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The U.S. Supreme Court's Pending Employment-Related Cases

The United States Supreme Court is ready to begin its 2007-2008 term. Four employment-related cases are set for inspection under the judicial microscope. As always, the Court's decisions in these cases will significantly impact future employer-employee relationships and lawsuits.

When is a charge a charge? In *Holowecki, et al. v. Federal Express Corp.*, the Justices will first consider "When is a charge that is not actually a charge a charge?" This may seem like a silly question at first glance, but its answer is anything but trivial. The answer dictates, in many instances, whether an employee's discrimination claim is timely or subject to dismissal.

Patricia Kennedy worked for Federal Express. Believing she was the victim of age discrimination, Ms. Kennedy contacted the Equal Employment Opportunity Commission ("EEOC"). Ms. Kennedy completed and submitted the EEOC's intake questionnaire as well as a four page affidavit, detailing the facts upon which she based her age discrimination claim.

Ms. Kennedy later filed an official charge of discrimination on an EEOC-approved form. The official charge was filed "too late," at least according to the District Court. Consequently, Ms. Kennedy's lawsuit was dismissed as untimely.

The Second Circuit disagreed. The Court rejected the idea that an alleged charge that looked like a charge but simply was not filed formally as a charge was not a charge. The documents Kennedy submitted included the name of her employer as well as her detailed allegations. The materials were "forceful" and sufficient to let the EEOC know Kennedy wanted an investigation. The EEOC did not treat the submissions as a charge, however, nor did it tell Federal Express that it had received a charge until after Kennedy filed "official" charge paperwork.

If the Supreme Court considers Kennedy's materials to be a charge, then the lawsuit lives as Kennedy timely filed a charge with the EEOC. If the Court believes more was necessary to constitute the timely filing of a charge, the lawsuit ends.

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Can you believe what this arbitrator did? The ins and outs of a landlord tenant arbitration agreement will be scrutinized in *Hall Street Associates LLC v. Mattel Inc.* Although this is not an employment case, the Court's decision will be far reaching.

The Supreme Court will decide whether the parties to an arbitration agreement may agree to expand the scope of judicial review under the Federal Arbitration Act ("FAA"). Employers with arbitration agreements must pay close attention to this decision. The outcome will significantly impact how arbitration agreements are structured.

Landlord Hall Street Associates and tenant Mattel agreed to submit any dispute to arbitration, according to the Ninth Circuit. Either could appeal the arbitrator's award to a court and argue the arbitrator's legal conclusions were erroneous. The Ninth Circuit said the FAA limits the grounds for judicial review to a few named grounds and it is easier for a camel to go through the eye of a needle than for an arbitration award to be set aside.

Many employers are unhappy with arbitration, which is turning out to be as expensive as the court system. If the employer loses, it has no right of review. If the Supreme Court says that an employer can utilize an expanded right of appeal, it will make arbitration more attractive; if not, many employers may, like the prodigal son, come back to the civil justice system.

Me, too…me, too! Plaintiffs love to parade co-workers across the stand in trial to show the plaintiff was not the only person subjected to the employer's alleged discrimination. Employers reply singing "enough is enough." They argue that each situation is different and holding mini-trials within the trial for the "me, too" witnesses is overly time consuming, confusing, irrelevant, and unfair.

In *Mendelsohn v. Sprint/United Management Co.*, plaintiff Ellen Mendelsohn was discharged due to a reduction in force. Mendelsohn sued for discrimination and later wanted to put other employees on the stand to say, "Me, too! I was wrongly fired in the RIF." The trial court rejected the "me, too" testimony. The Tenth Circuit disagreed.

The Tenth Circuit said the jury should hear "me, too" testimony relevant to the decision at issue even if the witnesses worked in different groups and under different supervisors. The Tenth Circuit rejected the notion that mini-trials would be required to show why each "me, too" witness was released from employment. The Court felt the trial judge would be able to sort through the witnesses and limit testimony to the relevant issues.

The Supreme Court's ruling in *Mendelsohn* will have significant repercussions. As Corporate America continues to "cut the fat," more employees will lose their jobs, and more employees will sue. Victory or defeat in the inevitable, subsequent litigation may hinge on whether courts admit this type of evidence. If jurors see a Greek chorus of over 40 employees lamenting their fate, they are much more likely to believe "where there's smoke, there's fire."

Show me the money! Finally, the Court will decide whether an individual employee who loses money in a retirement plan (because the fiduciaries made bad investments) may sue the plan fiduciaries for failing to "show her the money."

The Supreme Court has gone out of its way (in the past) to protect fiduciaries. Will this trend continue in *LaRue v. DeWolff, Boberg & Associates Inc.*? Most commentators say "yes." The Department of Labor ("DOL") filed an amicus brief to emphasize its belief that a single plan member may sue exclusively focusing on her own losses. The DOL believes individual lawsuits will benefit the overall plan -- "all for one, and one for all." The Fourth Circuit rejected this idea, saying plan participants must show a loss to the plan as a whole, not just their personal account.

It will be an interesting and important year. Stay tuned.

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Denise K. Drake practices labor and employment law exclusively on behalf of management for companies of all sizes and in all industries. Denise's practice concentrates on all aspects of commercial and employment litigation, management counseling, employment law training, and alternative dispute resolution. Denise is a trial attorney, with a successful track record in all venues (state and federal court, state and federal administrative hearings, "private" arbitrations). She also has a significant amount of experience as the lead attorney overseeing large, high-dollar litigation matters (class, collective, and multi-plaintiff and defendant cases). Denise has efficiently and effectively handled cases in at least thirty different states, and offices in both Kansas City, Missouri, and Overland Park, Kansas. A frequent lecturer and national speaker on many litigation and employment law topics, Denise is always aware of the latest trends, challenges and opportunities for her business clients. She has been on the forefront of many issues, including engaging in and defending electronic discovery issues, defending collective actions, and using alternative dispute resolution vehicles.