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## SUPREME COURT DOCKET: 12 EMPLOYMENT CASES BEING DECIDED

Employment law cases are a major part of the 07-08 Supreme Court docket. The cases already decided include:

### 1. “Me Too” Evidence in Cases of Age Discrimination

In February 2008, the Court unanimously decided *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008). In this case, the Court examined so called “me too” evidence to determine whether or not such evidence is admissible in cases brought under the Age Discrimination in Employment Act (ADEA). The phrase “me too” evidence refers to testimony and other statements given by other employees (not the Plaintiff) alleging that the same employer had similarly discriminated against them because of their age.

In this case, Ellen Mendelsohn, a Sprint employee, was terminated as part of a company-wide reduction in force. She sued Sprint on the ground that she suffered disparate treatment in violation of the ADEA. As part of her case, Mendelsohn sought to introduce the statements of five other Sprint employees who also allegedly suffered discrimination on the basis of age. These individuals did not work in the same department as Mendelsohn nor had any of them worked under the supervisors in her chain of command. Before the district court, Sprint challenged the admissibility of these “me too” statements on the ground that they were irrelevant.

The Supreme Court decided that “me too” evidence is neither automatically admissible nor inadmissible in ADEA cases. Instead, the Court determined that the relevancy of “me too” evidence is an individualized fact based determination. Moreover, the Court indicated that when determining admissibility in ADEA cases, the lower

courts should examine how closely related the “me too” statements are to the given circumstances and to the plaintiff’s theory of the case.

Based on this rationale, the Court vacated the judgment rendered by the court of appeals and remanded this case to the district court. Given this decision, employers should be aware that in certain circumstances, “me too” evidence might be admissible. Although this case arose under the ADEA, application of the underlying principle to other employment discrimination cases will not be surprising.

### 2. 401(k) Participants Win Right to Sue

For years, courts have differed as to whether an individual 401(k) plan participant can sue to recover losses to his or her personal retirement account (as opposed to the entire plan) due to the negligence of plan fiduciaries. Recently, the Supreme Court held such individual claims proper. *LaRue v. DeWolff, Boberg & Associates, Inc.*, 128 S. Ct. 1020 (2008).

Plaintiff, James LaRue, filed an action against his former employer, DeWolff, Boberg & Associates, and the retirement plan administered by the company. LaRue alleged that he directed the company to make certain changes to his investments in his individual 401(k) account, but they were never carried out. Such mistake, he claims, cost him approximately \$150,000 and amounted to a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA). The lower court agreed with DeWolff’s argument that the suit did not seek relief on behalf of the entire plan as ERISA mandates. The matter proceeded to the Supreme Court.

Section 502(a) of ERISA identifies six

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types of civil actions that may be brought by various parties. One of them, the one at issue in this case, authorizes plan participants to bring actions *on behalf of the entire plan* to recover for violations of § 409(a), or the fiduciary duties related to management, administration, and investment of fund assets. The issue for the Supreme Court was clear: LaRue's claim alleged fiduciary breach, but it was not a claim brought on behalf of the entire plan for injuries to the plan. Conversely, it was a claim brought by an individual plan participant seeking money damages for the losses that he – and only he – suffered.

Ultimately, all nine justices agreed that LaRue's claim was in fact, cognizable. Specifically, the Court noted the change in the pension plan landscape over the past twenty years. When ERISA was enacted, defined benefit plans were the "norm of American pension practice," whereas today "defined contribution plans dominate the retirement scene". Claims like LaRue's were unnecessary when defined benefit plans were the standard because such plans generally did not have individual accounts and promised a fixed level of retirement income. Any misconduct by an administrator would affect the assets of the entire plan, not an individual's entitlement. In contrast, defined contribution plans are made up of individual accounts so that a mistake in one participant's account does not affect the plan as a whole.

The Court held that ERISA does authorize recovery for fiduciary breaches that impair the value of plan assets in an participant's individual account. As for the actual merits of Mr. LaRue's claim – whether the company did in fact breach its fiduciary duty – the matter was remanded back to the district court for decision.

The repercussions of this outcome could be widespread. According to a recent news report, LaRue is one

of an estimated 50 million Americans who hold \$5.5 trillion in retirement savings through employee-sponsored 401(k) plans. Until the courts flesh out the scope of fiduciary duty – for example, the kind of administrative or computerized procedures that satisfy that duty – the actual impact of this ruling is hard to assess.

### 3. A Victory for Employees: A Formal Charge is Not Required Under the ADEA

Recently, the Supreme Court held that a formal charge is not required to satisfy the procedural requirements of the Age Discrimination in Employment Act (ADEA) as long as what is filed names the charged party, alleges generally the discriminatory acts and can be reasonably construed as a request for the agency to take remedial action. *Federal Express Corp. v. Holowecki, et al.*, 128 S. Ct. 1147 (2008).

Plaintiff, Patricia Kennedy (one of 14 plaintiffs), sued her employer, Federal Express, under the ADEA, claiming that a company program which tied compensation and continued employment to certain performance benchmarks was actually a veiled attempt to force out, harass and discriminate against older couriers. Prior to initiating the suit, Kennedy had filed a Form 283 Intake Questionnaire and a six-page affidavit instead of the customarily-used Form 5 Charge of Discrimination. FedEx sought to dismiss the case on the ground that what Kennedy filed was insufficient, and thus, she had not filed a "charge" with the EEOC at least 60 days prior to filing suit in court. The district court agreed and dismissed the case as untimely. The decision was reversed by the court of appeals and then the matter was sent to the Supreme Court to answer the following: What is a "charge" under the ADEA? Is it only the Form 5 Charge of Discrimination or do other documents suffice?

The problem, the Court found, was in the somewhat unclear regulations promulgated by the EEOC. One such regulation identifies specific information a charge should contain including the employee's and employer's names, addresses and phone numbers; a

statement of facts describing the alleged discriminatory act; the number of employees of the charged employer; and a statement indicating whether the charging party has initiated state proceedings. Another regulation however, appears to qualify these requirements stating that a charge is sufficient if it is in writing, names the employer and generally alleges the discriminatory acts. Such regulations, the Court noted, fell short of a comprehensive definition for the term "charge".

The Court ultimately adopted the standard advocated and practiced by the EEOC, finding that a formal charge is not required to satisfy the ADEA's procedural requirements: "[i]n addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must reasonably be construed as a request for the agency to take remedial action."

The Court understood that such a liberal standard could mean that a wide range of documents might be classified as charges, rather than just the commonly used Form 5 Charge of Discrimination. The Court justified such a potential result on the ADEA's "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process."

Applying this new standard, the Court found Kennedy's filing proper and suit timely. Although the Intake Questionnaire itself did not clearly request the agency to act (not all documents will suffice, the Court noted), it was supplemented with a six-page affidavit properly construed as a request for action. The Court also found persuasive the fact that Ms. Kennedy permitted the EEOC to disclose her identity to the company and the affidavit in a formal proceeding. Taken as a whole, this was enough to bring the entire filing within the definition of a "charge" as defined by the Court.

Since most charges are filed on standardized forms, the issue raised

by this case will not arise in the typical case. The case is interesting because it reflects the Court's concern about denying access to the courts based on technical requirements, particularly under a statute where proceedings are often initiated before lawyers get involved. Where the issue does arise, it can be expected that courts, reflecting the Supreme Court's concerns, will not lightly dismiss discrimination cases based on the technicalities of the charge.

The future application of the standard is also unclear – will it apply to other discrimination claims, *i.e.*, Title VII, ADA, etc. – but such application will not be surprising.

#### 4. ADA Changes May Be on the Horizon

Employers should be aware of the ADA Restoration ACT of 2007, a bill currently pending in Congress that, if enacted, would expand disability act coverage to millions of people. Specifically, the Act seeks to counter decisions of the Supreme Court that have “unduly narrowed the broad scope of protection afforded in the ADA, eliminating protection for a broad range of individuals who Congress intended to protect.” Among others, the Act seeks to redefine the definition of disability and to prohibit consideration of mitigating measures such as treatment and medication. The likelihood of this bill being enacted under President Bush is uncertain, but this kind of bill is almost certain to be enacted if a Democrat is elected President.

#### NLRB CLARIFIES EMAIL RULES

NLRB watchers have been waiting for the Board to clarify the rules governing employer email policies. One underlying issue is whether employees have a statutory right to use email for union organizing. Unions have argued that email has in major ways replaced person-to-person solicitation and that in the 21<sup>st</sup> century, employees should have a statutory right to use email for organizing purposes just as they

have a statutory right to engage in union organizing activity when they are on company property but off the clock.

In *The Guard Publishing Co.*, 351 N.L.R.B. No. 70 (Dec. 16, 2007), the Board broadly held that a company email policy that prohibits employees from using company email for any “non-job-related solicitations” is lawful. This conclusion rests on a line of cases in which the Board has held that employees do not have a statutory right to use company equipment, such as bulletin boards or telephones, for personal purposes as long as the restriction on use is not discriminatory.

The Board then addressed the question of whether the employer's enforcement of its rule was discriminatory. The Administrative Law Judge (ALJ) had found a violation where the employer prohibited an employee from using email for union purposes but permitted other employees to use email for personal purposes, such as baby announcements and jokes. Initiating a major change in law, the Board found that discrimination occurs only when there is “unequal treatment of equals,” *i.e.*, when employees engaged in similar conduct are treated differently. Acknowledging that the employer prohibited use of email for personal communications, the Board found no discrimination because there was no evidence that employees were allowed to use email to solicit other employees in support of any group or organization, *i.e.*, according to the Board, there was no disparate treatment of similar conduct.

This is a dramatic change in NLRB law. One could credibly argue that when an employer allows employees to use email for personal purposes, it has demonstrated that it is not averse to employees using company property and that the general rationale for limiting email to company purposes – to insure that employees are doing work during company time and not overloading the email system – become inapplicable. Under these circumstances, the only logical reason for prohibiting use of email for union purposes is that the employer wants to chill unionization.

It will be very interesting to see how this decision fares on appellate review. We would not be surprised to see future court decisions holding that the Board has too narrowly construed the concept of “similar conduct” and that two employees using company email are “similarly situated” even if they are using email for different purposes.

#### THE FAMILY MEDICAL LEAVE ACT NOW PROVIDES LEAVE FOR EMPLOYEES WITH FAMILY MEMBERS IN THE ARMED FORCES

The 2008 National Defense Authorization Act, signed by President Bush on January 28, 2008, amends the Family Medical Leave Act (FMLA) to include two new forms of leave for employees with family members in the Armed Forces. Prior to these amendments the FMLA provided qualified employees 12 weeks leave in a 12-month period for the birth or placement of a child, a serious health condition of a parent, child or spouse and an employee's own serious health condition. Pursuant to the amendments employees with family members in the Armed Forces may take leave to deal with a servicemember's serious injury, illness (Servicemember Family Leave) or active duty.

Servicemember Family Leave allows for employees to take leave to care for the serious injury or illness of a servicemember who is the employee's spouse, child, parent or next of kin. An employee utilizing this leave is entitled to a total of 26 weeks leave in any 12-month period, which may be used intermittently. During the 12-month period, eligible employees are entitled to take a combined total of 26 weeks of Servicemember Family Leave and any other form of leave provided by the FMLA. An employer that employs spouses may require the spouses to take an aggregate of 26 weeks of leave for Servicemember Leave or a combination of leave totaling 26 weeks under both the Servicemember Leave and any other form of leave provided by the FMLA. An employer may require the employee to substitute any accrued

paid vacation leave, personal leave, family leave or medical leave of the employee for any part of the 26-week period. As of January 28, 2008, employers must allow qualified employees to take this leave.

Active duty-related leave allows for leave in order to deal with a "qualifying exigency" arising out of an active duty in the Armed Forces of an employee's spouse, child or parent, in support of a "contingency operation," a term that covers most types of military service. The Department of Labor (DOL) will issue regulations defining what is a "qualifying exigency." Until such regulations are issued, employers are not obligated to allow their employees to take this leave, but the DOL has encouraged employers to provide this leave to qualifying employees, to the extent the term is understood. This leave only allows for 12 weeks in any 12-month period. If it is foreseeable that an employee's spouse, child or parent has or will be receiving a call to active duty, the employee must give his or her employer reasonable notice. Additionally, the employer may require that a request for leave be supported by a certification related to the active duty.

#### **NEW YORK LAW: IS A "SERVICE CHARGE" A GRATUITY?**

Under New York law (Labor Law Sec. 196-d), an employer may not retain for itself any part of a gratuity or "any charge purported to be a gratuity." The question raised in *Samiento v. World Yacht, Inc.*, 10 NY3d 70 (2008) was whether a service charge held out to customers as a substitute for a tip is a "charge purported to be a gratuity" within the meaning of the New York Labor Law. The Court of Appeals held that it was.

The employer in this case was World Yacht Cruises. World Yacht charged customers a 20 per cent "banquet service charge" but did not

remit any of that money to the employees who provided the service. World Yacht argued that in order to constitute a "gratuity," a payment must be voluntary. The court rejected this argument, finding that the standard for determining whether a mandatory charge or fee is "purported to be a gratuity" should depend on the expectation of the reasonable customer. Since World Yacht told patrons that the service charge was compensation to the cruise line's wait staff, and treated the revenues from the banquet service charge as gratuities for tax purposes, the court concluded that plaintiff's complaint stated a triable claim.

For New York employers, this case raises the generic question of whether an employer may retain for itself mandatory charges to patrons which are represented to be service charges or gratuities. Employers who impose and retain the revenues from such charges would be well advised to review them in light of the Court of Appeals decision.

#### **NEW YORK: NEW REGULATIONS REGARDING SOCIAL SECURITY NUMBERS**

Effective immediately, all employers, corporations and persons must comply with recent legislation placing strict limits on the use and dissemination of Social Security numbers. The New York Social Security Number Protection Law applies to dissemination of a person's social security number, a number based on a social security number or any partial number – yes, it also seemingly applies to the commonly used last four digits. The statute makes it impermissible: (i) to communicate to the public a person's social security number; (ii) to make access to products, services or benefits contingent on the use of an access card or tag containing a person's social security number, including health care membership or building access cards; (iii) to require a person to transmit his or her social security number over the Internet unless the connection is secure or the social security number itself is encrypted; (iv) to require a person's social security number for Internet or web access; and (v) to print a person's social security number on any correspondence unless pursuant an exception. This effectively

prohibits use of any postcards or mailing labels containing a social security or partial number and any documents sent via mail must be sent in an envelope through which the number cannot be viewed. Exceptions do exist for certain correspondence including any documents required by law; any forms or applications sent as part of an application or enrollment process; and any used to establish, amend or terminate an account, contract or policy.

The new law likewise requires companies to adopt reasonable measures to ensure confidentiality of Social Security numbers and preclude unauthorized access. Until further guidance is given, this presumes that custodians should maintain numbers under lock and key or by other equivalent means. Fines, which can be assessed even if no harm resulted, range between \$1,000 per violation for first-time violators and \$5,000 per violation for repeat offenders. Similar laws apply in New Jersey and Connecticut.

#### **FIRM NEWS**

We are pleased to welcome Dina Kerman to our Firm. Dina has practiced general litigation in New York and New Jersey, focusing on labor and employment, and other business-related matters. She will work in all phases of our labor/employment law practice. We hope and expect that many of you will soon have the opportunity to meet and work with Dina.

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