Sixth Circuit—2012 En Banc Review

By John A. Ferroli

The United States Court of Appeals for the Sixth Circuit issued only four en banc opinions in 2012, but the cases it decided en banc were particularly noteworthy. Three are discussed here.[1]

In *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary v Regents of the University of Michigan*,[2] the majority held that the Michigan constitutional amendment prohibiting affirmative action in public education, employment, and contracting violated the Equal Protection Clause. Proposal 2, which took effect in December 2006, amended article I, section 26 of the Michigan Constitution to eliminate the consideration of "race, sex, color, ethnicity, or national origin" in individualized admissions decisions at Michigan's public colleges and universities, altering longstanding affirmative action policies. In finding that Proposition 2 violated the Equal Protection Clause, the Sixth Circuit explained that:

> [a] student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change.[3]

As such, the court went on to hold that:

> [b]ecause less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment. We thus conclude that Proposal 2 reorders the political process in Michigan to place special burdens on minority interests.[4]

The Sixth Circuit's opinion is now before the United States Supreme Court, which granted certiorari on March 25, 2013.[5]

In *Lewis v Humboldt Acquisition Corporation, Incorporated*,[6] the court reversed prior Sixth Circuit cases holding that an Americans with Disabilities Act (ADA) claimant must show that his or her disability was the "sole" reason for the alleged adverse employment action. Lewis sued under Title I of the ADA, which at the time prohibited discrimination "because of" the disability of an employee.[7] The defendant asked the court to instruct the jury that Lewis could prevail only if the company's decision to fire her was "sole[ly]" because of Lewis's disability. Lewis, on the other hand, asked the court to instruct the jury that she could prevail if her disability was "a motivating factor" in the company's employment action. Sitting en banc, the court held that "we see no reason to insert the one addendum ('solely') or the other ('a motivating factor') into the ADA." Addressing its own prior rulings that imported the "solely" test into the ADA, the court held that "[o]ur interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong."[8] But the court also rejected Lewis's proposed instruction, holding that "[t]he words 'a motivating factor' appear nowhere in the ADA but appear in another statute: Title VII [42 USC 2000e *et seq.*]. For the same reasons we have no license to import 'solely' from the Rehabilitation Act [29 USC 701 *et seq.*] into the ADA, we have no license to import 'a motivating factor' from Title VII into the ADA."[9] The court reversed the judgment against Lewis and remanded it for new trial.

In *Chapman v United Auto Workers Local 1005*,[10] the court overruled prior precedent that had created an exception to the requirement that a union employee exhaust

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internal union remedies before litigating a claim against the union. The district court held that Chapman was barred from suit because he failed to exhaust his internal union remedies. On appeal, Chapman argued that *Williams v Molpus*[11] required that the case be remanded for a trial on his fair representation claim to determine whether he was excused from meeting the exhaustion requirement. The Sixth Circuit accepted the case for en banc review to determine whether it had erred in *Molpus* in holding that the general requirement that a plaintiff must exhaust internal union remedies or be barred from suit is excused if the union breaches its duty of fair representation. The court held that its "reasoning on this issue in *Molpus* resulted from a misunderstanding of Supreme Court precedent and the national labor policy upon which it relies," and it overruled *Molpus* and its progeny in part.[12] The court found that *Molpus* "mistakenly applied the exhaustion doctrine applicable to contractual grievance procedures… to a case that turned on failure to exhaust internal union remedies."[13] The court admitted further that it "confused constitutional union remedies with contractual grievance procedure remedies arising from a collective bargaining agreement."[14] However, the court concluded that, applying the proper legal standard, Chapman had nonetheless failed to establish a legally justifiable basis for failing to exhaust his internal union remedies. Finding that Chapman's failure to exhaust was not excused, the court affirmed the district court's grant of summary judgment and the dismissal of Chapman's suit against GM and the UAW. ■

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ENDNOTES

1. In the fourth, *Gagne v Booker*, 680 F3d 493 (CA 6, 2012), the en banc court held that the Michigan Court of Appeals' exclusion of evidence in a criminal sexual misconduct trial of the victim's past willingness to engage in consensual group sex was not objectively unreasonable under United States Supreme Court precedent.
2. *Coalition v Regents of the University of Michigan*, 701 F3d 466 (CA 6, 2012).
3. *Id.* at 470.
4. *Id.* at 485.
5. *Schuette v Coalition to Defend Affirmative Action*, 133 S Ct 1633; 185 L Ed 615 (2013).
6. *Lewis v Humboldt Acquisition Corp, Inc*, 681 F3d 312 (CA 6, 2012).
7. *Id.* at 315.
8. *Id.*
9. *Id.* at 317.
10. *Chapman v UAW*, 670 F3d 677 (CA 6, 2012).
11. *Williams v Molpus*, 171 F3d 360 (CA 6, 1999).
12. *Chapman*, 670 F3d at 679.
13. *Id.* at 683–684.
14. *Id.* at 684.