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The Supreme Court of Employment Law

Each year, the U.S. Supreme Court receives more than 7,000 petitions for writs of certiorari, requesting the Court to review decisions made by the lower courts from all over the country.[1] However, the nine justices of the Supreme Court schedule only 80–100 of those cases for oral argument and decision each year, leaving the vast majority of review requests unfulfilled.[2] Of late, it appears as if the Supreme Court's docket is increasingly populated by cases from the labor and employment sector of the law, with numerous such cases currently scheduled for oral argument, waiting for decisions, or having been recently decided by the Court. This column will summarize some of those labor and employment law cases.

LaRue v. DeWolff, Boberg & Associates Inc.

On Feb. 20, 2008, the Supreme Court issued its decision in the case of *LaRue v. DeWolff, Boberg & Associates Inc.*,[3] which dealt with the issue of whether the Employee Retirement Income Security Act (ERISA) allows employees to recover from their employers losses from their 401(k) retirement savings plan that allegedly stem from the employer's breach of its fiduciary duties. Larue claimed that he had suffered approximately $150,000 of loss to his "interest in the plan" as a result of his employer's alleged failure to follow his instructions with regard to allocating his funds among the available investment options. The Fourth Circuit held that § 502(a)(2) of ERISA does not provide for lawsuits like this one, because LaRue alleges only individual losses stemming from the fiduciary breach, rather than loss to the plan as a whole.[4] That court further held that § 502(a)(3) was equally unavailing, because the recovery requested by LaRue does not constitute "equitable relief." LaRue appealed this decision, and the Supreme Court reversed the Fourth Circuit's ruling, holding that—

> [a]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. Section 502(a)(2) provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm plans. The principal statutory duties imposed by § 409 relate to the proper management, administration, and investment of plan assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to plan participants.

Preston v. Ferrer

This case[5] stemmed from an arbitration proceeding instituted against Alex Ferrer (the judge on the television show, "Judge Alex") by his manager, who claimed that he was owed 12 percent of Ferrer's compensation pursuant to their contract. The appeal sought review of a decision made by the California Court of Appeals that Ferrer did not have to submit to arbitration, because Preston had failed to exhaust his administrative remedies prior to moving to compel arbitration. The appeals court's decision was based on the California Talent Agencies Act, which gives the state labor commissioner exclusive original jurisdiction to determine the legality of contracts between "artists" and their agents. However, Preston claimed that the act is pre-empted by the Federal Arbitration Act, citing the Supreme Court's holding in *Buckeye Check Cashing Inc. v. Cardegna*[6] that arbitrators—not courts—must decide the validity of an arbitration agreement. The Supreme Court issued its decision on Feb. 20, 2008, reversing the California court's denial of an order compelling arbitration and holding that "[w]hen parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act[7] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."

Sprint/United Management Co. v. Mendelsohn

In the *Sprint/United Management Co. v. Mendelsohn* case,[8] Mendelsohn, a former Sprint employee and one of approximately 15,000 employees who lost their jobs as a result of reductions-in-force (RIFs) at Sprint over an 18-month period, sued her former employer for age discrimination. She eventually lost at trial, at least in part because of the trial court's blanket exclusion of so-called me-too evidence from other RIF'd employees. The Tenth Circuit Court of Appeals reversed the jury's verdict, finding that the evidence had been improperly excluded.[9] The court reasoned that, regardless of the fact that the other employees had worked for different supervisors, and thus were not similarly situated with Mendelsohn, the "me-too" evidence was both relevant and admissible. The Tenth Circuit held that such "evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination." Sprint appealed the decision, and the Supreme Court issued its ruling, which reversed the Tenth Circuit's decision and remanded the case on Feb. 26, 2008. The Supreme Court refused to adopt a per se rule governing the inclusion or exclusion of this type

of evidence but, instead, held that "me-too" evidence may be relevant to an employee's discrimination case and that it is a very fact-specific inquiry that should be left to the discretion of the trial court.

Federal Express Corp. v. Holowecki

Federal Express Corp. v. Holowecki,[10] decided by the Court on Feb. 27, 2008, concerns the question of whether or not submitting an "intake questionnaire" along with a notarized affidavit to the Equal Employment Opportunity Commission (EEOC) is equivalent to filing a charge for purposes of the time limits set by the Americans with Disabilities Act (ADEA). In order to file a lawsuit under the ADEA, the plaintiff must first file a charge with the EEOC.[11] The ADEA provides that this charge must be filed within 300 days of the alleged discriminatory act. In *Holowecki*, the Second Circuit held that the EEOC intake questionnaire and sworn affidavit filed by the plaintiff with the EEOC within those 300 days were sufficient to constitute such a "charge," despite the fact that the EEOC never notified FedEx that a charge had been filed or investigated any such charge.[12] The Second Circuit held that all that is required is for the EEOC to receive something in "writing" from the charging party that names the employer, generally describes the allegedly discriminatory acts, and "seeks to activate the administrative investigatory and conciliatory process." The Supreme Court affirmed the holding of the Second Circuit and declared that the intake questionnaire was sufficient to meet the EEOC's "request to act" standard for what constitutes a charge, showing deference to the EEOC's own internal interpretations of the ADEA and the EEOC regulations issued under that act.

Kentucky Retirement Systems v. EEOC

In this case,[13] the EEOC sued Kentucky Retirement Systems, the state of Kentucky, and the Jefferson County Sheriff's Department, claiming that the defendants' disability retirement benefits plan violates the ADEA. The trial court granted summary judgment for the defendants, but the Sixth Circuit, sitting en banc, reversed the decision, holding that the EEOC had made a prima facie case of age discrimination. The defendants appealed the ruling, and the Supreme Court heard oral argument on Jan. 9, 2008. The question before the Court is whether a disability retirement benefits plan that disqualifies employees who are still working from receiving disability retirement benefits if they have already reached the normal retirement benefit age is "arbitrary" and facially discriminatory, as the Sixth Circuit held the Kentucky Retirement Systems' plan to be.

Gomez-Perez v. Potter

Gomez-Perez[14] addresses the question of whether a cause of action for retaliation exists in a federal statute that lacks explicit textual authorization for such a provision. The plaintiff in this case, an employee of the U.S. Postal Service, sued her employer for age discrimination and retaliation, relying on provisions in the ADEA that apply to employees in the federal sector. However, unlike the ADEA provisions applying to private-sector employees, the provisions that apply to the federal sector do not contain specific language prohibiting retaliation.[15] The First Circuit, refusing to read such language into the ADEA where it was not included by Congress, held that no cause of action for retaliation existed in those provisions. Gomez-Perez appealed that decision, and the Supreme Court heard oral argument on Feb. 19, 2008.

Chamber of Commerce v. Brown

The issue in *Chamber of Commerce v. Brown*[16] is whether a California law that bars employers from using state funds to "assist, promote, or deter union organizing" is pre-empted by the National Labor Relations Act (NLRA) or violates the First Amendment. The Ninth Circuit held that the statute is not pre-empted, because California's exercise of its sovereign authority over the use of its funds does not conflict with the national labor policy embodied by the NLRA. The court also held that "California's refusal to subsidize employer speech for or against unionization does not regulate an activity that is actually protected or actually prohibited by the NLRA." Appellants argue that the California law is pre-empted, because it "regulates employer speech that Congress intended to leave unregulated." Oral argument to the Supreme Court was held on March 19, 2008.

Crawford v. Metropolitan Gov't of Nashville and Davidson County

In *Crawford*,[17] the plaintiff claimed that she had been discharged, in violation of Title VII, because of her cooperation in an internal, employer-led investigation of sexual harassment complaints against another employee. Title VII protects an employee from retaliation because that employee "has opposed" some unlawful employment practice (the opposition clause) or "participated in any manner in an investigation … under this chapter" (the participation clause).[18] The Sixth Circuit found that Crawford's conduct did not constitute opposition to an unlawful employment practice and held that, because the investigation in this case was not preceded or prompted by an EEOC charge, Crawford had not "participated" in an investigation "under this chapter." Therefore, neither the opposition or participation clause provided her with protection. Crawford appealed that decision to the Supreme Court, which will hear oral argument on this issue later this year.

Meacham v. Knolls Atomic Power Laboratory

This is actually the second time that the *Meacham* case[19] has been before the U.S. Supreme Court on appeal from the Second Circuit Court of Appeals. The plaintiffs, former employees of Knolls Atomic Power Laboratory, sued the company for age discrimination

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her fiduciary duty to the business and to the other shareholders or member.

If Violet and Petunia cannot agree that one or the other of them can use the trademark, a court is likely to stop both of them from using the name Everything's Rosy.[8] Allowing both partners to use the mark would lead to consumer confusion and an impermissible split of the business good will and the trademark used in that business. In order to secure rights in the mark and stop Petunia from using it, Violet should negotiate to obtain the trademark and business goodwill while Petunia receives other partnership assets. Another option for Violet, if she is financially able, is to attempt to buy Petunia's portion of the business. Ideally, Violet and Petunia should have included a provision in their partnership agreement providing for distribution of the trademark and associated good will to one of the partners in the event of the dissolution of the partnership. Unfortunately, if the two partners cannot resolve the dispute, Everything's Rosy will be pushing up daisies. **TFL**

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Endnotes

[1]*See generally* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 16.44 (4th ed. 2007).

[2]*Id.*, §§ 3.10–3.11

[3]*Durango Herald Inc. v. Riddle,* 719 F. Supp. 941, 945 (D. Colo. 1988); *see also Visa, U.S.A. Inc. v. Birmingham Trust Nat. Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982).

[4]*See* 15 U.S.C. § 1060(a).

[5]*Durango*, 719 F. Supp, at 945.

[6]18B Am. Jur.2d *Corporations* § 1460 (2004).

[7]New Topic Service Am. Jur.2d *Limited Liability Companies* § 11 (2005).

[8]*See*, *e.g.*, *Durango*, 719 F. Supp. at 953.

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under the ADEA after they were terminated because of a reduction in force, claiming that the fact that 30 of the 31 employees who were laid off were over the age of 40 supported their disparate-impact allegations. Originally, the Second Circuit held that the plaintiffs had been successful at both proving a prima facie case for disparate-impact liability and in refuting the employer's "facially legitimate business justification" for their discharge under the "business necessity" test. However, the Supreme Court, in light of new precedent, reversed the Second Circuit's ruling and remanded the case. The current appeal stems from the Second Circuit's decision on remand to apply the new "reasonableness" test and place the burden of persuasion for such test on the employees' shoulders. In placing the burden on the employees, the court stated that "[i]t is therefore hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable." Plaintiff employees appealed this decision, and the Supreme Court heard oral argument on April 23, 2008. **TFL**

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Endnotes

[1]Chief Justice William H. Rehnquist, Remarks at the University of Guanajuato, Mexico, Sept. 27, 2001.

[2]*Id.*

[3]128 S. Ct. 1020 (Feb. 20, 2008).

[4]*Larue v. DeWolff, Boberg & Associates Inc.*, 450 F.3d 570 (4th Cir. 2006), *rev'd by* 128 S. Ct. 1020 (Feb. 20, 2008).

[5]128 S. Ct. 978 (Feb. 20, 2008).

[6]546 U.S. 440 (2006).

[7]9 U.S.C. § 1 et seq. (2008).

[8]128 S. Ct. 1146 (Feb. 26, 2008).

[9]*Sprint/United Management Co. v. Mendelsohn*, 466 F.3d 1223 (10th Cir. 2006), *rev'd by* 128 S. Ct. 1146 (Feb. 26, 2008).

[10]128 S. Ct. 1147 (Feb. 27, 2008).

[11]29 U.S.C. § 626(d) (2008).

[12]*Federal Express Corp. v. Holowecki*, 440 F.3d 558 (2nd Cir. 2006), *aff'd by* 128 S. Ct. 1147 (Feb. 27, 2008).

[13]467 F.3d 571 (6th Cir. en banc Oct. 31, 2006), *cert. granted*, 76 U.S.L.W. 3153 (U.S. Sept. 25, 2007) (No. 06-1037).

[14]476 F.3d 54 (1st Cir. 2007), *cert. granted*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 06-1321).

[15]29 U.S.C. § 633a (2008).

[16]463 F.3d 1076 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3273 (U.S. Nov. 20, 2007) (No. 06-939).

[17]211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted*, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1595).

[18]42 U.S.C. § 2000e-3 (2008).

[19]461 F.3d 134 (2nd Cir. 2006), *cert. granted*, 76 U.S.L.W. 3391 (U.S. Jan. 18, 2008) (No. 06-1505).