



LEGAL MOMENTUM

Supreme Court Press Briefing

October Term 2008



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TABLE OF CONTENTS

Program	1
This Term's Cases of Interest	
<i>AT&T Corp. v. Hulteen</i> , No. 07-543	5
<i>Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.</i> , No. 06-1595	6
<i>14 Penn Plaza LLC v. Pyett</i> , No. 07-581	8
<i>Fitzgerald v. Barnstable School Comm.</i> , No. 07-1125	10
<i>United States v. Hayes</i> , No. 07-608	12
Overview of Last Term	14
About the Speakers	19
About Legal Momentum	21

Program

Welcome and Introduction	Altagracia Diloné Levat <i>Vice President for Communications and Marketing</i>
Briefing	Maya Raghu <i>Senior Staff Attorney</i>
	Gillian Thomas <i>Senior Staff Attorney</i>
Overview of Last Term	Jennifer K. Brown <i>Vice President and Legal Director</i>

PRESS CONTACT

Altagracia Diloné Levat

Vice President for Communications and Marketing

Legal Momentum

395 Hudson Street, New York, NY 10014

T: 212.413.7510 M: 347.739.7664 F: 212.226.1066

alevat@legalmomentum.org | www.legalmomentum.org

Cases

AT&T Corp. v. Hulteen, No. 07-543

(cert. granted June 23, 2008; to be argued Dec. 10, 2008)

(decision below reported at 498 F.3d 1001 (9th Cir. 2007))

TOPIC

Does an employer violate Title VII when, in making post-Pregnancy Discrimination Act (PDA) eligibility determinations for pension and other benefits, the employer does not restore service credit lost by female employees when they took pregnancy leave under pre-PDA policies?

BACKGROUND

Noreen Hulteen, Eleanora Collet, Linda Porter and Elizabeth Snyder (the plaintiffs) all were long-term employees of AT&T Corporation and its predecessor companies, and all took pregnancy leaves between 1968 and 1976. Under the company's policy at the time, employee retirement benefits were based on years of service. Although employees who took time off for temporary disability earned service credit for the entire duration of their absence, women who took time off for pregnancy and childbirth received no service credit for most of their leave.

In 1978, Congress passed the Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act of 1964 and clarified that employment discrimination on the basis of pregnancy, childbirth or related medical conditions is unlawful sex discrimination. The PDA explicitly requires employers to treat women affected by pregnancy in the same manner as other employees with similar medical conditions or limitations.

Accordingly, when the PDA took effect, AT&T adopted a new policy that did away with the old system for calculating years of service. Under the new policy, the company would award the same credit for pregnancy leave as for temporary disability leave. However, AT&T did not restore any of the lost time for women, including the plaintiffs, who had taken pregnancy leave under the old policy and been denied service credit. Consequently, when all four women retired in the 1990s, their benefits were lower than if they had taken maternity leave after the PDA became law.

The plaintiffs brought suit, alleging that AT&T's current calculation of their pre-PDA service credit violated the PDA. The trial court agreed, but a three judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed, ruling in favor of AT&T. However, the judges on the full Ninth Circuit agreed to re-hear the case, and reached a different result, upholding the trial court's finding in favor of the plaintiffs.

The court ruled that AT&T's current decision to credit the plaintiffs with less service due to their pregnancies was unlawful, even though it stemmed from a policy that pre-dated the PDA and was arguably legal at the time plaintiffs took their leaves.

SIGNIFICANCE

Observers may notice the case's similarity to *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), in which the Supreme Court considered the question of when the statute of limitations for a Title VII pay discrimination claim begins to run—at the time the discriminatory decision is made (even if the victim is not aware of it), or at the time it has its discriminatory effect (in the form of each paycheck that is lower because of the discrimination). The Court ultimately ruled that the employer's discriminatory decision "starts the clock" for filing a claim. Since Lilly Ledbetter's pay discrimination case was filed long after those discriminatory decisions had been made, and there was insufficient proof of any *current* intent to discriminate, the Court dismissed her case as untimely. According to the Ninth Circuit, however, the *Hulteen* case is different: the court found that AT&T's denial of service credit to these plaintiffs when calculating their present-day retirement benefits *does* reflect a current intent to discriminate by treating leave taken for pregnancy less favorably than other short-term leaves, and therefore violates today's law forbidding pregnancy discrimination.

Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn., No. 06-1595

(cert. granted Jan. 18, 2008; to be argued Oct. 8, 2008)

(decision below reported at 211 Fed. Appx. 373 (6th Cir. 2006))

TOPIC

Does the anti-retaliation provision of Title VII protect a worker who cooperates in her employer's internal investigation of sexual harassment?

BACKGROUND

Vicky Crawford was an employee of the Metropolitan Government of Nashville and Davidson County (Metro) for thirty years. In 2002, Metro's Human Resources Department began an investigation of alleged inappropriate sexual behavior by a supervisor, Gene Hughes. Investigators contacted employees who had worked with Hughes, including Crawford, to interview them.

Crawford told investigators that Hughes had sexually harassed her, such as by asking to see her breasts, grabbing his crotch, and suggesting she perform oral sex on him. Crawford also told investigators Hughes had harassed other employees. After gathering information from Crawford and other employees, Metro concluded that Hughes had engaged in "inappropriate and unprofessional behavior," but it took no disciplinary action against him. However, within six months of Crawford's interview, she was fired, allegedly for performance deficiencies.

Title VII makes it unlawful for an employer to retaliate against any employee "because [the employee] has opposed any practice made an unlawful employment practice by this subchapter"(the "opposition clause"), "or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"(the "participation clause"). 42 U.S.C. § 2000e-3(a). Crawford filed a lawsuit alleging that Metro discharged her for the statements she made while cooperating with the sexual harassment investigation, in violation of both the opposition and participation clauses.

The trial court dismissed the case, and the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal. The

court reasoned that Crawford's corroborating statements about Hughes did not meet the definitions of either "opposition" or "participation" under Title VII, so Metro's decision to fire her could not be considered retaliatory. As to the opposition clause, the court found that Crawford's cooperation in an internal investigation did not rise to the level of "opposing" discrimination. Instead, said the court, Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.*, 211 Fed. Appx. 373, 376 (6th Cir. 2006) (citation omitted). An example of such activity in this case, explained the court, would be Crawford's filing a complaint of her own against Hughes. As to the participation clause, the court ruled that Crawford's statements during an internal investigation of a complaint did not qualify as "participation." Rather, it found that only statements given during an investigation of a charge of discrimination filed with the U.S. Equal Employment Opportunity Commission (EEOC) or other outside enforcement body rise to the level of "participation" protected by Title VII.

SIGNIFICANCE

Three terms ago, in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Supreme Court resoundingly approved broad protection from retaliation for employees who complain about perceived discrimination. In that decision, the Court expressly ruled that Title VII's ban on retaliation is critical to fulfilling the law's central purpose: eradicating employment discrimination. In *Crawford*, the Court is asked to apply those principles to employees who do not themselves file discrimination complaints, but who speak up on behalf of those who do. Depriving those employees of any less protection will make employment discrimination much more difficult to root out and remedy. It also will send an emphatic message to employees that unless they are prepared to file formal charges of discrimination—a step many employees are

understandably reluctant to take—they are at risk of retaliation if they disclose what they know about existing harassment and bias.

Crawford also requires the Court to reconcile its retaliation precedent with its rulings in the landmark sexual harassment decisions of a decade ago, *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). Those opinions stated a preference for employers' internal resolution of harassment complaints, with the goal of lessening the litigation burden on employees, employers, and the courts. That goal is drastically undermined if an employee who participates in such an internal investigation fears she can be fired with impunity. Similarly, the employee who might be inclined to file an internal charge on her own behalf will be dissuaded from doing so if she knows that her colleagues will be too afraid to corroborate her allegations.

LEGAL MOMENTUM'S ROLE

Legal Momentum participated in an *amicus* brief submitted on behalf of 32 women's and employee-rights organizations. Through social science and other research, the brief documents the many reasons women keep silent about workplace harassment, including their legitimate fear that disclosure will result in retaliation. Without broad protection under Title VII's anti-retaliation provision, argues the brief, employees will have no incentive to speak up about harassment, and every reason not to.

***14 Penn Plaza LLC v. Pyett*, No. 07-581**
(cert. granted Feb. 19, 2008; to be argued Dec. 1, 2008)
(decision below reported at 498 F.3d 88 (2d Cir. 2007))

TOPIC

Can a union waive its members' rights to bring discrimination claims in court, and instead require that such claims be decided by arbitration?

BACKGROUND

Collective bargaining agreements (CBAs)—contracts negotiated between an employer and a union—outline the many details of union members' employment, from wage rates to layoff procedures to the right to strike. Typically, CBAs require that disputes about any of these contractual issues be resolved exclusively through an internal grievance process followed by arbitration. Arbitration is intended to provide a shorter and less expensive way to resolve disputes than a lawsuit, but it has significant limitations; for instance, arbitrators often are not lawyers, and the judicial rules of procedure and evidence do not apply in arbitration. Moreover, it is normally up to the union, not the individual member, whether to take a claim to arbitration.

The plaintiffs in this case worked as night watchmen in an office building in New York and were members of the Service Employees International Union. All were over 50. After being reassigned to less desirable positions and being replaced by younger workers, they filed grievances under the procedures in their union's CBA. The union chose not to pursue their charges of age discrimination. The plaintiffs also filed charges with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that their transfer by the building's management violated the Age Discrimination in Employment Act (ADEA). After the EEOC closed its investigation of the charge, the plaintiffs filed an age discrimination lawsuit in court.

The defendants asked the court to dismiss the case and require the plaintiffs to resolve their claims in arbitration. The defendants pointed to a clause in the union's CBA stating that all members with claims alleging

discrimination under state and federal laws—including the ADEA—"shall be subject to the grievance and arbitration procedure [outlined in the CBA] as the sole and exclusive remedy for violations."

The district court denied the motion, and the U.S. Court of Appeals for the Second Circuit affirmed that decision. The court found that the CBA provision was invalid and unenforceable. It ruled that members' rights under the ADEA and other anti-discrimination laws—including their right to have a court decide claims alleging violations of those laws—cannot be negotiated away by union representatives.

SIGNIFICANCE

This case tackles one of the most contentious issues in employment law: whether mandatory arbitration provisions are valid when it comes to employment discrimination claims. Three decades ago, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that while a union can mandate arbitration for union members' claims relating to "collective activity, like the right to strike," it cannot give up its members' right to file discrimination claims in court. Seventeen years later, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court found a mandatory arbitration provision acceptable when it was negotiated between an individual employee and her employer. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court revisited the collective bargaining context, and stated that, at the least, a "clear and unmistakable waiver" would be required in order for a union to give up members' rights to litigate employment discrimination claims in court.

The employer in *Pyett* will argue that the mandatory arbitration clause at issue contains a "clear and unmistakable waiver" of union members' rights under federal and state anti-discrimination laws, and accordingly, that the clause is valid and the watchmen's

claims should be arbitrated. The employees will contend that the Court should maintain its distinction between unions' and individuals' rights to waive access to the courts. Given that one in ten Americans is a member of a labor union, the repercussions of the Court's decision will affect literally millions of workers.

LEGAL MOMENTUM'S ROLE

Legal Momentum is supporting an *amicus* brief in this case led by the Lawyers' Committee for Civil Rights Under Law. Our brief points out that allowing a CBA to waive an individual's right to bring a discrimination claim in federal court "would extinguish the individual right and replace it with a collective one that could be abandoned without the individual's consent." Relying on unions to enforce individual rights in this context is risky, at best, for several reasons: unions sometimes are complicit in or actually engage in employment discrimination; a union may choose not to devote its limited resources to arbitrating an individual's discrimination claim; or a union may represent both the individual claiming discrimination and the persons charged with it. We therefore argue that the Court should follow the bright-line rule of *Gardner-Denver*, and rule that collective bargaining agreements cannot waive the right to pursue a federal discrimination claim in court.

Fitzgerald v. Barnstable School Comm., No. 07-1125

(cert. granted June 9, 2008; to be argued Dec. 2, 2008)

(decision below reported at 504 F.3d 165 (1st Cir. 2007))

TOPIC

Whether Title IX is the exclusive remedy for sex discrimination in federally funded educational institutions, or whether plaintiffs may also sue under 42 U.S.C. § 1983 for violations of the constitutional right to equal protection under the law.

BACKGROUND

This case concerns alleged sexual harassment of a female kindergarten student by a male third-grader on a school bus. Following complaints by the girl's parents, school officials met with the parents and conducted a timely investigation but said they were unable to corroborate her allegations. Her parents subsequently sued the school committee and superintendent. They alleged violations of Title IX of the Education Act Amendments of 1972, and also sued under 42 U.S.C. § 1983, or Section 1983, which permits lawsuits by individuals against state actors who have violated their federal statutory or constitutional rights. The federal district court resolved the case on summary judgment for the defendants, and the female student's parents appealed.

Title IX provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. Although Title IX does not expressly state that individuals can bring suit for violations of the law, the Supreme Court has interpreted it to provide such a right, known as a private right of action, as well as the ability to recover monetary damages for violations.

An educational institution may be liable pursuant to Title IX for student-on-student sexual harassment if the plaintiff can show: (1) that the institution receives federal funding; (2) that the harassment was severe, pervasive, and objectively offensive; (3) that the harassment deprived the student of educational opportunities or benefits; (4) that the institution had actual knowledge of the

harassment; and (5) that the institution's "deliberate indifference" caused the student to be subjected to the harassment. In rejecting plaintiff's appeal, the First Circuit found that while the facts alleged met the first four prongs of this test, the timely response of school administrators precluded a finding of the institution's "deliberate indifference," which the court explained means that the school's response must be so deficient as to be clearly unreasonable.

The First Circuit also dismissed the claims under Section 1983. One Section 1983 claim was essentially that school officials violated Title IX. That was dismissed on the ground that the private right of action under Title IX is comprehensive enough that alleged violations of Title IX must be pursued directly under that statute, not under Section 1983—even though the remedies available under Section 1983 would be broader.

The other Section 1983 claim was different: it claimed that school officials had violated not just the girl's statutory rights under Title IX, but also her constitutional right to equal protection under the law. The First Circuit dismissed this constitutional Section 1983 claim as well, holding that Congress intended Title IX to be "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions," at least insofar as a constitutional claim is "virtually identical" to a Title IX claim. *Fitzgerald v. Barnstable School Comm.*, 504 F.3d 165, 176 (1st Cir. 2007). The dismissal of the plaintiff's constitutional claim is now before the Supreme Court.

SIGNIFICANCE

A broad ruling by the Supreme Court that Title IX is the exclusive remedy for sex discrimination by a federally financed institution and that it therefore precludes bringing equal protection claims under Section 1983 would leave a substantial gap in protection against sex discrimination in education. Title IX, by the terms of the

statute itself, actually exempts certain forms of sex discrimination from its coverage, including admissions to elementary or secondary schools; military institutions; and traditionally single-sex public colleges. Under a broad reading of Title IX's preclusive effect, the Supreme Court could not have held in *United States v. Virginia*, 518 U.S. 515 (1996), that the men-only admissions policy at the Virginia Military Institute violated the Constitution. Moreover, most courts read Title IX to permit suits only against institutions, not individuals. If Title IX were the exclusive remedy for sex discrimination at institutions that receive federal funds, then even school officials who engaged in the most blatant sex discrimination would be immunized from personal liability for their acts.

A narrower ruling is also possible. The First Circuit held that Title IX precludes only those constitutional claims that are substantially identical to Title IX claims, and stated explicitly that Section 1983 might be available to pursue an equal protection claim against an individual who directly perpetrated unconstitutional discrimination (for example, a teacher who sexually harassed a student). Any ruling finding that Title IX preempts constitutional equal protection claims, however, would be a significant step backward for women's pursuit of equal rights in education.

LEGAL MOMENTUM'S ROLE

Legal Momentum has joined an *amicus curiae* brief led by the American Civil Liberties Union Women's Rights Project and the National Women's Law Center, arguing that Congress did not intend Title IX to supplant Section 1983 as a remedy for unconstitutional sex discrimination, but instead to expand upon constitutional rights that were only beginning to be recognized by the courts when Congress passed Title IX in 1972. Title IX and the Equal Protection Clause are not coextensive, and Title IX does not provide a comprehensive enforcement scheme that preempts Section 1983. Indeed, the sole remedy for violations that is stated explicitly in Title IX is withdrawal of federal funds from the offending institution. Even now, 36 years after Title IX was enacted, sex discrimination persists in many educational institutions. Comprehensive protection from discrimination, including the ability to bring Section 1983 suits, remains necessary to fully achieve equal opportunity in education.

United States v. Hayes, No. 07-608

(cert. granted Mar. 24, 2008; to be argued Nov. 10, 2008)

(decision reported below at 482 F.3d 749 (4th Cir. 2007))

TOPIC

Does the federal law that prohibits gun ownership by persons convicted of a “misdemeanor crime of domestic violence” apply only to individuals who violate laws that specifically prohibit violence against family members, or does it apply to anyone convicted of a violent misdemeanor that was, in fact, committed against a family member?

BACKGROUND

Under 18 U.S.C. § 922(g)(9), known after its sponsor as the “Lautenberg Amendment” to the federal Gun Control Act, it is unlawful for anyone convicted of a “misdemeanor crime of domestic violence” to possess a firearm.

In 1994, Randy Hayes pleaded guilty to the state law crime of misdemeanor battery against his then-wife, the mother of his child. Ten years later, in July 2004, police responded to a 911 call concerning domestic violence at his home. Hayes consented to a search and a rifle was found. He was then arrested and indicted for violating the Lautenberg Amendment.

Hayes sought to have the federal district court dismiss his indictment, arguing that his prior crime was not a “misdemeanor crime of domestic violence.” The federal statute defines that term as a misdemeanor under federal or state law that “has, as an element” the use or attempted use of force or the threatened use of a deadly weapon by a spouse, parent, person who shares a child in common with the victim, person who cohabits with the victim, or someone similarly situated. Hayes argued that his previous conviction did not bar him from gun ownership because the law he violated did not require a domestic relationship between the victim and offender. The district court denied his motion to dismiss the indictment, and he appealed to the U.S. Court of Appeals for the Fourth Circuit.

The nine circuits that previously had considered the issue unanimously agreed that the Lautenberg Amendment

did not require a domestic relationship to be an actual *element* of the prior offense, but only that the facts concern people in a domestic relationship. The Fourth Circuit, however, agreed with Hayes’s argument and remanded the case for the indictment to be dismissed.

SIGNIFICANCE

The federal domestic violence gun ban is a vital life-saving protection for victims of domestic violence. Incidents of domestic violence involve a gun nearly one in ten times, and when a gun is involved, it is twelve times more likely that the incident will end in death. Furthermore, approximately one-third of all women homicide victims are murdered by an intimate partner.

In enacting the Lautenberg Amendment in 1996, Congress recognized that even the most violent cases of domestic violence may not be taken seriously and may be pleaded down to misdemeanors. The Lautenberg Amendment closed a loophole in the federal Gun Control Act such that previously, only convicted felons were prohibited from possessing firearms. Since its enactment, domestic violence misdemeanants have been blocked from purchasing guns over 150,000 times.

However, opposition to the domestic violence gun ban is considerable. Opponents argue that the ban is especially harsh for police officers and others who might lose their jobs because they cannot carry a gun. Some judges believe that possessing a gun for employment and/or hunting is so important that they have refused to grant protective orders and have expunged domestic violence from offenders’ records. Opponents also question the ban on many grounds, including its retroactivity, its application to crimes that were committed many years ago, the use of evidence outside of the judicial record to prove that a crime involved a domestic relationship, and the loss of the constitutional right to bear arms because of a misdemeanor conviction.

LEGAL MOMENTUM'S ROLE

Legal Momentum joined a brief for *amici curiae*, led by the National Network to End Domestic Violence and the Domestic Violence Legal Empowerment and Appeals Project, to argue that a natural reading of the Lautenberg Amendment clearly does not require a domestic relationship to be an element of the prior offense. Furthermore, the Fourth Circuit's interpretation renders the Lautenberg Amendment both nonsensical and ineffective. Even today, fewer than half the states have misdemeanor assault or battery statutes that include a domestic relationship as an element of the offense. It is nonsensical that Congress would have enacted a law aimed at national protection for domestic violence victims that immediately would be moot in over half the states.

Overview of Last Term

Legal Momentum presents its Supreme Court Press Briefing each fall, shortly before the beginning of a new Term. Here we discuss the outcome of the cases covered in our fall 2007 briefing, as well as several cases that reached the Court later in the year

DOMESTIC VIOLENCE

The Court decided two cases last Term that involved broad questions of constitutional rights and criminal law with significant consequences for women threatened or victimized by domestic violence. Legal Momentum brought our years of experience as a national leader in combating domestic violence to the Court through *amicus curiae* briefs filed in both cases.

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court struck down the District of Columbia ban on private possession of handguns, definitively holding that the Second Amendment protects an individual right to possess a firearm for traditionally lawful purposes, such as self-defense in the home. Given statistics showing that domestic violence perpetrators use guns with alarming frequency in their attacks, and that access to a gun greatly increases the likelihood that domestic violence will be fatal, Legal Momentum joined an *amicus curiae* brief urging the Court to hold that the gun control law was constitutional because there are compelling reasons for restricting the use and availability of firearms under circumstances like those of domestic violence. The Court's decision in *Heller* will likely make it easier for domestic violence perpetrators to gain access to guns to threaten or harm their already vulnerable victims, especially if the Court decides for the defendant in this year's case, *United States v. Hayes* (see p. 12).

Giles v. California, 128 S. Ct. 2678 (2008), was the latest in a recent series of cases examining the admissibility of certain evidence against a criminal defendant under the Sixth Amendment's Confrontation Clause, which guarantees a defendant's right "to be confronted with the witnesses against him." Beginning with *Crawford v. Washington*, 541 U.S. 36 (2004), these decisions have had a dramatic impact on the prosecution of domestic violence cases throughout the country because they have

made it much harder for prosecutors to use evidence like 911 calls against defendants unless the victim is willing to testify at trial. In *Giles*, the Court considered whether a criminal defendant automatically "forfeits" his right to insist that the prosecution produce a live witness to testify against him when the defendant's wrongful act (in this case murder) has caused the unavailability of the key witness, or whether forfeiture requires an additional showing that the defendant committed the wrongful act with the specific intention of making the witness unavailable. The *amicus curiae* brief that Legal Momentum submitted with other groups examined the long history of the "forfeiture by wrongdoing" doctrine. We argued that the specific intent to make the witness unavailable is not necessary for forfeiture, and that requiring specific intent would make it very difficult for prosecutors to pursue domestic violence convictions. Nevertheless, in a 6-3 decision, the Court ruled that the murder victim's past statement to the police about Giles' domestic violence could not be used against him because the California courts failed to determine whether the victim was killed specifically to prevent her from testifying against him. The Court remanded and Giles will be retried. Although the decision leaves open the possibility that a domestic violence victim's statements could be admissible, it will be very difficult to have such evidence admitted unless, as the Court posited, there is a long, recorded history of violence that demonstrates the defendant had the intent to isolate the victim and prevent her from accessing the judicial process.

EMPLOYMENT RIGHTS

Last year's decisions on employment rights cases were decidedly better from the plaintiff perspective than *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), decided the previous Term.

In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), the Supreme Court took a refreshingly common-sense approach to what constitutes a “charge” of discrimination sufficient to exhaust administrative remedies before the U.S. Equal Employment Opportunity Commission. The EEOC is the federal agency that first considers most employment discrimination claims. The plaintiff in this case had filed an “intake questionnaire” with the EEOC, together with a six-page affidavit about her age discrimination claims. The Second Circuit had held that this filing met the requirement that a “charge” be filed with the EEOC at least 60 days before filing a lawsuit under the Age Discrimination in Employment Act. The Supreme Court relied heavily on an *amicus* brief filed by the EEOC in ruling 7-2 in favor of the plaintiff. The Court adopted the EEOC’s proposed standard that a filing be deemed a charge if, in addition to making an allegation of discrimination against a named employer, it can be “reasonably construed as a request for the agency to take remedial action to protect the employee’s rights or otherwise settle a dispute between the employer and the employee.” Here, the Court found that the filed documents—which ended with a plea to the EEOC to “force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile environment created” by the challenged policies—could be “reasonably construed” as a request for the EEOC to take action to protect the workers’ rights, and therefore the suit could proceed.

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Supreme Court reversed a Tenth Circuit ruling on what evidence an age discrimination plaintiff could use to support her claims. In this case, the plaintiff, who claimed that her supervisor discriminated on the basis of age when selecting her for layoff, wanted to use the testimony of other employees at the company who also believed their supervisors had used age to select them for layoff, and the Tenth Circuit had allowed that testimony. While reversing the circuit decision was superficially a victory for employers, in reality, the Court’s unanimous ruling underscored the key role of trial courts in making case-by-case assessments of the relevance of evidence in employment discrimination cases. The Court did not, as feared, adopt a rule that evidence about such other employees’ experiences could never be relevant to an

individual discrimination claim. Rather, as urged by the Solicitor General and the EEOC, it took a more nuanced approach: “[t]he question whether evidence of discrimination by other supervisors is relevant in an individual [age discrimination] 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.” On this basis, the Court ruled that the Tenth Circuit should not have stepped in to rule on the admissibility of the challenged evidence itself, and instead ordered that the case be remanded to the district court for further consideration with the understanding that there was no *per se* rule barring the admission of evidence about purported discriminatory treatment of other employees.

Last year, we also briefed the case *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), which considered the scope of review of an arbitration award. While this case was more peripheral to Legal Momentum’s concerns, we included it in our briefing because mandatory arbitration clauses in employment contracts have sent many an employment discrimination claim into arbitration rather than the courts. The Federal Arbitration Act permits an arbitration award to be overturned on only a handful of very narrow grounds, but in this case, the parties had made an agreement to allow an award to be overturned if a reviewing federal judge found it was based on “legal error.” When an award was overturned for exactly that reason, the losing party contested it on the grounds that—despite the agreement between the parties—in fact the Arbitration Act did not permit the award to be overturned. The Supreme Court agreed that the Federal Arbitration Act does strictly limit the review of arbitration awards, an outcome that may slow the trend toward mandatory arbitration of employment claims.

FEDERAL PREEMPTION

Legal Momentum has addressed federal preemption of state law in our annual briefings because preemption often has the effect of invalidating state laws that protect the health and well-being of the populace and, in effect, replacing those laws with lower, or no, federal standards. That trend solidified in the last Term.

In *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008), the Court ruled unanimously that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempts states from exercising their historic public health powers to impose certain requirements on retailers who market tobacco products for delivery directly to consumers. The Maine law struck down in this case required tobacco retailers who ship directly to homes to prevent delivery of cigarettes to minors, in part by using only motor carriers who would take specified steps to verify the identity and age of persons receiving tobacco deliveries. The Supreme Court ruled that this violated an FAAAA prohibition on state laws “related to a price, route, or service” of any motor carrier. Notable for its absence from the Court’s ruling was any reference to the historic balance that has been struck between the Constitution’s Supremacy Clause and respect for state sovereignty in exercising the “police power,” that is, using the law to protect public safety, health and welfare. The decision did not discuss established doctrine, which assumes that Congress does not intend to preempt a state’s exercise of its police power, and that when Congress has manifested a preemptive intent, the scope of preemption should be carefully limited. Instead, it simply dismissed this aspect of the state’s efforts to prevent minors from obtaining tobacco by saying that the FAAAA does not create any “public health exemption” to its preemptive effect.

In *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), the Court held that the federal Food, Drug and Cosmetic Act preempts any lawsuit brought under state law to challenge the safety or effectiveness of a medical device that has been “pre-approved” by the Food and Drug Administration (FDA). Legal Momentum spotlighted this case in last year’s briefing because the Court previously had held, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), that such lawsuits were not preempted for medical devices that the FDA allows to be marketed under a different section of the Food, Drug and Cosmetic Act. Thus, Medtronic was seeking—and won—a significant expansion of industry immunity from suit for personal injuries caused by medical devices.

The Court’s decision to review *Wyeth v. Levine*, No. 06-1249, in the coming Term suggests that it will

continue to broaden the scope of federal preemption, further weakening state authority to protect public health and safety and depriving individuals of remedies for injuries from dangerous or defective products. While the medical device cases considered the reach of a federal statute that explicitly preempts state law, *Wyeth v. Levine* is about implied preemption. The particular issue is whether the Food and Drug Administration’s approval of a drug label preempts state lawsuits claiming that the label failed to give adequate warning of known dangers. Despite the fact that for decades, courts have ruled almost unanimously that a federal drug label does not preempt state lawsuits premised on insufficient labeling, the Court appears poised to overturn this principle and further expand the medical drug and device industry’s immunity from personal injury lawsuits.

INTERNATIONAL LAW

Legal Momentum has a longstanding interest in the domestic incorporation of international human rights principles. For that reason, we paid close attention to the outcome of *Medellin v. Texas*, 128 S. Ct. 1346 (2008), deciding whether states have a legal obligation to adhere to a judgment about U.S. treaty obligations that is issued by an international court. In 2004, the International Court of Justice held that the U.S. was required to “review and reconsider” Mexican national Jose Medellin’s conviction in Texas on rape and murder charges, because Medellin was denied his right under the international treaty known as the Vienna Convention to contact his embassy after he was arrested. The United States had consented to the jurisdiction of the International Court to decide the case, and to obey its ruling. Moreover, President Bush had issued a memorandum stating that the U.S. would comply with the International Court ruling by “having State courts give effect to the decision.” Despite the ruling and the Bush memorandum, Texas courts declined to review the conviction and Medellin went to the Supreme Court for relief. The United States entered the case to argue that the Bush memorandum—though not the International Court ruling itself—obligated Texas to undertake the requested review. Rejecting both Medellin’s arguments and those advanced by the Solicitor General on behalf of the United States, the Supreme Court ruled that the International Court

ruling does not have binding effect in the U.S., and that President Bush lacked authority to force Texas courts to review Medellin's conviction. Jose Medellin was executed in August. As we anticipated, the ruling provided insight into the newest Justices' views on the role of international law in the U.S. courts. Chief Justice Roberts wrote the majority opinion in the 6-3 decision, and was joined by the other new member of the Court, Justice Samuel Alito.

Speakers

MAYA RAGHU

Senior Staff Attorney

Maya Raghu is a senior staff attorney at Legal Momentum. She directs Legal Momentum's Employment and Housing Rights for Victims of Domestic Violence project, which provides direct representation to survivors of domestic violence and expert consultation and trainings to attorneys and advocates around the country on employment and housing discrimination issues of victims, and conducts legislative advocacy and public education. She has litigated cases in state and federal trial and appellate courts around the country.

Prior to joining Legal Momentum, Maya was an associate at Simpson Thacher & Bartlett LLP in New York City for four years, where she worked on a variety of commercial litigation and pro bono matters in state and federal trial and appellate courts. She also served as a law clerk to Judge Vanessa Gilmore of the United States District Court for the Southern District of Texas. She received her B.A. from Trinity University and her J.D. from Georgetown University Law Center. She is a member of the New York City Bar Association's Civil Rights Committee.

GILLIAN THOMAS

Senior Staff Attorney

Gillian Thomas is a senior staff attorney with Legal Momentum. Prior to joining Legal Momentum, Gillian represented employees in employment discrimination cases at Vladeck, Waldman, Elias & Engelhard in New York City, and at Willig, Williams & Davidson in Philadelphia. Also while in Philadelphia, Gillian practiced commercial litigation at Schnader Harrison Segal & Lewis. Gillian received her B.A. in history from Yale University and her law degree from the University of Michigan, where she was a contributing editor to the *Michigan Journal of Race and Law*. After law school, she clerked for the Honorable John T. Nixon, U.S. District Judge in Nashville, Tennessee. Gillian has taught employment law as an adjunct professor at Rutgers School of Law.

JENNIFER K. BROWN

Vice President and Legal Director, Legal Momentum

As vice president and legal director of Legal Momentum since 2002, Jennifer K. Brown supervises programs that combine litigation with public policy advocacy to advance the rights of women and girls in the fields of sexuality and family rights; domestic violence; and opportunities in the traditionally male skilled trades and uniformed services. Jennifer was previously head of the Reproductive Rights Unit in the New York State Attorney General's Office; an Assistant United States Attorney in the Southern District of New York; and a fellow with the ACLU's Reproductive Freedom Project. She clerked for the Honorable Pierre N. Leval on the U.S. Court of Appeals for the Second Circuit after graduating from Yale Law School, and is a former president of the New York City Chapter of the National Organization for Women.

About Legal Momentum

Advancing Women's Rights Since 1970

Founded in 1970 as NOW Legal Defense and Education Fund, Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls. Legal Momentum is a leader in establishing litigation and public policy strategies to secure equality and justice for women. Its ground breaking work on behalf of women and girls is currently focused on freedom from violence against women, equal work and equal pay, the health of women and girls, strong families, and strong communities. Its ambitious and wide-ranging legal program is known for its cutting-edge legal theories and as a source of expert assistance to other women's rights attorneys and organizations.

Legal Momentum occupies a unique position as a multi-issue organization dedicated solely to women's rights. Its strategic litigation, advocacy and public education programs use the power of law to open opportunities closed to women and to ensure that all women can build safe and secure lives for themselves and their families. Legal Momentum addresses these issues through five programs, and through the work of its Policy and Communications offices. Our current program areas are:

The **Employment and Housing Rights for Victims of Domestic Violence (EHRVDV)** program combines ground breaking litigation with legislative advocacy and training for advocates, lawyers, employers and landlords to help domestic violence victims all over the country maintain employment and safe housing.

The **Equality Works Program** uses policy initiatives and impact litigation to challenge discrimination and expand opportunities for women working in historically male-dominated fields, such as the skilled trades and fire fighting. Jobs in these fields offer excellent wages and benefits, providing long-term economic security to women who might otherwise be forced into low-wage, dead-end jobs.

The **Immigrant Women Program** is the nation's expert on the rights and services available to immigrant victims of domestic and other violence. It shares this expertise through comprehensive materials and trainings for lawyers and advocates nationwide, and leads advocacy for legal protections, social services, and economic justice for immigrant women.

The **National Judicial Education Program** educates judges, lawyers, law students and other legal professionals, distributes educational materials, and leads the gender bias task force movement to fight gender inequality in legal systems across the country. The program also focuses on the treatment of domestic violence and sexual assault cases in the judicial process.

The **Sexuality and Family Rights** program works to promote women's autonomy, protect women's sexual and reproductive rights, and expose the government's funding and promotion of policies that limit these rights.

Legal Momentum is headquartered in New York City with a substantial policy office in Washington, DC. It is an independent 501(c)(3) nonprofit organization supported by foundations, corporations and individuals. It has a budget in excess of \$5.5 million and 31 employees (eight are in the Washington office).

Headquarters: 395 Hudson Street New York, NY 10014 212.925.6635

Policy Office: 1101 14th Street, NW, Ste. 300 Washington, DC 20005 202.326.0040

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Policy Office: 1101 14th Street, N.W., Ste. 300, Washington, D.C. 20005
www.legalmomentum.org

