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Key United States Supreme Court Decisions Affecting Labor and Employment for the 2012–2013 Term

EMPLOYMENT DECISIONS

Vance v. Ball State University: Narrow Definition of Supervisor in Harassment Suits

In *Vance*, the Supreme Court announced a narrow standard for determining which employees constitute "supervisors" for purposes of establishing vicarious liability under Title VII. In a 5-4 decision, the Court decided that a supervisor is a person authorized to take "tangible employment actions," such as hiring, firing, promoting, demoting or reassigning employees to significantly different responsibilities. The majority opinion rejected the EEOC's long-advanced definition that a supervisor is a person who could either make tangible employment actions or direct an employee's daily work activities. In making this ruling, Justice Alito called the EEOC's definition a "study in ambiguity."

The Supreme Court's ruling is significant because, under prior Supreme Court precedent, an employer is strictly liable for sexual harassment of an employee by a supervisor, regardless of whether the employer knew of the harassment and took steps to stop it. On the other hand, an employer can be liable for sexual harassment of an employee by a nonsupervisor only if the employer was negligent, which typically means that the employer was aware or should have been aware of the harassment yet failed to take steps to stop the conduct. Under the Supreme Court's new definition of a supervisor, more plaintiffs will be required to prove negligence by the employer because the alleged harasser will not meet the definition of supervisor. Assuming an employer maintains effective antiharassment policies and complaint investigation and resolution processes, and the employer follows those processes under all circumstances, plaintiffs' ability to succeed on harassment claims will diminish and employers will likely prevail more frequently at the summary judgment stage of the case.

University of Texas Southwestern Medical Center v. Nassar: But-For Causation Required in Title VII Retaliation Suits

In *Nassar*, the Supreme Court ruled that employees asserting retaliation claims under Title VII must satisfy a but-for causation standard in order to make out a successful claim. In other words, the plaintiff-employee must show that the contested adverse employment action would not have happened but for the employer's unlawful motive to retaliate against the employee for his or her alleged protected activity. Such a standard is distinguishable from the motivating-factor standard applicable to Title VII discrimination claims, wherein a plaintiff-employee need only show that an unlawful discriminatory motive was one of potentially many motivating factors for the adverse employment action.

The Supreme Court's decision was based solely on its reading of the antiretaliation provision of Title VII, and the fact that, unlike the "status discrimination" sections of Title VII, the antiretaliation provision did not provide for a motivating-factor causation standard. Congress, if so inclined, can easily "fix" the issue by amending the antiretaliation provision to incorporate a mixed motive standard. To date, Congress has remained silent. But, given President Obama's pro-labor stance, it seems likely Congress may address this issue in the future. In the interim, *Nassar* will enable more employers to beat retaliation claims on summary judgment because it is more difficult for plaintiff-employees to produce evidence sufficient to

satisfy the but-for standard. Moreover, the decision has implications reaching far beyond the Title VII context in that it essentially makes but-for causation the default standard for all employment law claims, unless a statute specifically provides a different, lower standard.

***Genesis Healthcare Corp. v. Symczyk*: Named Plaintiff in FLSA Collective Action Must Have Personal Stake for Case to Proceed**

In *Genesis*, the Supreme Court held that the plaintiff's collective action was properly dismissed for lack of subject-matter jurisdiction because her claims had been mooted by an unaccepted Rule 68 offer of judgment. Importantly, the Supreme Court opted not to decide whether Genesis's offer of judgment actually mooted the plaintiff's claims, but instead relied upon the Third Circuit's finding that the claims were mooted. In making this decision, the Supreme Court expressly rejected the argument that attempts to "pick off" plaintiffs frustrate the goals of collective actions.

This decision is instructive for any employer facing a potential FLSA collective action. Under *Genesis*, an employer is able to avoid the expense and hassle associated with defending itself against an FLSA class action if the employer makes a comprehensive Rule 68 offer of judgment for the entire amount of unpaid wages, attorneys' fees, costs and expenses before an FLSA plaintiff files his or her motion for conditional certification. While the cost to the employer with respect to the initial plaintiff may be high, it may be well worth it to the employer seeking to avoid the massive defense costs and headaches associated with defending itself against a collective action.

***US Airways, Inc. v. McCutchen et al.*: Equity Cannot Rewrite ERSIA Plans, But Equity Can Fill in Gaps Relating to Attorneys' Fees in Reimbursement Provisions**

In *McCutchen*, the Supreme Court held that, although equity cannot rewrite the plain language of an ERISA plan, equitable doctrines are available to fill in contractual gaps where the plan is silent. Specifically, the ERISA plan at issue in this case expressly required plan participants to reimburse the employer for any amounts the plan paid plan participants for injuries that were caused by the negligence or willful misconduct of third parties and that plan participants were able to recover from the third party who caused the injury. Because the plan expressly gave the employer the right to full reimbursement, the doctrine of double-recovery (an equitable doctrine limiting the amount of requisite reimbursement to the portion of the recovery attributable to medical expenses) could not override the plan's plain language. But, because the plan was silent on whether the employer was responsible for paying the attorneys' fees the plan participant incurred in obtaining the recovery, the equitable common-fund doctrine supplied the default and mandated that the employer contribute to the cost of obtaining the recovery. In other words, if an ERISA plan is silent on whether an employer must pay a portion of the attorney's fees an employee incurs in collecting a recovery from a third party, equity requires the employer to pay its fair share.

This case provides a valuable lesson for employers: be sure the reimbursement provisions of all ERISA plans expressly address the allocation of attorney's fees for any recoveries stemming from the negligence or willful misconduct of third parties. Otherwise, equity will require employers to pay the attorneys' fees their plan participants incur in recovering funds from third parties.

***Kloeckner v. Solis*: Federal Employees Asserting Mixed Cases Must Appeal Merit Systems Protection Board's Procedural and Merit Dismissals to Federal District Court**

In *Kloeckner*, the Supreme Court made clear that the Civil Service Reform Act of 1978 (the Act) requires federal employees seeking to appeal Merit Systems Protection Board's (Board) dismissal of a mixed case — involving both particularly serious employment decisions and allegations of discrimination in violation of federal employment laws — must appeal to a federal district court regardless of whether the Board

dismissed the case on procedural or merits grounds. The Court held that the plain language of the Act did not distinguish between Board dismissals on the merits and Board dismissals on procedural grounds. In finding that the federal employee had properly appealed the Board's procedural dismissal to the district court, the Supreme Court harshly criticized the government for its "mazelike tour" of the Act and its "odd view" of statutory terms. It further likened the government's statutory interpretation to living in an "alternate universe."

From this holding, federal employers receive consistency: federal employees must appeal all Board decisions — whether procedural or based on the merits — of mixed cases to federal district court. To the extent confusion on this issue existed prior to this holding, it has been resolutely put to bed.

CASES IMPACTING EMPLOYMENT DECISIONS

American Express Co. v. Italian Colors: Class Action Waiver in Arbitration Agreements Enforceable

In *American Express*, the Supreme Court, in a 5-3 ruling, reversed the Second Circuit and held that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act (FAA) even if the cost of proving an individual claim in arbitration exceeds the potential recovery. This decision builds upon the trend set in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) — that arbitration agreements should be enforced according to their terms even for claims under federal statutes. In reaching this decision, the Supreme Court squarely rejected the argument that *Concepcion* was predicated solely on the FAA's preemption of state law, and held that even for federal laws, the FAA requires that courts enforce the terms of an arbitration agreement as they have been written, absent "contrary congressional command." The Court also considered and rejected the merchants' "effective vindication" argument that the class action waiver prevents them from vindicating their rights because they would have no economic incentive to do so due to the high litigation costs. The Court stated that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."

The *American Express* decision is clearly a win for employers and corporations seeking to avoid costly and time-consuming class action litigation, especially in matters where courts have previously found that class action waivers conflict with federal or state statutes. However, challenges to enforcing arbitration provisions remain, including the NLRB's ruling in *D.R. Horton, Inc.*, that class action waivers in arbitration agreements violate Section 7 of the National Labor Relations Act because such waivers interfere with employees' right to engage in concerted activity. This ruling is now under review in the Fifth Circuit. Moreover, even after *American Express*, lower courts may still rely on general contract principles such as unconscionability and confusion to invalidate arbitration agreements. Given the opportunities presented by *American Express* and the remaining challenges, this decision reinforces the need for employers to reevaluate their arbitration agreements in light of their risk tolerance, docket composition and other specific circumstances, weigh the various benefits of an arbitration program against the costs and develop a comprehensive dispute resolution strategy.

Oxford Health Plans LLC v. Sutter: Plain Language of Arbitration Agreement Authorized Class Action to Proceed

The Supreme Court's ruling in *Oxford* is narrow and limited to the facts. Rather than clarifying its holding in the *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684 (2010) decision (an arbitration panel could not order class arbitration unless there is a contractual basis for concluding that the party agreed to do so) by identifying the contractual basis for concluding a party agreed to class

arbitration, the Court focused on the fact that the parties had agreed to allow the arbitrator to determine the scope of the arbitration agreement. Because Oxford did not argue below that the question of class arbitration was a question of arbitrability, the issue became one of contract interpretation — which is something that is left to the arbitrator. The Court noted that once the parties agree to entrust a decision to an arbitrator, a court may vacate the arbitrator's decision, including their decision to allow class arbitration, only in very unusual circumstances. As such, the Court unanimously held that the arbitrator's ruling must stand.

In light of the *Oxford* decision, employers with arbitration agreements that are silent on class arbitration should consider revising their agreements to minimize the risk of having an arbitrator decide whether class arbitration is possible under the parties' agreement.

***Fisher v. University of Texas at Austin et al.*: Constitutional Challenges Based on Racial Classifications Receive Strict Scrutiny**

In *Fisher*, Abigail Fisher, an unsuccessful University of Texas (University) applicant, claimed she had been discriminated against because she is white, and therefore did not benefit from the university's diversity policy. She filed a lawsuit against the University of Texas and others, contending that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted, and the Fifth Circuit affirmed, summary judgment for the University on the grounds that courts are required to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. In a 7-1 decision, the Supreme Court held that all racial classifications imposed by the government must be analyzed under strict scrutiny, and that strict scrutiny does not permit the deference afforded the University in this case. The Court vacated the Fifth Circuit's judgment and remanded the case so that the University's admissions process can be considered and judged under strict scrutiny. The Supreme Court left unanswered the big question of whether a race-based admissions policy is constitutional.

Under the strict scrutiny analysis, schools have to show that "no workable race-neutral alternatives would produce the educational benefits of diversity," and lower courts should not "accept a school's assertion that its admissions process uses race in a permissible way." Instead, courts should give "close analysis to the evidence of how the process works in practice." While there is no clear decision on the constitutionality of affirmative action plans, the *Fisher* decision, at a minimum, has made it more difficult for schools and employers to defend their diversity initiatives that use race as a factor.

***Comcast Corp. v. Behrend*: Evidence of Classwide Injury Must Survive "Rigorous Analysis" Before Certification**

In *Comcast*, an antitrust case, the Supreme Court held that evidence of classwide injury must survive a "rigorous analysis" before a putative class can be certified. Building on its recent decision in *Wal-Mart v. Dukes*, the Supreme Court held that class certification under Rule 23(b) called for "rigorous analysis," which will often overlap with the merits of the underlying claim, and that the Rule 23(b)(3) "predominance" criterion may be more demanding than a Rule 23(a) analysis. Ultimately, the Court held that the lower court erred in refusing to decide challenges to the plaintiffs' damages model because those arguments were also pertinent to the merits determination. The Supreme Court then held that, because the plaintiffs' damages model did not measure the damages attributable to the specific theory of antitrust violation on which the plaintiffs' claims were based, they could not "possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."

The *Comcast* decision is a significant win for defendants — including employers — in class action litigation. Certification is generally the most crucial part of a class action lawsuit and can often have serious ramifications on settlement negotiations. By requiring lower courts to take a closer look at plaintiffs' evidence prior to certification, and to consider defendants' arguments even if they relate to the merits of the underlying claim, the Supreme Court's decision should make it more difficult to obtain class certification.

United States v. Windsor: Congress Without Authority to Impose Restrictions on Same Sex Married Couples

In *Windsor*, the Supreme Court held that Section 3 the Defense of Marriage Act (DOMA) was an unconstitutional deprivation of personal liberty protected by the Fifth Amendment's due process clause. Under Section 3 of DOMA, "marriage" was defined as a legal union between one man and one woman, and "spouse" was defined as a person of the opposite sex who is a husband or wife. This definition applied to any act of Congress or any ruling of any federal agency and affected more than 1,000 federal laws that address marriage. In finding Section 3 unconstitutional, the Court opined that Congress improperly sought to impose restrictions and disabilities on same-sex married couples in violation of the Fifth Amendment. Critically, the Court left the remainder of DOMA intact, including Section 2, which allows states to deny recognition of same-sex marriages that took place in states where such marriages are recognized. In other words, the Court did not go so far as to rule that same-sex marriage was a constitutional right.

The Court's decision in *Windsor* will have a substantial impact on employers. For example, health and retirement benefit plans that until now were required to be taxed against same-sex couples may have to be updated to reflect the Court's ruling. The Family and Medical Leave Act and a host of other employee benefits laws contain provisions that speak to spousal rights. Employers may have to change their policies with respect to these laws to allow legally married same-sex couples the same benefits due to heterosexual couples. Additionally, 401(k) plans should also be updated to allow payments to surviving same-sex spouses. The issue is of potentially greater importance for companies operating in both states that recognize same-sex marriages and states that do not. While it remains unclear exactly how *Windsor* will affect employers, one thing is certain: employers will have to make an in-depth review of their policies to ensure they are in compliance with federal law with respect to same-sex couples.