2012-13 EMPLOYMENT LAW UPDATE: SUPREME COURT AND FOURTH CIRCUIT

Narendra K. Ghosh
Patterson Harkavy LLP
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This paper summarizes the most important employment law decisions by the United States Supreme Court and Fourth Circuit Court of Appeals over the past year, at least according to my own sense of importance. This review is not meant to be exhaustive. Less popular practice areas such as ERISA, labor law, and federal employee rights have been left out for the sake of brevity.

United States Supreme Court

The 2012-13 term has been a relatively quite one for the Supreme Court when it comes to the core areas of employment law, at least so far. There have been a few cases in peripheral areas such as arbitration (outside of employment), ERISA, and federal employee rights (before the Merit Systems Review Board). Only two decisions issued to date deserve discussion here. However, two employment cases of note will be issued before the end of June. **University of Texas Southwestern Medical Center v. Nasser** will address the burden of proof in Title VII retaliation cases, specifically whether but-for causation must be shown. **Vance v. Ball State University** will address which employees are deemed "supervisors" under the *Faragher/Ellerth* rule for Title VII harassment liability. Finally, **Fisher v. University of Texas**, reviewing the consideration of race in admissions at the University of Texas, and **Shelby County v. Holder**, reviewing Section 5 of the Voting Rights Act, may have broader ramifications for anti-discrimination law, particularly disparate impact cases.

Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013): *If a plaintiff in a pre-certification FLSA collective action has her claim mooted by an offer of judgment, the entire case becomes moot.*

Laura Symczyk filed a FLSA collective action challenging an unlawful meal break policy. Two months after she filed her complaint, at the same it filed its answer, defendant served a Rule 68 offer of judgment adequate to provide full relief to Symczyk. There were no opt-in plaintiffs at this point yet. Symczyk did not accept the offer. Defendant moved to dismiss the entire action as moot based on the Rule 68 offer and the district court agreed. On appeal, the Third Circuit reversed. Joining the Fifth Circuit – the only other Circuit court to address this issue – the Third Circuit applied Rule 23 class action principles to hold that if a plaintiff moves for conditional certification without undue delay, that motion relates back to the filing of the complaint, and prevents a settlement offer to just the plaintiff from mooting the case. The court thus remanded to give plaintiff time to file the conditional certification motion.

The Supreme Court – with the usual 5-4 split – reversed the Third Circuit. Justice Thomas, for the majority, wrote the expected simplistic opinion that rejected the use of the Rule

23 relation back doctrine in the FLSA context. The majority assumed without deciding that an unaccepted offer of judgment moots a case. It then held that because FLSA collective actions are different than class actions – a class has an independent legal status, while a FLSA collective action is merely a collection of opt-in plaintiffs – class action law is inapplicable. Nor did the "inherently transitory" exception to mootness apply because potential opt-in plaintiffs retained their rights to sue. As to the concern that the holding allows defendants to "pick off" plaintiffs before certification, the majority declined to care.

Justice Kagan's dissent spends most of its time addressing the issue of whether an unaccepted offer moots a claim, which the majority simply assumed. (Certiorari had not been granted on this issue and plaintiff never raised it because Third Circuit precedent was clear on this point.) The dissent, quite colorfully and cogently, argues that an unaccepted settlement offer cannot moot a case. Although it concedes that a court has discretion to enter judgment when defendant "unconditionally surrenders," that did not occur here. An individual offer of judgment would not provide full relief because the plaintiff is seeking class relief, though that gives credence to the collective action having some status, which the majority refused to do. If an individual's claim is never moot, the relation back doctrine never has to come into play. Justice Kagan claims that the situation in this case should therefore never arise in the future. Finally, in a footnote, the dissent notes that the majority is wrong on the merits because the relation back doctrine should apply to FLSA cases.

Like most of these 5-4 dissents, this one has the virtue of being correct, but likely makes no practical difference. Circuit courts have consistently held that an unaccepted offer of full relief moots a claim, with divergence only on whether a judgment should be entered to match the offer. *Compare, e.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1987) (holding that because "defendants had offered Horowitz the full amount of damages ($3,281.25) to which she claimed individually to be entitled, there was no longer any case or controversy."), *with McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (requiring default judgment for plaintiff in amount of offer). Courts are unlikely to change course based on the dissent, but it would be nice if they did.

Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam): *The validity of a non-competition agreement is a matter for the arbitrator where the agreement contains a valid arbitration clause.*

In a unanimous per curiam opinion, the Court reversed a decision of the Oklahoma Supreme Court, which had voided an employee non-competition agreement on state law grounds even though the agreement included an arbitration provision. Under the FAA, attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court. The state law governing covenants not to compete must give way to the FAA's direction to leave the issue to the arbitrator.

Fourth Circuit

For the first time in a while, there have been no changes to the composition of the Fourth Circuit over the past year. There are no vacancies, so the composition may not change for some time. Note that only published cases are discussed here. One unpublished case worth a mention, however, is *Altemus v. Federal Realty Investment Trust*, 490 Fed. App'x 532 (4th Cir. 2012), in which the Court absurdly concluded that a CEO's secretary was exempt under FLSA's administrative exception, crediting statements in performance reviews instead over those in plaintiff's affidavit on summary judgment. The only positive note for this case is that it is unpublished.

Sydnor v. Fairfax County of Va., 681 F.3d 591 (4th Cir. 2012): *Plaintiff properly exhausted her ADA claim at the EEOC where she consistently described her disability and restrictions, even though she did not include the specific requested accommodation in her EEOC charge.*

Carolyn Sydnor was a public health nurse employed by the Fairfax County Health Department. Sydnor filed an EEOC charge alleging that her manager denied her request for reasonable accommodation when she returned to work with the help of a wheelchair after her foot surgery. The health department questioned her "capacity to perform the full clinical duties of a public health nurse" and terminated Sydnor. The district court dismissed the case saying that she had failed to file her proposed accommodation with the EEOC and thus had not exhausted administrative remedies.

On appeal, the Fourth Circuit rejected the County's argument that Sydnor did not exhaust her administrative remedies. It noted that in both charge and formal complaint, Sydnor described the same individuals involved, alleged the same type of discrimination, and consistently described her disability, asserting her "limited walking ability," therefore putting the County on notice well in advance of litigation.

The court also rejected the County's argument that she did not exhaust her remedies because she never mentioned the use of a wheelchair as a proposed accommodation in her administrative documents, finding that she did, in fact, reference her use of a wheelchair multiple times in the EEOC questionnaire. Combined with the description of her disability as including "limited walking ability," the County was on notice that Sydnor relied on a wheelchair to do her job, and use thereof could thus be anticipated as a reasonable accommodation. The court commented that dwelling on technicalities in an EEOC charge (such as in specifically listing proposed accommodations) would undermine the congressional preference for agency resolution of discrimination disputes.

EEOC v. Randstad, 685 F.3d 433 (4th Cir. 2012): *A broad investigatory subpoena by the EEOC was proper where it was based on both the original and related, amended charge, and where the EEOC's determination of investigatory relevance was not obviously wrong.*

Kevin Morrison, a resident of Maryland, was born in Jamaica and could not read or write

English. He filed a charge of discrimination with the EEOC asserting that Randstad (a temporary staffing agency) terminated his employment pursuant to a requirement that its employees read and write English. Morrison alleged that Randstad's literacy policy violated Title VII. Two years later, in an amended charge, he claimed that the literacy policy violated the ADA because he has a learning disability. Randstad responded, admitting that Morrison was terminated because he could not read, but denied that the termination was the result of national origin discrimination, asserting an unwritten policy against hiring people who cannot read because "virtually all of the assignments ... require reading and/or writing skills." The assertion was belied by the fact that Morrison had completed several assignments.

The EEOC issued a Request for Information seeking information about any literacy requirements Randstad imposes and a list of all position assignments made by Randstad's Hagerstown office from 2006 through 2009. The EEOC late requested similar information from all of Randstad's 13 Maryland offices. The company objected and the EEOC sought judicial enforcement of the subpoena.

On appeal, the Fourth Circuit found that the EEOC did, in fact, have authority to investigate Morrison's charges under both the ADA and Title VII and that the requested materials were within the scope of EEOC's investigatory authority. The Fourth Circuit also rejected Randstad's undue burden argument, finding insufficient evidence that the costs of the subpoena would be too onerous.

On the initial issue, the court agreed with the EEOC that the ADA claim related back to the original Title VII claim, as they were based on the same facts, and thus was a proper subject of investigation. Under the EEOC's reading of its own regulations, to which the court deferred, the EEOC could also continue investigating the Title VII claim even after the new charge was filed. The court likewise deferred to the EEOC's determination of relevance for investigative purposes in upholding the broad scope of the EEOC's subpoena. Courts are to defer to the agency's "own appraisal of what is relevant so long as it is not obviously wrong." This gives the EEOC quite a lot of latitude in conducting investigations.

WEC Carolina Energy Solutions, LLC v. Miller, 687 F.3d 199 (4th Cir. 2012): *Interpretiting the CFAA narrowly in an issue of first impression, the Court held that the CFAA is not violated if an employee accesses employer information with authorization even if he then misappropriates that information to assist a competitor.*

In April 2010, Mike Miller resigned from his position as Project Director for WEC Carolina Energy Solutions, Inc. ("WEC"). Twenty days later, he made a presentation to a potential WEC customer on behalf of WEC's competitor, Arc Energy Services, Inc. ("Arc"). The customer ultimately chose to do business with Arc. WEC contends that before resigning, Miller, acting at Arc's direction, downloaded WEC's proprietary information and used it in making the presentation. Miller still had electronic access to the materials then; he did not hack into any system. WEC sued Miller, his assistant Emily Kelley, and Arc for, among other things, violating the Computer Fraud and Abuse Act ("CFAA") for accessing a computer without authorization and/or exceeding their authorized access.

Dismissing the CFAA claims, the district court followed the Ninth Circuit, where the statutory provisions of "without authorization" and "exceeds authorized access" are interpreted literally and narrowly to hold that if authorization has not been revoked there is no remedy for the misappropriation of information under the CFAA. In contrast, the Seventh Circuit holds that an employee breaches his duty of loyalty to his employer when he accesses a computer or its information to advance his own interests at the expense of his employer's interests. This breach implicitly revokes his rights as an agent of the employer to access the computer and its information, thus violating the CFAA.

Regarding the phrase "exceeds authorized access," the CFAA defines it as follows: "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." Like the Ninth Circuit, the Fourth Circuit focused on the plain language of the statute and concluded based on the common meaning of "authorization" that an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer. Thus, he accesses a computer "without authorization" when he gains admission to a computer without approval, and similarly, that an employee "exceeds authorized access" when he has approval to access a computer, but uses his access to obtain or alter information that falls outside the bounds of his approved access. The focus is on the means of obtaining information, not the use of the information.

The court thus adopted the Ninth Circuit's narrow interpretation and held that the CFAA applies only when an individual accesses a computer without permission or obtains or alters information on a computer beyond that which he is authorized to access. The court therefore agreed with the district court that, although Miller and Kelley may have misappropriated information, they did not access a computer without authorization or exceed their authorized access. Because Miller's and Kelley's conduct failed to violate the CFAA, Arc cannot be liable under the statute for any role that it played in encouraging such conduct, and thus WEC failed to state a valid CFAA claim. In sum, the court was "unwilling to contravene Congress's intent by transforming a statute meant to target hackers into a vehicle for imputing liability to workers who access computers or information in bad faith, or who disregard a use policy."

Reynolds v. American National Red Cross, 701 F.3d 143 (4th Cir. 2012): *Under the pre-amendment ADA standards, a one-time 15-pound lifting restriction, in the face of other evidence of continued ability to lift, is not sufficient to establish a disability.*

Benjamin Reynolds worked for the Greenbrier Valley Chapter of the American Red Cross in Lewisburg, West Virginia (the "Chapter"). He began as a volunteer in 1994, became an employee in 2004, and then the Manager of Service Delivery in 2006. In August 2006, Reynolds had been having some back stiffness and made it worse moving a piano. In September, he received a 15-pound lifting restriction from a physician, but there was no follow-up with the physician and Reynolds continued to lift items at work. Reynolds alleged that he discussed filing a workers' compensation claim and his supervisor said he would be fired if he did so. In January 2007, Reynolds was laid off due to supposed lack of funds. His subsequent workers' compensation claim was denied as untimely. Reynolds filed suit in 2010. Although the Chapter

had fewer than 15 employees, the district court found that it was an "agent" of the National Red Cross, a covered employer. But, it granted defendants summary judgment because Reynolds was not disabled.

Following all other circuits, the Court held the ADAAA is not retroactive, so followed the old ADA standards. Unsurprisingly, the Court found no disability because there was no evidence plaintiff's limitations were permanent or long-term and the lifting restriction itself was not substantial enough. Nor was there enough evidence for a record-of or regarded-as disability. Similarly, there was no evidence of retaliation with regard to his discharge. Finally, the Court did not need to reach defendants' cross-appeal on the 15-employee issue.

Laing v. Federal Express, 703 F.3d 713 (4th Cir. 2013): *There is insufficient evidence for an FMLA violation where the company was legitimately investigating the employee before her FMLA leave and terminated her upon her return to work based on the results of the investigation.*

Kimberly Laing worked for FedEx as a mail courier in Charlotte from 1988 to 2009. She requested FMLA leave for knee surgery in 2009. Prior to Laing's FMLA leave request, the company had initiated an investigation into her delivery route reports that her supervisor suspected might be falsified. The morning Laing returned to work, she was placed on paid suspension pending the conclusion of the investigation. The company terminated her on grounds that she had violated the company's Acceptable Conduct Policy by falsifying records. Laing then filed suit asserting that FedEx terminated her in retaliation for taking FMLA leave for her knee surgery and that it failed to restore her position upon her return to work. The district court granted summary judgment to the company, finding that Laing did not dispute that her records were not in compliance with company policy and that FedEx had not denied her right to return since it had paid her while she was out on suspension.

On appeal, the Court found that Laing had presented a prima facie case but that she neither presented convincing direct evidence linking the protected leave to her termination nor did she provide comparator evidence. Although Laing presented some evidence of vaguely suspicious conversations with coworkers, the court found that it fell short of providing the necessary causal link. It was also not enough that Laing offered explanations for her suspicious delivery records, as she admitted the numerous suspicious records gave proper rise to concern. Laing offered no comparator evidence showing that FedEx was using her routing irregularities as a pretext to fire her due to her FMLA leave. In fact, there was evidence to the contrary as months before the investigation into Laing's records, FedEx had terminated an employee who had not taken FMLA leave who was found to be falsifying route information. Thus, the Court found that Laing had failed to establish a triable issue for her first claim and granted summary judgment to the company.

The Court also affirmed the granting of summary judgment on the issue of having not restored Laing to her previous position, although it differed from the district court in how it reached that conclusion. The Court pointed out that according to the statute an equivalent position must involve the same or substantially similar duties. This was clearly not the case with

Laing, who was relieved of all work duties and employee privileges. However, the Court still granted summary judgment to the company on this issue because FMLA leave does not guarantee or provide a right to be restored absolutely as in the instant case, where the company made a case that it would have suspended and then terminated Laing's employment even if she had not taken FMLA leave.

Young v. United Parcel Service, 707 F.3d 437 (4th Cir. 2013): *A corporate policy that provided light duty work to workers with on-the-job injuries or ADA disabilities, but not to pregnant workers with similar restrictions, did not violate the PDA.*

Peggy Young worked for UPS as a part-time package deliverer. In July 2006, UPS granted Young's request for a leave of absence to try in vitro fertilization. Young extended her leave when she became pregnant. In September and October 2006, Young's doctor and midwife stated that she should not lift more than twenty pounds during her pregnancy. Shortly thereafter, Young called UPS informing them that she was ready to return to work. Young was informed that based on UPS policy, she would be unable to perform her essential job functions and would not be eligible for light duty, which was reserved for those who had *job-related* injuries or recognized ADA disabilities. Because she had exhausted her FMLA leave, was ineligible for short-term disability, and UPS policy would not allow her to work with the lifting restrictions, Young was not allowed to return to work in the fall of 2006. Young did return to UPS, however, after the birth of her child.

Young filed suit for race, pregnancy, and disability discrimination. The district court granted summary judgment on all claims. Young only appealed on the latter two. The Court held that Young's pregnancy and her lifting restrictions did not constitute a disability under the ADA because they were temporary impairments. Nor did UPS err in finding Young unable to work based on the physician notes. Nor was there any evidence for a regarded-as claim as UPS reasonably believed Young's limitations were temporary.

In the heart of the case, the court considered Young's PDA claim that the lack of a UPS policy providing light duty for pregnant workers while providing it for other workers is direct discrimination. However, the Court found that the UPS policy was "pregnancy blind" and not discriminatory. Although restricted pregnant workers may be similar to restricted workers with on-the-job injuries or recognized disabilities, they are also similar, and perhaps more so, to workers temporarily restricted due to off-the-job causes. Following other circuits, the Court held that the PDA does not require that pregnant workers be treated better than other workers, only that they be treated no less favorably than others with medical conditions. In short, Young's lifting restrictions afforded her no more right to accommodations than an individual who was injured *off the job* and put on the same lifting restrictions. Finally, under McDonnell Douglas, Young did not establish the final element of the prima facie case for pregnancy discrimination, that similarly situated employees received more favorable treatment than her. Thus, the Court affirmed the district court's decision that granted summary judgment to UPS.

Balas v. Huntington Ingalls Industries, Inc., 711 F.3d 401, 409 (4th Cir. 2013): *Courts do not have jurisdiction over Title VII claims based on adverse actions that are nowhere specified in the EEOC charge.*

Karan Balas allaged that she was subjected to a sexually hostile work environment, her supervisor, Brad Price, made numerous sexual comments and once propositioned her, Price would not let her wear ripped jeans, and that Price once hugged her against her will in January 2010. In February 2010, she was fired with another employee for falsifying a time card. Balas' EEOC questionnaire and a later letter to the EEOC described all of these allegations, but the resulting EEOC charge and amended charge only mentioned the jeans incident, hug incident, and termination. The "continuing action" boxes were not checked and the dates of incidents were only those of the termination. Balas then filed suit. The district court dismissed for lack of jurisdiction her Title VII claims that were based on conduct not included in the EEOC charges. It then rejected the remaining Title VII and state law claims on summary judgment.

The Court affirmed the partial dismissal, holding that courts may only consider those allegations included in the EEOC charge, and not in questionnaires or letters, because only the charge is provided to the employer. The Court rejected the Title VII retaliatory discharge claim because the HR manager who terminated Balas did not know of her complaints regarding discrimination, and that her supervisor, though involved in the investigation, was not a decisionmaker. The Court also had little trouble rejecting the state-law claims for assault, battery, and wrongful discharge.

Muriithi v. Shuttle Express, Inc., 712 F.3d 173 (4th Cir. 2013): *An arbitration agreement that includes a class action waiver, fee splitting provision, and incorporates a one-year statute of limitations is not unconscionable when applied to wage and hour claims.*

Samuel Muriithi was a driver for Shuttle Express, a airport passenger shuttle service. Muriithi alleges that Shuttle Express misled him concerning the compensation he would receive, inducing him to sign a Unit Franchise Agreement with Shuttle Express in April 2007 (the Franchise Agreement). Muriithi also alleges that Shuttle Express improperly classified him in the Franchise Agreement as an "independent contractor" or "franchisee," rather than as an "employee," and that, as a result, he is entitled to overtime pay and to compensation of at least the prevailing minimum wage required under FLSA. Muriithi brought a FLSA collective action along with analagous state wage and hour claims. Defendants moved to compel arbitration based on an arbitration provision in the Franchise Agreement. The arbitration provision included a class action waiver, equal fee-splitting, and one-year statute of limitations. The district court found the arbitration provision unconscionable because of these factors and denied the motion.

On appeal, the Court found that all claims arose of the Franchise Agreement, as they were based on misclassification, and thus implicated the arbitration provision. Based on the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), issued after the district court decision, the Court held that a class action waiver cannot render an arbitration agreement unconscionable.

The Court concluded that Muriithi had not met his substantial burden of showing prohibitive arbitration costs. His estimate of arbitration costs was based on a quote from a different type of case in a different jurisdiction. He also failed to provide evidence on the likely value of his claim. On top of that, defendants offered to pay all costs during oral argument. Finally, because the one-year limitations provision applied to the entire Franchise Agreement, and was not part of the arbitration clause itself, the district court erred in considering the limitations period as part of its unconscionability analysis. In the court's gatekeeping function, the scope of a motion to compel arbitration is restricted to consideration of challenges specific to the arbitration clause; general defenses are for the arbitrator to decide.