New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 256—NO. 25

FRIDAY, AUGUST 5, 2016

Labor Relations

Expert Analysis

Supreme Court Review: FLSA, Title VII, First Amendment, Religious Freedom

By **John P. Furfaro**

And **Risa M. Salins**

This is the second 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 whether automobile service advisors are exempt from overtime pay under the Fair Labor Standards Act (FLSA); whether a ruling on the merits is a necessary predicate to finding a defendant is a prevailing party eligible for an attorney fees award under Title VII of the Civil Rights Act of 1964 (Title VII); when the statute of limitations period begins running in constructive discharge cases under Title VII; whether a public sector employee may bring a First Amendment claim where his employer takes an adverse employment action based on a mistaken belief the employee engaged in constitutionally protected political activity; and whether requiring religious non-profits to affirmatively opt out of providing employees with contraceptive coverage under the Affordable Care Act (ACA) violates the Religious Freedom Restoration Act (RFRA).

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* KASEY A. YOUNGENTOB *and* EMILY D. SAFKO, *summer associates at the firm, assisted in the preparation of this article.*

The Supreme Court, in a 7-1 decision, ruled that in a constructive discharge case under Title VII, the limitations period begins to run once the employee tenders his or her resignation.

Overtime Exemption

In 2011, the U.S. Department of Labor (DOL) issued an interpretation, at 29 CFR §779.372(c), stating automobile service advisors were not included in the FLSA exemption from overtime compensation for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles…," at 29 USC §213(b)(10)(A) (the Auto Sales Exemption). Departing from the DOL's decades-old practice of treating service advisors as exempt, the DOL interpreted the term "salesman" narrowly to mean "only an employee who sells automobiles, trucks, or farm implements"; automobile service advisors sell automobile repair and maintenance services, but not vehicles.

Encino Motorcars v. Navarro, 136 S.Ct. 2117 (2016), involved a group of current and former service advisors at an automobile dealership who alleged they were entitled to overtime pay under the FLSA; the dealership argued the automobile service advisors fell within the Auto Sales Exemption. The Supreme Court, in a 6-2 decision, held the DOL's 2011 interpretation of the Auto Sales Exemption was arbitrary and capricious and not entitled to deference.

In reaching its decision, the court focused on the fact that the DOL issued its 2011 interpretation without the reasoned explanation that was required in light of the DOL's change in position and the decades of industry reliance on the DOL's prior policy. The court stated, for example, the DOL did not explain or analyze why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services. In addition, the court recognized the retail automobile and truck dealership industry had relied since 1978 on the DOL's prior position that service advisors are exempt from overtime pay requirements, and structured their compensation plans against this understanding. The court remanded the case to the U.S. Court of Appeals for the Ninth Circuit to interpret the Auto Sales Exemption in the first instance without placing controlling weight on the DOL's 2011 regulation.

In a concurring opinion, Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, agreed that in issuing its 2011 rule the DOL did not satisfy its obligation to explain its reasons for the new policy. However, Ginsburg stressed that nothing in the majority's opinion disturbs well-established agency law and, in particular, there is no heightened standard of review where an agency has departed from a prior position. Justice Clarence Thomas, joined by Justice Samuel Alito, in dissent, agreed that the DOL's position was not entitled to deference, but would have held the automobile service advisors were covered by the Auto Sales Exemption instead of punting the question to the Ninth Circuit.

Attorney Fees

Title VII authorizes the award of attorney fees to a party who prevails in a discrimination or retaliation claim brought under the statute. In a helpful decision for employers, *CRST Van Expedited v. EEOC*, 136 S.Ct. 1642 (2016), the Supreme Court ruled, 8-0, that such fee-shifting provision allows attorney fees to be awarded to the defendant as the prevailing party even in instances where the defendant does not obtain a ruling on the merits.

CRST Van Expedited began when a former employee of the defendant trucking company filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII alleging she had been sexually harassed during her training. Following a year-and-a-half investigation, the EEOC determined there was reasonable cause to believe a class of employees and prospective employees had been subject to sexual harassment. After the EEOC's conciliation efforts failed, the EEOC, in its own name, filed a Title VII suit against the company.

During discovery, the EEOC identified over 250 women who had allegedly been subject to sexual harassment while working for the company. However, the district court dismissed all of the claims, including those on behalf of 67 women which, the district court found, were barred on the ground that the EEOC had not satisfied its statutory duty to investigate and conciliate its claims on their behalf before filing suit.

The district court awarded over $4 million in attorney fees to the defendant despite the fact that the court had not made a determination on the merits of the claims, reasoning such award was appropriate because the EEOC's failure to satisfy its duties was unreasonable. The U.S Court of Appeals for the Eighth Circuit reversed the attorney's fee award because the district court's dismissal was not a victory on the merits, but rather, was on procedural grounds.

In reversing the Eighth Circuit, the Supreme Court reasoned that common sense undermines the notion that a defendant cannot "prevail" under Title VII unless there is a disposition on the merits. The court stated a defendant has accomplished its objective any time the plaintiff's claim is rejected by the court for whatever reason. The court found the aims of Title VII's fee-shifting provision, primarily to deter non-meritorious suits, are furthered by broadly construing the statute to cover court determinations that are not on the merits.

The court refused to rule on the ultimate issue of whether the defendant employer was in fact entitled to fees. Instead, the court remanded the case to the Eighth Circuit to make determinations on the EEOC's argument that a defendant must obtain a preclusive judgment in order to prevail and, alternatively, the EEOC's position it had satisfied its pre-suit obligations was not frivolous, unreasonable or groundless.

Constructive Discharge

In *Green v. Brennan*, 136 S.Ct. 1769 (2016), the Supreme Court, in a 7-1 decision, ruled that in a constructive discharge case under Title VII, the limitations period begins to run once the employee tenders his or her resignation. Notably, the court indicated it would construe the federal statute that applies to private-sector employees in an identical way.

Green involved a Postal Service worker who complained to his employer that he was denied a promotion on the basis of his race. The employee alleged that following his complaint, two supervisors accused him of delaying the mail, exposing him to potential criminal liability. The employee entered into a settlement agreement with the Postal Service in December 2009, whereby he agreed to leave his then current post office and the Postal Service agreed not to pursue criminal charges; he later submitted his resignation paperwork in February 2010.

In order to pursue a Title VII claim of discrimination, a federal civil servant must reach out to an EEOC counselor within 45 days of the "matter alleged to be discriminatory." See 29 CFR §1614.105. In this case, the plaintiff reported a constructive discharge in violation of Title VII to an EEOC counselor 41 days after resigning, but 96 days after signing the agreement with the Postal Service. Plaintiff then filed suit in federal district court, which dismissed his complaint as untimely, and the U.S. Court of Appeals for the Tenth Circuit affirmed, holding the 45-day limitations period began to run on the date plaintiff signed the agreement.

> In 'Heffernan,' the Supreme Court, in a 6-2 decision, held a public employee is entitled to First Amendment protections where his demotion is predicated on a supervisor's mistaken belief that he was involved in political activity protected by the First Amendment, even if he did not actually engage in such activity.

In reversing the Tenth Circuit, the Supreme Court noted that Title VII regulations provide no guidance on whether a "matter alleged to be discriminatory" includes an employee's resignation. The court relied on the standard rule for limitations periods, which provides a limitations period ordinarily begins to run when a plaintiff has a complete and present cause of action. Since, in order to establish a constructive discharge claim, a plaintiff must prove both that he was discriminated against by his employer to the point that a reasonable person would have felt compelled to resign and that he actually resigned, the court found an employee does not have a "complete and present cause of action" for constructive discharge until he resigns. Accordingly, it held a constructive discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation.

Justice Thomas, in dissent, asserted the meaning of a "matter alleged to be discriminatory" refers to actions taken by the employer, not the employee, and argued the majority opinion will allow plaintiffs to control the statute of limitations in constructive discharge cases.

First Amendment

In *Heffernan v. City of Paterson*, 136 S.Ct. 1412 (2016), the Supreme Court, in a 6-2 decision, held a public employee is entitled to First Amendment protections where his demotion is predicated on a supervisor's mistaken belief that he was involved in political activity protected by the First Amendment, even if he did not actually engage in such activity.

Heffernan involved a police officer who was demoted after he was seen at a political candidate's office picking up a campaign sign. However, rather than being there to personally assist in the campaign, he was actually picking up the sign for his bedridden mother. The Supreme Court looked to prior First Amendment precedent and determined the employer's motive in firing or demoting an employee is the proper focus of a court's inquiry. Thus, the court found the fact that an employer took adverse action against an employee because it believed the employee was taking part in the protected activity, not whether the employee was actually taking part in that activity, is what entitles the employee to challenge the employer's action under the First Amendment.

The court further reasoned that the constitutional harm—discouraging employees from engaging in protected speech or association—is the same whether or not the employer's action is based on a factual mistake. Because the court noted its decision was based on an assumption the city had acted based upon an improper motive, the court remanded the case to the U.S. Court of Appeals for the Third Circuit for a determination as to whether that was, in fact, the case.

Justice Thomas, joined by Justice Alito, in dissent, argued the police officer was entitled to protection only if he actually engaged in the protected conduct. Thomas asserted the First Amendment only provides protection for actual conduct and that "harm alone is not enough; it has to be the right kind of harm."

Religious Freedom

Zubik v. Burwell, 136 S.Ct. 1557 (2016), one of the most closely watched cases of the 2015-16 term, was a religious-freedom challenge to the Affordable Care Act's contraceptive mandate brought by a group of religious non-profit organizations under the Religious Freedom Restoration Act. Under regulations issued by the Department of Health and Human Services, the non-profits were required to submit a form notifying the government that they object to providing their employees with insurance coverage for contraceptives; the government would then order the non-profits' insurers to provide the coverage as part of the employee policy, at no cost to the employer.

The Supreme Court issued a per curiam opinion declining to decide whether requiring petitioners to submit such a form "substantially burdens the exercise of their religion," in violation of the RFRA. After oral argument in the case, the court requested supplemental briefing on whether petitioners' insurance companies could provide contraceptive coverage to petitioners' employees without any such notice from petitioners, thereby eliminating any potential burden on their religious exercise.

Because the parties agreed that an arrangement where women receive contraceptive care with their health coverage was feasible, the court declined to consider the merits of the dispute regarding whether required submission of the form at issue substantially burdened petitioners' exercise of religion. Instead, the court vacated the judgments below and remanded the cases to the respective courts of appeals to provide the parties with an opportunity to reach an agreement on an approach that accommodates petitioners' religious exercise and ensures that women receive full and equal health coverage, including contraceptive coverage.

Relying on past opinions where it similarly remanded cases in light of new developments, the court made clear it did not decide "whether petitioners' religious exercise [was] substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." Justice Sotomayor's concurrence, joined by Justice Ginsburg, emphasized the court expressed no view on the merits of the cases and lower courts should not interpret the court's opinion in any way to decide the merits of the RFRA question.

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