KIM KORATSKY AND JULIE M. MCGILL

The Supreme Court of Employment Law

EVEN THOUGH THE U.S. Supreme Court is certainly not a court that rules exclusively on cases involving employment, the Court's last term included at least 12 cases dealing with workplace or employment issues—an amazingly large number given the Court's limited docket. Many of these cases will make employers and employees re-examine their legal rights. Some of the Court's decisions expand employees' rights; other rulings limit them, ultimately protecting employers.

The cases of *Meacham v. Knolls Atomic Power Laboratory* (No. 06-1505, slip op. at 1 (June 19, 2008)) and *Kentucky Retirement Systems v. EEOC* (No. 06-1037, slip op. (June 19, 2008)) exemplify the complementary nature of the Supreme Court's decisions last term. In *Meacham*, the Court ruled that an employer bears the burden of persuasion when asserting the "reasonable factor other than age" defense in an age discrimination lawsuit claiming disparate impact on employees. Although the Court projected that its decision would affect the way employers handle reductions in force and make defending lawsuits claiming disparate impact more difficult, the Court declared that employers should not fear that the ruling would "nudge plaintiffs with marginal cases into court." The Court's ruling reassured employers by pointing out the burden employees bear in identifying the specific discriminatory practice creating the disparate results.

In contrast, in *Kentucky Retirement Systems v. EEOC*, the Court ruled that plaintiffs bringing disparate treatment claims must bear the burden of producing "sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." Because Congress approves of programs that base disability benefits on age, discrimination based on an employee's pension status is not unlawful when it is not being used as a proxy for the person's age. When calculating disability benefits, the disability plan at issue imputed years of tenure to workers who were disabled before becoming eligible for retirement, but the plan imputed no years to older workers who were eligible for retirement. The Court recognized that the disparity was accompanied by a "non-age related rationale" specifically in order to provide every disabled worker with sufficient retirement benefits.

The Supreme Court also examined a pair of cases claiming retaliation against employees. In *Gomez-Perez v. Potter* (No. 06-1321, slip op. at 5 (May 27, 2008)), the Court concluded that federal employees may bring suits against their employers if the employees were fired in retaliation for making complaints about age discrimination. Similarly, in *CBOCS Inc. v. Humphries* (No. 06-1431, slip op. at 14 (May 27, 2008)), the Court held that retaliation against an employee for making complaints about racial discrimination is itself a form of intentional discrimination. Retaliation by the employer is one of the fastest growing claims in charges brought to the Equal Employment Opportunity Commission (EEOC) as well as in district court filings; therefore, an increase in appellate testing of retaliation theories can be expected in the future.

The Supreme Court set another precedent in the realm of discrimination when the justices rejected an employee's "class-of-one" equal protection cause of action in *Engquist v. Oregon Department of Agriculture* (No. 07-474, slip op. (June 9, 2008)). In this case, Engquist, a public employee, brought suit against her employer alleging that she was "treated differently from other similarly situated employees" for "arbitrary, vindictive, and malicious reasons." Finding that class-of-one equal protection claims have no place in the public employment context, the Court stated that it would be impossible for government offices to function if every grievance brought by an employee became a constitutional matter. It is consistent with the spirit of at-will employment that employers may make discretionary decisions on a subjective and individualized basis. As a result, the Equal Protection Clause will only be implicated in the public employment context when employers treat distinct groups differently.

The Court also took the opportunity to ask the EEOC to revise its charge procedures in *Federal Express Corp. v. Holowecki* (No. 06-1322, slip op. (Feb. 27, 2008)). In *Holowecki*, the employer implemented new programs tying employees' compensation and continued employment to performance goals. Alleging that these new programs discriminated against older workers, Holowecki filed an EEOC Intake Questionnaire (Form 283) along with a detailed affidavit. The EEOC did not treat the documents as a charge and did not notify the employer. Later, Ho-

SUPREME COURT *continued on page 22*

lowecki, along with a number of other employees, filed suit. The district court dismissed the suit, agreeing with the employer that Holowecki did not file an EEOC charge prior to filing suit. The Second Circuit reversed this decision.

In affirming the circuit court's decision, the Supreme Court began by defining a charge under the Age Discrimination in Employment Act as a written statement that identifies the name of the employer, generally alleges the discriminatory act(s), and can 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." Next, the Court examined whether the documents submitted by this employee met the Court's definition of a charge. After opining that EEOC Form 283 will not always be sufficient to constitute a charge, the Court announced that, in this case, the form, along with the affidavit asking the EEOC to force the employer to "end their age discrimination plan" was determined to be a charge, because the form requested the EEOC to act. The Supreme Court also suggested that the EEOC revise its forms and procedures in order to avoid future confusion such as the parties experienced in this case.

On a different note, the Court took action in two cases to help workers protect their benefit plans. In *Metropolitan Life Insurance Co. v. Glenn* (No. 06-923, slip op. (June 19, 2008)), the Court recognized the conflict of interest that arises when employers and insurance companies make discretionary decisions about individual employee benefits. Many times the entity that makes the decision about the employee's eligibility for disability benefits is the entity that pays those benefits out of its own pocket. The Court held that such a conflict of interest should be a relevant factor considered by a court when determining whether a plan administrator has abused its discretion in denying benefits. Consequently, self-insured employers and insurance companies must exercise care when making decisions about insurance coverage.

In like fashion, the Court's decision in *LaRue v. DeWolff, Boberg & Associates Inc*. (No. 06-856, slip op. (Feb. 20, 2008)) should cause companies that manage employees' retirement plans to handle them with extreme caution. Most modern retirement plans give employees control over the investment of the assets in employees' individual accounts. Because administrators of defined contribution plans have a fiduciary duty to invest funds the way the plan beneficiary requests, the Court held that an employee may sue an administrator whose misconduct impairs the value of the individual account.

Employers will breathe easier knowing that the Supreme Court has not overlooked the importance of protecting their rights as well. In *Chamber of Commerce of United States v. Brown* (No. 06-939, slip op. (June 19, 2008)), the Court ruled that states are pre-empted from using their own funds to regulate employers' speech about union organization. The ruling was made after several employers challenged California's policy, which placed spending restrictions on several classes of employers that receive state funds and prohibited those employers from using the funds to assist, promote, or deter union organizing. Ultimately, the Supreme Court decided that employers have a federally protected right to express their opinions about unionization so long as their expressions contain "no threat of reprisal or force or promise of benefit."

The U.S. Supreme Court had a very busy term. Certainly, considerable impact will be felt by both public and private employers and employees, governmental bodies, and benefit plan administrators. But the Court's next term may be even busier. Cases for the term starting October 2008 include another examination of a claim of retaliation, specifically, whether the anti-retaliation provision in Title VII protects an employee from being discharged because she cooperated with her employer's internal investigation of sexual harassment. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*. Also on tap is *14 Penn Plaza LLC v. Pyett*, which will ask the Court to decide whether an arbitration clause in a collective bargaining agreement constitutes a waiver of an employee's right to sue for violation of anti-discrimination statutes. As long as the Court maintains its current split—and the 5-4 decisions that result from that split—it should be interesting to continue to watch what the "Supreme Court of Employment Law" does. **TFL**

Kim Koratsky is a partner in the Memphis, Tenn., office of Wyatt, Tarrant & Combs LLP and a member of the editorial board of The Federal Lawyer. *Julie M. McGill is a student at the University of Kentucky College of Law and was a summer associate in the Lexington, Ky., office of Wyatt, Tarrant & Combs, LLP.*