NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

SUPREME COURT UPDATE: COURT ISSUES SOME POSITIVE DECISIONS; OTHER CRITICAL CASES REMAIN TO BE DECIDED

As the 2010-2011 Supreme Court term progresses, advocates for women's rights are relieved that in the three employment rights decisions that the Court has released thus far, the Court interpreted the law according to its purposes and intent and did not set aside crucial protections against discrimination in order to protect corporate interests. But, the Court recently heard arguments in *Dukes v. Wal-Mart*, a critical case that could determine whether individuals can join together in a class action to challenge large corporations that violate the law, and skeptical questioning by the Court's conservative Justices raises the specter of recent adverse decisions such as *Ledbetter v. Goodyear Tire and Rubber Co.* That case sharply limited women's ability to bring pay discrimination claims and led Congress to pass the Lilly Ledbetter Act restoring pay discrimination law. In *Ledbetter* and many other cases, the Roberts Court has taken the side of big corporations and powerful interests, disregarding the law's intended purpose and failing to adequately consider its real-world impact on ordinary people.

In addition to *Wal-Mart*, we are still waiting for decisions in *Flores-Villar v. United States*, a case in which the Court will have the opportunity to either reaffirm or weaken the Constitution's fundamental protection against sex discrimination, as well as in an arbitration case that may affect workers' ability to enforce their rights

Employment Rights

So far this term, the Court has decided three employment discrimination cases that raised issues of significance to women in favor of workers. In two retaliation cases, the Court continued its recent recognition of strong anti-retaliation protections in Title VII, the statute that bars employment discrimination, and extended protections against retaliation to workers under the Fair Labor Standards Act, as the National Women's Law Center had urged. In the third case, it made it more difficult for employers to avoid responsibility for the discriminatory conduct of supervisors.

- In *Thompson v. North American Stainless*, an employer retaliated against a woman who complained about sex discrimination by firing her fiancé, who worked for the same company. Miriam Regalado was one of only a few women engineers at North American Stainless. Only three weeks after the company learned that Regalado had filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) (the first step for an employee who wishes to file a discrimination lawsuit), it terminated her fiancé—now husband—Eric Thompson. Thompson then filed his own EEOC charge and lawsuit claiming that he had been fired because Regalado had complained about discrimination. But, the Sixth Circuit upheld the dismissal of his case, holding that only

Regalado had a claim under Title VII, even though Thompson was the one who lost his job.

On January 24, 2011, the Supreme Court released a unanimous decision reversing the Sixth Circuit and holding that Thompson can bring a retaliation claim against his former employer. This decision is especially important for women, because, as the National Women's Law Center said in its friend-of-the-court brief urging reversal of the Sixth Circuit's decision, workers, especially women in male-dominated fields like Miriam Regalado, experience acute pressure to remain silent when they suffer discrimination. Not allowing Thompson to sue would have emboldened employers to retaliate against a worker's family members and other close associates, further deterring employees from reporting discrimination.

- *Kasten v. Saint-Gobain Performance Plastics Corp.* also involves employer retaliation, in this case based on employees' complaints of violations of the Fair Labor Standards Act (FLSA). The FLSA sets wage and hour standards and also includes the Equal Pay Act, which bars pay discrimination on the basis of sex. The Court of Appeals for the Seventh Circuit held that employees who complain of FLSA violations to their employers orally, rather than in writing, are not covered under the FLSA provision prohibiting employers from retaliating against an employee who has "filed any complaint."

  The National Women's Law Center and other friends of the court urged the Supreme Court to reverse the court of appeals and provide protection for employees who make oral complaints. On March 22, 2011, it did just that. Writing for a 6-2 Court, Justice Breyer asked ""Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?"

- A few weeks earlier, on March 1, 2011, the Court issued a unanimous decision, written by Justice Scalia, in *Staub v. Proctor Hospital*, in which it held an employer can be liable for discrimination when a company official who makes a final job decision acts on the basis of another official's bias.

  Staub involves the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which bars discrimination on the basis of military status. The plaintiff, Vincent Staub, was a member of the United States Army Reserve. His immediate supervisors resented the time that Staub was obligated to devote to his Reserve duties, and notified an HR official that Staub had violated a company rule. Relying on that accusation – which Staub contended was false and motivated by anger regarding his Reserve duties –the HR official fired Staub after a cursory review of his personnel file. (A claim that company officials with a bias against an employee cause another official to take actions against the employee is referred to as a "cat's paw" case, based on a fable in which a monkey induces a cat to extract roasting chestnuts from a fire.)

A jury found in Staub's favor, and awarded him damages. However, the Court of Appeals for the Seventh Circuit overturned the jury's verdict. Fortunately, the Supreme Court reversed its decision. It held that an employer is liable under a cat's paw theory of liability if a supervisor motivated by antimilitary animus takes an action that is intended to harm the employee, and if that act is a "proximate cause" of the employer firing or taking other adverse action against the employee. Although this case was brought under USERRA, the Court strongly suggested that its decision is also applicable to cases brought under Title VII, which prohibits employment discrimination based on factors including sex and race.

But two key employment rights cases remain to be decided that go to when and how individuals can come together as a class to challenge unlawful corporate conduct, including *Wal-Mart v. Dukes*.

- On March 29, 2011, the Supreme Court heard argument in *Wal-Mart v. Dukes*, in which women employees allege that Wal-Mart discriminated against them in pay and promotions. The issue before the Court, which agreed to hear Wal-Mart's appeal of the decision of the Court of Appeals for the Ninth Circuit, is whether the case can proceed as a class action on behalf of more than a million women against the giant retailer. In support of certifying the case as a nationwide class action, the plaintiffs put forward statistical evidence that women working at Wal-Mart earned less than men and were less likely to be promoted in every region of the country. They also put forward evidence indicating that Wal-Mart had a national policy allowing managers to make decisions about pay and promotions with few safeguards against discrimination and evidence from scores of women indicating that such a policy led to gender stereotyping in these decisions. In response, Wal-Mart has argued that the thousands of women employees across the country do not have enough in common for the case to proceed as a class action on behalf of all of them. At oral argument, several of the conservative Justices asked questions that suggest skepticism about the plaintiffs' arguments; should the Court hold that the case cannot proceed as a class action, it could have significant implications for other employees challenging employer-wide discrimination to bring class action cases.

  The National Women's Law Center filed a friend-of-the-court brief highlighting evidence of sex discrimination at Wal-Mart – the statistical disparities in pay and promotions and the prevalence of sex stereotyping – as well as the barriers faced by individual women in challenging discrimination. Individual lawsuits are expensive, in many cases employees are not even aware of rights violations, and employees may fear retaliation if they act alone. The brief emphasizes the importance of allowing plaintiffs in these sorts of cases to proceed as a class in order to give effect to the purposes and intent of Title VII and the class action rules.

- The arbitration case that may affect employees' ability to enforce their rights in the workplace is *AT&T Mobility LLC v. Concepcion*, which involves an arbitration clause in a cellular phone contract that prohibits class actions. The Court heard arguments in November on the question whether the Federal Arbitration Act (FAA) prevents courts

from invalidating contract clauses banning class-wide arbitration as unconscionable under state law. The FAA has been held to recognize the enforceability of arbitration agreements, including those in employment contracts. But in many states, a contract provision—including an arbitration agreement—may be deemed "unconscionable" (and therefore unenforceable) if it fails to meet basic standards of fairness, often when one of the parties had no input into the contract terms. Many employment contracts, like the contract at issue in *AT&T Mobility LLC*, include arbitration clauses limiting employees' ability to participate in class actions.

The National Women's Law Center joined a friend-of-the-court brief emphasizing that the FAA specifies that it does not preempt state contract law—including California's law on unconscionable contract clauses. Therefore, the California court's determination that the AT&T's class action waiver is unconscionable should stand. The brief also points out that recourse to class actions is essential for workers—especially women, low-income, and immigrant workers—who face violations of their rights under wage and hour laws and antidiscrimination laws but have few resources to bring individual claims. Class actions allow employees to act together, making the cost of litigation less onerous, and provide a notice mechanism to inform employees of possible rights violations. For workers who have no input into an employment contract, class action waivers are often highly unfair, and it is therefore important to preserve state courts' ability to invalidate unconscionable waivers, consistent with the intent of the FAA.

Sex Discrimination and the Constitution

The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides protection against discrimination by the government, including sex discrimination. The case this Term that challenges such discrimination still remains to be decided.

- *Flores-Villar v.United States* presents the question of whether a provision of the Immigration and Nationality Act (INA) that treats unmarried men and women differently in conferring citizenship on their children born abroad discriminates on the basis of sex in violation of the Equal Protection Clause. Petitioner Ruben Flores-Villar was born in Mexico and raised by his citizen father in the U.S. His father was unable to confer U.S. citizenship on him because he was sixteen when Flores-Villar was born and federal law held that an unmarried father of a child born abroad could not convey citizenship to the child at birth unless he had lived in the U.S. for five years after the age of fourteen—a standard physically impossible for the teen father to meet. No parallel requirement applies to unmarried U.S. citizen mothers. Several years ago, in *Nguyen v. INS*, the Court—over a strong dissent by Justice O'Connor—upheld a related provision. The current case raises the question of whether the Constitution's protection against sex discrimination will be further weakened. At oral argument, many of the Justices appeared skeptical of Flores-Villar's claim.

  The National Women's Law Center filed a friend-of-the-court brief urging that the Court assess the law in question under the heightened scrutiny standard that applies to discrimination on the basis of gender under the Constitution. Under that standard, the

government must demonstrate "an exceedingly persuasive justification" for sex discrimination. It has the burden of showing that the challenged classification is "substantially related" to the achievement of "important governmental objectives." The brief sets out why the distinction made between mothers and fathers does not meet this standard, but instead perpetuates the stereotype that unmarried fathers are always less involved than unmarried mothers in their children's lives.

The decisions of the Court have a profound and lasting impact on the women of this nation for generations to come. Women can breathe a sigh of relief regarding three of the Court's decisions that have already been issued this Term, but are watching for the decisions in the critical cases that remain.