

JUDGES & THE COURTS

FACT SHEET

Supreme Court Preview: 2012-2013 Term

(October 2012)

A number of cases that the Supreme Court will hear in its new 2012-2013 Term could have a significant impact on women's legal rights, while the implications of last Term's decisions for women continue to reverberate. This Term, the Court's review of affirmative action policies in state university admissions presents the troubling possibility that a majority of the Court will vote to turn back the clock, given that Justice O'Connor, a key vote in the Court's 2003 decision upholding affirmative action in admissions (and its author), has since left the Court. The progress of women in education, as well as minorities, has been helped over the years by the availability of affirmative action programs. In addition, women's advocates are participating in cases interpreting the Court's prior precedents on protections against sexual harassment and raising issues related to class action litigation. Given the success of corporate interests before the Court during Chief Justice Roberts' tenure, to the detriment of individual rights, these cases bear close scrutiny. Finally, in addition to the cases that the Court has already decided to review, the Court is considering whether to hear cases challenging the constitutionality of Section 5 of the Voting Rights Act and cases implicating marriage equality, both of which have the potential to affect women in profound ways.

Even as this term begins, significant questions remain about the ramifications of last Term's final decision, the Court's 5-4 split in *National Federation of Independent Business, et al v. Sebelius*, which largely upheld the constitutionality of the Affordable Care Act (ACA). Some are pressing for that decision to be interpreted to allow new constitutional challenges to important social programs, predicated on the portion of the Court's decision permitting states to refuse to

participate in the expansion of the Medicaid program set out in the ACA. As a practical matter, with respect to the ACA itself, it also remains to be seen whether states will in fact refuse to participate in the Medicaid expansion as a result of the Court's decision; state refusals to participate would harm the many women who would otherwise receive health coverage as a result of the ACA Medicaid expansion.

Affirmative Action

In 2003, in *Grutter v. Bollinger*, the Court upheld the use of race-conscious affirmative action in admissions to the University of Michigan Law School by a 5-4 vote. Justice O'Connor cast the deciding vote and wrote the majority opinion, which held that consideration of race in public university admissions could properly forward the state's compelling educational interest in diversity.

In *Fisher v. University of Texas at Austin*, a divided panel of the Fifth Circuit ruled that the University of Texas's undergraduate admissions policy, which uses race as one of multiple factors in making some admissions decisions, was constitutional under *Grutter*. The Fifth Circuit denied rehearing en banc, and the Supreme Court granted certiorari. The case will be argued in October. Because Justice Kagan is recused, based on her involvement with the case while she served as United States Solicitor General, it is possible that no opinion will garner a majority of the Court. (If the Justices are equally divided, the Fifth Circuit's decision will stand.)

Fisher is the first case in which the Court has addressed affirmative action in higher education during Chief Justice Roberts' tenure. The Court's 2007 decision in

Parents Involved in Community Schools v. Seattle struck down race-based admissions decisions in public elementary and high schools, although Justice Kennedy's concurrence preserved school districts' ability to make admissions decisions in order to increase and further diversity. Affirmative action policies intended to promote not only racial but also gender diversity are particularly necessary in vocational and higher education—by example, by eliminating barriers to women's entrance into historically male-dominated fields, such as engineering and computer science.

The Center submitted an *amicus* brief in support of the University of Texas, explaining that an educational experience in a diverse community of learners can dispel both race and gender stereotypes, which are often intertwined, and that this diversity is essential to preparing students to succeed as leaders in communities and businesses. Additionally, the Center described the stereotypes faced by women of color in higher education and in the workplace, demonstrating that affirmative action is a necessary tool to create the diverse educational environment that breaks down these stereotypes.

Sexual Harassment

The 1998 cases *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* held that an employer is vicariously liable for harassment by an employee's supervisor in cases brought under Title VII of the Civil Rights Law of 1964, without any need to show that the employer was negligent in allowing the harassment to occur. (The Court in *Faragher* further provided that the employer may assert an affirmative defense that the employer provided a reasonable system for complaints and the employee unreasonably failed to use it.)

In ***Vance v. Ball State***, the Supreme Court this Term will tackle the question of whether an employer is vicariously liable for harassment by a plaintiff's immediate or day-to-day supervisor, as opposed to a supervisor who has the ability to hire and fire her. In *Vance*, the Seventh Circuit ruled that under Title VII, a harasser must have the power to hire or fire the victim for the company to be vicariously liable for the harassment. The Seventh Circuit's ruling in *Vance* stands in stark opposition to the Second, Ninth, and Fourth Circuits, as well as the U.S. Equal Employment Opportunity Commission's position, all of which apply a definition of "supervisor" that includes day-to-day and immediate supervisors.

Vance is set for argument in November. This case provides a critical opportunity for the Supreme Court to clarify the scope of Title VII's protections for women and minorities who face harassment on the job, which remains a problem of enormous scope—for example, one recent study indicated that over a quarter of female doctors have experienced harassment by a supervisor. The National Women's Law Center joined an *amicus* brief arguing that the Seventh Circuit's narrow definition of "supervisor" is contrary to Supreme Court precedent and the ordinary meaning of the word and that the limited view of who constitutes a supervisor ignores the realities of workplace harassment and the intent of Title VII.

Class Actions

Class actions and collective actions are important tools for women workers seeking to enforce their rights because when workers stand together, they do not face the same risk of retaliation from their employer, are less burdened by the costs of litigation, and are more able to obtain legal representation. Successful class actions also result in employer-wide solutions to employer-wide problems. But in 2011, the Court made it significantly more difficult for workers to band together as a group to challenge employment discrimination with its ruling in *Walmart v. Dukes*.

This Term, in ***Comcast v. Behrend***, the Supreme Court will take on another case involving class actions. The question presented in *Comcast* is whether the district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis. The Third Circuit ruled that plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof at the class certification stage, but that courts need not resolve the question of whether that evidence was sufficient until the merits phase of the litigation.

This case is important for workers—especially women—who wish to sue their employers as a class. If the Supreme Court overturns the Third Circuit's decision, yet another hurdle will confront workers seeking to litigate their claims, but for whom bringing lawsuits as individuals is impracticable. *Comcast* is calendared for argument in November.

The Court will also consider issues related to class actions in ***Genesis Healthcare Corp v. Symczyk***. In this case, which will be heard in December, the Court will address whether a defendant can stop a collective action in its tracks by offering to fully satisfy the claims of the named plaintiff in a Fair Labor Standards Act (FLSA) collective action before other plaintiffs have opted in. (“Collective actions” are the means by which plaintiffs can come together as a group to challenge employer policies under FLSA, the Equal Pay Act, and the Age Discrimination in Employment Act.) The defendants below (petitioners before the Supreme Court) argue that the offer to the named plaintiffs eviscerates a court’s jurisdiction under Article III in the specific context of FLSA litigation. The Third Circuit ruled against defendants in the litigation below.

The Center intends to submit a joint *amicus* brief with the Service Employees International Union in support of plaintiffs below (respondents in the Supreme Court), describing the critical protections the FLSA and the Equal Pay Act provide and were intended to provide for working women, and in particular, women in the nursing profession like Ms. Symczyk. A decision allowing a settlement offer to the named plaintiff to moot a case would make it significantly harder for women and all workers to sue their employer as a group for violations of the FLSA, by essentially allowing employers to continuously “buy off” named plaintiffs until the statute of limitations runs.

Looking Ahead

Voting Rights

In 2009, in *Northwest Austin Municipal Utility District No. One v. Holder*, the Court declined to directly address the ongoing constitutionality of Section 5 of the Voting Rights Act (“VRA”), but flagged the constitutional question as an issue of concern. Section 5 of the VRA prohibits certain “covered jurisdictions”—those that have a history of racial discrimination in voting—from making any changes to their voting procedures without first demonstrating to the Attorney General or a three-judge district court that the change “neither has the purpose nor the effect of denying or abridging the right to vote on account of race or color.”

This Term, the Court has been asked to address the constitutionality of Section 5 in two cases. The first

case, *Nix v. Holder*, involves a change in policy in the small town of Kinston, N.C., under which references to candidates’ party affiliation would have been removed from ballots. The D.C. Circuit Court of Appeals found that the issue of constitutionality was moot, accepting the U.S. Department of Justice’s contention that the proposed change was not premised on race, based on new information that it received after the litigation had commenced. The town has petitioned for Supreme Court review, arguing that the Justice Department’s actions were strategic attempts to moot the suit and that the Court should examine the constitutionality of Section 5. In *Shelby County v. Holder*, in which a petition for review has also been filed, the D.C. Circuit found that Congress did not exceed its constitutional authority when it reauthorized Section 5.

These cases are important to women, especially minority women, because Section 5 also provides authority for the Justice Department to challenge state laws that, for example, require voters to produce particular forms of identification or require states to remove certain categories of individuals from voter registration rolls in covered districts. Women are disproportionately impacted by these requirements because married women who change their names may lack voter ID with their new name on it. A study found that of voting-age women, only 66% have documents reflecting proof of citizenship and only 48% have birth certificates with their current legal names. Additionally, 18% of people who are college-age lack a photo ID with their current address and legal residence, and women make up over half (60%) of all college students. Women also make up a greater percentage of the elderly, and older voters are far less likely to have state-issued voter IDs. The Court will decide later this fall whether or not it will review either of these two cases.

Marriage Equality

In addition to the cases that the Court has already decided to hear this Term, the Court has been asked to review several cases involving the constitutionality of the federal refusal to recognize same-sex marriage. The federal Defense of Marriage Act (DOMA), which provides that federal law only recognizes marriages between one man and one woman, affects same-sex couples validly married under state law (or the law of other countries, like Canada, that allow same-sex marriage) in a variety of ways: it prevents same-sex spouses from filing joint federal tax returns, places an additional income tax burden on individuals who receive health insurance coverage for their same-sex spouses or part-

ners through their employers, limits compensation to same-sex spouses whose spouse was killed in combat, precludes the receipt of spousal Social Security benefits, and much more.

The First Circuit has recently ruled that Section 3 of DOMA is unconstitutional. At the beginning of July, a petition was filed with the Supreme Court seeking review of this decision, and the Court will decide whether or not to review it in the fall. (In addition, the Court was asked to review the decision by the Ninth Circuit Court of Appeals striking down Proposition 8, which amended California's constitution to ban same-sex marriage, as violating the Equal Protection Clause of the U.S. Constitution, but the Court declined to take that appeal.) These cases are important to women, not only because they implicate federal recognition of legal marriages of LGBT women and the right of LGBT women to marry under state law, but also because they have

the potential to affect the scope of the Equal Protection Clause for LGBT individuals and women more generally.

The decisions of the Court have a profound, and lasting, impact on the women of this nation for generations to come. Women will be watching the decisions that the Court will make during the 2012-2013 term.

To read the *amicus* briefs that the Center wrote or joined in the 2012-2013 Term to date:

- ***Fisher v. University of Texas at Austin***, http://www.nwlc.org/sites/default/files/pdfs/nwlc_fisher_final_brief_08.13.12.pdf.
- ***Vance v. Ball State***, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-556_petition-eramcunpwf.authcheckdam.pdf.