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U.S. Supreme Court Rulings In Arbitration And Employment Matters

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The United States Supreme Court continued its trend of business-friendly decision making in the 2012-2013 term, ruling more often than not in favor of business interests. In particular, the Supreme Court's decisions on arbitration- and employment-related issues gave companies and employers victories, enforcing arbitration agreements and limiting the scope of harassment and retaliation claims under Title VII. This article discusses four such decisions. The first two decisions discussed below concern the Court's continued affirmance of the federal policy favoring enforcement of arbitration agreements. These decisions reflect the Court's willingness to (1) enforce agreements containing dispute resolution methods even if those methods bar class actions and (2) defer to the arbitrator's interpretation of those agreements, even if the Court believes the arbitrator wrongly interpreted the agreement. The other two decisions discussed highlight the Court's strict construction of Title VII to define the term "supervisor" in the way it was intended and to require employees claiming retaliation under Title VII to prove that the employee's protected activity was the "but-for" cause of the employer's action, rather than just one motivating factor.

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Oxford Health Plans, LLC v. Sutter[1]

The Court's decision in this case affirmed the U.S. Court of Appeals for the Third Circuit's holding that an arbitrator did not exceed his powers in contravention of §10(a)(4) of the Federal Arbitration Act ("FAA") when he interpreted the parties' contract to permit class-wide arbitration.

The case began in 2002 when John Sutter ("Sutter"), a pediatrician, initiated a class action against Oxford Health Plans ("Oxford"), a health insurance company, in New Jersey Superior Court. Sutter brought suit on behalf of himself and other physicians under contract with Oxford, alleging breach of contract and violations of various New Jersey laws. Oxford moved to compel arbitration, and the state court granted the motion, referring the suit to arbitration. Apparently, Oxford and Sutter had agreed that the arbitrator could determine the meaning of their contract, including whether its terms permitted class arbitration. The arbitrator decided to permit class proceedings despite the absence of language in the agreement that supported that conclusion. Oxford then filed a motion in federal court to vacate the arbitrator's decision on the ground that he exceeded his powers under §10(a)(4) of the FAA. The district court denied the motion, and the circuit court of appeals affirmed.

The Supreme Court affirmed, holding that a court may not vacate an arbitral award on the ground that the arbitrator exceeded his powers as long as the arbitrator arguably construed the contract, even if the interpretation is incorrect.[2] The Court ruled that the arbitrator interpreted the contract, *as agreed to by the parties*, and therefore he did not exceed his powers. Class arbitration, the Court concluded, was a matter of contract. As a result, an arbitrator may employ class procedures if the parties authorized them. While the Court disagreed with that result, it gave deference to that interpretation because the parties agreed the arbitrator shall make that decision.

This decision reminds contracting parties seeking to ensure one-on-one dispute resolution of the importance of clear and unambiguous class arbitration waivers. As seen by the result in this case, although there are many benefits to arbitration, vague arbitration provisions can lead to unintended outcomes with no opportunity for judicial review. Business entities that intend to prohibit class arbitration in disputes should do so clearly and unambiguously.

American Express v. Italian Colors Restaurant[3]

In its other arbitration decision, the Court held that class action waivers are fully enforceable, even if they limit the effective vindication of legal rights under federal statutes. The Court specifically held that the FAA does not permit courts to invalidate arbitration agreements on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

In this case, several merchants, including Italian Colors Restaurants, brought a class action against American Express, a company that provides charge card services, alleging that the Card Acceptance Agreement they were required to enter into violated U.S. antitrust laws. The agreement contained a clause that required all

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suits to be resolved by arbitration and prohibited the merchants from bringing claims on a class action basis. American Express moved to compel individual arbitration under the FAA, and the merchants responded by submitting a declaration from an economist showing that the costs of proving antitrust claims exceeded the recovery for each individual merchant. The U.S. District Court for the Southern District of New York granted the motion and dismissed the lawsuits. The U.S. Court of Appeals for the Second Circuit reversed and remanded, however, holding that the class action waiver was unenforceable and that the arbitration could not proceed because the merchants would face prohibitive costs if they had to arbitrate.

The Supreme Court reversed, reiterating that the FAA reflects the principle that arbitration is a matter of contract and that courts must enforce the terms of arbitration agreements, including terms that specify with whom the parties choose to arbitrate and the rules under which the arbitration can be conducted. The Court reasoned that this holds true for claims that allege violations of federal statutes unless a contrary congressional command requires the rejection of arbitration provisions. In this case, no contrary congressional command required the Court to reject the waiver of class arbitration provisions. The merchants argued that a judge-made "effective vindication" exception should apply to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies. However, the Court held that the merchants could still pursue their remedy because the arbitration clause did not eliminate their ability to sue.

This decision makes clear that, if a contracting party seeks to avoid class action litigation, it should include in its contracts an arbitration agreement that contains an express class action waiver. Subject to limited exceptions, such provisions generally will be upheld under the FAA. Indeed, following this decision, the United States Court of Appeals for the Second Circuit recently ruled – in *Sutherland v. Ernst & Young LLP*[4] and *Raniere, et al. v. Citigroup, Inc., et al*.[5] – that Ernst & Young's and Citigroup's arbitration agreements, which required that employees individually arbitrate their claims, must be enforced in proposed overtime collective actions brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq*. In reaching that conclusion, the Second Circuit held that the FLSA does not include a "contrary congressional command" that would prohibit the enforcement of class action waivers.

University of Texas Southwestern Medical Center v. Nassar[6]

In this case, the Court held that Title VII retaliation claims must be proved according to traditional principles of "but-for" causation, not according to the lesser "motivating factor" test applicable to status-based discrimination claims.

Here, Dr. Naiel Nassar, a physician of Middle Eastern descent, was a faculty member and a hospital staff physician at the university medical center of the University of Texas ("University"). Nassar filed a suit alleging two violations of Title VII of the Civil Rights Act of 1964. He alleged that his supervisor's harassment resulted in his constructive discharge from the University and that the University retaliated against him. A jury found in favor of Nassar on both claims. The U.S. Court of Appeals for the Fifth Circuit affirmed in part and vacated in part, holding that there was sufficient evidence to support a finding of retaliation, but insufficient evidence to support a finding of constructive discharge.

The Supreme Court reversed, holding that the "but-for" causation standard is applicable to proving retaliation claims, not the lesser "motivating factor" test. To reach its conclusion, the Court engaged in a statutory construction analysis stemming from the status-based discrimination case *Price Waterhouse v. Hopkins* and the Civil Rights Act of 1991. In *Price Waterhouse*, the Court held that a plaintiff had to show that her race, sex or religion was a motivating factor for the employer's decision. Congress enacted the 1991 Act, where they codified *Price Waterhouse* in part and overruled it in part, which states that it suffices to show that the motive to discriminate was one of the employer's motives, even though other factors motivated the decision. In its analysis, the Court pointed out that the text of the *motivating factor* provision is limited to discriminatory employment actions based on the employee's status and makes no mention of retaliation claims. In addition, the Court noted, status-based discrimination and retaliation claims are contained in two different provisions of Title VII, and the 1991 amendment changed only the status-based discrimination provision. The Court also explained that lessening the causation standard would contribute to the filing of frivolous claims and siphoning of resources to combat workplace harassment.

Vance v. Ball State University[7]

Maetta Vance, an African-American woman, filed a suit against her employer, Ball State University ("BSU"), alleging that a coworker created a racially hostile work environment that violated Title VII. The district court granted summary judgment to BSU, holding that BSU was not liable for the coworker's actions because the coworker, who could not take tangible employment actions against Vance, was not a supervisor. The U.S. Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court held that an employer may be vicariously liable for an employee's harassment only when the employer has empowered that employee, the "supervisor," to take tangible employment actions against the victim, i.e., to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

As noted above, *Nassar* requires the employee to prove that retaliation was not just a motivating factor but the "but-for" cause of the employment decision. *Vance* provides a concrete definition of "supervisor." These decisions will help employers potentially obtain summary judgment as to the entire case or, at the very least, narrow the issues for trial. Because they concern only Federal claims, however, the Court's holdings in *Vance* and *Nassar* ultimately may not reduce the number of retaliation and harassment claims filed against employers. State and local laws may have a different causation standard or definition of "supervisor" leading to just as many lawsuits. Employers should, therefore, continue to enforce their policies and safeguards against harassment and retaliation. Employers' measures remain crucial to protect employees against illegal treatment and to maintain employers' defenses against claims based on their employees' misconduct.

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1 No. 12-135, 569 U.S. ___ (June 10, 2013).

2 The Court distinguished the holding in *Stolt-Nielsen NA v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010), that overturned an arbitral decision because the arbitrators abandoned their interpretive role and did not construe the contract.

3 No. 12-133, 570 U.S. ___ (June 20, 2013).

4 Docket No. 12-304-cv (2nd Cir., Aug. 9, 2013).

5 Docket No. 11-5213-cv (2nd Cir., Aug. 12, 2013).

6 No. 12-484, 570 U.S. ___ (June 24, 2013).

7 No. 11-556, 570 U.S. ___ (June 24, 2013).