.S. Court of Appeals for the Second Circuit recently affirmed the dismissal of two related actions, holding that the plaintiffs failed to state a claim based on allegations that plan fiduciaries failed to diversify plan investments and invested plan assets in mutual funds that charged excessive fees. *Young v. General Motors Investment Management Corp.*, No. 08-1532, 2009 U.S. App. LEXIS 9792 (2d Cir. 2009). In so doing, the Second Circuit reached two important holdings:

- The fiduciary duty to diversify a plan's investments imposed by ERISA § 404(a)(1)(C) applies only to the plan "as a whole," and not to the individual funds in which a portion of the plan's assets may be invested; and
- Plaintiffs must allege that the fees charged by a particular mutual fund are excessive relative "to the services rendered," and also must meet other standards established under the Investment Company Act for determining whether a mutual fund fee is excessive, to state a claim for breach of fiduciary duty under ERISA based on a plan's allegedly paying excessive fees to the funds in which its assets are invested.

The Second Circuit's decision in *Young* is unpublished and therefore carries no official precedential value under Second Circuit rules.[1] Nonetheless, the decision provides valuable insight into the Second Circuit's evaluation of claims on which it has not previously ruled, and may have implications for other types of breach of fiduciary duty cases under ERISA.

Background

General Motors Corporation sponsored four 401(k) plans (the "Plans"). *Young v. General Motors Investment Management Corp.*, 550 F. Supp. 2d 416, 417 (S.D.N.Y. 2008). General Motors Investment Management Company ("GMIMCo") served as the Plans' named fiduciary for purposes of Plan investments, and State Street Bank & Trust Co. ("State Street") served as the Plans' trustee. *Id.* at 418. Under the Plans, participants bore sole responsibility, subject to certain restrictions, for allocating the assets in their individual plan accounts among a variety of investment options offered through the Plans, including, but not limited to, certain "single equity funds" – investment options that primarily consisted of the stock of a single publicly traded company. *Id.*

The Second Circuit held that the duty to diversify under ERISA § 404(a)(1)(C) applies to a plan's investments "as a whole," and not to individual investment options.

Plaintiffs, who were participants in the Plans, brought suit against GMIMCo and State Street under ERISA § 502(a)(2), alleging that Defendants breached their fiduciary duties to the Plans and the Plans' participants. *Id.* at 417.

First, Plaintiffs alleged that Defendants violated ERISA § 404(a)(1)(C), which requires a fiduciary to "diversif[y] the investments of a the plan so as to minimize the risk of large losses," by allowing a portion of the Plans' assets to be invested in single equity funds, as opposed to investing the Plans' assets exclusively in funds holding a diversified mix of equities. *Id.* According to Plaintiffs, the Plans' investment in certain single equity funds "was inconsistent with modern portfolio theory, which holds that diversification across and within asset classes is the optimum way to balance risk and return." *Young*, 2009 U.S. App. LEXIS 9792, at *3-4. Plaintiffs alleged that Defendants "knew or should have known" that the single equity funds offered through the Plans were "too risky and volatile [as] investment[s] for a pension plan . . . designed to provide retirement income," and, as a result of Defendants' imprudent conduct, Plaintiffs and the Plans' other participants lost millions of dollars when the value of the single equity funds offered by the Plans declined. *Id.* at *4 (alterations in original).

Second, Plaintiffs alleged that GMIMCo breached its fiduciary duty by allowing the Plans to invest in mutual funds offered under the Fidelity brand name that carried fees in excess of similar investment products available to large, institutional investors like the Plans. *Young*, 550 F. Supp. 2d at 418. Plaintiffs alleged that permitting investments in these funds caused the Plans to pay millions of dollars that could have been avoided by selecting cheaper, alternative investments. *Id.*

District Court Opinion

On March 24, 2008, the United States District Court for the Southern District of New York dismissed the plaintiffs' complaint on the ground that the plaintiffs' claims were barred by the relevant statute of limitations. ERISA § 413 provides that, absent fraud or concealment, a claim for breach of fiduciary duty under ERISA § 502(a)(2) must be brought before the earlier of (1) six years after the date of the last act that constituted part of the breach; or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. *Id.* Under Second Circuit precedent, a plaintiff need not know the law, but must only "have knowledge of all facts necessary to constitute a claim" in order to have "actual knowledge" sufficient to trigger the three-year statute of limitations period under ERISA § 413. *Id.* at 418-19 (*citing Caputo v. Pfizer*, 267 F.3d 181, 193 (2d Cir. 2001). The district court held that where a plaintiff's claim is based on an inherent statutory breach of fiduciary duty, knowledge of the transaction "standing alone" may be sufficient to trigger the running of the limitations period. *Id.* at 419.

The district court held that Plaintiffs' failure to diversify claim was based on an inherent breach of fiduciary duty, i.e., the allegedly imprudent decision to permit the Plans to invest assets in single equity funds. *Id.* Yet, as the court explained, all of the investments in the single equity funds were made more than three years prior the commencement of Plaintiffs' suit, and the Plan documents provided to the Plans' participants more than three years before the filing of the suit accurately described each of the single equity funds as an undiversified fund holding primarily the stock of a single corporation. *Id.* Accordingly, the district court held that Plaintiffs had "actual knowledge of all of the facts" on which their diversification claim was based more than three years prior to filing suit, and their claim was therefore barred by the applicable statute of limitations. *Id.*

As to Plaintiffs' excessive fees claim, the district court found that the allegedly excessive fees that formed the basis of Plaintiffs' claim likewise were "readily apparent from the information provided to all Plan participants" more than three years before Plaintiffs filed suit. *Id.* at 420. The district court thus held that this claim too was time-barred. *Id.*

Plaintiffs' claim could not survive a motion to dismiss in the absence of allegations that the plan as a whole was undiversified.

Second Circuit Opinion

On May 6, 2009, the Second Circuit – in a summary order authored by then-Judge Sonia Sotomayor, in addition to two other judges – affirmed the district court's dismissal of the suit, although on different grounds. In contrast to the district court, the Second Circuit examined the substantive sufficiency of the pleadings. As it found that the complaint failed to state a claim upon which relief could be granted, the Second Circuit did not reach the question of whether the action was time-barred. 2009 U.S. App. LEXIS 9792, at *6.

As to Plaintiffs' claim that the defendants breached their fiduciary duties under ERISA by permitting the Plans to invest in single equity funds, the Court held that the duty to diversify under ERISA § 404(a)(1)(C) applies to a plan's investments "as a whole," and not to individual investment options. *Id.* at *4. Plaintiffs, in contrast, alleged merely that certain individual funds offered by the Plans were undiversified. *Id.* Although Plaintiffs claimed that the failure to diversify is a fact-intensive inquiry that cannot be resolved at the pleadings stage, the Court held that Plaintiffs' claim could not survive a motion to dismiss in the absence of allegations that the plan as a whole was undiversified, and thus dismissed the claim on that basis. *Id.*

Turning to Plaintiffs' excessive fees claim, the Court held that this claim too was subject to dismissal because Plaintiffs failed to allege that the fees were excessive relative "to the services rendered." *Id.* at *5. The Court acknowledged that ERISA § 404(a)(1), which establishes the fiduciary duty of prudence for ERISA fiduciaries and which Plaintiffs alleged Defendants breached by selecting investment funds with allegedly excessive fees, "does not specifically address excessive fee claims." *Id.* The Court, however, looked to Second Circuit authority interpreting the Investment Company Act, which the Court found analogous to Plaintiffs' claims under ERISA. *Id.* Second Circuit case law provides that to establish an excessive fees claim under the Investment Company Act, an investment advisor must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length-bargaining. *Id.* Analyzing Plaintiffs' claims, the Court found that Plaintiffs failed to allege that the fees charged by the funds at issue were excessive relative to the services rendered and otherwise failed to allege facts relevant to the determination of whether the fees were excessive. *Id.*

Observations

Though unpublished, the Second Circuit's holding in *Young* that ERISA's diversification requirement applies only to the plan as a whole may have broad ramifications, most notably in so-called "stock drop" cases under ERISA. In those cases, where plaintiffs generally allege that a plan's fiduciaries breached their fiduciary duties by permitting the plan to invest in company stock when company stock was an imprudent investment option, some defendants have argued, based on modern portfolio theory, that such claims fail where the investment options offered within the plan provide participants the opportunity to minimize their investment risk for a given desired return through diversification. Certain courts, however, have limited the force of this defense, holding that "[u]nder ERISA, the prudence of investments or classes of investments offered by a plan must be judged individually." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) (*quoting Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 308 n. 18 (5th Cir. 2007)). The Second Circuit's decision in *Young* may signal the Second Circuit's reluctance to view a plan's individual investment options in isolation, which may be significant as ERISA stock drop cases begin to reach the Second Circuit on appeal.

The Second Circuit's decision in *Young* also represents the Court's first ruling in a so-called "excessive fee" case under ERISA. Since the first such case was filed in 2006, many lower courts have denied pre-discovery motions to dismiss.[2] Earlier this year, however, the Seventh Circuit became the first appellate court to address the duties of ERISA plan fiduciaries to control fees charged to plan participants in *Hecker v. Deere & Co.*, – F.3d –, 2009 WL 331285 (7th Cir. Feb. 12, 2009), and handed a significant victory to plan fiduciaries. (See *Employer Update*, Spring 2009, for a more detailed discussion of the *Hecker* decision.) In affirming the dismissal of Plaintiffs' excessive fee claim on substantive rather than procedural grounds, the Second Circuit's decision in *Young* could foreshadow a new trend of applying stricter scrutiny to plaintiffs' allegations in 401(k) fee lawsuits under ERISA.

Moreover, while unpublished, the Second Circuit decision to look to the standards under the Investment Company Act in *Young* may give rise to new, alternative grounds for defendants to explore in responding to excessive fee cases.[3]

1 Second Circuit Local Rule 32.1(b) provides that "[r]ulings by summary order do not have precedential effect." Pursuant to Local Rule 32.1(c)(1), however, "[c]itation to summary orders filed after January 1, 2007 is permitted."

2 *See George v. Kraft Foods Global, Inc.*, No. 06-cv-798-DRH, 2007 WL 853998 (S.D. Ill. Mar. 16, 2007); *Spano v. The Boeing Co.*, No. 06-cv-743-DRH, 2007 WL 1149192 (S.D. Ill. Apr. 18, 2007); *Kanawi v. Bechtel Corp.*, No. 06-cv-005566 (N.D. Cal. May 15, 2007); *Taylor v. United Technologies Corp.*, No. 3:06cv1494, 2007 WL 2302284 (D. Conn. Aug. 9, 2007); *Waldbuesser v. Northrop Grumman*, No. 06-06213 (C.D. Cal. May 21, 2007).

3 Notably, the Supreme Court likely will address the excessive fee standard under the Investment Company Act in a case in which it granted certiorari this year. *Jones v. Harris Associates*, Case No. 08-586 (*cert. granted* March 9, 2009).

Does Your Company's Email Policy Violate the National Labor Relations Act?

By Lawrence J. Baer and Philip F. Repash

In *Guard Publishing Co. d/b/a The Register Guard v. NLRB*,[1] the D.C. Circuit Court of Appeals recently reversed an important 2007 decision of the National Labor Relations Board (the "Board")[2] concerning an employer's right to enforce non-solicitation rules as part of its workplace email policy. The D.C. Circuit found that where an employer maintained an email policy that prohibited all "non-job-related solicitations" by employees, the employer violated the National Labor Relations Act (the "Act") by selectively enforcing that policy against a union employee who had sent emails communicating about union activities and soliciting union support. As discussed in this article, in reversing the Board's decision, the D.C. Circuit's opinion has reopened questions as to when an employer's email and other communication policies may run afoul of the Act.

Factual Background

Guard Publishing Company (the "Company") publishes the *Register-Guard*, a daily newspaper in the Eugene, Oregon area. In 1996, the *Register-Guard* adopted a Communication Systems Policy (hereinafter, the "CSP") to govern use of its communication systems, including email. The CSP provided, in relevant part, that:

> Company communication systems and the equipment used to operate the communication systems are owned and provided by the Company to assist in conducting the business of [the Company]. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

While the Company's employees used email regularly for work-related matters, the Board found that

> the [Company] was aware that employees also used email to send and receive personal messages. The record contains evidence of emails such as baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking.[3]

In May and August 2000, Suzi Prozanski, a Company employee and the union president, was issued written disciplinary warnings for sending three union-related emails from her Company email to other employees. The first email, sent on May 4, 2000, was for the purpose of clarifying events from the union's perspective relating to a union rally held the day before at the Company. On May 5th, the Company issued Prozanski a written disciplinary warning, stating: "[Y]ou used the company's email system expressly for the purpose of conducting [union] business. As you know, this is a violation of the Company's Communication Systems policy."[4]

As an issue of first impression for the Board, it found that an employer "may lawfully bar employees' nonwork-related use of its email system, unless [the employer] acts in a manner that discriminates against Section 7 activity."

Two months later, in August 2000, Prozanski sent two additional emails to the Company employees. The first, sent August 14 and entitled "Go Green," reminded employees to "WEAR GREEN on Tuesday" to "show unity" regarding the union's position in contract negotiations.[5] The second email, sent August 18 and entitled "Let's parade," asked for volunteers to help with the union's "fun, entertaining, PRIZE-winning entry in the Eugene Celebration Parade."[6] On August 22, the Company issued Prozanski another written disciplinary warning, stating that Prozanski had violated the CSP by using the email system "for dissemination of union information."[7]

In response, the union filed an unfair labor practice charge against the Company. Based on the charge, a complaint was issued by the Board's General Counsel alleging, *inter alia*, that the Company violated the Act by: (1) "maintaining, promulgating, and enforcing an overly broad no-solicitation policy" and (2) "discriminatorily enforcing its no-solicitation policy" by issuing disciplinary warnings to Prozanski on May 5th and August 22nd.

Legal Analysis

In a 3-2 decision, the Board held that the Company did not violate the Act simply by maintaining a communications policy that barred employees from using the Company's email system for all "nonjob-related solicitations." As an issue of first impression for the Board, it found that an employer "may lawfully bar employees' nonwork-related use of its email system, unless [the employer] acts in a manner that discriminates against Section 7 activity."[8] Section 7 of the Act provides that employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Citing a long line of cases governing employee use of other forms of employer-owned equipment, the Board analogized to find that "the employees here had no statutory right to use the [Company's] email system for Section 7 matters."[9]

In a strongly worded dissent, Member (now Chairman) Liebman and Member Walsh argued that in light of the major role email communications now play in modern industrial life, where an employer allows employees to use email for regular, routine use in their work, a ban on all "nonjob-related solicitations" by employees presumptively violates the Act, absent special circumstances. The dissent noted that its proposed rule would recognize employees' rights to discuss Section 7 matters using a resource that has been made available to them for routine workplace communication. In this case, the dissent stated that it would have found that the Company's mere maintenance of an email policy prohibiting all "nonjob-related solicitations" violated the Act.

Although the majority found that that the Company's non-solicitation policy on its face did not violate employees' Section 7 rights, the Board majority proceeded to examine whether the Company violated the Act "by discriminatorily enforcing the CSP to prohibit Prozanski's union-related emails while allowing other nonwork-related emails."[10] The Board found that the Company discriminatorily enforced the CSP with respect to Prozanski's May 4th email. The Board noted that the CSP "prohibited only 'non-job-related *solicitations*,' not all non-job-related *communications*," and the May 4th email (concerning Prozanski's views on events relating to a union rally held at the Company) "was not a solicitation."[11] The Board noted that while there is no Section 7 right to use an employer's email system, there is a Section 7 right to be free from discriminatory treatment where other similar types of communications by employees are permitted by the employer. The Board, therefore, found that the Company "acted discriminatorily in applying the CSP to Prozanski's May 4 e-mail."

The Board came to a different conclusion, however, regarding Prozanski's two August emails, the "Go Green" and "Let's parade" emails. The Board found that both of these emails constituted solicitations. The Board, however, noted that although "[t]he evidence shows that the [Company] tolerated personal employee email messages," including solicitations for "sports tickets or other similar personal items," there was "no evidence that the [Company] permitted employees to use email to solicit other employees *to support any group or organization*." Because Prozanski's August emails solicited support for the union (which is a "group or organization"), the Board concluded that the Company's enforcement of the CSP's "non-solicitation" provision with respect to the August emails did not discriminate along Section 7 lines. In explaining its reasoning, the Board stated:

> [A]n employer clearly would violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.

On appeal, the D.C. Circuit affirmed the Board's ruling that disciplining Prozanski for the May 4th email violated the Act because the expression of her views about a union rally held at the Company was not a "solicitation," but a mere "communication," which was not prohibited by the CSP. However, the D.C. Circuit disagreed with the Board regarding Prozanski's two August emails. The D.C. Circuit criticized the distinction drawn by the Board between soliciting on behalf of *outside organizations versus individuals* as "a post hoc invention."

Although the D.C. Circuit's ruling did not challenge the Board's core holding that employees have no per se Section 7 right to engage in union activity via an employer's email system, employers must be careful that any prohibitions, including non-solicitation rules, placed on employee email usage are uniformly and consistently applied to all employees engaged in similar categories of communications.

The court noted that the CSP drew no such distinction and, in fact, mentioned solicitations for "outside organizations" as only one example of the CSP's broader prohibition against "non-job-related solicitations." Moreover, the court found equally significant that the Company's August disciplinary warning of Prozanski did not raise solicitation on behalf of an "outside organization" as the offense. As the D.C. Circuit noted, Prozanski simply was told to "refrain from using the Company's systems for *union/personal* business." Finding that the Board's decision was unsupported by the record evidence, the D.C. Circuit set aside the Board's determination that the disciplining of Prozanski for her August emails was not an unfair labor practice and remanded the case to the Board for further proceedings consistent with its opinion.

Conclusion

Although the D.C. Circuit's ruling did not challenge the Board's core holding that employees have no *per se* Section 7 right to engage in union activity via an employer's email system,[12] employers must be careful that any prohibitions, including non-solicitation rules, placed on employee email usage are uniformly and consistently applied to all employees engaged in similar categories of communications. The Board's and D.C. Circuit's decisions make clear that selective or discriminatory enforcement of an employer's email policy may violate the Act. Finally, in light of Member (now Chairman) Liebman's dissenting view that the mere maintenance of a non-solicitation rule in an employer's email policy presumptively violates the Act, and the expected ideological shift of the Board once the full Obama Board is seated, employers should consult with experienced labor counsel in drafting or revising their email and other communication policies, including any non-solicitation rules, to ensure that their policies do not run afoul of the Act.

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1 571 F.3d 53 (D.C. Cir. 2009).

2 *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007).

3 *Id.* at 1111.

4 571 F.3d at 130.

5 *Id.* at 127.

6 *Id.* at 128.

7 *Id.* at 132.

8 351 N.L.R.B. at 1116.

9 *Id.* at 1114.

10 *Id.*

11 *Id.* at 1119 (emphasis added).

12 The union in this case did not appeal the Board's holding that an employer may promulgate a policy barring union access to email on a neutral basis.

Supreme Court Analyzes Legality of Employment Testing

By Danitra Spencer

In *Ricci v. DeStefano*,[1] the Supreme Court addressed an issue with broad implications for employers who use "pencil and paper" tests as part of their hiring or promotion processes. In that case, the Court analyzed the steps taken by a municipality in designing and implementing an exam for promotion of firefighters to lieutenant and captain, but thereafter disregarded the results of that exam out of concern that the exam appeared to have an adverse impact based upon race or ethnicity. The Court reversed the municipality's decision to disregard the results of the exam as itself being unlawful discrimination because of race, and in the process outlined several principles employers should consider in determining whether their tests comply with the dictates of Title VII of the Civil Rights Act of 1964.

In this article, we analyze *Ricci* and contrast it with another recent case, the Second Circuit Court of Appeals' decision in *U.S. v. City of N.Y*. In *City of N.Y*., the court distinguished *Ricci* and nullified the results of an exam that also was administered to firefighters because of an unlawful adverse impact under Title VII. As will be demonstrated below, unlike the municipality in *Ricci*, the City of New York failed to make sufficient efforts to establish that its exam was sufficiently related to the requirements of the job of a firefighter and consistent with the needs of the fire department. Finally, we identify actions that employers should consider in seeking to ensure that their employment exams comply with Title VII.[3]

Ricci v. DeStefano

In *Ricci*, the Supreme Court held, in a 5-4 decision, that the City of New Haven intentionally discriminated against several white firefighters and one Hispanic firefighter when it refused to certify the results of a promotional examination. Based on the exam scores, no African-American firefighters and only one Hispanic firefighter would have been eligible for a promotion. New Haven refused to certify the test results because it feared a lawsuit by the minority firefighters, and potential liability under Title VII's disparate impact provisions. Seventeen white firefighters and one Hispanic firefighter who passed the examination subsequently filed a lawsuit alleging that the city's failure to certify the test results violated their rights under Title VII and the Equal Protection Clause of the Constitution.

The racial adverse impact in *Ricci* was significant, and both parties agreed that New Haven was faced with a *prima facie* case of disparate-impact liability. In lower court proceedings, the district court granted summary judgment for New Haven, and the Second Circuit affirmed. The Supreme Court granted certiorari, and ultimately held that New Haven's actions in discarding the tests violated Title VII, because the city failed to show that it had a "strong basis in evidence" to find the test inadequate.

The *Ricci* court found that employers may legally use employment exams and other employee selection devices despite an adverse impact on protected groups, as long as the tests are job related and consistent with business necessity.[4] It further found that the steps that New Haven took in creating and validating its promotional examination demonstrated that the exam was related to the job, and that there were no less onerous methods available that would have accomplished the same objective as the exam that was used. For example, New Haven hired an experienced consultant to develop and administer the promotional examinations at issue. The consultant ultimately developed written and oral examinations to measure the candidates' job-related knowledge, skills and abilities. Prior to designing the exam, the consultant performed an extensive job analysis to identify the knowledge, skills and abilities essential to the positions at issue, conducted various employee interviews, and observed on-duty officers. In addition, the consultant deliberately over sampled minority firefighters at every stage of the job analysis to ensure that the results would not unintentionally favor white candidates. The court found that New Haven's assertions that the exams at issue were *not* job related and consistent with business necessity was "blatantly contradicted" by the detailed steps the city took to develop and administer its promotional examinations, and its "painstaking analyses" of the test questions to assure their relevance to the captain and lieutenant positions.[5] In addition, the *Ricci* court found that the city lacked a "strong basis in evidence" showing that an equally valid, less discriminatory testing alternative existed that New Haven refused to adopt.[6] The *Ricci* court held that New Haven's action of discarding the test results was impermissible under Title VII, and granted the firefighters summary judgment on their disparate-treatment claim.

In her dissent, Justice Ginsburg noted the high adverse impact resulting from the examinations, and her belief that several feasible alternative methods existed for assessing candidate qualifications. She discussed existing evidence of "better" firefighter examinations that were successfully used in other cities, and which yielded far less racially skewed results. Justice Ginsburg stated that in her opinion using an assessment center to test candidates skills and leadership abilities, and weighting the oral and written portions of the examinations differently, were alternative methods that likely would have reduced the disparate impact on New Haven's African-American and Hispanic candidates.

U.S. v. The City of N.Y.

By contrast to *Ricci*, the court in *U.S. v. City of N.Y.*[7] found that the New York City Fire Department's use of written tests that resulted in adverse impact, and had minimal job-related relevance, unlawfully excluded hundreds of qualified African-American and Hispanic candidates from admission to the city's fire academy.[8] The court held that New York City's reliance on these examinations constituted employment discrimination in violation of Title VII. The *City of N.Y.* court referenced *Ricci* at length, to explain why the Supreme Court's ruling *did not* control. In finding New York City's testing methods inadequate, the *City of N.Y.* court found it noteworthy that the city took significantly fewer steps than New Haven took in validating its examinations in *Ricci*.

The *City of N.Y.* court followed the Second Circuit's holding in *Guardians Ass'n v. Civil Serv. Comm'n*,[9] in concluding that the city's use of the written examinations at issue resulted in an unlawful disparate impact upon African-American and Hispanic applicants for the entry-level firefighter positions. The court further concluded that the city failed to present evidence supporting a business justification for its employment practices, and therefore granted the plaintiff firefighters' motions for summary judgment in their entirety. *The City of N.Y.* court cited *Guardians* as the governing Second Circuit case for assessing the validity of employment tests.[10]

In light of *Ricci*, *City of N.Y.* and *Guardians*, employers are well advised to proceed with caution when using standardized employment and skills testing. Employers may wish to examine the viability of alternative testing methods *prior* to implementing employment examinations.

The *City of N.Y.* court noted that the Second Circuit utilizes two sources to determine whether an employment examination has been properly "validated:" (1) the testimony of experts in the field of test validation, and (2) the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures.[11] The five-part test established by *Guardians* tempers the stricter standards set forth in the Uniform Guidelines on Employee Selection Procedures, and is as follows: (1) the test makers must have conducted a suitable job analysis; (2) the test makers must have used reasonable competence in constructing the exam itself; (3) the content of the test must be related to the content of the job; (4) the content of the test must be representative of the content of the job; and (5) the scoring system must correlate to job success. The court's application of *Guardians'* five-part test to determine the validity of the written examinations at issue in *City of N.Y.* demonstrated that the exams were not valid.

Practice Pointers

In light of *Ricci*, *City of N.Y.* and *Guardians*, employers are well advised to proceed with caution when using standardized employment and skills testing. Employers may wish to examine the viability of alternative testing methods *prior* to implementing employment examinations. Once valid employment exams are administered, and employees rely on those exams, after *Ricci* employers may not then summarily disregard the test results based solely on the undesired existence of a disparate impact *unless* the employer has a "strong basis in evidence" to believe that the test was unlawful. Employers who use exams in connection with hiring or promotion also may wish to consult testing experts and legal counsel to ensure that their employment examinations are both job related and necessary to achievement of business objectives. In particular, employers should consider the following actions prior to designing and/or implementing employment-related examinations, whenever it is feasible to do so:

- Retention of a reputable testing consultant, with experience in the particular field and organization type.
- Utilization of the best testing methods for particular positions in addition to or in place of multiple-choice and written examinations, including assessment centers and/or oral examinations.

- Review of the types of examinations that have successfully been used by similar organizations.
- Periodic review and updating of older examinations as needed.
- Adequate consideration of the weight that will be allocated to various portions of the examination – e.g., written exam questions versus oral exam questions.
- Any unique business necessity and/or job-related considerations of the position(s) the employer is seeking to fill. Employers may wish to examine what tasks and abilities are essential to particular employment positions, and ensure that the proposed employment tests are relevant to the necessary skills and abilities.

1 129 U.S. 2658 (2009).

2 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, (E.D.N.Y. July 22, 2009).

3 42 U.S.C. §§ 2000e-2(a)&(d).

4 129 U.S. at 2662.

5 129 U.S. at 2662.

6 *Id.* at 2662-63.

7 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at *163 (E.D.N.Y. July 22, 2009).

8 *Id.* at *2.

9 630 F.2d 79, 82 (2d Cir. 1980).

10 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at *89.

11 *Id.*

Responding to Employee Requests for Extended Disability Leave and Heeding EEOC's Stand Against "Inflexible" Policies

By Jonathan E. Sokotch

The following scenario should be familiar to most readers: The Good Guys Company provides generous benefits to its employees, including six-months of short-term disability leave. Some or all of the leave is paid depending on the employee's tenure with the company, and the employee's job is secure provided he or she returns within the six-month time period.[1] As the six-month period draws to a close, HR begins sending the employee notices that his leave is about to expire, and asks the employee to contact HR to provide a date on which the employee will return to work. The letter also reminds the employee that under the company's leave policy, the employee will be terminated if he does not return to work by the end of the six-month leave period. Finally, the letter explains how to apply for long-term disability benefits should the employee feel that is appropriate. What could be wrong with that? After all, Good Guys provided the employee with far more leave than required by the Family Medical Leave Act. Plenty, according to the Equal Employment Opportunity Commission ("EEOC") and a number of courts.

EEOC Enforcement Guidance

An enforcement guidance issued by the EEOC specifically addresses the lawfulness of leave policies that terminate employees who exceed a set leave period. In its enforcement guidance titled "Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," (the "Enforcement Guidance") the EEOC takes the position that an employer may not apply a leave policy "under which employees are automatically terminated after they have been on leave for a certain period of time" to a disabled employee "who needs leave beyond the set periods." Instead, if a disabled employee needs additional time as a reasonable accommodation, the EEOC advises that the employer must grant the requested time unless (i) the employer can propose another effective accommodation that would enable the person to perform the essential functions of her position, or (ii) granting additional leave "would cause an undue hardship." To establish that additional leave would cause an undue hardship, the employer must conduct "an individualized assessment showing the disruption to the employer's operation."

While EEOC's interpretations of the ADA are not controlling, they are entitled to respect by the courts,[2] and at least one federal court has relied on the Enforcement Guidance in holding that an employer violated the ADA by terminating a disabled employee because she exceeded a period of leave set by policy.[3] Additionally, without reference to the Enforcement Guidance, at least two courts have found that an employer violated the ADA by relying on a company policy to automatically terminate a disabled employee who requested leave beyond the maximum allowed under that policy.[4]

EEOC v. UPS

The EEOC has backed up its Enforcement Guidance with litigation. The EEOC recently filed a class action against the United Parcel Service, Inc.

("UPS") in the U.S. District Court for the Northern District of Illinois[5] claiming UPS violates the ADA by instituting an "inflexible" leave policy.[6] Contemporaneously with filing its lawsuit, the EEOC issued a press release in which Stuart J. Ishimaru, the EEOC's Chairman, stated, "[t]his case should send a wake-up call to Corporate America that violating the Americans with Disabilities Act will result in vigorous enforcement by the EEOC."[7]

The EEOC alleges that UPS maintains a leave policy under which employees are terminated if they exceed a 12-month allotment of leave. The complainant in the action, Trudy Momsen, a former administrative assistant at UPS, allegedly took a 12-month leave of absence from work because she was suffering from what was later diagnosed as multiple sclerosis. After returning to work for several weeks, she asked for additional time off. UPS denied her request and terminated her employment, allegedly for exceeding its 12-month leave policy. The EEOC claims that Momsen could have returned to work if she had been given an additional two-week leave of absence, and that UPS failed to accommodate her disability by refusing to provide her the additional requested leave. For this and other alleged violations, the EEOC seeks wide-ranging injunctive relief in addition to multiple categories of monetary damages from UPS for Momsen, as well as for a class of disabled persons that UPS similarly refused to accommodate.

UPS disputes various of the factual allegations asserted by the EEOC, and has expressed surprise at the EEOC's position, arguing that the EEOC "is attacking one of the more generous and flexible leave policies in corporate America." In opposing a policy that provides a relatively lengthy period of permissible leave, the EEOC is taking a position that leave policies that "set arbitrary deadlines for returning to work after medical treatment" violate the ADA irrespective of how generous that deadline may be, because, the EEOC asserts, they "unfairly keep disabled employees from working." Instead, the EEOC advises employers that "[s]ometimes a simple conversation with the employee about what might be needed to return to work is all that is necessary to keep valued employees in their jobs."

While the EEOC's position is clear – that automatically terminating employees who exceed a set period of leave runs afoul of the ADA – some courts have found that such a policy does not, on its face, violate the ADA as long as the policy is uniformly applied …

Further Guidance from New York State's Appellate Division

New York's Supreme Court, Appellate Division, First Department, recently weighed in on the issue of leave policies that do not permit employees to exceed a pre-determined amount of leave, holding that an employer violated the disability discrimination provisions of the New York State and City Human Rights Laws ("HRLs") when it denied an employee's request for an extension of her unpaid medical leave based on the employer's uniform policy of denying leave beyond a set period.[8] According to the decision, the employer first granted its employee 12 weeks of medical leave per the employee's initial request. Several weeks into her leave the employee requested a full year leave of absence. The employer denied this request, stating that the employee's 12 weeks of leave had been provided pursuant to the FMLA, and that she was ineligible for additional unpaid medical leave per the employer's general policy of limiting leave to 12 weeks. The employer communicated that it would terminate the employee's employment should she fail to return to work at the conclusion of the 12-week leave period. The employee then asked if she could obtain "any further extension of her medical leave," to which the employer responded, again, that she could not take additional leave and would be terminated if she did not return as originally scheduled.

The Court held that an employer facing a request for a reasonable accommodation from a disabled employee must, under the HRLs, "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested." The employer cannot avoid engaging in this individualized "interactive process" by relying on a blanket policy of limiting an employee's medical leave to the 12 weeks mandated by the FMLA.

The Court also disagreed with the trial court's determination that the employee's request for one year of leave was an impermissible request for "open-ended leave" rather than a request for a reasonable accommodation. While the Court acknowledged that "in a great many cases a request for a one-year leave will not turn out to be a 'reasonable accommodation'" because it deprives the employer of the employee's services for too long, an employer may not rely on a bright line "beyond which leave time is automatically unreasonable" even with respect to a one-year leave request. Accordingly, the Court found that the employer was required to engage in an interactive process when an employee requests a leave, even for as long as one year.

Uniformly Applied Policies May Not Violate the ADA

While the EEOC's position is clear – that automatically terminating employees who exceed a set period of leave runs afoul of the ADA – some courts have found that such a policy does not, on its face, violate the ADA as long as the policy is uniformly applied and does not distinguish between disabled and non-disabled employees.[9] Nevertheless, none of those courts expressly addressed the issue of whether an employee's request to extend her leave beyond the maximum allowable period could constitute a request for a reasonable accommodation, such that denial of the request would violate the ADA.

Lessons for Employers

Employers should review their policies and practices and consider whether they want to continue automatically terminating disabled employees who need extended leave or who do not return to work within the time period set by policy. Given the EEOC's position and the position of some courts, employers should consider permitting leave that extends beyond the fixed periods set by company policy if an employee makes a viable request for an extension that would be a reasonable accommodation after an appropriate interactive process. For example, we have advised employers that automatically discharge employees who fail to return to work within an approved period of leave, to include language in their leave policies permitting an extension of leave if the employer "receives from the employee a request for extension of reinstatement rights for an additional, reasonable period to allow the employee to recover sufficiently and to return to work and such extension is required under federal, state or local disability laws."

If an employee requests extended disability leave, employers should probably treat that request as seriously as it would view a request for wheelchair accessibility; the employer should engage in an open "interactive process" with the employee, eliciting information from the employee about the needs of the employee and the reasonableness of the request. Typical information an employer should seek includes whether the employee will be able to perform the essential functions of the job upon conclusion of leave and when the employee will be able to return to work.[10] In considering this information, employers should evaluate whether other viable accommodations exist that would allow the employee to perform her job. If employers go down this road, they need to make an "individualized" assessment of the reasonableness of the request and the burden to the organization from providing the requested leave rather than rely on any bright line standards (i.e., the length of the requested leave). Employers also need to document their decision process, so that if they are sued for a denial of the request, they can show that they have engaged in an interactive process, that the proposed accommodation is unreasonable and/or that it would cause undue burden.

1 *See* EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 17 (as revised October 17, 2002).

2 *See e.g., Bergman v. Paulson*, 555 F. Supp. 2d 25, 32 (D.D.C., 2008).

3 *See Gibson v. Lafayette Manor, Inc.*, 2007 WL 951473 at *7 (W.D. Pa., 2007) (court relied on EEOC guidance No. 915.002 in permitting an ADA claim to proceed to trial where defendant/employer terminated employee who did not return to work at the end of his FMLA leave period pursuant to employer's policy of terminating employees who failed to return to work at end of their FMLA leave).

4 *See e.g., Garcia-Ayala v. Lederle Parenterals, Inc.* 212 F.3d 638 (1st Circ. 2000); *Philips v. New York*, 884 N.Y.S.2d 369 (1st Dep't, 2009) *case discussed infra under section titled* "Further Guidance from New York State's Appellate Division."

5 *See* Complaint, *EEOC v. UPS*, No. 1:09-cv-05291 (N.D. Ill. Aug. 27, 2009).

6 The EEOC also recently announced a $2.2 million settlement of an administrative claim brought against Bank One, in which the EEOC made an administrative determination that Bank One had violated the ADA by its policy of terminating employees who took more than six months of disability leave if their position had been filled during the leave. By terminating employees without first attempting to determine whether they required accommodation because of a disability, Bank One had run afoul of the ADA according to the EEOC. *See* Press Release, EEOC, EEOC and Chase Reach $2.2 Million Settlement in Disability Discrimination Claim (Nov. 22, 2006) *available at* http://www.eeoc.gov/press/11-22-06.html.

7 Press Release, EEOC, UPS Sued for Disability Discrimination (Aug. 28, 2009) *available at* http://www.eeoc.gov/press/8-28-09.html.

8 *Philips v. New York*, 884 N.Y.S.2d 369 (1st Dep't, 2009).

9 *See Covucci v. Service Merchandise Co., Inc.*, 115 Fed. Appx. 797, 799-800 (6th Cir. 2004) (employer did not violate state disability discrimination statute by terminating employees who exceed one year of leave because the policy "imposes a uniform approach" that "does not distinguish between handicapped and non-handicapped individuals"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998) (policy of terminating employees who do not return to work within 12-month leave period did not violate ADA because it was a "uniform policy" that did not "distinguish between disabled and non-disabled employees"); *Balek v. Hobart Corp.*, 1999 WL 639184 at *3 (N.D. Ill., 1999) (policy of terminating employees who did not return to work after six months of medical leave did not violate the ADA because "[t]here is nothing in the record to indicate [the employer's] policy distinguished between disabled and non-disabled employees").

10 Bear in mind that questions that go to whether an employee is disabled and the nature and severity of an employee's disability are impermissible under the ADA, unless those questions are "necessary to the reasonable accommodation process" or are "job-related and consistent with business necessity." *See* 42 U.S.C. § 12112(d)(4)(A)-(b); 29 C.F.R. Part 1630, App. § 1630.14(c).

International Employment Law

Remuneration Restrictions for Management Board Members in Germany

By Stephan Grauke and Mareike Pfeiffer

The reaction of governments as well as public opinion worldwide are becoming more critical and uncomprehending on the subject of managers of the banking industry held responsible for the economic crisis receiving or suing for million dollar bonus or severance payments.

In this connection, the Obama administration decided in June 2009 to appoint Kenneth R. Feinberg to oversee and set the salaries and bonuses for the 175 most highly paid senior executives and employees of the nation's seven largest companies that have received billions of dollars in federal assistance to survive the economic crisis. This measure taken by the US government corresponds to the actions carried out by the German government: In October 2008, the German government statutorily limited remuneration payments to board members and managing directors of companies in the financial industry that received governmental assistance to EUR 500,000 p.a.

In addition, in August 2009, the German government passed an act that generally limits the remuneration paid to management board members of a stock corporation. The intention of this act is to link the remuneration closer to the performance of the board members and to avoid remuneration systems that provide incentives for the willingness to assume risks. The majority of governments in the European Union pleads for further restrictions of manager salaries, especially for a cap of bonus payments. However, the discussions prior to the G20 summit at the end of September 2009 show that the US government is apparently not planning to follow this proposal.[1]

Act re the Fund for Stabilization of the Financial Markets

On October 18, 2008, the Act regarding the Stabilization of the Financial Markets (*FMStG*, "Stabilization Act") came into force with the purpose of stabilizing the financial markets in Germany by providing assistance to resolve liquidity squeezes and strengthening the equity capital base of the financially stricken financial industry. At the core of the Stabilization Act is the establishment of a fund in an amount of 480 billion Euro, of which 400 billion Euro are to be granted by guarantees. The scope of the Stabilization Act and the fund is limited to financial institutions, insurance companies, pension funds and comparable institutions; other stricken industry areas are not covered.

Germany introduces statutory caps of EUR 500,000 p.a. for remuneration of the top management of financial institutions receiving federal assistance.

The first DAX-listed company that accessed the financial assistance was Hypo Real Estate, other well-known companies like Commerzbank have followed in the meantime. However, the decision to apply for support under the Stabilization Act is linked to material cuts to the remuneration of the respective board members and managing directors, since the granting of support is, *inter alia*, subject to the following conditions:

- The total remuneration (including monetary parts as well as pension commitments and all other benefits and commitments with respect to the services rendered to the respective group) of each management board member and managing director has to be limited to an "adequate dimension." Criteria for adequacy are, in particular, the duties, the personal achievement, the economic situation, the success and the future prospects of the group under consideration of comparable companies, whereas a monetary remuneration that exceeds EUR 500,000 p.a. is generally considered inappropriate and therefore not permitted.
- Severance payments that are not legally required shall not be paid. Benefits due to a change of control or early resignation from the company must not be agreed upon in new service agreements to be concluded with management board members or managing directors.
- Bonus payments and other benefits that are paid at the discretion of the company must not be paid as long as the company receives assistance from the fund. The payment of bonus or other discretionary benefits that compensate a low fixed salary are permitted as long as the total remuneration is appropriate within the meaning described above.

Martin Blessing, the CEO of Commerzbank, which received financial assistance from the fund, was thus the worst paid chairman of all DAX companies in 2008.[2] However, in practice it appears that there are several possibilities of agreeing on extra benefits with affected managers apparently without violating the Stabilization Act, e.g., by granting special payments prior to accessing governmental assistance.[3] In addition, the period for which the restrictions will apply is currently the subject of extensive media discussions, and it remains to be seen whether the reduced remuneration will be recovered after the Stabilization Act has expired.

Act re the Adequacy of Remuneration of Management Board Members

In view of the ongoing media coverage about managers who receive high bonus or severance payments despite the financial crisis, it was considered insufficient to limit the salaries paid by companies in the financial industry that obtained state assistance under the Stabilization Act. Therefore, on August 5, 2009, the act re the adequacy of remuneration of management board members (*VorstAG*, "Remuneration Act") came into force generally restricting salary payments of newly hired board members of stock corporations with the purpose of linking their remuneration closer to their performance and providing incentives for sustained management. The Remuneration Act does not apply to German limited liability companies (GmbH), which are customarily used as acquisition entities in Germany, or any company form other than stock corporations.

The implementation of the Remuneration Act is basically in line with the recommendation of the European Union of April 30, 2009 to ensure that the variable remuneration components of managers of listed companies are aimed at the long-term development of the company, e.g., by not making bonus payments for a minimum time period, limiting the amount of bonus payments in general and fixing the vesting period of stock-related benefits to at least three years.[4]

The remuneration of the stock corporation management board is henceforth subject to several statutory restrictions.

Although the Remuneration Act itself does not contain a fixed remuneration or bonus cap and does not apply to service agreements entered into prior to the Remuneration Act coming into effect, the following restrictions apply to all newly concluded service agreements with management board members of a stock corporation:

- The responsibility of the supervisory board for the structure of the remuneration has been more closely defined. Under former Section 87 para 1 German Stock Corporation Act (*AktG*) the supervisory board only had to observe two criteria for the determination of the total remuneration: its appropriate relation to the duties of the respective board member and its appropriate relation to the standing of the company. From now on, the supervisory board additionally has to make the remuneration dependent on its appropriate relation to the performance of the board member with the remuneration not exceeding the customarily paid remuneration in the respective market other than for special reasons.[5]
- The remuneration structure of board members of listed companies must be aligned with a sustained development of the company. Variable compensation components must be determined on an assessment basis of several years. Details of the implementation of such components (e.g., bonus bank system, claw-back clauses) are not determined in the Remuneration Act.
- The remuneration of board members of listed companies shall be contractually capped should certain extraordinary developments (e.g., takeover, increase of hidden reserves, external influences) occur. According to the grounds provided by the legislator in connection with the Remuneration Act, the supervisory board can only refrain from agreeing upon a cap due to special circumstances.
- Subscription rights (*Bezugsrecht*) by management board members can be exercised after four years at the earliest (formerly after two years). The prolongation of this period shall also apply to comparable rights in stocks and phantom stocks.
- The possibilities of the supervisory board to reduce the remuneration have been extended: Whereas the supervisory board formerly "was entitled to" decrease the remuneration of the management board in case (i) the economic situation of the company had materially changed for the worse and (ii) the further granting of the remuneration was considered to be materially inequitable, the supervisory board "shall" from now on decrease the remuneration of the management board in case (i) the economic situation of the company deteriorates and (ii) the further granting of the remuneration is considered to be inequitable. This means that under the former law the remuneration of board members

could only be decreased in case the company was in a situation threatening its economic existence and, in addition, the remuneration of the board member was markedly out of proportion. Under the new law, the supervisory board shall decrease the remuneration in case the economic situation of the company deteriorates (with layoffs or reductions in pay together with the inability to distribute profits being sufficient grounds) and the deterioration occurs under the responsibility of the respective board member.

- In order to keep the board members from assuming irresponsible risks, the D&O insurance must include a deductible of at least 10 percent of the damages suffered up to an amount of 1.5 times the annual remuneration of the board member.
- Section 120 German Stock Corporation Act expressly clarifies that the supervisory board is liable for the determination of an inappropriate remuneration of the management board. However, this already applied under the former law.
- A "cooling-off period" of two years for board members is introduced, i.e., board members of a listed company are not allowed to switch to the supervisory board of the same listed company prior to expiration of a period of two years. This does not apply in case the respective board member is nominated by stockholders who hold more than 25 percent of the voting rights.
- The duties to disclose remuneration details of the management board in the annual report of a listed company have been extended and more closely defined.

The commentary of legal experts as well as the media reporting in Germany with respect to the Remuneration Act have been somewhat cautious: The Remuneration Act is considered to be partially incomplete, unclear and not specific enough.[6] According to some experts, the Remuneration Act merely provides a statutory framework for measures that have already been good practice in the past.[7] Thus, it is assumed that the Remuneration Act may not leave a mark as it appears unlikely that the remuneration of board members will in fact decrease, thus serving the intended purpose.[8]

However, since the Remuneration Act only applies to newly concluded service agreements with members of the management board of a stock corporation, it remains to be seen whether the act results in the expected effects.

1 Süddeutsche Zeitung dated September 17, 2009, "Verzweifelter Kampf gegen die Boni-Banker."

2 Süddeutsche Zeitung dated September 8, 2009, "Ende der Enthaltsamkeit" by Martin Hesse and Ulrich Schäfer.

3 Manager Magazin dated August 12, 2009, "Wieandt kassierte hohe Sonderzahlungen."

4 Recommendation of the European Union dated April 30, 2009, no. 2009/385/EG.

5 BT-Drs. 16/13433, page 15.

6 Lingemann, Betriebsberater 2009, p. 1918, 1924; Frankfurter Allgemeine Zeitung August 4, 2009, "Neue Regeln, altes Spiel" by Melanie Armann.

7 Jürgen van Kann/Anjela Keiluweit, Deutsches Steuerrecht 2009, p. 1587, 1592.

8 Joachim Jahn, Gesellschafts- und Wirtschaftsrecht 2009, 135; Lingemann, Betriebsberater 2009, p. 1918, 1924.

New Shanghai Court Opinions Limit the Application of the Labor Contract Law

By Helen Jiang

The implementation of the PRC *Labor Contract Law*[1] and the *Implementing Rules for the Labor Contract Law* (the "*Implementing Rules*")[2] in 2008 has significantly expanded employee protection in China but has also generated many controversies. The new law has led to the increase of labor costs and disputes. The number of labor arbitration cases heard by the Shanghai Labor Arbitration Committee has increased significantly. In 2008 alone, more than 64,580 applications were filed for arbitration, which figure was about the same as the combined total for the previous two years.[3] One of the reasons for this increase in arbitration cases can be attributed to the free-of-charge system provided under the *Labor Contract Law*, which encouraged employees to initiate actions against their employers, regardless of whether the employers were at fault or not. In view of this increase in employees' actions, and the severe economic impact on employers, the Shanghai High People's Court issued its *Opinions on the Application of the Labor Contract Law* (the "*Shanghai Opinions*")[4] on March 3, 2009, which took immediate effect. The *Shanghai Opinions* have not only clarified certain ambiguities in the application of the *Labor Contract Law* and the *Implementing Rules*, but have also provided certain guidelines for the labor arbitration committee and courts in Shanghai to resolve labor disputes.

In a nutshell, some of the more noteworthy points that have been addressed and clarified in the *Shanghai Opinions* are as follows:

1. Certain disputes between the professionals of law firms, foundations and accounting firms that are set up as partnerships (collectively "Firms") shall be treated as civil disputes and resolved in accordance with civil law principles, and not as employment disputes.
2. The doctrine of "honesty and good faith" shall govern labor relationships.
3. Certain clarifications have been made regarding open-ended labor contracts.
4. The compensation amount for abiding by non-competition obligations has been clarified.
5. Employers have the right to waive certain agreed labor service periods.
6. The *Labor Contract Law* does not apply retroactively to labor disputes that arose prior to the *Labor Contract Law* and its *Implementing Rules*.

Labor Disputes Between Professional Firms and Their Staff

It was not clear under the *Labor Contract Law* whether professional Firms (set up as partnerships) would fall under the definition of "Employer" provided in Article 2 of the *Labor Contract Law*.[5] In fact, the absence of mention of "partnerships" in the definition of "Employer" was widely considered as being an exclusion of Firms and other partnerships from the coverage of the *Labor Contract Law*. In light of this ambiguity, Article 3 of the *Implementing Rules*[6] attempted to clarify that the application of the *Labor Contract Law* should extend to such partnerships and funds. This clarification, however, caused difficulties for Firms, as the relationships between certain professionals or advisors and such Firms are not typical employer-employee relationships. For example, many professionals often do not work fixed hours each day, and some professionals are also entitled to special interest distributions (dividends or carried interests). Therefore, their relationship with Firms could be regarded as being more in the nature of independent contractors or owners than typical employment relationships.

***Shanghai Opinions* now provide that any disputes, relating to remuneration and the like between the professionals, partners and the Firms might be treated as civil disputes and the firm can be made a party to the civil litigation proceedings.**

Given this special status of professionals working for Firms, the *Shanghai Opinions* now provide that any labor disputes between the administrative staff and Firms should be resolved pursuant to applicable labor-related laws and regulations; however, disputes over the distribution of interests between Firms and the professionals or partners should be treated as civil disputes and resolved in accordance with civil law principles. The application of civil law principles essentially means that, notwithstanding the labor contract signed between such professionals and their Firms, the professionals may not be protected by the umbrella of "labor regulations," which regulations have often been viewed as being overly employee-friendly.

Note that representative offices ("Rep Office") of foreign Firms established in Shanghai may not be allowed to seek civil law protection for disputes with their professionals, as a Rep Office itself is recognized as an "Employer" under the Chinese labor regulations. However, if the dispute is between a foreign Firm and a partner or senior counsel who is working for the Firm's Rep Office (and who is entitled to annual dividends or carried interests on top of his or her regular remuneration), one can reasonably expect that the courts in Shanghai may take the view that this should be regarded as a civil dispute to which civil law principles should be applied (as opposed to the labor rules).

Honesty and Good Faith Doctrine

The "honesty and good faith" doctrine (the "Good Faith Doctrine") is one of the most important principles of the *PRC Civil Law*, but prior to the implementation of the *Shanghai Opinions*, it has not been widely applied in resolving labor disputes under the *Labor Contract Law* or its *Implementing Rules*. The *Shanghai Opinions* introduce the Good Faith Doctrine in labor related matters, and confirms that a party who breaches the Good Faith Doctrine shall bear the consequences of their actions. Further, if a party does not act in bad faith, it may be given the chance to remedy certain unintentional non-compliance with the labor regulations.

The Good Faith Doctrine is addressed several times in the *Shanghai Opinions*. First, the conclusion and performance of a labor contract must now comply with the Good Faith Doctrine. For example, under the *Labor Contract Law*, if an employer failed to conclude a written labor contract with its employee for more than one month after the date such employee actually started work, the employee would have the right to request the employer to pay twice his monthly salary. However, in practice, the failure to reach a written contract was often caused by complicated circumstances or reasons. For example, the delay may have arisen due to the common practice of both parties signing an offer letter, instead of a complete written contract, or the delay in signing the contract may have been caused by the employee himself, with the intention of invoking the penalty in bad faith. Now, in light of the *Shanghai Opinions*, so long as the employer can prove it has fulfilled the Good Faith Doctrine by at least offering a written contract to the employee, regardless of whether the contract has been signed or not, then the employer shall be released from its obligation to pay the penalty. Further, if the employee unreasonably refuses to conclude the written contract and discontinues the performance of his duties, it shall be deemed that the employee has unilaterally terminated the labor relationship.

The Good Faith Doctrine is also mentioned in the *Shanghai Opinions* in connection with an employer's obligation to make full payment of an employee's salary or wages, and related social insurance premiums. The *Labor Contract Law* grants employees the right to terminate their labor contracts and claim severance pay from their employers if their employers fail to make full payment of labor remunerations or social insurance premiums for such employees.[7] In practice, Shanghai courts and local labor arbitration committees encountered cases in 2008 in which certain employees, wishing to resign from their posts while taking advantage of this provision, alleged that the employers underpaid their social insurance (even where the amounts underpaid were insignificant). Such provisions in the *Labor Contract Law* gave employees the expectation that they would have the right to unilaterally terminate their labor contracts, and to receive severance pay simply if the employer failed to make full and due payment of their social insurance premiums. Additionally, since the calculation of social insurance premiums was somewhat complicated and subject to adjustment from time to time, sometimes an employer unintentionally underpaid such premiums. To avoid the abuse of this severance payment clause, the *Shanghai Opinions* provide courts and labor arbitration committees with the discretion to use the Good Faith Doctrine in dealing with such disputes. Now, according to the *Shanghai Opinions*, if an employer has not failed to pay the remuneration or social insurance premiums in bad faith, and if the late payment or underpayment was attributable to certain objective reasons, then the employee cannot use such failure or delay as grounds for unilateral termination and severance payment claims.

> ***Shanghai Opinions* further clarify that employer's failure to pay social insurance premiums adequately and duly, if not in bad faith, should not be the grounds for employee's unilateral termination and severance payment claims.**

Some Clarifications on Open-ended Contracts

Under Article 14 of the *Labor Contract Law*, if certain requirements have been satisfied, an open-ended employment relationship (e.g., non-fixed-term) between the employee and employer will automatically result, unless the employee requests a fixed-term contract. However, the *Shanghai Opinions* provide employers with more flexibility and shift the responsibility of requesting an open-ended contract to the employee. That is, even if an employee satisfies certain requirements under the *Labor Contract Law* and is entitled to an open-ended employment contract, if such employee signs a fixed-term contract or renews his contract for a fixed term with the employer, the fixed-term contract shall be valid.

The *Shanghai Opinions* also attempt to clarify the ambiguity created by Article 14 (3) of the *Labor Contract Law* as to when an open-ended contract will be triggered.[8] Article 14 (3) was unclear as to whether an open-ended contract would be triggered upon the second or third renewal of a fixed-term contract. Some argued that under Article 14 (3) a labor contract had to be renewed twice after the original term of the contract, before an open-ended contract would begin (i.e., on the third renewal). Others argued that the labor contract had to be renewed only once after its original signing before an open-ended contract would be triggered (i.e., on the second renewal). The *Shanghai Opinions* now have clarified that the employee is entitled to an open-ended contract upon the second renewal (i.e., following two consecutive fixed terms, including the original term and one renewal term).

Compensation for Non-Competition Obligations

The *Labor Contract Law* provides that an employer should pay an employee certain compensation if the employer imposes non-competition obligations on the employee. However, the *Labor Contract Law* is silent as to the amount of such compensation to be paid by the employer, and this has caused numerous disputes in practice. To fill this gap, the *Shanghai Opinions* provide that if the employer and employee have not agreed upon the compensation to be paid for such non-competition obligations, the non-competition clause shall nonetheless be valid and the compensation amount will be between 20 percent and 50 percent of the employee's original salary; if the parties cannot agree upon the exact compensation, the arbitration committee and the court will have the discretion to determine the compensation amount within the range provided.

Employer's Right to Waive Agreed Service Period

According to Article 22 of the *Labor Contract Law*, an employer can require its employees to agree to work for a specific period of time following, and in consideration of, any training opportunities provided and paid for by the employer (the "Service Period"). The employee must pay liquidated damages if he/she does not complete the full Service Period. However, the *Labor Contract Law* was silent as to whether, prior to the expiry of the agreed Service Period, the employer itself could lawfully terminate the employee's services during the Service Period. The *Shanghai Opinions* have made it clear that, based on the principle that civil rights can be waived as a whole, the employer should be allowed to waive an employee's remaining Service Period following the expiration of the labor contract. If the term of the labor contract of such employee expires while the Service Period remains valid, no severance or compensation would need to be paid to such employee if the remaining Service Period is waived.

No Retroactive Effect of Severance Pay Requirements

The *Shanghai Opinions* also attempt to clarify the computation methods for severance pay, and provide that these new severance pay methods shall not be applicable to any disputes which arose before the implementation of the *Labor Contract Law*, i.e., the *Labor Contract Law* shall not retroactively apply to disputes arising prior to its implementation date.

Under the *Labor Contract Law*, if a labor contract, which existed at the time of the implementation of this law, was terminated or revoked, the employer would have to pay such employee severance pay. If such employee's monthly salary was higher than three times the average monthly salary of local employees (as published by the local government), then the latter amount would be used to calculate the severance. That is, the severance for one year of employment would be capped at three times the average monthly salary of local employees announced by the local government.[9] However, the *Shanghai Opinions* have now clarified that such cap shall not retroactively affect the calculation of any severance pay due during the years before the implementation of *Labor Contract Law*. The severance payment for the service periods prior to the date of the *Labor Contract Law* should be calculated in accordance with the standards provided in other regulations effective at that time.[10]

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1 Effective as of January 1, 2008, promulgated by the Standing Committee of the National People's Congress of the People's Republic of China.

2 Effective as of September 18, 2008, promulgated by China's State Council.

3 Information released by Shanghai Human Resources Bureau, Shanghai Human Resource Information Center on its website on April 9, 2009.

4 HuGaofa [2009] No. 73.

5 Under Article 2 of the *Labor Contract Law*, Employer is defined as "corporations, individual economic organizations or non-government-sponsored non-corporate entities, government bodies, non-commercial entities or social groups in China."

6 Article 3 of the *Implementing Rules* provides that partnerships, including law firms, audit firms and other entities such as foundations, are qualified employers under the *Labor Contract Law*.

7 Article 38, read with Article 46 of the *Labor Contract Law,* provides, among other things, that, if an employer fails to pay work remuneration and social insurance premiums fully and timely, the employee may terminate the employment contract with the employer, and the employer shall pay economic compensation to the employee.

8 According to Article 14 (3) of the *Labor Contract Law*, if a fixed-term employment contract is renewed after it has been consecutively executed twice, and the employee has not violated Articles 39, 40 (1) and 40 (2) thereof, the employee shall be entitled to an open-ended employment contract.

9 It was announced by the Shanghai Municipal Human Resources and Social Security Bureau that the average monthly salary of local employees in 2008 was RMB 3,292.

10 For such disputes, an employee whose salary was higher than three times the average monthly salary of the local employees might be entitled to severance pay exceeding the cap specified in the *Labor Contract Law*.

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