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Supreme Court Roundup: 2015-2016 Undecided Cases

By Hope Eastman

Last week, we wrote to you about the 2015-2016 term cases that have been decided. Here is a preview of cases for private sector employers to watch, decisions for which are still pending.

UNDECIDED CASES

Encino Motorcars, LLC v. Navarro, No. 15-415

The Court agreed to hear an appeal by Encino Motorcars after the Ninth Circuit ruled that car dealership service advisors were entitled to overtime pay. The Ninth Circuit took a different position than all the other federal courts that had heard this dispute over the years. For thirty years, the Department of Labor acquiesced in the position that the service advisors were not entitled to overtime. After the Supreme Court ruled that courts should defer to agencies' interpretation of the laws they administer, the Department of Labor changed its position to require overtime for service advisors. That change in regulation is what is before the Court.

It is likely that the Court will defer to the DOL, but the decision may be interesting in its approach to the Department's thirty years of acquiescence. It remains to be seen if the Court will draw on its decision last year which approved the Department's changing its position on mortgage bankers' entitlement to overtime without even formal rule-making.

Green v. Brennan, No. 14-613

This case involves a public employer which could have implications for private employers and examined whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer's last alleged discriminatory act giving rise to the resignation, as three other circuits have held. The Court took the case to resolve a split in the Circuits.

The U.S. Court of Appeals for the Tenth Circuit had ruled that the forty-five-day clock for former U.S.P.S. employee Marvin Green to contact an equal employment opportunity (EEO) counselor – a prerequisite to file his lawsuit alleging that he had been "constructively discharged" in retaliation for complaining about discrimination – began to run on the date of the "last discriminatory act" alleged in his lawsuit.

The ultimate Court decision, of course, will affect the length of time the employee has to file and would raise avenues for challenging the time periods for private employers.

Fisher v. University of Texas at Austin, No. 14-981

In this case, the Court looks again at the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions. With only seven Justices participating (Justice Elena Kagan is not taking part due to her involvement in the case while at the Justice Department), it is very unclear where the case may come out and what the broader ramifications for other educational and governmental affirmative action efforts, including the impact on government contract affirmative action programs, may be.

In the absence of a stronger majority than Court watchers now see, it is likely that the Court will leave the Fifth Circuit's opinion in place. That would provide no guidance for other public colleges and universities which, some think, may lead the Court to issue more definitive guidance if a consensus can be reached.

That seems to be a tall order. Justices Samuel A. Alito, Jr. and Clarence Thomas are hostile to affirmative action in general. Chief Justice Roberts, at the oral argument raised concerns about whether the time would ever come when race would no longer be used in affirmative action on college campuses. There are three Justices clearly on the University's side — Justices Ginsburg, Breyer and Sotomayor. As is often the case, the result may turn on Justice Kennedy, who has supported the University in the past, but whose current view in this round remains unknown.

Zubik v. Burwell, No. 14-1418

Two years ago, the Court ruled in the case of *Burwell v. Hobby Lobby* that closely held corporations may have a religious identity that allows them to object and opt out of providing contraceptive coverage as part of their employee health insurance plans.

Zubik is actually seven consolidated appeals from four separate federal appeals courts, filed by non-profit religious institutions objecting on religious grounds to providing health insurance coverage that includes access to contraceptives.

The Affordable Care Act mandates that health insurance plans cover the cost of contraception for women. The Obama administration regulation allowed them to opt out if they notified the Department of Health and Human Services in writing of their religious objection.

Many religious institutions still objected, arguing that the act of providing written certification to the government was what triggered the contraceptive coverage, making them complicit in a process that is contrary to their religious views and violates their rights under the Religious Freedom Restoration Act (RFRA).

On March 29, 2016, the Justices took the highly unusual step of issuing an order, asking the parties to come up with methods by which the contraceptive coverage could be provided with no trigger or any other active involvement of the religious objectors. Once again, stay tuned.

CRST Van Expedited v. EEOC, No. 14-1375

Title VII of the Civil Rights Act of 1964 contains a provision (Section 706(k)) that gives district courts discretion to award attorney's fees to the "prevailing party." This case gives the Court its first opportunity to consider what "prevailing party" means when a judgment is entered in favor of a defendant rather than a plaintiff. This case presents the issue as to whether a dismissal "without prejudice" is enough for a defendant to be a "prevailing party".

CRST won in the district court because the EEOC had not performed its statutory pre-suit duties to conduct separate investigations, reasonable cause determinations, or conciliation attempts as to the sixty-seven individuals on whose behalf the EEOC had sued. Rather than stay the proceeding to allow the EEOC to comply (the procedure recommended by the Court in its later decision in Mach Mining LLC v. EEOC), the district court entered an order dismissing the case as to the sixty-seven individual claimants and then awarded CRST its attorney's fees but was silent on whether the dismissal was with or without prejudice.

The Eighth Circuit reversed the attorney's fees award due to its rule that a defendant must obtain a favorable decision "on the merits" in order to be a "prevailing party" under Section 706(k). It seems clear that there is no support on the Court for the Eighth Circuit's "on the merits" rule. The Justices' questions and comments at oral argument suggest that they will prefer a bright-line rule – either that (1) a defendant prevails by winning in any fashion or (2) a defendant must gain a dismissal with prejudice.

James v. City of Boise, No. 15-493

The Court held that, "(u)nder federal law, a court has discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee" in a civil rights lawsuit filed under 42 U.S.C. § 1983. Because the Supreme Court has interpreted this to allow a prevailing defendant to recover fees only if "the plaintiff's action was frivolous, unreasonable, or without foundation," the Court concluded that the Idaho Supreme Court should have followed federal interpretations and erred when it concluded that it was not bound by this interpretation and awarded fees under federal law to a prevailing defendant without first making this determination.

In a sharply worded decision, the Court reversed. It held that it is this Court's responsibility to say what a federal statute means, and once the Court has spoken, it is the duty of other courts to respect that

understanding. In so doing, it quoted from a Supreme Court decision almost as old as the Republic itself. As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 348 (1816).

