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## MONTHLY UPDATE

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### SUPREME COURT

- *Sprint/United Management Company v. Mendelsohn*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1140 (U.S. 2008) (Trial court should decide, using the Federal Rules of Evidence, whether “me too” evidence is admissible).
- *Federal Express Corporation v. Holowecki*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1147 (U.S. 2008) (EEOC Intake Questionnaire may satisfy Charge requirement if sufficient to constitute a request for EEOC to take action).
- *Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 978 (U.S. 2008) (The “Judge Alex” case; FAA preempts California state law, the California Talent Agencies Act, which would otherwise have invalidated arbitration agreement; arbitrators are more generally vested with authority to decide arbitrability).
- *Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 2008 U.S. LEXIS 2911 (U.S. 2008) (Parties cannot agree to expand grounds for judicial review/appeal beyond the FAA’s sections 10 and 11 by; therefore, the parties’ agreement that had provided for judicial review “where the arbitrator’s conclusions of law are erroneous” was not enforceable; not an employment case).
- Potentially major labor and employment cases pending before the Supreme Court include:
  - *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, Supreme Court case no. 06-1595 (Whether cooperating with a company’s internal investigation of sexual harassment complaints is protected against retaliation by Title VII’s opposition and/or participation clauses).
  - *Gomez-Perez v. Potter*, Supreme Court case no. 06-1321 (Whether the ADEA prohibits retaliation against federal government employees).
  - *CBOCS West, Inc. v. Humphries*, Supreme Court case no. 06-1431 (Whether sec. 1981 prohibits retaliation against employees).

- *Vaden v. Discover Bank*, Supreme Court case no. 07-773 (Whether a lawsuit, under the FAA, to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, is itself an action under federal law giving rise to federal-question subject matter jurisdiction).
- *14 Penn Plaza LLC v. Pyett*, Supreme Court case no. 07-581 (Whether arbitration clause in collective bargaining agreement waives an employee's right to claim discrimination under the ADEA).
- *Meacham v. Knolls Atomic Power Laboratory*, Supreme Court case no. 06-1505 (Whether an employee asserting a disparate impact/statistics case bears the burden on the ADEA's RFOA clause ["reasonable factors other than age"]).
- *Kentucky Retirement Systems v. EEOC*, Supreme Court case no. 06-1037 (Whether any consideration of age as a factor – in a retirement plan – constitutes a facial ADEA violation).
- *Engquist v. Oregon Department of Justice*, Supreme Court case no. 07-474 (Whether public employees can file a "class of one" lawsuit under the traditional equal protection "rational basis" analysis under *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L Ed 2d 1060 (2000)).
- *Chamber v. Commerce v. Brown*, Supreme Court case no. 06-939 (Whether California's gag-rule prohibiting employer speech during union organizing campaigns is preempted by the NLRA/violates First Amendment speech rights).
- *Ysursa v. Pocatello Education Association*, Supreme Court case no. 07-869 (Whether the First Amendment permits a state to ban local governments from implementing payroll deductions that fund political activities).
  - Note: *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10<sup>th</sup> Cir. 1/10/08) (Held: Utah's Voluntary Contributions Act, which would have prohibited state and local government agencies from implementing voluntary payroll deductions, violates First Amendment).
  - Note: Governor Ritter's Executive Order D 006 07 (Permitting dues check-off clauses to allow withholding payroll deductions for government workers).
- *Locke v. Karass*, Supreme Court case no. 07-610 (Whether union representing government workers is authorized, under the First and Fourteenth Amendments, to use agency fees to finance litigation under 42 U.S.C. §1983).
- On or about January 16, 2008, certiorari was dismissed in *Huber v. Wal-Mart Stores Inc.*, Supreme Court case no. 07-480 (whether the ADA requires an employer to assign a disabled worker into a position automatically as a reasonable accommodation or whether the employer can still hire the best person for the job). Apparently, the parties settled.

## EEOC

- The EEOC published final rules and regulations:

- Allowing employers to coordinate health insurance benefit plans for retirees with Medicare. Federal Register, vol. 72, no. 246, pp. 72938-72945.
- Deleting three grounds for dismissal of charges. Federal Register, vol. 73, no. 13, pp. 3387-3389. Specifically, EEOC will no longer dismiss due to (1) the charging party's failure to cooperate, (2) the charging party cannot be located, and (3) the charging party's refusal to accept an offer of full relief. The EEOC contends that those three grounds are no longer necessary because its 1995 changes now permit the EEOC to dismiss charges upon determinations that further investigation is not likely to lead to evidence establishing a violation. In its final rule, the EEOC suggests a possible impact on two prior Tenth Circuit cases in particular: "*McBride v. Citgo Petroleum Corp.*, 281 F.3d 1099 (10th Cir. 2002) (dismissing a private plaintiff's claim under the Americans with Disabilities Act (ADA) on the ground that she had failed to exhaust her administrative remedies before the EEOC where the Commission dismissed plaintiff's charge for "failure to cooperate" as set forth in section 1601.18(b)) and *Shikles v. Sprint/United Management Company*, 426 F.3d 1304 (10th Cir. 2005) (extending the holding of *McBride* to the Age Discrimination in Employment Act (ADEA)),” quoting the EEOC's final rule, p. 3388.
- The EEOC published proposed regulations, implementing the Supreme Court's 2005 decision, *Smith v. City of Jackson*. Federal Register, vol. 73, no. 62, pp. 16807-16809. The proposed regulations contend that, in disparate impact claims, the plaintiff bears the burden of identifying a specific practice or policy that is facially neutral but causes the statistical disparity, then the employer bears the burden of proving that practice/policy is due to a RFOA (reasonable factor other than age).

#### GENERAL EEO

- *Somoza v. University of Denver*, 513 F.3d 1206 (10<sup>th</sup> Cir 2008) (Applying the Supreme Court's 2006 decision in *Burlington Northern*, the Tenth Circuit held that incivility, rudeness, and even offensive statements regarding ethnicity and national origin were not sufficiently severe to trigger a retaliation claim because they would not have dissuaded a reasonable employee from exercising Title VII rights).
- *Tademy v. Union Pacific Corp.*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 6916 (10<sup>th</sup> Cir. 4/1/08) (Summary judgment reversed where plaintiff's evidence included among other things an alleged noose; application of *Morgan* to statute of limitations argument; detailed discussion regarding what constitutes a prompt and effective investigation under Title VII of graffiti).
- *Grossman v. South Shore Public School District*, 507 F.3d 1097 (7<sup>th</sup> Cir. 2007) (Writing for the Seventh Circuit, Judge Posner affirmed the trial court's summary judgment for school district against guidance counselor's claims of religious discrimination. Among other things, guidance counselor had thrown away brochures regarding condoms, distributed brochures regarding abstinence instead, and prayed with two troubled students. Distinguishing between her conduct and her religious beliefs, the Seventh Circuit conceded that her conduct was likely the result of her religious beliefs but affirmed summary judgment because she had not been terminated for those beliefs, but for her conduct.).

- *Brady v. Office of the Sargeant at Arms*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 6460 (D.C. Cir. 3/28/08) (*McDonnell Douglas*' requirement of a "prima facie case is a largely unnecessary sideshow"; if the employer asserts a non-discriminatory reason, the court should not consider whether plaintiff has shown a prima facie case).
- *Davis v. Coca-Cola Bottling Co. Consolidated*, 516 F.3d 955 (11<sup>th</sup> Cir. 2/6/08) (General overview of systemic disparate treatment claims, a/k/a, "pattern or practice" claims, how they can be filed as "hybrid class actions," certified as a class, and the application of *Morgan* to statute of limitations arguments in such cases; general condemnation of "shotgun pleadings" by both plaintiff and defense counsel).

## FMLA

- Effective 1/28/08, the National Defense Authorization Act for FY 2008, sec. 585(a), amended the FMLA to permit up to 26 weeks of FMLA leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness," so long as the serviceman/woman is the employee's "spouse, son, daughter, parent, or next of kin."
  - An additional amendment under the NDAA will permit FMLA leave when the spouse, child, or parent of a serviceman/woman, who is on active duty, experiences "any qualifying exigency." Before this additional amendment takes effect, the DOL implement a final rule defining the phrase, "any qualifying exigency."
- The DOL issued proposed FMLA regulations that address the NDAA among a number of other topics, including joint employers, eligibility, the definition of a "serious health condition," the calculation of leave, intermittent leave, notification, and medical certifications).
- *Grace v. USCAR and Bartech Technical Services, LLC*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 6192 (6<sup>th</sup> Cir. 2008) (Staffing agency and employer held to be joint employers under the FMLA).
- *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7<sup>th</sup> Cir. 2008) (No FMLA violation where employee was fired due to absences on three days leading up to what would have otherwise been FMLA-protected leave for rehab treatment. Although employee and his family were arguably working on getting him admitted during those days, the record failed to establish that he received a protected treatment during that time.)

## IMMIGRATION REFORM

- The United States Citizenship and Immigration Services released a new I-9 form that changes the kinds of documents, which can be provided by a new hire. The new form also contains a more prominent antidiscrimination language. See, <http://www.uscis.gov/files/form/i-9.pdf>.
- The Department of Homeland Security's program explaining how employers should respond to Social Security Administration "No-Match" letters was stayed by the United States District Court for the Northern District of California, case no. 3:07-cv-4472-CRB,

which case has also since been stayed, effective 11/23/07, at the DHS' request, in order to permit the DHS to revise its program.

- In response, the DHS reconsidered and reissued its prior no-match rules (Failure to respond to a no-match letter would be evidence of a "knowing" violation, but employers who follow DHS' no-match resolution procedures, including by checking their own records to confirm no error within 30 days, then giving employees 60 days to resolve with the SSA, fall within a Safe Harbor). Federal Register, vol. 73, no. 59, pp. 15944-15955.
- *Ariz. Contrs. Ass'n v. Napolitano*, 526 F. Supp. 2d 968 (Dist. Ariz. 12/21/07) (Dismissal of lawsuit, for lack of standing, that had sought an injunction against implementation of Arizona's 2007 immigration reform legislation, which requires, among other things, all Arizona employers to use DHS' Basic Pilot program, n/k/a E-Verify.).
- The EEOC's 2008 fiscal spending bill is stuck in conference committee as Congressional lawmakers debate an amendment, HR 3093, sponsored by Sen. Lamar Alexander (R-Tenn.) that would bar the EEOC from litigating English-only cases.
- A variety of immigration-related RICO claims were reported, including *Trollinger v. Tyson Foods Inc.*, \_\_\_ F.3d \_\_\_ 2008 U.S. Dist. LEXIS 11243 (E.D. Tenn. 2/13/08) (RICO claims against employer alleging that employer violated RICO by hiring illegal aliens in effort to depress wage rates, dismissed); *Hager v. ABX Air Inc.*, \_\_\_ F.3d \_\_\_, 2008 U.S. Dist. LEXIS 23486 (S.D. Ohio 3/15/08) (RICO claim against employer and its parent company dismissed; RICO claims against executives of employer, not dismissed).

## NLRB

- The NLRB proposed rules permitting a consent election upon the employer and union's joint request, without any showing of consent by employees, for an NLRB-conducted election, to be commenced by what the NLRB proposes calling an "RJ petition." Federal Register, vol. 73, no. 38, pp. 10199-10201.
- The NLRB's General Counsel issued two guideline memos.
  - Guideline Memo no. GC 08-02 (12/27/07) (Discussing how NLRB offices should investigate allegations that a lawsuit was filed without a reasonable basis in violation of the Supreme Court's 2007 decision in *BE&K Construction Co.*, instructing NLRB personnel first to investigate "whether the suit is reasonably based").
  - Guideline Memo no. GC 08-04 (2/15/08) (Discussing the NLRB's 2007 decision in *Toering Elec. Co.*, holding that SALTs are not entitled to protection unless the SALT was "genuinely interested" in employment).
  - Guideline Memo no. GC 08-29 (2/15/08) (Discussing the NLRB's 2007 decision in *Oil Capitol Sheet Metal Inc.*, holding that an award of backpay to a genuinely-interested SALT requires General Counsel to prove that, if hired, the SALT would have actually worked for the employer for the period during which backpay is sought).

- *Dana Corp.*, 351 NLRB No. 28 (9/29/07) (The NLRB modified its recognition-bar doctrine, in order to better protect employee free choice, providing that no election bar will be triggered by card recognition unless, among other things, employees and the NLRB regional office are notified of that recognition and the NLRB regional office then gives such employees 45 days to object).
- *Smithfield Packing Co. v. NLRB*, 510 F.3d 507 (4<sup>th</sup> Cir. 2007) (NLRB's ruling reversed and employees held not entitled by the NLRA to walk out in protest of employer's changes to management personnel).
- Due to loss of two members, the NLRB has authorized 2-member quorums, so that decisions can be issued, and delegated authority to NLRB General Counsel over certain litigation decisions. See NLRB press release no. R-2653 (12/28/07).

#### STATE LAW AND MISCELLANEOUS

- *Cardenas v. Jerath*, \_\_\_ P.3d \_\_\_, 2008 Colo. LEXIS 248 (Colo. 2008) (Hospital's attorney's notes may be discoverable in medical malpractice lawsuit because, although attorney work product, they are the only investigative record from the time and, therefore, "may contain unique factual information such as the contemporaneous sense impressions of a fact witness" although trial court should review them *in camera* first to ensure redaction of any entries that reflect the attorney's "mental impressions, conclusions, opinions, and legal theories").
- *Pace v. United Services Auto. Ass'n*, 2007 U.S. Dist. LEXIS 49425 (D. Colo. 7/9/07) (Attorney who failed to appear at settlement conference required to pay opposing party's attorney fees. Attorney's law firm had done work on its spam-filter which, inadvertently, had blocked e-served notice of the settlement conference. The court held that was an insufficient reason.).
- *Hamilton v. Boise Cascade Express*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 5686 (10<sup>th</sup> Cir. 3/17/08) (General discussion of the blackletter law regarding sanctions under sec. 1927 for vexatious litigation; such sanctions do not require a showing of bad faith, and the amount of such sanctions need not be the smallest amount necessary to deter).
- *Meson v. GATX Tech. Servs. Corp.*, 507 F.3d 803 (4<sup>th</sup> Cir. 2007) (Discussing then applying WARN's definition of a single site of employment in the context of an employee who had an office but traveled considerably for work).
- *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052 (D.C. Cir. 2007) (Non-union employer who, apparently because they were not union, was unaware of union practices, which in turn became basis for prevailing wage, held responsible, nonetheless, under Davis-Bacon).
- *Navigant Consulting Inc. v. Wilkinson*, 508 F.3d 277 (5<sup>th</sup> Cir. 11/15/07) (Discussing an employee's fiduciary duty while preparing to leave employment, decided under Texas law).
- *Wilson v. CARCO Group Inc.*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 4379 (D.C. Cir. 2008) (Job applicant may sue background checking company directly under the Fair Credit Reporting Act and does not necessarily require expert testimony in support of his claim).

## OSHA

- OSHA published a proposed rule requiring employers to pay for PPE, excepting among other things “nonspecialty” foot protection (such as steel-toed boots), everyday clothing (including gloves), lost or intentionally damaged PPE. See Federal Register, vol. 72, no. 220, pp. 64341-64430 (11/15/07) (“The rule does not require employers to provide PPE where none has been required before. Instead, the rule merely stipulates that the employer must pay for required PPE, except in the limited cases specified in the standard.”).