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LABOR AND EMPLOYMENT

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The docket for the U.S. Supreme Court's October 2012 term already contains five cases that could substantially impact the employment litigation landscape and employer affirmative action and diversity efforts. This month's *Take 5* will summarize these five cases and how they may affect employers.

1. ***Fisher v. University of Texas*[1] – Is Race-Based Affirmative Action Constitutional?**

On October 10, 2012, the Supreme Court heard oral arguments in a landmark case on whether race can be considered for some college admissions programs. In 2008, Abigail Fisher sued the University of Texas ("University"), claiming that she was denied admission to the University because she was white. According to Ms. Fisher, there were minority students in her class that were accepted by the University even though they had lower grades and did not participate in as many school-related activities.

Under Texas law, Texas universities use a "Top 10 Percent" plan for admissions, through which students in the top 10 percent of their high school graduating class are automatically admitted to the state university of their choice. This plan, which is race-neutral, has helped Texas universities boost racial diversity, primarily because most of the state's public high schools are de facto segregated by race and ethnicity. Ms.

[1] *Fisher v. Univ. of Texas*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3475 (U.S. Feb. 21, 2012) (No. 11-345).

Fisher argues that an affirmative action program in addition to the Top 10 Percent plan is unnecessary and that a student's race and ethnicity should not be considered in admissions. The University asserts that the Top 10 Percent plan does not create a "critical mass" of minority students, and as a result, it must also consider race in filling out the rest of each year's incoming class. To that end, the University has adopted an admissions program based on an individual evaluation that allows race to be considered as one of many factors, just as a unique ability in music or art can be a plus factor.

The last time the Supreme Court ruled on affirmative action was in 2003 in the case of *Grutter v. Bollinger*.[2] In that case, the Court ruled 5-4 that the University of Michigan Law School could use race as one factor in admissions, so long as it did not use a numerical or "quota" system. The composition of the Court now is much different than it was in 2003 with the author of the *Grutter* opinion, Justice Sandra Day O'Connor, gone, and with five Supreme Court Justices who are on record opposing affirmative action programs.[3] The key vote now may well be Justice Anthony Kennedy.

The outcome of this case could have significant ramifications for employers as well as educational institutions. Indeed, the outcome of this case could result in serious questions as to whether the requirement that federal contractor employers take affirmative action as to employment decisions affecting minorities and women under Executive Order 11246 should remain intact.

Additionally, many private employers have instituted hiring policies and procedures aimed at promoting greater diversity in the workplace. If the Court makes a sweeping declaration that racial preferences at universities are unconstitutional, the lawfulness of similar employer programs may well be open to serious question.

A decision on this case is expected in the spring of 2013.

2. Vance v. Ball State University[4] – Who Is a "Supervisor" Under Title VII?

Vance v. Ball State University addresses an issue that has split the federal appellate courts in harassment cases: who is a "supervisor" under Title VII of the Civil Rights Act of 1964? Under existing interpretation of harassment law, based on the 1998 companion cases of *Faragher v. City of Boca Raton*[5] and *Burlington Industries, Inc. v. Ellerth*,[6] the issue of vicarious employer liability for employee actions in harassment cases hinges on the finding of who is a supervisor. Generally, if the harasser is a supervisor, liability is imputed to the employer. If the harasser is a non-supervisory co-

[2] 539 U.S. 306 (2003).

[3] Justice Kagan has recused herself from the case, presumably because she was involved with it while serving as Solicitor General in 2009-10.

[4] *Vance v. Ball State Univ.,* 646 F.3d 471 (7th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3301 (U.S. June 25, 2012) (No. 11-556).

[5] 524 U.S. 775 (1998).

[6] 524 U.S. 742 (1998).

worker, for liability to attach, the victim must prove that the employer knew or should have known of the harassment.

In *Vance,* the plaintiff, a former Ball State University dining services employee, asserted that her supervisor subjected her to a hostile work environment because of her race and, as a result, Ball State should be found vicariously liable. In denying the plaintiff's claims, the U.S. Court of Appeals for the Seventh Circuit held that while the purported harasser had the authority to direct and oversee the victim's daily work, he did not have the power to take formal employment actions against her. As such, the harasser was more of "straw boss" and not truly a "supervisor" and thus the employer was not vicariously liable for the harasser's actions.

In reviewing the Seventh Circuit's dismissal, the Supreme Court will provide needed guidance as to the appropriate interpretation of *Faragher* and *Ellerth* and resolve a wide split in the Circuit Courts of Appeals. In particular, the Supreme Court will have the opportunity either to side with the Seventh, First, and Eighth Circuits, which have interpreted the scope of supervisory capacity narrowly and held that supervisors must have the power to hire, fire, demote, promote, transfer, or discipline—or with the Second, Fourth, and Ninth Circuits, which have ruled that supervisors need only have the authority to direct and oversee an alleged victim's daily work. Whichever way the Supreme Court resolves the split, the consequences of this decision will be notable, as the holding will affect all employers nationwide who are subject to Title VII. Under the Seventh Circuit's standard, there are a smaller number of individuals who could potentially subject the employer to vicarious liability. Thus, the potential number of claims against employers may depend in large part on whether the Supreme Court takes a narrow or broad view as to what qualifies an employee as a "supervisor" for purposes of vicarious liability claims. The decision may also have an effect on various other issues under employment laws. For example, in the burgeoning area of retaliation claims, the question of whether a complaint was made to a supervisor who could retaliate or merely to a co-worker who could not, could be pivotal.

Oral arguments are scheduled for November 26, 2012.

3. Comcast Corp. v. Behrend[7] – What Evidence Should a District Court Consider When Determining if a Class Should Be Certified?

Although this case originated from an antitrust lawsuit, it is being closely watched by employment law practitioners because it touches on significant class action issues that will affect employment class action litigation. This case could give the Supreme Court justices a chance to build on their landmark decision in *Wal-Mart Stores Inc. v. Dukes,*[8] which focused on the evidentiary requirements of Rule 23 of the Federal Rules of Civil Procedure.

In *Behrend,* the plaintiffs assert that Comcast engaged in anti-competitive and monopolistic activities in the Philadelphia area. Comcast relies heavily on the decision

[7] *Comcast Corp. v. Behrend*, 655 F.3d 182 (3rd Cir. 2011), *cert. granted*, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864).

[8] 131 S.Ct. 2541 (2011).

in *Dukes* and alleges that the Third Circuit ignored *Dukes* and instead relied on non-controlling law in declining to consider several arguments directly relevant to the certification analysis. The Supreme Court will decide whether a district court may certify a class action without resolving whether the plaintiff class has introduced "admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." This relates directly to the holding in *Dukes* that a case is not suitable for class certification unless the case can among other things, commonly resolve issues of relief to the class.

Because so many putative employment class actions are essentially won or lost at the class certification stage, the Supreme Court's decision regarding the level of consideration that should be given to the merits at the class certification state could be critical for employers defending against putative class allegations.

Oral arguments were heard on November 5, 2012, and a decision is expected in early 2013.

4. Genesis Healthcare Corp. v. Symczyk[9] – Does an Offer of Full Relief to a Lead Plaintiff Render a Putative FLSA Collective Action Moot?

The issue before the Supreme Court in this case is whether a former nurse's putative collective action under the Fair Labor Standards Act ("FLSA") regarding meal time breaks was rendered moot because the company offered her full relief.

The company contends that because the lead plaintiff refused its offer to cover her purported unpaid wages and legal costs, she effectively lost her personal stake in the case and thus the case became moot. Although the U.S. District Court for the Eastern District of Pennsylvania agreed with the company, the Third Circuit did not and reversed the lower court, allowing the case to move forward. The Supreme Court will therefore decide whether Article III of the U.S. Constitution, which has historically been read to allow courts to hear only live claims, prevents a federal court from hearing this case.

If the company can successfully convince the Supreme Court that an offer of judgment to a single named plaintiff can forestall a collective action and make the entire case moot, employers will have a new tool in their arsenal that can be used to outmaneuver plaintiffs' attorneys attempting to build a collective or class case. In addition, the Supreme Court's analysis may provide some clarity to the lower courts in terms of the treatment of Rule 23 class actions (which are "opt-out") as opposed to Rule 216(b) collective actions (which are "opt-in").

Oral arguments in this case are scheduled for December 3, 2012.

[9] *Genesis Healthcare Corp. v. Symczyk*, 656 F.3d 189 (3rd Cir. 2011), *cert. granted*, 80 U.S.L.W. 3512 (U.S. June 25, 2012) (No. 11-1059).

5. ***U.S. Airways, Inc. v. McCutchen*[10] – Can Courts Rewrite ERISA Benefit Plan Language to Prevent Recoupment of Benefits from Plan Participants?**

This case will address a split among the circuits as to whether equitable principles may be used to limit a benefit plan's reimbursement right under ERISA, even if the plan's terms give it an absolute right to full reimbursement of benefits paid.

In *U.S. Airways,* an employee who was injured in a car accident recovered $110,000 from third parties and paid a 40 percent contingency fee to his attorney, for a net recovery of $66,000. As permitted under the ERISA health plan's reimbursement provisions, U.S. Airways sought to recover from the employee the full amount of medical expenses the plan paid for his injuries, even though the plan's payments exceeded the amount of the participant's net recovery.

The U.S. District Court for the Western District of Pennsylvania entered judgment in favor of U.S. Airways, finding that that airline was entitled to recover the full amount paid by the plan. In vacating that judgment, the U.S. Court of Appeals for the Third Circuit was sympathetic to the plight of the employee. It ruled that U.S. Airway's health plan could not be fully reimbursed under the plan's subrogation clause for money it paid to the employee, because the full reimbursement would have left him worse off than if he had never recovered any money in the first place. By holding that ERISA limited the airline's relief options to those that were "appropriate" under traditional equitable principles, the Third Circuit broke from the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits.

The Third Circuit's decision permits clear and specific plan provisions regarding subrogation rights to be judicially nullified in certain circumstances. As subrogation clauses similar to the one in U.S. Airways' plan are common, clear guidance from the Supreme Court is necessary so that ERISA plan fiduciaries and administrators know whether plan participants can use equitable defenses to defeat an unambiguous reimbursement provision.

Oral arguments are scheduled for November 27, 2012.

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[10] *U.S. Airways, Inc. v. McCutchen*, 663 F.3d 671 (3rd Cir. 2011), *cert. granted*, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (No. 11-1285).

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