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EMPLOYMENT

Supreme Court takes on employment

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Despite maintaining a select docket, the U.S. Supreme Court has granted certiorari on a surprisingly large number of employment-related cases this term.

With multiple retaliation, Age Discrimination in Employment Act and ERISA decisions on the horizon, employment lawyers are keeping a close eye on the Court's happenings.

Overall, the number of employment cases is second only to criminal cases in the federal system, noted Ross Runkel, Professor of Law Emeritus at Willamette University College of Law in Salem, Ore.

"That's a huge number of cases in the system," increasing the chances for review at the highest level, he said.

The increase could be due in part to the ever-expanding scope of employment law, suggested Bruce Elfvin, a partner at Elfvin Besser in Cleveland, Ohio who practices employment law.

Over the last 30 years, a number of employment statutes have been enacted, including the ADEA, ERISA legislation, the Family and Medical Leave Act, the Equal Pay Act and the Americans with Disabilities Act. This means the Court must address "a panoply of different issues," Elfin said.

William E. Hannum III, a partner at Schwartz Hannum in Andover, Mass., said that because Congress hasn't addressed a number of controversial issues, this has created a "pent-up demand. Judges at the trial and appellate level are dealing with issues that are now working their way up to the Supreme Court."

The justices have already heard oral argument in seven employment cases and have five more on the calendar. (See accompanying story for a full list of employment-related cases the Court will hear this term.)

Retaliation heats up

The number of retaliation cases before the Court reflects that fact that "retaliation is one of the most rapidly growing areas of employment law," said Michael Lotito, a partner at Jackson Lewis who primarily represents employers in his San Francisco practice. "You almost never get a case these days without some allegation of retaliation included."

The justices recently granted certiorari in *Crawford v. Metropolitan Government of Nashville*, No. 06-1595. The outcome of that closely-watched case will determine whether the anti-retaliation provision of §704(a) of Title VII protects a worker from being dismissed because she cooperated with an internal investigation of sexual harassment.

The plaintiff in *Crawford* alleged that she was terminated after she spoke out in support of another employee's discrimination claim. The 6th Circuit held that because the complaining employee had not filed a charge with the EEOC, she was not protected.

Elfvin said the case could have negative ramifications for both employees and employers.

If the Court rules that employees aren't protected by Title VII when they participate in an employer's internal investigation, "why would an employee risk his or her job [and speak out] when they know the employer can do whatever it wants?" he asked.

And if the employee has to file an EEOC charge to be protected, "there will be an increase in the volume of cases" if the justices affirm the 6th Circuit, Elfvin cautioned.

Employers face a problem too: the loss of an affirmative defense if they can show that they performed an investigation and attempted to make the situation right.

An affirmation of the 6th Circuit would be a "death knell for informal employer investigations," Elfvin predicted.

The Court has also agreed to hear two other retaliation cases this term: *Gomez-Perez v. Potter*, No. 06-1321, which addresses whether federal employees are protected from retaliation under the ADEA and *CBOCS West, Inc. v. Humphries*, No. 06-1431, in which the justices will determine whether race retaliation is a cognizable claim under §1981.

Evidentiary and procedural issues

Two cases filed under the ADEA are being closely watched by employment lawyers for their guidance on the statute, as well as the implications for other areas of employment law.

In *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221, the justices will decide if an age discrimination plaintiff should have been allowed to introduce the testimony of co-workers who also claimed the employer used age as a factor in implementing a reduction in force – colloquially known as "me, too" evidence.

Ellen Mendelsohn sued after being let go as part of a reduction-in-force plan which resulted in more than 14,000 companywide layoffs.

She claimed that she was laid off because of her age, in violation of the ADEA, and sought to introduce the testimony of five other Sprint employees who said they were also laid off because of their age, although the decision to let them go was not made by Mendelsohn's supervisor.

Sprint moved to exclude the evidence before trial, and the court granted the motion, ruling that only testimony from "similarly suited" employees – those laid off by the same supervisor – was admissible.

The 10th Circuit ordered a new trial, deciding that the "same supervisor" rule had no application in this context because the plaintiff alleged a company-wide policy of which all Sprint's supervisors were allegedly aware.

The decision created a split in the circuits.

The Supreme's Court take on this could have a huge impact on employment practice, Hannum said.

"I deal with this issue in discrimination cases every day, where the plaintiff's attorneys are seeking information about any discrimination by any person on any basis," he said. "Discovery motions asking for production about every instance of discrimination company-wide is the rule of thumb nowadays."

If the Supreme Court were to rule that such evidence was admissible, "that could open the doors much wider to discovery and make it much harder for employers to defend discrimination claims," Hannum said. "Employers would not only be litigating the plaintiff's claim, but also dozens of other mini-trials about other alleged acts of discrimination, making the case much more expensive and complicated."

In another closely-watched case, *Federal Express Corp. v. Holowecki*, No. 06-1322, the Court is considering whether an intake questionnaire submitted to the Equal Employment Opportunity Commission constitutes a "charge" of discrimination pursuant to the requirements of the ADEA.

Patricia Kennedy, a FedEx employee, filed an intake questionnaire with the EEOC claiming that her employer violated the ADEA. She later joined a lawsuit against FedEx with fellow employees.

Federal law requires that an employee file a "charge" of discrimination with the EEOC, a move that triggers the agency's duty to notify the employer and gives the employee the ability to file a discrimination suit after a period of 60 days.

But the agency never notified FedEx that it was the subject of a charge of discrimination or took any other action, and the employer moved to dismiss, arguing that the plaintiff had failed to file a "charge" of discrimination as required by the ADEA.

A U.S. District Court agreed, but the 2nd Circuit reversed.

The case, which focuses on a procedural aspect of employment law, is important to employees who may not know which forms to fill out if they experience discrimination in the workplace, Runkel noted.

Age cases on the docket

The court will also hear three other cases arising under the ADEA.

Claims under the statute have been increasing, which is "a reflection of the workforce getting grayer," Lotito said.

Hannum is keeping an eye on *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, where the Court will determine if an employee alleging disparate impact under the ADEA bears the burden of persuasion on a "reasonable factors other than age" defense.

During an involuntary reduction in force, an employer laid off 31 employees. Thirty of the employees were over 40 years old, and they sued under the ADEA using a disparate impact theory.

A jury found for the employees, but the 2nd Circuit vacated the verdict and remanded the case with instructions to enter judgment for the employer, finding that it was the plaintiffs' burden to prove the employer's justification was unreasonable.

The 2nd Circuit's decision created a split in the circuits.

Hannum believes the Supreme Court will reverse.

"The burden ought to be the employer's, as an affirmative defense," he said.

The justices will also review *Kentucky Retirement Systems v. EEOC*, No. 06-1037, where they will consider whether the use of age as a factor in a retirement plan is facially discriminatory in violation of the ADEA, as well as *Gomez-Perez*.

ERISA cases

The Court will hear two ERISA cases this term.

In *MetLife v. Glenn*, No. 06-923, the justices will consider whether the fact that a claim administrator of an ERISA plan also funds the plan benefits constitutes a "conflict of interest" and, if so, how that conflict should be taken into account on judicial review of a discretionary benefits determination.

The facts of *MetLife* are "very common," Runkel said, so the decision will impact many employers' ERISA plans. "The circuits are a mess on this issue."

The question is one of deference, he explained – if a claim is denied and makes it way to court, the employer will argue that it should be accorded deference as the plan administrator. Employees, on the other hand, argue that because of the conflict of interest – being able to both deny a claim and review that decision – administrators should be subject to a higher standard of review.

In a second ERISA case, *LaRue v. DeWolff, Boberger & Associates, Inc.*, No. 06-856, the Court is considering if an employee participating in a 401(k) plan can recover damages under ERISA for lost economic growth if the fiduciary failed to make changes as directed by the employee.

While the circumstances of *LaRue* occur less frequently than those of *MetLife*, the stakes are still high, Runkel said. If the Court rules for the employee, individuals will have a right of action for personal losses even if the entire plan itself has suffered no loss.

Questions or comments
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Employment cases before the Court

The U.S. Supreme Court's 2007-2008 term is well-stocked with employment law cases, but only half have been argued to date.

Cases argued

- *Federal Express Corp. v. Holowecki*, No. 06-1322. Can an intake questionnaire submitted to the Equal Employment Opportunity Commission constitute a "charge" of discrimination pursuant to the requirements of the Age Discrimination in Employment Act? Argued Nov. 6, 2007.
- *LaRue v. DeWolff, Boberger & Associates, Inc.*, No. 06-856. Can an employee participating in a 401(k) plan recover damages under ERISA for lost economic growth if the fiduciary failed to make changes as directed by the employee? Argued Nov. 26, 2007.
- *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221. Should an age discrimination plaintiff have been allowed to introduce the testimony of co-workers who also claimed the employer used age as a factor in implementing a reduction in force? Argued Dec. 3, 2007.
- *Kentucky Retirement Systems v. EEOC*, No. 06-1037. Is the use of age as a factor in a retirement plan facially discriminatory in violation of the Age Discrimination in Employment Act? Argued Jan. 9, 2008.
- *Preston v. Ferrer*, No. 06-1463. Does the Federal Arbitration Act preempt a California state law regulating talent agencies that requires claims to be submitted to an administrative agency? Argued Jan. 14, 2008.
- *Gomez-Perez v. Potter*, No. 06-1321. Does the federal-sector provision of the Age Discrimination in Employment Act prohibit retaliation against employees who complain of age discrimination? Argued Feb. 19, 2008.
- *CBOCS West, Inc. v. Humphries*, No. 06-1431. Is race retaliation a cognizable claim under 42 U.S.C. §1981? Argued Feb. 20, 2008.

Argument not yet held

- *Chamber of Commerce v. Brown*, No. 06-939. Does the National Labor Relations Act preempt states from barring employers receiving state funds from promoting or deterring union organization or using state funds for that purpose? Oral argument scheduled for March 19, 2008.
- *Engquist v. Oregon Department of Agriculture*, No. 07-474. Can a state worker sue her employer on the grounds that she was treated differently than other similarly situated employees based on the "class of one" theory of equal protection? Oral argument scheduled for April 21, 2008.
- *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505. Does an employee alleging disparate impact under the ADEA bear the burden of persuasion on a "reasonable factors other than age" defense? Oral argument scheduled for April 23, 2008.
- *MetLife v. Glenn*, No. 06-923. Does the fact that a claim administrator of an ERISA plan also funds the plan benefits constitute a "conflict of interest" and, if so, how should that conflict be taken into account on judicial review of a discretionary benefit determination? Oral argument scheduled for April 23, 2008.
- *Crawford v. Metropolitan Government of Nashville*, No. 06-1595. Does the anti-retaliation provision of §704(a) of Title VII protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment? Oral argument has not been scheduled.

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