Victory Is Sweetest When You've Known Defeat

Insights
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A review of the 2008-2009 Supreme Court decisions

(Labor Letter, August 2009)

Good news for employers this year! Well . . . at least as compared to last year's Supreme Court term. The majority of the employment cases decided by the Court this term can be considered a victory for employers, and even one of the decisions siding with employees is not all bad. So, after losing all but four of the eleven employment decisions decided last year, employers can finally breathe a welcome sigh of relief. As discussed below, employers can claim victory in six cases, while only accepting defeat in one case and considering another case to be a mixed result.

The Victories
The large majority of the cases, thankfully, landed squarely on the side of employers. But a few of these decisions have already gained significant attention from pro-employee advocates, with some even believing that quick action by Congress may be in order to overturn some of the more significant decisions.

Perhaps the most surprising decision of the term, and the most likely to lead to potential legislative action, was the Court's divided (5-4) decision that the Age Discrimination in Employment Act (ADEA) does not authorize mixed-motive claims of age discrimination and that the plaintiff bears the burden at all times to prove that age was a "but-for" cause of the adverse employment action. *Gross v. FBL Financial Services, Inc.*

Jaw-dropping to long-time practitioners is the fact that this ruling called into question the Court's 20-year-old decision in *Price Waterhouse v. Hopkins*, which shifted the burden of persuasion to the employer in a Title VII case once a plaintiff had presented evidence that discrimination was a "motivating" or "substantial" factor in the employer's action. *Price Waterhouse* resulted in quick action by Congress to amend Title VII to specifically authorize a claim by an employee where an improper consideration was "a motivating factor" in the employer's decision. The ADEA does not contain such an express authorization and the Court refused to read that language into the statute.

Shocking to many – most likely the parties themselves – was that the Court did not answer the question as framed by the parties, but instead answered a "threshold inquiry" that it considered

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necessary to the decision. While the chance for legislative action is high, for now, employers should consider this decision a win.

In another significant victory for employers, the Court (also split 5-4) held that a collective bargaining agreement (CBA), freely negotiated in good faith between a union and an employer, which "clearly and unmistakably" requires members of a union to submit their claims under the ADEA to arbitration *is* enforceable as a matter of law. *14 Penn Plaza LLC v. Pyett*. This is true even though the CBA is signed by a union representative—not by the individual employee seeking to vindicate his or her rights. While this case is welcome relief for employers, the Court did specify that the agreement must be clear and explicitly state the specific statutory antidiscrimination claims that are subject to the arbitration agreement.

In another employer-friendly decision, the Court held that an employer's payment of benefits which were calculated, in part, under an accrual rule that gave less retirement credit for pregnancy leave than for other general disability or medical leaves was not a violation of Title VII where such rule was applied only prior to the adoption of the Pregnancy Discrimination Act (PDA). *AT&T Corp. v. Hulteen*. This rule, part of a bona fide seniority system under Title VII, was lawful at the time it was adopted and the employer had no intent to discriminate.

And in January 2009, a unanimous Court held that a common-law waiver embodied in a divorce decree that was not a qualified domestic relations order was not rendered invalid by the anti-alienation provision of the Employee Retirement Income Security Act (ERISA). The Court found that the plan administrator properly disregarded the waiver and distributed the decedent's benefits to his ex-wife because the administrator was required to follow the plan documents, from which the decedent had failed to remove his ex-wife as his designated beneficiary. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*.

Finally, early on in the term, the Court decided two cases dealing with union dues. In the first, the Court ruled that a local union may charge nonmembers a portion of its contribution to its national affiliate's litigation expenses as long as the national litigation "bears an appropriate relation to collective bargaining" (e.g., does not constitute political activity or lobbying) and the arrangement is reciprocal (i.e., the fee paid to the national affiliate could "ultimately inure" to the local members' benefit), *Locke v. Karass.* In the second, the Court upheld an Idaho state law that banned payroll deductions by government employers for the political activities of a union. *Ysura v. Pocatello Education Association*.

The Lone Defeat

Only one decision of the term sits firmly in the employees' corner, although it has the potential to cause much trouble to employers in the retaliation arena.

A persistent employee (who lost at the EEOC, district court and circuit court of appeals levels) eventually succeeded in persuading the Supreme Court to lower the bar for the "opposition" clause in a Title VII retaliation claim. The Court held that an employee who reported

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in a Title VII retaliation claim. The Court held that an employee who reported discrimination/harassment in answering questions during an employer's internal investigation concerning another employee's claim – not on her own initiative – was nevertheless protected from retaliation because she had "opposed" the unlawful conduct by speaking out in her interview. *Crawford v. Metropolitan Government of Nashville*.

In fact, the Court went so far as to say that a rule which protected as opposition a report of discrimination/harassment by an employee speaking on his or her own initiative, but not that of an employee who makes the same report but only when asked direct questions by his or her boss, would be a "freakish" rule.

The only good news for employers from this case is that most retaliation claims are brought under the "participation" clause of Title VII. Because the Court was able to dispose of the appeal once it had ruled on the "opposition" issue, the Court found no reason to address the parties' arguments concerning whether the employee's report might also be protected as "participation." But with the bar set so low as to allow retaliation claims when the "opposition" is merely passive, employers may see a rise in the number of retaliation claims filed in the near future.

The Toss Up

Technically speaking, the ruling in *Ricci v. DeStefano* belongs in the win column for employees. But the decision is not entirely negative for employers and may even provide some freedom when making certain tough employment decisions.

On the last day of the term, a divided Court (again by a 5-4 margin) held that a city employer violated Title VII's disparate treatment provision when it refused to certify the results of a promotional examination it had given to firefighter employees simply because the results of the test appeared more heavily skewed against minority candidates.

The City quickly found itself in a position where it believed it was going to be sued either way – either by the minority firefighters for disparate *impact* if it certified the results, or by the white and Hispanic firefighters for disparate *treatment* if it refused to certify the results – and ultimately decided to refuse the certification, thereby denying promotions to those who had passed the examination. White and Hispanic firefighters who passed the exam brought a reverse-discrimination suit, alleging that the City had discriminated against them on the basis of their race. The City's main defense was that it acted to comply with the disparate impact provision of Title VII.

In an attempt to balance the sometimes conflicting interplay between Title VII's disparate-treatment and disparate-impact provisions, the Court adopted a "strong-basis-in-evidence standard" – previously used by the Court in cases brought pursuant to the Equal Protection Clause of the Fourteenth Amendment – stating that the application of this standard to Title VII gives effect to both provisions, and allows "violations of one in the name of compliance with the other only in certain, narrow circumstances."

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In ruling for the employees, the Court stated that, "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."

Ricci has by far garnered the most attention, but on a practical level, may offer some comfort to employers. It is doubtful that *Ricci* will lead to a surge in reverse-discrimination cases, and the Court offered employers a great defense for defending the much more common disparate impact claims (which are bound to increase in light of the many layoffs and reductions-in-force that have taken place this year). "If, after it certifies the test results, the [employer] faces a disparate-impact suit," the Supreme Court said, "then in light of our holding today it should be clear that the [employer] would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."

What's Next?

The Supreme Court already has five employment cases on its docket for next term, which will start in October 2009, and will likely have more by that time. The future of the Court's leanings are as yet unknown, but are not likely to change significantly despite the recent retirement of Justice Souter and Judge Sonia Sotomayor's nomination to the Supreme Court still in the works. For now, the following issues will be before the Court next term:

- Under the Railway Labor Act, can a court set aside a final arbitration award for an alleged violation of due process? *Union Pacific Railroad Co. v. Brotherhood of Locomotive*.
- Can class arbitration be imposed upon parties under the Federal Arbitration Act when the arbitration agreement itself is silent as to class arbitration? *Stolt-NielsenS.A. v. AnimalFeeds International Corp.*
- Do disclosures made in certain audits or investigations performed by a state or its political subdivision amount to a prior "public disclosure" under the False Claims Act, so as to bar a plaintiff's action for lack of jurisdiction? *Graham County Soil & Water Conservation District v. United States*ex rel. *Wilson*.
- Does a cause of action exist under the LMRA against an international union that is not a direct signatory of the collective bargaining agreement between the employer and a local union, but that caused a strike breaching the CBA for its own benefit? *Granite Rock Co. v. International Brotherhood of Teamsters*.
- Does a district court have an obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan and whether a district court has "allowable discretion" to adopt a reasonable interpretation of the terms of the plan when the issue arises as a result of an ERISA violation? *Conkright v. Frommert*.

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