Employment Law

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Employment Law in the Upcoming Supreme Court Term

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The Legal Intelligencer | September 28, 2012

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On Monday, the U.S. Supreme Court begins its new term, and is currently scheduled to hear arguments on three notable employment law cases over the coming months as well as a case that is certain to interpret the recent employment class action case, *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

On November 26, argument will be held on *Vance v. Ball State University*, Docket No. 11-556. In *Vance*, the Supreme Court is expected to clarify the seemingly simple matter of how the term "supervisor" is defined under Title VII. Under Title VII, an employer may be liable for unlawful discrimination against its employees, 42 U.S.C. 2000E-2(A), and may be vicariously liable for a supervisor's harassment of employees. (See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998).) According to Maetta Vance's petition for certiorari, the issue is whether a "supervisor" is limited under Title VII to those supervisors with authority to, for example, terminate or discipline employees, or if it includes any employee who has authority to oversee another employee's daily activities.

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In the underlying decision of *Vance*, 646 F.3d 461 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit ruled that there was no vicarious liability because the purported "supervisor" was not vested with authority to take any adverse employment actions against the employee. This is in accord with the position taken by the First and Eighth circuits, though the Second, Fourth and Ninth circuits have held that vicarious liability applies even if the "supervisor" is only in charge of directing and overseeing an employee's daily work. (See Vance's petition for certiorari.) In addition to the parties' briefs, the Supreme Court has received amicus briefs from the United States as to its interpretation of Title VII and EEOC regulations, as well as from the National Employment Lawyers Association and from the National Partnership for Women & Families in support of Vance's position. The ultimate decision will certainly impact the degree to which employers can be held liable for the actions of their "supervisory" employees.

An Employee Retirement Income Security Act (ERISA) case, *U.S. Airways v. McCutchen*, Docket No. 11-1285, will be heard on November 27. The issue is whether courts can rely upon ERISA § 502(a)(3) to essentially overrule requirements of an employee benefit plan based upon equitable principles (See U.S. Airways' petition for certiorari.) The Third Circuit, in *McCutchen*, 663 F.3d 671, 678, 52 EBC 2143 (3d Cir.

2011), found that they can, in contrast to prior decisions of the Fifth, Seventh, Eighth, Eleventh and D.C. circuits.

According to the Third Circuit decision, James McCutchen suffered severe injuries in an automobile accident, and received medical care covered by his employee health plan through U.S. Airways. After McCutchen recovered a sum in a personal injury suit, U.S. Airways filed a subrogation claim to seek full reimbursement of their expenses pursuant to the ERISA plan. The amount sought exceeded the amount of the personal injury award, after reduction for the attorneys' contingency fee. The Third Circuit found that granting the full reimbursement would be inequitable to McCutchen and would unjustly enrich U.S. Airways, and remanded the case for the purpose of fashioning equitable relief. For Supreme Court review is whether ERISA § 502(a)(3) permits the application of equitable principles that are directly contrary to the ERISA plan. How the Supreme Court rules is likely to affect subrogation and third-party claims in general, even beyond ERISA reimbursement claims.

The court has granted certiorari in a Third Circuit class action case, *Genesis Healthcare v. Symczyk*, Docket No. 11-1059, which will be heard on December 3. Arising under the Fair Labor Standards Act, Laura Symczyk brought a wage-and-hour lawsuit on behalf of herself and those similarly situated in Genesis, 656 F.3d 189, 190 (3d Cir. 2011). According to the Third Circuit decision, the employer made an unaccepted Rule 68 offer of judgment in an amount sufficient to cover the entirety of Symczyk's independent claim, and did so prior to a class being certified. The U.S. District Court for the Eastern District of Pennsylvania then dismissed the case for lack of subject-matter jurisdiction as Genesis had acted to satisfy all of Symczyk's claims. The Third Circuit reversed, finding that the offer of judgment did not render moot the ability to establish a class action.

The Supreme Court's decision in Genesis should determine how putative class action plaintiffs bring about their claims, and how the defendant employers respond. If a defendant is able to bring an immediate stop to a potential class action by settling with the lead plaintiff, it can be expected to be a strategy used in many cases, though could also lead to more and more individual actions being brought.

On November 5, argument will be held on a Third Circuit class action case involving Comcast, captioned as *Comcast v. Behrend*, Docket No. 11-864. While not an employment law case, this is one that is sure to be of great interest to cable subscribers as well as antitrust and class action practitioners. Comcast had been relisted for conference by the Supreme Court multiple times before the court finally granted certiorari on the last day of the October 2011 term. According to Comcast's petition for certiorari, the question posed to the Supreme Court is whether a class action can be certified pursuant to Federal Rule of Civil Procedure 23(b)(3) without evaluating whether the plaintiff has presented sufficient admissible evidence as to class damages. The purported class consists of Philadelphia area cable subscribers who were allegedly harmed by Comcast's alleged antitrust violations of eliminating competition, presenting barriers to competition, and instituting unreasonable price increases in the absence of competition. (*Comcast*, 655 F.3d 182, 186-87 (3d Cir. 2011).)

In the underlying decision, the Third Circuit ruled that "merits arguments" are not properly before the court at the certification stage and that the qualification for class standing had been met. The petitioner, Comcast, argues that this is contrary to the Supreme Court's recent decision in *Wal-Mart*, 131 S. Ct. 2541, 2551 (2011). In *Wal-Mart*, the Supreme Court found that "merits questions" may need to be heard and resolved by the trial court for purposes of class certification even if the same issues must later be tried by the court again. In agreeing to hear the Comcast case, the Supreme Court is expected to further resolve this class certification issue and delve deeper into what evidentiary issues are appropriate to consider prior to a trial on the merits.

There should be some interesting legal developments coming out of the Supreme Court's October term, considering the variety of employment law cases alone. The court's schedule, as well as copies of the underlying appellate decisions, petitions for review, and party and amicus briefings are all easily accessible at **www.scotusblog.com**. •

Jeffrey Campolongo *concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.*

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