

# STETTNER MILLER, P.C.

ATTORNEYS AT LAW

KENNETH R. STETTNER  
ROBERT R. MILLER  
KATE RAABE  
JOHN S. FINN  
BRUCE ANDERSON  
BILL C. BERGER  
SUSAN M. SCHAECHER  
BERINA IBRIŠAGIĆ

INDEPENDENCE PLAZA  
1050 17<sup>TH</sup> STREET, SUITE 700  
DENVER, CO 80265-2008  
(303) 534-0273  
FAX (303) 534-5036  
EMAIL: BBERGER@STETMIL.COM

## MONTHLY UPDATE

Prepared for October 17, 2008 Meeting of the CBA Labor and Employment Law Section  
Last revised October 13, 2008

*By Bill C. Berger, Esq.*

### SUPREME COURT

- *Gomez-Perez v. Potter*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1931 (2008) (The ADEA prohibits retaliation against federal government employees).
- *CBOCS West, Inc. v. Humphries*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1951 (2008) (Sec. 1981 prohibits retaliation against employees).
- *Meacham v. Knolls Atomic Power Laboratory*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2395 (2008) (In ADEA cases, the employer bears the burden of proving a RFOA [“reasonable factors other than age”]).
- *Engquist v. Oregon Department of Justice*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2146 (2008) (A public employee cannot file a “class of one” lawsuit under the Equal Protection analysis articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L Ed 2d 1060 (2000)).
- *Kentucky Retirement Systems v. EEOC*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2361 (2008) (The mere involvement of age as a factor in a retirement plan’s calculations of benefits, without more, does not constitute a facial ADEA violation).
- *Chamber of Commerce v. Brown*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2408 (2008) (California’s gag-rule prohibiting speech by employers who had received state funds, during union organizing campaigns, is preempted by the NLRA under the doctrine articulated in *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U. S. 132, 140 (1976) [Although the NLRA contains no preemption language, when Congress adopted it, “Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes,” therefore, state law is preempted when it delves into “a zone protected and reserved for market freedom.”]).

### STATUTES, EXECUTIVE ORDERS, REGULATIONS, ETC.

- Genetic Information Nondiscrimination Act (GINA), U.S.H.R. 493 (Prohibits discrimination by employers and insurance companies on the basis of an individual’s genetic information).

- ADA Amendments Act of 2008, P. 110-325 (Reversed numerous Supreme Court cases, especially parts of *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002), likely making millions more people eligible now to be considered “disabled” because mitigating measures – other than [at least?] eyeglasses and contact lenses – can no longer be considered in determining whether a medical condition “substantially limits” a “major life activity”).
- Executive Order 12989 (federal contractors must use e-Verify on all personnel when hired or assigned to federal project; note, unlike Colorado law, this Executive Order expressly requires an e-Verify check on *existing personnel* – not just new hires – when assigned to the federal project, see Sec. 5(a)).
- Colorado statutes:
  - SB 114 (Employee leasing companies must pay wages and unemployment taxes for covered employees).
  - SB 120 (Wages may be paid by paycard).
  - SB 122 (Wage Transparency Act) (Incorporates NLRA sec. 7 rights to discuss wages, hours and working conditions, specifically with regard to an employee’s ability to discuss wages, into Colorado state law).
  - HB 1276 (Workplace Accommodations For Nursing Mothers Act) (Employers of one or more must allow new mothers unpaid breaks and an appropriate space to breastfeed and/or express milk for up to two years after birth).
  - HB 1020 (Costs are recoverable in civil suit if judgment does not exceed settlement offer, including even costs incurred prior to settlement offer) (Dubbed the “No Trial Lawyer Left Behind Act,” the Bill was more contentious than one might imagine; numerous issues are likely to be litigated, including a plaintiff’s ability to trigger the statute by making an offer of any amount, whether or not reasonable, prior to trial).
- EEOC Directives Transmittal no. 915.003 (7/22/08), adding to the EEOC Compliance Manual, a new sec. 12 (“Religious Discrimination”).
- CBA Ethics Committee Formal Opinion 120 (5/17/08) (“Representing an Organization as a Party in Dispute”).

#### GENERAL EEO

- U.S. Department of Justice, Bureau of Justice Statistics Special Report, “Civil Rights Complaints in U.S. District Courts, 1990-2006,” NCJ 222989 (Aug. 2008). Note: The study largely lumps all civil rights claims together, including employment, housing, etc. Interesting statistics in this report include the following:
  - About one-half of all civil rights claims in federal court are employment cases.
  - Employment claims doubled from 6,936 total filed in 1990, to 13,042 in 2006, with a high of 19,371 in 2001.
  - Plaintiffs win about a third of all civil rights cases that go to trial.

- The median damages award in civil rights cases (not including attorney fees) ranged from \$114,000 to \$154,500.
- Prisoner litigation has held steady at about 25,000 petitions filed each year, with a temporary rise to just over 40,000 in 1995, which was immediately cut back to 25,000'ish after enactment of the Prisoner Litigation Reform Act of 1996.
- *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, (10<sup>th</sup> Cir. 6/27/08) (The EEOC's policy for responding to FOIA requests related to confidential information provided by an employer was held arbitrary and capricious then stayed pending the EEOC's adoption of a court-approved policy sufficient to comply with notice and other requirements of FOIA).
- *Hall v. Nalco Co.*, 534 F.3d 644, (7<sup>th</sup> Cir. 7/16/08) (Female employee who claims she was fired "for taking time off from work to undergo in vitro fertilization after being diagnosed with infertility" states a claim of sex discrimination under Title VII and the PDA).
- *Trujillo v. PacifiCorp*, 524 F.3d 1149, (10<sup>th</sup> Cir. 5/7/08) (Plaintiffs, a married couple, state an association claim of disability discrimination when both were fired while their son was being treated for cancer, where there was evidence that the treatments were both costly and that management was tracking the costs).
- *Kelley v. City of Albuquerque*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 19706 (10<sup>th</sup> Cir. 9/17/08) (Detailed analysis of Title VII's participation and opposition clauses, holding that the plaintiff, a former assistant city attorney, engaged in "participation" -- though not "opposition" -- by appearing on behalf of the City at an EEOC mediation).
  - *Vaughn v. Epworth Villa*, 537 F.3d 1147, (10<sup>th</sup> Cir. 8/19/08) (Plaintiff, a certified nurse's aide, engaged in Title VII protected activity when she disclosed patient's medical records to the EEOC in support of her charge, but because they were unredacted, her disclosure violated the employer's policies and became a legitimate business reason underlying her discharge). For a similar case, holding the plaintiff's disclosure was not even protected, see *Niswander v. The Cincinnati Ins. Co.*, 529 F.3d 714, (6<sup>th</sup> Cir. 2008).
  - Reminder, pending before the Supreme Court, and just argued, is *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).
- *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, (3<sup>rd</sup> Cir. 2008) (Arbitration agreement is enforceable even though it was written in English and plaintiff understood only Spanish, relying on *Upton v. Tribilock*, 91 U.S. 45, 50 (1875) ["It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained."]).
- *Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878 (D.C. 7/3/08) (Split decision with majority and dissent disagreeing over how to analyze an "English

proficiency” requirement for an office clerk position and whether such a requirement even constitutes race/national origin discrimination under Title VII).

- *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, (10<sup>th</sup> Cir. 2008) (Thorough analysis of how EEO laws apply in the context of large-scale layoffs, holding among other things that age-related information contained in hidden – but not password-protected – cells of a spreadsheet that decisionmakers reviewed does not on its own suggest age discrimination, absent evidence that decisionmakers actually accessed those hidden cells).
- *EEOC v. Federal Express Corp.*, \_\_\_ F.3d \_\_\_, 2008 U.S. App. LEXIS 19242 (9<sup>th</sup> Cir. 9/10/08) (EEOC can issue an administrative subpoena even after it has issued a right-to-sue letter, where the right-to-sue letter notified employer that the EEOC would be continuing its investigation).
- *Richardson v. Commission on Human Rights & Opportunities*, 532 F.3d 114, (2<sup>nd</sup> Cir. 7/7/08) (The Supreme Court’s decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) did not apply to the parties’ collective bargaining agreement as drafted because it included language authorizing union to pursue a grievance and arbitration of discrimination claims.).
  - Reminder, pending before the Supreme Court is *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 file an age discrimination lawsuit).

#### FMLA

- *Ridings v. Riverside Medical Center*, 537 F.3d 755, (7<sup>th</sup> Cir. 2008) (Detailed analysis of a case involving intermittent leave and the breakdown of the two-way cooperation required by the FMLA, holding among other things, “An employer cannot be deemed to retaliate against an employee by asking her to fulfill her obligations under the FMLA”).

#### NLRB

- NLRB General Counsel Memorandum GC 08-07 (5/15/08) (Discussing issues arising out of the NLRB’s recent decision allowing employers to prevent use of their email systems, *The Guard Publishing Co., d/b/a The Register Guard*, 351 NLRB No. 70 (2007)).
- NLRB General Counsel Memorandum GC 08-10 (7/22/08) (Discussing issues arising out of political advocacy in the workplace).
- NLRB General Counsel Memorandum GC 09-01 (10/3/08) (Discussing issues related to the General Counsel’s burden to prove backpay in light of the NLRB’s recent decision, *St. George Warehouse*, 351 NLRB No. 42 (2007)).
- *Evergreen America Corp. v. NLRB*, 531 F.3d 321, (4<sup>th</sup> Cir. 2008) (Affirming a type-II *Gissel* bargaining order – ordering employer to bargain even though it won election and even though, unlike a type-I *Gissel* order, its conduct had not been exceptional, outrageous, or pervasive).

- *United Brotherhood of Carpenters and Joiners of America Local 848 v. NLRB*, 540 F.3d 957 (9<sup>th</sup> Cir. 2008) (Mall's rules regarding protests in its privately-owned property violated at least California's constitutional protections of speech rights, which rights are stricter than those set forth in the NLRA and the U.S. Constitution. Because they violated at least California state law, the mall's actions to enforce them, including its ejection of protesters from its property for violating those rules, constituted a violation of the NLRA § 8(a)(1).)
  - *St. John's Church in the Wilderness v. Scott*, \_\_\_ P.3d \_\_\_, 2008 WL 3877826 (Colo.App. 2008) (Protesters, whose protests against abortions and homosexuality included "graphic depictions of aborted fetuses" and "loud, angry, and confrontational" verbal protests, but whose protests were not violent and did not interfere with the flow of people or cars, were properly enjoined from further protests during plaintiff-church's services).

#### STATE LAW AND MISCELLANEOUS

- *Keller Corp. v. The Blind Man of America*, 187 P.3d 1133 (Colo.App. 2008) (Franchisee bought a franchise. As part of the agreement, franchisee agreed not to compete in other franchise areas. Held: Although Colorado's covenant not to compete statute, CRS § 8-2-113, is typically read as permitting enforcement of covenants provided by the sellers of a business, the statute also permits enforcement of covenants against the buyer of a business, such as the franchisee here.).
- *Affordable Country Homes, LLC v. Smith*, \_\_\_ P.3d \_\_\_, 2008 WL 4140585 (Colo.App. 9/4/08) (Court lacks jurisdiction to reform a settlement agreement once it has dismissed the case even if one party claims it was the product of fraud on the court by the other party).
- *Stone v. State Farm Mutual Automobile Ins. Co.*, 185 P.3d 150 (Colo. 2008) (A plaintiff's tax returns are not automatically discoverable in garden variety state tort claims. Defendant must show a "compelling" need for the information contained in the tax returns and that it is not "readily available" elsewhere).

#### OSHA

- OSHA proposed rule regarding cranes and derricks, including pre-lift assessment of the ground, area, etc., and crane operator certification. The proposed rule is available on the Internet at [http://www.osha.gov/doc/proposedrule/Cranes\\_Derricks\\_Proposed\\_Rule.pdf](http://www.osha.gov/doc/proposedrule/Cranes_Derricks_Proposed_Rule.pdf).