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**Review of the Supreme Court's Employment Cases (2007-2008 Term)  
and A Preview of the Coming Term (2008-2009 Term)**

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## Cases

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### October Term, 2007-2007 - Employment Cases

1. Federal Express Corp. v. Holowecki, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1147, 170 L. Ed. 2d 10, 2008 U.S. LEXIS 2196 (2008), *aff'g* 440 F.3d 558 (2d Cir. N.Y., 2006).

The Supreme Court ruled by a 7-2 vote, that a worker claiming age bias in the workplace may start a case before the Equal Employment Opportunity Commission only if he or she spells out more than a bare allegation of discrimination and the name of the employer. A “charge” necessary to open a case, the Court concluded, must include enough substance so that it be “reasonably construed” as a request for EEOC to take action to protect the workers’ rights or to settle a dispute over those rights. Largely deferring to EEOC’s views of what might constitute a “charge,” and thus start legal time lines to running, the Court said the proper test is whether an objective observer examining what the complaining worker has filed is enough to ask the agency “to activate its machinery and remedial processes.”

The ruling came in the case of *Federal Express v. Holowecki* (06-1322). Justice Anthony M. Kennedy wrote for the majority; Justice Clarence Thomas dissented, joined by Justice Antonin Scalia.

The ruling concluded that the material submitted in this case did constitute a “charge.” The Age Discrimination in Employment Act — the anti-bias law at issue in the specific case — requires a worker to file a timely charge of bias with EEOC before bringing a lawsuit to pursue the claim. The charge must be filed within 180 days after the act of discrimination occurred, unless the state where the incident arose has its own age bias law, in which case the time limit is 300 days. The worker must wait 60 days after filing a charge before suing in court.

The specific case involved a group of employees of Federal Express Corp., the delivery company, claiming that the company engaged in discrimination against its older employees. One worker filed an intake questionnaire at EEOC making he claim, but did not treat it as if it were a formal charge. EEOC did not treat it as the filing of a charge, and did not start an investigation. Wednesday’s ruling, however, concluded that the worker in filing the paper at EEOC had come close enough to EEOC’s filing requirements to constitute a “charge” under ADEA.

At the close of the Court’s opinion, after making some criticism of EEOC for the way it handled its charge-filing process, Justice Kennedy suggested that “to reduce the risk of further misunderstandings by those who seek its assistance, the agency should determine, in the first instance, what additional revisions in its forms and processes are necessary or appropriate.”

2. Sprint v. Mendelsohn, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1140, 170 L. Ed. 2d 1, 2008 U.S. LEXIS 2195 (2008), *vacating and remanding* 466 F.3d 1223 (10th Cir. 2006).

The Court held that testimony by non-parties claiming that they were discriminated against by individuals other than those accused in the lawsuit is neither per se admissible nor per se inadmissible. The Court held that the probativeness of such evidence must be determined under Rule 403 of the Federal Rules of Evidence and its prejudice must be weighed under Rule 401.

The Court found that the Tenth Circuit had erred in finding that the District Court Judge had applied a per se rule excluding so-called “me too” evidence from other employees. Instead, the Court found the District Judges order to be unclear, and thus held that the Tenth Circuit should have remanded the case to the District Judge for clarification. As stated, the court held that a per se rule excluding such evidence is improper, and that relevance and prejudice must be determined in the context of the facts and arguments in the particular case. Among the factors that District Judges should consider in assessing whether evidence of discrimination by other supervisors is relevant in an individual case include “how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” In determining whether such evidence is unduly prejudicial, the district court is required to conduct a fact-intensive, context-specific inquiry.