

ALI-ABA Teleseminar and Audio Webcast
Employment Law Update: Spring 2009

April 29, 2009

Employment Law Update

By

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SUPREME COURT

1. Crawford v. Metro. Gov't of Nashville & Davidson County, Tennessee, 2009 WL 160424, (U.S. Jan. 26, 2009). A former city employee alleged retaliation under Title VII against her former employer after she reported sexual harassment in response to questions that the employer asked her while investigating her coworker's complaints. Since the former employee did not report the harassment on her own initiative, the question in the case was whether her report of harassment satisfied the opposition clause of the anti-retaliation provision of Title VII. The Supreme Court answered this question in the affirmative, based largely on the fact that the term "oppose" is not defined by Title VII. As such, "oppose" for the purposes of Title VII's anti-retaliation provision was interpreted according to the ordinary definition of the word, which means to resist or to contend against, and which does not require "active" or "instigating" behavior.
2. Metro. Life Ins. Co. v. Glenn, 128 S.Ct. 2343 (June 19, 2008). In a case contesting termination of an individual's long-term disability benefits under the Employee Retirement Income Security Act (ERISA), the Supreme Court held that where an entity is both an ERISA plan administrator and a payer of plan benefits, a reviewing court should consider the potential conflict of interest that could arise from such a dual role in determining whether that entity abused its discretion in denying benefits. The weight that the court should attribute to that factor will depend upon the unique circumstances of the particular case.
3. Meacham v. Knolls Atomic Power Lab., 128 S.Ct. 2395 (June 19, 2008). In a case alleging, *inter alia*, violation of the Age Discrimination in Employment Act (ADEA), the Supreme Court held that the exemption from liability for disparate impact claims under the ADEA for actions taken by the employer based upon reasonable factors other than age creates an affirmative defense for the employer. In raising this defense, the employer bears both the burden of production and the burden of persuasion.
4. Kentucky Ret. Sys. v. Equal Employment Opportunity Comm'n, 128 S.Ct. 2361 (June 19, 2008). The Equal Employment Opportunity Commission (EEOC) brought an action claiming that a state retirement benefits plan violated the Age Discrimination in Employment Act (ADEA). The Supreme Court held that where an employee pension plan treats its employees differently based on pension status, using age as a factor, in order for an employee to establish a disparate treatment claim under the ADEA against the plan, the employee must show that the differential treatment under the plan was actually motivated by age, and not by pension status.
5. Engquist v. Oregon Dep't of Agric., 128 S.Ct. 2146 (June 9, 2008). In a case dealing with the layoff of a former state employee, the Supreme Court held that a "class-of-one" equal protection claim – where the plaintiff alleges disparate treatment as compared to similarly situated persons without a rational basis, but does not allege that the disparate treatment was based on the claimant's membership in any particular protected class – is not actionable in the context of public employment.

6. Allison Engine Co., Inc. v. Sanders, 128 S.Ct. 2123 (June 9, 2008). In a False Claims Act (FCA) action brought against Navy subcontractors, the Supreme Court held that:
- (1) In order to violate the FCA provision which prohibits making or using a false record or statement to induce the government to pay or approve a claim, the defendant (a) must make a false record or statement in order to get “a false or fraudulent claim paid or approved by the government” and (b) must intend that the government itself pay the claim. A mere showing that a false statement by the defendant resulted in the use of government funds to pay a false or fraudulent claim is not sufficient to establish a violation of this provision; and
- (2) In order to establish a violation of the conspiracy provision of the FCA, the plaintiff must show that the conspirators agreed that the false record or statement would materially effect the government's decision to pay the false or fraudulent claim. However, the plaintiff does not have to show that the conspirators intended the false record or statement to be presented directly to the government.
7. Richlin Sec. Serv. Co. v. Chertoff, 128 S.Ct. 2007 (June 2, 2008). In a dispute over reimbursement of fees and expenses under the Equal Access to Justice Act (EAJA), the Supreme Court held that, so long as the EAJA’s other requirements are satisfied, the prevailing party in an EAJA action may recover paralegal fees at prevailing market rates and is not limited to the attorney’s actual cost for the paralegal services.
8. Gomez-Perez v. Potter, 128 S.Ct. 1931 (May 27, 2008). In this case, a federal government employee brought an action alleging retaliation against her employer under the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §633a(a). Given the fact that a cause of action for retaliation is not expressly provided for in the federal-sector portion of the ADEA and is explicitly excluded in the private-sector context, the question in the case was whether a federal employee may assert retaliation under the federal-sector provision of the statute. Resolving a circuit split on the issue, the Supreme Court answered this question in the affirmative. The Court primarily founded its reasoning on two prior cases “ruling that retaliation is covered by similar language in other antidiscrimination statutes.”
9. CBOCS West v. Humphries, 128 S. Ct. 1951 (May 27, 2008). In a case dealing, inter alia, with a retaliation claim brought under 42 U.S.C. §1981, the Supreme Court held that §1981 provides a cause of action for retaliation claims, including those claims brought in the employment context. Further, the Court held that §1981 provides relief for an individual who is retaliated against for trying to help another individual exercise his §1981 rights.
10. Fed. Express Corp. v. Holowecki, 128 S.Ct. 1147 (Feb. 27, 2008). A group of employees over 40 years old sued their employer alleging that two of the employer’s compensation programs violated the Age Discrimination in Employment Act (ADEA). A question arose in the case as to whether the plaintiffs had filed a charge with the Equal Employment Opportunity Commission (EEOC) at least 60 days before filing suit. In this

regard, the Supreme Court held that in order for a filing to the EEOC to constitute a “charge” under the ADEA, the filing (a) must provide the information required by the applicable regulations, e.g., an allegation of age discrimination and the name of the charged party; and (b) must reasonably constitute a request for EEOC to take action to protect the employee's rights or to settle a dispute between the parties.

11. Sprint / United Mgmt. Co. v. Mendelsohn, 128 S.Ct. 1140 (Feb. 26, 2008). This case, brought under the Age Discrimination in Employment Act (ADEA), involved the admissibility of “me too” evidence – i.e., evidence of discriminatory acts in addition to those of which the plaintiff complained. The Supreme Court held that it is the duty of the district court – not that of the court of appeals – to balance the probative value of such evidence against its possible prejudicial effect. The Court held that the appeals court shouldn’t have assumed that the district court improperly applied a per se rule against admission of such evidence, and should have remanded the case for the district court to perform the necessary balancing test and to clarify its holding on the evidence’s admissibility.

D.C. CIRCUIT

12. Filebark v. United States Dep’t of Transp., 2009 U.S. App. LEXIS 2827 (D.C. Cir. Feb. 13, 2009). In a dispute over whether the Administrative Procedure Act (APA) could be used to litigate a pay dispute because the Civil Service Reform Act of 1978 (CSRA) provided no protection on the matter, the D.C. Circuit held: (1) As to plaintiffs’ argument that the district court erred in dismissing the bargaining unit members because 5 U.S.C.S. § 7121(a)(1), as amended, no longer precluded judicial review of negotiated grievance procedures – § 7121(a)(1) did not confer jurisdiction or create a cause of action. (2) As to plaintiffs’ argument that by revisiting dismissal of the APA claims, the district court violated the law of the case – interlocutory orders were not subject to the law of the case doctrine and could always be reconsidered prior to final judgment; and (3) As to plaintiffs’ argument that because their employer was largely exempt from the CSRA, the controllers could maintain an APA cause of action notwithstanding CSRA preclusion precedents – in exempting the Federal Aviation Administration (FAA) from the CSRA, Congress made clear its intent to provide for greater flexibility in the hiring, training, compensation, and location of personnel. Giving FAA employees a unique right of access to the courts would have frustrated that intent.
13. Hill v. Gould, 2009 U.S. App. LEXIS 2826 (D.C. Cir. Feb. 13, 2009). Despite the fact that the plaintiff prevailed in a suit against the Secretary of the Interior under the Migratory Bird Treaty Act, the D.C. Circuit affirmed the district court’s denial of the plaintiff’s application to recover attorney fees and expenses under the Equal Access to Justice Act (EAJA), because the Secretary's position at the merits stage was substantially justified. While the Secretary lost the case on the merits for failing to support its decision in this particular case, its legal position was in line with the text and purpose of the controlling statute and treaties.

14. Dean Transp., Inc. v. Nat'l Labor Relations Bd., 551 F.3d 1055 (D.C. Cir. Jan. 1, 2009).
A private employer took over from a school district the operation of the district's school bus transportation system. Under the former management of the district, the bus drivers had been represented by a union. On appeal from a determination by the National Labor Relations Board (NLRB), the D.C. Circuit held that the private employer was a successor in interest to the school district, therefore obligating the private employer under the National Labor Relations Act (NLRA) to bargain with the bus drivers' union.
15. Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. Nat'l Labor Relations Bd., 550 F.3d 1183 (D.C. Cir. Dec. 30, 2008). The National Labor Relations Board (NLRB) found that an employer engaged in unfair labor practices in violation of the National Labor Relations Act (NLRA) when, following a merger and termination of the collective bargaining agreement covering the employer's workers, the employer (1) withdrew recognition of a successor union, and (2) unilaterally changed the scope of the bargaining unit to exclude certain employees who had previously been part of that unit. On appeal, the D.C. Circuit held that, due to the fact that the union continued to be supported by a majority of the employees, including the subset of employees which the employer was trying to exclude from the bargaining unit, the employer had a continuing obligation to bargain with the successor union after the merger and was precluded from withdrawing recognition of the union or from unilaterally changing the scope of the bargaining unit.
16. Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. Dec. 30, 2008). In a suit by an federal government employee charging his employer with hostile work environment, retaliation, and discrimination based on race, religion, age, and disability in violation of the Age Discrimination in Employment Act (ADEA), Title VII, and the Rehabilitation Act; the D.C. Circuit held that:
 - (1) The employee did not suffer an adverse employment action for the purposes of his discrimination or retaliation claims. While some of the employee's duties were changed, the new work wasn't qualitatively inferior to the work the employee previously performed. While another employee was hired, this was done to increase the strength of the office and to fill experience gaps. Despite the employee's sick leave restrictions, proposed suspensions, letters of counseling and reprimand, unsatisfactory performance review, and alleged verbal altercations with supervisor; the employee's sick leave was always granted, his suspensions were not actually served, his letters contained only job-related constructive criticism, his evaluation did not affect his position, grade level, salary, or promotion opportunities, and his altercations with his supervisor were sporadic and not severe. Further, several of these actions were taken due to the employee's infractions;
 - (2) Even if the employee had suffered an adverse employment action, the employer proffered legitimate, non-discriminatory reasons for its actions which were not shown to be a pretext for illegal discrimination or retaliation. The employer's actions weren't based on any of the complainant's protected classes, and were undertaken for legitimate, work-related reasons.

(3) The employee failed to show that the employer's actions constituted a hostile work environment.

17. American Postal Workers Union v. United States Postal Serv., 550 F.3d 27 (D.C. Cir. Dec. 23, 2008). In regard to an arbitration award which placed a certain position within a collective bargaining unit and which mandated future arbitrations to settle disputes regarding a settlement agreement, the D.C. Circuit remanded the case for the district court to determine whether the arbitration award was unenforceable.
18. Johnson v. Dist. of Columbia, 2008 U.S. App. LEXIS 25855 (D.C. Cir. Dec. 23, 2008). A former D.C. employee challenged her termination. She elected to pursue her claim under the grievance procedure laid out by the collective bargaining agreement (CBA) between D.C. and her union. Shortly thereafter, D.C. refused to arbitrate her grievance. Instead of petitioning the Public Employee Relations Board (PERB) for review, as required under the CBA and D.C.'s Comprehensive Merit Personnel Act (CMPA), the former employee sued D.C. in federal court, alleging wrongful termination and denial of due process under the Fifth Amendment. The district court dismissed the complaint, and the D.C. Circuit affirmed the dismissal, because the former employee failed to exhaust the remedy available to her under the grievance procedure which she elected. Once the former employee elected that grievance procedure, it became her exclusive remedy under the CMPA and D.C. case law.
19. Adams v. Fed. Aviation Admin., 550 F.3d 1174 (D.C. Cir. Dec. 19, 2008). A suit challenging an administrative application of a Federal Aviation Administration regulation barring pilots from flying commercial aircraft after they turned 60 years old was held to be moot after a statute was subsequently enacted abrogating that regulation.
20. Oscarson v. Office of the Senate Sergeant at Arms, 550 F.3d 1 (D.C. Cir. Dec. 12, 2008). In an action dealing with the Congressional Accountability Act (CAA), which makes certain provisions of the Americans with Disabilities Act (ADA) applicable to congressional offices, the D.C. Circuit held that a motion to dismiss in a minute order was not subject to interlocutory appeal.
21. Am. Ctr. For Int'l Labor Solidarity v. Fed. Ins. Co., 548 F.3d 1103 (D.C. Cir. Dec. 5, 2008). In a liability insurance dispute between an insured and insurer over reimbursement of amounts paid to settle employment discrimination claims brought under Title VII, the D.C. Circuit held that an Equal Employment Opportunity Commission (EEOC) proceeding which had preceded the Title VII suit was a "claim" requiring notice to the insurer.
22. Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 548 F.3d 137 (D.C. Cir. Nov. 21, 2008). In an action by a former employee alleging racial discrimination against his former employer in violation of 42 U.S.C. §1981, the D.C. Circuit held that the employee's inadequate work performance constituted a legitimate, non-race based reason for terminating the employee, and the employee had not shown that this reason was a pretext for illegal discrimination.