

The US Supreme Court will be back in session Monday, October 1. Eleven employment law cases are already on the docket, and six of them are scheduled for oral argument. More cases may be added soon.

Here are short summaries of 11 cases.

For more information, including links to the decisions below:

- <http://www.lawmemo.com/emp/sum/courts/supreme/> .

Calendar of oral arguments:

- <http://www.lawmemo.com/emp/sum/courts/supreme/schedule.htm> .

Please re-distribute this email to anyone who is interested.

ERISA - Whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" relief.

MSPB - Use of other pending disciplinary actions to support penalty.

Arbitration - Can EEOC still obtain a remedy for the individual employee?

Constitutional question - DOT's race-conscious presumptions.

OSHA - Jurisdiction over off-shore barge.

Disability - The meaning of substantially limited.

Disability - Effect of seniority on right to reassignment.

Title VII - Continuing violation theory.

EEOC procedure - Does late verification of EEOC charge relate back?

FMLA - Requirement that employer designate leave and notify employee.

Constitutionality of 28 USC Section 1367(d) in 11th amendment case.

ERISA - Whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" relief. Oral argument October 1.

In *Great-West Life & Annuity v. Knudson* the Court will decide whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" rather than "legal" relief. If an ERISA plan makes payments for medical care on behalf of an injured beneficiary, and then the beneficiary settles a claim against those responsible for the injury, the ERISA fiduciary may seek reimbursement. If the fiduciary sues a beneficiary under 29 USC Section 1132(a)(3) seeking reimbursement, the claim must be for "equitable" rather than "legal" relief. Lower courts are split on whether such claims are legal or equitable.

MSPB - Use of other pending disciplinary actions to support penalty. Oral argument October 9.

In *United States Postal Service v. Gregory* the Court will decide whether other pending disciplinary actions may be considered in MSPB grievance proceedings. An employee was discharged from the postal service for allegedly overestimating her delivery time. The Merit Systems Protection Board (MSPB) denied her appeal on the ground that the discharge was justified by her prior disciplinary record, part of which was subject to then-pending administrative grievance proceedings. The Federal Circuit held that "as a matter of law, consideration may not be given to prior

disciplinary actions that are the subject of ongoing proceedings challenging their merits."

Arbitration - Can EEOC still obtain a remedy for the individual employee?
Oral argument October 10.

In EEOC v. Waffle House Inc the Court will decide whether a private arbitration agreement limits the EEOC's litigation remedies. If an individual employee has signed an agreement to arbitrate employment disputes, can the EEOC still obtain reinstatement and monetary damages on behalf of that employee? Lower courts are split on the issue.

Constitutional question - DOT's race-conscious presumptions. Oral argument October 31.

In Adarand Constructors v. Mineta the Court will decide whether the 10th Circuit correctly applied the "strict scrutiny" standard mandated by Adarand Constructors v. Pena, 515 US 227 (1995). Adarand submitted the low bid for a federal government subcontract. The prime contractor awarded the subcontract to a certified small business owned and controlled by socially and economically disadvantaged individuals - because the government provided a financial incentive for doing so. Adarand sued claiming that the use of a race-conscious presumption in determining who is a socially and economically disadvantaged individual violated its 5th amendment equal protection rights. The 10th Circuit found that there was a compelling governmental interest in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," and that the government's program was narrowly tailored.

OSHA - Jurisdiction over off-shore barge. Oral argument October 31.

In Chao v. Mallard Bay Drilling the Court will decide whether OSHA has jurisdiction over an oil drilling barge located within the territorial waters of Louisiana. The 5th Circuit held that the United States Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen aboard such vessels.

Disability - The meaning of substantially limited. Oral argument November 7.

In Toyota Motor Mfg v. Williams the Court will decide whether an employee is disabled because she was substantially limited in performing manual tasks. An employee had work-induced carpal tunnel syndrome. The 6th Circuit concluded that she was "substantially limited in performing manual tasks" because "the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally."

Disability - Effect of seniority on right to reassignment.

In US Airways v. Barnett the Court will decide whether seniority trumps a disabled employee's right to reassignment. Although the ADA provides that job reassignment is a potential method of reasonably accommodating an individual with a disability, courts are split on what to do when another employee has greater seniority rights. In this case the 9th Circuit held, "If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees."

Title VII - Continuing violation theory.

In National Railroad Passenger Corp v. Morgan the Court will review the "continuing violation" theory. Title VII has a 300 day statute of limitations. Conduct occurring earlier is often used as evidence solely for providing "background" or "context." The question in this case is whether the earlier conduct, assuming it is related to the later conduct, can create liability.

EEOC procedure - Does late verification of EEOC charge relate back?

In Edelman v. Lynchburg College the Court will decide whether an EEOC charge must be verified (signed under oath or affirmation) within the 300 days statute of limitations period, or whether an out-of-time verification relates back to an earlier unverified charge.

FMLA - Requirement that employer designate leave and notify employee.

In Ragsdale v. Wolverine Worldwide the Court will review the validity of a series of DOL regulations dealing with the Family and Medical Leave Act. The regulations provide that (a) the employer must designate leave as FMLA-qualifying and notify the employee of the designation, (b) the employer must designate leave as FMLA leave prospectively rather than retroactively, and (c) any leave taken prior to the notice cannot be counted as FMLA leave. The 8th Circuit held that the regulations are not a permissible interpretation of the statute, saying that the FMLA was not intended to require an employer to grant more than 12 weeks of leave.

Constitutionality of 28 USC Section 1367(d) in 11th amendment case.

In Raygor v. Regents of the University of Minnesota the Court will decide whether 28 USC Section 1367(d) is constitutional as applied in this case. Section 1367(d) tolls a state statute of limitations for claims asserted under federal supplemental jurisdiction while those claims are pending in federal court. Raygor's state and federal claims were dismissed from federal court because of the 11th amendment. His state court suit was filed late under the state statute of limitations, but Section 1367(d) would toll

the state limitation period while the state claim was pending in federal court. The Supreme Court of Minnesota held that applying Section 1367(d) in this case would be unconstitutional under the 11th amendment.

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