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U.S. SUPREME COURT
2007 TERM IN REVIEW AND 2008 TERM PREVIEW
EMPLOYMENT LAW CASE OUTLINE[1]

Drafted by Andrea C. Farney & Sharon R. López

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1 **A Note on terminology:** This outline uses the terms "Plaintiff" and "Defendant" in reference to the parties' designation at the commencement of the underlying lawsuit.

I. THE 2007 – 2008 TERM IN REVIEW

A. **PUBLIC EMPLOYEES:** *ENGQUIST V. OREGON DEPARTMENT OF AGRICULTURE*, 128 S.Ct. 2146, 170 L.Ed. 2d 975, 2008 U.S. LEXIS 4705 (June 9, 2008). *Opinion by Roberts, C. J. (6-3). Dissent filed by Stevens, J. joined by Souter, J. and Ginsburg, J. Affirming the judgment of the Ninth Circuit, reversing a jury's verdict in favor of the employee on a class-of-one claim.*

1. **ISSUE Whether a public employee is protected under the Equal Protection Clause as a class of one, when the public employer takes adverse action against the public employee?**

ANSWER: No. Although the Equal Protection Clause protects individuals, whether the individual is in a protected class or a class of one, there are some forms of state action that involve discretionary decision-making rather than arbitrary classification. Employment decisions are subjective and individualized, therefore the Equal Protection Clause's proscription against arbitrary classification will not give the employer the wide latitude they need to manage their offices.

2. **KEY FACTS:** The plaintiff was a public employee who was laid off by the Oregon Department of Agriculture. The plaintiff brought an Equal Protection Claim based upon the Plaintiff's race, sex and national origin. Her final Equal Protection Claim also included a "class of one" claim.[2] The jury found for the plaintiff and the employer appealed.

3. **HOLDING:** The "class of one" theory of equal protection does not apply to the public employment context.

4. **RATIONALE:** The Court acknowledged that the equal protection clause protects persons not groups. They also acknowledged that state actors must provide equal protection to its employees, however, allowing employees to challenge employment decisions based on a theory that they are being arbitrarily singled out undermines the discretion public employers need to exercise as employer's at will. Because employment at will allows an employer to fire an employee for no reason, good reason, or no reason at all, employment permits arbitrary decisions that accommodate an employer's

[2] The "class of one' claim arises from the Supreme Court's 2000 decision acknowledging that the Equal Protection Clause protects everyone, whether the person is part of a large class or merely a "class of one." The analysis of the "class of one" cases requires the courts to review whether the state actor treated the individual in an arbitrary, vindictive, or malicious manner that was not based on reason.

needs. If a "class of one" claim were permissible in the public employer context, then the public employer would lose that discretion to hire and fire at will.

5. **COMMENTARY**: Justice Stevens authored the dissent and he was joined by Justice Souter and Justice Ginsburg.

He accused the majority of unnecessarily denying public employees access to the "class of one" protection. "Instead of using a scalpel to confine so-called "class of one" claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decision in the employment context." 128 S. Ct. at 2160.

6. **PRACTICE TIPS:**

a. Employers: Public employers are shielded from equal protection arguments based on a "class of one" theory. The claim can be dismissed with a 12(b)(6) motion. If the employee does not fit into a protected class, e.g. disabled persons or gays and lesbians, arbitrary termination does not offend the Constitution.

b. Employees: Public employees can still bring Title VII claims and equal protection claims based on membership in a protected class.

B. EXHAUSTION OF ADMINISTRATIVE PROCESS: *FEDERAL EXPRESS CORP. V. HOLOWECKI, 128 S. Ct. 1147, 170 L. Ed. 2d 10, 2008 U.S. LEXIS 2196 (February 27, 2008). Opinion by Kennedy, J. (7-2). Dissent filed by Thomas, J. joined by Scalia, J.*

1. **ISSUE:** Was the Intake Questionnaire and affidavit filed by Plaintiff with the EEOC a "charge" under the Age Discrimination in Employment Act (ADEA)?

   ANSWER: Yes.

2. **HOLDING:** The required elements of a charge under the ADEA are (a) allegations of discrimination; (b) the name of the charged party; and (c) a request for the EEOC to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee.

3. **KEY FACTS:** Plaintiff was one of 14 current and former employees of FedEx in an age discrimination class action case. The lawsuit challenged FedEx on two of its performance policies. Plaintiff's alleged that the policies were pretext for FedEx treating older workers less favorably and forcing early retirement. The District Court determined that Plaintiff's intake questionnaire and signed affidavit were not a charge and granted the Defendant's motion to dismiss. The Second Circuit Court of Appeals reversed.

4. **RATIONALE:** An individual may not file a lawsuit under the ADEA until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC. 29 U.S.C. §626(d). A charge must be filed within 180 days, or 300 days, after the alleged unlawful practice occurred. 29 U.S.C. §626(d)(1),(2). The ADEA does not define charge. EEOC regulations give guidance on defining "charge", but are not well-defined. The EEOC is entitled to deference when it adopts reasonable interpretation of its own regulations. Under *Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), the Court accepts the agency's position unless it is "plainly erroneous or inconsistent with the regulation." Here, the EEOC took a permissible reading of the regulations - that they did not state the full contents for a charge. Further, the EEOC submits that the proper test for determining whether a filing is a charge is "whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." Even if not entitled to deference under *Auer*, the Court reasons that the EEOC's construction is acceptable because (1) the agency has applied its position with consistency for five years; (2) the agency has a dual role of enforcing anti-discrimination laws and public awareness; (3) the proposed test is compatible with the principles that a charge be a form, easy to complete, or an informal document, easy to draft. The intake questionnaire in use here (in 2001) is not, by itself, necessarily enough to constitute a charge. However, plaintiff had a sentence at the end of her six page affidavit that requested that the EEOC "force FedEx to end their age discrimination plan."

5. **PRACTICE TIPS:**

a. Employers: Since an intake questionnaire is not enough to constitute a charge, look for the date of the signature on the questionnaire or affidavit as the date the employee filed the pro se charge.

b. Employees: Make sure to sign the charge or questionnaire and secure proof of delivery to the EEOC.

C. BURDEN OF PROOF- *AFFIRMATIVE DEFENSES: MEACHAM V. KNOLLS*, 128 S. Ct. 2395, 171 L.Ed. 2d 283, 2008 U.S. LEXIS 5029 (June 19, 2008). *Opinion by Souter, J.* (7-1). *Dissent filed by Thomas, J. Breyer, J. took no part in the decision.*

1. **ISSUE:** Whether in and age discrimination case, the employer or the employee, has the burden of proving the factors used to determine a layoff were reasonable.

   ANSWER: Yes, the Employer has the burden of proof when asserting an affirmative defense.

2. **HOLDING**: Under ADEA the employer bears both the burden of production and the burden of persuasion for the use of "reasonable factors other than age" in the decision to terminate employment.

3. **KEY FACTS:** Knolls Atomic Power Lab was forced to reduce its workforce. As a part of the downsizing effort the employer asked the managers to score the workers based on both an objective factor (years of service) and subjective factors (performance, flexibility, and the critical nature of the skills the employee possessed for the employer). Thirty-one employees were laid off and all but one was over the age of forty. Twenty-six of these dismissed employees filed suit against Knolls for age discrimination in violation of the Age Discrimination in Employment Act (ADEA). A jury found for the employees.

   The Second Circuit affirmed the judgment, which the employer appealed. During this time period, the United States Supreme Court issued the opinion in *City of Jackson* and remanded the case to the Second Circuit. The Second Circuit reversed the trial court order because the wrong standard, "business necessity," was applied rather than the correct standard of "reasonableness." The Second Circuit held that the plaintiff had not met the burden of persuasion as to the reasonableness of the employer's standards. The plaintiffs appealed arguing the burden of proof for the employer's reasonableness is on the employer, not the employee.

4. **RATIONALE**: Justice Souter determined that both "reasonable factors other than age" (RFOA) and "bona fide occupational qualifications" (BFOQ) are affirmative defenses under the ADEA. When a provision carves out an exception to a rule, the party who benefits from the exception bears the burden of proof. Applying principles of statutory construction to the case, the majority found that affirmative defenses were treated in a similar manner in other employment statutes, e.g. the Fair Labor Standards Act. The employer argued that RFOA should be read as "mere elaboration on an element of liability." However, given the case was a disparate impact case and not a disparate treatment case, the action taken by the employer is assumed to be a factor other than age.

> The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a 'reasonable' one for the employer to bus using. Reasonableness is a justification categorically distinct from the factual condition 'because of age' and note necessarily correlated with it any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.

128 S.Ct. at 2403.

5. PRACTICE TIPS:

1. Employers: Prepare to defend the factors chosen for reductions in workforce. The more subjective the factors appear the more likely the jury will not find the factors reasonable. Make sure to amend your answer to include this as an affirmative defense. Also, if the employer is sure that the layoffs do not give rise to a disparate impact on any particular group, release that information at the time of layoffs. This will assist employees in assessing the viability of a disparate impact case.

2. Employees: Disparate impact cases under the ADEA present litigation opportunities where the employer appears to lay off more baby-boomers than Gen Xers. However, disparate impact cases do require some knowledge of statistics. The business necessity defense is not available for the employer, but proving reasonableness is not that hard to prove. Make sure to request the demographics of the layoffs as soon as possible during discovery.

D. EVIDENCE: *SPRINT/UNITED MANAGEMENT CO. V. MENDELSOHN, 128 S. Ct. 1140, 170 L.Ed. 2d 1, 2008 U.S. LEXIS 2195 (February 26, 2008). Opinion by Thomas, J. for a unanimous Court. Vacating the judgment of the U.S. Court of Appeals for the Tenth Circuit and remanding the case with instructions to have the district court clarify the basis for its evidentiary ruling.*

1. **ISSUE:** Whether the Federal Rules of Evidence require admission of testimony in an Age Discrimination in Employment Act (ADEA) case by nonparties alleging discrimination by supervisors of the defendant company who played no role in the adverse employment decision challenged by plaintiff?

ANSWER: No, this type of evidence is neither *per se* admissible nor *per se* inadmissible.

2. **KEY FACTS:** Sprint terminated Mendelsohn as part of an ongoing company-wide reduction in force. Plaintiff Mendelsohn sued Sprint alleging disparate treatment based on her age. To support her claim, Mendelsohn sought to introduce testimony by five former Sprint employees who claimed their supervisors had discriminated against them because of age. None of these five witnesses worked in the same business group as Mendelsohn. These witnesses were *not* going to testify about anyone in Mendelsohn's chain of command, including the decision maker. Sprint moved *in limine* to exclude the testimony, arguing irrelevance, under Fed. R. Evid. 402 and also that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading and undue delay (Fed. R. Evid. 403). The District Court granted the motion, without a basis for its ruling, but later clarified during trial that the evidence was not excluded as to the "totally different" question whether as to whether Sprint's reduction in force (their stated non-discriminatory reason, was a pretext for age discrimination. The Court of Appeals for the Tenth Circuit reversed the District Court because they viewed the District Court's ruling as an application of a *per se* rule prohibiting the evidence because it did not relate to the same supervisor. *The Court of Appeals then determined that the evidence was relevant, not unduly prejudicial, and reversed and remanded for a new trial.*

3. **HOLDING:** Evidentiary questions of relevance and prejudice are for the District Court in the first instance. When the District Court's order was ambiguous, the Court of Appeals should not have engaged in an inquiry as to whether evidence was relevant and not unduly prejudicial under Fed. R. Evid. 401 and 403. District Courts should not apply *per se* rules of evidence in discrimination cases because such cases are fact based and depend on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.

4. **RATIONALE:** District Courts should be given wide discretion in determining the admissibility of evidence under the Federal Rules. The Court describes this decision on whether relevant evidence is unduly prejudicial as the "hallmark of abuse-of-discretion review." An appellate court should not presume that a District Court's opinion adopts the viewpoint or argument of one of the parties, unless that is explicit. Where a lower court's opinion is ambiguous, it is improper, under an abuse of discretion review, to presume that the lower court reached an incorrect legal conclusion. A remand directing the district court to clarify its order is

generally permissible and would have been the better approach. Evidentiary questions involving balancing relevance vs. prejudicial effect are almost always best made by the District Court because of its unique role with each particular case. *Had the District Court applied a per se rule excluding the evidence,* the Court of Appeals would have been correct that it had abused its discretion.

E. AGE DISCRIMINATION – PENSION STATUS - *KENTUCKY RETIREMENT SYSTEMS V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 128 S. Ct. 2361, 171 L. Ed. 2d 322, 2008 U.S. LEXIS 5032 (June 19, 2008). Opinion by Breyer, J. (5-4). Dissent filed by Kennedy, J, joined by Scalia, Ginsburg, and Alito, J.*

1. **ISSUE:** Does a retirement plan automatically "discriminate based on age" in violation of the Age Discrimination in Employment Act (ADEA) when it lawfully makes age a partial condition of eligibility and treats workers differently in light of their pension status?

   ANSWER: No, this type of plan does not automatically discriminate based on age where some disabled individuals are treated more generously than those who become disabled only after becoming eligible for retirement on the basis of age.

2. **HOLDING**: The Kentucky Plan does not discriminate against workers based on age in violation of the ADEA.

3. **KEY FACTS:** Kentucky, like many states, has a special retirement plan (Plan) for state and county employees who occupy "[h]azardous position[s]." These positions include active duty law enforcement officers, firefighters, paramedics, and correctional workers. Kentucky's Plan has special provisions for hazardous position workers who become disabled prior to becoming eligible for "normal retirement."[3] The purpose of the special rules is to treat a disabled worker as though she became disabled after reaching "normal retirement." Under the special rules, a person becoming disabled before the normal retirement age receives "imputed" years of experience up to a limit of their actual number of years worked.[4] Retirement benefits are calculated according to a standard formula of number of years of service x 2.5% of final pre-retirement pay. Plaintiff here, became eligible for retirement at age 55, but then became disabled after that point and retired at age 61. Plaintiff's pension was calculated under the plan as his actual years of service times 2.5% of his final pre-retirement pay. The District

[3] "Normal Retirement" in the Kentucky Plan occurs either (1) when a worker has 20 years experience; or (2) when a worker has 5 years experience and is at least 55 years-old.

[4] The imputed number of years is the number that would bring the person to normal retirement.

Court ruled that the EEOC could not establish age discrimination, and granted summary judgment. The Sixth Circuit in an en banc opinion reversed and said that the scheme did violate the ADEA.

4. **RATIONALE:** The ADEA allows age to be a systemic factor in pension status benefits because of the special nature of a retirement benefit scheme.[5] The purpose of Kentucky's Plan is to be more generous to those that become disabled prior to reaching the normal retirement point. The Court reasons that the difference in treatment is not because of age, but because of pension eligibility. All employees, when hired, are promised the benefits of the special provisions if they become disabled prior to normal retirement eligibility. To show discrimination based on age, a Plaintiff would need to show that the disparate treatment occurred because age "actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). In this case, there is no age-related motivation for the difference in treatment.

5. **PRACTICE TIPS:**

   a. Employers: Disparate impact cases based on pension eligibility will survive a motion to dismiss. You will still need to defend disparate treatment complaints.

   b. Employees: Make sure to allege that age actually played a role in the employee's eligibility determination.

F. RETALIATION § 1981: *CBOCS WEST, INC. V. HUMPHRIES, 128 S. Ct. 1951, 170 L. Ed. 2d 864, 2008 U.S. LEXIS 4516 (May 27, 2008). Opinion by Breyer, J. (7-2). Dissent filed by Thomas, J., joined by Scalia, J.*

1. **ISSUE:** Does §1981 include retaliation claims?

   ANSWER: Yes**.**

2. **HOLDING**: An individual can bring a retaliation claim under 42 U.S.C. §1981

3. **KEY FACTS**: Plaintiff Humphries, an African-American man, was fired by Defendant Cracker Barrel Country Store (Cracker Barrel) Plaintiff alleged that Cracker Barrel fired him because of racial bias and because he complained to managers that a co-worker had fired another worker because of race. Plaintiff brought claims against

[5] 29 U.S.C. §623(l)(1)(A)(i) allows pension eligibility to turn on age.

Cracker Barrel under both Title VII and for retaliation under 42 U.S.C. §1981. The District Court granted summary judgment for Defendant, but the U.S. Court of Appeals for the 7th Circuit determined that retaliation claims were viable under §1981.

4. **RATIONALE**: The Court emphasizes that its holding is based on principles of *stare decisis.* The Court looks to *Sullivan v. Little Hunting Park, Inc.*,[6] a 1969 case holding that 42 U.S.C. §1982 encompasses retaliation claims. The Court declares that its precedents have "long construed §§ 1981 and 1982 similarly." The Court also looks to the 2005 decision in *Jackson*[7], which interpreted Title IX[8] language and found a claim for retaliation, even though that word is not expressly used in Title IX. The Court rejects the argument that allowing a retaliation claim under §1981 would subvert the administrative scheme of Title VII because the claims overlap. Rather, the Court finds that the overlap is intentional and overlap is not a reason to preclude a claim. The Court also advises that *Burlington Northern*[9] does not dictate a different result. Here, the Defendant's argued that *Burlington Northern*, decided by the Court in 2006, made distinctions between discrimination based on an individual's status, "who they are" vs. discrimination based on what the individual does, i.e. "conduct." The Court agreed that in *Burlington*, the Court said that an employer could be liable for retaliation conduct beyond acts directly connected to employment conditions. But, the Court rejects the argument that these distinct harms necessarily require separate legislative treatment. Instead, the Court describes *Burlington* as discussing the reach and breadth of the anti-retaliation provision, not that the two provisions are redundant.

5. **PRACTICE TIPS**:

    a. Employers: Make sure to document the problem employee issues before taking the adverse action. Remove biased management from the review process. As always, follow your won process and policies so that you treat all employees consistently. Make sure to document the performance problems in reviews with the employee.

    b. Employees: Gather copies of positive reviews that were given to the employee prior to the protected activity. Look for other employees who suffered apparent retaliation after engaging in protected activity.

[6] See also Myrna Gomez-Perez v. Potter infra.
[7] See infra.
[8] Title IX is part of the Education Amendments of 1972 and is codified at 20 U.S.C. § 1681 et seq.
[9] 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).

G. RETALIATION AGE: *MYRNA GOMEZ-PEREZ V. POTTER, 128 S. Ct. 1931, 170 L. Ed. 2d 887, 2008 U.S. LEXIS 4518 (May 27, 2008). Opinion by Alito, J. (6-3). Dissent filed by Roberts, C.J., joined by Scalia and Thomas, JJ., as to all but Part I. Dissent filed by Thomas, J., joined by Scalia, J.*

1. **ISSUE:** Can a federal employee sue for retaliation under the federal-sector provisions of the Age Discrimination in Employment Act?

   ANSWER: Yes.

2. **HOLDING:** The language of the federal-sector provision of the ADEA prohibiting "discrimination based on age", 29 U.S.C. § 633a(a) includes retaliation based on the filing of an age discrimination complaint.

3. **KEY FACTS:** Plaintiff worked for the US Postal Service as a window distribution clerk. In October 2002, Plaintiff, then 45 years-old, requested a transfer to be closer to her mother who was ill. The transfer was approved and Plaintiff began working part-time in the new position. Meanwhile, her supervisor changed her old position to a part-time position and filled it. Plaintiff requested a return to her old job and was denied. Plaintiff filed a union grievance. After that she filed an equal employment opportunity age discrimination complaint with the Postal Service. After that, Plaintiff alleged that the Postal Service retaliated against her by drastically reducing her work hours, writing her name on anti-sexual harassment posters, making false accusations of sexual harassment against her, condoning her co-workers verbal abuse telling her to "go-back" to where she "belong[ed]," and reprimanding her for groundless complaints.

4. **RATIONALE:** The language of the ADEA provision ("discrimination based on age") is similar to the statutory language in Title IX of the Educational Amendments of 1972, "discrimination based on sex." In *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005) the Court upheld a retaliation claim under Title IX for a male public school teacher who had complained about sex discrimination against his girls' basketball team. The Court rationale in that case, that retaliation is a form of discrimination, could be applied in this case involving age discrimination. The Court also looked back to the *Jackson* precursor, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), where the Court found that a plaintiff could bring an action under § 1982 for retaliation, even though the statute did not have an explicit retaliation provision, but plainly prohibited discrimination based on race in the conveyance of real and personal property. *Court rejects argument that a negative implication be drawn from the absence of a separate*

retaliation provision covering federal workers when the ADEA private sector provisions have both a prohibition on age discrimination and a separate retaliation provision, 29 U.S.C. §623(d). The Court reasons that (1) the provisions were not considered or enacted together; and (2) the private sector provisions are significantly different from the federal sector provisions on defining unlawful employment practices.

5. **DISSENT:** Chief Justice Roberts does agree that *Sullivan* and *Jackson* do allow reading broad anti-discrimination language to include retaliation. But here, Roberts views Congressional intent as clear that they did not mean to include retaliation and cites as an example that in the same year that the ADEA federal sector provision was enacted, 1974, Congress amended the Fair Labor Standards Act. In that amendment, Congress did expressly subject federal employers to the FLSA's express anti-retaliation provision, *29 U.S.C. §215(a)(3).* Roberts also points to the history of addressing retaliation in the federal sector through the Civil Service Commission as a rationale for the position that Congress did not intend to cover retaliation for federal employers in the ADEA.

   Thomas, joined by Scalia Dissent: *Jackson* was wrong, so therefore the majority here is incorrect.

6. **PRACTICE TIPS:**

   i. Employers: Retaliation claims are everywhere. See notes above.

   ii. Employees: The court is willing to follow precedent they did not necessarily agree with. In this case, the text of the statute was compelling for the employer. (See Chief Justice Robert's Dissent) This case is a signal that the courts will review retaliation claims carefully. This certainly provides more opportunities for litigation for plaintiff's counsel.

H. ERISA – CONFLICTS OF INTEREST – *METROPOLITAN LIFE INSURANCE COMPANY, ET AL. V. GLENN, 128 S.Ct. 2343, 171 L.Ed. 2d 299, 2008 U.S. LEXIS 5030 (June 19, 2008). Opinion by Breyer, J. (6-3). Concurrence filed by Roberts, C.J., and Kennedy, J. Dissent filed by Scalia, J., joined by Thomas, J.*

1. **ISSUE:** For the purposes of ERISA, is it a conflict of interest for an insurance company acting as a plan administrator to act as both an assessor of claims for merit and a payer of claims? If a conflict exists, how should the court consider and weigh the conflict?

ANSWER: Yes, but conflicts of interest are only one factor that the court's may consider when reviewing a denial of a claim by an insurance company.

2. **HOLDING:** Yes, it is a conflict of interest. Since the insurance company is acting as a proxy for the employer and the employer has an interest in maintaining lower insurance costs and rates, and employer may choose an insurance provider that has a track record of denying claims rather than making sure the claims are evaluated correctly. Conflicts of interest should be considered as one of many factors.

3. **KEY FACTS:** Plaintiff Glenn was covered by the employer's long-term disability plan. The plaintiff submitted a claim under her ERISA plan to MetLife, the insurance carrier. MetLife directed the Plaintiff to apply for SSD, which she was awarded. After the plaintiff was approved for SSD, MetLife decided the plaintiff was no longer eligible for disability benefits under the ERISA plan. The Plaintiff filed an ERISA claim and the district court ruled in MetLife's favor. U.S. Court of Appeals for the Sixth Circuit reversed.

   The Sixth Circuit noted MetLife's dual role as both the entity determining when disability awards should be paid out as well as the entity actually funding those payments and found a conflict of interest. MetLife appealed to the U.S. Supreme Court.

4. **RATIONALE:** The Court relied on its prior ruling in *Firestone Tire & Rubber Co. v. Bruch*, which set forth four principles as a standard for judicial review. 1) The principles of trust law should apply and the plan administrator should be analogized to the trustee. 2) Review the denial *de novo* unless the plan requires otherwise. 3) The court should be deferential to a plan administrator's decision where the plan gives discretion to the administrator. 4) The court should apply the abuse of discretion standard to an administrator operating with plan discretion and with a conflict of interest.

   A conflict of interest is a factor that should be considered in review. The court avoided making a special burden shifting rules in this type of case. "Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflict … for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review."

   Chief Justice John G. Roberts concurred in part and dissented in part. He would only find a conflict of interest where there is evidence that the benefit denial was

motivated or affected by the administrator's conflict. He did not see a conflict, but he would have sustained the Sixth Circuit because he found an abuse of discretion. He was persuaded that MetLife abused discretion by denying the plaintiff benefits under the plan where MetLife failed to explain the contrary position it took from the Social Security Administration's position on the plaintiff's disability.

Justice Kennedy also concurred in part and dissented in part, suggesting that the case should be remanded to the Sixth Circuit where it could apply the majority opinion to the facts of the case on its own.

Justice Scalia, joined by Justice Thomas, dissented, finding the mere fact that an entity both determines claims and funds those claims insufficient to prove a conflict of interest for the purposes of ERISA. Justice Scalia also did not support considering conflicts of interest as a factor because it makes the outcome too unpredictable. He also objected to the court making the final decision on reasonableness. He would have remanded to the court below.

5. PRACTICE TIPS:

iii. Employer: This holding does not change the standard for insurance defense counsel in the Third Circuit. Where the evidence raises a question of the plan administrator's impartiality or there is an inherent conflict of interest, a heightened standard of review was already required in the Third Circuit. *Pinto v. Reliance Std. Life Ins. Co.*, 214 F.3d 377 (3d Cir. 2000); *see also Goldstein v. Johnson & Johnson*, 251 F.3d 433, 442 (3d Cir. 2001).

iv. Employee: The conflict of interest factor allows plaintiff's counsel another opportunity to show the denial of long-term disability benefits was arbitrary and capricious. This case could have huge practical implications for increased success in most circuits.

I. ERISA – BREACH OF FIDUCIARY DUTY - *LARUE V. DEWOLFF, BOBERG & ASSOCIATES, INC., 128 S. Ct. 1020, 169 L. Ed. 2d 847, 2008 U.S. LEXIS 2014 (February 20, 2008). Opinion by Stevens, J. (5 – Souter, Ginsburg, Breyer, and Alito JJ. joined). Roberts, C.J. filed an opinion concurring in part and concurring in the judgment, in which Kennedy, J., joined. Thomas, J. filed an opinion concurring in the judgment, joined by Scalia, J.*

1. **ISSUE:** Does §502(a)(2) of the Employee Retirement Income Security Act authorize a participant in a defined contribution pension plan to sue a fiduciary for alleged misconduct that impairs the value of the individual's plan account?

   ANSWER: Yes.

2. **HOLDING:** § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) authorizes recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.

3. **KEY FACTS:** Plaintiff filed suit against his former employer and the ERISA-regulated 401(k) plan administered by the former employer. The Plan allowed for individual defined contributions held collectively in the Plan but segregated in individual investment accounts. Plaintiff alleged that the Plan administrator breached his fiduciary duty by failing to make some specific investment instructions directed by Plaintiff. As a result, Plaintiff's interest in the Plan was diminished by $150,000. The District Court dismissed the Complaint on a motion for judgment on the pleadings because Plaintiff appeared to be seeking damages and not equitable relief, the only form of relief recoverable under the relevant provision at issue - §502(a)(3). The Fourth Circuit Court of Appeals ruled that Plaintiff did not have a claim under §502(a)(2).[10]

4. **RATIONALE:** The Court says that the 4th Circuit Court of Appeals "misread" the case of *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)*. In *Russell*, the Court determined that an individual participant in an ERISA plan *could not* sue a fiduciary for alleged misconduct with respect to the participant's individual account because the intent of the statute was to protect the "entire plan" rather than the rights of an "individual beneficiary." The Court distinguishes *Russell* in two ways. First, that case involved misconduct that involved a delay in processing the Plaintiff's claim where she sought damages for the delay. Second, the Court emphasizes that *Russell* was decided in the context of a world of defined-benefit plans. The Court notes that the "landscape has changed" and that "defined contribution plans" are the predominant retirement plan today. *Russell's* language about the "entire plan" is not applicable in the defined contribution plan context. The Court further notes that §404(c) exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts. The Court says that this provision would be superfluous if participants did not have a claim in the first instance.

[10] This became the issue before the Court because the 4th Circuit made a merits decision on this issue even though Plaintiff only raised the matter for the first time on appeal.

CONCURRENCE BY ROBERTS, C.J. JOINED BY KENNEDY, J. Chief Justice Roberts reasons that the Plaintiff's claim is more in the nature of a claim under §502(a)(1)(B) and that a claim that fits under that provision may not allow a similar claim under §502(a)(2).

5. Practice Tips:

v. Employers: Check to see if you can make a failure to exhaust administrative remedies argument. The Court does not rule on this matter in deciding this case. Also question how the Plaintiff is determining damages because relief under §502(a)(2) is restorative and equitable.

vi. Employees: Sometimes appellate courts do actually consider new arguments on appeal, so don't be so hesitant to fail to make those arguments.

J. PARALEGAL FEES – *RICHLIN SECURITY SERVICE V. CHERTOFF, 128 S.Ct. 2007, 170 L.Ed. 2d 960, 2008 U.S. LEXIS 4522 (June 2, 2008). Opinion Alito, J.*

1. ISSUE: Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(l) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

ANSWER: Yes, the EAJA permits a prevailing party to seek paralegal fees against the federal government at the market rate.

2. HOLDING: The Supreme Court ruled that companies that successfully sue the United States in administrative proceedings are entitled to recover the full market cost of paralegals who aided them.

3. KEY FACTS: Richlin provided guards who watched over detainees at Los Angeles International Airport. Through mutual mistake, the guards the parties misclassified and consequently underpaid the guards.

Richlin sued the government to recover its lost income and prevailed. Under the Equal Access to Justice Act, 5 U.S.C. Sec. 504, Richlin was entitled to recover attorney fees, expenses and costs. Richlin sought $45,141.10 in paralegal fees for

523.8 house of paralegal work. They also filed for $6,760 for 68.2 hours of paralegal work on the EAJA application itself. The administrative agency reviewing the petition, the Department of Transportation's Board of Contract Appeals, ruled that Richlin was only entitled to reimbursement for the cost of the paralegal time, rather than the fare market value of the each paralegal. The Federal Court Circuit affirmed.

4. **RATIONALE:** In asking the Court to review the decision, Richlin argued that the Eleventh Circuit, in *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) reached the opposite conclusion, creating a split between the circuits.
Richlin also noted that in *Missouri v. Jenkins*, 491 U.S. 274 (1989), the Supreme Court held that under the analogous Civil Rights Attorney's Fees Awards Act, paralegal services are an element of attorney's fees and therefore should be compensated at a firm's billable rate, rather than at the cost to the firm. In the *Missouri* case, the Court concluded that permitting market reimbursement for paralegals would encourage attorneys to delegate appropriate work to paraprofessionals in order to provide more cost-efficient legal services.

THE 2008 – 2009 Term CASES SCHEDULED

A. RETROACTIVE APPLICATION OF THE PREGNANCY DISCRIMINATION ACT: *AT&T V. HULTEEN*, 128 S. Ct. 2957, 2008 U.S. LEXIS 5217 (June 23, 2008). *Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.*

1. **ISSUE:** Whether the Ninth Circuit's finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

2. **PROCEDURAL HISTORY:** Hulteen and the other plaintiffs filed their lawsuit alleging that AT&T violated Title VII in it calculation of net credited service to the company. The parties stipulated to the facts. The district followed Ninth Circuit precedent and found for Plaintiff Hulteen. AT&T appealed to the Ninth Circuit. A three-judge panel reversed the district court, finding that it impermissibly applied the PDA retroactively. The Ninth Circuit *en banc* panel reversed the three judge panel. The court of appeals, sitting en banc, entered judgment on August 17, 2007. AT&T filed a petition for certiorari on October 22, 2007, and the United States Supreme Court granted the petition on June 23, 2008.

3. **KEY FACTS:** Hulteen and the other plaintiffs in the action were communications workers with AT&T. She and the other plaintiffs took maternity leave between 1968

and 1976, before the passage of the Pregnancy Discrimination Act of 1978 (PDA) in 1978. Noreen Hulteen voluntarily retired in 1994 as part of a reduction in force program. She had a total of 210 uncredited pregnancy leave days that affected her pension level.

The workers could not file a discrimination charge at the time AT&T adopted the policy because that was prior to the passage of the PDA. The workers did not file a discrimination charge when AT&T applied the policy to workers because that also occurred prior to the passage of the PDA. Between 1994 and 2002 the Plaintiffs retired and AT&T calculated their pension benefits a lower rate because of the lower net credited service. The parties filed their suit in 2001.

Before the passage of the PDA, it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. Gilbert v. Gen. Elec. Co., 429 U.S. 125 (1976). After the passage of the PDA, the Ninth Circuit issued an opinion wherein it held that the employer violated the Title VII by ***calculating*** the employee's retirement benefits after passage of the PDA, even though the employer applied the rules that created the service credit well before the passage of the PDA.

4. **THE MAJORITY RATIONALE BELOW:** The Ninth Circuit reasoned they had to follow circuit precedent. It also looked at the calculation of the benefits as a discrete act that the employer affirmatively chose to apply. It distinguished *Ledbetter* from this case, stating that calculating a pension benefit is a separate and actionable act of discrimination.

5. **THE DISSENT BELOW:** They argued that the Ninth Circuit split from the Sixth and Seventh Circuits on the issue of retroactivity. They also argued that the Ninth Circuit precedent referred to by the *en banc* panel was wrong earlier and was wrong in this instance. The stated issue for the dissent was whether the plaintiffs filed their sex discrimination action within the specified period of limitations. They also pointed out that even if this were a discrete act, the plaintiffs failed to prove there was discriminatory intent when the employer engaged in the discrete action.

6. **ORAL ARGUMENT:** This case is not scheduled yet.

B. MANDATORY ARBITRATION – *14 PENN PLAZA V. PYETT, 128 S. Ct. 1223, 2008 U.S. LEXIS 1418 (February 19, 2008) Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit granted.*

1. **ISSUE:** Are mandatory arbitration clauses in collective bargaining agreements enforceable?

2. **KEY FACTS:** Plaintiffs are employees of a building service and cleaning contractor. They worked as night watchmen in a commercial office building owned by Defendant. Plaintiffs are members of a union and are covered by a collective bargaining agreement (CBA). The CBA contains a mandatory arbitration clause for discrimination claims:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA] as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

   Defendants engaged a new security services contractor and reassigned plaintiffs to different locations and less desirable positions as night porters and light duty cleaners. Plaintiffs filed grievances with the union under the CBA. They alleged that they were transferred and denied OT in violation of terms of the CBA, but also due to discrimination based on age because they were the only employees over 50. The Union declined to pursue Plaintiff's wrongful transfer and age discrimination claims, and while the arbitration was ongoing, Plaintiff's filed with the EEOC and then in federal court alleging age discrimination under the ADEA.

3. **RATIONALE BELOW:** In *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974), the Supreme Court held that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for Title VII violations. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed. 2d 26 (1991) the Court held that an individual employee who agreed individually to waive his right to a federal forum *could* be compelled to arbitrate an ADEA claim. The Defendants argue that a later Supreme Court case, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), abandoned *Gardner-Denver's* rule that a union may only waive certain

statutory rights related to collective activity, e.g. the right to strike. The Second Circuit rejects that argument by Defendants as already decided by a prior Second Circuit case, *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000).

4. **ORAL ARGUMENT:** Scheduled for Oral Argument on December 1, 2008. Multiple amicus filed on both sides.

C. RETALIATION AGAINST WITNESSES – *CRAWFORD V. NASHVILLE, 128 S.Ct. 1118, 169 L.Ed. 2d 846, 2008 LEXIS 1102 (January 18, 2008) Petition for writ of certiorari is granted.*

1. **ISSUE:** Does the anti-retaliation provision of Title VII of the Civil Rights Act Apply to employees fired for participating in an internal investigation of sexual harassment?

2. **KEY FACTS:** In July 2002, Vicki Crawford, a government employee, took part in an internal investigation regarding sexual harassment claims against another employee. After the investigation, January 2003, Crawford was fired based on charges of embezzlement and drug use. She was cleared of both later. In June 2003, she filed a Title VII complaint based on retaliatory discharge.

3. **RATIONALE BELOW:** The district court granted employer's motion for summary judgment. The Sixth Circuit affirmed the district court's dismissal of the Crawford's claim, reasoning that the employee's participation in the investigation did not constitute opposition and was therefore not protected activity under Title VII. They noted that Crawford merely cooperated with the investigation rather than instigating a report or investigation. The Circuit Court also noted that there was no protected activity because Crawford had not filed an EEOC Charge. [Note: Filing a charge is not required for protected activity to be found in the Third Circuit.]

4. **ORAL ARGUMENT:** Wednesday, October 8, 2008. During argument, Justice Breyer asked if the EEOC's standard should be followed. The standard provides that an employee may sufficiently believe she is opposing a Title VII illegal practice by providing information in an employer-initiated investigation of an alleged discrimination. Justice Souter, Ginsberg and Stevens indicated strong support for the employee's position. Chief Justice Roberts focused on questions regarding the breadth of the decision. For instance, would opposition include wearing a button that states "sex harassment is terrible!" However, during his questioning of the Solicitor General, it became more clear that he was looking for direction from the EEOC, which would support a finding that cooperating in an investigation is sufficient to constitute participation for the purposes of retaliation.