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Supreme Court Employment Cases

Even though the headlines relating to decisions of the U.S. Supreme Court typically pertain to cases addressing more high-profile areas of the law (free speech, political fund raising, imprisonment of terrorist suspects, and the like), the High Court this term again has a full slate of cases with potential impact on the labor and employment arena. The Court will address issues ranging from who is protected by statutory antiretaliation provisions, to how a terminated employee can attempt to prove discrimination, to how employers will be able to resolve disputes with their employees in the future. This article will briefly summarize the facts, lower court holdings, and potential import of four such cases currently pending before the Supreme Court, as set forth below.

Kasten v. Saint-Gobain Performance Plastics Corp. (09-834)

The *Kasten* case, which was argued before the Court on Oct. 13, 2010, and is currently awaiting decision, concerns whether an employee's internal complaint with respect to the employer's wage and hour practices must be in writing to protect its maker from retaliation.[1] The Fair Labor Standards Act, which governs federal wage and hour obligations, itself provides that: "it shall be unlawful for any person … to discharge or in any other manner discriminate against any employee because such employee has filed any complaint … under or related to this chapter."[2]

In this case, the plaintiff was discharged by his employer after the employee verbally complained to management about the employer's placement of time clocks, which the plaintiff alleged caused violations of the provisions of the Fair Labor Standards Act.[3] Accordingly, he filed a lawsuit wherein he contended that he had been unlawfully discharged after "fil[ing]" a complaint pertaining to purported Fair Labor Standards Act violations.[4]

However, the Seventh Circuit Court of Appeals held that the plaintiff was not entitled to statutory protection, because an employee does not "file" such a complaint, as required by the above-referenced provision, when he submits the complaint in unwritten form.[5] In other words, an employee has not "filed" a complaint under the Fair Labor Standards Act, entitling him or her to protection from retaliation, unless the complaint has been submitted in writing.[6] Relying solely on the plain language of the statute and its ordinary dictionary definitions, the Court concluded that "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body."[7] In so holding, the Seventh Circuit expressly joined the Second and Fourth Circuits on this issue, while recognizing that the Sixth, Eighth, and Eleventh Circuit Courts of Appeals appear to have taken a contradictory view, which is likely a large part of the Supreme Court's rationale for accepting this case.

The anti-retaliation provision of the Fair Labor Standards Act appears less expansive than the anti-retaliation provisions of other employment-related statutes, such as Title VII; and, if the Seventh Circuit's holding in this case is upheld, it will remain that way.

Staub v. Proctor Hospital (09-400)

Argued on Nov. 2, 2010, and currently awaiting decision, the *Staub* case concerns what kind of analysis is proper in a case in which the plaintiff has alleged discrimination pursuant to the "cat's paw" theory[8]—that is, a way of proving discrimination when the decision maker is admittedly unbiased. Under this theory, the discriminatory animus of another is imputed to the decision maker when that other individual "has singular influence over the latter and uses that influence to cause the adverse employment action."[9] The question before the Court is whether a specific level of evidence of such a singular influence must exist for such a case to be presented to a jury.

The plaintiff in the *Staub* case is a military reservist whose immediate supervisor had repeatedly expressed dislike for the inconvenience caused by the plaintiff's fulfillment of his military reserve obligations.[10] However, even though the evidence in this case demonstrated that this particular supervisor possessed the requisite discriminatory animus, the plaintiff was ultimately discharged by a different supervisor, who had independently investigated the incident that led to the employee's termination and concluded that discharge was warranted.[11] Accordingly, the plaintiff was forced to use the cat's paw theory of discrimination, claiming that the biased supervisor exercised influence over the unbiased decision maker, resulting in a discharge that was based on discrimination.[12]

The plaintiff was successful at trial, and a jury concluded that he had been unlawfully discharged, but the Seventh Circuit Court of Appeals reversed the verdict, holding that the evidence demonstrates that the decision maker was not influenced by the biased supervisor and that the trial court should have con-

sidered this evidence prior to allowing the plaintiff to present evidence concerning the biased supervisor to the jury.[13] In other words, before allowing a jury to hear potentially prejudicial evidence concerning the discriminatory animus of a particular individual, the plaintiff must demonstrate that it was that individual who either made the relevant employment decision or exercised singular influence over the actual decision-maker.[14] Without such a showing, this evidence could prejudice the jury in favor of the plaintiff, despite ultimately being irrelevant to the employment decision at issue.

According to the Seventh Circuit Court of Appeals, when considering whether a biased individual exercised a singular influence over a decision-maker, "[i]t is enough that the decision-maker 'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'"[15] As such, if this holding stands, employers should be able to limit their liability for unlawful discrimination by ensuring that adverse employment decisions are made after an independent review of the relevant facts by an impartial investigator. If the Supreme Court agrees with the Seventh Circuit, such proactive efforts by an employer should be sufficient to prevent a plaintiff from presenting potentially damaging evidence concerning discriminatory animus possessed by individuals other than the ultimate decision-maker in any particular case.

AT&T Mobility LLC v. Concepcion (09-893)

At first blush, the *Concepcion* case, argued on Nov. 9, 2010, and currently awaiting decision, does not appear to be relevant to the field of labor and employment law, but the fact is that the Supreme Court's decision in this case could potentially have a broad and wide-ranging effect on the employer-employee relationship for the foreseeable future.[16] This case, from the Ninth Circuit Court of Appeals, concerns the enforceability of an arbitration provision in a contract, where that provision contains a waiver of so-called class arbitrations.[17]

The plaintiffs in *Concepcion* filed a lawsuit against AT&T Mobility LLC arising out of their purchase of two cellular telephones.[18] However, the Wireless Service Agreement signed by the plaintiffs included an arbitration clause, which required any disputes to be submitted to arbitration as well as "a class action waiver clause, which required any dispute between the parties to be brought in an individual capacity."[19] Accordingly, after the plaintiffs filed a class action lawsuit in the U.S. District Court for the Southern District of California, the defendant filed a motion to compel the plaintiffs to submit their claims to individual arbitration.[20] However, the court ultimately held that, pursuant to California law, the arbitration provisions, combined with the class action waiver, were unconscionable and therefore unenforceable.[21] Moreover, the court further overruled defendant's contention that the Federal Arbitration Act pre-empted application of California law on unconscionability.[22] Both of these rulings were upheld by the Ninth Circuit Court of Appeals.[23]

According to the Ninth Circuit, the court's unconscionability analysis was appropriate, despite the Federal Arbitration Act's support for arbitration agreements, as:

> The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Therefore, if a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general, that state-law principle is preempted by the FAA. However, "because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."[24]

Accordingly, even though the FAA generally promotes the enforceability of arbitration clauses, state-law principles of contract will not be displaced by the act.[25] Because arbitration provisions have become increasingly popular in the employment arena, the Supreme Court's decision on this point will affect the very nature of the employer-employee relationship going forward. Many of the perceived advantages to arbitrating disputes instead of going to court (such as class action waivers and limited/expedited discovery/pretrial procedures) are the very types of issues that could cause arbitration provisions to run afoul of states' common law principles, such as the California unconscionability principle applicable in this case. Therefore, employers will need to re-evaluate the specifics of their arbitration provisions, if any, in light of the Supreme Court's decision in this case to ensure that they remain enforceable in the future; otherwise, employers will have to abandon these provisions completely.

Thompson v. North American Stainless LLP (09-291)

Finally, the *Thompson* case, argued on Dec. 7, 2010, and currently awaiting decision, is likely the most high profile employment-related case on the Supreme Court's docket this term.[26] This case, which addresses the issue of whether a cause of action for retaliation exists for persons who did not themselves engage in protected activity, has engendered much comment on both sides of the issue. The Sixth Circuit Court of Appeals, en banc, held that no such cause of action exists, but the court did so in the face of vociferous dissent.[27] Moreover, the acting solicitor general of the United States even participated in oral argument of this case on behalf of the United States,

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despite the fact that the government was not a party to the case.

Briefly, the facts of this case involve an employee who claims that he was unlawfully discharged because his then fiancée had filed an Equal Employment Opportunity Commission charge against their common employer, wherein his fiancée alleged that she had been subject to gender discrimination.[28] The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 provides the following:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."[29]

Even though all the parties involved in the case as well as the Sixth Circuit Court of Appeals conceded that the plaintiff's fiancée could have filed a retaliation action under this provision, because the plaintiff's termination could have been deemed an "adverse employment action" against her, the court ultimately held that the plaintiff could not maintain such an action, because he had not "opposed any practice" or "participated in any manner in an investigation, proceeding or hearing."[30]

According to the Sixth Circuit, the statutory language at issue is plain and unambiguous, and "'[i]f the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.'"[31] Despite this fact, the plaintiff "argue[d] that the statute should be construed to include claimants who are 'closely related [to] or associated [with]' a person who has engaged in protected activity."[32] Not swayed by this argument, the court stated that "no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity," and the court declined to become the first to do so.[33]

Several Sixth Circuit judges authored dissenting opinions, expressing their views that the issue is much more complicated than the majority opinion sets forth. For example, one of the dissenting opinions expresses the view that the majority's interpretation of the language of Title VII is much too limiting and that the term "oppose" is ambiguous and can be construed to cover much more than just active, vocal opposition of the type referenced in the majority opinion.[34] Accordingly, the Supreme Court will be forced to choose between the majority's narrow and purportedly textual interpretation of Title VII and the dissenters' broader reading, which allegedly more fully protects the interests set forth in Title VII generally. Regardless of the Supreme Court's decision in this case, it is likely both to be contentious and to have far-reaching effects. **TFL**

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Endnotes

[1]*Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009).

[2]*Id.*, *citing* 29 U.S.C. § 215(a)(3).

[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]*Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009).

[9]*Id.*, *citing Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir. 2007).

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.* (internal citations omitted).

[25]*Id.*

[26]*Thompson v. North American Stainless LLP,* 567 F.3d 804 (6th Cir. 2009) (en banc).

[27]*Id.*

[28]*Id.*

[29]*Id.*, *citing* Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a).

[30]*Id.*

[31]*Id.*, *citing Caminetti v. United States*, 242 U.S. 470 (1917).

[32]*Id.*

[33]*Id.*

[34]*Id.*