

## An Era Of Uncertainty In Discrimination, Speech Cases

Evolving analytical frameworks drive courts to differing decisions

By **PETER J. MURPHY**

The employer-employee relationship is subject to numerous state and federal laws that address a diverse range of topics, including hiring and firing, wages and benefits, and prohibited employment actions such as discrimination and retaliation. Certainty and clarity in these statutes and regulations allow employers to assess the legality of potential courses of action before taking any such actions. Certainty and clarity also allow employers and employees to assess the strengths and weaknesses of their respective cases in employment litigation.

Unfortunately, however, certainty and clarity are not always found in the text of those laws or in court rulings interpreting such laws — as demonstrated by recent cases from Connecticut and the Sixth Circuit Court of Appeals.

### Discrimination Cases

All employers know that it is illegal under both the Americans with Disabilities Act (ADA) and the Connecticut Fair Employment Practices Act (CFEPA) to discriminate against any individual on the basis of a disability. However, what analytical framework will be used to assess disability claims has become less certain by recent court cases and legislative changes.

The ADA prohibits employers from discriminating against an employee “because of” the employee’s disability.



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When addressing ADA claims, the U.S. Court of Appeals for the Second Circuit and other courts across the country had permitted employees to assert “mixed motive” claims. In such a claim, once a plaintiff proves that a disability played a motivating factor in an employment decision, the employer could avoid liability only by proving it would have made the same decision even if it had not taken the disability into account.

In the 2009 case of *Gross v. FBL Financial Services*, the U.S. Supreme Court reviewed the availability of “mixed motive” claims under the Age Discrimination in Employment Act (ADEA), which prohibits discrimination “because of” a person’s age. The court concluded that the “because of” language in the ADEA does not permit “mixed motive” claims. Instead, the court held that a plaintiff must prove that he would not have suffered the adverse action “but for” the unlawful discrimination on the basis of

age. This ruling was a victory for employers, as the “but for” standard is a more demanding standard for plaintiff’s to meet.

Given that the ADEA and the ADA both prohibit discrimination “because of” a protected category, defense lawyers began arguing that *Gross* applied equally to ADA claims. In its May 25, 2012 opinion, the U.S. Court of Appeals for the Sixth Circuit agreed, with a majority of the judges, sitting en banc, concluding that the holding of *Gross* compelled the conclusion that the “but for” standard also applied to ADA claims.

The majority’s opinion accords with the Seventh Circuit’s 2010 opinion in *Serwatka v. Rockwell*, and numerous district court opinions from across the country—including a September 2011 opinion by Connecticut U.S. District Judge Robert Chatigny. There were several dissents to the Sixth Circuit opinion, and the Second Circuit has not yet addressed the applicability of *Gross* to the ADA. Thus, although it appears that the approach taken by the Sixth Circuit is likely to be the prevailing approach, that issue remains unclear for employers within the Second Circuit.

The ambiguity facing employers is only heightened by the passage of the ADA Amendment Act (ADAAA), which became effective on Jan. 1, 2009, and which was intended to broaden the scope of individuals who are con-

sidered disabled and entitled to protections under the ADA. Among other things, the ADAAA changed the “because of” language in the ADA to “on the basis of.” The Supreme Court in *Gross* equated the terms “because of” and “on the basis of” in one section of its opinion, and a strong argument can be made that *Gross* should continue to apply to discrimination claims under the ADAAA.

The Sixth Circuit declined to address this issue, however, and at this point no other court has addressed this issue. Consequently, even if *Gross* applies to ADA claims, it is uncertain whether it will also apply to ADAAA claims.

The relationship between the ADA/ADAAA and the CFEPFA adds an additional layer of uncertainty to employment litigation in Connecticut. Just like the ADA and the ADEA, the CFEPFA also prohibits discrimination “because of” several different protected categories, including disability and age. It is well settled that the Connecticut courts look to analogous federal court opinions when interpreting Connecticut’s civil rights statutes. Borrowing from federal court opinions, the Connecticut courts have allowed “mixed motive” claims in regard to age and disability discrimination.

Given the rulings in *Gross* and its progeny, it can be argued that the Connecticut appellate courts should adopt the more demanding “but for” standard from *Gross* into the CFEPFA analysis. At this time, the sole Superior Court judge to address this issue found in an age discrimination case that the “but for” standard does not apply to CFEPFA claims. Until the Connecticut appellate courts weigh in on this matter, therefore, ambiguity will remain as to whether *Gross* impacted the analysis of CFEPFA discrimination claims.

### Uncertainty In Speech

The need for appellate court guidance on the proper application of the CFEPFA in light of *Gross* is demonstrated by a May 2012 opinion from the Connecticut Supreme Court, which corrected and clarified the approach taken by judges on the Superior Court and one district court judge to free speech retaliation claims brought pursuant to Connecticut General Statutes § 31-51q.

Public employees have traditionally enjoyed protection for speech taken in their capacity as private citizens. The legislature extended that protection to private sector employees through § 31-51q, and such claims are frequently litigated between employers and employees. In 2006, the U.S. Supreme Court concluded in *Garcetti v. Ceballos* “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for first amendment purposes, and the constitution does not insulate their communications from employer discipline.”

Just like in *Gross*, the Supreme Court’s opinion in *Garcetti* was a significant win for employers, as it greatly reduced the types of speech that may constitute protected speech. Not surprisingly, therefore, defense attorneys quickly argued that, given the Connecticut appellate court’s long-standing reliance on federal court precedent when addressing § 31-51q claims, this important defense established by *Garcetti* applied equally to § 31-51q claims. Not until 2012, after the Connecticut Supreme Court had already heard argument on this issue, did a superior court judge accept this argument. All of the other judges addressing this issue previously rejected this argument based on the grounds that *Garcetti* was a federal court decision, and, therefore, it did not apply to § 31-51q claims.

In *Schumann v. Dianon Systems*, the Connecticut Supreme Court rejected the weak reasoning employed by the Superior Court judges and one district court judge, noting that such reasoning provided private sector employees with greater protections than public sector employees. The court then officially adopted *Garcetti* into the analysis of a § 31-51q claim based on alleged violations of free speech rights under the U.S. Constitution. This significant win for employers was not absolute, however, as the court declined to decide whether *Garcetti* also applied to § 31-51q claims based on alleged violations of the Constitution of Connecticut. Until that issue is addressed, therefore, some ambiguity remains in regard to whether speech made pursuant to official job duties is protected by § 31-51q.

These recent opinions from federal courts and the Connecticut Supreme Court have provided some clarity and certainty in regard to the proper interpretation of the ADA and § 31-51q. The courts also have left open issues that, if decided in a particular way, will render the provided certainty and clarity short-lived and temporary. As such, employers and their attorneys must continue to monitor the courts’ assessment of these statutes when considering potential employment actions or assessing litigation.

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