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U. S. SUPREME COURT TO ADDRESS IMPORTANT LABOR AND EMPLOYMENT ISSUES IN FALL TERM

The U. S. Supreme Court currently has five important labor and employment cases on its docket that could have significant implications for employers. It is anticipated that the U. S. Supreme Court will rule on these cases in late 2012 and 2013. This summary provides a run-down of the key cases to be decided over the coming months in order of significance:

1. Vance v. Ball State University, (Docket No. 11-556) (Appeal from 7th Circuit) (Oral argument scheduled for November 26, 2012). The U. S. Supreme Court is likely to resolve a split among the circuits as to who qualifies as a "supervisor" for purposes of holding an employer vicariously liable for harassment under Title VII. In this case, the Seventh Circuit Court of Appeals joined the First and Eighth Circuits in holding that a supervisor is someone who has the power to "hire, fire, demote, promote, transfer, or discipline" the alleged victim. In contrast, the Second, Fourth and Ninth Circuits have held that supervisors also include employees who oversee and direct the alleged victim's daily work.*

The case was brought under Title VII by Maetta Vance, a dining services employee at Ball State University, who alleges that she was subjected to "an environment of physical intimidation and racial harassment" by a co-worker who had the authority to direct Vance's work. Vance argues that Ball State is vicariously liable for the co-worker's harassment. The Seventh Circuit ruled against Vance, holding that the co-worker was not a supervisor for Title VII purposes.

The U. S. Supreme Court's decision will be important for employers because of the potential for increased employer liability for harassment by employees under the "oversee and direct" definition. A ruling in favor of the employee would change the law in the Seventh Circuit.

2. Genesis HealthCare Corp. v. Symczyk, (Docket No. 11-1059) (Appeal from 3rd Circuit) (Oral argument scheduled for December 3, 2012). The Court will decide whether a case becomes moot when a lone plaintiff in a Fair Labor Standards Act (FLSA) collective action receives an offer of judgment from her employer that satisfies all claims. In this case, the plaintiff filed a lawsuit under the FLSA on behalf of herself, and other unnamed plaintiffs to be recruited at a later date, alleging that her employer deducted pay for meal breaks even when employees worked during those breaks. An FLSA collective action is similar to a class action, but

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* In Faragher v. City of Boca Raton, 524 U. S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U. S. 742 (1998), the U. S. Supreme Court held that employers may be vicariously liable for harassment by "supervisors" of the alleged victim. At that time, the Court did not provide a definition of "supervisor."

covers only wage and hour claims. Before the plaintiff could obtain conditional certification of the class, her employer made an offer to fully compensate her for her unpaid wages and attorney's fees. The plaintiff did not respond to the offer and the employer moved to dismiss the lawsuit on the ground that it was now moot. The trial judge granted the dismissal, but the Third Circuit Court of Appeals reversed, holding that it would "frustrate the objectives" of class actions to allow a defendant to "pick off" certain plaintiffs by offering to fully compensate them before a class is certified.

A decision from the U. S. Supreme Court in favor of the employer would make it much more difficult for employees to file FLSA collective actions. This case may also provide an opportunity for the Court to address whether the rules governing class actions also apply to FLSA collective actions.

3. U. S. Airways, Inc. v. McCutchen, Docket No. 11-1285 (Appeal from 2nd Circuit) (Oral argument scheduled for November 27, 2012). The U. S. Supreme Court will decide whether a judge can, under the Employee Retirement Income Security Act (ERISA), use equitable principles to refuse to order a participant in a health plan to reimburse the plan for benefits paid, even when the terms of the plan explicitly require it. Under ERISA, Section 502(a)(3) authorizes plans to pursue "appropriate equitable relief" to "enforce . . . the terms of the plan."

In this case, the ERISA plan provided that an employee-beneficiary had to reimburse the plan for claims paid out from any money recovered from third parties. After a car accident, the employer, under its plan, paid $66,866 for medical bills. The employee-beneficiary recovered $110,000 from the other driver, but after attorney's fees, the net recovery was less than $66,000. The plan administrators, however, initiated this suit, demanding full repayment of the claim. The Third Circuit Court of Appeals disagreed with the Fifth, Seventh, Eighth and Eleventh Circuits when it held that an employee can assert equitable limitations, such as unjust enrichment, against such claims. The Third Circuit ruled it was unfair to order respondent to pay more than he actually recovered, even though the language of the plan called for it. The Ninth Circuit recently followed the Third Circuit's reasoning.

A ruling from the U. S. Supreme Court in favor of the employee-beneficiary would mean a change of law in the Seventh Circuit. The case could have wider implications in opening the door to trial courts having more latitude to ignore express provisions in ERISA plans in the interest of fairness or equity.

4. Comcast Corp. v. Behrend, (Docket No. 11-864) (Appeal from 3rd Circuit) (Oral argument scheduled for November 5, 2012). The U. S. Supreme Court will decide whether a district court may certify a class action without resolving whether plaintiffs have produced admissible evidence to show that relief can be awarded on a class-wide basis. While this is an antitrust case, the Court is expected to define the scope of Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011), the recent significant case where female Wal-Mart employees who alleged sex discrimination were denied class certification because of their failure to meet the commonality requirement. The Court will have the opportunity to extend Wal-Mart's strict interpretation on commonality or limit its application. If the Court decides not to allow certification of the class in this case, it will continue its trend in making it more difficult for employees to meet the threshold requirement of commonality necessary for class certification.

5. Fisher v. University of Texas at Austin, (Docket No. 11-345) (Appeal from 5th Circuit) (Oral argument held on October 10, 2012). The U. S. Supreme Court will decide whether a university's use of race as a factor in college admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment. In this case, the plaintiff is a white student who was denied admission to The University of Texas. She alleges that but for the University of Texas' practice of giving minority students priority in admissions she would have been admitted.

The Court will reconsider Grutter v. Bollinger, 539 U. S. 306 (2003), where the Court held that colleges and universities can consider race in admissions until the school reaches a "critical mass" of racial diversity. While this case specifically addresses affirmative action in higher education, the decision could have an impact on the use of affirmative action in all contexts, including private employers, and could affect the way some private employers make hiring and promotion decisions.

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November 2, 2012