Legal Issues

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Recommended Citation
DOI: https://doi.org/10.58188/1941-8043.1236
Available at: https://thekeep.eiu.edu/jcba/vol0/iss5/34

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37th ANNUAL NATIONAL CONFERENCE

Renewal and Reinvestment in Higher Education:
Implications for Academic Collective Bargaining

Hunter College
April 11-13, 2010

Annual Legal Update

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NLRB Appointments

Since January 2008, the five-member NLRB has been operating with only two members, Wilma Liebman (D) and Peter Schaumber (R). On March 27, 2010, President Obama announced his intent to recess appoint 15 nominees to administrative posts, including two members of the National Labor Relations Board: Craig Becker (D) and Mark Pearce (D). Even though President Obama had also nominated Brian Hayes (R) to sit on the Board as a fifth member, he did not recess appoint Mr. Hayes. Democratic pro-labor members of the Board will now hold a 3-1 majority with one seat left to fill. Becker, Associate General Counsel to the SEIU and staff counsel to the AFL-CIO, had been vehemently opposed by Republicans in the past, partly based on arguments that his legal writings have suggested that employers have no role in union representation cases and that NLRB rulemaking might force employers to recognize unions based on card check majorities.

Because of the vacancies, the Board over the past two years has avoided seriously controversial cases, and, even with the cases heard, challenges have reached the Supreme Court that a two-member Board did not have the authority to issue any decisions. However, with a majority of the Board now appointed, it is likely that more controversial decisions will wind their way up the docket. These include a host of cases decided over the past 10 years or so that have tilted in management's favor rather than labor. Among these are:

1. **Brown University**, 342 NLRB No. 42, 175 LRRM 1089 (2004), where the Board, in a 3-2 decision, reversed its decision in **New York University**, 332 NLRB No. 111 (2000), and held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act. The Board majority held that such individuals “have a predominantly academic rather than economic relationship with their school.”

2. **Oakwood Healthcare Center, Inc.**, 348 NLRB 686 (2006), where the NLRB clarified its stance on when an individual is deemed a “supervisor” and thus excluded from the coverage of the Act, and provided a liberal interpretation of who would qualify as a supervisor. Labor contends that many individuals who have marginal authority have been denied the right to organize under this decision.

3. **IBM Corp.**, 341 NLRB No. 148 (June 9, 2004), where the Board reversed **Epilepsy Foundation**. In **IBM Corporation**, the Board decided that the precedent of **Epilepsy Foundation** should be overruled, and, by a 3-2 majority, the Board concluded that the **Weingarten** rights do not extend to a workplace where employees are not represented by a union.

4. **The Register Guard**, 351 NLRB 1110 (2007), where the Board held that employees have no statutory right to use an employer’s email system, and thus, an employer could regulate its use by prohibiting employee use of the system for non-job
related solicitation. In that case, even though employees used the email system for personal communication, a rule banning its use for solicitation was still deemed appropriate as long as it was not discriminatorily enforced.

The dissent argued that email was the virtual lunch room of the 21st century and that any restrictions on employee use of the system for union solicitation, especially when personal use was allowed, should be presumptively discriminatory and illegal under the long line of cases dealing with employee solicitation.

5. Harborside Healthcare, Inc., 343 NLRB 906 (2004), where the Board held that supervisory pro-union activity is objectionable conduct when it interferes in the freedom of choice so as to materially affect the election outcome. It also held that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The majority opinion said that the Board would look to whether the supervisory conduct was generally interfering with employee free choice, and whether such conduct interfered with freedom of choice to the extent it materially affected the election outcome.

The dissent contended that supervisory solicitation of union cards should not be inherently coercive, even when the person is unaware that he or she is a true statutory supervisor or where that status is unclear. Furthermore, the dissent would look at such cases in the total context of the employer’s anti-union campaign.

A reversal of this decision could mean a greater involvement by supervisors, especially first line supervisors, in soliciting for a union. It would mean that supervisors might actively campaign for a union and not be found to be violating the Act.

6. Tradesmen International, 338 NLRB 460 (2002). There are numerous Board cases in which employer work rules are scrutinized to determine whether or not they interfere with employees’ Section 7 rights to engage in collective activity. At issue in Tradesman was whether the following employer rules would “reasonably chill employees in the exercise of their Section 7 rights”: (1) prohibition of disloyal, disruptive, competitive or damaging conduct; (2) prohibition of slanderous or detrimental statements; (3) requirement that employees represent the employer in a positive manner. The Board held that these rules did not violate the Act because they serve a legitimate business purpose and reasonable employees would not construe such rules as intended to proscribe Section 7 activity. The dissent thought otherwise, arguing that such rules do chill employees in organizing and coming together for collective action to improve the workplace. The dissent would require an employer to specifically state that such rules do not include Section 7 activity.

7. Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers, 351 NLRB No. 28 (9-29-07), where the Board modified its recognition bar doctrine in cases where the union’s original majority status was based on a card check rather than a Board-supervised election. In the case of Board-
supervised secret ballot elections, no Board election can be held in the bargaining unit for at least 12 months following the election. But in cases where an employer voluntarily recognizes a union, the rules barring a decertification petition had been less clear. Under prior law, an employer’s voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union “for a reasonable period of time” [Keller Plastics Eastern, Inc., 157 NLRB 583 (1966)]. Any collective bargaining agreement negotiated during this insulated period bars Board elections for up to three years of the contract’s term.

In Dana, the Board said it will strike a balance between the interest of employee free choice and the promotion of stable labor relations. It established a policy that no election bar will be imposed after a voluntary card check agreement unless 1) employees in the unit are given notice of the recognition and of their right, within 45 days, to file a decertification petition; and 2) 45 days pass from the date of notice without the filing of a petition. Thus, unlike Board supervised elections, in cases where there is a card check recognition, disgruntled employees or rival unions who wish to file a decertification may immediately do so within a 45-day window period. Once that period passes, however, the union’s majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective bargaining agreement. Once any such agreement is reached, such a contract will further bar elections for up to three years.

These and many other cases will be ripe for review once the full Obama Board is constituted.¹

Impact on Yeshiva University cases. Finally, the new appointees may have an impact on questions of faculty managerial authority. Because it is a Supreme Court decision, and not an NLRB case, it is unlikely that Yeshiva University, 444 U.S. 672 (1980) will be reversed anytime soon, given the current constituency of the Court. However, Yeshiva never stood for the proposition that all private sector faculty members are banned from collective bargaining. The issue of whether or not faculty members at any particular institution are managerial employees is still dealt with on a case by case basis by the NLRB. While the Supreme Court gave guidance as to what to examine in establishing managerial status, a pro-labor board may hold colleges to a subtly higher standard of proof simply in its interpretation of the rich fact patterns that these cases present.

Stay tuned.

¹ An excellent summary of these and other cases can be found in the U.S. Chamber of Commerce’s report, “The National Labor Relations Board in the Obama Administration: What Changes to Expect.” (Sept., 2009), by Harold Coxson and Christopher Coxson of Ogletree, Deakins, Nash, Smoak and Steward, P.C.
Arbitration and Discrimination Claims: Post-Pyett Cases

Last year at this conference we discussed the then-recently issued decision in 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009), a case that involved the question of whether an arbitration provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act is enforceable. The Second Circuit had found this type of clause unenforceable (See 14 Pyett v. Pennsylvania Building Co., 498 F. 3d 88, (2nd Cir., 2007). The Supreme Court, in a 5-4 decision, reversed the Second Circuit and held that the clause was enforceable. Justice Clarence Thomas wrote the majority opinion in which Chief Justice Roberts and Justices Scalia, Alito and Kennedy joined.

Over the past year, there have been some cases dealing with the aftermath of the Pyett case and its implications.


This case was considered by the U.S. District Court for the Southern District of New York. The judge held that the situation fell within the exception to the enforceability of union-negotiated arbitration agreements that was expressly noted in Pyett, and therefore this plaintiff could not be compelled to arbitrate her discrimination claim.

The case arose when Triangle Services decided not to offer Eva Kravar a daytime cleaning position at the new headquarters of Bloomberg L.P. Ms. Kravar, who is Slovakian, was sixty-two years old at the time, and had worked for more than twenty-five years as a daytime cleaner at the previous Bloomberg headquarters. She also had some physical limitations as a result of abdominal surgery. Ms. Kravar alleged that Triangle illegally discriminated against her on the basis of her national origin, failed to reasonably accommodate her disability (her disability being the limitations resulting from surgery), and retaliated against her for filing a charge with the EEOC.

Ms. Kravar was covered by a collective bargaining agreement and was represented by the Service Employees International Union, Local 32BJ. The agreement had the following language:

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership or any other characteristic protected by law, including but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the NY State Human Rights Law, the New York City Human Rights Code… or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedures as the sole and exclusive remedy for violations.
Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Under the contract language, only the Union could bring a claim to arbitration. An individual union member had no unfettered right to demand arbitration of a discrimination claim. The only option for an individual union member seeking arbitration was to present the claim to the union, “which ‘may’ demand arbitration, presumably if it finds the claim colorable.”

Triangle filed a motion to compel arbitration in light of Pyett, claiming that the situation fit squarely within the Court’s holding that “a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate [ADEA] claims is enforceable as a matter of federal law.”

The court considered Pyett, where the Supreme Court stated “the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right… it waives only the right to seek relief from a court in the first instance.” However, in Pyett the Supreme Court expressly declined to decide whether “the [agreement] operate[d] as a substantive waiver,” but noted that “a substantive waiver of federally protected rights will not be upheld.” The Supreme Court instead remanded the matter for further proceedings.

In light of Pyett the court determined it was necessary to decide if the agreement in the present case operated as a substantive waiver of Kravar’s discrimination claim. The court stated that “there [was] little question that if [the] union prevented [Ms. Kravar] from arbitrating” her claim, the provision could not be enforced against her.

The only evidence on the matter was a sworn declaration from Ms. Kravar where she stated that “her union declined to prosecute her claims.” She stated that she told her union representative that she wanted to arbitrate her disability claims but his response was to laugh and tell her she could not. The union representative “was unable to confirm or deny that this exchange occurred.” In his testimony, he said that he “did not recall.” The court found that the record, though sparse, supported the conclusion that the agreement operated as a substantive waiver, precluding Ms. Kravar from raising her disability discrimination claim in any forum.

The current record is sparse, but it only supports a single conclusion: the CBA here operated to preclude Ms. Kravar from raising her disability discrimination claim in any forum. As such, the CBA operated as a waiver over Ms. Kravar’s substantive rights, and may not be enforced. See, Pyett, 129 S.Ct. at 1474; Gilmer, 500 U.S. at 29

The court also disagreed with Triangle’s argument that the agreement should be enforced because, even though the union was not willing to arbitrate the claim, Triangle was willing to arbitrate the claim. “The arbitration provision that the Court must enforce is the one the union… entered into, not a hypothetical agreement in which the employer’s
rather than the union’s consent is critical.” The court refused to enforce the agreement and denied Triangle’s motion to compel arbitration.

_Tewolde v. Owens & Minor Distribution_, 2009 WL 1653533 (USDC, Minn., 2009)

The U.S. District Court for the District of Minnesota granted in part the defendant’s motion for summary judgment, relying on an arbitrator’s findings in an earlier grievance brought by the plaintiff-employee pursuant to a collective bargaining agreement.

Tewolde, an employee of Owens & Minor who worked as a material handler, grieved his termination from Owens & Minor to the Union and later filed a lawsuit in the district court alleging national origin discrimination in violation of Title VII and state laws, as well as retaliation. Both the grievance and the lawsuit arose from the same facts.

Tewolde’s position as a material handler required him to receive and stock products, pick products for customer orders, prepare the orders for shipment, and occasionally clean the warehouse. The material handlers use an electronic device to keep track of orders, and then pick the order from the stock; each order is considered a “line.” Sometimes an order is too big to be picked at once, and the handler will break it down into the necessary number of subdivisions in order to prepare the order for shipping, and in such an instance each subdivision is a “line.” The electronic device contains an “M key” to help the handlers keep track of lines in order to prevent errors. Owens & Minor had an expectation that employees pick 320 lines per eight-hour shift with no more than one error for every 1,000 lines picked.

Owen & Minor had a collective bargaining agreement with Minnesota’s Health Care Union Local 113 SEIU which governed the relationship between Owen & Minor and material handlers (among other positions). The agreement provided that during the first 90-days of employment there would be a probationary period where the employee did not pay union dues and could be terminated with or without cause, but thereafter could be terminated only with “just cause.” Just cause included dishonesty and falsification of reports, records, or applications. The agreement also mandated a process for filling job vacancies which required Owen & Minor to post qualifications for the job and that no employees who have worked for less than 120 days in their existing job would be eligible for the vacant position.

Shortly after Tewolde’s 90-day probationary period ended, the warehouse manager posted a signup sheet for the vacant position of lead material handler. Tewolde was the first employee to sign the sheet and the warehouse manager removed the signup sheet the next day. The warehouse manager told other employees that Tewolde’s name had been scratched off the signup sheet and that another material handler had signed up. As a result, Tewolde filed a complaint with human resources alleging that the warehouse...
manager was discriminating against him based on his “culture, ethnicity and English-speaking capabilities.” The day after Tewolde filed a complaint the warehouse manager formally disciplined Tewolde for the firm time by filing a corrective action form for Tewolde’s picking errors.

A few weeks later general manager informed Tewolde by letter that he had not been selected as lead material handler because he had not been employed for at least 120 days as the collective bargaining agreement required and because he did not posses the necessary skills required to perform the job. The position was not given to the other employee who signed up because he also did not meet the 120 day requirement.

The position remained vacant and the warehouse manager posted the position with a signup sheet again a few months later to correspond with the other employee’s 120th day. Tewolde and the other employee both signed up and were both interviewed. The warehouse manager told Tewolde he was not qualified and hired the other employee as lead material handler.

In the time after Tewolde was denied the promotion, he was not meeting the lines per-shift requirement and was failing to meet safety orders. Tewolde was notified of this and the next week his productivity increased. However, it was reported that Tewolde’s productivity increased because he was misusing the electronic device to inflate the number of lines. Tewolde was suspended pending further investigation and terminated shortly after.

The day after his termination Tewolde filed his grievance regarding termination with the union. The case was processed to arbitration. The arbitrator determined that Tewolde was not minimally qualified for the lead position because he had too high an error right and denied the grievance.

However, the following year Tewolde filed a second grievance with the union. The arbitrator denied that grievance as well stating that Tewolde misused the electronic device to inflate his production numbers and that Tewolde was properly terminated pursuant to the collective bargaining agreement.

Tewolde then filed a complaint alleging national origin discrimination and retaliation (“reprisal” in Minnesota) in violation of Title VII and the Minnesota Human Rights Act (“MHRA”). Following receipt of a right to sue letter, Tewolde commenced action in U.S. District Court for the District of Minnesota.

In his Title VII claims, Tewolde alleged that Owens & Minor discriminated against him based on his national origin by refusing to make him a lead material handler on both occasions that he was denied the position, and that Owens & Minor retaliated against him for his charge of discrimination with corrective actions and his subsequent suspension and termination. To support his Title VII claims, Tewolde argued that he was qualified for the position of lead material handler and that he was not terminated for just cause.
Owens & Minor filed for summary judgment claiming, among other things, that Tewolde could not advance his Title VII claims before the court because the arbitrators’ decisions preclude such arguments.

In its decision, the Court examined the Supreme Court’s decisions in Gardner-Denver and more recently in Penn Plaza LLC v. Pyett and agreed with the company that the previous arbitrators’ decisions precluded Tewolde from making those arguments.

The Court first reviewed the history of the effect of arbitration awards on later litigation, noting the long road beginning in 1974 with Gardner-Denver. In reviewing the Penn Plaza v Pyett decision, however, the Court noted that the Supreme Court had looked more favorably on the ability of arbitrators to examine statutory discrimination issues.

In effect, 14 Penn Plaza subjects an arbitrator’s decision interpreting and applying a CBA that EXPRESSING incorporates federal antidiscrimination law to highly deferential review on appeal…. If an arbitrator’s actions can directly limit judicial review of federal antidiscrimination laws, deference to an arbitrator’s interpretation and application of a CBA in a later-filed federal court action is warranted even if that deference precludes an employee’s statutory claims. … Therefore, a court affords an arbitrator’s decision interpreting and applying the terms of a CBA “an extraordinary level of deference” in a later Title VII action in federal courts and confirms the decision ‘so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority’ [citations omitted].

In the case at hand, the Court found that the arbitrators acted within the scope of their authority and their decisions were entitled to substantial deference.

The court then determined the Tewolde could not establish a prima facie case of discrimination as required by the McDonnell-Douglas framework. In light of the arbitrator’s finding that Tewolde was not minimally qualified for the lead position, Tewolde could not demonstrate that he was qualified for the promotion – an element of his claim.

The court also found that with respect to his claim of retaliation, stemming from allegations that in response to his charge of discrimination Tewolde was “assigned more difficult orders, required to clean more than other pickers, disciplined, suspended and terminated,” the arbitrator’s findings warranted summary judgment. The court deferred to the arbitrator’s finding that “Tewolde was not treated differently from other workers with respect to ‘cleaning and related duties.’”  

2 The court granted summary judgment on the two claims, but denied summary judgment with regard to Tewolde’s other claim of reprisal, in which he alleged that in response to his complaint of discrimination to human resources the warehouse manager took formal disciplinary action for the first time. The court found
Americans with Disabilities Act and reasonable accommodations

_Fiumara v. President and Fellows of Harvard College_, 2009 WL 1163851 (1st Cir. 2009)

The U.S. Court of Appeals for the First Circuit held last year that an indefinite leave of absence was not a “reasonable accommodation” under the Americans with Disabilities Act and state law. It also confirmed that the ADA does not trump collective bargaining rights, and that a requested accommodation that would violate the seniority rights of fellow unionized employees will not be required under the law.


Fiumara was employed by Harvard as a full-time temporary employee and during the relevant time period occupied a position operating the “family van.” The position required that Fiumara have a Commercial Driver’s License (“CDL”). Fiumara’s alleged disability resulted from an incident in which he slipped on the steps of the “family van” and injured both knees. Harvard granted him 12 weeks of medical leave and held his position open for 6 months. During the time he was out, Fiumara’s physicians “regularly informed Harvard that he was not cleared to return to work,” and Fiumara let his CDL expire. Shortly before Fiumara was terminated, he agreed to have a medical examination and return to work, but he cancelled the medical appointment without informing Harvard that he planned to reschedule it in a few weeks.

The court of appeals affirmed summary judgment on the failure to accommodate claims because “Fiumara failed to show that he was a qualified individual under the ADA” and the Massachusetts state law standards are the same as the ADA standards. Fiumara did not hold a CDL, a requirement for his job, and failed to request permission to reschedule his medical examination in a “direct and specific” manner. The only accommodations that Fiumara sought were a van driver position or additional leave. Neither accommodation was a “reasonable accommodation.” The Court wrote:

An accommodation that inherently breaches existing employee agreements is not a reasonable accommodation. See _Laurin v. Providence Hospital_, 150 F. 3d 52 (1st Cir., 1998). Similarly, indefinite leave is not a reasonable accommodation under the ADA. See _Watkins v. J & S Oil_, 164 F. 3d 55, 61 (1st Cir., 1998).

That Tewolde had established his prima facie case of reprisal. That claim had not been reviewed in arbitration.

3 As a unionized employee, Fiumara was not an eligible bidder for the van job under the provisions of the CBA. He was not senior to other employees who had greater rights under the CBA.
Harvard was neither required to give Fiumara a position as a bus driver nor to grant Fiumara an indefinite leave.\(^4\)

The court of appeals also affirmed summary judgment on the Massachusetts retaliation claim because Fiumara did not show any evidence suggesting that he was engaged in protected behavior. The court of appeals did not discuss the breach of contract or other claims.

**Discharge of Tenured Faculty Member Upheld.**

*Bernold v. Board of Governors of the University of North Carolina, -- SE 2d ---, 2009 WL 3320312 (NC App.Ct., 2009)*

In this case, the Court of Appeals of North Carolina affirmed the Wake County Superior Court’s decision to uphold the University of North Carolina’s Board of Governors’ decision upholding a tenured professor’s discharge.

Leonhard Bernold was a professor in the Department of Civil, Construction and Environmental Engineering at North Carolina State University. Bernold had been a tenured professor since 1996. The University adopted post-tenure review regulations in 2002 which provided that “unsatisfactory reviews in two consecutive years or any three out of five years ‘will constitute evidence of the professional incompetence of the individual and may justify… discharge for cause.’” Bernold received post-tenure review findings of “does not meet expectations” in 2002, 2003, and 2004. He was then discharged for incompetent teaching and incompetent service.

After his discharge, Bernold requested a hearing before the faculty hearing committee. The committee found unanimously that he was not an incompetent teacher, but found that he had provided incompetent service by a 3 to 2 vote. The University’s chancellor upheld these findings and remanded the matter to the Department of Civil, Construction and Environmental Engineering for a recommendation on whether to discharge Bernold based solely on the finding of incompetent service. The committee then held an additional hearing on the issue of petitioner’s service and found that petitioner was “not incompetent in the area of service” by a 4 to 1 vote. This time, the chancellor reversed the committee’s decision and the University’s Board of Trustees affirmed the chancellor’s decision. The University’s Board of Governors affirmed the Trustees’ decision. Bernold sought judicial review in the Wake County Superior Court pursuant to N.C. Gen.Stat. §150B-51. The superior court affirmed the Board of Governor’s decision and Bernold appealed.

\(^4\) The District Court below had noted that “a leave of absence and leave extensions are reasonable accommodations in some circumstances. *Garcia-Ayala v. Lederle Parenterals Inc.*, 212 F. 3d 638 (1st Circ., 2000)…. However, an open-ended or indefinite leave extension is not reasonable. *Fiumara v Harvard College* 526 F.Supp. 150 (2007)
The appeals court addressed three arguments. Bernold first argued that the superior court erred in upholding his discharge on the grounds of lack of collegiality because tenured professors have a substantive due process right to protection from discharge for any reason other than incompetence, misconduct or neglect of duty. Section 603 of the Code of the Board of Governors of UNC governs the due process requirements for tenured faculty facing discharge. Although Section 603(1) provides for discharge due to incompetence, misconduct or neglect of duty, Bernold’s argument failed because the University’s post-tenure review regulation specifies that “unsatisfactory reviews in two consecutive years or any three out of five years ‘will constitute evidence of the professional incompetence…” Bernold received unsatisfactory reviews three years in a row, which the court found was sufficient evidence of professional incompetence.

The Court then noted that UNC based its ultimate discharge of the professor on “incompetence of service” which rendered him unfit to continue as a member of the faculty, specifically alleging that “his interactions with colleagues had been so disruptive that the effective and efficient operation of his department was impaired.” A regulation for the College of Engineering stated that “each faculty member is expected to work in a collegial manner.” By such regulation, the petitioner was aware that collegiality “was a professional expectation for his position and that his collegiality or lack thereof was one possible focus of evaluation during his post-tenure reviews.” His unsatisfactory post-tenure reviews constituted “sufficient evidence of his professional incompetence to justify his discharge for cause.”

Bernold also argued that the superior court erred in failing to find that the respondent violated his due process rights in its use of the review process to discharge him. Although Section 603 set forth the particular due process requirements for tenured faculty facing discharge, and did not mandate improvement plans, Bernold cited language from the University Policy Manual, Policy 400.3.3 which states that one purpose of post-tenure review process is to “provide for a clear plan and timetable for improvement of performance of faculty found deficient.” Because the University did not provide a clear plan or timetable, Bernold alleged that his due process rights had been violated. However, the court found that the policy manual was not a set of due process requirements as was section 603, but rather a “list of principles to guide the post-tenure review process.” Whether or not the University followed the policy manual, it did follow the requirements of 603 and thus did not violate Bernold’s due process rights.

Bernold’s final argument was that the superior court erred in finding substantial evidence in the record to support his discharge for incompetence. However, Bernold merely offered evidence which would support a different outcome than that reached by the Board of Governors. The court rejected this last argument because the task of the reviewing court is only look for substantial evidence to support the decision reach, and the “whole record” contained “ample evidence that [Bernold] was disruptive to the point that the department’s function and operation were impaired.” The court noted:

5 The Court wrote that “the whole record test does not allow the reviewing court to replace the Board’s judgment as between two reasonably conflicting views, even though the court could justifiably have
Petitioner relies on his argument that “lack of collegiality” cannot constitute incompetence; however, he cites no authority that disruptive behavior cannot constitute incompetence. Petitioner then draws our attention to evidence in the record showing petitioner’s positive interactions with some colleagues and explaining the reasons behind his negative interactions with others. Our task is not to comb the record for evidence that would support a different outcome from that reached by the Board, but rather to look for substantial evidence to support the decision. Here there is ample evidence that petitioner was disruptive to this point that his department’s function and operation were impaired.

What survives expiration of collective bargaining agreements?
Dues Checkoff and arbitration requirements

*Tribune Publishing Co. v. National Labor Relations Board,* 564 F.3d 1330 (D.C. Cir. 2009)

This case made it to the U.S. Court of Appeals for the D.C. Circuit when Tribune Publishing petitioned for review of the NLRB’s decision that the Tribune had violated the NLRA by unilaterally discontinuing the use of the Company’s direct deposit system to collect union dues.

Tribune and the Graphic Communications International Union entered into a collective bargaining agreement which provided for payroll deduction of union dues upon written request of the employee. Thirty-seven employees filed written requests and paid union dues through dues checkoff. After the collective bargaining agreement expired, Tribune continued dues checkoff for about a month, and then discontinued payroll deduction of union dues informing the employees through a letter that “the Company was exercising its legal right.”

While the parties were bargaining for a new collective bargaining agreement, the union secretary-treasurer obtained signed direct deposit authorization forms from those thirty-seven employees who had previously participated in dues checkoff. He took the forms to Tribune’s administrative manager who told the secretary-treasurer that it was “a good idea” to use direct deposit to pay union dues and accepted the forms for processing. Tribune effectuated this use of direct deposit for one pay period only. After the first pay period, the administrative manager sent a letter to the employees stating that direct deposit payment of union dues had been an error and it was to be discontinued because dues checkoff had been previously discontinued.

reached a different result had the matter been before it *de novo.* *Thompson v. Wake County Bd. Of Education,* 292 N. C. 406, 410 (1977)
The union contended that Tribune violated the NLRA when it unilaterally discontinued the direct deposit of union dues. A NLRB administrative law judge determined that direct deposit of payroll deductions were working conditions of the union employees and that Tribune violated NLRA sections 8(a)(5) and (5) of the NLRA by ceasing to allow direct deposit because it changed the working conditions of those employees without affording the union an opportunity to bargain, as required. A three-member panel of the NLRB reviewed and adopted the ALJ’s conclusion and noted that Tribune entered into a new agreement allowing for direct deposit of union dues after the collective bargaining agreement expired.

On appeal before the D.C. Circuit, Tribune argued that when it allowed employees direct deposit of union dues, it was simply reinstituting the dues checkoff provision from the expired agreement because direct deposit of union dues and dues checkoff accomplish the same result and are therefore “one and the same.” Since dues checkoff and direct deposit are the same, Tribune argued it could discontinue either because the collective bargaining agreement had expired. The employer was essentially arguing that, because it had the right to discontinue union dues deduction upon expiration of the union contract, when it stopped direct deposit of union dues it “once again exercised its right in the context of an expired collective bargaining agreement to cease deducting money from the wages of employees in payment of membership dues to the union.” If a company can cease dues deduction after a CBA expires, then “surely the employer has the same right to cease payroll deduction of union dues pursuant to an informal oral agreement reached during a contract hiatus.”

The NLRB, in response, argued that the real issue is not the expired CBA but the fact that the Tribune had reached a “new” agreement with the union for direct deposit of union dues and that, having made that agreement, the employer cannot unilaterally cease that practice.

The court first noted that the right of an employer to cease payroll deduction of union dues at the expiration of a union contract is beyond dispute [Bethlehem Steel Co., 136 NLRB 1500 (1962)]. Of course, a company is also at liberty to continue such deductions even though a contract has expired.

Having noted that, the court did not accept the company’s argument that when it agreed to direct deposit it was merely “reinstituting” dues checkoff under the CBA and that it was as if it never has terminated dues checkoff. It then follows that the company could terminate the dues checkoff because that agreement was not expired. The court said that once the dues checkoff was terminated, it could not be reinstated unilaterally. The practice could only be instituted again under a new agreement. That new agreement was reached – and now it could not be terminated without negotiations with the union. The court found that the board’s decision that the institution of direct deposit constituted a new agreement was supported by substantial evidence and upheld the decision.
The court also rejected Tribune’s argument that section 302 of the LMRA does not authorize the use of direct deposit unless there is a written collective bargaining agreement, because Tribune cited no cases supporting such an argument.

**Reuters v. LLC Newspaper Guild, (US. District Court, SDNY) (10 Civ.0273 and 0639), March 9, 2010**

Reuters Newspaper sought to stay two separate arbitration cases. One related to the failure of the newspaper to deduct union dues from employees’ paychecks; the other involves a grievance by a Reuters employees and a union member. The newspaper maintained that it was no longer obligated to arbitrate either of those cases because the collective bargaining agreement had expired.

The union, however, argued the cases were arbitrable because the collective bargaining agreement contained an “evergreen clause.” This clause specifically stated:

"The terms and conditions of this Agreement shall remain in effect during such negotiations as required by applicable law."

The court noted that an arbitrator does not have the power to resolve a grievance concerning “renewal” of the agreement, but found that the provision would not restrain the arbitrator or from interpreting existing clauses, including the evergreen provision.

**Burden of Proof in ADEA Cases**

**Gross v. FBL Financial Services, Inc. 129 S. Ct. 2343 (2009)**

In this case the Supreme Court was presented with the question of whether a plaintiff seeking a mixed-motive jury instruction under the ADEA must present direct evidence of age discrimination in order to obtain the instruction. The court did not directly address the question, but rather, in a 5-4 decision, found that a mixed-motive jury instruction is never proper in an ADEA case – whether the evidence of discrimination is direct or circumstantial.

The case arose when Jack Gross, who had been working for FBL since 1971, was reassigned from the position of claims administration director to the position of claims project coordinator in 2003. Gross was 54 years old at the time of the reassignment. At the same time that FBL reassigned Gross, it also transferred many of his previous job duties to a newly created position – claims administration manager. The position was then filled by a woman who had previously been supervised by Gross and who was in her early forties. Gross filed suit in district court alleging that his reassignment was a
violation of the ADEA. At trial, Gross “introduced evidence suggesting that his reassignment was based at least in part on his age.”

The district court instructed the jury that it must return a verdict for Gross if it determined that the reassignment was a demotion, and that his age was a motivating factor in FBL’s decision to demote him. The court gave further instructions that age was a motivating factor “if [it] played a part or a role in [FBL]’s decision to demote [him].” The court also instructed the jury on the burden shifting effect of a mixed-motive case; once Gross established that age was a motivating factor the burden was upon FBL to prove it would have made the same decision if age had not been a motivating factor.

FBL appealed, challenging the jury instructions. The U.S. Court of Appeals for the Eighth Circuit reversed and remanded, holding that the jury should only have received a mixed-motive instruction if Gross had presented direct evidence of discrimination. Because Gross conceded that he did not present direct evidence, the mixed-motive instruction, including the instruction regarding the burden shifting to FBL, was improper.

Although the question presented on certiorari “was whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case,” the Supreme Court instead addressed whether mixed-motive instructions are ever proper in an ADEA case.

The Court refused to apply Title VII decisions regarding mixed-motive cases to the ADEA “because Title VII is materially different with respect to the relevant burden of persuasion.” The Court noted that the Supreme Court first recognized the mixed-motive framework in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). There the Court held that if a Title VII plaintiff shows that discrimination was a “motivating” or a “substantial” factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. Justice O’Connor separately concurred that in order to shift the burden of persuasion to the employer, the employee must present “direct evidence that an illegitimate criterion was a substantial factor in the employment decision.”

The Court found it significant that Congress amended Title VII to explicitly authorize mixed-motive discrimination claims but has not amended the ADEA to recognize such claims. Congress must have acted intentionally in doing so.

The Court observed that it had never held this burden-shifting framework applicable to ADEA claims, “and we decline to so now.” The Court stated that “unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination

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6 Congress amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was a “motivating” factor for an adverse employment decision. See 42 U.S.C. Section 2000e-2(m) (providing that an “unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for an employment practice, even though other factors also motivated the practice” (emphasis added).
by showing that age was simply a motivating factor,” and interpreted Congress’ decision not to amend the similar provisions in the ADEA to mean that the mixed-motive framework does not apply to cases brought under the ADEA. “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”

The court also interpreted the plain language of the ADEA, “it shall be unlawful for an employer… to… discriminate… because of” age, and found that it required “but-for” causation. In ADEA cases, there is no shift in the burden of persuasion from the plaintiff to the defendant; the burdened of persuasion remains with the plaintiff to show by a preponderance of the evidence that age was the “but-for” cause of the challenged decision. The Court held that “a plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was a “but-for” cause of the challenged employer decision.

The court also explicitly rejected the argument that, although the 1991 Amendments codifying Price Waterhouse do not apply to the ADEA, Price Waterhouse itself should be controlling.

Justice Stevens wrote a dissenting opinion in which Justices Souter, Ginsburg and Breyer joined. The dissent disagreed with the majority’s interpretation of the ADEA as requiring “but-for” causation, and urged that the most natural reading of the plain language of the ADEA is that the statute “prohibits adverse employment actions motivated in whole or in part by the age of the employee.” The dissent pointed out that the Supreme Court rejected the “but-for” interpretation of identical language in Title VII in Price Waterhouse, and Congress rejected such an interpretation in enacting the amendments to Title VII in 1991. The dissent would apply the reasoning of Price Waterhouse and Wards Cove Packing Co. v. Atonio, 490 U.S.642 (1989) to the ADEA, and hold that a plaintiff bringing a claim of age discrimination under the ADEA need not present direct evidence in order to obtain a mixed-motives instruction.

The dissent also disagreed with the majority’s decision to answer a question that “was not the question [the court] granted certiorari to decide.” The question which the majority answered was raised for the first time in a brief and it is not the usual course of the court to answer questions “raised only in a merits brief.”

Justice Breyer wrote a separate dissent, in which Justices Souter and Ginsburg joined, explicitly stating that it was appropriate to apply the Price Waterhouse affirmative defense to ADEA claims because Congress only eliminated the defense with respect to Title VII claims.

Application of Gross to Claims under the ADA

Serwatka v. Rockwell Automation, Inc., 591 F. 3d 957. (7th Cir., 2010)
In this case, the U.S. Court of Appeals for the Seventh Circuit applied the Supreme Court’s reasoning in *Gross* to a claim arising under the Americans with Disabilities Act and found that the mixed-motive framework is not available in claims brought pursuant to the ADA.

Kathleen Serwatka filed suit in the U.S. District Court for the Eastern District of Wisconsin alleging that her former employer, Rockwell, discharged her because it regarded her as being disabled, in violation of the ADA. After trial and deliberations, the jury answered “yes” to the following question on the special verdict form: “Did defendant terminate plaintiff due to its perception that she was substantially limited in her ability to walk or stand?” The jury also answered “yes” to the question “Would defendant have discharged plaintiff if it did not believe she was substantially limited in her ability to walk or stand, but everything else remained the same?” The district court decided the jury’s findings constituted a mixed-motive finding. Rockwell appealed arguing that the mixed-motive finding was improper in light of *Gross* and that if it were proper, the relief that Serwatka was awarded was improper.

The court, like the Supreme Court in *Gross*, discussed the landmark decision of *Price Waterhouse* and Congress’ subsequent amendments to Title VII in 1991. The court noted that, similar to the ADEA, Congress did not amend the ADA to expressly recognize mixed-motive decisions. Despite the similar “because of” language between the ADA and the ADEA, the court took a moment to discuss the enforcement provisions of the ADA because, unlike the ADEA, the enforcement provisions of the ADA cross-reference the remedies provisions of Title VII, including the Title VII remedy provision which authorizes a court to award certain types of relief in mixed-motive cases.

In light of the importance that the *Gross* court placed on the “because of” language in the ADEA, the court found that the cross-reference to the mixed-motive remedy provision was not enough – there was no cross-reference to the provision recognizing employer liability for mixed-motive claims. The court interpreted *Gross* to mean that “when another anti-discrimination statute lacks comparable language [to the Title VII language], a mixed-motive claim will not be viable under that statute. The court also took note of another recent Seventh Circuit decision, *McNutt v. Board of Trustees of University of Illinois*, 141 F. 3d 706 (7th Cir., 1998), in which the court held that the Congressional amendments to Title VII recognized mixed-motive claims in substantive discrimination (race, gender, national origin), but not in retaliation claims. The court in *McNutt* held “the omission of retaliation claims from this new provision affects the relief courts can grant” [*Accord, see also, Fairley v. Andrews*, 578 F. 3d 518 (7th Cir., 2009), (decided under Civil Rights Act of 1871; “but for” causation required.]).

Compare, however, the recently issued decision in *Smith v. Xerox Corp.* (5th Cir., No. 08-11115, 3/24/10), where Fifth Circuit held that the mixed motive theory of liability is still available to prove retaliation under Title VII. The “but for” causation is not required for such retaliation claims.
Statute of Limitations Issues under Title VII

_Gentry v. Jackson State University_, 610 F. Supp. 2d 564 (S.D. Miss., 2009)

This case was filed by a professor at Jackson State University who was denied tenure in the U.S. District Court for the Southern District of Mississippi. Jackson State filed a motion for summary judgment. The court granted the motion in part and denied the motion in part.

Dr. Laverne Gentry filed suit alleging that “she was denied tenure and a related salary increase because of her gender,” in violation of Title VII, §1981 and the equal protection clause of the United States Constitution. Gentry also asserted that Jackson University retaliated against her in violation of Title VII, and filed a state law claim of intentional infliction of emotional distress.

The court dismissed plaintiff’s §1981 and equal protection claims because those claims were barred by the Eleventh Amendment. The court also dismissed the state law claim of intentional infliction of emotional distress, because the plaintiff did not comply with the provisions of the Mississippi Tort Claims Act which requires any person with a claim for injury against a governmental entity to provide 90 days notice to the CEO of the entity.

However, the court did not dismiss Gentry’s Title VII claims because they fell within the purview of the Lilly Ledbetter Fair Pay Act. ⁷

The defendant argued that the Title VII claim that the denial of tenure was an adverse action taken because of the plaintiff’s gender should be dismissed because the denial of tenure occurred in 2004, but the plaintiff did not file her charge with the EEOC until 2006, which is beyond the 180 day requirement for the timely filing of a charge. However, the plaintiff contended that the denial of tenure negatively affected her compensation and therefore qualified as a compensation decision or other practice which affected her compensation. _Although the court recognized that the denial of tenure was a discrete act, in light of the recently-enacted Lilly Ledbetter Fair Pay Act of 2009, the_

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⁷ The Lilly Ledbetter Fair Pay Act overturned _Ledbetter v. Goodyear Tire & Rubber Co_, 550 U.S. 618 (2007), which had held that where there is no evidence that the employer “initially adopted its pay rate system in order to discriminate… or that it later applied this system … within the statutory time period with any discriminatory animus,’ the mere fact that “this discrimination reduced the amount of later paychecks” does not mean that “each new paycheck constitutes a new violation.” The new law states:

For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of the Act, when a discriminatory compensation decision or other practice is adopted; when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation or practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice.
court agreed with the plaintiff that it also denied her a salary increase which made it a compensation decision.

Here, it can hardly be denied that the denial of tenure was a “discrete” act of which plaintiff was obviously aware. However, plaintiff has asserted that the denial of tenure also effectively denied her salary increases and hence was a compensation decision. Accordingly, the court concludes that it cannot grant summary judgment on the limitations basis urged by the University. Cf. Rehman v. SUNY, 596 F. Supp. 2d 643 (E.D.N.Y. 2009) (in cases involving allegations that defendant refused to propose the plaintiff for appointment to associate or full professor with tenure, the court held that although the plaintiff filed his EEOC charge on April 13, 2007, under the Ledbetter Act, his wage discrimination claims based upon actions occurring on or before April 13, 2005, two years, were timely, which claims presumably included the defendant’s refusal to consider him for tenure.); Shockley v. Miner, Civ Action 06-478, JBF, 2009 WL 866792 (D. Del March 31, 2009) (applying Ledbetter Act to failure to promote case); Bush v. Orange County Corrections Department, 597 F. Supp. 2d 1293 (M.D. Fla 2009) [16 year old claims over demotion were not longer untimely under the new Act].

Because the decision amounted to a compensation decision, under the act, the discrimination claim was renewed with each paycheck, making the 2006 filing of the charge timely. Accordingly, the court denied summary judgment of the Title VII discrimination claim.

The defendant also sought summary judgment on the plaintiff’s claim for gender discrimination based on pay disparity because the plaintiff was unable to identify appropriate male comparators. However, the court disagreed and found that summary judgment was not appropriate on that claim. The court also denied summary judgment on the retaliation despite the fact that the plaintiff did not exhaust her administrative remedies because “it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge” (emphasis added).

Mezu v. Morgan State University, No. 09-1447, 4th Cir., Court of appeal (unpublished decision, 2/19/10)

An associate professor's claim that she was discriminatorily denied promotion was dismissed because she failed to file within 300 days after being notified that her promotion was denied.

Rose Ure Mezu, who is of Nigerian origin, was notified on April 6, 2006 that she had been denied promotion to professor. She appealed internally and sued in federal court claiming violations of Title VII due to race and national origin discrimination. Her EEOC charge was filed on March 27, 2007, more than 300 days after being notified of the promotion denial.
The Court affirmed the decision of the lower district court, which had dismissed her claims as untimely filed. The Court wrote:

The time the initial employment decision was made and communicated triggered the commencement of the limitations period despite the pendency of the internal appeal and the possibility of reversal of the initial decision. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980)

* * *

We agree with the district court that Dr. Richardson’s letter post-marked April 6, 2006 denying Mezu’s promotion to full professor, constituted the discrete act of failure to promote triggering the commencement of the limitation period despite the pendency of her internal appeal with the University. We further agree that the Provost and the Vice President Academic’s reaffirmation of her prior adverse recommendation to the President, as well as Defendant’s alleged failure to complete the internal appeal process, did not constitute independently discriminatory acts commencing the limitation period anew.

The pendency of the internal appeal does not toll the running of the limitations period. [citing *Ricks* and also *IBEW v. Robbins and Myers*, 429 U.S. 229 (1976), noting that the existence and utilization of grievance procedures under a union contract does not toll the running of the limitation period that would otherwise begin on the date the allegedly discriminatory act took place.]

**Non-reappointment considered an “adverse action”**


This case was on appeal at the U.S. Court of Appeals for the Second Circuit. The plaintiff appealed a U.S. District Court for the Southern District of New York decision granting summary judgment to the defendants. The court of appeals affirmed the district court’s order in part and vacated the order in part.

Leibowitz was an employee of the New York State School of Industrial and Labor Relations (“ILR”) which is a “contract college” of Cornell University, funded by the State University of New York system. She began as an Extension Associate in 1983 and was promoted to the position of Senior Extension Associate II in 1987. Leibowitz’s employment was a term appointment, governed by the Cornell and ILR policy that senior extension associates “may be appointed to ‘terms of up to five years and may be reappointed on the basis of recommendations by the department.’” Leibowitz’s contract was renewed in 1992 and 1997. Each appointment letter explicitly stated that the
appointment was “for a finite term and was contingent upon funding.” Although the position was not tenured, plaintiff asserted that the position was equivalent to that of a tenured professor. Prior to the non-renewal of Leibowitz’s contract, defendants had never terminated, laid off, or failed to renew the contract of a Senior Extension Associate II without cause.

Because Leibowitz was teaching at the Ithaca campus but was based in New York City, Cornell reimbursed her travels costs. In 2001, Cornell was required to increase the amount of travel reimbursement to account for a policy which required Leibowitz to record travel reimbursement as taxable income. Leibowitz’s travel reimbursement was increased from $20,000 to $30,000. In June 2002 Cornell reminded Leibowitz that her contract was set to expire on October 31, 2002 and informed her that it would not be renewing her contract because of fiscal reasons; that she was assigned to Ithaca for the 2002-2003 academic year; and that her employment would extend to May 31, 2003. Cornell made this decision despite the Long Island office’s interest in having Leibowitz work as a senior extension associate. The director of the Long Island office was eager to hire Leibowitz, but this interest was “certainly not considered [by Cornell].”

In early December 2002, Leibowitz informed Cornell that she intended to retire effective December 30, 2002. On December 20, 2002 she requested that she be able to rescind her retirement in order to be assigned to a position in the Long Island office. Her request was denied because of “fiscal circumstances.” Four days later, the director of the Long Island office wrote to Leibowitz to “confirm his offer to her” of a recently vacated position. Cornell informed Leibowitz that the offer was not valid and fired the director for making the offer. Leibowitz was not considered for any vacancies at all. Leibowitz filed suit in the district court alleging gender and age discrimination in violation of Title VII and state and municipal laws, and breach of contract, breach of implied-in-fact contract, unjust enrichment, and quantum meruit. The district court originally granted the defendants’ motion to dismiss for failure to state a claim for which relief can be granted; but this decision was reversed by the court of appeals and remanded for further proceedings. The district court then dismissed the action granting summary judgment for the defendants. Leibowitz again appealed.

The district court determined that Leibowitz could not prove the existence of an adverse action because she was unable to produce evidence that she had any right to any official or unofficial tenured position, and that the plaintiff could not show circumstances giving rise to an inference of discrimination. The district court also found that Leibowitz failed to raise a genuine issue of material fact that the defendants’ reasons for refusing to renew her contract were pretextual. The district court also dismissed all of Leibowitz’s contract claims.

On appeal, the court found that the district court was incorrect in ruling that the non-renewal of her contract did not constitute an adverse employment action. The district court had concluded that the plaintiff did not demonstrate an unofficial policy of tenure for employees in the position of Senior Extension Associate II, and without an unofficial tenure policy the non-renewal of an employment contract was not an adverse
The court of appeals, however, found that even without an official or unofficial tenure policy, non-renewal of an employment contract when the individual is seeking continued employment constitutes an adverse action. The court reasoned that the statute makes it unlawful for an employer to discriminate against a new applicant seeking employment, so it is equally unlawful to discriminate a current employee who is seeking continued employment. The court stated:

Were we to accept defendants’ arguments here, we would effectively rule that current employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination as prospective employees. In other words, under defendant’s reasoning, an employee could bring a discrimination lawsuit if an employer refused to hire her based on her age and/or gender but not if the same employer failed to renew an employment contract for the same discriminatory reasons. We decline to adopt that flawed legal analysis, which is inconsistent with prior decisions of the Supreme Court and this court… There is simply no reason that the discrimination laws should not apply with equal force to an employer’s decision regarding a current employee who is denied a renewal of an employment contract. An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA.

The court of appeals also found that the district court erred in finding that the circumstances did not give rise to an inference of age or gender discrimination. Leibowitz presented evidence that during the relevant time period, the defendants laid off five additional employees, all of whom were females over the age of fifty; that defendants reassigned Leibowitz’s duties to at least three male instructors; and that defendants did not consider Leibowitz for any vacant positions and attempted to fill one such position with a younger, male employee. The court of appeals found that this was sufficient to give rise to an inference of discrimination and rejected the district court’s reasoning that no inference of discrimination could be drawn because none of the male employees “specifically replaced [Leibowitz].”

The court of appeals rejected the district court’s alternative reasoning for granting summary judgment on the grounds that the defendants “had proffered a legitimate, non-discriminatory reason for the non-renewal, and [Leibowitz] had failed to provide evidence sufficient for a rational jury to find that the reason was pretextual.” The court of appeals found that the evidence giving rise to an inference of discrimination, combined with additional evidence, created material issues sufficient to survive summary judgment. Although the defendants argued they did not renew the contract because of budgetary concerns, evidence that the budgetary concerns that existed in early 2002 diminished during the 2002-2003 school year and that the ILR hired twelve new employees during the relevant time period, combined with the evidence discussed earlier, was enough for a rational fact finder to conclude that the defendants’ reason was pretextual.
Furloughs in Hawaii disallowed

*Hawaii State Teachers Association v. Lingle*, Civil No. 09-1372-06 KKS, First Circuit Court of Hawaii, July 29, 2009

Two unions brought suit against the Governor of Hawaii, the director of the Department of Human Resources Development and the director of the Department of Budget and Finance, alleging constitutional violations stemming from an executive action that unilaterally imposed a statewide furlough of public employees. Hawaii’s circuit court for the first circuit granted a temporary restraining order against defendants as to the unions’ first claim, but the court denied the motion for a temporary restraining order as to the unions’ other claims.

Hawaii is one of five states affording constitutional protection to collective bargaining, and that protection extends to persons in private employment as well as persons in public employment. The relevant Constitutional provision states that, “persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.” Hawaii further provides by statute that:

> it is the public policy of the State to promote harmonious and cooperative relations between government and its employees… [this policy is] best effectuated by recognizing the right of public employees to organize for the purpose of collective bargaining, [and requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, an other conditions of employment.

Hawaii statutes also provide that, “employees shall have the right of self-organization… for the purpose of bargaining collectively” and that “this chapter shall take precedent over all conflicting statutes… and shall preempt all contrary… executive orders.”

The Governor, mayors of various counties, the chief justice and the Hawaii Health Systems Corporation Board were all parties to collective bargaining agreements – one of which contained a provision governing furloughs. In 2008, the teachers’ union and the public employees union (UPW) had a desire to modify and amend certain provisions of the agreements and bargaining began. At no time did any defendant indicate a desire to modify and amend the furlough provision or any other section of either the agreement with the teachers’ union or the UPW to provide for a three day furlough per month.

In order to reduce labor costs, including wages and benefits, on June 1, 2009 the Governor announced a unilateral decision to implement three furlough days per month for all state employees, effective July 1st and continuing for the next two years. This
decision eliminated the defendants’ obligation to engage in collective bargaining with respect to the three-day per month furloughs for all state employees for two years. A week later, the unions requested that the defendants negotiate over the decision and to cease and desist from unilaterally implementing the policy, but the defendants refused to bargain in good faith.

The executive order implementing the furloughs was issued by the Governor on June 24, 2009. The order defined furlough to mean “the placement of an employee temporarily and involuntarily in a non-pay and non-duty status by the employer because of lack of work funds.” The order also provided that state employee pay would be automatically adjusted by reducing monthly wages by one and a half days per pay period. Any employee who did not take the required number of furlough days would still endure the pay adjustment and would be directed to take all untaken furlough days before the end of the year. The pay adjustment would result in a reduction of state employee monthly wages by 14 to 16 percent.

In their first claim, the unions alleged that the decision and subsequent implementation of the executive order violates the right of public employees (represented by the unions) to organize for the purpose of collective bargaining in light of Article XIII, §2 of the Hawaii State Constitution. The court found that the plaintiffs demonstrated a likeliness of success on the merits; the balance of irreparable damage favors a temporary injunction; and the public interest supports granting injunction and granted the motion for a temporary restraining order.

The court noted that although the Constitutional provision states “as provided by law,” the Hawaii Supreme Court has held that when a law, statute, or act withdraws core subjects that voters contemplated in the collective bargaining process, it is a violation of Article XIII, §2. The court did not understand the phrase “as provided by law” to mean that the legislature retains ultimate authority to govern the parameters of collective bargaining. The court found that the imposition of furloughs “concerns core subjects of collective bargaining, such as wages,” because although a “mere delay” of wage payments is not a core subject, a reduction of wage payments is, and the furlough results in a 14 to 16 percent wage reduction for public employees. By removing the furlough issue from the bargaining process by executive order, the defendants’ actions are inconsistent with the constitutional requirement that the State engage in negotiations concerning core subjects. The court held that the ordered furloughs cannot be imposed by unilateral action.

The court also rejected the State’s argument that the Hawaii Labor Relations Board has exclusive jurisdiction to hear the issue. The Hawaii statute setting forth the exclusive original jurisdiction of the HLRB states that “any controversy concerning unfair labor practices may be submitted to the board… but nothing herein shall prevent the pursuit of relief in courts of competent jurisdiction.” The court found that the case was properly before the circuit court for the issuance of injunctive and declaratory relief.

The defendants also relied on language in the relevant Hawaii statute to justify the
unilateral imposition of the furlough program. Defendants argued that the provision allowing for “managerial rights” permitted the type of action taken here. The court found that such a broad reading of the statute would defeat the intent of Article XIII, §2, and declined to accept the defendants' interpretation.

The section of the statute concerning when the Governor “can take actions as necessary to carry out the missions of the employer in cases of emergencies,” presented a separate issue. The court found that the State failed to establish that the fiscal concerns at issue constituted an emergency as defined by statute, and that “an emergency was not properly and validly raised by the Governor to outweigh a constitutional violation that this Court has already found.”

The court found that the first claim had a likelihood of success on the merits and next considered the balance of irreparable damage and the public interest. The court found that a constitutional violation itself is irreparable damage, and additionally that irreparable damage was established because the unilateral imposition of furloughs “goes to the heart of workers’ livelihood.” The court also found that the public interest supports granting the temporary restraining order, because “the government cannot violate constitutional rights of the people.” The court thus granted a temporary restraining order and also issued a permanent injunction in favor of the plaintiffs as to count I.

In their second claim, the unions alleged that the defendants' actions would violate Article XVI, §2 of the Hawaii constitution, which guarantees that accrued retirement benefits shall not be diminished or impaired. The court found that as to this claim, the plaintiffs did not demonstrate a likelihood of success on the merits because the furlough is “prospective only,” with no affect on accrued benefits attributable to past services and by its plain language--that section of the Hawaii Constitution applies only to accrued benefits, not future benefits. The court denied the temporary restraining order as to count II.

In their third claim, the unions alleged that the budget and finance director’s decision to reduce the funds allotted to the Department of Education and University of Hawaii is a violation of the Hawaii statute which allows such action, or alternatively that the section violates the separation of powers doctrine.

The statute that allows the director of budget and finance to reduce the amount allotted states that no such reduction shall reduce “any allotted amount below the amount required to meet valid obligations or commitments previously incurred against the allotted funds.” The unions alleged that the collective bargaining agreement and the teachers’ next-year assignments were “valid obligations or commitments previously incurred.” However, the court rejected this argument because “teacher assignments do not sufficiently raise [an]… issue that their obligations or commitments previously incurred are impacted." The court also rejected the separation of powers argument, and found no likelihood of success on the merits as to claim three. The court denied the temporary restraining order as to count III as well.
Solicitation and distribution issues

*Loparex LLC v. NLRB*, 591 F.3d 540 (7th Cir., 2009)

In this case, the Seventh Circuit upheld a Board order finding that Loparex had engaged in unfair labor practices during a union organizing campaign, and subsequently ordering the company to take several affirmative steps to remedy the matter.

Loparex owns multiple production facilities around the country, manufacturing polycoated and silicone-coated papers and films. At one of these plants, in early 2007, some employee sentiment built for a union after the company announced several controversial employment policies. The company’s response to this union activity led to charges before the Board.

First, after some employees posted pro-union materials on the bulletin board, the company issued a policy requiring employees to obtain approval before placing any materials on the board. Second, after some employees attempted to distribute union literature in the parking lot, they were stopped by company officials. Third, after employees had passed out union buttons and had left some in the area of the time clock for employees to pick up, they were told they had violated company policy and told to stop. Fourth, company officials discouraged talk about a union during working hours. Fifth, the company informed all shift leaders that they were statutory supervisors and were prohibited from participating in union activities.

The Board had found all such conduct objectionable under section 8 (a) (1) of the Act, and the Seventh Circuit agreed. On the issue of bulletin board policy, the Court noted that “while the new bulletin board policy was facially neutral and nondiscriminatorily applied, an employer may violate the Act if its motivation for a new policy is its hostility toward pro-union activity.” In this case, since the company did not offer any other explanation for establishing the new bulletin board policy, and since there was evidence of company awareness of union activity and company’s policy in opposition to the drive, the Court found that the Board’s conclusion that the company was motivated by anti-union animus was supportable.

On the parking lot issue, the Court agreed with the Board that an employer may not prohibit all solicitation in a company parking lot by off-duty employees. The Court also agreed with the Board that prohibiting the distribution of union buttons violated the Act. The prohibition against passing out buttons in the plant was overly broad, as employees could have believed that they were barred from soliciting near the time clock – a non-work area – during non-work time.

On the shift leader issue, the Court analyzed the Board’s finding that they were not supervisors and thus could not be restricted in their support for the union. The Court found sufficient facts to support the Board’s conclusions. Of particular note was the
Board’s finding that the shift leaders did not have authority to take either disciplinary or corrective action against employees because they were unable to control their crew members in any meaningful sense. The Board also found that the shift leaders did not exercise independent judgment while assigning work.

**Nova Southeastern University**, 2009 NLRB LEXIS 76 (NLRB, March 16, 2009)

In an opinion issued by an Administrative Law Judge, a University’s overly broad non-solicitation rule was found to be unlawful, as was the discipline imposed on employees of a contractor working at the University for violating that rule. The rule as stated in the Campus Safety and Traffic Handbook read: “No solicitation is allowed on the NSU campus or facility without the permission of the NSU Executive Administration.”

UNICCO contract employees working on the NSU campus were told they could not engage in solicitation or distribution of literature in accordance with this rule, and when one of the UNICCO employees violated this rule, he was disciplined.

The rule was deemed overly broad on its face, with no special circumstances justifying such a sweeping prohibition. By prohibiting on its face the lawful activity of employees to engage in solicitation during non-working time, the rule was in per se violation of the Act. In addition, the ALJ wrote:

Any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in nonwork areas is unlawful. Further, the Board held in *Schnadig Corporation*, 265 NLRB 147 (1982) that the mere existence of an overly broad rule tends to restrain and interfere with employees’ rights under the Act even if the rule is not enforced. We find that the Respondent’s promulgation and maintenance of its no solicitation/no distribution rule constituted a per se violation of Section 8 (a)(1).

The University tried to avoid liability by arguing that the rule was not enforced against its own employees, and that employees of a subcontractor working on campus do not have the same rights as the primary employer’s employees. In a sense, when such contract employees are doing anything other than working on the job, they are in essence “trespassers,” and the employer can restrict any solicitation on the premises by such individuals, just as the Supreme Court said it could in *Lechmere v. NLRB*, 502 U.S. 527.

The ALJ disagreed, noting that the Board has held that “a subcontractor’s employees may engage in solicitation and distribution among co workers even while working on the property of a contractor” [*Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F. 2d 700 (11th Cir., 1992)]. Moreover, *Lechmere* involved non-employee union organizers trespassing on employer property and attempting to organize the
employer’s employees by leafleting and other means. Here, the subcontractor’s employees were not trespassers but had a legitimate right to be on campus. In striking the appropriate balance of rights, then, allowing subcontractor employees to legitimately solicit one another when they are legally on the primary employer’s property is to be favored.

When the relationship situates the subcontract employees’ workplace continuously and exclusively upon the contracting employer’s premises, the contracting employer’s rules purporting to restrict that subcontract employee’s rights to distribute literature among other employees of the subcontractor must satisfy the test of Republic Aviation v NLRB, 324 U.S. 79 (1945).