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Supreme Court's Rulings on Same-Sex Rights Issues Have Impact on Employers

The U.S. Supreme Court issued two key rulings relating to marital status which are anticipated to have effect on employers throughout the country.

In *U.S. v. Windsor,* the Court addressed the federal Defense of Marriage Act (DOMA) and considered the terms "marriage" and "spouse" which as defined excluded same-sex partners such that they were deprived of the benefits of more than 1,000 federal laws, including, but not limited to, employer-sponsored retirement and health benefits. By virtue of its plain language, in states where same-sex marriage is legal, DOMA required employers to treat employees with same-sex spouses as single for some purposes (e.g., for federal tax withholdings) but as married for other state law benefits. The Supreme Court found DOMA unconstitutional. Although *Windsor* dealt specifically with a same-sex surviving spouse's estate tax liabilities, the Supreme Court's determination is much broader. In declaring DOMA unconstitutional, the Court essentially paved the way for lawfully-married same-sex partners to receive the same benefits under federal law as their heterosexual counterparts. It is believed that the decision will also have immediate implications for federal immigration law in that same-sex partners who are legally married under state law will now be entitled to the same immigration

benefits that previously were limited to heterosexual spouses. Further, U.S. citizens in such marriages will be more than likely to be able to obtain green cards for their same-sex spouses.

In *Hollingsworth v. Perry,* the Court effectively vacated California's Proposition 8, which amended the state's Constitution to define marriage as a union between a man and a woman. Same-sex couples challenged the proposition, arguing due process and equal protection under the law, and ultimately, the proposition was declared unconstitutional. Under the circumstances, same-sex marriages are once again legal in California. This will inevitably mean changes for employers in terms of tax withholdings, the provision of certain health-care and retirement benefits, as well as rights for protected leave under federal and state statutes.

While the total ramifications of these decisions are unknown at this point, employers may have to revise certain policies and practices in order to comply with the law.

United States v. Windsor, No. 12-307 (U.S. Sup. Ct. June 26, 2013)

Hollingsworth v. Perry, No. 12-144 (U.S. Sup.Ct. June 26, 2013)

Contact for more information: Amy K. Jensen

Proving Title VII Retaliation Claim Requires "But-For" Causation

A medical school maintained an affiliation agreement with a hospital that permitted faculty members to fill all hospital staff positions. When a physician perceived that his newly-hired superior was discriminating against him based upon his religion and ethnicity, he resigned from the school and sought to become a full-time employee of the hospital. The hospital initially agreed, but withdrew its offer when a representative of the school protested. Although the school representative had a legitimate reason for opposing the offer (i.e., the affiliation agreement required that all staff physicians be faculty members of the school), he also publicly opposed the physician's discrimination allegations and defended the accused superior. The physician sued the medical school and the hospital under Title VII of the Civil Rights Act of 1964, as amended, alleging that the hospital's decision to withdraw his offer was in retaliation for his speaking out about the alleged discrimination. The jury found for the physician. The U.S. Court of Appeals for the Fifth Circuit vacated the decision on the constructive discharge claim, but affirmed on the retaliation claim. Before the Supreme Court, the issue for consideration was the burden of proof applicable to claims based upon allegations of engaging in protected conduct under Title VII. The burden of proof was important because if the "motivating-factor" standard applied, the physician could prove his case by showing that the representative was in part retaliating because of his discrimination complaints; if the "but-for" standard applied, the physician most likely could not prove his case because the affiliation agreement also played an important role in the hospital's decision to withdraw the offer. The majority held that the stricter "but-for" test applies to retaliation claims, requiring a showing "that the harm would not have occurred" absent the retaliatory motive. "Congress acted deliberately when it omitted retaliation claims from" the "motivating-factor" portion of Title VII," Justice Anthony Kennedy wrote for the majority, and "[i]f Congress had desired to make the motivating-factor standard applicable to all Title VII claims, it could have." This decision

means that employees bringing Title VII retaliation claims will be required to prove that an employment action "would not have occurred" if not for the employer's retaliatory motive.

University of Texas Southwestern Medical Center v. Nassar, No. 12-484 (U.S. Sup. Ct. June 24, 2013)

Contact for more information: Brett A. Strand

U.S. Supreme Court Limits Definition of "Supervisor" in Significant Title VII Harassment Decision

An African American female who served in a university's dining services division filed a complaint against the university alleging racial harassment and discrimination due to the actions of a white catering specialist who worked at the same location. The catering specialist did not direct the employee's day-to-day activities or have authority to hire, fire, demote or discipline the employee, but sometimes handed the employee her list of tasks and directed the employee in the kitchen. The employee alleged that the catering specialist was her supervisor and that the university was liable for the creation of a racially hostile work environment. The U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for the employer. The matter proceeded for review by the U.S. Supreme Court. Under Title VII of the Civil Rights Act of 1964, as amended, an employer's liability for harassment may depend on the harasser's status. If the harassing employee is merely a co-worker, the employer is liable only if it was negligent in controlling working conditions. In this case, the Court held that "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." The Court specifically rejected the Equal Employment Opportunity Commission's definition of "supervisor," which required only that the individual have authority of sufficient magnitude to explicitly or implicitly assist the harasser in carry out the harassment. The Court further noted that the bright-line definition it accepted would streamline litigation and avoid the presentation of extensive evidence on the status of the harasser as well as the nature of the harassment. While this case helps to provide clarity as to the definition of a "supervisor," employers should note that job definitions and duties alone may not be determinative of supervisory status.

Vance v. Ball State University, No. 11-556 (U.S. Sup. Ct. June 24, 2013)

Contact for more information Eileen M. Caver

Supreme Court Approves Class-Action Arbitration Waiver, Rejects Argument That Individuals Will Not Have Financial Incentive and Capacity to Prove Claims

A group of merchants each separately signed a commercial arbitration agreement with a credit card company that required arbitration of claims but provided that such arbitration would be unavailable "on a class basis." Despite the agreement, the merchants filed a class-action suit against the company, alleging violations of federal antitrust laws. The company moved to compel individual arbitration of the claims. The merchants argued that the agreements that they signed were unenforceable under the

Federal Arbitration Act (FAA). The U.S. Court of Appeals for the Second Circuit agreed, finding that the arbitration agreements were invalid under the FAA due to the "prohibitive costs" that they imposed and that the class action suit therefore should go forward. The U.S. Supreme Court reversed and upheld the arbitration agreements. The Court found that the FAA was designed by Congress to ensure that arbitration remains "a matter of contract." Therefore, the majority observed, courts are compelled to "rigorously enforce" parties' private arbitration agreements, with just two exceptions: where a separate federal statute expressly overrides the FAA and where an arbitration agreement is so restrictive that it prevents "effective vindication" of a federal cause of action. The majority found that neither exception applied here. This case serves as a useful tool for employers when drafting arbitration agreements, and demonstrates that if an agreement does not require express waiver of federal rights or create unreasonable barriers to prosecuting a claim in the arbitration forum, a provision such as a class-action waiver may be found to be valid and enforceable. The argument that individual employees or customers would not have the financial incentive or capability to prove their federal claims individually is insufficient to invalidate such provisions, which now may be applied to class waivers regarding some federal discrimination and employment-related statutes.

American Express Co. et al v. Italian Colors Restaurant et al., Case No. 12-133 (U.S. Sup. Ct. June 20, 2013)

Contact for more information: Brett A. Strand

U.S. Supreme Court Upholds Arbitrator's Decision Finding That Contract Provides for Class Arbitration

A doctor had a contract with a health plan to provide medical services in exchange for payment. The contract contained a provision requiring the parties to submit all contractual disputes to final and binding arbitration. The doctor filed a proposed class action in New Jersey state court on the ground that he (and other contracted physicians) were not being paid in full as required under the contract. The health plan compelled arbitration, and the arbitrator was to decide whether the contract provided for class arbitration. The arbitrator ultimately concluded that the medical services contract supported class arbitration based on a provision which stated that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court . . ." The health plan disagreed and unsuccessfully sought to vacate the arbitrator's decision, claiming that the arbitrator "exceeded [his] powers" under Section 10(a)(4) of the Federal Arbitration Act (FAA), and relying upon prior decisions holding that class arbitration could not be compelled under the FAA unless the contract showed that the parties agreed to class arbitration. Due to the split in the U.S. Courts of Appeals, the U.S. Supreme Court reviewed the matter. The high court ultimately concluded that arbitrators possess broad authority to interpret contracts and that "[t]he arbitrator's construction holds, however good, bad, or ugly." The Court found that the arbitrator did not "exceed" the powers granted to him by the contract. The Court also noted that the health plan never asserted that class arbitration constituted a question of arbitrability, and stressed that it had agreed that the arbitrator would decide whether the contract provided for class arbitration. Employers should review their arbitration agreements to determine whether there are provisions specifically addressing the arbitrator's powers and the ability to appeal, as well as any language concerning the ability of employees to maintain class actions.

Oxford Health Plans LLC v. Sutter, Case No. 12-135 (U.S. Sup. Ct. June 10, 2013)

Contact for more information: Ambrose V. McCall

Court Incorrectly Denies Employee Opportunity to Present Comparator Evidence

A product engineer took an approved leave of absence to visit family in Gaza, but security issues rendered it impossible for him to return to the United States prior to the end of his leave. His employer extended the employee's leave, but he did not return. On the day he was scheduled to be terminated for failure to return to work, the employee sent an email to his supervisors advising that he was finally able to leave Israel. The employee returned to work a week later and learned he was fired. The employee sued, alleging age and national-origin discrimination and retaliation in violation of the Age Discrimination in Employment Act, the Elliott-Larsen Civil Rights Act, and Title VII of the Civil Rights Act of 1964 as amended. The employer moved for summary judgment, seeking dismissal of the action, which was denied. In discovery, the employee identified various employees as being "comparable" employees in order to establish that he was treated differently. The employer successfully sought to exclude the employee's evidence of comparable employees on the grounds that none of the individuals were similarly situated because the various leave and termination decisions relating to these employees were made independently by separate decision makers that had no involvement in the decisions concerning this employee's leave or termination. The U.S. Court of Appeals for the Sixth Circuit vacated the district court's grant of summary judgment. The court found that the district court focused on whether the employee had established that he was treated differently from similarly situated employees outside the protected class. The district court had stated that "to be deemed 'similarly situated,' the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor." The appellate court found that this supervisory inquiry does not automatically apply in every employment discrimination case, and that the court should make an independent determination about the relevancy of the data before reaching a conclusion. The court of appeals accordingly found that the district court improperly placed too much weight on the supervisory factor. It also noted that the district court made findings of contested facts and concluded that a certain supervisor terminated the employee pursuant to an automatic termination policy, though there was sufficient evidence demonstrating otherwise. Employers should be mindful that in discrimination cases, more and more courts are broadening the interpretation of who is considered to be "similarly situated" and allowing more comparative evidence, which can ultimately affect an employer's defenses.

Louzon v. Ford Motor Co., No. 11-2356 (6th Cir. June 4, 2013)

Contact for more information: Daniel A. Krawiec

Police Officers Forced to Retire Under City's Ordinance Lack Age Bias Claims

Five city police officers were forced to retire at age 65 under a city's ordinance that provided for mandatory retirement of police officers. The police officers sued the city and three city officials alleging

age discrimination under federal and state law. Prior to 2009, retiring police officers were allowed to request an extension of their employment on a yearly basis once they reached age 65, contingent upon passing a medical exam. In 2010, the chief of police denied five police officers' request for an extension of their employment. The district court dismissed the officers' claims, ruling that the officers failed to disprove the city's claim that its retirement plan was permissible under an exception to the Age Discrimination in Employment Act (ADEA). The district court also found the police officers' forced retirements did not violate the equal protection clause because they were rationally related to the police department's budget concerns. On appeal, the officers argued that the district court incorrectly assigned them the burden of determining whether the city's mandatory retirement ordinance was a subterfuge to evade the purpose of the ADEA. The U.S. Court of Appeals for the Sixth Circuit declined to resolve the burden of proof debate because the city ultimately proved that its mandatory retirement plan was "not subterfuge" to evade the ADEA's purposes. Specifically, the ADEA exception in Section 623(j) allowed the city to enforce a mandatory retirement rule. The Sixth Circuit joined the First, Second and Seventh Circuits when it ruled that the exception applies regardless of whether any individual officer harbors a discriminatory motive. The Sixth Circuit found that the express purpose of the city's retirement plan was to promote the efficiency of the police department, and that the decision to deny all requests for extended appointment for officers age 65 was consistent with that purpose. The officers argued that the district court erred by applying the "rational basis" test to their Fourteenth Amendment protection claims but the Sixth Circuit affirmed that the proper standard was used for assessing the constitutional claims. The court found that the chief of police's decision was rationally related to addressing the police department's budget concerns. The court also found that the decision to deny all requests for an extension was in furtherance of the stated purpose of the retirement plan — the efficiency of the department — and the officers failed to put forth evidence that the plan existed for some reason other than its stated purpose. This ruling is important to employers, and especially so to governmental entitles faced with balancing an economic crisis and providing for retirement benefits. Mandatory retirement plans must be carefully drafted and consistent with federal and state law.

Sadie v. Cleveland, No. 12-3252 (6th Cir. June 11, 2013)

Contact for more information: Geri Lynn Arrindell

Employer's Shifting Explanations for Termination Suggestive of Discrimination

A home health care worker informed her employer that she was pregnant. Her supervisor subsequently began increasing her workload and questioning her ability to work as a mother. During that same time period, the employee was involved in a bizarre work situation in which she arrived at a patient's home, but the patient's son would not allow her entry. The employee left the home, and it was later discovered that the patient had been deceased for several days at the time of the employee's visit. She was terminated shortly thereafter and filed a claim alleging pregnancy discrimination. The employer sought dismissal by way of summary judgment, arguing that the employee was terminated due to the incident with the deceased patient. Four separate explanations were given by the staff as to why the employee was actually terminated. The district court judge found that all of the reasons were similar, and that no reasonable jury would find the reasons to be pretextual. The U.S. Court of Appeals for the Seventh Circuit found the "shifting explanations" to be inconsistent or "suspect." Thus, there was a reasonable

inference that the reasons given did not reflect the real reason for the termination. The employer, "by piling on additional ever-evolving justifications," could lead a juror "to wonder whether [it] can ever get its story straight." The employer's "many explanations for [the] termination were shifting, inconsistent, facially implausible, or all of the above," the court held, and, as a result, "a reasonable jury could conclude that [the] explanations were lies, and that [the employee] was fired because she was pregnant." This case serves as a reminder concerning the importance of identifying, documenting and communicating consistent and uniform explanations for employment decisions, as a lack of consistency may give rise to suspicions of pretext.

Hitchcock v. Angel Corps, Inc., No. 12-3515 (7th Cir. June 11, 2013)

Contact for more information: Eileen M. Caver

NLRB Finds Company's Restrictive Electronic Communications Policy Invalid

A paper manufacturing company employed a group of employees who were part of a pulp and paper union. The company issued an electronic-media use policy that restricted employees' use of the company's electronic media for business purposes only and allowed for limited personal use with managerial permission. Employee union representatives regularly used the electronic media to communicate about union contract and administration matters. Due to the increased use of work email by union representatives, the company issued another notice that limited the amount of time the union representatives could access the company's e-mail systems. The union thereafter directed its representatives to cease conducting union business via email. The union then claimed that the notice violated Section 8(a)(1) of the National Labor Relations Act by maintaining an overly restrictive electronic media use policy, and an overly restrictive rule on informational notice, regarding the union's use of the email system. The National Labor Relations Board agreed, finding the policy to be facially discriminatory because it was specific in limiting union-related email, which rendered it unlawful. While employers are entitled to institute electronic communications policies and may restrict use, it is important to ensure that the policy is not directed at limiting the speech of a single group of employees (*e.g.,* unionized workers)

Weyerhaeuser Company and Association of Western Pulp and Paper Workers, No. 19-CA-033069, 19-CA-033095 (N.L.R.B., June 20, 2013)

Contact for more information: Katherine Cheng-Arnold

At-Will Employee's Due Process, Discrimination Claims Fail

An employee who was a liver transplant coordinator was terminated after it was determined that she had altered patient records. Following her termination, the employee unsuccessfully filed a grievance claiming she was never given specific details surrounding her termination nor allowed to respond to the allegations. She then sued, alleging that her employer violated the Fourteenth Amendment by depriving her of a property interest in her employment without due process, a liberty interest in her reputation without due process, and equal protection under the law by terminating her because of her gender. The

U.S. Court of Appeals for the Eighth Circuit affirmed summary judgment in favor of the employer, reasoning that, to prevail, the employee had to demonstrate a property right in continued employment. Because she was an at-will employee, there was no promise or expectation of continued employment, and thus, no property interest. Even if the employee did have an expectation of continued employment, the court found that she had opportunities to present her position and defend her employment at the three meetings prior to her termination. Further, the court concluded that the employee could not establish a due process violation regarding her claimed liberty interest in her reputation because she never specifically made a request for a name-clearing hearing, as well as the fact that her grievance did not reference the that the charge stigmatized her reputation. Finally, the court held that the employee failed to establish gender discrimination because she failed to demonstrate that the other employees who received less severe discipline were "similarly situated" such that the evidence of their individual situations could be used here. Having at-will policies and documentary evidence in support of disciplinary/termination decisions can prove useful in defending against employees' claims.

Floyd-Gimon v. Univ of Ark. for Med. Scis., No. 12-1791 (8th Cir. June 18, 2013)

Contact for more information: Amanda Mattocks

New York Court Finds Unpaid Interns Entitled to Protections of Labor Laws

Production interns on the set of a blockbuster movie did basic tasks such as answering phones, arranging travel, taking lunch orders, and performing general office work. They sued, claiming that the production company violated the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) by not paying them for their work. The interns ultimately moved for summary judgment on the issue of whether they were employees and also sought class certification. The company moved for summary judgment and opposed the request for class certification. The federal district court judge agreed with both, in part. As to the issue of employment or joint employment between the company that retained the interns and the production company, the court found that the production company had hiring and firing power; supervised or controlled work schedules or conditions; determined the rate and method of payment; and maintained employment records. The court also found that the interns did not use the production company's premises and equipment; that their work was not part of an "integrated production unit;" that the production company closely monitored work on the production and exercised effective control over it; and that the interns worked exclusively on this single production. Upon review of the totality of the circumstances, the factors weighed in favor of finding that the production company was a joint employer, which meant that the production company was the interns' employer. To determine whether the interns were covered by the FLSA and NYLL, the court looked to the criteria set forth by the U.S. Department of Labor regarding unpaid internships. Although no single factor is controlling, and the circumstances must be considered in rendering the determination, the court concluded that the interns were improperly classified as unpaid interns, and should have been treated as employees, entitled to the benefits of the FLSA and NYLL. Employers utilizing unpaid interns should take caution. This case has serious ramifications, not only for employers in New York, but employers throughout the country. Companies with unpaid interns should consult with counsel to ensure

compliance with state and federal employment laws in order to evaluate and manage risk so as to avoid ending up on the wrong side of a certified class action lawsuit.

Glatt v. Fox Searchlight Pictures, Inc., No. 11 Civ. 6784 (WHP) (S.D.N.Y., June 11, 2013)

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