



# **2010 EMPLOYMENT LAW UPDATE**

**Keith M. Weddington**  
**May 5, 2010**

# INCREASED EMPLOYMENT LITIGATION IN 2009

- **Approximately 94,000 EEOC charges filed in 2009**
- **Charges continue to exceed the pre-2007 levels by about 15,000/year**
- **Discrimination lawsuits up 6.2%**
- **Disability lawsuits up 9.1%**
- **Wage & hour lawsuits up 12.6%**

# U.S. SUPREME COURT

## AT&T v. Hulteen (decided May 15, 2009)

- **No violation of Pregnancy Discrimination Act (“PDA”) for smaller pension benefit due to less service credit for pre-PDA pregnancy leave than other types of leave.**
- **Lily Ledbetter Fair Pay Act inapplicable because AT&T’s policy was not unlawful at the time it was applied**

# U.S. SUPREME COURT

## Gross v. FBL Financial Services, Inc. (Decided June 18, 2009)

- ADEA plaintiff alleging disparate treatment must prove that age discrimination was “but for” cause.
- Age as “motivating factor” or “mixed motive” is insufficient.
- Burden of persuasion in ADEA cases never falls on employer
- Plaintiff must meet tougher standard under ADEA than Title VII.

# U.S. SUPREME COURT

## Ricci v. DeStefano (Decided June 29, 2009)

- **Before employer can engage in intentional discrimination for purpose of avoiding or remedying disparate impact, employer must have “strong basis in evidence”**
- **Mere threshold showing of a significant statistical disparity, without more ≠ “strong basis in evidence”**

# U.S. SUPREME COURT

## Ricci v. DeStefano

- **To justify reconsideration of selection results/criteria, employer must show:**
  - (1) Original test/criteria not job-related and not consistent with business necessity**
  - (2) Equally valid, less discriminatory alternative was available**

# U.S. SUPREME COURT

## Ricci v. DeStefano – Application To RIF's

- **Set neutral, business-related criteria**
- **Review preliminary results to determine whether negative statistical effect on any protected group**
- **If disparate impact, evaluate and document “strong basis in evidence” before rejecting criteria/results.**

# U.S. SUPREME COURT

## Hertz Corp. v. Melinda Friend et al. (Decided Feb. 23, 2010)

- “Principal place of business” is where a corporation’s high level officers direct, control and coordinate the corporation’s activities.
- Nerve center/corporate HQ.
- Aids removal to federal court by employers

# U.S. SUPREME COURT

## Conkright v. Frommert (Decided April 21, 2010)

- Continued affirmation of ERISA plan administrator's exercise of discretionary authority to interpret plan, even after a single honest mistake.
- Court rejected a "one strike and you're out" approach. District Court cannot decline to apply deferential standard on remand, absent bad faith.

# U.S. SUPREME COURT

- **Lewis v. City of Chicago (Argued Feb. 22, 2010)**

**Issue: Is plaintiff's time for filing EEOC charge triggered by employer's announcement of discriminatory decision/practice or by employer's use of discriminatory practice?**

# U.S. SUPREME COURT

## City of Ontario v. Quon (Argued April 19, 2010)

- **Whether governmental employee has reasonable expectation of privacy in messages sent on employer issued device where employer has official, though unenforced no-privacy policy.**
- **Whether senders of messages to employees have reasonable expectation of privacy.**
- **Potential impacts: content and enforcement of technology usage policies, e-discovery**

# U.S. SUPREME COURT

- **Kasten v. Saint-Gobain Performance Plastics Corp. (Argument in Fall 2010)**

**Issue: Whether an internal oral complaint of FLSA violation is protected conduct under FLSA's anti-retaliation provisions.**

## FOURTH CIRCUIT

### EEOC v. Central Wholesalers, Inc. (July 21, 2009)

- **In responding to allegations of harassment, employer's investigation must be prompt, thorough and aggressive.**
- **Remedial action must be effective**
- **Decision underscores fact that employer must do more than go through the motions of investigation and discipline. Expect objective critique of employer's response.**

## FOURTH CIRCUIT

### Inman v. Klockner Pentaplast (Oct. 22, 2009)

- **SJ for employer on ADEA claim reversed where evidence showed:**
  - Plaintiff performing well, received bonuses, recently praised.
  - Employer's reference to "young", "energetic", "future people", "revitalized" company
- **Statements reflecting bias & stereotype, combined with adverse action unsupported by documentation = trouble.**

# FOURTH CIRCUIT

## Stone v. Instrumentation Laboratory (Decided Dec. 31, 2009)

- **SOX Whistleblower claim – OSHA**  
→ALJ→ARB→Circuit Court of Appeals
- **If final administrative decision not issued within 180 days of filing complaint, complainant has right to *de novo* review in federal district court**
- **Employers face duplicative litigation**


# FOURTH CIRCUIT

## Whitten v. Fred's, Inc. (April 1, 2010)

- **Was store manager supervisor over assistant manager so as to create vicarious liability for employer?**
  - **Harassment “aided by the agency relation”. Court considered:**
    - **Formal rank of harasser vis-à-vis victim**
    - **Ability to discipline, give unpleasant assignments and schedules**
    - **Freedom to walk away vs. suffer offensive conduct**

# FOURTH CIRCUIT

## Whitten v. Fred's, Inc.

- District manager tells plaintiff she is over-reacting and should just go to work as scheduled.
  - Employer's luke-warm/dismissive response to employee's complaints of sexual harassment created issue of fact re: constructive discharge
  - Failure to act in face of known intolerable conditions
-  **Take all complaints seriously. Act promptly.**

# NORTH CAROLINA

## Carolina Power & Light v. ESC (Decided August 28, 2009)

- **Employee who accepts voluntary exit/retirement benefit not eligible for unemployment benefits**
- **Possibility of layoff  $\neq$  good cause attributable to employer**

# NORTH CAROLINA

## MSC Industrial Direct Co. v. Steele (August 18, 2009)

- **Restricted stock grant was illusory consideration for non-compete**
- **No vesting for three years, then partial vesting through fifth year**
- **Shares reverted to employer in the event of resignation or termination with or without cause**
- **Until vested, no right to dividends, vote or alienation**

# NORTH CAROLINA

## Combs v. City Electric Supply Co. (Decided March 16, 2010)

- Public policy wrongful discharge claims are alive and well
- At will employee's opposition to employer stealing from customers supports wrongful discharge claim
- Plaintiff's lawyers will check to see who has been naughty or nice

# LEGISLATIVE/REGULATORY

## FMLA MILITARY AMENDMENTS

- **Military Caregiver Leave**
- **26 weeks leave for family members of covered service member with a serious injury or illness incurred in line of duty--Now includes vets who were in Armed Forces within five years prior to serious injury or illness**
- **“Serious illness or injury” includes aggravations by service in line of duty**

# LEGISLATIVE/REGULATORY

## FMLA MILITARY AMENDMENTS

- **“Qualifying Exigency” – 12 weeks leave**
- **Previously limited to families of National Guard, Reservists and retirees called up in support of “contingency operations”**
- **Oct. 2009 amendment: families of those serving in regular armed forces also covered if service member is deployed on active duty abroad**

# LEGISLATIVE/REGULATORY

## ADA AMENDMENTS ACT (ADAAA)

- **ADAAA significantly expanded the definition of disability.**
- **EEOC issued proposed regulations in Sept. 2009, final regs due in July 2010**
- **In most cases, disability will be found to exist. Focus is now on reasonable accommodation.**

# LEGISLATIVE/REGULATORY

## COBRA SUBSIDY

- **Involuntarily terminated employees pay 35% of COBRA premiums for up to 15 months**
- **Originally for involuntary termination occurring between 9/1/08 and 12/31/09**
- **Recently extended for 3rd time. Now covers involuntary terminations up to 5/31/10**
- **Extends eligibility for employees involuntarily terminated between 3/2/10 and 5/31/10 following a COBRA triggering reduction in hours between 9/1/08 and 5/31/10. Subsidy is not retroactive.**

# LEGISLATIVE/REGULATORY

## No More Wage & Hour Division Opinion Letters

- **Opinion letters to be replaced by Administrator's Interpretations, providing a general interpretation of laws and regulations, applicable across-the-board, without an analysis of specific facts presented.**

# LEGISLATIVE/REGULATORY

## Genetic Information Nondiscrimination Act

- **Employment law provisions effective Nov. 21, 2009**
- **Protects employees from discrimination by employers, unions and insurers based on genetic info/family medical history**
- **EEOC issued proposed GINA regulations in February 2010**

# COMING SOON TO A WORKPLACE NEAR YOU.....OR MAYBE NOT....

- **Healthcare Reform?**
- **Employee Free Choice Act?**
- **Paycheck Fairness Act?**
- **Employment Non-Discrimination Act?**
- **More aggressive enforcement of existing laws by federal agencies**



**Keith M. Weddington**  
**Attorney at Law**

**Three Wachovia Center  
401 South Tryon Street  
Suite 3000  
Charlotte, NC 28202**

**Direct Dial 704-335-9035  
Facsimile 704-335-9697  
Main 704-372-9000  
[keithweddington@parkerpoe.com](mailto:keithweddington@parkerpoe.com)  
[www.parkerpoe.com](http://www.parkerpoe.com)**





Parker Poe