criminatory restrictions, such as prohibiting large attachments or the sending of audio or video files, in order to ensure the e-mail system's efficient functioning. Finally, *Purple Communications* does not affect the employer's right to monitor employees' use of an e-mail system or the right to notify employees of such monitoring.

Both union and non-union employers will need to reevaluate their existing policies regarding e-mail usage in light of the new framework established in Purple Communications. Blanket prohibitions on non-business use of employer provided e-mail by employees will now, absent a very narrow exception for special circumstances, constitute an unfair labor practice. These restrictions should be curtailed so as to only prohibit such use during working hours. Notably, however, the NLRB's decision provided no guidance as to what constitutes working and non-working time, an area of ambiguity in the digital age when employees may send work-related e-mails from home via smartphone outside of the traditional working hours. In addition, policies relating to non-business related use of other types of equipment should also be reviewed in light of the NLRB's criticism of the equipment restriction cases as the NLRB has not been hesitant to apply newly-created policies, including the one in Purple Communications, retroactively against employers.

There may be a considerable delay before the policy announced in *Purple Communications* is subjected to judicial review. The NLRB remanded the proceedings in *Purple Communications* to an administrative law judge to provide the parties an opportunity to present evidence and argument under the new standard. After the administrative law judge issues a new decision under Purple Communications' standard, there could be additional proceedings before the NLRB itself. Only after those proceedings concluded would the policy finally be subject to review by a federal court. Because the NLRB will likely seek to enforce the new standard in the interim, employers may wish to comply while awaiting further developments.

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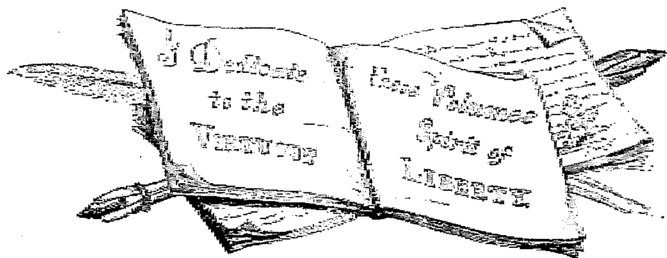
1. 29 U.S.C. § 157.
2. *See, e.g., Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565 (1978).
3. 29 U.S.C. § 158(a)(1).
4. *See, e.g., Pressroom Cleaners*, 361 N.L.R.B. No. 57 (2014); *Pacific Lutheran University*, 361 N.L.R.B. No. 157 (2014); *Huntington Ingalls Inc.*, 361 N.L.R.B. No. 64 (2014).



SUPREME COURT RULES THAT ERISA FIDUCIARIES HAVE DISTINCT LIABILITY FOR ONGOING DUTY TO MONITOR PLAN INVESTMENTS

By Jessica B. Summers, Paley Rothman

In a recent decision that has surely unnerved many retirement plan fiduciaries, the Supreme Court, in the case of *Tibble v. Edison International et al.*, No. 13–550, 2015 WL 2340845 (May 18, 2015), weighed in on the issue of whether a retirement plan fiduciary can be held liable for retaining an imprudently selected investment after the statute of limitation has run from the date of the initial selection of the investment.

Overruling the Ninth Circuit in a unanimous opinion, the Court held that retirement plan fiduciaries have an ongoing duty to monitor investments that is distinct from their duty to prudently select investments. As such, the Court established that, depending on the circumstances, the six year statute of limitation for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) can extend not only from the date on which an investment was selected but from a later point at which the fiduciary was obligated to monitor the investment.

The *Tibble* case was brought by participants in Edison International's 401(k) plan against the plan's fiduciaries. The participants alleged that the fiduciaries imprudently, and in breach of their fiduciary duties, chose to offer participants six higher priced retail-class mutual funds when they could have offered lower cost institutional-class mutual funds. Of the six funds in question, three were added to the plan in 1999 and three were added in 2002. The participants filed their claim in the U.S. District Court for the Central District of California in 2007.

In deciding the case, the District Court held that the defendants had breached their fiduciary duties with respect to the three mutual funds selected in 2002. However, as to the mutual funds selected in 1999, the District Court held that the claims related thereto were barred by ERISA's statute of limitations. The ERISA statute of limitations provides that a complaint must be filed within six years of "the date of the last action which constitutes a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." The District Court reasoned that the selection of the funds had occurred more than six years prior to the filing of the complaint and that the funds had not undergone sufficient change in the preceding six years for the fiduciaries to have a duty to review the funds. The Ninth Circuit affirmed the District Court's decision.

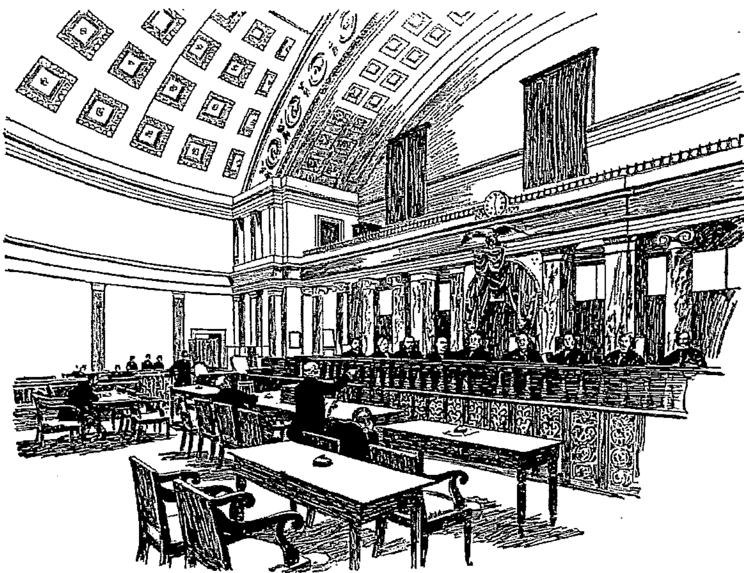
Reversing the Ninth Circuit's decision and remanding the case for further consideration, the Supreme Court relied heavily on the common law of trust, from which ERISA fiduciary duties are derived. The Court noted that both sides had acknowledged that, under the common law

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