2015 YEAR IN REVIEW

EMPLOYMENT LAW UPDATE

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U.S. SUPREME COURT

***Mach Mining, L.L.C. v. EEOC,* 135 S.Ct. 1645 (April 29, 2015)**

Considering issues of first impression for the Court, it unanimously held that federal courts may exercise judicial review over whether the EEOC fulfills its legal duty to conciliate claims prior to filing litigation, but the scope of that review is narrow.

In this case, the EEOC investigated a charge of discrimination against Mach Mining and issued a determination that there was reason to believe that discrimination had taken place. In that same letter, the EEOC invited the parties to participate in informal methods of dispute resolution and promised that an EEOC representative would "soon 'contact [them] to begin the conciliation process.'" It appears that about a year later the EEOC sent a letter to Mach Mining that "'such conciliation efforts as are required by law have occurred and have been unsuccessful' and that any further efforts would be 'futile.'" The EEOC filed suit and Mach Mining contested the EEOC's claim that the conciliation requirement had been fulfilled and argued that the EEOC did not conciliate in good faith.

The Supreme Court began by considering whether it had the legal authority to review whether the EEOC met the conciliation prerequisite for suit. The Court concluded that federal courts do have judicial review authority over whether the EEOC met the prerequisite. The Court then took up the question as to the scope of the judicial review and held that the scope should be narrow.

The Court held that, in order for the EEOC to comply with the conciliation prerequisite, the it must: notify the employer about the allegedly unlawful employment practice for which it has found reasonable cause; and the EEOC must "try to engage the employer" in written or oral discussion to give the employer an opportunity to remedy the practice. Ensuring that these steps took place is essentially the scope of the permissible judicial review.

The Court noted that a sworn affidavit by the EEOC that it has complied with the requirements but conciliation has been unsuccessful will normally suffice, unless the employer provides credible evidence indicating that the EEOC did not provide "the requisite information about the charge or attempt to engage in a discussion about conciliating the claim." If the employer provides such evidence, a court would then have to conduct factfinding to decide that limited dispute. If the factfinding court were to find for the employer, the proper remedy is to order the EEOC "to undertake the mandated efforts to obtain voluntary compliance," imposing a stay of the case if appropriate.

***Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (March 25, 2015)**

Under the Pregnancy Discrimination Act's second clause, a pregnant worker may show disparate treatment through indirect evidence using the *McDonnnell Douglas* framework.

The PDA's second clause reads,

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... *as other persons not so affected but similar in their ability or inability to work....*

At issue was the interpretation of the italicized portion of the clause.

The Court held that the *McDonnell Douglas* framework could be used when making disparate treatment claims under this portion of the PDA. Specifically, a plaintiff asserting a claim would have to show that she belongs to a protected class, that she sought an accommodation, that her employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer can counter by showing legitimate, non-discriminatory reasons for denying the accommodation, though the reasons "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those…whom the employer accommodates."

If the employer meets its burden, the plaintiff can show that the proffered reasons are pretextual. The plaintiff can reach a jury on this by showing that the "employer's policies impose a significant burden no pregnant workers, and that the employer's 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather--when considered along with the burden imposed--give rise to an inference of intentional discrimination. The plaintiff can show a significant burden by providing evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___, 135 S.Ct. 2028 (2015)**

In a religious discrimination claim, the question is whether the potential need for an accommodation for a religious practice is a "motivating factor" in an adverse employment action, not whether the employer had actual knowledge of the underlying religious practice. In other words, an employer may be held liable for an adverse employment action, if the employer takes such action because it suspects that an employee's religious practices will require an accommodation and it does not wish to provide such accommodation, regardless of whether the employee has told the employer of a religious practice that will require an accommodation or has asked for an accommodation.

Samantha Elauf, a Muslim, applied to work at Abercrombie and arrived for the job interview wearing a headscarf, which she believes to be required by her religion. Though the interview rating given to her indicated that she could be hired, the interviewer was concerned that the headscarf would conflict with Abercrombie's "Look Policy." At no time did the interviewer ask Ms. Elauf if the headscarf was worn as part of her religious practice, nor did Ms. Elauf at any time indicate the need to continue to wear the headscarf for religious reasons. The interviewer, however, in conversations with superiors indicated that she *believed* that the headscarf was being worn for religious reasons. Ultimately, the interviewer was instructed not to hire Ms. Elauf, as the headscarf would interfere with the Look Policy which barred religious and non-religious headwear. Ms. Elauf sued claiming violation of her Title VII rights not to be discriminated against based on her religion.

Justice Scalia issued the majority opinion. His opinion is, essentially, a close reading of Title VII. Justice Scalia noted that Title VII prohibits religious discrimination, with the term "religion" being defined as including "all aspects of religious observance and practice, as well as belief." An employer could discriminate against an employee's religion, but only if it showed that no reasonable accommodation was possible without the business suffering undue hardship. Abercrombie's primary argument before the Court was that it could not have discriminated against Ms. Elauf without having "actual knowledge" of the need for an accommodation, which it claimed it did not have. Justice Scalia disagreed, relying on Title VII's text, which requires only that the need for an accommodation be a "motivating factor" in the employment decision in question. Title VII prohibits adverse actions against an employee or a prospective employee "because of" the employee's religion. In other words, an employee's religious practice may not be a motivating factor for taking an adverse employment decision against an employee. Title VII lacks the knowledge requirement that Abercrombie argued the Court should impose, but instead proscribes motives.

The Court ended its decision by noting that Title VII gives favored treatment to religious practices, going beyond requiring employers to merely have neutral policies. With regard to religion, "[t]itle VII requires otherwise-neutral policies to give way to the need for an accommodation."

FIFTH CIRCUIT COURT OF APPEALS

Zamora v. City of Houston, 798 F.3d 326 (5th Cir. Aug. 19, 2015)

In Title VII retaliation claims, the cat's paw theory for establishing liability remains a valid means of proving causation. The holding in *Nassar*, which clarified that a plaintiff asserting a Title VII retaliation claim must establish but-for causation, did not affect the applicability of the cat's paw theory of causation in retaliation claims.

In this case, Zamora, a Houston police officer, sued the City of Houston for unlawful retaliation under Title VII. Prior to the instant suit, Zamora participated in a lawsuit by several members of the Houston Police Department ("HPD") alleging race discrimination and retaliation. After joining the suit, Zamora was removed from the Crime Reduction Unit ("CRU"). During discovery in the first suit, several members of the CRU lied under oath,

colluding to make up a reason for Zamora's removal from the CRU. This perjury was reported to the Department's Internal Affairs Department and an investigation was conducted. During that investigation, Internal Affairs determined that it was Zamora, not the members of the CRU that had violated the Department's policies for untruthfulness. That determination was largely based on Zamora's CRU supervisors harshly attacking his credibility and contradicting his factual assertions. As a result of these statements, a department disciplinary committee recommended that Zamora be suspended for ten days, and the Chief of Police approved the suspension.

Zamora amended his complaint to include not only the removal from the CRU, but the 10 day suspension. After a jury trial, a jury found the City liable for retaliation. The City appealed, asserting that Zamora did not produce sufficient evidence from which a reasonable jury could find a causal connection between his protected activity and the suspension.

On appeal, the City argued that Zamora did not sufficiently establish the but-for causation required for a retaliation claim under Title VII because he relied upon a cat's paw theory of causation. The City argued that since the holding in *Nassar* held that a plaintiff in a Title VII retaliation claim must meet a higher standard of causation by establishing that "his or her protected activity was a but-for cause of the alleged adverse action by the employer," that the cat's paw theory of causation was no longer a viable analysis of causation.

The cat's paw theory of liability is used when the plaintiff cannot show that the decisionmaker—the one who took the adverse employment action—harbored any retaliatory animus. Under the theory, the plaintiff must show that the person with retaliatory animus used the decisionmaker to bring about the intended retaliatory action.

In holding that the cat's paw theory of liability was still valid post *Nassar*, the Fifth Circuit pointed out that *Nassar* did not say anything about whether a supervisor's unlawful animus could be imputed to a decisionmaker. Instead, *Nassar* only requires that the supervisor's influence be so strong that it actually causes the adverse employment action. In so holding, the Fifth Circuit joined other circuits which have addressed the same issue and held that in the context of Title VII retaliation claims, the cat's paw analysis remains a viable theory of causation.

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