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EMPLOYER UPDATE

SIGNIFICANT UNITED STATES SUPREME COURT EMPLOYMENT LAW CASES DECIDED FROM JANUARY 2007 THROUGH MARCH 2008

By Keely E. Duke and Megan E. Mooney

With the recent wave of United States Supreme Court decisions dealing with employment law issues, we wanted to take this opportunity to provide a brief update on these recent decisions as well as a few others decided over the past year. In the tradition of David Letterman – here’s our top seven United States Supreme Court Employment Law decisions of 2007 – March 2008.

1. What Constitutes a Charge under the EEOC?

The Supreme Court answered this question on February 27, 2008, holding in *Federal Express Corp. v. Holowecki* that an intake questionnaire filed with the Equal Employment Opportunity Commission (EEOC) might constitute a charge under the Age Discrimination in Employment Act (ADEA) even if the individual does not subsequently file the EEOC’s charge form. The Court limited its decision by holding that in order for an intake questionnaire to constitute a charge it must, in addition to containing the information required by the EEOC regulations, “reasonably

be construed as a request for the agency to take remedial action to protect the employee’s rights.”

This lawsuit was filed after FedEx adopted a compensation program tying couriers’ compensation and continued employment to performance benchmarks. In response, 14 current and former FedEx couriers over the age of 40 sued, claiming that the new program was a veiled attempt to force older workers out of the company. FedEx responded that the lawsuit was not timely because one plaintiff, Patricia Kennedy had not filed a charge with the EEOC. Under the ADEA, no civil action may be commenced until 60 days after a charge has been filed with the EEOC. In examining the facts, the Supreme Court held that the intake questionnaire which contained a request to “please force Federal Express to end” its new compensation programs, was sufficient to constitute a charge.

In addition to this issue causing a spike in charges filed with the EEOC, even before the Supreme Court’s decision

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in *FedEx v. Holowecki* was issued, the extent to which this decision will effect employers is unknown. However, as the dissent pointed out, the utterly vague criteria established by the Court for determining what constitutes a charge under the ADEA may mean that any document filed with the EEOC constitutes a charge. This lack of certainty may possibly undermine the benefit of certain administrative procedures including prompt notification to the employer that a charge has been filed and the subsequent opportunity for the employer to attempt to resolve the problems through other means before the sixty day window preventing litigation from being filed has passed.

2. The Admissibility of “Me, Too” Evidence in Discrimination Cases

On February 26, 2008, the Supreme Court handed down another employment law related decision in *Sprint/United Management Company v. Mendelsohn*, holding that the admissibility of “me, too” evidence in discrimination cases should be determined by the trial court on a case by case basis. So called “me, too” refers to evidence of similar discrimination provided by employees other than the plaintiff.

In *Sprint v. Mendelsohn*, the Plaintiff, Mendelsohn, worked for Sprint’s Business Development Strategy Group. She brought an ADEA claim after she was laid off in 2002. She argued that “me, too” testimony from five of her coworkers asserting their supervisors had discriminated against them because of age should be admitted. Sprint argued that it was irrelevant as Mendelsohn’s co-workers were not parties to the lawsuit, did not work in the Business Development Strategy Group, did not report to any of the supervisors in her chain of command, and did not hear any discriminatory remarks by Mendelsohn’s supervisors.

The District Court granted Sprint’s motion and the 10th Circuit Court of Appeals reversed, concluding that the District Court applied a per se rule that evidence from employees with other supervisors is irrelevant to proving discrimination in ADEA case. The Supreme Court reversed the 10th Circuit holding that

the appeals court should have sent the case back to the District Court for clarification.

In overruling the 10th Circuits’ holding, the Supreme Court rejected a per se rule precluding the admissibility of “me, too” evidence. Instead, the Court determined that whether evidence of other supervisor’s discrimination is relevant in an ADEA case is “fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”

3. The “Next Frontier” in ERISA litigation?

On February 20, 2008 the United States Supreme Court decided the case of *LaRue v DeWolff, Boberg & Associates, Inc.*, unanimously holding that individual participants in defined contribution plans regulated by ERISA (Employee Retirement Income Security Act of 1974) can sue their plan administrator for a breach of fiduciary duty when such a breach reduces the value of their individual account.

The plaintiff, LaRue, participated in an ERISA-regulated 401(k) retirement plan administered by his former employer. LaRue made contributions that were allocated to an individual retirement account for his personal benefit, and he was allowed to direct the investment of the money allocated to his individual account. LaRue claimed that he directed DeWolff to make certain investment changes to safer investments that were never carried out. LaRue alleged that based on his employer’s failure to make those changes, his individual account lost approximately \$150,000 as a result.

LaRue sued DeWolff under ERISA, arguing that DeWolff breached its fiduciary duty by failing to make the investment changes he had requested. The lower federal courts held that LaRue’s claims failed as a matter of law, ruling that he could not sue for a breach of fiduciary duty because ERISA limits such claims to situations where the “plan as a whole” was injured.

The Supreme Court disagreed, clarifying that the decision relied upon by the lower courts, was based on a different type of retirement plan, a defined benefit

plan in which employees do not have individual accounts to manage and any misconduct on the part of the plan administrator would affect the entire plan.

In contrast, in this case the 401(k) plan is a defined contribution plan where by retirement benefits are based on the amount of money allocated to individual accounts by the individual participants. For defined contribution plans, fiduciary misconduct by the administrator of the plan can reduce the amount allocated to an individual's plan without affecting the whole plan.

Because defined contribution plans now "dominate the retirement plan scene," this decision has opened the door to many possible lawsuits by individual participants. However, the concurrence of Chief Justice John Roberts may have created a new argument for employers defending these cases. Roberts said that the wording of LaRue's 401(k) may require a narrower "denial of benefits" remedy forcing employees to exhaust administrative remedies prior to filing suit.

Regardless, employers are encouraged to make time to review their ERISA regulated plans to ensure compliance with fiduciary and other obligations.

4. Discriminatory Pay Decisions and Timely Filing Under the EEOC

In a sharply divided 5-4 decision issued on May 29, 2007, the majority of the United States Supreme Court held in *Ledbetter v. Goodyear Tire & Rubber Co.* that an employee who sues under Title VII must timely challenge pay decisions and cannot rely on the "continuing violations theory" to reach back to allegedly discriminatory decisions that occurred prior to the beginning of the EEOC's charge filing period.

Ledbetter worked for Goodyear from 1979 until 1988. Shortly before she retired, she filed an EEOC charge alleging that Goodyear had discriminated against her based on her gender in violation of Title VII. Ledbetter alleged that in years past, Goodyear had lowered her performance evaluations because of

her gender and that the lower evaluations resulted in lower merit pay increases.

The majority, deciding against Ms. Ledbetter, held that the 180 day window for filing a charge of employment discrimination with the EEOC begins when the discriminatory act occurs. The discriminatory act is any discrete act like promotion, termination, or a pay decision. Rejecting Ledbetter's argument that every time she received a pay check it was a continuing violation of Title VII, the Court held that the discriminatory act occurred on the date the allegedly discriminatory pay decision was first communicated to the employee, thus triggering the 180-day time window.

This decision provides employers with some protection against discriminatory pay claims based on wage-related decisions that occurred years earlier – at least with respect to charges under Federal law which must be filed with the EEOC. However, change in this area may also be coming soon as U.S. Congress, upset with the Supreme Court's decision, passed the Ledbetter Fair Pay Act which is currently awaiting a vote in the U.S. Senate.

5. In Home Health Care Providers

In a unanimous decision in *Long Island Health Care at Home, Ltd. v. Coke*, the United States Supreme Court held on June 11, 2007, that in-home health care providers are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act – even if the workers are employed by third parties.

6. Proper Termination of Pension Plans

In *Beck v. PACE International Union*, decided June 11, 2007, the United States Supreme Court found that the merger of single-employer plans into multiemployer plans is not a permissible method of pension plan termination. Specifically, the Court held that a bankrupt employer did not breach its fiduciary duties when it chose to purchase an annuity to terminate its pension plans rather than merge the plans into the union's multiemployer pension funds.

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7. Restrictions on Union's Power to Spend Fees

On June 14, 2007, the United States Supreme Court, in *Davenport v. Washington Education Association* upheld a law restricting a union's exercise of its "extraordinary power" provided by the state to charge fees to public employees it represents who do not wish to join the union. The law required a union to obtain the affirmative authorization of non-members before spending any part of their agency fees for political purposes. It had previously been struck down by the Washington Supreme Court on the grounds that it violated the union's First Amendment rights.

Soon To Be Decided Cases

Keep your eyes peeled for decisions in the following employment law cases currently pending before the United States Supreme Court:

Gomez-Perez v. Potter (No. 06-1321) regarding whether the ADEA prohibits federal agencies from retaliating against government workers who file complaints of age discrimination.

Kentucky Retirement Systems v. EEOC (No. 06-1037) Whether any use of age as a factor in a retirement plan is arbitrary and renders the plan facially discriminatory in violation of the ADEA.

CBOCS West Inc. v. Humphries (No. 06-1431) Can an employee state a claim for retaliation under 42 USC Section 1981?