Franczek Radelet & Rose represents management in all aspects of labor and employment law and employee benefits issues. The firm represents employers nationwide, with over 50 attorneys who are prepared to address specific questions and concerns regarding the impact of these recent Supreme Court decisions on your workplace, as well as any other labor or employment issue.

For further information, please contact...

Jennifer Niemiec
312.786.6585
jan@franczek.com

...or any other firm attorney.

Call us at 312.986.0300.

A Review of the Supreme Court's 2007–2008 Term

During its recently concluded 2007-2008 term, the United States Supreme Court considered an extraordinarily high number of labor and employment-related cases, ranging from individual employment discrimination claims to ERISA lawsuits. The Court, led by Chief Justice John Roberts, is widely regarded as moving in a more conservative direction, as evidenced by the Court's recent decisions holding that the Second Amendment establishes a personal right to own firearms, invalidating school affirmative action and diversity programs, and overturning campaign finance reform legislation.

Interestingly, however, this conservative trend is not apparent from the Court's labor and employment law decisions. Indeed, many of the Court's employment-related decisions were decidedly favorable to employees, some by unanimous or near unanimous votes.

The Court's labor and employment decisions held that employers bear the burden of proving an affirmative defense based on reasonable factors other than age under the Age Discrimination in Employment Act (ADEA); considered the admissibility of "me-too" evidence in employment discrimination cases; examined whether §1981 encompassed retaliation claims; determined that a "class-of-one" equal protection claim does not apply in the context of public employment; clarified the definition of a "charge" under the ADEA; considered the scope of the Federal Arbitration Act; addressed individual causes of action under ERISA to recover losses for breaches of fiduciary duties relative to defined contribution plans; clarified the appropriate standard for judicial review of ERSA disputes; concluded that a state pension plan which includes age as a factor was not "actually motivated" by age and therefore did not violate the ADEA; preempted a state law prohibiting the use of state funds to assist, promote or deter union organizing pursuant to the National Labor Relations Act (NLRA); and held that federal employees are protected from retaliation under the ADEA.

The following review summarizes these decisions and analyzes their likely impact on employers. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

Under the ADEA, Employer Bears Burden of Proving Affirmative Defense Based on "Reasonable Factors other than Age"

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 76 U.S.L.W. 4488 (2008), the Court considered the extent of an employer's burden in defending a claim of disparate impact discrimination under the ADEA. In this case, the employer laid off 31 salaried employees, 30 of whom were at least 40 years old, and several sued, claiming that their layoffs violated the ADEA. Under the ADEA, it is not unlawful for an employer to take action that has a disparate impact on workers over 40, as long as the differentiation is based on reasonable factors other than age (RFOA).

In a 7-1 ruling (Justice Breyer did not participate; Justice Thomas dissenting), the Court reversed the Second Circuit's finding that plaintiffs had the burden of persuasion with respect to the RFOA element. The Court held that the RFOA exemption is an affirmative defense for which the burden of persuasion falls to the employer. The Court recognized that its previous decisions have "spoken of" the RFOA as "being among the ADEA's five affirmative defenses," and that it is well established that those who rely on an exception must prove it. In the Court's view, the RFOA clause exempts otherwise illegal employer conduct by referring to an additional item of proof, thereby creating a defense for which the burden of proving falls on the employer.

The potential cost and difficulty presented by the Court's holding did not go unnoticed. In writing for the majority, Justice Souter acknowledged that requiring employers to persuade factfinders that their employment decisions are reasonable "makes it harder and costlier to defend" than if employers merely had the burden of production. He further acknowledged that this decision will sometimes affect the way employers conduct their business with employees.

"Me-Too" Evidence of Employment Discrimination is Admissible on Case-by-Case Basis

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (2008), the Court held that "me-too" evidence of discrimination is neither *per se* admissible nor *per se* inadmissible in employment discrimination matters. Plaintiff had filed suit under the ADEA, alleging that her employer had discharged her based on her age. In support of this allegation, Plaintiff sought to introduce "me-too" evidence of age discrimination – that is, testimony by other employees not parties to the case, who alleged discrimination at the hands of supervisors who had no role in the decision to discharge Plaintiff. The district court excluded the evidence as irrelevant, finding that the employees were not "similarly situated" to Plaintiff. The Court of Appeals reversed, finding that Plaintiff should have been allowed to introduce this evidence.

In a unanimous decision, the Court reversed, holding that the Court of Appeals overreached when it deemed this "me-too" evidence admissible. According to the Court, the Court of Appeals correctly concluded that the evidence was not *per se* irrelevant, but then impermissibly determined that the evidence *was* relevant and not unduly prejudicial. The Court noted that questions of relevance and prejudice are for the district court to decide in the first instance. The Court further noted, however, that the district court must conduct such inquiries based on the context of the facts and arguments of each particular case, and therefore cannot apply a *per se* rule that "me-too" evidence is always admissible or inadmissible.

Significantly, the Court remanded the case to the district court for further clarification of its ruling. The Court's decision ultimately provides district court judges with significant discretion but very little guidance concerning the circumstances under which "me-too" evidence actually is admissible. As a result, an additional element of risk has been introduced where "me-too" evidence is offered.

Visit the Publications page of franczek.com to subscribe to our Labor and Employment e-mail bulletins and to access the archive of past bulletins posted to our subscribers.

"Class-of-One" Claim Under Equal Protection Clause Does Not Apply to Public Sector Employment

In *Engquist v. Oregon Department of Agriculture, et al.*, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008), Plaintiff brought a "class-of-one" equal protection claim, in which she alleged that she was fired from her job with the Oregon Department of Agriculture not because she was a member of any identified class, such as race, sex or national origin, but rather for "arbitrary, vindictive and malicious reasons." In considering this claim, the Court recognized certain well settled principles – namely, that the Equal Protection Clause applies to administrative well as legislative actions, and that States do not generally escape its reach in their role as employers.

However, in a 6-3 opinion, the Court found that the "class-of-one" theory simply does not apply in the context of public employment. The Court noted that some forms of state action by their very nature involve discretionary decisionmaking based on various subjective, individualized assessments. In the Court's view, under those circumstances, treating one person differently than the others is a natural and accepted consequence of the exercise of that discretion, and therefore the principle of equal protection – that all individuals be treated alike – is not violated. The Court held that allowing a challenge based on the "arbitrary singling out" of a particular person in that instance undermines the very discretion granted to state officials. Further, since employment decisions are often highly subjective and individualized, treating similarly situated individuals differently in that context is "par for the course." Accordingly, the Court concluded that the "class-of-one" theory, which assumes that all individuals be treated alike and that a rational reason underlies the decision to treat someone differently, is a "poor fit" for the public employment arena.

An additional reason cited by Chief Justice Roberts as support for this holding was the need to avoid increased litigation that permitting "class-of-one" theories by public employees would inevitably cause. He wrote that accepting Plaintiff's claim in this case would mean that any personnel action where an employee could maintain a claim of differential treatment would become the basis for a federal constitutional claim. This holding obviously forecloses such a result.

§1981 Includes Claims of Retaliation

In *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008), the Court determined that 42 U.S.C. §1981 encompasses a claim of retaliation against a person who has complained about a violation of another person's contract-related rights. Plaintiff claimed that Defendant discharged him due to his race (African-American) and because he had complained to management that a colleague had discharged another African-American employee on the basis of race. Plaintiff instituted his lawsuit under 42. U.S.C. §1981 rather than Title VII, alleging that the Defendant violated §1981's "equal rights provision."

In finding that §1981 encompasses retaliation claims, the Court analogized §1981 to its companion statute, §1982. Both statutes were passed after the Civil War in order to protect the rights of black citizens: Section 1981 provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens, whereas §1982 provides that all persons shall have the same right to own and convey real and personal property. The Court recognized that precedent has long construed the statutes similarly due to their common language, origin and purpose. The Court further recognized that, in light of the fact that §1982 has long been interpreted as encompassing retaliation claims, it would interpret §1981 as encompassing the same.

Under *Humphries*, plaintiffs are now able to assert retaliation claims under §1981, and employer potential liability in such cases consequently expands. While other federal laws, including Title VII, prohibit unlawful employer retaliation, these statutes impose procedural requirements and damage limits that are not applicable under §1981.

"Charge" Defined Broadly Under the ADEA

In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008), the Court considered what constitutes a "charge" for filing purposes under the ADEA. In this case, Plaintiffs alleged that Federal Express' work performance standards were veiled attempts to force out older employees and were used to harass and discriminate against older employees, all in violation of the ADEA. Federal Express moved to dismiss the claim, arguing that Plaintiffs had not timely filed a valid charge with the EEOC before instituting suit, as required by law. Plaintiffs had submitted a "Form 283 Intake Questionnaire" to the EEOC, accompanied by a supporting affidavit describing the alleged discriminatory employment practices in detail, but had not submitted a charge form.

The Court concluded that the completed intake form and accompanying affidavit satisfied the ADEA's requirement that a "charge" be filed prior to filing suit. The Court noted that the statute itself does not define "charge;" and while the EEOC regulations provide some guidance regarding that term, they too do not provide a comprehensive definition. EEOC regulations indicate that a charge means "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." The regulations also identify five pieces of information that a charge should contain – namely, the names/addresses/telephone numbers of the charging and responding parties, a description of the alleged discrimination, the number of employees employed by the employer and an indication whether the charging party has initiated state proceedings. At the same time, the EEOC regulations qualify these requirements, noting that a charge is "sufficient" if it is in writing, names the prospective respondent and generally alleges the discriminatory acts.

The Court ultimately agreed with the EEOC's interpretation of these regulations, holding that a filing is deemed a charge "if the document reasonably can be construed to request agency action and appropriate relief on the employee's behalf." In this case, the intake form contained all of the information required by the EEOC. Further, the affidavit detailed the alleged discrimination and included a request that the agency require Federal Express to end its discriminatory practices. The Court construed the latter as a request for the agency to act and held that the intake form and affidavit constituted a charge for purposes of the ADEA.

Federal Arbitration Act Supersedes State Laws

In *Preston v. Ferrer*, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), the Court again affirmed federal labor policy endorsing and favoring arbitration. In this case, the Court held that when parties agree to arbitrate *all* claims under a contract, state laws that confer jurisdiction in another forum, whether judicial or administrative, are superseded by the Federal Arbitration Act (FAA).

Here, Plaintiff Alex Ferrer – also known as "Judge Alex" on the Fox television network – signed a contract with Arnold Preston, a California attorney who works in the entertainment industry. This contract contained a standard clause providing that the parties agreed to arbitrate before the American Arbitration Association "any dispute … relating to the terms of [the contract] or the breach, validity, or legality thereof." Preston later demanded arbitration regarding his claim for fees due under the contract. Ferrer refused this demand for payment, alleging that the contract – arguably for "personal management" services – was void because Preston had acted as an unlicensed talent agent, in violation of the California Talent Agencies Act (TAAA). Ferrer maintained that the TAAA vested exclusive jurisdiction over disputes concerning talent agency contracts with the California Labor Commissioner, and that the FAA did not displace the state agency's primary jurisdiction. Preston insisted that he had acted as a "personal manager" rather than a talent agent, and that given the contract's arbitration clause, all claims must be brought in the arbitral forum.

In an 8-1 decision, the Court determined that, where the parties voluntarily enter an agreement to arbitrate disputes, the FAA overrides any state law that may vest jurisdiction and adjudicatory authority regarding those disputes in a state administrative agency. The Court noted that the FAA's displacement of conflicting state law was well established, and that attacks on the validity of an entire contract – as Ferrer alleged here – were within the province of the arbitrator. The Court specifically relied on its decision in *Buckeye Check Cashing, Inc. v. Cardgena*, 546 U.S. 440 (2006), where it held that even where state laws vest primary jurisdiction regarding certain disputes in a judicial forum, questions involving the validity of a contract under the FAA were for the arbitrator to decide. Here, the Court expanded *Buckeye* to find that the FAA displaced those state laws conferring jurisdiction on state administrative agencies.

Individual Action Recognized for Fiduciary Breach by 401(k) Participant

In *LaRue v. DeWolff, Boberg & Associates, Inc.,* 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008), the Court considered whether a participant in a 401(k) retirement savings plan can sue an employer under ERISA to recover losses caused by his employer's alleged failure to comply with the employee's investment instructions. Plaintiff had filed suit against his former employer, DeWolff, as well as the 401(k) retirement savings plan administered by that employer. Plaintiff asserted that he had directed his employer to make changes to his account investments, but the employer failed to heed these instructions. Plaintiff alleged that this failure resulted in a loss of $150,000 to his account and constituted a breach of fiduciary duty under ERISA.

ERISA identifies six causes of actions, one of which authorizes plan participants, beneficiaries and fiduciaries to bring actions "on behalf of a plan" to recover for violations of the obligations to properly manage, administer and invest fund assets. The Court of Appeals had determined that ERISA's provisions protect the "entire plan," rather than the rights of individual participants like Plaintiff, and that he therefore could not sue to recover for personal losses in his individual plan account.

In a unanimous decision, the Court disagreed, finding that Plaintiff's cause of action concerned misconduct that fell squarely within ERISA's provisions. In doing so, the Court recognized a distinction between defined benefit and defined contribution plans under ERISA. It noted that, with defined benefit plans, misconduct by the plan administrators does not affect an individual's entitlement to the benefit unless it creates or enhances the risk of default of *the entire plan*. In contrast, fiduciary misconduct relative to defined contribution plans "need not threaten the entire plan" to result in a reduction of benefits below the amount that participants might otherwise receive.

Thus, the Court concluded that claims of fiduciary breach are recognized under ERISA, whether it results in reduction of plan assets to all participants and beneficiaries, or only to individual account holders. ERISA therefore authorizes causes of action for fiduciary breaches that impact the value of a participant's individual investment account, and the availability of such claims demonstrates the importance of close and proper administration of ERISA benefit plans.

In Reviewing Denial of Benefits, Courts Must Weigh Conflict of Interest Created by Dual Role of ERISA Plan Administrator

In *Metropolitan Life Ins. Co., et al. v. Glenn*, 128 S. Ct. 2343, 76 U.S.L.W. 4495 (2008), the Court clarified the appropriate standard of review for ERISA disputes. Petitioner Metropolitan Life Insurance Company served as both the administrator and the insurer of an employer's long-term disability insurance plan, which was governed by ERISA. As administrator, Petitioner had discretionary authority to determine whether an employee's claim for benefits was valid and whether it would pay valid benefit claims.

The Court, clarifying its earlier standard of review set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), concluded in a 5-4 decision that a plan administrator that both evaluates claims for benefits and pays benefits claims – like Petitioner – creates an inherent conflict of interest. The Court also ruled that this conflict of interest should be taken into account on a case-by-case basis, depending on the facts and circumstances, on judicial review of benefit determinations. While ultimately the Court's opinion provided little direct guidance regarding the specific weight the conflict of interest should be given, it noted that this factor will prove "less important" where plan administrators take active steps to lessen potential bias, such as isolating claims administrators from those involved in financial decisions and imposing a system that penalizes inaccurate decision-making. Both employers and plan administrators should consider revising their claims procedures in light of the Court's opinion in this case.

State Disability Plan Lawful Under the ADEA Despite Disparity in Benefits Based on Age

In *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361, 76 U.S.L.W. 4503 (2008), the Court examined whether a state disability benefits plan violated the ADEA where it seemingly drew a distinction based on age.

Under the State of Kentucky's pension plan, law enforcement officers, firefighters and other public employees engaged in "hazardous occupations" are eligible for retirement if they have 20 years of service or are over the age of 55 and have at least 5 years of service. Employees who become disabled but are not eligible for normal retirement benefits can retire immediately. These "disability" retirement benefits are calculated by adding a number of imputed years – meaning, a number equal to the years the disabled employee would have had to work in order to become eligible for normal retirement benefits. In this case, the employee became disabled at the age of 61. As he became disabled after he had already qualified for normal retirement benefits, the pension plan did not impute any additional years in calculating the amount of his benefit. The employee complained of age discrimination and the EEOC argued that the pension plan impermissibly failed to impute years solely because he became disabled after he reached age 55.

In a split 5-4 decision, the Court found that the plan did not violate the ADEA. The Court relied on its decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), explaining that a plaintiff in a disparate treatment claim based on age must demonstrate that age "actually motivated" the employer's decision. Here, six factors persuaded the Court to conclude that the disparity in benefits under the Kentucky pension plan was not actually motivated by age.

First, age and pension status are "analytically distinct" concepts, and the Court noted that it is easily conceivable that decisions are actually made because of pension status, rather than age, even where pension status it itself based on age – which is entirely permissible under the ADEA. Second, the Court recognized the flexibility afforded pension plan benefits under the ADEA, and further recognized that Congress has approved benefit programs calculating disability benefits using a formula that expressly accounts for age. Third, the Court found there was a "clear non-age-related rationale" for the disparity in benefits under the Kentucky plan, in that the plan sought to treat disabled employees as if they became

(cont.)

disabled after attaining eligibility for normal retirement benefits. Fourth, the Kentucky plan, while working to the disadvantage of this particular older employee, could work to the advantage of older workers in some instances. Fifth, the Court determined that the state pension plan did not rely on any stereotypical assumptions that the ADEA seeks to eradicate, such as stereotypes about the work capacity of older workers relative to younger workers. Finally, the difficulty of crafting a remedy that can simultaneously correct this disparity and achieve the legitimate objective here – namely, to provide disabled employees with the benefits they would normally receive absent their disabled condition – further suggested to the Court that this particular objective, rather than age, "actually motivated" the decision herein.

Federal Employees Protected from Retaliation Under the ADEA

In *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 170 L. Ed. 2d 887 (2008), the Court ruled that the ADEA prohibits retaliation against federal employees who have filed complaints of age discrimination. Plaintiff, an employee with the United States Postal Service (USPS), had asserted that the USPS violated the federal-sector provision of the ADEA by retaliating against her because she had earlier filed an age discrimination claim. The federal-sector provision of the ADEA provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age."

The question for the Court was whether the phrase "discrimination based on age" includes retaliation based on the filing of an age discrimination claim. In a 6-3 decision, the Court held that it does. In doing so, the Court relied on prior decisions interpreting similar language in other antidiscrimination statutes, including §1982 and Title IX, to include claims of retaliation. The Court rejected USPS's reliance on the presence of a specific provision in the ADEA itself prohibiting retaliation against individuals who complain about age discrimination in the private sector, and the absence of any such provision for employees in the federal sector, as support for its argument that Congress intended that the ADEA not encompass retaliation claims. The Court found this argument undermined by the seven year gap between the enactment of the private and federal-sector provisions.

NLRA Preempts State Law Prohibiting the Use of State Funds to Assist, Promote, or Deter Union Organizing

In *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 76 U.S.L.W. 4482 (2008), the Court concluded that the NLRA preempted a state law that restricted employers' right to respond to union organizing campaigns and engage in lawful speech regarding union organizing. In this case, the Court considered a California state law that forbid certain employers receiving state funds from using those funds to "assist, promote, or deter union organizing." The statute encompassed any attempt by an employer to influence its employees' decision to either support or oppose a labor organization.

The Court recognized that Congress intended to encourage free debate on issues dividing labor and management and expressly protected free debate and non-coercive speech when it enacted Section 8(c) of the NLRA. In a 7-2 decision, the Court held that the state statute was unequivocally preempted because it embraced a

(cont.)

policy judgment renounced by Congress – namely, that partisan employer speech interferes with an employee's choice about union representation. The Court further determined that the State of California clearly enacted the statute in its role as a regulator, rather than as a market participant seeking to legitimately respond to state procurement constraints or to local economic needs. Put simply, the Court found that the statute imposed a negative restriction on employer speech about unionization that was clearly preempted by the NLRA.

This decision reinforces an employer's right to freely and openly express its views about unionization to its employees, and ensures that the NLRB, rather than a patchwork of state statutes, will continue to regulate and determine the range of permissible conduct during union organizing campaigns.

Looking Ahead: The 2008–2009 Term

The Court will open its 2008-2009 term on October 1, 2009. The Court has already selected several labor and employment cases that it will hear during the next term:

- ***14 Penn Plaza v. Pyett:*** The Court will consider whether unions can waive individual members' rights to pursue employment discrimination claims in court.
- ***Crawford v. Metropolitan Government of Nashville:*** The Court will consider whether employees are protected against retaliation for accusations of discrimination or harassment that they assert during an internal employer investigation.
- ***Locke v. Karass:*** The Court will consider whether a state can require public employees who are not union members but are included in a bargaining unit represented by a labor organization to pay agency fees for litigation expenses outside the bargaining unit.