

Employment Law Update

Recent Decisions on employment law issues

Cindy Lovato-Farmer¹
Kristina Lindquist (*law clerk*)
Office of Laboratory Counsel
Los Alamos National Laboratory

U.S. Supreme Court Cases

TITLE VII - RETALIATION

Burlington Northern & Santa Fe Railway Co. v. White, -- S.Ct. --, 2006 WL 1698953 (2006).

- The Court granted certiorari to resolve a split in the interpretation of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, which prohibits employers from “discriminating against” employees who “opposed any practice” forbidden by Title VII or who “made a charge, testified, assisted, or participated in” a Title VII investigation or proceeding.
- The Court interpreted “discriminated against” by looking at differences in language and purpose between the substantive provision in § 703(a) and the anti-retaliation provision in § 704(a) to hold that the scope of the anti-retaliation provision extends to 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.
- Materiality depends on the circumstances of the case. In this case, 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 even though the employer had reinstated the employee and awarded backpay on the basis that living without income with an uncertain future for over a month is a serious hardship for many employees and could deter charges of discrimination by an employee.

¹ The summaries and views expressed herein are those of the author, and not of the Los Alamos National Laboratory. The Los Alamos National Laboratory strongly supports academic freedom and a researcher’s right to publish; therefore, the Laboratory as an institution does not endorse the viewpoint of a publication or guarantee its technical correctness.

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

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

- The Supreme Court reversed the Ninth Circuit and held “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitutional does not insulate their communications from employer discipline.”
- The Court reasoned that “restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”
- The majority (Kennedy, Roberts, Scalia, Thomas, and Alito) declined to extend the test established in *Pickering* for speech made by public employees as citizens on public concerns (weighing individual and public interest in the speech versus government interest in operating efficiently without distraction or embarrassment) to speech made by public employees performing their job duties. Instead, the majority held that when a government employee speaks as part of the job he/she is performing, the individual is not speaking as a citizen for First Amendment purposes. The employee is speaking for the government, not him/herself. Supervisors can evaluate the performance of their employees, including the speech made as part of the job. The individual retains the right to speak outside of his/her job duties.

Tenth Circuit Court of Appeals Cases

ADEA

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006).

Summary Judgment for Employer reversed.

- Employees were terminated as part of a reduction in force. They signed identical Releases of Claims to get a severance package and gave up the right to assert an ADEA claim against the employer. 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, so the waiver was deemed ineffective as a matter of law.
- The Court rejected the contention that the defendant’s error in identifying the “decisional unit” was de minimis stating that the requirements of the OWBPA are “strict and unqualified.”

TITLE VII - Race Discrimination

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, -- F.3d --, 2006 WL 1545501 (10th Cir. 2006).

Summary judgment for employer reversed.

- The “cat’s paw” and “rubber-stamp” theories were accepted by the 10th Circuit. “Cat’s paw” is described as a “situation in which a biased subordinate, who lacks decisionmaking 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.”
- 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 proper inquiry is whether the “biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action.”
- The court found that summary judgment was inappropriate because there was a dispute of material fact – whether the individual who provided the information to the decisionmaker (who had no knowledge of the employee’s race) had a history of racist comments and racial treatment of employees sufficient to show racial bias.