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Supreme Court Review: 2007-08 Term

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The Supreme Court has granted *certiorari* in a number of employment and labor cases that it has agreed to review during its current term. Below if a brief review of a number of the employment cases the Court has agreed to decide.

Court to Decide When Plaintiffs May Present "Me Too" Evidence

In *Mendelsohn v. Spring/United Mgmt. Co.*, 466 F.3d 1223 (2006), the U.S. Supreme Court will decide whether and when plaintiffs may present "me too" evidence in discrimination claims. Plaintiffs sometimes attempt to prove their claims of discrimination by calling as witnesses other current or former employees, who also allege they too were victims of the same type discrimination the plaintiff allegedly suffered. Some courts have held such evidence inadmissible unless the other employee worked under the same supervisor during approximately the same period as the plaintiff. In *Mendelsohn*, the United States Court of Appeals for the Tenth Circuit held otherwise.

The plaintiff in *Mendelsohn* alleged she was terminated because of her age during a company-wide reduction in force ("RIF"). The district court decided to exclude evidence that other Spring employees had been selected for termination because of their age during the RIF as well. The plaintiff, however, had attempted to introduce such evidence to show that as evidence of Sprint's overall animus against older workers.

In rejecting the evidence, the district court relied on a prior Tenth Circuit case, *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). In *Aramburu*, the court had held that a plaintiff seeking to present testimony of other employees treated more favorably for violating the same or a similar workplace rule to show discriminatory intent, had to show that the complainant and other employees shared the same supervisor.

The Tenth Circuit in *Mendelsohn*, however, sharply limited the reach of its earlier decision in *Aramburu* and held that the "same-supervisor" rule applied only to disciplinary cases. In doing so, the court held that the rule made no sense in the context of a case alleging a company-wide policy of

discrimination, of which all the employer's supervisory employers were aware. According to the appellate court, application of the rule in a case challenging a supposed company-wide policy could make it impossible for a plaintiff to prove a claim of discrimination based on circumstantial evidence. A plaintiff might be the only employee selected for a RIF by her particular supervisor; however, there might also be scores of other employees within the protected group who also were selected for a RIF because of the policy but by different supervisors. The court explained that to apply the rule in the RIF context would create a disparity in those cases where a plaintiff is fortunate enough to have other RIF'd employees in the protected group working for the same supervisor and those cases where the other RIF'd employees work for other supervisors. The court found such a disparity unfair.

Oral arguments before the Supreme Court are set for December 3.

What Constitutes a Charge of Discrimination Under the ADEA

On November 6, the Supreme Court heard oral arguments in a case decided by the United States Court of Appeals for the Second Circuit, which held that a plaintiff's intake questionnaire and multi-page verified affidavit were the equivalent to filing a "charge" of discrimination for purposes of the time-limit requirements contained in the Age Discrimination in Employment Act ("ADEA"). In *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2nd Cir. 2006), the Second Circuit noted that EEOC regulations do not define the term "charge." The regulations do, however, set forth what a "charge" must contain, which includes the names of the complainant, the name of the employer, and a description of the alleged discriminatory acts. The Second Circuit held that when a complainant filed documentation with the EEOC that satisfies the regulatory requirements of what a charge must contain, that filing, itself, constitutes a charge.

The Second Circuit also adopted the "manifest intent rule" imposed by some circuits with regard to "charges." That rule, which is not explicitly set forth in the statute of regulations, provides that for a written submission to the EEOC to constitute a charge, "it must manifest an individual's intent to have the agency initiate its investigatory and conciliatory process." Citing the Third Circuit, the Second Circuit contended that to constitute a charge under the ADEA, "notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery".

FedEx had argued that the fact that the plaintiff also later filed an actual charge suggested that she did not intend for the intake questionnaire and affidavit to be considered her "charge." The Second Circuit recognized that the Eight and

Eleventh Circuits had followed that logic, but rejected that reasoning. It stated that nothing in the record suggested that by filing a formal charge, the "plaintiff" was doing anything more than supplementing her earlier charge, or acting out of a surfeit of caution."

May Government Employees Sue Under the ADEA for Retaliation? First Circuit Says No

The Court granted *certiorari* to resolve a split within the circuits concerning whether the ADEA bars a federal agency from retaliating against an employee who has filed an age discrimination claim. In *Gomez-Perez v. Potter*, 476 F.3d 54 (1st Cir. 2007), a United States Postal Service employee sued her government employer for age discrimination after a request for a transfer was denied. The plaintiff then alleged that after she filed a complaint with the EEOC, her employer retaliated by reducing her hours and harassing her.

The district court granted the government's motion to dismiss on the grounds that the United States had not waived its sovereign immunity for retaliation claims brought under the ADEA. The First Circuit affirmed, but on different grounds. According to the court, the United States had waived immunity under the ADEA. The court held that the employee's claim was still barred, however, because the ADEA did not include a substantive cause of action for retaliation by a government employer.

The court recognized that its decision conflicted with an earlier decision from the D.C. Circuit, *Forman v. Small*, 271 F3d 285 (D.C. Cir. 2001). The D.C. Circuit had reasoned in *Forman* that it made little sense to contend that a federal employee could file a discrimination claim against her employer but then be fired or suffer other adverse action as a result. The D.C. Circuit explained that it found nothing in the ADEA that suggested Congress intended the federal workplace to be any less free of age discrimination than in the private workplace.

The First Circuit, however, disagreed. In noted that the ADEA did not contain an express provision relating to retaliation claims as did the ADEA provisions relating to private employers. According to the court, the difference in the language of the ADEA between the provisions relating to the private sector and the public sector was dispositive.

Court To Decide Whether 42 U.S.C. § 1981 Protects Against Retaliation

The Supreme Court has agreed to consider whether a plaintiff may bring a claim of retaliation under Section 1981 after enduring an adverse action for filing a race discrimination claim against an employer. In *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007), an African American restaurant associate manager alleged he was fired for unlawfully discriminatory reasons and because he had

complained to a district manager about his supervisor's racially discriminatory treatment of another employee. The district court dismissed the plaintiff's Title VII claims as procedurally barred and granted summary judgment on the plaintiff's claim for race discrimination and retaliation. The employee appealed dismissal of his race and retaliation claims under Section 1981.

On appeal, the defendant argued that Section 1981 did not allow claims for retaliation but, instead, allowed only claims of race discrimination. Joining every other circuit that has addressed the issue, the United States Court of Appeals for the Seventh Circuit held that, as amended by the Civil Rights Act of 1991, § 1981 protects private employees who complain of race discrimination from retaliation from employers.

The Supreme Court has yet to set a date for oral arguments in the case.

State Disability Plan That Provides Lesser Benefits To Older Workers May Violate ADEA

The Court has agreed to hear a case decided *en banc* by the United States Court of Appeals for the Sixth Circuit to address whether the use of age as a factor in determining benefits under a retirement plan violates the ADEA. *See EEOC v. Jefferson County Sheriff's Dept.* 467 F3d 571 (6th Cir. 2006) (*en banc*). The plan at issue in the case is a public retirement plan and provides for "normal retirement benefits" and "disability-retirement benefits."

Under the plan, when an employee is eligible for normal retirement benefits that employee is not entitled to disability benefits. Since age is a factor in determining whether an employee qualifies for normal retirement benefits, it indirectly serves to disqualify some employees from receiving disability retirement benefits. Since employees who are of retirement age can never receive disability benefits, older workers are barred from receiving these additional benefits. The court concluded that the plan was facially discriminatory on the basis of age.

The case is set for argument before the Supreme Court of January 9, 2008.

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