

**RECENT U.S. SUPREME COURT
DECISIONS AFFECTING PUBLIC EMPLOYERS
July 22, 2008**

Theodore A. Olsen, Sherman & Howard L.L.C. ©

I. Employment discrimination/Procedural Issues

***Ledbetter v. Goodyear Tire & Rubber Co.*, Case No. 06-1322, 127 S.Ct. 2162, 551 U.S. --- (May 29, 2007).**

- Holding: An employer's allegedly discriminatory decision regarding the pay rate for an employee is an alleged violation of Title VII, triggering a 180 day period (or 300 day period in deferral states) during which the employee must file a charge of discrimination with the EEOC or a state or local deferral agency, 42 U.S.C. § 2000e-5(e), and an agency charge regarding such pay discrimination filed after that period is untimely, such that the pay decision may not be challenged under Title VII, despite the employee's receipt of paychecks based on that decision during the charge-filing period. The periodic receipt of paychecks did not make the allegedly discriminatory pay decisions "continuing violations" under Title VII.

Ledbetter worked at a Goodyear plant as a salaried employee from 1979 until 1998. In July 1998, she filed a discrimination charge with the EEOC, and later filed suit under Title VII and the Equal Pay Act asserting, among other claims, a pay discrimination claim. The district court dismissed the EPA claim, as a matter of law, but allowed other claims, including her Title VII pay discrimination claim, to proceed to trial.

Ledbetter claimed that during her employment she had received poor performance evaluations because of her gender. She asserted that this resulted in her pay not increasing as much as it would have had she not been a victim of sex discrimination. She alleged that the past pay decisions continued to affect the amount of her pay through the last pay decision in 1998. Ledbetter was being paid significantly less than any of her male counterparts. A jury awarded her back pay and damages.

On appeal, the Eleventh Circuit reversed, holding that Ledbetter's pay discrimination claim was time barred as to all pay decisions prior to Sept. 26, 1997 – 180 days before the filing of Ledbetter's EEOC charge. The court ruled that a Title VII pay discrimination claim cannot be based on any pay decision that occurred before the last pay decision that affected the employee's pay during the EEOC charging period.

The Supreme Court, in a 5-4 decision, affirmed. According to the Court, the period for filing an EEOC charge is triggered when a discrete unlawful practice takes place. A new violation does not occur upon the occurrence of subsequent nondiscriminatory acts that are the mere effects of the past discrimination. *See, United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554-55, 557 (1977). Ledbetter's ongoing paychecks were the nondiscriminatory effects of a discriminatory act, not new or continuing violations of Title VII.

Ledbetter did not argue that the employer acted with discriminatory intent when issuing her paychecks or taking any other employment action during the charging filing period; instead she claimed that her paychecks were smaller because of discriminatory decisions made prior to the charging period. The Supreme Court noted that, not only would following Ledbetter's argument eliminate the element of intent, but it would also distort Title VII's enforcement procedures and Congress' intent to encourage early resolution. Ledbetter's claim was fully formed and present when each discriminatory employment action was taken against her, which is the point when she could have and should have filed her charge. This was not a recognized "continuing violation" and each new paycheck did not constitute a new violation that restarted the clock for filing an EEOC charge.

The Supreme Court's decision in *Ledbetter* overturns the case law in many jurisdictions. See, e.g., *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002). Some courts have already attempted to distinguish (or marginalize) *Ledbetter* as based entirely on the fact that the plaintiff there made "no claim that intentionally discriminatory conduct occurred during the charging period," but rather, "argue[d] simply that [defendant's] present conduct during the charging period gave present effect to discriminatory conduct outside of that period. 127 S.Ct. at 2169. *Osborn v. Home Depot U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 69996 at *26-28 (D. Conn. Sept. 19, 2007) (pay gap was created outside limitations period, but employer's ongoing failure to correct the pay gap was a discriminatory act occurring during the charging period, so that *Ledbetter* did not apply).

Ledbetter attracted Congressional attention. On July 31, 2007, the House of Representatives passed, by a 225-199 vote, the Lilly Ledbetter Fair Pay Act of 2007 (H.R. 2831; S. 1843 in the Senate), ostensibly designed to reverse the Supreme Court's *Ledbetter* decision. The Act, sponsored by Rep. George Miller of California, has not yet been passed by the Senate. The bill clarifies that the time limit for filing a charge of discrimination against an employer for Title VII pay discrimination begins each time an employer issues a paycheck that reflects past sex or race discrimination, not when the employer initially commits the alleged discriminatory act. The Bush Administration has threatened to veto the legislation. The President's office has stated that the bill far exceeds the stated purpose of undoing the Court's decision in *Ledbetter* by extending the expanded statute of limitations to any "other practice" that remotely affects an individual's wages, benefits, or other compensation in the future. The President's office states that this could effectively eliminate the statute of limitations for a wide variety of claims (such as claims for non-promotion and even termination decisions) traditionally regarded as actionable only when they occur.

***Federal Express Corp. v. Holowecki*, Case No. 06-1322, 128 S.Ct. 1147, 552 U.S. --- (Feb. 27, 2008).**

- Holding: A plaintiff's completed EEOC Form 283 "Intake Questionnaire," and an attached signed affidavit could lawfully be deemed a charge under the Age Discrimination in Employment, sufficient to discharge the plaintiff's requirement that a charge be filed before filing a federal court ADEA civil action. Such materials, which (1) named the charging party,

(2) identified the accused employer, (3) alleged unlawful discrimination, and (4) requested the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employee and employer, were deemed a "charge."

The employer in *Federal Express* won at the district court level, but lost on appeal, arguing that the plaintiff's ADEA case was barred because she had not filed a charge at least 60 days before she filed suit. *See* 29 U.S.C. § 626(d) ("No civil action . . . may be commenced . . . until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.").

The plaintiff had not signed or filed a Charge of Discrimination form. Rather, she had completed a Form 283 "Intake Questionnaire," and submitted it to the EEOC with an attached signed affidavit elaborating on her contention that Federal Express programs tying driver compensation to certain performance benchmarks discriminated against older workers. Neither document stated that it was a "charge." On the contrary, the Intake Questionnaire form stated that its purpose was for the purpose of "pre-charge" counseling. The EEOC did not assign a charge number to either document, and did not process the documents as a "charge." Most notably, the EEOC did not notify the employer that the papers had been submitted or of the complainant's allegations, which the EEOC does when a Charge of Discrimination is filed against an employer. After the employer raised this procedural defense in the district court case, the plaintiff returned to the EEOC and filed a formal Charge of Discrimination. During the litigation, the EEOC entered an appearance in the case and argued that the plaintiff's original EEOC papers were sufficient to serve as a "charge."

The Supreme Court, by a 7-2 vote, ruled that the papers were a sufficient "charge" for the purpose of exhausting the charge-filing requirements of the ADEA. The Court acknowledged that the EEOC had issued various public regulations and protocols, defining the term "charge" inconsistently, and observed that these papers did not satisfy many of the EEOC's definitions. Ultimately, however, the majority concluded that the EEOC's position was a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of a statute it enforces. In reaching this conclusion, the Court said that papers given to the agency may be deemed a charge if they (1) name the charging party, (2) identify the accused employer, (3) allege unlawful discrimination, and (4) request the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employee and employer.

Many defense attorneys were surprised that the Supreme Court chose to hear this case, as it seemingly relates to a unique procedural situation of rather limited significance. If this decision has broader meaning, its implications probably are not favorable to employers. First, charging parties who miss the statutes of limitations with their formal Charges of Discrimination may argue that other preliminary papers they gave the EEOC should be deemed their charges. Second, the Supreme Court's decision in *Federal Express* shows substantial deference to the EEOC's interpretation and administration of the employment discrimination laws. Considering how the Supreme Court's reading the laws has often contradicted the Commission's interpretations of such laws, and how the agency continues to issue some attenuated interpretations of the laws, this deference could prove to be a significant concern.

II. Employment discrimination/Substantive Law

Sprint/United Management Co. v. Mendelsohn, Case No. 06-1221, 128 S.Ct. 1140, 552 U.S. --- (Feb. 26, 2008).

- Holding: There is no automatic rule that evidence of alleged employment discrimination suffered by employees other than the plaintiff, is admissible or inadmissible. Rather, the admissibility of so-called “me, too” evidence will be decided by the trial court judge on a case by case basis, and the judge’s decision will be reviewed under an abuse of discretion standard.

In *Mendelsohn*, a federal court case in Kansas, the plaintiff claimed she was selected for layoff as part of a company-wide RIF at Sprint, due to her age. In her age discrimination lawsuit, she sought to present testimony at trial from five other former Sprint employees, each of whom claimed to have evidence of age bias at the company.

- ✓ Three witnesses said they had heard Sprint managers or supervisors make derogatory comments about older workers.
- ✓ One witness had seen a spreadsheet suggesting that a supervisor had considered employees’ ages when making layoff decisions.
- ✓ Another witness asserted he had been given a negative evaluation and banned from work at Sprint because of his age.
- ✓ The final witness said that Sprint had required him to get permission before hiring anyone over age 40, that after his termination he had been replaced by a younger employee, and that Sprint had rejected his applications for re-employment because of age.

The relevancy of this “me, too” evidence was highly doubtful. None of the five witnesses worked in Mendelsohn’s department. None of them worked for the managers involved in the decision to lay-off Mendelsohn. The five “me, too” witnesses did not claim to have heard any discriminatory remarks by those who selected Mendelsohn for layoff. Many of the layoffs in the company-wide reduction in force were separated by more than one year.

The potential prejudice to Sprint that would have been caused if the “me, too” evidence had been received at trial was undeniable. The company would have been forced to present its own evidence to refute the five witnesses, and the jury might have been unduly influenced by evidence of age bias completely unrelated to Mendelsohn.

The evidence from the five witnesses was not admitted at trial. The district court judge elaborated that Mendelsohn could only “offer evidence of discrimination against Sprint employees who [were] similarly situated to her.” The judge also commented that “similarly situated” employees were those allegedly discriminated against (a) by the same managers who made the decision to lay-off Mendelsohn, (b) in “temporal proximity” to Mendelsohn’s layoff.

This ruling did not appear to be a blanket rejection of “me, too” evidence; indeed, if anything, it seemed to articulate certain factors to be considered by a judge when deciding on the admissibility of such evidence. The jury ultimately found in Sprint’s favor in Mendelsohn’s case.

The Tenth Circuit Court of Appeals, covering the region including Colorado, reversed the district court judge. The Court of Appeals inexplicably interpreted the trial judge’s decision as saying that “me, too” evidence is *per se* inadmissible. By going out of its way to overturn an evidentiary ruling, a ruling typically left to a trial judge’s discretion, the Tenth Circuit’s decision implied that “me, too” evidence of any type was *per se* admissible in all discrimination cases.

The Supreme Court ruled that the Tenth Circuit was wrong in its conclusion that the district court had found “me, too” evidence *per se* inadmissible. Justice Thomas, writing for a unanimous Court, declared that “me, too” evidence is not *per se* admissible, nor is it *per se* inadmissible. Rather, such evidence is subject to the requirements of Federal Rules of Evidence 401 (relevancy) and 403 (prejudice not outweighing probative value). Such questions are for district court judges to decide, in their discretion, because a trial court is “virtually always [] in the better position to assess the admissibility of the evidence in the context of the particular case before it.”

The Supreme Court’s decision in *Mendelsohn* corrected a major error by the Tenth Circuit – an error that favored plaintiffs – but the decision is far from a complete victory for employers. The decision provided very little guidance as to when “me, too” evidence should and should not be admitted at trial. Some employers had hoped the Supreme Court would pronounce that all “me, too” evidence is improper, or would put strict limitations on when such evidence may be admitted, or would at least bemoan the problems and prejudice experienced by employers forced to defend themselves when confronted with such evidence. The Supreme Court’s decision did none.

***Meacham v. Knolls Atomic Power Laboratory*, Case No. 06-1505, 128 S.Ct. 2395, 554 U.S. --- (June 19, 2008).**

- Holding: In a disparate impact age discrimination case under the Age Discrimination in Employment Act, when the defendant employer defends its policies and practices as based on a “reasonable factor other than age,” the employer bears the burden of production and persuasion on the issue.

Three years ago, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the U.S. Supreme Court ruled that plaintiffs may challenge under the Age Discrimination in Employment Act (“ADEA”), the legality of facially-nondiscriminatory policies and practices of an employer, when such policies and practices have a disparate age impact on employees or candidates. The Supreme Court also ruled that, in such cases, there is no ADEA liability if the policies and practices are based on a “reasonable factor other than age” (“RFOA”). By ruling this way, the Supreme Court held that employers in age cases need not satisfy the “business necessity” standard, which is a defense under Title VII.

A question not addressed in *Smith v. City of Jackson* was whether the employer, or the plaintiff, had the burden of persuasion on the RFOA issue in such an age discrimination case. This question has determined the outcome of many suits, as the party that has been required to carry the burden of proof has often lost close cases. The Supreme Court has now answered the question, holding that employers have the burden of production and persuasion on the RFOA defense.

Before *Meacham*, age discrimination plaintiffs argued that the RFOA issue is in the nature of an affirmative defense for employers – similar to, albeit easier to satisfy than, the “business necessity” defense in Title VII cases – and that employers should therefore bear the burden of persuasion.

In response, employers argued that plaintiffs generally have the ultimate burden of persuasion in disparate impact cases, and that plaintiffs should therefore bear the burden of persuasion on the RFOA question. Also, employers argued, because the Supreme Court has recognized that age, unlike race and gender, sometimes is a legitimate consideration when assessing an individual’s skills and qualifications, the fact that employers have the burden of persuasion on the “business necessity” defense in Title VII cases is of no significance as to who bears the burden of persuasion on the RFOA issue in ADEA cases.

In *Meacham*, an employer involved in a reduction in force planned to rank all of its employees, based on their scores on factors such as “performance,” “flexibility,” “criticality of skills,” and years of company service, and to let the lowest ranked employees go. Of 2,063 employees, however, only 245 were placed on the matrices; and of the 245, only 31 were selected for layoff. *All but one of the 31 were in the protected age group.*

Managers, a review board, the general manager and the general counsel were supposed to check that the RIF selection decisions did not have a disparate impact on any protected class. However, they did not perform the disparate impact analyses. The only impact analysis was done by a Human Resources manager who lacked training and serious preparation, who merely compared the average age of the workforce before and after the RIF. Due to the size of the workforce, this technique was inadequate to identify age-related discrepancies resulting from a layoff of only 31 employees.

At trial, an industrial psychologist expert witness for the defense testified that “criticality” and “flexibility” were common components of “systems for making personnel decisions,” and that these subjective components of the RIF were appropriate because the managers conducting the evaluations “were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation.” Also, the employer’s staffing manager testified that “criticality” and “flexibility” were important to the employer, to carry on operations with a shrinking workforce.

An expert statistician testified for the plaintiffs, however, that the age disparities resulting from the RIF were too great to be the result of chance, that “criticality” and “flexibility” were the criteria most responsible statistically for the selection of the individuals to be laid off, and that

the employer's review procedures "did not offer adequate protections to keep the prejudices of managers from influencing the outcome."

At trial, the employer relied on the "business necessity" defense (as *Smith v. City of Jackson* had not yet been decided). At the close of trial, the jury was not instructed on the RFOA issue. The jury was instructed that the employer had the burden of persuasion on the "business necessity" defense, and the jury found for the plaintiffs on their disparate impact theory, awarding damages. After a series of appeals, the Second Circuit ruled in favor of the employer, based on the RFOA defense, finding that the plaintiffs had not carried the burden of persuasion as to the reasonableness of the employer's non-age factors.

The Supreme Court's decision will now require the parties to try the case a second time, and the jury will be presented with the question of whether the employer proved its decision was based on a "reasonable factor other than age."

Kentucky Retirement Systems v. Equal Employment Opportunity Commission, Case No. 06-1037, 128 S.Ct. 2361, 554 U.S. --- (June 19, 2008).

- Holding: A disability retirement benefit system that was designed to bridge disabled employees to normal retirement age under the normal retirement plan did not violate the Age Discrimination in Employment Act, even though, under the disability retirement system, (1) greater disability retirement benefits were given to younger employees who became disabled, who were farthest from reaching normal retirement age in the regular retirement plan, and (2) total benefits were generally greater for employees who became disabled at a younger age.

The Kentucky Retirement System for "hazardous position" state and county employees provided two different types of benefits: (1) disability retirement benefits, and (2) normal retirement benefits. Eligibility for a normal retirement depended on a combination of an employee's age and years of service. For instance, employees in hazardous positions were eligible for normal retirement benefits at age 55 or after 20 years' service. (In non-hazardous positions, the eligibility for normal retirement benefits was age 65 or 20 years' service.)

In general, the purpose of the disability retirement benefits was to give a disabled worker the amount of benefits he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years. Disability benefits were calculated under a formula that added to an employee's actual years of service the number of years that the employee would have had to continue working in order to become eligible for normal retirement benefits, adding no more than the number of years the employee had previously worked. If an employee became disabled after qualifying for a normal retirement, the employee received no disability retirement benefits. This generally meant that employees who became disabled after qualifying for regular retirement benefits did not get disability retirement benefits, while younger employees who became disabled before qualifying for normal retirement benefits received disability benefits. Also, the disability retirement benefits were calculated in such a way that older employees who were eligible for disability benefits received fewer benefits – in the form of lower monthly benefit payments – than

otherwise similarly-situated younger employees who received disability retirement benefits. Further, the total benefits received by an employee who qualified for disability retirement benefits (and later, normal retirement benefits) were often greater than the total benefits received by an employee who was disabled after qualifying for a normal retirement and receiving only normal retirement benefits.

The EEOC proved that, assuming all factors other than age – position, disabling condition, final compensation, and length of service – were the same for two employees, the amount paid annually to the worker who retired on disability at the younger age would frequently exceed (and would never be less than) the annual benefits of a worker who retired due to disability at an older age. The EEOC also showed that, in every case, a worker younger than the normal retirement age who retired on disability would receive more benefits each year than an older employee who retired from the same job, with the same disabling condition, length of service, and final compensation, who became disabled after reaching the normal retirement age.

On the other hand, several examples showed how the plan did not differentiate disability benefits strictly based on age, but rather, on age only in relation to years of service. For example, if two employees were the same age but one had more service (less than 20 years' service), they would get different years of disability benefits, in each case for the period until they became eligible for normal retirement benefits. Also, for example, if two employees (one age 50, the other age 55) in hazardous positions with the same years of service, 15 years, became disabled, they would get the exact same years of disability benefits, five years, as if each worked until they became eligible for normal retirement. Finally, for example, there were instances in which an older employee (age 45, with 10 years' service) would receive greater disability benefits than a younger employee (age 40, with 17 years' service).

The entire Sixth Circuit Court of Appeals held that the EEOC had presented a prima facie case of age discrimination, as the retirement plan facially discriminated by (1) rendering employees age 55 and above ineligible for any disability benefits, and (2) calculating benefits so that older eligible employees received lower disability benefits than younger eligible employees, even without additional proof of discriminatory intent.

In a 5-4 decision, the Supreme Court reversed the Sixth Circuit. The majority ruled that, when an employment decision (such as the setting of benefit levels) is based on an employee's pension status, the decision is not because of the employee's age, but because of a factor that merely correlates with age, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Because age and pension status are "analytically distinct" concepts, basing benefits on pension status is not illegal age discrimination. Moreover, Congress has approved programs, such as Social Security Disability Insurance, that calculate disability benefits using a formula that expressly takes into account age.

The purpose here was simply to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits; age factored into the disability calculation only because the normal retirement rules themselves permissibly considered age. Further proof that the disability retirement plan rules here were not

age-motivated were those instances when younger workers would receive less disability retirement benefits than older ones.

***CBOCS West, Inc. v. Humphries*, Case No. 06-1431, 128 S.Ct. 1951, 553 U.S. --- (May 27, 2008).**

- Holding: A claim of retaliation for opposing race discrimination in employment is cognizable under the 1866 Civil Rights Act, 42 U.S.C. § 1981.

Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant. He complained to higher management of race discrimination when his immediate supervisor made racist remarks and issued five unjustified disciplinary reports in the first month. No investigation of the complaints was made. Humphries later complained to higher management of race discrimination when a new supervisor fired another black employee. After these internal complaints were made, he was fired, allegedly for leaving the store safe unlocked during the evening. He claimed that other associate managers did the same thing, but were not fired. He pursued claims of race discrimination and retaliation under both Title VII and the 1866 Civil Rights Act, 42 U.S.C. § 1981. The Title VII claims were dismissed due to procedural deficiencies. The district court granted summary judgment for the employer as to the Section 1981 retaliation claim. The Seventh Circuit reversed, holding that retaliation for opposing racial discrimination in employment is actionable under Section 1981. The Supreme Court, in a 7-2 decision, agreed, recognizing such legal claims.

Section 1981, enacted to implement the Thirteenth Amendment, granted all persons the same right “to make and enforce contracts.” It is undisputed that this applies to racial discrimination in employment, but there has been an ongoing evolution of the meaning of “make and enforce.”

The majority based its decision on a number of points. For example, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Supreme Court held that a white homeowner who (1) was prevented from assigning his membership in a community park to an African-American, and (2) was then expelled from the non-profit corporation that operated the park for protesting the decision, had standing to bring a claim under a companion statute to Section 1981. *See*, 42 U.S.C. § 1982 (“All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to convey real and personal property.”). In *Sullivan*, the Supreme Court loosely commented that, if the white plaintiff could be expelled for advocating the cause of the black citizen, he would be “punished for trying to vindicate the rights of minorities protected by § 1982.” The majority asserted that the Supreme Court has long interpreted Sections 1981 and 1982 alike.

The majority further reasoned that Congress intended for Section 1981 to cover retaliation, as indicated by certain comments made by members of Congress when it amended Section 1981 in the 1991 Civil Rights Act, 42 U.S.C. § 1981a. (The 1991 law amended Section 1981 to make clear that it prohibited discrimination with regard to the conditions of continuing employment, and was not limited to “contract formation” and “contract enforcement,” as the Supreme Court had held in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989). To do

this, the phrase “make and enforce contracts” was amended to “include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”) The comments listed “retaliation” as an example of an action included in the term “make and enforce contracts.” While CBOCS argued that the absence of an explicit anti-retaliation provision in the 1991 law showed Congress’ intention not to provide for Section 1981 retaliation protection, the majority reasoned that, because of the new statutory language nullifying *Patterson*, there was no need for explicit retaliation language.

The majority also relied on *Jackson v. Birmingham Board of Educ.*, 544 U.S. 167 (2005), where a male coach of a girls’ high school basketball team was fired after protesting sex discrimination in the athletic program. The Supreme Court held he could sue for retaliation under Title IX of the Education Amendments of 1972, even though it did not expressly mention “retaliation,” because the prohibition of sex discrimination in Title IX necessarily subsumed (and implied) acts of retaliation. Basically, the Court viewed retaliation as simply one of many forms of discrimination.

The majority also rejected the employer’s argument that a Section 1981 retaliation cause of action would lead to circumvention of Title VII’s administrative exhaustion requirements, by pointing out that Title VII plaintiffs often have other causes of action available to them.

***Gomez-Perez v. Potter*, Case No. 06-1321, 128 S.Ct. 1931, 553 U.S. --- (May 27, 2008).**

- Holding: A claim by a federal employee of retaliation for complaining of age discrimination is cognizable under the Age Discrimination in Employment Act, 29 U.S.C. § 633a.

A window distribution clerk of the U.S. Postal Service filed an EEO complaint within the USPS, alleging she had been denied a transfer back to the station and position she had previously held because of her age (age 45). After that, groundless complaints were leveled against her in meetings, her name was written on sexual harassment posters in the workplace, she was falsely accused of sexual harassment by her co-workers, and her hours were drastically reduced. The district court granted summary judgment to the defendant, and the First Circuit affirmed. The Supreme Court, in a 6-3 decision, reversed.

The issue arose because the ADEA provisions applicable to federal employees, 29 U.S.C. § 633a, prohibit age discrimination, but not retaliation. The federal sector provision of the ADEA states that all personnel actions affecting employees or applicants in the protected age group “shall be made free from any discrimination based on age.” By contrast, the ADEA provision governing private employers, 29 U.S.C. § 623(d), provides an explicit cause of action for retaliation: “It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter.”

The majority of the Court relied heavily on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (discussed above in *CBOCS West, Inc. v. Humphries*), which recognized legal protection for a white person who spoke out against race discrimination. The majority also relied heavily on *Jackson v. Birmingham Board of Educ.*, 544 U.S. 167 (2005) (discussed above in *CBOCS West, Inc. v. Humphries*), where an anti-retaliation prohibition was held implicit in the sex discrimination provisions of Title IX of the Education Amendments of 1972 (discussed above). The majority concluded that the ADEA federal sector language was not materially different from the language at issue in *Jackson* and was the functional equivalent of the language at issue in *Sullivan*. The majority also emphasized that the employer did not urge the overruling of *Jackson* or *Sullivan*, and did not question the reasoning of those decisions.

One complication was that the private sector provisions of the ADEA expressly provided prohibitions against both discrimination and retaliation, but the federal sector provisions only addressed discrimination. The majority concluded that the presence or absence of an express prohibition against retaliation in a statute should not influence a decision as to whether a retaliation protection arises from a discrimination ban. Also, because the ADEA's federal sector and private sector provisions were enacted seven years apart, looking to one set of provisions to interpret the other was deemed inappropriate. Further, because of assorted inconsistencies in the wording of the different ADEA provisions, such inconsistencies were no basis for restricting the broad § 633a ban against "discrimination."

Still pending: Crawford v. Metropolitan Government of Nashville & Davidson County, Tenn., Case No. 06-1595:

- Ruling below: 99 Fair Empl. Prac. (BNA) 438 (6th Cir. Nov. 14, 2006)
- Current status: Supreme Court granted review (Jan. 18, 2008).
- Oral argument: Set for October 8, 2008.

- Question presented: "Does anti-retaliation provision of Section 704(a) of Title VII of 1964 Civil Rights Act protect worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?"

- Facts: Crawford was a witness interviewed in the employer's investigation into an internal complaint of sexual harassment made by another employee against the Human Resources Director. (The other employee did not file an agency charge of discrimination.) Crawford reported to the investigator (who herself was also a subordinate of the accused) her own experiences with the HR Director. According to Crawford, on numerous occasions, the accused asked to see her "titties," grabbed his crotch in reaction to her asking "What's up?," and on one occasion, reacted to her asking what she could do for him by grabbing her head and pulling it to his crotch. Two other employees who were interviewed reported the accused had engaged in sexually inappropriate conduct. The investigator concluded that the accused had engaged in "inappropriate and unprofessional behavior," but not to the extent of Crawford's allegations. The accused was not disciplined. The investigator recommended training and education for the staff. The three employees who reported sexually inappropriate behavior by

the accused HR Director, including Crawford, were fired. Crawford then filed a retaliation charge, and later pursued a retaliation lawsuit.

- Court of Appeals' decision: Summary judgment for the employer was affirmed. Crawford's interview with the investigator was not protected "opposition" under Title VII, as she had not filed an agency charge, nor registered an internal complaint. Moreover, her interview was not "participation" "in an investigation, proceeding, or hearing under" Title VII, as no agency charge had been filed by complainant. If the employer had been investigating an agency charge, her interview would have been protected "participation."

III. Arbitration

Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S.Ct. 1396, 552 U.S. --- (Mar. 25, 2008).

- Holding: The grounds for a court to vacate or modify an arbitration award on an expedited basis, specifically enumerated in Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are exclusive, and may not be supplemented by the parties' arbitration agreement; specifically, a court may not grant expedited vacatur or modification of an arbitration award as "based on erroneous conclusions of law," under the FAA, notwithstanding the parties' express agreement for such broader judicial review.

This is a lease dispute with a tortuous history. The landlord (Hall Street) contested the tenant's (Mattel's) right to terminate the lease on the date it did, and also claimed that the tenant was responsible for, among other things, indemnification payments for required environmental clean-up at the site. The tenant argued that it had the right to terminate the lease and challenged the landlord's interpretation of the lease's indemnification provision. In a district court trial, the tenant's right to terminate the lease was sustained.

The parties agreed to refer the remaining dispute – the landlord's claim for the costs of cleaning up the site – to arbitration. The district court entered the parties' arbitration agreement as a court order. One paragraph stated that the district court (emphasis added):

may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) *where the arbitrator's conclusions of law are erroneous.*

(Evidence was presented later indicating that the parties would not have agreed to arbitration had they known that the "erroneous conclusions of law" judicial review would not be available.) The arbitration agreement expressly mentioned one section of the FAA, Section 7, empowering arbitrators to compel attendance of witnesses.

This agreement and order provided for greater appellate review of the arbitration decision than that provided by the FAA. Section 9 of the FAA provides that a court "must" confirm an

award “unless” it is vacated, modified or corrected “as prescribed” in Sections 10 and 11 of the FAA. Section 10 lists grounds for vacating an award, such as where the award was procured by “corrupted,” “fraud,” or “undue means,” and where the arbitrators were “guilty of misconduct,” or “exceeded their powers.” Under Section 11, the grounds for modifying or correcting an award include “evident material miscalculation,” “evident material mistake,” and “imperfect[ions] in [a] matter of form not affecting the merits.” Section 6 of the FAA provides that the applications to the court under Sections 10 or 11 “shall be made and heard in the manner provided by law for the making and hearing of motions. . . .”

The arbitrator issued a decision in the tenant’s favor. Hall Street applied to the district court under the FAA to vacate the award as based on “erroneous conclusions of law,” which the court did. Although Mattel contended that the FAA limited the permissible scope of judicial review to those grounds enumerated in the FAA, the court concluded that the FAA left parties “free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review.”

The arbitrator issued a new award, resulting in another district court decision under the FAA, generally upholding the arbitrator’ new award but correcting the calculation of interest.

Both parties then took the case to the Ninth Circuit Court of Appeals, which held that “the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.” The case was remanded to the district court, which again vacated the arbitration award under the FAA. This time the court concluded that the award was in excess of the arbitrator’s powers, in violation of Section 10 of the FAA, 9 U.S. C. § 10, because the award supposedly rested on an “implausible interpretation” of the lease. Mattel again appealed, and the Ninth Circuit again reversed, holding that “implausibility” is not a valid ground for vacating or correcting an award under Sections 10 or 11 of the FAA.

The Supreme Court, in a 6-3 decision, affirmed the Ninth Circuit.

Although arbitration is a creature of contract, and the FAA lets parties tailor many features of arbitration by contract (how arbitrators are chosen, what their qualifications will be, which issues are arbitrable, arbitration procedure, choice of substantive law, etc.), the FAA has “textual features at odds with enforcing a contract to expand judicial review following the arbitration.” The types of grounds for vacating or modifying an arbitration award, specified in Sections 10 and 11 of the FAA, involve “extreme arbitral conduct.” Such outrageous conduct does not support review “for just any legal error.”

Also, Section 9 of the FAA provides that the court “must grant” an order confirming the award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” The mandatory language “does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.”

The text of the FAA is consistent with a national policy favoring arbitration with only the minimum judicial review necessary to make it a fair forum. Letting the parties control the

judicial standard of review would make informal arbitration a mere prelude to more cumbersome and time-consuming judicial review process.

This interpretation of the FAA is consistent with select statements made by legislators and members of Congress when enacting predecessor legislation.

The dissenting opinion generally reasoned that the FAA was intended to make agreements to arbitrate more enforceable, not less, and that the objective of the FAA was to enforce private arbitration agreements according to their terms. The dissenting Justices also reasoned that Sections 10 or 11 of the FAA merely list certain grounds for vacating or modifying an arbitration award “that must always be available,” but “simply does not speak to the question whether [the parties] may agree to additional grounds for judicial review.

Note: The Tenth Circuit’s position on this question is the same as the majority in *Hall Street. Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001).

Note: The significance of this decision is uncertain, because of its narrow scope. The majority opinion made clear that the FAA “is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.” The Court observed that, from the outset and continuing through all the appeals, the parties consistently treated the case only as a FAA case. The majority also noted that the parties, instead of treating this case strictly as an FAA case, might have “amended [their pleadings] to raise an independent state-law contract claim or defense specific to the arbitration agreement.” 552 U.S. at ---, n. 3.

Note: After the oral argument of this case, on November 7, 2007, the parties were ordered to file supplemental briefs addressing three questions: “(1) Does authority exist outside the [FAA] under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review of an arbitration award? (2) If such authority does exist, did the parties, in agreeing to arbitrate, rely in whole or in part on that authority? (3) Has petitioner in the course of this litigation waived any reliance on authority outside the FAA for enforcing the judicial preview [sic] provision of the parties’ arbitration agreement?” Briefs were filed on these questions. The majority opinion suggested that the “authority outside the FAA” referred to in these questions was Rule 16 of the Federal Rules of Civil Procedure, as the arbitration was the subject of a court order in the middle of federal litigation – “should the agreement be treated as an exercise of the District Court’s authority to manage its cases under Federal Rules of Civil Procedure 16?” In the majority opinion, the Court expressly declined to answer these questions, expressing no opinion about them, due to their lack of development.

Still pending: Penn Plaza LLC v. Pyett, Case No. 07-581:

- Ruling below: *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. ----)
- Current status: Supreme Court granted review (Feb. 19, 2008).

- Question presented: “Is arbitration clause in collective bargaining agreement, freely negotiated by union and employer, that clearly and unmistakably waives union members’ right to judicial forum for their statutory discrimination claims, enforceable?”

- Facts: Commercial office building employees, all over age 50, were reassigned from positions as night watchmen to less desirable positions as night porters and light duty cleaners, when the building manager contracted out building security work. The employees claimed they were demoted because of their age.

Age discrimination was expressly prohibited by the employees’ collective bargaining agreement, between their union, Local 32BJ of the Service Employees International Union, and their employer. The CBA specifically prohibited age discrimination in violation of the Age Discrimination in Employment Act, and provided that all such discrimination claims “shall be subject to 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.”

The plaintiffs filed grievances with the Union under the CBA, claiming violations of the ADEA. The grievance was submitted to arbitration. Shortly after the arbitration began, the Union declined to pursue age discrimination claims as to the reassignments, because the Union had consented to the employer’s contracting out the security work. The Union did pursue certain claims regarding the denial of overtime work and the allegedly wrongful denial of a promotion to one of the plaintiffs. The arbitrator later ruled in the employer’s favor on all issues presented.

While the arbitration was ongoing, but after the Union had declined to submit the age discrimination claims, the plaintiffs filed EEOC age discrimination charges. The plaintiffs later pursued ADEA claims in federal court regarding their transfers and replacement by younger individuals with the security company.

- Court of Appeals’ decision: The CBA provision in *Penn Plaza* could not legally deny the plaintiffs the right to pursue federal, state and local statutory age discrimination claims in court. The Court followed an earlier Second Circuit decision, *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir. 2000), which held that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker’s right to pursue statutory employment discrimination claims in a federal forum is unenforceable, regardless of the wording of the CBA or the arbitration provision. 498 F.3d at 92.

The Supreme Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), held that a CBA could not waive covered workers’ rights to a judicial forum for causes of action created by Congress – in that case, a cause of action created by Title VII. The same logic applies to statutory age discrimination claims.

The Supreme Court’s later decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), did not change *Gardner-Denver*. In *Gilmer*, an arbitration agreement between an individual employee and an employer, waiving the individual’s right to go to court with

employment discrimination claims, was held enforceable under the Federal Arbitration Act as to the individual employee's later age discrimination claims. But *Gilmer* did not address whether a CBA could compel the arbitration of a bargaining unit employee's age discrimination claim.

Further, the Supreme Court's decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), did not overrule *Gardner-Denver*; nor did it recognize *Gilmer* as having done so. (In *Wright*, the defendant-employer argued that the plaintiff-employee's disability discrimination claim under the Americans with Disabilities Act was barred by his failure to exhaust the grievance and arbitration system provided in the existing CBA, notwithstanding the fact that the union had urged the employee to pursue an ADA suit, not file a grievance under the CBA's grievance and arbitration system.) The Supreme Court in *Wright* reasoned that a union-negotiated waiver of bargaining unit employees' statutory right to a judicial forum for claims of employment discrimination must be "clear and unmistakable," and that the CBA in that case – which merely provided for arbitration of "matters under dispute" – was not such a "clear and unmistakable waiver." The Supreme Court in *Wright* expressly reserved ruling on whether a union could lawfully waive an employee's right to pursue discrimination claims in court, if "a CBA clearly encompass[ed] employment discrimination claims. . . ." 525 U.S. at 82 n. 2. "We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable." 525 U.S. at 82. Basically, the Second Circuit's *Rogers* decision had addressed the question left unanswered by *Wright*, holding that a union could not lawfully waive an employee's statutory right to sue in court for violations of the discrimination laws.

Penn Plaza concluded that there had been no change in the case law since its *Rogers* decision, and that *Rogers* had previously addressed all the arguments presented by the employer.

IV. Public Employees

***Davenport v. Washington Education Ass'n*, 127 S.Ct. 2372, 551 U.S. --- (June 14, 2007).**

- Holding: A provision of the Washington Fair Campaign Practices Act, prohibiting labor unions from using the agency-shop fees of any nonmember for election-related purposes without first obtaining the nonmember's affirmative consent, Wash. Rev. Code § 42.17.760, when applied to public-sector unions, does not violate the First Amendment.

Agency-shop fees may be assessed against individuals who are not members of the union representing them in collective bargaining, to prevent these nonmembers from free-riding on the union's efforts, yet sharing in employment benefits obtained by the union's collective bargaining efforts. Agency-shop arrangements in the public sector, however, raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment. Therefore, public sector unions are constitutionally prohibited from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective bargaining duties. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Also, public sector unions collecting agency fees must observe certain procedural requirements, to

permit an objecting nonmember to prevent the use of his fees for impermissible purposes. *Teachers v. Hudson*, 475 U.S. 292 (1986).

Washington law permits unions to charge nonmembers an agency fee equal to the union's full membership dues, and to collect this fee by the employer through payroll deductions. *See*, Wash. Rev. Code §§ 41.56.122(1), 41.59.060(2), 41.59.100. However, § 42.17.760 ("Section 760"), a provision of the Fair Campaign Practices Act, provided that a union could not use agency shop fees paid by a nonmember "to make contributions or expenditures to influence an election or to operate a political action committee, unless affirmatively authorized by the [nonmember]."

A public sector union that gave nonmembers an opportunity, twice a year, to object to non-chargeable expenses, and to receive rebates as determined by the union or an arbitrator, or otherwise to pay full agency fees, was accused of violating Section 760 in two separate cases. One case was filed by the State of Washington, the other was filed by a class of nonmembers of the union. In both cases, the union asserted that Section 760 was unconstitutional. The Washington Supreme Court held that Section 760's affirmative-authorization requirement violated the First Amendment. The Washington Supreme Court reasoned that the affirmative-authorization requirement improperly imposed on the union the burden of confirming that a nonmember did not object to the expenditure of his agency fees for electoral purposes, and further, interfered with the union's expressive associational rights.

The Supreme Court held that, because the State of Washington could have prohibited the spending of any nonmember's agency fees for anything other than collective bargaining, and because Washington could have constitutionally eliminated agency fees entirely, it was not unconstitutional for the State of Washington to place the burden of verifying that nonmembers do not object to the spending of nonmembers' agency fees for election purposes on the union.

The Supreme Court ruled that the Washington Supreme Court had misread one sentence of *Hudson* and *Abood* as having dictated "that a nonmember must shoulder the burden of objecting before a union can be barred from spending his fees for purposes impermissible under *Abood*." The sentence read, "[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Hudson*, 475 U.S. at 306, n. 16; *see also*, *Abood*, 431 U.S. at 236. The Supreme Court clarified that this sentence was *not* balancing the constitutional rights of public sector unions and nonmembers, because "unions have no constitutional entitlement to the fees of nonmember-employees." *Hudson* established a *minimum* set of procedures to be followed by unions, to meet the constitutional requirements of *Abood*, but did not set "a constitutional *ceiling* for state-imposed restrictions." (Emphasis added.)

Relying on Supreme Court campaign-finance cases, the public union in *Davenport* also argued that Section 760 was unconstitutional because it limited how the union spent "its" money, and did not limit the election-related expenditures of others. The Supreme Court distinguished the campaign-finance cases, observing that they dealt with how a regulated entity may spend money that has come into its possession without the assistance of governmental coercion of employees. On the other hand, *Davenport* was addressing public-sector agency fees that were in the union's possession only because State law and public unions had compelled the public

employees to make such payments. Section 760, the Supreme Court reasoned, was “a condition placed upon the union’s extraordinary *state* entitlement to acquire and spend *other people’s* money.” (Emphasis in original.)

Still pending: Locke v. Karass, Case No. 07-610:

- Ruling below: 498 F.3d 49 (1st Cir. 2007)
- Current status: Supreme Court granted review (Feb. 19, 2008).
- Oral argument: Set for October 6, 2008.

- Question presented: “May state, consistent with First and Fourteenth Amendments, condition continued public employment on payment of agency fees for purposes of financing monopoly bargaining agent’s affiliates’ litigation outside of non-union employee’s bargaining unit?”

- Facts: The Maine State Employees Association, designated by the state as the exclusive bargaining agent for certain executive branch employees, is legally obligated to provide certain administrative services for all the employees in the bargaining unit, regardless of whether they are or are not union members. As a result, the non-members are charged an “agency fee” by the union; this “agency fee” represents a non-member’s share of MSEA’s expenses related to its services as the exclusive bargaining agent. One of MSEA’s expenses is an affiliation fee paid to its national affiliate, the Service Employees International Union. MSEA’s affiliation fee is pooled by SEIU with the affiliation fees of other local unions. One charge against those pooled affiliation fees is SEIU’s cost of litigation across the country that is substantively related to the collective bargaining process. This means that non-members of MSEA are charged for expenses related to “extra-unit” litigation, not undertaken specifically for their own bargaining unit, but rather, was conducted by or on behalf of other units or the national affiliate sometimes in other states. Plaintiffs in this case contend that this practice violates their First and Fourteenth Amendment rights.

- Court of Appeals’ decision: This practice is constitutional, so long as the fees are pooled and the charged extra-unit litigation is germane to MSEA’s collective bargaining duties. Such charges are justified by the government’s interests in labor peace and prevention of free riders, and they do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

V. Labor

See, Davenport v. Washington Education Ass’n, 127 S.Ct. 2372, 551 U.S. --- (June 14, 2007) (“Public Employees” section above).

Chamber of Commerce of United States v. Brown, Case No. 06-939, 128 S.Ct. 2408, 554 U.S. --- (June 19, 2008).

- Holding: State laws that prohibit employers that receive state funds from using such funds to communicate with employees about union organizing are preempted by the National Labor Relations Act.

Many states have enacted laws attempting to stop employers from communicating to employees about unions, most typically banning employers from making certain communications informing employees of the disadvantages of union representation. The Supreme Court, in 7-2 decision, ruled that such state laws are preempted by the National Labor Relations Act.

California enacted two laws in 2000 to preclude state funds from being used by employers to assist, promote, or deter union organizing. One law (Cal. Gov't Code § 16645.2) bars private employers who are recipients of a grant of state funds from using the funds to assist, promote, or deter union organizing. Another law (Cal. Gov't Code § 16645.7) bans a private employer receiving state funds in excess of \$10,000 in any calendar year on account of its participation in a state program from using program funds to assist, promote, or deter union organizing. If an employer commingles state and other funds, the statute presumes that any expenditures to assist, promote, or deter union organizing derive in part from state funds. Cal. Gov't Code § 16646(b). Violators are subject to fines and penalties, including the disgorgement of the state funds, and a civil penalty equal to twice the amount of the funds used for prohibited purposes. Suspected violators may be sued by the California Attorney General or by any private taxpayer.

The California statutes were modeled on many federal laws prohibiting the use of federal funds to assist, promote, or deter union organizing. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2931(b)(7); National and Community Service State Grant Program, 42 U.S.C. § 12634(b)(1); Head Start Programs Act, 42 U.S.C. § 9839(e).

On behalf of employers receiving California state program funds, the Chamber of Commerce brought this lawsuit to have the statutes declared void, as preempted by federal labor law and the National Labor Relations Act, and as violating the First Amendment. The Ninth Circuit, in a 12-3 decision, ruled that the California statutes did not undermine federal labor policy, were not preempted by the NLRA and did not violate the First Amendment.

The Supreme Court reversed this decision, holding that the state laws are preempted by the NLRA. In 1947, the NLRA was amended by the Taft-Hartley Act, by adding Section 8(c), which protects from National Labor Relations Board regulation non-coercive speech by both unions and employers about labor organizing. California's statutes reflect a policy judgment that partisan employer speech necessarily interferes with an employee's choice about union representation – this is the same policy judgment that Congress rejected in 1947. When Congress has left employers' or unions' "weapons of self-help" unregulated by the NLRA, intending that their actions will be controlled by the free play of economic forces, states may not

impose restrictions on such employer or union activity. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

VI. Equal protection

***Engquist v. Oregon Dep't of Agriculture*, Case No. 07-474, 128 S.Ct. 2146, 553 U.S. --- (June 9, 2008).**

- Holding: The “Class-of-One” theory of Equal Protection does not apply in the context of public employment.

The U.S. Supreme Court has long held that a government entity may violate the Equal Protection clause of the U.S. Constitution, if – in the performance of its regulatory and licensing functions – the entity singles out particular citizens for different treatment without a rational basis. Examples of such regulatory and licensing functions have included the setting of easement requirements and the assessment of property values. These cases have developed the so-called “Class-of-One” theory of Equal Protection, as distinguished from those Equal Protection cases in which a plaintiff claims that to have been treated adversely because of membership in an identified class (race, gender, etc.).

Some creative attorneys successfully extended the “Class-of-One” theory of Equal Protection, to challenge adverse employment actions against public employees. Most of the federal circuit courts of appeals that had considered the issue recognized the “Class-of-One” theory in the employment setting, offering relief to any public employee able to prove that he or she was singled out for adverse treatment for irrational, arbitrary, vindictive, and/or malicious reasons.

The Supreme Court, in a 6-3 decision, ruled that the “Class-of-One” Equal Protection theory does not apply to public employment.

In *Engquist*, a state employee sued her agency, her supervisor, and a co-worker under the “Class-of-One” theory, asserting that she had been fired for arbitrary, vindictive and malicious reasons. The majority of the Supreme Court ruled that public entities have “significantly greater leeway” when acting as employers than they do when acting as regulators and licensors. According to Chief Justice Roberts, the supervision and management of public employees inherently requires discretionary judgments due to variables such as different employee personalities and skills, and different entities’ business needs, and the “Class-of-One” theory – if applied to public employment – would be contrary to such necessary discretionary judgments.

There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be “treated alike, under like circumstances and conditions” is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a

challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

* * *

[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. . . . [T]reating seemingly similarly situated individuals differently in the employment context is par for the course.

The majority of the Court emphasized that the “Class-of-One” theory is inconsistent with the rule of at-will employment. (While this is true, the point was paradoxical as the plaintiff in *Engquist* was covered by a collective bargaining agreement, and as such, presumably was not an at-will employee.)