

## INSIDE

EEO .....	1
Supreme Court Clarifies Scope of Retaliation .....	1
The "Lilly Ledbetter" Law .....	1
What is an "Adverse Employment" Decision? .....	2
Cat's Paw Liability .....	2
FMLA - THE NEW REGULATIONS .....	2
Military Caregiver Leave .....	3
Leave Because of a Qualifying Exigency .....	3
ERISA - SEVENTH CIRCUIT NARROWS BASIS FOR PLAN FEES CASES .....	3
LABOR LAW .....	4
Supreme Court Case Now Pending .....	4
Payments to Benefit Funds After Contract Termination .....	4
UPDATE TO SUPREME COURT CASE NOW PENDING .....	5

## EEO

### Supreme Court Clarifies Scope of Retaliation

Is an employee protected against retaliation for statements which she makes during a company EEO investigation? In *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), the Supreme Court said yes.

In this case, the employer was investigating rumors that one of its supervisors had sexually harassed employees. When asked if she had observed any inappropriate behavior, the plaintiff, Crawford, told the company investigator about several incidents of harassment by the supervisor, such as when he was asked "what's up" by a female employee, the supervisor pointed to his crotch and said, "You know what's up." Although the employer took no action against the supervisor, when the investigation was over, it terminated Crawford for embezzlement. Crawford claimed that the charge of embezzlement was a pretext for retaliation.

Title VII has two anti-retaliation provisions which make it unlawful for an employer to retaliate against an employee because he "opposed" any practice made unlawful by Title VIII (the so-called "opposition clause") or because he filed a charge, testified, assisted or participated in an EEO investigation. Crawford claimed that she was protected by both provisions. The Court found that Crawford was protected by the "opposition" clause and did not address the second provision.

The court of appeals had held that Crawford was not protected by the "opposition" clause because Crawford was simply answering questions, not

opposing, and that protected "opposition" required "active, consistent opposing activities." The Supreme Court disagreed. It concluded that opposition goes beyond "active, consistent behavior." It agreed with an EEOC guideline which said that when "an employee communicates to her employer a belief that the employer has engaged in...a form of employment discrimination, that communication virtually always 'constitutes the employee's opposition to the activity.'" The Court also noted that if employees could be penalized for reporting discrimination, prudent employees would be deterred from reporting unlawful practices.

Although one might wonder how the court of appeals could have concluded otherwise, this decision clearly establishes that employees who report unlawful activity during an EEO investigation cannot be punished for what they reported.

### The "Lilly Ledbetter" Law

As expected, Congress has enacted the "Lilly Ledbetter" Act, which is named after the woman who sued her employer under Title VII and the Equal Pay Act for discrimination, claiming that she had been paid less than male employees performing the same kind of job. The Supreme Court—not in one of its better moments—ruled that Ledbetter's claim should have been dismissed because she did not file it within the 180-day statute of limitations period. It rejected Ledbetter's argument that employees often learn about pay disparities long after their employment begins and that by dismissing the claim, the Court not only foreclosed back pay for Ledbetter but also perpetuated the discrimination going forward.

The new law makes a claim like Ledbetter's actionable based on a

**Report From Counsel**  
Klein Zelman Rothermel LLP  
485 Madison Avenue  
New York, New York 10022  
Tel: 212-935-6020  
Fax: 212-753-8101  
e-mail:  
[kleinzelman@kleinzelman.com](mailto:kleinzelman@kleinzelman.com)

**Editor**  
Andrew E. Zelman

“continuing violation” theory by providing that unlawful employment practices involving compensation occur not only when the discriminatory practice is adopted but each time a paycheck is issued perpetuating that discrimination. As a result, if an employee now files a claim, she can get back pay (but only for paychecks issued within the statute of limitations period), and, more importantly, a wage adjustment to equalize her wages going forward.

### What is an “Adverse Employment” Decision?

In order to present a viable claim for employment discrimination, a plaintiff must show that he suffered an “adverse employment action.” In *Douglas v. Preston*, DLR, March 19, 2009 (D.C. Cir 2009), the plaintiff, Douglas, an employee of the Department of Housing and Urban Renewal, claimed that he was discriminated against when his department failed to nominate him for a prestigious and lucrative award. Douglas claimed that his former supervisor, John Weicher, an Assistant Secretary of Labor, had written a memo stating, in so many words, that Weicher would never recommend a black man for that award. The issue in the case was whether Douglas, who was not nominated for the award, suffered an “adverse employment action.” The court held that he did not.

In reaching this conclusion, the majority noted that an adverse employment decision means a “significant change in employment status, such as hiring, firing . . . reassignment with significantly different responsibilities.” An employee must “experience . . . materially adverse consequences affecting terms and conditions of employment.” Because an adverse employment decision requires “significant” and “objectively tangible” harm, a negative performance evaluation is ordinarily not actionable under Title VII. On the other hand, hiring, firing, and reassignment with different responsibilities are presumed to be adverse employment decisions

because they “relate to one’s work position and responsibilities.” Where an action does not cause a significant change in employment status, such as a poor evaluation or a reassignment of office space, the plaintiff must show how the action caused “objectively tangible harm.”

Applying these criteria, the court found that, unlike failure to be *promoted*, failure to be *recommended* for an award, even a lucrative one, is not an adverse employment action. Moreover, according to the court, the inherent uncertainty in the award process makes any actual effect on employment speculative so that “there can be no direct tie between a nomination and an award.” While sharing the dissenting opinion’s revulsion about the racial animus of the supervisor, the majority noted that a racially-motivated negative evaluation would, under the court’s precedents, not be actionable and, therefore, the dissent’s quarrel was not really with the majority opinion but with the statutory requirement for an adverse employment decision as a predicate to any discrimination claim under Title VII.

### Cat’s Paw Liability

The theory of “cat’s paw” liability in employment discrimination cases has been mentioned in earlier newsletters. Under this theory, a fired employee can claim that the disciplinary action taken against him was infected by the involvement of another person who was biased so that the final decision was effectively a rubber stamp (“cat’s paw”) of the other person’s bias. Most recent cases require that a cat’s paw theory will stand only if the plaintiff shows that the involvement of the biased supervisor actually tainted the decision-making process. A recent federal district court decision illustrates the limits of cat’s paw liability. *Perez v. Saks Fifth Avenue Inc.*, 592 F.Supp.2d 1388 (S.D.Fla. 2009).

In that case, two women were fired because they allegedly gave unauthorized discounts to customers. They sued, claiming age

discrimination. The decision to fire them was made by Regional HR Director, Margaret Phelan. Although plaintiffs admitted that Phelan had no bias against older employees, they claimed that Phelan’s decision was influenced by the plaintiffs’ immediate supervisor and by the HR Director of the store, both of whom were allegedly biased against older employees. The court overturned a \$621,000 jury verdict in plaintiffs’ favor.

The court found that a reasonable juror could have found that the plaintiff’s supervisor had made discriminatory remarks about older workers and was himself biased against them. But the court also found no evidence that the supervisor’s bias influenced the termination decision, which was made by the Regional HR Director based solely on the charge of unauthorized discounts, a charge that had originated not from the plaintiffs’ supervisor but from the corporate Asset Protection Department. Under these circumstances, the court found no evidence that Phelan’s decision was a “mere conduit” for the prejudice of her immediate supervisor.

Hopefully, this case illustrates that a cat’s paw liability will be sustained only when there is convincing evidence that the bias of company officials actually influenced the decision-making process.

## FMLA - THE NEW REGULATIONS

The Department of Labor (“DOL”) recently published new regulations and issued new forms to be used in connection with the Family Medical Leave Act (“FMLA”). The DOL conducted a comprehensive review of the regulations, taking into account 15 years of experience, court and agency opinions, as well as the recent addition of two new types of leave relating to military service. These new rules became effective on January 16, 2009.

Of particular importance are the new regulations, which further define the

new military leave provisions. The two new types of leave relating to military service are Military Caregiver Leave and leave because of a “qualifying exigency.”

#### **Military Caregiver Leave**

Employees may now take FMLA leave to care for a member of the Armed Forces with a serious injury or illness. The rules set forth that this type of leave may be taken for 26 weeks in a “single 12 month period.” The leave is “per-servicemember, per injury.” In other words, an employee can take 26 weeks to care for one covered service member and then take another 26 weeks in a different 12-month period to care for another servicemember.

#### **Leave Because of a Qualifying Exigency**

Employees may take FMLA leave while the employee’s spouse, son, daughter or parent is on active duty if a “qualifying exigency” occurs. Unlike Military Caregiver Leave, FMLA leave for “qualified exigencies” is limited to 12 weeks. Qualified exigencies include: (i) short-term deployment; (ii) military events and related activities, such as attending military ceremonies or family support programs; (iii) child-care and school activities, such as arranging child-care for the service member’s children; (iv) to make financial or other arrangements for an absent servicemember; (v) counseling; (vi) rest and recuperation, such as spending time with the servicemember on short term leave; and (vii) post-deployment activities such as attending arrival ceremonies. The rules provide definitions for each of the aforementioned qualified exigencies.

The new rules also contain many procedural changes that affect the implementation of the FMLA by employers and HR professionals. Such changes include, increased notice obligations and clarification as to when employees must notify their employers of the need for a leave; reconciliation of contrary HIPAA provisions; and clarification of when, and how, an employer may challenge a medical certification. The DOL also

issued a new employer posting as well as new notice and certification forms to be used in connection with leave requests.

### **ERISA - SEVENTH CIRCUIT NARROWS BASIS FOR PLAN FEES CASES**

An emerging field of litigation involves lawsuits under ERISA claiming that plan fiduciaries allowed excessive fees to fund providers, thereby breaching their fiduciary duties. A long-awaited decision by the court of appeals for the seventh circuit has dealt a blow to these claims and has been described as a clear-cut victory for plan sponsors and service providers. *Hecker v. Deere & Co.*, 556 F.3d 575 (7<sup>th</sup> Cir. 2009).

Litigation over alleged mismanagement of defined contribution plans received a boost when, in *LaRue v. DeWolff*, 128 S. Ct 1020 (2008), the Supreme Court held that a participant in a defined contribution pension plan may sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant’s individual account. The *Deere* case raised issues not resolved in *Larue*: How broad is the scope of actionable misconduct and who is a fiduciary?

In 1990, Deere made an agreement with Fidelity Management Trust Co. (“Fidelity Trust”) making that company the plan’s trustee responsible for recordkeeping and other administrative tasks. Deere retained authority to select the plan’s investment options. Twenty-three of the 26 funds available for selection by employees were Fidelity funds. Each of those funds charged fees to the employee-investors. A second Fidelity company, Fidelity Management and Research Company (“Fidelity Research”), was the investment advisor for the Fidelity mutual funds. Fidelity Research shared some of its fees received from Deere employees with Fidelity Management.

Plaintiffs claimed that although the two

Fidelity companies were not trustees under the terms of the Deere 401(k) plan, both Fidelity companies were “functional fiduciaries” which, in that capacity, could be sued for breach of fiduciary duty under ERISA. Plaintiffs sued Deere and the two Fidelity companies, claiming that, as fiduciaries, they provided fund options that contained excessive fees and that Deere violated its fiduciary duties by failing to disclose the fee arrangements to the employee-investors.

The district court dismissed all claims. Although Fidelity Research was sharing some of its fees with its affiliate, Fidelity Management, the court found it “unremarkable” that Fidelity Research’s fees included some profit margin which it shared with Fidelity Research. It also found no violation from the failure of Deere to disclose the fee sharing between the two companies because nothing in ERISA required disclosure of fee-sharing arrangements. The court also found no violation of fiduciary duties based on the alleged excessive fees charged by the funds, relying on the so-called “safe harbor” provision in ERISA which provides, in substance, that when a plan provides for employee selection of funds, fiduciaries are not liable for losses resulting from the exercise of that authority. In other words, according to the district court, if excessive fees were incurred by employee/beneficiaries, those fees were disclosed to the employees, and any losses resulting from the employee/beneficiary’s exercise of control over his investments were not actionable because of the safe harbor provision in ERISA.

The court of appeals affirmed the district court. It specifically held that the two Fidelity companies were not “functional fiduciaries” under ERISA because Deere retained the final responsibility for investment options and, while playing a role, the two Fidelity companies did not exercise sufficient authority to warrant “fiduciary” status. Since the charges to the employees were made by the

mutual funds, the court concluded that those charges were not “plan assets” protected by ERISA. It also found no disclosure violation by Deere, reasoning that Deere disclosed the amounts paid to the funds and directed the employees to review the expenses associated charged by fund. Nor was there a violation stemming from the selection of so many Fidelity funds since, according to the court, nothing in ERISA prohibits a fiduciary from limiting investments to one investment company.

This is the first court of appeals decision on fee sharing and excessive charges since the Supreme Court’s decision in *LaRue*. Whether it will be followed by other courts of appeals remains to be seen. Until more decisions are rendered, this area of law will continue to be unsettled and companies will need to be mindful that other courts might have a more expansive view about who is a fiduciary and the scope of fiduciary responsibilities.

## LABOR LAW

### Supreme Court Case Now Pending

An interesting and important case now awaiting decision by the Supreme Court addresses the legality of a clause in a collective bargaining agreement which requires employees to submit all discrimination claims to arbitration. Such a clause effectively waives the right of unionized employees to sue in court for employment discrimination, which would appear to be impermissible under a 1974 Supreme Court decision, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Supreme Court has enforced similar waivers in employment agreements between a company and an employee and has held that such agreements constitute a waiver by the employee of his right to sue in court. *Gardner-Denver*, however, holds that the union cannot waive that right for an employee that it represents. The fact that the Court granted review of this case suggests that at least some members of the Court may want to reconsider *Gardner-Denver*.

### Payments to Benefit Funds After Contract Termination

After a collective bargaining agreement expires, an employer bargaining for a new agreement cannot change any terms and conditions of employment unless it has proposed the change to the union and bargained to impasse. For years there has been some ambiguity about how this rule applies to payments to benefit plans that are jointly-trusted by unions and management. The ambiguity arises from a provision in the Taft-Hartley law which states that it is unlawful for any employer to pay or deliver any money to a union with certain exceptions, which include the right to make payments to a jointly-trusted benefit plan when the basis for those payments is “specified in a written agreement with the employer.” After a contract expired, some argued that employer payments to the plan could not be made because there was no “agreement” in effect at that time.

A recent decision of the second circuit rejects that view. *Cibao Meat Products, Inc. v. NLRB*, 547 F.3d 336 (2<sup>nd</sup> Cir. 2008). The court holds that for two reasons there is no Taft-Hartley violation when an employer continues making plan contributions under an expired agreement. First, such a rule would be inconsistent with the basic principle that after collective bargaining agreements terminate, employers cannot change terms and conditions of employment except as noted above. Second, since the purpose of the written agreement requirement was to protect the bargaining process from side deals between companies and individual union representatives, that purpose that is not implicated when companies continue making plan contributions after labor agreements expire.

---

**KLEIN ZELMAN ROTHERMEL’s Report From Counsel is published periodically with the intent to inform readers of recent legal developments and issues. It is not intended, nor should it be used, as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations.**

## UPDATE TO SUPREME COURT CASE NOW PENDING

In this *Report from Counsel* [page 4, "Supreme Court Case Now Pending"], we discuss a case pending before the Supreme Court dealing with the enforceability of a provision in a labor agreement requiring employees to submit all discrimination disputes to arbitration rather than pursue those claims in court.

On April 1, the Supreme Court issued its decision in *14 Penn Plaza LLC, et al., v. Steven Pyett et al.*, No. 07-581, 556 U.S. \_\_\_\_ (2009). For the first time, the Court held that unionized employers with appropriate contract language can force litigants to pursue discrimination claims only in arbitration, a faster and more economical forum in which the parties may have some control over the selection of arbitrator. Moreover, to the extent that plaintiffs have failed to arbitrate claims in pending cases, employers may have a basis on which to dismiss the case.

The *Penn Plaza* case arose out of an agreement between a multi-employer association of landlords and building managers in New York City and the union representing building service workers. A group of employees challenged job reassignments, claiming that the reassignments violated the Age Discrimination in Employment Act of 1967 ("ADEA"). Despite a 1974 Supreme Court decision holding that such clauses were unenforceable, the employer sought to enforce a provision of the labor agreement that clearly and unmistakably required employees to bring such claims to arbitration.

Writing for the majority, Justice Thomas noted that unless Congress specifically exempted a class of claims from mandatory arbitration clauses, parties were free to negotiate restrictions on an employee's access to the courts and require that discrimination claims be brought to arbitration. The Court previously had held that such clauses were binding in

individual contracts of employment, and there was no reason for a different result in collective bargaining situations.

While this decision has substantial implications for employers and plaintiffs, it is not without reservations. Most existing arbitration clauses do not clearly and unmistakably require arbitration of discrimination claims or waive the employees' right to seek redress in court. Until now, there has been no reason to include such language. Employers should address this issue at the earliest opportunity for re-negotiation.

Further, with respect to such clauses in individual agreements, there are procedural safeguards and steps that must be followed that mirror litigation procedures, such as discovery procedures, which normally are not available in arbitration. This adds to the cost and duration of arbitration procedures and makes arbitration a somewhat less attractive option. Finally, at any time Congress or state and local governments can amend discrimination statutes to prohibit mandatory arbitration of such claims.

For the time being, however, employers ought to make full use of this unprecedented opportunity.

---

**KLEIN ZELMAN ROTHERMEL's Report From Counsel is published periodically with the intent to inform readers of recent legal developments and issues. It is not intended, nor should it be used, as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations.**