

# **Recent Cases Involving Employment Discrimination and Employee Benefits<sup>1</sup>**

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<sup>1</sup>This represents a survey of recent court decisions involving the intersection of employment discrimination law and employee benefit law. Cash balance plan litigation is omitted, as are cases involving only ERISA Section 510. Case summaries are limited to only those parts of the decisions that relate to the interplay of employee benefits and employment discrimination law.

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## Supreme Court Cases

**Hulteen et al. v. AT&T Corp., 498 F. 3d 1001 (9<sup>th</sup> Cir. 2007), cert. granted, 76 U.S.L.W. 3672 (U.S. June 23, 2008) (No. 07-543).**

The Supreme Court heard oral arguments on December 10 in this case, on appeal from the Court of Appeals for the Ninth Circuit. The issue in *Hulteen* involves the meaning of “retroactivity” in applying the provisions of the Pregnancy Discrimination Act of 1978 (“PDA”).

Before the effective date of the PDA, the employer in this case limited to 30 days the service credit (for purposes of service-related benefits and programs, including pension plans) it awarded to employees on pregnancy leave. This contrasted with the employer’s policy for employees on other types of disability leave, who could receive much longer periods of service credit. In 1978 the PDA rendered such differential practices illegal, but the PDA was enacted without retroactive effect. The plaintiffs had, prior to 1978, taken pregnancy leaves of more than 30 days; the information recorded for these leaves in the employer’s personnel files continued to reflect service as limited by the employer’s pre-PDA policy. Many years after 1978 the plaintiffs retired, and their benefits were calculated based on their employer’s records, which still showed service of only 30 days for pre-1978 pregnancy leaves.

The question in the case is: As of what date can this employer be said to have acted toward the plaintiffs in a discriminatory fashion? If the answer is when the plaintiffs took their pregnancy leave and were originally credited with only 30 days’ service, then the employer’s action cannot be challenged under the PDA, both because the statute does not apply retroactively and because the plaintiffs missed the statute of limitations for bringing their claim. If on the other hand the answer is the date on which the employer calculated and began paying pension benefits, using the service credit calculated taking into account the 30-day limit, the PDA applies and the plaintiffs’ claims are timely.

The Ninth Circuit had previously held that the practice at issue in this case did violate the PDA (that is, that the employer’s violation effectively occurred after the statute’s effective date, when the employer calculated benefits based on a service-crediting policy that would no longer comply with the statute). *Pallas v. Pacific Bell*, 940 F.2d 1324 (9<sup>th</sup> Cir. 1991). In *Hulteen*, however, a three-judge panel of the Ninth Circuit, relying on the intervening Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), initially held to the contrary, concluding that *Pallas* was no longer good law. (In *Ledbetter*, the Supreme Court had held that the statute of limitations for unequal pay claims started to run as soon as the plaintiff’s rate of pay had been agreed upon, rejecting the argument that a separate act of discrimination occurred with each paycheck.) The Ninth Circuit Court of Appeals, later sitting *en banc*, disagreed, striking the three-judge panel’s decision and reinstating *Pallas*.

The Supreme Court granted certiorari and heard arguments December 10. (A description of the oral argument is online at <http://www.workforce.com/section/00/article/26/02/74.php>.) The EEOC is involved in the case on the side of the plaintiffs, but the Solicitor General filed an *amicus* brief on behalf of AT&T.

**Effect of Ledbetter Act.** After the oral argument in *Hulteen*, as one of his first acts as president, Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. This statute legislatively overturns the Supreme Court's 2007 decision in *Ledbetter*, which had served as the principal rationale for the Ninth Circuit three-judge panel's initial decision in *Hulteen*.

The Ledbetter Act amends Title VII to provide, in part, as follows:

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, *including each time wages, benefits, or other compensation is paid*, resulting in whole or in part from such a decision or other practice.

Pub. L. No. 111-2, 123 Stat. 5, Sec. 3 (emph. added).

The plaintiffs in *Hulteen* have filed a supplemental brief, available online at <http://www.scotusblog.com/wp/wp-content/uploads/2009/02/07-543bssb.pdf>, arguing that the Ledbetter Act requires that the Ninth Circuit's *en banc* decision be affirmed.

**Kentucky Retirement Systems et al v. Equal Employment Opportunity Commission, 128 S. Ct. 2361; 171 L. Ed. 2d 322; 43 E.B.C. (BNA) 2933 (June 19, 2008).**

This case involved the extent to which an employer may structure benefits under a retirement plan in a way that can cause benefits for older employees to be less than the benefits for otherwise similarly situated younger employees.

Kentucky's pension plan provided for normal retirement either (1) after 20 years of service, or (2) at age 55 or later after five years of service. The plan also contained a disability retirement proviso under which employees who became disabled would be entitled to retirement benefits even though they had not yet, as of the date of disability reached the eligibility requirements for normal retirement. This was accomplished by crediting the disabled employee with sufficient additional years of service to qualify for normal retirement. So, for example, if an employee was age 35 at the time of disability with four years of service, the employee would be credited with the additional 16 years of service necessary to qualify for normal retirement. If on the other hand an employee was age 54 at the time of disability with four years of service, the employee would be credited with only the one additional year of service needed to qualify that employee for normal retirement under the "age 55 plus five years of service" test. These additional years of service counted not only for purposes of qualifying for retirement, but also for purposes of calculating the benefit provided under the plan formula.

This set of provisions had the effect (on facts such as those above) of causing the disability benefit for older employees to be less than the disability benefit for younger employees with the same number of years of service. The EEOC charged that as a result the disability formula was impermissible under the Age Discrimination and Employment Act ("ADEA").

The Supreme Court held, five to four, that the arrangement did not violate ADEA. The majority emphasized that "pension status," while related to age, is an "analytically distinct" concept, and noted that ADEA permits a plan expressly to condition benefits on attainment of a certain age. As a result, the majority held, it is also permissible to condition some other benefit, such as disability retirement benefits, upon "pension status" even where pension status is based in part on age – unless it is shown that pension status is being used merely as a "proxy" for a difference in treatment that is "actually motivated" by age. Here, the majority found, there was no such evidence; rather, the facts indicated the state merely intended to credit sufficient service to qualify all disabled employees for normal retirement. Moreover, facts could be supposed under which an older worker would be better off, under the plan provisions, than a similarly situated younger one. (A four-Justice minority consisting of justices Kennedy, Ginsberg, Thomas and Alito vigorously dissented, arguing that ADEA expressly prohibits discriminatory effects like those present in this case, without regard to the employer's intent.)

**Practical lesson for employers:** The decision, as well as others such as *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) and *McKnight v. Gates*, described below, establish that in general it is possible for employers to take differential actions on the basis of pension status without violating ADEA. Any internal or external employer communications concerning such an action should, however, be strictly limited to "pension status" and *avoid mentioning age itself*. Otherwise the employer will raise the risk of being viewed as having used pension status as an illegal "proxy" for an action actually motivated by age.

## Lower Court Cases: Age Discrimination

### AARP v. EEOC, 489 F.3d 558 (3rd Cir., 2007), *cert. den.* 128 S. Ct. 1733 (2008).

This AARP challenged the validity of a proposed regulation by the Equal Employment Opportunity Commission that would permit postretirement medical benefits to coordinate benefits with eligibility for Medicare or state retiree health benefit programs. The Court of Appeals upheld the validity of the proposed rule (which, as noted below, has since been made final).

The EEOC's proposed rule provided that it would not constitute a violation of ADEA to reduce employer-provided postretirement medical benefits for Medicare or state-sponsored retiree benefits, even though eligibility for the latter was based on age, thus resulting in age-based reductions in the amount of benefits provided under the employer plan. The AARP challenged the proposed rule's validity on several grounds, including that it exceeded the EEOC's rule-making authority under the ADEA, and that the EEOC had violated various provisions of the Administrative Procedures Act ("APA").

The Third Circuit upheld the proposed rule. It noted that Congress had expressly granted authority to the EEOC to establish "reasonable exemptions" to the ADEA to the extent the EEOC finds the exemptions "necessary and proper in the public interest." Acknowledging that this statutory authorization does not afford unfettered license to the EEOC, the Court nonetheless found the EEOC had demonstrated that the proposed exemption was a narrow one that represented a "reasonable, necessary and proper exercise" of the agency's discretion. Specifically, the court credited as reasonable the EEOC's rationale that ever-fewer American employers are providing post-retirement benefits; and that reducing the regulatory constraints on such plans might help to arrest that decline. (For several years before issuing the proposed rule the EEOC had taken the opposite view, that Medicare offsets *did* violate the ADEA; reversing its position only after becoming convinced this position was hastening the erosion of retiree medical coverage.)

The Court also dismissed the AARP's challenges based on the APA, finding that the EEOC had "exercised due regard for the purposes of the ADEA"; that the proposed regulation was not "arbitrary and capricious"; that the EEOC had considered all relevant factors and possible alternatives; and that the agency had adequately complied with the relevant notice and comment procedural requirements.

**Note:** The EEOC's proposed rule permitting coordination with Medicare and state plans was made final in late 2007. 29 C.F.R. §1625.32; 72 Fed. Reg. 72938 (Dec. 26, 2007).

**Practical lesson for employers:** Given the Third Circuit's decision (and the Supreme Court's denial of certiorari), and the subsequent issuance of final regulations by the EEOC, employers may amend (or design) post-retirement medical benefits with an offset for Medicare or state-sponsored retiree benefits with the assurance that such an offset will not be deemed to violate the ADEA.

**McKnight v. Gates, 282 Fed. Appx. 394, U.S. App. LEXIS 13652 (6<sup>th</sup> Cir. June 23, 2008) (unpublished).**

In this case, the Court of Appeals followed reasoning similar to that of the Supreme Court in the *Kentucky Retirement Systems* case, above, in concluding that a failure to hire an individual based on his status as an annuitant currently receiving pension benefits was not, in itself, a violation of ADEA.

The plaintiff in this case was a retired civil service employee of the U.S. Army. Several years after retiring and beginning to receive pension benefits, he sought and obtained new employment with the Department of Defense. Shortly after his rehiring, however, the plaintiff's new employment was terminated as a result of a newly-issued Department of Defense memorandum suspending the hiring of current annuitants.

The Sixth Circuit cited *Hazen Paper Company v. Biggens*, 507 U.S. 604 (1993) (which also figured prominently in *Kentucky Retirement Systems*) for the proposition that *pension status* is analytically distinct from *age*. As a result, the mere allegation that an action or policy affects individuals based on pension status, even where that may correlate with age, does not state a claim under ADEA. The Court noted that the Defense Department memorandum suspending annuitant hiring did not refer to age, but only to annuitant status. While pension status may not be used as a "pretext" to discriminate on the basis of age, the Sixth Circuit found that in this case the plaintiff had failed even to allege such a pretextual use of pension status.

**Note:** EEOC officials continue to indicate informally that they believe a refusal to hire retirees because they are already receiving a pension violates the ADEA. See "Impact of *Kentucky Retirement Systems* Unknown," 35 Pension & Benefits Rep. (BNA) 1729-30 (July 22, 2008).

**Practical lesson for employers:** Employer memoranda, discussions, or other communications in connection with any differential treatment based on "pension status" should be limited to pension status and avoid mentioning age itself. Otherwise the employer will increase the risk of being viewed as having used pension status as an illegal "pretext" for an action based on age.

**Panecasio v. Unisource Worldwide, 532 F. 3d 101 (2d Cir., July 7, 2008).**

In this case the Court of Appeals for the Second Circuit considered ADEA and ERISA claims brought by a former executive who had elected to accept an early retirement offer from his employer. Earlier in his career, the employee had participated in a deferred compensation plan maintained for select highly compensated employees. Pursuant to the plan, participants deferred a portion of their income each year and in return were promised benefits including life insurance coverage both before and after retirement, as well as (depending on the employees' elections under the plan) a ten-year post-retirement annuity. The deferred compensation plan expressly stated that it was subject to termination by the company, in which case any

contributions previously made by participating employees would be returned to them with interest.

In 1994, at the age of 57, the plaintiff accepted the company's offer of early retirement. The early retirement offer was presented in a separate brochure, which outlined the various benefits available under the early retirement program. Among these was accelerated partial vesting of benefits under the deferred compensation plan. The early retirement brochure did not specifically refer to the company's right to terminate the deferred compensation plan; it did, however, contain a general disclaimer stating that "[i]n case of any dispute, the official legal documents or contracts will govern over this brochure." Nearly seven years after the plaintiff's retirement, and six months before he attained age 65, the company terminated the deferred compensation plan. This entitled the plaintiff only to the return of all his contributions with interest, an amount far less than the benefits he would have received had he reached age 65 and retired under the plan.

The plaintiff brought claims under ERISA and ADEA, alleging that he had been wrongfully induced to terminate his employment. The court dismissed both claims, finding the ADEA claim untimely because the plaintiff had not filed his complaint within 300 days of the alleged act of discrimination, the termination of employment. The statute of limitations for bringing an EEOC claim could be equitably tolled if evidence were found that the company had misled the employee into being unaware of an act giving rise to discrimination. The court concluded, however, that no such evidence was present here. The court noted there was no suggestion that the company had selected the employee for participation in the early retirement program because of his age, that at the time of the early retirement program the company had been aware that it would seven years later terminate the deferred compensation plan, or that the deferred compensation plan was terminated because the plaintiff was six months away from beginning to receive benefits under it.

**Practical lessons for employers:** First, where an employer is taking an action such as terminating a deferred compensation plan, it is important to make sure that decision is made without regard to the proximity of any covered employees to achieving eligibility for benefits under that plan. It can help, in ensuring this is the case, to have different people in charge of plan administration and decisions as to, for example, the termination or amendment of a plan. Second, the case is a further reminder that in any document summarizing an employee benefit plan for employees, it is best to include any important disclaimers (such as reservation of the right to terminate the plan). While in this case the court held that inclusion of termination rights in the original plan document was sufficient, the case's result would have been more clearly compelled had the early retirement program brochure itself also restated that right.

**Syverson v. IBM, 461 F.3d 1147 (9<sup>th</sup> Cir. 2006); *reh. den.* 472 F.3d 1072 (2007).**

The issue in *Syverson*, very similar to an earlier case in the Eighth Circuit (*Thomforde v. IBM*, 406 F.3d 500 (2005)), was whether an employee's waiver of rights was valid under the waiver provisions of the ADEA added by the Older Workers Benefit Protection Act of 1990 ("OWBPA").

The waiver in this case contained two parts. The first was a “waiver of claims,” in which the plaintiff waived all claims arising under employment discrimination laws, expressly including the ADEA. This was immediately followed, however, by a “covenant not to sue” in which the plaintiffs agreed not to bring any claims for employment discrimination rights, *except* for claims under ADEA. The plaintiffs claimed that his combination of provisions – with the second provision containing an express exception for ADEA claims apparently waived by the first provision – was ambiguous, and not “written in a manner calculated to be understood by the average individual eligible to participate” as required by OWBPA. The company countered that the two provisions – the waiver of claims and the convent not to sue – covered two different concepts. The exception in the second provision was meant to ensure that employees, although they had waived ADEA claims in the first provision, nonetheless retained the right to *assert* those claims; for example, on the issue of whether the waiver was valid. (An individual’s right to file a charge with the EEOC being nonwaivable under EEOC regulations. 29 U.S.C. §626(f)(4).)

The court agreed with the plaintiffs. It noted that the difference between a “wavier of claims” and a “convent not to sue” on the same claims is a subtle legal issue – one that often confuses lawyers and judges, let alone average workers. Emphasizing the principle that waivers, to be valid, must be calculated to be understandable by an “average participant,” the Ninth Circuit determined that the plaintiffs had not knowingly waived their claims within the meaning of OWPBA.

**Practical lessons for employers:** The specific lesson is that a waiver of claims should not be accompanied by a covenant not to sue unless the two provisions are fully consistent, if the waiver is intended to be valid under the OWBPA. The more general lesson is that in any waiver intended to be valid under the OWBPA, extreme case must be taken to ensure that neither the language nor the effect of the waiver turns on legal technicalities that may not be familiar to average plan participants.

**Embrico v. U.S. Steel, 245 Fed. Appx. 184; 42 E.B.C. (BNA) 1466 (3<sup>rd</sup> Cir. 2007).**

The Court of Appeals for the Third Circuit agreed with the District Court for the Eastern District of Pennsylvania that merely presenting executives with a time-limited, early retirement incentive “window,” under conditions of uncertainty and lack of information about future employment prospects, did not amount to “constructive discharge” of the employees. As a result the plaintiffs could not sustain their ADEA (or state employment law or ERISA) claims.

The plaintiffs had been offered an early retirement incentive under which the value of their pension benefits would be enhanced, provided they accepted the offer by a specified deadline approximately six weeks later. This offer came against the backdrop of the company’s stated intention to shut down one of its production lines and contract its workforce. The evidence showed that the plaintiffs had been in a state of extreme uncertainty as to whether their employment by U.S. Steel would be maintained, and thus whether they should accept the offer. Ultimately they did decide to accept the early retirement incentive.

ADEA, as amended by the OWBPA, permits the use of an early retirement incentive program, provided the program is “voluntary.” The plaintiffs in this case essentially argued that the conditions under which they were forced to make their decision were so difficult and stressful as to make their terminations “involuntary.” The Court of Appeals disagreed. It noted that although information available to the plaintiffs had been elusive at the time of their retirement and rumors widespread, their situation had not been “intolerable,” the high standard required to conclude an involuntary termination had occurred.

**Practical lesson for employers:** Where possible, take demonstrable steps to ease the stress on workers being offered an early retirement incentive window, such as, for example, making available the services of a financial, career or other counselor. Such actions can serve to make the atmosphere surrounding such a program less amenable to attack as having amounted to an “intolerable” work environment, and therefore to characterization as a constructive termination of employees.

**Wells v. Gannett Ret. Plan, 2008 U.S. Dist. LEXIS 50017; 44 E.B.C. (BNA) 2865 (D. Colo., July 1, 2008).**

The District Court held that a “pension equity” plan, under which participants earned annual credits to a hypothetical “account” that were a function of earnings and years of credited service, did not violate the ADEA.

The plaintiffs, following a line of argument taken by litigants in cash-balance plan cases, argued that because the plan in *Wells* was technically a defined benefit plan, accrual rates should be evaluated by converting the value of each year’s credit to the present value of a retirement annuity commencing at normal retirement age. As so converted, the benefit accrual rate for an older worker was less in any given year than that for a similarly situated younger worker. The District Court followed precedent in earlier cash-balance cases (*Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7<sup>th</sup> Cir. 2006); *Register v. PNC Financial Svcs. Grp.*, 477 F.3d 56 (3<sup>rd</sup> Cir. 2007)), in rejecting the plaintiffs’ argument that the test for discrimination in such a case is to be performed by converting the annual accrual to the present value of an annuity commencing at retirement. The court instead focused on the nominal (defined contribution) accrual rate; and finding that this rate did not decline among similarly situated employees with age, the court concluded that no discrimination existed.

**Practical lesson for employers:** Pension equity plans are just as likely as cash-balance plans to survive age discrimination challenge.

**Fulghum v. Embarq Corp., (D. Kan., December 2, 2008) (unpublished decision, available at [https://ecf.ksd.uscourts.gov/cgi-bin/show\\_public\\_doc?2007cv2602-45](https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2007cv2602-45)).**

Plaintiffs in *Fulghum* were former employees of Sprint Corporation and its affiliates and successors. They sued because their former employer had reduced benefits under various post-

retirement welfare benefit plans, including post-retirement medical benefit plans. In addition to suing under ERISA, plaintiffs included claims under ADEA. In its decision, the District Court deferred resolution of many of the claims on procedural grounds; but it dismissed one of the plaintiffs' claims, that of reduction of benefits to integrate with Medicare benefits, on the grounds that regulations issued by the EEOC (and discussed in detail in connection with the *AARP* case, above) were valid and expressly authorized the reduction. The case thus serves as yet further judicial confirmation of the validity of the EEOC's Medicare integration regulation.

**Vaughn v. Air Line Pilots Assn. et al., 2008 U.S. Dist. LEXIS 56741; 44 E.B.C. (BNA) 1785 (E.D.N.Y., July 24, 2008).**

The plaintiffs were older and retired pilots of US Airways, which had declared bankruptcy twice during the years at issue in the case. As part of its reorganizations, US Airways had negotiated changes to the pilots' retirement plans; first replacing a defined benefit plan with a "target benefit" defined contribution plan, and then modifying the defined contribution plan so it merely required a defined percentage of each pilot's salary to be contributed each year. The plaintiffs argued that both these changes – the change from a true defined benefit arrangement to a target benefit plan, and the change from a target benefit to a fixed percentage contribution formula – had the effect of discriminating against older pilots. By the time of the decision, US Airways had been removed as a defendant, and the plaintiffs' claims were principally directed against the Air Line Pilots Association, which had agreed to the pension changes.

The court dismissed the plaintiffs' claims, finding that the complained-of changes did not amount to age discrimination. Relying on the reasoning in other courts' cash-balance plan decisions, the District Court concluded that differences in retirement benefits between younger and older employees were the result of the effect of time and interest – the "time value of money" – and not age. The court also found that the plan provisions were exempted under the "equal cost or equal benefits" safe harbor of Section 623(f) of the OWBPA, which renders lawful a bona fide employee benefit plan where "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker."

**Hailey v. AGL Resources, Inc., 2008 U.S. Dist. LEXIS 11861; 44 E.B.C. (BNA) 1570 (D. N.J., Feb. 19, 2008).**

Plaintiffs accepted an early retirement offer, allegedly on the strength of misrepresentations by their employer as to the cost and extent of post-retirement medical benefits. After the monthly contribution required of the plaintiffs for post-retirement benefits was raised ten-fold by the employer, the plaintiffs sued, among other grounds, alleging age discrimination under a New Jersey state anti-discrimination statute. The plaintiffs claimed that the employer had made misleading statements about the cost of retiree medical coverage with the intention of eliminating older workers from the workforce.

The District Court held that this claim was preempted by ERISA. In particular, the court concluded that the plaintiffs' claim amounted to a claim of discharge based on a "benefits-defeating" motive, which sounded under Section 510 of ERISA and was thus preempted. (In reaching this conclusion, the court seems to have misconstrued the plaintiffs' argument, which was that the employer misrepresented benefits in order to rid itself of older employees, not in order to defeat the employees' potential benefit claims.)

**Weddum v. Davenport Community School Dist., 750 N.W.2d 114 (Iowa Sup. Ct., June 6, 2008).**

The plaintiff was a teacher who was ineligible, by reason of being a few months too young, for an early retirement incentive program established by her employing school district. She sued, alleging age discrimination under the Iowa state nondiscrimination statute. One issue was whether the Iowa law prohibited "reverse discrimination": discrimination against younger employees, in favor of older ones. Noting that the similar, federal ADEA has been held not to prevent reverse discrimination (*General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 583 (2004)), the Iowa Supreme Court nonetheless declined to answer this question as to the Iowa law. Instead the Court held that the early retirement incentive plan, as a bona fide employee benefit plan, was exempted from the statute. The Court noted that the school district had legitimate nondiscriminatory reasons for imposing the age cap: First, that elimination of older employees, because they had on average greater seniority and thus greater pay, produced greater cost savings; and, second, that payments to employees at least age 55 (the cutoff that the plaintiff just missed) could be made from a different funding source under Iowa law than payments to younger employees, thus affording the school district greater financial flexibility.

**EEOC v. Baltimore County, 593 F. Supp. 2d 797 (D. Md., Jan. 21, 2009).**

The employer sponsored a contributory defined benefit pension plan under which the required level of participant contributions increased with the participant's age, as of the date of his or her initial participation in the plan. The sponsor subsidized the remaining cost of the pension, and this subsidy grew increasingly generous with age; so that even though the absolute level of a participant's required contribution under the plan increased with age on the date of initial plan participation, the participant's *percentage share* of the overall cost of his or her pension decreased.

The court held that the plan did not violate the ADEA, because the increase in required participant contributions was motivated by the time value of money, rather than employees' age. The annual cost of funding a given pension for an older employee exceeds that for a younger employee, because less time remains, in the case of the older employee, for the contributions to earn interest. According to the court, the disparate contribution levels were based on the number of years until a participant's retirement eligibility, which is a variant of participant "pension status" – and discrimination on the basis of "pension status" is permissible under the Supreme Court's holding in *Kentucky Retirement Systems* (summarized above).

**Lerman v. City of Fort Lauderdale, 2008 U.S. Dist. LEXIS 103799 (S.D. Fla., Dec. 23, 2008).**

The plaintiffs in *Lerman* had accepted early retirement under a somewhat complicated retirement incentive program maintained by their employer, the City of Fort Lauderdale. Under the program, a several-year “window” period commenced running when each employee reached a specific age – generally, the age of eligibility for retirement under the plan. If the employee elected to participate in the incentive program, then, during the remainder of his or her window period: (1) he continued to be employed, but ceased to accrue additional pension benefits; and (2) the plan began to pay out the employee’s pension at the level he had accrued prior to the election, via, however, credits to a separate interest-bearing account rather than direct payments to the employee. At the end of the window period the employee ceased employment and the amounts that had been credited to the separate account were either paid to him in a lump sum or rolled over to another plan.

A participant could elect to participate in this program at any time during his or her window period, but the window period was not extended by an employee’s delay in so electing (i.e., if an employee began participating three years into his five-year window, his remaining payout window was only two years long). Any employee who did not elect to participate in the program (and remained employed) continued to earn additional benefits under the plan, but forfeited the monthly benefit payouts he would otherwise have received during the window period. The plaintiffs contended this arrangement constituted age discrimination, because a similarly situated employee who elected to participate later in his or her window period (i.e., an older employee) received a smaller payout of benefits.

The principal issue addressed by the court was the validity of age discrimination waivers executed by the plaintiffs under OWBPA as a condition to their having participated in the early retirement program. Enumerating the statutory requirements for a valid waiver, the court found that each had been satisfied and that the waivers were, as a result, enforceable. The court expressly rejected the plaintiffs’ contention that benefits under the incentive program were so generous that the plaintiffs’ participation had not been “voluntary” (which is one of the conditions of such waivers’ effectiveness under OWBPA). The court noted that such an argument, if accepted, would undermine the viability of OWBPA waivers generally.

The court also found that the program and waivers did not violate the purpose of ADEA, following *Kentucky Retirement Systems* in concluding that the shrinkage of the window period over time was a function of “pension status” rather than of employees’ ages.

## Lower Court Cases: Gender and Pregnancy Discrimination

**Doe v. C.A.R.S., 527 F.3d 358 (3<sup>rd</sup> Cir., May 30, 2008), cert. den. 77 U.S.L.W. 3280 (Nov. 10, 2008).**

The plaintiff had decided to abort her pregnancy after learning, based on blood tests and amniocentesis, of severe complications. Several days after her abortion, while she was absent from work attending a funeral for the baby, the plaintiff's supervisor (a part-owner of the company) terminated her employment. During the subsequent lawsuit brought by the plaintiff under the Pregnancy Discrimination Act, it emerged that (1) the supervisor had been told by plaintiff about the problems with her pregnancy and her decision to have an abortion; (2) evidence suggested the plaintiff or her husband had informed the supervisor of her impending several-day absence from work (although the supervisor later denied this); and (3) evidence suggested that the supervisor disagreed on philosophical grounds with plaintiff's decision to have an abortion.

The defendant argued that plaintiff's employment had been terminated for failure to follow the company's policy that absent employees must call in every day; and the District Court for the Western District of Pennsylvania had granted the defendant's motion for summary judgment, holding that the plaintiff had failed to establish a *prima facie* case of discrimination.

The Court of Appeals for the Third Circuit reversed. It held, first of all, that the decision to have an abortion is among the things protected by the PDA. In particular, the PDA's definition of the term "because of sex" or "on the basis of sex" (for purposes of establishing sex discrimination) includes "pregnancy, childbirth, or related medical conditions." The Court of Appeals agreed with the Sixth Circuit (*Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6<sup>th</sup> Cir. 1996)), in concluding that the term "related medical conditions" under the PDA includes an abortion.

Having so held, the Court of Appeals turned to the question of whether the plaintiff could prove she had been terminated because of her decision to have an abortion. The Court concluded that plaintiff had presented sufficient information to proceed with her claim, noting that the supervisor who terminated her had been aware of the abortion and terminated her employment almost immediately; and that the supervisor had been overheard to make remarks disagreeing with the plaintiff's decision. As to plaintiff's alleged failure to call in during her absence, the Court noted the presence of significant evidence that her husband had indeed called on her behalf; and also that the company's policy of requiring daily calls had not been adhered to in the case of other absent employees.

**Practical lessons for employers:** The conclusion that the PDA protects abortions, as a "related medical condition," is consequential for the design of leave policies and other benefit arrangements. In general the PDA requires that women who are pregnant or have a related medical condition – thus including, now, women undergoing an abortion – be extended the same benefits (under, for example, disability plans) as would be extended to other non-pregnant employees with a similar ability or inability to work. This is also one of many cases suggesting

the importance for employers of, if possible, separating responsibility for employment decisions from those involving supervision of benefits and leave.

**Wicker v. State of Oregon, 543 F.3d 1168 (9<sup>th</sup> Cir., Sept. 17, 2008)**

This case involved the interpretation of a consent decree entered into by the state of Oregon in response to the Supreme Court decision in 1978, in *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), regarding the use of different benefit plan mortality tables for men and women. The consent decree had specified that females were to be governed by the same mortality table as males. The question in *Wicker* was whether this was meant to say that females were to be governed by the same mortality tables as was in effect for males in 1978. Thus, the plaintiffs argued that the mortality tables for females could not be updated to reflect improvements in mortality subsequent to 1978. The state countered that the consent decree was only meant to require that females be subject to the same mortality table as males at any given time. The court agreed with the state, holding that although the language of the consent decree was ambiguous, the surrounding circumstances and the intent of the decree, as well as the tenor of the *Manhart* decision, meant that females need only be subject to the same mortality table as males as that table was in effect from time to time: not that females were guaranteed as a “floor” the mortality in effect for males as of 1978.

**Deem v. BB&T Corp., 2007 U.S. Dist. LEXIS 46013, 41 E.B.C. (BNA) 2193 (S.D. W.V. 2007); *aff'd* 279 Fed. Appx. 283, 2008 U.S. App. LEXIS 11327 (4<sup>th</sup> Cir., May 28, 2008).**

The plaintiff had previously settled a gender discrimination claim against her employer (the predecessor of the defendant). The settlement agreement provided that in the event of a change in control of the employer, the plaintiff would be entitled to the same severance benefits that were to be paid generally to all other employees upon a change in control. When her employer was acquired by BB&T Corp., the plaintiff disputed the amount of change in control benefits proffered to her under this part of the settlement agreement. In its decision the District Court concluded that the plaintiff’s claims were preempted by ERISA, and must therefore be dismissed because she had failed to exhaust her administrative remedies.

Both parties in the case had conceded that the severance plan at issue was covered by ERISA. The question, then, was whether the plaintiff’s state law claims – consisting of breach of contract, tortious interference with contract, and gender discrimination under West Virginia state law – were sufficiently connected with the ERISA plan to justify a conclusion of preemption. The court held that they were, reasoning that since determination of each of the plaintiff’s state law claims required an interpretation of the ERISA plan, each was preempted. (This holding seems especially open to question in the case of the state law gender discrimination claim.) Accordingly, since plaintiff’s claims were preempted by ERISA, and because she had failed to exhaust her administrative remedies as required under ERISA, her case was dismissed without prejudice, allowing her to pursue those remedies with her former employer.

**Venezuela v. Massimo Zanetti Beverage USA, 525 F. Supp. 2d 781; 43 E.B.C. (BNA) 1205 (E.D. Va. 2007).**

This case involved a suit for breach of an employment agreement. The District Court granted the plaintiff's request to remand the case to state court, disagreeing with the defendant employer that the case raised a federal question under Title VII of the Civil Rights Act of 1964.

At the time the employer terminated his employment (without providing a reason), the plaintiff was covered by an employment agreement providing for the right to severance benefits upon termination without "cause." The plaintiff sued in state court for benefits under the contract. Among the elements listed in the plaintiff's complaint was that shortly before the termination, the employer had been informed that the plaintiff was contemplating filing a Title VII complaint against the employer with the EEOC. The employer claimed that the inclusion of this element showed that the gravamen of the plaintiff's complaint had to do with prohibited discrimination under federal law. The District Court disagreed, noting that the plaintiff had sued simply to enforce his employment agreement, and that under the "well-pleaded complaint" rule, the plaintiff was entitled to limit his complaint to state causes of action, even if federal claims would otherwise have been available.

## Lower Court Cases: Disability Discrimination

### Trujillo v. PacifiCorp, 524 F.3d 1149 (10<sup>th</sup> Cir., May 7, 2008).

The Court of Appeals determined that the plaintiffs, a husband and wife, had raised at least a triable claim of unlawful termination under the Americans with Disabilities Act (“ADA”), where both were fired shortly after learning of a relapse of brain cancer in their young son.

Mr. and Mrs. Trujillo learned on May 30, 2003, that their son Charlie had suffered a relapse of brain cancer. His doctors recommended an aggressive, expensive series of treatments, which began immediately. Management at the Trujillos’ employer, PacifiCorp, was aware of the diagnosis and the expense associated with Charlie’s treatment. Within a few days, on June 10, 2003, management began an investigation into whether the Trujillos had been falsely overstating the number of hours they had worked. Relying on data from personal ID cards used at security gates upon employees’ arrival at their worksite, Pacificorp determined that Mr. Trujillo, a twenty-five year company employee, had overstated his time by 27 hours over the course of a month; and Mrs. Trujillo, an eight-year employee, by 13. Both were promptly fired.

The Court of Appeals determined that the fact that PacifiCorp’s management knew of the expense associated with their son’s treatment (indeed, management included self-insured health costs, per employee, in “line-item” budgets), and the “temporal proximity” of their son’s diagnosis and the employment action, established a *prima facie* case that Charlie’s medical condition was the real reason for termination. This would violate the “association provision” of the ADA, under which it is impermissible to discriminate against an employee “because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”

Although the employer could rebut the *prima facie* case by showing a legitimate nondiscriminatory reason for the firings, the court noted the presence of significant evidence that the alleged overstatement of hours was merely a pretext. These included that the ID card data was unreliable (employees often arriving at work with others, who opened the gates for them); that the investigation had been procedurally unfair; that immediate termination without a probationary period was inconsistent with the employer’s usual disciplinary procedures; and that many other employees whose time records showed discrepancies were not terminated.

**Practical lesson for employers:** If possible, it is advisable for employers to separate responsibility for employment decisions from responsibility for, or even knowledge of, employee benefits. In this case the employees’ supervisors – those responsible for investigating and addressing alleged employee misconduct – were also provided with detailed, employee-specific information concerning health insurance costs, making it easy for the court to connect the employment action with an improper, discriminatory motive.

**McKnight v. General Motors, 2008 U.S. App. LEXIS 24373 (6<sup>th</sup> Cir., December 4, 2008).**

This *McKnight* case (not to be confused with *McKnight v. Gates*, above, another case decided by the Sixth Circuit in 2008) concerned an issue about which the Courts of Appeal have split: Whether a former employee, who has retired and is no longer able to function as an employee, has standing to sue under the ADA over alleged violations that are reflected in post-retirement benefits such as pensions.

The plaintiffs in this case had retired and begun receiving benefits under their employer's pension plan. Under the pension plan, pensions were reduced by Social Security benefits payable under the Social Security disability insurance program. Each of the plaintiffs received a Social Security disability insurance award, and as a result each saw his or her benefits reduced under the employer's plan. The plaintiffs contended that this constituted unlawful discrimination on the basis of disability.

The threshold issue in the case was simply whether the plaintiffs had standing to sue. This question depended, in turn, on whether the plaintiffs were "qualified employees with a disability." The Courts of Appeal had split on the issue, with the Seventh, Ninth and Tenth Circuits holding that former employees did not have standing to sue under the ADA; and the Second and Third Circuits holding that they did. The Sixth Circuit agreed with the majority position, finding that under the language of the statute, because these plaintiffs were now totally disabled former employees, they were not "qualified employees with a disability" and therefore had no standing to sue.

**Practical lesson for employers:** Depending on the Circuit, it may not be illegal for an employer to discriminate against retirees on the basis of disability.

**Brown v. City of Los Angeles, 521 F.3d 1238 (9<sup>th</sup> Cir., April 10, 2008).**

This case involved the question whether it violates the ADA to reduce disability pension payments by the amount of worker's compensation received in connection with the disabling injury. The Court of Appeals held that it does not.

The plaintiffs were police officers injured in the line of duty. Under the pension arrangements maintained by their employer, the City of Los Angeles, disabled officers could choose between two types of pension. One provided benefits under a service-based formula; and this pension was unaffected by the amount of external payments such as worker's compensation awards. The second type of pension was a disability pension. Payments under the disability pension were offset by the amount of any worker's compensation award received by the participant in connection with the disabling injury. The plaintiffs in this case had selected the disability pension. They contended that the offset constituted prohibited discrimination under the ADA.

The Ninth Circuit disagreed, finding that the plaintiffs had failed to show that the offset policy discriminated "by reason of" disability. It noted that the employer provided two different pension formulas, each of which was available to disabled employees to at least the same degree

as to nondisabled employees. Moreover the court emphasized that the offset did not single out disability, *per se*; rather, it limited benefits based on the *cause* of the injury (one that was sufficiently work-related to prompt an award of worker's compensation).

**Practical lesson for employers:** It was important to the Ninth Circuit that under this case the challenged benefit was an alternative to the regular service-based pension that was available to all employees, disabled and nondisabled. Structuring a special pension (or other type of benefit) for disabled employees as an elective *alternative* to a general formula would thus appear to maximize the chance that offsets against the disability pension (or other potentially challengeable features of the disability benefit) will survive scrutiny under nondiscrimination law.

**Dewitt v. Proctor Hospital, 517 F.3d 944 (7<sup>th</sup> Cir., Feb. 27, 2008).**

This case is similar to *Trujillo*, above. The plaintiff's husband was receiving extensive, expensive treatment for advanced prostate cancer. Evidence indicated that the employee's supervisor took the plaintiff aside on several occasions to ask about her husband's condition and to suggest that a less expensive course of treatment be considered. Other evidence also suggested that, because its medical benefits were self-insured, the employing hospital took a keen interest in its employees' medical expenses, soliciting quarterly "stop-loss" reports that individually identified all employees whose recent claims exceeded \$25,000 (including the plaintiff). In August 2005, in the midst of her husband's treatments, the plaintiff was fired by the same supervisor who had previously taken her aside to ask about her husband's condition. The plaintiff's husband died a year later.

A three-judge panel of the Court of Appeals for the Seventh Circuit held that the plaintiff had passed the necessary test to survive summary judgment under the "association" provision of the ADA, having raised evidence that she was qualified for her job; that she was subject to an adverse employment action; that she was known by her employer at the time of the action to have a relative or associate with a disability; and that her employer had fired her because that relative's disability would be costly to the employer. The Court also determined that the plaintiff should have been allowed to amend her complaint to allege unlawful retaliation under ERISA Section 510, a claim that was also likely to succeed because it effectively overlapped the ADA allegations.

Judge Posner, in a concurring opinion, agreed with the other members of the panel as to their disposition of the case, but indicated that in his view the defense should have raised the argument that evidence such as present in the case could not support an allegation of discrimination based on *disability*; rather, it could only support an allegation of discrimination based on *expense*. That is, the employer's motive would have applied to any employee who had, or had a dependent who had, an expensive medical condition, regardless of whether that condition rose to the level of a disability. (This theory does not seem to have been raised in other federal disability cases. Presumably the same evidence would, even under Posner's view, support a claim under Section 510 of ERISA, if not under the ADA.)

**Practical lesson for employers:** This is one of many cases that show how important it is for an employer to be able to demonstrate that personnel decisions are made without regard to an employee's (or his or her dependent's) health status. This case involved, from that perspective, a "worst-case scenario": The same supervisor that ultimately terminated the plaintiff's employment had previously made specific, cost-related inquiries about the plaintiff's husband's condition.

**Libel v. Adventure Lands of America, Inc., 482 F.3d 1028 (8<sup>th</sup> Cir. 2007).**

The plaintiff alleged that her employment was terminated, in violation of the ADA, because of the effect of her multiple sclerosis on the employer's health insurance costs. The plaintiff's employment was terminated by employer's general manager, who was the son of company's chief executive officer. The plaintiff offered evidence that the CEO (the father) had explained to the plaintiff that the company could not afford to continue to provide insurance for her; however, the plaintiff was unable to produce any evidence that the father had communicated this to his son, or that the son's decision was based on health insurance costs. The son, to the contrary, maintained that the plaintiff's employment had been terminated for poor performance.

The Court of Appeals for the Eighth Circuit affirmed the District Court's entry of summary judgment against the plaintiff. Without evidence that the actual decision to terminate her employment stemmed from the cost of her medical condition, the plaintiff could not create the "requisite inference of unlawful discrimination" – a somewhat remarkable conclusion, given the father-son relationship between the CEO (who the evidence indicated *was* concerned about her health costs) and the general manager who terminated the plaintiff's employment.

**Practical lesson for employers:** As noted in connection with many cases described in this survey, it is imperative for an employer to be able to show that personnel decisions are made without regard to an employee's (or his or her dependent's) health status. This case demonstrates that that objective is achievable, at least in principle, even in the case of small, family-run businesses.

**Avenevoli v. Lockton Companies, 2008 U.S. Dist LEXIS 13587 (E.D. Mo., February 22, 2008).**

The District Court held that a plaintiff's claim that she had been fired because she had cancer, in violation of a Missouri state nondiscrimination law, was not preempted by ERISA and therefore should be remanded to state court.

The defendant employer argued for preemption on the ground that the plaintiff's case amounted to a claim for interference with employee benefits under ERISA Section 510. The court disagreed, citing the "well-pleaded complaint rule," under which, to justify preemption, the federal question must appear on the face of the plaintiff's well-pleaded complaint. The District Court noted that that was not the case, here: The plaintiff had simply alleged that she had been fired because of her cancer, not because of any issues arising from an employee benefit plan. Among the damages claimed by plaintiff (in addition to \$5 million for punitive damages,

eligibility for which would have been eliminated had the court held the case to be preempted), was a claim for “lost benefits.” The District Court held that including this claim for lost employee benefits as part of the sought-for *damages* was not sufficient to support preemption, where the “heart” of the plaintiff’s case was her claim that she was wrongfully discharged on the basis of her disability.

**Brand v. Kansas City Gastroenterology & Hepatology, 547 F. Supp. 2d 1001 (W.D. Mo., February 28, 2008).**

In a case very like *Avenevoli*, above, a doctor, formerly employed by the defendant, sued on the grounds that he had been involuntarily terminated because of his disability, in violation of a Missouri state nondiscrimination statute. The doctor claimed the employer had sought to compel him to change status from that of an employee to that of an independent contractor, in order to save money on group medical insurance. The defendant sought to remove the case to federal court on the ground of ERISA preemption. The defendant argued that the doctor was effectively claiming that he had been terminated in order to prevent his receiving benefits under the insurance plan, in violation of ERISA Section 510.

The District Court agreed with the plaintiff and remanded the case to state court, finding the doctor’s claim was not preempted. Although the plaintiff’s allegations included suggestions that the defendant’s conduct had been motivated by reducing health insurance expenses, this was not enough for preemption. Under the “well-pleaded complaint rule,” a federal question must appear on the face of the plaintiff’s well-pleaded complaint; and that was not the case, here, where the doctor did not seek benefits under the medical plan or to enforce his rights under the plan. Acknowledging that the case presented a “close question,” the court concluded that there was a difference in defendant’s conduct from being motivated by “greed” to fire the plaintiff to avoid paying higher health costs, and firing him to “interfere” with his rights to benefits under the plan.