

Recent Supreme Court Developments

By

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During its 2000-2001 session, the United States Supreme Court decided a number of significant cases involving labor and/or employment law issues. In this review, I will address several: three dealing with traditional labor law, two involving sovereign immunity and the Eleventh Amendment and one involving the Americans with Disabilities Act. I will address one National Labor Relations Board decision as well.

There were a number of developments in the area of traditional labor law (i.e., the National Labor Relations Act (“NLRA”) and other laws dealing with unions and the union-management relationship) over the past year. In Epilepsy Foundation of Northeast Ohio,¹ the National Labor Relations Board (“NLRB” or the “Board”) found that so-called Weingarten rights of unionized employees also apply to employees not represented by a union. Weingarten rights allow unionized employees to insist on union representation during an investigatory interview by the employer, provided the employee “reasonably believes” the interview “might result in disciplinary action.”²

¹ 331 NLRB No. 92 (2000).

²Weingarten rights grew out of a 1975 Supreme Court Decision, NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975). These rights have protected unionized employees since 1975, although the precise parameters of the rights have been refined over time. For example, they right only apply if an employee specifically requests representation, employers are not required to advise employees of this right and it applies only to “investigatory” meetings, not to meetings when the employer merely wishes to communicate a decision the employer has reached already regarding a disciplinary matter.

Since the Weingarten decision, the NLRB has addressed the applicability of Weingarten rights to employees who are not unionized several times. In 1982, the Board held that Weingarten rights did apply to nonunion employees.³ In the 1984, however, the NLRB reversed its position and held nonunion employees were not entitled to Weingarten rights⁴ and in 1988, the Board reiterated its holding that Weingarten rights are confined to unionized employees only.⁵

In the Epilepsy Foundation decision, the NLRB concluded that its earlier rulings in du Pont and Sears cases were inconsistent with the Supreme Court's rationale in the Weingarten case and with the purposes of Section 7 of the NLRA, which guarantees employees the right to engage in concerted activity for their mutual aid and protection. The NLRB explained that the right to representation recognized in the Weingarten case was grounded in Section 7 of the NLRA, which guarantees the right of employees to engage in concerted activity for purposes of mutual aid and protection. Flowing from employees' Section 7 rights is the right to act together to address the imposition of unjust discipline. Weingarten rights do not arise from Section 9 of the Act, which recognizes the right of unions to act as the employees' exclusive bargaining representative, but from Section 7. According to the Board, since Section 7 rights apply to all employees, whether unionized or not, Weingarten rights to representation should apply to nonunionized employees as well.

³Materials Research Corporation, 262 NLRB 1010 (1982).

⁴Sears Roebuck & Co., 274 NLRB 230 (1984).

⁵E.I. du Pont de Nemours & Co., 289 NLRB 627 (1988)

In another significant labor law case, N.L.R.B. v. Kentucky River Community Care Inc., et al.,⁶ the Supreme Court held that the Board's test for determining whether a worker is a "supervisor" under §2(11) of the NLRA was flawed. According to the Act, an individual employed as a "supervisor," as defined in §2(11), is *not* considered an employee under §2(3) and is therefore entitled to the Act's protections (e.g., supervisors can be discharged for joining unions, are not entitled to strike, etc.).

Section 2(11) of the NLRA states:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁷

In Kentucky River, the Kentucky State District Council of Carpenters petitioned the NLRB in 1997 to represent a unit of professional and nonprofessional employees at the employer's Caney Creek Development Complex. The employer objected to the inclusion of Caney Creek's six registered nurses in the bargaining unit, arguing that they were supervisors under the Act. The regional director found that the employer had not carried its burden in showing that the nurses were supervisors, included them in the bargaining unit and directed an election

⁶121 S. Ct. 1861 (2001).

⁷29 U.S.C. §152(11) (2001).

The union won the election and was certified as the employees' bargaining representative but the employer refused to bargain. The Board's general counsel filed an unfair labor practice charge against Kentucky River for refusal to bargain and the Board granted summary judgment to the general counsel.⁸ The Sixth Circuit, however, refused to enforce the bargaining order as it applied to the nurses.⁹ The circuit court first held that the Board had erred in placing the burden of proving supervisory status on the employer rather than on the general counsel and, more importantly, ruled that the Board had erred in finding that the nurses were employees rather than supervisors. The Supreme Court agreed to hear the case.

The Supreme Court first reversed the Sixth Circuit and agreed with the Board that, on the question of supervisory status, the burden of proof is on the party seeking to exclude individuals as supervisors (usually the employer). According to the Court: "the Board's rule is supported by 'the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'"¹⁰ In other words, since it was the employer seeking to exclude certain individuals as supervisors, the employer had the burden of proof (all nine justices agreed).

On the question of the nurses' supervisory status and the Board's test for determining whether employees are supervisors generally, the Court, in a 5 to 4 decision, affirmed the Sixth Circuit's reversal of the NLRB. The Court noted that Section 2(11) implies a three part test for determining whether individuals are supervisors under the Act: The Act deems individuals to be "supervisors" if: (1) they hold the authority to exercise 1 of 12 supervisory functions listed §2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires

⁸Kentucky River Community Care, Inc., 323 NLRB No. 209 (1997). The Board granted summary judgment to the General Counsel pursuant to regulations providing that, absent newly developed evidence, the propriety of a bargaining unit may not be re-litigated in an unfair labor practice hearing predicated on a challenge to the representation determination. 29 CFR §102.67(f) (2000).

⁹Kentucky River Community Care, Inc. v. NLRB, 193 F.3d 444 (6th Cir. 1999).

¹⁰The Court cited *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)

the use of independent judgment; and, (3) their authority is held "in the interest of the employer." In Kentucky River, the issue was whether the nurses used "independent judgment" (number (2) above). In deciding that the nurses were not supervisors, the Board had said that employees do not use "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." In other words, pursuant to established precedent, the Board made a distinction between judgment exercised on behalf of management, which the Board found as warranting supervisor status and professional or technical judgment in accordance with employer specified standards, which the Board held not to be supervisory.

Justice Scalia, in an opinion joined by Justices Rehnquist, O'Connor, Kennedy and Thomas, found the Board's distinction to be without basis in law. Scalia wrote: "the first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence." Acknowledging that the Board has the discretion to determine the degree to which an employee's exercise of judgment places her within the exemption, Scalia nonetheless pointed out that the text of Section 2(11) focuses on the "clerical" or "routine" nature of the judgment, not whether it is "professional or technical." "Let the judgment be significant and only loosely constrained by the employer; if it is 'professional or technical' it will nonetheless not be independent," he said. "What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?' " he asked.

Scalia further criticized the Board for applying its professional judgments exclusion only to the direction of less-skilled workers. While all the supervisory functions listed in the Act -- such as hiring, promoting, and disciplining -- require the use of independent judgment, "the Board would apply its restriction upon 'independent judgment' to just 1 of the 12 listed functions: 'responsibly to direct.'" Nothing in the text of the statute justifies this "asymmetrical limitation," he said.

Justice Stevens wrote a dissenting opinion which was joined by justices Souter, Ginsburg and Breyer. Stevens said that the Board's interpretation of "independent judgment" was entitled to deference because it was rational and consistent with the NLRA. In addition, Stevens charged, a broad reading of the term "supervisor" (i.e., that endorsed by the majority) could essentially nullify the act's coverage of professional employees.

In two other cases involving labor relations, Eastern Associated Coal Corp. v. UMW, Dist. 17¹¹ and Major League Baseball Players Association v. Steve Garvey,¹² the Supreme Court addressed the issue of a court's role in reviewing arbitration awards. In Eastern Associated Coal Corp. v. UMW, Dist. 17, James Smith worked for Eastern as a truck driver subject to Department of transportation (DOT) regulations requiring random drug testing of workers engaged in "safety sensitive" tasks. After each of two occasions on which Smith tested positive for marijuana, Eastern discharged him. The union took the matter to arbitration each time, however, and the arbitrator concluded that the drug use did not amount to "just cause" and ordered the employer to reinstate Smith.¹³ After the second arbitration, Eastern filed suit to vacate the arbitrator's award on the grounds that the arbitrator's award violated public policy, but the district court refused to vacate the award because Smith's conditional reinstatement "did not violate the strong regulation-based public policy against drug use by workers who perform safety-sensitive functions."¹⁴ The Fourth Circuit affirmed.¹⁵

The Supreme Court affirmed the decision to uphold the award in an opinion written by Justice Breyer,¹⁶ Breyer noted that the "public policy" exception only allows a reviewing court to overturn an arbitrator's award only if that award runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests. Breyer stated: "To put the question more specifically, does a contractual agreement to reinstate Smith with specified conditions, run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?" Then, after discussing several potential public policy arguments that might warrant overturning the reinstatement award, Breyer concluded: "We recognize that reasonable people can

¹¹531 U.S. 57 (2000).

¹²121 S. Ct. 1724.

¹³In the second case, the arbitrator ordered Smith to comply with a list of conditions and stated that his failure to comply would result in his immediate discharge.

¹⁴Eastern Associated Coal Corp. v. UMW, Dist. 17, 66 F. Supp. 2d 796, (S.D. W. Va. 1998).

¹⁵Eastern Associated Coal Corp. v. UMW, 188 F.3d 501(4th Cir. W. Va. 1999).

¹⁶All nine justices agreed that the award should be enforced but only seven joined in Justice Breyer's opinion. Justice Scalia wrote a concurring opinion that was joined by Justice Thomas.

differ as to whether reinstatement or discharge is the more appropriate remedy here. But both employer and union have agreed to entrust this remedial decision to an arbitrator. We cannot find in the Act, the regulations, or any other law or legal precedent an ‘explicit,’ ‘well defined,’ ‘dominant’ public policy to which the arbitrator's decision ‘runs contrary.’ We conclude that the lower courts correctly rejected Eastern's public policy claim” (citations omitted).

The one area of disagreement between the majority and the concurring justices concerned the scope of the public policy exception. The majority agreed with Eastern’s position that arbitrators can invoke the public policy exception even if an arbitrator’s award does not specifically violate a specific law. Breyer’s majority opinion stated: “We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.” On this point, Scalia and Thomas disagreed with the majority: “I do not endorse, however, the Court's statement that ‘[w]e agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.’ No case is cited to support that proposition, and none could be. There is not a single decision, since this Court washed its hands of general common-lawmaking authority in which we have refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for the violation of, some positive law” (citations omitted).

In Major League Baseball Players Association v. Steve Garvey,¹⁷ Garvey made a certain claim against the baseball players’ union and when the union denied his claim, Garvey took his grievance to arbitration. When the arbitrator ruled against Garvey, he moved in federal district court to have the award vacated but the district court refused and Garvey appealed to the Ninth Circuit. In (Garvey I)¹⁸ the 9th Circuit reversed the district court. The appeals court acknowledged that judicial review of an arbitrator's decision in a labor dispute is limited but said that the arbitrator's refusal to credit a letter offered into evidence by Garvey was "inexplicable" and "border[ed] on the irrational." Based on that, the circuit court reversed the district court and remanded the case, directing the court to vacate the ruling in favor of the union. Instead of vacating the ruling, however, the district court remanded the case to the arbitration panel for further hearings and Garvey again appealed. In its second opinion (Garvey II),¹⁹ the

¹⁷121 S. Ct. 1724 (2001).

¹⁸ Garvey v. Roberts, 203 F. 3d 580, 583 (9th Cir. 2000).

¹⁹Garvey v. Major League Baseball Players Ass'n, 2000 U.S. App. LEXIS 31918 (9th Cir. 2000).

Ninth Circuit ruled that, as a result of its ruling in *Garvey I*, no further hearings were warranted and the district court's only option was to remand the case to the arbitration panel with instructions to enter an award for *Garvey*. The Supreme Court granted certiorari.

In a per curiam opinion, the Supreme Court reversed. The Court stated: "Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement" citations omitted. Further, citing *Eastern Assoc. Coal Corp. v. Mine Workers*, (discussed above)²⁰ the court stated if an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that a "court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision." When a court weighs the merits of a grievance, it usurps the role of the arbitrator, the court said. Under prior precedent, a court must not foreclose further arbitral procedures by settling the case on its merits, even if an arbitrator's "procedural aberrations" rise to the level of affirmative misconduct, the court said. The Ninth Circuit was aware of these principles, the high court said, "but its application of them is nothing short of baffling." The appeals court's opinions reveal that it overturned the arbitrator's decision because it disagreed with the arbitrator's factual findings. "But even 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority," the court said.

In addition, by resolving the merits of the parties' dispute in *Garvey II*, the appeals court violated established law, which "ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determination, no matter how erroneous the arbitrator's decision." "The Court of Appeals usurped the arbitrator's role by resolving the dispute and barring further proceedings, a result at odds with ... governing law," the high court held, reversing the Ninth Circuit and remanding the case for further proceedings.

Justice Stevens dissented, criticizing the court for disposing of the case without further briefings by the parties or oral arguments. He argued that Supreme Court precedent does not provide guidance as to what standards a federal court should use in assessing whether an arbitrator's behavior constitutes an attempt to "dispense his own brand of industrial justice," or how a court should deal with an arbitrator's ruling that goes beyond the erroneous to the inexplicable.

²⁰531 U.S. 57 (2000).

Moving away from the realm of labor law, the Supreme Court also handed down two decisions involving the Eleventh Amendment. Kimel v. Florida Bd. of Regents²¹ and Board of Trustees v. Garrett.²² The cases held that the Eleventh Amendment prevents a person from suing the state for damages under the ADEA and the ADA, respectively.

Kimel involved a suit filed by employees of several state universities in Florida against the Florida Board of Regents claiming that the Board and its policies discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act (“ADEA”). Instead of defending the claim on its merits, the defendants asked the court to dismiss the case on the grounds that, since the defendant was a state agency, the lawsuit violated the Eleventh Amendment of the U.S. Constitution:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In an opinion written by Justice O’Connor, the U.S. Supreme Court agreed with the defendant’s argument and held that the case should be dismissed because the Eleventh Amendment grants the states immunity from such lawsuits. The Court acknowledged that Congress had intended individuals to be able to sue states and state agencies for violating the ADEA but held that Congress lacked the power to abrogate the Eleventh Amendment with respect to age discrimination.

In reaching its decision, the Court first pointed that the ADEA constitutes a valid exercise of Congress’ Article I Commerce Clause power, but stated that Congress’ powers under Article I do not include the power to subject States to suit at the hands of private individuals. The Court went on to note that, while Section 5 of the

²¹ 528 U.S. 62 (2000).

²²531 U.S. 356 (2000).

Fourteenth Amendment does grant Congress the authority to abrogate the States' sovereign immunity, the ADEA is not "appropriate legislation" under §5 of the Fourteenth Amendment.

Justice Thomas and Justice Kennedy concurred with the result but dissented from part of the Court's opinion. They concluded that Congress did not even intend to allow lawsuits against the states under the ADEA.

Justices Stevens, Souter, Ginsburg and Breyer dissented. They disagreed with the majority and felt that Congress' powers under Article I do include the power to subject States to suit at the hands of private individuals.

Garrett involved two cases, both of which sought damages against the State of Alabama (one against the University of Alabama in Birmingham Hospital and one against Alabama Department of Youth Services) under the ADA. The holding in Garrett, dismissing the plaintiffs' lawsuits based on the Eleventh Amendment, was hardly a surprise given the decision in Kimel. In fact, the Court cited Kimel many times (although the majority opinion in Garret was written by Chief Justice Rehnquist whereas the opinion in Kimel was written by Justice O'Connor). The only real difference between the two cases was the Court's analysis of whether Section 5 of the Fourteenth Amendment gave Congress the authority to apply the ADA to the states.

The same four Justices (Breyer, Stevens Souter and Ginsburg) dissented in Garret, although this dissent was written by Breyer (the dissent in Kimel was written by Stevens). Breyer's dissent was based on his reasoning that Section 5 of the Fourteenth Amendment gave Congress the authority to apply the ADA to the states.

Finally, the Supreme Court decided another case not directly dealing with employment law but with important ramifications for Title I of the Americans with Disabilities Act of 1990 (ADA). PGA Tour, Inc. v. Casey Martin.²³ Casey Martin is a golfer who suffers from a degenerative circulatory disorder that prevents him from walking golf courses (There was no dispute that his affliction constitutes a disability under the ADA) Upon turning pro, Martin made a request, supported by detailed medical records, for permission to use a golf cart while golfing. PGA executives refused his request and Martin filed suit under Title III of the ADA.²⁴

²³121 S. Ct. 1879 (1991).

²⁴ Martin had filed suit under Title I of the ADA but a the court ruled that he was an independent contractor rather than an employee, making Title I inapplicable.

Title III requires an entity operating "public accommodations" to make "reasonable modifications" in its policies "when . . . necessary to afford such . . . accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . accommodations." After trial, the District Court entered a permanent injunction requiring the PGA to permit Martin to use a cart.²⁵ The Ninth Circuit affirmed, concluding that golf courses are places of public accommodation during professional tournaments and that allowing Martin to use a cart would not "fundamentally alter" the nature of those tournaments.²⁶

The Supreme Court, in a 7 - 2 opinion authored by Justice Stevens, dealt with two questions concerning the application of the ADA: (1) whether the PGA tour was a public accommodation rendering Title III of the Act applicable to Martin and (2) whether the tour was justified in denying Martin the use of a golf cart because its use would "fundamentally alter the nature" of tournaments

First, the Court disposed of the PGA's argument that the ADA did not even protect Martin because he was not a client or a customer and, therefore, was not entitled to the Act's protection. The Court's conclusion rested on the fact that the legislative history of the phrase "public accommodation" indicates that the term should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to those without disabilities. Further, the majority was unpersuaded by the Tour's argument that allowing Martin's claims would blur the distinction between Article III (the public accommodations title) and Article I (the employment title).

Then the court held that allowing Martin to use a golf cart would not "fundamentally alter the nature" of the Tour. The court dealt with two ways in which an accommodation might be a "fundamental alter[ation]:" (1) It might alter such an essential aspect of golf, e.g., the diameter of the hole, that it would be unacceptable even if it affected all competitors equally; or (2) a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and therefore fundamentally alter the character of the competition. The Court was not

²⁵Martin v. PGA TOUR, Inc., 984 F. Supp. 1320 (D. Or. 1998).

²⁶Martin v. PGA TOUR, Inc., 204 F.3d 994 (9th Cir 2000).

persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense. The Court noted that the use of carts is not inconsistent with the fundamental character of golf, the essence of which has always been shot-making. The walking rule contained in petitioner's hard cards is neither an essential attribute of the game itself nor an indispensable feature of tournament golf.

Justice Scalia filed a dissenting opinion that was joined by Justice Thomas. The dissenters disagreed with both of the Court's holdings. First, they pointed the Court's broad interpretation of Title III would enable every employee and independent contractor of every place of public accommodation to come within Title III, even if the alleged discrimination is really employment discrimination. They felt that the majority's "interpretation would make a muddle of the ADA as a whole." The dissent went on to address the Court's holding on the second question. In a sharply worded opinion, Justice Scalia objected to the Courts conclusion that allowing Martin to use a cart would not " fundamentally alter the nature" of golf. Essentially, the dissent felt that the right to determine what was (not) a "fundamental" alteration to golf belonged to the PGA executives and that the Court had no right to dispute the PGA executive's conclusion on this.

In summary, there were a number of significant developments in labor and/or employment law over the past year. Nevertheless, while the seven cases discussed above all were important, none really represents a fundamental change. At least five of the six Supreme Court cases discussed were important rulings but, for the most part, continued Supreme Court trends that been established already.

The decision in Kentucky River Community Care continues the Court's trend of expanding the scope of §2(11), thereby limiting the number of people entitled to the protections of the NLRA. The decisions in Eastern Associated Coal Corp. v. UMW, Dist. 17 and Major League Baseball Players Association v. Steve Garvey continue the deference the Court has shown to labor arbitration since the famous "Steelworkers Trilogy" of 1963. Similarly, the decisions in Kimel and Garret continue the Rhenquist Court's deference to states and states' rights. The decision in Epilepsy Foundation is also not a major surprise, given the composition of the current NLRB. Of the cases discussed, the only one that might be deemed a surprise in the Martin decision. Then again, with little prior precedent in the area, the outcome was not really susceptible of prediction.