New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 24
FRIDAY, AUGUST 2, 2013

LABOR RELATIONS

Expert Analysis

Supreme Court Review: Retaliation, Harassment, Arbitration, DOMA

Today's column is our second article discussing decisions by the U.S. Supreme Court during the 2012-13 term that will have a significant impact on employers.

Title VII

On June 24, 2013, the court issued two highly anticipated rulings interpreting Title VII of the Civil Rights Act of 1964. In the two opinions, the court (1) made it more difficult for employees to succeed in Title VII retaliation claims, and (2) narrowed the class of employees who qualify as "supervisors" who can potentially create strict liability for employers in Title VII harassment cases.

In the first case, *University of Texas Southwestern Medical Center v. Nassar*, 133 SCt 2517 (2013), the court ruled 5-4 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, a physician of Middle Eastern descent, was employed as a faculty member at the University of Texas medical center 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, 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 U.S. Court of Appeals for 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 one of those protected characteristics "was a motivating factor for any employment practice, even though other factors also motivated the practice." §2000e-2(m). 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, Congress had not changed the traditional but-for standard of causation when deciding retaliation claims under Title VII.

By **John P. Furfaro**

And **Risa M. Salins**

In dissent, Justice Ruth Bader Ginsburg asserted the majority "has seized on a provision, §2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation."

Supervisors

In the second Title VII case, *Vance v. Ball State University*, 133 SCt 2434 (2013), the court resolved a circuit split regarding the definition of "supervisor" for purposes of vicarious liability under Title VII. The court held 5-4 that an employee is a "supervisor" if and only if the employer has empowered that employee to take tangible employment actions against the victim, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

As background, under Supreme Court precedent in *Faragher v. City of Boca Raton*, 524 US 775 (1998), and *Burlington Industries v. Ellerth*, 524 US 742 (1998), employer liability for workplace harassment depends on the status of the harasser. If the harassing employee is a co-worker, the employer is liable only if it was negligent in controlling working conditions. If the harassing employee is a "supervisor," however, different rules apply. If the supervisor's harassment 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, as an affirmative defense, (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) plaintiff unreasonably failed to take advantage of such opportunities.

In *Ball State*, petitioner, an African-American catering assistant at the university, claimed she was subjected to a racially hostile work environment in violation of Title VII. Petitioner contended the alleged harasser was her supervisor and her employer, therefore, was vicariously liable. The district court granted summary judgment in favor of the employer and the U.S. Court of Appeals for the Seventh Circuit affirmed because under applicable precedent an employee is only a supervisor if she has "the power to hire, fire, demote, promote, transfer, or discipline an employee." Because the alleged harasser did not possess those powers, the university could not be held liable unless petitioner could prove negligence; the Seventh Circuit found the university was not negligent.

On June 24, 2013, the court issued two highly anticipated rulings interpreting Title VII of the Civil Rights Act of 1964.

The Supreme Court affirmed. It first looked at the disagreement among the lower courts. The First, Seventh and Eighth circuits held an employee is not a supervisor unless he or she is authorized to take tangible employment actions against the victim. However, the more open-ended approach advocated by the Equal Employment Opportunity Commission (EEOC), and adopted by the Second and Fourth circuits, ties supervi-

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* TATUM JI, *a summer associate at the firm, assisted in the preparation of this article.*

sor status to "the ability to exercise significant direction over the victim's daily work."

In rejecting EEOC guidance, the court looked to the framework set out in *Faragher* and *Ellerth*, which it found "presupposes a clear distinction between supervisors and coworkers" and "contemplate[s] a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions." The court stated this approach will not leave employees unprotected against harassment by coworkers with authority to assign daily tasks because, in such cases, a victim can prevail by showing the employer was negligent in permitting the harassment to occur. The majority further reasoned a clear-cut definition of "supervisor" would allow the question of supervisor status to be resolved without undue difficulty, often as a matter of law before trial.

In dissent, Justice Ginsburg wrote: "The limitation the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplace."

Class Arbitration

The court handed down two important decisions on class arbitration this June. Though neither case arises specifically in the employment context, both will have far-reaching implications for employers. In the first, *Oxford Health Plans v. Sutter*, 133 SCt 2064 (2013), the court unanimously held an arbitrator does not exceed his powers under the Federal Arbitration Act (FAA) when he decides, with both parties' agreement, whether a contract authorizes class arbitration. Given the limited review of arbitrators' decisions under FAA §10(a)(4), the court refused to vacate the arbitrator's decision to allow class arbitration, even though the arbitration agreement was silent on the issue.

Respondent, a New Jersey pediatrician, was party to a contract with Oxford under which he provided medical care to Oxford's members in exchange for Oxford's payment of prescribed rates. The contract required binding arbitration of contractual disputes but did not make express reference to class arbitration. Respondent filed a proposed class action in New Jersey Superior Court, alleging Oxford failed to fully and promptly pay him and other physicians with similar contracts.

The parties agreed, in court compelled arbitration, that an arbitrator should decide whether their contract authorized class arbitration, and the arbitrator concluded it did. Oxford then filed a motion in federal court to vacate the arbitrator's decision, claiming he exceeded his powers under FAA §10(a)(4). The district court denied the motion and the U.S. Court of Appeals for the Third Circuit affirmed. While the arbitration was proceeding, the Supreme Court decided *Stolt-Nielsen v. AnimalFeeds Int'l*, 559 US 662 (2010), which vacated an arbitration panel's decision to allow class arbitration because "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." In light of *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider his decision to allow class arbitration. The arbitrator reiterated that class arbitration was available and Oxford again sought judicial review. Both the district court and the Third Circuit again affirmed.

The Supreme Court affirmed, emphasizing that where both parties authorized the arbitrator to interpret the parties' contract, the arbitral decision will only be set aside under FAA §10(a)(4) if the arbitrator strayed from his delegated authority, not if the arbitrator committed an error in construing the contract. The court held *Stolt-Nielsen* did not support Oxford's contrary view. There, the issue was whether, based solely on the parties' consent to arbitration proceedings, an arbitrator could compel parties to take part in class procedures. Here, the court did not hold that an arbitration agreement silent with respect to class arbitration implicitly authorizes classwide proceedings. However, it made clear federal courts will not step in to review decisions the parties agreed an arbitrator should make.

The court handed down two important decisions on class arbitration this June. Though neither case arises specifically in the employment context, both will have far-reaching implications for employers.

Class Waivers

In the second class arbitration case, *American Express v. Italian Colors Restaurant*, 133 SCt 2304 (2013), the court held in a 5-3 decision that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

Respondents, a purported class of merchants, agreed with American Express that all disputes would be resolved by arbitration and that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." When a dispute arose over whether American Express breached federal antitrust laws (the Sherman and Clayton Acts), respondents filed a class action against American Express in federal court. American Express moved to compel arbitration under the FAA and specifically sought an order compelling each plaintiff to arbitrate individually.

The district court granted American Express's motion, but the U.S. Court of Appeals for the Second Circuit reversed, finding the class waiver unenforceable because respondents established that individual arbitrations would impose prohibitive costs on each merchant far exceeding their potential recoveries. The Second Circuit then sua sponte considered its decision in light of the Supreme Court's ruling in *AT&T Mobility v. Concepcion*, 131 SCt 1740 (2011), which held the FAA preempted a state law barring enforcement of a class arbitration waiver. However, the Second Circuit found *AT&T* did not apply to this case involving federal statutory claims.

The Supreme Court reversed, stating "truth to tell, our decision in *AT&T Mobility* all but resolves this case." The court determined in *AT&T Mobility* that enforcement of arbitration agreements, even if it meant the prosecution of claims "might otherwise slip through the legal system," was necessary to parties' freedom of contract. Here, the court found the Sherman and Clayton Acts do not evince an intent to preclude a waiver of class-action procedure and, therefore, a court cannot invalidate the parties' agreement on arbitration. Respondents argued enforcing the waiver would bar "effective vindication" of their claims because they had no economic incentive to pursue their claims individually in arbitration. The court rejected this argument, reasoning "the fact that it [was] not worth the expense in proving a statutory remedy d[id] not constitute the elimination of the right to pursue that remedy."

Writing for the dissent, Justice Elena Kagan argued the "effective vindication" rule should have been applied here "to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights."

DOMA

On June 26, 2013, the court in *United States v. Windsor*, 133 SCt 2675 (2013), in a 5-4 decision, struck down the Defense of Marriage Act as an unconstitutional violation of the Fifth Amendment. While not an employment law decision, the court's ruling will have far-reaching implications for employers in the 13 states (and the District of Columbia) that currently recognize same-sex marriage. For example, same-sex spouses may be deemed beneficiaries under defined contribution plans, subject to the spouse's right to waive survivor benefits; retirement plan provisions addressing spousal rights and benefits such as qualified domestic relations orders must be administered consistent with the court's decision; rights pertaining to spouses under COBRA, the Health Insurance Portability and Accountability Act and the Family and Medical Leave Act will now be available with respect to same-sex spouses; and employer-provided medical benefits to same-sex spouses will no longer be considered taxable income. *Windsor's* impact is not yet clear for employers in states that do not recognize same-sex marriages.