Employment Law In The Supreme Court: What To Expect In The Next Term

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After last year's term saw the Supreme Court decide University of Texas Southwestern Medical Center v. Nassar, Vance v. Ball State University, and Burwell v. Hobby Lobby all in favor of employers, four more employment cases will be before SCOTUS in the upcoming October 2014 term. These cases will address issues such as the use of "failure to conciliate" as an affirmative defense against the Equal Employment Opportunity Commission ("EEOC"), the requirements of the Pregnancy Discrimination Act ("PDA"), and two wage and hour issues.

Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013)
Shortly after the decision in the Hobby Lobby case, female employees are again center stage at the Supreme Court.
In this case, Peggy Young, having tried to get pregnant through two rounds of in vitro fertilization, asked her employer, UPS, for leave under the Family and Medical Leave Act ("FMLA") for a third round in July 2006. She was granted the leave, became pregnant, and subsequently requested additional leave. Ms. Young provided Carolyn Martin, the UPS occupational health manager, with a note from Young's doctor stating that Young should not lift more than twenty pounds for the first half of her pregnancy, and no more than ten pounds during the second.
Ms. Martin responded that Young had exhausted her FMLA leave, and could not continue to work with a twenty-pound restriction, despite Ms. Young's protestation that she rarely had to carry large packages, and when she did, she could use a hand truck or ask for help from a fellow employee. Alternatively, Ms. Young was willing to be reassigned to light duty work, which was the standard practice for employees who had been injured on the job and could not lift the seventy pounds required by UPS.
Ms. Martin went on to inform Ms. Young that, while she was not allowed to work with a twenty-pound restriction, she was not disabled such that she qualified for protection under the Americans with Disabilities Act ("ADA"), and thus was ineligible to receive light duty. Furthermore, she had not been injured on the job, nor had she lost her Department of Transportation ("DOT") certification, which UPS claimed were the only other reasons it would permit light duty assignments. Ms. Young was then forced to take an extended unpaid leave of absence until after April 2007, when she gave birth.
In response, Ms. Young brought two claims against UPS: first, that UPS violated the ADA, and second, that UPS violated the Pregnancy Discrimination Act ("PDA"). After extensive litigation, the Fourth Circuit Court of Appeals affirmed the decision of the District of Maryland, holding that Ms. Young had no claim under either the ADA or the PDA. The Fourth Circuit held that because she was not actually disabled (pregnancy and its routine, related conditions virtually never qualify as a disability on its own), and UPS did not regard her as being disabled, Ms. Young was not covered by the ADA. Accordingly, the Fourth Circuit granted UPS summary judgment on the ADA issue. It then turned to her PDA claim.

Ms. Young's PDA claim centered around the contention that UPS's policy of limiting light duty work to only those who: (1) had been injured on the job, (2) were disabled within the meaning of the ADA, or (3) had lost their DOT certification, while denying this accommodation to pregnant women, violated the

PDA. The Fourth Circuit found that this policy was neutral, noting that it would similarly deny light duty accommodation to "an employee who injured his back while picking up his infant child or [] an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter . . . ."

In the end, Ms. Young fell into a strange dilemma, stuck between two opposing situations, each of which potentially offered a better ending for her than the specific one in which she found herself. Had her doctor written a note that said that she was fully capable of physical work with no weight limitations during her pregnancy, the PDA would have protected her from any adverse action UPS might have taken. Alternatively, had she been more disabled, she might have fallen within the protection of the ADA.

This case illustrates the dangerous gap between the ADA and the PDA. Inasmuch as pregnancy alone is not considered a disability under federal law and thus does not qualify for the ADA, the policy adopted by UPS avoided accommodating pregnant women at all. Since pregnancy will (almost certainly) never "occur" on the job, barring accommodations to those with off-the-job injuries effectively removes the requirement that UPS accommodate healthy, routine pregnancy in any substantive way.

On July 14, 2014, in advance of the Supreme Court hearing this case, and just two weeks after the Supreme Court granted certiorari, the EEOC issued a new set of Pregnancy Discrimination Enforcement Guidelines ("Guidelines"). The new Guidelines pointedly include a pronouncement that the practice of limiting light duty only to workers who are injured on the job is a violation of the PDA. In particular, the EEOC directs employers to treat weight-lifting restrictions on pregnant employees the same way as they do weight-lifting restrictions on disabled persons under the ADA. Furthermore, the EEOC declared that telling a pregnant employee that having her in the workplace is too much of a liability for the company qualifies as evidence of pregnancy-related animus, thus relieving the employee of having to show that another similarly situated employee was given preferential treatment (as required by the Fourth Circuit in Young). All of these examples used in the Guidelines were taken directly from Young, and were likely intended to try to sway the Supreme Court in its upcoming decision.

Equal Employment Opportunity Commission v. Mach Mining, LLC, 738 F.3d 171 (7th Cir. 2013)
The U.S. Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for the enforcement of federal employment discrimination laws. There are, however, administrative prerequisites to the EEOC filing suit against an employer. The prerequisite at issue in this case is the requirement that before filing suit in federal court, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b).

In this case, the defendant, Mach Mining, was charged by the EEOC with unlawful sex discrimination. Mach Mining, following precedent in the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, claimed as an affirmative defense that the EEOC had failed its duty to conciliate, and moved for summary judgment, which was granted by the District Court for the Southern District of Illinois. The above Circuits all either held or simply assumed that conciliation was a prerequisite, and failing to satisfy the prerequisite could be an implied affirmative defense. The EEOC argued that there is no such affirmative defense, and that the EEOC's conciliation efforts are not judicially reviewable.

In the face of seven of its sister Circuits finding otherwise, the Seventh Circuit held that a failure to

conciliate is not an affirmative defense, and that the subject is entirely beyond the review of the court. The Seventh Circuit relied on three main factors in becoming the first Circuit Court of Appeals to reject this implied affirmative defense: (1) the clear and unambiguous statutory language of Title VII, (2) the lack of a standard of review, and (3) public policy.
As required by the canons of statutory construction, the court first addressed the plain language of the statute. The court pointed out that Title VII includes no express affirmative defense for a failure to conciliate. The court noted that the words that are used in the language of Title VII ("endeavor to eliminate," "informal methods," "agreement acceptable to the [EEOC]") suggest an extreme deference to the EEOC. The Seventh Circuit took to heart the Supreme Court's language in its 2013 decision Nassar, in which it concluded that Congress had taken such special care in drafting Title VII that it would be incorrect to infer that Congress meant anything other than what the statute expressly says.

The Seventh Circuit then addressed its second reason for rejecting the implied failure-to-conciliate affirmative defense: there is no standard of review. The Second, Fifth, and Eleventh Circuits apply an in-depth, three-part inquiry into the EEOC's conciliation efforts, while the Fourth, Sixth, Eighth, and Tenth Circuits employ a lower good-faith threshold. The reason for this wide discrepancy is at least in part due to a lack of statutory guidance. Those Circuits that adopted the good faith requirement have done so in part by following the lead of the National Labor Relations Act ("NLRA"). The Seventh Circuit disagreed, countering that the NLRA has explicit language requiring employers and unions to negotiate in good faith. Finally, the Seventh Circuit cautioned that even in the NLRA, where there is clear statutory language, enforcement of a good faith standard is very difficult, and that it would be near-impossible in the Title VII context, where there is no such explicit language.

Additionally, the Mach Mining court notes, any method of review would require some type of evidence. However, the sentence immediately following the conciliation mandate in Title VII forbids anyone from revealing any details of the conciliation process, and even provides criminal penalties for doing so. Since the conciliation process is strictly confidential, nothing can be used as evidence to show a court that the EEOC failed to conciliate, whatever the standard of review.

Finally, the Seventh Circuit pointed out public policy concerns with Mach Mining's argument. Implying an affirmative defense could encourage employers to use the conciliation process as a means of undermining the enforcement of Title VII. It would certainly encourage employers to litigate heavily the conciliation efforts by the EEOC, as they could potentially lead to dismissal of a Title VII claim. As a result, this would add a great deal of time and expense to the process for both sides, as well as for the courts. Additionally, it would very strongly encourage employers to aggressively pursue failure-to-conciliate litigation. The Seventh Circuit also held that even if conciliation efforts were reviewable and could be used as an affirmative defense, the proper remedy cannot be dismissal of the case, but rather sending the parties back to the negotiating table.

Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525 (9th Cir. 2013)
This case involves what qualifies as compensable time under the Fair Labor Standards Act ("FLSA"). The defendant, Integrity Staffing, is a company that provides space and staffing for clients like Amazon.com. The plaintiffs, Jesse Busk and Laurie Castro, worked in warehouses in Nevada filling orders for Amazon.com customers. At the end of each workday, all employees were required to go through a security screening, which could take up to 25 minutes. Additionally, employees' 30-minute lunch breaks

were often shortened by up to 10 minutes due to a five-minute walk and security process on the way to and from the cafeteria. The plaintiffs sought compensation for this time, while the defendant claimed that neither activity was covered by the FLSA.

The rule the Ninth Circuit applied to the post-work security process derives from the 1947 Port-to-Portal Act. The rule laid out was that employees generally need not be compensated for activities just before and just after work (such as putting on a uniform, traveling to work, etc.). There is, however, an exception that requires an employee to be compensated for such activity when it is "integral and indispensable" to the employee's job. This means that the activity must be (1) necessary, and (2) done for the benefit of the employer.

The Ninth Circuit found that the district court relied too heavily on cases where the FLSA did not cover time spent in security clearance. These cases, the Ninth Circuit found, were distinguishable from the current case because in those cases, the security was not for the benefit of the employers. For example, one case involved construction workers at an airport, and another involved a nuclear power plant, both of which required security for all entrants, visitors included. The Ninth Circuit found that the district court incorrectly assumed that security checks could never qualify for compensation under the FLSA, and neglected the "integral and indispensable" analysis. In the current case, however, the security check was being done at the end of the day in order to prevent employee theft, which was indisputably for the benefit of the employer. Therefore, the Ninth Circuit held that the plaintiffs had a right to be compensated for time spent going through the post-work security line.

The claim regarding lunch time posed a different issue. The FLSA requires that, if an employee is not to be paid for her lunch break, she cannot be required to continue with any work-related duties during that break. The plaintiffs here argued that because the clocks (where they clocked in and out of work) were placed so far from the cafeteria, part of their work duty included the 5-minute walk to and from the clock. The court disagreed, finding that walking to the cafeteria was not work-related and thus did not qualify under the FLSA.

The lesson to take away from this case is that the connection between the activity in question and the main work duties of an employee are key to FLSA coverage as compensable time. The Supreme Court's ruling in this case will help further refine whether certain activities are integral to an employee's job and are compensable under the FLSA.

Mortgage Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013)
This case is about the manner in which an administrative agency issues interpretations of the law. In 2006, the Department of Labor ("DOL") issued an Opinion Letter finding that mortgage loan officers (as defined therein) were exempt from FLSA overtime requirement under the so-called "administrative exemption." However, four years later, the DOL issued an Administrator's Interpretation, which said that mortgage loan officers (as defined therein) were not, in fact, administrative employees, and were therefore nonexempt and entitled to overtime pay.

The plaintiff, Mortgage Bankers Association ("MBA"), is a national trade association that includes in its membership many mortgage loan officers. The Administrative Procedure Act ("APA") requires that in order for an agency to amend one of its own rules, there must be a period of "notice and comment." In

Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), and Alaska Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), the court held that once an agency definitely interprets one of its rules, any attempt to significantly change that interpretation is treated like it is a rule change, and is thus bound by the notice and comment requirements of the APA.

In the initial lawsuit, the MBA asked the district court to enforce the rule announced in Paralyzed Veterans and Alaska Hunters, while the DOL argued that Paralyzed Veterans and another D.C. Circuit case, MetWest Inc. v. Sec'y of Labor, 560 F.3d 506 (D.C. Cir. 2013), required that there be "substantial and justifiable reliance" on the original interpretation in order for notice and comment to be required. The district court held that reliance was a necessary factor in the decision, and found that there had been no such reliance in this case. The D.C. Circuit Court of Appeals, however, denied that substantial reliance was absolutely required, but rather that it was merely a part of the calculus in determining whether the interpretation was "definitive."

Why is this important? If the Supreme Court overturns this case, employers may be concerned that government regulators may "flip-flop" between interpretations of rules, thus circumventing the notice and comment requirements of the APA, and leaving uncertainty as to whether it can rely on DOL published interpretations. If the Supreme Court upholds the case, the DOL (and other government regulators) may be concerned that they will become "locked-in" to interpretations that it no longer follows, for instance, when it was issued during a previous administration.

Brian A. Bodansky
Associate
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
wigdorlaw.com