

LABOR RELATIONS

Expert Analysis

Supreme Court Rulings Affecting Employers

Today's column is the first of two articles discussing a multitude of decisions by the U.S. Supreme Court during the 2012-13 term important to the area of labor and employment law.

FLSA Actions

In *Genesis Healthcare v. Symczyk*, 133 S Ct 1523 (2013), the court resolved a circuit split and ruled 5-4 that a collective action under the Fair Labor Standards Act (FLSA) is not justiciable and may not proceed when the representative employee's individual claims become moot.

Respondent, a registered nurse, filed a collective action FLSA complaint on behalf of herself and other similarly situated employees alleging that her employer had deducted meal break times from employee paychecks whether or not the employee had an uninterrupted break. Petitioners, respondent's former employers, served her with an offer of judgment under Federal Rule of Civil Procedure 68, offering her all of the unpaid wages she was seeking, plus reasonable attorney fees, costs and expenses. Respondent did not respond to the offer, and when the time limit ran out petitioners moved to dismiss for lack of subject-matter jurisdiction, arguing that their offer of complete relief rendered respondent's FLSA claim moot.

The district court granted petitioners' motion to dismiss, noting that no other employees had yet joined respondent's suit. However, the U.S. Court of Appeals for the Third Circuit reversed. While recognizing that petitioners had offered complete relief, thus mooting the individual FLSA claim, the Third Circuit found that using strategic Rule 68 offers to "pick off" aggrieved plaintiffs would frustrate the FLSA's collective-action process.



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The Supreme Court reversed. The court did not decide whether the unaccepted Rule 68 offer actually mooted respondent's individual FLSA claim, instead noting that the two lower courts agreed that it did and that respondent waived the argument. The remaining question was whether respondent's suit remained justiciable based on the collective-action allegations she raised. The court held that it did not because "the mere presence of [such] allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." The court reasoned that because respondent's claim was mooted before any other employees had joined, she had no "personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness."

In *'Symczyk'*, the court ruled that a collective action under the Fair Labor Standards Act may not proceed when the representative employee's individual claims become moot.

The court explicitly distinguished its Rule 23 class action (opt-out) precedent—on which respondent had relied—as legally and factually inapposite from the FLSA collective action (opt-

in) at issue here. The court stated that although the Rule 68 offer prevented additional claimants from seeking relief in respondent's collective action suit, those claimants "are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all."

In a vehement dissent, Justice Elena Kagan characterized the assumption on which the majority decision rested—that respondent's individual FLSA claim was moot—as "wrong, wrong, and wrong again." She asserted that a plaintiff who has rejected or ignored an offer of judgment maintains an individual interest in the case, and thus that plaintiff's claims are not moot. Kagan expressly warned lower courts not to treat unaccepted offers as moot claims and urged parties in FLSA actions to "[f]eel free to relegate the majority's decision to the furthest reaches of [their] mind[s]: The situation it addresses should never again arise."

Class Actions

In *Comcast v. Caroline Behrend*, 133 S Ct 1426 (2013), the court reversed the certification of a class of more than two million present and former cable television customers seeking antitrust damages against their cable provider. In a 5-4 decision, the court held that the ability to establish classwide damages is essential to a favorable ruling on class certification. The case extends the holding of *Wal-Mart Stores v. Dukes*, 131 S Ct 2541 (2011), which applied a "rigorous analysis" requirement to the existence of a common issue of law or fact under Federal Rule of Civil Procedure 23(a), to damages classes certified under Federal Rule of Civil Procedure 23(b)(3). While *Comcast* involved antitrust claims, the court's decision has implications for all Rule 23 class actions, including employment class actions.

In this case, cable television subscribers accused Comcast of violating antitrust laws by using "clustering" methods to increase its share

of the local cable market. They sought to certify a class under Rule 23(b)(3). That provision permits certification only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.”

During class certification proceedings, plaintiffs’ expert presented four damages theories and a damage calculation model to show that classwide damages could be ascertained through “common methodology.” The district court accepted only one of plaintiffs’ four damages theories, but still certified the class even though the expert acknowledged that his model did not limit damages to the single theory that the court accepted. On appeal, the Third Circuit held that Comcast’s arguments about plaintiffs’ damages approach amounted to a merits issue that should not be considered at the class certification stage.

The Supreme Court overturned, striking down the Third Circuit’s refusal to hear arguments about damages when ruling upon class certification. Justice Antonin Scalia wrote that the issue was whether “certification was improper because respondents had failed to establish that damages could be measured on a classwide basis.” Relying on *Wal-Mart*, the court explained that all Rule 23 requirements must be satisfied and that damages—like liability—must be capable of measurement on a classwide basis. Because plaintiffs’ damages model was dependent on several theories that were rejected by the trial court, the court held that “[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class,” defeating predominance and rendering class certification improper.

The dissent challenged whether damages issues are sufficient to bar class certification in cases certified under Rule 23(b)(3), stating that “a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.”

ERISA Plans

In *U.S. Airways v. McCutchen*, 133 S Ct 1537 (2013), the court addressed the right of a welfare plan to reimbursement of funds that a participant recovers from a third party. In a 5-4 decision, the court held that the equitable defense of unjust enrichment could not be raised to override the terms of a benefit plan that clearly established the plan’s right to reimbursement. On the other hand, the court held that where a plan document is silent on a question—in this case, the allocation of attorney fees the participant pays to obtain the third-party recovery—equitable

principles may be looked to in filling the gap.

In this case, a former U.S. Airways employee suffered severe injuries in an automobile accident while he was a participant in the company’s self-funded group health plan. The health plan paid \$66,866 for the employee’s accident-related medical expenses. The employee subsequently recovered a total of \$110,000 from a settlement with the driver who caused the accident and underinsured motorist benefits available under his own automobile insurance policy. Of that sum, he paid 40 percent to his attorneys, leaving a net third-party recovery of \$66,000.

U.S. Airways then demanded reimbursement of its total expense of \$66,866. The health plan included a reimbursement provision that required participants to reimburse the plan “for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, [the participant’s] own insurance company, as the result of judgment, settlement or otherwise.” However, the plan documents did not expressly address whether the plan or the participant would be responsible for paying any attorney fees expended to obtain such recovery.

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After the employee refused to reimburse the health plan, U.S. Airways, as fiduciary and plan administrator, filed suit under Section 502(a)(3) of ERISA seeking “appropriate equitable relief” to enforce the plan’s reimbursement provision. The employee argued that when a plan brings an equitable action under Section 502(a)(3) to enforce plan terms, certain equitable principles such as the “double-recovery rule” (permitting an insurer to recover only the share of the amount the insured received to compensate him or her for the same loss the insurer covered) and the “common-fund rule” (providing that a lawyer who recovers a common fund for the benefit of other persons is entitled to reasonable attorney fees from the fund as a whole) trump plan terms and prevent unjust enrichment. In contrast, U.S. Airways argued that equitable principles or defenses could not be employed to defeat the clear terms of the plan.

The district court granted summary judgment to U.S. Airways and awarded it the full \$66,866

reimbursement. The Third Circuit vacated the district court’s order, reasoning that in a suit for equitable relief under Section 502(a)(3), a court must apply equitable doctrines and defenses, such as the principle of unjust enrichment.

Reversing the Third Circuit, the court relied heavily on its ruling in *Sereboff v. Mid Atlantic Med. Services*, 547 US 356 (2006), where it held a plan administrator’s suit under Section 502(a)(3) for equitable enforcement of a reimbursement provision constituted an action to enforce an equitable lien by agreement. Here, the court stated such an equitable action “arises from and serves to carry out a contract’s provisions.” According to the court, that means applying the terms of the plan, and rejecting rules—such as the “double-recovery rule” or the “common-fund rule”—that are at odds with the parties’ agreement. However, the court also held that when a plan is silent or ambiguous as to whether equitable defenses are available, equitable principles could apply to help interpret the plan or to fill in gaps.

Because the U.S. Airways health plan did not specifically require reimbursement with reduction for attorney fees, the court looked to the common-fund doctrine, explaining: “[I]f U.S. Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so, and here it did not.”

Anticipated Rulings

In the coming weeks, we expect that the court will issue rulings in a number of highly anticipated cases that will have significant implications for employers. These include *United States v. Windsor* (Docket No. 12-307), in which the court will decide whether the Defense of Marriage Act, as applied to persons of the same sex who are legally married under the laws of their state, violates the Fifth Amendment’s guarantee of equal protection of the laws; *Fisher v. University of Texas* (Docket No. 11-345), where the court will address the constitutionality of a university’s consideration of race in its undergraduate admissions process; and *Vance v. Ball State University* (Docket No. 11-556), which will decide who is a “supervisor” for purposes of harassment lawsuits under Title VII.

Our next column will discuss these rulings of the Supreme Court’s 2012-13 term and their impact on employers.