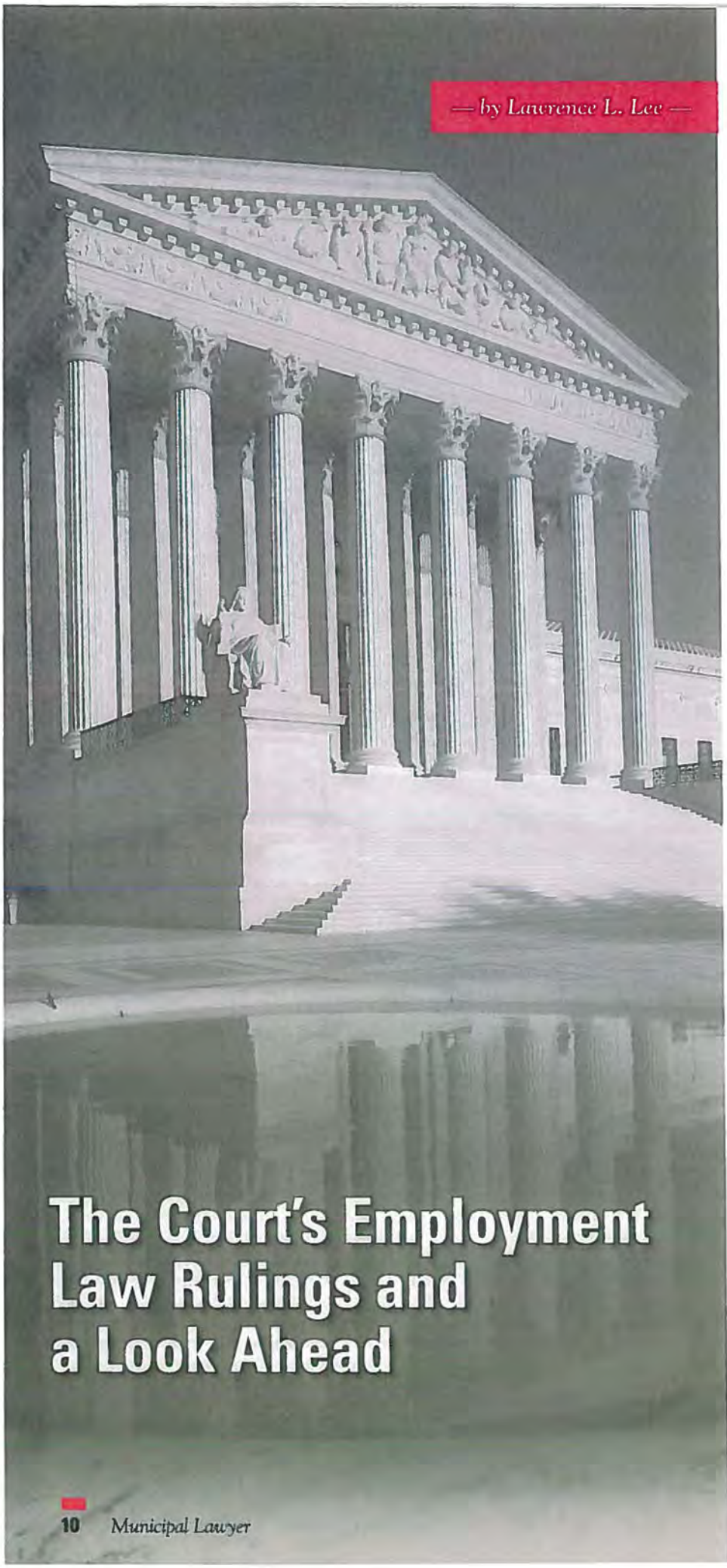

— by Lawrence L. Lee —

The Court's Employment Law Rulings and a Look Ahead

In 2008, the Roberts' Court put its stamp on employment law. Here's a look at the U.S. Supreme Court's noteworthy decisions for public employers.

Class-of-One Claims

In *Enquist v. Oregon Dep't of Agric.*,[1] the Supreme Court refused to extend the "class of one" theory under the Fourteenth Amendment's Equal Protection Clause to a claim brought by a former public employee. When public employees sue their employer in federal court for illegal discrimination as a group, the lawsuit is considered to be "class based." Recently, however, some federal courts have allowed an individual public employee, claiming that he was singled out for discrimination by a vindictive supervisor, to sue the governmental employer based on the class-of-one theory. Under this doctrine, an employee, regardless of race, age, sex, or other classification, could recover damages for an equal protection violation if he established that the public employer intentionally treated that employee differently from other, similarly situated employees, and that the different treatment was not rationally related to any legitimate government objective.[2] At issue in *Enquist* were allegations by Indian-born Anup Enquist that her employer fired her, not because she was a member of an identified class (race or gender), but for "arbitrary, vindictive, and malicious reasons."

In a 6-3 decision, the Supreme Court foreclosed the application of this theory in the employment context and limited a terminated employee's ability to file an equal protection claim under 42 U.S.C. § 1983. Chief Justice Roberts, writing for the majority, stated that the government, as an employer, had "significantly greater leeway" in its dealings with employees than it did when acting as a sovereign in relation to citizens at large.[3] The Court declined to "constitutionalize" an employee's grievance. The Chief Justice noted that, in the employment context, treating seemingly similarly-situated individuals differently was "par for the course."[4] Government offices would not be able to function if every personnel issue became a constitutional matter, and

recognizing class-of-one claims in the employment context would eviscerate the doctrine of at-will employment.[5] The *Enquist* decision, a clear victory for the public employer, reveals that a Supreme Court majority believes that public employers should have leeway in making personnel decisions because many such decisions are based on a "vast array of subjective, individualized assessments" that are difficult to articulate or quantify.[6]

Retaliation

In one day, the Supreme Court expanded two federal anti-discrimination statutes to include a claim for retaliation. In *CBOCS West Inc. v. Humphries*,[7] the Court held that 42 U.S.C. § 1981 also encompasses a claim for retaliation.[8] Humphries, an African-American restaurant manager, had complained that a white general manager was making racist remarks in the workplace. Humphries was subsequently terminated, ostensibly for leaving the restaurant safe unlocked. He sued his employer, claiming retaliation in violation of Title VII of the Civil Rights Act of 1964[9] and Section 1981. The district court dismissed the Title VII claim based on Humphries' failure to pay filing fees on a timely basis, and ruled that the Section 1981 claim failed to encompass retaliation.[10] The Supreme Court, in addressing whether the race retaliation claim was cognizable under Section 1981, concluded that it was. The 7-2 majority opinion, written by Justice Breyer, opined that previous decisions by the Court compelled a broad interpretation of Section 1981. The Court construed the identical language of a companion statute—42 U.S.C. § 1982, prohibiting discrimination in connection with property ownership—as also prohibiting retaliation. The majority opinion reasoned that, since Sections 1981 and 1982 share common language, origins, and purposes, both should be consistently interpreted.[11] Prior precedent, "as well as the long line of related cases where we construe §§ 1981 and 1982 similarly, lead us to conclude that the view that § 1981 encompasses retaliation claims is indeed well embedded in the law."[12]

In *Gomez-Perez v. Potter*,[13] decided on the same day as the CBOCS decision, the Court, in a 6-3 majority opinion written by Justice Alito, held that the Age Discrimination in Employment Act of 1967[14] (ADEA) protected federal employees from retaliation. The plaintiff, 45-year-old Gomez-Perez, sued her employer, the United States Postal Service, alleging that she was subjected to various forms of retaliation after she filed an administrative ADEA complaint. The district court granted summary judgment in favor of the employer and the First Circuit affirmed, finding that the ADEA prohibition of discrimination based on age did not cover retaliation.[15] On appeal, the Supreme Court, as it did in *CBOCS*, followed the reasoning in two prior decisions and held that retaliation was covered by similar language in other anti-discrimination statutes, Section 1982 and Title IX of the Education Amendments of 1972.[16]

The Supreme Court's decisions in *CBOCS* and *Gomez-Perez* clearly enlarged the scope of potential claims by an employee for retaliatory conduct. Both decisions are evidence of the Court's willingness to further expand the rights of employees and potential claims of employees in the area of discrimination. The Court continues a decade-long trend of taking a broad interpretation of anti-retaliation protection for employees.[17]

Age Discrimination

The Supreme Court also decided three important age discrimination cases. In *Kentucky Retirement Sys. v. E.E.O.C.*,[18] the Court held that Kentucky's public retirement system did not discriminate based on age, in violation of the ADEA, against certain workers in hazardous positions (law enforcement officers and firefighters) who became disabled after becoming eligible for retirement. The Equal Employment Opportunity Commission (EEOC), acting on behalf of individually-affected workers, argued that the State's retirement system discriminated against older workers because it allowed younger employees to receive higher payments than older employees with the same length of service. In a 5-3 majority opinion led by Justice Breyer, the Supreme Court found that the State of Kentucky was not motivated by age discrimination, but by a desire to allow those disabled on the job to receive compensation. Any disparity between older and younger workers turned "upon pension eligibility and nothing more,"[19] and the retirement plan did not rely upon the age-related stereotypes or assumptions "that the ADEA sought to eradicate."[20] This decision appears to provide public employers with more flexibility in drafting pension plans that utilize age as a factor in benefits calculations. However, employers should exercise caution when a proposed pension plan appears "actually motivated by age," as it still may be in violation of the ADEA.

In *Fed. Express Corp. v. Holowecki*[21] the Supreme Court held that, for purposes of the ADEA's administrative filing requirements, a "charge" alleging unlawful age discrimination is any document filed with the EEOC that identifies the complaining party and the employer, alleges discriminatory acts, and can be reasonably construed by an objective observer as requesting agency action and appropriate relief. Several couriers over the age of 40, including Patricia Kennedy, sued Federal Express Corp. (FedEx) under the ADEA, alleging age discrimination. FedEx moved to dismiss Kennedy's claim on the basis

continued on page 12

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 continued from page 11

that she did not file the requisite formal EEOC Charge of Discrimination (Form 5) before bringing her lawsuit. Instead, she had submitted an Intake Questionnaire (EEOC Form 283) and a six-page affidavit detailing her allegations. In a 7-2 decision, the Supreme Court found that Kennedy's documents constituted a "charge" because they demonstrated an intent to request action by the EEOC. A charging party's documents "must be reasonably construed as a request" for the EEOC to take "remedial action to protect employee's rights" or to settle a dispute between the employer and employee.[22] Although the questionnaire would not normally suffice, Kennedy showed an intent to disclose her identity to her employer, and her affidavit requested the EEOC to "Please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created."[23] The *Holowecki* decision is likely to make it more challenging for employers to obtain dismissal of claims on the basis of an untimely or incomplete EEOC Charge of Discrimination. Further, although the Court's holding is limited expressly to the ADEA (as opposed to a Section 1981 or Title VII claim), the case may have broader legal implications in the future.

In *Meacham v. Knolls Atomic Power Lab.*,[24] the Supreme Court held that, in ADEA claims, the employer bears the burden of proving that its actions were based on reasonable factors other than age. The ADEA protects workers aged 40 or more and generally prohibits employment practices that have disparate impacts on older workers. It also allows employers to engage in "otherwise prohibited" acts so long as the acts are based on "reasonable factors other than age"[25] (RFOA). Until *Meacham*, federal circuit courts of appeals were split over whether the employer or the employee had the burden of proving the reasonableness of non-age-based factors. In *Meacham*, the employer, a privately-owned defense contractor, was forced to reduce its workforce, resulting in layoffs for 30 out of 31 employees that were 40 years old or older. The laid-off employees sued, claiming disparate impact under the ADEA. Justice Souter, part of a six-member majority, concluded that the assertion of RFOA was an affirmative defense and not an "elaboration" of an element of liability. The Court saw no reason to read the RFOA exemption differently from the ADEA's exemption for "bona fide occupational qualifications" (BFOQ), which federal courts had viewed as an affirmative defense.[26] "[W]e find it impossible to look at the text and structure of the ADEA and imagine that the RFOA clause works differently from the BFOQ clause next to it. Both exempt otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the 'one who claims its benefits,'" the employer.[27] Although *Meacham* may make it more difficult to defend against disparate impact claims under the ADEA at the summary judgment stage, it forces employers to strongly consider potential disparate impact claims (filed prospectively by older workers) when making major changes in the workplace by removing subjectivity from its decision-making process.

"Me, Too" Evidence

In *Sprint/United Mgmt. Co. v. Mendelsohn*,[28] the Court addressed the admissibility of so-called "me, too" evidence—evidence of non-party former employees regarding allegedly discriminatory acts by supervisors who played no role in the actions complained of by the plaintiff. The 51-year-old plaintiff, Mendelsohn, sued Sprint, claiming age discrimination under the ADEA. Sprint moved to exclude the testimony of former employees alleging discrimination by supervisors other than Mendelsohn's, on the basis that such evidence was irrelevant and unduly prejudicial. The district court granted Sprint's motion to exclude evidence of discrimination against employees not "similarly situated" to Mendelsohn. After a jury returned a verdict in Sprint's favor, Mendelsohn appealed. The U.S. Court of Appeals for the Tenth Circuit, assuming that the district court applied a *per se* rule of excluding such evidence, found the evidence was relevant and remanded the case for a new trial. Sprint appealed.

In a unanimous decision reversing the ruling by the Tenth Circuit, the Supreme Court held that the admissibility of "me, too" evidence was a fact-based determination that was "neither *per se* admissible nor *per se* inadmissible."[29] The Court found that the Tenth Circuit acted erroneously in holding that trial judges had broad discretion to admit or exclude evidence, and that the district court did not apply a *per se* rule of exclusion. The Supreme Court vacated the Tenth Circuit's decision and remanded the case back to the district court to clarify its order on Sprint's motion to exclude. The ruling did not shed light on the question of when a trial court should admit coworker evidence, particularly when the proffered testimony relates to supervisors uninvolved with a plaintiff's adverse employment action. As a result, evaluating the strength of a plaintiff's case for settlement purposes may be challenging, as such evidentiary disputes may be resolved by a trial court judge's "on the spot" and "fact-intensive, context-specific" balancing of relevance under the Federal Rules of Evidence 401 or 403.

Looking Ahead

The Supreme Court's upcoming docket for labor and employment cases is lighter than those of previous terms. However, one case—in which the Court considers whether Title VII protects an employee who was terminated after she cooperated with an employer's internal investigation by reporting sexual harassment—will greatly impact all public and private sector employers. Over the past decade, the legal expansion of an employee's ability to claim retaliation, as recently displayed in the *CBOCS* and *Gomez-Perez* decisions, appears to remain a top priority for the Supreme Court.

In *Crawford v. Metro. Gov't of Nashville & Davidson County*,[30] the Metropolitan Government of Nashville and Davidson County (Metro) conducted an internal investigation into allegations of sexual harassment against Hughes, an employee relations director. Crawford, a payroll manager for Metro,

was contacted as part of the investigation, as were others who worked with Hughes. She told the investigator that Hughes had sexually harassed her and other employees. Hughes was never disciplined, but six months later, Crawford was fired for alleged embezzlement and drug use, and other women interviewed during the investigation were similarly discharged. Ultimately, the allegations against Crawford were found to be without merit. Crawford filed a Charge of Discrimination with the EEOC and then filed suit, claiming retaliation pursuant to a provision of Title VII that prohibits employers from discriminating against employees who "opposed" any unlawful employment practice or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."[31] Crawford asserted that she "opposed" the harassment by participating in the internal investigation, and that her participation was a protected activity under Title VII. The district court disagreed and granted summary judgment in favor of Metro. The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that Crawford's cooperation with the employer-initiated investigation fell short of the "overt opposition" to suspected unlawful employment practices required under Title VII; further, no employee "participation" in a "proceeding" under the statute had occurred, as neither Crawford nor any other employee had filed an EEOC charge at the time of the investigation or prior to being fired.[32]

It is well known that employers have a legal duty to try, in good faith, to prevent and correct sexual harassment under the *Faragher* and *Ellerth* standard.[33] As a result, many public employers have developed internal investigation procedures that include inviting employees to discuss, internally, whether an employee can corroborate a coworker's complaints. Should the anti-retaliation provision protect all employees in all internal investigations? If the provision does not apply to internal investigations, employees who witness harassment would have no protection against a less-than-truthful employer (who could simply erase the evidence of harassment). This would discourage truthful employees from participating in internal investigations for fear of retaliation. The employer, in turn, would face hardship in redressing misconduct in the workplace. Still, employers could face costly retaliation claims after discharging an underperforming employee who happened to have participated in an internal investigation involving a coworker's complaint of harassment. Dishonest employees may be more likely to make up harassment allegations during an internal investigation to avoid getting disciplined or terminated. As a result, the employer would be less likely to initiate further investigations, or might limit participation to only those employees who are "strong" performers.

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The Supreme Court heard oral arguments in *Crawford* on October 8, 2008. In light of its previous decisions in *CBOCS* and *Gomez-Perez*, expanding claims of retaliation for the employee, recent history may repeat itself when the Court releases its decision in *Crawford*.

Notes

1. 128 S.Ct. 2146 (2008).
2. In the regulatory/administrative content, the Court had previously recognized, in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), that an equal protection claim could be sustained even if the plaintiff had not alleged class-based discrimination, but, instead, claimed that he had been irrationally singled out as a so-called "class of one."
3. 128 S.Ct. at 2151.
4. *Id.* at 2155. Unlike the zoning issue in *Olech*, involving a "clear standard against which departures, even for a single plaintiff, could be readily assessed," personnel decisions involved "discretionary decisionmaking" based on many subjective factors. *Id.* at 2153, 2154.
5. *Id.* at 2156.
6. *Id.* at 2154.
7. 128 S.Ct. 1951 (2008).
8. Section 1981 prohibits discrimination in contractual matters, particularly in employment. However, it does not include an explicit anti-retaliation provision or the word "retaliation."
9. 42 U.S.C.A. § 2000e *et seq.* (West 2008).
10. Humphries v. CBOCS West, Inc., 392 F. Supp.2d 1047 (N.D. Ill. 2005).
11. 128 S.Ct. at 1952-53.
12. *Id.* at 1958.
13. 128 S.Ct. 1931 (2008).
14. 29 U.S.C. § 633a (a) (West 2008). The ADEA requires all personnel actions affecting employees at least 40 years of age to be free from any discrimination based on age. The plaintiff sued under the federal-sector provision requiring that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age ... shall be made free from any discrimination based on age."
15. 476 F. 3d 54 (1st Cir. 2007).
16. 128 S.Ct. at 1936.
17. *See* Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997) (Title VII protects a former employee claiming his employer gave him a negative reference in retaliation for alleging his termination was discriminatory); Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (2005) (Title IX of the Education Amendments of 1972, which prohibits sex discrimination in schools that receive federal funds, authorizes claims of retaliation for complaints about gender discrimination, despite not having an express anti-retaliation clause); Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (Title VII retaliation is not limited to "adverse employment actions" within the office, but includes retaliatory conduct by employers outside of the workplace; and second, Title VII prohibits any retaliatory conduct that "well might have dissuaded a reasonable worker" from complaining of discrimination).
18. 128 S.Ct. 2361 (2008).
19. *Id.* at 2363.
20. *Id.* at 2369.
21. 128 S.Ct. 1147 (2008).
22. *Id.* at 1158.
23. *Id.* at 1159-60.
24. 128 S. Ct. 2395 (2008).
25. 29 U.S.C. § 623(f)(1) (West 2008).
26. 128 S. Ct. at 2401.
27. *Id.*
28. 128 S.Ct. 1140 (2008).
29. *Id.* at 1143.
30. 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 1118 (U.S. Jan. 18, 2008) (No. 06-1595).
31. 42 U.S.C. § 704(a) (West 2008).
32. 211 Fed.Appx. at 376.
33. Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). ML