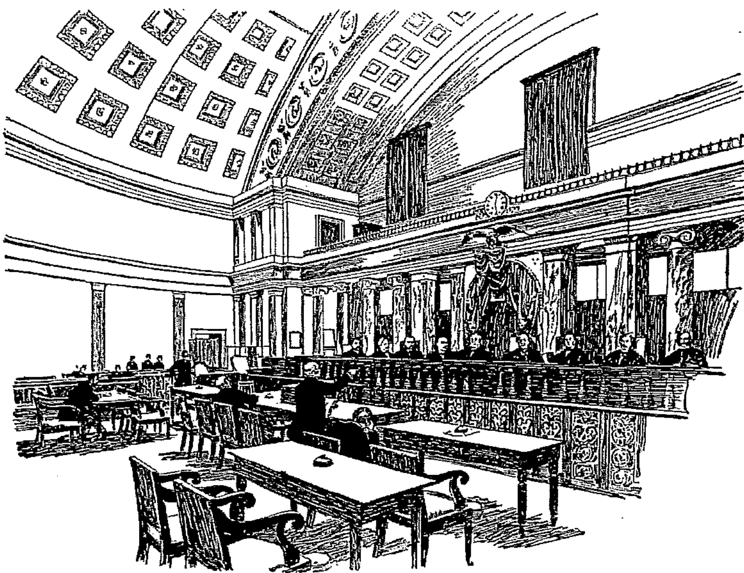
of trusts, fiduciaries have a continuing duty to monitor investments. The Court emphasized that this duty to monitor and remove improper investments is distinct from the duty to prudently select investments and rejected the District Court's position that the duty to monitor is only triggered when the investment has undergone substantial changes.

In finding that fiduciary duties include a duty to monitor, the Court clarified that a claim for breach of fiduciary duties related to a specific investment may still be sustainable after the statute of limitations has run on claims for breach related to the initial selection of the investment. However, the Court expressly declined to weigh in on the nature or scope of the review or monitoring required of a fiduciary to discharge his or her duties, leaving this issue for the Ninth Circuit on remand.

Given the narrow scope of the Court's decision, far from setting a clear line for when a plan fiduciary may be subject to a claim for breach of fiduciary duties, the decision leaves a number of unanswered question about scope of fiduciary duties and timing of claims which we can expect to see litigated in the years to come.

[1] The Supreme Court also left the Ninth Circuit to consider the fiduciaries' assertion that the participants waived any claim of breach related to the duty to monitor the investments because they did not specifically plead this duty in the earlier stages of the case.



AN ACTIVE TERM: SUPREME COURT EMPLOYMENT CASES OF 2015

By Hope B. Eastman, Paley Rothman

The Supreme Court has issued opinions in a number of significant employment law cases during its 2015 term. Additionally the Court is considering at least one case which is not strictly an employment case, but which will have important effects on employers.

Decided Cases

This term, the Court decided six employment-related cases, one involving religious accommodation, one involving the EEOC conciliation requirement, one involving the Pregnancy Discrimination Act, one involving the FLSA, one involving whistleblower protection for federal employees, and one on the DOL interpretive guidance on the exempt status of mortgage brokers.

EEOC v. Abercrombie & Fitch Stores, Inc., No. 14-86, decided June 1, 2015

In its most recent employment law ruling, the Court made clear that an applicant may prevail on a claim of religious discrimination by showing simply that her need for an accommodation was the motivating factor behind the employer's decision not to hire her. Overruling the Tenth Circuit, the Court held that the applicant was not required to show that the employer had actual knowledge of her need for a religious accommodation.

This case presented the Court with the question of whether an employer can only be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" 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.

This case involved an applicant who wore a headscarf to her interview for a position as a sales employee at *Abercrombie & Fitch*. The applicant was not hired because wearing a headscarf conflicted with Abercrombie's "look policy" which set forth the dress requirement for sales employees and prohibits employees from wearing "hats." Although the manager who performed the interview believed that the headscarf was worn for religious reasons, the applicant herself never actually informed the manager of this nor indicated that she would need any accommodation.

Each side in this case, during oral arguments, sought to persuade the Court that the rules they propose would be workable. The government argued that accommodation requirements should be triggered if the employer knows the practice (in this case the wearing of the headscarf) and correctly understands the practice to be religious. Abercrombie & Fitch argued that such a rule would require it to make impermissible inquiries into an applicant's religion and sought to put the burden on

the applicant to come forward and tell the employer about their religious practice and need for accommodation.

In an 8 to 1 decision authored by Justice Scalia, the Court rejected Abercrombie's argument that an applicant must demonstrate that the employer had actual knowledge of her need for an accommodation. The Court emphasized that, unlike other anti-discrimination statutes, such as the Americans with Disabilities Act, Title VII does not include a knowledge requirement. The Court refused Abercrombie's push for it to "add words to the law to produce what is thought to be a desirable result," noting that such a change would be for Congress not the Court. Instead, the Court highlighted the distinction between knowledge and motive, noting that Title VII looks only to the issue of whether an employer failed to hire an applicant because of his or her religion. However, in doing so, the Court made it clear in a footnote that they were not deciding a case in which the employer did not know or suspect it to be a religious practice but that rather Abercrombie suspected that the applicant wore the head scarf for religious reasons.

The Court concluded that the applicant could sustain a disparate-treatment claim under Title VII by demonstrating that the employer did not hire her because of her religion, which the Court noted to be synonymous with a refusal to accommodate the religious practice. The Court emphasized that this is true regardless of whether the applicant has requested an accommodation or otherwise made the employer aware of a need for accommodation. The Court remanded the case to the Tenth Circuit, which had previously granted summary judgment in favor of the employer, for further consideration.

Mach Mining v. EEOC, 135 S.Ct. 1645, decided April 29, 2015

In a unanimous decision authored by Justice Kagan, the Court held that the statutory requirement that the EEOC attempt conciliation before filing suit is subject to limited judicial review.

This case resolved the fascinating question of whether a court can require the EEOC to fulfill Title VII's conciliation requirement in good faith, which is hardly something that ought to require judicial intervention. The EEOC has been subject to intense employer criticism over the years for the manner in which it conducts conciliation of cases where reasonable cause findings have been issued, including the failure to specify the violation or the suggested remedies and relief, and the failure to engage in anything that represented a real effort to resolve the matter. Additionally, the EEOC has presented a demand for relief on a take it or leave it basis and then simply moved to file suit. Under Title VII of the Civil Rights Act, the EEOC is required conciliate the dispute with an employer before bringing suit. The EEOC views the obligation as being minimal at best and argues that the failure to conciliate in good faith should not be a valid defense against a suit by the EEOC.
This case involved a woman who alleged that she was denied a job based on her gender. The EEOC found reasonable cause that the company had discriminated against female applicants and sent a letter to Mach Mining inviting it to participate in conciliation. The letter did not offer any suggested remedial steps it was asking the company to take and notified the company that the EEOC would be in contact to begin the conciliation process. Approximately one year later, the EEOC sent Mach Mining another letter stating that conciliation had failed and proceeded to file suit. What occurred in the interim between the two letters was not addressed in the judicial record. Mach Mining argued that the EEOC had not conciliated in good faith. The EEOC moved for summary judgment on whether failure to conciliate in good faith is a viable defense. The district court denied the motion and held that courts may review the EEOC's informal settlement efforts to determine whether the EEOC made a sincere and reasonable effort to negotiate. The Seventh Circuit reversed and held that, so long as the EEOC has pleaded that it complied with Title VII and the relevant documents are facially sufficient, judicial review is satisfied.

In overruling the Seventh Circuit, the Supreme Court emphasized the strong presumption in favor of allowing judicial review of administrative actions. The Court concluded that there is nothing in Title VII to indicate that Congress intended the conciliation process to be exempt from judicial review.

In finding that the EEOC's conciliation obligation is subject to judicial review, the Court recognized that Title VII does give the EEOC "wide latitude over the conciliation process." As such, the Court held that judicial review of conciliation must be limited to enforcing the statutory obligation. In other words, a court may review whether the EEOC actually tried to conciliate, but not scrutinize the conciliation process itself. In setting forth this limitation, the Court rejected Mach Mining's assertion that a court's inquiry should include a factual look at the conciliation process. The Court concluded that allowing broad judicial review of this nature would conflict with both the significant discretion that the Title VII gives the EEOC in how to proceed with conciliation as well as the related confidentiality provision.

In concluding its decision, the Supreme Court noted that generally an affidavit from the EEOC is sufficient to establish that the conciliation requirement has been met. However, in the event that the employer responds with evidence to the contrary, a court may engage in a factual investigation to determine whether conciliation actually occurred. In the event that the court finds that conciliation has not occurred, the remedy in such a situation is for the EEOC to be ordered to make appropriate conciliation efforts. The Supreme Court vacated the judgment of the Court of Appeals and remanded the case for further proceed-ings consistent with its opinion.

Young v. United Parcel Service, 135 S.Ct. 1338, decided March 25, 2015

In a decision authored by Justice Breyer, the Court addressed the question of what the Pregnancy Discrimination Act (PDA) means when it requires employers to treat pregnant employees the same as non-pregnant employees who are "similar in their ability or inability to work."

The employee in question was a delivery driver for United Parcel Service (UPS) who became pregnant and was advised by her medical practitioners not to lift more than twenty pounds while working. UPS's employee policy requires their drivers to be able to lift up to seventy pounds. Due to Young's inability to fulfill this work requirement, as well as the fact that she previously had used all her available family/

medical leave, UPS forced her to take an extended, unpaid leave of absence and denied her light duty. Young sued UPS and claimed she had been the victim of gender- and disability-based discrimination under the Americans with Disabilities Act and the Pregnancy Discrimination Act, highlighting the fact that UPS had accommodated other employees with work limitations, specifically (i) drivers disabled on the job, (ii) drivers who lost their Department of Transportation certification, and (iii) drivers suffering from a disability covered by the Americans with Disabilities Act (ADA). UPS moved for summary judgment and argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently from a similarly situated co-worker. Furthermore, UPS argued it had no obligation to offer Young accommodations under the ADA because Young's pregnancy did not constitute a disability. The district court dismissed Young's claim. The U.S. Court of Appeals for the Fourth Circuit affirmed.

In reviewing the issue, the Court ruled 6-3 (with Justice Alito issuing an opinion concurring in the judgment only) to vacate the Fourth Circuit's affirmation of summary judgment and to remand the case for further consideration by the Fourth Circuit. In doing so, the majority declined to adopt either the employer's or the employee's statutory interpretations of the PDA, finding both to be too extreme in different directions. Instead, the majority cut a middle ground holding that, where an employer has asserted that its employment decision was based on a neutral policy in which pregnancy was not a factor, the employee may respond, and create a triable issue of fact, by demonstrating that the policy imposed a significant burden on pregnant employees and that the non-discriminatory reason for the policy was insufficient to justify the burden.

It is important to note that, as the Court recognizes in its decision, the ADA was amended in 2008 (after the lawsuit began) to broaden the definition of disabilities to include those of limited duration. The Court declined to take a position on whether this means that impairments related to pregnancy (such as Ms. Young's) may be covered by the ADA. However, the EEOC has taken this position and asserts that certain impairments related to pregnancy are protected under the ADA as amended.

Integrity Staffing Solutions v. Busk, 135 S.Ct. 513, decided December 9, 2014

On December 9, 2014, the Court ruled 9-0, in a decision authored by Justice Thomas, on a case involving time spent by a putative class of warehouse workers waiting for and undergoing security screenings. The employees in question were employed by Integrity Staffing which provided warehouse workers to Amazon. The issue was whether the employees' waiting and screening time was compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, and turned on the oft-litigated question under these statutes as to what activities are considered preliminary or postliminary to the performance of the principal activities that an employee is required to perform.

The issue is framed by two somewhat conflicting principles: the Portal-to-Portal Act exception for preliminary/postliminary activities versus the continuous workday rule. In early days of the FLSA in 1946, the Supreme Court held in the case of *Anderson v. Mt. Clemens Pottery Co.,* 66 S.Ct. 1187, that the term "work" in the statute broadly encompasses time spent "pursuing certain preliminary activities after arriving ... and such as putting on aprons and overalls, removing shirts, taping or greasing arms [etc.]" Immediately thereafter, organized labor seized on the ruling and by late 1946 "portal pay suits" had exploded, with over 1,500 cases seeking nearly $6 billion in claims. In response, Congress passed the Portal-to-Portal Act in 1947, which excluded from compensable time "activities that are preliminary to or postliminary to the principal activities [that an employer is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activities." On the flip side, the FLSA regulations include what is commonly known as the "Continuous Workday Rule," which states that compensable time comprises "the period between commencement and completion on the same workday of an employee's principal activity or activities ... whether or not the employee engages in work throughout all of that period."

In Integrity Staffing, the Supreme Court recognized that its earlier decisions consistently interpreted "principal activity or activities" "to embrace all activities which are integral and indispensable part of the principle activities" an employee performs. The question the Court faced this time around was what does "integral and indispensable" mean. It held that an activity is integral and indispensable to the principle activities that an employee is employee to perform "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." Under the Court's analysis, the term "principal activities" includes all activities which are an "integral and indispensable part" of the principal activities.

Under this framework, the Court concluded that the screenings were not part of the principal activities the employees were employed to perform as the employees were not employed to undergo security screenings. The security process could be easily eliminated without impacting the principal job the warehouse workers were required to perform, i.e., stocking the shelves and packaging the goods for shipping. The Court also relied on a 1951 Department of Labor Opinion Letter which found both pre-shift screening for safety and post-shift searches conducted to prevent employee theft to be non-compensable.

Department of Homeland Security v. MacLean, 135 S.Ct. 913, decided January 21, 2015

On January 21, 2015, the Court decided this case by 7-2, with Justice Roberts writing for the Court and Justices Sotomayor and Kennedy dissenting. The case involved whistleblower protection for a federal air marshal who publicly disclosed that the TSA had decided to cut costs by removing air marshals from certain long-distance flights and canceling all overnight missions. The Court held that the marshal was entitled to protection under the federal whistleblower statute because his disclosure did not fall within the statute's exception for disclosures "specifically prohibited by law." Although the disclosure was specifically prohibited by a TSA regulation, the Court held that the "specifically prohibited by law" exception does not extend to violations of rules and regulations, nor was the air marshal's disclosure specifically prohibited

by the statute that authorized the TSA to promulgate those regulations. In July 2003, the TSA briefed all federal air marshals - including Robert J. MacLean - about a potential plot to hijack passenger flights. A few days after the briefing, MacLean received a text message from the TSA canceling all overnight missions from Las Vegas until early August. MacLean, who was stationed in Las Vegas, believed that canceling those missions during a hijacking alert was dangerous and illegal. He disclosed this information to a reporter. The TSA fired him and he appealed to the Merit Systems Protection Board. MacLean challenged his termination on the ground that his disclosure was protected under the Whistleblower Protection Act of 1989 because he reasonably believed that the leaked information disclosed "a substantial and specific danger to public health or safety." The Board held that he did not qualify for protection because his disclosure was "specifically prohibited by law." The Court of Appeals for the Federal Circuit vacated the Board's decision, holding that the applicable regulation was not a valid source of prohibition.

The Supreme Court upheld whistleblower protection for MacLean. It refused to act on the government's argument that providing whistleblower protec¬tion to individuals like MacLean would "gravely endanger public safety" by making the confidentiality of sensitive security information depend on the idiosyncratic judgment of each of the TSA's 60,000 employees. It acknowledged that these concerns are legitimate but concluded that they must be addressed by Congress or the President, rather than by the Court.

Perez v. Mortgage Bankers Association and Nickols v. Mortgage Bankers Association, 135 S.Ct. 1199, decided March 9, 2015

The Supreme Court ruled 9-0 in favor of the Department of Labor (DOL) in a case challenging the ability of the DOL to issue and revise interpretive guidance without notice-and comment rulemaking. These two cases, consolidated for decision, posed the question whether a federal agency, in this case the DOL, must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act (APA) before it revokes an authoritative interpretation of a regulation and replaces it with a new authoritative interpretation that reverses the agency's prior interpretation. The Court has resoundingly said no.

During the Bush Administration, the DOL issued revised regulations relating to various exemptions under the Fair Labor Standards Act (FLSA), including the exemption for administrative employees. The revised regulations included a new section giving examples of administratively exempt employees, including one related to mortgage loan officers in the financial services industry. In September 2006, the DOL issued an Opinion Letter (FLSA2006-31), in response to an inquiry from the Mortgage Bankers Association (MBA), confirming that mortgage loan offers were exempt from the FLSA under the administrative exemption. The DOL held the Opinion Letter out as the Department's definitive interpretation of its regulations as it applied to mortgage loan officers and concluded that mortgage loan officers were not entitled to overtime.

Four years later in March 2010, the DOL withdrew its 2006 Opinion Letter and reversed its position by issuing Administrator's Interpretation No. 2010-1 stating that mortgage loan officers are nonexempt and entitled to overtime. The DOL conceded in an earlier amicus brief in another case that this was a "substantive" change.

The MBA filed suit, challenging the Obama Administration's revocation of the 2006 Opinion Letter and issuance of the contrary guidance. The MBA argued that allowing the DOL to make this change was inconsistent with the principles of the APA which requires that agencies use a notice-and-comment period before issuing legislative or substantive rules which are binding on the public. The MBA's position was based on a long-held judicial principle that when an agency interprets a regulation one way and subsequently interprets it another way, the agency in effect is revising the underlying regulation. Finding against the MBA, the Court accepted the government's position that no notice-and-comment was required for the withdrawal of the Opinion Letter. The Court reached this conclusion based on the fact there is an exemption to the APA notice-and-comment requirement for "interpretive rules," which these were deemed to be. As Justice Sotomayor wrote in her opinion for the Court, under a "straightforward" reading of the APA, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." The separate concurring opinions by Justices Scalia and Thomas suggest that other challenges may arise. Both of them questioned the basis for judicial deference to agency "interpretations," as opposed to regulations adopted with notice-and-comment. Justice Scalia argued that this practice leaves the agency with largely unfettered freedom to draft broad and vague regulations through notice-and-comment and then use interpretive guidance to fill in the gaps unchecked by notice-and-comment. Justice Thomas, in a lengthy concurring opinion, essentially called for reevaluation of the deference doctrine as a constitutional violation of the separation of powers.

Pending Cases

Still to be decided by the Court is a key Affordable Care Act case which, while not an employment case, may have major impacts on both employers and employees.

King v. Burwell, No. 14-114, argued March 4, 2015

This case, hotly watched throughout the country and awash with amicus briefs, presents the Court with an issue of statutory interpretation of the Affordable Care Act (ACA). While not a constitutional challenge to the ACA, a decision by the Court against the government's interpretation of the ACA could have an enormous an impact on the entire ACA infrastructure. The central question of the case is whether the IRS can make federal subsidies available to individuals in states that did not establish their own state insurance exchanges but instead have exchanges administered by the federal government.

Three years ago, the Court, upheld the so called "individual mandate" under the ACA as a tax. The question in that case was whether the constitution allowed Congress to require everyone to buy health insurance or pay a penalty. In a dramatic opinion on the last day of that term, Chief Justice John Roberts joined the Court's four more liberal Justices in ruling that it does, so the law survived.

The question now is a statutory one which, depending on how it is decided by the Court, could have an impact on the overall health insurance infrastructure created by the ACA, which has been carefully crafted to ensure participation in the insurance marketplace by both healthy and sick people in order to keep coverage affordable.

While many people in this country get their health insurance through their jobs, or their spouse's jobs, not everyone can, or wants to, obtain coverage through an employer. For example, people who are self-employed or work for businesses that don't have to provide them with insurance must purchase their own health insurance. To ensure the availability of health insurance for such individuals, the ACA directed the states to establish "exchanges" – called marketplaces - where individuals can buy coverage. Where states do not set up their own exchanges, as thirty-six states have done, the federal government comes in to administer the exchange in those states.

The ACA authorizes federal subsidies for individuals with certain household incomes who are "enrolled through an Exchange established by the State." The question that the Court is being asked to answer turns on the phrase "established by the State." The IRS has issued regulations making federal subsidies available to qualifying individuals who purchase health insurance on exchanges administered by either a state or the federal government (where the state did not set up their own exchange). Opponents of the law argue that these regulations are an overreach by the IRS and read the language of the ACA as only providing subsidies for purchases on state-established exchanges and not on federally-run exchanges. This argument would mean that people who would be eligible for subsidies on a state-run exchange will no longer be eligible for subsidies if they are enrolled in a federally-run exchange. Given that there are more than 7.5 million people now enrolled in federally-run exchanges this could have widespread implications. Supporters of the law argue that the IRS has the authority to make subsidies available to those enrolled on both the state-run and federally-run exchanges and point to other sections of the ACA as contemplating coverage wherever you live if there is an exchange.

Some interesting points add to the drama facing the Court. If the Court finds that this was a drafting error that only Congress can fix, there is little likelihood that the Republican-controlled Congress would take any steps to remedy the drafting error and give the IRS the authority to provide subsidies for individuals enrolled in federally-run exchanges. Instead, Republican members of both the Senate and the House have already begun floating proposals to create "bridges" out of the ACA in the event that the decision goes against the Administration.

In the event that the subsidies are struck down and Congress refuses to act, legislatures in states without state run exchanges will face pressures from both sides about whether or not to establish an exchange.

As to the implications for employers and their employees, if the Court decides against the Administration and invalidates the subsidies, this will undermine both the employer mandate and the individual mandate in states where the exchanges are federally-run. The penalties under the employer mandate are triggered when an employee who is not offered the mandated health insurance by his or her employer receives a subsidy on the exchange. Thus, if the Court rules that there can be no subsidies in states with federally-run exchanges, there will also be no employer mandate penalties for employers in these states regardless of whether they offer coverage. In other words, because the penalties, which are the enforcement mechanism behind the employer mandate, are tied to individual subsidies, the employer mandate will be unenforceable in states where the subsidies are not available. On the individual side, the individual mandate only applies when the individual has access to "affordable" insurance. Without the subsidies, insurance on the federally-run exchanges will become unaffordable for many, thus eliminating their obligation to purchase coverage or pay a penalty. However, while these individuals will not be obligated to purchase coverage, they may still want health coverage and find that, without the subsidies, they can not afford to do so. Thus, if the subsidies are eliminated in federally-run exchange states, employers in these states who do not offer plans may face increased pressure from their employees to offer plans as, without the subsidies, it may be difficult for the employees to afford plans purchased through the marketplace. The March 4, 2015, Supreme Court hearing on *King v. Burwell* was expected to focus on the proper interpretation of words and phrases in the ACA discussed above. The Justices did address these issues, however, the oral argument veered surprisingly into the constitutional balance between federal and state power. Commentators have focused on Associate Justice Anthony Kennedy who raised questions about this issue, suggesting he might join the liberal Justices to uphold the subsidies. Although there is a widespread belief that a negative ruling will significantly undermine the law, predicting the outcome from oral arguments is an unreliable game.

Petition for Certiorari

A review of petitions for certiorari this term reveals only two that raise employment law issues. On April 27, 2015, the Court granted certiorari in the case of *Green v. Donahoe*, No. 14-613, in which the Court is being asked to determine, under federal employment discrimination law, whether the filing period for a constructive discharge claim begins to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held. On April 20, 2015, the Court denied certiorari in *Landers v. Quality Communications*, No. 14-969, which asked the Court to address whether plaintiffs seeking overtime under the FLSA must support their allegations with detailed facts demonstrating the time, place, manner or extent of their uncompensated work, or whether it is sufficient if plaintiffs' allegations give defendants fair notice of their claim for overtime and the grounds upon which the claim is based.

Stay tuned as the Court continues to issue decisions on the cases presently before it.