

# Cray • Huber

## **Labor and Employment Law Notes**

### *United States Supreme Court Issues Five Decisions Likely to Increase Number of Employment Law Claims*

#### **I. INTRODUCTION:**

Between February 27, 2008 and June 19, 2008 the United States Supreme Court issued six decisions that are favorable to employees and will likely amount to an increase in employment discrimination litigation in the Federal Courts. The decisions involve the ADEA, ERISA, The Civil Rights Act of 1966. The following is a brief discussion of each of the cases and the potential impact on employers and their insurance companies.

#### 1. *LaRue v. DeWolff Boberg & Associates, Inc.* (ERISA)

On February 20, 2008 the court held that ERISA permits a participant to bring an action to recover losses attributable to his account in a “defined contribution plan” that were caused by fiduciary breach. James LaRue, an employee of the management consulting firm DeWolff Boberg & Associates, sued his employers for improper management of his 401K pension plan. Under DeWolff’s pension plan, LaRue could choose among a variety of investment options for his individual account. In his suit, LaRue alleged that DeWolff failed to follow his investment instruction. LaRue sued under Section 502(a)(2) and 502(a)(3) of the Employment Income Security Act.(ERISA). [The Fourth Circuit held that neither section authorized LaRue’s claim because it was an individual claim and because LaRue sought compensatory damages.] LaRue argued that his claim benefits the plan as a whole rather than himself individually, and that he seeks equitable relief rather than compensatory damages. The Supreme Court agreed with LaRue and disagreed with the Fourth Circuit. In so doing the Supreme Court held that although Section 502(a)(2) of ERISA does not provide a remedy for individual injuries distinct from planned injuries. That provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account. The result of this case is that an individual can and will use these provisions to sue an employer for improper management of a pension fund.

#### 2. *Sprint/United Management Co. v. Mendelsohn* (ADEA)

Mendelsohn sued her employer, Sprint, for allegedly selecting her to be laid-off because of her age in violation of the Age Discrimination Employment Act. During the trial, the district court excluded the testimony of other Sprint employees who alleged similar discrimination during the

same period. The district ruled that any testimony not related to the actions of Mendelsohn's direct supervisor was irrelevant. Mendelsohn appealed, arguing that the testimony of the other employees helped show the pervasive atmosphere of age discrimination at Sprint. The Tenth Circuit Court of Appeals reversed, holding that the exclusion of such evidence unfairly inhibited Mendelsohn from presenting her case to the jury. The district court had improperly applied the "same supervisor rule," which only applies to cases of discriminatory disciplinary action by a supervisor. The Tenth Circuit declined to extend this rule to the alleged victim of a discriminatory company-wide policy.

The Supreme Court agreed with the Tenth Circuit and held that it is for the trial court to decide whether to admit "me to" evidence-testimony, by non-parties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff-subject to abuse of discretion review. The Supreme Court held that federal rules of evidence 401 and 403 do not make such evidence per se admissible or per se inadmissible; and, the Circuit Court erred in conducting its own analysis of the relevant factors under the rules, as the inquiry required by those rules was within the province of the district court in the first instance. The negative impact on employers may be that "me to" evidence will be more readily admitted and encourage plaintiff's lawyers to bring ADEA and other Civil Rights cases in light of the court's decision.

### 3. *Federal Express Corp. v. Holowecki* (ADEA)

In an Age Discrimination in Employment Act case involving the question of whether a Fed Ex couriers filing of an intake questionnaire and affidavit with the EEOC was a "charge" under the Act, so as to allow the filing of a civil action, the court deferred to the EEOC's interpretation for the proper test for determining whether a filing is a charge. Specifically, in addition to the information required by the implementing regulations, if a filing is to be deemed a charge it must 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. In this case, the filing has constituted such a charge in the Circuit Court correctly reversed dismissal of the case.

The actual ruling in this case may have very little direct impact on employers. The case presented a rather rare situation where a proper charge of discrimination was not completed by the complainant. It is the possible indirect effects of this decision that are more interesting. First, seven justices signed off on an opinion granting substantial deference to the EEOC's regulations and the EEOC's internal (in other words, non-public) interpretation of those regulations. It begs the question of whether this suggest that the current court will be less likely to strike down regulations if directly challenged. It also begs the question of whether agencies will be able to defend their interpretations of regulations in the future based on non-public, internal "interpretations". Next, the court noted that the "permissive" standard it approved was justified in part by the remedial nature of the ADEA. Many courts around the country rely on this "remedial" principal to avoid dismissing discrimination lawsuits based on procedural errors. The courts reliance on this may justify additional relaxation in the pre-suit filing requirements in other areas.

4. *Meacham v. Knolls Atomic Powered Laboratory* (ADEA)

In this case former employees at Knolls Atomic Power Laboratory ask the Supreme Court to overturn the Second Circuit's finding for the defendants. The plaintiffs had prevailed at trial and on appeal on a disparate impact theory of illegal age discrimination under the ADEA. The Supreme Court remanded for reconsideration in light of *Smith v. City of Jackson*. While upholding the disparate theory, *City of Jackson* also requires the touchstone of the analysis to whether employers considered "reasonable factors other than age" which the Second Circuit determined was a burden of persuasion to be born by the plaintiffs. The plaintiffs disagreed to a maintaining "reasonable factors other than age" harbor in the ADEA statute is a traditional affirmative defense on which the employer/defendants bear the burden of proof. The Supreme Court held that an employer defendant a disparate impact claim under the ADEA bear both the burden of production and the burden of persuasion for the "reasonable factors other than age" affirmative defense. In the context of the ADEA, an employer facing a disparate impact claim and planning to defend on the basis of reasonable factors other than age must not only produce evidence raising the defense, but also persuade the fact finder of its merit.

Given the ruling in *Meacham*, employers will have more difficulties winning ADEA disparate-impact claims both on summary judgment and ultimately at trial. For this reason, an employer considering a reduction in force, or any adverse employment decision should especially cognizing of using objective factors in making its determinations. These factors must be "reasonable" and an employer should feel comfortable with persuading a fact finding that the employment decision had sound business rationale that did not involve any consideration of age. It is a result of the reduction in force, rather than the employer's intent, that will prove a disparate impact case. Thus, an employer should carefully analyze every one of its actions that affect more than one employee, including reductions in force, restructuring and any other employment decisions, to insure that the impact on employees over 40 years of age is not discriminatory. If there's a disparate impact on older workers and this is unavoidable, employers should review the factors used to be sure they are reasonable and are being applied objectively. The age-neutral rationale for the business decision should be carefully documented in the event that the employer must defend against a disparate impact claim and present it to a jury.

5. *CBOCS West, Inc. v. Humphries* and *Gomez-Perez v. Potter* (Retaliation – ADEA and Civil Rights Act of 1866)

On May 27, 2008, the Supreme Court decided two retaliation cases which may expose both private and public sectors employers to additional employment retaliation claims and greater potential liability in such cases. In *CBOCS West Inc. v. Humphries*, the court held that 42 USC SEC. 1981-a law which grants people of all races equal rights in the making and enforcement of contracts-encompass retaliation claims, despite the fact that "retaliation" is not expressly addressed in the text of statute. In the second decision, *Gomez-Perez v. Potter*, the Supreme Court held that the federal-sector provision of the ADEA allows federal employees to file claims for retaliation in federal court based on age bias. Both of these decisions are likely to have an adverse affect on employers as will be discussed. The court's holdings in *Humphries* and *Gomez-Perez*, described in more detail below, mark a departure from previous decisions in

which the court was reluctant to imply causes of action where they were not specifically provided for in a statute.

- ***CBOCS West, Inc. v. Humphries***: In this case a former assistant manager of a Cracker Barrel Restaurant claimed he was terminated because of his race and in retaliation for complaining to management that a co-worker was being discriminated against because her race. He brought his discrimination and retaliation claims under Title VII of the Civil Act of 1964 and Section 1981. The trial court dismissed his Title VII claims for failing to pay certain court fees. It also granted CBOCS' motion for summary judgment on the 1981 claims. The Seventh Circuit Court of Appeals affirmed the lower courts decision with respect to the race bias claims under Section 1981, but revived his retaliation claim. Consistent with every other appellate court to had considered the issue, the Seventh Circuit concluded that Section 1981 could be properly read to encompass retaliation claims. The Supreme Court affirmed the Seventh Circuit's decision and emphasized the point made in prior court rulings that the recognized and implied right to bring retaliation claims under Section 1982 – a companion statute to Section 1981 – for a white property owner who suffered punishment from his homeowner's association after renting his property to a black man. Supreme Court noted that it “has long interpreted [Sections] 1981 and 1982 alike because they were enacted together, have common language and served the same purpose” of providing equal rights. The court also justified its holding on the basis that, in 1991, Congress expanded the scope of Section 1981 to prohibit discriminatory post-contract formation conduct and express the desire to recognize retaliation claims in the legislative history to the amendments. The Supreme Court noted that appellate courts across the country have “reached a broad consensus” that the amended version of Section 1981 was meant to include retaliation claims. This “broad consensus” together with the “long line of related cases” construing Sections 1981 and 1982 similarly caused the court to hold the right to bring retaliation cases under Section 1981 is “well embedded in the law.”

Employers can expect that this decision can cause an increase in Section 1981 litigation. The key distinction between discrimination and retaliation claims under Title VII versus claims under Section 1981 is that plaintiffs who bring Section 1981 claims do not have to file charges with the EEOC prior to suing in court. Section 1981 claims are essentially contract claims that are based on the notion that employees should be free from race discrimination and retaliation in the creation and enforcement of the contract created by the employment relationship. **An employee can go straight to court with a Section 1981 claim and bypass the entire administrative process.** Moreover, Section 1981 claims are not subject to the damages caps applicable to Title VII and are, therefore, potentially more lucrative to plaintiffs and their attorneys. Also, bypassed is the EEOC's early warning system it gives the parties a chance to resolve workplace disputes prior to expensive litigation. CBOCS decision might cause employees to forego this early resolution process and eliminate some of the potential for early, lower-cost resolutions. The clear effect of CBOCS West, Inc. is to increase employer's exposure to race based retaliation claims and liability.

- ***Gomez-Perez v. Potter***: In *Gomez-Perez v. Potter* The Supreme Court decided that a federal employee that is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the Federal-Sector Provision of the EDA of 1967. The Fifth Circuit Court of Appeals affirmed a trial court decision granting the postal services motion for summary judgment on the grounds that U.S. Government had not waived sovereign

immunity in ADEA retaliation cases. The First Circuit Court of Appeal affirmed the decision, but for a different reason; it affirmed because it found that the ADEA did not prohibit retaliation against federal employees. The Supreme Court reversed the First Circuit Court's decision relying on prior decisions or language similar to that and the ADEA had been interpreted to include retaliation claims. The Supreme Court presumed that Congress was aware that, when it amended the ADEA to protect federal employees from age discrimination, the protection would extend to retaliation claims just as it had with other statutes. *Gomez-Perez* is a major victory for federal workers because it gives them rights that are equal to those of their private sector counterparts. Moreover, the decision underscores the Supreme Court's current direction as to legislative interpretation in general. The effect of this decision is not as far reaching as the *CBOCS* decision since the ADEA provision at issue in *Gomez-Perez* only applies to federal government employers. With respect to those employers, however, the court's ruling allows employees, who previously were able only to bring ADEA retaliation claims to a federal civil service commission, to bring those claims to federal court and pursue the same remedies under the ADEA as are available to private sector employees, including money damages.

Employers should keep in mind that there are a number of steps that can be taken to minimize the risk of liability for retaliation. Employers should review their anti-discrimination and anti-harassment policies to insure they contain provisions strictly prohibiting any type of retaliation against an employee who files an internal or external complaint of harassment or discrimination, or who participates in any investigation. Employers should also conduct periodic training sessions to insure that all employees are aware of their obligation not to retaliate against an employee who has filed a discrimination or harassment complaint. During an employer's investigation of an internal complaint of harassment or discrimination, the complainant, witness, alleged harasser and relevant decision maker should be specifically advised that any type of retaliation will not be tolerated. The complainant and any witness should be encouraged to make the employer aware of any conduct that might be retaliatory. If the employer's harassment or discrimination investigation results in disciplinary action against a supervisor or co-worker of the complainant, the supervisor or co-worker who has been disciplined should be specifically warned that any retaliatory conduct will lead to additional disciplinary action.