EMPLOYMENT CASES FROM THE 2007-2008 SUPREME COURT TERM

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by

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Nearly twenty years ago, the Supreme Court decided a series of employment discrimination cases that dramatically narrowed the protections available to employees. The 1988 Term of Court, as I wrote in an article for THE LABOR LAWYER, "was widely described to the American people by the news media as a "watershed" term, a point at which a new conservative majority began to restrict the reach of previously expansive interpretations of civil rights statutes. To a large degree, employment discrimination was the battleground upon which sometimes bitterly divided justices waged war among themselves."[1] That term, as the older lawyers among you know, triggered a response by Congress, The Civil Rights Act of 1991.[2] The CRA largely reversed the 1988-1989 statutory constructions of the Supreme Court[3] and expanded the range of employment discrimination law, most notably by adding capped compensatory and punitive damages to the remedies available to plaintiffs in Title VII cases.[4]

The replacements of Chief Justice Rehnquist and Justice O'Connor by Chief Justice Roberts and Justice Alito[5] was widely anticipated to swing the Court further toward employer-oriented decisions.[6] Last Term, in the seven cases reported by my predecessor Professor Christine Cooper, plaintiffs, employees, and unions lost all seven; employers and defendants won all seven.[7] Legislation, in the wake of the 2006 Term, was introduced to overturn the most controversial of these decisions, Ledbetter v. Goodyear Tire & Rubber Co., Inc.[8] Not surprisingly, Court kibitzers widely expected

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[1] Shanor and Marcosson, "Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89," 6 THE LABOR LAWYER 145, at 145-46 (Winter 1990).

[2] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. See id. at 180 ("It is thus ironic that the most significant result of the Court's efforts in the field will be to shift to Congress the fight over many of these same questions.")

[3] See, e.g. Civil Rights Act of 1991, supra n. 2, § 2 ("The congress finds… (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 400 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections against unlawful discrimination in employment…") and § 3 (The purposes of this Act are-- …(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.")

[4] Civil Rights Act of 1991, § 102. Damages in Cases of Intentional Discrimination, 42 U.S.C. 1981a.

[5] Chief Justice Roberts and Justice Alito joined the Supreme Court effective Fall Term, 2006.

[6] See, e.g. Linda Greenhouse, *Justices Express Skepticism in a Discrimination Case*, N.Y. Times, Dec. 4, 2007, at A26; Tom Ramstack, *Pro-Business Rulings Blasted*, Washington Times, July 7, 2008, at B1.

[7] Cooper, "Employment Cases from the 2006-2007 Supreme Court Term, THE LABOR LAWYER 223 (Winter/Spring 2008).

[8] H.R. 2831, 110th Cong. (Jun. 22, 2007); Sen. 1843, 110th Cong. (July 20, 2007); Sen. 2945, 110th Cong. (Apr. 30 2008); H.R. Educ. and Lab. Comm., *Lilly Ledbetter Fair Pay Act of 2007: Hearings on H.R. 2831*, 110th Cong. H8940-50 (July 30, 2007); H.R. Educ. and Lab. Comm., *Lilly Ledbetter Fair Pay Act of 2007: Hearings on H.R. 2831*, 110th Cong. H9219-22 (July 31, 2007) (Bill passed in H.R. 225-199); Sen. *Fair Pay Act: Hearings on S. 2945*, 110th Cong. H3273-88 (Apr. 23, 2008); Sen. *Fair Pay Act: Hearings on S. 2945*, 110th Cong. H3395-96 (Apr. 24, 2008) (procedural vote failed to garner three-fifths majority, 56-42).

similar outcomes, thinking that the Roberts Court, having wet its feet last term, would wade further into pro-employer waters this term.[9]

The Court in fact granted certiorari in and decided a large number of employment cases this term—nine or ten, depending on what is counted as an "employment case"—out of only 72 decisions.[10] It was a watershed year, as in 1988, at least in terms of attention devoted by the Court to the employment arena. Of course, to the broader public, it was the year in which Guantanamo detainees won a constitutional law habeas corpus victory[11] and gun-toters, Second Amendment rights were vindicated.[12]

But it was not a watershed term for pro-employer dispositions in employment law cases. More than half were decided in favor of employees and plaintiffs,[13] and even the losses for the so-called "victim's side" were modest. Even more surprising, perhaps, was the lineup of justices. The two most conservative justices in these types of cases, Thomas and Scalia, were the most frequent dissenters, with four for Thomas and five for Scalia.[14] And in one of those cases, Scalia dissented from an employer victory; in his view, the employee should have prevailed! Five Justices (Alito, Breyer, Roberts, Souter, and Stevens) dissented only once apiece in all the cases combined, and the media's proclaimed swing justice, Kennedy, dissented only twice. Only one case, limited to the public employment context, provoked the pattern of liberal dissent predicted by the media by Stevens, Souter, and Ginsburg to an employer victory. Justice Breyer, the fourth usually liberal vote, did not join that dissent. Here is a graphic overview of the cases:

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[8] See, e.g. Cooper, supra n. 7 at 252 ("An editorial in the New York Times suggested that the outcome of a case under the Roberts court can be predicted by asking this question: What would a conservative Republican businessperson want? In looking back at the 2006 term, that seems to have been a good prognosticator. Perhaps that will define the coming term as well.")

[9] See, e.g. Cooper, supra n. 7 at 252 ("An editorial in the New York Times suggested that the outcome of a case under the Roberts court can be predicted by asking this question: What would a conservative Republican businessperson want? In looking back at the 2006 term, that seems to have been a good prognosticator. Perhaps that will define the coming term as well.")

[10] All these decisions may be accessed at http://www.supremecourtus.gov/opinions/07slipopinion.html . The tenth case is *Richlin Security Services Co. v. Chertoff*, 128 S.Ct. 2007 (2008), which concerns whether to allow as part of attorneys fees under the EAJA fees for paralegals in a case involving a claim for reimbursement on a government contract. This may have potential employment implications though it is not an employment case and merely followed a case interpreting the Civil Rights Attorneys Fees Awards Act of 1976, Missouri v. Jenkins, 491U.S. 274 (1989). The same might be said of the Supreme Court's Second Amendment decision, which might impact gun-toting government employees and their employers, at least if the employee decides to bring a gun to work.

[11] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

[12] *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

[13] The count is 5-3. *Sprint* was a victory for district courts over courts of appeals, counted for neither side.

[14] See generally the chart inserted infra to identify the cases mentioned indirectly in this paragraph.

Case	Statute	Issue	Outcome	vote count	Dissenters
Meacham v. Knolls Lab.	ADEA	Does an employer bear the burden of proof on "reasonable factor other than age" in a disparate impact case?	Employee wins	7-1 (Breyer recused)	Thomas (all ex. Parts I and IIA)
Ky. Retirement v. EEOC	ADEA	Does Kentucky discriminate against workers disabled after becoming eligible for retirement based on age?	Employer wins	5-4	Kennedy (w/ Scalia, Ginsburg, and Alito)
FedEx v. Holowecki	ADEA	Does an intake questionare qualify as an ADEA "charge"?	Employee wins	7-2	Thomas (w/ Scalia)
Sprint/United Mgmt. v. Medelsohn	ADEA/ FRE	Did the Tenth Circuit err in not remanding "me too" evidence assessment to the District Court?	Vacated and Remanded	9-0	N/A
Gomez-Perez v. Potter	ADEA	Is retaliation against a federal employee who complains of age discrimination prohibited?	Employee wins	6-3	Roberts (w/Scalia and Thomas); Thomas (w/ Scalia)
CBOCS West v. Humphries	§ 1981	Does § 1981 encompass relaliation claims?	Employee wins	7-2	Thomas (w/ Scalia)
Engquist v. Oregon	Equal Prot. Clause	Does the EP "class-of-one" theory apply in the public employment context?	Employer wins	6-3	Stevens (w/ Souter and Ginsburg)
MetLife v. Glenn	ERISA	Does a conflict of interest arise when an insurance company both evaluates and funds disability claims?	Employee wins	6-3 (Roberts all but part IV)	Kennedy (concurring in part); Scalia (w/Thomas)
Chamber of Commerce v. Brown	NLRA	Are Cal. Restrictions spending state funds to assist, promote, or deter union organizing preempted by the NLRA?	Employer wins	Breyer (w/Ginsburg)	Breyer (w/Ginsburg)

No legislation has been introduced to overturn any of these decisions. That may be in part a function of the preoccupation of the political classes with elections and with the veto available to a lame duck President Bush. However, as I shall show, these cases are likely to create little backlash in Congress.

My task in this Supreme Court roundup, therefore, is not to document any dramatic outcome-oriented developments. Rather, I will focus on more nuanced developments, that is matters important to labor and employment lawyers, but of lesser interest to the general public. One set of cases, involving retaliation, may present a broader theme for the Court's approach to statutory construction more generally. The theme of these cases, in a sentence, is the decline of textualism in the interpretation of employment discrimination statutes. This decline, however. was not matched with a rise in the use its opposite mode of statutory construction, the contra-textual well-placed bit of legislative history.[15] Textualism's counterpoint this term was what might best be called "pragmatism," what practitioners will recognize as careful attention to text, context, and facts.[16] In short, you will find this term, at least for the most part, a reassuring victory of law over politics in the employment field. That should presage a fair fight for all in the coming term, in which the Court has already granted cert in several important employment law cases.[17]

Now let's move on to the individual cases. I have taken the liberty of grouping them together by theory or statute as much as possible. First, I will consider the retaliation cases mentioned above. Second, I will examine the ADEA disparate impact and treatment cases. Third, I will consider two cases that involve governmental entities. Finally, I will evaluate two decisions in which the Court faced issues of fairness to the

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[15] For an interesting article contesting the usual position that liberals pick their legislative history friends in the employment context while conservatives are neutral textualists, see Brudney and Ditsler, "Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect," 29 BERKELEY J.EMP.& LAB. L. 117 (2008). One of the authors, James Brudney, was active on the legislative front as Chief Counsel of the Senate Select Committee on Aging when I was General Counsel of the EEOC.

[16] Richard Posner, LAW, PRAGMATISM, AND DEMOCRACY (Harv. Univ. Press 2003); Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915 (Summer 2007); Susan Haack, *On Legal Pragmatism: Where Does the "Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71 (2005).

[17] The employment cases in which the Court has thus far granted cert for October Term, 2008 are the following: *Crawford v. Metropolitan Gov't of Nashville and Davidson, Co., Tenn.*, 06-1595, *cert. granted*, Jan. 18, 2008 (Does anti-retaliation provision, § 704(a) of Title VII of the 1964 Civil Rights Act, protect workers from being dismissed because they cooperated with their employer's internal sexual harassment investigation?); *Locke v. Karass*, 07-610, *cert. granted*, Feb. 19, 2008 (May a state, consistent with the 1st and 14th Amend., condition continued public employment on the payment of fees connected to non-union employee litigation?); *14 Penn Plaza LLC v. Pyett*, 07-581, *cert. granted*, Feb. 19, 2008 (Is an arbitration clause enforceable when it is freely negotiated and waives union members' rights to a judicial forum for statutory discrimination claims?); *Kennedy v. Plan Admin. for DuPont Sav. and Inv. Plan*, 07-636, *cert. granted*, Feb. 19, 2008 (Is the ERISA qualified domestic orders provision, 29 U.S.C. § 1056(d)(3)(B)(i), the only valid way that a divorcing spouse can waive their right to receive ex-spouse's ERISA benefits?); *AT&T Corp. v. Hulteen*, 07-543, *cert. granted*, Jun. 23, 2008 (Does an employer engage in a current violation of Title VII of the 1964 Civil Rights Act when, in making post-PDA eligibility determinations for pension and other benefits, employer fails to restore service credit that female employees lost during lawful pre-PDA leave policies?).

little guy—the employee—in dealing with government agencies and administrators of pension plans.

A. The Retaliation Cases

Charges with the EEOC claiming retaliation—most frequently in addition to charges of discrimination against a protected class member—have grown dramatically. While the total number of charges were virtually the same in FY 1997 and FY 2007, the charges involving retaliation jumped from 18,198 to 26,663, a growth spurt from 22.6% of the charges to 32.3% of the charges.[18] Another way of looking at these figures is that, while total charges grew by only 2.5%, retaliation charges grew by over 33%.

Despite this growth, the development of the law concerning retaliation has lagged behind the law concerning discrimination, at least at the Supreme Court level. Two major questions answered this term involved statutes silent about the issue of retaliation. First, does § 1981 include retaliation claims, or is it limited to race discrimination claims alone? Second, is retaliation a cognizable claim under the federal-sector provisions of the ADEA? I will examine these two cases separately, and then discuss their implications collectively.

1. In the more straightforward of the two cases, *CBOCS West, Inc. v. Humphries*,[19] the employee alleged that he had been dismissed for complaining to management that a black co-employee had been dismissed for racial reasons. The Court concluded, 7-2, that this allegation, if true, was actionable; retaliation claims are included under § 1981. *Stare decisis* was the key factor in the Court's decision, for the Court perceived that it had long ago held that a companion statute encompasses retaliation. That statute, 42 U.S.C. § 1982, grants "[a]ll citizens…the same right…as is enjoyed by white citizens…to inherit, purchase, lease, sell, hold, and convey real and personal property" encompassed claims of retaliatory denials of such transactions, even without racial animus. So how could 42 U.S.C. § 1981, giving "[a]ll persons…the same right ...to make and enforce contracts…as is enjoyed by white citizens" *not* encompass retaliation claims? If it is unlawful to refuse to lease to someone who has advocated fair housing, how could it *not* be unlawful to refuse to hire someone who had been outspoken about fair employment? Phrased that way, the Court had little choice but to overrule its earlier decisions or apply them in the employment contract context.

Justice Breyer, for the majority, noted that the Court has traditionally applied its precedents under the two statutes similarly because of the "common language, origin, and purposes" of the two provisions. Justice Breyer commented on the misguided 1988 Term narrowing of § 1981 in *Patterson v. McLean Credit Union*,[20] which was overturned by Congress in the Civil Rights Act of 1991. Congress intended, said Justice Breyer, to

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[18] The data on which this paragraph was based is available at http://www.eeoc.gov/stats/charges.html. This data concerns charges filed under the statutes administered by EEOC. Notably, this data does not include activity under the statutory provisions dealt with in the cases discussed in this section of this article

[19] 128 S. Ct. 1951 (2008).

[20] 491 U.S. 164 (1989).

include retaliation claims in the revised statute, citing a House Report showing an intent to include retaliation claims and subsequent Courts of Appeals decisions doing so.[21] While Justice Breyer conceded there was no "explicit" text concerning retaliation in § 1981, either before or after the Civil Rights Act of 1991, he found that factor insufficient to carry the day in light of precedent and congressional intent.

Two justices dissented. Justice Thomas, writing only for himself and Justice Scalia, said that the Court's decision "has no basis in the text of § 1981 and is not justified by principles of *stare decisis*."[22] The text, said the dissenters, appears to talk only in racial terms when it refers to rights enjoyed by *white* citizens, apparently in contrast to *non-white* citizens. In the words of the dissent, "Retaliation is not discrimination based on race. When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather, it is the result of his *conduct*."[23] In short, Thomas argues that the racially-oriented text ought to exclude rather than include conduct opposing race discrimination and that earlier decisions allowing retaliation claims under § 1982, similarly lacking in textual support, should not be extended to § 1981 cases. He distinguished the leading § 1982 case as being "best read as a third-party standing case"[24] that provides "only a figleaf of ersatz *stare decisis*."[25] Justice Thomas at bottom argues that the statute is "not a model of clarity" and need not be extended in this case. It is not desirable, he says, that "an error in one area metastasizes into others."[26] Finally, Thomas chides the majority for "crafting its own enforcement mechanism" rather than letting Congress do so. He says that "the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purposes."

In short, *CBOCS* is a case about pure congressional silence concerning retaliation. The statutory silence was sufficient to enable the majority to infer retaliation claims as part of the same right as white citizens to "make and enforce" contracts. This interpretation thus protects those complaining of race discrimination, even if they are not themselves the victims of such discrimination. The dissenters would require Congress to amend the statute to accomplish this result. In short, the Court was more generous in construing the reach of § 1981 than it had been in the 1988 Term, when it held that harassment claims were not part of the right to "make and enforce" contracts.[27] If this is a more conservative Court, it did not show it in this case.

The effect of *CBOCS* is to ratify the inclusion of retaliation claims under § 1981. Such claims could become as common as retaliation claims in Title VII race discrimination cases. Any employee whose conditions of work have deteriorated after making a race claim or supporting the right of other employees to be free of race discrimination should make a §1981 retaliation claim. Even when the claim of race

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[21] 128 S. Ct. at 1958.
[22] Id. at 1961.
[23] Id. at 1963 (emphasis in original).
[24] Id. at 1965.
[25] Id. at 1967.
[26] Id. at 1968.
[27] *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

discrimination is unsuccessful, as we all know, the retaliation claim may succeed. If it does, the employer presumably has no caps on its liability, as is the case with other § 1981 claims.

2. The harder retaliation case, *Gomez-Perez v. Potter*,[28] drew a dissent from Chief Justice Roberts, whom Justices Scalia and Thomas joined, as well as a separate brief dissent from the latter two justices. The case involved a postal service worker's claim that she had been retaliated against for filing an age discrimination complaint. The Postal Service is covered by the federal sector provision of the ADEA rather than the ADEA provisions applicable to private sector employees. This complaint was presumably first filed with the Postal Service, though the Court is not clear whether the alleged retaliation occurred at this point or after the complaint was lodged with EEOC.

Gomez-Perez was harder than *CBOCS* for two reasons. First, § 1981 was simply silent on the issue of retaliation, while the federal sector ADEA provision's silence stood in contrast to the private sector ADEA's explicit antiretaliation provision. The federal sector language reads "all personnel actions…[shall] be made free of discrimination based on age" while the private-sector language makes it unlawful to "discriminate against any individual…because of such individual's age."[29] The public-sector provision states that no private-sector provision is applicable to actions under it, including the separate private-sector provision making it "unlawful for an employer to discriminate against any of his employees or applicants for employment… because such individual…has opposed any practiced made unlawful by this section, or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or proceeding under" the ADEA.[30] In short, one section of the ADEA, applicable to private employers, has an antiretaliation provision; the other part of the statute, applicable in federal-sector cases, does not.

The second factor making the case harder was that there was a much weaker *stare decisis* argument for inferring an antiretaliation provision in the ADEA federal-sector context. Here, there was no companion statute previously interpreted to inply a retaliation claim. The Court was writing on a fairly clean slate with its public sector ADEA decision.

How did the majority get over these hurdles? Justice Alito's opinion acknowledged the federal/private language difference, but concluded this was not dispositive. He noted that the two provisions were drafted eight years apart by different Congresses and that the argument for reading provisions together is strongest when they are enacted together. Second, he cited language from cases discussing retaliation which referred to retaliation as simply another form of discrimination ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination"). Third, looking at the language in the private and federal

[28] 128 S. Ct. 1931 (2008).

[29] 29 U.S.C. §623(d).
[30] 29 U.S.C. §633(a).

sector provisions, Justice Alito stressed their verbal differences rather than their similarities. He saw "personnel actions…free of discrimination" as being different from language making it unlawful to "discriminate against any individual." Fourth, the majority dismissed the dissenters' arguments for a difference based on the enforcement of the federal sector provisions through the Civil Service System as "unsupported speculation" about a lack of congressional desire to include retaliation as a claim in federal-sector cases. In short, the Court said the federal sector provision outlawed retaliation with "the requisite clarity."

From now on, we should see a rise in retaliation claims by federal employees claiming age discrimination to a level comparable to the use of such claims in private sector ADEA cases.

3. What do these two cases together foreshadow? First, they clearly expand the use of retaliation claims, probably not only under the two statutes considered but also under any other statutes not yet dealt with by the Court. If retaliation is "part of the discrimination," it would be hard not to find a similar claim under any other federal labor or employment statute unless Congress explicitly barred retaliation claims. Second, these cases together may tell us that both "opposition" and "free access" or "participation" are protected, as under § 704 of Title VII, even without language to that effect. My reason for this inference is that one case involved oppositional conduct (*CBOCS*) and the other participation in claims processes (*Gomez-Perez*). Third, because the Court seemed unconcerned about whether the federal sector claim in *Gomez-Perez* was internal or external to the postal service, a claim of protected participation may not be limited to situations where there is a "proceeding under this title," to use the language of § 704 of Title VII.

Beyond this, it is hard to know how far the Court will go in protecting employees against retaliation. The *Crawford* case this coming term, for example, involves alleged retaliation against one employee because of a relationship with another employee allegedly adversely treated because of race. The charging party was not married to nor otherwise closely affiliated with the other employee, and it is not clear exactly why the employer would have seen the two as being "two peas in a pod" who should both be fired. Nevertheless, because *Crawford* involves causation issues in which allegations of retaliation may be easy to claim and particularly difficult for employers to defend, the case will be carefully watched by employment lawyers.

I also wonder after these cases what the Court would do with my favorite case involving the perversion of a retaliation claim, *Merritt v.Dillard Paper Co.*[31] In *Merritt*, a manager who admitted in deposition that he harassed another employee unlawfully, thereby triggering corporate liability and settlement with the harassed female employee, won a retaliation claim when he was thereafter fired. His claim was that his discharge was retaliatory since he was participating in a proceeding under Title VII when deposed. While it would be lawful to fire him for harassment, he could not be fired for answering truthfully in deposition that he had engaged in harassing behavior. My suspicion is that

[31] 120 F. 3d 1181 (11th Cir. 1997).

the "retaliation is part and parcel of the discrimination" concept articulated in *Gomez-Perez* would be hard to sell in the manager's case.[32] After all, it was the manager who was doing the harassing, not protecting the rights of others to be free of harassment.

B. The ADEA Theory Cases

Two cases this year made significant contributions to disparate treatment and disparate impact theory under the ADEA. In the disparate treatment case, *Kentucky Retirement v. EEOC*,[33] the employer narrowly prevailed (5-4), while in the disparate impact case, *Meacham v. Knolls Atomic Power Laboratory*,[34] the employee prevailed fairly handily (7-1). Justice Scalia led the dissenters in the first; Justice Thomas filed a solo dissent in the other. A third case, a unanimous decision concerning "me too" evidence, decided little—or at least that is my take on it.

1. The disparate treatment case, *Kentucky Retirement v. EEOC*,[35] involved a special retirement plan for "hazardous duty" employees, those in certain police, fire, paramedic, and correctional positions. Normal retirement for hazardous duty workers came after 20 years of service or at age 55 (so long as the employee had worked at least 5 years). The normal retirement benefits formula was number of years service times 2.5% of final preretirement pay. Disability retirement was allowed regardless of age after at least five years of service for employees unable to continue working. There was a benefits "sweetener" to the normal retirement computation, and it was that sweetener that became the source of controversy in the case. The "sweetener" came through imputation of additional years of service from the age at which disability occurred up to age 55, with a "cap" to the "sweetener" consisting of the employee's actual years of service. For example, an employee disabled at age 45 with 15 years of service would get credit for an additional ten years of service—a 25% per year additional retirement benefit.

The problem arose when a hazardous position worker eligible to retire at age 55 continued to work until he was disabled at age 61. When his retirement pay was computed, he received *no* sweetener, because he was over the normal retirement age of 55 when he was disabled. Simply put, he argued that the only reason he received no "sweetener" was that he was "too old," i.e. over 55.

The 5-4 decision turned largely on differing interpretations of *Hazen Paper Company v. Biggins*,[36] which held that age and retirement eligibility were analytically distinct concepts, and that discrimination based on retirement eligibility was not age discrimination unless retirement eligibility was used by the employer as a proxy for age. *Hazen Paper* left undecided "the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service."[37] This case, where

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[32] For a scathing academic commentary on this case, see Brian Kreiswirth, *Justifiable Limitations on Title VII Anti-Retaliation Provisions*, 107 YALE L.J.2339 (1998).
[33] 128 S.Ct. 2361 (2008).
[34] 128 S.Ct. 2395 (2008).
[35] 128 S.Ct. 2361 (2008).
[36] 507 U.S. 604 (1993).
[37] Id. at 613..

denial of the "sweetener" was because of the employee's age at the time of disability, rather than years of service, was a variant on *Hazen Paper's* "special case."

Applying *Hazen Paper*, Justice Breyer wrote that the differences in treatment under the Kentucky retirement plan were "not 'actually motivated' by age." Why not? First, Justice Breyer argued that age and pension status remained "analytically distinct" concepts, to use *Hazen Paper*'s terminology, even where pension status was itself based on age. Second, he found a background circumstance—the offer of the sweetener to each new hire if disabled before retirement—sufficient to negate the pension status being used as a "proxy for age." Congress, said Justice Breyer, had done the same thing in calculating some federal disability benefits. Third, Justice Breyer found "a clear non-age-related rationale for the disparity"—tracking the normal retirement age scheme of eligibility at age 55. Fourth, he found that in some cases the rule in contention could operate "to the *advantage* [rather than disadvantage] of older workers," though it worked to their disadvantage in the case before the Court. Fifth, Breyer found "no stereotypical assumptions" underlying Kentucky's program, only assumptions applicable to all workers. Finally, Justice Breyer was convinced that a decision favoring the worker here would simply lead Kentucky to reduce disability benefits, perhaps by eliminating the sweetener altogether, to keep the system fiscally sound.

Two more points about Justice Breyer's opinion should be noted. The first is his vigorous protest that the decision here "in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA"—this is only pension status, albeit that status turns in part on age. Second, he dismissed two government arguments, finding first that the OWBPA was irrelevant and second that the EEOC's contrary interpretation of the ADEA was unpersuasive.

An odd combination of dissenters (Kennedy, Scalia, Ginsburg, and Alito) argued for a straightforward reading of the ADEA—age was a factor in doling out sweetened disability pensions that are disadvantageous to older employees. Since this age-based disability pension add-on was not cost-justified, it was unlawful. The dissenters argued vigorously that "whether intended or not," the retirement system sometimes "compensates otherwise similarly situated individuals differently on the basis of age." They found the difference not supported by the text of the ADEA, chastised the majority for lifting the *Hazen Paper* phrase ("proxy for age") out of context, and concluded that Justice Breyer's six factors were unconvincing. Finally, though the dissenters conceded there was irony in the fact that Kentucky had treated older workers very favorably in its normal retirement plan, the dissenters found this to be a matter of policy for the legislature rather than a rule of law for the courts.

2. The ADEA disparate impact case, *Meacham v. Knolls Atomic Power Laboratory*,[38] answers a question left undecided when the Court concluded that disparate impact claims are available under the ADEA in *Smith v. City of Jackson*[39] three years ago. The facts, straightforwardly, were that Knolls laid off 31 salaried employees based

[38] 128 S. Ct. 2395 (2008).
[39] 544 U.S. 228 (2005)

on their low ratings for "performance," "flexibility," and "critical skills." Of these 31 employees, 30 were over age 40, producing an undisputed age impact. As *City of Jackson* required, the plaintiff also pinpointed the source of the impact in the discretionary scoring of "flexibility" and "criticality." The issue was who—plaintiff or defendant—should bear the burden of production and persuasion concerning whether there was a "reasonable factor other than age" behind the layoff decisions having a disparate impact on older workers.

All Justices agreed that this burden falls to the employer, though Justices Scalia and Thomas concurred for reasons other than those given in Justice Souter's majority opinion.[40] For Justice Souter, the key was that there was no compelling reason *not* to see RFOA as an affirmative defense for the employer to prove. That, he explained, is the "longstanding convention" when Congress provides justifications or exemptions to statutory liability, that is how the Court has read the RFOA's "nearest [ADEA] neighbor," the BFOQ defense, and that is how the "any other factor other than sex" defense works in the Equal Pay Act. When the Court looked at two instances in 1989 when it had not followed this convention,[41] both of which Congress soon overturned, it found both cases distinguishable. Finally, the majority considered a practical concern: whether "recognizing an employer's burden of persuasion on an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court." It concluded that this would seldom happen, and that if it does, Congress can fix this problem. On the facts, the case was then remanded for application.

3. What is the upshot of *Kentucky Retirement* and *Meacham* when considered together? At first glance, it seems that ADEA disparate <u>treatment</u> cases have become <u>harder</u> for plaintiffs to win, because decisions that turn on reasons that are age-determined may not be age-based. It also appears initially that ADEA disparate <u>impact</u> cases have become <u>easier</u> for plaintiffs to win, because employers must prove that apparently neutral reasons are "reasonable factors other than age." Could we go so far as to say that the disparate <u>treatment</u> defendant need only articulate "pension eligibility" to win, while the disparate <u>impact</u> defendant must prove that its layoff criteria were based on reasonable factors other than age? At first glance, this appears to be an upside-down prioritizing of treatment versus impact theories, especially since the latter barely made it into the plaintiff's quiver of theories three years ago in *Smith v. City of Jackson* and that the Court took pains in *Smith* to show that disparate impact theory is far less powerful under the ADEA than under Title VII.

Alas, I suspect that the above analysis overreads both cases. The Court goes to substantial trouble in *Kentucky Retirement* to say that this is a very narrow, maybe even unique, case involving retirement systems when Congress has allowed retirement eligibility to be based on age. And in *Meacham*, the Court leaves much room for

[40] Justice Scalia would have deferred to the EEOC's "unquestionably reasonable" view that the burden was on the employer. Justice Thomas' more cryptic one-paragraph opinion says there should be no disparate impact ADEA claim, but agrees "that the RFOA exception is an affirmative defense-when it arises in disparate-treatment cases."

[41] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *PERS v. Betts*, 492 U.S. 158(1989).

employers to show the reasonableness of their decisions when those decisions impact older workers disproportionately. How broad this case will prove may turn substantially on how it is applied on remand. Will the case be reopened for further evidentiary development before the District Court, or will it be decided on the record below, the contents of which are not elucidated in the Supreme Court's decision? We can only await the next installment of this long-running series.

4. Perhaps the most heralded of the ADEA cases this term was *Sprint/United Management Co. v. Mendelsohn*. [42] The case was touted as a decision that would resolve a deep split in the courts over when plaintiffs could use "me too" evidence from employees of other supervisors in claiming age discrimination. Those seeking clear guidance as to when "me too" evidence is admissible are in for a big disappointment. The unanimous and brief decision was a remand directing the Court of Appeals to let the District Court balance "explicitly and on the record," the probative value of the specific evidence in the case against its possible prejudicial effect under Federal Rules of Evidence 401 and 403. The Court, while acknowledging that "such evidence is neither *per se* admissible nor *per se* inadmissible," unanimously faulted the Court of Appeals for engaging in that weighing *de novo*. As Justice Thomas observed, "[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules." The District Courts are in a better position to weigh these factors than appellate courts.

The big question after *Sprint* is whether the dictum accompanying the remand will facilitate admission of more "me too" evidence by district courts than is currently allowed. A spirited colloquy by three law professors indicates that even this component of the case is unclear. Professor Mitchell Rubenstein says the decision will be a "shot of adrenaline" for plaintiffs because Justice Thomas' dictum "implicitly approves of the use of such evidence" and because "[i]t is difficult to come up with a more factually remote setting than what occurred in *Sprint*" for use of "me too" evidence.[43] Not so, says Professor Paul Secunda, who speculates that "although the Supreme Court may have taken on the case with some justices hoping to banish "me too" evidence to the dustbin of employment-discrimination-law history," it is more likely that, in the hands of many Republican district court judges, the case "will lead to exclusion of "me too" evidence in many more cases than where it is let in.[44] Secunda concludes by noting that it is unlikely that the Court will take another case to clarify this exercise of district court discretion any time soon. The third professor, David Gregory, concludes that "[o]ne suspects that the endless parade of witnesses to which Sprint has potentially opened the door will displease

[42] 128 S. Ct. 1140 (2008).
[43] Rubenstein, *Sprint/United Mgmt. Co. v. Mendelsohn: The Supreme Court Appears to Have Punted on the Admissibility of "Me Too" Evidence of Discrimination. But Did It?*, 102 NW. L. REV. COLLOQ. 264 (2008); Rubenstein, *The Significance of. Sprint/United Mgmt. Co. v. Mendelsohn:A Reply to Professors Gregory and Secunda*, 102 NW. L. REV. COLLOQ. 387 (2008).
[44] Secunda, *The Many Mendelsohn "Me Too" Missteps:An Alliterative Response to Professor Rubenstein*, 102 NW. L. REV. COLLOQ. 374 (2008).

the courts," who will have to develop "an efficient method" for separating "the prejudicial from the probative."[45]

My assessment is that the case may lead plaintiffs to expand "me too" proffers of evidence but that the courts will not read Sprint as approving of such evidence. The burden will ultimately rest with plaintiffs to demonstrate that evidence concerning comments of supervisors other than the plaintiff's will seldom be deemed admissible without some additional ties to the plaintiff's theory of the case. It is conceivable that, over time, guidelines may emerge from the lower courts for making this assessment, but even then, the list of factors is likely to be long enough that finding law amid the factual underbrush will be difficult at best.

C. Public Sector Employment Cases

Two public sector cases were decided this term, one involving state employment rules and the other federal employment decisions. In this arena, the employers were both victorious. The first of these cases, a traditional labor preemption case, was fairly narrow and can be easily avoided by state officials. The second, a constitutional equal protection case, has potentially broader employment law ramifications.

1. *Chamber of Commerce v. Brown*[46] is a National Labor Relations Act preemption case. At issue was a California statute prohibiting grant recipients and private employers receiving more than $10,000 in state program funds in a year from using state funds "to assist, promote, or deter union organizing." Collective bargaining was exempted from this ban.

Justice Stevens, in a 7-2 decision, held that California's statute was preempted under the *Machinists* preemption doctrine: California had sought to regulate an area Congress left "to be controlled by the free play of economic forces."[47] His opinion draws sustenance from the protection of employer speech under § 8(c), a provision that Justice Stevens says makes this case "easier, in at least one respect, than previous cases" because there was no difficulty in finding Congressional intent from silence.[48] "California's policy judgment that partisan employer speech necessarily "interfere[s] with an employee's choice about whether to join or to be represented by a labor union…is the same policy judgment that the NLRB advanced" before Congress added § 8(c). Justice Stevens looked at the reasons given by the Ninth Circuit for rejecting *Machinists* preemption: (1) that the spending constraint applied only to use of state money, (2) that Congress did not preclude all regulation, and (3) that the California law was modeled on federal statutes doing the same thing. On the first issue, California was regulating those with whom it was doing business through a "targeted negative restriction," not merely

[45] Gregory, *Sprint/United Mgmt. Co. v. Mendelsohn and Case-by-Case Adjudication of "Me Too" Evidence of Discrimination*,102 NW. L. REV. COLLOQ. 382 (2008).
[46] 128 S. Ct. 2408 (2008).
[47] *Machinists v. Wisconsin Employ. Rel. Comm'n*, 427 U.S. 132 (1976).
[48] Section 8(c) was added to the Wagner Act by the Norris-laGuardia Act specifically to counterbalance union campaigning for representation by allowing employers to speak out against unionization.

acting as a market participant.[49] On the second, the Court rejected California's argument that some speech is barred under the NLRA also (e.g. employer interviews with employees in their homes immediately before an election and bars to mass audience election speeches on company time within 24 hours before the election). These instances, said the Court, were a "narrow zone of speech to ensure free and fair elections." Finally, concerning the federal statutes point, the Court found that the few Federal spending limits were not government-wide, had comparable remedial provisions (including triple damages) or had any pro-union exemptions.

Justices Breyer and Ginsburg dissented. To them, California's statute in no way limited employer speech, but "simply says to those employers, do not [speak] on our dime."[50] He continues by opining that "[a]s far as I can tell, States that *do* wish to pay for employer speech are generally free to do so. … [W]hy should States that do *not* wish to pay be deprived of similar freedom?"[51]

It is not clear whether any state other than California had a statute like the one held preempted in *Chamber of Commerce v. Brown*, or even whether other states had been considering such legislation. Employers, as we know, are far more likely to spend money to deter unionization than to assist unionization, so the practical effect of the decision, in California and any like-minded state, will be to allow companies to spend state money for their anti-union efforts. However, it should be noted that the decision is a narrow one, and the Court seems to allow room for states to impose general restrictions on use of their money. They can say that state money is only to be spent on matters directly related to the provision of goods or services, for instance. Even though the practical effect of such a provision might be to keep State money from being spent to deter unions, such a general provision, saying nothing specific about unions, would not be preempted.

2. In *Engquist v. Oregon Dept of Agriculture*,[52] the plaintiff alleged arbitrary treatment, but with no claim that her discriminatory treatment was based on membership in a protected class. In other contexts, such as provision of municipal services or granting zoning variances, such "class-of-one" claims under the equal protection clause are allowable if the claimant can show there was no rational basis for her treatment.[53]

The Court, 6-3, decided that such "class-of-one" claims are not available in public employment cases. The Court expressed its concern that there was no "clear standard against which departures, even for a single plaintiff, could be readily assessed" in public employment. Rather, the state's personnel decisions "by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments." [54] Since <u>all</u> such decisions are subjective and individualized, no claim lies,

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[49] This may be something like a "downstream regulation" in the dormant commerce clause field. See *South Central Dev. Corp. v. Wunnicke*, 467 U.S. 82 (1984).
[50] 128 S. Ct. at 2420 (2008)
[51] Op. cit.
[52] 128 S. Ct. 2146 (2008).
[53] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).
[54] 128 S. Ct. at 2154.

said the Court. Interestingly, the Court buttressed its decision on the historical understanding of public employment as "at-will employment," while at the same time acknowledging that in most contexts statutes keep public employers from discriminatory discharges.[55] A "class-of-one" claim, said the Court, would upset the "delicate balance" between employee rights and governmental discipline, leading every adverse personnel decision to provoke a lawsuit.

The dissenters, Justices Stevens, Souter, and Ginsburg, criticized the majority for "speculation about unnecessary hypothetical cases, and an incorrect evaluation of the importance of the government's interest in preserving a regime of "at will" employment." The Court's "meat-axe" approach was unnecessary, said the dissenters. To them, traditional "rational basis" deference to employment decisions would have sufficiently protected the government's interests.

What will the effects of *Engquist* be? In a sentence, it will be to limit discrimination claims to the statutory categories with which we are all familiar—race, sex, national origin, age, disability, and retaliation. Claims of arbitrary treatment not tied to those categories will in the normal case be decided under Civil Service System processes or public sector bargaining agreements, where these exist, rather than in the courts. And in states where the political authorities desire to do so, employment can be more truly "at will" than it would have been had Engquist prevailed.

D. Level Playing Field Cases

1. *Federal Express Corp. v. Holowecki*[56] is a case about the charge-filing processes of the EEOC. All the ADEA says is that "a [timely] charge alleging unlawful [age] discrimination" must be filed with the EEOC at least 60 days before a suit may be commenced. As the Court notes, the agency receives or "intakes" about 175,000 inquiries per year. Of these, roughly 100,000 are mere inquiries about rights, and about 75,000 are docketed as charges. Two separate forms have traditionally been used by EEOC at intake. The first form is called an "Intake Questionnaire," the second a "Charge of Discrimination." In this case, the question was whether an intake questionnaire filled out by Holowecki, accompanied by a six-page affidavit, would suffice as a charge.

Former EEOC Chair Clarence Thomas, joined by Justice Scalia, said "no," but the rest of the Court said "yes."

The majority reasoned that the statute did not define the term "charge," an EEOC regulation said that a charge consists of a writing "reasonably construed as a request for the agency to take remedial action to protect the employee's rights," regardless of the form used, and that this regulation reasonably construed the statute.[57] In this case, the questionnaire said nothing about the agency taking action. However, the attached affidavit asked EEOC to "[p]lease force Federal Express to end their age discrimination

[55] Civil Service statutes, for example, typically allow discharge of civil servants only "for cause."
[56] 128 S. Ct. 1147 (2008).
[57] Id. at 1158.

plan so we can finish out our careers [without] unfairness and hostile work environment."[58] This was enough of a request for agency action, said the Court, even though EEOC did not treat the filing as a charge, the agency never contacted the employer, and there was no pre-litigation conciliation opportunity. The Court noted that there have since been changes in the charge-filing processes and it was up to EEOC (rather than the Court) to "reduce the risk of further misunderstandings by those who seek its assistance."

In its opinion, the Court repeatedly positioned itself as taking, with EEOC, a reasonable middle ground. It rejected the employee's argument that any written statement submitted to EEOC that names the employer and generally alleges discriminatory acts is sufficient. Likewise, it rejected the employer's argument that what was submitted was deficient because the EEOC in fact never notified the employer or initiated conciliation. *These* documents were "reasonably construed" as requests for EEOC action, even if the questionnaire alone would not have been and even though EEOC did not even construe the submissions including the affidavit as a request for action. The Court seemed loathe to bar the employee from pursuing remedies because EEOC was unclear in its forms and regulations and in fact never acted on the employee's submissions.

The dissent argued that the dictionary meaning of "charge" was "a formal allegation that initiates proceedings against a wrongdoer,"[59] that the purpose of a charge is to trigger notice to the employer, an investigation, and conciliation, and that the affidavit and intake questionnaire had performed none of these functions. In a long footnote, the dissent pointed out how the EEOC had been inconsistent in its position as to what constitutes a charge over the years.[60]

My view of this case is simple. The Court reaffirmed its commitment, dating back to the Warren and Burger Court years, to treat processes used by untutored and timid lay persons leniently. Substantive or merits considerations in employment discrimination cases will be overridden only by the most convincing procedural obstacles. The Roberts Court, with both new Justices aboard, has thrown the doors a bit further open to those who think they might have been victims of discrimination, even if they are reluctant to have EEOC send charges with the employees' names on them back to the employer.

In the real world, it is unlikely that many of the 100,000 inquiries without charges that come to EEOC each year will lead to litigation; many are simply questionnaires that could not reasonably be construed as asking the agency to do anything. Moreover, the agency will not likely push members of the public with simple inquiries to file affidavits seeking relief or formal charges. With more charges than EEOC can now handle effectively, pressing to increase that number, perhaps by more than 100%, does not seem like a wise course of action.

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[58] Id. at 1159-60.
[59] Id. at 1161.
[60] Id. at 1162, fn. 3.

2. *Metropolitan Life Ins. Co. v. Glenn*[61] may prove to be one of the most important ERISA cases decided by the Court….or not. The Court faced a very common situation under ERISA: the plan administrator, typically the employer or an insurance company, both determined benefit eligibility and paid benefits from its own pockets. This dual role, said the Court, created a conflict of interest that should be weighed as "a factor" in determining whether there has been an "abuse of discretion" in denying eligibility to an employee or former employee. The Court expressed concern over excessive involvement of courts in reassessing decisions by plan administrators, but it nevertheless affirmed decision that found an abuse of discretion. The Court of Appeals, in addition to the conflict, weighed Metlife's finding of Glenn's ability to work against Social Security's finding of total disability, its elevation of one physician's views over other conflicting and more thorough physicians' assessments, its failure to give its experts various reports, and its failure to take account of stress in aggravating Glenn's situation.

Chief Justice Roberts wrote a mild concurrence saying that reviewing courts should look at the actual motivation of the conflicted decision maker, and that the court of appeals should be affirmed "wholly apart from Metlife's conflict of interest." Likewise, Justice Kennedy concurred. He approved of the majority's "a factor" framework for assessing abuse of discretion, but argued that the case should be remanded rather than affirmed.

Finally, there is Justice Scalia's dissent, which Justice Thomas joined. It could hardly be more scathing. Justice Scalia agrees that there is a conflict of interest, but finds that this is no excuse for judicial meddling in decisions by ERISA fiduciaries. Virtually all ERISA plans are administered by fiduciaries in this conflicted situation, so the Court's decision, he says, is "nothing but *de novo* review in sheep's clothing."[62] This is a recipe for judicial second-guessing in potentially every denial of benefits, a result dramatically at odds with trust law, which would intervene only upon a showing that "the conflict *actually* and *improperly motivates* the decision."[63]

Will this case spawn rampant lawsuits whenever ERISA benefits are denied? I am no ERISA lawyer, but the door seems a bit more open than it was before, particularly when there is a conflict between a Social Security Administration determination and the ERISA administrator's decision. Even if there is no real change in the law—after all, the "a factor" formulation from the *Firestone* [64]case had been around for nineteen years—there seems to be a wider opportunity for plaintiffs to pursue discovery that may, at least in some percentage of cases, lead to inconsistencies in the plan administrator's decisions.

For employers, the majority's suggestion that administrators take "active steps to reduce potential bias and to promote accuracy" may be a wise bit of litigation-avoidance advice. For example, the Court suggests "walling off claims administrators from those

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[61] 128 S. Ct. 2343 (2008).
[62] Id. at 2358.
[63] Id. at 2357.
[64] *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1990).

interested in firm finances [or] imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits."[65] Interestingly, an early source for this suggestion cited by the Court was Jerry Mashaw, my favorite professor when I was a law student.[66]

E. Conclusion

In conclusion, one might be tempted to say it was "just another term at the Supreme Court," at least in the labor and employment area. Compared to the 1988 term, that is clearly true. To the extent that Congress legislates in the employment law field, it will be driven by concerns other than the overruling of this year's Supreme Court decisions.

The term will be remembered and its decisions used by lawyers in a number of specific areas. The Court expanded retaliation claims and in the course of doing so moved away from textual statutory construction to more contextual or pragmatist approaches to statutory interpretation. It also was an active term for interpreting the ADEA. The Court discouraged disparate treatment age claims even where pension eligibility for benefits is tied to employee age, it placed the burden on employers to show that factors other than age were involved in decisions disparately impacting older workers, and it left to another day (and mainly to district court discretion) the sorting out of "me too" evidence. Public entities won one and lost one. States, while spending tax dollars, were told that they can't explicitly prohibit government contractors and recipients of grants not to spend the state's money on union-related matters. But states as employers were freed a bit from judicial oversight, at least under the equal protection clause, in cases where employee complaints do not fit into the traditional "protected classes" now covered, at least for the most part, by federal statutes. Finally, the Court provided a helping hand to unsophisticated charging parties betrayed or confused by EEOC processes or denied benefits by plan administrators with a financial interest in such denials.

In short, while there was no big news, there was generally good news this year in the labor and employment field. The good news was that the Roberts Court by and large stuck to narrow and incremental decision-making that did not seem in the least bit outcome-oriented.

[65] Jump cite
[66] J. Mashaw, BUREAUCRATIC JUSTICE (Yale Univ. Press, 1983).