Labor and Employment Decisions from the Supreme Court's 2015–2016 Term

Thomas C. Goldstein*

Introduction

The Court's October 2015 Term provided several important labor and employment rulings, including two cliffhangers that remain unresolved. This Article reviews these decisions. Part I describes two highly anticipated cases—an agency shop case and an employer-mandated contraceptive case—that the Court did not decide on the merits. Part II discusses *Heffernan v. City of Paterson*,[1] a First Amendment retaliation case concerning an employer's mistaken belief that an employee engaged in political activity. Part III examines the procedural decisions of the Court's 2015 Term. Part IV discusses the Court's ERISA-related holdings. The Article concludes by anticipating issues the Court will address in its 2016–2017 Term.

I. The Court's Unresolved Decisions

The most anticipated decision of the 2015 Term, *Friedrichs v. California Teachers Ass'n*,[2] turned out to be uneventful. In *Freidrichs*, the Court was poised to decide whether to overturn *Abood v. Detroit Board of Education*,[3] which held public sector unions could collect dues from workers represented by a union, even if not themselves union members.[4] Unions rely on these "agency shop" arrangements to fund costly bargaining and contract grievance processes.[5] After oral argument, it appeared a five-Justice majority was prepared to overrule *Abood* and hold public sector agency shop arrangements violated the First

* Thomas C. Goldstein is a partner of Goldstein & Russell, P.C. and an appellate advocate. He is best known as one of the nation's most experienced Supreme Court practitioners. Mr. Goldstein has taught Supreme Court Litigation at Harvard Law School since 2004 and previously taught the course at Stanford Law School for nearly a decade. Mr. Goldstein is also the co-founder and publisher of SCOTUSblog, one of the most widely read Supreme Court blogs.

1. 136 S. Ct. 1412 (2016).
2. 136 S. Ct. 1083 (2016) (Mem.).
3. 431 U.S. 209 (1977).
4. *Id.* at 212.
5. *Id.* at 221–22.

Amendment.[6] Overruling *Abood* could have substantially undermined the viability of public sector unions.

The Court ultimately left the issue unresolved in a four-four tie after Justice Antonin Scalia's death.[7] As with any four-four split, the Court affirmed the Ninth Circuit's ruling,[8] adhering to *Abood* without setting any national precedent.[9] But the unions' victory is likely to be short-lived. Unions surely anticipated Hillary Clinton's presidential victory and appointment of a Justice sympathetic to *Abood*. Now that Justice Neil Gorsuch is serving on the U.S. Supreme Court and has filled Justice Scalia's seat, *Abood* is once again on life support. Anti-union organizations are already preparing the next *Friedrichs*-type case to present the issue again to the Court, likely within the next two years.

A similar situation occurred in a major dispute over the Affordable Care Act's contraception mandate,[10] presented by several consolidated cases, including *Zubik v. Burwell*.[11] Religious non-profit employers challenged a regulatory requirement mandating that they either provide contraceptive care under their health plans or notify the government or their insurer that they object to doing so.[12] In effect, the employers' notification triggered insurers directly to offer contraception to employees.[13] The religious employers argued that complying with the notification requirements violated their religious beliefs because it facilitated use of certain forms of contraception they deemed immoral.[14]

In an unusual opinion, the Court resolved the cases by remanding them to the circuit courts to consider whether contraceptive care could be provided without the religious non-profits having to provide notice.[15] In response to a judicial inquiry, the employers had indicated that their religious views would be adequately accommodated if they played no role in the process, and the government confirmed that the insurance plans "could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage."[16] The Justices took care to clarify that they were not ruling on any aspect

6. *See* Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES (Mar. 29, 2016), https://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html?_r=2.

7. *Freidrichs*, 136 S. Ct. 1083.

8. Freidrichs v. California Teachers Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

9. *Freidrichs*, 136 S. Ct. 1083.

10. 42 U.S.C. § 300gg-13 (2012); 45 C.F.R. § 147.131 (2016).

11. 136 S. Ct. 1557 (2016).

12. *Id*. at 1559.

13. *See* Supplemental Brief for Petitioners at 15, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418).

14. *See* Supplemental Brief for Petitioners, *supra* note 13, at 15.

15. *Zubik*, 136 S. Ct. at 1560.

16. *Id.*

of the non-profits' claims.[17] The Court very likely chose this narrow disposition because Justice Scalia's death precluded a majority ruling—which would probably have favored the religious organizations.

II. First Amendment Retaliation

The Court did reach a decision in a quirky First Amendment employment case, *Heffernan v. City of Paterson*.[18] Heffernan was a police officer in Paterson, New Jersey.[19] The chief of police was told that Heffernan had picked up a lawn sign supporting the incumbent mayor's opponent in the upcoming municipal election.[20] As a result, the chief reassigned Heffernan.[21]

Heffernan alleged that the city retaliated against him in violation of the First Amendment.[22] The twist was that Heffernan had not engaged in free speech or political association on his own behalf.[23] He picked up the sign as a favor to his mother,[24] but the police chief mistakenly thought he did it for himself.[25] The city contended that because Heffernan was not expressing any political views, he had no First Amendment protection.[26]

The Supreme Court held that the chief's mistake did not affect its First Amendment analysis. Heffernan could sue under the First Amendment.[27] The Court concluded that the chief's motive, despite its reliance on false information, was the key factor.[28] It reasoned that the harm to the employee—and the effect of inhibiting protected speech and association by other employees—was the same regardless of the employer's mistake.[29] The Court did not express an opinion on the city's defense that Heffernan was not reassigned as political retribution, but pursuant to a neutral policy prohibiting certain officers from being involved in political campaigns.[30]

Heffernan provides employees with greater protection against retaliation for political expression. Government employers cannot avoid retaliation liability by arguing that an employee did not actually en-

17. *Id.* ("The Court expresses no view on the merits of the cases.").
18. 136 S. Ct. 1412 (2016). Mr. Goldstein represented the defendant-employer.
19. *Id.* at 1416.
20. *Id*.
21. *Id.*
22. *Id.*
23. *Id.* at 1417.
24. *Id*. at 1416.
25. *Id*. at 1417.
26. Brief for Respondents at 7–8, Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (No. 14-1280).
27. *Heffernan*, 136 S. Ct. at 1416.
28. *Id*. at 1418 ("the government's reason for demoting Heffernan is what counts here").
29. *Id.*
30. *Id.* at 1419 (remanded for lower court consideration).

gage in constitutionally protected free speech if the employer intended to discipline an employee for doing so.

III. Procedural Controversies

The Justices decided several cases involving important procedural questions unique to labor and employment litigation. Most noteworthy is *Tyson Foods, Inc. v. Bouaphakeo*,[31] which involved a dispute over the extent to which the employer failed to meet its obligation under the Fair Labor Standards Act (FLSA) to pay employees for time spent "donning and doffing" protective gear at work.[32] A jury awarded a class of more than 3,000 employees nearly $3 million in damages.[33]

Because the payment owed to each employee varied, the Court had to determine whether, and to what extent, the employees could proceed as a single class or in a single collective action.[34] Some employees were paid only for time spent donning gear, and some spent more time than others because they wore different gear.[35] Critically, the employer lacked records of the amount of time employees spent donning and doffing.[36]

The issue reached the Court against the backdrop of rulings showing the Court's hostility to employment class actions, such as *Wal-Mart Stores v. Dukes*.[37] But here, the Justices held that the employees could proceed collectively to establish Tyson's liability.[38] The Court relied on *Anderson v. Mt. Clemens Pottery Co.*,[39] which held that employers' statutory duty to maintain time records triggers liability if the absence of those records prevents employees from proving the time each spent performing compensable work.[40] Because Tyson Foods had not maintained records of the time employees spent donning and doffing gear, the Court allowed the plaintiffs to rely on a study estimating average times for different parts of the plant.[41]

Tyson Foods is an important victory for employees seeking to bring FLSA collective actions. Frequently, employees with different responsibilities at a single facility will seek compensation for different amounts of time. Pursuing all claims individually would burden the

31. 136 S. Ct. 1036 (2016).
32. *Id.* at 1042.
33. *Id.* at 1041, 1043.
34. *Id.* at 1041.
35. *Id.* at 1042.
36. *Id*.
37. 564 U.S. 338, 352 (2011) ("respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.").
38. *Tyson Foods*, 136 S. Ct. at 1049.
39. 328 U.S. 680 (1946).
40. *Id.* at 687.
41. *Tyson Foods*, 136 S. Ct. at 1047.

courts and the parties. The Court's decision allows these claims to be adjudicated efficiently. That said, the Court left unresolved one major concern for employers: how to distribute funds from any judgment or settlement.[42] It did not resolve whether and how lower courts should ensure that only individual employees actually entitled to compensation receive it.[43]

In another important procedural controversy, *CRST Van Expedited, Inc. v. EEOC*,[44] the Court considered whether a defendant must prevail on the merits to be awarded attorneys' fees in a frivolous Title VII suit.[45] For plaintiffs, lower courts had imposed substantial barriers to plaintiffs' ability to recover attorneys' fees if they had not prevailed on the merits.[46] But here, the Court unanimously held that defendants are different because they "prevail" whenever the plaintiff fails to change the status quo, regardless of how that occurs.[47] However, the Court left open whether the employer must secure a preclusive judgment against the plaintiff to be eligible for fees.[48]

The EEOC is also a litigant in another procedural case, this one already decided in the 2016 Term.[49] In *EEOC v. McLane Co.*, an employer refused to comply with an EEOC subpoena seeking certain data.[50] When the EEOC sued, the district court refused to fully enforce the subpoena.[51] The Ninth Circuit reversed, holding—in the ruling now before the Supreme Court—that it would review the district court's decision de novo.[52]

Before the Supreme Court, the government changed positions and now agrees with the employer that the district court's ruling should be reviewed deferentially.[53] This happens occasionally, as the Solicitor General's Office—which litigates on behalf of the federal government in the Supreme Court—reassesses the sometimes aggressive positions taken by agencies in the lower courts.[54] In response, the Court ap-

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42. *Id.* at 1050.
43. *Id.*
44. 36 S. Ct. 1642 (2016).
45. *Id.* at 1645–46.
46. *See, e.g.*, Marquart v. Lodge 837, Int'l Ass'n of Machinists, 26 F.3d 842, 851–52 (8th Cir. 1994).
47. *CRST Van*, 36 S. Ct. at 1652.
48. *Id.* at 1653.
49. 137 S. Ct. 1159 (2017).
50. EEOC v. McLane Co., 804 F.3d 1051, 1054 (9th Cir. 2015), *vacated and remanded*, 137 S. Ct. 1159 (2017).
51. *Id.* ("The district court granted in part and denied in part the EEOC's request for enforcement.").
52. *Id.* at 1056, 1059.
53. Brief for Respondent at 14–15, McLane Co. v. EEOC, No. 15-1248 (U.S. filed Dec. 14, 2016).
54. *See, e.g.*, US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (Solicitor General changed its position about a rule interpreting ERISA benefit reimbursement); *see also* Lincoln Caplan, *The Chief Justice Loses His Cool*, N.Y. TIMES: EDITORIAL PAGE

pointed a private attorney to defend the Ninth Circuit's decision.[55] This is how the Court typically handles a case if neither party will defend the lower court's ruling,[56] particularly when the Solicitor General will not defend a ruling favorable to a federal agency. Ultimately, the Supreme Court decided the case consistently with the government's revised position, which tracked the view of other courts of appeals.[57] The Justices unanimously held that a district court's decision of whether to enforce or quash a subpoena is reviewed for abuse of discretion.[58] The Court reasoned that this standard has long been applied to administrative subpoena rulings.[59] Further, district courts are better suited to determine whether a subpoena is appropriate.[60]

The remaining procedural case from the 2015 Term involves filing deadlines and another change in the government's position. In *Green v. Brennan*,[61] the plaintiff, a federal post office employee, brought a constructive discharge claim.[62] At issue before the Supreme Court was whether the employee brought the claim too late.[63] Green had signed an agreement to resign in December 2009, submitted a letter of resignation in February 2010, and left his job in March 2010.[64] Forty-one days after he submitted his resignation, Green contacted an Equal Employment Opportunity counselor.[65]

The law provides that a federal employee's discrimination claim is timely if the employee contacts the Equal Employment Opportunity counselor within forty-five days of "the matter alleged to be discriminatory."[66] The court of appeals deemed Green's claim untimely because his resignation was not alleged to be discriminatory.[67] The government refused to defend that ruling in the Supreme Court, agreeing instead with Green that the relevant date triggering the filing obligation was the date he resigned.[68]

EDITOR'S BLOG (Nov. 30, 2012, 11:17 AM), https://takingnote.blogs.nytimes.com/2012/11/30/the-chief-justice-loses-his-cool/?_r=0 (discussing *McCutchen*).

55. McLane Co. v. EEOC, 137 S. Ct. 461 (2016) (Mem.) ("Stephen B. Kinnaird, Esquire, of Washington, D.C., is invited to brief and argue this case, as *amicus curiae,* in support of the position that a district court's decision to quash or enforce an EEOC subpoena is subject to de novo review.").

56. *See, e.g.*, Pepper v. United States, 562 U.S. 476, 487 (2011) (Court appointed an *amicus curiae* to defend court of appeal's judgment).

57. McLane Co. v. EEOC, 137 S. Ct. 1159, 1167 (2017).

58. *Id.* at 1170.

59. *Id.* at 1168.

60. *Id.* at 1167.

61. 136 S. Ct. 1769 (2016).

62. *Id.* at 1774.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1775.

68. *Id.* at 1776.

The Supreme Court rejected both proposed interpretations and held that Green had timely presented his claim.[69] The Court reasoned that the employee's constructive discharge claim was not complete until the employee actually resigned.[70] However, the Court left open the factual question of when Green actually resigned, i.e., the agreed-upon date of resignation (as the government argued) or the date Green submitted his formal letter of resignation (as Green maintained).[71] The ruling avoids the anomaly of employees filing constructive discharge claims before actually resigning, which could have been a trap for unwary employees.[72]

In the cases discussed above, the government acted as the employer or as an employment law enforcer. Its further role in interpreting federal statutes was at issue in *Encino Motorcars, LLC v. Navarro*.[73] The Fair Labor Standards Act provision at issue exempts from overtime any "salesman . . . primarily engaged in selling or servicing automobiles . . . ."[74] Over time, the Department of Labor has repeatedly switched positions over whether the exemption includes "service advisors" who sell automobile service.[75] The regulation challenged before the Supreme Court provided that service advisors were not exempt.[76]

The Court held that the regulation was not entitled to any deference because the Department had failed to give a reasoned explanation for switching its regulatory position.[77] But the Court stopped there and declined to decide the ultimate question of how to read the statute itself, leaving that to the lower courts.[78] The decision has little immediate effect, leaving the overtime eligibility of service advisors uncertain. But more broadly, *Encino* signals to federal agencies that their decisions to reverse significant policies will not receive substantial deference unless accompanied with a serious explanation for the change. That holding may come into play as the Trump administration decides whether to reverse an array of Obama-era regulations.

IV. ERISA Decisions

Deference to the government's position is also at issue in a series of ERISA cases upcoming in the 2016–2017 term, including *Advocate*

69. *Id.* at 1782.
70. *Id.*
71. *Id.*
72. *Id.* at 1781–82.
73. 136 S. Ct. 2117 (2016).
74. 29 U.S.C. § 213(b)(10)(A) (2012).
75. *Encino*, 136 S. Ct. at 2122–24.
76. *Id.* at 2123.
77. *Id.* at 2126.
78. *Id.* at 2127.

Health Care Network v. Stapleton.[79] A statute provision exempts from ERISA a pension or welfare plan "established and maintained . . . by a church . . . ."[80] For a considerable period of time, various federal agencies have read the exemption to extend far more broadly than plans established directly by churches to include plans established by entities associated or affiliated with churches.[81] For example, Advocate Health Care Network claims the exemption benefit even though it is not a church and has more than 33,000 employees and $4.6 billion in annual revenues.[82] The employer's effort to secure support for its broad reading of the exemption will depend heavily on how much the Court is willing to defer to an agency's longstanding statutory interpretation.

Two other ERISA cases bear mentioning. *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*[83] involves the recurring issue of subrogation.[84] There, an employee injured in a car accident received benefits from both his ERISA-covered health insurance plan and the driver who caused the accident.[85] The employee spent the money from the health insurance plan.[86] The plan then sued the employee under ERISA, invoking the plan's subrogation provision.[87]

The Court held that the plan could not recover.[88] Under the Court's precedent, the plan could only pursue an "equitable"—not "legal"—remedy.[89] The Court noted that equitable remedies could only attach to specific money, but here the money had been spent.[90] The ruling will require ERISA plans to try to monitor plan participants' pending lawsuits against third-parties for health costs to keep funds paid by the plan segregated, if at all possible.[91]

Preemption, another recurring ERISA issue, was the focus of *Gobeille v. Liberty Mutual Insurance Co*.[92] A Vermont statute intended

79. Stapleton v. Advocate Health Care Network, 817 F.3d 517 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 546 (2016).

80. *Stapleton*, 817 F.3d. at 522; *see also* 29 U.S.C. § 1002(33)(A); 33(C)(i) (2012).

81. *Stapleton*, 817 F.3d. at 530; *see also* Jeffrey A. Herman, *Resolving ERISA's "Church Plan" Problem*, 31 A.B.A. J. LAB. & EMP. L. 231 (2016).

82. *Stapleton*, 817 F.3d. at 520.

83. 136 S. Ct. 651 (2016).

84. *Id.* at 655 (a subrogation clause requires "a participant to reimburse the [employee benefits] plan if the participant later recovers money from the third party for his injuries").

85. *Id.* at 655–56.

86. *Id.*

87. *Id.*

88. *Id.* at 655.

89. *Id.* at 657; *see also* US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1542 (2013); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 363 (2006); Great–West Life & Annuity Ins. v. Knudson, 534 U.S. 204, 217 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).

90. *Montanile*, 136 S. Ct. at 659.

91. *Id.*

92. 136 S. Ct. 936 (2016).

to help reduce health care costs by creating a database cataloging health care expenditures.[93] The statute required health insurers, including ERISA plans, to provide the state with a variety of data, including health care claims payments.[94] The insurer alleged the Vermont statute was barred by an a ERISA provision that preempts state laws that "relate to" an ERISA plan.[95]

The Court struck down the statute.[96] The opinion stresses that ERISA itself imposes significant recordkeeping requirements on covered plans—requirements that the Court viewed as central to the statutory scheme.[97] The Court concluded that the prospect that states could adopt inconsistent reporting regimes—indeed, potentially fifty different regimes—created too great a risk of interference with the federal scheme.[98]

Interestingly, the Obama administration argued that the statute was not preempted, taking the view that it would facilitate implementation of the Affordable Care Act.[99] In response, Justice Breyer suggested, in a separate opinion, that the federal government could require production of the data itself and provide it to the states.[100]

Conclusion

Although the Supreme Court set no precedent in *Friedrichs* or *Zubik*, the Court issued important decisions regarding the First Amendment and ERISA that clarified important procedural issues for employment and labor litigants. The 2016 Term became far more interesting when the Justices announced they will consider the legality of arbitration clauses in employment contracts that bar class-wide arbitration. Three recently granted petitions for certiorari present this question,[101] on which the circuit courts are currently divided.[102]

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93. *Id.* at 940.
94. *Id.* at 941.
95. *Id.* at 943.
96. *Id.* at 947.
97. *Id.*
98. *Id.*
99. Brief for the Unites States as Amicus Curiae Supporting Petitioner at 2–4, 10, Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016) (No. 14-181).
100. *Gobeille*, 136 S. Ct. at 949 (Breyer, J., concurring).
101. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 2017 WL 125664 (U.S. Jan. 13, 2017); Morris v. Ernst & Young, 834 F.3d 975 (9th Cir. 2016), *cert. granted,* 2017 WL 125665 (U.S. Jan. 13, 2017); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *cert. granted,* 2017 WL 125666 (U.S. Jan. 13, 2017); *see also* Patterson v. Raymours Furniture Co., 2016 U.S. App. LEXIS 16240 (2d Cir. 2016), *petition for cert.* (U.S. filed Sept. 22, 2016) (No. 15-2820).
102. *See* Brief for Respondent Murphy Oil USA, Inc. in Support of Granting the Petition for a Writ of Certiorari at 1, NLRB v. Murphy Oil USA, Inc., No. 16-307 (U.S. filed Nov. 10, 2016) (arguing that the Supreme Court should grant certiorari because of circuit splits).

The Obama administration and some lower courts took the position that such provisions violate the Norris-LaGuardia Act and the National Labor Relations Act because they violate employees' statutory right to act collectively.[103] If the government's view changes, as anticipated in the Trump administration, the issue will be presented to the Court very differently. The implications of a ruling either way would obviously be sweeping.

103. *See, e.g.*, *Epic Sys. Corp.*, 823 F.3d at 1154–56 (employer arbitration provision prohibiting employees from seeking collective, representative, or class legal remedies violated National Labor Relations Act).