

Insights, News & Events

ONE-TIME ANOMALY OR POTENTIAL TURNING OF THE TIDES? A REVIEW OF THE SUPREME COURT'S 2014-2015 TERM

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In a marked departure from the overwhelming success employers experienced before the Supreme Court in recent years, the less successful recently wrapped 2014-2015 term could be an indication that the judicial tides may be shifting against management. Of the six major decisions falling within the realm of labor and employment law, employers can only count two as outright wins; both came in smaller cases which will have relatively limited impacts.

Three high-profile cases with wide-ranging effects were decided losses for employers, and the final one can be considered a draw. Only time will tell whether this year's disappointing win-loss record is simply a one-time blip on the radar screen or whether it signals the start of an enduring negative trend employers may face for years to come.

Decline Of The Business-Friendly Roberts Court

Supreme Court observers have long debated whether the Roberts Court is reflexively biased toward business. Before this term most would generally agree that the Roberts Court has at least been "business friendly" by consistently issuing decisions that aid businesses and employers. But based on the most recent term, the continued accuracy of this description may be in serious jeopardy.

Service Focus

Counseling and Advice

Of the 22 cases on the Supreme Court's docket that pitted a company against an individual or a government agency, companies won only 12 of those cases. The resulting 54% win rate is the lowest since 2011 when companies won only 50% of their cases.

Two Big Losses For Employers: Pregnancy Discrimination And Religious Accommodation

The Supreme Court heard a pair of cases this term aimed at expanding the scope of Title VII of the Civil Rights Act as it pertains to pregnancy discrimination and religious accommodation claims. In both cases, the Court sided with employees, a stark departure from the past few terms when the Supreme Court opted to narrow the parameters of Title VII at every possible opportunity. In addition to expanding the scope of Title VII's protections, the Court also altered the burdens placed on the parties in both of these decisions – lowering the employees' burden in one, while increasing the employers' burden in the other – which will effectively make it more difficult for employers to secure victories in these types of cases.

In the first of these two cases, *Young v. UPS*, the Court analyzed the scope and requirements of the Pregnancy Discrimination Act (PDA), the 1978 amendment that expanded Title VII to include pregnancy discrimination. At issue was the employer's denial of a request for light-duty work necessitated by pregnancy, despite having a policy allowing light-duty work in cases of on-the-job injuries.

In a 6-3 decision, the Supreme Court resurrected the claim and reversed the lower courts' dismissal of the action. The Court held that an employee's claim can survive if she can show that the employer accommodated a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. Despite the Court's expression of doubt that Congress intended to give pregnant employees a "most favored nation" status over other impaired employees, many observers believe that this decision has done just that.

Following this ruling, employers would be wise to review their reasons for any policies that may place a burden on pregnant employees or which allow accommodations for some workers but not for others. You should pay particular attention to whether any accommodations can be made for pregnant employees in order to prevent or better defend against future pregnancy discrimination claims.

Delivering its second Title VII loss to employers of this term, the Supreme Court handed down an 8-1 decision in favor of employees in the religious discrimination case of *EEOC v. Abercrombie & Fitch*. The SCOTUS held the employer liable for refusing to hire an applicant who wore a hijab for religious reasons, despite the fact that she did not inform the employer her hijab was worn for such protected reasons.

The *Abercrombie* ruling makes clear that an employer can be liable under Title VII for taking an adverse employment action against an employee or applicant based on a religious observance or practice, regardless of whether the employer has actual notice from the employee or applicant that the observance or practice is done for religious reasons or that an accommodation was needed.

By all accounts, the Supreme Court's ruling in *Abercrombie* represents a significant expansion of the reach and scope of Title VII in religious discrimination cases, thus opening the door for a flood of new claims on this basis. The decision seemingly requires employers to speculate whether an employee's practices are done for religious reasons, while at the same time trying to avoid the additional problems that might be caused by such direct inquiries.

The dissenting opinion presents a grim forecast of how far this decision could reach, suggesting that employers, even without any discriminatory motive in mind, may nevertheless be punished for enforcing neutral policies. As a result, you should be extra mindful about the increased scope of this statute when

implementing and enforcing even seemingly religious-neutral policies.

A Small Loss With Huge Potential: *Perez*'s Impact On Federal Agency Rulemaking

In another decision that went against employers this past term, the Supreme Court in *Perez v. Mortgage Brokers Association* unanimously abolished longstanding precedent regarding the requirements that a federal agency must follow when issuing new interpretations of its own rules. The underlying case involved an analysis of whether certain mortgage loan officers are exempt from overtime requirements under the Fair Labor Standards Act (FLSA), but the case will be remembered for its ruling on how to interpret relevant administrative rules that impact employers and businesses.

For nearly 20 years, courts had held that before an agency could issue new interpretations of rules that significantly deviated from the agency's prior definitive interpretations, the agency must engage in a public notice-and-comment period. Known as the *Paralyzed Veterans* doctrine, this rule had been relied upon for years to help prevent agencies from making sudden changes to their rule interpretations. But in *Perez*, the Supreme Court soundly rejected this doctrine, holding that federal agencies are *not* required to engage in the public notice-and-comment process when issuing interpretive rules.

The immediate effect of the *Perez* decision is that agencies may issue and change interpretive rules as they please, even if they conflict with prior interpretive rules, without first providing a notice-and-comment period to the public. Notably, the Court's three most conservative justices (Justices Scalia, Thomas, and Alito) questioned the amount of deference that courts should give to an agency's interpretation of its own rules and regulations. For over 70 years, courts have followed Supreme Court precedent and given great deference to an agency's interpretation of its own rules.

In this case, however, the three Justices mused whether this standard violates the separation-of-powers doctrine by allowing agencies to both make the law and then interpret it, essentially signaling their willingness to reconsider prior holdings establishing this rule of deference. It will be interesting to see what happens if and when the Court is given the opportunity to overrule this doctrine in future years.

Two Small Wins For Employers: Wage/Hour And Collective Bargaining

The Supreme Court gave employers their first win of the term in *Integrity Staffing v. Busk*, a unanimous wage and hour ruling issued in December 2014. Following on the heels of last year's *Sandifer v. United States Steel Corp.* decision, which held that time spent by employees "donning and doffing" their protective gear before and after work is not compensable, the Court continued its efforts to winnow the often-litigated issue of when the compensable workday begins and ends.

In *Integrity Staffing*, the Supreme Court unanimously held that time spent by employees waiting for and undergoing mandatory security screenings at the end of their shifts was not compensable under the FLSA because it did not constitute a "principal activity" of the employees' jobs, nor was it "integral and indispensable" to their jobs.

While this is a clear victory for employers and prevented a new onslaught of wage and hour lawsuits, employers should still exercise caution by reviewing any preliminary and postliminary activities performed by their employees to determine whether they are compensable under the Court's test.

The Court delivered a second win for employers in *M&G Polymers USA, LLC v. Tackett*, ruling that terms of collective bargaining agreements – in particular those that establish vesting of retiree health benefits – must be interpreted pursuant to ordinary rules of contract interpretation.

In its 9-0 decision, the Court delivered a crushing blow to the presumption of lifetime vesting which had stood in some jurisdictions for more than 30 years. Courts in other jurisdictions disagreed, leading the SCOTUS to resolve the issue once and for all. It *essentially adopted a middle-ground approach, holding that traditional rules of contract interpretation must be applied when determining the intent of the parties to a collective bargaining agreement as it pertains to retiree healthcare benefits.*

This decision may provide employers with an enhanced defense to lawsuits which seek to invalidate the termination or reduction of retiree benefits. Employers should be cognizant that lifetime vesting still could be deemed to arise from the implied terms of an agreement, even absent any presumption. You should be mindful to use clear, unambiguous language when drafting agreements to ensure that the terms of the contract are those intended by the parties.

Win, Lose, Or Draw? *Mach Mining's* Judicial Review Of EEOC Conciliation Efforts

The Supreme Court's unanimous decision in *Mach Mining v. EEOC* cannot be considered a true win or loss for employers. The holding states that the EEOC's statutory duty to conciliate a dispute with an employer is subject to a limited level of judicial review. While the EEOC argued that its conciliation efforts were not subject to judicial review in any form, and the employer argued that courts should be broadly permitted to evaluate conciliation, the Court instead split the proverbial baby with a compromise approach.

It ruled that employers are entitled to certain information from the EEOC that allows them the opportunity to remedy the alleged discriminatory practice, and that courts are permitted to review the EEOC's conciliation efforts to determine whether the agency complied with its obligations. The EEOC may ordinarily satisfy this burden by submitting a simple affidavit, and the Court held that permissible judicial review "goes no further" than that. Because the Court declined to allow review of the EEOC's many

questionable negotiation and litigation tactics employers often feel are used to bully them into settling claims, this decision is unlikely to afford employers any real, meaningful relief.

Other Decisions That May Impact Employers

The Supreme Court issued several other notable decisions during this term which, although outside the realm of traditional labor and employment cases, may have at least a limited impact on employers.

In *King v. Burwell*, the Court followed up on its landmark 2012 decision *National Federation of Independent Business v. Sebelius* to once again quash an attack on President Obama's Affordable Care Act (ACA). In 2012, the Court upheld the constitutionality of ACA's requirement that most Americans obtain health insurance or pay a penalty, determining the imposition of such a penalty to be authorized by Congress's power to levy taxes.

This term, the Supreme Court ruled by a 6-3 margin that health insurance subsidies are available to all qualifying individuals regardless of whether the individual obtained coverage through a health insurance exchange set up by the federal government or through one run by the state. This decision essentially preserves the status quo, and thus the law's requirements applicable to employers and group health plans will continue to apply without change.

In another of the Court's highest-profile cases of the term, a divided Supreme Court struck down state-prescribed prohibitions on same-sex marriage in *Obergefell v. Hodges*, ruling that such bans violate the Equal Protection and Due Process clauses of the Constitution's 14th Amendment. By a 5-4 vote, the Court effectively "legalized" same-sex marriage in all 50 states, requiring all states to issue licenses for marriages between same-sex individuals and to recognize same-sex marriages performed in other states.

This decision dovetails with the Court's 2013 decision in *U.S. v. Windsor*, which struck down as unconstitutional the Federal Defense of Marriage Act's bar on same-sex married couples being recognized as "spouses" for purposes of federal laws and benefits. As a result of the two decisions, employers should review and make any necessary changes to their FMLA policies and benefit offerings to ensure they are applied equally to same-sex married couples.

Finally, in *Tibble v. Edison International*, the Court confirmed that employers who maintain 401(k) plans have a continuing fiduciary duty to monitor the investment funds offered under those plans and the fees associated with those funds. This decision serves as a reminder to employers to have their plans reviewed regarding the performance of the funds against relevant benchmarks, the level of fees charged to the funds, and the adherence by the fiduciary to the plan's investment policy statement.

Decisions on the Horizon

The Supreme Court will soon begin gearing up for the 2015-2016 term, set to begin in October, and there are several labor and employment cases already on the docket which we will be closely following:

- *Friedrichs v. California Teachers Association*: in perhaps the most closely watched case of the upcoming term, the Court will review the constitutionality of forced union dues for public employees, which could further erode the power of Big Labor;
- *Tyson Foods v. Bouaphakeo*: will clarify requirements for class membership and certification in class actions and FLSA collective actions;
- *DirectTV v. Imburgia*: an arbitration case that will determine whether a reference to state law in an arbitration agreement governed by the Federal Arbitration Act (FAA) requires the application of state law preempted by the FAA;

- *Green v. Donahoe*: will resolve a Circuit split regarding whether the filing period for discrimination claims based on a constructive discharge begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation; and
- *Fisher v. University of Texas at Austin*: an affirmative action case, though in the university admissions setting, which could have broader implications on states' ability to continue using affirmative-action practices in certain public hiring situations.

As always, Fisher Phillips will be there to issue same-day analysis and summaries of all of these new cases, providing background and context for each decision, explaining the Court's reasoning in layman's terms, and discussing the impact on employers. If you are receiving this newsletter via email, you should already be receiving Fisher Phillips' Supreme Court Legal Alerts automatically. If you aren't, or if you're not sure whether or not you've signed up, contact your regular Fisher Phillips attorney, or email us at communications@fisherphillips.com.

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