Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 30, ISSUE 16 / MARCH 1, 2016

SUPREME COURT

# After Scalia Death, Outlook Unclear for Some Employment Cases

**By Tricia Gorman, Managing Editor, Westlaw Journals**

The sudden death of Justice Antonin Scalia on Feb. 13 will have a profound impact not only on the makeup of the U.S. Supreme Court but also on pending cases.

Given the possibility that a new justice will not be appointed to the sometimes ideologically divided nine-member court before the current term ends in June, court watchers foresee a number of 4-4 decisions coming.

In the event of a 4-4 tie, the lower court ruling remains in place but no national precedent is set.

"Scalia's death will affect cases that have not yet been argued and those in which arguments were already held but no ruling has been issued," Reuters reported Feb. 14. "Court experts say that any preliminary votes Scalia took on cases already argued will no longer count."

The Reuters report said Justice Scalia's death could "deprive the court's conservative majority of some major wins, but does not guarantee wins for liberal causes."

"In the short term, Justice Anthony Kennedy, a conservative who sometimes sides with the four liberals, will still be the key vote," it said.

Oral arguments have already taken place in several employment-related cases on the Supreme Court's docket. Legal experts see some divisions among the justices in three of the cases that present significant questions for the high court.

## UNION DUES

One of the most significant cases currently before the high court involves public union fees, and it is considered a likely candidate to end in a split decision.

Ten non-union member teachers sued the California Teachers Association in 2013 over fees nonmembers pay in place of standard dues. The teachers say the so-called fair-share fees force them to support union activities they object to, including political activism.

In 2014 the 9th U.S. Circuit Court of Appeals affirmed the trial court's ruling in favor of the union. *Friedrichs et al. v. Cal. Teachers Ass'n et al.,* No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

The questions on appeal were governed by the controlling Supreme Court precedent in *Abood v. Detroit Board of Education,* 97 S. Ct. 1782 (1977), the appeals court said in a brief order.

In *Abood* the high court ruled that a union could not require nonmembers to contribute financially to the union's political causes but approved "agency shop" systems. Under those systems, nonmembers who work in the public sector and object to the use of dues to support union activities can instead pay a fee to support other union efforts.

In oral argument held Jan. 11, the union and state argued that nonmembers need to pay fees in support of the union's negotiating efforts on behalf of all teachers. *Friedrichs et al. v. Cal. Teachers Ass'n et al., No. 14-915, oral argument held* 2016 WL 344760 (U.S. Jan. 11, 2016).

Attorney Joel S. Barras, a partner at Reed Smith LLP in Philadelphia, who was not involved in the case, said Justice Scalia's death likely changes the dynamics of the case.

"The public sector unions are among the greatest benefactors of Justice Scalia's untimely passing," Barras said.

"The anticipated 5-4 decision in *Friedrichs* now seems destined for either a 4-4 split that would uphold the current ruling or a deferral to next year's docket," he said. "In either event, for at least the next couple years, public sector unions can continue to include fair-share fees in their revenue budgets."

## CONSTRUCTIVE DISCHARGE

In another employment case, the high court is set to decide when the limitations period for constructive-discharge claims starts.

Marvin Green, a retired Colorado postmaster, sued the U.S. Postal Service in 2010 for alleged violations of Title VII of the Civil Rights Act. Green, who is black, said the USPS retaliated against him for his complaints of racial discrimination and constructively discharged him by forcing him to retire.

The 10th U.S. Circuit Court of Appeals partially affirmed the trial court's dismissal of the case, agreeing that Green had filed the constructive-discharge claim too late. *Green v. Donohoe*, 760 F.3d 1135 (10th Cir. 2014).

The appeals court said the clock for filing the claim started at the last discriminatory act by the employer, not with Green's resignation.

During oral arguments Nov. 30, both Green's attorney and the Justice Department argued for the resignation date rule. They disagreed as to whether the relevant date here is when Green received notice from the USPS that he had to either retire or be demoted, or when he submitted his retirement letter two months later.

Counsel for the USPS argued the time limit should begin when the employee gives "definitive notice" of his resignation. *Green v. Brennan*, No. 14-613, *oral argument held,* 2015 WL 8776574 (U.S. Nov. 30, 2015).

Attorney Theodore A. Schroeder with Littler Mendelson PC, who is not involved in the case, said he does not expect the outcome to be affected by Justice Scalia's death.

"The case was likely on its way to a unanimous decision, as all of the justices seemed to be going in the same direction (to overturn the 10th Circuit) during oral arguments," he said.

Questioning during oral arguments, however, does leave open the possibility that a majority of the justices could decide to overturn the 10th Circuit, according to attorney Doug Haloftis of Barnes & Thornburg, who is not involved in the lawsuit. Justice Scalia clearly showed he favored a resignation-date rule, he said.

"As was typical of his keen intellect tempered by a commonsense approach to the rule of law, Justice Scalia attempted at length during the argument to craft a further refinement to the resignation-date rule," Haloftis said. "Does it run from the date the employee gives notice of his intent to resign due to the hostile activity or the date on which the resignation actually takes effect?"

"With Justice Scalia's absence, the court may not be compelled to weigh in on this distinction he raised," Haloftis said. "But it is a clear example of the fine distinctions in law and argument that Justice Scalia was able to discern."

## FREE SPEECH RIGHTS

Public employees' free speech rights are also before the high court in this term.

A police officer in Paterson, New Jersey, says the city demoted him in retaliation for political activity he did not actually engage in, in violation of his First Amendment rights. Jeffrey Heffernan says the city misperceived his presence at a political rally to get a yard sign for his mother as support for the candidate opposing the mayor.

A panel of the 3rd U.S. Circuit Court of Appeals unanimously upheld a lower court decision to dismiss the case, saying Heffernan had not shown that he exercised his free speech rights. The appeals court cited his testimony that he had no stake in the mayoral election. First Amendment claims depend on conduct actually protected by the First Amendment, the panel said. *Heffernan v. City of Paterson et al.*, 777 F.3d 147 (3d Cir. 2015).

At oral arguments Jan. 19 several justices, including Scalia and Chief Justice John Roberts, challenged the Heffernan's attorney's attempt to frame the argument around the First Amendment when the officer's speech was not involved. *Heffernan v. City of Paterson et al., No. 14-1280, oral argument held,* 2016 WL 344754 (U.S. Jan. 19, 2016).

Senior attorney Elisaveta Dolghih at Godwin PC in Dallas, who is not involved in the suit, said the case could end in a 4-4 tie in the high court.

"Justice Scalia's questioning during the argument indicated that he was skeptical of the employee's claim, even stating that there was no 'constitutional right not be fired for the wrong reason,'" Dolghih said. "With his passing, the likely result is that the court will rule 5-3 in favor of employee or that there will be a 4-4 tie, in which case the lower court's ruling will stand."