LAW OFFICE OF RICHARD T. SEYMOUR, P.L.L.C.
1150 Connecticut Avenue N.W., Suite 900
Washington, D.C. 20036-4129
E-Mail: rick@rickseymourlaw.net
Voice: 202-862-4320 Fax: 800-805-1065 Cell: 202-549-1454

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MEMORANDUM

Supreme Court Will Hear Six Employment-Law Cases This Term

On Tuesday, September 25, 2007, the Court grated review in four additional employment-law cases, bringing this Term's unusually high total to six cases. The new cases and their issues are:

- *Kentucky Retirement Sys. v. EEOC* (No. 06-1037), seeks review of the Sixth Circuit decision reported at 467 F.3d 571 (6th Cir. 2006. The petition stated the following Question Presented:

> This Petition involves a public employee retirement plan that includes normal and disability retirement benefits. A member who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based on service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. Moreover, the calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone; age may thereby be an indirect factor in determining the amount of disability retirement benefits.
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> The question presented in this Petition is accordingly:
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> Whether any use of age as a factor in a retirement plan is "arbitrary" and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act.

The EEOC stated the following alternative Question Presented:

> Whether proof that an employee benefit plan on its face requires older workers to be denied disability benefits available to younger workers or to receive fewer disability benefits than younger workers establishes a prima facie case of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

- *Gomez-Perez v. Potter* (No. 06-1321), seeks review of the First Circuit's decision reported at 476 F.3d 54. The Question Presented in the petition is:

> Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits retaliation against employees who complain of age discrimination.

The Postal Service's Opposition to the petition stated an alternative Question Presented:

> Whether the federal sector prohibition against discrimination based on age in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a (Supp. IV 2004), creates a cause of action that permits an employee to sue a federal employer for alleged retaliation.

- *CBOCS West v. Humphries* (No. 06-1431), seeks review of the Seventh Circuit's decision reported at as 474 F.3d 387 (7th Cir. 2007). The Question Presented in the petition is: "Is a race retaliation claim cognizable under 42 U.S.C. § 1981?"

- *Preston v. Ferrer* (No. 06-1463), seeks review of the decision of the California Court of Appeals, 4th District, reported at 145 Cal.App.4th 440, 51 Cal.Rptr.3d 62 (Calif. App. 2006), *review denied*, . Mr. Preston is a manager of artists. Judge Ferrer is the star of a program called "Judge Alex," in which he arbitrates small civil disputes as a form of entertainment. The dispute in the Supreme Court is between the artist TV arbitrator and his manager. The Question Presented in the petition is:

> Whether the Federal Arbitration Act and *Buckeye Check Cashing, lnc. v. Cardegna,* 546 U.S. 440, 126 S.Ct. 1204 (2006) preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?

The alternative Question Presented in the Opposition to the petition is:

> Whether the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), preempts California legislation regulating "talent agencies" (as defined by the legislation) that, as interpreted by California courts, provides that a dispute regarding contract validity (including a dispute arising from a contract with an arbitration provision) between an individual or a company that is alleged to have functioned as a talent agency without having obtained the required state license and an "artist" (e.g., performer), who is making that allegation, is to be initially submitted to an administrative agency that has expertise in matters pertaining to that type of dispute, where the legislation also provides that if either party is dissatisfied with the administrative agency's ruling, she/he/it has the right to have the dispute

> heard de novo by a court, unless it is determined that the arbitration provision requires that the de novo hearing be conducted by an arbitrator (which is a determination that has not yet been made in this case)?

The Court's earlier grants of certiorari for this Term are:

- *Federal Express Corp. v. Holowecki*, (No. 06-1322), seeks review of the decision of the Second Circuit reported at 440 F3d 558 (2d Cir. 2006). The Question Presented in the petition is:

> Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

The Opposition to the petition stated two alternative Questions Presented:

> 1. Whether the Court of Appeals, in ruling that Respondent Kennedy's Dec., 2001 filings were a charge under the ADEA, properly relied in part upon the lawful procedural regulation of the EEOC, 29 C.F.R. 1626, which provides that the first writing by a potential plaintiff to the EEOC that identifies the employer and generally alleges the discriminatory acts of the discrimination is sufficient to constitute a"charge"?
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> 2. Whether the Second Circuit erred in ruling, contrary to the decision in *Bost et al v. Federal Express Corporation*, 372 F.3d 1233, (11th Cir. 2004), that a charging party should not be denied the right to bring suit to enforce the ADEA because of a failure of EEOC to perform its statutory duty to "promptly notify " the employer or other respondent of the filing of the charge ?

- *Sprint/United Management Co. v. Mendelsohn*, No. 06–1221, seeks review of the decision of the Tenth Circuit reported at 466 F.3d 1223. This is the petitioner's "question presented":

> This case presents a recurring question of proof in employment discrimination cases: whether a district court must admit "me, too" evidence—testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.
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> The Tenth Circuit panel majority held that a court commits reversible error by excluding "me, too" evidence. This decision conflicts with those of other

circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that "me, too" evidence may be excluded under Federal Rule of Evidence 403. Granting certiorari will resolve the conflict between the circuit courts of appeals on this important question of law.