

Recent Supreme Court Decisions Impacting Corporate Liability Issues



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1983 **25** 2008

2008 Chapter of the Year

Recent U.S. Supreme Court ADEA Cases (Age Discrimination In Employment Act)

- **ADEA – Created In 1967**
 - Affords Workers Over 40 Protection From Employment Discrimination
- **Increased Number Of ADEA Cases**
 1. Size Of Protected Class Increasing (Baby Boomers)
 2. Longer Living (Medical & Technological Advances)
 3. Reduction Of Workforce (Economy)

October 2007 Term

- **5 Out Of The 73 Cases Heard – ADEA**
 - ***Sprint/United Mgmt. v. Mendelsohn***
Decided February 26, 2008
 - ***Federal Express v. Holowecki***
Decided February 27, 2009
 - ***Gomez-Perez v. Potter***
Decided May 27, 2009
 - ***Meacham v. Knolls Atomic Power Lab.***
Decided June 19, 2008
 - ***Kentucky Ret. Systems v. E.E.O.C.***
Decided June 19, 2008

Sprint v. Mendelsohn

Background

- 51 year old employee (1989 – 2002)
- Terminated as part of an ongoing company-wide reduction in force.

Issue

- May the Court allow testimony (evidence) from other employees who feel the defendant has discriminated against them because of age?

Did not work in same group or with same supervisors

Analysis & Decision

Impact

Federal Express v. Holowecki

Background

- In 1994 and 1995, FedEx initiated two programs, it says, were designed to make its 45,000 strong courier network more productive. Best Practice Pay and Minimum Acceptable Performance Standards were the programs and they tied the couriers' compensation and continued employment to certain performance benchmarks.
- 14 current and former FedEx couriers over 40 sued alleging that the programs violate ADED because they are “veiled attempts to force older workers out of the company before they would be entitled to receive retirement benefits.
- Under ADEA an EEOC charge must be filed within either 180 or 300 days of the alleged discriminatory action and “No civil action may be commenced by an individual under ADEA until 60 days after a charge alleging unlawful discrimination has been filed” with EEOC.

Federal Express v. Holowecki

Background (cont.)

- “Upon receiving such a charge, the Commission shall promptly notify all persons named . . . as perspective defendants . . . and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.”
- The Act does not define charge. FedEx employee filed an intake questionnaire on December 3, 2001; filed lawsuit in federal court on April 30, 2002; filed EEOC charge on May 30, 2002.
- FedEx moved to dismiss complaint arguing that employee did not wait the requisite time after filing a charge with EEOC.
- District Court agreed and dismissed.
- Employee argued that the questionnaire was sufficient for a charge and therefore the suit was timely.
- Second Circuit agreed and reversed ruling the questionnaire sufficient.

Federal Express v. Holowecki

Issue

- Was the EEOC intake questionnaire the same as an EEOC “charge”?

Analysis & Decision

Impact

Gomez-Perez v. Potter

Background

- Petitioner was employed full-time for the United States Postal Service in Dorado, Puerto Rico. In order to be closer to her ill mother, she transferred to another office, but after one month requested to return to her former position in Dorado. After being denied she filed an EEO complaint with the Postal Service alleging age discrimination. She claims that her supervisors' retaliated by reducing her work hours and making false complaints against her.
- Respondent argued that there is no cause of action for retaliation within ADEA, 29 USC § 633(a) which requires that “[a]ll personnel actions affecting employees . . . at least 40 years of age . . . be made free from any discrimination based on age.”
- Petitioner argued that the language is similar to the language in *Jackson v. Birmingham Board of Education* interpreting Title IX.

Gomez-Perez v. Potter

Issue

- Whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA; i.e. Does the statutory phrase “discrimination based on age” include retaliation based on the filing of an age discrimination complaint

Analysis & Decision

Impact

Meacham v. Knolls Atomic Power Laboratory

Background

- Because the demand for naval nuclear reactors changed at the end of the cold war, Knolls was ordered to reduce its work force. In order to select those for layoff, managers had to score their subordinates on three scales – performance, flexibility and critical skills. The scores were summed, along with points for years of service and the totals determined who should be let go. Of the 31 salaried employees laid off, 30 were age 40 or over. 28 sued alleging both disparate treatment and disparate impact under the ADEA and state law. After a jury verdict, in the employees' favor, employer filed post-trial motions for a judgment as a matter of law. Motions were denied and on appeal, decision was affirmed. Supreme Court reversed and remanded. On remand, Court of Appeals vacated and remanded with instructions to enter JMOL.

Meacham v. Knolls Atomic Power Laboratory

Issue

- Whether an employer facing a disparate-impact claim and planning to defend on the basis of “reasonable factors other than age” (RFOA) must not only produce evidence raising the defense, but also persuade the fact finder of its merit

Analysis & Decision

Impact

Kentucky Retirement Systems v. E.E.O.C.

Background

- Kentucky permits “hazardous position” workers to receive normal retirement benefits after working either 20 years or 5 years and attaining age 55. Disability benefits are calculated by adding actual years of service plus the number of years that the employee would have had to continue working in order to become eligible for retirement at age 55.
- Employee continued to work after becoming eligible for retirement at age 55. He became disabled and retired at age 61. He filed an age discrimination complaint with EEOC alleging disparate treatment because there were no additional years of service imputed. EEOC sued Kentucky.

Kentucky Retirement Systems v. E.E.O.C.

Issue

- Did Kentucky's retirement system discriminate because of age against workers who become disabled after the age of 55?

Analysis & Decision

Impact

14 Penn Plaza v. Pyett

Background

- In the CBA agreed to by an SEIU local and the bargaining association for the New York City real estate industry, there is an anti-discrimination provision that requires all employees to submit any employment discrimination claim to binding arbitration under procedures set forth in the CBA.
- Three former night watchmen at 14 Penn Plaza were reassigned to duties at other locations in the building when another security services company was hired. Union filed a grievance alleging both contractual and statutory claims but withdrew the latter and the arbitrator denied the former. Respondent watchmen then filed a lawsuit against 14 Penn Plaza and Temco (the agency for which they worked) alleging age discrimination in violation of the CBA. Petitioners moved to dismiss the suit, or in the alternative, compel arbitration.

14 Penn Plaza v. Pyett

Background (cont.)

- The district court denied the motion to compel but dismissed the suit under the Second Circuit decision in *Rogers v. New York University* which held that union-negotiated CBAs waiving an employee's right to bring a statutory claim in court are unenforceable. On appeal, the Second Circuit affirmed, holding it was bound by its decision *Rogers* which was based on the Supreme Court's opinion in *Gardner-Denver*. However, in *Gilmer*, the Supreme Court found that an individual employee who had agreed to waive his right to a federal forum could be compelled to arbitrate an ADEA claim.

Issue

- Whether an arbitration provision in a collective bargaining agreement which precludes an employee from bringing a lawsuit in court for an alleged violation of statutory anti-discrimination law is enforceable

Analysis & Decision

Impact

Gross v. FBL Financial Services, Inc.

Background

- Gross began working at FBL in 1987. During a reorganization in 2001 when he was the claims administration vice president, he was reassigned to the position of claims administration director. In 2002, FBL eliminated Gross' position and reassigned him, and some of his old responsibilities were transferred to a new claims administration manager position. He contended his reassignment was a demotion because the claims administration manager's position was the "functional equivalent" of Gross' former position and his new position was ill-defined. Gross sued alleging he was demoted because of age. The trial court used a mixed-motive jury instruction. Verdict for Gross. FBL appealed and Eighth Circuit reversed and remanded for a new trial holding the mixed-motive jury instruction was incorrect.

Gross v. FBL Financial Services, Inc.

Issue

- Must a plaintiff in a non-title VII discrimination suit present direct evidence of discrimination to be entitled to a mixed-motive jury instruction?
- Gross had presented circumstantial evidence.

Analysis & Decision

Impact

AT&T Corp. v. Hulteen

Issue

- Whether maternity leave taken before passage of the 1978 Pregnancy Determination Act can be considered in calculating employee pension benefits

Analysis & Decision

Impact

Stoneridge Investment Partners v. Scientific-Atlanta, Inc.

Background

Issue

- Can suppliers be held liable in a private damage action under Section 10(b) as part of a scheme to defraud along with the primary violator public company?

Analysis & Decision

Impact

Antitrust

Key Decisions from 2007 Term

- Twombly – heightened pleading standard
- Leegin – resale price maintenance no longer per se illegal, but subject to rule of reason

Antitrust

Pacific Bell v. linkLine Communications

- Facts:
 - Plaintiffs = ISP Providers
 - Defendant = AT&T ISP
 - AT&T owned “last mile”
 - Plaintiffs relied on AT&T infrastructure to carry Internet to customers
 - Plaintiffs also competed against AT&T in selling and providing internet services

Antitrust

Pacific Bell v. linkLine Communications

- Claim:

AT&T violated Section 2 of Sherman Act:

- By setting a high wholesale price for transmission services
- And by setting a low retail price for internet services
- a/k/a a price squeeze

Antitrust

Pacific Bell v. linkLine Communications

- Decision:
 - Wholesale price allegation – no liability because no duty to deal
 - Retail price allegation – no liability because pricing was not predatory

Antitrust

Pacific Bell v. linkLine Communications

- Significance:
 - Sellers of a product or service are free to charge whatever price they want for product or service as long as there is no antitrust duty to deal and the pricing is not predatory
 - Rarely an antitrust duty to deal and to provide services to a competitor
 - Pricing is only predatory if:
 1. Below rivals costs
 2. Dangerous probability of recoupment

RICO

Background

- RICO passed by Congress to get at mob-related enterprises
- Engaged in pattern of racketeering
- Pattern of racketeering defined to include violations of federal mail fraud statute
- Treble damages and attorney fees

RICO

Mail Fraud – 18 U.S.C. §1341

- Use of mails for purpose of executing scheme to defraud
- Any mailing incidental to scheme satisfies mailing element even if mailing contains no false information

RICO

Bridge v. Phoenix Bond & Indemnity

- Facts
 - Plaintiff and defendant were competitors for a bid
 - State statute prohibited multiple bids
 - Defendant placed bids in own name and in name of proxy submitting false certificate
 - Defendant argued that plaintiff didn't rely on false statement

RICO

Bridge v. Phoenix Bond & Indemnity

- Issue:
 - Reliance is an element of common law fraud
 - Does a RICO plaintiff need to prove reliance in a civil action predicated on mail fraud?
 - How can anyone be injured by a fraud no one relied on?

RICO

Bridge v. Phoenix Bond & Indemnity

- Unanimous Decision
 - Nothing in mail fraud statute requires reliance
 - Plaintiff can be injured by reason of mail fraud even if didn't rely on false statement
 - Court refused to “rewrite RICO” to reflect views of good policy
 - The remedy for an “undue proliferation of RICO suits” must lie with Congress

RICO

Bridge v. Phoenix Bond & Indemnity

- Significance
 - RICO remains both a weapon and a threat for businesses
 - Issues of individual reliance do not preclude RICO class action

Arbitration

- ***Vaden v. Discover Bank***

Federal court has jurisdiction over motion to compel arbitration if underlying controversy involves a federal question

Arbitration

- *Preston v. Ferrer*

Federal Arbitration Act supersedes state law establishing primary jurisdiction in another forum, whether a state court or an administrative agency

Arbitration

- **Hall Street Associates v. Mattell**
 - Arbitration agreement provided for judicial review if award was erroneous
 - Federal Arbitration Act provides exclusive grounds for appealing an award
 - Under Act, sole grounds for overturning an award are corruption, fraud, misconduct by arbitrator or that arbitrator exceeds powers

Pre-emption: The US Supreme Court speaks, but how clearly?

- *Riegel v. Medtronic, Inc.*
- *Altria Group, Inc. v. Good*
- *Wyeth v. Levine*

Riegel v. Medtronic, Inc.

- *Issue:*

“[W]hether the pre-emption clause enacted in the Medical Device Amendments of 1976, 21 U.S.C. §360k, bars common-law claims challenging the safety and effectiveness of a medical device given premarket approval by the” FDA. 128 S. Ct. 999, 1002 (2008).

Riegel v. Medtronic, Inc.

- **Holding:**

State court common-law claims challenging the safety and effectiveness of a Class III medical device which has been subjected to FDA's rigorous pre-market approval process are pre-empted if they claims would impose a different or additional requirement to those imposed by federal law.

Riegel v. Medtronic, Inc.

- **Background:**

- Class III medical device, an Evergreen Balloon Catheter, received pre-market approval from FDA in 1994; in 1995 & 1996 it received supplemental approvals for label changes;
- Device's label stated that use was contraindicated in patients with diffuse or calcified stenoses;
- Plaintiff, who had diffuse and calcified stenoses, underwent cardiac catheterization with the Evergreen Balloon Catheter and catheter ruptured resulting in emergency bypass surgery.

Riegel v. Medtronic, Inc.

- Plaintiffs initiated their lawsuit claiming that the catheter “was designed, labeled, and manufactured in a manner that violated New York common law,” 128 S. Ct. at 1005;
- Court asked whether or not the Federal Government established requirements that applied to the catheter and whether the Plaintiff’s claims were based upon a state law requirement that is “different from or in addition to” the federal requirements. *Id.*

Riegel v. Medtronic, Inc.

- **Analysis:**

- Court distinguished *Lohr* because the device in *Lohr* was not subjected to pre-market approval, unlike the catheter, and thus the requirements were not specific to the medical device at issue in *Lohr*;
- Court also found that the state common-law duty imposed would be premised on a legal duty and would impose requirements that would be different or in addition to the FDA;

Altria v. Good

- **Issue:**

Whether state law consumer fraud claims of Respondents, light cigarette smokers of Petitioner's cigarettes, were pre-empted by the Cigarette Labeling and Advertising Act.

- **Holding:**

Neither the Labeling Act nor the FTC's actions pre-empted respondent's state-law fraud claims.

Altria v. Good

- **Background:**

- Respondents are smokers of Petitioners' light cigarette;
- Allege that Petitioners deliberately deceived Respondents about the "true and harmful nature" of light cigarettes;
- Petitioners failed to advise that smokers of light cigarettes use compensatory behaviors and unknowingly inhale as much tar and nicotine as smokers of regular cigarettes

Altria v. Good

- *Background (cont.)*

- Respondents' claims are in substance fraud claims based upon false misrepresentation;
- Court determined that the claims were not impliedly pre-empted as an obstacle to the policies of the FTC;
- Court also found that the claims were not expressly pre-empted.

Altria v. Good -- Analysis

- Pre-emptive intent can be either **express** or **implied** from the scope of the statute when it appears that Congress intended to occupy that area of law or if there is a conflict between state and federal law;
- Labeling Act contained 2 express pre-emption provisions, one protecting cigarette manufacturers from inconsistent state labeling requirements and another prohibiting regulations based on “smoking and health.”

Altria v. Good -- Analysis

- The Labeling Act did not expressly pre-empt state regulation of deceptive trade practices;
- “Although both of the Act’s purposes are furthered by prohibiting States from supplementing the federally prescribed warning, neither would be served by limiting the States’ authority to prohibit deceptive statements in cigarette advertisements.” 129 S. Ct. 538, 544 (Dec. 15, 2008)

Altria v. Good -- Analysis

Court reviewed its decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Altria v. Good

Court followed the *Cipollone* plurality test for determining whether a common-law claim is pre-empted: “whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition based on smoking and health ... with respect to...advertising or promotion,’ giving that clause a fair but narrow reading.” *Id.* at p.545, *citing Cippolone*, 505 U.S. at 524.

Altria v. Good

Court distinguished the duty of the Labeling Act from the State regulations on the basis that the latter were unrelated to smoking and were a general prohibition against deceptive advertising and held that the phrase “based on smoking and health” does not encompass a more general prohibition against fraudulent statements.

Wyeth v. Levine

One of the most anticipated pre-emption decisions

- **Issue:**

Whether the FDA's approval of Wyeth's Phenergan label pre-empted a state law failure to warn claim.

Wyeth v. Levine

- **Holding:**

While the FDA retains authority to reject labeling changes made pursuant to CBE regulation, “[a]bsent clear evidence that the FDA would not have approved a change to Phenergan’s label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements.” 555 U.S. ____ (2009).

Wyeth v. Levine

- **Background:**

- Plaintiff was injured and required an amputation by injection of Phenergan administered by IV-push method;
- Plaintiff filed a state failure to warn claim against Wyeth and Wyeth moved for summary judgment arguing that the failure to warn claim was pre-empted;
- Case went to trial and a jury rendered a verdict against Wyeth.

Wyeth v. Levine

- Phenergan was first approved by the FDA in 1955 and the warning labels were changed as a result of supplemental NDAs in 1973, 1976, and 1981;
- In 1987 FDA suggested a different warning about the risk of arterial exposure (with IV push injections);
- In response to the FDA's suggestion, Wyeth submitted a new label and NDA in 1988;

Wyeth v. Levine

- FDA never acted on the proposed label, but instead requested a copy of the label in use from Wyeth in 1996;
- FDA instructed Wyeth to retain the label in use regarding intra-arterial injection;
- In 1998, FDA approved Wyeth's 1981 application and instructed Wyeth that the final label must be identical to the one approved.

Wyeth v. Levine

- Wyeth made 2 pre-emption arguments:
 1. It would have been impossible to comply with the state-law duty and to modify Phenergan's labeling without violating the FDA federal law;
 2. Levine's state tort action would create an unacceptable obstacle to achieving the objectives of Congress because it would substitute a jury's decision about drug labeling for the expertise of the FDA.

Wyeth v. Levine

- **Analysis:**

Supreme Court began its analysis with the 2 “cornerstones” of “pre-emption jurisprudence;”

1. “the purpose of Congress is the ultimate touchstone in every pre-emption case” *citing Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996);
2. in all pre-emption cases the Court starts with the assumption “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,” *Id.*

Wyeth v. Levine

- **Analysis:**

- The Changes Being Effected “CBE” regulations allow a manufacturer to “add or strengthen a contraindication, warning, precaution, or adverse reaction” and change the label upon the filing of a supplemental NDA, without awaiting FDA approval. *citing* §§314.70(c)(6)(iii)(A), (C).
- Court held that the manufacturer always bears responsibility for the content of its label.

Wyeth v. Levine

- Wyeth had a duty to provide a warning that adequately described the risks of IV push Phenergan;
- CBE regulation permitted Wyeth to change the warning before receiving FDA approval;
- “[A]bsent clear evidence that the FDA would not have approved a change” the Court refused “to conclude that it was impossible for Wyeth to comply with both federal and state requirements.” *Wyeth*, 555 U.S. ____ (2009).

Wyeth v. Levine

- **Analysis:**

- *The Court seemed to focus on the fact that pre-emption is disfavored unless clearly within Congress' intent; and*
- *Wyeth never took the express changes suggested by Levine to FDA for approval;*
- *Unlike with medical devices, Congress did not extend the broad reaching pre-emption requirements to pharmaceuticals.*

Riedel and Wyeth v. Levine

- Only way to reconcile *Riedel* and *Wyeth v. Levine* is because of the express pre-emption provisions in the Medical Device Act were not extended to pharmaceutical products;
- Unlikely Congress in this administration will intercede.

PA Supreme Court and Product Liability

*Commonwealth of PA, Department of General
Services*

v.

US Mineral Products Co., et al.

DGS v. US Mineral

- *Issue:*

Whether a new trial was warranted where there was conflicting evidence of whether PCBs were distributed on surfaces throughout an agency building before or as a result of a fire.

- *Holding:*

Where there was conflicting evidence, the jury could reasonably have concluded that PCBs were spread as a result of the fire, not through the intended use of the PCB containing products.

DGS v. US Mineral

- **Analysis:**

- This was a classic battle of the experts;
- PA Supreme Court reinforced that “strict liability is available only for harm that occurs in connection with a product’s intended use by an intended user.” 956 A. 2d at 969