



July 13, 2010

A Review of the Supreme Court's 2009 – 2010 Term

As the United States Supreme Court's 2009-2010 term drew to a close, commentators remarked on the evolution of the Roberts Court. Justice Roberts continued to emerge as a key figure this term, as he was a member of the majority 92 percent of the time, more than any other justice. While his majority percentage may suggest to some a willingness to compromise with his more liberal colleagues on certain issues, he also clearly demonstrated firm convictions on important issues such as campaign finance and gun rights, which yielded some of the most highly publicized decisions of the term. Indeed, the Court's ruling in the *Citizens United* case, which invalidated legislation imposing limits on corporate spending in elections, has led some commentators to conclude that the Roberts Court is ushering in an era where business interests will reign supreme.

This view, however, does not accurately characterize the Court's labor and employment decisions, which demonstrate a far more even split between employer and employee interests. The nine employment-related decisions issued by the Court this term included:

- Two ERISA cases (*Conkright*, *Hardt*);
- Two attorneys' fees cases (*Perdue*, *Hardt*);
- Three arbitration cases (*Stolt-Nielsen*, *Rent-a-Center West*, *Granite Rock*); and
- Important proclamations regarding: authority of the two member National Labor Relations Board (*New Process Steel*), timeliness of discrimination charges (*Lewis*), and privacy rights (*Quon*).

These decisions demonstrated that the Court's conservative justices continue to play a dominant role, a trend that will likely continue at least through the next term with the pending retirement of Justice Stevens. Of these nine decisions, five were decided 5-4 or 5-3, with the conservative block constituting the majority in all but one. The remaining four decisions were generally unanimous, with the exception of a partial dissent in *Granite Rock*. Of the nine decisions, five are viewed as generally favorable to employers; of the remaining four, viewed as favorable to employees, three were essentially unanimous, including the *Granite Rock* ruling against the viability of a new federal cause of action for tortious interference under § 301(a) of the Labor Management and Relations Act.

Executive Summary

The following table briefly summarizes the issues and outcome of each of the Court's nine labor and employment decisions this term.



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CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
<p>1. <i>New Process Steel v. National Labor Relations Board</i> Case No. 08-1457 Decided: June 17, 2010</p>	<p>The National Labor Relations Act requires the Board to maintain at least three members in the group to which the Board's authority has been delegated for the Board to take valid action; decisions of the two member Board are invalid.</p>	<p>Split: 5-4 Majority: Stevens (joined by Roberts, Scalia, Thomas and Alito) Dissent: Kennedy (joined by Breyer, Ginsburg and Sotomayor)</p>
<p>2. <i>Lewis v. City of Chicago</i> Case No. 08-974 Decided: May 24, 2010</p>	<p>A plaintiff who does not file a timely charge challenging the adoption of a particular employment practice may nevertheless assert a disparate impact claim challenging the employer's subsequent application of that practice.</p>	<p>Split: 9-0 Opinion: Scalia (writing for a unanimous Court).</p>
<p>3(a). <i>Rent-A-Center, West, Inc. v. Jackson</i> Case No. 09-497 Decided: June 21, 2010</p>	<p>Under the Federal Arbitration Act, while a district court decides the enforceability of an arbitration clause if the party specifically challenges that provision, if a party challenges the enforceability of the agreement as a whole, the decision is the arbitrator's.</p>	<p>Split: 5-4 Majority: Scalia (joined by Roberts, Kennedy, Thomas and Alito). Dissent: Stevens (joined by Ginsburg, Breyer and Sotomayor).</p>



<p>3(b). <i>Granite Rock Company v. International Brotherhood of Teamsters</i></p> <p>Case No. 08-1214</p> <p>Decided: June 24, 2010</p>	<p>Disputes over the effective date of a collective bargaining agreement containing an arbitration clause are properly resolved by the courts as opposed to the arbitrator; court also refuses to recognize a new federal cause of action under § 301(a) of the Labor Management Relations Act (LMRA) for the union’s alleged tortious interference with the collective bargaining agreement.</p>	<p>Split: 9-0</p> <p>Majority: Thomas (joined by Robert, Kennedy, Scalia, Thomas, Breyer and Ginsburg)</p> <p>Concurring in Part and Dissenting in Part: Sotomayor (joined by Stevens)</p>
<p>3(c). <i>Stolt-Nielsen v. AnimalFeeds International Corp.</i></p> <p>130 S.Ct. 1758</p> <p>Decided: April 27, 2010</p>	<p>Arbitrators cannot decide class-wide arbitration claims unless an arbitration agreement specifically provides for it.</p>	<p>Split: 5-3</p> <p>Majority: Alito (joined by Roberts, Scalia, Kennedy and Thomas)</p> <p>Dissent: Ginsburg (joined by Stevens and Breyer)</p> <p>Sotomayor recused.</p>
<p>4(a). <i>Perdue v. Kenny</i></p> <p>130 S.Ct. 1662</p> <p>Decided: April 21, 2010</p>	<p>An attorneys’ fees award made under a federal fee-shifting statute in a civil rights case can include an enhancement for superior attorney performance only in “extraordinary” circumstances.</p>	<p>Split: 5-4</p> <p>Majority: Alito (joined by Roberts, Scalia, Kennedy and Thomas).</p> <p>Concurrence: Kennedy</p> <p>Concurrence: Thomas</p> <p>Concurring in Part and Dissenting in Part: Breyer (joined by Stevens, Ginsburg and Sotomayor)</p>



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<p>4(b). <i>Hardt v. Reliance Standard Life Insurance Co.</i> Case No. 09-448 Decided: May 24, 2010</p>	<p>An ERISA claimant asserting wrongful denial of a claim for benefits under § 502(a)(1)(B) may be entitled to attorneys’ fees as long as there is “some degree of success on the merits.”</p>	<p>Split: 9-0 Majority: Thomas (joined by Roberts, Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor and Stevens as to Parts I and II) Concurrence: Stevens</p>
<p>5. <i>Conkright v. Frommert</i> 130 S.Ct. 1640 Decided: April 21, 2010</p>	<p>Administrators of ERISA plans that provide for discretionary review are entitled to deferential judicial review of their plan interpretations, even if a previous interpretation of the same plan provision was unreasonable.</p>	<p>Split: 5-3 Majority: Roberts (joined by Scalia, Kennedy, Thomas and Alito) Dissent: Breyer (joined by Stevens and Ginsburg) Sotomayor recused.</p>
<p>6. <i>City of Ontario, California v. Quon</i> Case No. 08-1332 Decided: June 17, 2010</p>	<p>The city’s review of two months’ worth of text messages on a police officer’s city-issued pager was reasonable where the city was concerned that, among other things, it might be paying for employees’ personal use of those pagers.</p>	<p>Split: 9-0 Majority: Kennedy (joined by Roberts, Stevens, Thomas, Ginsburg, Breyer, Alito, Sotomayor and Scalia, except for Part III A) Concurrence: Scalia</p>



Individual Case Analysis

Following is a more detailed summary of each of these decisions and their likely impact on employers. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

1. **Supreme Court Invalidates Approximately 600 NLRB Decisions**

In *New Process Steel v. NLRB*, Case No. 08-1457 (June 17, 2010), the Supreme Court ruled that the National Labor Relations Board (the Board) does not have the authority to issue decisions without at least three members sitting on the Board. The Court's decision invalidated roughly 600 decisions that had been issued by the Board during a 27-month period in which the Board had only two members.

A fully constituted labor board has five members, but the National Labor Relations Act (NLRA) allows the Board to delegate its authority to a group of at least three members. The NLRA further provides that the Board's three-member group can take action so long as two of the members concur in the decision. Beginning in January 1, 2008, however, the Board took the position that it could operate with only two members after the appointments of certain Board members expired. The Board issued almost 600 two-member decisions during this time. The *New Process Steel* case arose out of an unfair labor practice charge in the Seventh Circuit. The Seventh Circuit concluded that the two member panel constituted a valid quorum of the three member group to which the Board has delegated its powers, and therefore could issue valid decisions.

The Court reversed the Seventh Circuit, holding that the NLRA requires the Board to *maintain at least three members* in the group to which the Board's authority has been delegated for the Board to take valid action. In contrast, the dissent found that the decisions issued under the two member panel were valid, finding authority in the fact that only a two-member quorum is required in support of a decision. While the dissent found that the NLRA's delegation clause to a three member board clearly demonstrated that Congress did not want to delegate to two members regularly, the Board could function with two members in extraordinary circumstances.

The holding of the case likely has little impact on employers who received one or more of the 600 decisions issued by the Board while it was operating with two members. While the Court did not address what happens to these cases, given the composition of the Board—a Democratic appointee and a Republican appointee—during that time, there is unlikely be to a reversal of those cases or any larger substantial labor law changes. However, the decision did result in the speedy confirmation of two new members to the Board, Mark Gaston Pearce and Brian Hayes, insuring that the Board will have three members following the expiration of Republican appointee Schaumber's term in August 2010.



2. Disparate Impact Claims May Be Brought Against Practices When They Are Used, Regardless of When Adopted

In a unanimous decision, *Lewis v. City of Chicago*, Case No. 08-976 (May 24, 2010), the Supreme Court held that a plaintiff who does not file a timely charge challenging the adoption of a particular employment practice may nevertheless assert a disparate impact claim that challenges the employer's subsequent application of that practice.

In January 1996, the City announced that it would hire randomly from the pool of firefighters who scored 89 or above out of a possible 100 points. Those individuals were deemed "well qualified," whereas those applicants who scored below 65 points were notified that they failed the test. Notably, the "in between" applicants who scored between 65 and 88 points were considered "qualified" but were placed on an eligibility list because, based on projected hiring needs, it was not likely they would be hired. In May 1996, the City selected its first class of applicants by drawing randomly from the "well qualified" range of scores. The City repeated this process 10 more times over the next six years, each time hiring from the "well qualified" range.

On March 31, 1997, African-American applicants who scored in the "qualified" range and had not been hired filed a charge with the EEOC, alleging that the City's practice of selecting only those applicants who scored 89 or better for advancement caused a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act.

The District Court rejected the City's claim that the plaintiff's claims were untimely, finding that the ongoing reliance on the 1995 test results constituted a continuing violation under Title VII. The Seventh Circuit Court of Appeals reversed, holding that the claims were in fact untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act – the decision to sort the scores into "well qualified," "qualified" and "not qualified" categories. In its view, the subsequent hiring decisions made over the next six years were immaterial because they were the automatic consequence of the test scores, rather than new, discrete discriminatory acts.

The Supreme Court reversed the decision and held that the City's use of the cutoff score in selecting candidates constituted an employment practice that caused a disparate impact that was actionable under Title VII. According to the Court, a Title VII plaintiff establishes a *prima facie* case of disparate impact discrimination by showing that the employer *uses* a particular employment practice that causes an unlawful disparate impact. While Title VII itself does not define the term "employment practice," the Court found that the term encompassed the City's conduct in this case. Although it had adopted the eligibility list earlier and announced an intention to draw from that list, it made use of the practice of excluding those applicants below 89 each time it selected a new class of firefighters. The Court held that the plaintiffs' allegation that this exclusion had a disparate impact upon African American applicants stated a cognizable claim under Title VII.



The Court recognized the potential practical implications of its decision. It noted that employers could face new disparate impact suits for practices that they have used regularly for years, and that evidence essential to a business-necessity defense might be unavailable or unreliable by the time subsequent lawsuits are brought. However, the court found that adopting the City's position in this instance would allow an employer to adopt an unlawful employment practice and continue using that practice indefinitely, with impunity, despite ongoing disparate impact, simply because no timely charge was brought challenging the adoption of that practice.

The opinion marks a notable departure from Scalia's concurrence in *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) during the Court's 2008-2009 term. At that time, Justice Scalia flirted with the notion that disparate impact claims were inherently in conflict with the "disparate treatment" prohibition of Title VII and the Equal Protection guarantees of the United States Constitution which prohibit intentional race-based decision making. He noted that Title VII's disparate impact provisions often require "employers to evaluate the racial outcomes of their policies, and to make decisions (because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory." *Id.* at 2682.

Lewis makes clear that any predictions about the demise of "disparate impact" claims may have been premature. Scalia's unanimous opinion in *Lewis* makes no mention of his prior comments in *Ricci* and expresses no misgivings about the viability of disparate impact claims generally, where there is no issue or claim pending that an employer's attempt to remedy or protect against a disparate impact has resulted in potentially discriminatory race-based decision. While *Ricci* clearly holds that an employer cannot engage in race-based remedial action absent a "strong basis in evidence" that such action is necessary to remedy a practice shown to have an unlawful disparate impact, in *Lewis* there was no allegation or issue before the Court that the application of a disparate impact theory had resulted, or would result, in the employer engaging in intentional discrimination as a means to remedy the disparate impact. Thus, the Court, Scalia included, appears to be in no hurry to resolve what Scalia characterized as a potentially irreconcilable conflict between the two theories of discrimination. As a result, for the time being, employers, particularly those in the public sector, will have to continue to walk the fine line between ensuring that their policies do not have a race-based disparate impact, and ensuring that any efforts to protect against a disparate impact do not result in intentional race-based decision making.

3. Court Continues to Promote Arbitration and Stresses Critical Question Is: What Have Parties Agreed To?

a. Arbitrators Determine the Enforceability of Contracts as a Whole, While Courts Determine Whether Parties Agreed to Arbitrate.

In *Rent-a-Center West v. Jackson*, Case No. 09-497 (June 21, 2010), the Supreme Court ruled that where a party specifically challenges the enforceability of an agreement to arbitrate, the District Court makes the enforceability determination, but if a party challenges the enforceability of the agreement as a whole, the enforceability determination should be made by the arbitrator.



The case began when an employee filed an employment discrimination suit against his former employer in a Nevada District Court. The employee had previously signed an arbitration agreement which provide for arbitration of all past, present or future disputes arising out of his employment, including “claims for discrimination” and “claims for violation of any federal ... law.” It also provided that “[t]he Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” Accordingly, the employer moved to compel arbitration. The employee opposed the motion to compel on the grounds that the arbitration agreement was unconscionable, and therefore unenforceable. The District Court granted the employer’s motion to compel arbitration, finding that the enforceability question belonged to the arbitrator. On appeal, the Ninth Circuit affirmed that the decision of the District Court.

Reversing the Ninth Circuit, the Supreme Court drew a distinction between two kinds of validity challenges under § 2 of the Federal Arbitration Act (FAA). One type of validity challenge goes to the agreement to arbitrate, while the other challenges the agreement as a whole, either on a ground that directly affects the entire agreement, or on the ground that the illegality of one of the agreement’s provisions renders the whole agreement invalid. The Court found that the basis of a challenge to an agreement must be directed specifically to the agreement to arbitrate before a court will intervene. Thus, unless a party contends that an agreement to arbitrate itself was somehow invalid or unenforceable, any other dispute about the overall validity or enforceability of the underlying contract is for the arbitrator to decide.

The dissent found that questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. The dissent would allow questions of arbitrability to go to the arbitrator in two circumstances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so, or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part. The dissent found that questions of unconscionability preclude any determination that there has been a clear and unmistakable agreement sufficient to submit such an issue to the arbitrator.

This decision reaffirms that arbitration under the FAA is largely a creature of contract law. Once the court has determined that the parties have entered into a valid agreement to arbitrate a dispute, all aspects of that dispute, except the narrow issue of whether the parties validly agreed to arbitrate in the first instance, is typically for the arbitrator to decide. While the long-term impact of this decision is unclear, the decision does establish that it behooves employers to include language in arbitration agreements that explicitly delegates questions of enforceability to arbitrators.

b. Determining Agreements to Arbitrate Includes Determining Contract Ratification

On the heels of the *Rent-a-Center* decision, the Supreme Court handed down *Granite Rock Company v. International Brotherhood of Teamsters*, Case No. 08-1214 (June 24, 2010), in which it found that



disputes over the effective date of a collective bargaining agreement containing an arbitration clause were properly resolved by the courts. A unanimous court also refused to recognize a new federal cause of action under § 301(a) of the LMRA for the union's alleged tortious interference with the collective bargaining agreement.

Granite Rock and Local 287 (Local) were parties to a 1999 collective bargaining agreement (CBA) that expired in April 2004. The parties attempted to negotiate a new CBA but reached impasse resulting in a strike on June 9, 2004. The strike continued until July 2, 2004, when the parties reached agreement on the terms of a new CBA. The new CBA contained a no-strike clause, but did not address union members' liability for any strike-related damages incurred before the new CBA was negotiated but after the prior CBA had expired. International Brotherhood of Teamsters (IBT) opposed Local's decision to return to work without an agreement shielding both Local and IBT members from liability for strike-related damages. Therefore, IBT instructed Local members to continue the strike until the liability issue was resolved. On July 9, 2004, Granite Rock sued IBT and Local, seeking an injunction against the strike and strike-related damages. The complaint invoked jurisdiction under LMRA § 301(a), and asked the District Court to enjoin the strike because the hold-harmless dispute giving rise to the strike was an arbitrable grievance.

The District Court initially denied Granite Rock's request to enforce the no-strike provision, but after Local members testified that the new CBA was ratified on July 2, Granite Rock moved for a new trial. Granite Rock also amended its complaint to add tortious interference claims against IBT. While that motion was pending, Local conducted a second successful ratification vote on the CBA on August 22. IBT and Local moved to dismiss because: (1) Granite Rock could not plead a tort claim under § 301(a) and (2) the ratification date dispute (whether ratification was on July 2 and August 22) should be arbitrated. The District Court agreed with IBT and Local as to the tort claim issue and dismissed it. However, it determined that the ratification date dispute was for a court to decide, and a jury determined the CBA was ratified on July 2. Therefore, the District Court ordered the parties to proceed with arbitration on Granite Rock's breach of contract claims for strike-related damages. The Ninth Circuit affirmed the dismissal of the tortious interference claims, but disagreed that the date of the CBA ratification was a matter for judicial resolution.

The Supreme Court affirmed the decision as to the tortious interference claims, but reversed the Ninth Circuit's decision that the ratification date determination was one for the arbitrator. In light of the unusual facts of the case, the Court emphasized that the proper framework for deciding when disputes are arbitrable is that a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To reach satisfaction, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause a party is seeking to enforce. In this case, the issue of when the CBA was ratified required judicial resolution because this was the threshold issue to determining whether the parties had agreed to submit their disputes to arbitration. The Court also noted an additional reason for judicial resolution – the dispute fell outside the scope of the



parties' arbitration clause. The clause stated that "[a]ll disputes *arising under this agreement* shall be resolved in accordance with the [Grievance] procedure." The ratification dispute clearly did not arise under the agreement.

The Court next addressed the question of whether a federal tort claim could be brought under § 301 for alleged interference with the CBA. The Court observed that the balance federal statutes strike between employer and union relations in the collective bargaining arena is "carefully calibrated," and concluded that creating a federal common law tort cause of action would require a host of policy choices that could easily upset this balance. Despite this result, the Court explicitly noted that it did not approve of IBT's conduct, and encouraged the employer to pursue other available means of redress (i.e. state law, breach of contract or administrative action).

The dissent found that the whether the CBA proscribed the July work stoppage was clearly a dispute arising under the CBA. According to the dissent, it was "entirely irrelevant" when the CBA was ratified, because the CBA was made retroactive from May 1, 2004. Since the strike postdated the May 1 date, the matter was clearly arbitrable. Notably, the majority chose not to address the retroactivity argument because the parties had failed to raise it in earlier proceedings, and it was therefore waived.

c. Class Claims are Arbitrable Only If Agreement Clearly Provides For It

In *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010), the Supreme Court ruled that arbitrators cannot decide class action arbitration claims unless an arbitration agreement specifically provides for it.

The case involved an arbitration clause which did not expressly state that the parties could present class or group claims. A panel of arbitrators found that they had authority to hear the class claims, and their decision was upheld by the Second Circuit.

The Supreme Court held that the arbitral panel exceeded its power in deciding to entertain class claims because it embraced its own policy views rather than attempting to give effect to intent of the parties. According to the Court, imposing class arbitration on parties who had not agreed to it is inconsistent with the Federal Arbitration Act (FAA). The Court said the FAA imposes rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." The FAA's central purpose, according to the Court, is to ensure that "private agreements to arbitrate are enforced according to their terms." Parties may agree to limit the issues arbitrated and may agree on rules under which an arbitration will proceed. Therefore, the Court reasoned that a party may not be compelled under the FAA to submit to class arbitration unless there is an express contractual basis for concluding that it specifically agreed to do so. However, the dissent found that the arbitrators were asked to interpret the arbitration clause, and by finding that class claims were arbitrable, they did not exceed their authority.



Despite the Court's ruling, employers should use caution before creating policies that require arbitration of employment claims but also exclude class action claims or prohibit class-wide relief. Among other concerns, under the NLRA, employees have the right to form, join or assist a union, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is possible that the labor board or courts could find that employers unlawfully interfere with their employees' Section 7 rights when they impose an arbitration agreement on employees that prevents resolution of class or group claims.

4. Courts Awarding More Attorneys' Fees May be on the Horizon

Two decisions this term addressed the ability of prevailing claimants to recover attorneys' fees and rejected the defendants' attempts to limit the circumstances under which a claimant can recover fees or limit the amount of fees that can be awarded.

a. Attorneys' Fees Award Under a Fee Shifting Statute May Be Enhanced in "Extraordinary Circumstances"

In *Perdue v. Kenny*, 130 S.Ct. 1662 (2010), the Supreme Court held that an attorneys' fees award made under a federal fee-shifting statute in a civil rights case can include an enhancement for superior attorney performance in "extraordinary" circumstances.

This case was brought on behalf of 3,000 children in foster care who claimed that deficiencies in the foster-care system in two counties near Atlanta violated their federal and state constitutional and statutory rights. Following the parties entering into a consent decree, the children's attorneys submitted a request for more than \$14 million in attorneys' fees. Half of the \$14 million figure was based on the lodestar – approximately 30,000 hours of attorney and non-attorney time. The other half was a fee enhancement for superior work and results. The attorneys argued that without this enhancement, lawyers of similar skill, judgment, professional representation and experience would not be incentivized to litigate this kind of case.

The Court held that the District Court properly enhanced the attorneys' fees in this case. While attorneys' fees should not typically be enhanced, the District Court may do so where the quality of the attorneys' performance led to a more favorable outcome than predicted based on governing law. The attorney seeking such an enhancement must also show that the lodestar method alone is insufficient because: (1) the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, (2) the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted, or (3) extraordinary circumstances in which an attorney's performances involves exception delay in the payment of fees. While the Court upheld the general enhancement principle, it overturned the District Court's enhancement in this case as insufficiently supported. Justice Kennedy and Justice Thomas concurred separately to emphasize that extraordinary cases justifying fee enhancement are present in the "rarest of circumstances."



Four members of the Court dissented because, while they agreed with the conclusion that an enhanced award may be justified, they disagreed that the Court needed to second-guess the lower court's decision to award such an enhanced fee in this case. The dissent stated that the District Judge did not abuse his discretion because the lawyers' objective in the case was unusually important and fully consistent with the central objectives of 42 U.S.C. 1983, the course of the lawsuit was lengthy, the results obtained were exceptional and the attorney performance was exceptional.

b. Fees May Be Awarded Under ERISA if There is "Some Degree of Success"

Shortly thereafter, the Supreme Court handed down *Hardt v. Reliance Standard Life Insurance Company*, Case No. 09-448 (May 24, 2010), in which the Court ruled that an Employee Retirement Income Security Act (ERISA) claimant may be entitled to attorneys' fees as long as there is "some degree of success on the merits."

This case began when Hardt sought long-term disability benefits pursuant to her employer's ERISA plan, which she was denied. After exhausting her administrative remedies, Hardt brought suit, and both parties moved for summary judgment. The District Court denied Reliance's motion for summary judgment, finding that the decision to deny benefits was based on incomplete information. The District Court also denied Hardt's motion for summary judgment, concluding that while it found compelling evidence to suggest that Hardt was totally disabled, it refused to rule in her favor without first giving Reliance the opportunity to address the deficiencies in its evaluation. The District Court ordered Reliance to act on Hardt's application by adequately considering all the evidence within 30 days, or judgment would be entered in favor of Hardt. Reliance conducted a review and awarded her disability benefits. Hardt then moved for attorneys' fees and costs, which the court granted. Reliance appealed, and the Fourth Circuit reversed, holding that Hardt was not a "prevailing party."

The Supreme Court ruled that a fee claimant need not be a prevailing party to be eligible for attorneys' fees award under § 502(g)(1). The language of § 502(g)(1) provides: "the court in its discretion may allow reasonable attorneys' fee and costs of action to either party." Therefore, the party need only have achieved some success on the merits. In this action, the District Court found compelling evidence that Hardt was totally disabled and was inclined to rule in her favor. Therefore, the Court found that the facts established that Hardt achieved far more than trivial success on the merits or a purely procedural victory, and therefore it was within the District Court's discretion to award attorneys' fees.

What employers should take away from these fees cases is that the Court is endorsing judicial discretion in awarding fees. While enhancement is unlikely to become a common practice, employers should be aware that it is a possibility. In the event of an adverse decision, attorneys' fees may often approach if not exceed the amount of underlying liability. Accordingly, when determining how best to handle litigating employment matters, employers should confer with their counsel to examine what they can expect to pay in attorneys' fees should the plaintiff(s) prevail.



5. **ERISA Administrators Entitled to Deferential Judicial Review**

In *Conkright v. Frommert*, 130 S.Ct. 1640 (2010), the Supreme Court ruled that administrators of ERISA plans that provide for discretionary review are entitled to deferential judicial review of their plan interpretations, even if a previous interpretation of the same plan provision was unreasonable.

The case concerns Xerox employees who left the company in the 1980s and received lump-sum distributions of retirement benefits earned up to that point, and who were later rehired. The issue stems from how to account for the employees' past distributions when calculating their current benefits to avoid paying the same benefits twice.

The Plan Administrator initially interpreted the Plan to allow for the use of the "phantom account" method, which calculates the hypothetical growth the past distributions would have experienced if the money had remained in Xerox's investment funds, and reduces the employees' present benefits accordingly. This method was rejected by the Second Circuit as unreasonable. On remand, the District Court considered other accounting methods, including one submitted by the Plan Administrator that accounted for the time value of the employees' previously received money, but which did not calculate the present value of the past distributions based on events that occurred after the past distribution was made. Instead, the new approach used an interest rate, fixed at the time of distribution, thereby calculating the distribution's present value based on information known at the time of the distribution. Xerox argued that the District Court should apply a deferential standard of review and accept this new approach as a reasonable Plan interpretation. The District Court declined to apply a deferential standard of review, and the Second Circuit affirmed its decision, holding that a court need not apply a deferential standard where the Administrator has previously construed the same Plan terms in violation of ERISA.

The Supreme Court refused to accept the "one-strike-and-you're-out" approach. Due to the fact that ERISA is enormously complex and detailed, the Court found that "a single honest mistake" did not justify stripping the Administrator of deference. In short, all of the reasons for awarding deference to Plan Administrator decisions – efficiency, predictability and uniformity – are not affected by one err in the Plan Administrator's judgment. The dissent found that courts are not obligated to defer to a Plan Administrator where an Administrator has previously construed the same Plan terms in violation of ERISA.

The practical implication for employers is the maintenance of the *status quo*. Employers need not be concerned that a single honest mistake will result in courts usurping the Plan Administrator's authority to interpret the terms of an ERISA plan. In short, Plan Administrators should continue striving to interpret the Plan in good faith without fear that an occasional misinterpretation will divest them of their authority.



6. **Court Finds Employer Search of Text Messages Reasonable**

In *City of Ontario v. Quon*, Case No. 08-1332 (June 17, 2010), the Supreme Court held that a California city's review of two months' worth of text messages on a police officer's city-issued pager constituted a "reasonable search" that did not violate the Fourth Amendment's prohibition on "unreasonable searches and seizures" where the city was concerned that, among other things, it might be paying for employees' personal use of those pagers. Notably, the Court took pains to limit its holding to the particular facts of the case, making clear that it wished to avoid defining the contours of employee privacy rights on new technology before the role of the technology in the workplace and society become clear.

The case arose when officials for the City of Ontario, California noticed that an officer on the City's SWAT team, Jeff Quon, was repeatedly exceeding the character limit on his work-issued pager, leading to overage charges. An audit of the officer's text messages uncovered hundreds of personal messages, some of which were of a sexual nature. The District Court held a jury trial to determine the purpose of the audit. The jury concluded that the audit was ordered to determine the efficacy of the character limits, and the District Court accordingly held that the employer did not violate the Fourth Amendment. The Ninth Circuit reversed, finding that even though the search was conducted for "a legitimate work-related rationale," it "was not reasonable in scope." Because the audit was not conducted in the least intrusive manner possible, the Ninth Circuit held that it violated the Fourth Amendment.

The Supreme Court reversed the Ninth Circuit by focusing on one question: was this particular employer's review of text messages a reasonable search under the Fourth Amendment? The Court has long recognized that public employees are protected under the Fourth Amendment against "unreasonable" searches by public employers at work. *Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989). In *Quon*, the Court noted that regardless of the employee's expectation of privacy, an employer's search of an employee's property at work is reasonable if it is a non-investigatory, work-related search or a search incident to an investigation of work-related misconduct, and if the search is "justified at its inception" and "reasonable in scope." Because the City had a legitimate interest in ensuring that employees were not paying for work-related messaging expenses and that the City was not paying for personal messages, the Court found that the search was justified at its inception. Moreover, the Court refused to adopt the Ninth Circuit's view that only the least intrusive search is reasonable in scope. This search was reasonable in scope for three reasons: (1) it was an "efficient and expedient" way to reach the City's goal, (2) it was not "excessively intrusive," since it covered only two months worth of messages and did not include messages sent or received during non-work hours, and (3) because Quon was a SWAT team member, he did not have much—if any—expectation in privacy in a work-issued pager, because he could reasonably expect that his work-related communications might be subject to scrutiny.



The Court declined to specifically answer perhaps the most interesting question for employers: Does a public employee have any expectation of privacy in messages communicated on work-issued electronic devices? Although the Court declined to specifically address the issue, the majority opinion included significant discussion of and seeming sensitivity to the rights of employees to some privacy in their electronic communications. Indeed, Justice Scalia, in a concurring opinion, warned that many employees may grasp onto the Court's discussion of privacy to attempt to push back on employer's search rights in future cases.

In what is perhaps a rare admission of its own limitations, the Court expressed hesitancy to issue any generally applicable rules regarding the searching of electronic data or devices due to the fast-evolving nature of technology: "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." That this decision involved the use of "pagers," which have largely, if not entirely been supplanted by Blackberrys, cell phones and "text messaging," highlights the Court's legitimate concern in this area.

While the Court's opinion in *Quon* leaves many important questions unresolved, the practical lessons for employers are clear. First, although *Quon* itself addressed constitutional protections afforded only to public employees, it is vital for all employers, both public and private, to have a comprehensive electronic communications policy clearly placing employees on notice that communications over employer-provided systems and devices are not private and may be reviewed. Second, employers should undertake searches of employee communications only for legitimate, work-related reasons. Finally, employers should ensure that the scope of any search is reasonable in light of the underlying purpose.



Looking Ahead: The 2010-2011 Term

The Supreme Court will open its 2010-2011 term on October 4, 2010. The Court has already selected several labor and employment cases that it will hear during the next term. Some of the cases involve arbitration, the Uniformed Services Employment and Reemployment Rights Act (USERRA), ERISA retirement benefits, privacy rights, retaliation and the Fair Labor Standards Act (FLSA).

In the past few terms, the Court has proved to be a receptive place in particular for the consideration of retaliation claims. For instance, in *Burlington Northern v. White* (2006), the Court held that an employer can retaliate within the meaning of Title VII with actions short of terminations and other ultimate employment actions. Most recently, in *Crawford v. Metro Government of Nashville* (2009), the Court ruled that an employee who was terminated after she answered questions during an employer's internal investigation was protected under the anti-retaliatory provisions of Title VII.

As to retaliation, this upcoming term is no exception, as the Court will hear argument in two key retaliation cases: *Thompson v. North American Stainless* and *Kasten v. Saint-Gobain Performance Plastics Corporation*. In *Thompson*, the Court is expected to determine whether Title VII's anti-retaliation provision extends to an employee who claims he was terminated as a result of his fiancée's EEOC claim alleging sex discrimination. In *Kasten*, the Court will consider whether an employee's oral complaint regarding a violation of the FLSA constitutes protected conduct under the FLSA's anti-retaliation provision.

In addition to these cases, the Court also will consider other significant employment issues in the following cases during its next term:

- ***AT&T Mobility LLC v. Concepcion, US:*** Continuing its focus on arbitration, the Court will consider whether the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures, including class-wide arbitration, when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.
- ***Staub v. Proctor Hospital:*** The Court will consider under what circumstances an employer can face liability under the USERRA based on the unlawful intent of employees who caused or influenced an adverse employment decision but did not actually make the decision themselves. Under this theory, known as the "cat's paw" theory of liability in the Seventh Circuit, a plaintiff employee may prevail on a claim of intentional discrimination when the decision maker does not have any biases themselves but receives all of their information from or is solely influenced by someone who does; and the decision maker does not conduct their own investigation before making the adverse employment decision.



- **NASA v. Nelson:** The Court will consider whether a federal agency violates an employee's constitutional right to informational privacy when it asks questions in the course of a background investigation regarding (1) whether the employee has received counseling or treatment for illegal drug use that occurred within the past year, and (2) whether the employee's references have any adverse information that may have a bearing on his or her suitability for employment.

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Franczek Radelet P.C. was established in 1994 when 12 attorneys came together to form the Chicago boutique law firm. The firm, now nearly 50 attorneys, focuses exclusively on representing management in all aspects of labor and employment law and employee benefits matters in the private and public sectors. The firm's employee benefits services include benefit plan design, drafting and reviewing of plans, multi-employer plan representation, union bargaining over benefits, and representation in benefit claims and benefits-related litigation.

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