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LABOR & EMPLOYMENT ALERT

May 2008

The Supreme Court's Recent ADEA Rulings: A Big Win and A Small Loss For Employers

by Anthony J. Amendola

In two recent decisions, the U.S. Supreme Court was called upon to decide important evidentiary and procedural questions arising under the Age Discrimination in Employment Act ("ADEA"). In the first of these cases, the Supreme Court curtailed the ability of claimants to pile on "me too" evidence of alleged discriminatory conduct by other supervisors against other employees. In the second, the Court held that completing only an "intake questionnaire" was sufficient to meet the prerequisite of filing an administrative "charge" before initiating a lawsuit.

Sprint v. Mendelsohn: "Everybody's Doing It…."

In *Sprint v. Mendelsohn* 552 U.S. ___ (2008), a former employee who had been laid off as part of a reduction in force sued Sprint, alleging age discrimination in violation of the ADEA. At trial, the claimant sought to introduce the testimony of five other former Sprint employees who also alleged that they had been discriminated against on the basis of age. None of these proposed witnesses had worked in the claimant's department, nor had any of them reported to any of the supervisors in her chain of command. Sprint moved to exclude the testimony of these employees, arguing that allegations against supervisors in other departments were not relevant to whether the claimant's supervisor had discriminated against her. The trial court excluded the testimony, but the Tenth Circuit Court of Appeals reversed and remanded the case for a new trial in which these witnesses would be permitted to testify.

On review, the United States Supreme Court reversed the Tenth Circuit and upheld the trial court's exclusion of these witnesses. While the Supreme Court did not decide that "me too" evidence is never admissible, it found "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. . . .[T]o determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry."

Thus, while evidence of discriminatory conduct toward others may still be admissible if it is closely related to the claimant's circumstances, simply "piling on" evidence that other employees, in other departments, had similar claims will likely be excluded as prejudicial. This is a significant victory for employers who often confront "me too" allegations by claimants seeking to bolster otherwise weak claims of discrimination.

Federal Express v. Holowecki: If It "Quacks Like A Duck …."

In order to sue under the ADEA, a claimant first must file a "charge" of discrimination with the Equal Employment Opportunity Commission (EEOC).

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Sexual Harassment Prevention Training

In order to assist our clients and friends in complying with the training requirements of California law, MS&K is pleased to offer sexual harassment prevention training for supervisors.

When: Wednesday, June 4, 2008
Registration 8:30 - 9:00 a.m.
Program 9:00 - 11:00 a.m.

Where: MS&K
11377 W. Olympic Boulevard
Los Angeles, CA 90064

Cost: $50 per attendee

RSVP: Mary Marshall
events@msk.com or
(310) 914-7981 by May 29

Q: Does the *Sprint* decision mean that all evidence about conduct towards employees other than the claimant will be precluded?

A: No. Evidence about conduct by the same alleged wrongdoers or of an employer's treatment of "similarly situated employees" may be considered but must be closely related to the employee's circumstances and theory of the case. The issue of who is "similarly situated" will now be the focus in ADEA cases and the admissibility of "me too" evidence will be determined on a case-by-case basis without any bright-line rule to guide trial court judges.

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The ADEA does not define the term "charge," and, for administrative purposes, the EEOC has created two forms, an "intake questionnaire" form and a "charge" form. At issue in *Federal Express v. Holowecki* 552 U.S. ___ (2008), was whether a claimant had, in fact, filed a "charge," when all she had submitted to the EEOC was an "intake questionnaire." In a 7-2 decision, the Supreme Court held that the documents submitted by the employee satisfied the requirements for a "charge," upholding a ruling by the Second Circuit Court of Appeals allowing the lawsuit to proceed.

In reaching its decision, the Supreme Court noted that EEOC regulations require only that "[a] charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." Here, the Supreme Court found that the claimant's submission contained the minimal written information required by the regulation, coupled with what could be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute."

In a sharply worded dissent, Justice Thomas, formerly the Chairman of the EEOC, stated:

> Today the Court decides that a "charge" of age discrimination under the [ADEA] is whatever the [EEOC] says it is. The filing at issue in this case did not state that it was a charge and did not include a charge form; to the contrary, it included a[n intake questionnaire] form that expressly stated it was for the purpose of "pre-charge" counseling. What is more, the EEOC did not assign it a charge number, notify the employer of the complainant's allegations, or commence enforcement proceedings. Notwithstanding these facts, the Court concludes, counterintuitively, that respondent's filing is a charge because it manifests an intent for the EEOC to take "some action."

Although the *Holowecki* decision certainly takes one quiver out of employers' bows, this decision is not a major setback to the employer community. While employers are often able to dispose of ADEA, Title VII, and certain state law claims due to a claimant's failure to exhaust administrative remedies, here, while not completing a charge form, the employee did make the effort to visit the EEOC and to provide a detailed written statement of her allegations.

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Q: WILL COMPLETING AN EEOC "INTAKE QUESTIONNAIRE" ALWAYS BE SUFFICIENT FOR MEETING THE "EXHAUSTION OF ADMINISTRATIVE REMEDIES" PREREQUISITE TO FILING AN ADEA LAWSUIT?

A: NO. AS THE SUPREME COURT MADE CLEAR IN *HOLOWECKI*, AT A MINIMUM THE DOCUMENT FILED MUST IDENTIFY THE EMPLOYER AND THE ALLEGED DISCRIMINATORY ACTS AND MUST CONTAIN A STATEMENT THAT CAN REASONABLY BE CONSTRUED AS A REQUEST THAT THE EEOC TAKE ACTION. INDEED, ON ITS WEBSITE THE EEOC NOW STATES: "AN INTAKE QUESTIONNAIRE OR OTHER CORRESPONDENCE CAN CONSTITUTE A CHARGE UNDER THE STATUTES WE ENFORCE IF IT CONTAINS ALL THE INFORMATION REQUIRED BY EEOC REGULATIONS GOVERNING THE CONTENTS OF A CHARGE AND CONSTITUTES A CLEAR REQUEST FOR THE AGENCY TO ACT." FURTHER, THE EEOC HAS ISSUED A MEMORANDUM TO ITS OFFICES STATING, "IF IT APPEARS THAT A PERFECTED CHARGE CANNOT BE DOCKETED AND SERVED WITHIN TEN DAYS OF RECEIPT OF A CORRESPONDENCE MEETING THE MINIMAL REQUIREMENTS OF A CHARGE, BE IT A LETTER OR INTAKE QUESTIONNAIRE, STAFF MUST TAKE STEPS TO PROMPTLY ASCERTAIN WHETHER THE SUBMITTER INTENDED TO INITIATE PROCEEDINGS AND, IF SO, DOCKET THE QUESTIONNAIRE OR OTHER CORRESPONDENCE AS A CHARGE AND SERVE NOTICE ON THE RESPONDENT WITHIN TEN DAYS OF RECEIPT. INTENT CAN BE INFERRED FROM A PLAIN READING OF THE CORRESPONDENCE OR DETERMINED BY CONTACTING THE AUTHOR/SUBMITTER."

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