

The Good, The Bad, and The Ugly

Looking Back At The 2007-2008 Supreme Court Term

The recently-concluded U.S. Supreme Court term offered employers several reasons to cheer but even more reasons to jeer. Of the 11 cases decided by the Court between October 2007 and June 2008, only 4 of them could be considered as victories for employers; many of them proved to be real setbacks for management. Although most Supreme Court watchers would label the current Supreme Court as conservative and business-friendly, a review of these 11 decisions shows that the Court is anything but.

The Good

None of the four victories for employers offer any ground-breaking new rules of law but nevertheless should be considered welcomed relief. Perhaps the biggest victory for employers can be found on the arbitration front, as the Court upheld the ultimate power of the Federal Arbitration Act in the face of a conflicting state statute.

In Feb. 2008, the Supreme Court struck down a California law that required certain employment disputes to be submitted to the Labor Commissioner for determination even if the parties had entered into an arbitration agreement. Once again the federal courts have reaffirmed the national policy favoring resolution of disputes through arbitration, and once again individual states have been stymied in their attempt to limit the reach of pre-dispute arbitration agreements.

Preston v. Ferrer.

Another victory for employers rejected a theory of law that would have allowed any terminated public employee to advance an equal protection claim under a “class of one” premise. In June 2008, the Supreme Court gave the at-will employment principle a much-needed shot in

the arm, upholding a public employer's right to terminate. *Engquist v. Oregon Dept. of Agriculture*.

On the last day of the term, the Court decided two additional cases in favor of employers: in the first it ruled that a state's disability plan did not violate the Age Discrimination in Employment Act (ADEA) even though it excluded certain employees based on years of service or age; and in the second the Court struck down a California statute that prohibited certain employers from using State funds to assist or deter unionization efforts by their employees. *Kentucky Retirement Systems v. EEOC*; *U.S. Chamber of Commerce v. Brown*.

The Bad

Several other cases came down on the wrong side of the fence for employers, although a few of them appear to be of limited utility to disgruntled workers and their attorneys. In June 2008, the Court decided that a conflict of interest exists where "dual-role" employee benefit plan administrators have the authority to both evaluate and pay claims, and set out standards for evaluating the potential conflict. *MetLife v. Glenn. I*

But most employers should not bear much pain from this decision – perhaps seeing increased premiums due to dragged-out benefit determinations will be the worst of it, while self-funded employers may avoid problems by contracting away fiduciary liability to third-party administrators.

And in Feb. 2008, the Court side-stepped a direct decision regarding "me too" evidence (evidence of other adverse actions offered by a plaintiff at trial to show bad motivation by an employer), instead saying that there will be times such evidence is admissible, while other times when inadmissible. *Spring v. Mendelsohn*.

Also in February, the Court held that an employee's intake questionnaire submitted to the EEOC may suffice as a charge of discrimination under the ADEA, but offered employers several opportunities to defend such claims depending on the specific content of the questionnaire. *Federal Express Corp. v. Holowecki*.

Finally, in *Gomez-Perez v. Potter* (May 2008), the Court ruled that the ADEA allowed individuals to bring private rights of action for retaliation against public employers, but this ruling is limited to those individuals working for the federal government. By and large, none of these decisions should be cause for panic for the average employer, and it will be the rare workplace impacted by these cases.

The Ugly

But three decisions by the Court this past term have the potential to rear their ugly heads for most employers at some point or another in the future. In *CBOCS West, Inc. v. Humphries* (May 2008), the Supreme Court held that Section 1981 of the Civil Rights Act of 1866 allows employees to bring retaliation claims along with their race/color claims, bypassing the procedural hurdles established by Title VII and the EEOC. In addition to escaping this administrative burden, employees can bring claims for unlimited damages, have a longer period of time to file such claims, and are provided an opportunity to file federal lawsuits against smaller employers (under 15 workers) not covered by Title VII. This decision could wreak havoc on small businesses.

Another decision that could open the floodgates of litigation was *LaRue v. Wolff* (Feb. 2008), a case that allows 401(k) plan participants seeking recovery of retirement account losses to sue based on alleged breaches of fiduciary duty. This decision sends a clarion call to plan fiduciaries of the need for ensuring absolute compliance with ERISA's dictates. With an ever-

growing segment of society counting on retirement accounts to help fund their futures, and with continued losses in the stock markets, expect to see numerous new lawsuits filed because of dwindling 401(k) balances.

Finally, on the last day of the term, the Court held that employers defending ADEA lawsuits had the burden of establishing the reasonableness of their explanations for suspect employment practices. In *Meacham v. Knolls Atomic Power Laboratory* (June 2008), the Court said that employers defending disparate impact claims (most often RIFs or mass layoffs) needed to prove the legitimacy of the “reasonable factors other than age” used in determining which employees are impacted. This decision will likely lead to increased ADEA litigation, will make it more difficult and costlier for employers to defend their decisions, and may have a chilling effect on employer decisions.

What Will Next Term Hold?

When the Supreme Court reconvenes again in October 2008, it will be facing at least 5 employment cases on its docket, and will no doubt accept additional cases as the term unfolds. For now, expect to see rulings on the following issues:

- Can a public union collect and use agency fees from nonunion workers for purposes of financing litigation that would benefit union affiliates (“extra-unit litigation”)? *Locke v. Karrass*.
- Can an employee sue under Title VII’s retaliation provision because of an allegation involving cooperation with the employer’s internal investigation of sexual harassment? *Crawford v. Metro. Gov’t of Nashville*.
- Can a State ban local government payroll deductions for political activities? *Ysura v. Pocatello Education Assoc.*

- Can an employer enforce an arbitration clause in a collective bargaining agreement which clearly waives the union members' right to file statutory discrimination claims? *14 Penn Plaza, LLC v. Pyett*.
- Can an employee sue for pregnancy discrimination when an employer makes pension eligibility determinations based on service credit eligibility criteria that take into account determinations that would currently be illegal but were originally made prior to the passage of the Pregnancy Discrimination Act of 1978? *AT&T Corp. v. Holteen*.