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Was The Supreme Court Term Actually Boring?

A Review of the 2011-2012 Supreme Court's Labor & Employment Decisions

By Rich Meneghello (Portland, OR)

In the same year that the Supreme Court issued one of the most important decisions in its history, which ended up being the biggest employment law news story since the passage of the Civil Rights Act in 1964, it would seem odd to label the just-concluded 2011-2012 term as "boring." After all, for the past month, it seems that every news outlet has debated and parsed the healthcare decision upholding the Affordable Care Act *ad infinitum*, and each employer has been inundated with instructions and advice on how best to comply with its accompanying obligations. And that's not even mentioning the ground-breaking immigration decision out of Arizona that came down a few days before the healthcare decision.

But taking a step back from these two hot button decisions, the remainder of the employment cases decided by the Supreme Court will barely impact employers. In fact, unless you are a religious organization, pharmaceutical company, or public employer, this past term might have absolutely no impact on the labor and employment world in which you live. Compared to years past, when the Court issued major decisions on discrimination cases, retaliation claims, class-action lawsuits, arbitration agreements, and labor unions, this past term might actually be considered boring for the average employer.

Here's a quick recap of the seven decisions that were published by the Supreme Court this year, along with a preview of what to expect in the 2012-2013 term.

Employers Can Claim Victories In Almost All Decided Cases

Setting aside the healthcare and immigration decisions, both of which contained a mixed bag of results for employers and both of which were hailed as victories or derided as defeats depending on individual or corporate perspectives, the other five decisions published in this term were all considered victories for employers. This continues the somewhat unpredictable nature of the current Roberts Court as it relates to employment law.

Over the last five years, only one other year (2009) saw an overwhelming number of victories for employers. Another year (2008) saw almost all victories in the employee/union column. And the last two years (2010, 2011) have seen mixed results for employers. Although the current composition of the Court (five GOP appointees) and judicial philosophies of the majority of Justices would have you believe that it should be business-friendly, it's important to realize that employer-side victories are not the slam dunks that some may expect. A year with five out of five decisions for employers should be celebrated, even if the decisions are of limited application.

Religious Organizations, Drug Companies, Public Employers: Celebrate Your Wins

The 2011-2012 session, in employment law terms, got off to a good start for employers in January 2012 when the Supreme Court blocked a

discrimination lawsuit against a Lutheran school on the theory that religious organizations have the right to make certain employment decisions without regard to employment discrimination laws (known as the "ministerial exception"). In *Hosana-Tabor v. EEOC*, the Court applied the exception to ensure that those acting in a ministerial capacity could not bring employment concerns to court, but made clear that lay employees could still seek judicial relief.

Near the end of the term in June 2012, the Court also okayed the dismissal of a wage claim brought by a pharmaceutical sales rep, agreeing with the employer that such salespersons were exempt from overtime pay under the Fair Labor Standards Act (FLSA). Although *Christopher v. SmithKline* only applies to the drug industry, the reasoning behind the decision may end up being applied to other fields in the future.

This term also saw the Court rule in employers' favor in three public sector cases. In *Coleman v. Maryland*, the Court held that public employers could not be involuntarily subjected to private lawsuits under the self-care provision of the Family and Medical Leave Act (which allows employees to take unpaid leave if they are suffering from a serious health condition); in *Filarsky v. Delia*, the Court held that public agencies that retain private employees to assist in certain functions could shield those employees from

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Montana Obesity Ruling May Be Cause For Concern

By Myra Creighton (Atlanta)

Americans with Disabilities Amendments Act (ADAAA) did not change the definition of impairment but it may have changed the EEOC's view on whether obesity is an impairment.

The EEOC definition of "impairment," is "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems, such as neurological, musculoskeletal, spatial sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hermetic, lymphatic, skin, and endocrine."

The EEOC Interpretative Guidance specifically excludes from the definition of impairment, physical characteristics. This includes things such as eye color, hair color, and left handedness, but also height, weight, or muscle tone that is within the "normal" range and is not the result of a physiological disorder from the definition of impairment. Before the ADAAA passed, the EEOC took the position that severe or morbid obesity was an impairment but that obesity rarely is. The EEOC subsequently removed the language that obesity is rarely an impairment from the 2011 version of its Compliance Manual.

While it is not a definitive ruling, a recent state court decision may shed some light on how courts will view the EEOC's position. *BNSF Railway Co. v. Feit.*

Too Big For A Train Engine

Eric Feit sued BNSF Railway after it revoked a conditional offer of employment to work as a conductor trainee on the grounds that Feit was not qualified because of the significant health and safety risks his extreme obesity presented in a safety sensitive position. BNSF offered to consider him for the job if he lost 10% of his body weight or successfully underwent additional physical examinations at his own expense.

Although Feit passed additional physical exams, he could not afford the $1800 sleep test. Feit subsequently filed a complaint with the Montana Department of Labor (MDOL) alleging that BNSF discriminated against him based on a physical disability. The MDOL found in Feit's favor on the ground that BNSF had regarded him as disabled. The Montana Human Rights Commission affirmed the MDOL's decision. BNSF then appealed to the U.S. district court for Montana to review whether it had violated Montana law. The district court asked the Montana Supreme Court whether obesity unrelated to a physical condition is an impairment under Montana law. The Montana court said "yes."

The Montana court noted that Montana's anti-discrimination law uses the *same terms* as the federal ADA and that Montana courts looked to federal law and the EEOC regulations and guidance in interpreting the law. In rejecting BSNF's argument that Feit's obesity was not an impairment because it did not result from a physiological condition, the court stated that the EEOC's Interpretative Guidance suggests that a physiological disorder is required only if an individual's weight is within the normal range.

The court further noted that 1) the EEOC's Compliance Manual indicated that extreme derivations in height, weight or strength can be impairments; 2) the Compliance Manual states that "severe obesity is an impairment"; 3) the federal appellate opinions holding that obesity is not an impairment absent a physiological condition all were decided before the ADAAA passed; 4) the 2011 Compliance Manual omitted the statement that simple obesity was rarely a disabling impairment; and 5) the ADAAA was intended to expand the definition of disability. The court then cited two district court decisions, one in Louisiana and one in Mississippi.

Both held that under the ADAAA severe obesity need not be based on a physiological condition to be an impairment.

The net result of the Montana Supreme Court's opinion is that it opens the door for more courts to view severe obesity or even obesity standing alone as an impairment. Given the lack of definitive guidance be careful about rejecting requests for accommodation from morbidly obese and obese employees. Remember, to bring an action under the ADA, individuals need only show that they have an impairment or that the employer *thinks* they have an impairment.

And if obesity is viewed an impairment, it most likely will be immune to the affirmative defense that it is temporary (lasting less than six months) and minor. Consequently, employers who once felt secure in rejecting requests for accommodation from obese employees or denying obese applicants jobs should exercise caution when doing so.

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Employer Fleeced By Naked Dancers

By Larry Sorohan (New Orleans)

Perhaps only two types of people could walk into an adult-entertainment establishment and ask "I wonder if these dancers are properly paid in accordance with the Fair Labor Standards Act?" The first would be plaintiffs' attorneys. The second would be agents from the Department of Labor.

Ordinarily, any discussion concerning minimum wage and overtime law may appear interesting to only a slightly larger audience of persons. It probably goes without saying that a movie such as "Magic Mike and the Independent Contractors" would gross even less at the box office than "Harry Potter and the Chamber of Commerce."

Still, should you or your business be interested? To determine this, ask yourself two questions. First, does anyone perform services for or in your business? Second, do you pay them wages? If the answer to the first question is yes, the FLSA should interest you. If the answer to the second question is either yes or no, the FLSA should still interest you.

The Potential Pitfalls of Misidentifying Employees

As seen from the experience of the proprietors of the Club Onyx in Atlanta, any employer who utilizes workers as independent contractors should pay particular attention. In a recent action, the club was forced to agree to pay over $1.5 million to strippers after a federal court concluded they misidentified the women as independent contractors. *Clincy v. Garaldi South Enterprises, et al.*

The case was brought by a group of dancer/entertainers who sued their employer alleging that they had been misidentified as independent contractors rather than employees for purposes of the FLSA. Rather than pay wages as would be due employees, the defendants required the strippers to pay a fee to the club for the privilege of dancing as non-employees. The decision potentially placed millions of dollars at stake.

The trial court in *Clincy* agreed to a two-part approach. In other words, it permitted proceedings to first explore only the question of whether the dancers were employees or independent contractors under the FLSA. After a large, and presumably expensive, amount of discovery, it ruled them employees. At the second stage of the proceeding, the court was to determine whether any FLSA defenses applied and, if not, the amount of any damages owed. Prior to the trial on the second issue, the defendants settled the action. They agreed to pay a $1.55 million settlement to the class of strippers. Notably, if the defendants failed to make a timely scheduled payment, the amount owed would basically double to $3 million.

The decision in *Clincy* dealt with one particular strip club in one location. While it might seem of limited interest to other types of business, the decision actually provides a number of potentially universal lessons for all employers. To begin with, the nature of the defendants themselves is, well, revealing. The CEO's of two of the corporate defendants were *personally* sued as well. And that was not necessarily a mere harassing maneuver by the strippers. Rather, in certain instances, the FLSA provides for individual liability as well.

How The DOL Figures Things Out

Equally revealing is the fact that the court's decision took 56 pages to reach its conclusion on the employee-versus-independent contractor issue. In other words, the question requires a detailed analysis of multiple factors. In *Clincy*, the club required the strippers to enter into specific "Independent Contractor Agreements." But while such a step is definitely recommended, it is not the only factor. Put it this way: "dancers" may be called "exotic entertainers." That does not necessarily mean they are not strippers. Labels are important, but they do not always control.

In its analysis, the court considered factors ranging from whether the club recruited dancers (it did not) to the interview process (dancers underwent a "body check" for tattoos or stretch marks). It noted the application process, involving a two-dance audition evaluated by club management. If successful in the audition, the entertainer needed to obtain an individual entertainment license, specific to the Club Onyx and issued by the City of Atlanta. The court also exhaustively examined the rules of the club as well as the claim that patrons actually paid the dancers rather than the club paying them.

In short, the "employee or independent contractor" decision is never one that can be determined without careful analysis. Instead, courts often determine the answer by examining the economic realities of the relationship between the putative employee and putative employer. The court in *Clincy* looked to a number of factors. These included: 1) the nature and degree of the alleged employer's control over the work; 2) the alleged employee's opportunity for profit or loss depending on her managerial skill; 3) the alleged employee's investment in equipment required for the task, or her employment of workers; 4) whether the services required a special skill; 5) the degree of permanency and duration of the working relationship; and 6) the extent to which the services rendered are integral to the alleged employer's business.

None of these factors is exclusively the deciding one. Ultimately, the *Clincy* court determined an employee-employer relationship existed given the club's control over the work, the entertainer's opportunity for profit and loss, the entertainer's relative investment and lack of specialized skill, and the integral nature of nude entertainment to the club's business.

At The End Of The Dance

Again, application of these factors can be a complex inquiry. For each, specialized rules of law explain how they apply to a particular situation. If your business utilizes independent contractors, it's worthwhile to have their status examined for FLSA purposes. Further, enlisting the assistance of an attorney may help ensure that you not only comply with the law, but will assist your business in reaching its goals. In fact, other legal opinions on the issue involving the employment status of exotic dancers suggest methods that Club Onyx could have employed to avoid liability.

The next time you see a construction worker you may well ask yourself whether the person is an employee or independent contractor. If you are a patron of adult entertainment establishments, you may join the exclusive crowd that wonders whether dancers are being treated properly under the FLSA. A court found that the Club Onyx answered this question incorrectly. Don't let your business do the same.

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claims under a qualified-immunity theory; and in *Knox v. SEIU*, the Court rebuked public sector unions that tried to assess fees to nonunion members without providing proper notice and the opportunity to opt out, which ultimately could further weaken labor's influence in the workplace.

Hot Button Issues: Healthcare and Immigration

The big one that overshadowed them all was decided on the last day of the Supreme Court's term, the decision upholding the Affordable Care Act (*NFIB v. Sebelius*). Most Court observers were surprised that the individual mandate was upheld, and many employers had largely ignored the healthcare statute assuming that it would be declared unconstitutional. What's clear for employers now, whether happy with the decision or not, is that it is time to get to work and comply with the law.

The good news is that employers have some time to get into compliance with the most significant changes (those that go into effect in 2014 include the "Pay or Play" mandate, the Nondiscrimination Requirements, and the Automatic Enrollment provision), but should start working to determine their impact immediately so as to plan for any resulting additional economic burdens. There are also a whole host of immediate compliance issues that should be addressed as well, including disposition of Medical Loss Ratio Rebates, reporting the cost of coverage on 2012 W-2 forms, and new limitations on Medical Flexible Spending Accounts.

Employers will not have to face new state-mandated immigration requirements, however, after the Supreme Court struck down Arizona's attempt to regulate immigration issues on its own (*Arizona v. U.S.*). The Court held that states do not have the right to insert themselves into certain areas of immigration law, ruling that such decisions are the province of the federal government alone. Arizona had passed a law which made it a criminal offense for undocumented workers to solicit, apply for, or perform work in the state, among other things, but the Court wrote that the law went too far.

On the other hand, the Court did make clear that there are certain immigration laws that individual states could pass if they so chose – such as regulating business and requiring state employers to use E-Verify when hiring – so employers will still need to be aware of the patchwork quilt of immigration laws that exist from state to state.

What's On Deck for 2012-2013?

As noted above, it has now become all but impossible to predict whether employers will be happy with the Supreme Court's decisions in the coming term (which kicks off in October 2012), but we can at least take a look at the issues that the Court has decided to take up in its next term. At first glance, it certainly appears that those cases pending on the Supreme Court docket, have the potential for widespread impact on all employers.

- **Discrimination and Harassment:** The Court will decide whether an employee who oversees other employees' daily work but lacks the authority to hire and fire is considered a "supervisor" under Title VII. This decision will have a direct impact on many harassment and discrimination cases, since employers are deemed liable for the actions of "supervisors" but can escape liability in certain instances when other employees are the perpetrators. *Vance v. Ball State University*.

- **Class-Action Litigation:** Two cases on the Court's docket will play a role in shaping future class action litigation. In *Genesis Health Care Corp. v. Symczyk*, the Court will determine whether an FLSA collective action becomes moot if the lone plaintiff receives an offer of judgment from an employer that satisfies all of his or her individual claims. And in *Comcast v. Behrend*, we will learn whether a class action can be certified without resolving whether the plaintiffs have introduced evidence to show that the whole class of plaintiffs can be awarded damages.

- **Benefits Law:** The subject of another case accepted for review by the Supreme Court is ERISA and whether certain defenses can be applied to limit a benefit plan's recovery, even if the plan itself plainly says that the plan would be entitled to full reimbursement. *U.S. Airways, Inc. v. McCutcheon.*

- **Education Affirmative Action Law:** In what may end up being the blockbuster case of the 2012-2013 term, at least in terms of media coverage, the Court will rule whether a college can take race into account when making undergraduate admissions decisions. *Fisher v. Univ. of Texas at Austin*.

Invariably the Supreme Court will accept other labor and employment cases for review and decision in the 2012-2013 term, and when it does, Fisher & Phillips will be there to summarize the holdings in these cases to provide employers with timely and practical advice.

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