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Summer Supreme Court Match-Up: Employees Are In the Lead

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The Supreme Court has decided several employer/employee match-ups on matters as diverse as Title VII, ERISA, and the National Labor Relations Act. The winner thus far? Employees, with a clear victory in two of the cases (and a draw in the third).

In *Lewis v. Chicago*, decided on May 24, the Supreme Court unanimously held that employers who use tests that have a disparate impact on groups protected by Title VII may be sued each time they use the test results in making a hiring decision, no matter how long after the test the hiring decision is made.

Lewis arose out of a written employment test the City of Chicago administered in 1995 to more than 26,000 applicants for firefighter positions. In January 1996, the City announced that it was going to limit its initial hires to a random selection of "well qualified" applicants – *i.e.*, applicants who had scored at least 89 out of 100 on the written employment test. (Applicants who scored 65 to 88 points were categorized as "qualified"; applicants scoring less than 65 points were notified that they had failed the test.) The City conducted eleven rounds of hiring based on the test over the next six years, always hiring from the "well qualified" pool of applicants.

In March 2007, a class of more than 6,000 black applicants in the "qualified" category sued under Title VII, claiming that the "cut-off" of 89 points had a disparate impact against them. The trial court agreed, and found that the City's repeated reliance on the 1995 test results was a continuing violation of Title VII.

The Seventh Circuit reversed, finding that the plaintiffs had not timely filed their charges of discrimination. The court said that the plaintiffs should have filed within 300 days of the City making the decision to sort the test scores into the "well qualified" and other categories.

The Supreme Court reversed, noting "[u]nder the city's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact" on protected groups. The court thus found that the City had opened itself to liability each time it relied on the test results to hire firefighters.

In *Hardt v. Reliance Standard Life Ins. Co.*, decided May 24, the Supreme Court unanimously rejected a long-applied standard in many ERISA benefits cases that a party must be a "prevailing party" to be awarded attorney's fees.

Hardt involved a claim for long-term disability benefits in which the claimant and the plan administrator brought competing motions for summary judgment. The trial court denied both motions. However, the court also noted that the evidence supported the claimant and ordered the plan administrator to reconsider its denial of benefits. The plan administrator awarded benefits, and the claimant then moved for payment of her attorney's fees, which the trial court granted.

The Fourth Circuit vacated the fee award, relying on a requirement applied by many courts that a party must be a "prevailing party" in an ERISA case to recover fees. The court found that the order remanding the matter to the plan administrator for reconsideration did not make the claimant a "prevailing party" because the order was not an enforceable judgment on the merits or a court-ordered consent decree.

The Supreme Court reversed. ERISA, the court said, does not specify that a party be a "prevailing party" to recover attorney's fees. A party must achieve more than a "trivial success on the merits" or a "purely procedural victory", but the trial court may award attorney's fees as long as the party shows "some degree of success on the merits" of the claim.

Finally, in *New Process Steel LP v. NLRB*, decided on June 17, the Supreme Court called into question almost 600 cases decided by the National Labor Relations Board between early January 2008 and late March 2010.

The Board, by statute, consists of five members. In late December 2007, with one seat vacant and one member's term about to expire, the four Board members delegated their authority to a three-member panel. A few days later, the recess appointment of one member of that three-member panel expired. The remaining two members (one a Democrat and one a Republican) forged ahead, issuing almost 600 unfair labor practice and representation decisions before additional members were finally sworn in by early April 2010.

The Court, in a 5-4 decision, held that the two-member Board did not have the authority to issue those decisions. According to the Court, under the National Labor Relations Act, if the Board delegates its authority to a three-member group, then the group cannot go below three members and still exercise its delegated authority. What remains to be seen, however, is how the Board will deal with the now-vacated cases.

These cases serve as reminders that even with statutes that have been on the book for years, there may always be something new around the corner. If you need assistance with these or any kind of labor and employment issue, do not hesitate to contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in *Birmingham, Alabama*; *Atlanta, Georgia*; *Baton Rouge*, *Mandeville* and *New Orleans, Louisiana*; *Jackson, Mississippi*; and *Chattanooga*, *Johnson City*, *Knoxville*, *Memphis* and *Nashville, Tennessee*.

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