

High Court To Tackle Split On Gov't Worker Age Bias Claims

By **Abigail Rubenstein**

Law360, New York (October 03, 2013, 5:39 PM ET) -- The Supreme Court is scheduled to kick off its new term on Monday with oral arguments in a case over whether government workers must bring age discrimination claims under a law that requires them first to go to the Equal Employment Opportunity Commission, and the court's ultimate decision could leave state and local governments more vulnerable to age bias claims, lawyers say.

The justices are slated to hear arguments in an appeal from Illinois Attorney General Lisa Madigan that asks the court to resolve a circuit split over whether state and local government employees can directly sue for age discrimination under the equal protection clause or must follow the out-of-court procedures of the Age Discrimination in Employment Act.

The case could change the game for government employers because the ADEA mandates that workers file claims with the EEOC and take other administrative steps before filing a complaint in court. If employees can sue for constitutional violations, they can bypass all of that and go straight to court.

Constitutional claims, while harder to prove, are also not subject to the same restrictions on damages as claims under the ADEA, so they could make age discrimination claims more costly for government employers.

“The outcome does have a potentially significant impact on state employees across the country either way, because the court is either going to say that the ADEA is the only remedy or the court will say state employees have a much broader menu of remedies that they can pursue,” Andrew S. Rosenman of Mayer Brown LLP told Law360.

The Supreme Court agreed in March to hear Madigan's appeal of a Seventh Circuit decision holding that state workers were allowed to bring age discrimination claims under the 14th Amendment. The ruling created a split with several other circuits that have ruled the opposite way.

Former Assistant Illinois Attorney General Harvey N. Levin sued Madigan and her office in 2007, claiming he had been fired because of his age — he was 55 when terminated — and replaced by a female attorney in her 30s. He brought claims under both the ADEA and the 14th Amendment, via 42 U.S.C. § 1983.

When Illinois and Madigan moved to dismiss the constitutional claims because they were foreclosed by the ADEA, the judge sided with Levin. In August, the Seventh Circuit affirmed that ruling, prompting Madigan to turn to the Supreme Court.

The high court's ultimate ruling in the case will have a wide reaching impact on what kinds of claims state and local governments will face going forward.

“There is a clear conflict among the circuits, and the Seventh Circuit is the only one to conclude that state employees can pursue age discrimination claims through the equal protection clause rather than exclusively through the ADEA,” Rosenman said.

“When you consider the thousands and thousands of state employees across the country, and that until the Seventh Circuit no federal court of appeals had acknowledged state employee age discrimination claims without having to go through the EEOC ... it could significantly expand the scope of age discrimination claims that can be brought by public sector employees,” he said.

A brief filed in support of Madigan's position by 21 attorneys general from other states noted that a decision affirming the Seventh Circuit would mean that state and municipal government employers, and only state and municipal governments among employers, would not be able to take advantage of the ADEA's comprehensive scheme with its focus on conciliation.

And this could make things much more complicated for state and local government employers, according to Ruthanne Deutsch of Akin Gump Strauss Hauer & Feld LLP.

“It opens the door to potential rush of litigation that otherwise would be challenged through a more orderly administrative process,” Deutsch said.

There is, however, a chance that the High Court will opt to sidestep the main question presented in the case and shed light on jurisdictional questions instead.

A group of law professors filed an amicus brief in August claiming that the Seventh Circuit should have limited itself to addressing the lower court's denial of summary judgment based on qualified immunity, which shields officials from liability for constitutional rights violations, because the appeals court was considering an interlocutory appeal on that issue.

Meanwhile, in his own briefing to the court, Levin has insisted that the question of whether government workers can bypass the ADEA and bring constitutional claims is not properly before the high court since he is not covered by the ADEA because a court found him to be a political appointee outside the law's scope.

“The combination of those two vehicle issues, combined with a sense that this case is close on the actual merits gives me some pause as to whether they will actually decide the merits,” Deutsch said.

And whether or not the court ultimately reaches the heart of the case when it hands down its final opinion, Deutsch said she expected to see a good chunk of Monday's arguments devoted to the jurisdictional questions.

“I think the oral arguments are going to be very interesting because there are so many potential directions to go in,” she said.

An attorney for Levin and a representative for the Illinois attorney general's office did not immediately respond to requests for comment.

Levin is represented by attorney Edward R. Theobald and Eric Schnapper of the University of Washington School of Law.

The case is Madigan v. Levin, case number 12-872, in the U.S. Supreme Court.

--Additional reporting by Bill Donahue. Editing by Jeremy Barker.

All Content © 2003-2013, Portfolio Media, Inc.