

Employment Cases at the Supreme Court – OT06

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This Term, the Supreme Court will hear five employment-related cases. The cases are important both in their own right and for what they tell us regarding the views of the Court's two new members on important issues in labor law, such as the statute of limitations for filing a complaint under Title VII (*Ledbetter v. Goodyear*), employers' liability under Title VII for the acts of subordinates (*BCI Coca-Cola v. EEOC*), and the regulation of union fee arrangements (*Davenport v. WEA/Washington v. WEA*)

*BCI Coca-Cola Bottling Co. v. EEOC*

In *BCI Coca-Cola Bottling Co. v. EEOC*, No. 06-341, the Supreme Court is presented with the question whether an employer is liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, when the person(s) who actually made the adverse employment decision harbored no discriminatory motive toward the affected employee. Petitioner BCI Coca-Cola appeals a decision of the U.S. Court of Appeals for the Tenth Circuit reversing a district court decision awarding summary judgment to petitioner.

BCI Coca-Cola terminated an African-American employee, Stephen Peters, for alleged insubordination. The final decision to terminate Peters was made by an official in the company's Human Resources Department who was based in another state, had never met Peters, had no knowledge of his race, and harbored no discriminatory animus. The official based her decision on a report of insubordination from Peters' direct supervisor, who reported that Peters refused to attend a weekend workday. Prior to terminating Peters, however, the HR official conducted a limited investigation into the situation, which was comprised of a review of Peters' personnel file – which contained a prior act of insubordination – and a discussion of the facts surrounding the insubordination with Peters' manager. She did not, however, discuss the situation directly with Peters before he was terminated.

In fact, on the day prior to his scheduled workday, Peters visited a walk-in medical clinic and was apparently diagnosed with a sinus infection. Peters told another BCI manager that he was sick; that manager unsuccessfully attempted to communicate the information to Peters' direct supervisor. The next day Peters did not attend work, and the following Monday Peters' direct supervisor relayed that information to the HR official who terminated Peters. Thus, that official was not aware of Peters' illness when she made her decision.

The EEOC, which filed suit on behalf of Peters, argues that the manager who reported the insubordination was biased against African-Americans and that the manager's bias sufficiently influenced the decision to terminate Peters to hold BCI liable. Although the biased manager had no authority to actually terminate Peters, the EEOC argues that the manager's bias is imputed into the actual decisionmaker's tangible employment action for purposes of Title VII liability.

Title VII makes it unlawful for an employer, including its agents, to terminate an individual because of her race. In particular contexts, the Court (in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998)) has previously held employers vicariously liable for the adverse employment actions of their discriminatory supervisors acting within the scope of their employment. However, the Court left open the question whether an employer is liable when the non-biased supervisor who makes the final decision relies in part or in total on the recommendation or influence of a biased subordinate. The courts of appeals are divided on the amount of influence a biased subordinate must have over the decisionmaking process to impose Title VII liability. Some circuits require the biased subordinate to merely possess some influence over the decision, while others require that the biased subordinate be either the actual decisionmaker or principally responsible for the adverse employment action.

The outcome of the *BCI* case will likely hinge on the Supreme Court's interpretation and application of agency principles, which begin with the understanding that an employer is liable for the tortious acts of its agents acting within the scope of their employment.

Argument is set for April 18, and a decision is expected by the end of June.

*(Disclosure: Tom Goldstein is co-counsel to the petitioner.)*

#### *Ledbetter v. Goodyear Tire & Rubber*

On November 27, 2006, the Supreme Court heard oral argument in *Ledbetter v. Goodyear Tire and Rubber Co.*, No. 05-1074, on writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit. At issue is the correct interpretation of the statutory limitation on filing sex discrimination claims under Title VII of the Civil Rights Act of 1964, which provides an employee with 180 days "after the alleged unlawful employment practice occurred" to file a sex discrimination claim. 42 U.S.C. 2000e-5(e)(1).

At trial, a jury found that during her early years at Goodyear – approximately twenty years before – petitioner Lilly Ledbetter had been discriminated against and received unfairly low pay, which was never rectified for the duration of her employment. She filed no complaint, however, until her retirement in 1997.

At trial, the jury awarded Ledbetter back pay and damages exceeding three million dollars (which were later reduced by the judge under statutory guidelines). On appeal, however, the Eleventh Circuit reversed on the ground that the "unlawful employment practice" required by Title VII did not occur within the 180 days preceding Ledbetter's claim.

The appellate court held that because Goodyear did not make discriminatory decisions regarding pay raises and promotions in the 180 days prior to her complaint, Ledbetter's claims were time-barred. Ledbetter, however, has asked the Supreme Court to interpret the 180-day window more broadly and allow her to bring a claim because the original discrimination against her went uncorrected for so many years. With each new paycheck lower than it ought to have been if she were paid fairly at the outset, she contends that every payment to her constituted an unlawful act.

Notably, although the EEOC supported Ledbetter in the lower courts, in the Supreme Court the Solicitor General filed a brief on behalf of the United States in support of Goodyear Tire.

At oral argument, the Court was closely divided. Justice Ginsburg was the most overtly sympathetic to Ledbetter's argument, noting that there can be "an effective [disparate pay] claim unless it builds up to the point where there is a noticeable disparity." Justices Breyer, Souter, and Stevens also appeared to be sympathetic to the contention that each "uncorrected" paycheck constitutes a new "unlawful employment practice" for the purposes of the statute.

On the other side, the two newest justices seemed wary of an interpretation of Title VII that could potentially expose employers to liability for pay decisions made decades ago. Justice Alito wondered if companies are really obligated to "periodically review[] the entire pay record of every employee to make sure that there has never been an uncomplained-of act of discrimination." Justices Scalia, Kennedy, and Thomas gave little indication as to how they will vote.

*(Disclosure: Tom Goldstein was co-counsel to Ledbetter at the certiorari stage.)*

#### *Davenport v. WEA/Washington v. WEA*

The intersection of election law and labor law is the focus of the consolidated cases of *Davenport v. WEA* and *Washington v. WEA*, Nos. 05-1589 and 05-1657, in which the Supreme Court granted cert. to review the decision of the Washington Supreme Court. Argument was held on January 10. At issue is the constitutionality of Section 760 of the Washington Fair Campaign Practices Act, which was adopted as part of a state-wide ballot initiative in 1992 and which provides that a labor union "may not use agency shop fees paid by an individual who is not a member of the organization" for election-related purposes unless that individual has affirmatively authorized such an expenditure.

In 2000, the state's 70,000-member teachers' union admitted to "multiple violations" of the law, was assessed a \$590,000 penalty, and was additionally faced with an impending class action by some of WEA's non-union members. However, after an intermediate state appellate court, struck down the statute as unconstitutional and the Washington Supreme Court affirmed, the U.S. Supreme Court granted certiorari.

The Washington Attorney General's office and the non-union teachers ask the Supreme Court to uphold the constitutionality of the statute. They contend that Section 760 does not place any significant burden on the union's freedom of political expression, and, additionally, *protects* the First Amendment rights of non-union members by shielding them from unwittingly endorsing political positions that they do not espouse. They argue that the line of Supreme Court cases dealing with the use of labor union fees, including *Abood v. Detroit Board of Education* and *Chicago Teachers Union v. Hudson*, specifies what protections are owed to such non-union members, and that Section 760 is an entirely reasonable application of those safeguards against compelled political speech. The federal government agrees.

The Washington Education Association, however, takes an entirely different view of the purpose of the statute. It urges the Court to affirm the decision below on the ground that the statute infringes on the union's "right to use funds lawfully in its possession for political speech."

Relying on the Court's election law jurisprudence, the union views Section 760 as an unlawful attempt to constrain it from protected political speech; such a restriction ought to be subject to strict scrutiny by the courts, and, the union argues, the statute is not justified by any compelling justification. Both parties, then, see the First Amendment as being firmly on their side: the non-union teachers regard the opt-in requirement as necessary to protect them from compelled political speech, while the union sees such a regulation as an infringement on its right to use lawfully collected funds to make any political speech in the first place.

At oral argument, the Justices shared little common ground throughout the hour, as the discussion veered from the purpose of the statute – whether it ought to be treated as election law or labor law, and whom it is supposed to protect – to the deference owed the Washington state courts and the voters who approved the ballot initiative.

### *Long Island Care at Home v. Coke*

A case making its second trip from the U.S. Court of Appeals for the Second Circuit to the Supreme Court, *Long Island Care at Home v. Coke*, No. 06-593, will address how workers who provide live-in care and companionship for the elderly are compensated. Under the Fair Labor Standards Act, an employer need not pay overtime to “any employee engaged in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.” A Department of Labor regulation appears to extend the overtime exemption to caretakers “who are employed by an employer or agency other than the family or household using their services.”

The status of the regulation is before the Supreme Court. When Evelyn Coke, a caretaker working for an agency, sued her employer claiming that she was owed overtime pay, the district court found that the Department of Labor's regulation has the effect of law and ruled against her. The Second Circuit, however, reversed, deeming the regulation interpretative rather than legislative. Explaining that, as an interpretative rule, the Department of Labor's amendment is not entitled to *Chevron* deference, the Second Circuit found it unpersuasive as a matter of law and ruled for the employee. After this ruling, and with the agency's petition pending before the Supreme Court, the Department of Labor issued “Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005).” The Supreme Court in early 2006 decided not to step in and hear the case on the merits, but rather to vacate the Second Circuit's decision and remand it in light of the new agency guidance.

On remand, the Second Circuit did not budge from its original position. Instead, in the summer of 2006 it stated that although it had reconsidered the case in light of the new memo, the Department of Labor's arguments were quite simply “not persuasive.” *Long Island Care at Home* again petitioned the Supreme Court to take up its case, and this time the Court granted a full hearing on the merits.

The case is set for argument on April 16, and a decision is expected by the end of the Term in late June.

### *Office of Senator Mark Dayton v. Hanson*

*Office of Senator Mark Dayton v. Brad Hanson*, No. 06-618, a direct appeal from the U.S. Court of Appeals for the D.C. Circuit, will examine the scope of the immunity provided to Senators by the Speech or Debate Clause of Article I of the U.S. Constitution in the context of an employment action brought under the Congressional Accountability Act (CAA). The CAA was passed in 1995 as part of the slate of legislation passed pursuant to the “Contract with America” and in the wake of the Republican takeover of the House in the 1994 elections. The CAA incorporates against members of Congress eleven employment statutes, including Title VII, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Family Medical Leave Act (FMLA).

Brad Hanson was an employee of Senator Mark Dayton, who was elected to the Senate in 2000 by voters in Minnesota. Hanson was employed in Dayton’s Minnesota office, where his work focused on healthcare issues, involving both constituent service and preparation for congressional hearings. Hanson was fired when he took time away from work to have heart surgery. The length of his tenure with the Senator’s office qualified him under the terms of the CAA and FMLA for the right to take medical leave, a right that was allegedly violated by the firing. Hanson filed suit under the CAA in federal district court in Washington, D.C.

Dayton’s office, represented by the office of the Senate Chief Counsel for Employment, fought the claims in the district court in an early motion to dismiss. The Speech or Debate Clause provides that a member of Congress “shall not be questioned in any other Place” “for any Speech or Debate in either House.” This protection has been read by the Supreme Court to apply not merely to the contents of actual floor debates but to any activities sufficiently tied to the legislative process; it has also been read to apply to the acts of congressional staff members carrying out the legislative work of members of Congress. Dayton argued that, under Supreme Court and D.C. Circuit precedent, the Speech or Debate Clause protected his decision to terminate Hanson, because Hanson’s job was to assist the Senator in carrying out his legislative duties and the Senator was protected from suit over any personnel decision related to those duties. The district court appeared to disagree, denying the motion without explanation, and Dayton took an interlocutory appeal to the D.C. Circuit.

Hearing the case *en banc*, the D.C. Circuit affirmed the district court’s denial of the motion to dismiss. Although the *en banc* court did not produce a majority opinion, every member of the full court agreed that the Speech or Debate Clause did not preclude the suit on the facts alleged. Moreover, they agreed, the Clause did offer some protections in some suits, perhaps in the form of a privilege to prevent the entry of certain evidence or to refuse to testify; they failed, however, to provide definitive guidance on what those protections would be.

The CAA permits litigants to take a direct, mandatory appeal to the Supreme Court from a judicial decision on the constitutionality of the statute, and Dayton’s office relied on this section in appealing directly to the Supreme Court from the decision of the D.C. Circuit. Hanson opposed the appeal on jurisdictional grounds, asserting that the statute should be read to grant direct review only from district court, rather than appellate, decisions. The Supreme Court, in granting review, deferred its determination of jurisdiction and asked the parties to brief the jurisdictional question.

In addition to the jurisdictional question, there is another potential obstacle that could preclude the Court from reaching the merits of the Speech or Debate question: while the case was on appeal, Senator Dayton's term in the Senate expired, and he did not seek reelection. Because the CAA requires that the defendant in a CAA suit be the "personal office" of the Senator, the failure to seek reelection thus created the prospect that – as the Senate Employment Counsel's office contends –the case either abated or became moot when the Senator left office, because his "personal office" ceased to exist when the Senator finished his term. The Supreme Court also asked for briefing on the question of the continued vitality of the case in light of the expiration of Dayton's term.

The heart of the case remains, however, the scope of the Speech of Debate Clause immunity a federal legislator enjoys. Among the questions at issue are 1) the relevance of the fact that, as prescribed by the statute, the defendant in the suit is not the Senator himself, but his office, and 2) whether the fact that the legislation was passed by Congress with the express intention of subjecting itself to the same employment rules that bind employers throughout the country affects the right of an individual legislator to invoke the clause.

The case will be argued on April 24, 2007.

*(Disclosure: Tom Goldstein is co-counsel to the petitioner.)*