Legal Backgrounder

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ENVIRONMENT AND EMPLOYMENT LAW: KEY CASES BEFORE THE SUPREME COURT

by

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This LEGAL BACKGROUNDER will discuss the employment and environmental law cases on the Supreme Court's docket in its 2003 Term. A forthcoming installment will examine bankruptcy, telecommunications, tax, and other cases of interest to the business community.

This Term, the Court will decide a number of cases raising important issues of employment law and environmental law. On the employment law front, the Court will address the requirements for a finding of disability under the Social Security Act; the viability of a claim of "reverse discrimination" under the Age Discrimination and Employment Act; the applicability of the federal catch-all statute of limitations provision to certain types of employment discrimination claims; and the effect of the Americans with Disabilities Act on the rehiring of employees lawfully terminated for misconduct such as illegal drug use. On the environmental front, the Court will consider the scope of both the Clean Water Act and the Clean Air Act. All of these cases will likely have a significant impact in defining businesses' rights and responsibilities in the employment and environmental arenas.

Employment Law Cases

Barnhart v. Thomas (00-3506). This case, which was argued on October 14, 2003, asks the Supreme Court to address a ruling by the Commissioner of Social Security that a claimant who is physically and mentally able to do her previous job is not "disabled" within the meaning of the Social Security Act, regardless of whether that particular job exists in significant numbers in the national economy.

At issue is the proper interpretation of a provision of the Act that states that a claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity

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that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy." The Social Security Administration follows a sequential five-step process in assessing the existence of a disability under this provision, and disqualifies a claimant who fails to meet the requirements of any one of the regulatory steps. Thus, only if the claimant's impairment renders her functionally incapable of performing the kind of work she did in the past (step 4) does the agency ask whether the impairment prevents the claimant from doing any job that exists in significant numbers in the national economy (step 5). The agency adhered to this procedure in denying the disability claim of a woman whose position as an elevator operator had been eliminated and who asserted that she should not be disqualified at step 4 of the inquiry ─ on the ground that she had the ability continue to perform the functions of an elevator operator ─ because the elevator operator position has become obsolete.

On review of this decision, the *en banc* U.S. Court of Appeals for the Third Circuit, disagreeing with the prior rulings of a number of other Circuits, held that the Act precludes the agency from finding that a claimant is not disabled based on her capacity to perform her previous work, unless that previous work exists in significant numbers in the national economy. The court's holding was largely based on its close reading of the text of the relevant provision; the court construed the phrase "any other" as making clear that "an individual's 'previous work' was regarded as a type of 'substantial gainful work which exists in the national economy,'" and explained that a different interpretation would lead to absurd results. The court concluded that, if respondent "can show that elevator operator positions really are obsolete," the agency is required to "proceed[] to Step Five of the sequential evaluation to ascertain whether [respondent's] medical impairments prevent her from engaging in any work that actually exists."

This case turns on a fairly technical issue of statutory interpretation. Nevertheless, it is significant both for the agency and for the sub-class of claimants (which includes many immigrants) whose previous jobs essentially no longer exist in the U.S. economy.

General Dynamics Land Systems v. Cline (02-1080). The Age Discrimination in Employment Act ("ADEA"), which covers "individuals who are at least 40 years of age," makes it unlawful for an employer to "discriminate against any individual . . . because of such individual's age." 29 U.S.C. §§ 623(a)(1), 631(a). In *Cline*, which was argued on November 12, 2003, the Supreme Court will consider whether the U.S. Court of Appeals for the Sixth Circuit erred in holding that the ADEA prohibits "reverse discrimination."

In the decision below, the Sixth Circuit considered the applicability of the ADEA to a collective bargaining agreement that offered retiree health benefits only to employees who were at least fifty years old as of July 1, 1997. A fractured panel held that the ADEA forbids employers from treating older employees more favorably than younger co-workers, so long as the younger workers are forty or older, and reversed the district court's dismissal of an ADEA claim brought by employees who were at least forty but not yet fifty on the relevant date.

This decision conflicts with the prior decisions of a number of other federal courts, including the First and Seventh Circuits. The Supreme Court must now decide whether the Sixth Circuit's conclusion is consistent with the structure and purpose of the ADEA and whether the ADEA forecloses the common employment practice of affording greater benefits to older workers.

Jones v. Donnelley (02-1205). This case involves the interpretation of 28 U.S.C. § 1658, which establishes a four-year statute of limitations for any "civil action arising under an Act of Congress enacted after [December 1, 1990]" unless the limitations period is "otherwise provided by law." At issue is the applicability

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of this statute to 42 U.S.C. § 1981, which has long prohibited discrimination in the "mak[ing] and enforce[ment] of contracts" and which was amended in 1991 to overrule the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court held "that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." Congress responded by placing the original text of § 1981 in subsection (a) of the provision, which continues to guarantee all persons the equal right to "make and enforce contracts," and then adding a definitional subsection (b) stating that the phrase "make and enforce contracts" includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Plaintiffs in the instant case brought a claim under § 1981 asserting discrimination in the benefits, privileges, terms, and conditions of their employment. This claim's timeliness depends entirely on whether the 1991 amendment to § 1981 is deemed to be "an Act of Congress enacted after [December 1, 1990]," thus triggering the four-year statute of limitations set forth in § 1658. The U.S. Court of Appeals for the Seventh Circuit held that the claim was time-barred, explaining that "when Congress amends a preexisting statute, it does not create a 'new act,' and claims arising under the statute as amended continue to arise under the preexisting statute." Under the Seventh Circuit's view, § 1658 "applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment."

This case raises a number of interesting issues, including the meaning of "arising under" and the significance of a statutory amendment in applying § 1658.

Raytheon Co. v. Hernandez (02-749). In *Raytheon*, which was argued on October 8, 2003, the Supreme Court granted certiorari to consider the effect of the Americans with Disabilities Act ("ADA") on the "rehire rights" of employees lawfully terminated for misconduct such as illegal drug use. Respondent Hernandez resigned in lieu of termination in 1991 from Hughes Missile Systems Company (now owned by Raytheon) when he failed a workplace drug test; he reapplied for a position at Hughes in 1994, but his application was denied. According to Hughes, this denial was based on a neutral policy of refusing re-employment to previously terminated employees. According to Hernandez, Hughes discriminated against him in violation of the ADA, which protects qualified individuals capable of performing the essential functions of a job from adverse employment actions based on a disability, a record of a disability, or a perception of a disability.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment in favor of Hughes, finding that there were factual disputes as to whether Hernandez was qualified and whether the 1994 denial was based on his past record of the disability of drug addiction. The Ninth Circuit also held that a facially neutral policy barring rehire of terminated employees violates the ADA insofar as it serves to bar rehire of a rehabilitated drug addict, regardless of whether the person making the hiring decision knows about the past addiction.

Although there are factual disputes in the case that could muddy the waters, the Supreme Court may decide a number of important issues of first impression in resolving the question presented. The Court faces the issue of how to analyze neutral hiring policies that are alleged to discriminate by "screening out" a person with a record of a disability, as well as how to determine whether misconduct allegedly caused by the disability is analytically distinct from the disability itself. The Court may also address the question of whether an employer must make a "reasonable accommodation" for a rehabilitated drug addict who claims that he is being treated

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discriminatorily due to a record of disability rather than a current disability.

Environmental Law Cases

South Florida Water Management District v. Miccosukee Tribe (02-626). The Supreme Court will consider in this case whether the pumping of water from a collection canal to a conservation area within the Florida Everglades constitutes an "addition" of a pollutant "from" a point source in violation of the Clean Water Act, 33 U.S.C. § 1342, where the water contains a pollutant and the pumping station point source itself adds no pollutants to the water being pumped.

The U.S. Court of Appeals for the Eleventh Circuit held that the South Florida Water Management District had violated the Clean Water Act by engaging in this sort of pumping without a permit. The court concluded that the relevant inquiry under the statute is whether "a point source is the cause-in-fact of the release of pollutants into navigable waters," and that a point source is indeed the cause-in-fact of pollutant discharge where it "changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed."

In resolving this issue, the Supreme Court will more clearly define the obligations imposed on businesses and others by the Clean Water Act, and its opinion may well provide courts and litigants with guidance in interpreting provisions of the Act other than § 1342.

Engine Manufacturers Association v. South Coast Air Quality (02-1343). This case concerns the scope of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), which preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." At issue are "Fleet Rules" adopted by a local government body in California that prohibit an operator of a fleet of fifteen or more vehicles from purchasing certain types of new motor vehicles because of those vehicles' emission characteristics. The U.S. District Court for the Central District of California held that the Fleet Rules are not preempted by Section 209(a), concluding that because the Rules regulate purchase rather than sale they do nothing more than "requir[e] purchasers to choose from among a subset of previously certified vehicles" and do not impair car-makers' ability to manufacture and market vehicles that meet otherwise applicable emissions standards. The U.S. Court of Appeals for the Ninth Circuit affirmed the judgment "for the reasons stated" in the district court's opinion; the First and Second Circuits, however, have reached contrary conclusions. Thus, the Supreme Court's decision in this case will resolve a conflict among the circuits and define the contours of an important statutory preemption provision.

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