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INTRODUCTION

The United States Supreme Court decided several significant employment law cases during the 2006-2007 Term. The Court's opinions address a number of topics, from the statute of limitations in cases alleging discriminatory pay practices, to the exempt status of home care aides under U.S. Department of Labor regulations. Additionally there are currently three significant cases on the docket for next term that are summarized below.

Ledbetter v. Goodyear Tire & Rubber Co., Inc.

In Ledbetter the Court decided its first employment discrimination case of the calendar year. Lilly Ledbetter claimed Goodyear discriminated against her based on her sex by setting her pay lower than male counterparts. As a result, her pay continued to be lower over time. Years after the allegedly discriminatory pay decisions, she brought a claim of sex discrimination under Title VII of the Civil Rights Act of 1964. Title VII requires plaintiffs to file administrative charges within 180 days of the discriminatory decision in some states, and within 300 days in others (deferral states). But Ledbetter argued that each paycheck was a new discriminatory decision to pay her, based on the initial discriminatory setting of her pay.

In an opinion delivered by Justice Michael Alito, the Supreme Court held (5-4) that the EEOC charge was untimely. Justice Alito was joined by Roberts, Scalia, Kennedy, and Thomas. Justice Ginsburg wrote the dissent and was joined by Stevens, Souter, and Breyer. Reviewing its prior decisions on the issue, Alito wrote that: "The

EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. ” The Court further reasoned that that according to Title VII, discriminatory intent must be a central element in the 180-day charging period.

Ledbetter did not claim that Goodyear acted with discriminatory intent in the charging period, in issuing the checks, or denying her a raise in 1998. She argued that the discriminatory act occurred long before and affected her in the charging period. However, the Court held, that precedent established that the actual act of intentional discrimination must occur within the charging period. The Court also stated that according to these cases, Ledbetter’s claim that each check is an act of discrimination is inconsistent with the statute because there was no evidence of discriminatory intent in the issuing of the checks.

The holding in this case reveals a shift to a pro-employer Court and adds a major procedural hurdle for an employee seeking recourse for discrimination. However, the continued validity and significance of Ledbetter is uncertain for two major reasons. First, on June 12, 2007, the House Committee on Education and Labor called Ledbetter to testify, and Chairman George Miller (D-CA) indicated that he will introduce legislation to overturn the Court’s decision. It is still, however, unclear whether the potential legislation will succeed. Second, *Ledbetter* does not necessarily govern the interpretation of state EEO laws. Some state courts have their own interpretations of discrimination law issues, and do not necessarily defer to the federal interpretation.

In short, the overall implications arising from the Ledbetter holding remain to be seen. However, to date, the case certainly can be construed as a major victory for employers and a significant obstacle for employees alleging discrimination.

Philip Morris USA v. Williams

The *Philip Morris* case concerned constitutional limits on punitive damages. Although it was not decided in the context of an employee dispute, the decision has significant repercussions in employment law cases. A jury found that Jesse Williams' death was caused by smoking and that Philip Morris, the entity that manufactured the cigarettes he favored, knowingly and falsely led him to believe smoking was safe. The jury awarded Williams' estate $821,000 in compensatory damages and $79.5 million in punitive damages. The Oregon courts upheld the award.

Philip Morris argued that the punitive damages award was inappropriately based on conduct directed not only at Williams, but also at all other victims of Philip Morris' "deceit." Philip Morris argued that the jury punished Philip Morris based on its alleged deceitful conduct towards smokers other than Williams because Williams' lawyer argued to the jury that it should consider the other smokers affected by Philip Morris' conduct. The trial court refused to instruct the jury that punitive damages may be awarded only to punish the defendant for its conduct towards the plaintiff actually before the court.

The Supreme Court concluded that due process prohibited the jury from awarding Williams punitive damages for conduct directed towards those who were not parties to the lawsuit. Therefore, it reversed the Oregon Supreme Court. Justice Alito authored the

5-4 decision and was joined by Justices Kennedy, Breyer, Roberts, and Souter. Justice Ginsburg wrote the dissent and was joined by Justices Scalia, Stevens and Thomas.

This case will affect punitive damage awards in state and federal court in all types of cases. For example, in a sexual harassment case, the plaintiff will not be awarded punitive damages based on an alleged harasser's conduct towards other employees. Courts will be required to carefully instruct juries to disregard such evidence when awarding punitive damages.

Norfolk Southern Railway Co. v. Sorrell

The first employment case decided by the Court in 2007 was a decision involving the standards of negligence under the Federal Employers' Liability Act (FELA). Respondent Timothy Sorrell was injured while working for the petitioner railroad (Norfolk), and sought damages for his injuries in Missouri state court under the FELA, which allows for railway disability for an employee's injuries "resulting in whole or in part from [the railroad's] negligence." A jury awarded him $1.5 million after trial, which was affirmed on appeal.

The issue for the Supreme Court was the standard applied to define "negligence" and "contributory negligence." FELA reduces any damages awarded to an employee "in proportion to the amount [of negligence] attributable to" the employee. Under Missouri law, different causation standards apply to whether the railroad was negligent and whether the employee was "contributorily" negligent. Railroad negligence depends on whether the railroad's negligence "contributed in whole or in part" to the injury. On the other hand, an employee's contributory negligence depends on whether the employee's conduct "directly contributed to cause" the injury.

The Supreme Court reversed the judgment and sent the case back to the Missouri courts. Chief Justice John Roberts authored the opinion and wrote that the Court held that courts should apply the same causation standard for railroad negligence that is applied for contributory negligence. The Court based its decision on the prevailing common-law view at the time FELA was enacted that the causation standards for negligence and contributory negligence were the same. The Court noted that Congress did not include in the statute any intention to depart from the common law rule. The Court declined to announce what causation standard was appropriate, simply concluding that whatever standard was applied must be applied to employer and employee negligence.

Although the decision was a victory for the railroad, the Chief Justice mildly scolded the railroad's lawyers for attempting to "smuggle additional questions into a case after the grant of certiorari." Thus, he said, the Court rejected the Southern Railway lawyers' "attempt to expand the question presented to encompass *what* the FELA standard should be." Moreover, the Chief Justice remarked that the railroad was taking a different position on the applicable issue in the Supreme Court than it did in state court. It also would be "unfair at this point," Roberts wrote, to allow the railroad "to switch gears and seek a ruling from us" on what the standard should be.

In the two concurring opinions, authored by Justice Souter and Justice Ginsburg (with Justices Scalia and Alito joining Justice Souter's Concurrence) representing the views of four of the nine Justices, those Justices suggested that the standard of causation is already quite well established by past precedent and Wednesday's decision did not depart from that.

<u>Beck v. PACE International Union</u>

<u>Beck</u> involves issues related to the fiduciary duties of company when an ERISA plan sponsor terminates benefits plan. Respondent PACE International Union represented employees covered by single-employer defined-benefit pension plans sponsored and administered by Crown, which had filed for bankruptcy. The Company’s board of directors considered whether to terminate a number of ERISA-qualified defined benefit pension plans by purchasing annuities. PACE International Union, which represented employees covered by many of the plans, objected and proposed merging the plans with a pre-existing multi-employer plan. Crown decided to terminate the plans and purchase the annuities.

PACE sued Crown in bankruptcy court, claiming that Crown’s board breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA), and the bankruptcy court agreed. Beck, the bankruptcy trustee, appealed. The Ninth Circuit reasoned that the decision to terminate the plan was a business decision not subject to ERISA fiduciary obligations. However, the Ninth Circuit also held Crown breached its fiduciary duty by failing to consider the merger.

The Supreme Court, in a unanimous opinion authored by Justice Scalia, held that Crown did nothing wrong. The Court’s decision primarily is based on the fact that ERISA provides for only two options when terminating a plan: purchasing annuities, as

Crown did, or a lump sum distribution. The Court agreed with the Pension Benefit Guaranty Corporation, the federal agency that regulates pension plans, that merger is not an authorized form of plan termination.

Long Island Care at Home, Ltd. v. Coke

Long Island Care at Home involves the application of the U.S. Department of Labor's (DOL) exemption of home health employees to the Fair Labor Standards Act (FLSA). Evelyn Coke was employed by Long Island Care at Home. She was a home-care companion to elderly patients. Long Island Care at Home did not pay Coke minimum wages or overtime, relying on the U.S. Department of Labor's application of an exemption in the Fair Labor Standards Act. In 1974, Congress amended the FLSA to provide coverage for "employees in domestic service." However, the 1974 amendments exempted casual babysitters and companions to the elderly or infirm. That section provides that its terms are to be "defined and delimited by regulations" prescribed by the Secretary of the Department of Labor.

The DOL issued regulations stating that "[e]mployees who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements."

Coke sued Long Island Care at Home, claiming she was non-exempt and entitled to minimum wages and overtime. To do so, she had to defeat the DOL's regulation. The Second Circuit agreed with Coke that the DOL's regulation was invalid. The Supreme Court, in a unanimous decision delivered by Justice Breyer, disagreed, however, holding that the DOL properly exercised its authority to issue regulations interpreting the FLSA. Therefore, Coke was properly classified as exempt.

California's wage-hour laws may have dictated a different result in this case. Employers operating in the home health field should consult experienced employment counsel regarding the appropriate classification of home health employees for overtime purposes.

Davenport v. Washington Education Association

The National Labor Relations Act permits states to regulate their labor relationships with public employees. Many states (including Washington in this case) authorize public-sector unions to negotiate agency-shop agreements that entitle a union to levy fees on employees who are not union members, but whom the union represents in collective bargaining.

The First Amendment prohibits public-sector unions from using objecting nonmembers' fees for ideological purposes not germane to the union's collective-bargaining duties. Unions therefore must observe various procedural requirements to ensure that objecting nonmembers can keep their fees from being used for such purposes.

Washington voters approved an initiative requiring a union to obtain the nonmembers' affirmative authorization before using their fees for election-related purposes. Davenport sued the Washington Education Association (WEA), claiming the union was using fees for political activity in violation of the initiative. The WEA challenged the initiative.

The Washington Supreme Court ultimately held that the initiative violated the First Amendment because it regulated the expenditure of funds on political issues. The Supreme Court disagreed. Writing for the Court, Justice Scalia reasoned, that although this condition separated election-related speech from other types of speech, it is not an unconstitutional, content-based restriction. The reason, he explained, is that it is a "a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees" and did not "impermissibly distort the marketplace of ideas." The Court thus ruled that states can require unions to obtain its members' affirmative consent to spend agency fees on political activities. The opinion was unanimous in parts I and II-A and the second paragraph of footnote 2. The remainder of Scalia's opinion was joined by Justices Stevens, Kennedy Souter, Thomas and Ginsburg with Justice Breyer filing a separate opinion concurring in part and concurring in judgment, in which Chief Justice Roberts and Justice Alito joined.

Pending Cases

Sprint/United Management Company v. Mendelsohn

In this matter, the Supreme Court will review a federal appeals court decision in Colorado requiring trial courts to allow testimony of non-party former employees alleging discrimination by supervisors who played no role in the action challenged by the plaintiff to show that discrimination against older workers pervaded the workplace and to persuade jurors that plaintiff's layoff also was discriminatory. Ellen Mendelsohn sued her former employer Sprint/United Management Company (Sprint), alleging Sprint unlawfully discriminated against her on the basis of age in violation of the ADEA. Mendelsohn alleged she was selected for termination on account of her age during a company-wide reduction in force (RIF).

A jury decided the case in favor of Sprint. But Mendelsohn successfully argued to the Tenth Circuit Court of Appeals that the trial court improperly excluded evidence that Sprint discriminated against other employees during the same layoff. Sprint argued that only alleged discrimination against "similarly situated" employees – those supervised by the same decisionmaker as Mendelsohn – was admissible. Most courts have held that such proof, also sometimes known as "me-too" evidence, is inadmissible, or admissible only under limited circumstances.

Federal Express Corporation v. Holowecki

In the upcoming Term, the Court will consider what constitutes a "charge" of discrimination sufficient to satisfy the Age Discrimination in Employment Act (ADEA)'s requirement that a plaintiff must first file such a charge with the Equal Employment Opportunity Commission. The Second Circuit held that plaintiff Patricia Kennedy satisfied the requirement of filing a charge by submitting an EEOC Intake Questionnaire, plus a four-page verified affidavit detailing her claims of age discrimination. The EEOC did not prepare a formal charge, investigate the claim, or send notice to the employer. The Court of Appeals, however, held that Holowecki had done enough to satisfy the "exhaustion" of administrative remedies requirement. The Supreme Court granted certiorari review of this case in June of this year.

Hall Street Associates, L.L.C. v. Mattel, Inc.

This is not an employment law case, but it will have an impact on arbitration agreements in employment law matters. The parties' arbitration agreement in this commercial dispute provided that the courts had the power to vacate or modify an arbitrator's decision when "the arbitrator's conclusions of law are erroneous." The Ninth Circuit held this provision is invalid under the Federal Arbitration Act because that law specifies arbitration awards may be vacated or modified only in limited circumstances, such as fraud or arbitrator bias.

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