



# DEEM, FARNEY & LÓPEZ LAW OFFICES

YOUR APPELLATE, CIVIL RIGHTS & EMPLOYMENT LAW ATTORNEYS

## U.S. SUPREME COURT – 2006 TERM YEAR IN REVIEW EMPLOYMENT CASE OUTLINE

Developed September 2007 by Carol D. Deem & Andrea C. Farney

1. ***Beck v. Pace Int'l Union***, 127 S. Ct. 2310, 168 L. Ed. 2d 1, 2007 U.S. LEXIS 7716 (June 11, 2007). *Docket No. 05-1448. Reversed and remanded to the Ninth Circuit Court of Appeals. Opinion by Justice Scalia.*

**Issue:** Does an employer that sponsors and administers a single-employer defined-benefit plan have a fiduciary obligation under ERISA to consider a merger with a multiemployer plan as a method of terminating the plan?

Answer: No, because merger is not a permissible form of termination.

**Facts:** Pace International Union (PACE) represented employees at Crown Paper, and its parent company, Crown Vantage (Crown). Crown offered its employees a defined-benefit pension plan. Crown was the plan sponsor and administrator. In March 2000, Crown filed bankruptcy and later sought to undertake a “standard termination” of its pension plan. Crown wanted to terminate the plan by purchasing annuities and PACE proposed to Crown that they convey all of the plan assets to PACE’s multiemployer plan. Under the annuity option, Crown would be able to retain \$5 million for its creditors, after providing for all obligations to plan participants and beneficiaries. Under the PACE option the \$5 million would go to the PACE multiemployer plan. The Pension Benefit Guaranty Corporation (PBGC) offered to withdraw its claims in the bankruptcy proceeding if Crown chose the annuity option. Crown chose the annuity option, combining its multiple plans into one and then terminated that plan through purchasing an \$84 million annuity. Two plan participants and PACE filed an adversary action against Crown in the Bankruptcy Court, alleging breach of fiduciary duty under ERISA. Ultimately, the Ninth Circuit sustained the position that “the decision to terminate a pension plan is a business decision not subject to ERISA’s fiduciary obligations” but that “the *implementation* of a decision to terminate” is fiduciary in nature.” *Id.*, 168 L. Ed. 2d 1, at 10.

**Holding:** Under ERISA, a single-employer defined-benefit pension plan can not be terminated by merger.

**Rationale:** ERISA sets the exclusive manner for termination of a single-employer pension plan, and §1341(b)(3)(A) provides the permissible methods of termination. The Court traditionally defers to the PBGC when interpreting ERISA. Here, the PBGC and the Department of Labor both take the position that merger is an alternative to plan termination and is, thus, not a method of plan termination. The Court could not find PBGC’s view unreasonable as ERISA does

not expressly provide for merger as a permissible means of termination. Finally, the ERISA statutory scheme put mergers under an entirely different section, with different rules and procedures. These differing rules and procedures are significant in terms of the amount of agency (PBCG) oversight of a plan's termination vs. a merger, with the later having significantly less oversight.

2. *Davenport, et al. v. Washington Education Assoc.; Washington v. Washington Education Assoc.*, 127 S. Ct. 2372, 168 L.Ed.2d 71, 2007 U.S. LEXIS 7722 (June 14, 2007). *Docket Nos. 05-1589 and 05-1657, vacated and remanded to the Supreme Court of Washington. Opinion by Justice Scalia.*

**Issue: Does it violate the First Amendment for a state to require its public sector unions to receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes?**

**Answer:** No, this requirement does not violate the First Amendment.

**Facts:** The National Labor Relations Act allows states to regulate their labor relationships with public employees. Many states, including Washington, authorize a union and a government employer to enter into an agency-shop agreement. These arrangements allow the union to levy a fee on employees who are not members of the union but who are nonetheless represented by the union in collective bargaining. Washington law allowed the union to charge an agency fee through payroll deduction.

Public sector unions are constitutionally prohibited from using objecting nonmember fees for ideological purposes. In 1992, Washington voters, through a state initiative, restricted the union's ability to spend these collected agency fees "to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

Respondent is the exclusive bargaining agent for 70,000 public educational employees. It collected agency fees from nonmembers, and sent a packet to all non-members notifying them of their right to object to paying fees. Two lawsuits were filed in Washington; one suit was brought by the State, and the second by a putative class of nonmembers of the union that alleged Respondent had failed to obtain affirmative authorization from them before using their agency fees for election-related purposes.

**Holding:** The voters placed a reasonable, viewpoint-neutral limitation on the state's authorization that allowed public sector unions to acquire and spend governmental employees' money.

**Rationale:** There was no First Amendment violation: the Washington statute did not trigger heightened First Amendment strict scrutiny. Washington voters did not impermissibly distort the marketplace of ideas. The statutory restriction was focused on protecting the integrity of the election process, and was limited to the

state-created harm the voters sought to remedy. The Supreme Court in Washington had extended the Supreme Court's agency fee cases beyond their proper ambit. There was no need to balance the constitutional rights of unions and nonmembers because unions have no constitutional entitlement to the fees of nonmembers. The Court further found that its campaign finance cases were not on point. The statute at issue was not a restriction on how the union could spend its money, but instead a condition placed on the "union's extraordinary state entitlement to spend other people's money."

3. *EEOC v. BCI Coca-Cola*, 450 F.3d 476 (10<sup>th</sup> Cir. 2006), *cert. granted BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852, 166 L. Ed. 2d 681, 2007 U.S. LEXIS 13 (U.S. 2007), *cert. dismissed*, 2007 U.S. LEXIS 4333 (U.S., Apr. 12, 2007).

**Issue: Can a Title VII race discrimination in employment claim survive summary judgment where it is undisputed that the person who made the decision to terminate the employee did not know the employee's race?**

Answer: Yes, if the plaintiff can show that racial animus of an employee without the power to terminate should be imputed to the employer's ultimate decision-maker.

**Facts:** Plaintiff, Stephen Peters worked as a merchandiser for BCI in Albuquerque for six years. Peters had the greatest seniority in his district, and had the best schedule, Saturdays and Sundays off. Peters reported to Cesar Grado and to Jeff Katt, on a daily basis. Both Katt and Peters reported to Grado. Grado was responsible for monitoring and evaluating his employees, but was not authorized to discipline or terminate anyone. The HR Department was ultimately responsible for this, with Grado having broad discretion to bring facts to HR's attention. One weekend in late September 2001, Mr. Grado called Mr. Peters on a Friday afternoon and ordered Peters to work on a Sunday. Mr. Grado told Peters that "If you do not come to work, it could lead to insubordination and could lead to termination." 450 F. 3d at 479. Peters told Grado he had plans and that "[D]o what [you] got to do and I'll do what I got to do." *Id.* Grado called the Phoenix HR Department and the ultimate decision-maker (Edgar) did not decide to terminate Peters that day, but did determine that Peters' conduct in the conversation amounted to insubordination warranting termination. Peters turned out to be actually ill on Saturday evening and went to an urgent care clinic where he was diagnosed with a sinus infection. He cancelled his personal plans for Sunday and also called Katt to tell him he could probably not work on Sunday due to illness. On Monday, HR, via Edgar and Pederson, held a series of phone calls with Grado. Pederson pulled Peters file and found a discipline note from 1999 for the same type of problem. By the end of the day on Monday, Edgar decided to terminate Peters for insubordination. Edgar claims to have known that Peters called in sick to Katt, but Katt alleged that Grado never found this out until Monday evening. Peters was terminated on Tuesday morning and given a paper that concluded that he didn't report to work on Sunday, and therefore his

employment was terminated. No one from HR knew that Peters was black until the termination meeting, despite the information appearing in the personnel file.

**Holding:** Employers can be accountable for the actions of biased subordinates where the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action.

**Rationale:** Title VII imposes liability for employment discrimination by employers and their agents, 42 U.S.C. §2000e(b). The 4<sup>th</sup> Circuit position that an employer cannot be held liable even if a biased subordinate exercises "substantial influence" or plays a "significant" role in the employment decision is rejected. *450 F. 3d at 487*. This approach is too limiting, according to the 10<sup>th</sup> Circuit, because the 4<sup>th</sup> Circuit's approach is "inconsistent with the normal analysis of causal issues in tort litigation." *Id.*, citing *Lust v. Sealy, Inc.* 383 F.3d 580, 584 (7<sup>th</sup> Cir. 2004). In this case, the decision-maker did not engage in an independent investigation, but rather simply pulled plaintiff's personnel file. This type of investigation is, as a matter of law, inadequate to defeat the inference that the subordinate's racial bias tainted the decision.

4. ***Ledbetter v. Goodyear Tire & Rubber Co., Inc.***, 127 S. Ct. 2162, 167 L.Ed. 2d 982, 2007 U.S. LEXIS 6295 (May 29, 2007). *Docket No. 05-1074, affirming the 11<sup>th</sup> Circuit Court of Appeals. Opinion by Justice Alito.*

**Issue:** Does the act of paying an employee automatically confer a right to recalibrate the Title VII EEOC filing deadline from the date the paycheck is delivered by the employer?

**Answer:** No.

**Facts:** Lilly Ledbetter worked for Goodyear Tire and Rubber from 1979 until 1998. Ledbetter brought claims against Goodyear under Title VII for pay discrimination and also under the Equal Pay Act. Ledbetter abandoned her Equal Pay Act claim prior to trial. At trial, Ledbetter submitted that several of her supervisors gave her poor evaluations because of her sex and that her pay was not increased as much as it would have been without the biased evaluations. At the end of her career with Goodyear, Lilly Ledbetter received significantly less pay than her male counterparts. Ledbetter prevailed at trial and the jury awarded her back pay and damages. Goodyear appealed based on the argument that Ledbetter's claim was time barred with respect to all pay decisions made prior to 180 days before Ledbetter filed her questionnaire with the EEOC. The 11<sup>th</sup> Circuit reversed, "holding that a Title VII pay discrimination claim cannot be based on any pay decision that affected the employee's pay during the EEOC charging period." *Id.*, 127 S. Ct. at 2166.

**Holding:** An employment practice committed without improper purpose and without discriminatory intent is not unlawful because it gives some effect to an

intentional discriminatory act that occurred outside the EEOC charging period. *Id.*, 127 S. Ct. at 2172.

**Rationale:** An employment discrimination charge under Title VII must be filed with the EEOC within 180 or 300 days of the discriminatory act. A pay-setting decision is a discrete act that occurs at a particular point in time. *Id.*, 127 S. Ct. at 2165. It is recognized that the EEOC 180-day filing deadline is short, but a statute of limitations is designed to be law of repose, and Congress clearly intended the short deadline. As a policy matter, the language and Congressional intent affects the policy of protecting employers from the burden of defending long past employment decisions.

5. *Long Island Care at Home, Ltd., et al., v. Coke*, 127 S. Ct. 2339, 168 L.Ed. 2d 54, 2007 U.S. LEXIS 7717 (June 11, 2007). *Docket No. 06-593, reversed and remanded to the U.S. Court of Appeals, Second Circuit. Opinion by Justice Breyer.*

**Issue: Must courts defer to a Department of Labor regulation that interprets the Fair Labor Standards Act as exempting home health care workers employed by agencies and other third parties if the regulation was published under the heading “Interpretations?”**

**Answer:** Yes, this third party regulation is valid and binding.

**Facts:** Ms. Coke was employed by Long Island Care as a home-care companion to elderly patients. She was not paid minimum wage or overtime. A provision of the Fair Labor Standards Act (FLSA) exempts from the minimum wage and overtime rules “Any employee employed in domestic service employment to provide companionship services for individuals....” A Department of Labor (DOL) regulation defines “domestic service employment” as services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed....” However, a second regulation (the “third party regulation”), labeled an “interpretation,” says that this statutory exemption includes those companionship workers who are “employed by an employer or agency other than the family or household using their services.” The District Court found the regulation valid and controlling and dismissed the suit. The Second Circuit set aside the lower court’s judgment. The Supreme Court vacated the 2<sup>nd</sup> Circuit’s decision and remanded the case so that the circuit court could consider a recent DOL “Advisory Memorandum” explaining the regulation. The Second Circuit again held the regulation unenforceable, and the Supreme Court granted certiorari.

**Holding:** When an agency reasonably makes a rule to fill a “gap” left by Congress and follows other applicable procedural requirements, the result is legally binding. Further, the third party regulation did not exceed the Department of Labor’s designated rulemaking authority.

**Rationale:** The FLSA explicitly left gaps, including the scope and definition of statutory terms such as “domestic service employment” and “companionship services.” FLSA’s statutory language expressly directs the agency to work out the details of the broad definitions. Whether to include workers paid by third parties within the scope of the definitions was one of those details. Whether or how the definition should apply to all workers paid by third parties raises a group of complex questions, and the Court inferred that Congress intended its broad grant of definitional authority to DOL to include the authority to answer these questions.

The literal language of the two regulations conflicts as to whether workers paid by third parties are included within the statutory exemption. DOL, in its Advisory Memorandum, suggested, and the Court agreed, that the third party regulation governs this question. Another result would seem clearly contrary to Congress’ intent. The Court looked at statutory construction: the specific governs the general. The third party regulation’s purpose was to explain how the companionship services exemption applies to workers employed by third party entities, while the primary purpose of the general regulation was to describe the kind of work that must be performed by someone to qualify as a “domestic service” employee.

Even though DOL may have interpreted these regulations differently at different points in time, the interpretative changes did not create any unfair surprise. These changes in interpretation alone presented no separate ground to disregard the DOL’s present interpretation. Further, even though the “Advisory Memorandum” appears to have been written in response to this litigation, the Court had no reason to suspect that it did not reflect DOL’s fair and considered judgment or that it was merely a “post hoc rationalization.” An agency’s interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the regulations being interpreted.

The DOL intended the third party regulation as a binding application of its rulemaking authority. DOL gave notice, proposed regulations, received public comment and issued final regulations – procedures that are not required if the agency is producing an interpretive rule. The section of the regulations where the third party regulation was located contains matters in detail that interpret and apply the more general definitions. The Court found the regulation warranted judicial deference and was not improperly promulgated.

6. *Norfolk Southern Railway Co. v. Sorrell*, 127 S. Ct. 799, 166 L.Ed. 2d 638, 2007 U.S. LEXIS 1006 (January 10, 2007). *Docket No. 05-746, vacated and remanded to the Court of Appeals of Missouri, Eastern District. Opinion by Chief Justice Roberts.*

**Issue:** Should the causation standard under the Federal Employers' Liability Act (FELA) be the same for the railroad's negligence and for the employee's contributory negligence?

**Answer:** Yes. The standards should be the same. Common law standards are entitled to great weight unless they are expressly rejected in the language of a statute. A review of FELA model jury instructions shows there are a variety of ways to instruct a jury to apply the same causation standards to both parties, and Missouri has the same flexibility as other states in deciding how to do so.

**Holding:** The Court concluded that the causation standard under FELA should be the same for both the railroad's negligence and for employee contributory negligence. Norfolk attempted to expand the question presented to encompass what the standard of causation *should be* under FELA. The Court determined that the question of the substantive content of the causation standard was significant enough that the Court preferred not to address it when it was not fully presented. It was unfair at this point to allow Norfolk to seek a ruling that the standard should be proximate cause across the board when it only objected below to the employee contributory negligence standard.

**Facts:** Sorrell was injured while working as a trackman for Norfolk. He sought damages for his injuries in the Missouri state court under FELA. FELA preempts state tort remedies, and provides a statutory cause of action that sounds in negligence. FELA provides that a railroad is liable for an employee's injuries "resulting in whole or in part from [the railroad's] negligence". FELA further reduces any damages to the employee "in proportion to the amount [of negligence] attributable to" that employee.

The Missouri jury instructions applied different standards to the contributory negligence of the employee and the employer's negligence in FELA actions. Missouri is apparently the only state to do so. An employee will be found contributorily negligent if the negligence "directly contributed to cause" the injury. The railroad's negligence is measured by a different standard: whether the negligence "contributed in whole or in part" to the injury.

Norfolk objected that the instruction contained different standards for the parties and that the standard was much more exacting for the railroad, but the objection was overruled. Sorrell was awarded \$1.5 million dollars. The Missouri Court of Appeals affirmed, rejecting the railroad's contention that the same causation standard should apply to both parties' negligence. The appeals court noted that where an approved jury instruction is available, it must be given to the exclusion of other instructions.

**Rationale:** Absent any express language to the contrary, the elements of a FELA claim are determined in reference to common law. The prevailing common law at the time FELA was enacted was that the causation standards for negligence and contributory negligence were the same. FELA did not expressly depart from this approach. FELA had departed from the common law in abolishing a railroad's defense of assumption of the risk and in eliminating the absolute bar to recovery for an employee's contributory negligence. Contributory negligence is not a bar to recovery under FELA, but damages are reduced "in proportion to" the fault of the employee.

The Court noted it would be difficult to reduce damages "in proportion" to the employee's negligence as required by the statute if the each party's negligence is measured by a different standard of causation. Further, FELA's remedial purpose cannot compensate for the lack of express statutory language. The statute's remedial purpose to protect railroad employees does not require the Court to interpret every uncertainty in FELA in favor of the railroad employee. The Supreme Court left it to the Missouri court on remand to determine if a new trial was warranted or if the instruction was harmless error.

*Justice Souter concurred (with Justices Scalia and Alito).* The concurrence focused on whether or not proximate cause still governed in FELA actions. The concurrence discussed how the Court's *Rogers* case instructed courts about how to proceed when there are multiple causes of an injury, but it did not alter existing law concerning the degree of causation necessary for negligence. Whether FELA requires proof of proximate causation before recognizing negligence is for the Missouri Court to determine on remand.

*Justice Ginsberg concurred.* The Court's decision left in place precedent establishing that the causation standard is more relaxed in FELA cases. The Court's *Rogers* case merely described the test for proximate causation applicable in FELA suits. Whenever a railroad's negligence is the slightest cause of the employee's injury, it is a legal cause for which the railroad is proportionately held responsible.

7. ***Philip Morris USA v. Williams***, 127 S. Ct. 1057, 166 L. Ed. 2d 940, US LEXIS 1332 (February 20, 2007). *Docket No. 05-1256, vacated and remanded to the Supreme Court of Oregon. Opinion by Justice Breyer.*

**Issue: If a punitive damages award is based on punishment for harm to persons not before the court is it a taking of property without due process?**

Answer: Yes, a jury may not punish for the harm caused others.

**Facts:** This case involved a state negligence and deceit lawsuit by Mr. Jesse Williams estate against Philip Morris. Mr. Williams was a heavy smoker of Malboro cigarettes, the brand made by Philip Morris. At trial the jury found

Philip Morris engaged in deceit and awarded punitive damages roughly 100 times compensatory damages. Ultimately, the Oregon Supreme Court upheld the \$79.5 million punitive damage jury award over Philip Morris's argument that it was "grossly excessive" under *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Philip Morris argued that the Oregon trial court improperly rejected a jury instruction that the jury could not punish a defendant for alleged misconduct to other persons not before the court.

**Holding:** In a 5-4 decision written by Justice Breyer, the Court makes an explicit pronouncement that a jury may not punish a tortfeasor for harm caused to others. The Court holds that the due process clause of the 14<sup>th</sup> Amendment requires States to provide assurance that juries are not asking the wrong question, i.e. seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers.

**Rationale:** The Court relies considerably upon *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) in describing that a state does have a legitimate interest in punitive damage awards to deter unlawful conduct. Simultaneously, the Court notes that "proper standards" are necessary to set limits on a jury's discretionary authority or else a punitive damages system may deprive a defendant of "fair notice...of the severity of the penalty that a State may impose." *Philip Morris USA* citing *BMW supra*, at 574, 116 S. Ct. 1589, 134 L. Ed 2d 809. Further, the Court explains that a state's jury award system amounts to a policy choice, which can improperly impose one State's policies upon other. Thus, the Court accepts constitutional limits with respect to proper procedures providing for punitive damages, with such limitations forbidding grossly excessive awards. The Court does acknowledge that a plaintiff can show harm to other victims as part of a showing of "reprehensibility" of a defendant's conduct. What is constitutionally circumspect, however, is insufficient jury instruction or "guidance" on punitive damage awards. Some form of protection, without the specific parameters set out, is necessary to meet constitutional requirements.

## 2007 TERM PREVIEW

### Employment cases

*Federal Express Corp. v. Holowecki, Docket No. 06-1322.*

**Question presented:** Does an intake questionnaire submitted to the EEOC qualify as a charge of discrimination required by the ADEA, even if the agency did not treat the questionnaire as a charge?

- Mr. Holowecki and other employees sued FedEx for age discrimination under the Age Discrimination in Employment Act (ADEA). The District Court dismissed the complaint on the ground that none of the plaintiffs had met the time limits and filing requirements of the ADEA. The ADEA requires that a plaintiff file a “charge” with the Equal Employment Opportunity Commission (EEOC) 60 days prior to filing suit. One of the plaintiffs had completed an EEOC intake questionnaire, but the EEOC did not investigate the matter, notify the employer or offer to mediate.
- The EEOC regulations state that “A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s).” The district court judge ruled that the intake questionnaire did not qualify as a charge under the ADEA.
- The Second Circuit Court reversed and allowed the suit to go forward, ruling that the intake questionnaire contained the minimal written information required for a charge. The questionnaire also met the ADEA implicit requirement that the charge be intended to start the lawsuit process. The court found it insignificant that the EEOC did not act on the information: to dismiss the complaint based on the EEOC’s inaction would hold the plaintiff responsible for the agency’s failure.
- Oral argument is scheduled on Tuesday, November 6, 2007.

*Sprint/United Management Co. v. Mendelsohn, Docket No. 06-1221.*

**Question presented:** In employment discrimination cases, must a court admit “me, too” evidence – testimony by other employees who are not parties to the case but were allegedly discriminated against by others who had no role in the plaintiff’s employment decision?

- Sprint fired Ms. Mendelsohn during a company-wide reduction in force. She sued, claiming that Sprint had discriminated against her in violation of the ADEA. Ms. Mendelsohn attempted to introduce evidence at trial from other Sprint employees who also alleged discrimination by the company: so-called “me, too” testimony. The District Court judge refused to admit the testimony of these non-party employees. The court cited the “same supervisor” rule, stating that the testimony was not relevant to the alleged discriminatory intent behind the decision to fire Ms. Mendelsohn because the other employees did not share her supervisor.

- The jury found for Sprint, but the Tenth Circuit Court reversed and ordered a new trial. The circuit court held that the “same supervisor” rule only applies to discriminatory disciplinary actions, and not to lawsuits alleging a company-wide policy of discrimination. The “me, too” testimony was relevant because the other employees were similarly situated and fired around the same time.

**A potentially relevant case:**

*Hall Street Associates, L.L.C. v. Mattel, Inc., Docket No. 06-989.*

**Question presented:** Can a federal court enforce an arbitration agreement that provides for more expansive judicial review of an arbitration award than the standard of review outlined in the Federal Arbitration Act?

- Mattel was sued by its landlord in a property lease dispute. After filing in federal court, both parties agreed to resolve the case by arbitration according to the procedures set forth in the Federal Arbitration Act. The parties’ arbitration agreement stipulated that the District Court could override the arbitrator’s decision if “the arbitrator’s conclusions of law are erroneous.” This provision granted the court a much broader role than that provided in the FAA. The FAA only provides a limited set of circumstances under which a court can override an award, such as corruption, partiality or arbitrator misbehavior.
- The arbitrator decided in favor of Mattel and Hall sought District Court review. The court found that the arbitrator’s decision contained legally erroneous conclusions. The arbitrator then ruled for Hall and the District Court affirmed.
- The Ninth Circuit ruled that the original arbitration award favoring Mattel must stand. The arbitration agreement could not be enforced where it expanded the scope of judicial review of the arbitration.
- Oral argument is scheduled on Wednesday, November 7, 2007.