

## **N.J. HUMAN RESOURCES LAW ALERT™**

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### **AGE DISCRIMINATION: EMPLOYEE HAS BURDEN TO PROVE AGE WAS THE "BUT FOR" CAUSE OF ADVERSE EMPLOYMENT ACTION**

The U.S. Supreme Court recently refined the burden of proof in a "mixed motive" age discrimination case under the Age Discrimination in Employment Act, holding a an employee plaintiff bringing a "disparate treatment" claim must prove not simply that age was a motivating factor in the adverse employment action, but that age was the "but for" cause of the challenged adverse employment action. Unlike race and gender discrimination cases under Title VII of the Civil Rights Act of 1964, the burden of persuasion in an age case under the ADEA does not shift to employer to show it would have taken action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor. (Gross v. FBL Financial Services, Inc., U.S. Sup. Ct. June 19, 2009)

### **CONCLUSION**

Heretofore, the burden of proof under the ADEA had been identical to that of Title VII cases. Gross makes it more difficult for an age discrimination plaintiff to survive a summary judgment motion, let alone win a trial verdict.

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### **EMPLOYEE PRIVACY: EMPLOYEES HAVE SOME (LIMITED) RIGHTS OF PRIVACY IN USE OF COMPUTERS AT WORK**

The N.J. Appellate Division recently recognized, for the first time, that an employee's emails to her attorney, sent via her employer's email system, are protected by the attorney-client privilege, notwithstanding the employer's well-publicized email policy claiming a right of access to all employee emails. (Stengart v. Loving Care Agency, Inc., N.J. App. Div., June 26, 2009)

### **CONCLUSION**

Although earlier decisions in most states held that an employer may effectively destroy its employees' expectations of privacy in their email communications at work by announcing such a policy, New Jersey has now joined New York in finding exceptions to that rule. However, this decision is of limited applicability in two respects: (1) it relies heavily on the importance of the attorney-client privilege to justify overcoming the employer's announced policy, and thus might not apply to communications that are not protected by that privilege; and (2) it suggests a more carefully drafted and uniformly enforced policy might trump even attorney-client privileged communications.

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## **EVIDENCE; DAMAGES; TRIAL PROCEDURE: “AFTER-ACQUIRED EVIDENCE” REQUIRES BIFURCATION**

The N.J. Appellate Division recently held that where an employer seeks to cut-off its exposure to “front pay” damages in a wrongful termination case by introducing “after-acquired evidence” – *i.e.*, facts that the employer learned about after firing the employee that would have justified the termination of employment – the trial must be bifurcated in order to prevent the employee from suffering prejudice to her effort to show liability.

Plaintiff alleged her employer fired her because she was going to disclose defendant's improper conduct in connection with an IRS audit. After plaintiff filed suit, defendant discovered that plaintiff had falsely represented in her employment application that the reason she left her prior job was because her position had been "eliminated", whereas she had in fact sued her former employer for wrongful discharge. The trial Court permitted defendant to use the after acquired evidence at trial, and the jury entered a no-cause verdict.

On appeal, the Appellate Division reversed and remanded, holding "the after-acquired evidence is relevant and admissible only on the issue of damages[.]" and thus it is improper to admit such after-acquired evidence before the jury reaches a decision on liability. Instead, trial courts confronted with the after-acquired evidence defense are now required to bifurcate the trial into a liability phase, and, if necessary, a damages phase. (Redvanly v. ADP, N.J. App. Div., June 2, 2009)

## **CONCLUSION**

In those cases in which the employer asserts the after-acquired evidence defense, this opinion represents a fundamental change in trial procedure, to the detriment of the employer. Before Redvanly, an employer could justify presenting the after-acquired evidence at trial on the ground it was relevant to the calculation of damages, whereas in reality the jury frequently would consider the after-acquired evidence as impeachment of the former employee's credibility.

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## **SAIBER LLC'S EMPLOYMENT LAW PRACTICE GROUP**

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**Sean R. Kelly, Esq.**, a Partner in the firm's Employment Law Practice Group, has over 29 years experience in advising and defending employers. A graduate of Yale College and Georgetown Law, Mr. Kelly is a former Master of the Sidney Reitman Employment Law Inn of Court, is Certified by the New Jersey Supreme Court as a Civil Trial Attorney, and frequently publishes and lectures on employment law before business and legal professional groups.

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