

## Supreme Court Ends 2009-2010 Term

The Supreme Court ended the 2009-2010 term on June 29, saying goodbye to Justice John Paul Stevens, who retired after 34 years on the bench. The Court decided few employment law cases but has already accepted several for next term. Highlights of this term include the Court's employer-friendly opinion on employer review of text messages and a ruling that opens the door for more adverse impact claims under Title VII.

On the docket for next term are employment law cases concerning the so-called "cat's paw" doctrine, a case asking when a wronged third-party can bring a retaliation suit, and a case about a job applicant's right to "informational privacy" in the course of a background investigation. The Court is likely to add several more employment law cases before the next term begins October 4, 2010.

Although the just-ended term was light on employment-law decisions it was an important one. The Court considered a case directly affecting public sector employers in an emerging area of HR law - employees' right to privacy in the content of their computer/wireless communications.

While employers long ago adjusted to the use of phones and emails for personal use, the advent of Facebook, Linked In, online shopping, Twitter, and blogging provide employees with exponentially more opportunities to bring their personal lives into the workplace. The fact that HR struggles with these issues is apparent from the requests of IPMA-HR members for sample policies on social networking and the appropriate use of technology.

The Supreme Court's opinion, *Quon v. City of Ontario, California*, clarified that the constitutionality of the review will depend upon the reasonableness of the search. A unanimous Court ruled that public employees have a privacy interest in the content of their communications but that reasonable searches will not violate the Fourth Amendment's right to privacy.

At issue were hundreds of text messages sent by SWAT officer Jeff Quon to his wife, girlfriend, and coworker, some of which were sexually explicit. The messages were sent on a government-provided pager. The City of Ontario, California has a written "Computer Usage, Internet and E-Mail Policy" reserving the right to monitor all activity with or without notice and informing users that they should have no expectation of privacy or confidentiality when using these resources. The policy was extended to paging devices through a meeting and a written memorandum.

Despite the policy, officer Quon's supervisor told him and other officers that as long as they stayed within the contract's character limits or reimbursed the city for personal use, there would be no problem. The chief of police however decided to review messages to determine if the repeated overages were due to work or personal use for the purpose of deciding whether or not to increase the number of messages allowed under the contract.

When Quon's extensive personal use was discovered, the chief appointed an investigator who reviewed the messages and removed all those sent during non-work hours. The investigator concluded that Quon had violated workplace rules and he was allegedly disciplined. The Court ruled that the department's review of the messages did not violate Quon's right to privacy. The Court declined to issue a broad

ruling, deciding instead that he did have a right to privacy in the messages but because the search was conducted in a reasonable manner, the Fourth Amendment was not violated.

Another case decided this term that is important to public sector HR professionals is the case *Lewis v. City of Chicago*. The Supreme Court issued a unanimous opinion finding that under Title VII's disparate impact provisions, every time an employer uses a particular employment practice, it starts the clock running again.

The city of Chicago argued unsuccessfully that minority firefighters were time-barred from bringing a discrimination claim because they failed to file their claims within 300 days of the announcement of the test results. At issue is a firefighter entrance exam taken by 26,000 applicants in 1995.

Test scores were grouped into three categories, "well-qualified," "qualified," and "not qualified." Only a small percentage of minority candidates made the well-qualified category and because of the large number of applicants, the city did not hire from the qualified category.

In the case, the city did not dispute that the test had a disparate impact on minorities. Rather, the city argued that the unsuccessful candidates waited too long to file their complaint – they waited until the city was hiring from the list instead of when the city announced the test results. The Supreme Court disagreed and distinguished disparate impact cases from disparate treatment cases.

In disparate impact cases, where an otherwise neutral practice has an adverse impact on a protected class, Title VII says that the clock begins to run when the employer applies the practice. In disparate treatment cases, where discriminatory intent is required, the employee must show that the discriminatory activity took place within the limitations period.

When the Court returns on October 4, they will consider the following three employment law cases, along with any the Court adds to the docket this summer and fall.

- ***Thompson v. North American Stainless, LP*** –The case was brought by an employee who argues that he was fired after his fiancée filed a discrimination charge with the EEOC. The question is whether or not Title VII's anti-retaliation provision allows for third party suits.
- ***Staub v. Proctor Hospital*** - The case was brought by an employee alleging he was fired because his immediate supervisors were biased against him for his service in the army reserves. There is no evidence that the VP of HR, who actually made the termination decision, was biased. The question is when an employer can be held liable for unlawful discrimination when biased officials had some influence in the termination but were not the ultimate decision maker. This is the so-called "Cat's Paw" theory of liability where an employee alleges that the decision maker, although unbiased herself, was unduly influenced by others who were biased.
- ***NASA v. Nelson***- Twenty-eight scientists employed as contractors by NASA's Jet Propulsion Laboratory which is operated under contract by the California Institute of Technology sued arguing that background investigations asking about mental health, drug use and finances were overly intrusive. The workers are in non-sensitive positions. The background investigation is required by a federal law that applies the National Agency Check with Inquiries (NACI) to contractors as well as all civil service employees. The NACI was extended to contract employees

in 2004 as part of an anti-terrorism policy to protect US facilities. The Supreme Court is expected to determine the scope of a right to information privacy.