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One Minute Memo®

The "Supreme" Summer Recess Begins Monday: A Recap of 2012-2013 and Preview of Next Monday's Rulings

The U.S. Supreme Court's 2012 October Term quickly is coming to a close. Already, the Court has ruled on a number of high-profile cases. Just in the past few weeks, in fact, the Court

- upheld a Maryland state law that authorizes the collection of DNA samples from individuals arrested for "serious crimes" (*Maryland v. King*);

- struck down an Arizona state law that required proof of citizenship for prospective voters on the basis that it is preempted by federal election law (*State of Arizona v. Inter Tribal Council of Arizona*); and

- affirmed an arbitrator's interpretation of an arbitration agreement as allowing class-wide arbitration, even though the agreement lacked any language authorizing class-wide arbitration (*Oxford Health Plans, LLC v. Sutter*).

And only yesterday, the Court handed down the long-awaited opinion in *American Express Co. v. Italian Colors Restaurant*, in which the Court repeated the message that is sent in *Sutter* that it would hew closely to the express terms of any arbitration agreement. Specifically, the Court held that an arbitration agreement that explicitly *precludes* arbitration initiated by a plaintiff class likewise is enforceable. Thus, even if the class could prove that it would be economically infeasible for individuals to pursue arbitration individually, arbitration would proceed only on an individual, bilateral basis, as specified in the arbitration agreement. Seyfarth Shaw's coverage of this important decision can be found *here*.

But as the Court enters into its final week of announcing opinions, many more high-profile decisions are on the horizon. One of the most anticipated decisions this Term is *Fisher v. University of Texas*. At issue in *Fisher* is whether the Supreme Court's past decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including the ten-year-old decision *Grutter v. Bollinger*, permit the University of Texas to use race when making decisions during the undergraduate admissions process. Equally anticipated are the Court's opinions in *United States v. Windsor* and *Hollingsworth v. Perry*. In *Windsor*, the Court has been asked to address whether the federal Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection as that guarantee applies to individuals of the same sex who are legally married under the laws of their states. Similarly, in *Hollingsworth*, at issue is whether the Fourteenth Amendment's Equal Protection Clause prohibits California from limiting marriage to the union between a man and a woman.

Among those opinions that have yet to be released are two cases that will have wide-ranging repercussions for employment harassment and discrimination law: *Vance v. Ball State University*, and *University of Texas Southwestern Medical Center v. Nassar*. *Vance* addresses the scope of the *Faragher/Ellerth* affirmative defense that employers can raise when faced with harassment or discrimination claims. Specifically, the central question in the case is whether the defense (i) applies to harassment by all of those whom the employer vests with authority to direct and to oversee the complaining party's daily work activities, or (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" the complaining party. The Court's opinion in *Nassar*, in turn, will answer whether the retaliation provision of Title VII of the

Civil Rights Act of 1964 requires a plaintiff to prove "but-for causation" — that is, for example, that an employer would not have taken an adverse employment action but for an improper motive — or instead requires only proof that the employer had a mixed motive — that is, for example, that an improper motive was one of any number of reasons for the employment action.

Seyfarth Shaw's previous coverage of *Vance* can be found *here*, *here*, and *here*; and the firm's previous coverage of *Nassar* can be found *here*. In the coming week, Seyfarth will continue to monitor both cases and provide up-to-the-minute coverage of the Supreme Court's decisions. And in early July, Seyfarth Shaw will host a webinar, during which the Firm's experts will discuss the Supreme Court's October 2012 Term generally and explain how *Vance*, *Nassar*, and other important commercial-litigation opinions will impact employment practices nationwide.

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