U.S. High Court Hears Arguments in Government Worker's Age Bias Appeal

WASHINGTON, D.C. — (Mealey's) The U.S. Congress never intended, when it extended age bias administrative and judicial procedures and remedies to government employees, to permit state and municipal workers to "frustrate this regime or bypass it entirely using the more general remedies of [42 U.S. Code] Section 1983," Solicitor General Michael A. Scodro of Chicago argued on Oct. 7 before the U.S. Supreme Court on behalf of Illinois Attorney General Lisa Madigan and four additional attorney general employees (Lisa Madigan, et al. v. Harvey Levin, No. 12-872, U.S. Sup.; See September 2013, Page 42).

Age Bias Claims

Levin worked as an Illinois assistant attorney general from Sept. 5, 2000, until May 12, 2006. Levin, who was over 60 at the time he was fired, believed that he was fired because of his age and gender. He sued the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan (in her individual and official capacities) and four additional attorney general employees (in their individual capacities) in the U.S. District Court for the Northern District of Illinois. He brought claims under the ADEA, 29 U.S. Code Section 621, *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S. Code Section 2000e, *et seq.*, and the equal protection clause via 42 U.S. Code Section 1983.

The individual-capacity defendants argued that they were entitled to qualified immunity with respect to Levin's Section 1983 age discrimination claim. On March 10, 2010, Judge David H. Coar agreed that they were entitled to qualified immunity because the availability of such a claim was not clearly established when Levin was terminated. However, Judge Coar disagreed with the defendants that the ADEA forecloses Levin's Section 1983 equal protection claim.

On Jan. 7, 2011, Levin's case was reassigned to Judge Edmond E. Chang. Judge Chang issued an opinion on July 12, 2011, granting in part and denying in part two pending motions for summary judgment. Judge Chang did not disturb Judge Coar's ruling that the ADEA is not the exclusive remedy for age discrimination claims. However, he ruled that Levin is not an "employee" for purposes of Title VII and the ADEA. Judge Chang also held that the individuals were not entitled to qualified immunity on Levin's Section 1983 claim for age discrimination.

The individual defendants filed an interlocutory appeal, asking the Seventh Circuit to find that they were entitled to qualified immunity because the ADEA was the exclusive remedy for Levin's age discrimination claims.

No Immunity

The Seventh Circuit panel affirmed. "At the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violates the Equal Protection Clause. ... Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not 'rationally related to a legitimate state interest.' Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant, and as Judge Chang noted, it is 'odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively broader than the equal protection clause.' ... Because Levin's constitutional right was clearly established, the Individual Defendants are not entitled to qualified immunity," Judge Michael S. Kanne wrote for the panel.

The defendants petitioned the U.S. Supreme Court. The petition was granted March 18.

Qualified Immunity

When questioned by Justice Ruth Bader Ginsburg about the Seventh Circuit U.S. Court of Appeals' authority to find that state and local government employees may avoid the remedial regime established by the Age Discrimination in Employment Act (ADEA) and bring age discrimination claims directly under the equal protection clause of the 14th Amendment to the U.S. Constitution and 42 U.S. Code Section 1983 when it was asked only to address qualified immunity on interlocutory appeal, Scodro responded that the appellate panel had the authority to do so under the Supreme Court's holding in Wilkie v. Robbins (551 U.S. 537 [2007]).

Scodro was also questioned by the high court justices regarding the Government Employees Right Act (GERA). "I think the point here is that Mr. Levin is covered not by the ADEA, but by a separate statute, the GERA. And there's a separate question whether the GERA would displace constitutional relief, which apparently has . . . never been argued to anybody in this case," Justice Elena Kagan said.

Scodro argued that GERA is actually just a part of the broader remedial regime under the ADEA and that "it would be artificial to consider the two separately." However, he noted, if the high court were to find that the GERA amendments in 1991 created a whole new statute that needs to be considered independent, the proper remedy would be to vacate the Seventh Circuit's judgment to allow Levin to raise a claim that is new to the case on the merits here rather than to dismiss the present appeal.

Respondent's Arguments

Arguing on behalf of Levin, Edward R. Theobald III of Chicago told the high court that he conceded that there was "no realistic possibility" that Levin was an employee within the ADEA but that it was unclear whether Levin was covered by GERA. However, he noted, "there's no evidence that when Congress passed GERA

they intended GERA to enforce the constitutional right to equal protection of the law."

Justice Anthony M. Kennedy questioned Theobald about whether there would be any unfairness to the parties if the high court remanded the matter to the Court of Appeals with instructions for it to decide whether the GERA issue had been properly presented or waived. Theobald replied that it would be very unfair to Levin. "We were scheduled to go to trial in May before the Court granted its cert. The case has been pending almost six years. . . . [T]his issue in GERA was raised this year. It wasn't raised for six years," he told the justices.

Counsel

Michigan Solicitor General John J. Bursch in Lansing, Mich., filed an *amicus* brief on behalf of Michigan and 20 other states. Matthew J. Ginsburg of Washington filed an *amicus* brief on behalf of The American Federation of Labor and Congress of Industrial Organizations and The Service Employees International Union. Brian J. Murray of Jones Day in Chicago filed an *amicus* brief on behalf of International Municipal Lawyers Association, The Council of State Governments and The International City/County Management Association. Francisco M. Negron Jr. of National School Boards Association in Alexandria, Va., filed an *amicus* brief on behalf of National School Boards Association and Illinois Association of School Boards. Alice M. O'Brien of National Education Association in Washington filed an *amicus* brief on behalf of the National Education Association. Thomas W. Osborne of AARP Foundation Litigation in Washington filed an *amicus* brief on behalf of AARP and National Senior Citizens Law Center. Stephen I. Vladeck in Washington filed an *amicus* brief on behalf of law professors.