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U. S. Supreme Court to Address Key Employment Discrimination Questions in Fall Term

The U. S. Supreme Court heard four (4) cases in its 2007 fall term that could have long-lasting implications for employers and their ability to defend employment discrimination and harassment lawsuits. Decisions in these cases will be issued in 2008.

Sprint/United Management Co. v. Mendelsohn, (Docket No. 06-1221) (Appeal from 10th Circuit). The U. S. Supreme Court will decide whether testimonial evidence by co-workers alleging similar discrimination by the employer, though not necessarily by the same supervisor or decision-maker, is admissible in a disparate treatment case. In this case, the plaintiff sought to introduce, as evidence of the employer's discriminatory animus toward older employees in a company-wide reduction in force, the testimony of five former employees as to the "pervasive atmosphere of age discrimination." The Tenth Circuit Court of Appeals held the District Court committed reversible error in excluding the so-called "me, too" evidence and unfairly inhibited the plaintiff from presenting her case to the jury.

In finding that testimonial evidence of other employees terminated in a reduction in force was admissible to establish a company-wide discriminatory policy or an overall discriminatory atmosphere in the workplace, the Tenth Circuit joined several federal circuits in permitting "me, too" evidence of discrimination. Some circuits (including the Third and Eighth Circuits) have extended the admissibility of such evidence to sexual harassment cases, and hold that blanket evidentiary exclusions can be especially damaging in employment cases, in which plaintiffs face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives.

The decision is at odds with the view of at least four (4) circuits, which have found "me, too" evidence to be wholly irrelevant and prejudicial. The hope is that the Supreme Court will conclusively bar such evidence from employment discrimination litigation. However, if the Supreme Court affirms the Tenth Circuit's decision in Mendelsohn, employers will undoubtedly face more difficult evidentiary battles at trial in an attempt to exclude such testimony or be forced to rebut it, and the gates will have been opened for plaintiffs to introduce anecdotal evidence from individuals who were not at all involved in the specific events that gave rise to the trial at hand. This evidence will be both illustrative and memorable to the jury, and prejudicial to employers. It removes the focus from the specific facts at issue in the trial and potentially puts the employer's entire business and culture on trial.

CBOCS West Inc. v. Humphries, (Docket No. 06-1431) (Appeal from 7th Circuit). The U. S. Supreme Court will decide whether a race retaliation claim is actionable under Section 1981 (42 U.S.C. § 1981). Section 1981, at its core, protects the right of all persons to make and enforce contracts without regard to race. The right to enforce contracts also includes the performance, modification and termination of contracts. This right to contract has been applied to ensure that at-will employment relationships are free of race discrimination. In this case, the Seventh Circuit Court of Appeals held that Section 1981 also covers claims that an employee was terminated in *retaliation* for complaining of race discrimination.

In so ruling, the Seventh Circuit joined the Second, Fourth, Fifth, Eighth and Eleventh Circuits in concluding that retaliation claims are cognizable under Section 1981. While retaliation claims are typically brought under Title VII, the inclusion of such claims under Section 1981 would have a substantial impact on employment litigation. Under Section 1981, plaintiffs are not required to exhaust administrative remedies by filing predicate charges with the EEOC. The statue of limitations for Section 1981 actions may be as long as four (4) years in some instances (depending on the nature of the claim), while charges filed with the EEOC must be brought within 180 or 300 days depending on the jurisdiction. Finally, and perhaps most significantly, Section 1981 actions, unlike Title VII lawsuits, have no caps on compensatory and punitive damages.

The Seventh Circuit's holding allows would-be plaintiffs asserting retaliation claims to circumvent these features of Title VII by reading that Section 1981 provides the same substantive rights as Title VII without the procedural safeguards. If the Seventh Circuit's decision is not reversed, plaintiffs will be able to bypass the EEOC and go directly to court long after Title VII's limitations period has run.

Federal Express Corp. v. Holowecki, (Docket No. 06-1322) (Appeal from 2d Circuit). The U. S. Supreme Court will review what constitutes a "charge" of discrimination, and specifically, whether an "intake questionnaire" submitted to the EEOC satisfies the requirement under the Age Discrimination in Employment Act ("ADEA") of a timely filed charge of discrimination. The Second Circuit Court of Appeals held that a plaintiff's intake questionnaire and her accompanying affidavit *did* constitute a charge, even though the EEOC did not treat it as a charge and never investigated the matter or notified the employer. The determination was critical to the plaintiff's case because the intake questionnaire was timely filed within the requisite 300-day filing period, while the actual charge was untimely filed long after the 300 days expired.

In making its determination, the Second Circuit adopted the "manifest intent rule," holding that if a written submission to the EEOC contains the minimal information typically found in a charge and "manifests an individual's intent" to have the agency initiate its investigatory and conciliatory processes, then it constitutes a charge – even if the submission does not trigger the EEOC to commence an investigation. This position reflects a trend among the federal circuits, including the Seventh and Eleventh Circuits, which have found that an intake questionnaire suffices as a charge as long as it meets the manifest intent rule.

If the U. S. Supreme Court follows the trend and affirms the decision of the Second Circuit, plaintiffs will have an easier time exhausting administrative remedies before filing a lawsuit under the ADEA, as well as claims under Title VII and the Americans with Disabilities Act ("ADA"). Allowing intake questionnaires to satisfy the charge requirement may lead to an increase in litigation because doing so by-passes the significant process of conciliation. If the EEOC has not treated a document as a charge, conciliation efforts will not occur and fewer claims will be resolved prior to litigation. However, if the EEOC begins to treat intake questionnaires as charges going forward, then employers will likely find the EEOC investigating more accusations of discrimination and harassment, which in turn will lead to more plaintiffs earning the right to file discrimination lawsuits in federal court.

Hall Street Associates, L.L.C. v. Mattel, Inc., (Docket No. 06-989) (Appeal from 9th Circuit). The U. S. Supreme Court will decide whether parties to an arbitration agreement may contractually provide for more expansive judicial review of an arbitration award, beyond the narrow scope of review permitted under the Federal Arbitration Act ("Act"). The First, Third, Fourth, Fifth and Sixth Circuit Courts of Appeal have answered the question in the affirmative and permitted expanded judicial review of an arbitrator's findings of fact and conclusions of law, where there was contractual agreement between the parties for expanded review. Whereas, in Hall Street Associates, the Ninth Circuit took a more restrictive approach and joined the Tenth Circuit in finding the parties' agreement to extra judicial review of an arbitration award to be unenforceable.

Currently, under the Act, an arbitration award may be vacated only on narrow grounds, such as where: (i) the award was procured by fraud; (ii) there was evidence of partiality by the arbitrator; (iii) the arbitrator was guilty of misconduct; or (iv) the arbitrator exceeded or failed to execute contractually vested powers. Some courts have been reluctant to expand their review beyond the bounds of the Act, because by agreeing to arbitration, the parties have agreed to accept the arbitrator's, rather than a judge's, view of the facts and the law. Furthermore, the primary purpose of arbitration is expeditious dispute resolution, and courts have sought to protect the finality of arbitration decisions.

If the U. S. Supreme Court were to reverse the Ninth Circuit's decision and hold that parties may contractually agree to judicial review of arbitration awards beyond the bounds of the Federal Arbitration Act, it is possible that arbitrations could become a prelude to litigation, instead of a substitute for it.