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Workplace Law Cases in the Tenth Term Of The Roberts Court: Between the Usual Ideological Lines

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WORKPLACE LAW CASES IN THE TENTH TERM OF THE
ROBERTS COURT: BETWEEN THE USUAL IDEOLOGICAL
LINES

BY
RUBEN J. GARCIA*

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I. INTRODUCTION

In his tenth Term as Chief Justice, John G. Roberts Jr. presided over what one noted constitutional scholar is calling “the most progressive Term” in the last forty years.¹ The political scientists will dissect the decisions and the alignments of the various justices for years to come. Regardless of the accuracy of the “most progressive” claim, some of the most noteworthy cases of the Term dealt with hot button

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1. Erwin Chemerinsky, *The Return of the Jedi: The Progressive October 2014 Term*, 18 GREEN BAG 2D 363 (2015); see also Jonathan Ross Harkavy, 2015 Supreme Court Employment Law Commentary (Aug. 25, 2015), available at <<http://ssrn.com/abstract=2655765>> (for a view focusing just on workplace law cases).

social issues such as same sex marriage, the First Amendment, and civil rights.² Even these cases, as I will discuss below, have ramifications in the labor and employment law world.

When looking at the labor and employment cases, however, the usual ideological alignments do not always apply. Workplace law cases generally make up a small percentage of the Court's docket (this Term, about 11 percent of the seventy-five merits cases).³ Because workplace law cases usually involve issues of statutory construction rather than constitutional interpretation, it is hard to characterize the Term as "liberal" or "conservative" for workplace law. Although, the traditional ideological lines can often predict whether a decision will be pro-employer or pro-worker, the cases this Term did not always lend themselves to those ideological labels. But this apparent consensus on the Court might be misleading. Labor law – the highly polarized field of union-management collective bargaining in the private and public sectors – has declined as a portion of the Court's docket for many years. This year, there was only one decision involving collective bargaining, and it was more technical than the divided decisions involving public employees of the last few years.⁴ In other words, the trend of decreasing labor cases has continued.⁵ Without a blockbuster public-sector labor case in the October 2014 Term, most of the action was in employment discrimination, wage and hour law, and benefits. Nevertheless, there were several labor and employment decisions in areas where there has been a significant amount of litigation in recent years.⁶ My review of the Supreme Court's October 2014 Term will focus on cases involving workplace law statutes such as the Fair Labor Standards Act of 1938 (FLSA), Title VII of the Civil Rights Act of 1964 (Title VII), the Labor Management Relations Act of 1947 (LMRA) and the Whistleblower Protection Act of 1989 (WPA).⁷ These cases can be viewed through the lens of the following

2. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

3. See SUPREME COURT OF THE UNITED STATES BLOG (last viewed Dec. 1, 2015), <<http://www.scotusblog.com/case-files/terms/ot2014/>> (comprehensive data and analysis on the October 2014 term).

4. See *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015).

5. The most recent labor case was from the October 2012 Term. See *UNITE HERE Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (pledge of employer neutrality is not necessarily an illegal gift to an employer violating section 302; petition dismissed as improvidently granted).

6. There were a number of cases that could have labor and employment implications in the October 2014 term that will not be discussed in this review.

7. This Review will not address the case brought under the Employee Retirement and Income Security Act of 1974 (ERISA), *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015), because

trends: 1) the Court continues its judicial narrowing of the Fair Labor Standards Act and federal labor law; 2) plaintiffs who have the backing of the administrative agencies are more likely to be successful; and 3) some justices are concerned that the Court will not adequately check the power of these in the future. These trends can be seen in the following cases.

II. WORKPLACE LAW CASES IN THE 2014 TERM

A. Integrity Staffing Solutions: *Minutes Spent for the Benefit of the Employer?*

With the volume of litigation under the FLSA increasing each year, it is not a surprise that the number of FLSA cases in the Supreme Court has also been steady each year. Last year, the Court decided *Sandifer v. U.S. Steel Corp.*⁸ and two years before, *Christopher v. SmithKline Beecham Corp.*⁹ In both of those cases, the Court ruled against the employees.¹⁰ That trend continued in this Term. The Court decided *Integrity Staffing Solutions, Inc. v. Busk* relatively early in the Term, in part because it was the first labor case argued in the Term and in part because the result was unanimous.¹¹ In this case, warehouse employees sued for compensation for the time they spent going through security checks at a Reno, Nevada area warehouse that contracted with Amazon.com and other retailers.¹² Plaintiffs in this case worked in a warehouse in Nevada filling orders for Amazon.com among other clients.¹³ The whole process of waiting to pass through the security checkpoint could take up to twenty-five minutes because the workers had to remove their keys, wallet and belts and pass through a metal detector and also possibly be searched.¹⁴ Up to ten minutes of their lunchtime were also used for this process.¹⁵ Plaintiffs alleged that the practices were violations of the FLSA and Nevada wage law.¹⁶

that case is less about workplace law than the investment practices of ERISA plans.

8. 134 S. Ct. 870 (2014).

9. 132 S. Ct. 2156 (2012).

10. *Id.*

11. *See* 135 S. Ct. 513 (2014).

12. *Id.* at 515.

13. *Id.*

14. *Id.*

15. *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 527 (9th Cir. 2013), *rev'd*, 135 S. Ct. 513 (2014).

16. *Integrity Staffing Solutions*, 135 S. Ct. at 515.

The employees wanted to receive compensation for waiting in line for the security checks, which the employer required to prevent the theft of merchandise.¹⁷ The Portal-to-Portal Act of 1947, which prevents the employee from receiving the compensation for time spent “preliminary” and “postliminary”¹⁸ to the worker’s principal activities, did not answer the question of whether standing in line at a security check should be considered compensable “hours worked.”¹⁹

Justice Thomas wrote the opinion for the Court, holding that the time spent by warehouse workers undergoing security screen means is not compensable under the FLSA.²⁰ Justice Thomas wrote that the screenings were not a principal activity nor integral to the employees’ principal duties therefore they were not compensable.²¹ Justice Sotomayor, joined by Justice Kagan, concurred in the judgment because the employer could have dispensed with the security screens without impairing job safety or effectiveness.²² In contrast to the Court’s 2005 decision in *IBP, Inc. v. Alvarez*,²³ which held that this donning and doffing of safety gear for meatpackers was integral and indispensable as a safety matter, the Court here held that there was no safety reason.²⁴ The case also might have reminded some of last Term’s FLSA case *Sandifer v U.S. Steel Corp.*, where the Court ruled against the plaintiffs on the meaning of “clothes” in another section of the FLSA.²⁵ With a case interpreting the FLSA each Term, wage and hour law is a regular part of Court’s workplace law docket, and wage and hour law occupies a large share of employment litigation in the federal courts.

B. *Perez v. Mortgage Bankers Association: Feigned Unanimity?*

The employees in *Perez v. Mortgage Bankers Association* fared better in this FLSA case with the support of an administrative agency – but there was still skepticism of the agency’s authority.²⁶ *Perez* turned on the authority of the Secretary of Labor, Tom Perez, to in-

17. *Id.* at 515-16.

18. 29 U.S.C. § 254 (2012).

19. *See Integrity Staffing*, 135 S. Ct. at 515.

20. *Id.*

21. *Id.* at 518.

22. *Id.*

23. 546 U.S. 21 (2005).

24. *Integrity Staffing*, 135 S. Ct. at 520.

25. 134 S. Ct. 870 (2014).

26. *See* 135 S. Ct. 1199 (2015).

interpret the FLSA.²⁷ The DOL's original case involved the exemptions to overtime for those employed in a bona fide executive administrator or professional capacity, but the case reached the Supreme Court on the question of administrative law.²⁸ In 2006, the Department of Labor issued an opinion letter that stated that mortgage loan officers were within the administrative exemption and thus not eligible for overtime pay.²⁹ With the new administration and a new Secretary of Labor taking over in 2009, the Deputy Administrator of the DOL declared in 2010 that the mortgage loan officers did not qualify for the administrative exemption.³⁰ The Mortgage Bankers Association sued the DOL, arguing that the DOL's interpretation was invalid because the agency did not go through the notice and comment period required by the Administrative Procedure Act (APA).³¹ The issue was whether notice and comment was required for a new interpretation of an agency rule.³² All the members of the court answered "no" in an opinion authored by Justice Sotomayor,³³ but three justices (Scalia, Thomas and Alito) expressed concerns of the potential ramifications of the decision.³⁴ While previous precedents required agencies to use notice and comment procedures when making significant changes to previous interpretations, the Court found those precedents to be inconsistent with the plain language of the APA³⁵ providing for notice and comment only when legislative rules have the "force and effect of law."³⁶ The Court was not concerned by the Mortgage Brokers' argument that agencies will try to change substantive rules under the guise of interpretations.³⁷

Three justices wrote separately but concurred in the judgment.³⁸ Justice Scalia voiced his concern that administrative agencies would take advantage to interpret their own rules, as The Mortgage Bankers

27. *Id.* at 1204.

28. *Id.* at 1203.

29. *Id.* at 1205.

30. *Id.*

31. *Id.* at 1206; *see also* 5 U.S.C. §§ 551-59 (2012).

32. *Perez*, 135 S. Ct. at 1205.

33. *Id.* at 1203.

34. *Id.* at 1210-25.

35. *Id.* at 1205-06 (citing *Alaska Prof'l Hunters Assn., Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)).

36. *Id.* at 1203-04, 1208-09.

37. *Id.* at 1207-08.

38. *Id.* at 1210 (Alito, J., concurring); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring).

had suggested.³⁹ Scalia was concerned about the growing power of agencies to interpret their own rules without notice and comment oversight.⁴⁰ Justice Thomas agreed with Justice Scalia's opinion, and expanded on the separation of powers concerns posed by deference to administrative agency interpretations.⁴¹ In a separate opinion, Justice Alito agreed that the prior precedent was incompatible with the APA but that there was concern that interpretive rules would have substantive impact.⁴² The ping pong match between administrative agencies such as the NLRB, the DOL, the EEOC, and the courts has produced one or two decisions in each Term in the Supreme Court that have changed the balance between these agencies and the courts.⁴³

C. DHS v MacLean: *What is Law?*

One of the common patterns in labor and employment law is the Court's mistrust of administrative agencies, which often leads to decisions that disadvantage workers. *Department of Homeland Security v. MacLean* was also in the "mistrust of administrative agencies" theme this Term, but in this case, the mistrust of agencies helped the worker in this post-9/11 case.⁴⁴ Upon receiving a tip about a possible plot to hijack U.S. planes in July 2003, the Transportation Security Administration (TSA) notified federal marshals that all missions on flights from Las Vegas would be canceled until the next month.⁴⁵ Air Marshal Robert MacLean was concerned enough about the threat of danger to the public that he contacted a reporter at MSNBC and attempted to create a news story.⁴⁶ MSNBC ran the story, and several members of Congress criticized TSA's decision to cancel marshals on flights from Las Vegas.⁴⁷ Soon after, TSA reversed its decision but then investigated MacLean and his role in the story.⁴⁸ MacLean's contact with MSNBC was deemed an unauthorized disclosure of sensitive security information, and he was removed from his position as an air

39. *Id.* at 1211-12 (Scalia, J., concurring).

40. *Id.*

41. *Id.* at 1213-25 (Thomas, J., concurring).

42. *Id.* at 1210 (Alito, J., concurring).

43. *See* NLRB v. Noel Canning, 134 S. Ct. 2550 (2014); *Christopher v. SmithKline Beecham, Corp.*, 132 S. Ct. 2156 (2012).

44. *See* 135 S. Ct. 913 (2015).

45. *Id.* at 917.

46. *Id.*

47. *Id.*

48. *Id.*

marshal.⁴⁹

MacLean challenged this action, arguing that the information he revealed was not classified at the time he received it and could not be classified after-the-fact.⁵⁰ MacLean challenged the action before the Merit Systems Protection Board (MSPB) available to federal employees, arguing that he was protected under the Whistle Blower Protection Act as well.⁵¹ The MSPB decided that MacLean's actions did not fall under the WPA because they were "prohibited by law."⁵² The Federal Circuit Court of Appeals disagreed and held that MacLean's actions were not "specifically prohibited by law."⁵³

In the opinion for the Court, Chief Justice Roberts affirmed the Federal Circuit, and decided that the language in the exception that allows for prosecution of disclosures "specifically prohibited by law" means that *Congress* has to decide what is "prohibited by law."⁵⁴ Surely, the meta-discussion of what counts as "law" will continue in the rarefied air of the Supreme Court chambers.

The Court's decision in *MacLean* provides needed clarity for millions of federal employees, but its impact on the protection of whistleblowers may be limited. Further, as MacLean's case itself shows, many federal employees will first go through the Merit Systems Protection Board, where many claims will stop before even getting to the federal courts like MacLean's.⁵⁵

D. *M & G Polymers v. Tackett: Non-Polarizing Labor Law*

The Court's only case of the Term involving collective bargaining was *M & G Polymers USA, LLC v. Tackett*,⁵⁶ which dealt with retirees' health care, but did not have the polarizing aspects of other recent cases involving either the health care decision of the Term⁵⁷ or the public employee bargaining cases of prior Terms.⁵⁸ Nonetheless, it led to a decision which, although unanimous in the result, displayed

49. *Id.* at 918.

50. *Id.*

51. *Id.*

52. *Id.* (citing 5 U.S.C. § 2302 (2012)).

53. *Id.*

54. *Id.* at 923.

55. *See id.* at 918.

56. 135 S. Ct. 926 (2015).

57. *King v. Burwell*, 135 S. Ct. 2480 (2015) (upholding by a 5-4 margin the subsidies for states to expand Medicaid under the Affordable Care Act).

58. *E.g.* *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012).

some differences of opinion about how the lower court should evaluate the claim on remand.⁵⁹

The underlying statute in *M & G Polymers*, the Labor Management Relations Act (LMRA), has long provided a framework for the enforcement of collective bargaining agreements. The question before the court was how to interpret the silence of the collective bargaining agreement (CBA) on the question of retiree health benefits.⁶⁰ Retirees from an M&G plant in West Virginia filed suit under the LMRA and the Employee Retirement Income Security Act of 1974 (ERISA) arguing that prior CBAs (from 2005 to 2008) guaranteed full coverage of healthcare benefits without any contribution or any cap on costs; since the cap was not included in the ERISA documents or the CBAs, the retirees argued that they were not subject to contributions or a cap on their health care.⁶¹

The district court dismissed the retirees' complaint, and they appealed to the Sixth Circuit.⁶² The Sixth Circuit reversed the lower court based on its reading of prior precedent, known in shorthand as "*Yard-Man*," which created several inferences in favor of vested retiree benefits, and concluded that the employees would not have left the uncertainties of retiree health benefits up to future negotiations.⁶³ After remand to the district court for a bench trial, the court found in favor of the retirees, and the Sixth Circuit affirmed the judgment.⁶⁴

In an opinion authored by Justice Thomas, the Supreme Court reversed the Sixth Circuit and its reliance on the *Yard-Man* decision.⁶⁵ Four justices, in a concurring opinion authored by Justice Ginsburg, agreed that the case should be remanded, but seemed to want to make sure that the lower court not put a "thumb on the scales" against perpetual retiree benefits, the way that *Yard-Man* might do in favor of perpetual retiree health benefits.⁶⁶ Instead, Justice Ginsburg reminded the lower court first to examine the entire context of the agreement.⁶⁷ Then, after considering all the relevant industry practices if the court concludes that the contract is ambiguous, it may "turn to

59. See *M & G Polymers*, 135 S. Ct. 926.

60. *Id.* at 933.

61. *Id.* at 931-32.

62. *Id.* at 932.

63. *Id.* (citing Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. (UAW) v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)).

64. *Id.*

65. *Id.*

66. *Id.* at 937 (Ginsburg, J., concurring).

67. *Id.* at 938.

extrinsic evidence, for example, the parties' bargaining history."⁶⁸ Justice Ginsburg, along with the other three justices appointed by Democratic presidents (Breyer, Sotomayor, and Kagan), joined in the decision to remand on the understanding that these principles would be followed by the court below.⁶⁹

Ever since the *Steelworkers Trilogy* gave the federal courts a primary role in interpreting collective bargaining agreements, federal courts have long allowed the usual rules of contract law to be displaced by federal common law governing the interpretation of collective bargaining agreements.⁷⁰ This deference was tested in the recent *M&G Polymers* case.⁷¹ In *M & G Polymers*, the issue was whether retiree health benefits were to be granted in perpetuity.⁷² Although the Court remanded the case to be decided in light of its holding, it is likely that the health benefits at issue will not be found to be granted in perpetuity.⁷³

E. Mach Mining v. EEOC: *The Agency Strikes Back?*

The power of administrative agencies was at issue in *Mach Mining, LLC v. EEOC*.⁷⁴ An applicant filed a charge with the EEOC against Mach Mining Co. for violations of Title VII of the Civil Rights Act.⁷⁵ Normally, when this happens, the EEOC attempts to conciliate the charge. The question in *Mach Mining* was whether the EEOC's failure to conciliate deprived it of jurisdiction to litigate the case.⁷⁶

Before suing an employer for discrimination, the EEOC must use informal methods of conciliation and mediation to get the employer to comply with the law.⁷⁷ In *Mach Mining*, the EEOC alleged that the Company had discriminated against a class of women by refusing to hire them as coal miners.⁷⁸ The EEOC sent Mach Mining a letter alerting the Company to the allegations and that someone from

68. *Id.*

69. *Id.*

70. See generally *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

71. See *M & G Polymers*, 135 S. Ct. at 933-34 (majority opinion).

72. *Id.* at 937.

73. *Id.*

74. 135 S. Ct. 1645 (2015).

75. *Id.* at 1650.

76. *Id.* at 1651.

77. *Id.* at 1650.

78. *Id.*

the Agency would be in touch to attempt conciliation.⁷⁹ A year later, the EEOC sent Mach Mining a letter saying that its conciliation efforts had failed and that it was preparing to sue.⁸⁰

In defense to the suit, the company countered that the EEOC had failed to conciliate the claim in good faith.⁸¹ In its reply, the EEOC argued that its efforts to conciliate were not subject to judicial review.⁸² The Seventh Circuit Court of Appeals agreed with the EEOC, but the Supreme Court reversed, holding that the EEOC's conciliation efforts are subject to judicial review, but that review is limited.⁸³ The theory behind the decision is that although judicial review is important to make sure that conciliation happens, it is not the role of the courts to review the quality of conciliation efforts.⁸⁴

In this hyper-polarized environment, a requirement that conciliation take place might not change the hardened positions of the parties. Nevertheless, employment discrimination is a sufficiently divisive area that adequate conciliation is important. While it may not have been a complete victory or a complete loss for the EEOC, by increasing the Agency's incentive to conciliate, even under limited judicial review, perhaps more cases will be resolved before litigation.

F. EEOC v. Abercrombie & Fitch: *The "Look Policy" Gets a Second Look*

Another showing of near unanimity, though with differing rationales, was *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*⁸⁵ Abercrombie & Fitch (A & F) has stores throughout the country with several lines of clothing.⁸⁶ A & F's "Look Policy" prohibits caps as part of an image the company wants to project through the dress of its employees.⁸⁷ When Samantha Elauf interviewed for a sales position with A & F she wore a headscarf.⁸⁸ The manager who interviewed Elauf decided she was an impressive candidate, but was concerned that the

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1650-56.

84. *Id.* at 1656.

85. 135 S. Ct. 2028 (2015).

86. *Id.* at 2031.

87. *Id.*

88. *Id.*

headscarf might violate the store's Look Policy.⁸⁹ There was a dispute about whether the managers discussed the religious nature of the headscarf.⁹⁰

The managers decided not to hire Elauf, and the EEOC sued on her behalf.⁹¹ The Tenth Circuit held that Elauf's claim should be dismissed because an employer, it reasoned, could not be liable for failing to accommodate a religious practice until the employer has actual knowledge of the need for an accommodation.⁹² The Supreme Court, reversed the lower court's grant of summary judgment for the employer, holding that an employer can be found liable under Title VII if the employee can show that the assumed need for a religious accommodation was a motivating factor in the decision not to hire the employee.⁹³ In an opinion authored by Justice Scalia, the Court held that the intentional discrimination provision of Title VII prohibits "*motives, regardless of the state of the actor's knowledge.*"⁹⁴

Justice Alito wrote a concurring opinion where he agreed the facts of the case were sufficient to show that A & F had knowledge, but he further emphasized that the statute requires actual knowledge.⁹⁵ He cited his concern that if there were no knowledge requirement, employers could be liable without fault.⁹⁶

Justice Thomas wrote an opinion concurring in part and dissenting in part, though his only real agreement with the Court's opinion were the two grounds for liability for discrimination under Title VII – disparate treatment and disparate impact.⁹⁷ Besides that, he would hold that the Look Policy did not disfavor anyone and that the Court was redefining intentional discrimination.⁹⁸ The application of a neutral policy, he wrote, cannot constitute intentional discrimination.⁹⁹ According to Justice Thomas, the Court's decision leaves open the possibility that an employer who "does not even suspect the practice in question is religious can be punished for intentional discrimina-

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2033-34.

94. *Id.* at 2033 (emphasis in original).

95. *Id.* at 2034-35 (Alito, J., concurring).

96. *Id.* at 2036.

97. *Id.* at 2037 (Thomas, J., concurring in part and dissenting in part).

98. *Id.* at 2038.

99. *Id.* at 2037.

tion.”¹⁰⁰

The *Abercrombie & Fitch* case also represents an important counterweight to the cases that prevent liability for uniforms and “looks,” such as *Jespersen v. Harrah’s Operating Co.*, the Ninth Circuit Court of Appeals case from 2006 that upheld Harrah’s policy that their cocktail servers should wear makeup.¹⁰¹ On the other hand, there is a good chance the decision will mostly be limited to situations where the employee is looking for a religious accommodation. In this case and the next one, the Court seems to be conflating straight discrimination and accommodation, and disparate impact and disparate treatment.

G. *Young v UPS: Accommodation of Pregnant Workers*

In one of the closely watched cases of the Term, the Court found in favor of Peggy Young, a part-time driver for United Parcel Service (UPS), whose doctor advised her that she should not lift more than twenty pounds because of her pregnancy.¹⁰² Because UPS required drivers to lift as much as seventy pounds, the Company refused to allow Young to drive or offer her an accommodation.¹⁰³ Young filed a lawsuit against UPS, alleging violations of the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA), part of Title VII of the Civil Rights Act.¹⁰⁴ The trial court granted UPS summary judgment, and the Fourth Circuit affirmed.¹⁰⁵

The lower courts reasoned that UPS was not actively discriminating against Young on the basis of pregnancy and that the weight restrictions operated the same against her as any other similarly situated coworker. The Fourth Circuit also dismissed Young’s claim under the ADA because pregnancy is not a disability under the ADA.

The Supreme Court, in an opinion written by Justice Breyer, reversed the Fourth Circuit and found that UPS should have not granted summary judgment.¹⁰⁶ Justice Breyer painstakingly went through the facts that should have precluded summary judgment for the employer. Among these was the fact that the collective bargaining

100. *Id.* at 2039 (internal quotations omitted).

101. 444 F.3d 1104 (9th Cir. 2006) (en banc).

102. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015).

103. *Id.*

104. *Id.*

105. *Id.* at 1347.

106. *Id.* at 1356.

agreement between UPS and the union representing Young required the employer to provide temporary “inside” alternative work assignments to employees who had lost their DOT certifications due to factors such as a failed medical exam, a lost driver’s license, or involvement in a motor vehicle accident.¹⁰⁷ Further, the manager of UPS’ Capital Division told Young that, while she was pregnant, she was “too much of a liability” and could “not come back” until she “was no longer pregnant.”¹⁰⁸ These facts, as well as examples of those accommodated with different conditions, such as knee injuries and foot injuries, showed that Young was treated differently than others *similar in their ability or inability to work*.¹⁰⁹ Of course, this is the language of the PDA, which is at the heart of the case. Was Peggy Young treated similarly to other workers, or only non-pregnant workers? The Court majority held that the policy should be viewed in light of other workers with conditions preventing them from being drivers, and thus summary judgment for the employer was inappropriate.¹¹⁰ The lower courts must determine whether there are legitimate, nondiscriminatory reasons for treating pregnant employees different than non-pregnant workers who also cannot perform a particular task required by the employer.¹¹¹

Moreover, the plaintiff can then show that the reasons the employer gives for not accommodating the pregnancy are a pretext in that the failure to offer pregnant workers the same accommodations as non-pregnant workers results in a significant burden on pregnant workers.¹¹² From that, the plaintiff can show that the employer’s reasons to justify this inequality in accommodations are simply not strong enough to justify the inequality, and from that a jury could infer intentional discrimination.¹¹³

Three Justices dissented, with Justices Scalia writing one opinion and Justice Kennedy writing another.¹¹⁴ Justice Scalia’s dissenting opinion revives the debate about whether the plaintiff is receiving special treatment due to her pregnancy, rather than the equal treat-

107. *Id.* at 1346.

108. *Id.*

109. *Id.* at 1346-47, 1348 (citing 42 U.S.C. § 2000e(k) (2012)).

110. *Id.* at 1353-55.

111. *Id.* at 1354.

112. *Id.* at 1354-55.

113. *Id.*

114. *Id.* at 1361 (Scalia, J., dissenting); *id.* at 1366 (Kennedy, J., dissenting).

ment that the PDA was intended to provide.¹¹⁵ In his separate dissent, Justice Kennedy agreed with Justice Scalia that the Court's opinion risks conflating disparate treatment and disparate impact. "In so doing," Justice Kennedy concluded, "[T]he Court injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas v. Green*."¹¹⁶

The win for the plaintiff in *Young* is perhaps the most divisive of the workplace cases this Term, and it is notable that it does not include an administrative agency, although the Solicitor General supported the plaintiff in this case. The disagreement between the majority and the dissent represents the latest chapter in the ongoing debate about pregnancy discrimination under Title VII, which led to the passage of the Pregnancy Discrimination Act of 1978.¹¹⁷ Nevertheless, the *Young* decision will be an important interpretation that will be a touchstone for future courts.

H. Other Big Decisions of the Term: Workplace Implications

Perhaps the most noted case of the Term was *Obergefell v. Hodges*, where the Court held that the states' denial of marriage rights to same-sex couples violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.¹¹⁸ The 5-4 decision at the end of June 2015 was a watershed moment for the gay rights movement, which had achieved several victories in state courts and legislatures but had yet to win the right to marry nationwide.¹¹⁹ The *Obergefell* decision was rightfully seen as one of the more progressive decisions of the Court in recent years, thus marking the Term as one of the most progressive in recent memory.

The *Obergefell* decision did not settle the employment discrimination against gays and lesbians that still violates no law in twenty-eight states,¹²⁰ nor the potential benefits issues that will arise if employers refuse to extend the same benefits to same sex couples that

115. See *id.* at 1362-63 (Scalia, J., dissenting).

116. *Id.* at 1368 (Kennedy, J. dissenting) (citing 411 U.S. 792 (1973)).

117. *Id.* at 1353 (majority opinion) (citing *inter alia* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976)).

118. 135 S. Ct. 2584 (2015).

119. See *id.* at 2597.

120. See *Non-Discrimination Laws: State by State Information – Map*, ACLU, <<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>> (last viewed Dec. 3, 2015). An additional ten states prohibit sexual orientation discrimination in public employment. *In Your State*, LAMBDA LEGAL, <<http://www.lambdalegal.org/in-your-state>> (select "workplace" tab) (last viewed Dec. 3, 2015).

they do to other married couples. To effectively deal with these issues nationwide, amendments to Title VII and ERISA are needed. The Employment Non-Discrimination Act, which has been a possibility for almost two decades, would amend Title VII and bar private employers from discriminating in employment even in the absence of a state law prohibiting sexual orientation discrimination.¹²¹ Given the politics of Washington, however, it seems very unlikely that there will be progressive workplace legislation until after the next election.

The decisions in *King v. Burwell*, upholding the subsidies to states to expand Medicaid and establish exchanges,¹²² and *Texas Department of Housing v. The Inclusive Communities Project, Inc.*, holding that disparate impact liability is available under the Fair Housing Act,¹²³ were also among the progressive decisions of the Term. These decisions do not have obvious workplace law implications, but there will be *workplace* implications of both decisions. *Inclusive Communities*, in particular, will have an effect on Title VII's causation requirement, and may have furthered kindled the debate over disparate impact theory.¹²⁴

III. CONCLUSION: A GOOD TERM FOR EMPLOYEES, OR ADMINISTRATIVE AGENCIES?

By a basic percentage indicator, whether the employer or the employee prevailed, the Term was a largely a good one for employees. Employees or agencies prevailed in five of the seven cases above – *Abercrombie & Fitch*, *Perez*, *MacLean*, *Mach Mining*, *Young* – and lost in two – *M&G Polymers* and *Integrity Staffing Solutions*.¹²⁵ The ones lost by employees may have the greatest impact in the areas where many claims are being contested – the LMRA and the FLSA. Indeed, as most of the employee claims in the court's labor docket are coming from administrative agencies, the cases that were not brought by the EEOC and DOL, the cases lost involved individual plaintiffs without the help of an administrative agency were pro-employer (*In-*

121. S. 815, 113th Cong. (2013).

122. 135 S. Ct. 2480 (2015).

123. 135 S. Ct. 2507 (2015).

124. Noah Zatz, *The Many Meanings of "Because Of": A Comment on Inclusive Communities Project*, 68 STAN. L. REV. ONLINE 68 (2015).

125. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015); *Perez v. Mtge. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015); *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015); *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513 (2014).

tegrity Staffing Solutions and M&G Polymers).¹²⁶

In the first part of 2015, the Court granted review in three cases that can implicate workplace statutory claims. In *DIRECTV, Inc. v. Imburgia*, the Court will again decide whether the California courts should have enforced arbitration clauses that disallowed class claims.¹²⁷ The California courts refused to enforce DIRECTV's arbitration agreement barring class claims.¹²⁸ The outcome of this decision will affect the litigation of a number of employment claims, including under the FLSA and Title VII. In *Green v. Donahoe*, the Court will have to resolve a Title VII question that has split the circuits: whether the statute of limitations for constructive discharges runs from the time that the plaintiff leaves the job or at the time of the last discriminatory act.¹²⁹

On the other hand, there are three constitutional cases that are likely to be closely ideologically divided. The first is another challenge to the University of Texas affirmative action program in *Fisher v. University of Texas at Austin*.¹³⁰ In 2013, the Court voted to remand the Fisher case back to the Fifth Circuit to ensure strict scrutiny was applied to the affirmative action program.¹³¹ After remand, the Fifth Circuit upheld the program again, and now the case is back at the Supreme Court.¹³² With Justice Kagan recused from the case because of her work in the Solicitor General's office before taking the bench, the case will again hinge on Justice Kennedy's view of affirmative action programs in higher education. The ramifications of the decision on the diversity of higher education will ultimately affect the professional workforce.

Finally, in *Friedrichs v. California Teachers Association*, the Court will hear a challenge to the constitutionality of agency fees in the public sector,¹³³ where the plaintiffs will try to overturn *Abood v. Detroit Board of Education*.¹³⁴ In this case, Dianne Friedrichs and other teachers brought a constitutional challenge so they could pay

126. *M & G Polymers*, 135 S. Ct. at 926; *Integrity Staffing Sols.*, 135 S. Ct. at 513.

127. *Imburgia v. DIRECTV*, 170 Cal. Rptr. 3d 190 (Ct. App. 2014), *review denied* (July 23, 2014), *cert. granted*, 135 S. Ct. 1547 (2015).

128. *Id.* at 192.

129. 760 F.3d 1135 (10th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

130. 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

131. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

132. *Fisher*, 135 S. Ct. 2888.

133. No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015).

134. 431 U.S. 209 (1977).

nothing to the union that represented them, the California Teachers Association.¹³⁵ The Ninth Circuit Court of Appeals summarily dismissed her constitutional challenge to California's agency shop law that required her to pay any dues to the union that represented her for collective bargaining or grievance processing purposes.¹³⁶ The decision to review the Ninth Circuit's decision in *Friedrichs*, especially in light of recent decisions such as *Knox v. SEIU Local 1000*¹³⁷ and *Harris v. Quinn*,¹³⁸ suggests a willingness to overturn *Abood*, but since only four justices can agree to hear a case, it may not be the occasion to overrule *Abood*.

The *Friedrichs* case portends another closely divided public sector labor law case in the mold of several others discussed above. The Supreme Court continues to be ideologically divided, and workplace law is an extremely polarized and polarizing field, particularly in an election year, so observers can expect more division in the very near term. Thus, the seeming consensus among the justices during the October 2014 Term on workplace law cases may indeed be vanishing soon.

135. *Friedrichs*, No. SACV 13-676-JLS CWX, 2013 WL 9825479, at *1 (C.D. Cal. Dec. 5, 2013), *aff'd*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, 135 S. Ct. 2933 (2015).

136. *Friedrichs*, No. 13-57095, 2014 WL 10076847, at *1.

137. 132 S. Ct. 2277 (2012).

138. 134 S. Ct. 2618 (2014).

