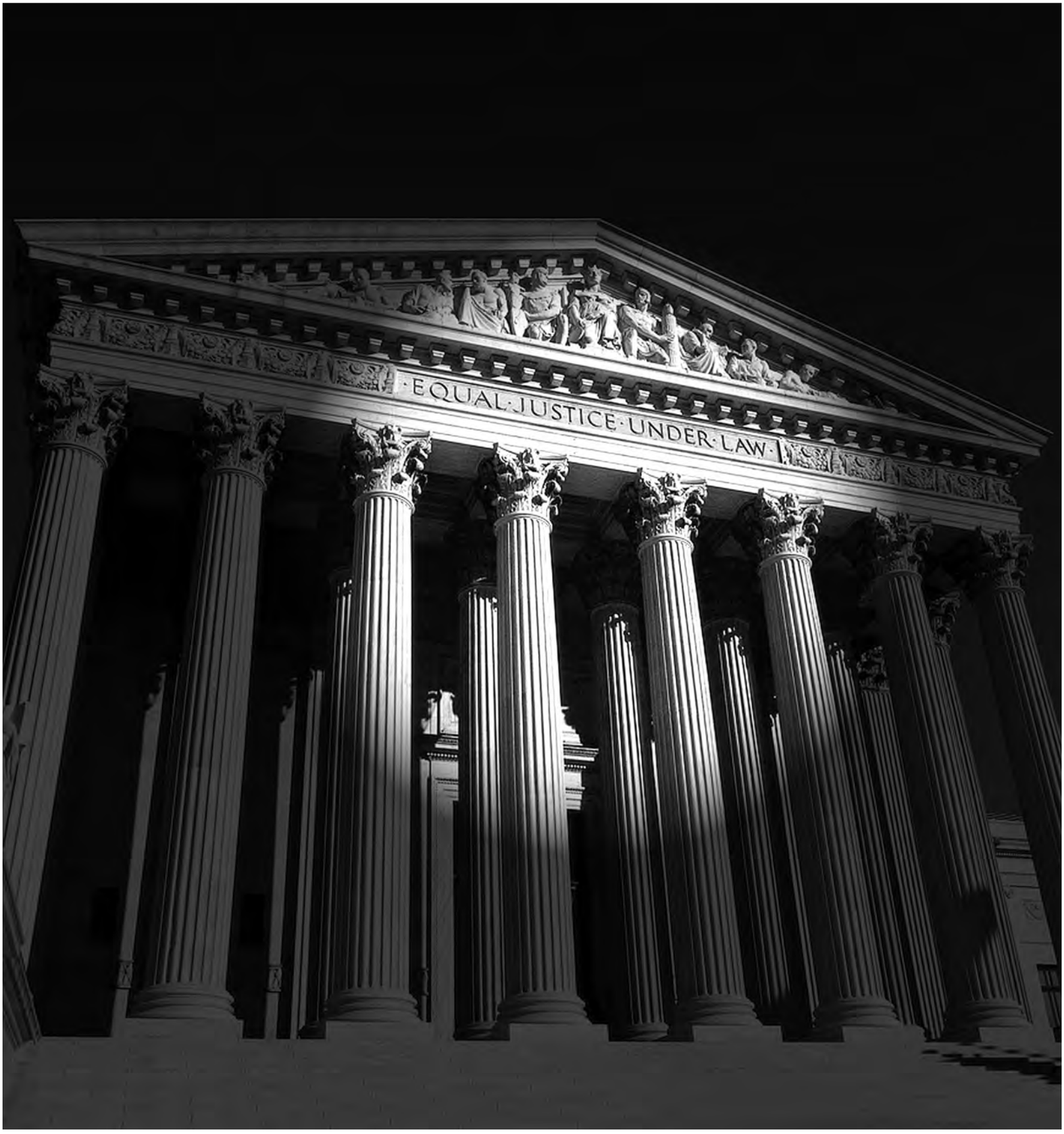
# The Supreme Court's Employment Law Rulings

*by Lawrence L. Lee*



The United States Supreme Court continues to hand down significant decisions in in employment law that affect how employers will be conducting business. This article reviews several recent decisions that are especially noteworthy.

## Reverse Discrimination Claims Viable

Reverse discrimination claims filed by employees in the federal courts have been historically met with dismissal. On June 29, 2009, in a 5-4 decision authored by Justice Kennedy, the Supreme Court ruled against the employer in a reverse discrimination suit, *Ricci v. DeStefano*.[1] The suit, brought by a group of Caucasian firefighters and one Hispanic firefighter, was based on claims of reverse discrimination under Title VII of the Civil Rights Act of 1964 and an alleged violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution. Among other things, Title VII prohibits intentional acts of employment discrimination "because of" an individual's race.[2] The *Ricci* plaintiffs sued the City of New Haven, Connecticut, two members of its Civil Service Board (CSB), and various City officials after the City used exams to identify firefighters for promotion, but declined to certify the promotional exam results. The evidence showed that the Caucasian candidates generally outperformed the minority firefighters on the promotional exams.[3] Due to the limited number of promotional vacancies and a requirement in the City Charter that positions be filled by the three candidates with the highest scores (the "rule of three"), no minority candidates qualified for promotion. The City struggled with the decision to promote the higher-scoring, white test-takers and, after conducting public hearings (during which time both the minority and Caucasian candidates threatened to file lawsuits), the CSB declined to certify the results, fearing a disparate-impact lawsuit by the minority candidates.[4] The district court granted the City's summary judgment motion, finding that the City's motivation – to avoid making promotions based on tests with a racially disparate impact – did not, as a matter of law, constitute a discriminatory intent under Title VII, nor did it constitute proof of a discriminatory animus so as to support the Equal Protection claim.[5] The U.S. Court of Appeals for the Second Circuit affirmed.[6]

When the case reached the Supreme Court, the issue was whether the City's rejection of the results was a violation of Title VII's disparate-treatment prohibition, or whether "the purpose to avoid disparate-impact liability excuse[d] what otherwise would be prohibited disparate-treatment discrimination."[7] The Supreme Court reversed and remanded, finding that the City had decided not to certify the test results based on race,[8] but without the necessary "strong basis in evidence" to believe that it was subject to, or would lose, a disparate impact lawsuit.[9] The City could be liable for disparate-impact discrimination only if the exams were not job-related and inconsistent with business necessity, or if there existed an equally valid, less-discriminatory testing alternative that the City refused to adopt. Based on the record, the Court found the exams met the job-related and business-necessity requirements, and found no evidence of an equally valid alternative.[10]

The upshot of the ruling, however, is that the Court provided no real guidance as to what a public employer is to do when it faces a Catch-22 hiring or promotional situation. If an employer promotes Caucasian employees on the basis of test results that end up excluding a protected class under Title VII, the employer is vulnerable to a future disparate-impact claim; if the employer certifies the tests results, it remains subject to disparate-impact claims based on reverse discrimination, as happened in *Ricci*. The "strong basis in evidence" standard identified by the Court – that an employer has to have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take a race-conscious, discriminatory action – does provide some assurance to employers who rely on race-neutral test results for promotions and hiring, but the standard remains to be fleshed out.

## A Higher Burden – Age Discrimination

Before 2009, an employee's argument in support of a claim of age discrimination made under the Age Discrimination in Employment Act of 1967[11] (ADEA) was that age was one of the factors that led to an adverse employment action, with the burden then shifting to the employer to demonstrate that the employee's age was not part of any mixed motive leading to the action.

The Supreme Court's 5-4 decision in *Gross v. FBL Financial Services, Inc.*[12] raised the bar for employees in an age discrimination claim. The majority opinion, written by Justice Thomas, requires an employee now to prove that he or she would not have suffered the adverse action "but for" his or her age. The case involved 54-year-old Jack Gross, who filed a lawsuit under the ADEA after his duties were transferred to a younger employee (one he had previously supervised) and he was reassigned to a different position. Although Gross and the other employee received the same pay, Gross considered the reassignment to be a demotion because of the transfer of his responsibilities. The employer, FBL, argued that the reassignment was part of a corporate restructuring and that Gross's new position was one better suited to his skills.[13] The trial court found FBL liable for age discrimination and awarded damages of $46,945, based on jury instructions using the motivating-factor standard.[14] The jury found that FBL had intentionally discriminated against Gross and that his age had been a motivating factor. On appeal, the U.S. Court of Appeals for the Eighth Circuit

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reversed and remanded, ruling that the jury had been incorrectly instructed.[15]

The issue for the Supreme Court was whether an employee had to present direct evidence of discrimination to obtain a mixed-motive jury instruction in a non-Title VII employment discrimination case. In reversing and remanding the case, the Supreme Court held that the ADEA did not authorize a mixed-motive age discrimination claim,[16] and imposed a higher standard on employees. An employee could no longer simply rely on evidence that age was a factor in an employer's averse employment decision; instead, the employee had to prove that age was the "but-for" cause of the decision.[17] The Court was careful to limit its holding to alleged mixed-motive discrimination claims brought under the ADEA. It's likely that the *Gross* decision will draw legislative scrutiny in a Democratic-controlled Congress — all the more reason for employers to use caution and ensure that they keep an objective written record of the strengths and weaknesses of their employees. Otherwise, employers risk liability for taking a legitimate adverse employment action against an employee that happens to be over 40 years old.

## Internal Investigations and Retaliation

In a case that took six years to reach the Supreme Court, the Court unanimously held that Title VII protects employees, who cooperate with an employer's investigation into allegations of discrimination or harassment, from employment retaliation. In *Crawford v. Metro. Government of Nashville and Davidson County*,[18] the Court held that Vicki Crawford, who answered questions about workplace discriminatory practices in response to an internal investigation, was protected under Title VII from retaliation. After Crawford voluntarily provided multiple examples of inappropriate behavior by a male employee relations director, she was fired. She claimed the firing was in retaliation for cooperating with the investigation and violated the anti-retaliation provision of Title VII.[19] However, the district court granted the employer's motion for summary judgment, ruling that Crawford had not participated in a "protected activity" under Title VII, and had not "opposed" the unlawful harassment simply by answering her employer's questions.[20] The Sixth Circuit affirmed.[21]

In an opinion written by Justice Souter, the Supreme Court stated that an employee *could* "oppose" workplace discrimination and come under the protection of Title VII's anti-retaliation provision by responding to questions about discrimination. The employee need not engage in "active, consistent" resistance to a discriminatory act in order to oppose it,[22] and the protection would extend to "someone who has taken no action at all to advance a position beyond disclosing it."[23] Justice Alito's statements, in his concurring opinion, are equally important for employers: "the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct."[24] He further limited the scope of Title VII protections to exclude an employee's "silent opposition" to harassment, or conversations with co-workers "at the proverbial water cooler" that are subsequently communicated to the employer.[25]

Clearly, an internal investigation should be handled professionally and fairly, without adverse employment actions against an employee who honestly reports or responds to questions of alleged illegal activity. The *Crawford* decision extends Title VII protection to an employee that has not taken affirmative steps to report his or her personal experiences with an alleged harasser, but has responded to questions as part of an internal investigation. Construed broadly, however, the *Crawford* decision may open the floodgates for any disciplined employee to file a retaliation claim, even if the employee said nothing to management about the alleged harassment or discrimination.

## Length of Service and Pregnancy Leave

AT&T's policy was to include time spent on disability leave, but not other leave types (including pregnancy) in the calculation of time served on the job. This affected retirement benefits, which were based on the length of the employee's service. When the Pregnancy Discrimination Act of 1978[26] (PDA) was passed, the company changed its policy to include pregnancy leave in the same manner as disability leave, but it did not "backtrack" for pregnancy leaves taken earlier. Four female former employees filed suit, claiming discrimination on the basis of sex and pregnancy under Title VII. The plaintiffs took pregnancy leave before 1978, and claimed they had not been given a full service credit for pension and other benefits for their pre-PDA leaves, and that their retirement income had been "short-changed" as a result.

In a 7-2 decision, the Supreme Court held that maternity leave taken before the passage of the PDA could not be considered in calculating employee pension benefits.[27] Because the employer's pension payments accorded with a bona fide seniority system under Section 703(h) of Title VII, they were insulated from a challenge under that Act. Further, the Court declined to apply the recently-enacted Lilly Ledbetter Fair Pay Act of 2009,[28] which provides that the statute of limitations begins to run, for the purposes of federal discrimination claims, when wages, benefits, or other compensation are paid, even if the alleged original discriminatory decision occurred outside the statute of limitations. The employer's decision, pre-PDA, not to award a service credit for pregnancy leave was not discriminatory; thus, the plaintiffs had not been "affected by application of a discriminatory compensation decision or other practice."

## Arbitration and Age Discrimination

Collective bargaining agreements (CBAs) often require union members to arbitrate any claims of age discrimination under the ADEA. In *14 Penn Plaza L.L.C, v. Pyett*,[29] former unionized night-watchmen filed an ADEA suit, alleging that they were reassigned to less desirable positions (as porters or cleaners) based on their age.

The employer attempted to enforce the CBA provision that made the claim subject to arbitration. Both the district court and the U.S. Court of Appeals for the Second Circuit denied the motion to compel arbitration, relying on a 1974 Supreme Court ruling, *Alexander v. Gardner-Denver Co.*, that an arbitration clause in a CBA did not preclude an employee's suit for race discrimination under Title VII because the CBA did not expressly cover statutory claims.

In a 5-4 decision, however, the Supreme Court retreated from *Gardner-Denver Co.* and reversed. Relying on the National Labor Relations Act, which gives unions the authority to agree to binding arbitration of age discrimination claims, the Court found the arbitration provision was enforceable. There was no language in the ADEA that superceded that authority, and the Court noted that its previous decisions had "required only that an agreement to arbitrate statutory anti-discrimination claims be explicitly stated in the [CBA]."[30] The decision signals the Court's favorable view of arbitration in resolving employment disputes, and underscores the need for employers to ensure that arbitration provisions in CBAs are unambiguous in identifying the statutory claims that fall within the sphere of arbitration. The decision, however, fails to address whether an individual employee still has the right to file a statutory claim in court, in spite of an arbitration provision in the CBA, if the union chose not to pursue the employee's claim through arbitration.

## Political Payroll Deductions Ban

The State of Idaho passed a Voluntary Contributions Act (VCA), prohibiting payroll deductions for political purposes. The ban allowed deductions for union dues, but not for union political action committees or other political activities. In *Ysura v. Pocatello Education Association*,[31] the issue was whether the VCA prohibition on deductions for political activities violated public employees' (or their unions') First Amendment rights. Various unions representing government employees filed suit, claiming that the ban amounted to a restriction on speech and expression. The district court held that the ban was constitutional as applied to the state government itself, but unconstitutional insofar as it applied to private and local government employers.[32] When the State appealed, the Ninth Circuit affirmed.[33]

In a 6-3 decision, the Supreme Court upheld the ban as constitutional. Chief Justice Roberts delivered the majority opinion. Although publicly-administrated payroll deductions for political purposes could enhance a union's free speech rights, the State was under no obligation to assist organized labor in its political activities through the administration of a payroll system. Because the Court found that the State had not infringed the unions' First Amendment rights, Idaho was only required to demonstrate a rational basis to justify its ban: "Idaho's decision to allow payroll decisions for some purposes but not for political activities is plainly reasonable."[34]

## Litigation Expenses and Non-Union Members

The Maine State Employees Association was the exclusive bargaining agent for certain State employees. Pursuant to the collective bargaining agreement (CBA), all non-member employees represented by the union were required to pay a service fee. This included an equivalent to the portion of union dues that would go towards ordinary representational activities, but also helped to pay for national litigation activities that did not benefit the local union or association. In *Locke v. Karass*,[35] state employees – non-members of the Association – filed a Section 1983 action claiming that the First Amendment prohibited charging them any portion of the service fee that represented litigation that did not directly benefit the local union. The district court granted the union's motion for summary judgment, and the U.S. Court of Appeals for the First Circuit affirmed.[36]

The question before the Supreme Court was whether such union requirements, in which non-member employees paid a service fee that, through a pooling arrangement, was used to fund national litigation that might not specifically benefit those non-members, violated the non-members' First Amendment rights. The Supreme Court unanimously held in favor of the union. Writing for the Court, Justice Breyer opined that the First Amendment permitted a local union to charge non-members for national litigation expenses as long as the subject matter was of a kind that would be chargeable if the litigation was local, and the charge was reciprocal in nature (i.e., the local's payment to the national affiliate was for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization"[37]). The Court reasoned that the fees paid by the non-members met this two-prong test and did not violate the First Amendment.

## Going Forward

Over the past few years, the Roberts-led Court has demonstrated an active level of legal interpretation of employment statutes that, for the most part, has led to some clarification of the law. Even with incoming Justice Sonia Sotomayor replacing Justice David Souter in the new Term, which has many employers concerned, it appears that the majority conservative group will remain at five justices, over the minority liberal or moderate faction of four. Perhaps the greater concern for employers should be the changes of employment law that Congress has already imposed and which will continue under the new executive Administration. Consultation with an attorney, familiar with compliance in employment matters, is likely to become more important than ever.

## Notes

1. 129 S.Ct. 2658 (2009).
2. 42 U.S.C. § 2000e-2(a)(1) (West 2009).
3. The top ten candidates eligible for promotion to lieutenant were white; seven whites and two Hispanics were eligible for promotion to captain. 129 S. Ct. at 2666.
4. The City relied on anti-discrimination laws and its "good faith belief that Title VII mandated non-certification." Ricci v. DeStefano, 554 F. Supp.2d 142, 151 (D. Conn. 2006).
5. *Id.* at 160, 161-62.

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## Qualified Immunity

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32. *Id.*
33. *Id.* The Court added that there would also be difficulties when a court held that a defendant committed a constitutional violation but that the violation was not clearly established, as "the [successful] defendant may face a difficult situation… [the] right to appeal the adverse holding on the constitutional question may be contested." *Id.*
34. *Id.* at 821.
35. *Id.*
36. 515 U.S. 304, 314 (1995) ("a fact-related legal inquiry").
37. *Pearson*, 129 S. Ct. at 820.
38. Asserting the defense in a motion to dismiss does not waive the right to assert the defense again in a motion for summary judgment. Behrens v. Pelletier, 516 U.S. 299, 308 (1996).
39. Elder v. Holloway, 510 U.S. 510, 516 (1994) ("a question of law, not one of 'legal facts'").
40. 129 S. Ct. 1937, 1947 (2009) (citing *Johnson*, 515 U.S. 304, 314 (1995)).
41. Fed. R. Civ. P. 8(a)(2).
42. 129 S. Ct. at 1949; Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
43. 129 S. Ct. at 1949.
44. *Id.*
45. *Id.*
46. *Id.* (emphasis added).
47. *Id.*
48. *Id.*
49. *See* Fed. R. Civ. P. 12; Fed. R. Civ. P. 7; Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (describing dispositive motions and holding that a trial court is obligated to "exercise its discretion in a way that protects the substance of the qualified immunity defense").
50. *Pearson*, 129 S. Ct. at 820-21, discussing the Court's concern over the possibility that constitutional issues may get resolved on less than complete records.
51. *See* Leong, Nancy, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. Law Rev. (2009).
52. *See* Hannon, Kendall. W., *Much Ado About* Twombly*? A Study on the Impact* of Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev.1811 (2008). **ML**

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6. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).
7. 129 S. Ct. 2658, 2674 (2009).
8. *Id.* at 2673.
9. *Id.* at 2681.
10. *Id.* at 2678-79.
11. 29 U.S.C. § 621 *et seq.* (West 2009).
12. 129 S. Ct. 2343 (2009).
13. *Id.* at 2347.
14. Gross v. FBL Fin. Group, Inc., No. 4:04-CV-60209-TJS, 2006 WL 6151670 at * 13 (S.D. Iowa June 23, 2006).
15. 526 F.3d 356 (8th Cir. 2008).
16. 129 S. Ct. at 2350.
17. *Id.* at 2351.
18. 129 S. Ct. 846 (2009).
19. 42 U.S.C. § 2000e-3(a) (West 2009).
20. Crawford v. Metro. Gov't, No. 3:03-0996, 2005 WL 6011557 (M.D. Tenn. Jan. 06, 2005).
21. 211 Fed. Appx. 373 (6th Cir. 2006).
22. 129 S. Ct. at 851.
23. *Id.*
24. *Id.* at 853.
25. *Id.* at 854.
26. 42 U.S.C. § 2000e(k) (West 2009). The PDA was an amendment to Title VII and took effect on April 29, 1979.
27. AT & T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).
28. Pub. L. 111-2, § 3(A), 123 Stat. 5-6.
29. 129 S. Ct. 1456 (2009).
30. *Id.* at 1465.
31. 129 S. Ct. 1093 (2009).
32. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 WL 3241745 (D. Idaho Nov. 23, 2005).
33. 504 F.3d 1053 (9th Cir 2007).
34. 129 S. Ct. at 1095.
35. 129 S. Ct. 798 (2009).
36. Locke v. Karass, 425 F. Supp.2d 137 (D. Me. 2006), *aff'd*, 498 F.3d 49 (1st Cir. 2007).
37. *Id.* at 806 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)). **ML**

## Voting Rights Litigation

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country of racial discrimination in voting. Tremendous progress in race relations has been made as a result of an increasingly accessible electoral process, and facilitated the the Act's subsequent revisions and extensions. That racial progress is palpable. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full. We have learned how to pull, haul, and trade in the marketplace of political competition. We have witnessed the transformation of *E Pluribus Unum* from a nice-sounding phrase to a political reality.

We are indeed a better country as a result.

### Notes

1. 42 U.S.C. § 1973 to 1973aa-6 (West 2009).
2. U.S. Const. amend. XV.
3. South Carolina v. Katzenbach, 383 U.S. 301, 314, 328 (1966).
4. 42 U.S.C. § 1973(a) (West 2009).
5. 383 U.S. 301(1966).
6. *Id.* at 327-28.
7. *Id.* at 328.
8. *Id.*
9. For more information, *see About Section 5 of the Voting Rights Act*, U.S. Department of Justice, Civil Rights Division, at http://www.justice.gov/crt/voting/sec_5/about.php.
10. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (1982).
11. Pub. L 109–246, 120 Stat. 577 (2006).
12. As pointed out by the Supreme Court, the Act "retained 1972 as the last baseline year for triggering coverage under § 5." Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S.Ct. 2504, 2510 (2009).
13. *Id.*
14. 573 F. Supp. 2d 221 (S.D. Tex. 2008).
15. 129 S. Ct. at 2516.
16. *Id.* at 2515-16.
17. *Id.* at 2508.
18. *Id.* at 2513, citing *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927).
19. *Id.* at 2512.
20. *Id.* at 2517.
21. *Id.* at 2525.
22. *Id.* at 2516.
23. *Id.* at 2519 n 1.
24. *First Local Government Seeks Voting Rights Bailout Post Supreme Court Ruling,* The BLT: The Blog of Legal