Summary of 2007-08 Supreme Court Decisions in Employment Law Cases
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The October 2007 term of the Supreme Court produced a high volume of employment law cases. The employment law cases decided that term reveal an emphasis on claims of discrimination based on age, as nearly all of employment cases decided by the Court included a discussion of the Age Discrimination in Employment Act ("ADEA"). As the federal workforce grows older and we approach the pending retirement tsunami, age claims likely will take on increasing importance and may encompass a larger percentage of federal-sector EEO claims. In over a half dozen decisions, the Court attempted to further define the scope of protection given to employees by the ADEA as well as the possible defenses available to employers defending against claims of age discrimination.

Explained below in greater detail, the Court also ventured beyond claims of age discrimination to prohibit public employees' use of a "class of one" theory when alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. Further, the Court, relying on analysis from a similar suit interpreting the ADEA, determined that a claim of retaliation is available under 42 U.S.C. § 1981.

Provided below are brief summaries of the Supreme Court's employment law decisions issued during the October 2007 term.

Court expands employees' ability to pursue retaliation claims.

In a case of particular interest to federal employees, the Court in Gomez-Perez v. Potter, 553 U.S. ___, 128 S.Ct. 1931 (2008), held that federal employees who are retaliated against because of the filing of an age discrimination complaint may assert a claim under the federal-sector provision of the ADEA. Gomez-Perez, a postal worker in Dorado, Puerto Rico requested a transfer to the Post Office in Moca, Puerto Rico in order to be closer to her ill mother. When she requested a transfer back to her original position, her request was denied because her supervisor had converted it to part time and filled it with another employee. After she filed an EEO complaint based on her age, Gomez-Perez was harassed by her supervisors and her hours were drastically reduced.

Relying on prior Court precedent in the areas of race and sex discrimination, the Court in Gomez-Perez found that the statutory phrase "discrimination based on age," contained in the ADEA's federal sector provision encompasses claims of retaliation. The Court determined that retaliation against an employee who has complained of age discrimination is another form of intentional age discrimination is thus prohibited by the federal sector provision of the ADEA. The court explicitly rejected the notion that the absence of the word "retaliation" from the text of the statute precluded a finding that such claims were not protected.

A similar analysis guided the Court's decision in CBOCS West, Inc. v. Humphries, 553 U.S. ____, 128 S.Ct. 1951 (2008), which held that 42 U.S.C. §1981 also encompasses retaliation claims. In Humphries, the respondent, an African-American former assistant manager of a Cracker Barrel restaurant was dismissed because of racial bias and because he had complained to managers that a fellow assistant manager had dismissed another black employee for race based reasons. In addition to the pattern of analysis provided in Gomez-Perez, the Court also based its decision on its long standing practice of interpreting §§1981 and 1982 alike because they were "enacted together, have common language, and serve the same purpose of providing black citizens the same legal rights enjoyed by other citizens."

Burden of Proof Rests with Employer to show "Reasonable Factors Other than Age."

The Court addressed disparate impact claims under the ADEA in Meacham et. al. v. Knolls Atomic Power Laboratory, 554 U.S. ____, 128 S.Ct. 2395 (2008). In Meacham, the Court vacated and remanded a lower court decision upholding Knolls' reduction in force plan which resulted in 30 of the 31 terminations being of employees who were 40 years of age or older. In particular, the Court focused on an employer's affirmative defense that an employment decision was made based on "reasonable factors other than age," ("RFOA"). The Court held that an employer utilizing the RFOA affirmative defense bears both the burden of production and the burden of persuasion. The Court's finding was based in large part on the ADEA's text and structure, which indicate that the RFOA exemption creates an affirmative defense and not merely an elaboration on an element of liability. Meacham also expressly stands for the notion that the "business necessity" test has no place in ADEA disparate impact cases as utilization of both the "business necessity" and RFOA defenses would result in a "wasteful and confusing structure of proof." In an effort to assuage the concerns of the business community that the ruling would encourage strike suits or push marginal plaintiffs into court, the Court emphasized that an ADEA disparate-impact plaintiff must "isolate and identify the *specific* employment practices that are allegedly responsible for any observed statistical disparities."

In context of equal protection, no longer a "class of one"

In Engquist v. Oregon Department of Agriculture, 553 U.S. ___, 128 S.Ct. 2146 (2008), the Court rejected an Oregon public employee's claim that the loss of her position was a violation of the Equal Protection Clause because she was a "class of one,"; namely that she was fired not because of her membership in a protected class (i.e. race, sex, national origin), but simply for arbitrary, vindictive and malicious reasons. The Court held that the government has significantly greater leeway in its dealings with citizen employees than in bringing its sovereign power to bear on ordinary citizens. Though government employees do not lose their constitutional rights when they go to work, those rights must be balanced against the realities of the employment context. Further, the Court's decision recognized that there are some forms of state action which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized

assessments. In such cases treating like individuals differently is an accepted consequence of the discretion granted to governmental officials. The Court decided that to recognize a "class of one" theory of equal protection in the context of government employment would significantly damage the at-will nature of government employment.

Is "me too" evidence relevant?

In Sprint/United Management Co. v. Mendelsohn, 552 U.S. ____, 128 S.Ct. 1140 (2007), the Court had the opportunity to determine whether testimony from non-parties alleging discrimination by supervisors of the employer who played no role in the adverse employment action challenged is relevant to the ultimate question of whether discrimination occurred in the employment action at issue. In Mendelson, the respondent employee alleged she had been discriminated against based on her age when she was terminated as part of an ongoing company-wide reduction in force. In support of her claim, Mendelsohn sought to introduce testimony by five other former Sprint employees who claimed that their supervisors had discriminated against them because of age.

In evaluating so-called "me too" evidence, the District Court granted Sprint's motion to exclude the testimony defining employees to be "similarly situated" if they had the same supervisor as Mendelsohn. The Court of Appeals reversed, rejecting what it perceived to be the District Court's attempt to apply a per se rule of inadmissibility of such evidence. The Court of Appeals also conducted its own analysis of the evidence under Federal Rules of Evidence 401 and 403. The Court, in vacating the lower court decision, held that such "me too" evidence is neither per se admissible nor per se inadmissible. The Supreme Court remanded the case to the District Court, finding that the Court of Appeals should not have engaged in an inquiry to determine the relevance of the testimony but should have remanded the case to the District Court for clarification of the basis for its ruling to exclude the testimony. Thus, while the Supreme Court dismissed any attempt to establish a per se rule on the admissibility of so-called "me too" evidence, any analysis by the Court of the specific relevance of such testimony will have to wait.

When is a charge a charge?

The Court, in Federal Express Corp v. Holowecki 553 U.S.___, 128 S.Ct. 1147 (2008) held that an EEOC intake questionnaire and attached detailed affidavit supporting the respondent's claim of discrimination does constitute a "charge" under the ADEA. Use of the EEOC's charge form is not required. In order to be considered a "charge," the document must be "reasonably construed as a request for the Agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." Though the EEOC's definition of a charge is not exhaustive, the Court granted the Agency deference in its interpretation of its own regulation. The Court rejected Fed Ex's argument that because the EEOC failed to notify them of the filing it is not a charge; the court stated "that the statute requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking action."

As the Court cautions, employees should be cognizant of the fact the EEOC's enforcement mechanisms and statutory waiting periods differ among the statutes the agency enforces, such as Title VII of the Civil Rights Act of 1964, and should not apply rules applicable under one statute to a different one without careful consideration. This is the case even if the EEOC forms and the same definition of a charge apply in more than one kind of discrimination case.

Age as a potential factor in retirement plans

In another decision, the Court addressed age discrimination claims in the context of disability retirement plans. In Kentucky Retirement Systems, et. al. v. Equal Employment Opportunity Commission, 554 U.S. ___, 128 S.Ct. 2361 (2008), the Court held that Kentucky's pension plan did not treat employees differently based on their age. In Kentucky Retirement Systems, Kentucky's plan allowed "hazardous position" workers such as policemen to receive normal retirement benefits after working either 20 years or 5 years and attaining age 55 and pays "disability retirement" benefits to workers meeting specified requirements. At issue was a hazardous position employee that continued working after becoming eligible to retire at age 55 and later retired at age 61 after he became disabled. The employee alleged that he was discriminated against based on his age when the Plan failed to impute years solely because he became disabled after age 55. Kentucky's plan calculates normal retirement benefits based on actual years of service; disability benefits are calculated by adding to an employee's actual years of service the number of years that the employee would have had to continue working into order to become eligible for normal retirement benefits, adding no more than the years the employee had previously worked.

In upholding the plan, the Court decided that age and pension status remained "analytically distinct" concepts and that Congress has otherwise approved programs such as Social Security Disability Insurance, that calculate disability benefits using a formula that expressly takes account of age. Further the Court recognized that the plan's disparity has a clear non-age-related rationale, namely that the Plan's disability rules track the normal retirement rules by imputing only those additional years of service needed to bring the disabled worker's total to 20 or to the number of years that the individual would have worked had he worked to age 55. Thus, the Court determined that the purpose of the plan was not to penalize employees based on age but rather assist them based on their disability.