New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 26
FRIDAY, AUGUST 7, 2015

Labor Relations

Expert Analysis

Supreme Court Review: Marriage, Health Care, Discrimination, Retirees

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This is the second of two columns discussing U.S. Supreme Court decisions from the 2014-15 term in the area of labor and employment law. This month we review rulings pertaining to recognition of same-sex marriage, the validity of health-care subsidies issued by federal marketplaces under the Affordable Care Act, the tests for proving religious discrimination and pregnancy discrimination, and the standards governing claims for retiree benefits arising from collective-bargaining agreements.

Same-Sex Marriage

In the historic decision of *Obergefell v. Hodges*, 135 SCt 2584 (2015), the Supreme Court held on June 26, 2015, that same-sex couples have a constitutional right to marry in all states and all states must recognize same-sex marriages lawfully performed in other states. The ruling has significant implications for employers, as same-sex spouses are now entitled to the rights extended to opposite-sex spouses under both federal and state law.

Obergefell comes exactly two years after the Supreme Court's decision in *United States v. Windsor*, 133 SCt 2675 (2013), that "spouse" includes same-sex spouses for purposes of federal law. However, *Windsor* addressed only the issue of whether the federal government must recognize same-sex marriages for federal law purposes. *Obergefell* was a consolidation of petitioners' separate lawsuits against state officials in Kentucky, Michigan, Ohio and Tennessee, claiming the states violated the Fourteenth Amendment by denying petitioners the right to marry and by not recognizing their marriages that were lawfully performed in another state.

In the 5-4 decision authored by Justice Anthony Kennedy, the Supreme Court concluded that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the fundamental right to marriage applies with equal force to same-sex couples. Thus, laws banning the right of same-sex couples to marry were "in essence unequal" as they denied same-sex couples all the benefits afforded to opposite-sex couples. In finding states must recognize marriages performed elsewhere, Kennedy reasoned that "[b]eing married in one State but having that valid marriage denied in another is one of 'the most perplexing and stressing complication[s]' in the law of domestic relations."

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After *Windsor*, the Internal Revenue Service and U.S. Department of Labor issued guidance providing same-sex marriages would be recognized for purposes of the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act (ERISA) if they were legally recognized in the state where the marriage was celebrated. Thus, IRC and ERISA protections were extended to same-sex spouses even if the couples lived in a state that did not recognize same-sex marriage. These protections included same-sex spouse entitlement to joint and survivor annuities under defined benefits plans, status as a default beneficiary under 401(k) plans, COBRA continuation elections and flexible spending account participation.

In the wake of *Obergefell*, state law, in particular in the areas of insurance and taxes, will have to conform. Employers with fully insured health and welfare plans provided under policies issued in states that previously banned same-sex marriage will now be required to offer coverage to same-sex spouses that is equivalent to the coverage those employers offer to opposite-sex spouses.

Employers located in states that did not previously recognize same-sex marriages also should review and update employee handbooks and policies to comply with the court's ruling. In particular, following *Obergefell*, employers must permit employees to take medical leave to care for same-sex spouses under the Family and Medical Leave Act (FMLA). On Feb. 25, 2015, the Labor Department issued a Final Rule amending the FMLA's definition of spouse to ensure lawfully married couples, whether opposite-sex or same-sex, have consistent federal family leave rights regardless of where they live. However, in March 2015, a federal district judge in *Texas v. United States*, No 7:15-cv-00056-0 (March 26, 2015), granted a preliminary injunction staying enforcement of the Labor Department's Final Rule because same-sex marriage was not recognized in the states seeking the injunction. Following *Obergefell*, employers in states that previously did not recognize same-sex marriage will be required to follow the Labor Department's Final Rule. In light of *Obergefell*, the *Texas v. United States* injunction was dissolved.

Conversely, *Obergefell* does not appear to provide any protection for unmarried same-sex couples who are in a domestic partnership or civil union. Some employers are reportedly contemplating changing their coverage for domestic partner benefits, but it remains to be seen how many will actually implement any such changes.

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Health-Care Subsidies

In another long-awaited ruling, on June 25, 2015, the Supreme Court in *King v. Burwell*, 135 SCt 2480 (2015), rejected a challenge to a key provision of the Affordable Care Act (ACA). The court ruled 6-3 that statutory language in the ACA authorizing tax credits for consumers on "an exchange established by the State" allows the federal government to provide tax credits to consumers on both state and federal exchanges. The decision ensures tax credits will still be available on health insurance markets in the 34 states that rely on federal exchanges and means that approximately 6.4 million Americans who currently receive subsidies in these states will continue to benefit from the ACA.

In a decision authored by Chief Justice John Roberts, the court looked beyond the plain language of the ACA and examined its broader structure with a particular focus on congressional intent and potential consequences of limiting health-care subsidy eligibility to individuals residing in states with their own exchanges. The court concluded that limiting the allowance of health-care subsidies to state exchanges would "destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the [ACA] to avoid."

The most significant result of *King* is that the ACA's employer mandate remains in effect in its entirety for states without their own exchanges. This means large employers with 50 or more full-time employees are still subject to tax penalties if any of their employees receive federal tax credits to buy health insurance, regardless of whether the exchange is run by the federal government or by a state. Thus, such employers, even in states with a federal exchange, will continue to risk penalties if they do not offer affordable minimum value coverage to substantially all of their full-time employees.

As the King decision is the second from the Supreme Court in the last three years to preserve the ACA and thus maintain the status quo, Justice Antonin Scalia proposed calling the ACA "SCOTUScare" in his dissent.

Religious Discrimination

In *EEOC v. Abercrombie & Fitch*, 135 SCt 2028 (2015), the Supreme Court decided that an employer can be held liable for disparate treatment based on religion under Title VII of the Civil Rights Act of 1964 if the employer makes an applicant's religious practice, whether or not it has been confirmed, a motivating factor in employment decisions.

A practicing Muslim applied for a position at Abercrombie & Fitch (A&F) and wore a headscarf during her interview. The applicant earned an interview score that qualified her for employment under A&F's rating system. The interviewer informed A&F's district manager that she believed the applicant wore a headscarf for religious purposes. A&F's district manager said the applicant's headscarf conflicted with A&F's Look Policy, which prohibits employees from wearing "caps," and A&F did not hire her.

The Equal Employment Opportunity Commission (EEOC) sued A&F on the applicant's behalf, claiming A&F discriminated against her on the basis of her religion in violation of Title VII. The U.S. Court of Appeals for the Tenth Circuit granted A&F summary judgment, concluding, "ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with the actual knowledge of his need for an accommodation."

In an 8-1 decision authored by Justice Scalia, the Supreme Court reversed, holding an applicant must only show that his or her need for an accommodation was a motivating factor in the employer's decision not to hire the applicant and a showing of actual knowledge of the need is not required. The court looked to the text of Title VII, 42 USCA §2000e-2(a)(1), and highlighted that its disparate treatment provision does not have a knowledge requirement, rather it "prohibits certain motives."

Pregnancy Discrimination

In *Young v. United Parcel Service*, 135 SCt 1338 (2015), the Supreme Court created a new standard for deciding pregnancy discrimination claims under the Pregnancy Discrimination Act (PDA), which states that "women affected by pregnancy…shall be treated the same for all employment related purposes…*as other persons not so affected but similar in their ability or inability to work*." 42 USC §2000e-(k)(emphasis added).

Plaintiff was a UPS driver whose doctor recommended that she not lift packages more than 20 pounds for the first 20 weeks of pregnancy and no more than 10 pounds thereafter. UPS told plaintiff she could not return to work due to her inability to meet the job requirement of handling packages weighing up to 70 pounds. However, UPS provided accommodations to drivers who had become disabled on the job, lost their Department of Transport certifications or suffered from a disability covered by the Americans with Disabilities Act. Plaintiff subsequently sued UPS for pregnancy discrimination.

In a 6-3 decision delivered by Justice Stephen Breyer, the Supreme Court held that a pregnant employee can make a prima facie case of disparate treatment under the PDA by using the *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973), framework to show (1) she belongs to a protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability to work." After these elements are established, the employer has the burden of offering legitimate and nondiscriminatory reasons for its refusal to accommodate. Then, the pregnant employee has the burden of showing the proffered reasons are pretextual.

The court noted a plaintiff could reach a jury on this issue by providing enough evidence to show the employer's policies inflict a significant burden on pregnant employees and the proffered reasons are not sufficiently strong to justify the burden. The court remanded to the U.S. Court of Appeals for the Fourth Circuit for further proceedings.

The court noted the minimized impact of this ruling due to the 2008 amendment to the ADA which expanded the definition of "disability" to include "physical or mental impairment[s] that substantially limi[t]" a person's ability to lift, stand, or bend. 42 USC §12101. The EEOC interprets this expanded definition to require employers to accommodate employees whose temporary lift restrictions originate off the job. Notably, on June 25, 2015, the EEOC issued a revised Enforcement Guidance on Pregnancy Discrimination to align its July 2014 revisions with the Young decision.

Retiree Benefits

In *M&G Polymers v. Tacket*, 135 SCt 926 (2015), the Supreme Court held that ordinary contract rules govern the interpretation of collective-bargaining agreements. The court ruled the U.S. Court of Appeals for the Sixth Circuit's longstanding inference of vested retiree welfare benefits, known as the Yard-Man inference, is inconsistent with ordinary principles of contract law.

A group of retired employees sued their previous employer claiming certain expired collective-bargaining agreements provided the retirees with a right to lifetime contribution-free health care benefits. The employer argued the retiree benefits provisions terminated when the collective-bargaining agreement expired.

The Sixth Circuit found for the retirees, relying on its decision in *UAW v. Yard-Man*, 716 F2d 1476 (6th Cir. 1983), which concluded that in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. The Supreme Court reversed, overturning *Yard-Man*, and ruling that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." The case was vacated and remanded to the Sixth Circuit for the court to apply ordinary contract principles.