INSIDE THE MINDS™

THE IMPACT OF SUPREME COURT EMPLOYMENT LAW CASES

LEADING LAWYERS ANALYZE RECENT DECISIONS AND THEIR IMPACT ON EMPLOYMENT LAW

2011 EDITION

ASPATORE

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Inside the Minds Project Manager, Caitlin Keiper; edited by Eddie Fournier; proofread by Melanie Zimmerman

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Privacy, Discrimination, and Establishment of NLRB Authority: Recent Decisions in Employment Law

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ASPATORE

Introduction

Having a diverse labor and employment practice, I enjoy helping my clients not just as their advocate, but also as a counselor. My goal is to develop a partnership of trust between client and attorney. While I am a trial attorney, I also enjoy helping clients prevent lawsuits from happening.

Prevention through good employment practices and relationships with employees is critical to having a great work environment. Therefore, employment audits, training, and review of employment practices are vital. Moreover, knowing your employees and having leaders who encourage employee input and participation greatly contribute and result in a better workplace and prevent labor relations issues.

Employment law in many respects is still a maturing and ever-changing area of the law. It is really an adolescent as opposed to an adult, as it faces new challenges and opportunities for growth. Having an innovative and forward-leaning approach to both litigation and prevention is critical, and has resulted in the best results for employers. While my practice is primarily in California, it is important to keep a view as to how trends in California can affect the national employment landscape. No matter the type of case, be it discrimination, harassment, failure to accommodate, or wage and hour, viewing the case as a means to educate both yourself and your client is critical. Therefore, I learn from every client and every matter I try. The willingness to learn and stay informed makes one not only a better attorney, but also a better person. Therefore, understanding and evaluating the recent decisions of the US Supreme Court and trends in labor and employment law is critical.

Overview of Recent Supreme Court Decisions

The US Supreme Court was fairly busy in 2010 with employment cases, including several of note. For example, in *Conkright v. Frommert*, 130 S.Ct. 1640 (2010), the Supreme Court dealt with the Employee Retirement Income Security Act of 1974 (ERISA), specifically an ERISA plan administrator's right to be entitled to deference even when their initial evaluation of the ERISA plan was considered improper. The Supreme Court struggled with the issue as to whether an initial mistake by the

administrator should be viewed as arbitrary and capricious. In a 5–3 decision, the Supreme Court upheld the right that, even where there is an initial improper interpretation, the ERISA plan administrator is entitled to deference in his or her subsequent decision.

The Supreme Court dealt with the interpretation of the Federal Arbitration Act in two cases during its past term. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010) addressed whether you can impose class arbitration on parties that have not agreed to be bound by arbitration. The court found a violation of the Federal Arbitration Act by a 5–3 vote and held that imposing arbitration on parties that have not agreed to arbitration violates that act. The Supreme Court also decided *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S.Ct. 2847 (2010), another arbitration case, which basically established that it is the court and not an arbitrator who decides a collective bargaining ratification date. The decision also explicitly rejected a new cause of action for tortious interference.

The *Lewis v. City of Chicago, Ill.*, 130 S.Ct. 2191 (2010) case is another in a series of disparate impact case opinions the Supreme Court seems to address every year. This case followed on the heel of the much more well-publicized *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) case decided in June 2009, which overturned a decision by now Supreme Court Justice Sonia Sotomayor when she was on the US Circuit Court of Appeals for the Second Circuit. Unlike *Ricci*, the *Lewis* decision was by a unanimous court. However, the case was on a very narrow issue. The Supreme Court did not decide whether the city of Chicago actually had a defense to the disparate impact claim. The Supreme Court merely addressed whether a *prima facie* case to support a disparate impact claim existed and whether the claim was timely filed. The court examined whether the claim was time-barred by the 300-day rule for filing a disparate impact claim under 42 U.S.C. § 2000. The court unanimously ruled that the claim was in fact timely without deciding the validity of the disparate impact case.

Another case that warrants discussion is *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619 (2010), which shows the Supreme Court struggling with reasonable searches under the Fourth Amendment of the Constitution in this ever-changing age of technology. This case dealt with the question of police pager text messages and whether the search of these was reasonable

under the Fourth Amendment. In another unanimous decision, the Supreme Court found that the search of the police pager text messages was reasonable. It held that, even assuming the police officer had an expectation of privacy regarding text messages on his police mobile phone, the search was not done contrary to the Fourth Amendment. Rather, the search was done for the legitimate neutral purpose of finding out whether the city's policy about the number of characters it allowed for free texting under its contract for its text messages was too little or too much. The Supreme Court unanimously decided that in conducting this type of search, the finding of private and sexually explicit material did not violate the reasonable search provision of the Constitution, and results could be used to discipline officers. However, the Supreme Court left the door open for future cases addressing the reasonable expectation of privacy.

Going forward, the larger issue that still needs to be addressed is defining a reasonable expectation of privacy in the high-tech era surrounding the use of work PDAs as to e-mails and text messages. Specifically, what is an employee's expectation of privacy around that issue? The Supreme Court in *Quon* said it was not sure at this point, and that past precedent may have to be revisited. Therefore, this will be a closely watched area of the law for many years.

Much of what is happening in the area of employment law going forward could be happening at the National Labor Relations Board (NLRB), particularly in the area of labor organizing and NLRB rules. The Supreme Court in *New Process Steel L.P. v. N.L.R.B.*, 130 S.Ct. 2635 (2010) dealt with the issue of whether the NLRB can specifically delegate its authority to issue rulings to only three members at times when, in actuality, the panel has only two members. The Supreme Court answered the question: does a two-member NLRB have the right to issue binding NLRB decisions in the case where both members agree as to the result? The NLRB recently operated for almost two years with only two members. During that time, they issued over 500 decisions. The Supreme Court in this ruling said a three-member NLRB can issue decisions, but once the board is only two, the right to issue decisions as a two-member board is not permitted. This was a 5–4 decision that did not split along your normal ideological conservative versus liberal lines. Now-retired Justice John Paul Stevens, who is considered part of the liberal wing, wrote the majority decision

invalidating the right to have a two-member NLRB issue decisions. Justice Anthony Kennedy, who tends to be the swing vote (but on the conservative side), wrote the dissenting opinion. Because of the opinion, the current NLRB is now in the process of sorting through the consequences of this decision.

Impact of Supreme Court Decision: *Conkright v. Frommert*

The *Conkright v. Frommert* decision has not caused a massive change in the way employers are dealing with the ERISA law. In a 5–3 majority decision, the court reinforced its precedent set forth in *Firestone v. Bruch*, 489 U.S. 101(1989). The *Firestone* case set forth the standard of review in examining the plan interpretation of an ERISA plan administrator. This decision and its progeny have set forth a deferential standard of review as to the decisions made by an ERISA plan administrator even in the face of a conflict of interest. In summary, under the *Firestone* standard, the interpretation by the plan administrator is not to be overturned unless it is found to be unreasonable. Rather, the interpretation should be given great deference.

In the *Conkright* case, the ERISA plan administrator made a determination that dealt with Xerox employees who had left Xerox, and then came back and were re-employed. The interpretation as to the ERISA was how to make sure the company did not pay these employees twice under the ERISA plan. The plan administrator made a determination that ultimately the appellate court decided was not consistent with the ERISA. The case was remanded back to the lower court, at which point the plan administrator evaluated these employees' rights under the ERISA using a different valuation methodology that was based on the time value of money. The Second Circuit Court of Appeals decided that, because the administrator was unreasonable in the initial interpretation under the ERISA plan, it was not going to give the plan administrator the normal deference afforded under the *Firestone* case, but instead it said the lower court was entitled to reject the new reasonable interpretation.

In its decision, the Supreme Court overturned the decision of the Second Circuit, announcing that the Second Circuit was incorrect in creating an

exception to *Firestone* deference. The majority decision written by Chief Justice Roberts stated that a deferential standard still existed as to the ERISA plan administrator even where the plan administrator's initial interpretation was determined to be in error. The Supreme Court held that it was an error by the Second Circuit to not apply *Firestone* deference. Basically, the majority recognized that people make mistakes and that the interpretation of a plan administrator is not entitled to any less deference just because an honest mistake was made the first time.

ERISA cases have been fairly common before the Supreme Court in recent years. What this decision reinforces is that the ERISA plan administrator is entitled to deferential treatment in his or her interpretation of a plan due to the expertise of the plan administrator, rather than subjecting every decision of a plan administrator to a *de novo* judicial review from judges who may have no experience with ERISA plans and their language. This decision supports what the Supreme Court has continually reinforced under the *Firestone* deference standard: predictability and uniformity. The Supreme Court again asserted that it was not the place of a court to substitute its own interpretation for that of a plan administrator, so long as the plan administrator's interpretation was reasonable and not in bad faith. The Second Circuit was overturned because the court never even examined whether the plan administrator's interpretation was done in a reasonable manner. The Supreme Court remanded the case back so the lower court could take action consistent with this decision.

With this decision, the Supreme Court did not disturb the foundation of ERISA plan interpretation. As a result, employers will be able to continue to rely on their ERISA plan administrators to interpret plan provisions without worrying that some judicial officer will overturn the interpretation without giving the interpretation deference. ERISA interpretation review will continue to be based on a deferential, reasonable person standard even in instances where the interpretation was deemed improper. Therefore, employers will have the protection of assuming plan administrators are honest and truthful people, and that their discretion is reasonable. Since the ERISA is a complicated area of the law, employers should continue to watch the Supreme Court as it continues to take for review on average one ERISA case per year.

Impact of Supreme Court Decision: *Lewis v. City of Chicago*

The *Lewis v. City of Chicago* case will have a significant impact on employers who use written examinations as a measure to determine promotions. The *Lewis* case is the latest case the Supreme Court has addressed involving claims of disparate impact. Disparate impact cases have been defined as cases where there is an adverse effect from a practice or standard that is neutral and non-discriminatory in its intention but, nonetheless, disproportionately affects individuals having a disability or belonging to a particular group based on their age, ethnicity, race, or sex (a protected class). (*The Business Dictionary*, 2010 edition.)

The case involved allegations that the city of Chicago's system of grading written examinations (instituted in January 1996) of firefighters seeking positions was discriminatory. The city made a decision that it would draw candidates randomly out of the list of applicants who scored eighty-nine or higher on the examination—people they designated as well qualified. The city designated anyone who scored below sixty-five as a failure, and those who scored between sixty-five and eighty-eight were told that, while it was unlikely they would be called, they would be kept on a list and could be called on later.

In May 1996, the city selected their first class of applicants to advance. Beginning in March 1997, some of the African American applicants who had scored in the sixty-five-to-eighty-eight range and had not been hired filed discrimination claims with the Equal Employment Opportunity Commission. The claimants received the mandatory right-to-sue letter and filed a lawsuit, alleging that the city's practice of only selecting applicants who scored eighty-nine and above had a disparate impact on African Americans and therefore was in violation of Title VII of the Civil Rights Act of 1964. The litigation proceeded and ultimately, after a bench trial, the applicants prevailed on the merits. However, the Seventh Circuit Court of Appeals reversed the judgment solely based on the fact that the lawsuit was not filed within the applicable statute of limitations. Under 42 U.S.C. § 2000 of Title VII, a claimant must file a charge within 300 days after the discriminating act. The Seventh Circuit found that the only discriminatory act occurred in January 1996 when the applicants were sorted into the various categories. To be eligible, therefore, the lawsuit and claim would