

**2006 EMPLOYMENT LAW UPDATE**  
*Recent Decisions on employment law issues*

Carlos M. Quiñones<sup>1</sup>  
Narvaez Law Firm, P.A.

S. Charles Archuleta<sup>2</sup>  
Keleher & McLeod, P.A.

**U.S. SUPREME COURT CASES**

First Amendment retaliation claim under 42.U.S.C. Section 1983

*Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

- \* Deputy district attorney alleged that his supervisors retaliated against him based on a memo he wrote explaining his concerns regarding alleged inaccuracies in an affidavit used to obtain search warrant.
- \* Supreme Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the United States Constitution does not insulate their communications from employer discipline. Supervisors can evaluate the performance of their employees, including the speech made as part of the job.
- \* Public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

*Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006).  
(6/22/06)

- \* The Court determined that the anti-retaliation provision, 42 U.S.C.S. § 2000e-3(a), unlike the substantive provision, 42 U.S.C.S. §2000e-2(a), was not limited to discriminatory actions that affected the terms and conditions of employment, but could be actions not related to employment and that do not take place at the workplace.
- \* The plaintiff must show that a reasonable employee, considering all of the circumstances, would have found the action "materially adverse," meaning that it may deter an employee from making a discrimination charge.
- \* Reassignment of duties within the job description was determined to be materially adverse because assigning less desirable duties would discourage an employee from charging discrimination. In addition, a 37-day investigatory suspension without pay was deemed materially adverse. Suspension, even though the

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<sup>1</sup> The summaries and views expressed herein are those of the author and not of the Narvaez Law Firm, P.A.

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employer had reinstated the employee and awarded backpay, is a serious hardship for many employees because of the uncertainty of living without income.

## TENTH CIRCUIT COURT OF APPEALS

### Title VII and Equal Pay Act

*Metzler v. Fed. Home Loan Bank of Topeka*, 2006 U.S. App. LEXIS 24268 (10th Cir. 2006)(September 26, 2006)

- \* Plaintiff was an employee of Federal Home Loan Bank of Topeka a/k/a FHL Bank of Topeka ("FHLB"). Defendant FHLB terminated plaintiff from her position as a Database and Systems Analyst in November 2002. Plaintiff then filed an action under the Family and Medical Leave Act alleging: (1) interference with her FMLA-created rights in violation of 29 U.S.C. § 2615(a)(1); and (2) retaliation for exercising her rights under the FMLA in violation of 29 U.S.C. § 2615(a)(2).
- \* The Tenth Circuit had previously held in *Maldonado v. City of Altus*, 433 F.3d 1294 (10<sup>th</sup> Cir. 2006) that a prima facie case of retaliation under both Title VII and the FMLA required an "adverse employment action".
- \* However, later they noted in *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193 (10th Cir. 2006), that the Supreme Court recently rejected their "adverse employment action standard," by holding that a Title VII retaliation claim plaintiff "need only show 'that a reasonable employee would have found the challenged action materially adverse.'" *Id.* at 1202 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15, 165 L. Ed. 2d 345 (2006)).
- \* Subsequently, they extended *Burlington* to ADEA and ADA plaintiffs. *See Haynes v. Level 3 Communs.*, 456 F.3d 1215, 2006 WL 2258836 (10th Cir. 2006) (holding that a Title VII, ADEA, or ADA plaintiff must show: "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action").
- \* The Supreme Court's rejection of the Tenth Circuit's "adverse employment action" requirement applies with equal force in the context of an FMLA retaliation case because the FMLA's retaliation clause is derived from Title VII and is thus intended to be construed in the same manner.

*Mickelson v. New York Life Ins. Co.*, 2006 U.S. App. LEXIS 21944 (10<sup>th</sup> Cir. 2006) (August 28, 2006)

- The employee, a marketing service coordinator, demonstrated in her case that each of the women serving in that grade and title in her office were paid less than the men in a comparable position.
- The Tenth Circuit took the opportunity to explain the differences between the Equal Pay Act and Title VII claims opining that "There are two ways a

plaintiff can proceed on a claim of salary discrimination: on a theory of intentional discrimination on the basis of sex in violation of Title VII, or on a theory of wage discrimination on the basis of sex in violation of the EPA.”

- This is a significant distinction because a plaintiff's burden to prove discrimination varies depending on the statute at issue.
- Under Title VII, the plaintiff always bears the burden of proving that the employer intentionally paid her less than a similarly-situated male employee.
- The EPA, however, has been described as imposing a form of strict liability on employers who pay males more than females for performing the same work--in other words, the plaintiff in an EPA case need not prove that the employer acted with discriminatory intent.”

*EEOC v. BCI Coca Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 2006 WL 1545501 (10<sup>th</sup> Cir. 2006). (June 7, 2006)

Summary judgment for employer reversed.

- \* “Cat’s paw” is described as a “situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.”
- \* The “rubber stamp” doctrine is used when “a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.”
- \* The “cat’s paw” and “rubber-stamp” theories were accepted by the Tenth Circuit. The Tenth Circuit adopted an intermediate approach which tests the biased subordinate’s actions that caused the adverse employment action.
- \* These theories arise in subordinate bias claims and impute racist motive to the employer who does not undertake an independent investigation into the reasons for an employment action but relies solely on the input of another employee, who has racial animus.
- \* The court found that summary judgment was inappropriate because there was enough evidence of Defendant’s racial bias and of a casual relationship between supervisor’s actions and Plaintiff’s firing to have a jury decide the case.

*Reed v. Mineta*, 483 F.3d 1063 (10<sup>th</sup> Cir. 2006). (February 23, 2006)

- \* District court jury returned a verdict for the employee in his religious discrimination action against the FAA.
- \* The district court awarded prejudgment interest on the entire amount of his back pay award, starting as of the date of his termination.
- \* Appeals court held that prejudgment interest should not have been calculated on entire back pay award from date of termination.
- \* In reversing the district court's decision and remanding for a recalculation of prejudgment interest, the court held that the employee's monetary injuries were incrementally inflicted from the date of his termination through entry of judgment as each pay period passed and the employee went unpaid.

- \* Although the plaintiff was injured on date of termination, he did not actually suffer his entire monetary injury at the time of termination. Because Plaintiff's monetary injuries were incrementally inflicted as each pay period he went unpaid passed, prejudgment interest should have been calculated accordingly.

*Maldonado v. Altus*, 433 F.3d 1294 (10<sup>th</sup> Cir. 2006), *overruled on other grounds*, *Metzler v. Fed. Home Loan Bank of Topeka*, 2006 U.S. App. LEXIS 24268 (10<sup>th</sup> Cir. 2006). (January 11, 2006)

- \* Hispanic city street department employees alleged employer's English only policy violated Title VII and 42 U.S.C. Section 1981 and 1983.
- \* District court ruling in favor of employer who implemented English-only policy was reversed by the Tenth Circuit.
- \* Tenth Circuit held that a jury could reasonably find that the English-only policy had a disparate impact on Hispanic workers and trial court erred in concluding that employer had established a business necessity for the policy.
- \* The policy itself, and not just the effect of the policy in evoking hostility by coworkers, may create or contribute to the hostility of the work environment.
- \* The Tenth Circuit found Defendants' evidence of business necessity as "scant." As observed by the district court, "There was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." (Note: two New Mexico federal court judges on this three judge panel)

*Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303 (10<sup>th</sup> Cir. 2005). (November 2, 2005).

- \* Plaintiff employee, a probation officer, sued defendant employer, a state agency, alleging that defendant subjected her to a disparate treatment on the basis of sex when it passed her over for a promotion in violation of Title VII of the Civil Rights Act of 1964.
- \* The district court found that defendant provided a legitimate, nondiscriminatory reason for its decision to promote the successful candidate, namely his superior qualifications, and that plaintiff failed to produce evidence of pretext. Appellate court concurred.
- \* Plaintiff conceded that the other candidate was at least as well qualified as she was.
- \* Evidence of pre-text may include prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g. falsifying or manipulating criteria); and the use of subjective criteria.
- \* The courts may not act as super personnel department that second guess employer's business judgments. Accordingly, minor differences between a plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext.

## **Qualified Immunity**

*Perez v. Unified Gov't of Wyandotte County*, 432 F.3d 1163 (10<sup>th</sup> Cir. 2005).  
(December 27, 2005)

- \* Appeals Court reverses denial of firefighter-defendant's motion for summary judgment pursuant to qualified immunity.
- \* A bystander hit by an emergency response vehicle in the process of responding to an emergency call could not sustain a claim under the substantive due process clause without alleging intent to harm.
- \* Firefighter-defendant was responding to an emergency call and it was not alleged that defendant had intent to harm; therefore, the firefighter should have been granted qualified immunity.

## **ADEA**

*Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10<sup>th</sup> Cir. 2006) (May 2, 2006)

Summary Judgment for Employer reversed.

- \* Defendants terminated employees as part of a reduction in force. Each plaintiff signed an identical release of claims in order to obtain a severance package in exchange for his or her waiver of the right to assert an ADEA claim against defendant. Plaintiffs contested the waiver for failing to conform to the requirements of the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA).
- \* The release was found to be invalid because the employer inaccurately identified the "decisional unit" as required by the OWBPA, the release was ineffective as a matter of law, and plaintiffs did not waive their right to pursue claims under the ADEA.

*Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 2006 WL 337586 (10<sup>th</sup> Cir.). (February 14, 2006)

- \* Employee terminated in RIF filed age discrimination suit against his former employer.
- \* Court of Appeals affirmed district court's decision granting summary judgment to employer.
- \* The employer was properly granted summary judgment on the employee's disparate treatment claim because he failed to present sufficient evidence to support an inference of pretext in the RIF itself, in his prior work performance evaluations, or the employer's alleged history or pattern of age discrimination.
- \* The Tenth Circuit has said that a showing of pretext can look to prior treatment of plaintiff, for example, "the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating criteria); and the use of subjective criteria."

- \* However, the Court found that plaintiff had failed to establish evidence supporting a prima facie case of disparate impact applying the Supreme Court's recent decision in, *Smith v. City of Jackson*, 544 U.S. 228 (U.S. 2005).
- \* The Tenth Circuit determined that to successfully prove that his former employer intended to discriminate against him because of his age, Plaintiff had to show that he was discharged despite the adequacy of his work.

*Whittington v. Nordam Group, Inc.*, 429 F.3d 986 (10<sup>th</sup> Cir. 2005). (November 29, 2005)

- \* The Tenth Circuit affirmed jury verdict for terminated 62 year old employee who was replaced by a 57 year old employee.
- \* Employer defended on the basis that 57 year old was not “substantially younger” than 62 year and therefore there was no evidence of discrimination.
- \* Court refused to set a bright line rule defining “substantial” age difference, stating the amount of weight to be given to a five year age difference is analyzed on a case by case basis and was properly left to the jury.

### **ADA**

*McWilliams v. Jefferson County*, 2006 U.S. App. LEXIS 22656 (10<sup>th</sup> Cir. 2006) (September 6, 2006).

- \* McWilliams worked for the County from September 1995 until October 2002 and suffered from depression. While employed, she received several negative performance evaluations concerning her interaction with others and in October 2002 she was terminated when she couldn't get along with her co-workers.
- \* The Tenth Circuit decided that the employee's claim of ADA disability discrimination was correctly dismissed by the district court.
- \* According to the Circuit, McWilliams is not disabled under the ADA because, “[a]lthough she attests that her intermittent depressive episodes caused her difficulty in sleeping and getting along with her co-workers, she has not shown how these limitations prevented her from performing her job or that she is unable to perform any of the life activities completely.”

### **NEW MEXICO FEDERAL DISTRICT COURT**

*Whitaker v. San Jon Schs*, 2006 U.S. Dist. LEXIS 28786 (D.N.M. 2006). (April 19, 2006).

- \* Plaintiff filed complaint alleging gender discrimination in violation of Title VII alleging that Defendant treated her differently, in response to an alleged inappropriate interaction with a child, than San Jon treated a similarly situated male employee under the same circumstance.
- \* The Court agrees with four other Circuits that paid administrative leave is not adverse employment action because the “terms, conditions, or benefits of a

person's employment do not typically, if ever, include general immunity from the application of basic employment policies" against employees who violate those rules. Plaintiff did not show that there was adverse employment action because she was placed on paid administrative leave.

- \* The Tenth Circuit has advised that district courts should compare work histories when determining whether two employees are similarly situated. *See Green v. New Mexico*, 420 F.3d 1189 (10<sup>th</sup> Cir. 2005). Plaintiff failed to show that she was treated differently than a similarly situated male employee because she had additional instances of inappropriate conduct with a student.

*Barber v. Lovelace Sandia Health Sys.*, 409 F. Supp.2d 1313 (D.N.M. 2005). (December 31, 2005).

- \* Medical assistants, employees, both Spanish-speaking females, sued medical clinic, alleging, inter alia, national origin discrimination and retaliation claiming no-Spanish policy violated Title VII.
- \* A violation of 29 C.F.R. § 1606.7(a) based on a no-Spanish policy did not automatically constitute disparate treatment under Title VII, but the policy did establish an adverse employment action.
- \* Defendant articulated a legitimate, nondiscriminatory reason for the policy, i.e., other employees complained that they felt uncomfortable when employees spoke to each other in Spanish, and one patient complained about overhearing a conversation where derogatory remarks made between co-workers in Spanish about a patient.
- \* There is nothing inherently discriminating about English-only policies established for legitimate business reasons.
- \* The EEOC has determined that a rule requiring employees to speak only English, when applied at all times, is presumed to violate Title VII and a English-only rule, when applied only sometimes, is permissible if based on business justification.
- \* Several courts have found English-only policies as applied to bilingual employees do not, alone, violate Title VII.

## NEW MEXICO STATE COURTS

### New Mexico Human Rights Act

*Deflon v. Sawyers*, 2006 NMSC 25, 137 P.3d 577. (April 24, 2006)

- \* The claimant originally sued the former employer in federal district court for sex discrimination. The federal district court granted the former employer's motion for summary judgment, and the ruling was affirmed on appeal.
- \* The claimant then filed suit against several co-employees in state district court.
- \* Finding that the doctrines of res judicata and collateral estoppel barred the claims, the state district court dismissed the claimant's complaint with prejudice, and the appellate court affirmed.
- \* The reviewing court held that res judicata did not bar the claims for intentional interference with a contract and civil conspiracy because the employees,

defendants in the state court action, who allegedly acted outside the scope of their authority, were not in privity with the employer, defendant in the federal suit.

- \* The current issues between the claimant and the employees had not been litigated.
- \* Also, collateral estoppel did not bar the claimant's action because the federal district court did not actually and necessarily decide issues which would bar the present claims.

*Aguilera v. Bd. of Education*, 2006 NMSC 15, 132 P.3d 587. (March 14, 2006)

- \* Teacher could only be discharged for reasons personal to her qualifications and performance, and not for an RIF.
- \* The issue was whether statutory “just cause” allowed for discharge of a teacher when exigent fiscal circumstances justified an RIF, but the teacher’s competence, turpitude, and performance did not.
- \* Contrary to the Court of Appeals, the New Mexico Supreme Court held that the plain meaning of the “just cause” definition was not appropriate; instead, the court looked to judicial interpretations of “just cause” prior to the time of the legislature defined the term.
- \* The 1991 statutory definition intended to codify and incorporate the Swisher rule into the School Personnel Act.
- \* Accordingly, when a school board was forced to reduce its teaching staff by way of an RIF, it had to satisfy the Swisher requirement and prove that there were necessities of the district.

*Ulibarri v. State Corr. Acad.*, 2006 NMSC 9, 131 P.3d 43. (February 10, 2006)

- \* Summary judgment was properly granted in a Human Rights Act case alleging sexual harassment because the actions plaintiff complained of do not amount to sexual harassment.
- \* Plaintiff’s supervisor made advances to plaintiff, which she rebuffed
- \* The appellate court adopted the continuing violation analysis in the federal case of *Morgan* in analyzing hostile environment claims under the NMHRA.
- \* No hostile work environment because the actions were not sufficiently severe or pervasive.
- \* No constructive discharge claim because the working conditions did not force her to resign.
- \* No quid pro quo claim because there was no action to deprive the employee of tangible employment benefit
- \* The isolated criticism cited by the employee did not sufficiently show retaliation.

*Juneau v. Intel Corp.*, 2006 NMSC 2, 127 P.3d 548. (January 17, 2006)

- \* The employee alleged that he was pressured to admit that he had engaged in harassment and felt employer prejudged him as guilty and began campaign to get rid of him after he refused to admit guilt.

- \* Employee filed EEOC charge alleging retaliation and thereafter was disciplined and ultimately discharged.
- \* District court dismissed claim and in overruling that decision, the Supreme Court found that the employee had presented sufficient evidence to create a genuine factual dispute that needed to be resolved by a jury.

### **OTHER CASES**

*Leveille v. IRS*, 2006 U.S. App. LEXIS 21401 (D.C. Cir. 2006). (August 22, 2006).

- \* Court ruled that the I.R.S could not tax compensation for emotional distress as it was not in lieu of income.
- \* Court further ruled that 26 U.S.C.S. §104(a)(2) was unconstitutional insofar as it permits the taxation of compensation for a personal injury, which compensation is unrelated to lost wages or earnings.
- \* The Sixteenth Amendment does not authorize the Congress to tax as “incomes” every sort of revenue a taxpayer may receive.
- \* The first test is to determine whether “the taxpayer’s award of compensatory damages is a substitute for a normally untaxed personal quality, good, or asset.”