

Supreme Court Update on Employment Cases

By Joëlle Khouzam

The U.S. Supreme Court has been busy deciding or accepting to hear cases of note for employers. In the first, *Rent-a-Center West, Inc. v. Jackson*, an arbitration provision in an employment agreement required claims or disputes among the parties to be arbitrated, and specifically provided that enforceability of this arbitration clause could only be submitted to an arbitrator. The trial court affirmed the agreement's language about who determines enforceability. The Ninth Circuit Court of Appeals reversed, holding that a court must decide questions of unconscionability and then allow the arbitrator to decide the case on the merits if the agreement were enforceable. The Supreme Court ruled that if the entire agreement's enforceability is at issue, the arbitrator considers all question; however, where only the arbitrability provisions are at issue, a district court will preliminarily consider that issue.

The second case addresses an employee's privacy expectation in text messages. In *Quon v. Arch Wireless Operating Co.*, four employees brought suit against the Ontario, California Police Department and the city's text messaging service provider, for violating their reasonable expectation of privacy in text messages sent over the city pager system. The police department's policy stated that employee email use was limited to City business, that email was subject to periodic review, and that employees had no expectation of privacy. But it did not expressly address text messages. When overcharges were initially detected, the employees' supervisor told the employees to pay for it or he would have to audit the messages and determine the number of personal texts. For several months, the employees paid the supervisor for overcharges. Following excessive overcharges, Internal Affairs contacted the text service provider, who sent hard copies of all the texts sent and received from specific numbers. Internal Affairs' audit found thousands of personal email, many of which were sexually explicit. The four employees sued for violation of the Stored Communications Act and the Fourth Amendment.

The California trial court held that the text service provider violated the Act because it released archived text messages to the subscriber, not the intended recipient of the communication. The appellate court agreed and also held the city violated the officers' constitutional privacy right, finding the search unreasonable and that users of text messaging services have a reasonable expectation of privacy in the text messages stored by the provider. The court noted that the supervisor's conduct in requesting payment for overcharges strengthened the employees' expectation of privacy. The court noted that if the city had made clear that the email policy applied to text messages and had the "operation reality" in the workplace confirmed that policy, the employees would not have had a reasonable expectation of privacy.

The third case involved the so-called "cat's paw" doctrine, which gets its name from a 17th century poem about a monkey who persuaded a cat to pull chestnuts out of a fire for him, causing the cat to get burned. As that theory applies to employment law, it seeks to hold an employer liable for discrimination by an employee who does not make the actual job decision but influences the one who does. In *Staub v. Proctor Hospital*, an employee alleged he was dismissed for being in the Army Reserves, in violation of the employment laws that protect service members.

Mullaly, the second-in-command of Staub's department resented his involvement in Reservist activities, made anti-Reservist remarks, and scheduled him for weekends when he was in training. Staub was also

disciplined for insubordination, based largely on reports made by Mullaly. He was ultimately terminated by a company vice president, who had no animus against Staub or his activities, based on further allegations of insubordination and of a history that Staub was difficult to work with which predated Mullaly's management.

At trial, Staub attempted to demonstrate that Mullaly's animus influenced the ultimate decisionmaker. The jury found for Staub, but the court of appeals reversed, finding the lower court erred in admitting evidence of the cat's paw theory. The court found there was not "blind reliance" on the part of the vice president on Mullaly's unlawful animus and she thus did not have a "singular influence" over the decision-making by the manager. In other words, though anti-military animus may have been an influence, the plaintiff's other problems could have given rise to his termination. It remains to be seen if the Supreme Court will affirm this narrow interpretation of the cat's-paw doctrine.

Finally, a case heard by a Tennessee District Court (which is in the same appellate jurisdiction as Ohio's federal courts), is notable for its holding that the employer must not only have a sexual harassment policy and make it available to all employees, but it must also actively train employees to be able invoke defenses in harassment suits. In *Bishop v. Woodbury Clinical Laboratory*, the court reminded employers that the Faragher/Ellerth defense (referring to prior Supreme Court decisions on this subject) is available to employers sued for vicarious liability in a harassment case only when the employer can prove it exercised reasonable care to prevent or correct any harassment but the plaintiff failed to avail herself of the protection of the policy. If successfully asserted, an employer is not liable for damages that a plaintiff could have avoided by reporting the misconduct to the designated person(s). In *Bishop*, the court expanded the Faragher/Ellerth defense requirements, saying a company's policy should "(1) require supervisors to report incidents of sexual harassment, (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy." In that case, although Woodbury provided employees with a handbook policy, there remained a question of fact as to whether training on implementation of the harassment policy was conducted.

These cases underscore the need to have and train employees on policies that reflect a company's evolving technologies, policies, and procedures. For more information about handbooks and training, please contact Joëlle Khouzam or your CPM attorney.