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Employment Law Highlights from the Supreme Court's Current Term

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Employment law loomed large on the Supreme Court's docket this term. In seven highly anticipated cases, the Court interpreted federal employment statutes from Title VII and the Pregnancy Discrimination Act to FLSA and ERISA.

While employers received favorable rulings in some cases, the Court's decisions regarding religious discrimination and the accommodation of pregnant workers could impact employers' current practices and policies. Employers should review hiring, accommodation, and other policies—even those that are facially neutral—to ensure compliance with the Court's recent holdings.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. (June 1, 2015)

Samantha Elauf, a practicing Muslim, wore a headscarf as a part of her religious practices. She applied to retail store Abercrombie & Fitch (Abercrombie) and received an evaluation from the store's assistant manager that qualified her to be hired. Abercrombie did not hire Elauf, however, because her headscarf would violate Abercrombie's employee dress policy, which prohibited employees from wearing "caps."

The Equal Employment Opportunity Commission (EEOC) brought suit on behalf of

Elauf, arguing that Abercrombie's refusal to hire Elauf constituted religious discrimination in violation of Title VII. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating the applicant's religious practice.

Writing for an 8-1 majority, Justice Scalia held that actual knowledge of an applicant's need for accommodation is not required to state a disparate treatment claim under Title VII; the applicant need only show that her need for an accommodation was a "motivating factor" in the employer's decision. The Court found that Title VII prohibits employers from making an applicant's religious practice, even if based on an "unsubstantiated suspicion," a factor in its employment decisions. In addition, the Court rejected Abercrombie's argument that a neutral policy cannot result in "intentional discrimination." Where an applicant requires an accommodation of a religious practice, an employer has no defense that its refusal to hire the individual was due to an otherwise-neutral policy.

What Employers Should Know

Abercrombie increases protections against religious discrimination, such that employers cannot claim a lack of actual knowledge to avoid liability. Religious accommodation of applicants and employees should be approached with caution, and employers should evaluate neutral policies, such as a dress code, that might conflict with current or potential employees' religious practices.

Young v. United Parcel Service, Inc. (Mar. 25, 2015)

Peggy Young worked as a part-time driver for United Parcel Service (UPS). During her pregnancy, her doctor advised her not to lift more than 20 pounds. UPS required its drivers to be able to lift up to 70 pounds. UPS told Young that she could not work while she was under a lifting restriction. As a result, Young stayed home without pay for most of her pregnancy.

Young sued UPS for disparate treatment under the Pregnancy Discrimination Act, arguing that UPS unlawfully refused to accommodate her pregnancy-related lifting restriction and that UPS accommodated other drivers "similar in their ability or inability to work." The Pregnancy Discrimination Act provides that unlawful sex discrimination includes discrimination based on pregnancy. The Pregnancy Discrimination Act also requires that employers treat "women affected by pregnancy" the same for all employment purposes as "other persons not so affected but similar in their ability or inability to work."

UPS stated that it had accommodated "other persons" including (1) drivers who had become disabled on the job, (2) drivers who suffered from a disability covered by the Americans with Disabilities Act, and (3) drivers who had lost their Department of Transportation certifications. Because Young did not fall into one of these three categories, UPS argued that it did not discriminate against her on the basis of pregnancy.

In a 6-3 ruling, the Supreme Court rejected the parties' "polar opposite" interpretations of the Pregnancy Discrimination Act. Justice Breyer's majority opinion held that an individual pregnant worker may prove disparate treatment through indirect evidence under the well-established burden-shifting framework derived from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the third step of the framework, in which the plaintiff has an opportunity to rebut the employer's "legitimate, non-discriminatory" reasons for its actions by showing that the employer's reasons are pretext for discrimination, the Court found that a plaintiff may survive summary judgment by providing sufficient evidence that the employer's policies impose a "significant burden" on pregnant workers, and that the employer's "legitimate, non-discriminatory" reasons are not "sufficiently strong" to justify the burden. To show that a significant burden exists, a plaintiff can provide evidence that the "employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers." The Court concluded that a genuine dispute existed as to whether UPS provided preferential treatment to employees whose inability to work was not reasonably distinguishable from Young's, and remanded the case to the Fourth Circuit for further proceedings.

What Employers Should Know

Although *Young* did not create a bright-line rule for when an employer may properly distinguish between employees in providing accommodations, the Court made clear that employers must be able to support any distinction with strong, legitimate, non-discriminatory reasons. Accommodation policies, even if facially neutral, should be examined to determine whether they impose a "significant burden" on pregnant workers or otherwise fail to accommodate a "large percentage" of pregnant workers in violation of the Pregnancy Discrimination Act.

For additional analysis on *Young* and its implications for employers, see "Supreme Court Vacates Employer Victory in Pregnancy Discrimination Case."

Mach Mining, LLC v. Equal Employment Opportunity Commission (Apr. 29, 2015)

As a prerequisite to suing an employer for discrimination under Title VII, the EEOC is required to engage in informal methods of conciliation with the employer to try to remedy the alleged unlawful employment practices. After conducting an investigation, the EEOC found reasonable cause to believe that Mach Mining had discriminated against a class of women in hiring. By letter, the EEOC invited the company to participate in "informal methods" of dispute resolution and promised that the EEOC would contact the company "soon" to begin the mandatory conciliation process. A year later, the EEOC sent a second letter, stating that "such conciliation efforts as are required by law have occurred and have been unsuccessful." The EEOC then sued Mach Mining in federal court alleging sex discrimination. Mach Mining responded by stating that the EEOC had failed to conduct a good faith conciliation prior to filing suit. The EEOC argued that "conciliation efforts are not subject to judicial review" and at most, a court could only inspect the EEOC's two letters to confirm that the agency had met its duty to conciliate.

Justice Kagan, writing for a unanimous Supreme Court, held that the EEOC's conciliation activities are subject to judicial review. The Court applies a "strong presumption" in favor of judicial review of agency action, which can be rebutted only by overcoming a "heavy burden" to show a congressional intent to prohibit judicial review. The Court found that the EEOC failed to overcome the presumption of judicial review here in light of the language of Title VII and the routine judicial review of mandatory prerequisites to suit in Title VII litigation. However, the Court concluded that the scope of judicial review of the EEOC's conciliation efforts is narrow. A court may enforce Title VII's conciliation requirements, but its review may go no further.

What Employers Should Know

After *Mach Mining*, employers can challenge the EEOC's conciliation attempts in federal court and demand that the EEOC provide specific information about the claims alleged to facilitate early settlement. While the scope of judicial review is narrow, this case demonstrates that the EEOC does not have unfettered discretion in initiating litigation against employers.

Integrity Staffing Solutions, Inc. v. Busk (Dec. 9, 2014)

Integrity Staffing Solutions operated a warehouse in which employees packaged products for delivery to Amazon.com customers. Integrity required employees to undergo an antitheft security screening before leaving the warehouse after each shift, lasting roughly 25 minutes each day. The employees filed suit, arguing that the Fair Labor Standards Act (FLSA) entitled them to payment for the time spent waiting for and undergoing these security screenings because the screenings occurred "solely for the benefit of the employers and their customers."

The Supreme Court held that an activity is compensable under the FLSA if it is an intrinsic element of the principal activities that an employee is hired to perform, and if the employee cannot dispense with the activity to perform his or her principal activities. Justice Thomas described that Congress enacted the Portal-to-Portal Act to exempt employers from FLSA liability for "activities which are preliminary to or postliminary to" an employee's principal activities. The Court has interpreted "principal activity or activities" to include all activities that are an "integral and indispensable" part of the employee's principal activities. The Court has defined "integral and indispensable" as an "intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

The Court concluded that the security screenings were "noncompensable postliminary activities." The Court found that the Ninth Circuit erred in focusing on whether the employer required a particular activity or whether the activity benefited the employer. The proper focus of the "integral and indispensable test" is the "productive work that the employee is employed to perform." Integrity hired the employees to retrieve and package products for shipment to Amazon customers, not to undergo security screenings. Thus, the screenings were not the "principal activity" which the employees were hired to perform. The screenings also were not "integral and indispensable" to the employees' duties, as the screenings could be eliminated without any impact on the employees' ability to package products for shipment. Because the security screenings are not integral and indispensable to the employees' work as warehouse workers, this activity is not compensable under the

FLSA.

What Employers Should Know

Employers that mandate preliminary or postliminary activities should evaluate these policies under the Court's articulation of "integral and indispensable test" to determine whether that time is compensable under the FLSA. Additionally, employers should note that this case only addressed compensation under the FLSA, and does not affect whether certain activities are compensable under more stringent state laws.

M & G Polymers USA, LLC v. Tackett (Jan. 26, 2015)

A group of retired employees sued their former employer claiming that expired collective bargaining agreements entitled them to lifetime contribution-free health care benefits for retirees, their surviving spouses, and their dependents. The 2000 pension and insurance (P & I) agreement provided that those employees "whose full years of attained age and full years of attained continuous service . . . at the time of retirement equals 95 or more points will receive a full Company contribution towards the cost of [health care] benefits." Employees who attained less than 95 points were required to contribute in varying amounts to their health care benefits. The P & I agreement provided for renegotiation of its terms in three years.

In 2006, the company announced that it would begin requiring retirees to contribute to the cost of their health care benefits. The retirees sued, arguing that the 2000 P & I agreement created a vested right to health benefits that continued beyond the expiration of the agreement.

A unanimous Supreme Court, led by Justice Thomas, noted that collective bargaining agreements, including those establishing welfare benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), are interpreted according to ordinary principles of contact law. The Court found that the Sixth Circuit contravened ordinary contract law by "placing a thumb on the scale" in favor of vested retiree benefits in all collective bargaining agreements. In its attempt to ascertain the intent of the parties to the agreement, the Sixth Circuit relied on its own assumptions about retiree benefits negotiations instead of deriving intent from record evidence. By ignoring the unambiguous durational provision in the agreement, and requiring a contract to include a specific durational clause for retiree health benefits to prevent vesting, the Sixth Circuit's interpretation conflicted with basic principles of contract law. The Court concluded that when a contract is silent as to the duration of retiree benefits, courts may not infer that the parties intended lifetime vesting of those benefits.

What Employers Should Know

Although the Court reversed Sixth Circuit precedent inferring welfare benefit vesting in collective bargaining agreements, employers should confirm that these agreements include a general durational clause to negate an inference of vesting. The Court made clear that durational clauses specific to each type of benefit are not required, but the more specific the durational clause, the more likely an employer can defend against an ambiguous welfare benefit provision.

Tibble v. Edison International (May 18, 2015)

Current and former beneficiaries of the Edison 401(k) Savings Plan sued Edison for alleged breaches of fiduciary duties under ERISA. The beneficiaries claimed that Edison acted imprudently by offering higher priced mutual funds as Plan investments when nearly identical, lower priced mutual funds were available

Under ERISA, a breach of fiduciary duty cause of action must be filed no more than six years after “the date of the last action which constituted a part of the breach or violation” or “in the case of an omission the latest date on which the fiduciary could have occurred the breach or violation.” 29 U.S.C. § 1113.

A unanimous Supreme Court held that so long as an alleged breach of the continuing fiduciary duty to monitor investments occurred within six years of filing suit, the claim is timely. Writing for the Court, Justice Breyer noted that an ERISA fiduciary’s duty is derived from trust law, which imposes a continuing duty on fiduciaries to monitor investments and remove imprudent ones. This continuing duty is “separate and apart” from the duty to exercise prudence in initially selecting investments. The Court concluded that the Ninth Circuit erred by not considering trust law’s application in the ERISA fiduciary context and by limiting its analysis to whether the fiduciary breached its duty by initially selecting an imprudent investment within the six-year statutory period. Accordingly, the Court remanded the case to determine whether the fiduciary breached its duties within the six-year period, considering the relevance of trust law and continuing duty to monitor investments.

What Fiduciaries Should Know

Plan fiduciaries should be aware of the continuing duty to monitor investments and its effect on the statute of limitations under ERISA. As a result of this opinion, fiduciaries may have a harder time arguing that a claim for imprudent investing is time-barred, and beneficiaries will be able to plead around the six-year limitations period by arguing a continuing breach or violation. Ultimately, fiduciaries should review their procedures for monitoring ERISA plan investments and confirming the prudence of such investments.

Obergefell v. Hodges (June 26, 2015)

Fourteen same-sex couples, and two men whose partners had died, brought suit in four states, claiming that state officials violated the Fourteenth Amendment by denying them the right to marry or by failing to recognize their same-sex marriage lawfully performed in another state. The named plaintiff, James Obergefell, met his husband, Arthur, over two decades ago. Two years ago, the couple married after Arthur was diagnosed with ALS. The couple traveled to Maryland, where same-sex marriage was legal, to get married. Upon Arthur’s death, their home state of Ohio refused to list James as the surviving spouse on Arthur’s death certificate. James brought suit to be listed as the surviving spouse on Arthur’s death certificate, and, like every other plaintiff in the case, to receive the same treatment under the law as opposite-sex spouses.

In a landmark decision, the Supreme Court held that the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples and to recognize same-sex marriage lawfully performed in other states. The Court's decision, authored by Justice Kennedy, reversed the Sixth Circuit's ruling, which held that a state has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of state.

What Employers Should Know

After *Obergefell*, employers are no longer required to navigate the patchwork of state laws governing benefits for same-sex spouses. When it comes to employment policies and benefits, same-sex spouses must be treated the same as opposite-sex spouses in all states. Accordingly, employers should consider reviewing any state-specific policies and practices to ensure that any policies or benefits affecting same-sex spouses are consistent in all 50 states.

For a complete analysis of *Obergefell* and its implications for employers, see "Same-Sex Marriage Decision: Uniformity in All States."

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