Webinar Course Materials

Supreme Court Roundup: The Latest Labor and Employment Law Rulings Explained

Presented by:

John Gannon

Skoler, Abbott & Presser, P.C.

Wednesday, July 10, 2013
1:30 p.m. to 3:00 p.m. Eastern
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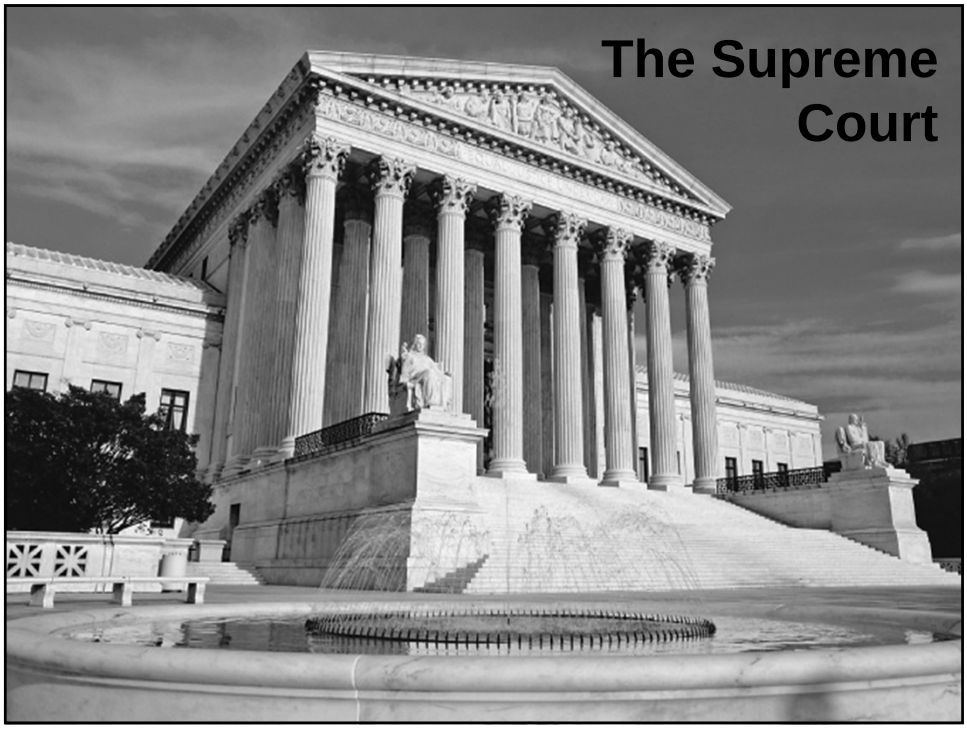
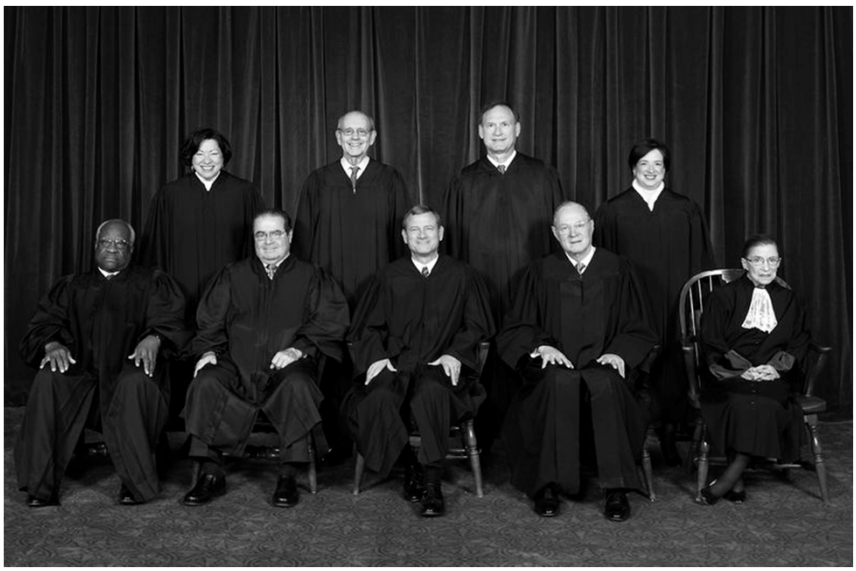
What We Will Cover Today

- *Vance v Ball State University* – Workplace Harassment
- *University of Texas Southern Medical Center v. Nassar* – Title VII Retaliation
- *Genesis HealthCare Corp. v. Symczyk* – Wage and Hour
- *Sandifer v. U.S. Steel* – Wage and Hour
- *United States v. Windsor* – Defense of Marriage Act (DOMA)
- *National Federation of Independent Business v. Sebelius* – Obamacare



The Supreme Court Justices



Back Row: Sonia Sotomayor , Stephen Breyer, Samuel A. Alito, Elena Kagan,
Front Row: Clarence Thomas, Antonin Scalia, John G. Roberts, Jr., Anthony Kennedy, Ruth Bader Ginsburg

The Supreme Court Justices

	Year of Birth	Year of Appointment	Political Party	Law School	Appointing President	Religion	Prior Judicial Experience	Prior Government Experience
John G. Roberts Jr.	1955	2005	R	Harvard	G. W. Bush	Roman Catholic	U.S. Court of Appeals	Dept. of Justice, White House counsel
Elena Kagan	1960	2010	D	Harvard	Obama	Jewish	None	Solicitor General/Law School Dean
Antonin Scalia	1936	1986	R	Harvard	Reagan	Roman Catholic	U.S. Court of Appeals	Assistant attorney general, Office of Legal Counsel
Anthony Kennedy	1936	1988	R	Harvard	Reagan	Roman Catholic	U.S. Court of Appeals	
Sonia Sotomayor	1954	2009	D	Yale	Obama	Roman Catholic	U.S. Court of Appeals	Assist. District Atty./Corp. law
Clarence Thomas	1948	1991	R	Yale	Bush	Roman Catholic	U.S. Court of Appeals	Chair, Equal Employment Opportunity Commission
Ruth Bader Ginsburg	1933	1993	D	Columbia/ Harvard	Clinton	Jewish	U.S. Court of Appeals	
Stephen Breyer	1938	1994	D	Harvard	Clinton	Jewish	U.S. Court of Appeals	Chief counsel, Senate Judiciary Committee
Samuel A. Alito Jr.	1950	2006	R	Yale	G. W. Bush	Roman Catholic	U.S. Court of Appeals	Dept. of Justice, U.S. Attorney.

Workplace Harassment

- Harassment defined
  - Not only sexual harassment
- Quid Pro harassment
  - Employee who dates supervisor gets better review
  - Employee who rejects advances is overlooked at raise time
- Hostile work environment
  - Sexual advances, requests or other conduct of sexual nature
  - Conduct unwanted and unwelcome
  - Severe and pervasive conduct resulting in intimidating, offensive, or humiliating work environment
  - Conduct unreasonably interfered with work performance or altered employment conditions

Vance v. Ball State University

- *Vance v. Ball State University*
- Question Presented:
  - Who qualifies as a supervisor for the purposes of workplace harassment?
- Why is it Important?
  - Under Title VII, an employer's liability for workplace harassment may depend on the status of the harasser
  - If the harassing employee is the victim's coworker, the employer is only liable if it was negligent in controlling working conditions
  - Where the harassing employee is a supervisor, different rules apply

Faragher-Ellerth Defense

- Harassment by supervisor + tangible employment action→ NO defense, employer vicariously liable
- Harassment by supervisor + no tangible employment action→ affirmative defense, employer may escape liability
  - Employer must prove:
    1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; *and*
    2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that the employer provided.

Vance v. Ball State University

- Maetta Vance was the only African-American employee in the catering department at Ball State University (BSU)
- After 18 years there and after filing numerous complaints alleging harassment on the basis of race by her coworkers, Vance filed a lawsuit against the university
- Vance alleged that Saundra Davis, a white coworker, harassed her on the basis of race in violation of Title VII
- While the parties agreed that Davis did not possess the power to take tangible employment actions against Vance, they vigorously disputed Davis' duties otherwise
  - Vance: Davis is my supervisor
  - BSU: Davis is a mere coworker

Vance v. Ball State University

- District Court
  - Davis was not Vance's supervisor because she did not have the power to hire, fire, demote, promote, transfer or discipline her.
  - Thus, Vance could not recover from BSU unless she could prove negligence with respect to Davis' conduct, which the court determined she could not.
- US Court of Appeals for the Seventh Circuit
  - Vance appealed. The Seventh Circuit agreed with the District Court.
- Supreme Court
  - Vance appealed the Seventh Circuit's ruling and the Supreme Court agreed to hear the case. The Court affirmed the decision.

Vance v. Ball State University

- Who is a supervisor *(i.e.,* whose harassing conduct is an employer vicariously liable for)?
  - An employee who has been empowered by the employer "to take tangible employment actions against the victim," including "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."
  - The Court rejected the broad definition used by some courts and the EEOC that a supervisor is an employee who has the authority to direct another employee's daily activities

Vance v. Ball State University

- The Court's solidified definition of supervisor is implicit in the *Faragher Ellerth* defense, which draws a sharp line between coworkers and supervisors.
- The strong implication of the *Faragher Ellerth* framework is that the authority to take tangible employment actions is the defining characteristic of a supervisor
- Supervisor has the authority to inflict direct economic injury on subordinates.
- The Court also describes this definition as easily workable
  - the alternative, in many cases, would "frustrate judges and confound juries."

Retaliation

- Most common type of discrimination alleged nationally
- Elements:
  - Employee Engages in a protected activity
  - Employer took some adverse action against the employee
  - Casual connection between the protected activity and the adverse action

University of Texas Southwestern Medical Center v. Nassar

- Question Presented:
  - What is the standard of proof in Title VII retaliation claims?
- Why is it Important?
  - Depending on the standard of proof, the plaintiff can have an easy or difficult time making his case

University of Texas Southwestern Medical Center v. Nassar

- "Motivating factor" standard of proof
  - requires a plaintiff to show that the improper motive was a motivating factor among many factors
- "But-for" standard of proof
  - requires a plaintiff to show that the employer would not have taken an adverse employment action *but for* the improper motive
  - more difficult for a plaintiff to show
- Prior to this case, it was unclear which standard applied to retaliation cases

University of Texas Southwestern Medical Center v. Nassar

- Dr. Naiel Nassar, a medical doctor of Middle Eastern descent who was both a University faculty member and a Hospital staff physician, claimed that Dr. Levine, one of his supervisors at the University, was biased against him on account of his religion and ethnic heritage. He complained to Dr. Fitz, Levine's supervisor.
- But after he arranged to continue working at the Hospital without also being on the University's faculty, he resigned his teaching post and sent a letter to Fitz and others, stating that he was leaving because of Levine's harassment. Fitz, upset at Levine's public humiliation and wanting public exoneration for her, objected to the Hospital's job offer, which was then withdrawn.
- Nassar sued the University of Texas Southwestern Medical Center alleging that the University retaliated against him for complaining of the alleged harassment.

University of Texas Southwestern Medical Center v. Nassar

- District Court
  - At trial, the jury was instructed that retaliation claims, like discrimination claims, require only a showing that retaliation was a "motivating factor" among many factors for the adverse action, rather than the "but-for" cause. The jury found for Nassar.
- US Court of Appeals for the Fifth Circuit
  - Nassar appealed. The Fifth Circuit affirmed as to the retaliation finding.
- Supreme Court
  - Nassar appealed again and the Supreme Court agreed to hear the case. The Supreme Court reversed the Fifth Circuit.

University of Texas Southwestern Medical Center v. Nassar

- The Court held that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened motivating factor test.
- Plaintiff must show that the employer's desire to retaliate against the employee was the but-for cause of the challenged employment action
- Using the higher standard may stop the "ever-increasing frequency" of retaliation cases, particularly those "frivolous claims" which "siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment."

Working Time

- Fair Labor Standards Act (FLSA) federal statute regulates wage and hour law
- Guarantees compensation for all time worked
- Preliminary/postliminary activities
  - Time spent on activities "preliminary to or postliminary to" an employee's principal activities is not counted as hours worked
  - "Preliminary activity": activity which is engaged in by the employee before the commencement of principal activities
  - "Postliminary activity": activity engaged in after completion of the employee's principal activities

Working Time

- Time related to "principal activities" compensable
- Includes short breaks under 20 minutes
- *De minimus* doctrine
  - Employer not obligated to pay for work time that is *de minimus*

Donning and Doffing

- Practice of putting on (donning) and taking off (doffing) work clothes
- Protective gear, clothing and uniforms
- Compensable work time?
  - Part of an employee's principal activities?
  - Split decisions from courts and the Department of Labor

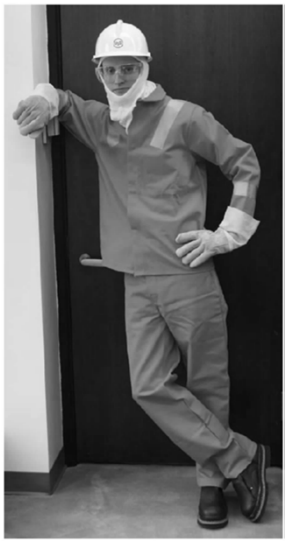
Donning and Doffing

- Section 3(o) of the Fair Labor Standards Act
- Excludes from hours worked time spent changing clothes or washing at the beginning or end of each workday if:
  - Express terms of CBA exclude
  - Excluded by custom or practice

Sandifer v. U.S. Steel

- What does it mean to "change clothes"?
- Facility in Gary, Indiana does not compensate employees for time spent putting on:
  - Flame-retardant pants
  - Jacket
  - Work gloves
  - Boots (steel toe)
  - Hard hat
  - Safety glasses
  - Ear plugs
  - A "snood" (hood that covers top of head, chin, and neck)

Sandifer v. U.S. Steel



Sandifer v. U.S. Steel

- Collective bargaining agreement does not require compensation for changing
- 800 factory workers file collective action for failure to pay wages
- Employees argue this is not "clothing" and instead is "personal protective equipment" (PPE)

Sandifer v. U.S. Steel

- Court of Appeals (7th Circuit) rules that the time changing is not compensable
- Glasses and ear plugs are *de minimus*
- Only substantial measure of time and effort is compensable
- The PPE is clothing
  - Protection against extremities is common function of work clothes

Sandifer v. U.S. Steel

- Conflicting decision from the 9th Circuit
- Conflicting opinions from the Department of Labor
- Petition for Review granted by Supreme Court
- Case will provide guidance and resolve dispute

FLSA Collective Actions

- FLSA allows employee to bring action on his behalf and other “similarly situated” employees
- Employees are "similarly situated" for purposes of FLSA collective wage suits if they are subject to a common policy, plan or design, that stretches across company departments or locations
- If there is no commonality, there is no collectiveness and the lawsuit will be dismissed

FLSA Collective Actions

- Other employees must opt in
- Affirmatively sign a document stating that they wish to be a part of the lawsuit

Genesis Healthcare Corp. v. Symczyk

- Employee was nurse working at Philadelphia hospital
- Employer, Genesis Healthcare, had a practice of automatically deducting 30 minutes for meals
- Symczyk claims she and others often worked through meal breaks

Genesis Healthcare Corp. v. Symczyk

- Symczyk files collective action on behalf of her and similarly situated employees
- Employer answers and the complaint and simultaneously serves a Rule 68 settlement offer of $7500
- Gave employee 10 days to respond, she did not respond

Genesis Healthcare Corp. v. Symczyk

- Employer files motion to dismiss claiming Symczyk's claim was now moot
- No personal stake in the litigation
- Rule 68 offer offered complete relief
- Unaccepted offer sufficient to moot the claim?
  - Split in the courts

Genesis Healthcare Corp. v. Symczyk

- District court rules in favor of employer
- No individuals joined in the action
- Individual and collective action moot

Genesis Healthcare Corp. v. Symczyk

- Court of Appeals reverses
- Agreed with lower court's findings
- Claim not moot for policy reasons
- Employer should not be able to "pick off" named plaintiff's before the class is created

Genesis Healthcare Corp. v. Symczyk

- Supreme Court addressed two questions:
  - (1) did her employer's settlement offer moot Ms. Symczyk's standing to sue; and
  - (2) if so, could she continue the lawsuit for the other employees?
- The Supreme Court answered yes to the first question, and no to the second, and dismissed the lawsuit

Genesis Healthcare Corp. v. Symczyk

- Court concludes no personal stake in the litigation
- When individual claim is moot, entire action moot if no others have opted in
- No other continuing interest
  - Distinguished from cases where attorney's fees and expenses available

Genesis Healthcare Corp. v. Symczyk

- Justice Kagan issues forceful dissent
- Joined by Justices Ginsburg, Breyer and Sotomayor
- Unaccepted settlement offer should not moot a claim
- Still has a stake in the litigation
- Never collected any money
- Collective action should go forward regardless

Defense of Marriage Act (DOMA)

- United States federal law that allows states to refuse to recognize same-sex marriages performed under the laws of other states
- Section 3 also effectively barred same-sex married couples from being recognized as "spouses" for purposes of federal laws, or receiving federal marriage benefits

Defense of Marriage Act (DOMA)

- In 1993, the Supreme Court of Hawaii ruled that the state must show a compelling interest in prohibiting same-sex marriage
- Raised concern among opponents of same-sex marriage that same-sex marriage might become legal in Hawaii and that other states would be compelled to recognize those marriages under the United States Constitution
- Introduced by Republicans in 1996
- DOMA passed both houses of Congress by large majorities and was signed into law by President Bill Clinton in September 1996

Defense of Marriage Act (DOMA)

- Defines "spouse" and its related terms to signify a heterosexual couple in a recognized marriage
- Same-sex marriages not recognized for all federal purposes, impacting
  - insurance benefits
  - tax consequences
  - social security benefits
  - retirement benefits
  - immigration
  - employment benefits
  - federal employment law:
    - FMLA
    - HIPPA
    - COBRA
    - ERISA

United States v. Windsor

- Supreme Court concluded Section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional
- Edith Windsor and Thea Spyer, a same-sex couple residing in New York, were lawfully married in Ontario, Canada in 2007
- Spyer died in 2009, leaving her entire estate to Windsor
- Because their marriage was valid under New York law, Windsor sought to claim the federal estate tax exemption for surviving spouses
- Internal Revenue Service found that the exemption did not apply to same-sex marriages
- Winsor compelled to pay $363,053 in estate taxes

United States v. Windsor

- Windsor files lawsuit in 2010 against the federal government in the United States District Court for the Southern District of New York
- In 2011, U.S. Attorney General Eric Holder issued a statement from the Obama administration that agreed with the plaintiff's position that DOMA violated the U.S. Constitution and said he would no longer defend the law in court
- District Court rules that Section 3 of DOMA was unconstitutional under the due process guarantees of the Fifth Amendment and ordered the federal government to issue the tax refund, including interest
- The U.S. Second Circuit Court of Appeals affirmed the decision on October 18, 2012

United States v. Windsor

- Supreme Court holds DOMA is unconstitutional
- Violates 5th Amendment to US Constitution
- DOMA creates a "stigma" on citizens
- Second tier marriage
- Same-sex couples are denied federal benefits

United States v. Windsor

- Strong dissent from Justice Scalia
- Constitution does not forbid the government to enforce traditional morals
- Should be decided by the state

United States v. Windsor

- Impact on employment law:
  - Taxes
  - Family Medical Leave
  - Affordable Care Act and COBRA
  - Employee benefits

Affordable Care Act

- Signed into law in March 2010 by President Obama
- Expands access to health care coverage
- Being phased in between 2010-2018

Affordable Care Act

- Includes individual mandate and penalties for employers that do not offer coverage
- Several challenges to constitutionality
- Congress did not have power to impose penalty on individuals
- Significant divide among federal courts

National Federation of Independent Business v. Sebelius

- Was the individual mandate a proper exercise of Congressional power under Commerce Clause?
- What about Congress's taxing power?
- Fragmented opinion

Affordable Care Act – Employer Obligations

- For Employers with less than 50 employees there is no penalty
- Could be eligible for a tax credit

Affordable Care Act – Employer Obligations

- More than 50 employees, must offer health insurance coverage to workers
- Penalty is $2,000 per employee (minus first 30)
- Must also offer affordable coverage and provide minimum value
  - Group plan with at least 60% coverage
  - Employee does not pay more than 9.5% of income
  - Penalty is $3,000 for each full-time employee who receives tax credit

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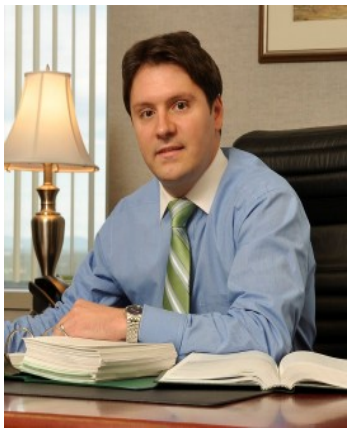

John Gannon

Attorney John S. Gannon is an associate in the Springfield, Massachusetts office of Skoler, Abbott & Presser, P.C. He defends employers against discrimination, retaliation, harassment, wrongful termination, and related claims. In addition, he conducts comprehensive workforce wage and hour audits and reviews workplace policies for compliance with state and federal employment laws. He is a regular contributor to business publications and the Massachusetts Employment Law Letter, and a frequent speaker on employment-related legal topics, such as wage and hour compliance, personnel policies and practices, and employment litigation.