

Supreme Court to Hear Several Cases Affecting Labor & Employment

The Supreme Court has accepted seven labor- and employment-related cases to be heard in the Court's next term, which begins in October 2010. These cases touch on a wide range of labor and employment issues, and the Court's rulings could have significant impacts on employers.

Staub v. Proctor Hospital

In *Staub v. Proctor Hospital*, No. 09-400, the Court will examine the “cat’s paw” theory of employer liability in discrimination cases. The “cat’s paw” theory is used to impute liability to an employer when a biased employee does not make an employment decision, but nevertheless influences the (otherwise unbiased) decisionmaker. Vincent Staub, an Army reservist, alleged that the reasons given for his termination were pretext for discrimination that was based on his membership in the Army Reserve, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Seventh Circuit found that although some evidence suggested that a discriminatory manager had an influence on the supervisor who terminated Staub, mere “influence” was not enough: “the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker where the former has *singular influence* over the latter and uses that influence to cause the adverse employment action.” The court noted that because the decisionmaker “looked beyond” the nondecisionmaker’s evaluations in her investigation, the decision to terminate Staub was not made with the “blind reliance” on the opinions of the discriminatory manager required for a finding of employer liability. The various circuits have taken different approaches to “cat’s paw” cases: the First, Third, Fifth, and Ninth Circuits require only that the nondecisionmaker “actually influence” the final decision, while the Fourth Circuit has found that as long as the decisionmaker has no discriminatory motive, the employer cannot be held liable for the bias of any nondecisionmakers. The Supreme Court’s decision could impact analyses under a number of antidiscrimination statutes, such as Title VII and the ADEA.

Mayo Foundation for Medical Education and Research v. United States

The Supreme Court will decide in *Mayo Foundation for Medical Education and Research v. United States*, No. 09-837, whether medical residents are “students” of their medical colleges or “employees” of teaching hospitals. Medical students receive stipends from hospitals and schools during residencies, which last from three to five years. Medical schools argue that such payments qualify for the “student exception” to Federal Insurance Contributions Act (FICA) taxes imposed on employers and employees; the IRS contends that residents are employees who do not qualify for the exception. The IRS promulgated amended regulations in 2004, which exempt residents from FICA’s student exception. In *Mayo*, the Eighth Circuit held that the IRS regulation exempting residents was a permissible interpretation of FICA. The Second, Sixth, Seventh, and Eleventh Circuits have come out the other way, finding the IRS regulations contrary to the plain meaning of the “student exception” provision. Those circuits held that a case-by-case approach is required to determine whether residents serving at specific institutions qualify for the exception. The stakes of the case are high: medical colleges pay about \$700 million per year in taxes on behalf of their residents, and refund claims total in the billions. The ruling will affect about 8,000 medical residency programs.

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Briefing

Cigna Corporation v. Amara

In *Cigna Corporation v. Amara*, No. 09-804, the Court will address a three-way circuit split regarding the showing that a beneficiary of an ERISA plan must make in order to recover benefits based on an inconsistency between the Summary Plan Description (SPD) and the plan document itself. In *Cigna*, the Second Circuit endorsed a “likely harm” standard, which permits recovery when a beneficiary can show that he or she was “likely harmed” by a deficient SPD, provided that the employer cannot prove that the deficiency was a “harmless error.” Under this standard, none of the 26,000 members of the plaintiff class were required to show reliance on the SPD or prejudice resulting from SPD-plan inconsistencies. The “likely harm” standard takes the middle ground between the restrictive “reliance-or-prejudice” standard—endorsed by the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits—and the beneficiary-friendly “no-reliance-or-prejudice” standard—adopted by the Third, Fifth, and Sixth Circuits. The reliance-or-prejudice standard requires that a participant make an individualized showing of reliance or prejudice to recover benefits based on conflict between the SPD and the plan. Under the no-reliance-or-prejudice standard, a beneficiary is entitled to recovery simply by establishing that the SPD contained a material legal deficiency—regardless of whether the beneficiary had even read the SPD. The Court’s decision in *Cigna* could have an impact on the burdens and costs associated with employee benefit plans under the currently inconsistent standards of the circuits.

NASA v. Nelson

In *NASA v. Nelson*, No. 09-530, the Court will address the scope of federal contract employees’ constitutional rights to informational privacy. A standard background check—called the National Agency Check with Inquiries (NACI)—has been required for all civil service employees since 1953. In 2005, the Department of Commerce extended the NACI to all federal contract employees seeking long-term access to federal facilities. Employees of NASA’s Jet Propulsion Laboratory (JPL) sued NASA, the California Institute of Technology (Caltech), and others, seeking to bar the implementation of the NACI at JPL. JPL is owned by NASA but operated by Caltech; the JPL employees are employed by Caltech, and are therefore federal contract employees. The Ninth Circuit granted a preliminary injunction against enforcement of the policy, finding that the employees were likely to succeed on their claim that questions in the NACI violated their federal constitutional rights to informational privacy. The court found that the government did not have “any legitimate interest” in seeking information regarding an applicant’s prior drug treatment or counseling, and that the questions the government could ask individuals who knew the applicant were too “broad” and “open-ended,” and not sufficiently “narrowly tailored” to justify the government’s security interests. The Supreme Court’s decision in

NASA could have important implications for federal (and perhaps state and local government) contractors.

Thompson v. North American Stainless

Section 704(a) of Title VII of the Civil Rights Act of 1964 forbids employer retaliation against an employee because that employee engaged in “protected activity,” such as the filing of an EEOC charge alleging unlawful discrimination. In *Thompson v. North American Stainless*, No. 09-291, the Supreme Court will address whether a third party who is closely associated with an employee engaging in protected activity is also afforded anti-retaliation protection under section 704(a). Eric Thompson was terminated after his employer was notified that Thompson’s fiancée—a co-worker—had filed an EEOC charge against the employer. Thompson sued, alleging retaliation under Title VII. The Sixth Circuit held that Thompson lacked standing to bring claim because Title VII does not create a cause of action for third-party retaliation when the third party has not engaged in activity that is protected under the statute. Although an individual with whom Thompson was closely associated *had* engaged in such protected activity, Thompson himself had not. In so holding, the Sixth Circuit joined the Third, Fifth, and Eighth Circuits, all of which rejected such associational retaliation claims. Employers should pay close attention to the Supreme Court’s decision in this case: in 2009, retaliation tied with race discrimination as the most frequently filed charge with the EEOC, and an expansion of the class of individuals protected by the anti-retaliation provision would likely add significantly to the number of retaliation charges filed.

Kasten v. Saint-Gobain Performance Plastics Corp.

In another retaliation case—albeit one arising under a different statute from *Thompson*—the Supreme Court will consider whether the anti-retaliation provision of the Fair Labor Standards Act (FLSA) protects an employee who complains to his or her employer orally, rather than in writing, about suspected violations of the FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834, involves the termination of an employee who made oral complaints to human resources personnel that the placement of a time clock resulted in employees not being compensated for time spent donning and doffing required protective gear, which was contrary to the requirements of the FLSA. Kasten brought an action against the company alleging that he had been terminated for complaining about FLSA violations. The district court granted the company’s motion for summary judgment, holding that although the FLSA protects an employee who has “filed any complaint” from retaliatory discharge, a complaint—whether made to an employer or to a governmental authority—must be made in writing. The court noted that “[o]ne cannot ‘file’ an oral complaint....An oral complaint can become a filed complaint only if it is committed in document form.” The Seventh Circuit

affirmed. In deciding *Kasten*, the Supreme Court will resolve a circuit split. The majority of circuits have held, contrary to the Seventh Circuit's decision, that oral complaints *are* covered by the FLSA's anti-retaliation provision.

Chamber of Commerce of the United States v. Candelaria

In *Chamber of Commerce of the United States v. Candelaria*, No. 09-115, the Supreme Court will decide whether an Arizona law that imposes sanctions on employers who hire unauthorized aliens and that requires participation in an electronic employment verification system (that is merely voluntary under federal law) is preempted by federal immigration law. The Ninth Circuit held that the Legal Arizona Workers Act—which allows Arizona courts to revoke the business licenses of employers that knowingly hire unauthorized aliens and requires employers to use a federal

verification system known as E-Verify—was not preempted. The Court's decision will have effects on several states other than Arizona: in 2009 alone, twenty-one laws relating to the hiring of unauthorized workers, employment eligibility verification requirements, and penalties for employer non-compliance were enacted in twelve states. Some of these laws address the same issues that will be tackled in *Candelaria*. A Hawaii law, for example, authorizes revocation of the business licenses of businesses that employ an unauthorized worker on a public works project, while a new Illinois law *prohibits* state and local governments from requiring that employers use E-Verify. The ruling could be particularly significant for employers that operate in multiple states: such businesses are often forced to navigate the confusing patchwork of state laws that regulate the employment of unauthorized workers.

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