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PDA Protection Extends to Female Employees Having Elective Abortions

By Brian W. Franklin

Employers have long understood that they cannot fire a female employee simply for having a baby. Does the same legal protection extend to a female employee who chooses to undergo an elective abortion?

It does, said the United States Court of Appeals for the Third Circuit in its May, 2008 ruling in *Doe v. C.A.R.S. Protection Plus, Inc.*,[1] a gender-based employment discrimination case arising under Title VII of the Civil Rights Act of 1964. An employee, claiming she had been terminated from her job because she had an abortion, sought relief under the Pregnancy Discrimination Act ("PDA").[2] The PDA, which was signed into law in 1978, amended the Title VII definition of gender-based employment discrimination – discrimination "because of sex" – to include discrimination because of "pregnancy, childbirth, or related medical conditions." The claimant contended that this amendment encompasses discrimination against a woman because she

[1] *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F. 3d 358 (3rd Cir. 2008).
[2] 42 U.S.C. § 2000e(k).

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What's Inside

Welcome

In 1978, Congress amended Title VII's definition of gender-based employment discrimination to specifically include discrimination because of pregnancy, childbirth, or related medical conditions. Of course, it was left to the courts to grapple with the application of the Pregnancy Discrimination Act ("PDA"), as the amendment came to be known, to specific factual contexts.

In this edition, we discuss two recent federal appellate decisions construing the PDA *vis-a-vis* two very different pregnancy-related issues. First, Brian Franklin examines *Doe v. C.A.R.S. Protection Plus, Inc.*, a Third Circuit decision extending the Act's protection to female employees having elective abortions. In our second article, I summarize the Seventh Circuit's opinion in *Hall v. Nalco Company*, which allows PDA claims for adverse employment actions taken against women undergoing *in vitro* fertilization.

Peter Strelitz and Arturo Aviles follow with their recap of the U.S. Supreme Court's recent decisions concerning retaliation claims based on two separate federal statutes (42 U.S.C. §1981 and 29 U.S.C. §633a) and ADEA claims relating to pension benefits.

Thank you for your continuing readership and feedback.

Gregory E. Rogus, Editor
grogus@smsm.com

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Segal McCambridge Singer & Mahoney

Austin Baltimore Chicago Detroit Jersey City New York Philadelphia Princeton

has exercised her right to terminate her pregnancy. After noting that the case raised a question of first impression within the Third Circuit, the Court of Appeals agreed.

Background and Procedural History

"Jane Doe" was a graphic artist for CARS, a company that specializes in insuring used vehicles. When Doe learned that she was pregnant in May of 2000, she informed her supervisor, CARS Vice President Fred Kohl, and asked about making up any time missed for doctor's appointments. Kohl told her they would "play it by ear."

Several months later, Doe learned she had complications with her pregnancy. On Monday, August 7, 2000, she notified Kohl's secretary that she needed to take off Tuesday for medical tests. Additional tests were scheduled for Wednesday and Doe's husband telephoned Kohl and informed him that there were problems with the pregnancy and that Doe would need to take Wednesday off. Kohl approved the absence and asked to be contacted the next day. On Wednesday, Doe learned that her baby had severe deformities. Her physician recommended terminating the pregnancy. Following that advice, Doe made arrangements to undergo an abortion.

That afternoon, Doe's husband telephoned Kohl and told him that Doe would not be at work on Thursday due to complications with the pregnancy. Kohl again approved the absence and asked to be contacted the following day. On Thursday, Doe's husband contacted Kohl, and informed him that his wife's pregnancy would be terminated on Friday. He requested that Doe be allowed to take a one week vacation the following week. In addition, he spoke with Doe's sister-in-law, Leona Dunnet, the CARS office manager and a key witness in the case. According to Doe's husband, Kohl approved the request. Kohl would later deny that Doe's husband made arrangements for her week-long absence, while Dunnet corroborated Doe's version of the facts. The following week Doe was terminated for abandonment of her position.

Doe filed suit under the PDA, asserting she was fired for her decision to undergo an abortion. To establish a claim for pregnancy discrimination, a plaintiff must prove: (1) she was pregnant and her employer was aware of the pregnancy; (2) she was qualified for her job; (3) she suffered an adverse employment action; and (4) there is a nexus between her pregnancy and the adverse employment action. Once a plaintiff establishes a *prima facie* case by satisfying these elements, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the adverse employment decision, under the familiar framework provided in *McDonnell Douglas Corp. v. Green*.[3] If the employer is able to do so, the burden then shifts back to the plaintiff to show that the employer's stated reason was a pretext for intentional discrimination.

The parties did not dispute that Doe was pregnant, that her employer was aware of the pregnancy, that Doe was qualified for her job, and that she was terminated. The case turned instead on whether she could demonstrate the requisite nexus between her pregnancy and her firing.

To prove that nexus, the plaintiff relied on Dunnet's testimony about a "stray remark" made by Kohl in reference to Doe's abortion, just days before Doe's termination. In response to a co-worker's comment about "what all this secrecy behind [Doe] losing her baby was," Kohl remarked, "[S]he didn't want to take responsibility." Kohl's meaning was the subject of dispute. Doe contended Kohl was voicing his disagreement with her decision to have an abortion by suggesting she was not "taking responsibility" for her baby. The temporal proximity between Doe's abortion and her termination, she argued, was "unusually suggestive" of a discriminatory nexus. She was terminated on the day her baby was buried, just three working days after she told Kohl she would undergo an abortion.

CARS however, contended that Doe was terminated for abandoning her job. Kohl initially testified that Doe failed to call in on a daily basis to report her absence, per company policy. At a later proceeding however, he admitted there were exceptions to the rule, depending on the nature of the medical condition, where it would not be necessary for an employee to call in every day. The record indicated that other CARS employees had missed consecutive days of work for various medical reasons and were not terminated for failing to call in on a daily basis. Moreover, Doe made advance arrangements for her extended absence, in accordance with common practice at CARS.

The district court sided with CARS, finding Doe failed to sufficiently establish all elements of her claim. In particular, the court found Kohl's "stray remark" insufficient evidence of a discriminatory nexus. Doe appealed from that decision.

The Third Circuit's Opinion

The Court of Appeals reversed, taking issue with many of the lower court's evidentiary findings. The appeals court found ample evidence in the record to establish a claim for discrimination. Moreover, the court seized upon the opportunity to address a question of first impression in its jurisdiction: "Whether the protections generally afforded pregnant women under the PDA also extend to women who have elected to terminate their pregnancies …"[4] The court answered this question in the affirmative, stating: "We now

[3] *McDonnell Douglas Corp., v. Green*, 411 U.S. 792 (1973).
[4] 527 F.3d 358 at 363.
[5] *Id.* at 364.

hold that the term 'related medical conditions' includes an abortion."[5]

The court found no ambiguity in the language of the PDA redefining the scope of Title VII to include discrimination because of "pregnancy, childbirth, or related medical conditions." The legislative history of the PDA also demonstrated that Congress intended to extend Title VII's protections to "all situations" in which women are affected by pregnancy, including termination of pregnancy.[6] However, the specific question of whether the PDA affords protection for women who undergo an abortion had not been decided in the Third Circuit. Only the Sixth Circuit had reached the issue. In fact, in *Turic v. Holland Hospitality, Inc.*,[7] the court concluded that the protection provided under the PDA "encompasses more than simply the act of having an abortion; it includes the contemplation of an abortion, as well."[8]

The court found no ambiguity in the language of the PDA redefining the scope of Title VII to include discrimination because of "pregnancy, childbirth, or related medical conditions."

The Court's Reliance on EEOC Guidelines

In addition to statutory language, legislative history, and the decision of a sister Circuit, the *CARS* court also relied heavily on the administrative guidelines promulgated by the Equal Employment Opportunity Commission (EEOC). In this regard, the Third Circuit again followed the Sixth Circuit's lead. In *Turic*, the court had acknowledged that the guidelines are entitled to a high degree of deference and that they "clearly indicate" the PDA applies to claims of discrimination arising from a woman's exercise of her right to an abortion.[9] In *CARS* , the Third Circuit reiterated: "Clearly, the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion."[10]

The reliance placed on the EEOC guidelines in both *CARS* and *Turic* should not be underestimated. The Supreme Court, after all, had also declared that the EEOC guidelines interpreting the provisions of Title VII are entitled to a high degree of deference "as expressing the will of Congress."[11]

The EEOC is an independent federal agency charged with enforcing federal laws prohibiting job discrimination. The agency issues regulations for the interpretation of federal civil rights laws, and renders opinions on individual claims brought before it.[12] The "Guidelines on Discrimination Because of Sex" are found at 29 CFR § 1604, *et seq*. Those guidelines expressly state that it is unlawful, under the PDA, to fire, or to refuse to hire or promote a woman "merely because she is pregnant or has had an abortion."[13]

The Supreme Court has provided little additional guidance on claims under the PDA, and the EEOC has shown no trepidation in expressing its disagreement with a lower court decision contrary to its position. For example, after the Seventh Circuit held, in *International Union v. Johnson Controls*,[14] that an employer's fetal protection policy, which barred female employees from working in high lead exposure positions, did not violate the PDA, the EEOC issued a "Policy Guidance" in disagreement. The Supreme Court granted *certiorari* – its third of only three opinions on the PDA[15] – and reversed the appellate court's decision, holding it was not in line with EEOC policy, case precedent, the language of the PDA or legislative history.[16]

The PDA as a Source of Additional Litigation

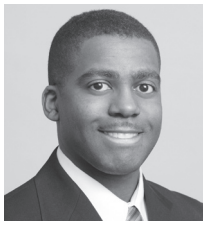
Over the years, the PDA has spawned some controversial litigation. As early as 1981, the Act was challenged on religious grounds. In *Nat'l Conf. of Catholic Bishops v. Smith*,[17] various Catholic organizations charged that the PDA unlawfully burdened the free exercise of religion by requiring all employers to provide benefits for elective abortions. The Court of Appeals for the District of Columbia Circuit dismissed the suit as premature.

Despite the Commission's guidelines and the Supreme Court's declaration that those guidelines are entitled to a high degree of deference, some lower courts have remained reluctant to lean too heavily on EEOC guidance. For example, the Second Circuit Court of Appeals in *Saks v. Franklin Covey Co.*,[18] was asked to decide whether the PDA requires an employer's health benefits plan to cover infertility treatments. In holding it does not, the court was careful to distinguish the EEOC guidelines and the Supreme Court's holding in *Johnson Controls*. In *Stanbridge v. Union Pacific Railroad Co.*,[19] the Eighth Circuit Court of Appeals

[6] H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766.
[7] *See Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996).
[8] *Id.* at 1214.
[9] *Id.*
[10] 527 F.3d 358 at 364.
[11] *See Griggs v. Duke Power*, 401 U.S. 424, 433-34 (1971).
[12] *See e.g. EEOC Commission Decision on Coverage of Contraception* (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decisions-contraception.html.
[13] 29 CFR § 1604.11, Pt. 1604, App. (2007).
[14] *International Union v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989), *reversed*, 499 U.S. 187 (1991).
[15] *In addition to Johnson Controls*, see: *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).
[16] *International Union v. Johnson Controls*, 499 U.S. 187 (1991).
[17] *Nat'l Conf. of Catholic Bishops v. Smith*, 653 F. 2d 535 (D.C. Cir. 1981).
[18] *See Saks v. Franklin Covey Co.*, 316 F.3d 337 (2nd Cir. 2003).
[19] *See Stanbridge v. Union Pacific Railroad Co.*, 479 F.3d 936 (8th Cir. 2007).

considered whether an employer's health plan that failed to provide coverage for contraception violated the PDA. The court concluded it did not, factually distinguishing the case from a contrary EEOC decision.

Coming on the heels of cases like *Saks* and *Stanbridge*, *CARS* suggests a lack of judicial unanimity regarding the scope of the PDA and the strength of the EEOC's role in shaping judicial oversight and decision in disputes arising under the Act. Perhaps other courts will fall in line behind the Third and Sixth Circuits, perhaps not. Regardless, as the *CARS* decision amply demonstrates, thirty years after the enactment of the Pregnancy Discrimination Act, litigants continue to test the PDA's resilience and outer boundaries. As issues concerning pregnancy, women's rights, and gender-based discrimination in the workplace continue to multiply and to take on added complexity, litigation involving the PDA will remain an active and challenging aspect of employment law.



Brian W. Franklin practices in the areas of products liability, general liability, and toxic torts in Pennsylvania and New Jersey. Prior to joining Segal McCambridge, Mr. Franklin practiced in California as a public defender and as a civil litigator defending manufacturers in wrongful death and personal injury suits, and an employer in FELA tort claims. Mr. Franklin has also advised clients in employment discrimination matters.

Employers Could Face PDA Liability for Adverse Actions Based on Childbearing Capacity

By Gregory E. Rogus

The Pregnancy Discrimination Act ("PDA"),[1] prohibits employers from taking adverse employment actions against female workers "because of or on the basis of pregnancy, childbirth, or related medical conditions." In many cases, the applicability of this statutory language is relatively straightforward and uncomplicated. However, as medical and reproductive science grows increasingly sophisticated, offering an enhanced range of options for those employed individuals wishing to have a child, new issues continue to emerge.

The Seventh Circuit Court of Appeals recently addressed such a novel issue. In *Hall v. Nalco Company*,[2] the court held that a woman who is terminated from her employment for taking time off to undergo *in vitro* fertilization has a cognizable claim of sex discrimination under Title VII.

Factual Background

Six years into her employment as a secretary for the Nalco Company, Plaintiff Cheryl Hall requested, and was granted, a leave of absence to undergo *in vitro* fertilization ("IVF"), an assisted reproductive technology that involves administration of fertility drugs to the woman, surgical extraction of her eggs, fertilization in a laboratory, and surgical implantation of the resulting embryos into the woman's womb. As the court noted, each IVF treatment takes weeks to complete, and multiple treatments are sometimes needed to achieve a successful pregnancy. Ms. Hall's initial leave was approved, but her first *in vitro* procedure was unsuccessful. Upon returning to work, she requested a second leave to once again undergo IVF.

Her employer, in the meantime, had begun a reorganization that led to a decision to eliminate Ms. Hall's position. Her supervisor told her that her termination was in her best interest due to her health condition. Nalco's employee-relations manager also noted, based on a conversation with Ms. Hall's supervisor, that the plaintiff missed a lot of work due to health, and specifically cited "absenteeism-infertility treatments." Nalco retained another female secretary who had been employed in one of the company's other offices, and who was incapable of becoming pregnant.

Ms. Hall filed a charge of discrimination with the Equal Employment Opportunity Commission, and then a lawsuit in federal district court alleging that her termination violated the

[1] 42 U.S.C. §2000e(k).
[2] *Hall v. Nalco Company*, 534 F. 3d 644 (7th Cir. 2008).

PDA in that she was fired for being a member of a protected class (female) with a pregnancy related condition (infertility). The district court rejected Ms. Hall's claim, finding that infertile women are not a protected class under the PDA because infertility is a gender-neutral condition.

Fertility v. Childbearing Capacity

The district court relied primarily on two earlier decisions from other circuits. In *Saks v. Franklin Covey Co.*,[3] the Second Circuit held that the PDA does not require employer insurance policies to cover infertility treatment so long as both male and female treatments are excluded. The court reasoned: "Because reproductive capacity is common to both men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive capacity."[4] The Eighth Circuit applied an identical rationale in *Krauel v. Iowa Methodist Med. Ctr.*[5]: "[B]ecause the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender neutral," it does not violate the PDA.[6]

An employer's good faith efforts to address, in a non-discriminatory manner, issues arising from or involving an employee's fertility or infertility may no longer suffice to pass muster under the PDA.

The Seventh Circuit, however, analyzed the issue before it as involving more than "infertility alone," which would be gender-neutral. Instead, the court focused on the gender-specific characteristic of *childbearing capacity*. Employees wishing to take time off to undergo IVF will necessarily always be women, since only women can have the surgical impregnation procedure. Thus, when a woman employee suffers an adverse employment action based on her decision to undergo IVF, she can bring a claim under the PDA because an adverse action based on childbearing capacity will always result in "treatment of a person in a manner which but for that person's sex would be different."[7]

Unlike the Second and Eighth Circuits, the Seventh Circuit found support for its position in the Supreme Court's decision in *International Union v. Johnson Controls, Inc.*[8] In *Johnson Controls*, the employer had a policy that barred all fertile women from jobs involving lead exposure because of its potentially damaging effect on fertility and the fetus. The Supreme Court held that this policy violated the PDA because it "classifie[d] on the basis of gender and childbearing capacity, *rather than fertility alone*."[9] As the Seventh Circuit explained, "[t]he employer policy in *Johnson Controls* ran afoul of [the PDA] because its justification was the effect of lead exposure on fertility – an effect implicating both women and men – yet it barred only fertile women from employment."[10]

Ramifications for Employers

The *Hall* case posed a question of first impression not only for the Seventh Circuit, but likely for the entire federal appellate judiciary, since the court noted it was unaware that any other circuit had previously addressed the precise question presented. It remains to be seen whether other circuits will follow the Seventh Circuit's lead, or will instead arrive at other conclusions based, for example, on differing readings of *Saks v. Franklin Covey Co.* and *Krauel v. Iowa Methodist Med. Ctr.* However, since *Hall's* authority is bolstered by its reliance on Supreme Court precedent addressing a closely related issue, many if not most appellate courts in other parts of the country will likely accept and adopt the Seventh Circuit's interpretation.

Consequently, an employer's good faith efforts to address, in a non-discriminatory manner, issues arising from or involving an employee's fertility or infertility may no longer suffice to pass muster under the PDA. Instead, employers will need to think one step further, as the Seventh Circuit did, and reevaluate their policies, practices, and procedures to ensure they are not discriminating against their female employees based on childbearing capacity.

Gregory E. Rogus is a shareholder in Segal McCambridge's Chicago office. In addition to his role as editor of this newsletter, Mr. Rogus serves on the firm's Benefits Committee. He received his Juris Doctor from the University of Illinois College of Law and a Bachelor of Arts degree from Loyola University of Chicago. He has extensive experience representing both private and public sector employers in Title VII, ADA, ADEA, due process and other forms of employment-related litigation. His trial and appellate practice also encompasses civil rights, police and governmental official liability, and commercial litigation.

[3] *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2nd Cir. 2003).
[4] *Id.* at 345.
[5] *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996).
[6] *Id.* at 680.
[7] *Hall*, 534 F.3d at 649, citing *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).
[8] *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
[9] *Id.* at 198 (emphasis added by Seventh Circuit, 534 F.3d at 648).
[10] *Hall*, 534 F.3d at 648, citing *Johnson Controls*, 499 U.S. at 199.

Supreme Court Update: Court Recognizes Additional Bases for Retaliation Claims, Rejects Age Discrimination Challenge to Retirement Plan

By Peter J. Strelitz and Arturo M. Aviles

***Editor's Note**: In follow up to our Spring edition, Peter J. Strelitz and Arturo M. Aviles recap three more employment-related decisions handed down by the Supreme Court during its past term:* CBOCS West, Inc. v. Humphries*;* Gomez-Perez v. Potter*; and* Kentucky Retirement Systems v. EEOC.

CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (2008) - Retaliation claims under 42 USC § 1981

The Supreme Court agreed to review *Humphries* to clarify whether a cause of action for retaliation exists under 42 USC § 1981. In the underlying case, Humphries, an African-American male and associate manager at a Cracker Barrel restaurant owned by CBOCS, complained about racially discriminatory statements made and actions taken by his supervisor. Shortly afterwards, but prior to a conference scheduled to address his complaints, Humphries was terminated. He sued CBOCS, alleging that his termination was discriminatory, in violation of Title VII of the Civil Rights Act of 1964, and in retaliation for the complaints he lodged against his supervisor, in violation of 42 USC §1981. CBOCS was initially granted summary judgment on both claims. The Seventh Circuit, however, reversed the district court on the retaliation claim, holding that the "plain text of the statute as amended in 1991, makes clear that §1981 encompasses 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract."[1] CBOCS asked the Supreme Court to review the case.

The Supreme Court affirmed, finding that precedent compels the conclusion that §1981, like Title VII, prohibits retaliation. In particular, the Court looked to the line of cases beginning with *Sullivan v. Little Hunting Park, Inc.*,[2] in which the Court interpreted 42 USC §§1981 and 1982 similarly. As a result, the Court held that §1981 clearly encompasses claims of retaliation, and could thus be used as an independent platform for employees, such as Humphries, to bring lawsuits when their employers retaliate against them for, among other things, complaining about their supervisors' discriminatory acts.

The Court's decision does not present any radical departure from prior anti-retaliation law, but rather a much-needed clarification of existing law that, unfortunately for employers, may encourage employees to become more creative in pleading their claims. For example, under certain circumstances, retaliation claims may now be brought solely under §1981, as opposed to Title VII. This could enable claimants to avoid the deadlines, limited range of remedies, and other strictures imposed under Title VII. This flexibility may result in a new wave of claimants who strategically forego their race-based Title VII claims and instead pursue redress exclusively under §1981.

Gomez-Perez v. Potter, 128 S.Ct. 1931 (2008) - Retaliation claims under 29 USC §633a

Federal-sector employees who believe they have suffered retaliatory adverse employment actions now have firmer footing on which to bring suit. In *Gomez-Perez*, the Supreme Court considered whether the federal-sector provision of the Age Discrimination in Employment Act ("ADEA"),[3] includes a cause of action for retaliation. In the underlying case, Myrna Gomez-Perez, a U.S. Postal Service ("USPS") employee, filed suit alleging that the USPS retaliated against her for filing an internal age discrimination complaint. The USPS sought summary judgment on the alternative grounds that it was entitled to sovereign immunity and that §633a does not encompass claims for retaliation. The district court granted the motion based on immunity. On appeal, the First Circuit held that the immunity had been statutorily waived, but nonetheless affirmed, holding that the ADEA does not provide federal employees a cause of action for retaliation. Since the Court of Appeals' ruling caused a split among the Circuits,[4] the Supreme Court granted *certiorari* and, in a 6-3 opinion authored by Justice Alito, held, contrary to the First Circuit's decision, that the ADEA federal-sector provision encompasses claims for retaliation based on the filing of an age discrimination complaint.

The Court's recognition of an implied cause of action for retaliation under §633a was based primarily on two of the

[1] *Humphries v. CBOCS West, Inc.*, 474 F. 3d 387, 398 (7th Cir. 2007).
[2] 396 U.S. 229 (1996).
[3] 29 USC §633a.
[4] In *Forman v. Small*, 271 F.3d 285 (C.A.D.C. 2001), the District of Columbia Circuit held that the ADEA's federal-sector provision covers retaliation.

Court's prior decisions, *Sullivan v. Little Hunting Park, Inc.*[5] and *Jackson v. Birmingham Bd. Of Ed.*,[6] both of which construed similar statutes. In *Sullivan*, the plaintiff leased his home to an African-American individual and attempted to assign the lessee a membership share of the non-stock corporation that operated a residential park and playground. The corporation subsequently rejected the assignment and expelled Sullivan for protesting the decision. He sued, claiming unlawful retaliation, based on 42 USC §1982, which prohibits discrimination based on race in the conveyance of real and personal property. The Supreme Court held that Sullivan's claim for retaliation was cognizable under §1982, declaring that a contrary holding would have punished Sullivan for protecting minorities' rights and would have perpetuated racial restrictions on property. In *Jackson*, a public school teacher filed suit under Title IX against his school board because he was retaliated against for complaining of sexual discrimination in the athletics program. Although Title IX does not expressly prohibit retaliation, the Supreme Court held that a funding recipient's retaliation against a person who complains of sex discrimination constitutes intentional discrimination on the basis of sex in violation of Title IX.

Since both *Sullivan* and *Jackson* equated retaliation to intentional discrimination, and since the ADEA outlaws intentional age discrimination, the Supreme Court reasoned that Congress must have intended the ADEA's federal–sector provision to likewise proscribe retaliation against federal employees complaining of age discrimination.

In dissent, Chief Justice Roberts, joined, in part, by Justices Scalia and Thomas, opined that Congress did not intend to create a judicial remedy for retaliation given the statutory language in issue and the existence of the civil service process for federal employees. Justice Thomas filed a separate dissenting opinion, joined by Justice Scalia, reiterating the position he had previously articulated in his *Jackson* dissent that retaliation does not constitute intentional discrimination.

Kentucky Retirement Systems v. E.E.O.C., 128 S.Ct. 2361 (2008) - Disability retirement benefits distinction based on pension status does not violate ADEA

If a state's disability retirement benefits formula imputes additional years of service only for disabled workers who are not yet eligible for normal retirement benefits, does that calculation represent age-based discrimination against workers who become disabled after attaining normal retirement eligibility? That issue, potentially affecting pension benefits provided under plans in effect in many states, came before the Supreme Court when it agreed to hear *Kentucky Retirement Systems* ("KRS"). A divided Court held that Kentucky's retirement benefits system, which incorporates such a differentiation, does not discriminate against those who continue to work but then become disabled after attaining normal retirement eligibility.

The underlying case involved a county sheriff's department employee who, after becoming disabled, retired at age 61 and was subsequently paid normal (i.e. non-disability related) retirement benefits based on his 18 years of service. He complained of age discrimination because, unlike younger disabled workers who had not yet attained normal retirement eligibility, his benefit calculation did not include any additional imputed years of service. (Under the Kentucky formula, the number of years to be imputed equaled the number of years that the disabled employee would have had to continue working in order to become eligible for normal retirement benefits, i.e. the years necessary to bring the employee up to 20 years of service or to at least 5 years of service when the employee would turn 55, whichever number of years was lower.) The district court determined that Kentucky's formula did not discriminate "because of age," but the Sixth Circuit Court of Appeals concluded otherwise.

The Supreme Court reversed. Justice Breyer authored the 5-4 majority opinion, which relied heavily on the Court's 1993 decision in *Hazen Paper Co. v. Biggins*.[7] In *Hazen Paper*, the Court held that a claim of intentional age discrimination must entail proof that age "*actually motivated* the employer's decision." Here, the Court determined that such actual motivation was not demonstrated. Analyzing the KRS formula in light of *Hazen Paper*, the Court concluded:

- Age and pension status remain "analytically distinct" concepts.
- Pension status is not the equivalent of a "proxy for age" under the KRS Plan.
- There clearly exists a non-age-related rationale for the disparity at issue.
- KRS' plan is advantageous to older employees in other circumstances.
- KRS' plan does not rely on the stereotypical assumptions that the ADEA seeks to eradicate.
- There is no alternate method to both correct the disparity and achieve KRS' legitimate objectives.

As a result, the Court held that "the Plan does not, on its face, create treatment differences that are 'actually motivated' by age." Justice Breyer cautioned that the Court's decision deals only with "the quite special case of differential treatment based on pension status, where pension status – with the explicit blessing of the ADEA – itself turns, in part, on age." The rule

[5] *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).
[6] *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005).
[7] 507 U.S. 604 (1993).

to emerge is that 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 ADEA, must adduce sufficient evidence to show that the differential treatment was "actually motivated" by age, not pension status.

Justice Kennedy, joined by Justices Scalia, Ginsburg, and Alito, issued a strong dissent, calling the differential treatment of older workers under the Kentucky plan a "straightforward act of discrimination on the basis of age."

Peter J. Strelitz, a shareholder in Segal McCambridge's Austin office, handles a wide variety of complex litigation defending large corporations (including Fortune 500 companies), products manufacturers and trucking companies. He defends companies, individuals, universities and state agencies in employment-related matters, and counsels clients on employment law issues. He has also drafted employment policies and handbooks for large companies. Mr. Strelitz received his B.A. from the University of Texas at Austin in 1994, and his J.D. from the University of Houston Law Center in 1997.

Arturo M. Aviles is a senior associate in Segal McCambridge's Austin office. He represents and counsels employers, insurers, insureds, manufacturers and suppliers in a wide array of matters, including employment, workers' compensation, business immigration, personal injury, premises liability, toxic tort, and product liability. In addition, he is a certified mediator and has mediated a variety of cases in Travis County, Texas. Mr. Aviles received his B.A. from the University of Colorado at Boulder in 1993, his J.D. from Southern Methodist University School of Law in 1996 and his M.B.A. from the University of Texas at Dallas in 2004.

Austin Office
100 Congress Avenue, Suite 800
Austin, TX 78701
Phone: 512.476.7834
Fax: 512.476.7832

Baltimore Office
One North Charles Street, Suite 2500
Baltimore, MD 21201
Phone: 410.779.3960
Fax: 410.779.3967

Chicago Office
Sears Tower, Suite 5500
233 South Wacker Drive
Chicago, IL 60606
Phone: 312.645.7800
Fax: 312.645.7711

Detroit Office
Novi Office Center
39475 Thirteen Mile Road, Suite 203
Novi, MI 48374
Phone: 248.994.0060
Fax: 248.994.0061

Jersey City Office
15 Exchange Place
Jersey City, NJ 07302
Phone: 201.209.0393
Fax: 201.209.1223

New York Office
830 Third Avenue, Suite 400
New York, NY 10022
Phone: 212.651.7500
Fax: 212.651.7499

Philadelphia Office
United Plaza
30 S. 17th Street, Suite 1700
Philadelphia, PA 19103
Phone: 215.972.8015
Fax: 215.972.8016

Princeton Office
103 Carnegie Center, Suite 103
Princeton, NJ 08540
Phone: 609.452.1558
Fax: 609.452.1559