Employers Go "Two For Two" – Three Times Over: A Review Of The 2012-13 Supreme Court Term

Insights
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Looking back at the recently-completed 2012-2013 Supreme Court term, employers should have reason to feel good about how things turned out. In fact, of the six major decisions that impact employers and can be categorized in the "win" or "lose" column, employers won all six of them – two victories each in three different categories of cases.

These decisions will end up helping employers in several ways, making it easier for your lawyer to win cases that were filed against you, discouraging plaintiffs' attorneys from bringing some of these cases in the first place, cooling off the big-dollar class actions that you fret about, and clearing the path for more cases to be decided in business-friendly arbitrations. You can read detailed summaries of each of the decisions on Fisher Phillips' website, but this article will present an overview of these cases and what they mean for employers.

Executive Summary: Court Remains Business Friendly – But Just Barely
It's true that liberal Justices occupy four of the nine seats on the Court, and it's true that these four usually act in lockstep. But until Justice Anthony Kennedy retires from the bench during a Democratic administration, we're not likely to see the philosophical makeup of the Supreme Court change.

The Roberts Court is very business friendly, and it has consistently issued opinions that aid employers and employers' business interests. However, the margin of victory in these cases is often razor thin. In fact, in five of the six major "victories" from this past session, there were but five Justices ruling for the winning side in each of them. Four of them saw a 5-4 vote count, and a fifth saw a 5-3 victory (with Justice Sonia Sotomayor recusing herself). Justice Kennedy once again proved to be the swing vote, turning up on the winning side in each of the employment decisions from the past term. None of the Justices have given any hints of retirement, and even though they are a notoriously secretive group, odds are that this lineup will remain intact for at least another year or two.

Title VII: Employers Go Two For Two

The Supreme Court took two stabs at further defining the contours of Title VII of the Civil Rights Act,

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and in both instances the Court narrowed the playing field and made it easier for employers to secure victories at the trial court level.

In *Vance v. Ball State Univ.*, the Court followed up their landmark *Farragher* and *Ellerth* decisions from 1998 to ensure that employers weren't unfairly held to pay for the sins of their rogue employees who harass coworkers in violation of company policy. The *Farragher/Ellerth* cases held that employers would be automatically liable for any harassment committed by company supervisors, but provided an escape hatch for non-supervisory harassment. When mere coworkers commit the harassment, employers who take active steps to promote a professional environment (through written policies, reporting mechanisms, training, etc.), and who do not receive reports of harassment from the victim, will not be held liable for the conduct under Title VII.

The *Vance* case decided who should be and who shouldn't be considered a "supervisor" under this theory. The Court ruled with the company and delineated a narrow definition of the term – only those who have the authority to make significant changes in the victim's employment status, such as hiring, firing, promotion, demotion, reassignment, and benefits change. Although the EEOC and the employee wanted a more expansive definition to incorporate anyone who would direct and oversee another employee's work, the Court held firm. This decision should allow employers to breathe a bit easier, resting comfortably with the knowledge that your preventive measures can actually have a positive impact, and provides another weapon in your lawyer's arsenal should you get sued.

In *Univ. of Texas v. Nassar*, the Court made it even more difficult for employees to win retaliation claims under Title VII, deciding that employees must clear the high hurdle of proving that their protected activity was the "but for" cause of whatever adverse action that aggrieved them, rather than just one of the possible motivating factors at play. Some Court observers saw this one coming: just a few years ago, the Court issued a similar ruling to apply in age discrimination cases, narrowing the scope of ADEA retaliation claims (*Gross v. FBL*, 2009).

This is a clear victory for employers – the Court's majority opinion expressly said they hoped this decision would reduce frivolous retaliation claims from being filed, and many believe this same standard will be applied to other federal remedial statutes (and may also be followed by individual states as well).

Class Actions: Employers Go Two For Two

In a pair of decisions this spring, the Supreme Court clamped down on the use of class actions as a remedy against businesses, further reducing the chances that employers will have to tangle with these costly lawsuits.

In *Genesis Health Care Corp. v. Symczyk*, the Court ruled that wage and hour collective action lawsuits brought under the Fair Labor Standards Act (FLSA) can be defeated if the lead employee (the named plaintiff) has no continuing personal interest in the outcome of the litigation. In that case, the employer had quickly offered to pay the named plaintiff the full amount she was claiming in unpaid wages, which it argued mooted the remaining lawsuit. The Court agreed that this

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in unpaid wages, which it argued mooted the remaining lawsuit. The Court agreed that this procedural maneuver effectively killed the collective action, because no one else had yet consented to join her claim, and no one remaining had a personal interest in the outcome of the suit.

On the one hand, this is an important win for employers, who will now need to quickly decide whether it is advantageous to "pick off" employees early on in a collective action to stop further bleeding. On the other hand, it may push plaintiffs' attorneys to work towards gathering as many putative class members as possible before a lawsuit is filed in order to try to avoid *Genesis'* sting.

In *Comcast Corp. v. Behrend*, the Court issued a decision in a non-employment law setting that will still help to stem the tide of class action cases filed by aggrieved employees and ex-employees. The issue in the case actually revolved around allegations of anti-trust violations, but these were brought in the context of a class action. The Court held that plaintiffs who want to bring class action cases must prove at the certification stage of the case that damages can be measurable on a class-wide basis.

This raises the bar one more notch in favor of employers, requiring that plaintiffs not only show that they *could* prove their claims through common evidence at trial, but places an affirmative burden on them to establish that there *is* reliable and admissible evidence of common injury and damages on a class-wide basis at the earliest stages of litigation. This decision should limit the number of cases filed as a class action, which can only be good news.

Arbitration Agreements: Employers Go Two For Two

Another pair of decisions went in employers' favor this past term, this time in the arbitration arena.

In *American Express v. Italian Colors Restaurant*, the Court once again upheld the principles behind the business-friendly Federal Arbitration Act (FAA), the federal statute which highly favors the use of cost-effective arbitration to resolve employment (and other) disputes over jury litigation. In this case, the Supreme Court held that lower trial courts cannot invalidate arbitration agreements that do not permit class-wide arbitrations.

Instead, the Court once again held that the FAA requires arbitration agreements to be rigorously enforced as written, and if the arbitration agreement states that no class arbitrations are permitted, then each aggrieved party must bring a separate and distinct arbitration claim. This 5-3 decision follows on the footsteps of the landmark *AT&T Mobility v. Concepcion* decision from 2011, which cleared the path for such language in arbitration agreements. This decision should give employers confidence to draft arbitration agreements in ways that ultimately benefit them procedurally, and can restrict the use of class-wide arbitrations.

Finally, in a rare unanimous 9-0 decision, the Court found that an arbitrator did not exceed his authority when he permitted class-wide arbitration of claims pursuant to the clear language of the agreement (*Oxford Health Plans LLC v. Sutter*). This decision stands strongly for the proposition that courts are not to disturb the content of an agreement between two consenting parties, especially when the agreement relates to arbitration of disputes. The Supreme Court has issued another

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when the agreement relates to arbitration of disputes. The Supreme Court has issued another warning to lower courts not to interfere with arbitration agreements, further demonstrating the powerful inclination to favor the arbitration of disputes when agreed upon.

Three Others To Be Aware Of

The Court also issued three decisions which could impact employers, but cannot necessarily be labeled a clear "win" or "loss." Depending on your own personal philosophy, these cases may be seen as a victory or a defeat, but as an employer, you should know about their possible impact either way:

- In the landmark 5-4 decision of the Supreme Court term (where Justice Kennedy played swing vote and was once again in the majority), the Court struck down the portion of the Defense of Marriage Act (DOMA) which had established a federal definition of marriage as being a union between a man and a woman.
  In *U.S. v. Windsor*, the Court held this section of the statute to be unconstitutional, clearing the way for same-sex married couples to be treated the same as other married couples under federal law. Although this decision does not force states to legalize gay marriage, it may impact the way employers treat same-sex couples under federal statutes and regulations when it comes to family leave entitlement, employee benefits, taxes, and numerous other areas.
- In *U.S. Airways, Inc. v. McCutcheon* (another 5-4 decision with Justice Kennedy as the swing vote), the Court held that equitable principles and defenses cannot be used to override the clear terms of a health plan covered by ERISA, even if the impact of the plan is unfair in some way, unless the language of the plan is ambiguous. This decision should serve as a reminder to all employers to have their plans reviewed and updated as necessary to clear up problems or uncertainties.
- Finally, in *Fisher v. Univ. of Texas at Austin*, the Court decided in a 7-1 ruling that educational institutions can consider race when making admission decisions, but must exercise their academic judgment by only using means that are narrowly tailored to achieve such affirmative action goals. This case continues a string of decisions in this area, and may end up impacting employers who are obligated to follow affirmative-action requirements under federal contractor rules.

What's On Deck For Next Term?

Next month's edition of the Labor Letter will include a summary of the decisions the Court will publish in the coming term, which kicks off in October. It promises to be another interesting term, with decisions expected in the fields of wage and hour law, age discrimination, and traditional labor law. Fisher Phillips publishes same-day summaries of all Supreme Court cases that impact employers; to ensure you are in the know, sign up for this electronic service. Click here to subscribe.

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