The Supreme Court has been busy this term with new employment decisions arriving in February, and more expected before June.

In *Federal Express v. Holecki*, the majority agreed with the appeals court that several Federal Express employees are entitled to proceed with their claims against the company, despite their failure to file a completed charge with the Equal Employment Opportunity Commission. Under the law, an age discrimination charge must be filed, and the EEOC be given exclusive jurisdiction for at least 60 days, before an aggrieved employee may proceed to federal court. (This time period is shorter than for other types of discrimination.)

In Holecki's situation, though, the employee filed an initial questionnaire, including a detailed affidavit. The EEOC failed to follow its own procedures and follow up with a formal charge. The Supreme Court refused to punish Holecki for the EEOC's admitted error, and expressed some sympathy for the employee acting without a lawyer or knowledge of the intricacies of discrimination law and procedure.

Justice Kennedy delivered the opinion, and agreed with the EEOC's position that "a filing is deemed a charge if the document reasonably can be construed to request agency action and appropriate relief on the employee's behalf." It also stated, however, that simply filling out an intake questionnaire would not likely be enough. Holecki's affidavit specifically requested the agency to force Federal Express to stop the alleged pattern of discriminating against older workers. Justice Thomas, joined by Justice Scalia, dissented. Justice Thomas is a former chair of the EEOC.

The Supreme Court decided the case of *Sprint/United Management Co. v. Mendelsohn* on February 26, 2008. This case was eagerly watched by employment practitioners waiting to get the final word on whether an employment discrimination plaintiff could use evidence of discrimination against other workers to show a culture of discrimination. Sprint urged the Court to disallow all such evidence, unless the other workers had the same supervisor. The Supreme Court refused to go so far, and held that the trial court had to balance the many factors that went into the determination of whether this kind of evidence is relevant. At this point, then there is no "final word," but no broad rejection of evidence of discrimination against others.

The investment community appears to be reeling over the potential impact of *Larue V. Dewolff, Boberg & Associates, Inc*., decided by the Supreme Court on February 20, 2008. The amount of angst would seem to be unwarranted, however. The Court decided that a participant in a 401(k) plan could sue to "recover for violations of the obligations defined in [the pension law's] §409(a). The principal statutory duties imposed on fiduciaries by that section 'relate to the proper management, administration, and investment of fund assets,' with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries." The Court went no further than deciding that the 401(k) investor could try to prove that the fund manager's failure to listen to his directions on how to invest his retirement funds was a breach of its fiduciary duties, and that he should be compensated for the market losses.

The decision discussed the change in the landscape of pension benefits, where more people are in defined contribution plans, in which the amount of retirement income depends largely on the contributions made by the employer and employee and the investment decisions made prior to the withdrawals. Formerly the majority of workers had defined benefit plans, in which their retirement income depended upon factors such as their years of service and salary history. In those cases, the fund manager's investment decisions did not have a direct affect on the retiree unless they were so faulty as to bankrupt the pension plan.

Now that the 401(k) investor is the rule, not the exception, the pension law (ERISA)'s purposes are furthered by allowing the employee to insist that his individual retirement account be administered appropriately.