Stay Tuned: Cases Currently Before the US Supreme Court May Have A Significant Impact on Employers

by Tina Aiken

Each year the United States Supreme Court reviews a select number of lower court decisions. Between October and June, the Court hears oral argument and issues decisions in less than 100 of the more than 7,000 petitions for review filed each year. This year, the Court granted certiorari (review) in a handful of cases involving labor and employment issues. The Court's decisions in these cases may have a significant impact on employers. Here are some of the notable cases:

Integrity Staffing Solutions v. Busk: The Supreme Court's first decision this term involving employment issues was issued on December 9, 2014. In a major win for employers, the Court ruled unanimously that the time spent by warehouse workers waiting to undergo and undergoing security screenings is not compensable under the Fair Labor Standards Act (FLSA). In this case, temporary workers at an Amazon warehouse sued their employer, Integrity Staffing, alleging the company violated the FLSA by requiring the workers to spend nearly 30 minutes in line at the end of their shifts to pass through a security screen as part of an anti-theft procedure. The workers claimed that they should be compensated for this waiting time because the employer required the checks.

The district court dismissed the claims and held the workers were not entitled to compensation under the FLSA because time spent walking through a security screening was not "integral and indispensable" to the principal activities of "fulfilling online purchase orders." The Ninth Circuit disagreed and reversed, agreeing with the workers' argument. The Supreme Court reversed the Ninth Circuit's decision and held that the security screenings at issue were not the principal activities the employees were employed to perform, were not "integral and indispensable" to those activities and, thus, were not compensable.

Although this is a pro-employer decision, employers should continue to monitor employees' activities before and after the clock has run, and analyze whether the activity is compensable under the FLSA. Further, though *Busk* is a win for employers under federal law, its impact on similar claims under Washington law is uncertain, as "hours worked" is defined broadly under state law. Although Washington courts have long relied on interpretations of federal statutes and regulations when analyzing similar state law, courts will apply the law that is more favorable for the employee.

Young v. United Parcel Service, Inc.: This case presents the Court with the opportunity to decide whether employers must accommodate pregnant employees under the Pregnancy Discrimination Act (PDA) in the same manner the employer accommodates certain non-pregnant employees with similar limitations. In this case, a UPS delivery driver was given a lifting restriction due to pregnancy, which rendered her unable to meet the 70 pound lifting requirement of her job. The driver was ineligible for a light duty assignment because UPS policy allowed light duty only for employees who were injured on the job, were eligible for accommodation under the Americans with Disabilities Act (ADA), or who had lost their Department of Transportation certification for various reasons. When UPS refused the driver's request for a light duty assignment, she took unpaid leave.

The driver filed suit, claiming that UPS was required to accommodate her as they would have accommodated a similarly limited disabled employee. UPS moved for summary judgment, arguing that the driver did not establish a *prima facie* case of sex discrimination under the PDA, nor could she show that its refusal to grant her an accommodation was based on her pregnancy. The district court granted UPS's motion for summary judgment, and the Fourth Circuit affirmed on the grounds that pregnancy is not a disability under the ADA and that the driver had not presented evidence of pregnancy discrimination.

The matter was argued before the Supreme Court on December 3, 2014, and significant time was spent wrangling over a clause of the PDA that contains the language, "Women affected by pregnancy, childbirth or related conditions shall be treated the same as other persons not so affected but similar in their ability or inability to work." The employer argued that that woman was treated the same as any other disabled employee who was not injured on the job and who was therefore not eligible for light duty. Although the Court's decision should provide meaningful clarification on the PDA's requirements, employers will still need to contend with the EEOC guidance on pregnancy discrimination issued after the Supreme Court decided to hear this matter. The new EEOC guidance provides that the 2008 amendments to the ADA apply when an employee has a pregnancy-related disability. Therefore, a pregnancy related impairment such as morning sickness may be a covered disability under the ADA if it substantially limits a major life activity. The EEOC guidance does not, however, have the force or effect of law. As such, employers should watch for the Supreme Court's *Young* decision to see if the Court adopts the EEOC's position or a different approach.

EEOC v. Abercrombie & Fitch Stores, Inc.: The issue to be decided in this case is whether an employer can be liable under Title VII of the Civil Rights Act of 1964 (Title VII) for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has *actual knowledge* that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee. In this case, a Muslim woman applied for a position with an Abercrombie store, and was not offered the position because her hijab (headscarf) did not comply with the company's "look policy." The applicant wore her hijab to the interview, but did not inform the interviewer that she wore it for religious reasons or that she would need an accommodation. The interviewer did not mention the "look policy" to the applicant, which prohibited employees from wearing black clothing and "caps." The interviewer consulted with her district manager regarding the applicant's hijab, and when she was told that the headscarf was inconsistent with the "look policy," the interviewer did not extend a job offer.

The EEOC brought suit, alleging that Abercrombie violated Title VII by refusing to hire the applicant because she wore a hijab and failing to accommodate her by making an exception to the look policy. Abercrombie argued that the applicant never informed anyone of a conflict between the look policy and her religious practices. The district court concluded that the clothing retailer had "notice" that she wore a headscarf because of her religious belief and refused to hire her because the garment conflicted with its policy. The Tenth Circuit reversed, ruling that the applicant never informed Abercrombie that she wore her hijab for religious reasons or that she would need an accommodation. According to the Tenth Circuit, because religious beliefs are personal, it was incumbent upon the applicant to inform Abercrombie that she wore the hijab for religious reasons and of her need for an accommodation to trigger the duty to accommodate. The 10th Circuit further explained that any awareness that the district manager had of the applicant's religious beliefs and required practices would have been derived solely from the interviewer's assumptions. The court

warned that an applicant should not be able to impose liability on an employer on the ground that it should have "guessed, surmised, or figured out from the surrounding circumstances" that the practice was based on her religion and that she needed an accommodation for it.

The Supreme Court's decision in this case will determine what level of notice is required from an applicant or employee before an employer is required to provide a reasonable accommodation for the applicant or employee's religious beliefs. This case is especially noteworthy for employers that have dress requirements for employees. Argument is scheduled for February 25, 2015.
