EMPLOYMENT FLASH

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INSIDE

U.S. Supreme Court Issues Two Important Decisions Under Title VII

On June 24, 2013, the U.S. Supreme Court issued two highly anticipated rulings interpreting Title VII of the Civil Rights Act of 1964. In the two opinions, the Court (i) made it more difficult for employees to succeed in Title VII retaliation claims; and (ii) adopted a clear-cut definition of "supervisors" who can potentially create vicarious liability for a company in Title VII harassment cases. Each case was decided by a narrow 5-4 vote of the justices, with Justice Ruth Bader Ginsburg authoring vigorous dissents in both.

Retaliation Standard

In *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the Court ruled that employees pursuing Title VII retaliation claims must show their employer would not have retaliated against them *but for* the employee having complained of unlawful discrimination.

Respondent is a physician of Middle Eastern descent who was employed as a faculty member at the University of Texas medical center (University) and staff physician at the affiliated Parkland Memorial Hospital. He filed two Title VII complaints against the University in district court. In the first, respondent asserted his supervisor's harassment and undeserved scrutiny of him, stemming from an alleged "religious, racial and cultural bias against Arabs and Muslims," resulted in his constructive discharge from the University. In the second, he claimed he was prevented from continuing to work at Parkland Memorial Hospital in retaliation for having complained about his supervisor. The jury found for respondent on both claims. Subsequently, the Fifth Circuit vacated the constructive discharge finding, but affirmed the retaliation finding on the theory that retaliation was a motivating factor for the employer's adverse action.

The Supreme Court reversed, holding a plaintiff must prove but-for causation to establish a Title VII retaliation claim. In the Civil Rights Act of 1991, Congress amended Title VII to provide that allegations of discrimination based on race, color, religion, sex or national origin are established when a plaintiff shows that one of those protected characteristics "was a motivating factor for any employment practice, even though other factors also motivated the practice." Congress, however, left the separate anti-retaliation provision of Title VII unchanged. The Court determined that, by omitting retaliation from the language of the motivating-factor provision it added, Congress had not changed the traditional but-for standard of causation when deciding retaliation claims under Title VII. The Court explicitly rejected respondent's argument that in interpreting Title VII, courts should defer to the Equal Employment Opportunity Commission (EEOC) guidance manual, which states if "there is credible direct evidence that retaliation was a motive for the challenged action," the causation element of a retaliation claim was satisfied.

In dissent, Justice Ginsburg argued application of the but-for standard of causation is too restrictive on a plaintiff who cannot otherwise show the employee's complaint was the actual cause of her injury. The dissent further criticized the holding because, going forward, it requires trial judges to instruct juries on two separate standards of causation in Title VII cases.

Supervisors

In *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013), the Court resolved a Circuit split regarding the definition of "supervisor" under Title VII. In a 5-4 ruling, the Court held an employee is a "supervisor" for purposes of vicarious liability under Title VII if and only if the employee is empowered by the employer to take tangible employment actions against the victim, such as being able to hire, fire, promote, demote, transfer or discipline the victim.

Petitioner worked for her employer as a part-time catering assistant. During her employment, petitioner filed complaints with her employer and with the EEOC, alleging racial harassment and discrimination; many of the complaints involved one employee in particular. In 2006, petitioner filed suit against her employer in federal district court, claiming she had been subjected by that employee to a racially hostile work environment in violation of Title VII. In her complaint, petitioner contended the alleged harasser was her supervisor and her employer, therefore, was vicariously liable. The district court entered summary judgment in favor of the employer. The Seventh Circuit affirmed because, under its precedent, an employee is only a supervisor if she has "the power to hire, fire, demote, promote, transfer, or discipline an employee." Since both parties agreed that the alleged harasser did not have these powers over the petitioner, the employer could not be held vicariously liable for her conduct.

The Supreme Court affirmed. The Court described the Circuit split between those defining "supervisor" as an employee authorized by the employer to take tangible employment actions against the victim versus those following the approach advocated by the EEOC, which ties supervisor status to the employee's ability to exercise significant direction over the victim's daily work. Then, the Court looked to its landmark decisions of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), in which the Court held that if a supervisor's workplace conduct culminates in a tangible employment action, the employer is strictly liable, but if no tangible employment action is taken, the employer may escape liability by establishing an affirmative defense. The Court concluded that "the framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers" and "contemplate[s] a unitary category of supervisors, *i.e.,* those employees with the authority to make tangible employment decisions." The majority further reasoned this narrower definition of "supervisor" would allow the question of supervisor status to be resolved as a matter of law before trial.

In a strong dissent, Justice Ginsburg wrote the majority's opinion was "blind to the realities of the workplace" and asserted the opinion further displaced the Title VII objective of preventing discrimination. She called on Congress "to correct the error into which [the] Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."

Supreme Court Holds Lone Plaintiff's FLSA Collective Action Is Moot When Claims Are Resolved Before Certification

On April 16, 2013, the U.S. Supreme Court issued its opinion in *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), holding that a lone plaintiff in a collection action under the Fair Labor Standards Act (FLSA), who resolved her own claims before certification, lacked a personal interest in the action thereby rendering the entire suit non-justiciable.

In 2009, Laura Symzcyk filed a claim under the FLSA for unpaid time against her former employer, Genesis Healthcare Corp., on behalf of herself and all other persons similarly situated, alleging Genesis automatically deducted time for meal breaks even if the employee worked during that time. Under the FLSA, such an action on behalf of "similarly situated" employees is known as a collective action.

Before any other individuals joined the suit, Genesis served an offer of judgment under Federal Rule of Civil Procedure 68 (Rule 68), offering Symzcyk $7,500 for alleged unpaid wages, and reasonable attorney's fees, costs and expenses. After Symczyk failed to respond to the company's offer, Genesis moved to dismiss for lack of subject matter jurisdiction, arguing that it had offered complete relief thereby eliminating plaintiff's personal stake in the outcome of the litigation. The district court agreed with Genesis and held the suit was moot because the offer fully satisfied Symzcyk's individual claim and no one else had joined her suit. (It should be noted that, under the law of the Third Circuit, an unaccepted offer of judgment in the full amount owed resolves a plaintiff's individual claims). The Third Circuit reversed, agreeing the individual claim was moot, but holding the collective action allegations kept the case alive, as a contrary holding would allow defendants to "pick off" named plaintiffs and frustrate the formation of FLSA collective actions.

Justice Thomas, writing for the 5-4 majority, reversed the Third Circuit's decision. While the majority acknowledged the circuits are split over whether an *unaccepted* offer resolves a plaintiff's individuals claims, it declined to directly address the question and, instead, assumed the individual claim was moot. The majority went on to hold the collective action allegations in the complaint did not render the suit justiciable, noting "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." In the court's view, because no other individuals had opted in before Symczyk's claim became moot, "she lacked any personal interest in representing others in this action." The court distinguished the cases relied upon by Symczyk on legal and factual grounds, emphasizing that those cases arose in the Federal Rule of Civil Procedure 23 class action context, which is "fundamentally different from collective actions under the FLSA … " According to the court, in Rule 23 class action cases, the class takes on independent legal status after certification, but under the FLSA, "'conditional certification' … does not produce a class with independent legal status, or join additional parties to the action." Further, unlike the dismissal of a class action, the dismissal of Symczyk's claims would not affect the other putative collective action members, as collective actions only bind individuals who explicitly opt in.

Many had expected the decision would provide clear guidance on the defense strategy of making an offer of judgment to a named plaintiff in order to moot the entire collective action suit. Because the majority did not reach this issue but assumed that the individual claims were moot, the decision may be of limited precedential value. Further, given that the Second Circuit has held that an unaccepted offer of judgment does not moot an individual plaintiff's claim, the Court's decision in *Genesis Healthcare* may be even less helpful in that circuit. The case nevertheless provides some support for the strategy of sending an FLSA plaintiff a Rule 68 offer before the case becomes an expensive collective action, at least in certain other circuits. The case also is instructive for the strong distinctions the majority drew between FLSA collective actions and Rule 23 class actions.

Supreme Court Allows Class Arbitration Despite No Express Agreement

In a unanimous opinion, the U.S. Supreme Court denied a party's right to challenge an arbitrator's interpretation that an arbitration agreement authorized class-wide arbitrations, even if the arbitrator committed an error – or even a serious error. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). While *Sutter* is not an employment law case, this decision is certain to affect employers. First, this case reminds employers about the trade-off of arbitration agreements: while arbitration provides a streamlined processes for dispute resolution, the corollary is that it is very difficult to challenge an arbitrator's decision. Second, employers wishing to prohibit class-wide arbitration should do so expressly in their arbitration agreements.

In 2002, Dr. Ivan Sutter, a physician who had a contract with Oxford Health Plans to provide care to the members of Oxford's network, sued Oxford on behalf of himself and a proposed class of other physicians, alleging that the company failed to pay for medical services in violation of the contract as well as New Jersey state law. The contract between Sutter and Oxford contained a broad arbitration provision, which neither expressly authorized nor prohibited class arbitrations. Significantly, after Oxford successfully moved to compel arbitration, the parties agreed that the arbitrator should decide whether their contract authorized class arbitration. The arbitrator determined that the contract allowed for such procedures.

Oxford then asked the federal courts to vacate the decision, arguing the contract did not specifically authorize the use of class procedures and the arbitrator therefore exceeded his powers under the Federal Arbitration Act (FAA). In doing so, Oxford relied on a recent Supreme Court decision, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a party may not be compelled to arbitrate on a class-wide basis unless there is a contractual basis for concluding the party agreed to do so. However, in this case, the Court refused to weigh in on the correctness of the arbitrator's decision, reiterating that the parties bargained for the arbitrator's construction of the arbitration agreement, and since the arbitrator's rationale was based on the language of the contract, Oxford got what it bargained for. As the Court stated, the sole question under the FAA is whether the arbitrator "even arguably" construed or interpreted the parties' contract, "not whether he got its meaning right or wrong." The Court further emphasized that FAA §10(a)(4) "permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."

The Court noted that it would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." As the Court confirmed, "gateway matters," such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration provision applies to a certain type of controversy, are presumptively for courts to decide. The Court pointed out that, although it has not yet decided whether the availability of class arbitration is a question of arbitrability, the *Sutter* case offered it no opportunity to address that question, since Oxford clearly agreed the arbitrator should determine whether its contract with Sutter authorized class procedures.

Second Circuit Adopts EEOC Negligence Standard Regarding Non-Employee Harassment

On February 21, 2013, the Second Circuit joined the majority of other federal courts of appeals in applying the Equal Employment Opportunity Commission's (EEOC) negligence standard in determining an employer's liability for sexual harassment of its employees by a non-employee. *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013).

Lauren E. Summa was a graduate student who worked part-time for Hofstra University as the football team's manager. Summa alleged that over the course of her employment with Hofstra, she was subjected to sexual harassment by university football players. Specifically, she alleged that the Hofstra football players made repeated sexually explicit comments regarding her boyfriend, both directly to her and via a Facebook page, among other allegedly harassing comments. Summa asserted that after she complained about the Facebook page, the head coach spoke with the players involved and ordered them to remove the postings. Summa also alleged that players made lewd comments to her while watching a movie with nudity during a bus ride home from a game. According to Summa, she asked the assistant coach to stop the movie, which he did. Following Summa's report to university officials, one of the players was removed from the team, and the university scheduled a training on sexual harassment for the athletics staff. Summa further alleged that after she reported the alleged harassment, the university retaliated against her by replacing her as team manager for the spring season and rescinding an offer it had made for a graduate assistantship position. Additionally, Summa claimed that after she filed her retaliation lawsuit the university terminated her student employment privileges.

Summa sued Hofstra for sexual harassment and retaliation in violation of Title VII, Title IX of the Education Amendments of 1972 and corresponding provisions of the New York State Human Rights Law, claiming she was fired from her position because of her complaints. The district court granted summary judgment in favor of Hofstra on the sexual harassment claim, and the Second Circuit affirmed. As the Second Circuit stated, because the offensive actions were taken by non-employees, Hofstra could be liable for sexual harassment only if the non-employee players' actions were imputed to Hofstra. Noting that the Second Circuit had not yet determined the standards for imputing acts of third parties to an employer, the court in *Summa* decided to adopt the "well-reasoned rules" of the EEOC, which impute liability for harassment by non-employees under the same standard as sexual harassment by non-supervisory co-workers. Such EEOC rules provide that liability is imposed only for the employer's own negligence, *i.e.*, where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. Relying on this standard, the Second Circuit emphasized that appropriateness of action depends on the timeliness of the response and the level of control the employer has over the non-employee's behavior.

In this case, Hofstra was deemed to have a high degree of control over the football players and, therefore, had an obligation to address the behavior once it knew about it. The court concluded that Hofstra met that obligation, stressing that every time Summa complained about the players' behavior, the school addressed such concerns. The court also noted that action was taken within days of Summa's complaint to university officials, buttressing the argument that Hofstra's response was appropriate.

However, the Second Circuit held that Summa's retaliation claim survived summary judgment based, in large part, on the temporal proximity between her protected activity and Hofstra's adverse action, noting that the seven-month gap between the filing of her suit and the decision to terminate her employment privilege was "not prohibitively remote." The court also relied on the other surrounding circumstances, including the fact that the university official who interceded in the graduate assistantship hiring process and was responsible for terminating Summa's employment privileges had "personal knowledge" of Summa's lawsuit.

Eleventh Circuit Finds That Undocumented Workers Can Pursue FLSA Claims

In *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013), the Eleventh Circuit affirmed the district court and found that undocumented workers were not prevented from seeking unpaid overtime wages under the FLSA. The March 6, 2013 decision further affirmed an earlier Eleventh Circuit decision, *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988), where the court found that undocumented aliens were "employees" for purposes of recovering unpaid wages under the FLSA.

Mario Feliciano and Augustin Milan, along with seven former co-workers, brought suit against Safe Hurricane Shutters, Inc. for unpaid overtime pay. The company filed a motion for judgment as a matter of law based, in part, on the *in pari delicto* defense, which states that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." In particular, Safe Hurricane Shutters argued that because the plaintiffs had engaged in wrongdoing by failing to accurately report their earned

income to the IRS, they could not recover damages. The company also claimed that Milan applied to work for the company using a false social security number. The Eleventh Circuit affirmed the district court's decision on this point on the ground that, in order to succeed with this defense, the defendants would have to show that the plaintiffs were active, voluntary participants in the unlawful activity that was the subject of the suit. Because the subject of the suit was payment of overtime wages and not the plaintiffs' wrongdoing, the Eleventh Circuit ruled that Safe Hurricane Shutters' defense was inapplicable. As the court made clear, "plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant."

The Eleventh Circuit also rejected Safe Hurricane Shutters' argument that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), effectively overruled the *Patel* decision thus preventing the plaintiffs from recovering damages. In *Hoffman*, the Supreme Court held that the National Labor Relations Board (NLRB) was prohibited from awarding backpay to undocumented aliens who were terminated for union activity in violation of the National Labor Relations Act (NLRA). The Eleventh Circuit noted that the NLRA, which was at issue in the *Hoffman* case, provided for limited judicial review of the broad discretion granted to the NLRB in formulating remedies. The scope of permissible judicial review included "the authority to reject the NLRB's chosen remedy where it 'trenches upon a federal statute or policy outside the Board's competence to administer.'" In exercising that authority, the Supreme Court in *Hoffman* rejected the NLRB's remedy on the ground that it trenched upon the policies underlying the Immigration Reform and Control Act of 1986. The Eleventh Circuit in *Lamonica* differentiated *Hoffman*, emphasizing that no administrative body or court is vested with discretion to fashion an appropriate remedy under the FLSA. As the court further noted, "unlike the NLRA, there is nothing in the FLSA that would allow us to conclude that undocumented aliens, although protected by the Act, are nevertheless barred from recovering unpaid wages thereunder."

NYC Human Rights Law Extended to Prohibit Discrimination Against the Unemployed

On March 13, 2013, the New York City Council passed Bill Number 814-A, which bans employment discrimination based on an individual's unemployment status. The law, which modifies the New York City Human Rights Law, went into effect on June 11, 2013.

The council passed the law amidst concerns employers are discriminating against applicants without jobs, exacerbating the situation of the unemployed and making it more difficult to regain employment. Mayor Michael Bloomberg vetoed the bill, expressing concerns about establishing a subjective standard that provides inadequate guidance to employers and opening the floodgates to litigation. In passing the law, the council overrode Mayor Bloomberg's veto.

In particular, the new law provides employers may not "base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment." Furthermore, employers and employment agencies are barred from publishing advertisements indicating current employment is a job requirement or unemployed individuals will not be considered. The law defines "unemployed" as "not having a job, being available for work, and seeking employment."

The new law contains many exceptions. For example, employers may consider unemployment if they have "a substantially job-related reason," and may inquire into the circumstances surrounding the applicant's separation from employment. Employers may also consider and require current and valid credentials, *e.g.*, a professional or occupational license, a registration or permit, or minimal levels of education or experience. Additionally, employers are permitted to give preference to, or consider exclusively, their own current employees.

While other jurisdictions have laws that ban employers from suggesting in advertisements that the unemployed need not apply, New York City's law goes an extra step in allowing a private suit for damages. An individual who believes he or she is the victim of discrimination may file a complaint with the New York City Commission on Human Rights, but has the option to bypass the commission and sue for damages in court. Remedies include injunctive relief, compensatory and punitive damages, attorneys' costs and fees, and a civil penalty up to $250,000.

In addition, the law prohibits practices or policies having a disparate impact on the unemployed. Notably, where a plaintiff demonstrates that a group of policies or practices results in a disparate impact, he or she is not required to demonstrate which specific policies or practices within the group results in such disparate impact. The employer may establish an affirmative defense that the policy or practice is based on a substantially job-related qualification or does not contribute to the disparate impact. Even if the employer establishes the affirmative defense, the plaintiff may prevail by showing that an alternative policy or practice is available and the employer does not prove the alternative would not serve the employer "as well."

While the contours of the new law are still undeveloped, employers are advised to review advertisements, interview questions and hiring practices.

California Appeals Court Rules That Oral Disclosure Can Constitute an Invasion of Privacy

On March 18, 2013, a California Court of Appeals reversed the trial court's dismissal of a violation of privacy suit in *Ignat v. Yum! Brands, Inc.*, 214 Cal. App. 4th 808 (2013), and held that an individual's right to privacy can be violated by oral, as well as written, communications.

Ignat, a Yum! Brands, Inc. employee, who suffered from bipolar disorder, occasionally missed work as a result of the side effects caused by her medication. Ignat alleged that after returning from an absence related to these side effects, she discovered her supervisor had verbally revealed her condition to others in their department. Following her termination in September 2008, Ignat filed suit against Yum! Brands for invasion of privacy by public disclosure of private acts. Yum! Brands moved for summary judgment, in part, on the grounds that Ignat's supervisor did not reveal her disorder in writing. The trial court granted the motion based solely on the lack of a writing disclosing the private facts. Reversing the lower court, the Court of Appeals concluded that given the state of communications today, "private facts can be just as widely disclosed — if not more so — through oral media as through written ones." As the court of appeals noted, the rule requiring a written document in order to maintain a cause of action for public disclosure of private facts is "outmoded" and "better suited to an era when the town crier was the purveyor of news." The court went on to explain that a contrary finding would be inconsistent with the tort's purpose of allowing a person to define his or her public persona.

Ignat also appealed from the lower court's dismissal of her California state constitutional right to privacy claim, which was dismissed on the grounds Ignat had failed to allege a cause of action based on the constitution. Ignat argued the common law privacy claim, which was raised in her complaint, was essentially the same as a cause of action based on the constitution and therefore did not constitute a new, unpleaded theory in opposing Yum! Brand's summary judgment motion. The Court of Appeals also rejected this argument, stating that the California Supreme Court "regards the two legal theories as providing separate, albeit related, ways to insure privacy." Unlike the common law tort, which requires publicity, the constitutional right to privacy focuses on institutional record-keeping and does not require wide dissemination of private information.

Employers Must Use Revised Employment Eligibility Verification Form I-9

Effective May 7, 2013, all employers were required to begin using the revised Form I-9 for verifying the identity and employment authorization of all new hires. (The new form includes a revision date of March 8, 2013). The revised Form I-9 makes several improvements aimed at minimizing errors in completion of the forms. Employers should keep in mind they are not required to complete the new Form I-9 for current employees if they already have a properly completed form on file. The revised form is available online at *www.uscis.gov/I-9*. As a reminder, employers are required to maintain a Form I-9 for as long as an individual works for the employer and for the required retention period for terminated employees, which is either three years after the date of hire or one year after the date employment ended, whichever is later.

Senate Passes Comprehensive Immigration Reform Bill

On June 26, 2013, the Senate passed the Border Security, Economic Opportunity and Immigration Modernization Act of 2013 (S. 744), by a margin of 68-32. The bill includes several workplace enforcement measures and enhanced border security actions. In addition, the bill contains a variety of provisions impacting the employment of foreign national skilled professionals on non-immigrant visas, including an increase to the annual H-1B cap, increased filing fees and penalties for noncompliance, a new wage system that effectively increases prevailing wages for H-1B workers, and restrictions on certain high-volume H-1B and L-1B visa filers. The bill would make the E-Verify system mandatory for all employers and preempt most state and local employment verification laws. The bill also includes provisions aimed at expanding non-immigrant and green card opportunities as well as creating a pathway to citizenship for undocumented immigrants. Employers also should note that a bipartisan group is working on unveiling a comprehensive immigration reform proposal in the House of Representatives.

Attorney contacts appear on the next page.

Employment Flash **provides information on recent developments in the law affecting the corporate workspace and employees. If you have any questions regarding the matters discussed in this newsletter, please call one of the following attorneys or your regular Skadden, Arps contact:**

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