2015 Employment Law Update

September—October 2015

Trends and Developments in Employment and Labor Law: Court Decisions and Agency Action

Gregory S. Fisher, Esq.

Davis Wright Tremaine LLP

Scope

- Brief review of case decisions from the U.S. Supreme Court, Ninth Circuit, and Alaska Supreme Court
- Upcoming court cases to watch
- Regulatory update

U.S. Supreme Court

Leading Labor and Employment Decisions for the 2014-2015 Term

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Mach Mining, LLC v. EEOC

Issue:

Does EEOC have duty to conciliate and, if so, how should courts review?

- Alleged sex discrimination for not hiring women miners

Mach Mining--facts

- Complaints filed alleging that Mach Mining discriminated against women
- EEOC files suit, but never attempts conciliation
- Mach Mining moves to dismiss, arguing that conciliation is mandatory prerequisite to EEOC filing suit
- District Court agrees that it may review whether EEOC met its duty to conciliate
- Seventh Circuit reverses, holding that courts may not review conciliation process

Mach Mining--result

- U.S. Supreme Court's holding: REVERSED
- EEOC has a duty to conciliate. Courts may review whether or not EEOC has met its duty.Review is limited. EEOC may meet its duty by providing employer with notice, engage with employer, and give employer opportunity to remedy discriminatory practice.
- If breached? Not dismissal—compel conciliation.

Mach Mining—significance?

- Important procedural checkpoint
- EEOC will have to at least stop and "go through the motions" of complying with the law
- Scope? May yet be TBD

Perez v. Mortgage Bankers

Issue:

Can USDOL change interpretative guidance without public comment?

- Are mortgage loan officers exempt or not?

Mortgage Bankers--facts

- For years, USDOL has classified mortgage loan officers as exempt administrative employees
- However, USDOL abruptly changed interpretative guidance in 2010 with no notice
- MBA filed suit, arguing that abrupt change offended due process because there was no notice or public comment on rule change
- Lower courts agreed with MBA, holding that USDOL's decision was functional equivalent of rule-making for which notice and public comment must be offered

Mortgage Bankers--result

- U.S. Supreme Court's holding: REVERSED
- Interpretative rules are simply guidance, and do not constitute formal rule-making for which notice and public comment must be offered
- Interpretative rules do not have the force of law
- *Paralyzed Veterans* doctrine is contrary to APA

Mortgage Bankers--significance

- *Paralyzed Veterans* doctrine provided that agencies must provide notice and public comment if and when it issues interpretative guidance that significantly deviates from prior guidance
- Troubling decision. Undermines predictability and stability, twin pillars of the rule of law. Will increase compliance review and costs. Affords agencies extremely broad discretion for capricious decisions.

Integrity Staffing v. Busk

Issue:

Is screening time compensable under the FLSA?

- Is time spent on workplace search integral to work?

Integrity Staffing--Facts

- Integrity Staffing provided warehouse stockers for Amazon
- Workers required to undergo security screening each day before they leave work; 25 minutes average waiting time
- District Court: not integral and indispensable to employer's activities
- Ninth Circuit: reverses, holding such searches are compensable if necessary and performed for employer's benefit

Integrity Staffing--Result

- U.S. Supreme Court—REVERSED
- Security searches not compensable as such searches are not integral and indispensable to the employee's principal activities
- Ninth Circuit erred by focusing on whether employer required activity as opposed to whether activity was linked to productive work performed by employee

Integrity Staffing--Significance

- Clarifies Portal to Portal Act
- Will probably facilitate employers' policies related to surveillance and security in the workplace
- Could lead to "artful drafting" of job descriptions and corresponding duties
- Emphasis on productive work performed by employee should (hopefully) promote stability and clearer guidelines

- Whistleblower case

DHS v. MacLean

Issue:

Does Homeland Security Act prohibit disclosure of sensitive information?

MacLean—some background

- Federal law protects whistleblowers who disclose any violation of law or issue that poses substantial and specific danger to public health or safety
- However, there is an exception if such disclosure is "specifically prohibited" by law
- So the issue here was whether the Homeland Security Act specifically prohibited MacLean's disclosure
- "Regulations" not included in HSA provision

MacLean--facts

- MacLean tells reporter that TSA cancelled air marshal missions during time of heightened alert
- TSA fires him for disclosing sensitive information without authorization. He files suit
- Merit Systems Protection Board upholds termination, ruling that disclosure was specifically prohibited by law
- Federal Circuit vacates decision, concluding that the Homeland Security Act does not specifically prohibit disclosure (only addresses "law" and not "law or regulation")

MacLean--result

- U.S. Supreme Court –AFFIRMED
- The Homeland Security Act authorizes TSA to promulgate regulations, but the law itself does not specifically prohibit disclosure
- TSA's regulations are not "law" for purposes of the Whistleblower exception; only a statute meets this standard.

MacLean--significance

- In the federal context, will help promote transparency and bring to light government misconduct
- Agencies cannot insulate themselves by promulgating regulations that prohibit disclosure of information
- Statutory interpretation—anchors meaning closer to actual terms or words. Congress acts intentionally when it omits language

Tibble v. Edison Int'l

Issue:

Limitations period for ERISA fiduciary claim

- Investing duty

Tibble--facts

- Plan Trustees selected higher-priced mutual funds when comparable lower priced funds were available
- Suit filed, but more than 6 years after the initial decision was made
- ERISA's limitations period for breach of fiduciary duty is 6 years from date of last action or from when violation could have been cured
- Ninth Circuit holds that claims are time-barred

Tibble--result

- U.S. Supreme Court—REVERSED
- Fiduciaries have continuing duty to monitor investments
- Initial selection of higher-priced mutual funds does not negate continuing duty

Tibble--significance

- Most retirement plans are defined contribution plans (benefits determined by value of individual investment accounts less expenses)
- Could be argued that decision here will increase fiduciary duty and open door to additional claims
- Process may help protect retirement benefits

M&G Polymers v. Tackett

Issue: May health benefits expire when CBA terminates?

- When, if ever, do health benefits vest?

M&G Polymers--facts

- M&G Polymers executes CBA with Union and promises to fund health benefits for retirees and their dependents
- CBA expires and is not renewed
- M&G Polymers announces that retirees and dependents must contribute
- Union files suit, alleging violation of ERISA
- Sixth Circuit holds that M&G Polymers cannot change agreement to fund contributions in this manner

M&G Polymers--result

- Holding: U.S. Supreme Court—REVERSED
- Ordinary contract principles apply to CBA, including ERISA terms
- The provision at issue did not create a vested right to retiree benefits
- Once contract expired, benefits under contract terminated
- ERISA treats pension plans differently from welfare benefit plans

Young v. UPS

Issue: Pregnancy Discrimination Act

- How do work limitations affect pregnancy rights?

Young v. UPS--facts

- Young pregnant, cannot meet lifting restrictions for drivers
- UPS advises Young she cannot work while so-limited by her doctor
- Other employees in comparable circumstances were accommodated (those who were injured on the job, or had disabilities under the ADA, or had DOT certificates temporarily suspended)
- Lower courts grant summary judgment to UPS

Young v. UPS--result

- Holding: U.S. Supreme Court –REVERSED
- Disparate treatment claim
- UPS failed to accommodate Young, and law prohibits treating pregnant employees less favorably than similarly-situated non-pregnant employees
- Summary judgment should not have been granted

Young v. UPS--significance

- When evaluating comparators, the other employees do not have to be exactly the same
- The question is whether the other employees can be reasonably distinguished from the plaintiff
- Is the Court's test a new test? A confusing test? "Cannot place a significant burden without substantial justification" (normal test, did similarly situated employees outside plaintiff's protected classification receive more favorable treatment?)

Always stay on the good side of the guy or gal with the needle

- Q meets his Vet

EEOC v. Ambercrombie & Fitch

Issue: Religious discrimination

- Notice and knowledge of need for religious accommodation

Ambercrombie & Fitch--facts

- Muslim job applicant wears hijab
- A&F has policy prohibiting head gear or scarfs
- Job applicant does not ask for any form of accommodation, and does not identify herself as Muslim
- A&F suspects that job applicant is Muslim
- Lower courts grant summary judgment, holding that employer cannot be liable for failing to accommodate religious practice where, as here, no request was made

Ambercrombie & Fitch--result

- Holding: U.S. Supreme Court—REVERSED
- Actual knowledge of the need for a religious accommodation need not be shown
- Instead, job applicant need only show that his or her need for an accommodation was a motivating factor in the employer's decision
- Unlike the ADA, which pre-conditions accommodation on known disability, Title VII makes no such distinction

Ambercrombie & Fitch--significance

- Confusing decision with uncertain implications
- Difficult to see how failure to accommodate a religious practice can be a motivating factor unless the employee or job applicant has somehow communicated the need for an accommodation
- Does this compel employers to start asking questions about religious practices during the application process? What about beards? Working hours? Working days?

Obergefell v. Hodges

- U.S. Supreme Court holds that there is a constitutional right to same-sex marriage
- Opinion rests on Liberty and Equal Protection grounds, and references a "Right to Dignity"
- Will this lead to sexual orientation being a protected right?
- Many/most employers already seem comfortable with protecting sexual orientation, but housing, employment, and religious rights will probably be evaluated in upcoming years

United States Supreme Court

Upcoming October 2015 Term

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Fisher v. University of Texas (Fisher II)

- After last decision, UT's policy was upheld on remand applying strict scrutiny
- Court accepted review
- This could dramatically change affirmative action policies

Friedrichs v. California Teachers' Ass'n

- Public employee unions—should *Abood* be overruled? May public employees be compelled to join union or fund union efforts with agency fees?
- Issue: First Amendment rights being violated when public employees are forced to pay agency fees
- "Bunker-busting" case

DirectTV v. Imbrogio

- Are class action waivers in arbitration agreements enforceable?

Spokeo v. Robins

- Does plaintiff have Article III standing to file suit for FCRA violation when plaintiff suffered no concrete injury?

Campbell-Ewald Co. v. Gomez

- Does an offer of complete relief moot claim and render class action moot as well?
- How far does derivative sovereign immunity extend for government contractors? Is it limited to work on public works projects? Or may it extend further?

Tyson Foods v. Bouaphakeo

- May class or collective action be certified based on statistical analysis?
- May class or collective action be certified when class or collective includes hundreds of members who suffered no injury and had no right to damages?

Kingdomware Technologies v. U.S.

- What deference should courts afford to agency interpretations?
- How should courts analyze agency interpretations and interpretative guidance?
- Are the old *Chevron* and *Skidmore* tests still valid?

Green v. Donahoe

- When does the filing period for a constructive discharge claim run under federal employment discrimination law?
- Federal employees have 45 days to contact EEO counselor in their respective branch
- Does one look to the underlying conduct or acts or the "resignation" date?

Alaska Supreme Court

Leading Employment Cases
in
2014-2015

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Becker v. Fred Meyer

- Loss prevention manager terminated after failing to follow prescribed policies for contacting suspected shoplifter
- Summary judgment for employer REVERSED
- Genuine issue regarding whether other similarly situated employees were treated the same
- Genuine issue regarding whether policy manual created a contract (contractual expectations); no express disclaimer and disciplinary procedures were detailed, suggesting contractual rights or obligations

Note on Becker

- Policy manuals (especially grievance procedures) can be too detailed
- Be sensitive to how contractual expectations are formed
- Also, on comparators, "similarly-situated" does not mean precisely the same

Resurrection Bay Auto v. Alder

- Wage and hour verdict for employee AFFIRMED
- Employer did not prove that employee was exempt manager (burden of proof beyond a reasonable doubt)
- Employer failed to prove good faith defense; did attend NAPA training, but too no other steps to learn and comply with law
- $48,000 OT damages, $48,000 liquidated damages, attorneys' fees and costs on top of the judgment
- Lesson? Have wage and hour audit conducted

Moody v. Royal Wolf Lodge

- Pilot is not a professional employee under 2005 amendments to Alaska Wage and Hour Act
- Does not require specialized academic training
- Contract damages awarded even though a contract claim was never specifically alleged

Notes on Moody and Alder

- Proposal to amend Alaska Wage and Hour Act is starting to circulate
- Goal would be to amend AWHA so that same burden of proof should govern exemptions under Alaska law as are used under federal law
- Alaska law is based on federal law
- Same law and principles should be governed by the same burden of proof
- Current burden, Beyond a Reasonable Doubt, is not observed in any other jurisdiction

Ace Delivery v. ASCHR

- Prevailing employer NOT entitled to attorneys' fees against ASCHR
- Employee's claim was marginal, perhaps frivolous (disparaging language was used, but employee did not belong to these classes and suffered no adverse action)
- But ASCHR's regulations only allow fees against charging party and not against ASCHR

Ace Delivery

- Troubling result
- How can an agency write its own rules to insulate itself from prosecuting frivolous claims?
- Shouldn't the agency reasonably exercise its own discretion?

Rodriguez v. ASCHR

- Airline worker furloughed then not hired for temporary position
- Race discrimination claim for furlough decision not timely filed within 180 days, and no evidence to support claim with respect to hiring decision
- Delta Airlines did not rehire Rodriguez because of his attendance and reliability problems
- No evidence that ASCHR failed to conduct reasonable investigation

Notes on Rodriguez

- Good case for summary of relevant standards governing when/whether hearing is necessary
- ASCHR must determine whether there is a reasonable possibility that employer's decision was discriminatory. If so, hearing should be held
- Investigation was sufficient. Does this signal re-calibration of court review? Greater deference afforded ASCHR?

Trial Results

Recent verdicts of interest

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Parker Drilling

- ADA disability case filed by EEOC in federal court in Alaska against Parker Drilling
- Parker Drilling rescinds job offer to drilling manager after he fails medical examination (he only had one eye)
- Employee's claim is that he worked in industry for 25+ years with no problems
- Business necessity and direct threat defenses
- Jury finds for EEOC and plaintiff
- Damages $250,000+ (not counting claim for attorneys' fees and costs of $300,000+)

Notes on Parker (an alarming result)

- Query: what would have happened if Parker Drilling hired drill manager, and catastrophic injury occurred?
- Query: how can independent medical practitioner be employer's agent?
- Query: could a pre-offer waiver work? "You waive any claim based on IME?" Or would this violate public policy?

State and Federal Agencies

Developments impacting Employers in 2014-2015

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NLRB—guidelines on employers' policies

- NLRB continues to issue decisions, guidelines, and memoranda addressing when and whether employers' policies violate the NLRA/LMRA (GC 15-04)
- http://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf

Google "GC 15-04" and you should be able to get the memo

NLRB—Browning-Ferris decision

- Joint employment case
- Board determines that company is joint employer with leasing entity supplying workers
- Test: (1) both are employers under common law; and (2) they share or codetermine those matters governing essential terms and conditions of employment
- Significance?: Most believe will apply to franchisor-franchisee relationship, too

EEOC

- EEOC has issued new guidelines on wellness policies
- http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm
- Anticipated that new guidance or guidelines on Pregnancy Discrimination Act may be forthcoming

U.S. Department of Labor

- Awaiting new interpretative guidelines on wage and hour exemptions (white collar exemptions)
- Initial proposed rule issued and public comment period closed September 4, 2015
- As of now (August 2015), proposal will raise salary threshold to $970/week (roughly $50,000/year) and will establish percentage test to analyze primary duty (similar to old 80/20 test under Alaska Wage and Hour Act)

U.S. Department of Labor

- New interpretative guidance issued in which USDOL has opined that most leased or contract service employees are, in fact, employees and not independent contractors under the USDOL's economic dependence test.
- Is work integral part of business?; Opportunity for profit or loss?; Investment in work (tools, training, advertising, insurance, licensing)?; Special skills?; Permanent or short-term relationship?; Degree of control over work?

Alaska State Dep't Labor and Workforce Development and ASCHR

- Alaska Hire—resurrected by AkDOL
- ASCHR—disability claims are spiking
- ASCHR reporting 12% increase in all employment discrimination claims in 2014
- AkDOL reporting nearly $600,000 recovered in wage claims in 2014 from Alaska employers

Marijuana Law—Employment Issues

- Colorado Supreme Court upheld Dish Network's decision to terminate employee for off-duty drug use
- Employee was disabled, and used marijuana under medical marijuana permit
- In Alaska, local ordinances and state regulations are in drafting stages
- Likely or predicted results? Little impact on employers or employment policies

Marijuana Laws and Employers--

- SHRM Webinar November 6, 2015:
- Gregory Fisher and Elizabeth Hodes from DWT will provide an update
- Hopefully we will have some clarifying comments on regulatory developments by that time

HR Audits—Legal Check Up

- Introducing fixed fee HR and Compliance Review audits
- We'll review policies, practices, and offer best practice tips for risk management and compliance review
- Quick, easy, affordable
- Time and cost efficient

Conclusion

- Questions? Comments?
- Gregory Fisher, Davis Wright Tremaine LLP, 188 West Northern Lights, Ste. 1100, Anchorage, Alaska 99503 (907) 257-5335 (direct) gregoryfisher@dwt.com
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