Friday, Nov 1, 2013

Troy Marriott Hotel
8:30 a.m. to Noon

Employment Law Update

Presented by

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Employment Law Update

I. Title VII of the Civil Rights Act of 1964

a. *Vance v Ball State University*, 133 S.Ct. 2434 (2013)

Maetta Vance (Vance), an African-American woman, began her employment at Ball State University (the University) in 1989 as a substitute server in the University Banquet and Catering Division of Dining Services Department. During her career, Vance was promoted to a part-time catering assistant and eventually to a full-time catering assistant. During the relevant time period, Saundra Davis ("Davis"), a white woman, was employed as a catering specialist in the same division. Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance.

In late 2005 and early 2006, Vance made several internal complaints to the University and filed charges with the Equal Employment Opportunity Commission (EEOC), wherein she alleged harassment and discrimination. Many of Vance's complaints and charges pertained to Davis.

In 2006, Vance filed a lawsuit against the University, claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII. Vance alleged that Davis was her supervisor and that the University was liable for Davis' creation of a racially hostile work environment.

The district court granted the University's motion for summary judgment, ruling that the University could not be held vicariously liable for Davis' alleged harassment because Davis could not "hire, fire, demote, promote, transfer, or discipline" Vance, and, therefore, was not Vance's supervisor under the Seventh Circuit Court of Appeals' interpretation of "supervisor." The Seventh Circuit affirmed the district court's ruling.

The Supreme Court concluded that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. The Supreme Court looked to the *Ellerth/Faragher* framework and found that it represents "what the court saw as a workable compromise between the aided-in-the accomplishment theory of vicarious liability and the legitimate interests of employers." *Id.* at 2444

The Supreme Court rejected the approach adopted by the EEOC and Vance (arguing that in order to be classified as a supervisor, an employee must wield authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment"), finding that under such approach "supervisor status would very often be murky—as this case well illustrates." *Id.* at 2449. The Supreme Court further stated that under the definition of "supervisor" it adopted, the question of supervisor status can "very often be resolved as a matter of law before trial." *Id.* at 2450

b. *University of Texas Southwestern Medical Center v Nassar*, 133 S.Ct. 2517 (2013)

Naiel Nassar (Nassar), a physician of Middle Eastern descent, brought a Title VII action against the University of Texas Southwestern Medical Center (the University), alleging that he was constructively discharged from a University faculty provision because of racially and religiously motivated harassment by a superior in violation of 42 U.S.C. § 2000e-2(a). Nassar also alleged that the University retaliated against him for complaining of the alleged harassment in violation of 42 U.S.C. § 20003-3(a).

The jury found for Nassar on both claims. The University appealed, and the U.S. Court of Appeals for the Fifth Circuit affirmed as to the retaliation claim, finding that retaliation claims brought under § 2000e-3(a) – like §2000e-2(a) require only a showing that retaliation was a motivating factor for the adverse employment action, not its but-for cause. The appellate found that the evidence supported a finding that the University was motivated, at least in part, to retaliate against Nassar for his complaints about his supervisor.

The Supreme Court held that employee retaliation claims filed under Title VII must be proved according to traditional principles of but-for causation, not the lessened causation test stated in 42 U.S.C. § 2000e-2(m). The court looked to the causation requirement of another federal statute, the Age Discrimination in Employment Act of 1967 (ADEA), and found the holding and reasoning of *Gross v Financial Services, Inc.*, 577 U.S. 167 (2009) instructive.

In *Gross*, the Supreme Court explained that the ordinary meaning of "because of" is "by reason of" or "on account of." As a result, "the requirement that an employer took adverse action 'because of age [meant] that age was the 'reason' that the employer decided to act," or, in other words, that "age was the 'but-for' cause of the employer's adverse decision." *Id.* at 176

In *Nassar,* the court explained that Title VII's anti-retaliation provision, like the statute at issue in *Gross,* makes it unlawful for an employer to take adverse employment action against an employee "because of" certain criteria. Moreover, "given the lack of any textual difference between the text in [Title VII's anti-retaliation provision] and the one in *Gross,* the proper conclusion … is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Nassar,* 133 S.Ct at 2528

c. *EEOC v Peoplemark, Inc.*, -- F.3d --, 2013 WL 5509158 (6th Cir. 2013)

The Equal Employment Opportunity Commission (EEOC) filed a Title VII action against temporary-employment agency Peoplemark, Inc. (Peoplemark), alleging that Peoplemark had a blanket, companywide policy of denying employment opportunities to persons with felony records and that the companywide policy had a disparate impact on African Americans.

However, the alleged companywide policy did not exist. As a result, the EEOC eventually dismissed its claim through a joint motion of the parties.

Thereafter, Peoplemark moved for costs and attorney's and expert fees. The district court awarded Peoplemark fees and costs totaling $751,942.48. The award included fees from Oct. 1, 2009, through the end of the litigation. The court determined that as of Oct. 1, the EEOC's claim was unreasonable to maintain.

The EEOC appealed the district court's decision and argued that the district court abused its discretion when it imposed attorney's and expert fees and/or that the fees were excessive.

The Sixth Circuit Court of Appeals affirmed the district court's decision and held that "[a] specific employment practice is a necessary component of a plaintiff's [disparate-impact] claim. As is required, the [EEOC] pleaded a specific employment practice – a companywide policy of denying employment opportunities to felons. That policy did not exist, and the claim the Commission pleaded could not be proved." *Id.* at *5. Furthermore, the appellate court noted that the EEOC "should have reassessed its claim" after discovery revealed that the policy did not exist, and from that point forward "it was unreasonable to continue to litigate[.]"

II. The Federal Defense of Marriage Act (DOMA)

a. *United States v Windsor*, 133 S.Ct. 2675 (2013)

New York residents, Edith Windsor and Thea Spyer, were married in Ontario, Canada, in 2007. The state of New York recognized their marriage. When Spyer died in 2009, she left her entire estate to Windsor. Windsor attempted to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by § 3 of the DOMA, which defined "marriage" and "Spouse" as excluding same-sex partners. After Windsor paid $363,053 in estate taxes and was denied a refund by the Internal Revenue Service (IRS), Windsor brought a refund suit, arguing that DOMA violates the principles of equal protection incorporated in the Fifth Amendment.

The district court ruled against the United States, finding § 3 unconstitutional and ordered the U.S. Department of the Treasury to refund Windsor's tax interest. The U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling.

The U.S. Supreme Court affirmed the ruling of the U.S. Court of Appeals for the Second Circuit and concluded that the DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. The court declared that it is the providence of states to legislate marriage: "[s]ubject to certain constitutional guarantees…regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 2680 (internal citations omitted)

III. The Fair Labor Standards Act (FLSA)

a. *Genesis HealthCare Corp. v Symczyk*, 133 S.Ct. 1523 (2013)

Laura Symczyk (Symczyk) filed a collective action pursuant to the FLSA on behalf of herself and "other employees similarly situated." She ignored Genesis Healthcare Corporation's (Genesis) Rule 68 offer of judgment, which fully satisfied her claim. The district court, finding that no other individuals had joined Symczyk's suit, determined that it was moot and dismissed it for lack of subject-matter jurisdiction.

The U.S. Court of Appeals for the Third Circuit reversed, holding that Szymcyk's individual claim was moot but that her collective action was not. The appellate court ruled that allowing defendants to "pick off" named plaintiffs before certification with calculated Rule 68 offers would frustrate the goals of collective actions.

The Supreme Court held that a collective action brought by a single employee on behalf of herself and all similarly situated employees for an employer's alleged violation of the Fair Labor Standards Act (FLSA) was no longer justiciable when her individual claim became moot, the court held that "[i]n the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." *Id.* at 1529. Furthermore, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.*

b. *Boaz v FedEx Customer Information Services*, 725 F.3d 603 (6th Cir. 2013)

The plaintiff, Margaret Boaz (Boaz) began working for FedEx in 1997. Her employment agreement included a provision that she would bring legal action against FedEx "within the time prescribed by law or 6 months from the date of the event forming the basis of [my] lawsuit, whichever expires first."

In April, 2009 Boaz sued FedEx, asserting claims under the Fair Labor Standards Act (FLSA) and Equal Pay Act (EPA). Specifically, Boaz alleged that from January 2004 through June 2008, FedEx paid her less than it paid a male employee for the same duties and that FedEx failed to pay overtime compensation to her as required by 29 U.S.C. § 207(a).

FedEx filed a motion for summary judgment, in which it argued that Boaz's claims were untimely pursuant to her employment agreement because the last allegedly illegal activity, a paycheck issued on June 30, 2008, occurred more than six months prior to her filing suit. The district court agreed, and granted summary judgment in FedEx's favor.

On appeal, the U.S. Court of Appeals for the Sixth Circuit held that as applied to Boaz's claims under the FLSA and EPA, the six-month limitations period in her employment agreement was invalid. Specifically, an employment agreement "cannot be utilized to deprive employees of their statutory [FLSA] rights." *Jewell Ridge Coal Corp. v Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945) (quotations omitted). The court further presumed that because the U.S. Congress enacted the EPA as an amendment to the FLSA, Congress meant for claims under the EPA to be unwaivable as well.

Notably, the court rejected FedEx's argument that discrimination barred by Title VII is just as bad as the discrimination barred by FLSA, and accordingly, if an employee can shorten her Title VII limitations period, she should be able to shorten her FLSA period too. The court found that argument "meritless" for two reasons: first, employees can waive their claims under Title VII (citing *Alexander v Gardner-Denver Co.*, 415 U.S. 36, 52, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Second, an employer that pays an employee less than minimum wage arguable gains a competitive advantage by doing so. An employer who refuses to hire African-Americans or some other racial group does not. Thus, the rationale for prohibiting waiver of FLSA claims is not present for Title VII claims.

IV The Federal Arbitration Act

a. Oxford Health Plans v Sutter, 133 S.Ct. 2064 (2013)

John Ivan Sutter (Sutter) provided medical services to Oxford Health Plans' (Oxford) insureds pursuant to a fee-for-services contract that required binding arbitration of contractual disputes. However, Sutter filed a proposed class action in New Jersey Superior Court, wherein he alleged that Oxford failed to fully and promptly pay him and other physicians with similar contracts.

Oxford moved to compel arbitration, and the district court granted its request. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration. The arbitrator concluded that it did. Subsequently, Oxford filed a motion to vacate the arbitrator's decision, claiming that he had "[e]xceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA). The district court denied Oxford's motion, and the U.S. Court of Appeals for the Third Circuit affirmed.

The Supreme Court held that when an arbitrator determines that the parties to an arbitration intended to authorize class-wide arbitration, that determination survives judicial review under § 10(a)(4) of the FAA, as long as the arbitrator was arguably construing the contract. The court explained that under the FAA, "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.* at 2068. Thus, "[s]o long as the arbitrator was 'arguably construing' the contract – which this one was – a court may not correct his mistakes under § 10(a)(4) … The arbitrator's construction holds, however good, bad, or ugly." *Id.*

V Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA)

a. Jones v Fabricut, Inc., Case No. 13-CV-248-CVE-PJC (N.D. OK., 2013)

Rhonda J. Jones (Jones) filed an Equal Employment Opportunity Commission *(*EEOC*)* charge of discrimination against Oklahoma wholesale fabric distributor, Fabricut, Inc. (Fabricut). During its investigation of Jones' charge, the EEOC reviewed records from the post-offer medical examination of Jones supplied by Fabricut, which the EEOC asserted "on their face reflected an unlawful inquiry for genetic information from Jones." Subsequently, the EEOC's investigation expanded to include a review of Fabricut's compliance with Title II of the GINA regarding Fabricut's solicitation of family medical history of applicants.

The investigation further revealed that Fabricut requested Knox Laboratories (Knox), when conducting post-offer medical exams, to ask applicants whether they had a family medical history for a variety of disorders and diseases. That information was then given by Knox to Fabricut to use in the hiring and employment process. The EEOC claimed that this practice "unlawfully sought genetic information about Jones and other applicants for employment by asking applicants, as part of a post-offer medical examination, whether or not they had a family medical history for a variety of disease."

Thereafter, in May 2013, the EEOC filed suit against Fabricut, alleging that Fabricut violated both the Americans with Disabilities Act (ADA) because it regarded Jones as disabled, and GINA, by asking Jones for her family medical history in its post-offer medical examination.

General Counsel of the EEOC, David Lopez, stated that "[e]mployers need to be aware that GINA prohibits requesting family history," and "[w]hen illegal questions are required as part of the hiring process, the EEOC will be vigilant to ensure that no one be denied a job on a prohibited basis."

Interestingly, the same day the complaint was filed by the EEOC, the parties reached a settlement in which Fabricut agreed to a number of corrective actions in addition to paying Jones $50,000. The company agreed to not discriminate against an applicant or employee on the basis of their disability, perceived disability or genetic information. They also agreed to post a notice for six months stating the law and advising employees to contact the EEOC; create personnel policies to implement the requirements of GINA and the ADA, and to supply the policies to employees; provide live anti-discrimination training to all management and H.R. personnel, with an emphasis on the requirements and prohibition of GINA and the ADA; and give the employees trained a detailed written memo designed to "reiterate and refresh" the employee on GINA and ADA every year the consent decree is in effect.

The consent decree is in effect for two years, and as part of the EEOC's monitoring efforts, Fabricut must send a memo showing compliance with the notice posting requirement and a report regarding the training sessions.

b. Founders Pavilion Inc. – Class Action

Just one week after filing its lawsuit in *Fabricut*, the Equal Employment Opportunity Commission *(*EEOC*)* took another affirmative step toward enforcing GINA by filing a class action lawsuit against The Founders Pavilion, Inc. (Founders), a Corning, New York, nursing and rehabilitation center. In particular, the EEOC alleged that Founders violated GINA by asking for genetic information during the hiring process.

According to the EEOC's suit, Founders conducted post-offer, pre-employment medical exams of applicants, which were repeated annually if the person was hired. As part of this exam,

Founders requested family medical history. The EEOC alleged that Founders' request violated GINA's prohibition of employers demanding genetic information, including family medical history, and using that information in the hiring process.

The *Founders* case is the EEOC's first class action filed under the GINA.

VI. The Equal Pay Act

a. Kienzle v General Motors, 903 F. Supp. 2d 532 (E.D. Mich. 2012)

The plaintiff, Patricia Kienzle (Kienzle), alleged that from July 2009 until January 2010, General Motors (GM) paid her less money for doing the same work as male counterparts, in violation of the Equal Pay Act (EPA).

During the pertinent period, Kienzle was classified as a level seven *part-time* salaried employee. Her salary was discounted based on her part-time status. When she was upgraded from 24 hours a week to 32 hours per week, she received a 33-percent raise. However, whenever she worked in excess of 32 hours, she was ineligible for additional pay, unlike the full-time salaried engineers she supervised who were eligible, and often approved, for overtime pay when they exceeded their regular 40 hours.

In its motion for summary judgment, GM argued that the EPA applies only to differences in the hourly rate of pay and not the number of hours worked. The company relied on two decisions that found no violation based on the denial of opportunity to work overtime.

The court found the decisions distinguishable because the issue in this case was not overtime, but "the failure to pay regular or overtime wages for hours actually worked in excess of an employee's regular schedule, or in excess of the statutory 40-hour-per-week limit."

Furthermore, although GM argued that Kienzle and her full-time male peers were not similarly situated, the court disagreed, indicating that this argument "merely restates the charge." Kienzle was paid less than her male full-time peers because GM subjected her to a part-time proration while still demanding on occasion that she work full-time hours.

In addition, GM argued that Kienzle could not compare herself to the full-time level seven male engineers she supervised because she proved she had more responsibility. However, the court again disagreed, noting that this argument only succeeds if the higher paying job had greater responsibility. But, in Kienzle's situation, the argument failed because the position having greater responsibilities is the one that was paid less. Therefore, GM's motion to dismiss the EPA claim was denied.

VII. Michigan's Whistleblowers' Protection Act

a. Whitman v City of Burton, 493 Mich. 303 (2013)

The plaintiff, Bruce Whitman (Whitman), was employed by the defendant-city as police chief until 2007 when co-defendant Charles Smiley (Mayor) did not reappoint him. Whitman sued under the Michigan's Whistleblowers' Protection Act (WPA), claiming that the Mayor's decision not to reappoint him was prompted by his repeated complaints to the Mayor and city attorney that the refusal to pay his previously accumulated unused sick time and unused personal leave time would violate a city ordinance.

The defendants denied that the Mayor's decision to appoint another police chief was related to Whitman's complaints about the ordinance violation. However, at trial, the jury found that

Whitman engaged in protected conduct that made a difference in the Mayor's decision not to reappoint him as police chief, and awarded him damages.

The Michigan Court of Appeals reversed with the majority holding that Whitman's claim was not actionable under the WPA because "[Whitman] clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern."

On appeal, the Michigan Supreme Court applied a statutory analysis and concluded that because the WPA does not address an employee's motivation in bringing a claim, there is no statutory basis for imposing a primary motivation requirement in connection with the protected activity element of a WPA claim. The court specifically noted: "[w]e clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim." *Id.* at 306. Accordingly, the Supreme Court reversed and remanded the case.

b. Fuhr v Trinity Health Corp., -- Mich.App --, 837 N.W.2d 275 (2013)

The plaintiff, Todd Fuhr (Fuhr) was hired by St. Mary's Hospital (a subsidiary of Trinity Health) in 2007 and promoted to the newly-created position of Surgical Services Informatics Manager. On numerous occasions between the time he was hired and April 2010, Fuhr's subordinates complained to his supervisor, Vicki Garrett, that he acted unprofessionally and demonstrated favoritism. During the same period, the hospital's inventory continued to fluctuate and inventory numbers were periodically "bad." However, both of Fuhr's annual performance reviews were positive.

Despite the positive reviews, in December 2009, the hospital hired a "coach" to work with Fuhr regarding his interpersonal issues. On April 8, 2010, the hospital's CEO stated in an email that "Steve Pirog [the hospital's CFO] said that [Fuhr] … is on his way out and that Amy Moored from finance will be assigned to get the OR inventory corrected."

Fuhr testified that during early April, he became aware of potential significant wrongdoing by one of the hospital's vendors relative to the inventory and billing for restocking. On April 15, 2010, Fuhr called the U.S. Attorney's office and spoke to the assistant U.S. Attorney about the overbilling issue and on April 16, 2010, Fuhr reported the overbilling issue to the hospital's integrity officer.

On May 10, 2010, Fuhr was terminated. At his deposition, Fuhr testified that he was specifically told when he asked, "[w]here did I go wrong?" that "[y]ou went wrong by going to the U.S. Attorney, talking with Liz and Mark, and not being part of our team in the surgery department, and causing distrust with me."

The Michigan Court of Appeals reversed the trial court's grant of summary disposition, finding that under oath, Fuhr testified that he was told he was being terminated for his call to the U.S. Attorney, and such testimony was direct evidence of impermissible discrimination.

The Michigan Supreme Court reversed the Michigan Court of Appeals' decision and reinstated the March 30, 2012 order of the Kent Circuit Court for the reasons stated in the appellate court's dissenting opinion. Justice Joel Hoekstra, who authored the dissent, stated that: "[b]ecause I conclude that plaintiff's self-serving deposition testimony is blatantly contradicted by the record so that no reasonable jury could believe it, I would affirm the trial court's grant of summary disposition in favor of defendants."

VIII. Michigan's Right to Work Law

a. *UAW v Green*, 203 Mich. App. 246 (2013)

The plaintiff unions challenged the Michigan Legislature's constitutional authority to pass 2012 PA 349 (colloquially called a "right to work" law) and the defendants' right to enforce it as to a subset of public sector employees – those in the classified civil cervices.

Ultimately, the Michigan Court of Appeals determined that PA 349 does apply to workers classified as civil service. In sum, the ruling prohibits the Michigan Office of State Employer from agreeing to terms in a collective bargaining agreement that would require non-members of a union to pay a service fee to the union to cover costs of bargaining and grievance administration.

Justice Henry William Saad wrote: "Contrary to plaintiffs' claim, it is within the authority of the Legislature to pass laws on public policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both unions and non-union public employees."