

In the 2008-2009 Term, A Number of Notable Decisions For Women

A number of crucial decisions from the Supreme Court's 2008-2009 Term demonstrate the impact of the Supreme Court on women's rights. The Court's decisions in *Fitzgerald v. Barnstable School Committee* and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* upheld hard-fought legal protections. But the Court's decision in *AT&T Corp. v. Hulteen* reaffirmed the damaging effect that the highly conservative Roberts Court has had on civil rights protections of the utmost importance to women. And, in *Ricci v. DeStefano*, a closely divided Court issued an opinion that set back the cause of equal employment opportunity, making it more difficult for women and minorities to compete fairly to secure jobs. These two decisions, in particular, demonstrate that the Roberts Court cannot be counted on to recognize or to uphold the civil rights protections of the utmost importance to women, because they repeatedly ignore the realities of the workplace for women and employees.

- In *Fitzgerald v. Barnstable School Committee*, the Supreme Court safeguarded women's and girls' rights by allowing them to pursue remedies for gender discrimination in schools under both Title IX and the Constitution. In this case, a kindergarten girl claimed that a third grade boy regularly harassed her on the school bus. Her parents were very dissatisfied with the school's response, and sued under Title IX, the federal statute that bars sex discrimination in schools that receive federal money, and the Equal Protection Clause of the Constitution, which is enforced through another federal statute known as Section 1983.

The First Circuit Court of Appeals ruled against the parents under Title IX. It also held that the parents could sue *only* under Title IX, and that no one protected under Title IX also had a right to claim their Constitutional rights against discrimination. The Fitzgeralds brought only the latter issue to the Supreme Court. In a unanimous decision, the Court ruled for the Fitzgeralds, stating that: "We hold that §1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."

- In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Court ruled that employees are protected from being subject to retaliation for cooperating with an employer's internal investigation of discrimination. Vicky Crawford was fired from her job of 30 years after she answered her employer's questions during an internal investigation, and told them that she had been sexually harassed.

The Supreme Court determined that Ms. Crawford was protected under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, which bars discrimination in employment. The Court recognized that this protection is necessary because failing to speak out about discrimination for fear of retaliation is "no imaginary horrible."

- In *AT&T Corp. v. Hulteen*, a closely divided Court ruled against female workers. Ignoring the realities of the workplace and the intent of Congress, the Supreme Court permitted AT&T, as Justice Ginsburg stated in a strong dissent, to pay women "for the rest of their

lives, lower pension benefits than colleagues who worked for AT&T no longer than they did.”

Noreen Hulteen is one of four women who sued AT&T after learning that their pension benefits were lower than they would have been if they had received credit for pregnancy leave that they took before the passage of the Pregnancy Discrimination Act of 1978 (PDA). AT&T continued to deny them that credit when it set their pension benefits many years later. The majority of the Court found that the credits were determined as part of a “bona fide” seniority system, and thus could not be challenged under Title VII of the Civil Rights Act of 1964.

Once again, as in the *Ledbetter* case, the Court simply did not understand the barriers women faced and continue to face in the workplace. By authorizing AT&T to treat women differently today based on past maternity leaves, the Court is allowing current employer policies to perpetuate pregnancy discrimination in damaging and unjustifiable ways.

- In *Ricci v. DeStefano*, the Supreme Court’s 5-4 ruling again demonstrated the Court’s disregard for the realities of the workplace.

The City of New Haven declined to certify the results of a fire department civil service exam because it believed that certifying the test would have a discriminatory impact on minority job applicants. The results of the exam at issue were extreme: no black firefighters and only one Hispanic firefighter scored high enough on the exam to be promoted to any position. The New Haven Civil Service Board held hearings and, following testimony that the exams did not actually predict who would make good fire captains or lieutenants, determined that it could not proceed with the promotions. Attempting to comply with Title VII’s mandate against employment discrimination, New Haven decided to freeze the promotions process so that it could determine whether there was a test that appropriately evaluated who might qualify for promotions without the adverse impact on minorities. Twenty white firefighters, including one Hispanic firefighter, filed suit, claiming that the decision by the City not to certify the results was reverse discrimination.

Employment practices that disproportionately exclude women and minorities, like the promotional test used in *Ricci*, have closed opportunities for women in nontraditional fields, such as firefighting, police work or construction. Women’s recent inroads into such nontraditional occupations were made possible in large part by challenges to such practices under the disparate impact theory of discrimination.

Unfortunately, in *Ricci*, a 5-4 majority of the Court crafted a new standard that represents a significant change in the law and that undermines women’s and minorities’ employment opportunities. But while the Court’s decision will make it harder for employers to take voluntary action to ensure that their tests comply with nondiscrimination mandates, the opinion does recognize employers’ continuing obligation to comply with the law and makes

clear that there are steps employers can still take to remove barriers to women's advancement in areas of nontraditional employment.

- The Court also decided several other cases with a significant impact on girls and women, even though they do not directly address sex discrimination:
 - The decision in *Safford Unified School District #1 v. Redding*, involving the strip search of a 13 year-old girl to find prescription ibuprofen, was a positive one: the Court protected the constitutional rights of students, holding that a school needs reason to suspect that the drugs present a danger and that a strip search is necessary to find them before conducting such a search. Justice Souter's majority opinion noted that the student's "expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating," and that her experience was consistent with research showing that "adolescent vulnerability intensified the patent intrusiveness of the exposure." However, only two members of the Court, Justices Ginsburg and Stevens, thought that the constitutional violation was so clear that the assistant principal who ordered the search should be liable for damages.
 - Two other decisions have a significant and damaging impact on women's rights. In *Gross v. FBL Financial Services*, a case challenging age discrimination in employment, the Court's decision made it exceedingly difficult for women who have both age and sex discrimination claims to bring age discrimination cases in the future. And now, unions may bargain away their members' statutory rights to bring discrimination claims in court by requiring arbitration because of the Court's decision in *14 Penn Plaza LLC v. Pyett*, which effectively overruled the law in effect since 1974.

The cases that came before the Supreme Court this Term illustrate that the Court is continually confronted with cases involving legal issues of the utmost importance to women. Each Justice on the Supreme Court will have a profound, and lasting, impact on the women of this nation and on their families. It is critically important that any nominee to the Supreme Court respect the constitutional and statutory protections upon which women rely.

For more information on these cases, see the Center's amicus briefs at:

<http://www.nwlc.org/pdf/crawfordamicusfinal.pdf>

<http://www.nwlc.org/pdf/ACLU%20NWLC%20Fitzgerald%20Amicus%20brief.pdf>

<http://www.nwlc.org/pdf/NWLC%20Hulteen%20Brief-Final.pdf>

<http://www.nwlc.org/pdf/NWLC-Partnership%20Ricci%20Brief%20Final.pdf>

For more information on the Supreme Court and women's rights more generally, see:

<http://www.nwlc.org/pdf/EveryVoteCountsMay2009.pdf>