



Wimberly Lawson
Seale Wright & Daves, PLLC

Attorneys & Counselors at Law

Briefly
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SUPREME COURT ISSUES A MAJOR DECISION ON CONFLICT BETWEEN AFFIRMATIVE ACTION FOR MINORITIES VERSUS DISCRIMINATION AGAINST OTHERS



Fred Bissinger

“One thing is for sure, employers are going to need specialized legal counsel in evaluating and deciding whether to use any type of hiring or promotion selection criteria.”

On June 29 the U.S. Supreme Court addressed an interesting and controversial issue – whether an employer faced with test results leading to the promotion of a number of whites but no minorities may in order to avoid possible disparate impact discrimination simply abandon the test results in the absence of evidence that the test was invalid. *Ricci v. DeStefano*, ____ U.S. ____ (2009). In other words, does Title VII of the Civil Rights Act prohibit an employer’s good faith intent to comply with Title VII’s disparate-impact provision by voiding test results constitute intentional discrimination on the basis of race against those non-minority applicants who passed the test? Relying on cases decided under the Equal Protection Clause of the Fourteenth Amendment, which have held that certain race based government actions to remedy past racial discrimination are constitutional only where there is a “strong basis in evidence” that the remedial actions were necessary, the majority ruled that under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a “strong basis in evidence” to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. This in turn requires the employer to show that the test was not job related and consistent with business necessity or that there was a less discriminatory alternative available. As stated by Justice Kennedy, who authored the 5-4 decision, “Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”

..... Applying the above standard to the facts of the case, the majority found that the test in question was job related and consistent with business necessity, as evidenced by the fact that the city undertook an extensive process to develop and administer the test, including a painstaking analysis to assure the questions asked were relevant to the positions in question. The Court also found that there was no showing that an equally valid, less discriminatory testing alternative, was readily available.

Another noteworthy aspect of the ruling was the Court’s discussion addressing the issue of what would happen if the city certified the test results, resulting in only whites being promoted, and then faced a disparate-impact suit contending that the test had a discriminatory impact on minorities. The Court stated that in light of its holding, it should be clear that the employer could avoid disparate-impact liability by showing a strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Four Justices dissented, arguing that if the city had good cause to believe use of the test would render the city liable for disparate impact discrimination, its actions “cannot be fairly characterized as race-based discrimination” or, thus, a violation of Title VII. This is especially true, the dissent argued, in light of Congress’ intent that “voluntary compliance” be the “preferred means of achieving the objectives of Title VII.” The dissent further found that, even under the strong basis in evidence standard adopted by the majority, there was ample evidence of deficiencies in the test that the case should have proceeded and been submitted to a jury.

In response to the Ricci ruling, some commentators have argued that our society truly must be “color-blind,” while others say it

Continued on page 4 ►►

Our Firm Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

EMPLOYER LAWFULLY TERMINATES EMPLOYEE FOR SECRETLY TAPE RECORDING CONVERSATION WITH SUPERVISOR



Joe Lynch
"Secretly tape-recording
conversations is
prohibited by law in
some states, but lawful in
other states."
.....

felony eavesdropping charge under state law, and her near-immediate dismissal. She filed suit contending that she was fired because she complained of sexual harassment.

The plaintiff contended that there was direct evidence of retaliation against her, pointing to the employer's admission that her secret recording of the meeting with her supervisors was one of the primary reasons for her dismissal. That is, she contended that she operated under the "protective umbrella" of Title VII – i.e., she engaged in protected activity – when she secretly recorded the meeting with her supervisors.

The court rejected the plaintiff's contentions, noting that although Title VII protects an employee who complains of discrimination, the statute does not grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination. The court, in essence, found that terminating the employee for her allegedly criminal conduct of eavesdropping by secretly tape-recording a meeting with supervisors, was a lawful reason for the termination, and the plaintiff could not prove that this proffered justification for her termination was a pretext for retaliation.

Editor's Note – Although plaintiffs have a right to "oppose" unlawful employment practices, they do not have a right to engage in "dubious self-help tactics or workplace espionage in order to gather evidence of discrimination." In this case, the employer's hand was strengthened because the plaintiff's eavesdropping violated a state law. It is likely the result would have been the same, had the employee's conduct violated an employer work rule. Had there been no work rule or state law applicable, the case would have presented a closer question.

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[bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)

KNOW YOUR ATTORNEY

Catherine E. Shuck



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CATHERINE E. SHUCK is a Senior Associate in the Knoxville, Tennessee office of the Firm, which she joined in September 2009. Cathy has practiced in the area of general civil litigation with an emphasis on research, motions and appeals since 2007. She has also served as a law clerk to Justice E. Riley Anderson of the Tennessee Supreme Court and to Judge William A. Fletcher of the United States Court of Appeals for the Ninth Circuit. She also practiced with the firm of Altshuler, Berzon, Nussbaum, Rubin and Demain in San Francisco.

Originally from Ohio, Cathy received her B.A. from Northwestern University and her J.D. from Boalt Hall at the University of California, Berkeley where she was a member of the Order of the Coif. While at Boalt Hall she was the Senior Articles Editor for the Berkeley Journal of Employment and Labor Law. Her Comment written for the journal, That's It, I Quit: Constructive Discharge After Ellerth, was cited by the United States Supreme Court in 2004. Prior to attending law school, Cathy worked for several years in the human resources field. She is an Adjunct Professor at the University of Tennessee College of Law and is a member of the Knoxville and Tennessee Bar Associations and the East Tennessee Lawyer's Association for Women. Cathy is an active volunteer at the East Tennessee Children's Hospital, serving on their Institutional Review Board and Family Advisory Council.

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WHETHER AN EMPLOYER MAY USE POLICE POLYGRAPH TEST RESULTS



Andrew Hebar

“Each subsection of the E.P.P.A. stands on its own and “constitutes an independent basis for asserting the liability of the employer” under the E.P.P.A.”

The Employee Polygraph Protection Act, (E.P.P.A.)(29 U.S.C. § 2001 *et. seq.*) prohibits an employer from using, accepting, referring to, obtaining, learning of, and/or inquiring as to the results of a polygraph examination or discharging an employee on the basis of the results of an such an examination (subject to limited exceptions). In a recent Federal Court of Appeals (Fourth Circuit) decision, an employee of SunTrust Bank claimed that he had been kidnapped in order to rob the bank. Police suspected the employee and his roommate were behind the attempted robbery. A SunTrust area manager was present (at the employee’s request) at the police station in addition to a SunTrust regional security manager when a polygraph examination was administered. In the presence of both managers, the examiner announced that the employee had failed the polygraph test. Neither manager saw the results of the polygraph test, nor did they request a copy.

The FBI administered a second polygraph examination. One investigating officer, (apparently unsolicited), informed the area manager that the employee had failed “miserably”. The employee himself later also told the area manager that he had failed the test. The regional security manager was informed of the results of the second test by the FBI. The area manager subsequently informed his superiors that the employee was considered a suspect and had failed the polygraph tests. The superiors concluded that the employee was not trustworthy and terminated him.

The employee later filed suit against SunTrust alleging two violations of the Employee Polygraph Protection Act. The employee first claimed that he was terminated based on the results of the polygraph examinations. The Fourth Circuit found that the employer was aware of the results of the two polygraph examinations. Under those circumstances, the employee could establish a prima facie case. However, the Court also found that the record showed that the employer would have terminated the employee even if it had not known the results of the polygraph examinations. Therefore, there was no violation of that portion of the E.P.P.A.

The plaintiff next contended that his employer had used, accepted, and referred to the polygraph examination results in a manner prohibited by the statute. The Fourth Circuit found that there was a question of fact as to whether the employer “used” or “referred to” the test results. Each alleged violation of the E.P.P.A. was to be analyzed as a separate and distinct claim. Each subsection of the E.P.P.A. stands on its own and “constitutes an independent basis for asserting the liability of the employer” under the E.P.P.A. For that particular provision, no proof of adverse employment action was required. Thus, although the termination claim was promptly dismissed, the employee was allowed to assert a separate claim that the employer “used” or “referred to” the polygraph examination results. See *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334 (4th Cir. 2008).

Editor’s Note – While there are limited occasions in which an employer may use or refer to polygraph results, the E.P.P.A. is both strict and technical. In most cases, employers have decided the risk of using a polygraph outweighs its potential usefulness. This case is interesting because it addresses the separate issue of the use of a polygraph by law enforcement authorities.

IS THE WITNESS LYING? – EXPERTS DEBATE THE TRUTH



Gerard Jabaley

“Thereafter, critical questions can be asked that may lead to fleeting signs of the energy at work under the surface that create what experts consider clues to lying.”

According to expert consultant groups, people on average predict correctly whether someone is telling the truth about 53% of the time, just slightly better than flipping a coin. Expert trial consultants claim to be able to use science to help attorneys analyze witness testimony for truth, claiming they can reach an accuracy rate of 90%. Much like the operation of a polygraph test, these experts cite their review starts with routine questions to which a witness would have no reason to lie, so that facial expressions, head movements, and body language can be read consistent with the situation. Thereafter, critical questions can be asked that may lead to fleeting signs of the energy at work under the surface that create what experts consider clues to lying. This would include looking for evidence of contradictory emotions – such as smiling when talking about something serious or nodding the head when saying no, and fleeting facial expressions not meant to be revealed that are leaked involuntarily. According to David Matsumoto, Managing Partner of the consulting firm The Paul Ekman Group, there is one tip for truth detection: “If you want to know if someone is lying, ask them to tell a chronological story backward.” If a person is lying, according to Matsumoto, it is very difficult to do so.

HIGH COURT CLARIFIES WHAT "BECAUSE OF" AGE MEANS



Mary Dee Allen

"The practical effect of the ruling is to eliminate so-called mixed-motive cases under the ADEA – cases in which age was one of several factors motivating the employer's action."

The U.S. Supreme Court, in a 5-4 decision issued in *Gross v. FBL Financial Services, Inc.* ___ U.S. ___ (2009), ruled that the text of the Age Discrimination in Employment Act (ADEA) does not allow a worker to establish discrimination by showing that age was one of multiple motivating factors in the employer's adverse decision. Instead, the majority held that the ordinary meaning of the ADEA requirement that an adverse action be "because of" age, requires that age be the only "reason" that the employer decided to act. In doing so, the majority ruled that precedent under Title VII cases and its 1991 amendments do not apply to the ADEA. Title VII and its amendments make it unlawful to act, if discrimination on any protected basis played any role in an employer's decision, even if the employer was also motivated by lawful factors. Thus, a jury verdict in favor of a plaintiff was overturned, where the trial court had instructed the jury to enter a verdict for the plaintiff if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and further told the jury that age was a motivating factor if it played a part in the demotion. The practical effect of the ruling is to eliminate so-called mixed-motive cases under the ADEA – cases in which age was one of several factors motivating the employer's action.

Further, the Court ruled that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Editor's Note – Civil rights groups argue that applying different standards for proving discrimination under Title VII and the ADEA is not good public policy. While that may be so, the history of the ADEA differs from that of Title VII, as the laws were passed at different times and incorporated certain different statutory concepts. Further, other differences between the two laws exist, such as Title VII's, but not the ADEA's, "adverse impact" theory, which makes it unlawful to base an action on a neutral or objective criteria if doing so has an adverse impact on a protected group unless the criteria is justified by business necessity. The Court's ruling may not make that much practical difference to a jury, but the analysis may help employers get summary judgment in ADEA cases.

"AFFIRMATIVE ACTION FOR MINORITIES" continued from page 1

increases the burden on employers who are trying to follow the law by avoiding both disparate treatment and disparate impact types of racial discrimination.

Meaning to Employers

The *Ricci v. DeStefano* ruling addresses one of the great debates of our time – can in some circumstances affirmative action or immediate relief in favor of minorities disadvantaged in the past result in discrimination against the majority? The Court addressed this dilemma in the context of an employer that had trained professionals develop an objective, apparently valid selection device, only to find that the test results led to the promotion of only whites, and no minorities, to supervisory positions. The employer was faced with a dilemma – whether to risk a lawsuit by the disadvantaged minorities who claimed they were denied promotion due to a racially discriminatory test (because of its adverse impact on minorities without being a valid selection device), or as in this case, the whites who had studied hard for many months and thought they were entitled to the promotions based on the results of the professionally developed test.

For employers desiring to practice equal employment opportunity, including engaging in voluntary affirmative action to hire and promote minorities and females to proportional representation in all job categories, there is no question that this decision raises additional legal liability. One thing is for sure, employers are going to need specialized legal counsel in evaluating and deciding whether to use any type of hiring or promotion selection criteria. Most employers mistakenly confuse "tests" with paper and pencil tests, but the law is clear that "tests" include any type of employee selection device for hiring or promotion. Thus, even an interview committee constitutes a "test" subject to all applicable legal principles.



Wimberly Lawson

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We invite you to attend our 30th Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

**Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 5 & 6, 2009**

A FEW COMMENTS FROM PRIOR YEARS

““ Accurate updates -
excellent presentations ““

““ This is always the most
valuable seminar of the year. ““

““ Very informative -
great resource ““

““ So well organized -
materials, speakers;
the best seminar
presentation of any
I have attended. ““



GUEST SPEAKER
Hallerin Hilton Hill
*Author, Motivational Speaker,
Trainer, Talk Show Host*



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Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
- I-9, E-Verify and Immigration Issues
- Recession and RIFs – Tips for Dealing with the Downturn
- Workers' Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,

Hallerin Hilton Hill



AGENDA

Thursday, November 5, 2009 (9:00 a.m. - 5:00 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session

The Year in Review - Employment/Labor Update
Wage and Hour Insights Regarding U.S. Department of
Labor Enforcement of FLSA

ADAAA - What Difference Does it Make?

Pending Workplace Legislation - Are You Ready for Change?

11:00 a.m. - 12:00 p.m. - Breakout Sessions

Employee and Employer Rights and Obligations Under the FMLA

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

OSHA - There is a New Sheriff in Town

Workers Compensation - Strategies to Manage Claims

Immigration Issues from A to Z

12:00 p.m. - 1:30 p.m. - Lunch (*Courtesy of Wimberly Lawson*)

1:30 p.m. - 2:30 p.m. - General Session

“Striking the Right Chord with the Six Strings of Success for
Maximum Personal and Professional Effectiveness” (by Hallerin Hilton Hill)

2:45 p.m. - 3:45 p.m. - Breakout Sessions

Recession, RIFs and Reality: Tips for Dealing with the Downturn

Major Labor Law Reform - EFCA, NLRB Decisions, and More

Workplace Violence - Prevention and Policies

Wage and Hour Issues - A Refresher Course for Compliance

Individual Employee Contracts - Who, What, When & How

4:00 p.m. - 5:00 p.m. - General Session

Records Retention and Destruction

Dress Codes and Employee Appearance Issues

Ledbetter Fair Pay Act - What It Means to You

Electronic Discovery Rules - What They Mean to You Before a Lawsuit is Filed

5:00 p.m. – 7:00 p.m. - Reception (*please join us for scrumptious hors d'oeuvres*)

Friday, November 6, 2009 (8:30 a.m. - 12:30 p.m.)

8:00 a.m. – 8:30 a.m. - Continental Breakfast

8:45 a.m. - 9:45 a.m. - General Session

OFCCP and Affirmative Action Update

Class Action Lawsuits - Could This Mean You?

Developing a Crisis Management Plan

10:00 a.m. - 11:00 a.m. - Breakout Sessions

Union Organizing Update - Don't Be Caught Unaware

Alternative Dispute Resolution - Mediation & Arbitration Analyzed

Socialism Run Amok - Employee Benefit Strategies in an Era of Governmental Mandates

Immigration Worksite Enforcement

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

11:00 a.m. - 12:30 p.m. General Session

EEOC Enforcement Initiatives

New Prohibitions Regarding Use of Genetic Information

Diversity - Why Can't We All Get Along?

2009 COBRA Subsidy

12:30 p.m. - 12:45 p.m. Conclusion and Prizes



This program has been approved for 9 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

This program has been accredited by Tennessee CLE for 9.0 general credit hours.



Wimberly Lawson

Attorneys & Counselors at Law

Thirtieth Annual Labor & Employment Law Update Conference

**Knoxville Marriott - Knoxville, Tennessee
November 5-6, 2009**

COST:

Early Bird (registration AND payment received by October 1)

\$295 per person

\$275 for each additional person from same company

\$230 for eight or more from same company

Registration and payment received AFTER October 1

\$335 per person

\$315 for each additional person from same company

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REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 5, 2009

CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

HOTEL ACCOMMODATIONS

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Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.95/standard.

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RESERVE ONLINE at www.marriott.com/TYSMC
(use the Group Code **LAWLAWA** to reserve at the conference rate)

FOUR WAYS TO REGISTER

1. Mail to: Bernice Houle
Wimberly Lawson Seale
Wright & Daves, PLLC
P.O. Box 2231
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: www.wimberlylawson.com



GUEST SPEAKER

Hallerin Hilton Hill

*Author, Motivational Speaker,
Trainer, and Talk Radio Host*

Striking the Right Chord with the Six Strings of Success for Maximum Personal and Professional Effectiveness!

Hallerin Hilton Hill will inspire and challenge you to reach your own personal and professional success with his latest presentation.

Hallerin is a radio talk show host, motivational speaker, and trainer. Hallerin's morning radio show airs from 5:30-10 every weekday mornings on Newstalk 100 WNOX. Hallerin was named to the "Top 100 Most Powerful People in Tennessee" and the "Top 50 Most Powerful African-Americans in Tennessee by Business Tennessee magazine (April 2004; page 39). He is the author of the books *Make 'em Say WOW!* and *The Seven Pillars of Wisdom*. Hallerin is also the television talk show host of *Anything Is Possible*, airing Sunday's at noon on the NBC affiliate in Knoxville. Hallerin has been voted Best Talk Show host by Metro Pulse 9 years in a row. His mission is to inspire, inform and entertain every time the microphone comes on. Hallerin is a graduate of Oakwood College in Huntsville, Alabama where he studied Communications. He is married to Nedra, and they have two children, Hallerin II and Halle Nicole. Hallerin is the CEO and founder of Wisdom House - a multimedia company focused on inspiring people around the world to grow in wisdom. He speaks to thousands of people each year to help inspire, motivate and encourage excellence.

Name _____

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BPR and State for CLE: _____ No. Attending Reception: _____

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.