New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 255—NO. 106

FRIDAY, JUNE 3, 2016

Labor Relations

Expert Analysis

Supreme Court Review: Agency Shop, Class Certification, ERISA, Arbitration


By **John P. Furfaro**

And **Risa M. Salins**

This is the first of two columns discussing U.S. Supreme Court decisions from the 2015-16 term in the area of labor and employment law. This month we review rulings pertaining to class certification under the Fair Labor Standards Act (FLSA); the viability of public-sector agency shop arrangements under the First Amendment; equitable relief, the duty of prudence and preemption under the Employee Retirement Income Security Act (ERISA); and the validity of class-arbitration waivers.

Class Certification

In *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036 (2016), the Supreme Court, in a 6-2 decision, upheld the lower court's decision to certify and maintain an FLSA class based on statistical sampling alone. *Tyson* involved a group of employees from various departments of the company's processing facility who claimed the company did not compensate the employees for, or even track, the time it took to "don and doff" (put on and take off) protective gear. The employees argued the function was "integral and indispensable" to their jobs and therefore should have been included in the calculation of their working time for purposes of overtime payments under the FLSA and Iowa's Wage Payment Collection Law.

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As the company did not monitor the time it took employees to don and doff the various gear, the employees relied on experts who conducted a statistical sampling analysis, ultimately averaging the variance in times. The company asserted reliance on this statistical sampling was improper because the employees took on and removed different protective gear, and because any damages recovered could be distributed to some employees who did not work overtime.

The employees' experts concluded the average time to perform the function among the departments varied by approximately four minutes and the sampling supported an award of approximately $6.7 million. The jury more than halved this recommendation, awarding the class about $2.9 million in unpaid wages, but without any clear explanation as to why it made this decision. The U.S. Court of Appeals for the Eighth Circuit denied the company's motion to set aside the verdict, reasoning that although it required inference from representative proof, this was permissible because the employer had failed to keep records.

The Supreme Court affirmed, reasoning the differences in times for donning and doffing were not fatal

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* MARI C. STONEBRAKER, *an associate at the firm, and* EMILY D. SAFKO, *a summer associate at the firm, assisted in the preparation of this article.*

to commonality. It explained that where employers violate their statutory duty to keep proper records, employees are left with no way to establish the time spent performing uncompensated work, making representative sampling appropriate. The majority noted the difficulty of ensuring the award only went to those actually injured (i.e., those who worked overtime), but concluded this issue will not be ripe until the district court decides how to allocate the damages among class members. Chief Justice John Roberts, in a concurring opinion, expressed his doubts that the district court could fashion a method for awarding damages only to those class members who suffered actual injury.

In dissent, Justice Clarence Thomas joined by Justice Samuel Alito asserted the majority's decision required employers to "either track any time that might be the subject of an innovative lawsuit or they must defend class actions against representative evidence that unfairly homogenize an individual issue."

Agency Shop

In *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016), an equally divided Supreme Court issued a one-sentence opinion affirming the U.S. Court of Appeals for the Ninth Circuit's decision to uphold the constitutional validity of public-sector "agency-shop" arrangements in California under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Here, all California public school teachers were required to pay agency fees to the union for their school districts regardless of whether they wanted union representation. Under California law, a union may become the exclusive representative for a bargaining unit, such as a public school district, if the majority of employees would like to be represented by that union. As the exclusive bargaining representative, the union may establish an agency-shop arrangement that requires all employees to either become union members and pay union dues, or to remain non-member employees and pay equivalent agency fees. Non-member employees may opt out of paying non-chargeable agency fees, or fees not "germane to collective bargaining." Chargeable fees are used only for collective bargaining efforts and not for political purposes.

The Supreme Court previously found public-sector agency-shop arrangements were constitutionally valid in *Abood*, but the plaintiffs in *Friedrichs* argued *Abood* should be overturned. The teachers asserted such arrangements violate their First Amendment rights to free speech and association both by compelling them to financially contribute to the union and by requiring them to affirmatively object, rather than affirmatively consent, to subsidizing non-chargeable speech by public-sector unions.

The district court found Supreme Court precedent holding public-sector agency-shop arrangements constitutional was controlling and ruled in favor of the unions. The court relied on *Abood*, which found requiring all employees to contribute to a union was constitutional, and a Ninth Circuit case upholding the constitutionality of requiring non-member employees to affirmatively opt out of paying non-chargeable fees. The Ninth Circuit summarily affirmed, and the Supreme Court simply affirmed the Ninth Circuit decision in a 4-4 tie.

The court's failure to issue a majority decision leaves some uncertainty but, for now, the right of public employee unions to charge agency-shop fees remains intact. On April 8, 2016, the plaintiffs filed a petition for rehearing requesting the court to rehear this case after it obtains a full complement of justices capable of reaching a majority resolution.

Plan Recovery

In *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, 136 S.Ct. 651 (2016), the Supreme Court, in an 8-1 decision, resolved a circuit split regarding appropriate equitable relief under an ERISA health-care benefit plan with reimbursement rights. The court held that where a participant dissipates a third-party settlement on non-traceable items, the plan fiduciary cannot bring suit under ERISA §502(a)(3) to attach the participant's general assets for purposes of plan reimbursement.

In *Montanile*, an employee, who was an ERISA health-care plan participant, was hit by a drunken driver and badly injured. His medical expenses were covered by the plan, which contained language obligating participants to reimburse the plan for such expenses if they subsequently recover any amounts from a third party. The participant sued the driver and recovered $500,000 in settlement.

The plan fiduciary sought recovery, but after discussions with the participant's attorney broke down the attorney informed the fiduciary he would distribute the settlement funds to the participant unless the fiduciary responded within 14 days, which the fiduciary did not do. Six months later, the fiduciary brought suit pursuant to ERISA §502(a)(3) to recover the reimbursement amount.

Under ERISA §502(a)(3), plan fiduciaries may file civil suits to obtain appropriate equitable relief to enforce the terms of an ERISA plan. However, here it appeared the participant had dissipated the settlement funds on non-traceable items. The district court held the plan was entitled to reimbursement from the participant's general assets. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

The Supreme Court reversed and remanded, explaining recovery from a participant's general assets, as opposed to from the settlement funds, constituted a legal remedy—even if the basis of that remedy was equitable—therefore, such recovery fell outside of the fiduciary's equitable powers under ERISA §502(a). The fiduciary argued this holding would encourage participants to dissipate any settlements quickly before fiduciaries had a chance to sue, but the court rejected this argument, noting that in this case the fiduciary had ample notice of the participant's settlement and an adequate opportunity to preserve those funds.

In dissent, Justice Ruth Bader Ginsburg argued the majority had reached a "bizarre conclusion" allowing participants to escape their reimbursement obligations by quickly dissipating settlement funds.

ERISA Prudence

In *Amgen v. Harris*, 136 S.Ct. 758 (2016), the Supreme Court unanimously held that, in evaluating a claim for breach of the duty of prudence under ERISA, a court must ensure the complaint plausibly alleges a prudent fiduciary in the same position could not have concluded the alternative action would do more harm than good.

> In 'Gobeille,' the Supreme Court ruled that a Vermont law requiring certain health insurers to report payments and other information related to health care for compilation in an all-inclusive health care database is preempted by ERISA.

Here, employees were participants in eligible individual account plans which (like Employee Stock Ownership Plans (ESOPs)) offered employees the option for ownership in employer stock. When the value of the company's stock fell in 2007, the stockholder employees filed a class action against the plan fiduciaries alleging they had breached their fiduciary duties, including ERISA's duty of prudence. The district court granted the fiduciaries' motion to dismiss, but the Ninth Circuit reversed.

The Supreme Court initially remanded the case after its decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), which held ESOP fiduciaries are not entitled to a "presumption of prudence." Rather, they are "subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets." Noting Congress sought to encourage the creation of ESOPs, a purpose the court recognized may come into tension with ERISA's general duty of prudence, the Fifth Third court held: "To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."

It also clarified that courts should determine whether the complaint itself states a claim satisfying that liability standard. On remand, the Ninth Circuit affirmed its reversal, stating it had already assumed the standards for ERISA fiduciary liability laid out in *Fifth Third*.

The Supreme Court reversed the Ninth Circuit's ruling, holding it failed to properly evaluate the complaint in the manner required by *Fifth Third* for claims of breach of the duty of prudence. In particular, the court found the complaint did not contain an allegation detailing an alternative action the plan fiduciaries could have taken which would have been consistent with the securities laws and which a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than help it. The court remanded the case, leaving to the district court whether the stockholders may amend their complaint to adequately plead a claim for breach of the duty of prudence under the Fifth Third standards.

ERISA Preemption

In *Gobeille v. Liberty Mutual Insurance Co.*, 136 S.Ct. 936 (2016), the Supreme Court ruled 6-2 that a Vermont law requiring certain health insurers to report payments and other information related to health care for compilation in an all-inclusive health care database is preempted by ERISA.

Here, a health plan concerned that disclosure of confidential information required by the Vermont statute might violate its ERISA fiduciary duties sought a declaration that ERISA preempts application of the statute to the plan. ERISA preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan" or have an impermissible "connection with" ERISA plans—meaning state laws that govern, or interfere with the uniformity of, plan administration. Here, given ERISA's extensive reporting and disclosure requirements, the majority found Vermont's law, which compels plans to report detailed information about claims and plan members, intrudes upon "a central matter of plan administration" and therefore is preempted. Justice Ginsburg, in dissent, argued Vermont's effort to track health care service "does not impermissibly intrude on ERISA's dominion over employee benefit plans."

Class Waivers

In *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2015), the Supreme Court ruled 6-3 that the Federal Arbitration Act (FAA) preempts California state laws that invalidate class-arbitration waivers. Therefore, the court found the arbitration provision at issue was enforceable. Although this is not an employment law case, it has significant implications for employers with arbitration agreements.

Respondents, California residents, each entered into a service agreement with DIRECTV, including an arbitration provision and waiver of class arbitration. The agreement stated that if the "law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision "is unenforceable." The agreement also indicated the FAA governs the arbitration provision. Notably, in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court found California state laws invalidating class-arbitration waivers were inconsistent with the FAA.

When respondents brought suit against DIRECTV, DIRECTV moved to enforce the arbitration provision, but the district court found the arbitration provision was unenforceable. The California Court of Appeal affirmed, explaining California state law would find the class-arbitration waiver unenforceable, which, according to the agreement, would invalidate the entire arbitration provision.

The Supreme Court reversed, finding the FAA preempted state law that invalidated class-arbitration waivers. Specifically, the majority found the California Court of Appeal interpreted California law in a way that made it inconsistent with the court's holding in *Concepcion*. The court also found the lower court's interpretation of the contract was unique to the arbitration context and failed to place arbitration contracts "on equal footing with all other contracts," making it inconsistent with the FAA. In particular, the court found respondents did not point to any contract case from California or any other state that interprets the "law of your state" to include invalid state law, and stated: "The view that state law retains independent force even after it has been authoritatively invalidated by the Court is one [that] courts are unlikely to accept as a general matter and to apply in other contexts."

Justice Thomas dissented, arguing the FAA "does not apply to proceedings in state courts." Justice Ginsburg wrote a separate dissenting opinion joined by Justice Sonia Sotomayor, emphasizing the ambiguous clause "law of your state" should have been interpreted against the drafting party.