Labor and Employment Law

The Supreme Court's ADEA Cases: How will the Nine Grapple with a Graying Workforce in the Wake of *Ledbetter*?

*By Alan F. Smith**

The Supreme Court heard five age discrimination cases this term which will have a significant impact on employment law. Of special interest in these cases is whether the Roberts Court will apply its allegedly pro-business/pro-employer jurisprudence in the ADEA context.[1] Not all of the High Court's recent decisions have pleased Congress, particularly the House, which has shown a keen interest in remedying some of the Court's allegedly anti-worker decisions. Depending on the outcome of this term's cases, Congress may be weighing in shortly with its opinion of the Court's decisions.

Congress did just that last summer in response to *Ledbetter v. Goodyear*.[2] *Ledbetter* drew sharp protests from powerful Democrats.[3] The House passed a legislative fix—by a 225-199 party-line vote—just two months after *Ledbetter* was handed down.[4] The House bill did not make it in the Senate, but Senator Edward Kennedy has introduced legislation this session to fix *Ledbetter*.[5] There is ample reason to think that the Democrat-controlled Congress will continue to seek legislative remedies for decisions that it believes limit employee rights or remedies.

Given the graying of the American workforce, no matter what the Court decides, it will likely face more ADEA cases in the future.[6] The number of older employees who are continuing to work is predicted to increase in the near future.[7] As the nation's overall population ages, these older employees will constitute an ever greater percentage of the American workforce.[8] The increased prevalence and importance of age-related cases will undoubtedly lead to increased review by the appellate courts and, presumably, by the Supreme Court itself.[9]

Such a development may, in turn, lead to more back-and-forth between the two branches over this increasingly important area of the law. The 110th Congress has taken a renewed interest in employment issues and a continued resurgence of employment legislation is likely, particularly if the Democratic candidate wins the White House and Democrats pad their existing congressional majorities next November.[10] Even with anticipated retirements, the Court's liberal/conservative makeup is expected to remain largely the same in the near term, although it may become slightly more conservative if a Republican wins the presidency this fall.[11] This interesting confluence may, therefore, continue for some time. Whether the Court's decisions this term will engender *Ledbetter*-like condemnation by Congress and accompanying legislation remains to be seen.

Sprint/United Management Co. v. Mendelsohn: Admissibility of "Me Too" Evidence of Discrimination

Background

Ellen Mendelsohn was laid-off by Sprint as part of a reduction in force ("RIF").[12] She sued under the ADEA and sought to introduce the testimony of five other former Sprint employees to support her claim. The other employees alleged variously: (1) hearing at least one Sprint supervisor denigrate older employees, (2) that Sprint used its intern program to discriminate against older workers, (3) seeing a spreadsheet indicating that age was a consideration in layoffs, (4) receiving an unwarranted negative evaluation, (5) being "banned" from working for Sprint because of age, and (6) that Sprint required permission before hiring anyone older than forty.

District Court

Sprint sought to preclude the other employees' testimony as irrelevant. None of the other employees worked in Mendelsohn's department, reported to the same supervisors, or alleged hearing discriminatory remarks by Mendelsohn's supervisors. The district court granted Sprint's motion, allowing "evidence of discrimination against Sprint employees who are similarly situated," but excluding evidence of "discrimination against employees not similarly situated to [Mendelsohn]." The Tenth Circuit held that the district court abused its discretion by improperly applying a per se rule that evidence of discrimination from employees with different supervisors is per se irrelevant.

Supreme Court

A unanimous Supreme Court held that evidence of discrimination by other supervisors is neither per se admissible nor per se inadmissible under the Federal Rules of Evidence.[13] Whether this "me too" evidence is relevant in an ADEA case is a "fact-intensive, context specific" determination based on numerous factors.[14] The Court specifically noted factoring in "how closely related the evidence is to the plaintiff's circumstances and theory of the case."[15]

The Court further held that the Tenth Circuit did not afford the district court the deference it deserved under abuse of discretion review in determining the admissibility of evidence under the Federal Rules.[16] Nothing in the district court's decision indicated application of a per se rule, the Court said,[17] and because the basis of the district court's decision was thus unclear, the Court vacated its ruling and remanded the case.

The Aftermath

Both sides, along with business interests and pro-employee groups in general, are already claiming victory.[18] Sprint, other businesses, and business organizations are pleased because the Court overturned the Tenth Circuit's order and analysis, allowing the "me too" testimony. Mendelsohn and other employee rights groups see the Court's ruling as a watershed, because the Court has now affirmatively stated that this evidence *may* be admissible on a case-by-case basis.

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Federal Express Corp. v. Holowecki: What Constitutes an EEOC "Charge" in ADEA Cases?

Background

In the mid-1990s, FedEx initiated two new programs which tied employee compensation to performance measures. Employees allege the programs are merely a "veiled attempt" to force older employees to leave before they can receive retirement benefits. Patricia Kennedy, a FedEx employee, filed with the EEOC, alleging age discrimination. Kennedy and fourteen other current and former FedEx employees, also over forty years old, then filed suit, alleging age discrimination.

The issue is whether Kennedy filed a "charge." After filing an EEOC charge alleging age discrimination, an individual must wait sixty days before filing suit.[19] During this time, the EEOC processes the charge, investigates, and attempts to resolve the matter without litigation. Kennedy did not file a formal charge form. Instead, she filed an intake questionnaire with a signed affidavit attached. The district court held that these documents were not a charge and dismissed the case, only to be reversed by the Second Circuit.

The Supreme Court

The Supreme Court, by a 7-2 vote, held that Kennedy's documents were a charge. Because the ADEA did not define "charge," the Court, led by Justice Kennedy, deferred to the EEOC's reasonable interpretation and regulations. The Court adopted the EEOC's permissive request-to-act standard to determine whether a filing is a charge: in addition to the name of the party charged with discriminating, the filing "must be reasonably [and objectively] construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."[20]

The EEOC's own interpretation and application of this position was inconsistent.[21] Initially, for example, Kennedy's filing was not considered a charge by the EEOC field office that received it.[22] Because of this mistake, Kennedy sued before the EEOC began its conciliation process with FedEx.

But the EEOC's interpretation is still entitled to deference. Its position is supported by its purpose and operations. The EEOC is required to initiate informal dispute resolution proceedings when an ADEA-related charge is received. But the EEOC is also supposed to educate the public.[23] The EEOC must have flexibility to weed out information requests from enforcement cases. Otherwise, employees may not consult the EEOC for information, fearing that this consultation will initiate action against their employer. The ADEA was intended to be easily accessible to average citizens and not to require the use of attorneys.[24]

Kennedy's filing was a charge. Her intake questionnaire, filed instead of the formal charge form, combined with her "detailed," signed affidavit were sufficient.[25] Kennedy's request to "[p]lease force Federal Express to end their age discrimination plan" is a request for EEOC to remedy the discrimination on her behalf. To a reasonable extent, filings should be interpreted to protect employee rights and remedies, and ambiguity should not be held against the filer. Kennedy's filing also included the minimum information required by federal regulations.[26] The potential confidentiality of her affidavit did not prevent it from becoming a charge.[27]

Because the EEOC did not originally consider Kennedy's filing a charge, it did not initiate the ADEA's informal dispute resolution process. FedEx was not notified of the allegations until Kennedy sued and, therefore, it had no opportunity to resolve the matter without litigation. The Supreme Court advised the district court to stay the case on remand to give the parties an opportunity to settle.

Justice Thomas, a former EEOC Chairman, wrote a strongly worded dissent, which Justice Scalia joined, which stated that the majority erred by introducing and applying an overly broad, "vague," "malleable," and "vacuous" standard.[28] The Court simply did not provide a clear standard for distinguishing whether a filing is or is not a charge. "Charge," which is commonly defined as an "accusation" or "indictment," has an ordinary administrative law understanding, Thomas said, including "the employment discrimination context where a charge is a formal accusation that an employer has violated or will violate, employment discrimination laws."[29] The standard must be grounded in the meaning of the word "charge."

The dissent argued that Kennedy's documents did not clearly and objectively indicate her "intent to initiate the EEOC's processes" and ask it to "take *the particular form* of remedial action that results from filing a charge."[30] Kennedy's request for help "cannot be equated with [her] intent to file a charge."[31] Her choice not to use the official charge form, while not dispositive, was "strong evidence" of her intent. Unlike the charge form, aspects of her filing indicated that it should not be considered a charge; including the title, a statement that additional steps were expected, and the filer's ability to maintain confidentiality.[32] The documents, in their entirety, did not objectively indicate her intent to initiate EEOC enforcement proceedings.

The EEOC's handling of Kennedy's filings and its general complaint process bolster the dissent's position. Initially, the EEOC itself did not treat Kennedy's filing as a charge.[33] Typically, the EEOC does not consider intake questionnaires, like Kennedy's, to be charges. Instead, the EEOC uses questionnaires to investigate and develop charges. Charges are then completed and filed by the EEOC, not the employee. While an intake questionnaire could be considered a charge, Kennedy's filings were not sufficient.

The Fallout

The decision generally benefits employees and is likely to meet with the approval of Congressional Democrats.[34] The Court's "permissive" standard gives the EEOC and employees greater flexibility when filing, processing, and investigating charges.[35] Althought the EEOC's interpretation and application were imperfect, its "request to act" standard will benefit employees overall, at least as opposed to the alternatives. Employees will also be encouraged by the Court's emphasis on the totality of the filing, and its strong reminder that the process should be as "laymen-friendly" as possible. The Court's holding that post-filing conduct will not nullify an otherwise valid charge is an additional positive for employees. The EEOC was also directed to revise and clarify its forms and procedures to minimize future "misunderstandings."[36]

Gomez-Perez v. Potter: Federal Employee ADEA Retaliation Claims

Background

Gomez-Perez will decide whether the ADEA provides federal employees with a private cause of action for retaliation.[37] Myrna Gomez-Perez, a forty-five-year-old Postal Service employee, was granted her request to transfer from New York to Puerto Rico. She then requested and was granted a transfer to another office which was closer to her sick mother. Shortly after this request was granted, she requested a transfer back. This request was denied, and the available position was changed to part-time and filled that day. After Gomez filed a union grievance and EEO complaint claiming age discrmination, her supervisor and co-workers retaliated against her.

District Court

Gomez sued under the ADEA, claiming she was retaliated against because of her EEO complaint. The district court held that the suit was barred, because the United States had not waived sovereign immunity for ADEA retaliation claims.

First Circuit

The First Circuit reversed the district court on sovereign immunity, holding that sovereign immunity was waived and did not bar Gomez-Perez's ADEA claim. The court then turned to whether the ADEA's federal-sector prohibition against "any discrimination based on age" includes "retaliation."[38] Although Congress chose to explicitly provide a retaliation claim for private employees under the ADEA, it did not do so for federal employees.[39] Congress's conscious decision to include a retaliation cause of action for private employees under the ADEA, but not for federal employees, is important and dispositive.[40] Unlike Title VII, where the federal employee provisions explicitly incorporate the private sector provisions, the ADEA's federal employee provisions specifically do not incorporate the private sector provisions. Congress simply did not intend to apply the broad private employee ADEA provisions to federal employees.

The First Circuit would not imply a cause of action for retaliation, as the Supreme Court did in *Jackson v. Birmingham Board of Education*, because Title IX is significantly different from the ADEA.[41] The ADEA federal provision provides an explicit right of action that does not include retaliation. Title IX instead contains a broad prohibition against discrimination and the Supreme Court has interpreted an implied right of action from it. This expansive prohibition, and the unique ability of teachers and coaches to vindicate student rights, led the *Jackson* Court to include retaliation within the implied cause of action.[42] The ADEA does not need to protect other uniquely situated parties from retaliation in the same manner as Title IX. Finally, the ADEA federal sector provision was adopted in a different historical context than Title IX.

Supreme Court

In a 6-3 decision, the Supreme Court reversed the First Circuit, holding that the ADEA's broad prohibition against age discrimination in federal employment includes retaliation.[43] Justice Alito wrote the majority opinion and was joined by Justices Breyer, Ginsberg, Kennedy, Souter, and Stevens. The majority followed *Sullivan v. Little Hunting Park, Inc.* and *Jackson v. Birmingham Board of Education,* noting that "[a]ll three cases involve remedial provisions aimed at prohibiting discrimination."[44] The majority determined that the ADEA language in this case is "not materially different from" the Title IX language in *Jackson*, and is the "functional equivalent of" the section 1982 language in *Sullivan*. It further noted that the government did not ask the Court to overrule *Sullivan* or *Jackson*, nor did it question their reasoning. In fact, the government asked the Court to follow *Sullivan* in *Jackson* and in *CBOCS v. Humphries,* which was decided the same day as *Gomez-Perez*.[45] This inconsistency was not lost on Justice Alito, who, during oral argument, pointedly questioned the government's position that "a general ban on discrimination includes a ban on retaliation except when the government is being sued."[46]

The Court held that the First Circuit erred in distinguishing *Jackson* and *Gomez-Perez*. First, the First Circuit was wrong to distinguish *Gomez* from *Jackson* because Title IX's private right of action is implied.[47] The First Circuit improperly conflated the question of whether a statute grants a private right of action with the question of whether the statute substantively prohibits certain conduct. Second, the First Circuit erred in distinguishing *Jackson* because retaliation is more important under Title IX than under the ADEA. Both *Jackson* and *Gomez-Perez* are based on the statute's text, not policy considerations.[48] Third, the First Circuit incorrectly held that Title IX was a response to *Sullivan*, but the ADEA federal-sector provision was not.[49] The ADEA was amended in 1974, five years after *Sullivan*, and only two years after Title IX was enacted. Like *Jackson*, it is "appropriate" and "realistic" to presume that Congress expected the Court to interpret the ADEA federal provision as it did similar language in *Sullivan*.

The presence of the private sector anti-retaliation provision and absence of a similar federal provision did not persuade the majority.[50] Because private sector anti-retaliation was enacted seven years before the public sector provision was added, the negative implication here is "not the strongest." The prohibitory language in the two provisions also "differs sharply." The private sector provision specifically lists prohibited employer practices (including retaliation), while the federal sector provision instead broadly prohibits "discrimination." Again, Congress was presumably familiar with *Sullivan* and expected the Court to interpret this broad prohibition as it did in *Sullivan*. These differences yield a negative implication which is not "sufficient reason to depart from the reasoning of *Sullivan* and *Jackson*."

The majority finished by dismissing the argument that the federal civil service system provides the exclusive means of addressing retaliation. There is no direct evidence, only "unsupported speculation," that Congress intended for the civil service process to be the only remedial process for retaliation. Finally, the majority questioned why the civil service commission would assume that Congress expected it to prohibit and remedy retaliation in federal employment when Congress did not explicitly do so in the ADEA itself.

Chief Justice Roberts began by noting, even in dissent, that broad anti-discrimination provisions may also prohibit retaliation. But not "every express ban on discrimination

must be read as a ban on retaliation as well," because anti-discrmination and anti-retaliation are distinct concepts and have different purposes.[51] The overall context here indicates that the ADEA does not include a retaliation claim for federal employees.

Congress "was not sloppy," it consciously and deliberately chose to include retaliation in the private sector provision, but not in the federal sector. The negative implication raised by the private sector anti-retaliation provision "may not be at its 'strongest,'" but "it is certainly strong enough."[52] Congress chose not to include retaliation because it intended for the civil service system to address it. Congress is "quite familiar with that detailed administrative system" and recognized that regulating civil service is "complex," "complicated," and requires the careful balancing of conflicting policy issues and priorities.[53] When Congress extended the ADEA to federal employees, it expected the civil service system's "comprehensive regulatory scheme" to administratively address retaliation as it had done with Title VII.[54] Although the Civil Service Reform Act was enacted after the federal sector provision, it prohibits retaliation and includes a "host of administrative remedies." Congress intended to provide an administrative, not a judicial, remedy for retaliation in federal employment.[55]

The Day After

Ironically, after the turnover on the Court and the expectation of a dramatic rightward shift, the outcome in *Gomez-Perez* is entirely consistent with *Jackson v. City of Birmingham*. Justice O'Connor wrote the majority opinion in *Jackson*, which some believed might be overturned, with the help of Justice Alito, after she left the Court.[56] Instead, Justice Alito authors the majority opinion that upholds, strengthens, and extends *Jackson*. Stare decisis and the role of precedent were an important and controversial part of Justice Alito's confirmation, and they appear to have played a significant role in this case.[57] *Gomez-Perez*, like *Holowecki*, is a pro-employee decision that should be a pleasant surprise for Congress' Democrat majority. It has already received praise for its "new tone and direction… in distinct contrast to [*Ledbetter*]."[58] Rather than restricting employee rights as many predicted, *Gomez-Perez* has expanded them.

Meacham v. Knolls Atomic Power Laboratory: Who Bears the Burden in ADEA Disparate Impact Cases?

Background

The issue in *Meacham* is whether an employee alleging disparate impact under the ADEA bears the burden of persuasion issue of whether the defendant employer had reasonable grounds other than age itself for its conduct.[59] Although this is not *Meacham*'s first trip to the Supreme Court, this one will be a bit more extensive. In 2005, the Court vacated the Second Circuit's judgment (affirming the district court's judgment in favor of Meacham and the other plaintiffs) and remanded the case for reconsideration in light of the Court's decision in *Smith v. City of Jackson*, which was decided while Meacham's certiorari petition was pending.[60]

After being laid off by Knolls during an RIF, Meacham sued alleging age discrimination. Specifically, he claimed that the RIF had a disparate impact on older employees because all but one of the employees were over forty years old. In the RIF, employees were ranked by their job performance, flexibility, and the importance of their skills on a scale of zero to ten. Managers identified the bottom-ranked employees in the RIF and conducted an adverse impact analysis on the identified employees, similar to the EEOC's four-fifths rule.[61] A board, followed by Knolls' general manager and general counsel, then reviewed the manager's selections and the impact analysis.

Second Circuit

The Second Circuit applied the *Wards Cove* burden-shifting framework for analyzing disparate impact cases under Title VII, in light of *Smith*.[62] In *Smith*, the Supreme Court held that disparate impact is cognizable under the ADEA, and that the appropriate test in ADEA cases is a "reasonableness test," not the *Wards Cove* "business necessity" test.[63] The reasonableness test requires that employers rely on reasonable, specific, non-age factors to accomplish the employer's legitimate goals. The reasonableness test emanates from the ADEA itself, which permits any "otherwise prohibited" action "where differentiation is based on reasonable factors other than age."[64] The reasonableness test recognizes that "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[65]

The Second Circuit held that employees bear the burden of persuasion on the "reasonable factors other than age" defense.[66] Knolls had the burden of offering a legitimate business justification, while Meacham bore the burden of demonstrating that the proffered justification was unreasonable.[67] Knolls had to offer a justification for its "unaudited and heavy reliance subjective assessments of criticality and flexibility."[68] Knolls' personnel manager and its expert testified that these assessments were "ubiquitous" and "routinely used components of personnel decisionmaking systems in general and were appropriate to the circumstances."[69] Knolls satisfied its burden, so the burden shifted to Meacham to demonstrate the justification was unreasonable.

The Second Circuit began its analysis of Meacham's burden by explaining that it would not sit as a "super-personnel department" in judgment of the "[wide-]range of reasonable personnel systems." While Knolls's process was not perfect, it was also "not unreasonable."[70] Knolls established guidelines and standards that were intended to prevent and restrict arbitrary decision-making by individual managers. And Knolls actually did monitor the RIF process. The process will usually be reasonable , even if decisions are based on subjective standards, like flexibility and criticality, if these decision are made by managers who directly supervise the employees. Because age often correlates strongly with legitimate employment needs, the age-distribution of the laid-off employees is not, by itself, probative of the RIF's reasonableness, the court said. Meacham's and the other plaintiffs' ADEA claims failed to meet their burden and establish that Knolls' justification was unreasonable.

Supreme Court Outcome

Forecasting *Meacham*'s outcome is particularly difficult due to the Court's recent turnover and *Wards Cove*'s distance in time. Justices Stevens, Scalia, and Kennedy are the only members of the Court remaining who were also on the bench when *Wards Cove* was decided in 1989. Kennedy and Scalia were in the *Wards Cove* majority, while Justice Stevens authored an impassioned dissent.[71] In *Smith*, Stevens did acknowledge that *Wards Cove* governed ADEA disparate impact claims.[72] Justices Kennedy and Thomas, who did not recognize disparate impact in the ADEA context, agreed with Justice Stevens that if these claims are cognizable, they are governed by *Wards Cove*. They may have tipped their hand further by joining Justice O'Connor in stating that "once the employer has produced evidence that its action was based on a reasonable non-age factor, the plaintiff bears the burden of disproving this assertion."[73] Because Chief Justice Rehnquist took no part in Smith, one cannot even his decision as a rough proxy for that of Chief Justice Roberts. Finally, Justice Breyer recused himself from this case, leaving the more liberal members of the Court without a typically reliable vote in employment law cases.

Perhaps the most interesting aspect of *Meacham* is what the Court will not be deciding. This was apparent during oral argument when former Solicitor General Seth Waxman conceded that regardless of what objective standards and requirements are in place, the RIF process still calls for human judgment. Waxman stated that "ultimately you are relying on one person's judgment of another." This he said, goes to the heart of the second question presented on appeal, whether granting supervisors broad discretionary authority during the RIF constituted a RFOA. The Court did not grant certiorari on this question. Ultimately, this question may have a greater impact on ADEA cases, but it will have to wait for another day.

Kentucky Retirement Systems v. EEOC

Background

Kentucky Retirement Systems ("KRS") addresses whether using age as a factor in calculating retirement benefits is facially discriminatory in violation of the ADEA.[74]

The KRS plan provides two types of retirement benefits: (1) normal retirement benefits ("normal benefits") and (2) disability retirement benefits ("disability benefits"). Workers are eligible for normal benefits at fifty-five or sixty-five years old (depending on whether they work in a hazardous position) or after working twenty years.[75] Workers disabled after they are eligible for normal retirement still receive normal benefits. Generally, annual benefits are 2.5% of final compensation multiplied by years worked. But employees who become disabled and are not yet eligible for normal retirement (i.e., under fifty-five and less than twenty years of service), have years added to their actual service. Disabled employees receive the number of years remaining until eligible for retirement (i.e., until they reach fifty-five or work twenty years), but not more than the number of years they have already worked. An employee in a hazardous position who is injured in the line of duty and is eligible for disability benefits is also guaranteed additional monthly benefits.[76]

As a result, disability benefits may be greater than normal benefits for similarly situated employees: those with the same years of service and final compensation. Employees receiving normal benefits have their actual service multiplied by 2.5%, while those receiving disability benefits have their actual service plus the additional years multiplied by 2.5%. Workers entitled to disability retirement at a younger age will also receive greater benefits than other employees with the same length of service.

KRS conceded that, "assuming every factor, other than age... is identical," the annual benefit for a younger retiring worker "will frequently exceed (and will never be less than)" the annual benefit for a worker retiring at an older age because of disability.[77] KRS also acknowledged that an employee retiring due to disability (who is not eligible for normal retirement) will always receive greater annual benefits than an older employee with the same condition, service, and final compensation, disabled after fifty-five and therefore ineligible for disability benefits.

Charles Lickteig, a sixty-one-year-old deputy sheriff (with only seventeen-and-a-half years of service) applied for disability benefits.[78] Denied because he was older than fifty-five, Lickteig filed an EEOC charge. The EEOC investigated and determined that KRS violated the ADEA. Conciliation was unsuccessful and the EEOC sued. The district court granted summary judgment for KRS, holding that the EEOC did not establish that the plan was "discriminatory, either facially or through disparate treatment combined with intent."[79]

Sixth Circuit: Take One

A three-judge panel of the Sixth Circuit upheld the district court's decision granting KRS summary judgment. Although the panel was troubled by the case, it felt constrained by precedent.[80] In *Lyon v. Ohio Education Association & Professional Staff Union*, the Sixth Circuit upheld a strikingly similar retirement plan that also attributed unworked service to younger workers when determining benefits.[81] "Because the retirement plan at issue is materially indistinguishable from the early retirement incentive plan in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA."[82] If it were not controlling, the "difficulties with the *Lyon* rationale and holding" may have resulted in a different outcome.[83] But *Lyon* "foreclosed" inferring intent from the employer's knowledge of its own plan.[84]

Sixth Circuit: Take Two

The Sixth Circuit granted the EEOC's rehearing request and sitting en banc, it overruled the three-judge panel.[85] The EEOC established a prima facie ADEA claim, the court held. The facially discriminatory policy was, by itself, sufficient; additional proof of discriminatory intent was not necessary. [86] "[A]n employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy."[87]

Applying Supreme Court precedent renders the KRS plan facially discriminatory "in at least two ways." First, the plan "categorically excludes" employees who are 55 or older and still working from disability benefits because of their age. Second, similarly situated employees who are eligible for disability benefits will receive different benefits "for no reason other than their age."[88] The plan is a "formal, facially discriminatory policy

requiring adverse treatment" based on age.[89] Buttressing this holding were the "persuasive" decisions of four sister circuit courts, recognizing prima facie ADEA claims, in analogous cases.[90]

There is also "compelling evidence" that Congress intended to prohibit the age-discrimination in this case and in *Lyon*. Responding to the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*, Congress enacted the Older Workers Benefit Protection Act.[91] By amending the ADEA, Congress intended "to prohibit discrimination against older workers in all employee benefits except when age-based reduction in employee benefit plans are justified by significant cost considerations."[92] Congress passed the ADEA knowing full well that there was no wide-spread discriminatory animus towards older workers.[93] It could not have intended to combat this non-existent strain of age discrimination. Instead, Congress meant to prohibit discrimination based on "assumptions," having no factual basis, that age adversely affects employee work.[94]

CONCLUSION

The decisions in these cases will indicate whether the Roberts Court will interpret many employee rights and remedies more expansively or restrictively. Whether or not the Court has a pro-business or pro-employer slant, it is important for practitioners, judges, and the public to have a clearer idea of where the Court is going in the future in this important area of employment law. With Congress in Democratic hands for the foreseeable future, it will be interesting to see not only how this Court addresses new, and presumably pro-employee, legislation, but also how Congress responds legislatively to the decisions of a more conservative Court. The Court's first three decisions appear unlikely to garner the wrath of Congress. These decisions are arguably pro-employee and have received the stamp of approval from Linda Greenhouse, the doyenne of the Supreme Court beat. Greenhouse has surmised that the sharp response to *Ledbetter* may have influenced the Court's rulings. Supreme Court watchers and employment law practitioners alike will have to wait and see if this harmony continues with a few more Fed Exes or whether the remaining decisions will go over like a "*Ledbetter*" balloon. If it is the latter, expect more congressional fireworks.

Endnotes

1 Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. Times Mag., Mar. 16, 2008 ("The Supreme Court term that ended last June was, by all measures, exceptionally good for American business.... The current term... has also been shaping up nicely for business interests."); Tony Mauro, *Supreme Court Continues Pro-Business Stance*, Legal Times, Feb. 21, 2008, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1203508159200; David G. Savage, *Supreme Court Gives Business 2 Wins*, L.A. Times, Feb. 21, 2008, *available at* http://www.latimes.com/news/nationworld/nation/la-na-scotus21feb21,1,856984,print.story?ctrack=2&cset=true; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times, July 1, 2007, at A1, *available at* http://www.nytimes.com/2007/07/01/washington/01scotus.html?_r=1&pagewanted=print&oref=slogin; Tony Mauro, *High Court Reveals a Mind for Business*, Legal Times, July 2, 2007, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1183107990440; Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, Wash. Post, June 22, 2007, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062100803_pf.html.

2 Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007), *available at* http://www.supremecourtus.gov/opinions/06pdf/05-1074.pdf.

3 Press Release, Chairman George Miller, House Comm. on Education and Labor, May 30, 2007, *available at* http://www.house.gov/apps/list/speech/edlabor_dem/rel053007.html ("Congress Needs to Address Supreme Court Decision on Employment Discrimination."); Statement of Majority Leader Steny Hoyer, June 12, 2007, *available at* http://www.speaker.gov/blog/?p=479 ("Congress Will Remedy The Supreme Court's Wrongly Decided Wage Discrimination Case.").

4 Final Vote Results for Roll Call 768, H.R. 2831, Lilly Ledbetter Fair Pay Act of 2007, *available at* http://clerk.house.gov/evs/2007/roll768.xml. Two hundred and twenty three Democrats and two Republicans voted in favor. Six Democrats and 193 Republicans voted against.

5 Major Congressional Action on H.R. 2831, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02831:@@@R; S.1843, Fair Pay Restoration Act, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01843. *See also* Lori Montgomery, *White House Threatens to Veto Discrimination Bill*, Wash. Post, Apr. 23, 2008, at A4.

6 *See* Dept. of Labor, Employment & Training Admin., Rep. on the Aging of the American Workforce, Exec. Summary, Feb. 2008, *available at* http://www.doleta.gov/reports/FINAL_Taskforce_Report_2-11-08.pdf ("The aging and retirement of the Baby Boomers generation is a dramatic demographic transformation for our county. According to the U.S. Census Bureau, by 2030, 19.7 percent of the population, or about 71.5 million Americans, will be 65 or older, compared with just 12.4 percent in 2000.").

7 *See* Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, Monthly Labor Rev., U.S. Dep't. of Labor, Bureau of Labor Statistics, Feb. 2004, v. 127 no. 2, at 47, *available at* http://www.bls.gov/opub/mlr/2004/02/art3full.pdf ("Increases in the [labor participation rate] are expected to be greatest for the 55-to-64 and 65-to-74 age groups" between 2002 and 2012.); *id.* at 9 ("This increase in the labor force participation rate of the 55 and older workers is projected to continue in the future.").

8 *See id.* ("The labor force will continue to age, with the annual growth rate of the 55-year-and older group projected to be nearly 4 times that of the overall labor force; as the participation rates of older age groups increase, the older population's share of the workforce will rise.").

9 Sara E. Rix, a Senior Pol'y Advisor with the Pub. Pol'y Institute of AARP, has cited the ADEA as one of the reasons for older workers' increased participation. Sara E. Rix, *The Aging of the American Workforce*, 81 Chi.-Kent L. Rev. 593, 599 (2006), *available at* http://lawreview.kentlaw.edu/articles/81-2/Rix.pdf.

10 Roger Clegg, *Equal Rights Nonsense*, Wall St. J., Feb. 8, 2008, at A16.

11 Tom Goldstein, "Analysis: The Court and the 2008 Election," SCOTUS-Blog, *available at* http://www.scotusblog.com/wp/commentary-and-analysis/analysis-the-court-and-the-2008-election/#more-5451 ("Even a Justice on the left [ex. Stevens and Souter] who is planning on leaving and would prefer to have his or her successor appointed by a Democrat will likely retire relatively early in a Republican presidency. The Senate will probably remain in Democratic hands in 2009, limiting the prospect of a very conservative replacement.... [I]f a Democratic President wins in 2008, the current conservative-leaning détente on the Court is likely to be enshrined for the indefinite future.").

12 Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2008), slip op. *available at* http://www.supremecourtus.gov/opinions/07pdf/06-1221.pdf.

13 *Id.* at 1.

14 *Id.* at 8-9.

15 *Id.* at 8-9.

16 *Id.* at 4-5.

17 *Id.* at 6-7.

18 *See* Robert Barnes, *Ruling May Aid Those Charging Age Bias*, Wash. Post, Feb. 27, 2008, at A2. Linda Greenhouse, *A Case-by-Case Ruling on Discrimination*, N.Y. Times, Feb. 27, 2008, *available at* http://www.nytimes.com/2008/02/27/us/27scotus.html?ei=5124&en=e60c8c366116048e&ex=1361854800&partner=permalink&exprod=permalink&pagewanted=print;

David G. Savage, *No Ruling from Justices in Age-Bias Case*, L.A. Times, Feb. 27, 2008, *available at* http://www.latimes.com/news/nationworld/nation/la-na-scotus27feb27,1,7541668,print.story?ctrack=4&cset=true.

19 19 U.S.C. § 626(d) ("No civil action may be commenced by an individual under [the ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]...."); *see also* Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008); slip. op. at 3, *available at* http://www.supremecourtus.gov/opinions/07pdf/06-1322.pdf.

20 Majority op., at 11.

21 *Id*. at 10-11.

22 *Id*. at 8-9.

23 *Id*. at 9.

24 *Id*. at 11-12.

25 *Id*. at 14. Kennedy filed a formal charge form with the EEOC, but only after she filed suit.

26 *Id*. at 4, 13; 29 CFR § 1626.8(b) (deeming a charge "sufficient" if it is a writing containing the name of the charged party and generally alleging the discriminatory acts). The preceding section, 29 CFR § 1626.8(a), states that a "charge *should* contain" the charged party's contact information, factual description of the discriminatory acts, the number of employees employed by the charged party, and whether the charging party has sued in state court. (Emphasis provided.)

27 Fed. Express, majority op., at 14-15.

28 Dissenting op., at 2, 10, 13.

29 *Id*. at 3.

30 *Id*. at 5-6 (emphasis in original).

31 *Id*. at 6.

32 *Id*. at 6-7.

33 *Id*. at 11-12.

34 *A Verdict for Workers, for a Change*, N.Y. Times, March 2, 2008) *available at* http://www.nytimes.com/2008/03/02/opinion/02sun2.html?_r=1&pagewanted=print&oref=slogin ("The decision is noteworthy because it suggests that this court could be pulling back from what has often seemed like a knee-jerk inclination to rule for corporations over workers.... The justices may have been chastened by the enormous criticism of the [*Ledbetter v.*] *Goodyear* ruling from Congress and the public.").

35 *Id.* ("It is surprising and welcome to see the court apply any sort of permissive standard....").

36 Majority op., at 16-17.

37 Gomez-Perez v. Potter, 461 F.3d 54 (1st Cir. 2007). The AARP filed an amicus brief on behalf of Gomez.

38 29 U.S.C. § 633a(a) ("All personnel actions affecting employees or applicants for employment who are at least 40 years of age... shall be made free from any discrimination.").

39 *Id.* § 623(d) ("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.").

40 *Gomez*, 476 F.3d at 59 (disagreeing with the D.C. Circuit's decision in Forman v. Small which found a federal employee retaliation cause of action). Contra Forman v. Small, 271 F.3d 285, 297 (D.C. Cir. 2001) ("Nothing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace.").

41 Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

42 *Gomez*, 476 F.3d at 58 (citing *Jackson*, 544 U.S. at 173-175).

43 Gomez-Perez v. Potter, slip op. *available at* http://www.supremecourtus.gov/opinions/07pdf/06-1321.pdf.

44 *Sullivan*, 396 U.S. 229 (1969) (holding that 42 U.S.C. 1982 included a claim for retaliation); majority op. at 5.

45 CBOCS West, Inc. v. Humphries, slip op. *available at* http://www.supremecourtus.gov/opinions/07pdf/06-1431.pdf

46 Transcript of Oral Argument, Gomez-Perez v. Potter, Feb. 19, 2008, at 27, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1321.pdf. Justice Alito questioning Deputy Solicitor General Gregory Garre:

> [W]ould it be unkind to say that the government's position seems to be that a general ban on discrimination includes a ban on retaliation except when the government is being sued?" In *Jackson* the government argued that discrimination on the basis of sex included retaliation.... And yet here you're arguing exactly, what seem to me exactly the opposite position.

See generally Jackson, 544 U.S. 167 (federal government supported Supreme Court interpreting Title IX's discrimination prohibition to include retaliation); Humphries v. CBOCS West, Inc., 474 F.3d 387 (7th Cir. 2007) (federal government supports reading § 1981's (42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991) discrimination prohibition to include retaliation); *but see Gomez*.

47 Majority op. at 6-7.

48 *Id*. at 8.

49 *Id*. at 8-9.

50 *Id*. at 10.

51 Dissent (C.J. Roberts) at 3-4. Justices Thomas and Scalia chose not to join this portion of the Chief Justice's dissent. Justice Thomas, joined by Justice Scalia, added a very brief, one-paragraph dissent criticizing *Jackson* and reiterating that the federal-sector provision does not cover retaliation. Dissent (J. Thomas) at 1.

52 *Id*. at 6.

53 *Id*. at 9-10, 12.

54 *Id*. at 11-12.

55 *Id*. at 12-13.

56 Marty Lederman, "The Profound Effect of Justice O'Connor's Retirement," SCOTUSBlog, *at* http://www.scotusblog.com/wp/uncategorized/the-profound-effects-of-justice-oconnors-retirement/ (citing *Jackson* as one of the cases in which "Justice O'Connor's has been the decisive vote or opinion, and in which a more conservative Justice might well vote to overrule the governing precedent").

57 Robert Barnes, *Justices Show Ability to Move to the Center*, Wash. Post, May 29, 2008, at A2.

58 Linda Greenhouse, Justices Say Law Bars Retaliation Over Bias Claims, N.Y. Times, May 28, 2008, at A1. *See also* Robert Barnes & William Branigin, *Justices Uphold Retaliation Lawsuits*, Wash. Post, May 28, 2008, at A1. *But see Flawed Victory: The Supreme Court Stretches the Law to Help Victims of Workplace Retaliation*, Wash. Post, May 29, 2008, at A18.

> The Supreme Court pleased workers this week . . . [y]et both [*Humphries* and *Gomez-Perez*] are deeply flawed and should make those applauding the results more than a little nervous…. Protecting employees from retaliation makes sense, but it is not the province of judges to create such protections on the basis of their own beliefs of what it right or wrong, or even on the basis of their intuitive sense of what Congress meant to do or should have done. (Emphasis provided.)

59 Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2d Cir. 2006). The EEOC, AARP, and National Employment Lawyers Association have filed amicus briefs supporting the plaintiffs. The U.S. Chamber of Commerce has weighed in on Knolls' behalf.

60 Smith v. City of Jackson, 544 U.S. 228 (2005). In *Smith*, Justices Stevens, Souter, Ginsburg, Breyer, and Scalia, supported applying disparate impact to the ADEA. A plurality, led by Justice Stevens, based its decision on the ADEA's text and purpose, relevant precedent (including *Griggs v. Duke Power* and *Hazen Paper Co. v. Biggins*), and agency deference. Justice Scalia concurred in judgment, deferring to the EEOC's consistent and reasonable views recognizing disparate impact recovery. He did not join the portion of Stevens' opinion addressing prior Court decisions interpreting Title VII's identical language. Justices O'Connor, Kennedy, and Thomas were not persuaded by these arguments, concurring in the judgment because disparate impact is not cognizable under the ADEA. Justice Rehnquist did not participate in the case.

61 Under the EEOC's four-fifths rule, a "serious discrepancy" exists if a protected group's selection rate is more than 120% of the total population rate.

62 *Meacham*, 461 F.3d at 143; Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

63 *Smith*, 544 U.S. at 243.

64 ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1).

65 *Smith*, 544 U.S. at 240.

66 *Meacham*, 461 F.3d at 141-42.

67 *Id*. at 144.

68 *Id*. at 143.

69 *Id*. at 144 (internal quotations omitted).

70 *Id*. at 146 (citing *Smith*, 544 U.S. at 243).

71 *Wards Cove*, 490 U.S. at 644-45, 662.

72 *Smith*, 544 U.S. at 240-41.

73 *Id*. at 267-68.

74 Thirteen states and several government associations (National League of Cities, National School Board Assoc.) weighed in on Kentucky's behalf. AARP and the National Employment Lawyers Assoc. filed the only brief supporting the EEOC.

75 The EEOC did not challenge this distinction. The district court and three-judge panel only reviewed the disability retirement's impact on those employed in hazardous jobs.

76 The employee receives at least 25% of their final pay and an additional 10% for each dependent child, up to a maximum of 40%.

77 E.E.O.C. v. Jefferson County Sheriff's Dept., No. 06-1037, 467 F.3d 571, 575 (6th Cir. 2006).

78 E.E.O.C. v. Jefferson County Sheriff's Dept., 424 F.3d 467, 470 (6th Cir. 2005). Although eligible for normal retirement, Licketig continued working to support his family.

79 *Id*. at 468, 471.

80 *Id*. at 475.

81 Lyon, 53 F.3d 135 (6th Cir.1995). *See also E.E.O.C.,* 424 F.3d at 471.

82 *E.E.O.C.*, 424 F.3d at 475.

83 *Id*. at 475. Lyon could be criticized for its "reliance on the observation that the very purpose of offering an early retirement incentive plan is to buy out expensive workers" because having a justification for discriminating does not make disparate treatment legal. *E.E.O.C.,* 424 F.3d at 473 (quoting Lyon, 53 F.3d at 139) (internal quotations omitted).

84 *Id*. at 473.

85 *E.E.O.C.*, 467 F.3d at 573, 583.

86 *Id*. at 583.

87 *Id*. at 582.

88 *Id*. at 579.

89 *Id*. at 579.

90 *Id*. at 573, 580 (citing the Second, Seventh, Eighth, and Ninth Circuit).

91 *Betts*, 492 U.S. 158 (1989) (holding that the retirement plan was facially discriminatory, but it met an exemption because there was not proof of subterfuge to avoid the ADEA).

92 *E.E.O.C.*, 467 F.3d at 580 (quoting the Older Workers Benefit Protection Act, 29 U.S.C. § 621). While the original panel considered *Betts*, the Act, and the legislative history, it could not distinguish *Lyon* because this information was available to the court when *Lyon* was decided. *E.E.O.C.*, 424 F.3d at 474-75.

93 *Id*. at 582-83.

94 *Id*. at 577-78, 582-83.