

I N S I D E T H E M I N D S

The Impact of Supreme Court Employment Law Cases

*Leading Lawyers Analyze Recent Decisions and
Their Impact on Employment Law*



ASPATORE

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Supreme Court's Messages on Retaliation, Arbitration, and Discrimination

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The *Crawford* Decision

Crawford v. Metropolitan Government of Nashville and Earlier Retaliation Decisions

One of the most significant 2009 U.S. Supreme Court decisions in the area of employment law was *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), decided on January 26, 2009. This decision was one in a series of cases in which the Court has broadly interpreted the retaliation component of Title VII.

In the case, the individual who brought the lawsuit was not the person who brought the original internal complaint against the defendant. Rather, she was an employee who had been interviewed as part of the investigation of the defendant, and the question before the Court was whether the prohibition against retaliation under Title VII covered someone who arguably could be considered a witness—someone who participated in the harassment investigation, but who was not the complainant.

By way of background, there are two elements to Title VII's prohibition on retaliation—the Participation Clause, which pertains to participation in an Equal Employment Opportunity Commission (EEOC) hearing; and the Opposition Clause, which pertains to complaints in the workplace, but that do not involve the formal EEOC machinery.

In reversing the U.S. Court of Appeals for the Sixth Circuit decision, the Supreme Court held that an employee may be protected from retaliation under the Opposition Clause if he or she discloses information as part of an internal investigation, even if the employee is not the complainant. The Court more or less adopted the government's position—i.e., “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 *Crawford* decision was one of those rare cases where there was no dissent, although there was a concurring opinion by Justices Alito and Thomas. They agreed that the individual in the case was protected from

retaliation, although they would have defined (not surprisingly) the term “opposed” more narrowly than the majority did.

The Supreme Court ruling in this case was not surprising, and it affirmed the law in other appellate circuits, which had come out differently from the Sixth Circuit. While the Court in other areas is often seen as less protective of employee rights than it once was, plaintiffs have a friendly forum in the high court when it comes to retaliation. Indeed, one cannot look at the *Cramford* decision in isolation; one needs to look at it relative to other recent cases to appreciate fully the Court's message.

There are three requirements for a retaliation claim: protective activity, adverse action, and causal connection. In 2006, *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Supreme Court said that a retaliation claim does not need to involve a tangible employment action, like a discharge, to be actionable. Instead, it said that a material change of terms and conditions of employment, which could mean excluding someone from career-development opportunities, could also be retaliation. By broadly defining the concept of adverse action in this case, the Supreme Court opened the door to retaliation claims.

Even prior to *Burlington*, statistics for retaliation charges doubled between 1992 and 2007. Post-*Burlington*, the numbers can be expected to jump even higher.

One year later, in 2008, the Supreme Court again ruled on the issue of retaliation. In *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the court held that Section 1981 of the Civil Rights Act of 1866—which prohibits racial discrimination with regard to making and enforcing contracts—covered retaliation. More specifically, it said that Section 1981 provides coverage for retaliation claims in the employment context. That decision is relevant for two reasons.

First, in Title VII, there is an administrative exhaustion requirement; there is none with Section 1981. Second, there is a four-year statute of limitations with Section 1981. In contrast, the statute of limitations under Title VII is either 180 or 300 days, depending on whether there is a comparable state remedy.

With this background in mind, I view the recent decision by the Supreme Court in *Crawford* as one in a trilogy of three decisions—in 2006, 2008, and 2009—in which an increasingly conservative Supreme Court has made clear that it will brook retaliation in no form.

Impact of Crawford on Employers: Creating a Retaliation Provision

In considering the practical impact of the trilogy of Supreme Court cases culminating in *Crawford*, employers should create a culture where, in words and in practice, they make it clear that they have no tolerance for retaliation. One way to do that is to create a separate retaliation provision with respect to employment policies, while avoiding some common mistakes.

For example, a retaliation policy should not say something like, “If you make a complaint, you are protected from retaliation,” because that is inadequate in light of the *Crawford* decision. Rather, it should be stressed that if you make a complaint, serve as a witness, or otherwise participate in an investigatory process, you are protected from retaliation.

Employers should also clarify that prohibited retaliation is not merely defined by tangible employment actions, but also by adverse material changes to the terms and conditions of employment. Consider giving specific advances.

A retaliation provision must alert employees to what cannot be done to them in the workplace, and this needs to be emphasized in the supervisory training process. Essential to both a retaliation policy and retaliation training is the need to underscore that even if a claim lacks legal merit, it does not mean that the employee who made the claim is not protected from retaliation.

In other words, assume an employee alleges that her supervisor harassed her, but the supervisor’s conduct was not severe or pervasive enough to be actionable harassment. Generally, as long as the complaint was brought in good faith, the employee is protected from retaliation.

Employers also need to review their complaint procedures. Unfortunately, it is not uncommon to see a complaint procedure that says, in effect, “If you have been discriminated against or harassed, please use this procedure;

we assure you that there will be no retaliation.” Rather, a complaint procedure should say, “If you think you have been discriminated against, harassed, or retaliated against, you should use this procedure.” Employees must be given an internal vehicle to challenge perceived retaliation. If no internal option, see you at the EEOC! (See Appendix A for a sample EEOC Policy.)

When training managers, employers need to make them understand that while retaliation may be their first impulse (because no one likes being accused of a legal wrong that is also a moral wrong), it cannot be the one they act upon—they need to rise above it, even if the complaint lacks merit. Employers also need to understand that sometimes retaliation is not what they do, but what they *do not* do—that is, they become so fearful of not engaging in retaliation that they avoid the complainant, and if that avoidance deprives the complainant of meaningful opportunities, it can be viewed as retaliation.

Another important consideration regarding retaliation is that, while most employees who make complaints do so in good faith, there are times when an employee engages in a pre-emptive strike by alleging discrimination and harassment before an employment action is taken; and if an adverse action is taken at a later time, it may appear retaliatory. Therefore, while employers need to be thoughtful, careful, and deliberate in handling certain matters, risks are also involved in their being too thoughtful, careful, or deliberate. For instance, a manager may avoid an employee because he or she is uncomfortable with what is about to happen (i.e., the manager knows termination is imminent); the employee knows what is coming and makes a complaint; and then the subsequent adverse action appears retaliatory based on timing. If the operative words in real estate are “location, location, location,” in retaliation case law, the key words are “timing, timing, timing”—and delay can create a window of opportunity for a preventive strike.

Therefore, where delay is unavoidable, the employer may want to document the timing of the decision and the reason for any delay in implementation; if there is an intervening complaint, the employer can show that, prior to and independent of the complaint, it had intended to take, and in fact wound up taking, corrective action.

The Impact of the Crawford Decision on Future Retaliation Trends

Employers should keep in mind that retaliation is not just a legal issue—it is a cultural issue that affects the bottom line. If employees are afraid to speak up for fear of retaliation, they may not complain—they may just leave when the economy improves.

Employers need to create a culture in which employees are not afraid to speak out, and where employees who have different views feel comfortable sharing them. Because of the current economic conditions, some employers may feel their employees do not have a great deal of options, but times will change. When the economy improves, employees who feel that they cannot speak their mind will end up leaving that workplace. Consequently, implementing a retaliation policy goes beyond a legal imperative—it is a business imperative, in terms of creating an environment where people are free, within reason, to share their feelings.

The *Penn Plaza* Decision

14 Penn Plaza v. Pyett and Mandatory Arbitration

Another important 2009 U.S. Supreme Court case in the area of employment law is *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), which involved whether mandatory arbitration could be applied in the context of collective bargaining.

In prior cases, the Supreme Court has held that individual employees can agree to arbitrate their discrimination claims (waiving their right to trial by jury), but that a union could not waive that right on behalf of their members. Compare *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

In *Penn Plaza*, the collective-bargaining agreement expressly held that employers could not discriminate based on age, and it referenced the Age Discrimination in Employment Act of 1967 (ADEA). In its decision, the Supreme Court held that mandatory arbitration did not violate public policy, and it reached that result based on a number of factors.

The Court emphasized that in this particular case, the language in the collective bargaining agreement was clear—it did not simply say, “We agree not to discriminate based on age”; it specifically referenced the ADEA. Therefore, the intent of the parties was apparent.

The Court also felt that the employee at the center of this case was not waiving any substantive right to bring a claim; rather, the arbitration agreement simply set forth the forum by which a claim would be resolved.

The Court also rejected the argument that arbitration was not an appropriate vehicle to resolve Title VII-type claims. It pointed out in its decision that arbitrators are now dealing with many complicated issues, such as antitrust claims, and there is no reason that arbitrators could not also handle equal employment opportunity (EEO) claims.

The third policy argument that the Court addressed was that an individual's rights with respect to making an age discrimination claim may be subordinated to the union—the union might decide not to bring the claim, and if that were to occur, the employee's age discrimination claim might never be heard.

The Court rejected that argument on the grounds that the National Labor Relations Act (NLRA) imposes on unions a duty of fair representation, and unions can be sued for not exercising it. Therefore, if a union were not to bring an employee's claim without a strong argument for that decision, the union could face legal problems for not bringing the claim.

The Impact of Penn Plaza

Penn Plaza was a significant holding because until this decision, Supreme Court case law was primarily negative with respect to the possibility of traditional EEO claims being resolved in union-context arbitration. Interestingly, in one of the footnotes to its decision, the Court said, “We disavow the anti-arbitration dicta of *Gardner-Denver* and its progeny.”

In *Gardner-Denver*, the high court had held that a union could not restrict an employee's remedies to arbitration. In *Penn Plaza*, the Court reframed the *Gardner-Denver* line of cases to allow greater flexibility for arbitration.

In the *Gardner-Denver* cases, the union contract said that it prohibited discrimination, but it did not specifically reference the federal statute by name. However, in *Penn Plaza*, the arbitration agreement specifically referenced the ADEA.

Consequently, the *Penn Plaza* case involved arbitrating a statutory, not a contractual, claim. In the eyes of the average person, that may be a distinction without much merit. An employee may view an agreement that says, “There will not be age discrimination” and an agreement that says, “There will not be discrimination based on the ADEA” in the same way, but the Court ruled that there is a key difference.

If an employer wants to “take advantage” of the decision in *Penn Plaza*, it should not only stipulate in its collective-bargaining agreement that it prohibits discrimination, but it should also consider including language such as, “We will not engage in discrimination in violation of any of the following statutes”—i.e., the ADEA, Title VII, Americans with Disability Act (ADA), or other federal laws. If the employer uses such language in its agreement, a good argument can be made—based on this case—that a unionized employee who makes an age or other discrimination claim will have to go through arbitration rather than court. Of course, the employee can always go to the EEOC to make a claim: that right cannot be taken away.

Many employers are still considering what they should do in light of this decision. Again, some are including provisions in their collective-bargaining agreement that provide that they will not discriminate based on certain statutes. As a result, they believe they can arbitrate all of their discrimination claims without having to litigate them. I believe that implementing such provisions is a judgment that needs to be reached after due deliberation.

My own personal view is that American Arbitration Association (AAA) arbitrators tend to have a bias toward employees. In contrast, employers are often able to prevail in litigation, where they can often show through exhaustive discovery that what may be unfair at first blush is not necessarily unlawful under careful examination.

In agreeing to arbitrate union-context discrimination claims, employers may save time and money, but that is our advantage, too—and we may lose

more than we win. Also, the appeal rights in arbitration are limited in contrast to traditional court-based litigation. (See Appendix B for Twelve Keys to Maximizing Enforceability of Arbitration Agreements in Employment Context.)

Dissenting Opinions in Penn Plaza

There were powerful dissents by Justices Breyer, Ginsburg, Stephens, and Souter, wherein they felt that the majority was evading *Gardner-Denver* by simply ignoring it; they felt the decision was potentially taking away the rights of employees to bring claims, because a union could refuse to bring them.

To quote Justice Souter: “Equally at odds with existing law is the majority’s statement that ‘[t]he decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by the parties designing grievance machinery.’ ... That is simply impossible to square with our conclusion in *Gardner-Denver* that ‘Title VII ... stands on plainly different ground’ from ‘statutory rights related to collective activity’; ‘it concerns not majoritarian processes, but an individual’s right to equal employment opportunities.’ ... When the majority does not speak to *Gardner-Denver*, it misreads the case in claiming that it turned solely ‘on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims.’”

Changes to Bargaining Agreements in Light of Penn Plaza

Again, the main question for employers is whether, based on the *Penn Plaza* decision, they should modify the non-discrimination clause as part of collective bargaining to reference federal and state statutes, such as the ADEA, the ADA, or Title VII.

In doing so, the employer may be able to avoid the cost of litigation by turning over decision-making in this area to an arbitrator. The benefit of agreeing to arbitration is that the employer may save time and money. However, the risk in doing so is that the employer may lose the benefit of time and money—where it has greater resources—and the arbitrator may be more biased against the employer and may not have the appropriate

skills to make a valid decision. Plus, the appellate rights in arbitration are narrow. Consequently, employers need to carefully make this decision.

The *Ricci* Decision

Ricci v. DeStefano and Discrimination in Employment Testing

In *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), the fire department of New Haven, Connecticut, had developed a comprehensive examination to qualify for promotion. The preliminary results of the test came in, and it was clear that white and Hispanic firefighters were much more likely to pass than were African-American firefighters. Based on those results, the City of New Haven felt that it had a potential problem: If it allowed those results to be finalized, it ran a real risk of ending up with a disparate impact claim.

It is important to note the two kinds of discrimination claims—disparate treatment and adverse impact. A disparate treatment claim refers to not hiring or promoting someone because of their race or membership in some other protected group; whereas, an adverse impact claim involves a neutral action that adversely affects a particular group.

For example, if a job involves the ability to bench-press 200 pounds, there might be more men than women who could do the job; such a requirement would be gender-neutral on its face, but adverse in its impact. For the record, I could not bench press fifty pounds, let alone 200 pounds.

In this case, the test methodology that was compiled was EEO-neutral, but it appeared to have an adverse impact. Forty-one candidates completed the exam—twenty-five whites, eight blacks, and eight Hispanics; of those, twenty-two passed—sixteen whites, three blacks, and three Hispanics. Under the test rules, nine candidates would get an immediate promotion—seven whites and two Hispanics, and not one African American.

The City of New Haven thought that it had developed a good test; yet the results of the test were undesirable in terms of the adverse impact, and the city feared that if it certified the results, it would face an adverse impact claim. Consequently, it decided not to certify the results—and instead, it

was faced with a disparate-treatment claim from the group of employees who passed the test. To add to its problems, the named plaintiff was sympathetic. He had several learning disabilities, including dyslexia, and testified that he had spent more than \$1,000 on study materials and studied for thirteen hours to prepare for the test.

The issue before the Court in this case was what an employer can do when presented with a potential disparate-impact claim situation. One view was that an employer can do nothing when presented with a disparate-impact scenario. If an employer has developed testing policies for jobs and promotions, the employer cannot reject the results, even if the results ultimately have an adverse impact. The contrary view espoused was that if a good-faith belief held that there was a racially disparate impact in a testing process, the employer should not have to wait until disparate impact is proved to take action; rather, if the employer has a good-faith belief that there may be a disparate impact, it should be able to reject the test results and start over.

The Court rejected both polar views and presented what it would describe as a centrist result, per Justice Kennedy (replacing Justice O'Connor as the center of the conservative court). Relying on precedent under the equal protection clause of the U.S. Constitution for guidance, the Court held that an employer can consider race and abandon test results if there is a strong basis in evidence to find that there was disparate impact. It is not enough to believe in good faith that a test's results were flawed, or to be afraid of being sued, in order to abandon test results—there must be a strong basis in evidence to find that the tests were inadequate, with some consequent disparate-impact liability violation of Title VII.

While the Court agreed that it is correct to look at disparate impact risk and consider it in the context of a testing process, the question then becomes: What qualifies as a strong basis of evidence for disparate impact, when a good-faith belief is not enough? The Court basically said that bad statistics alone are insufficient cause for abandoning employment test results because one could still prevail in court if the examination was job-related and consistent with business necessity. There was testimony to support that fact in this case.

Therefore, if the test is carefully designed, as it appears to have been in the *Ricci* case, the result cannot be rejected simply because the statistics are bad.

Indeed, to reject the test results, employers almost have to prove that their test design was not very good—and if they do everything right up-front in terms of the test design, it will be difficult to prove it was not designed properly on the back end.

The Impact of Ricci on Employment Law

This was a complicated 5-4 decision; indeed, there was a blistering dissent of four Justices in this case—Justices Ginsberg, Souter, Stephens, and Breyer. They stated forcefully that the majority had subordinated disparate-impact claims to disparate-treatment claims, even though Congress had intended “these twin pillars of Title VII” to stand on “equal footing.”

But even if new Justice Sotomayor agrees with former Justice Souter, *Ricci* will still be the law of the land, as Justice Souter was one of the dissenters in this case and one of the court’s most consistent moderate-liberals (appointed by George H. W. Bush).

This decision illustrates that employers need to take care on the design side with respect to testing practices and policies because abandoning those test results based on potential disparate impact may result in a disparate-treatment claim.

In addition, the only way employers will be successful in relying on adverse impact to defeat a disparate-treatment claim is to show that their company’s testing program was poorly designed, rather than carefully constructed—and that it was not job-related and was developed by business necessity. Ironically, this amounts to employers essentially attacking their own program to prove that adverse impact is based in evidence.

Responding to Ricci and Recent Supreme Court Employment Law Decisions

Employers should consider what they are doing with respect to hiring and testing policies up-front. Simply put, courts are not amenable to disregarding an entire testing process simply because it may have an adverse impact, unless employers can go the extra mile in terms of proving they

have strong evidence of adverse impact—and statistics alone are not enough. (See Appendix C for advice on Attracting and Promoting Diverse Talent.)

While it is good to champion diversity because the business and moral benefits are critical, employers have to be sensitive to the legal rights of all individuals and should be careful that what is done to create a more diverse workforce does not simply serve to create more discrimination claims.

In my experience, in almost all examples of adverse-impact claims, it is possible that the employer could have minimized the legal risk if more work had been done on the front end.

Let us assume that an employer is developing a hiring or promotion test. Before the employer decides whether it will use the test, it should apply the test to existing employees, who can answer anonymously, but with demographic data. If the employer finds that, after giving the test to a large group, it had an adverse impact among current employees, the employer might retool the test. Essentially, the employer creates a pool to “test the test” before it is ever used; if such questioning had been done sooner rather than later in the *Ricci* case, perhaps the test could have been reconstructed in a way that was slightly fairer and had lower adverse impact. Then the people who scored highest would have been awarded the position.

Even though Justice Kennedy was in the center of the Court, the *Ricci* decision is a conservative decision, leaving little room for employers to consider race, even where the argument can be made that they are trying to avoid adverse impact. However, one cannot draw from this conclusion that employers do not have flexibility in this area. The people who took the promotion test in the *Ricci* case went through a long and complicated process; many of them worked hard, studied, and passed. The outcome of this situation might have been different had testing of the test been conducted earlier, before anyone had gone through the process.

Final Thoughts: Advice for Employers and Employment Lawyers

The Supreme Court has become more conservative in the area of employment law, with the exception of retaliation. That will not change,

unless one of the more conservative justices retires and is replaced with a more liberal justice by President Obama.

However, as the federal courts have become more conservative, employees and their advocates have turned to the state courts for relief. State courts tend to be more pro-employee than the federal courts.

Moreover, if congress believes the high court has gone too far, it will get back in the game. When the Court eviscerated the ADA, congress responded with the ADA Amendment Act of 2008. When the Court issued the *Lilly Ledbetter* decision, Congress enacted the Lilly Ledbetter Act. And, as I write, Congress is considering legislation that would overturn *Penn Plaza* relative to mandatory arbitration.

Notwithstanding talk radio prattle from both sides, we live in a moderate society. Most people are sensitive to and concerned about protecting civil rights, but in a way that allows employers to function. Sometimes “big” wins for employers before the Supreme Court result in overreactions by Congress that make things more difficult for employers. The harshest legislation is often the direct product of the “biggest wins” before the Court. Employers should be careful what they wish for ... they may get it— but only for a glimpse of time.

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Often cited as a national authority on employment issues in The Wall Street Journal, The New York Times, Fortune, The Washington Post, CNN Online, Business Week Online, and Money, among many other media, Mr. Segal hosted a television special on sexual harassment, The Sexual Harassment Quiz, broadcast on more than 200 PBS stations. A member of the National Association of College and University Attorneys, he provides legal counsel to public, private, secular, and sectarian colleges and universities. He has been a featured speaker at NACUA and CUPA conferences and is the legislative director for the Pennsylvania State Council of SHRM Inc.

Mr. Segal has published more than 150 articles on employment issues for various publications. A contributing editor to HRMagazine, Mr. Segal also is a frequent contributor to Metropolitan Corporate Counsel.

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Dedication: *I dedicate this book to the honor and memory of my honorary nephew and special friend, Jacob Wetchler. Jacob died at age twenty after beating lymphoma and then succumbing to leukemia after a heroic fight. For those of us who lost Jacob, this is a loss from which we will never fully recover. To help prevent other young people from being cut down in the prime of their lives, Jacob's family started The Jake Wetchler Foundation for Innovative Pediatric Cancer Research.*

Appendix A

EEO POLICY SAMPLE¹

General Policy on Equal Employment Opportunity

Our Company is committed to ensuring equal employment opportunity. All employment decisions, policies and practices are in accordance with applicable federal, state and local anti-discrimination laws.

The Company will not engage in or tolerate unlawful discrimination (including any form of unlawful harassment or retaliation) on account of a person's sex, pregnancy, age, race, color, religion, creed, national origin, ancestry, citizenship, immigrant status, military status, veteran's status, disability, handicap, genetic information, sexual preference or orientation, gender identity, marital status, domestic partner or civil union status or membership in any other protected group.

For example, and by way of illustration only, the Company will not unlawfully consider an individual's membership in any protected group as defined above with regard to: interviewing, hiring, compensation, benefits, training, assignments, evaluations, coaching, promotions, discipline, discharge and layoffs.

[Moreover, our Company makes affirmative, good faith efforts to recruit and employ applicants and advance employees in accordance with our Affirmative Action Plan.]

The Company's policy on equal employment opportunity supports and is consistent with the Company's commitment to enhancing diversity and inclusiveness. Diversity means not only membership in the various "protected groups" identified above but also diversity in experience, perspective, ideas, style and contacts. We believe that we are much stronger

¹ This is a sample EEO Policy only that should be not be used unless it has been reviewed by your own legal counsel. In particular, it needs to be customized to comply with applicable state law and it may need to be harmonized to comply with your existing policies and/or union contracts. Finally, there are many decision points that should be discussed that may result in different language, for example, a confined prohibition on dating rather than simply discouraging it.

as a Company as a result of the richness of our diversity and strive to ensure that we have policies and practices which are respectful and promote inclusion of diversity.]

This entire Policy applies to all of the Company's officers, managers, supervisors, employees and applicants. All such individuals are both protected under and restricted by this entire Policy. You are protected in terms of your right to have a working environment free from unlawful discrimination, harassment and retaliation and other inappropriate conduct as described in this Policy. You are restricted in terms of your being prohibited from engaging in unlawful discrimination, harassment and retaliation and other inappropriate conduct as described in this Policy.

Policy Prohibiting Sexual Harassment

Sexual harassment is a form of sex discrimination which the Company will not tolerate. Consistent with the foregoing, the following behaviors are prohibited, whether by a man or a woman and whether directed at a man or a woman:

- To threaten or insinuate, expressly or implicitly, that any person is required to submit to sexual advances or to provide sexual favors as a condition of employment, continued employment or any term, condition or benefit of employment, or that a person's refusal to submit to sexual advances or to provide sexual favors will affect adversely the person's employment, continued employment or any term, condition or benefit of employment.
- To make any employment decision or take any employment action based on a person's submission to or refusal to submit to sexual advances.
- To engage in unwelcome sexually-oriented or otherwise hostile conduct which has the purpose or effect of interfering unreasonably with another person's work performance or of creating an intimidating, hostile, abusive or offensive working environment.

The following behaviors, communications etc. are inappropriate, and as such, prohibited, regardless of whether they are illegal:

- Linking/conditioning any employment decision, benefits, etc. to a subordinate's submission or refusal to submit to sexual advances;
- Demands or requests for sex;
- Repeated requests for dates (if the recipient says "No");
- Providing preferential treatment to someone with whom you are having a sexual or romantic relationship;
- Sexual assault;
- Unwelcome and/or inappropriate physical contact, such as patting, pinching or brushing against another person's body;
- Sexual bantering, "jokes" and "teasing;"
- Sexual, suggestive or biased "jokes;"
- Gender biased or stereotypic comments or other communications;
- Sexual flirtations, advances or propositions;
- Verbal abuse of a sexual nature;
- Verbal commentaries about an individual's body, sexuality, or sexual orientation;
- Sexually-degrading words used to describe individuals;

- Discussions of or questions about sexual desires, fantasies, experiences, frustrations, etc.;
- Pornographic or obscene materials or other communications of any kind;
- Sexually-explicit or sexually-suggestive objects, cartoons, software, photos, pictures, etc.;
- Sexually-oriented or degrading gestures;
- Verbal or nonverbal innuendo of a sexual, suggestive or biased nature;
- Other nonverbal communications of a sexual or suggestive nature, such as leers and gawks;
- Obscene, off-color or otherwise hostile language of a sexual, suggestive or biased nature;
- Any other behavior of a hostile or abusive nature directed at one sex, even if not sexual in nature; and
- Any other inappropriate behavior of the kind or similar to that referred to here or elsewhere in this policy.

It is important to remember that these prohibitions apply not only to oral and written communications, but also to e-mail, voice mail, Internet communications and searches, and other technology-assisted communications.

The prohibitions on inappropriate behavior set forth above apply not only in the workplace itself but also to all other work-related settings, such as meetings at customer/client work sites, as well as business trips and business-related social functions.

It is of no defense to inappropriate behavior that there was no bad intent, that it was only a “joke,” or that it was not directed at any particular person.

Harassment on Account of/with regard to any Protected Group

Harassment based on an individual’s membership in any protected group (for example, race, age, national origin, ancestry or disability) is equally prohibited and will not be tolerated.

The following behaviors, communications, etc. are inappropriate, and as such, prohibited, regardless of whether they are illegal:

- Derogatory comments about an individual’s membership in any protected group, for example, the “old guy;”
- Displays of cartoons, calendars, computer software, pictures etc. which are degrading to or reflect negatively upon any protected group;
- "Jokes," comments or stories which have the purpose or effect of stereotyping, demeaning or making fun of any protected group, for example, racial “jokes,” AIDS “jokes,” or Catholic “jokes;”
- Slurs to describe any protected group, for example, the “N” word or the "C" word;
- Nicknames which relate to a person’s membership in any protected group, for example, "r-g head";
- Verbal or non-verbal innuendo which relates to or reflects negatively upon any protected group, for example, mimicking a disabled employee’s walk or an immigrant’s accent;

- Hate symbols or other symbols which suggest the inferiority of any group, for example, a noose, a swastika or KKK symbols;
- Racist, sexist or other hate-based graffiti;
- Hostile, abusive or demeaning behavior, including threats, directed at an employee because of his or her membership in any protected group, even if not racial, ethnic, religious etc. in nature;
- Stereotypic or biased comments or slurs about any protected group, for example, “they don’t work hard;” and
- Any other inappropriate behavior of the kind or similar to that referred to here or elsewhere in this policy

It is important to remember that these prohibitions apply not only to oral and written communications, but also to e-mail, voice mail, Internet communications and searches, and other technology-assisted communications.

The prohibitions on inappropriate behavior set forth above apply not only in the workplace itself but also to all other work-related settings, such as meetings at customer/client work sites, as well as business trips and business-related social functions.

It is of no defense to inappropriate behavior that there was no bad intent, that it was only a “joke” or that it was not directed at any particular person.

Social Relationships

Sometimes social relationships may develop at work. While you have a right to say “yes,” you also have an absolute right to say “no.” Consequently, if you feel any unwelcome pressure to become involved with any officer, manager, supervisor, co-worker, agent or nonemployee with whom you come into contact in the course of your employment with the

Company, we urge you to use the complaint procedure set forth beginning on Page __. If you let us know there's a problem, we can help! In the absence of a complaint pursuant to the procedure which follows, the Company will assume that any relationship entirely consensual and welcome.²

Reasonable Accommodations

Upon request, the Company will make reasonable accommodations which do not impose an undue hardship on the Company on behalf of qualified individuals with disabilities or handicaps of which the Company is made aware. Upon request, the Company also will make reasonable accommodations which do not impose an undue hardship on the Company with regard to an employee's religious observances, practices and beliefs of which the Company is made aware. If you need an accommodation for religious or medical reasons, please speak with either _____ or _____.

Policy Prohibiting Retaliation

The Company will neither engage in nor tolerate unlawful retaliation of any kind against any person who makes a complaint of unlawful discrimination, harassment or retaliation, serves as a witness or otherwise participates in the investigatory process. As with all other provisions of this policy, all employees are protected by this provision as well as restricted in terms of what they do.

Prohibited retaliation includes adverse tangible employment actions, such as denial of a raise or promotion. It also may include, in some circumstances, other material changes in the terms and conditions of employment, such as work assignments. Prohibited retaliation also may include adverse actions independent of the workplace, such as trying to

² If you ask an employee or nonemployee with whom you come into contact in the course of your employment for a date and the person says "no," you cannot ask him or her again. Nor can you retaliate against him or her in any way. If you ask again or retaliate in any way, you will be subject to severe disciplinary action, up to and including the termination of your employment.

exclude an employee from membership in an outside professional organization because of a complaint he or she made at work.

It is no defense to retaliation by any person (officer, manager, supervisor, etc.) that the complaint did not have legal merit. Generally speaking, so long as an individual acts in good faith in making a complaint alleging unlawful discrimination, harassment or retaliation, serving as a witness or otherwise participating in the investigatory process, no adverse action can be taken against him or her because he or she made the complaint, served as a witness or otherwise participated in the investigatory process.

Prohibited retaliation will be handled under this policy in the same manner and subject to disciplinary/corrective action to the same degree as any other violation of this policy.

Discrimination, Retaliation, Harassment Advanced by Nonemployees

The prohibitions against unlawful discrimination, retaliation and harassment set forth in this Policy apply not only to the conduct of employees of our Company but also to the conduct of non-employees (for example, customers, vendors, suppliers and contractors) with whom our employees come into contact in the course of their employment with our Company. Consequently, if you feel discriminated or retaliated against or harassed (sexually or otherwise) by a nonemployee in the course of your employment with the Company, you should use the procedure set forth below. Conversely, the prohibitions against unlawful discrimination, harassment and retaliation set forth in this Policy apply to your conduct relative to nonemployees with whom you come into contact in the course of your employment with the Company.

What To Do If You Feel You Have Been Subjected to Discrimination, Harassment or Retaliation

If you believe that you may have been, or anyone else may have been, unlawfully discriminated against, harassed by or retaliated against by any officer, manager, supervisor, co-worker, agent or nonemployee in violation of this Equal Employment Opportunity Policy, you should report your concerns

immediately to _____, _____ or _____.³
Please speak with whichever person you feel the most comfortable, whatever your reasons.

Similarly, if you have any question as to whether certain conduct is unlawful discrimination, retaliation or harassment, you are encouraged to speak with any of the individuals identified above.

[The Company also has established an external hotline so that you can report concerns about unlawful discrimination, retaliation or harassment to a third party. You also may use the hotline to report concerns about ethical issues unrelated to this policy. The third party is _____. The phone number is _____. While you can report complaints anonymously to _____, the Company's ability to conduct a full and fair investigation may be limited if it does not have the opportunity to speak with you as part of its investigation.]

All complaints will be investigated promptly, and the existence and nature of your complaint will be disclosed only to the extent necessary to make a prompt and thorough investigation or as may be necessary to take appropriate corrective measures. The Company will neither engage in nor tolerate any form of unlawful retaliation against any person for making a complaint alleging unlawful discrimination, harassment or retaliation, serving as a witness or otherwise participating in the investigatory process.

[If you are an officer, manager, or supervisor and anyone complains to you that they believe that they or anyone else may have seen subject to unlawful discrimination, harassment or retaliation, you must report this by calling _____. You may neither keep the complaint confidential nor investigate the complaint on your own. If you are not sure whether you have a duty to report, play it safe and report.]

If you are not entirely satisfied with how your complaint has been handled, for whatever reason, you may appeal your complaint to _____ or _____. [Insert contact information].

³ The offices of the Company are located at _____.
The telephone number is () ____-____.

Your appeal should be in writing to help ensure that the person you contact is clear that you wish to appeal. While we encourage you to be detailed, it is sufficient to say "I wish to appeal my EEO complaint." [You also may appeal by using the hotline discussed above.]

Sanctions for Violations of the Company's Equal Employment Opportunity Policy

Any officer, manager, supervisor, employee, agent or nonemployee who, after appropriate investigation, has been found to have engaged in unlawful discrimination, harassment or retaliation and/or inappropriate behavior inconsistent with this Policy (even if not unlawful) will be subject to appropriate disciplinary and/or corrective action, up to and including termination of his or her employment or other relationship with our Company.

Exempt and non-exempt employees who violate this policy also may be suspended without pay. Exempt employees will be suspended in full-day increments only.

Appendix B

TWELVE KEYS TO MAXIMIZING ENFORCEABILITY OF ARBITRATION AGREEMENTS IN EMPLOYMENT CONTEXT⁴

1. The Agreement should be given to employee at time of hire and employee should be told signing it is condition of initial employment. If given to employee during employment, consideration may need to be given for legal and/or employee relations reasons.
2. The Agreement should apply to both parties and that both parties are giving up the right to trial by jury.
3. The Agreement should specify that arbitration is final and binding and who will arbitrate, such as before a single arbitrator, in accordance with the then current American Arbitration Association ("AAA") National Rules for the Resolution of Employment Disputes ("AAA Rules").
4. The Agreement should be specific in terms of the claims by employees which are covered by it. The list of claims should be broad and include, but not be limited to, claims arising under the following statutes (as enacted or amended): Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Genetic Information Non-Discrimination Act, Section 1981 of the Civil Rights Act of 1866 and the Family and Medical Leave Act. Add state non-discrimination and other key laws.
5. Exceptions to arbitration in favor of the employee are expressly spelled out—for example, the Agreement does not preclude the employee from filing a charge with EEOC but the employee does waive the right to monetary or other personal relief to the maximum extent permitted by law.

⁴ This Outline should not be construed as legal advice pertaining to specific factual situations.

6. Exceptions to arbitration in favor of the employer are expressly spelled out—for example, the employer can go into court and seek injunctive relief for breach of non-compete,
7. Agreement provides for a reasonable statute of limitations of not less than one year and ideally the same as would apply in court.
8. Agreement provides employer pays full cost of arbitrator's fee. No wiggle room here.
9. Agreement provides employer pays some, most or all of the employee's filing fee; the more the employer pays, the less likely the fee can be an issue relative to enforceability. In no case should employee's filing fee be more than to file in court.
10. The Agreement should grant the arbitrator all of the power of a court of law and equity, including the power to order discovery, in the arbitrator's discretion, as is available under the then current Federal Rules of Civil Procedure, and to grant legal and equitable remedies.
11. The Agreement should make clear that the decision of the arbitrator shall be in writing and set forth the findings and conclusion upon which the decision is based. The decision of the arbitrator shall be final and binding and may be enforced under the terms of the Federal Arbitration Act (9 U.S.C. Section 1 et seq.). Judgment upon the award may be entered, confirmed and enforced in any federal or state court of competent jurisdiction.
12. The Agreement should include a choice of law and forum provision.

Appendix C

ATTRACTING AND PROMOTING DIVERSE TALENT

Title VII v. Diversity

A. Legal Background

1. Title VII prohibits discrimination on account of sex, race, color, national origin and religion
2. With regard to gender and race, while Title VII was enacted primarily to protect women and racial and ethnic minorities, it also protects men and people who are white.
3. How does Title VII apply to voluntary affirmative action by an employer to benefit women and minorities?

B. Two Supreme Court Cases on Affirmative Action in Education in 2003

1. Gratz v. Bollinger, 123 S.Ct. 2411 (2003): University of Michigan Undergraduate
2. Grutter v. Bollinger, 123 S.Ct. 2325 (2003): University of Michigan Law School

C. Undergraduate Affirmative Action Plan

1. 100 points = automatic admission
2. 20 points for membership in certain minority groups
3. Up to 20 points for certain race-neutral diversity factors

D. Law School Affirmative Action Plan

1. No points
2. Race was but one factor without any specified weight
3. Other race-neutral factors were considered too (e.g., socioeconomic status)

E. Plaintiffs' Challenge

1. Violation of Equal Protection Clause of the 14th Amendment
2. Constitutional analysis:
 - a. Is there a compelling state interest?
 - b. Are the means narrowly tailored to achieve that interest?

F. Summary of Michigan Decisions

1. Six justices: "student body diversity" is a compelling state interest
2. Question then became: is the program narrowly tailored?
 - a. 6 justices struck down the undergraduate program – point system seen as too much like a quota
 - b. 5 justices (including O'Connor) upheld the law school program – holistic, individualized assessment in which race is a "plus"

G. Affirmative Action in Employment

1. Entirely different and more restrictive legal analysis applies in employment cases
2. Supreme Court has upheld voluntary affirmative action in employment only if:
 - a. Remedial purpose (to be discussed)
 - b. Narrowly tailored
 - i. No quotas or set asides
 - ii. Race or gender only one factor in holistic approach
 - iii. Limited time frame
3. What may be legitimate remedial purpose?
 - a. Admission of prior discrimination
 - b. “Manifest imbalance” in traditionally segregated job categories

H. Million Dollar Litigation Issue

1. Can an employer consider diversity in the absence of remedial purpose?
2. Can “workforce diversity” be compelling interest under EPC or defense under Title VII?

I. Taxman v. Board of Education of Township of Piscataway, 91 F.3d 1547 (3d Cir.1996)

1. School District had affirmative action plan in which white teachers were laid off ahead of minority teachers where their qualifications were equal
2. While the court found employer's purpose of having a "culturally-diverse workforce" laudable, it still found it unlawful
3. Appellate court held "no congressional recognition of diversity as a Title VII objective requiring accommodation" in the absence of a remedial purpose

J. Schurr v. Resorts International Hotels, Inc. 196 F.3d 486 (3d Cir. 1999)

1. Employer selected African American candidate over equally qualified white candidate
2. Employer admitted that race was determining factor but relied upon its affirmative action plan as a defense
3. Ruling for the plaintiff and relying on Taxman, the court held that, unless a voluntary affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of Title VII

K. Messer v. Meno 130 F.3d 130 (5th Cir. 1997)

1. 5th Circuit applies Taxman-like analysis in public employer case
2. "Diversity programs, no matter how well meaning, are not constitutionally permissible absent a showing of prior discrimination" by the public employer

**L. EEOC Compliance Manual Chapter 15 (Race and Color)
April 19, 2006**

1. EEOC encourages diversity efforts, but cautions employers to be careful to “avoid the potential for running afoul of the law,” citing, among other cases, Taxman

M. Title VII Restrictions

1. Employer cannot set aside or reserve a position for a woman or minority
2. Employer probably cannot consider race or gender as a “plus” in decision-making (unless for remedial purpose)

N. What Can You Do?

1. Increase the diversity of the applicant pool
2. Minimize unconscious bias in the screening and selection process
3. Value in decision-making the non-EEO aspects of diversity, to the extent job-related (e.g., contacts, experience, perspective)

Part II: Maximizing Diversity Consistent with Title VII in Hiring and Promoting

A. Educating senior management on business drivers for diversity

1. Diversity of applicant pool
2. Diversity of customer base
3. Diversity of ideas

B. Setting the criteria

1. Be careful of setting too high the number of years “traditional” experience
2. Be careful of caps too

C. Internal postings

1. Message of inclusion
2. Making and documenting legitimate exceptions

D. External recruiting

1. Word of mouth
 - a. Benefit
 - b. Limitation
2. General recruiting
 - a. Can be same time as internal posting
 - b. Diversifying general sources
3. Targeted recruiting
 - a. Supplements, not supplants, general recruiting
 - b. Should be same time as general recruiting
4. Third party recruiters
 - a. Identity—diversity in recruiters

- b. Instruction—diverse pool of qualified applicants

E. External community relationships

- 1. Building them
- 2. Maintaining them

F. Screening applicants/resumes

- 1. General rule: do not interview unless applicant meets minimum requirements
 - a. Risks of making legitimate exceptions
 - b. Making and implementing exceptions
- 2. Unconscious bias re: names/addresses
 - a. Covering names and addresses on resumes
 - b. Being aware of unconscious bias in interview, too

G. Impermissible interview questions

- 1. Examples
 - a. EEO status
 - b. Family status
 - c. Personal
- 2. Scope
 - a. Formal interviewing

- b. Informal follow-up

H. Permissible interview questions

1. Examples
 - a. Prior experience
 - b. Current skills
 - c. Job requirements
 - d. Situational/behavioral questions
2. Benefits of starting with uniform list of questions
 - a. Legal
 - b. Diversity

I. Decision Making

1. Do not make decisions based on EEO factors
2. Value in decision-making the non-EEO aspects of diversity, to the extent job-related (e.g., contacts, experience, perspective)

J. Top 5 Diversity/EEO danger zones

1. Personal comfort level — just “like me” bias
2. Bad cultural fit
3. Stereotyping
4. Mis-measure of different communication styles
5. Double standard on confidence/ assertiveness



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