EEOC Commissioner Stuart Ishimaru Updates Employers on EEOC Activities

by Tremain C. Mattress and K. Coe Heard

Waller Lansden’s Labor and Employment Practice Group recently hosted EEOC Commissioner Stuart J. Ishimaru at Waller’s annual Employment Law Roundtable held at Waller’s office in Nashville. Initially appointed by President George W. Bush, and then again by President Obama, Commissioner Ishimaru currently is one of five EEOC Commissioners who make the policy, regulatory, and enforcement decisions that affect practically every employer and employee in the United States. Commissioner Ishimaru joined us for a wide ranging discussion on his view of the EEOC’s various initiatives and enforcement priorities for 2012.

Employers using certain pre-employment screening criteria may expose themselves to EEOC scrutiny. According to Commissioner Ishimaru, the EEOC has increased its focus on employers’ use of arrest and conviction records, zip codes and credit checks in the employment application process. The EEOC has taken the position that using such screening criteria to eliminate applicants disproportionately impacts minority populations and may give the EEOC sufficient grounds to issue a charge of discrimination and eligibility for investigation. An applicant’s record or history of unemployment is also a criterion an employer should not consider because unemployment status, too, disproportionately impacts minority populations in the EEOC’s view.

New ADA guidance is on the horizon. Leave from work is considered an ADA accommodation. The EEOC recognizes that the recent amendments to the EEOC and its regulations have challenged many employers and that guidance is needed. While no definite time table has been established, the Commissioner assured the audience that guidance was forthcoming. Also, consistent with some court opinions, leave from work – whether extended past allowed FMLA leave or other absence from work – is considered an ADA reasonable accommodation. Left unanswered, however, is just how much leave is required in order to satisfy an employer’s obligation to provide a reasonable accommodation to a disabled employee. Commissioner Ishimaru acknowledges this is an issue for employers, but was unable to give any firm guidance as to how much leave is sufficient.

Ensuring employment opportunities for the mentally disabled. Commissioner Ishimaru noted that a top priority for the Commission is ensuring that those with mental disabilities are given equal employment opportunities through appropriate regulations, guidance, and enforcement. The delicate balance that needs to be recognized, he noted, is how to integrate mentally disabled workers into the labor force while also ensuring that employers appropriately use pre-employment screening criteria and make reasonable accommodations as necessary. While Commissioner Ishimaru was unable to describe the specifics of this EEOC concern, he emphasized that it is one of the Commission’s top priorities.

The Commission has joined with other agencies under the Lilly Ledbetter Fair Pay Act of 2009. Generally speaking, the Lilly Ledbetter Fair Pay Act allows individuals claiming Equal Pay Act violations to seek damages from the date of the alleged violation, instead of having their damages capped under the EPA’s statute of limitations. Commissioner Ishimaru noted that the Act created the National Equal Pay Enforcement Task Force, which brings together the EEOC, the Department of Justice, the Department of Labor, and

(continued on page 2)
The Expansion of “But For” Causation: Will the ADA Be Getting the Gross Treatment?

by Babar Azhar

When the Supreme Court’s decision in Gross v. FBL Financial Services, Inc., hurst on the legal scene, it gave employers and their legal counsel – a beacon of light in the recent employer-friendly, federal legislative darkness. The Gross decision replaced the traditional mixed-motive argument for age discrimination claims under the Age Discrimination in Employment Act (“ADEA”) with the much narrower “but for” causation standard.

This higher standard now forces plaintiffs to prove their age was the “but for” or sole cause of their complaint of adverse employment action. The Court supported its decision by distinguishing the statutory text of Title VII of the Civil Rights Act (“Title VII”) from the ADEA. Title VII specifically incorporated mixed motive or “motivating factor” language while the ADEA did not. This lack of “motivating factor” language in the ADEA meant, therefore, that employees had to show their employers took adverse employment actions against them “because of” their age.

Due to the Court’s focus on the ADEA, few considered whether Gross’ light would shine on other employment laws. It looks like it might, as the Gross decision may have inadvertently (or intentionally) affected the standard for subject to protection, more and more employee claims are able to meet that burden. Some courts are addressing this by either directly applying Gross’ “but for” causation requirement to ADA claims or opining that Gross’ requirement is likely applicable to ADA claims.

The most direct discussion of the Gross standard in the non-ADEA context was handed down by the Seventh Circuit Court of Appeals in Serwatka v. Rockwell Automation, where the Court held that the language of the ADA was similar to that of the ADEA in that it had a “because of” standard and no explicit mixed motive language. Thus, claims under the ADA should be analyzed under a “but for” standard.

The Seventh Circuit’s reasoning tracks that of the Supreme Court in Gross, and some federal courts have begun to follow suit, such as in Bolmer v. Oliveira, (stating that Gross might require “but for” causation in ADA claims), Saviano v. Town of Westport (finding the Gross “but for” standard applies in ADA cases); and Warshaw v. Concentra Health (finding that Gross barred mixed motive retaliation claims under the ADA).

Despite promising signs, Gross’ beacon has not yet expanded to all courts. Employers, however, should be cautiously optimistic the ADA’s “but for” standard may become the standard applicable to ADA claims. Regardless of whether it does, employers must still strive to work with their employees on disability-related issues, especially requests for reasonable accommodations, and they should continue to ensure all supervisors and managers are trained on their anti-discrimination, anti-harassment, and anti-retaliation policies.

(continued on page 1)

Managing Gender Identity Issues in the Workplace

by Stephanie A. Roth

Gender identity issues are bubbling up in workplaces across the United States. An issue once crudely reduced to whether an individual had undergone a “sex-change operation” is now defined by courts incorporating gender identity, appearance, behavior, and expression. Or, to translate, gender identity is not only about overtly transgressive issues (which bathrooms and pronouns should be used) but also about self-presentation that confounds gender stereotyping (make-up, attire, and leadership requirements based on biological sex).

Class Action Waivers in Arbitration Agreements: What Employers Need to Know

By Brian M. Clifford

“The right to engage in collective action – including collective legal action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.” – NLRB.

On January 6, 2012, after a wave of recent U.S. Supreme Court cases upholding class action waivers in arbitration agreements, the latest of which being AT&T Mobility v. Concepcion, the National Labor Relations Board (“NLRB”) held that such agreements unlawfully restrict employees’ rights to “engage in concerted action.” At least one Federal District Court however, has refused to acknowledge the NLRB’s position on such class action waivers, thereby adding to the confusion and controversy over whether such agreements are enforceable and which they can be relied upon by employers.

In D.R. Horton, Inc. and Michael Cuda, the NLRB held that: (1) Section 7 of the National Labor Relations Act (“NLR”), vests employees with a substantive right to engage in specified forms of concerted action; (2) the NLRB makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the NLRA; and (3) maintaining a mandatory arbitration agreement that waives the right to maintain a class or collective action is an unfair labor practice.

One week later, the Court in LaVoice v. UBS Financial Services, Inc., rejected the NLRB’s holding in D.R. Horton, finding that where a plaintiff relies on the decision in D.R. Horton as authority to support a conflicting reading of AT&T Mobility v. Concepcion, the Court declines to follow D.R. Horton.

LaVoice relies on AT&T by stating: “[g]iven that the Supreme Court held in AT&T Mobility that “[r]equire[ing] the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the [Federal Arbitration Act “FAA”]),” this Court must read AT&T Mobility as standing against any argument that an absolute right to collective action is consistent with the FAA’s “overarching purpose” of “en[ur[ing] the enforcement of arbitration agreements to their terms so as to facilitate streamlined proceedings.”

Although the NLRB may have overreached in authority in D.R. Horton, at least as viewed by one Court, it remains too early to reliably predict how this issue will ultimately be resolved. Fortunately, the Supreme Court’s Concepcion decision is the law of the land, but employers cannot ignore the NLRB’s decision that, in most respects, conflicts with the Supreme Court. Employers will be wise to work closely with counsel to craft their arbitration and other employer rights resolution plans with each of the holdings in mind to ensure compliance with one or both of the rulings.
Managing these issues in an ever-changing legal landscape can leave even the most conscientious employer reeling. Some strategies to consider as you prepare to manage transgender and other gender identity issues in the workplace:

- Be familiar with the law in each location where you do business. Knowing state law is not enough.
- Review dress and grooming codes. Can sex-specific requirements be eliminated? Are the codes compliant with local laws regarding gender identity and expression?
- Consider adding gender identity to your non-discrimination policy. If you do:
  - Have a gender transition plan in place and make it accessible so employees transitioning, or living with co-workers who are, can find guidance on how to handle common issues.
  - Reiterate non-discrimination policies, including anti-harassment and anti-retaliation provisions. Harassment is one of the most significant challenges faced in the workplace by transgender persons.
  - Emphasize confidentiality. For transitioned persons entering your workplace, treat their status - which may be revealed through background and health checks - as you would any employee health information.