U.S. Supreme Court Update

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U.S. Supreme Court Labor and Employment Case Update

I. 2016-17 Term – Decided Cases

McLane Co. v. EEOC, 137 S. Ct. 1159 (2017)

TOPIC:

McLane involves the standard of appellate review of decisions involving the enforcement of subpoenas issued by the Equal Employment Opportunity Commission ("EEOC").

FACTS:

Damiana Ochoa worked for McLane, a supply-chain services company, in a physically demanding job at a distribution center. In 2007, Ochoa took three months of maternity leave. McLane had a policy that those returning from medical leave must undergo and pass a physical evaluation before returning. Ochoa failed that physical three times, and was fired as a result.

Ochoa filed a charge of gender discrimination with the EEOC. As part of the agency's investigation, the EEOC served McLane with a subpoena seeking employee names, Social Security numbers, addresses, and phone numbers. McLane declined to provide this information. The EEOC then brought its own charge of age discrimination against McLane, and requested by subpoena nationwide information that McLane also refused to provide. The EEOC then filed two federal district court lawsuits to enforce its subpoenas, one arising out of Ochoa's gender discrimination charge and the other arising out of the EEOC's age discrimination charge.

PROCEDURAL HISTORY:

The district court judge declined to enforce the subpoenas, finding the information irrelevant. The United States Court of Appeals for the Ninth Circuit reversed, concluding the district court had erred in finding the information irrelevant. While doing so, the Ninth Circuit questioned why *de novo* review of the district court was the appropriate standard of review of the district court's decisions. The United States Supreme Court reviewed the case to resolve a circuit court split on the proper standard of review of subpoena enforcement decisions.

OPINION:

In an opinion by Justice Sotomayor, the Supreme Court ruled in favor of McLane, holding that the standard of review for subpoena enforcement decisions is the abuse of discretion standard, not *de novo* review. The Court first looked to the history of appellate practice, and concluded that courts have uniformly applied an abuse of discretion review standard to NLRB subpoenas from before Title VII was enacted. Apart from the Ninth Circuit, courts have utilized this abuse of discretion review standard.

The Court also looked at who would be in the best position to determine relevance and balance interests, noting this is the kind of fact-intensive inquiry that district courts routinely make as opposed to the application of broad principles involved at the appellate level. This abuse of discretion standard would free up appellate courts from having to reweigh evidence and reconsider facts that had been assessed once already. The Court then dismissed any concern about double deference, where the court of appeals defers to the district court that defers to the EEOC. District courts are not to defer to the EEOC's determination of relevance, but should make their own decision, cognizant of the agency's broad authority to seek and obtain evidence. Appellate courts, on the other hand, should apply a more deferential abuse of discretion standard in reviewing the district court's determinations.

IMPACT: This case ultimately gives the EEOC but primarily the district courts greater power in enforcing or not enforcing EEOC subpoenas, and appellate courts less power to review and/or reverse the EEOC's and district courts' enforcement decisions. This might be good or bad, depending upon your perspective and the makeup of the applicable courts involved.

NLRB v. SW General, Inc., 137 S. Ct. 929 (2017)

TOPIC:

This is a technical case, but the outcome impacts a large number of cases before the National Labor Relations Board ("NLRB"). It involves the authority of the NLRB acting General Counsel to issue complaints.

FACTS AND RULING:

The Supreme Court addressed whether NLRB acting General Counsel Lafe Solomon had the authority to issue a complaint against an employer allegedly committing unfair labor practices if he could not legally perform the duties of acting General Counsel once the President nominated him to fill that vacancy (because of a technical requirement of the Federal Vacancies Reform Act, or FVRA). The D.C. Circuit had vacated the Board's unfair labor practices charge because it ruled that the FVRA made Solomon ineligible to serve on an "acting" basis once the President nominated him to fill the vacancy permanently. The broader implication of this ruling was that any complaint brought by Lafe Solomon suffered this defect and recipients of these complaints could have them dismissed for this same technical reason.

The FVRA prohibits certain persons from serving as acting officers of executive positions that require Presidential appointment and Senate confirmation (known as PAS) if the President has nominated them to fill the vacant office permanently. The technical question in this case was whether this prohibition applies only to "first assistants", those who automatically assume acting duties (i.e., next in command), or whether this prohibition also applies to PAS officers and senior employees who serve as acting officers at the President's behest. After engaging in a statutory construction analysis, the Court ruled 7-2 that the FVRA prohibition applies to all three classes of government officials that the FVRA authorizes to become acting officers, which necessarily included Lafe Solomon.

IMPACT:

The significance for labor law, of course, is what happens to the numerous other cases in which Solomon was involved, or the effect of the current General Counsel's "notices of ratification," short notices by the NLRB that the current General Counsel, not susceptible to attack on the same ground as Solomon, affirms Solomon's actions.

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1421 (2017)
Dignity Health v. Rollins
Saint Peter's Healthcare Sys. v. Kaplan

TOPIC:

These three cases were consolidated. ERISA, which regulates pension plans among other things, generally obligates private sponsors, including nonprofits, to comply with reporting, vesting, funding, and other rules designed to ensure plan solvency and protect plan participants. ERISA has an exception from these requirements for plans maintained by an organization whose principal purpose is to fund or administer a benefit plan for employees of churches and their affiliates. 29 U.S.C. §§ 1002(33)(a) & 1002(33)(C)(i). The federal agencies administering ERISA have read the statute to mean that plans maintained by a church are exempt even if the plan was originally established by a non-church entity and this case addresses that reading of the statute.

OPINION:

This case involved three nonprofits that run hospitals and established their pension plans prior to any church affiliation. Groups of employees and former employees of the hospital networks disagreed with the government's interpretation and argued that the hospitals were not exempt from the ERISA requirements because the exemption applies only to those plans that are established or initiated by a church, even if a church later became involved and maintained the plan.

The Court sided with the government's interpretation, concluding that Congress wanted to ensure that all groups associated with church activities would receive comparable treatment under ERISA. In a concurring opinion, Justice Sotomayor was troubled by the numerous employees who work for organizations that look and operate like secular businesses might be denied ERISA's protections.

Goodyear Tire & Rubber Co. v. Haage, 137 S. Ct. 1178 (2017)

TOPIC AND FACTS:

This sanctions case has relevance to litigators in general. This case arose in the context of a consumer products liability lawsuit brought against the tire manufacturer Goodyear, alleging that its defective tires caused their motor home to flip over on the highway. After the parties entered

into settlement, the federal district court imposed sanctions against the manufacturer and its counsel. The manufacturer and its counsel appealed. The Ninth Circuit affirmed.

OPINION:

The Supreme Court reversed. The Court first noted that courts have a certain degree of inherent authority to manage their own affairs and dispose of litigation. That inherent authority includes the ability to fashion an appropriate sanction for conduct that abuses judicial process. An award of attorneys' fees is one appropriate sanction, instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side.

A sanctions order under a federal court's inherent power to manage its own affairs, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature. When a federal court, upon entering an attorney fees award under its inherent power to manage its own affairs, also levels a separate penalty as punishment for the sanctioned party's misbehavior, it needs to provide procedural guarantees applicable in criminal cases, such as a "beyond a reasonable doubt" standard of proof, and when those criminal-type protections are missing, a court's shifting of fees is limited to reimbursing the victim.

A federal court's sanction of a litigant for bad-faith conduct counts as compensatory, as required for the award to be made under the court's inherent authority, only if it is calibrated to the damages caused by the bad-faith acts on which it is based, and a fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned, but if an award extends further than that, to fees that would have been incurred without the misconduct, then it crosses the boundary from compensation to punishment.

IMPACT:

I guess this is good news for litigants who engage in sanctionable behavior. The courts will limit those sanctions to actual harm caused. Judges are allowed significant discretion, however, and so my guess is the angry ones will err on the high side of the compensation spectrum.

<u>Perry v. Merit Sys. Protection Bd.</u>, 137 S. Ct. 1975 (2017)

TOPIC:

This is a public sector employment case involving a federal employee's discrimination claim. Under the Civil Service Reform Act of 1978 ("CSRA"), the Merit Systems Protection Board ("MSPB") has the power to review certain serious personnel actions against federal employees. If an employee asserts rights under only the CSRA, MSPB decisions are subject to judicial review only in the Federal Circuit. 5 U.S.C. § 7703(b)(1). If the employee invokes only federal antidiscrimination law, the proper forum for judicial review is federal district court. <u>Kloeckner v. Solis</u>, 568 U.S. 41, 46 (2012). This lawsuit involves an employee who challenged a serious adverse employment action and claimed the action was due to a discriminatory bias, deemed a "mixed case."

FACTS:

The plaintiff in this case, Anthony Perry, brought such a mixed case. Perry received a notice of termination from the U.S. Census Bureau for attendance problems. Perry and the Bureau then reached a settlement in which Perry agreed to a 30-day suspension and then early retirement. The settlement also required Perry to dismiss discrimination claims he had brought separately at the EEOC.

PROCEDURAL HISTORY:

After retiring, Perry appealed his suspension and retirement to the MSPB, alleging several types of discrimination as well as retaliation. Perry attempted to avoid the settlement by claiming it was coerced, but an MSPB administrative law judge rejected that argument and dismissed the case because the retirement was therefore deemed voluntary and the MSPB does not have jurisdiction over voluntary actions. The MSPB affirmed, agreeing with its lack of jurisdiction.

Perry sought judicial review at the D.C. Circuit, which transferred the case to the Federal Circuit. Kloeckner did not require the review occur in federal district court, according to the D.C. Circuit, because it involved a dismissal based upon procedural grounds, not jurisdictional grounds.

OPINION:

The Supreme Court held that the proper review forum when the MSPB dismisses a case on jurisdictional grounds is district court. The Government argued that employees must split their mixed claims, appealing MSPB nonappealability rulings to the Federal Circuit while appealing their discrimination claims to district court. Perry argued, and the Supreme Court agreed, that the district court alone can resolve the entire complaint.

The Court followed Kloeckner's clear rule that mixed cases "shall be filed in district court." As long as the employee makes a nonfrivolous claim of discrimination, the district court has jurisdiction even if such claim is "mixed" and involves a challenge to the personnel action on other grounds. Among other things, this serves the CSRA objective of creating an integrated system of review instead of parallel litigation involving the same agency action. Justices Gorsuch and Thomas dissented.

IMPACT: This case provides clarity to litigants regarding how to traverse the procedural and jurisdictional requirements of the CSRA.

Kindred Nursing Centers Ltd. Partnership v. Clark, 581 U.S. (2017)

TOPIC:

This case involves an arbitration agreement that a Kentucky nursing home required residents to sign as a condition of providing nursing home services.

FACTS AND PROCEDURAL HISTORY:

Two separate families brought wrongful death lawsuits against the nursing home in court, and the nursing home sought to enforce the arbitration agreements. The Kentucky Supreme Court found the arbitration agreements invalid because the agreements were actually signed by relatives of the residents who had a power of attorney to manage the residents' affairs, and the powers of

attorney did not specifically entitle the representatives to enter into an arbitration agreement.

OPINION:

The Supreme Court reversed. The Court held that the clear statement that the Kentucky Supreme Court required violates the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment. The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. This "savings clause" establishes an equal-treatment principle: a court may invalidate an arbitration agreement based upon "generally applicable contract defenses" but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." The FAA thus preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements.

The Kentucky Supreme Court's clear-statement rule failed to put arbitration agreements on an equal plane with other contracts. By requiring an explicit statement before an agent can relinquish her principal's right to go to court and receive a jury trial, the court did exactly what the Supreme Court has barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement. Justice Thomas dissented. His view is that the FAA does not apply to state court proceedings.

IMPACT:

This application of the FAA's equal treatment principle has direct application to employment law. This principle may prevent many state efforts to regulate how employment arbitration agreements are formed and enforced. As Justice Kagan's opinion notes, state courts are not precluded from regulating such agreements, but the rule must "in fact" apply generally instead of singling out arbitration.

<u>Trinity Lutheran Church of Columbia, Inc. v. Comer</u>, 137 S. Ct. 2012 (2017)

TOPIC:

This case involves the constitutional implications of religious organizations seeking government funding for programs that are available to non-religions organizations, e.g., money for playgrounds.

FACTS:

A child learning center operating under the auspices of a church in Missouri sought to replace the pea gravel portion of its playground with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. The program offers reimbursement grants to qualifying nonprofits that install surfaces made from recycled tires. But the state agency running the program has a policy of denying grants to any applicant owned or controlled by a church, sect or religious entity.

PROCEDURAL HISTORY:

The Trinity learning center argued the agency's policy violated its first amendment rights to the free exercise of religion. The district court and Eight Circuit agreed, holding that while the first amendment prohibits restrictions on the exercise of religious practices, it does not require the state to provide an affirmative benefit to a church.

OPINION:

Although the Court issued five separate opinions in its ruling, it did hold that disqualifying the learning center from the tire scrap program violated its first amendment rights. Justice Roberts wrote the majority opinion, characterizing Missouri's policy as one that singles out religious entities for disfavored treatment, thereby imposing a penalty on the free exercise of religion. Missouri failed to advance a state interest compelling enough to burden the learning center's right to free exercise.

IMPACT:

Again, the principles of this case could have significance in the employment law context. For example, will employers or employees have the right not to comply with Title VII because of a sincerely held religious belief that women who have children should not work outside the home? Or what about an employer who seeks a religious exercise exemption from providing full healthcare coverage for women because of sincerely held religious beliefs about female contraception coverage? Or what about the employee working in a pharmacy who refuses to fill a prescription for contraceptives and is fired for insubordination?

II. 2017-2018 Term – Decided Cases

Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018)

TOPIC:

This case analyzes the scope of the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). It is a unanimous decision with the opinion from Justice Ginsburg.

FACTS:

In response to a variety of incidents of corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and the Dodd-Frank Act in 2010. Both acts protect whistleblowers from retaliation, but have key differences. Sarbanes-Oxley applies to all employees who report misconduct to the Securities and Exchange Commission ("SEC" or "Commission"), any other federal agency, Congress, or an internal supervisor. 18 U.S.C. §1514A(a)(1). In contrast, Dodd-Frank defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the Commission." 15 U.S.C. § 78u-6(a)(6). A Dodd-Frank whistleblower is eligible for an award if information he or she provides to the SEC leads to a successful enforcement action. 15 U.S.C. § 78u-6(b)-(g). In the Somers case, plaintiff Somers alleged that Digital Realty Trust ("Digital Realty") terminated his employment

shortly after he reported to senior management suspected securities law violations by the company and sued in federal court under Dodd-Frank.

PROCEDURAL HISTORY:

Digital Realty moved to dismiss this claim for failure to state a claim on the grounds that Somers was not a whistleblower under Dodd-Frank becaue he did not alert the SEC prior to his termination. The district court denied the motion and the United States Court of Appeals for the Ninth Circuit affirmed.

OPINION:

The United States Supreme Court reversed, holding that a Dodd-Frank whistleblower must provide information to the SEC in order to receive protection from retaliation. The Court had to grapple with the third situation in which the statute protects whistleblowers, because the first two situations clearly require a report to the SEC. 18 U.S.C. § 78u-6(h)(1)(A)(i) & (ii). The third situation, however, provides protection in making disclosures that are required or protected under Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation provision at 18 U.S.C. § 1513(e), or any other law or regulation subject to the jurisdiction of the SEC. 18 U.S.C. § 78u-6(h)(1)(A)(iii). But disclosures under Sarbanes-Oxley, for example, do not have to be reported to the SEC in order to receive whistleblower protection.

Further complicating matters is the fact that the SEC promulgated regulations containing two discrete whistleblower definitions. The first definition relates to the award program that Dodd-Frank created for whistleblowers to receive under certain circumstances a portion of the monetary sanctions from a successful enforcement action. This definition requires that the whistleblower provide the SEC with the information in order to be protected. 17 C.F.R. § 240.21F-2(a)(1). For purposes of the anti-retaliation provision, however, a whistleblower is protected if he or she provides the information in a manner described in either (i), (ii) or (iii) of 18 U.S.C. § 78u-6(h)(1)(A). In other words, the regulation does not require that a whistleblower provide information to the SEC if he or she otherwise fell into any of these three categories. "For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes-Oxley anti-retaliation provision." 138 S. Ct. at 775. The Court noted that the SEC in 2015 issued an interpretative rule reiterating that the anti-retaliation protection is not contingent upon a whistleblower's provision of information to the SEC. Id. at 775 n. 5 (citing 80 Fed. Reg. 47829 (2015)).

The lower courts adopted the position and definition of the SEC, and the Court likely considered this case in part because there was a split in the circuits on this issue. The Court began its analysis by looking at the statutory definition of whistleblower in Dodd-Frank, and remarked at the outset that it gave a definitive answer: a "whistleblower" is "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." 18 U.S.C. § 78u-6(a)(6) (emphasis added).

The Court then characterized this definition as describing who is eligible for protection (someone who reports to SEC), but the three clauses of section 78u-6(h)(1)(A) describe what conduct is shielded from retaliation. A whistleblower must meet the requirement of being both a whistleblower (reporting to SEC) and engaging in conduct that the law protects (even if the definition of protected conduct includes reporting to others than the SEC). With specific reference to (iii), relating to reports made, for example, under Sarbanes-Oxley, which does not require a report to the SEC, the Court still made sense of (iii) by noting that it protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC report. The employee also can recover without having to show whether it was the internal report or the SEC report that motivated the retaliation.

The Court referenced legislative history suggesting that the primary concern of Dodd-Frank was to bolster the ability of the SEC in light of the events of 2008. The Court took great pains to note that those reporting violations of securities laws already have whistleblower protection under Sarbanes-Oxley for making reports to their employer and not solely to the SEC.

The Court ruled that Dodd-Frank's definition of whistleblower was clear and conclusive, and therefore it would not accord deference to the contrary view advanced by the SEC. The statute's unambiguous whistleblower definition precludes the SEC from more expansively interpreting that term.

IMPACT: If the putative whistleblower made reports related to the violation of securities laws or regulations, you must evaluate both the Sarbanes-Oxley and Dodd-Frank Acts, as they provide very different protection, procedures, and remedies. This case highlights the different protections. It appears to exclude using the Dodd-Frank Act unless the whistleblower has reported to the SEC.

CNH Industrial N.V. v. Reese, 138 S. Ct. 761 (2018) (per curiam)

TOPIC:

This case involves a dispute between retirees and their former employer about whether an expired collective bargaining agreement created a vested right to lifetime health care benefits.

FACTS:

In 1998, CNH agreed to a collective bargaining agreement. The agreement provided health care benefits under a group benefit plan to certain employees who retire under the pension plan. All other coverages, such as life insurance, ceased upon retirement. The group benefit plan was made part of the collective bargaining agreement and ran concurrently with it. The agreement contained a general durational clause stating that it would terminate in May 2004.

PROCEDURAL HISTORY:

When the 1998 agreement expired in 2004, a class of CNH retirees and surviving spouses filed a lawsuit, seeking a declaration that their health care benefits vested for life and an injunction preventing CNH from changing them. The district court awarded summary judgment to the retirees, and the Sixth Circuit affirmed.

Although the agreement contained a general durational clause, the Sixth Circuit found this inconclusive. First, the 1998 agreement carved out certain benefits like life insurance and stated that those coverages ceased at a time different than other provisions. Second, the 1998 agreement tied health care benefits to pension eligibility. These conditions rendered the 1998 agreement ambiguous, which allowed the court to consider extrinsic evidence, which supported lifetime vesting.

OPINION:

The Court first cited its 2015 decision of M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015) for the principle that courts should interpret collective bargaining agreements according to ordinary principles of contract law. The Court found that the agreement is ambiguous only if illegitimate inferences and rules of contract interpretation are followed, the same illegitimate inferences and rules of contract interpretation that the Court had rejected in Tackett.

The Sixth Circuit wrongly refused to apply the general durational clause to the provisions governing retiree benefits. The Sixth Circuit also wrongly inferred lifetime vesting when a contract is silent as to the duration of retiree benefits. Contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. As for the tying of retiree health benefits to pensioner status, the Court found no basis to draw such a connection when Congress distinguishes in ERISA between plans that a form of delayed compensation and plans that offer medical benefits. 138 S. Ct. at 763-64.

The Sixth Circuit did not point to any explicit terms, implied terms, or industry practice suggesting that the 1998 agreement vested health care benefits for life. The 1998 agreement contained a general durational clause that applied to all benefits, unless the agreement specified otherwise. No provision specified that the health care benefits were subject to a different durational clause. The agreement state that the health benefits plan ran concurrently with the collective bargaining agreement, tying the health care benefits to the duration of the rest of the agreement. The only reasonable interpretation of the agreement is that the health care benefits expired when the collective bargaining agreement expired in May 2004.

IMPACT:

The question of what portions of a contract survive the expiration or termination of that agreement is a frequent source of litigation. Drafters need to analyze what portions of their agreement need to survive termination of the agreement or, in employment situations, termination of employment. For example, noncompete agreements need to ensure that the employee's post-termination obligations survive termination of the agreement and termination of employment.

<u>Artis v. District of Columbia</u>, 138 S. Ct. 594 (2018)

TOPIC:

In a decision by Judge Ginsburg, the Court dealt with a tricky statute of limitations issue after the dismissal of a federal lawsuit with supplemental state-court claims.

FACTS:

In this case, the plaintiff filed a lawsuit in federal court alleging a violation of a federal employment discrimination statute as well as three state law claims. The supplemental jurisdiction statute, 28 U.S.C. § 1367, enables federal district courts to entertain claims not otherwise within their adjudicatory authority when those claims are so related to claims within federal court competence that they form part of the same case or controversy. Two and a half years later, the federal court ruled against the plaintiff on her federal claim and dismissed the state claims without adjudicating them under 28 U.S.C. § 1367(c)(3).

This left the plaintiff with the prospect of refiling her state law claims in state court. However, before the federal claim was dismissed, two and a half years had elapsed and the statute of limitations on the state claims also had run. The supplemental jurisdiction statute, however, foresaw this situation, and provides that the period of limitations for any state claim joined with a claim within federal court competence is tolled whiled the claim is pending in federal court and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d). Thus, the plaintiff started a state court lawsuit.

QUESTION PRESENTED:

The question presented is whether the word "tolled" in section 1367(d) means that the state statute of limitations period is suspended during the pendency of the suit, or does the statute of limitations continue to run, but the plaintiff gets a 30-day grace period to refile in state court post dismissal of the federal case. This question is critical because the plaintiff refiled her state claims in state court 59 days after dismissal of her federal suit. If the provision is a 30-day grace period, the plaintiff's complaint would be time barred. But if the statute of limitations was not running during the pendency of the federal suit, the complaint would be timely.

OPINION:

The Court ruled that tolling means to hold in abeyance, i.e., to stop the clock, which meant that the plaintiff's lawsuit was timely. In both statutes and judicial decisions throughout the country, the term tolling has almost always meant stopped or suspended. Laws providing for a grace period had used clear language to do so.

Justices Gorsuch, Kennedy, Thomas, and Alito dissented. The dissent found the term "toll" to be ambiguous, meaning either to stop or simply to remove the effect of the limitations period.

Other textual clues led the dissent to find the grace-period method to be the proper interpretation of the statute.

IMPACT: The majority and dissent spend substantial time quibbling over the words in the tolling statute, but the bottom line is that plaintiffs frequently will end up with a substantial period of time to refile their state claims in state court in this scenario, particularly if the plaintiff commenced the federal court lawsuit quickly after the alleged wrong. However, this case underscores that the statute of limitations issues related to employment discrimination claims are quickly and practitioners must fully understand the jurisdictional, procedural, and limitations deadlines associated with bringing federal and/or state court lawsuits bringing federal and/or state claims involving federal and/or state deadlines.

III. 2017-2018 Term - Pending Cases

Epic Systems Corp. v. Lewis, No. 16-285 (argued Oct. 2, 2017)
Ernst & Young v. NLRB, No. 16-300 (argued Oct. 2, 2017)
NLRB v. Murphy Oil USA, No. 16-307 (argued Oct. 2, 2017)

TOPIC:

These three cases, argued on the first day of the Supreme Court's 2017-18 term, revisit the scope of the employer's ability to use arbitration agreements with its employees to prevent employees from bringing class action lawsuits against it. Specifically, the question in these cases is whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1) because they limit the employees' right under the National Labor Relations Act ("NLRA") to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. The savings clause affirms the validity of arbitration agreements generally except for those where grounds exist "at law or in equity for the revocation of any contract."

FACTS OF EPIC SYSTEMS:

Epic, for example, involves a Wisconsin-based health care data management software company. On April 2, 2014, Epic Systems sent an email to its employees containing an arbitration agreement that requires the employees to resolve any employment-based disputes with Epic Systems through individual arbitration and to waive their right to participate in or receive benefit from any class, collective, or representative proceedings. The email stated that an employee is deemed to have accepted this agreement if the employee continues to work at the company; there was no option for continuing to work but not signing this agreement. The email asked the employees to read the agreement and agree to it by clicking two buttons. Employee and later plaintiff Jacob Lewis clicked the two buttons.

PROCEDURAL HISTORY OF EPIC SYSTEMS:

Later, Lewis got into a dispute with Epic Systems, but he did not proceed under the arbitration agreement. Instead, he sued in federal court to pursue his claim that Epic Systems was violating the Fair Labor Standards Act ("FLSA") by misclassifying him and other technical writers at the company as exempt and therefore unlawfully denying them overtime pay. Epic Systems moved to dismiss the lawsuit and compel individual arbitration. Lewis opposed the motion and took the position, as did the National Labor Relations Board ("NLRB") in the other two cases, that federal labor law prohibits these arbitration agreements if they contain a class action waiver. Specifically, that the NLRA protects employees engaging in "concerted activities" for their "mutual aid and protection" and that class and collective actions constitute such a protected concerted activity. The district court in Epic agreed, and the Seventh Circuit reviewed *de novo* the district court's denial of the motion to compel arbitration. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

SEVENTH CIRCUIT OPINION IN EPIC SYSTEMS:

The Seventh Circuit affirmed, noting that the Supreme Court long has held that contracts stipulating the renunciation of rights guaranteed by the NLRA are unlawful and unenforceable by the NLRB. J.L. Case Co. v. NLRB, 321 U.S. 332 (1944); National Licorice Co. v. NLRB, 309 U.S. 350 (1940). In accordance with this long-standing doctrine, the NLRB also long has held that employer-imposed individual agreements that purport to restrict rights under Section 7 of the NLRA (concerted activities) are unenforceable. See, e.g., Adel Clay Products Co., 134 F.2d 342 (8th Cir. 1943). The Seventh Circuit also concluded that Section 7's text, history and purpose supports this result. Collective, representative and class legal remedies allow employees to band together and thereby equalize bargaining power. Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985).

The Seventh Circuit then concluded that the individual arbitration agreement impinges on Section 7 rights. First, the agreement requires that any wage and hour dispute must be submitted to arbitration rather than pursued in court. Second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Finally, the Seventh Circuit addressed Epic Systems' argument that the FAA overrides the above labor law and entitles it to enforce its arbitration agreement in full. The court initially noted that the FAA is in fact irrelevant as the agreement mandates arbitration except for class claims. Once that provision is deemed a violation of the NLRA and unenforceable, the agreement requires that class claims proceed in court and there is no agreement to arbitrate.

Epic Systems then essentially argued that this provision requiring courts and not arbitration if the class waiver is unenforceable is itself unenforceable because the FAA trumps the NLRA. But the Seventh Circuit found no conflict between the FAA and NLRA. The FAA's savings clause provides that arbitration agreements are to be enforced unless there are legal or equitable grounds that would render a contract unenforceable. Because the waiver of collective proceedings was illegal under the NLRA, it was unenforceable under the FAA. The statutes can be read without conflict.

The Fifth Circuit has come to the opposite conclusion. D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013). That court referenced comments from several Supreme Court opinions noting that class arbitration does not possess many of the advantages of individual arbitration, like speed, cost and formality. However, the Seventh Circuit noted, this does not mean that the FAA and the NLRA are irreconcilable. For example, if the parties had collectively bargained to arbitrate class claims, there is no reason to think this would have violated the NLRA. The Seventh Circuit also held this interpretation would render the FAA savings clause meaningless.

The Seventh Circuit also rejected Epic Systems' argument that Section 7 of the NLRA provides procedural rights only and not substantive rights. The Supreme Court has regularly noted that arbitration agreements cannot waive substantive rights, only the employees' ability to have those substantive rights adjudicated in courts. Section 7, however, provides substantive rights to engage in collective action, which a prohibition on bringing collective claims would impinge.

In the cases before the Supreme Court, the Department of Justice initially agreed, then reversed itself in July 2017 and supported the employer's ability to prohibit class action employment disputes via arbitration agreements.

IMPACT: These consolidated cases were the blockbuster opening to the Court's 2017-18 term, but we are not likely to see this opinion until the last day or few days of the term. Hopefully, the opinion will definitely resolve whether employers may contractually require employees to pursue collective claims through individual arbitration.

The reality is that no one would pursue an individual claim in the wage and hour context in many situations because one individual's remedy often is measured in pennies or dollars, e.g., the denial of a few minutes pay every day or a small amount of overtime pay. It is only through a collective action, where those pennies and dollars add up with a large number of victims, that lawyers and litigants find such claims to make economic sense.

Encino Motorcars LLC v. Navarro, No. 16-1362 (argued Jan. 17, 2018)

This case involves the Fair Labor Standards Act and auto dealership workers. The question is whether "service advisors" who talk to customers about repair work, but do not actually perform the repair work themselves, are exempt from overtime. The Ninth Circuit held that Congress did not intend to prohibit service advisors from collecting overtime. This ruling could affect not only the 18,000 auto dealerships in the country but also to a number of other industries that employ people in service advisor roles.

Janus v. American Federation of State, County, and Municipal Employees, Council No. 31, No. 16-1466 (argued Feb. 26, 2018)

TOPIC:

In a critical case for public sector union employees, the Court is considering the constitutionality of "fair share fees" required of certain public employees as a condition of employment. This issue had been before the Court in Friedrichs v. California Teachers Assn., but the death of Justice Scalia led to a 4-4 decision, which resulted in allowing the lower court's decision to allow fair share fees to stand. That case challenged fair share fees on first amendment grounds.

IMPACT:

With the addition of Justice Gorsuch, it is expected that the Court will strike down mandatory fair share payments. This will affect millions of public workers in 22 states that do not have right to work laws. Estimates are that as many as 30% of public sector union members will cease paying dues if such fees are not mandatory, significantly weakening the financial position and power of the public sector unions.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, No. 16-111 (argued Dec. 5, 2017)

TOPIC:

This is the now-famous wedding cake case. A wedding cake business refused to create one for a homosexual couple who were getting married, claiming it violated his religious beliefs.

FACTS:

Two gentlemen, Charlie Craig and David Mullins, went to Masterpiece Cakeshop in Lakewood, Colorado and requested that its owner, Jack C. Phillips, design and create a cake for their wedding. Craig and Mullins had planned to marry in Massachusetts, where same-sex marriages were legal, and later celebrate with friends in Colorado, which did not recognize same-sex marriages at that time. Phillips would not do so on the grounds that he does not create wedding cakes for same-sex weddings because of his religious beliefs, which is that decorating cakes is a form of art through which he can honor God and it would displease God to create cakes for same-sex marriages. Masterpiece and Phillips admitted that the bakery is a place of public accommodation under Colorado law and that they refused to sell Craig and Mullins a cake because of their intent to engage in a same-sex marriage ceremony.

PROCEDURAL HISTORY:

Craig and Mullins filed charges of discrimination with the Colorado Civil Rights Division, alleging discrimination in a place of public accommodation based upon sexual orientation under the Colorado Anti-Discrimination Act ("CADA"). Minnesota and other states have similar laws prohibiting discrimination in the area of public accommodations. The state agency and the Colorado Court of Appeals found in favor of Craig and Mullins. The Supreme Court took this case to determine whether Colorado's law violates the cake maker's sincerely held religious beliefs about same-sex marriage, violating the free speech or free exercise clauses of the first amendment.

It is interesting to note that the Colorado Civil Rights Commission's final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.

The case is at the Supreme Court from the decision of the Colorado Court of appeals. Craig v. Masterpiece Cakeshop, Inc. 370 P.3d 272 (Colo. Ct. App. 2015). The court first rejected Masterpiece's argument that it was not refusing to provide service "because of" sexual orientation. Rather, Masterpiece argued, it generally served patrons without regard to sexual orientation, just not in the sole instance of wedding cakes because of a disagreement about a particular aspect of sexual orientation, that it comes with same-sex marriages, which it opposes. The opinion refers to this argument as distinguishing between a person's status and conduct closely associated with that status, which is generally inappropriate. See Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (equating laws precluding same-sex marriage to discrimination on the basis of sexual orientation; denial to same-sex couples of the right to marry is a disability on gays and lesbians which serves to disrespect and subordinate them).

Masterpiece then argued that the Commission's cease and desist order compels speech in violation of the first amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argued that wedding cakes inherently convey a celebratory message about marriage and therefore the order unconstitutionally compelled it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.

The court disagreed and concluded that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government is not sufficient expressive to warrant first amendment protections. The court reviewed the conduct under the "compelled expressive conduct" doctrine. The government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose.

The court further concluded that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. To the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece. Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally. Because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

The court also rejected Masterpiece's free exercise of religion argument. The free exercise clause did not require neutral laws of general applicability to be reviewed under heightened, strict scrutiny, but rather under the rational basis standard, such that neutral laws of general applicability needed only to be related to legitimate governmental interest to survive constitutional challenge. CADA's proscription of sexual orientation discrimination by places of public accommodation was rationally related to the state's interest in eliminating discrimination in such places, and thus CADA was a reasonable regulation that did not offend the free exercise clause. Without CADA, businesses would have been able to discriminate against potential patrons based on their sexual orientation, such discrimination in places of public accommodation had measurable adverse economic effects, and CADA created a hospitable environment for all consumers by preventing discrimination on basis of certain characteristics, including sexual orientation.

IMPACT: Again, it is easy to see how this case implicates employment law. What if Phillips had been an employee of Masterpiece, refused to bake this cake, and then was fired?