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ALERT

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CASE UPDATES

FEDERAL – U.S. Supreme Court

Justices Endorse Expansive View of "Ministerial Exception"

Hosanna Tabor Evangelical Church is affiliated with the Missouri Synod of the Lutheran Church. The employer operates a small school offering a Christ-centered education to students from kindergarten through eighth grade. Two types of teachers work at the school: "called" and "lay." A teacher qualifies as "called" by completing certain programs at a Lutheran college. Lay teachers are not required to be Lutheran. "Lay" and "called" teachers perform the same duties.

Cheryl Perich joined the school as a lay teacher in 1999. She later became a called teacher. In both capacities she taught mostly secular subject but taught religion classes four days a week and led the students in prayer a few minutes a day. She led chapel services twice a year.

In June 2004 she became ill with what eventually was diagnosed a narcolepsy. She sought to return to work in February 2005. The school told her that it had contracted with a lay teacher to fill her position and expressed doubt that she was physically able to return. The school offered to release her from employment. Perich refused.

Perich reported for work in February 2005 but the school would not let her return. She told the school that she had spoken with an attorney and would assert her legal rights. The school board then rescinded her "call" and terminated her employment because she had threatened to take legal action against the church.

Perich filed a charge with the EEOC, which found probable cause that the school had retaliated against her for asserting her ADA rights. The EEOC filed suit on her behalf in district court. The district court granted Hosanna-Tabor's motion for summary judgment based on the First Amendment ministerial exception to the anti-discrimination laws. The district court concluded that the School treated Perich like a minister and therefore the court could not adjudicate her retaliation claims.

The Sixth Circuit reversed. The court of appeals concluded that ministerial exception was inapplicable because Perich's duties were largely secular. The Supreme Court granted certiorari and reversed the Sixth Circuit in a unanimous opinion by Chief Justice Roberts. The Court's essential holding was that the Religion Clauses of the First Amendment bar the government from interfering with the decision of a religious group to fire one of its ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, infringes on the church's constitutional rights to shape its own faith and mission and runs afoul of the Establishment Clause.

The court distinguished this case from *Employment Div. Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes. The conduct at issue in *Smith* was the ingestion of peyote. The Court reasoned the *Smith* case involved government regulation of outward physical acts. By contrast, the *Hosanna-Tabor* case involved governmental interference with an internal church decision.

The Court held that whether the ministerial

exception applies in a particular case depends on all of the circumstances of employment. Here it applied because (1) Hosanna-Tabor held Perich out as minister; (2) Perich held herself out as a minister; and (3) Perich's job duties reflected a role in conveying the Church's message and carrying out its mission.

The Sixth Circuit had erred by not considering the fact that Perich was commissioned as a minister. While not dispositive, the factor was relevant. The Sixth Circuit had placed too much weight on the fact that lay and called teachers had the same duties. While that factor was also relevant, it too was not dispositive. The Sixth Circuit also made too much of the fact that Perich spent most of her time performing secular duties. That factor was also relevant but could not be considered in isolation.

The Court held that an order of either reinstatement or monetary damages would penalize the church in violation of the First Amendment. It did not matter whether Hosanna-Tabor's articulated reasons for dismissing Perich might have been pretextual and not based on religious doctrine. "The purpose of the ministerial exception is not to safeguard a church's decision to fire a minster only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."

The Court determined that the ministerial exception was an affirmative defense to an employment discrimination suit that had to be raised by the employer or else it was waived. The Court declined to consider whether the exception barred other types of suits, whether based on tort or contract law.

Justice Thomas filed a separate opinion asserting that courts were required to defer to a church's good faith understanding of who qualified as a minister. He feared that the Court's multi-factor test might disadvantage religious groups whose beliefs, practices and membership are outside of the mainstream.

Justices Alito joined by Justice Kagan noted that the term "minister" is essentially a Protestant term and is not used by Catholics, Jews, Muslims, Hindus or Buddhists. They suggested that ordination and title were beside the point. The key question was the function the employee performed for the religious organization. They believed the ministerial exception should apply to any "employee" who leads the religious organization, conducts worship services, important religious ceremonies or rituals, or serves as a messenger or teacher of faith.

Hosanna-Tabor Evangelical Church and School v. EEOC, 132 S. Ct. 694 (1/11/12)

Sovereign Immunity Bars Enforcement of FMLA Self-Care Provisions Against States By Monetary Damages

Petitioner Daniel Coleman was employed by the Court of Appeals of the State of Maryland. When Coleman requested sick leave, he was informed he would be terminated if he did not resign. Coleman then sued the state court in the United States District Court for the District of Maryland, alleging, *inter alia*, that his employer violated the FMLA by failing to provide him with self-care leave.

The District Court dismissed the suit on the basis that the Maryland Court of Appeals, as an entity of a sovereign State, was immune from the suit for damages. The District Court concluded the FMLA's self-care provision did not validly abrogate the State's immunity from suit. The Court of Appeals for the Fourth Circuit affirmed, reasoning that, unlike the family care provision, the self-care provision was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination on the part of States. The United States Supreme Court affirmed.

Writing for a plurality of four, Justice Kennedy reiterated the general rule that States, as sovereigns, are immune from suits for damages. Congress, however, may abrogate the States' immunity from suit pursuant to its powers under Section 5 of the Fourteenth Amendment. Section 5 grants Congress the power "to enforce" the substantive guarantees of §1 of the Amendment by "appropriate legislation." In order to lawfully exercise this function, Congress must tailor legislation enacted under Section 5 to remedy or prevent conduct which violate the substantive provision of Section 1 of the Fourteenth Amendment. In addition,"[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Previously, the Court upheld the abrogation of sovereign immunity contained in the FMLA on the basis that leave for the care of a spouse, child, or parent with a serious health condition. *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 727–728 (2003). That ruling was justified on the grounds that States had family-leave policies that differentiated on the basis of sex and that States administered neutral family-leave policies in ways that discriminated on the basis of sex. These practices reflected what Congress found to be a "pervasive sex-role stereotype that caring for family members is women's work." *Id*. at 731.

The Court distinguished leave for family and leave for self-care. While the former was based upon sex-role stereotypes, the latter is not. "What the family-care provisions have to support them, the self-care provision lacks, namely evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations."

The Court rejected the argument that the self-care provision is a valid abrogation of the States' immunity from suit because it was enacted without regard to distinctions on the basis of sex. The Court also rejected the argument that the self-care provision is a necessary adjunct to the family-care provisions: "Congress made no findings and did not cite specific or detailed evidence to show how the self-care provision is necessary to the family-care provisions or how it reduces an employer's incentives to discriminate against women." "Congress must rely on more than abstract generalities to subject the States to suits for damages."

The Court also rejected the argument that the self-care provision helps single parents retain their jobs when they become ill. According to the Court, even if true that concern does not address a constitutional violation within the meaning of the Fourteenth Amendment. The Court was unimpressed with the fact that most single parents are women: "'Although disparate impact may be relevant evidence of . . . discrimination . . . such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny."' The Court concluded:

> As a consequence of our constitutional design, money damages are the exception when sovereigns are defendants. Citations omitted. Subjecting States to suits for damages pursuant to §5 requires more than a theory for why abrogating the States' immunity aids in, or advances, a stated congressional purpose. To abrogate the States' immunity from suits for damages under §5, Congress must identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations. It failed to do so when it allowed employees to sue States for violations of the FMLA's self-care provision.

Justice Thomas joined the plurality and concurred in the result, but reiterated his view

that *Hibbs* was wrongly decided. According to Justice Thomas even the family-care provision of the FMLA is not sufficiently linked to a pattern of unconstitutional discrimination.

Justice Scalia did not join the plurality and concurred in judgment. But he would abrogate the "congruence and proportionality" test. According to Justice Scalia, Section 5 of the Fourteenth Amendment is limited to conduct that *itself* violates the Fourteenth Amendment.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan dissented. They rejected the premise of the Court's state sovereign immunity jurisprudence. Even assuming the premise, the dissent would have held that Congress validly abrogated sovereign immunity through the self-care provisions of the FMLA because they also redress gender discrimination.

The dissent concluded that the purpose of the FMLA as a whole was to redress gender discrimination. One of the primary reasons for the self-care leave provisions of the FMLA was to allow pregnancy leave. The dissent would have overruled prior Court precedent to hold that pregnancy discrimination is per se sex discrimination.

The dissent noted that the plurality's holding does not authorize States to violate the FMLA. It just denies monetary relief. Plaintiffs can seek injunctive relief for such violations.

Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (3/20/12)

Court to Decide Proper Appellate Jurisdiction for "Mixed Cases" Where the MSPB Fails to Reach Merits of Discrimination Claims

A "mixed case" is one where a federal employee brings allegations of unlawful discrimination along with disputing his/her termination. In this case the Merit Systems Protection Board ("MSPB") dismissed the employee's claims as untimely without reaching the merits of the discrimination claim. The employee appealed to the district court, which held that the Federal Circuit had exclusive jurisdiction because the MSPB never reached the merits of the discrimination claims. The Eighth Circuit affirmed.

Kloeckner v. Solis, 132 S. Ct. 1088 (cert. granted 1/13/12)

FEDERAL - Ninth Circuit

McDonnell Douglas –Burdine Applies to Age Discrimination Cases Even After Gross v. FBL; Summary Judgment Reversed Based on Plaintiff's Superior Qualifications

The Plaintiff applied for a 120 day temporary position with the United States Army Corps of Engineers as a Chief of Contracting. He was 54 years old at the time of the application. His application was rejected in favor of a 42 year old candidate. The explanation given for the selection was that the Plaintiff, Shelley, received a bad reference from a former supervisor. But that supervisor denied giving a bad reference. One of the decision-makers knew that Shelley was in his 50s. That same decision maker stated that he had previously worked with the 42 year old candidate that was given the position, and that turned out to be false.

Shortly before it was announced that the younger candidate got the temporary position, a permanent job for the same position was posted. Shelley applied for that position as well. Prior to the decision for the permanent position, two decision makers inquired about the projected dates of retirement for all employees in their district and regions. Although some of that data did not include names of employees, it did include sufficient information from which their names and positions were readily discernible. After all the applicants for the permanent position were evaluated, Shelly was not given an

interview. The position was given to the same 42 year old employee who had been given the temporary position.

After exhausting internal EEO administrative remedies, Shelley filed suit alleging a violation of the Age Discrimination Employment Act, 29 U.S.C. Section 623(a)(1). The District Court granted summary judgment and the Plaintiff appealed. The Ninth Circuit *reversed.*

In *Gross v. FBL Financial Services*, the Court decided that the "mixed motive" analysis did not apply to the ADEA within the context of a proposed jury instruction. A Plaintiff is required to show that "but for" age the adverse action would not have happened. 129 S.Ct. at 2349. The Court specifically declined to decide whether the *McDonnell Douglas* framework applied. *Id*. The Ninth Circuit now has ruled that it does apply.

The Court found that the plaintiff had established pretext based upon the evidence that a decision maker inquired about projected dates of retirement, and that person could have influenced other decision makers on the hiring panel. The Court also ruled that a fact finder could have concluded that the Plaintiff had superior qualifications than the selected younger candidate and "[e]vidence of a plaintiff's superior qualifications, standing alone, may be sufficient to prove pretext." The Court concluded that the failure to hire Plaintiff for the temporary 120 day position was clearly a causative factor in the denial of the permanent position.

Judge Bybee dissented.

Shelley v. Geren, 666 F.3d 599 (1/12/12) (Wilken (N.D. Cal), B. Fletcher, Bybee)

Plaintiff was Not a "Policymaker" and Could Bring a Claim for First Amendment Retaliation but Individual Defendants Entitled to Qualified Immunity

The Plaintiff, William Hunt, was a lieutenant officer with the Orange County Sheriff's Department. He ran for office against the Orange County Sheriff alleging a culture of corruption. After the incumbent Sheriff was re-elected, the Plaintiff was placed on administrative leave and then demoted. The Plaintiff filed suit alleging a violation of his First Amendment rights under 42 U.S.C. Section 1983. The Plaintiff inadvertently waived his claim against the County.

At trial, it was undisputed that the Plaintiff was demoted because of his campaign against the incumbent. The District Court submitted 37 special interrogatories to a jury on the question of whether the Plaintiff was a "policymaker" and therefore not protected by the First Amendment. The jury found that he was not a policymaker, although that he did influence department policy affecting San Clemente, where he had formerly been Chief of Police. Nevertheless, the judge granted judgment as a matter of law, after concluding that the Plaintiff was a "policymaker." In the alternative, the District Court ruled that the incumbent Sheriff had qualified immunity. Plaintiff appealed.

The Ninth Circuit determined that the District Court erred in its conclusion that the Plaintiff was a policymaker, but affirmed on the grounds of qualified immunity. The Ninth Circuit recognized that employees generally have a First Amendment right to be free from retaliation based on political opinions, memberships, or activities. An exception has been created, however, where the employee occupies a "policymaking position" so that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Citing Elrod v. Burns*, 427 U.S. 347, 357 (1976). "[T]he burden of establishing this [policymaker] justification as to any particular respondent will rest on the government." *Id*. at 368. The inquiry is "highly fact specific."

Whether an employee is a "policymaker" is

generally determined by a consideration of nine factors articulated in *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997). But the *Fazio* factors must not be considered mechanically as did the District Court. Rather, the question is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Because the jury's findings concluded that Plaintiff's position did not require party affiliation, and that political considerations were not requirements for the effective performance of the public office at issue, the *Fazio* factors should not have been considered. The jury's answers to special interrogatories established that the Plaintiff was not a policymaker within the meaning of the First Amendment exception.

Nevertheless, the Ninth Circuit ruled that the incumbent Sheriff had qualified immunity from damages. The Court concluded that because the Plaintiff was the former Chief of Police of San Clemente, and significantly influenced policy as to that particular jurisdiction, the incumbent Sheriff could have reasonably but mistakenly believed that his conduct did not violate a clearly established constitutional right.

Judge Leavy would have held the plaintiff was a policymaker.

Hunt v. County of Orange, 672 F.3d 606 (2/13/12). (Wardlaw, Leavy, Mahan)

WASHINGTON – Court of Appeals

Court Fails to Answer Clearly Whether Graduate Student Working as Teaching Assistant Covered by WLAD Discrimination and Retaliation Protections.

The plaintiff was a student at WSU's experimental psychology program. She received financial assistance by working as a Teaching Assistant. She received several negative evaluations of her performance as a graduate student. She filed an internal charge of age discrimination. The faculty eventually dismissed her from the program for academic reasons.

She filed numerous claims in court including employment related claims under the WLAD for retaliation and age discrimination. The Superior Court granted summary judgment to the employer. Division III assumed without deciding that she was covered by the retaliation provisions, which protect "any person" from retaliation. The court found no evidence of causation between her protected activity and dismissal from the program.

The age discrimination provisions of the WLAD protect only employees. The plaintiff argued that she had an employment relationship with WSU because she had a part-time employment position with WSU. The court responded to that argument by pointing out that her employment was contingent upon her full-time enrollment as a student. She was not performing satisfactorily as a student. The court then said the plaintiff "cannot bring an age discrimination claim in this setting; moreover, she cannot move forward with her claim because her dismissal was the result of a legitimate non-discriminatory academic decision."

The court's decision could be read either as an acknowledgement or a disavowal of WLAD age discrimination coverage for graduate student teaching assistants. It isn't clear whether "this setting" was a reference to her status as a graduate student or her poor performance as a graduate student. The opinion's ambiguity may be due to the fact it was originally not intended for publication but publication was granted at the employer's request.

Becker v. WSU, 165 Wn. App. App. 235, 266 P.3d 893 (Div. 3 10/13/11; pub. 12/20/11) (Brown, Kormso, Sweeney).

Ambiguous Arbitration Award to Employee Must be Remanded to Arbitrator for Clarification

The employee in this case was a Snoqualmie Police Department sergeant. He was discharged for misconduct. His union filed a grievance. The arbitrator held the City lacked just cause for termination. He concluded the appropriate punishment was a 60-day unpaid suspension with a "return to duty" as a lower paid police officer rather than as a sergeant. He also ordered the City to make the employee whole except for the wages and benefits due to the 60-day suspension.

The City argued that backpay should be at the lower pay for a police officer. The Union argued that the sergeant rate should apply because the employee was terminated as a sergeant and the reduction in grade shouldn't take effect until he returned to duty. Both sides moved for summary judgment. The Superior Court granted the City's motion.

Division One held that arbitration award was ambiguous on its face and remanded it to arbitrator for clarification. The court rejected the City's argument that the Union had waived this remedy by not requesting it until its motion for reconsideration in the Superior Court. The panel held that because remand was merely an alternative remedy rather than a new legal theory the Union did not waive it.

Because the arbitrator's award was ambiguous, the court held there was no possibility for the Union to collect double damages from the City's failure to make the disputed payments.

Snoqualmie Police Association v. City of Snoqualmie, 165 Wn. App. 895, -- P.3d-- (Div. 1 1/17/12) (Cox, Ellington, Grosse)

Summary Judgment for Employer in Age Discrimination Case Reversed Where Evidence Allows Competing Inferences of Discrimination and Nondiscrimination.

Plaintiff had joined employer in 1991 at age 43 as a stevedore. He eventually rose to a management position.

In 2000 the Company hired a 25-year old as its operations manager. In 2005, the operations manager began referring to the plaintiff as "an old goat" and claiming he was "too old to stay on the job." The operations manager repeatedly tried to shift plaintiff's physically demanding job duties to a younger employee. The comments continued into 2007.

In December 2007 a vessel owned by one of the employer's customers caught fire. The plaintiff was off-duty at the time. Another employee went to the plaintiff's house to tell him about the fire. Plaintiff appeared intoxicated to the employee. The plaintiff was the only manager on-site and took charge of the accident scene.

At the fire scene, the plaintiff got into a dispute with police and fire officials over their handling of the situation. He apparently spit at a co-worker who tried to restrain him from getting into an altercation with firefighters and called her a "bitch" and a "dyke." The plaintiff then left the scene.

The operations manager fired plaintiff three weeks later without even interviewing him. The operations manager originally said the reason for his termination was that the plaintiff had tried to cut the lines of the burning vessel. Two weeks later he received a letter giving as the reasons for his termination his disruptive behavior the night of the fire, being intoxicated, and long-time poor treatment of employees.

The plaintiff filed a claim for age discrimination under the WLAD. The Superior Court granted summary judgment to the employer but Division I reversed. Judge Law held that a reasonable jury could find that the employer's explanation was a pretext for discrimination.

Firstly, the employer had given inconsistent reasons for the termination. The appellate court also relied on the operations manager's history of ageist comments. The court also said a jury could find that the plaintiff acted reasonably in dealing with the fire given the company's failure to have other senior managers on site in violation of its own policies. There was also no evidence to support the employer's claim that the plaintiff had a history of mistreating other employees. His personnel file contained only one written reprimand.

Rice v. Offshore Systems, Inc., --- Wn. App. ---, 272 P.3d 865 (Div. 1 1/17/12; pub. 3/19/12)

Victories & Defeats

Patty Rose represented the student/employee in *Becker*.

Reba Weiss represented the Union in *Snoqualmie Police Association.*

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