



## SUPREME COURT ISSUES

### TWO AGE DISCRIMINATION RULINGS



**Jerry Pinn** .....

*“The Court finds it obvious that the whole purpose of the disability rule is to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits.”*  
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#### Interaction Between Disability Plans and Pension Status

A June ruling of the U.S. Supreme Court dealt with the interaction between employer disability plans and pension entitlements. *Kentucky Retirement System v. EEOC*, 103 FEP Cases 897 (June 19, 2008). Under the terms of the Kentucky retirement plan for policemen, firemen, and other hazardous position workers, some disabled individuals are treated more generously than some of those who become disabled only after becoming eligible for retirement on the basis of age. The Court finds it obvious that the whole purpose of the disability rule is to treat a disabled worker as though he had become disabled after, rather than before, he had become eligible for normal retirement benefits. Age factors into the disability calculation only because normal retirement rules themselves permissibly include age as a consideration. Thus, the plan at issue simply seeks to treat disabled employees as if they had worked until the point at which they would be eligible for a normal pension. The disparity turns upon pension eligibility and not age. Further, the system does not rely on any of the sorts of stereotypical assumptions that the ADEA sought to eradicate. It does not rest on any stereotype about the work capacity of “older” workers relative to “young” workers. It also assumes that no disabled worker would have continued working beyond the point at which he was both (1) disabled; and (2) pension eligible. These “assumptions” do not involve age-related stereotypes, and they apply equally to all workers, regardless of age.

Based on these factors, the Court concludes that the plan does not, on its face, create treatment differences that are “actually motivated” by age. The Court explains that it is not unsettling the general rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA. The Court deals only with the quite special case of differential treatment based on pension status, where pension status itself turns, in part, on age. The rule adopted by the Court is as follows: “Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADA, must adduce sufficient evidence to show that the differential treatment was ‘actually motivated’ by age, not pension status.”

The Kentucky Retirement System ruling is a 5-4 decision, with the dissenters indicating that the Court is reading the statute as creating a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is tied directly to age, and then linked to another type of benefit program. The dissent says the

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G. GERARD JABALEY is a Member of the Knoxville, Tennessee office of the firm. Gerard's primary practice areas are defense oriented and encompass the areas of workers' compensation, employment law and human resources training, including preparation of handbooks and other policies for employers and management training seminars. He obtained his B.S. degree from The University of Tennessee at Chattanooga. He obtained his Doctor of Jurisprudence from The Cecil C. Humphreys School of Law at the University of Memphis in 1986. Gerard is an active member of the Knoxville Bar Association and served on the CLE Committee 1992-95; Co-Chair 1995-97, and the Professionalism Committee since 1999. Gerard is also a member of the Tennessee and American Bar Associations and a member of the Employment Law and Litigation Sections of these Bar Associations.

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## DISCIPLINE OF EMPLOYEES

### FOR OFF-DUTY SMOKING OR OTHER LAWFUL ACTIVITIES



#### Suzanne Roten

"Similarly, while various federal laws prohibit discrimination based on such things as race, sex, national origin, religion, age, or disability, there is no general federal protection for employees engaged in activities off-duty."

As a starting point, however, employers need to be aware that a number of states have passed state laws prohibiting employers from taking adverse action against employees for certain forms of off-duty activities.

The most common type of state law activity regarding off-duty activity has been encouraged by the tobacco industry, and some 18 states provide employees with protection against being discriminated against specifically for smoking or other use of tobacco outside work. Tennessee's statute is T.C.A. § 50-1-304. A few other states provide broader protection for employees for the use of "lawful products" outside the workplace, going beyond simply tobacco. Either in the statutory or decisional law interpreting such state statutes, certain exceptions are often recognized for important employer interests, such as an exception based on a bona fide occupational qualification of some kind, or where the use of a particular product could create a conflict of interest.

A few states have laws that might be referred to as "lifestyle discrimination"

A common question is whether an employer can terminate or discipline an employee for off-duty conduct. For example, suppose an employee is arrested, but released on bail, for the commission of a heinous offense, such as selling drugs or molesting a child, or even a less serious offense, such as public drunkenness. Can the employer suspend or terminate the employee, or what generally can the employer do?

As a starting point, many employers will point out that their state has an "employment-at-will" legal concept, in which an employee can be terminated for a good reason, bad reason, or no reason at all. Similarly, while various federal laws prohibit discrimination based on such things as race, sex, national origin, religion, age, or disability, there is no general federal protection for employees engaged in activities off-duty.

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## STATE LAW PROHIBITING FUNDS TO DETER ORGANIZING PRE-EMPTED BY LABOR ACT

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### Howard Jackson.....

"The case is interesting not only for its discussion of the pre-emption doctrine, but also, for its discussion of "free speech" in union organizing campaigns."

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The U.S. Supreme Court has ruled that a California state law that prohibits employers who receive state grants from using such money to assist, promote, or deter union organizing, is pre-empted by the Labor Act. *Chamber of Commerce v. Brown*, 184 LRRM 2385 (June 19, 2008). The case is interesting not only for its discussion of the pre-emption doctrine, but also, for its discussion of "free speech" in union organizing campaigns.

One part of the federal pre-emption doctrine forbids states to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." A second pre-emption doctrine forbids both the National Labor Relations Board (NLRB) and states from regulating conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" The Court found that the California state law violates the latter pre-emption provision, based on the rationale that the State plainly could not directly regulate non-coercive speech about unionization by means of an express prohibition, and similarly may not indirectly regulate such conduct by imposing spending restrictions on the use of State funds. The California law put considerable pressure on an employer either to forego his "free speech right to communicate his views to his employees," or else to refuse the receipt of any State funds.

The Court notes that as enacted in 1935, the original Labor Act did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights. The NLRB initially took the position that Section 8 of the Labor Act, which provides that workers have the right to organize, to bargain collectively, and to engage in concerted activity for their mutual aid and protection, required complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the rights of employees. In 1941, the Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its views on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within the meaning of the Act." The Court subsequently characterized these rulings as recognizing the First Amendment right of employers to engage in non-coercive speech about unionization. Notwithstanding these decisions, the NLRB continued to regulate employer speech too restrictively in the eyes of Congress.

Congress was concerned that the original Labor Act had pushed the labor relations balance too far in favor of unions, so it passed the Taft-Hartley Act in 1947. This law emphasized that employees "have the right to refrain from any or all" protected activities, and added provisions which prohibited unfair labor practices by unions. Third, the Taft-Hartley Act added Section 8(c), which protects speech by both unions and employers from regulation by the NLRB. Enactment of Section 8(c) manifested a "Congressional intent to encourage free debate on issues dividing labor and management." Thus, the addition of Section 8(c) expressly precludes regulation of speech about unionization "as long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" The California state law was deemed by the Court to interfere with these policy considerations.

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system violates the plain meaning of the ADEA which prohibits a benefit plan from paying younger workers more than older workers because of age.

### **Burden of Proving Reasonable Factors Other Than Age**

The second case deals with a disparate-impact claim under the ADEA in which the employer defends that its action was taken “based on reasonable factors other than age,” whether the employer must not only produce evidence raising the defense, but also persuade the factfinder of its merit. *Meacham v. Knolls Atomic Power Lab*, 103 FEP Cases 908 (2008). The Court, in essence, finds the employer has the burden of proving both. This result is not particularly surprising, but the factual context is interesting in addressing the law.

The government had ordered its contractor, the employer defendant, to reduce its workforce, and the employer had its managers score their subordinates on “performance,” “flexibility,” and “critical skills”; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. The plaintiffs were among those laid off, and filed a suit under a disparate-impact theory under the ADEA. To show such an impact, the plaintiffs relied on a statistical expert’s testimony that results so skewed according to age could really occur by chance, and the scores for “flexibility” and “criticality,” over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes.

A provision of the ADEA creates an exemption for employer actions “otherwise prohibited” by the ADA but “based on reasonable factors other than age” (RFOA). The plaintiffs raised both disparate-treatment (discriminatory intent) and disparate-impact (discriminatory result) claims under the ADEA and state law, arguing that the employer “designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees.” The Court discussed that it had previously ruled that in a typical disparate-impact case, the employer’s practice is “without respect to age” and its adverse impact (though “because of age”) is “attributable to a non-age factor”; so action based on a “factor other than age” is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it. The RFOA defense in a disparate-impact case is based on the defense that the factor relied upon was a “reasonable” one for the employer to be using. The Court concluded that the exemption from liability for disparate impact claims under the ADEA for employer actions based on reasonable factors other than age, creates an affirmative defense, in which the employer bears both the burden of production and the burden of persuasion. However, the Court noted that a plaintiff alleging disparate impact claims cannot merely allege a disparate impact, or point to a generalized policy that leads to such an impact; rather, a plaintiff is obligated to isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities.

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## **DISCIPLINE OF EMPLOYEES continued from page 2**

statutes, or case law, that protect life activities outside work, in general, from discrimination by employers. California has an extremely broad employee privacy statute protecting employees against discharge for “lawful conduct” occurring during non-working hours. New York, Colorado, and North Dakota, apparently have extremely broad similar laws. Michigan last year considered what would have been the broadest off-duty activity protection in the country, which would bar employers from making an employment decision based on the private, off-duty conduct of workers or job applicants – from smoking to blogging.

In addition to statutory law, there are some states like California that have rendered decisions under its privacy common law or state constitutional law, barring employers from discriminating against employees for off-duty activities, in the absence of a published employer policy. Thus, in some states and as a matter of general practice, it would probably be wise for an employer to have some type of work rule that it could use to address inappropriate off-duty conduct, such as inappropriate or illegal off-duty misconduct that adversely affects the employer’s business.