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JUDGES & THE COURTS

FACT SHEET

Supreme Court Preview: 2014-2015 Term

(October 2014)

This term, the Supreme Court will decide at least one case—and possibly multiple cases—with critical implications for both women's health and women's economic security. The Court's consideration of these cases comes in the immediate wake of the 2013-2014 term, when the Supreme Court's decisions in *McCullen v. Coakley*, *Burwell v. Hobby Lobby*, and *Harris v. Quinn* —threatened real harm to both. In addition, this term the Court will consider two other potentially important employment discrimination cases and a significant housing discrimination case, and may again take up the issue of marriage equality; the legal issues in all these cases are important for women.

Young v. United Parcel Service, Inc.

In ***Young v. United Parcel Service, Inc.***, the Supreme Court will decide whether the Pregnancy Discrimination Act ("PDA") requires an employer to provide light duty to a worker if she needs it because of pregnancy, if the employer provides light duty to workers with similar limitations in ability to work when they arise out of disability or on-the-job injury. In 2006, Peggy Young, a pregnant UPS delivery driver in Landover, Maryland, was instructed by her medical provider to avoid heavy lifting during her pregnancy. Although UPS routinely accommodated employees who needed light duty because they had a disability under the Americans with Disabilities Act, or because they had an on-the-job injury—and even when they lose their commercial driver's license because of a D.U.I. conviction—it forced Young to take a leave of absence for the rest of her pregnancy, causing her to lose her wages and her UPS health insurance coverage. Young sued UPS for pregnancy discrimination, but the district court and the Fourth Circuit Court of Appeals ruled against her, finding that the company's refusal to accommodate pregnancy when it accommodated the medical needs of other workers who had similar limitations in ability to work did not constitute pregnancy discrimination. The lower courts came to this conclusion despite the PDA's explicit requirement that employers treat pregnant workers as well as they treat nonpregnant employees who are "similar in ability or inability to work." The Fourth Circuit found that UPS's reliance on rules that provided accommodations to other categories of workers while excluding pregnant workers like Peggy Young did not violate this requirement because Young had not proven that these rules were motivated by an intent to harm pregnant women.

The Center filed an amicus brief in the Supreme Court support of Peggy Young on behalf of 123 members of Congress, arguing that the plain language and legislative history of the PDA clearly reflect Congress's intention to require employers to treat workers with medical needs arising out of pregnancy as well as they treat workers affected by injury, disability, or disease. Congress passed the PDA in 1978 in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court held that an employer did not discriminate on the basis of sex in violation of Title VII when it excluded women with disabilities arising from pregnancy and childbirth from a temporary disability insurance plan covering sickness and injury. Congress rejected the court's rationale and passed the PDA to ensure that distinctions based on pregnancy and related conditions would be considered discrimination on the basis of sex under Title VII. It specifically required

employers to treat pregnant workers the same as those "similar in ability or inability to work" to ensure that employers could no longer treat limitations arising out of pregnancy differently--and worse--than it treated limitations arising out of disease or injury and to end the practice of relegating pregnant women to the status of second-class citizens within the workplace.

This will be the first time the Supreme Court will consider whether the PDA requires an employer to make accommodations for those pregnant workers who have a medical need for them. The Court's decision will have a significant impact on women, particularly those women working in low-wage or physically demanding jobs who are particularly likely to be forced to choose between endangering their health and losing their paycheck if they have a need for accommodation as the result of pregnancy.

Mach Mining v. Equal Employment Opportunity Commission

When the Equal Employment Opportunity Commission ("EEOC")—the agency responsible for enforcing federal employment discrimination laws—receives a complaint, it must seek informal resolution of the complaint before it can file a lawsuit against an employer in federal district court. This process is called "conciliation." ***Mach Mining v. Equal Employment Opportunity Commission*** is a case in which the EEOC alleged that Mach Mining engaged in systemic hiring discrimination against women. Mach Mining sought to have the case dismissed based on the argument that the EEOC did not attempt to conciliate the discrimination complaint in good faith before filing the lawsuit. The question before the Supreme Court is whether the EEOC's obligation to engage in conciliation before filing suit is subject to judicial review, and if so, what standard courts should apply to the review. In other words, in this case the Supreme Court will decide whether an employer that the EEOC sues for discrimination can win the case if it proves that the EEOC didn't try hard enough to reach a settlement agreement before going to court.

In *Mach Mining*, the Seventh Circuit held that the conciliation efforts were not reviewable by the court and thus employers could not defend against a discrimination suit by arguing that the EEOC had breached its obligations to conciliate. In so holding, it disagreed with those circuits that have held that EEOC conciliation efforts are reviewable, under various levels of scrutiny. The Supreme Court's decision in this case may have significant implications for future discrimination litigation under Title VII as employers increasingly attempt to use failure of good-faith conciliation as an affirmative defense in cases filed by the EEOC. The EEOC has persuasively argued that judicial review of conciliation would actually undermine the effectiveness of informal complaint resolution–which the EEOC engages in frequently–by compromising the confidentiality of negotiations and providing an incentive for employers to resist conciliation efforts in order to use an unsuccessful conciliation process as a defense during a potential lawsuit. Judicial review of EEOC conciliation efforts may also be used to delay and divert courts from reaching the central and critical question in these lawsuits: whether the employer has engaged in unlawful discrimination.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.

EEOC v. Abercrombie & Fitch Stores, Inc., arises out of the allegation that Abercrombie discriminated against Samantha Elauf by refusing to hire her because she wore a hijab and thus did not conform to their "Look Policy." Title VII's prohibition on religious discrimination requires employers to make reasonable accommodations for religion, such as modifying dress codes, if they can do so without undue hardship. Elauf was interviewed for a sales position at Abercrombie Kids by an assistant manager who was aware that she wore her headscarf for religious reasons. After the interview, the assistant manager wanted to hire Elauf, but contacted a district manager to make sure that Elauf's headscarf was acceptable given that the store's policy prohibited employees from wearing "caps". The district manager told her that Elauf could not be hired because of her headscarf. The Supreme Court will consider whether an employer can only be liable for failing to provide a religious accommodation under Title VII when the employer has actual knowledge that a religious accommodation was required based on direct, explicit notice from the applicant or employee. This case may have important repercussions for women who wear religious head coverings and for the strength of Title VII protections, if employers are permitted to claim they did not understand a request for accommodation was religious in nature without direct and explicit notice from the employee or complainant.

Texas Dep't of Housing and Community Affairs v. The Inclusive Communities Project, Inc.

This term, the Supreme Court will determine whether the Fair Housing Act allows plaintiffs to prove discrimination by showing that a challenged action has an unjustified "disparate impact" on a protected class, even in the absence of a showing of discriminatory intent by defendants. The Court has taken up cases addressing this issue in its last two prior terms, but both of those cases settled out of court prior to any decision. In ***Texas Department of Housing and Community Affairs v. The Inclusive Communities Project***, a fair housing advocacy group alleged that Texas was distributing tax credits under a low-income housing program in a manner that concentrated those designated units in minority neighborhoods, perpetuating racially segregated neighborhoods and making it more difficult for African-American Section 8 clients to find housing in predominantly white neighborhoods.

All eleven Courts of Appeals that have considered the question have concluded that the Fair Housing Act prohibits disparate impact discrimination, just as Title VII prohibits disparate impact discrimination in employment. Additionally, the Department of Housing and Urban Planning issued regulations interpreting the Fair Housing Act to prohibit disparate impact discrimination, and this interpretation by the agency charged with enforcing the Act should be entitled to substantial deference.

The ability to challenge disparate impact housing discrimination is especially important to women in low-wage jobs and women of color, who are disproportionately affected by predatory lending practices when seeking mortgages. The disparate impact standard is also important for challenging housing discrimination against victims of domestic violence or sexual assault, who are often forced to vacate their homes when landlords impose "zero tolerance" policies for crimes committed in the home, or when jurisdictions penalize households to which police are dispatched on multiple occasions: such actions, which have the effect of doubly victimizing those who experience violence, will often have a discriminatory impact on women. Polices like these that serve no important purpose, yet discriminate in practice, should fail under the Fair Housing Act.

Looking Ahead

In addition to the cases that have already been granted for the upcoming Term, a number of other issues are working their way through the federal appellate courts.

Marriage equality: In the wake of the Court's historic decision striking down Section 3 of the federal Defense of Marriage Act in *United States v. Windsor*, over 70 marriage equality cases have been brought across the country. These cases challenge state laws prohibiting same-sex marriages or prohibiting the recognition of same-sex marriages. As the Center explained in amicus briefs filed in many of these cases, these prohibitions are based on gender stereotypes about the appropriate roles of men and women in marriage and should be subject to the same heightened scrutiny that courts apply to laws that discriminate on the basis of sex. To date, federal appellate courts in the Fourth Circuit, Seventh Circuit, and Tenth Circuit have found such state bans to be unconstitutional, and the Supreme Court is considering several petitions for Supreme Court review presenting this question.

Contraceptive coverage under the Affordable Care Act: The Supreme Court's decision in *Burwell v. Hobby Lobby* did not resolve all the lawsuits challenging the health care law's requirement that insurance plans include birth control coverage without cost-sharing. *Hobby Lobby* dealt with for-profit companies challenging the birth control requirement, but many of the lawsuits challenging the contraceptive coverage rule have been brought by non-profit religious organizations. The non-profit religious organizations are in a different position than the for-profits, since the federal government has already taken steps to "accommodate" these non-profit organizations' religious beliefs. An eligible non-profit organization need only certify to its insurance company or to the federal government that it wants to opt out of the requirement, and the insurance company will then provide the benefit directly to the female employees, without cost to the non-profit. But non-profit organizations are claiming that the requirement that they submit this paperwork if they wish to opt out of providing contraceptive coverage substantially burdens their religious beliefs and violates the Religious Freedom Restoration Act. One or more of these cases is likely to reach the Supreme Court.

State restrictions on abortion: Anti-abortion state politicians continue to relentlessly attack the right to abortion, in the hopes of closing down abortion providers and preventing women from obtaining an abortion. A number of these state laws are being challenged in court, including a Texas law that has already caused half of the clinics in the state to close and left the entire Rio Grande Valley without an abortion provider. Many expect that one of these challenges will make its way to the Supreme Court this term or next term, potentially giving the Court the opportunity to test the boundaries of *Roe v. Wade*.

The Supreme Court's decisions in these, and many other cases, will have a tremendous impact on women's legal rights for decades to come. In light of recent criticism that some of the male Justices have a "blind spot" when it comes to understanding the impact of their decisions on women, particularly close attention will be appropriately paid to these cases in the coming months.