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FR Report

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A Review of the Supreme Court's 2012-2013 Term

As the United States Supreme Court's 2012-2013 term drew to a close at the end of June, commentators observed a continuing gradual but perceptible shift to the right by the Court. The Roberts Court is generally viewed as pro-business, and its employment-related decisions issued this term did nothing to alter that perception. Indeed, nearly every major Court ruling addressing employment-related issues this term was favorable to employers in at least some respect. The 11 employment-related decisions issued by the Court this term included the following:

- One Title VII harassment case (*Vance*)
- One Title VII retaliation case (*Nassar*)
- Two civil rights cases (*Windsor* and *Fisher*)
- Two class action cases (*Genesis* and *Comcast*)
- Three arbitration cases (*American Express*, *Oxford*, and *Nitro-Lift*)
- One ERISA case (*McCutchen*)
- One federal employee case (*Kloeckner*)

As in the past, many of the Court's employment decisions reflected a split among the justices along ideological lines. Notably, Justice Kennedy—the key swing vote on the Court—was in the majority in every case. The importance of Justice Kennedy's vote in employment decisions mirrors the importance of his vote overall, as he has been either the justice most frequently in the majority of 5-4 decisions, or tied for that title, in every term since 2003, according to SCOTUSblog. Certainly, the decisions of this term suggest that the Roberts Court continues to be sympathetic to employer positions.

Executive Summary

The following table briefly summarizes the holding of each of the Court's 11 labor and employment decisions this term:

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Vance v. Ball State University 133 S. Ct. 2434 Case No. 11-556 **Decided**: June 24, 2013	For purposes of Title VII harassment, the definition of a "supervisor" encompasses only those employees with the authority to make significant changes in the victim-employee's employment status (i.e., tangible employment actions such as decisions about hiring, firing, promotion, demotion, reassignment to a vastly different position, or benefits changes).	**Vote:** 5-4 **Opinion:** Alito (joined by Roberts, Scalia, Kennedy, and Thomas) **Concurrence:** Thomas **Dissent:** Ginsburg (joined by Breyer, Sotomayor, and Kagan)
UTSMC v. Nassar 133 S. Ct. 2517 Case No: 12-484 **Decided**: June 24, 2013	Plaintiffs bringing retaliation claims under Title VII must show that their protected activity was the "but for" cause of the adverse employment decision, rather than just one "motivating factor."	**Vote:** 5-4 **Opinion:** Kennedy (joined by Roberts, Scalia, Thomas, and Alito) **Dissent:** Ginsburg (joined by Breyer, Sotomayor, and Kagan)
U.S. v. Windsor 133 S. Ct. 2675 Case No: 12-307 **Decided**: June 26, 2013	The portion of the Defense of Marriage Act which had established a federal definition of marriage as a legal union only between one man and one woman is unconstitutional.	**Vote:** 5-4 **Opinion:** Kennedy (joined by Ginsburg, Breyer, Sotomayor, and Kagan) **Dissent:** Roberts, Scalia (joined by Thomas and joined by Roberts as to Part I), Alito (joined by Thomas as to Parts II and III)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Fisher v. Univ. of Texas at Austin 133 S. Ct. 2411 Case No: 11-345 **Decided**: June 24, 2013	The Fifth Circuit Court of Appeals applied an incorrect strict scrutiny standard in deciding that the University of Texas' consideration of race in its undergraduate admissions process was legally permissible. To satisfy the test, an institution of higher education must: (1) demonstrate a compelling government interest; and (2) show that the means used to achieve that interest are narrowly tailored.	**Vote:** 7-1 **Opinion:** Kennedy (joined by Roberts, Scalia, Thomas, Breyer, Alito, and Sotomayor) **Concurrence:** Scalia and Thomas **Dissent:** Ginsburg Kagan recused.
Genesis Health Care Corp. v. Symczyk 133 S. Ct. 1523 Case No. 11-1059 **Decided**: April 16, 2013	Collective-action claims brought under the Fair Labor Standards Act are moot when the named plaintiff has no continuing personal interest in the outcome of the lawsuit and no motion for conditional certification has been filed.	**Vote:** 5-4 **Opinion:** Thomas (joined by Roberts, Scalia, Kennedy, and Alito) **Dissent:** Kagan (joined by Ginsburg, Breyer, and Sotomayor)
Comcast Corp. v. Behrend 133 S. Ct. 1426 Case No: 11-864 **Decided**: March 27, 2013	Plaintiffs in a putative class action are required to demonstrate at the class certification stage that damages are measurable on a class-wide basis.	**Vote:** 5-4 **Opinion:** Scalia (joined by Roberts, Kennedy, Thomas, and Alito) **Dissent:** Ginsburg and Breyer (joined by Sotomayor and Kagan)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Am. Exp. Co. v. Italian Colors Restaurant 133 S. Ct. 2064 Case No: 12-135 **Decided**: June 10, 2013	The Federal Arbitration Act does not permit courts to invalidate agreements that bar class arbitration of federal claims.	**Vote**: 5-3 **Opinion**: Scalia (joined by Roberts, Kennedy, Thomas, and Alito) **Concurrence**: Thomas **Dissent**: Kagan (joined by Ginsburg and Breyer) Sotomayor recused.
Oxford Health Plans v. Sutter 133 S. Ct. 2064 Case No: 12-135 **Decided**: June 10, 2013	A court should not disturb an arbitrator's decision on the arbitrability of a class action as long as the arbitrator does not ignore the express terms of the arbitration agreement.	**Vote:** 9-0 **Opinion:** Kagan (writing for a unanimous Court) **Concurrence:** Alito (joined by Thomas)
Nitro-Lift Technologies v. Howard 133 S. Ct. 500 Case No: 11-1377 **Decided**: November 26, 2012	Under the Federal Arbitration Act, when a contract contains an arbitration clause, attacks on the validity of the contract—as distinct from attacks on the arbitration clause itself—are to be resolved by the arbitrator, not by a federal or state court.	**Vote:** N/A **Opinion:** Per Curiam
U.S. Airways, Inc. v. McCutchen 133 S. Ct. 1537 Case No. 11-1285 **Decided**: April 16, 2013	Equitable principles and defenses cannot be used to override the clear terms of an ERISA plan.	**Vote:** 5-4 **Opinion:** Kagan (joined by Kennedy, Ginsburg, Breyer, and Sotomayor) **Dissent:** Scalia (joined by Roberts, Thomas, and Alito)

CASE	SUMMARY OF HOLDING	VOTE/OPINION AUTHORS
Kloeckner v. Solis 133 S. Ct. 596 Case No: 11-184 **Decided**: December 10, 2012	A federal employee whose "mixed case"—involving a challenge to a serious adverse personnel action and allegations of discrimination—is dismissed by the Merit Systems Protection Board must seek judicial review in federal district court, rather than in the U.S. Court of Appeals for the Federal Circuit.	**Vote:** 9-0 **Opinion:** Kagan (writing for a unanimous Court)

Individual Case Analysis

Following is a summary of each decision and the likely impact on employers. Please contact us for additional information or advice regarding the effect these decisions may have on your particular workplace.

1. THE COURT CLARIFIES TITLE VII'S DEFINITION OF "SUPERVISOR" FOR HARASSMENT CLAIMS

In *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013), the Court held that only those employees who have the authority to take "tangible employment actions" qualify as supervisors for purposes of harassment claims brought under Title VII of the Civil Rights Act of 1964. Since the Court's 1998 decisions in *Faragher v. City of Boca Raton, 524 U.S. 775,* and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, the applicable standards for evaluating harassment claims have differed depending not only upon the nature of the conduct, but also upon the status of the employee accused of the harassing behavior. Where the alleged harasser is a "supervisor," the employer is automatically liable for any harassment that results in a tangible employment action (as described below). Even with respect to harassment that does not result in a tangible employment action, an employer can avoid liability for a supervisor's harassment only if the employer can prove that (i) it took reasonable measures to prevent and correct harassment; *and* (ii) the employee unreasonably failed to take advantage of the employer's anti-harassment policies and procedures. By contrast, co-worker harassment exposes an employer to liability only if the employee can prove that the employer negligently failed to discover or remedy the harassment. Clearly, the proper definition of "supervisor" has enormous significance in analyzing an employer's potential harassment liability under Title VII.

In *Vance*, the Court held that for purposes of Title VII harassment, the definition of a "supervisor" encompasses only those employees who have the authority to make significant changes in the victim-employee's employment status (i.e., tangible employment actions such as decisions about hiring, firing,

promotion, demotion, reassignment to a vastly different position, or benefits changes). This has been the definition of a supervisor used by the courts of appeal for the First, Seventh, and Eighth Circuits, which cover Arkansas, Illinois, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wisconsin.

The *Vance* case came to the Court from the Seventh Circuit, where the lower court had applied the narrower definition of a supervisor ultimately approved by the Court. The Court rejected a broader definition of "supervisor" that would have included any individual possessing the authority to direct and oversee the harassment victim's daily work. The U.S. Equal Employment Opportunity Commission (EEOC) and numerous others had urged the Court to adopt the more expansive definition, but the Court adopted the narrower standard by a 5-4 majority.

Justice Thomas filed a two-sentence concurrence in which he reiterated his belief that *Faragher* and *Ellerth* were wrongly decided—he filed dissents in both decisions—but he joined in the majority opinion in *Vance* because "it provides the narrowest and most workable rule for when an employer may be held vicariously liable for an employee's harassment."

Justice Ginsburg authored a blistering dissent that she read from the bench and in which Justices Breyer, Sotomayor, and Kagan joined. The dissent would have followed the EEOC's enforcement guidance to determine which employees qualify as supervisors and charged the majority opinion as hyper-technical and overly formalistic in excluding persons who can control day-to-day schedules and work assignments. The dissent argued that the majority opinion diminished the effect of *Faragher* and *Ellerth*, ignored the realities of the modern workplace, and disserved Title VII's objective to prevent employment discrimination and workplace harassment.

Although *Vance* provides useful clarification and is a definite "win" for employers, it will not likely answer all questions concerning the definition of a "supervisor" for purposes of Title VII harassment liability. In particular, employers should not assume that this decision allows them to concentrate all significant employment decisions in a few senior-level positions and thereby avoid potential harassment liability. The question of whether an employee functions as a supervisor remains a fact-specific inquiry and depends upon how the employer organizes the workplace. In responding to this precise concern (that employers will concentrate decision-making in order to avoid liability), the Court noted that such senior-level decision-makers would necessarily have to rely on other individuals closer to the employee in order to make effective decisions. In that situation, the Court would likely find that the employer had delegated the power to take tangible employment actions to the employees upon whose recommendation the decision-makers relied. In other words, the senior decision-makers would have made the lower-level employees "supervisors" by virtue of their level of involvement in the decision. In its decision in *Staub v. Proctor Hospital*, 562 U.S. __, 131 S. Ct. 1186 (2011), the Court previously endorsed a version of this "cat's paw" theory, ruling that an employer can, in certain circumstances, become liable for employment discrimination based upon the unlawful bias of those who influenced, but did not make, the ultimate employment decision.

2. THE COURT REQUIRES "BUT-FOR" CAUSATION IN TITLE VII RETALIATION CLAIMS

In 2009, the Court made it more difficult to prevail on a claim under the federal age discrimination statute by holding that a plaintiff must show that the protected activity was the "but for" cause of the adverse employment decision, rather than just one "motivating factor." *Gross v. FBL Finan. Servs., Inc.*, 557 U.S. 167 (2009). In a significant victory for employers, the Court broadened that holding in *Univ. of Texas Sw. Med. Cent. v. Nassar*, 133 S. Ct. 2517 (2013), to retaliation claims under Title VII of the Civil Rights Act of 1964.

Naiel Nassar was a doctor of Middle Eastern descent who worked for the University of Texas Hospital and served on its faculty. Nassar alleged that Dr. Beth Levine, his supervisor, discriminated against him based on his religion and ethnic heritage. He complained about Levine's treatment to Levine's supervisor, Dr. Gregory Fitz, on numerous occasions.

To distance himself from Levine, Nassar requested to work only at the Hospital without being on the University's faculty. Upon receiving indications that his request could be accommodated, Nassar resigned his teaching position. He then sent Fitz a letter stating that he gave up his teaching position because of Levine's harassment of and bias against him.

After reading the letter, Fitz stated that he felt Nassar had "publicly humiliated" Levine and that it was "very important that she be publicly exonerated." Upon learning that the Hospital had offered Nassar a staff physician position, as it had indicated it would, Fitz argued that the arrangement was inconsistent with the affiliation agreement between the Hospital and the University, which required Hospital staff to be University faculty. The Hospital then withdrew the offer, and in the ensuing litigation, the Hospital claimed it would have done so regardless of Nassar's complaints.

A jury found in favor of Nassar on his discrimination and retaliation claims. On appeal, the U.S. Court of Appeals for the Fifth Circuit (covering Texas, Louisiana, and Mississippi) affirmed the jury on Nassar's retaliation claim on the grounds that Nassar needed to show only that his complaints about Levine's harassment were a "motivating factor" in Fitz's retaliatory act. Holding that the Fifth Circuit should have required Nassar to show that his complaints were the "but for" cause of the employment action, the Court reversed in a 5-4 decision. The opinion was authored by Justice Kennedy and joined by Justices Alito, Roberts, Scalia, and Thomas.

The Court's majority began by tracing the history of several of its prior employment discrimination decisions. In 1989, the Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228, that a plaintiff could prevail on a so-called "status-based" discrimination claim—i.e., race, color, religion, sex, or national origin—by showing that the discrimination was a "motivating" or "substantial" factor in the adverse employment practice, even if other factors also motivated the practice (i.e., a mixed-motive standard). In 1991, Congress codified the mixed-motive standard by providing that a plaintiff established liability by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

The Court also found instructive its 2009 decision in *Gross*, which involved a claim under the Age Discrimination in Employment Act. In *Gross*, the Court held that the statutory requirement that discrimination be "because of . . . age" should be read to require proof that age was the "but for" cause of the adverse decision.

Against this backdrop, the Court first noted that while Title VII prohibits retaliation, the 1991 provision of Title VII prescribing the use of the mixed-motive standard listed only five categories of status-based discrimination. According to the Court, the absence of retaliation from this list demonstrated that Congress intended to exclude it from the bases on which a plaintiff could prevail under the mixed-motive standard. Second, the Court found that the placement of the mixed-motive provision within the section of Title VII banning status-based discrimination signaled Congress' intent to differentiate between such discrimination claims and retaliation claims. Third, the Court found that the "precise, complex, and exhaustive" nature of Title VII made it inappropriate to treat retaliation as a "corollary" to discrimination claims, as the Court had done in interpreting other anti-discrimination statutes.

Finally, the Court expressed a concern about the growing number of retaliation claims, which have doubled over the past 15 years. The Court warned that allowing the mixed-motive standard to apply to retaliation claims could contribute to the filing of frivolous retaliation claims, which would in turn drain the EEOC's and courts' resources. It also noted that deference to the EEOC's interpretation of Title VII, which calls for the mixed-motive standard to apply, was not warranted because the agency did not explain the interplay between the status-based discrimination, anti-retaliation, and motivating-factor provisions of the statute.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. Tracing a line of Court cases holding that retaliation was a form of "status-based" discrimination, Justice Ginsburg argued that the Court should not stray from that precedent. She argued that since Title VII expressly includes retaliation as an "unlawful employment practice," the provision establishing the mixed-motive standard for "any employment practice" necessarily includes retaliation. Finally, she decried the Court's reliance on *Gross* because in that case, the Court "took pains" to distinguish age discrimination claims from Title VII claims to find that "but for" causation was required. As such, Justice Ginsburg concluded, the Court's application of *Gross* amounted to "heads the employer wins, tails the employee loses."

Nassar is undoubtedly a major victory for employers. The holding will likely result in fewer retaliation cases reaching a jury, and consequently may stem the tide of retaliation claims. It may also lead to a stricter standard for retaliation claims under other federal employment discrimination statutes, such as the Americans with Disabilities Act. Arguably, *Nassar* is a natural outgrowth of the 2009 *Gross* decision, but the law is now clear that a plaintiff must show that his or her protected activity was the singular cause of the employer's action, not just one of the causes.

3. THE COURT EXPANDS OR MAINTAINS THE STATUS QUO ON EMPLOYEES' CIVIL RIGHTS

Two important decisions issued this term underscore employees' civil rights, including employers' rights or obligations to implement and maintain affirmative-action programs.

a. The Court Strikes Down DOMA, Leaves Open the Definition of "Spouse" for States to Decide

In *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), the Court declared unconstitutional a portion of the Defense of Marriage Act (DOMA), which had established a federal definition of marriage as a legal union *only* between one man and one woman. The Court's 5-4 opinion, authored by Justice Kennedy, will reach well beyond the case of Edith Windsor, a New York widow who was sent a $363,000 estate tax bill by the Internal Revenue Service (IRS) after her wife died in 2009. Indeed, although *Windsor* was not an employment case, the decision is extremely significant for employers because it means that same-sex couples who are legally married now must be treated the same as opposite-sex married couples under federal law.

In striking down a significant part of DOMA, the Court cleared the way for each state to decide its own definition of "spouse." This, in turn, will impact employee rights under federal law. Most notably, *Windsor* will impact employers in the application of the Family and Medical Leave Act (FMLA).

For states that recognize same-sex marriage: If an employee is married to a same-sex partner *and* lives in a state that recognizes same-sex marriage, the employee will be entitled to take FMLA leave to care for his/her spouse who is suffering from a serious health condition, for military caregiver leave, or to take leave for a qualifying exigency when a same-sex spouse is called to active duty in a foreign country in the military.

For states that <u>do</u> <u>not</u> recognize same-sex marriage: For employees who live in a state that does not recognize same-sex marriage, some questions remain unanswered. As an initial matter, the FMLA regulations look to the employee's "place of domicile" (state of primary residence) to determine whether a person is a spouse for purposes of FMLA. Therefore, even if the employee formerly lived or was married in a state that recognized the same-sex marriage, he/she is unlikely to be considered a spouse in the "new" state for purposes of FMLA if the state does not recognize the marriage. This is no small issue, since more than 30 states currently do not recognize same-sex marriage and some do not go all the way (e.g., Illinois, which recognizes same-sex unions, not marriages). Surely, some might argue that the U.S. Constitution requires other states to recognize the marriage; however, this issue is far from settled.

The *Windsor* decision also will affect employers in the application of other federal laws, including the following:

- **Employee benefits**: Same-sex spouses are likely to be treated equally when it comes to employee benefits, including retirement benefits from 401(k) plans and pension plans. The repercussions of the *Windsor* decision may have a wide reach in the employee benefits arena impacting entitlement to

death benefits, consent rules regarding designation of beneficiaries, entitlement to surviving spouse annuities, etc.

- **Affordable Care Act and COBRA**: The Court's decision will impact how the Affordable Care Act is carried out, though many details remain unclear. For example, children of a same-sex spouse could now fall within the definition of dependent of a covered employee, becoming entitled to coverage until age 26. Moreover, same-sex spouses may be eligible for continuation of health insurance benefits (COBRA) if the spouse loses his/her job.

- **Taxes**: Same-sex spouses likely will share many federal benefits and may be able to manage tax liability in the same way that opposite sex spouses typically do. For instance, an inheritance, which was taxed under DOMA, will no longer be taxed for a same-sex spouse (this was the factual scenario at issue in *Windsor*). Income taxes, payroll taxes, health insurance benefits, and tax reporting may also be impacted going forward. At this time it is not possible to determine the extent to which DOMA will impact taxation for same-sex spouses. Also, whether the impact will be retroactive is yet to be determined. The IRS is expected to issue guidance clarifying the impact of DOMA on taxation. It is possible that employers may be able to seek FICA tax refunds (for the employer portion of FICA) on previously imputed income on account of same-sex partner health benefits.

- **Social security benefits**: The Court's decision also paves the way for social security survivor benefits to continue on to a legally married same-sex partner.

- **Citizenship**: According to NBC News, some 28,000 same-sex spouses who are American citizens will now be able to sponsor their non-citizen spouses for U.S. visas and can qualify for immigration measures toward citizenship.

Shortly after the *Windsor* decision was handed down, President Obama directed his administration to review relevant federal statutes to determine the need for additional guidance on statutes impacted by the Court's decision.

Justice Scalia, joined by Justice Thomas and in part by Chief Justice Roberts, dissented. He argued that the Court lacked jurisdiction to decide the case, stating that: "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation." Chief Justice Roberts and Justice Alito also filed dissenting opinions.

b. The Court Directs the Fifth Circuit to Reevaluate the University of Texas' Admissions Process Using the "Correct" Strict Scrutiny Test

In a 7-1 decision (in which Justice Kagan did not participate), the Court ruled in *Fisher v. Univ. of Texas at Austin,* 133 S. Ct. 2411 (2013), that the U.S. Court of Appeals for the Fifth Circuit applied the incorrect strict scrutiny standard in deciding that the University of Texas at Austin's (UT) consideration of race in its undergraduate admissions process was legally permissible. Although many had been anticipating a

significant adjustment of existing law regarding race-conscious admissions practices, the Court declined to overrule its previous decisions that have allowed institutions of higher education to consider race as one of several factors in seeking to achieve the educational benefits of diversity. Indeed, the *Fisher* decision clarified that, at least in the higher education context, schools may exercise their academic judgment to determine that achieving the educational benefits of diversity is a sufficiently compelling objective to justify the consideration of race as one of many diversity factors in conducting a holistic review of applicant files during the admissions process. The *Fisher* decision also emphasized, however, that institutions may pursue such an objective only by using means that are narrowly tailored to meet it. While *Fisher* did not arise in the employment context, it is an important civil rights ruling with potential implications for employers.

In writing for the majority, Justice Kennedy explained that it was not enough for courts to ask whether a college or university had acted in "good faith" in its consideration of race. Instead, *Fisher* stressed that the consideration of race by colleges and universities must be reviewed under the constitutional test known as "strict scrutiny" that applies in other contexts. The strict scrutiny test, which applies to public institutions and to private institutions that receive federal financial assistance, requires an institution of higher education to: (1) demonstrate a compelling government interest; and (2) show that the means used to achieve that interest are narrowly tailored. In *Fisher*, the Court remanded the case to the Fifth Circuit and instructed that court of appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to meet the educational benefits of diversity."

UT adopted the undergraduate admissions program at issue in *Fisher* following the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that the consideration of race in the University of Michigan's law school admissions program satisfied strict scrutiny and therefore was constitutional. As the Court explained in *Fisher*, *Grutter* "upheld the use of race as one of many 'plus factors' in an admissions program that considered the overall individual contribution of each candidate." The *Fisher* Court also contrasted the facts at issue in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the companion case to *Grutter* involving the University of Michigan's undergraduate admissions program, in which the Court determined that automatically awarding a certain number of points to applicants from certain racial groups was not constitutional. Like the admissions program approved in *Grutter*, UT did not assign a specified number of points to applicants based upon their race, but, according to the majority, race was still a "meaningful factor." UT is also subject to a law known as the "Top Ten Percent Law," which guarantees admission to any public university in Texas to all Texas high school students who are in the top 10% of their high school class. A key issue in *Fisher* was how the Court would evaluate the UT's consideration of race given that, unlike the University of Michigan, UT is subject to a race-neutral statute like the Top Ten Percent Law, which guarantees admission to certain students without regard to their race. The Court left this issue unanswered in remanding the *Fisher* case to the Fifth Circuit for further proceedings.

Significantly, the majority opinion in *Fisher* confirmed many of the key principles that underlay the Court's previous decisions in *Grutter* and *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978),

including the fact that "obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions." Although the Court confirmed that higher education institutions are entitled to deference with regard to the importance of the educational benefits of having a diverse student body, the majority in *Fisher* stressed that institutions of higher education face a substantial burden in showing that their consideration of race in the admissions process satisfies the strict scrutiny test. The Court rejected the standard used by the Fifth Circuit; namely, whether the University's use of race as a factor in the admissions process was made "in good faith."

Moreover, even if an institution decides that diversity is a sufficiently important interest, there still must be "a further judicial determination" that the means used to achieve diversity are "narrowly tailored" to meet that objective. In more practical terms, this means that admissions standards must be designed to ensure that each applicant is evaluated on an individual basis, rather than allowing an applicant's race or ethnicity to be the "defining feature" of his or her application. The judicial review required by *Fisher* also means that the courts must assess whether it is "necessary" for an institution to use race to attain the educational benefits of diversity or whether such benefits could be achieved without considering race. As the Court explained, strict scrutiny does not allow courts simply to defer to a college's or university's "serious, good faith consideration of workable race-neutral alternatives." Rather, courts must "examine with care" race-neutral alternatives in determining whether consideration of race is actually necessary.

Thus, *Fisher* affirmed that colleges and universities should be afforded some level of deference in determining whether the educational benefits of diversity are an objective worth pursuing, while suggesting that those same institutions will not be afforded deference in assessing whether the means used to achieve that objective are narrowly tailored. What remains to be seen is precisely how far UT and other institutions of higher education will have to go to demonstrate that race-neutral alternatives or other means are not adequate to permit colleges and universities to achieve a sufficient level of diversity.

In separate concurrences, Justices Thomas and Scalia indicated that they would overturn *Grutter* if given the opportunity. The extent to which their views could influence any subsequent decision of the Court in *Fisher* remains unclear. Justice Ginsburg, the lone dissenter, argued that UT had sufficiently demonstrated that its admissions process satisfied the strict scrutiny test and therefore no remand was needed.

Regardless of whether institutions are governed by a law comparable to Texas' Top Ten Percent Law, both public and private colleges and universities should take this opportunity to ensure that any consideration of race in their admissions processes are consistent with the admissions policies at issue in *Bakke* and *Grutter* and continue to assess whether race-neutral alternatives would allow them to meet their objectives. And although *Fisher* does not expressly apply to employers, its potential ramifications for employer affirmative-action and diversity programs are significant. In particular, the obligations of federal contractors to implement affirmative action programs may be affected by the outcome of *Fisher* on remand.

4. THE COURT CONTINUES TO REIN IN CLASS ACTIONS

In the past several terms, the Court has issued a number of opinions narrowing the ability of plaintiffs to bring class actions, such as its decision two years ago in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541 (2011). Two employer-friendly decisions issued this term follow this pattern and show that the Court continues to be receptive to limiting the viability of class actions.

a. The Court Holds that the "Mere Presence" of FLSA Collective-Action Claims Cannot Save a Lawsuit Where the Named Plaintiff's Individual Claims Are Moot

In *Genesis Health Care Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Court held 5-4 that collective-action claims brought under the Fair Labor Standards Act (FLSA) are moot when the named plaintiff has no continuing personal interest in the outcome of the lawsuit and no motion for conditional certification has been filed.

Laura Symczyk, a registered nurse, sued her former employer, Genesis Healthcare Corp. (Genesis), for violations of the FLSA. Specifically, she alleged that Genesis violated the FLSA by automatically deducting 30 minutes of time worked per shift for meal breaks, even when the employees performed compensable work during those breaks. Symczyk sought damages on behalf of herself and other similarly-situated individuals using the so-called "collective-action" mechanism prescribed in the FLSA, which requires other potential class members to affirmatively "opt-in" to the litigation in order to pursue their claims as a class.

When Genesis answered the complaint, it offered Symczyk $7,500 plus attorney's fees and costs to resolve her claims, an amount that equaled the total value of her claims if she were to prevail. Genesis made the offer in the form of an "offer of judgment" under the Federal Rules of Civil Procedure (FRCP). At the time Genesis made this offer, no other individuals had consented to join the suit and no motion for conditional class certification had been filed. After Symczyk failed to respond to the offer, Genesis moved to dismiss the complaint. Genesis argued that since it had offered Symczyk complete relief for her individual claims, the lawsuit was moot because Symczyk no longer had a personal stake in the litigation and she was the only active plaintiff. Both the district court and the U.S. Court of Appeals for the Third Circuit agreed that Symczyk's individual claims were moot in light of the offer of judgment. The Third Circuit, however, held that Symczyk's collective action was **not** moot, ruling that calculated attempts by a defendant to "short-circuit" collective actions by "picking off" named plaintiffs with strategic offers of judgment would frustrate the goals of the collective-action process.

The Court reversed the Third Circuit, rejecting the idea that the purpose of the FLSA would be frustrated by allowing such tactics by a defendant. As an initial matter, the Court assumed without deciding that the unaccepted offer of judgment rendered Symczyk's case moot since she did not challenge the lower courts' rulings and did not properly preserve the issue on appeal to the Court. Thus, the remaining issue to be addressed by the Court was whether her collective-action claims remained in controversy after her individual claims had been mooted.

Turning to that issue, the Court held that the collective-action claims did not remain in controversy for a number of reasons. As an initial matter, the Court differentiated between class actions under FRCP 23 and collective actions under the FLSA. In class actions, similarly-situated individuals who are not named as plaintiffs are considered part of the class—and therefore bound by the court's judgment—unless they affirmatively "opt-out." In contrast, in collective actions under the FLSA, such as the claim brought by Symczyk in this case, individuals who are similarly-situated to the named plaintiffs are not part of the suit unless and until they affirmatively agree to join it. Conditional class certification under the FLSA merely means that notice and an opportunity to opt-in to the suit are sent to the putative collective-action members. Therefore, the Court reasoned, if no one has consented to join the collective action at the time the offer of judgment is made, no one has a personal interest in the outcome of the suit as required to keep the suit alive.

Second, the Court rejected Symczyk's argument that her collective-action claims related back to the date the complaint was filed. Symczyk argued that it was possible that no plaintiff would have a personal stake in the suit long enough for the litigation to run its course if the defendant could "pick off" named plaintiffs before the collective-action process was complete. The Court rejected this argument, noting that if putative FLSA collective-action members did not consent to join the suit before it is resolved, they remained free to bring their own lawsuits against the defendant to vindicate their rights.

Finally, the Court rejected Symczyk's argument that the purposes of the FLSA's collective-action mechanism would be frustrated by allowing offers of judgment to named plaintiffs to moot a collective action before the process had run its course. Distinguishing prior case law on class actions under FRCP 23, the Court found that Symczyk had not asserted that she had any continuing economic interest in the outcome of the case—such as shifting a portion of the attorney's fees to the other putative collective-action members—and therefore could not continue to represent these individuals as the named plaintiff.

Dissenting, Justice Kagan, joined by Justices Ginsburg, Sotomayor, and Breyer, disputed the majority's premise that Symczyk's individual suit was mooted by the unaccepted offer of judgment. Justice Kagan reasoned that since a court had the ability to provide monetary relief to the plaintiff and putative collective-action members, a plaintiff's claims remained live until they were settled or judicially resolved.

Symczyk is a significant decision, and is generally favorable to employers because it extends the Court's close scrutiny of class-based claims to collective actions brought under the FLSA. At the same time, it is not the total victory for employers that some commentators have declared. In fact, the decision reveals several limitations on its scope that provide the basis for continuing exposure to employers in this area. As the Court points out, other employees who may have eventually opted-in to the class remained free to pursue their own claims, either individually or collectively. Moreover, the decision may push plaintiffs' attorneys to move more quickly to seek opt-in consents and file a motion for conditional certification to avoid falling victim to the "pick off" strategy used in this case. In addition, since the Court did not decide whether an unaccepted offer of judgment moots an individual plaintiff's claims, this issue remains the subject of a split among the courts of appeal. Thus, while the opinion sanctions an employer's right to use

the "pick off" strategy, employers must proceed with caution when making early offers of judgment because doing so may result in having to defend multiple lawsuits.

b. FRCP 23 Class-Action Plaintiffs Must Demonstrate at the Certification Stage that Damages Can Be Calculated on a Class-Wide Basis

In the second case reflecting the Court's tendency to closely scrutinize class actions, the Court held in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), that plaintiffs in a putative class action under Federal Rule of Civil Procedure (FRCP) 23 are required to demonstrate at the class-certification stage that damages are measurable on a class-wide basis. Although *Comcast* was not an employment case *per se*, its holding will impact employment cases that are pursued on a class-action basis.

In *Comcast*, the plaintiffs alleged that Comcast violated federal antitrust laws by monopolizing cable services and overcharging its subscribers in the Philadelphia area. The plaintiffs sought class certification under FRCP 23(b)(3), which requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members." To meet this so-called predominance requirement, the plaintiffs must show that: (1) the existence of individual injury as a result of the antitrust violations could be proved through evidence common to the class; and (2) damages resulting from the injury were measurable on a class-wide basis.

To establish this predominance requirement, the plaintiffs relied on a theory termed "overbuilding," whereby competing companies were deterred from building competing cable networks due to Comcast's anticompetitive practices. To support their theory of damages, the plaintiffs relied on an expert's model which did not isolate damages resulting from this overbuilding theory, but rather, calculated elevated prices regardless of the type of anti-competitive conduct. Based upon this evidence, the district court certified a class of more than two million current and former Comcast subscribers. In so holding, the district court found that questions of law and fact common to the class predominated over questions affecting individual class members.

Affirming the grant of class certification, the U.S. Court of Appeals for the Third Circuit refused to consider Comcast's argument about the merits of the damages model because it found that such arguments were inappropriate at the certification stage. Rather, the Third Circuit found that the plaintiffs merely needed to demonstrate that if they could prove antitrust violations, the resulting damages would be capable of measurement and would not require "labyrinthine individual calculations."

A 5-4 majority of the Court disagreed with the Third Circuit. Writing for the Court, Justice Scalia found that it was error for the Third Circuit to refuse to consider Comcast's arguments about the impropriety of the model at the certification stage. Citing its decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541 (2011), the Court found that the lower court should have conducted a "rigorous analysis" at the certification stage to determine whether the plaintiffs' model was consistent with their liability theory. When such an analysis was conducted, the Court found that the model was flawed because it did

not isolate damages caused under the overbuilder theory. If such a flawed model were used, the Court opined, questions of individual damages calculations would "inevitably overwhelm" questions common to the class. As a result, the Court concluded that the plaintiffs failed to show that common damages questions predominated over questions affecting individual class members, and the class should therefore not have been certified.

Justices Ginsburg and Breyer, joined by Justices Kagan and Sotomayor, authored a joint dissent. They cautioned against reading the decision as "requir[ing], as a prerequisite to certification, that damages attributable to a class-wide injury be measurable on a class-wide basis." They also decried the majority's consideration of factual matters and overturning of the two lower courts' factual findings about how the expert's model worked as contrary to the Court's "typical practice."

Although *Comcast* was an antitrust case, it has implications for employment discrimination class actions under FRCP 23 which should prove helpful to employers. Specifically, under *Comcast*, employers may argue that plaintiffs must demonstrate at the class certification stage that damages are measurable on a class-wide basis. Notably, however, *Comcast* is unlikely to affect the conditional certification of putative classes in wage and hour cases brought under the Fair Labor Standards Act, which are typically decided under a different, more lenient standard than those brought under FRCP 23.

5. TRIO OF ARBITRATION CASES REINFORCES THE ENFORCEABILITY OF ARBITRATION CLAUSES AND THE COURT'S DEFERENCE TO ARBITRATION

a. Class-Action Arbitration Waivers of Federal Antitrust Claims are Enforceable Under the FAA

In *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Court held that the Federal Arbitration Act (FAA) does not permit courts to invalidate arbitration agreements that waive arbitration of class-based federal claims. The majority reiterated the established principle that arbitration agreements should be rigorously enforced as written in the absence of a "contrary congressional command." Finding no such command pertaining to class actions involving federal antitrust laws, the majority held that the arbitration clause was enforceable.

The plaintiffs, merchants who accepted American Express credit cards, brought a class action seeking treble damages against American Express for violating the Sherman and Clayton Acts, federal antitrust laws. American Express moved to compel arbitration of the claims on an individual basis, relying on language in the merchant agreement that provided, "There shall be no right or authority for any Claims to be arbitrated on a class action basis."

The plaintiffs argued that forcing individual arbitration of their claims would effectively prevent them from pursuing their statutory rights because they would have no incentive to pursue their claims. In support, they submitted a declaration from an economist estimating the cost to prove their antitrust claims could exceed $1 million. Because the maximum recovery for each plaintiff would be only $38,549, they

argued that no individual plaintiff would have an incentive to bring a claim, and a class action was the only mechanism to enforce their rights.

The Court, in a 5-3 opinion authored by Justice Scalia (Justice Sotomayor did not participate), rejected the plaintiffs' argument. The Court first recognized the "overarching principle" that arbitration is a matter of contract and that an arbitration agreement must be rigorously enforced according to its terms. The Court also noted that the FAA requires enforcement of arbitration provisions unless "overridden by a contrary congressional command," and held that no such command applied to the class-action waiver at issue. Addressing the plaintiffs' argument that forcing them to arbitrate their claims individually would "contravene the policies of the antitrust laws," the Court held such laws contained no intention to preclude a class-action waiver. The Court based its reasoning on the fact that the Sherman and Clayton Acts made no mention of class actions and were enacted well before Federal Rule of Civil Procedure 23, the procedural rule governing class actions.

The Court also rejected the plaintiffs' argument that forcing them to litigate their claims individually would be cost-prohibitive and therefore would foreclose the effective vindication of their rights under the antitrust laws. The Court distinguished the plaintiffs' right to *pursue* their claims from the right to *prove* their claims. The Court held that the right to pursue a claim barred the imposition of prohibitively expensive filing and administrative fees, but not necessarily expert witness fees required to prove a claim. To hold otherwise, according to the Court, would require a court to determine "the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." Such a "preliminary litigating hurdle" would essentially destroy the speedy resolution that arbitration was meant to secure, the Court opined.

Finally, the Court relied on *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740 (2011), which invalidated a law that prohibited contracts from barring class-wide arbitration because it "interfered with fundamental attributes of arbitration." The Court in *Italian Colors* reasoned, as it did in *AT&T Mobility*, that class arbitrations sacrifice the main advantages of arbitration: quicker and less costly resolutions of disputes. The Court in *AT&T Mobility* rejected a similar argument that class arbitration was necessary to bring claims that may otherwise "slip through the legal system."

Justice Thomas authored a brief concurrence, adding his opinion that the plain language of the FAA foreclosed the plaintiffs' argument. Justice Thomas took the position that the only way an arbitration agreement could not be enforced was if a party was "furnished grounds for the revocation of [the] contract." Because the plaintiffs' arguments had nothing to do with the formation of the arbitration agreement, Justice Thomas would have ruled in favor of American Express on this ground alone.

In dissent, Justice Kagan, joined by Justices Ginsburg and Breyer, argued that the majority prevented the effective vindication of the plaintiffs' federal statutory rights. Further discussing the "effective vindication" rule, she stated that an arbitration clause cannot be enforced if it prevents the effective

vindication of rights "however it achieves that result." Citing *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), Justice Kagan argued that the effective vindication rule applies "when an agreement thwarts federal law by making arbitration prohibitively expensive." Justice Kagan attacked the majority's distinction between pursuing and proving statutory rights as being contrary to established authority. In addition, she viewed the majority's holding as depriving the plaintiffs of any opportunity to challenge American Express' allegedly monopolistic conduct—a result not intended by the FAA.

Although the Court's decision did not directly involve an employment issue, its decision in *Italian Colors* affirming the right to include class-action waivers in mandatory arbitration agreements is nonetheless significant for employers. The willingness of the Court to enforce the provision prohibiting an antitrust class action in arbitration could also be used in support of enforcing a prohibition on employment class actions.

As an aside, *Italian Colors* will undoubtedly have implications for a key labor case pending before the U.S. Court of Appeals for the Fifth Circuit, *D.R. Horton v. N.L.R.B.* In *D.R. Horton*, the National Labor Relations Board held that a mandatory arbitration agreement that waives employees' rights to participate in class or collective actions is unlawful under the National Labor Relations Act (NLRA). However, several district courts have criticized this holding on the grounds that it conflicts with the FAA and the Court's holding in *AT&T Mobility*. The Court's decision in *Italian Colors* will further support an employer's argument that class-action waivers do not violate the NLRA and must be enforced under the FAA.

b. An Arbitrator's Decision on the Arbitrability of Class-Based Claims Will Not Be Disturbed as Long as the Arbitrator Does Not Ignore the Express Terms of the Arbitration Agreement

In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the Court addressed yet another class-action arbitration issue: whether an arbitrator exceeded his authority under the Federal Arbitration Act (FAA) when he found that the parties' arbitration agreement permitted arbitration of class-based claims. The Court refused to overturn the arbitrator's decision, unanimously holding that it "survives the limited judicial review [the FAA] allows."

The plaintiffs were a group of doctors who filed suit in New Jersey Superior Court alleging breach of contract and violations of various state laws. Oxford moved to compel arbitration based on the following language in the contract: "No civil action concerning any dispute shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." The parties agreed that the arbitrator should decide the question of class arbitrability. The arbitrator found that "on its face, the arbitration clause expresses the parties' intent that class arbitration can be maintained."

Oxford asked the arbitrator to reconsider his decision in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Court vacated an arbitration panel's decision approving class arbitration in the absence of such an agreement on the basis that the arbitrators "imposed their own

view of sound policy" in lieu of interpreting the agreement. The arbitrator issued another decision finding that *Stolt-Nielsen* was distinguishable because the agreement at issue in the present case did authorize class arbitration. Oxford then challenged the arbitrator's decision in court.

The Court began its analysis by proclaiming, "Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." The Court then rejected Oxford's argument that *Stolt-Nielsen* was controlling, finding it to be distinguishable on the grounds that the arbitration cause at issue in that case clearly prohibited class claims. Thus, the arbitrators in that case had not just misinterpreted a contract, but had abandoned their role as interpreters altogether. It also rejected Oxford's secondary argument that the contract "lack[ed] any of the terms or features that would indicate an agreement to use class procedures." The Court was clear that in rejecting Oxford's argument, it did not necessarily agree with the arbitrator's interpretation, but its role was not to correct an arbitrator's mistake. As the Court noted, "The arbitrator's construction holds, however good, bad, or ugly."

Justice Alito, joined by Justice Thomas, authored a concurring opinion in which he expressed concern that the issue of arbitrability was not properly before the arbitrator. He failed to see how an arbitrator's decision involving absent class members could bind such members without an agreement to do so. For this reason, he felt that the issue of arbitrability should not have been decided by the arbitrator. However, because the argument was not raised by the parties, Justice Alito found that it was not properly before the Court.

The Court's decision, while not surprising, provides further evidence of the Court's strong reluctance to entertain judicial review of arbitration decisions. Because arbitration is a fixture in labor disputes and increasingly common in employment disputes, these decisions recognizing and endorsing the binding nature of arbitration are likely to continue to have a significant impact in the employment area. Even in this instance, where the Court seemingly disagreed with the arbitrator's decision, it refused to vacate it. The Court's decision reflects the overwhelming federal policy that arbitration is the preferred method of dispute resolution when the parties agree to it, and an arbitrator's decision will be overturned only in extremely rare circumstances.

c. The Court Enforces an Arbitration Clause in a Non-Compete Agreement

In *Nitro-Lift Technologies v. Howard*, 133 S. Ct. 500 (2012), the Court overturned a decision of the Oklahoma Supreme Court invalidating a non-compete agreement that contained a binding arbitration clause. The Court reasoned that by declaring the non-competition agreements null and void, rather than leaving that decision to a private arbitrator in the first instance, the Oklahoma Court ignored the basic tenets of the Federal Arbitration Act (FAA) that express a national policy favoring arbitration.

The employer, Nitro-Lift, sought to enforce the terms of a confidentiality and non-competition agreement against two of its former employees who went to work for a direct competitor. Nitro-Lift served the former employees with a demand for arbitration in accordance with a provision in the agreement which

provided that any dispute between Nitro-Lift and the employees would be settled by arbitration. The employees then sued in Oklahoma state court, asking the court to declare the non-competition agreements null and void under Oklahoma law. The Oklahoma trial court dismissed the lawsuit, holding that an arbitrator, not a court, must settle the parties' disagreement, but the Oklahoma Supreme Court reversed this decision. The Oklahoma Court found that the non-compete agreement was not enforceable under Oklahoma state law and that the existence of an arbitration agreement in an employment contract did not prohibit judicial review of the underlying legal issue as to the enforceability of the restriction. In so holding, the Oklahoma Court purported to rely on an "exhaustive overview of United Supreme Court decisions construing the Federal Arbitration Act."

In its *per curiam* decision, the Court rejected the Oklahoma Court's analysis and held that the state court's decision disregarded federal precedent interpreting the FAA. The Court held that under the FAA, when a contract contains an arbitration clause, attacks on the validity of the contract, as distinct from attacks on the arbitration clause itself, are to be resolved by the arbitrator, not by a federal or state court. The Court further rejected the Oklahoma Court's reasoning that Oklahoma's statute addressing the validity of non-compete agreements took precedence over the more general statute favoring arbitration. The Court held that the FAA trumped any conflicting state law under the Supremacy Clause of the U.S. Constitution.

This decision re-affirms the longstanding federal policy favoring the arbitration of private contractual disputes. When drafting non-compete agreements and other employment-related agreements, an employer should carefully consider whether future disputes arising with the employee are best resolved through the court system or in binding arbitration. If arbitration is likely to provide a more favorable forum, the employer should strongly consider including a binding arbitration clause in the agreement.

6. EQUITABLE PRINCIPLES DO NOT OVERRIDE THE CLEAR LANGUAGE OF AN ERISA PLAN

In a case involving subrogation/reimbursement to a health plan covered by the Employee Retirement Income Security Act (ERISA) following a participant's recovery for injuries in a separate personal injury action, the Court held in *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), that equitable principles and defenses cannot be used to override the clear terms of the plan, even if the result of applying the plan's clear terms is inequitable to the participant. But the Court also held that if there are ambiguities or gaps in the plan's terms, equitable doctrines may be used to interpret those plan terms. The practical impact of this 5-4 decision for ERISA-covered health and welfare plans is that clearly drafted subrogation/reimbursement provisions will be enforced as written. Conversely, poorly drafted subrogation provisions may be interpreted by considering equitable defenses raised by the participant.

James McCutchen was a participant in U.S. Airways' health and benefits plan who suffered injuries as a result of a car accident. The plan paid $66,866 in medical expenses on behalf of McCutchen. He then filed suit against the third party responsible for the accident, recovering a total of $110,000. Pursuant to a contingency fee agreement, McCutchen paid his attorney $44,000, leaving him with a net recovery of $66,000. Pursuant to the reimbursement provision in the plan, and upon learning of McCutchen's recovery, U.S. Airways sought reimbursement from McCutchen for the money it had paid for his medical

expenses ($66,866). After McCutchen refused to reimburse the plan, U.S. Airways filed suit under § 502(a)(3) of ERISA to recover the money the plan had paid.

McCutchen argued that the equitable doctrines of "double recovery" and "common fund" barred reimbursement. Under the double recovery doctrine, only the portion of McCutchen's recovery that related to the same medical expenses paid by U.S. Airways was subject to reimbursement. Under the common fund doctrine, McCutchen argued that the plan's reimbursement should be reduced by the amount of the attorney's fees paid by him because U.S. Airways benefited from his pursuit of the claim against the third party.

In addressing McCutchen's arguments, the Court first ruled that the double recovery and common fund doctrines could not override a plan's express contractual terms, which required McCutchen to reimburse the plan. The Court noted that the facts of this case were similar to those in *Sereboff v. Mid-Atlantic Medical Services*, 547 U.S. 356 (2006). In *Sereboff*, the Court addressed whether a reimbursement provision in an ERISA plan could be enforced under § 502(a)(3) of ERISA. The Court held that the plan administrator was allowed to file suit under § 502(a)(3) to recover "appropriate equitable relief . . . to enforce . . . the terms of the plan." Using *Sereboff* as a guide, the Court in *McCutchen* stated that unjust enrichment principles "are 'beside the point' when parties demand what they bargained for in a valid agreement." The Court held that when there is a contract present, agreed to by both parties, the relief provided by the contract is both "appropriate" and "equitable," and is therefore entitled to enforcement.

Second, the Court held that while equitable doctrines could not trump the express terms of a reimbursement provision, they could assist in construing a plan's terms. The Court found that in McCutchen's case, since the plan was silent on the issue of allocation of attorney's fees, the common fund rule applied. In discussing the rationale for applying the common fund rule, the Court explained that McCutchen could not have foreseen that in undertaking the expense to recover from the party responsible for the accident, he would be put in a worse position than if he had not sued. Such a result, the Court recognized, would severely reduce a plan participant's incentive to seek recovery from third parties. Therefore, the Court concluded that a plan could avoid application of the common fund doctrine only if it expressly addressed the reimbursement of attorney's fees. Ultimately, the Court held that in order to fully avoid the application of equitable principles of unjust enrichment, drafters of health plans should include express provisions departing from these principles.

Justice Scalia, with whom Chief Justice Roberts and Justices Thomas and Alito joined, issued a short partial dissent. Justice Scalia agreed with the majority on the first issue—that equitable principles could not override the "plain terms of the contract." However, Justice Scalia diverged from the majority on the second issue—contribution for McCutchen's attorneys' fees—arguing that McCutchen had admitted that U.S. Airways' plan did not require reimbursement for attorneys' fees and that that question was therefore not properly before the Court.

Although *McCutchen* makes it clear that equitable principles cannot override the clear terms of an agreement, just how "clear" the terms must be will vary from plan to plan. The *McCutchen* decision—which resolved a split among the courts of appeal—should be heeded when drafting new plans or revising existing plans. For example, to avoid the problems found in the U.S. Airways plan, a plan should clearly allow reimbursement rights in the beneficiary's full recovery against a third party, and should further state that attorney's fees should not offset any reimbursement. Thus, *McCutchen* reinforces that plan drafters should include language that is clear and comprehensive enough to protect the interests of the plan and also provide predictability in the administration of the plan.

7. FEDERAL EMPLOYEES SHOULD SEEK JUDICIAL REVIEW OF DECISIONS IN "MIXED CASES" IN FEDERAL DISTRICT COURT

A federal employee whose "mixed case"—i.e., involving a challenge to a serious adverse personnel action and allegations of discrimination—is dismissed by the Merit Systems Protection Board (MSPB) must seek judicial review in federal district court, rather than the U.S. Court of Appeals for the Federal Circuit, the Court held unanimously in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).

Carolyn Kloeckner filed an internal complaint with the U.S. Department of Labor (DOL), where she worked, alleging sex and age discrimination. A month after the DOL completed an internal investigation of Kloeckner's claims, the DOL fired her. She amended her discrimination complaint to include allegations of discrimination based upon her termination. After her claims were rejected, she sought review by the MSPB, an independent body charged with adjudicating serious federal employment disputes (such as termination or a reduction in grade or pay). The MSPB dismissed Kloeckner's appeal as untimely, and Kloeckner sought review in federal district court. The district court dismissed the complaint for lack of jurisdiction, and the U.S. Court of Appeals for the Eighth Circuit affirmed, holding that Kloeckner should have appealed the adverse MSPB decision to the Federal Circuit. The Eighth Circuit's decision contributed to a circuit split, with the Eighth and Federal Circuits holding that appeals of MSPB dismissals on procedural grounds must be brought in the Federal Circuit, and the Second and Tenth Circuits holding that such cases must be appealed to the district court.

The Court found that the relevant provisions of the Civil Service Reform Act (Act), which governed Kloeckner's case, were "plain." The Act generally requires an aggrieved federal employee to appeal an adverse decision by the MSPB to the Federal Circuit. However, the Act contains an exception for mixed cases, which are to be appealed in accordance with the relevant provisions of the substantive anti-discrimination statute at issue, e.g., Title VII of the Civil Rights Act of 1964. The Court concluded that when the relevant provisions were read in tandem, it was clear that mixed cases should be appealed to the district court.

The Court rejected the government's "mazelike" argument that cases dismissed by the MSPB on procedural grounds should be appealed to the Federal Circuit, while cases dismissed on the merits should be appealed to the district court. The Court found that the government's interpretation required reading into the Act requirements which were not present, and that if Congress had wished to bifurcate the

judicial review process in the manner the government urged, "it could have just said so." As a result, the Court held that Kloeckner had properly brought her appeal in district court. *Kloeckner* resolved a split amount the courts of appeal regarding the proper route for an employee seeking judicial review of a mixed case, and therefore provides helpful guidance for federal employers.

Looking Ahead: The 2013-2014 Term

The Court will open its 2013-2014 term on October 7, 2013. The Court will likely hear several significant cases affecting employers, including several that will focus on labor-management relations. The Court has already selected several labor and employment cases that it will hear during the next term, including the following:

- ***Sandifer v. U.S. Steel Corp.*:** The Court will consider what constitutes "changing clothes" under the Fair Labor Standards Act (FLSA), and whether that definition can be modified through collective bargaining. Under the FLSA, an employee must be paid for engaging in a "principal activity." Donning and doffing safety gear required by the employer is a principal activity when it is an integral and indispensable part of the activities for which the worker is employed. Under § 203(o) of the FLSA, however, an employer need not compensate a worker for time spent changing clothes—even if it is a principal activity—if that time is expressly excluded from compensable time under a collective bargaining agreement. This case has significant implications for employers in areas like manufacturing, which require their employees to don and doff safety gear at the beginning and end of their shifts, as even a small number of minutes can add up to substantial liability over a prolonged period.
- ***N.L.R.B. v. Noel Canning:*** This case involves the validity of President Obama's 2012 recess appointments to the National Labor Relations Board (NLRB) of members Richard Griffin, Terrence Flynn, and Sharon Block. The D.C. Circuit held that these appointments were unconstitutional because they did not occur during an intersession recess of the Senate. The issue before the Court is whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions. This case will impact private employers because it could potentially invalidate all actions and decisions of the NLRB since the date of the appointments, January 3, 2012. For more information, please see our recent Franczek Radelet alerts on the Court's decision to accept the case and the recent compromise between the U.S. Senate and President Obama on nominations for the NLRB.
- ***Mulhall v. UNITE HERE Local 355:*** This case involves union neutrality and card check agreements, where unions offer employers concessions in exchange for securing a commitment from the employer to remain neutral during an organizing campaign and to provide access and/or information to the union to make it easier for the union to contact employees. The Labor Management Relations Act makes it unlawful for employers "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization." The issue is whether organizing neutrality and/or assistance provided by the employer to the union is a "thing of value" and thus prohibited by

that statute. The courts of appeal are split on this issue. This case could dramatically alter the ability of employers and unions to enter into neutrality and card check agreements. For more information, please see our recent Franczek Radelet alert on the Court's decision to accept the case.

- ***Madigan v. Levin*:** At issue in this case is whether the Age Discrimination in Employment Act (ADEA) precludes state and local government employees from bringing constitutional claims of age discrimination under 42 U.S.C. § 1983. In a departure from the holdings of numerous other courts of appeal, which it acknowledged to be a "close call," the Seventh Circuit held that such constitutional claims are not precluded. This case will be important for public employees because it will determine whether they have a federal damages remedy for age discrimination claims, since state immunity under the Eleventh Amendment prevents them from recovering damages under the ADEA.