Fenwick Employment Brief

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U.S. Supreme Court Decides Several Employment and Employment-Related Cases

EMPLOYER STRICTLY LIABLE FOR SUPERVISOR'S HARASSMENT OF EMPLOYEE ONLY IF SUPERVISOR HAS HIRE AND FIRE AUTHORITY OVER SUBORDINATES

In a favorable decision for employers, the U.S. Supreme Court in *Vance v. Ball State University* ruled that employers are strictly liable for harassment by a supervisor where the supervisor is empowered to take tangible employment action against a subordinate employee, such as the authority to hire or fire. Under both federal Title VII and California Fair Employment and Housing Act ("FEHA"), employers face vicarious liability where a supervisor harasses an employee. Under Title VII, if no tangible adverse employment action is taken (for e.g., a termination or demotion), the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the employer's available procedure to complain about harassment (this defense is unavailable under California law, i.e. employers are strictly liable for supervisor harassment regardless of the existence or absence of a tangible adverse employment action). Conversely, an employer is liable for harassment by a non-supervisory co-worker only where the employer knew or should have known about the harassment and the employer was negligent in permitting the harassment to occur.

Maetta Vance, an African American woman, was a server in the university's dining services department. Vance alleged that Saundra Davis, a Caucasian woman, harassed her on account of her race by, among other actions, glaring at her, slamming pots and pans, blocking her movements, and giving her "weird" looks. It was undisputed that Davis had no power to hire, fire, demote, promote, transfer or discipline Vance. On occasion, Davis handed Vance food "prep lists."

On these facts, the court held that Davis was not a supervisor under Title VII, and that the university would be liable for co-worker harassment only if the employer was negligent in preventing or correcting the alleged harassment. The court affirmed the decision of the lower court dismissing Vance's lawsuit as she presented no evidence that the university was negligent in addressing Davis' conduct.

California FEHA also defines a "supervisor" as an "individual having the authority … to hire, … discharge, … or discipline other employees…" Accordingly, state courts should also follow the Supreme Court's ruling.

EMPLOYEE CLAIMING RETALIATION MUST MEET HIGHER STANDARD OF PROOF

In another favorable ruling for employers, the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* clarified that employees must satisfy a higher "but for" standard of proof to prevail in a Title VII retaliation claim. In a discrimination case, a plaintiff may prevail by showing that his race or other protected status was merely a "motivating factor" in making an adverse employment decision even if the employer had other, lawful motives for the action (i.e., "mixed motive" liability). In contrast, to prove retaliation under Title VII, a plaintiff must show that "because" he opposed an unlawful employment action or filed a Title VII charge, the employer retaliated against him. Thus, the plaintiff must show that the desire to retaliate against him was the "but for" cause of the adverse employment action, i.e., mixed motive liability for retaliation is insufficient.

In *University of Texas*, plaintiff Naiel Nassar was a university physician of middle-eastern descent. He claimed that university supervisors discriminated against and harassed him on account of his religion and ethnic origin. Nassar complained and resigned his university faculty position. He was then offered a job at the university hospital as a non-teaching staff

physician. According to Nassar, his faculty supervisor retaliated against him by causing the hospital to withdraw the job offer.

Nasser prevailed in the lower court by showing that retaliation was a motivating factor in the university's decision to withdraw the hospital job. Reversing the lower court's determination, the high court held that the matter must be re-tried with an instruction to the jury that retaliation is established only if the desire to retaliate was the but-for cause of the decision to withdraw the job offer.

Under California law, FEHA also prohibits retaliation "because" an employee "has filed a complaint, testified, or assisted in any proceeding under this part," such that state courts may also find the Supreme Court's ruling persuasive in FEHA retaliation cases.

WAIVER OF CLASS ACTION REMEDY ENFORCED EVEN THOUGH ANTICIPATED COSTS OF INDIVIDUAL ARBITRATION EXCEEDED MAXIMUM POTENTIAL RECOVERY

In *American Express Company v. Italian Colors Restaurant*, a non-employment case, the Supreme Court enforced a class action waiver in an American Express ("AMEX") arbitration agreement despite a restaurant's objection that the waiver effectively prevented a legal remedy. AMEX provides merchants with credit card processing services. As a condition of such services, merchants agree to individually arbitrate any disputes and waive the right to bring class action lawsuits. Italian Colors Restaurant filed a class action lawsuit against AMEX for alleged antitrust violations. Opposing AMEX's motion to compel individual arbitration, the restaurant argued that its maximum individual recovery was under $50,000 and the cost of expert evidence to prove the antitrust claim alone would cost hundreds of thousands of dollars. According to the restaurant, public policy required an affordable and effective remedy for the federal antitrust violation, and that a class action was that remedy.

Rejecting the restaurant's argument, the court held that a stronger public policy favoring arbitration outweighed the merchant's right to bring a class action antitrust claim. According to the court, the merchant may seek to vindicate its antitrust rights but must do so in individual arbitration.

The AMEX case may prove compelling to those California courts considering employee challenges to class action waivers in employment arbitration agreements.

DOMA AND PROP 8 RULINGS CLEAR THE WAY FOR SAME-SEX MARRIAGES IN CALIFORNIA AND REQUIRE CHANGES IN EMPLOYEE BENEFITS

In *U.S. v. Windsor*, the court struck down a portion of the federal Defense of Marriage Act ("DOMA") as unconstitutional. DOMA, for purposes of federal tax and benefits laws, defined marriage as only between "one man and one woman." Accordingly, even in states that allowed same-sex marriages, same-sex couples were denied the marital exemption to federal estate tax and other benefits of federal law. The court ruled that DOMA violated the due process and equal protection clauses of the U.S. Constitution.

In a separate but related ruling, the court in *Hollingsworth v. Perry* considered an appeal of a lower court ruling that California Proposition 8 was unconstitutional. Proposition 8 defined marriage in California as solely between opposite-sex couples. The lower court struck down Proposition 8 as unconstitutional in violation of the due process and the equal protection clauses. Dennis Hollingsworth, a private citizen, appealed seeking to enforce Proposition 8. Rejecting his appeal, the court held that Hollingsworth was not injured by the lower court action and had no "standing" to appeal. As a result, same sex marriages in California are lawful.

As a further consequence, employees in California who are in a same-sex marriage must be afforded the same rights and benefits afforded to employees in opposite-sex marriages. For instance, federal FMLA does not cover an employee's request for family leave to care for a seriously ill same-sex spouse (although the California Family Rights Act provides family care rights

for domestic partners). With the demise of DOMA and Proposition 8, eligible employees will be entitled to family leave to care for a same-sex spouse.

Readers are also encouraged to read the Employee Benefits Group alert *"The Supreme Court's DOMA Decision: What Does it Mean for Employee Benefit Plans?"*

NEWS BITES

Employees Must Be Paid for On-Call Time While Required to Stay on Work Premises

In *Mendiola v. CPS Security Solutions, Inc.*, a California court of appeal ruled that security guards must be paid for time spent on-call where they could not leave their work premises. CPS provides security guards for construction sites. During daytime hours, guards actively patrolled the site and were paid an hourly wage. During weeknights (9 pm to 5 am), the guards spent the night in employer-provided residential-type trailers and the time was classified as unpaid, on-call time. If there was an alarm or suspicious circumstances, the guards were required to don their uniform and investigate. Guards were paid for the actual investigation time only. The guards were allowed to keep personal items in the trailer, and could engage in personal activities such as reading, watching television, surfing the internet, and sleeping. However, children, pets, and alcohol were not permitted and adult visitors were allowed only with prior approval. If a guard wanted to leave the premises at night, he had to obtain a relief guard, stay within 30 minutes of the work site, and carry a pager.

On these facts, the court held that the degree of control exercised by the employer over the guards' on-call time rendered the time hours worked, and the guards were thus entitled to minimum wage and overtime for all such hours.

On weekends, the guards were on-call for 24-hour shifts. The court ruled that 16 hours were hours worked. However, the employer was allowed to exclude 8 hours for sleep time so long as the sleep time was uninterrupted, the employer provided a comfortable place to sleep, and the parties had entered into an agreement to that effect.

Coca-Cola Company Properly Required Employee to Undergo Mental Examination After Employee Threatened Co-Workers

In *Owusu-Ansah v. The Coca-Cola Company*, the employee challenged the employer's requirement that he undergo a mental examination as a condition of continued employment. Franklin Owusu-Ansah was a quality assurance specialist for a Coca-Cola call center located in Georgia. During a meeting with his supervisor, Owusu-Ansah complained about discrimination and harassment, became agitated, banged his fist on the table, and stated that someone was "going to pay for this." After the meeting, the manager conferred with Coca-Cola Human Resources and security personnel about this seeming threat against employees.

The employer required Owusu-Ansah to undergo a mental health fitness-for-duty examination. Owusu-Ansah underwent the examination and was released to return to duty. Despite his reinstatement, he sued alleging that the requirement that he undergo the fitness for duty examination violated the Americans with Disabilities Act ("ADA"). Dismissing the claim, the federal Eleventh Circuit Court of Appeals held that the ADA allows a medical examination that is job related and consistent with business necessity. The court held that Coca-Cola had a reasonable, objective concern about the employee's mental state which potentially threatened the safety of other employees.

Employee Allowed to Proceed with Age Discrimination Claim After He Was Discharged for Swearing and Raising His Voice

In *Ridout v. JBS USA, LLC*, Lyle Ridout was discharged as superintendent at a pork processing plant in Iowa after an incident arising out of an equipment failure. Ridout had worked for the company for 40 years. After the equipment failure, resulting in a significant backlog of product, Ridout and plant management met next to a large and noisy piece of equipment. Ridout became visibly upset, swore, and raised his voice. The plant general manager told Ridout to go home and the Company subsequently terminated him for

"insubordination." The employer replaced Ridout (age 62) with two substantially younger employees in their thirties.

In his lawsuit alleging age discrimination, Ridout explained that he raised his voice to be heard over the noise of the equipment, and due to hearing loss from working over forty years at the plant, he tended to speak loudly. Other supervisors testified in deposition that it was common to raise one's voice on the factory floor because of the equipment noise, and that heated arguments involving swearing were relatively common. No one could recall a single instance, other than Ridout's case, where any employee had been terminated for yelling or swearing. Reversing a summary judgment in the employer's favor, the federal Eighth Circuit Court of Appeals held that a jury must decide whether Ridout's termination was motivated by his age.

Affordable Care Act Pay or Play Rules Delayed One Year
On July 2, the Treasury Department issued a press release announcing that implementation of the "pay or play" rules, or employer shared responsibility rules, of the Affordable Care Act (the "Act") would be delayed for one year. The pay or play rules require employers with 50 or more full-time employees to provide health plan coverage that meets the requirements of the Act, or pay a penalty. The delay in the implementation of the pay or play rules does not affect other provisions of the Act, so employers should continue to plan and prepare for compliance with the Act.

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