Employment Law Update: A Year of Supreme Cases

Last year's Supreme Court decisions will have a dramatic impact on nonprofit employers. Here's a summary of the rulings and changes you may need to make in your personnel manual.

BY PETER R. BULMER

Last year was a time of major changes in employment law. It will be remembered as the year the U.S. Supreme Court set its sights on employment law. The Court's decisions reshaped employment law in a dramatic manner. Employers will feel the impact immediately and for years to come. Here's a summary of the rulings most likely to affect you:

Supreme Court Rules on COBRA Eligibility

The Supreme Court recently ruled that qualified beneficiaries who have *other* health coverage in effect prior to the date they make a COBRA election must be allowed to continue their employer-provided group health coverage under COBRA (*Geissal v. Moore*, No. 97-689, Sup. Ct., June 8, 1998).

In the past, relying on the Internal Revenue Service's Proposed Regulations, a number of courts ruled that individuals who had other coverage in force at the time of their COBRA election were not eligible to continue coverage under COBRA. However, the U.S. Supreme Court determined that the language in the statute only permits COBRA coverage to be limited when a COBRA beneficiary obtains other coverage *after* COBRA coverage has been elected.

Employers that are subject to COBRA must provide continuation coverage to qualified beneficiaries who, at the time of their COBRA election, have coverage under another group health plan, as well as to those who have coverage through Medicare. A COBRA continuation coverage period can be cut short only if the new health plan doesn't exclude any pre-existing condition the qualified beneficiary may have.

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To insure compliance with the Supreme Court's decision, employers are encouraged to review their COBRA procedures, notices, and election forms, and revise them as necessary.

Asymptomatic HIV Is a Protected Disability under the ADA

The U. S. Supreme Court has extended the protection of the Americans with Disabilities Act (ADA) to individuals who are infected with HIV even if they do *not* have any symptoms of Acquired Immune Deficiency Syndrome (AIDS) (*Bragdon v. Abbott*, 118 Sup. Ct. 1206, March 9, 1998). The Court ruled that a dental patient who was HIV-positive could sue her dentist under the ADA since he refused to repair her cavity in his office.

The dentist maintained that he couldn't perform the necessary procedure safely enough unless he were able to use hospital facilities, for which the patient would have financial responsibility. According to the Court, the patient could bring an ADA claim even though her HIV was "asymptomatic," since her condition met the ADA's definition of disability. In particular, the patient's condition

satisfied the first prong of the definition—"a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

While this case didn't involve the employment relationship, the Court's decision provides insight into how it will address similar issues involving workplace disability claims. Significantly, the Court held a *physical impairment* exists in the case of HIV infection "during every stage of the disease." Reviewing the medical evidence, the Court noted the disease follows "a predictable and, as of today, an unalterable course," relating to the virus's invasion of different cells in the blood and body tissues of the victim.

An acute or primary HIV infection typically lasts about three months. During this phase, the virus concentrates in the blood and immediately assaults the immune system. Then the disease enters its asymptomatic phase—the phase involved in this case. According to the Court, however, the term "asymptomatic" is misleading. Clinical features persist throughout the asymptomatic stage, which generally lasts from seven to 11 years, the Court noted. "In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease," the Court concluded, "we hold it is an impairment from the moment of infection."

The Court also found that asymptomatic HIV affects reproduction, a major life activity. Focusing on the adjective, "major," the Court reasoned that reproduction satisfies that qualification, since it is of comparative importance. In so holding, the majority of the justices specifically rejected an argument that the ADA was intended to cover only those aspects of a person's life which had a public, economic, or daily character. According to the Court, the ADA's explicit terms do not lend themselves to such a limitation. Supporting this finding is the "representative" list provided in the Rehabilitation Act's regulations ("function such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

The case has been sent back to the trial court to reevaluate the dentist's claim that the patient's condition posed a significant risk of communicating an infectious disease to others. While considering this defense, the Court pointed out there were reasons to doubt whether the dentist could produce sufficient evidence to support it.

This decision is likely to have wide-ranging consequences. It may make it more difficult for employers to restrict a worker's request for accommodation for treatment for infertility, impotence, or other reproductive disorder. More broadly, it will lend support to claims of discrimination by individuals who have other *asymptomatic or chronic conditions*, which are likely to remain asymptomatic with proper medication, such as diabetes or asthma.

Enforceability of Age Discrimination Releases

Employers seeking protection from liability under the Age Discrimination in Employment Act (ADEA) should be aware of several recent developments concerning the enforceability of waivers and releases. In January, the U. S. Supreme Court held that an older employee did not waive her ADEA claims when she executed a release of claims that didn't comply with the Older Workers Benefit Protection Act (OWBPA). (The OWBPA is the federal law governing requirements for waivers and releases of age discrimination claims.)

According to the Court, the release was defective in several ways (*Oubre v. Entergy Operations Inc.*, No. 96-1291, Sup. Ct., Jan. 26, 1998). First, it failed to provide at least 45 days for consideration of the severance agreement. Second, the agreement failed to advise the discharged worker that she had seven days within which to rescind her execution of the agreement. Third, the waiver itself didn't make specific reference to the ADEA. Finally, it lacked the required comparative data with other employees affected by the same employment action.

Rejecting the company's argument that the employee had ratified the release by retaining the severance benefit given to her, the Court said, "Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee 'may not waive' an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids." Despite the invalidity of the release as to the ADEA claim, the Court noted that a release that is unenforceable under the OWBPA still may be valid against claims other than age discrimination.

The Equal Employment Opportunity Commission (EEOC) has also published regulations governing the use of waivers and releases under the OWBPA. The regulations went into effect on July 6, 1998. Among other things, these regulations indicate that it may not be enough to comply with minimum requirements as to when a waiver is knowingly and voluntarily made. Other circumstances, such as mistakes, omissions, or misstatements supplied by the employer, may invalidate the release.

What Is a Hostile Environment?

In the first of three key decisions dealing with sexual harassment, the Supreme Court ruled unanimously that a man can sue his employer under Title VII of the Civil Rights Act of 1964 for sexual harassment inflicted by male supervisors and co-workers (*Oncale v. Sundowner Offshore Services*, *Inc.*, No. 96-568, Sup. Ct., March 4, 1998). That decision overturned the federal appeals court, which had dismissed the lawsuit—despite the man's numerous and graphic assertions of harassment—because it found that Title VII prohibited only "opposite sex" harassment. The Supreme Court stated that since it is possible for members of the same racial group to discriminate against one another, there was no justification in the language of Title VII or in the Court's precedents for a categorical rule that harassment among members of the same sex should be excluded from coverage.

In the *Oncale* decision, the Court clarified the standards for determining when workplace conduct constitutes hostile environment sexual harassment. Citing its one prior decision on the issue, the Court emphasized that the severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances, including the social context in which the behavior occurred.

The Court cautioned that Title VII's prohibition of harassment on the basis of sex only forbids behavior that is so objectively offensive that it alters the conditions of the victim's employment. According to the Court, that standard should "ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment'."

When Can an Employer Be Held Liable?

On June 26, 1998, the Supreme Court issued two decisions which *define for the first time an employer's liability* for sexual harassment. The first of these landmark cases, *Faragher v. City of Boca Raton*, involved a claim by a female lifeguard against the City of Boca Raton, Florida. The lifeguard alleged her supervisors had created a sexually hostile work environment by subjecting her (and other female lifeguards) to uninvited touching and lewd remarks. Although she told another supervisor about the offensive behavior, the supervisor didn't tell his superiors.

Shortly before the plaintiff resigned, another female lifeguard wrote to the City's personnel director and complained about harassing conduct by the same supervisors. The City investigated the report and reprimanded the supervisors. Subsequently, even though the plaintiff had not complained to City officials, she filed suit, claiming the City was liable for the harassment she allegedly had suffered.

The Supreme Court was called upon to define whether under those circumstances the City could be held liable for a first-line supervisor's sexually harassing behavior. To answer that question, the Court first invoked its landmark decision in *Meritor Savings Bank*, *FSB v. Vinson* (1986), in which it had applied traditional principles to find an employer could be liable for the supervisor's misconduct. However, the Court in *Meritor* had not defined precisely when an employer should be held liable.

Seeking to resolve the conflict between an employee's right to be free of harassment and the limits on employer liability for an "agent's" misconduct, the Court reasoned an employer should be responsible for its supervisors' misconduct because the employer has a significant opportunity to screen, train, and monitor its supervisors. However, even though it imposed a duty on employers to prevent harassment by supervisors, the Court refused to make employers automatically liable for supervisors' misconduct in the absence of any tangible harm to the employee. Rather, the Court placed the burden on the employer to show that it exercised reasonable care to prevent and correct harassment and that the complaining employee unreasonably failed to use the existing complaint procedures.

In its ruling, the Court defined the employer's risk of liability and provided guidance for avoiding that risk:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The Court found that the City's sexual harassment policy had never been effectively disseminated among the beach employees. Also, the internal complaint procedure did not provide a mechanism for bypassing the offending supervisors. Thus, the Court upheld the verdict in favor of the plaintiff.

The second key case is *Burlington Industries Inc. v. Ellerth.* In this case, a sales representative resigned after allegedly being subjected to repeated sexual advances by a mid-level manager. Despite rebuffing his advances, she suffered no retaliation or adverse employment action. To the contrary, she was promoted. Although she was familiar with the company's sexual harassment policy, she never informed management about her supervisor's conduct. Instead, she filed a sexual harassment lawsuit.

The Supreme Court accepted the case to decide the question of whether the employer could be held liable for its supervisor's conduct even in the absence of any effects on the plaintiff's employment status. The Court ruled that the plaintiff could bring suit despite the lack of tangible employment harm. However, it reiterated the availability of the same "affirmative defense" discussed in *Faragher*. To prove this defense, the employer must show the following:

- The employee suffered no tangible employment damage.
- The employer took reasonable care to prohibit and remedy sexual harassment.
- The employer created and disseminated a clear anti-harassment policy, with an effective complaint procedure and appropriate enforcement.
- The employee unreasonably failed to take advantage of the corrective opportunities offered by the employer.

The Lesson for Management

The *Faragher* and *Burlington* rulings make it clear that employers are liable when supervisors engage in sexual misconduct and misuse their authority. If a supervisor's harassment doesn't cause tangible job-related harm to the employee, the nonprofit can avoid liability *if* it proves that it had a program to prevent sexual harassment, including an effective complaint procedure, and the employee unreasonably failed to use it.

Absence of a preventive program guarantees exposure to liability.

Based upon these important pronouncements, employers should take the following steps:

1. Implement a *written policy* prohibiting all forms of sexual harassment.
2. Establish a *complaint resolution procedure*, including a well-defined prohibition against retaliation.
3. Conduct comprehensive *training* for supervisors and employees on the contents of the policy and use of the complaint procedure.
4. Document the training and make sure all personnel attend.

The Equal Employment Opportunity Commission, as well as the courts, have counseled employers to promote policies forbidding sexual harassment and to provide complaint investigation procedures. The Supreme Court's recent decisions elevate these precautions to a mandate.

How the trial courts will interpret these rulings is uncertain. The Supreme Court offered only limited guidance on what sort of "tangible" action caused by the supervisor deprives an employer of the affirmative defense and imposes strict liability. What is certain, however, is that the absence of a preventive program will guarantee exposure to liability.

New Legal Landscape for Employers

These Supreme Court rulings vividly demonstrate the judicial reach of the nation's highest court in reshaping the landscape of employment law. Employers will be well-served in heeding the dictates of the Supreme Court in reviewing and revising their employment practices.

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Nonprofit Organizations' Business Forms, Disk Edition.

These publications are available through the Society for Nonprofit Organizations' *Resource Center Catalog*, included in this issue, or contact the Society at 6314 Odana Road, Suite 1, Madison, Wisconsin 53719 (800-424-7367).

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