STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.state.nj.us/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.state.nj.us

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M E M O R A N D U M

TO: Commissioners

FROM: Ira W. Mintz
General Counsel

SUBJECT: Monthly Report on Developments in the Counsel's Office Since May 29, 2008

Agency Case

In Yanovak v. Hanover Tp. et al., the Court granted the Commission's motion to quash a subpoena issued to a former staff agent seeking his testimony in a civil suit filed by a police officer against his employer and police chief. The staff agent had tried to mediate a settlement of an unfair practice charge during an exploratory conference. The police chief had allegedly told the mediator that the plaintiff police officer would never be promoted. The plaintiff also subpoenaed his mediator notes. The Judge granted the motion based on a Commission rule that ensures the confidentiality of unfair practice settlement discussions. The parties then promptly settled the lawsuit.

Other Cases

In McElwee v. Borough of Fieldsboro, App. Div. Dkt. No. A-1230-06T3, the Appellate Division held that the 45-day limit for bringing charges found in N.J.S.A. 40A:14-147 et seq. applies only to alleged violations of department rules and regulations and not to other misconduct.

In Engquist v. Oregon Department of Agriculture (6/9/08), the U. S. Supreme Court rejected the argument that an individual employee who is not the victim of group-based discrimination can nonetheless suffer a denial of equal protection within the meaning of the

Amendment. An Oregon public employee, filed suit against her agency, her supervisor, and a co-worker – asserting claims under the Equal Protection Clause, among other things. She alleged that she had been discriminated against based on her race, sex, and national origin, and she also brought a so-called "class-of-one" claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for arbitrary, vindictive, and malicious reasons. In a prior case involving a zoning dispute, the Supreme Court had accepted the theory that an individual can comprise a "class of one" for equal protection purposes and can sue a government agency for mistreatment that has no objectively rational explanation.

The "class-of-one theory of equal protection" was "simply a poor fit in the public employment context," Chief Justice Roberts said, writing for the majority. He explained that the government needed "broad discretion" to make "subjective and individualized" decisions concerning its work force.

In a dissenting opinion, Justice John Paul Stevens objected that the majority "carves a novel exception out of state employees' constitutional rights." There is a "clear distinction between an exercise of discretion and an arbitrary decision," he said. The Equal Protection Clause protects people against "unequal and irrational treatment at the hands of the state," Justice Stevens continued. He said that "even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection 'class of one' claims, the court should use a scalpel rather than a meat-axe."

In CBOCS West, Inc. v. Humphries (5/27/08), the U. S. Supreme Court affirmed that §1981 encompasses retaliation claims, such as when an individual (black or white) suffers retaliation because he or she tried to help a different individual suffering direct racial discrimination.

In Gomez-Perez v. Potter (5/27/08), the U.S. Supreme Court held that the ADEA prohibits retaliation against a federal employee who complains of age discrimination. In so concluding, the Court followed the reasoning of two prior decisions holding that retaliation is covered by similar language in other anti-discrimination statutes.

In Meacham v. KAPL, Inc. (6/19/08), the U.S. Supreme Court placed the burden on employers in age discrimination cases to prove a layoff or other action that hurts older workers more than others was based not on age but on some other "reasonable factor." The 7-to-1 decision overturned a ruling by the federal appeals court in New York, which had said that employees had the burden of disproving an employer's defense of reasonableness.