PUBLICATION

Supreme Court Roundup: A Look Back – and Ahead – for Employment Law

Authors: Donna M. Glover, Elizabeth Ann Liner
July 20, 2018

As the Supreme Court ended its 2017-18 Term, Justice Anthony Kennedy announced his resignation; the Court did away with "agency fees" for public employees; and in other decisions favorable to employers, the Court solidified the use of class waivers in arbitration agreements and eased up on the standards for analyzing exemptions under the Fair Labor Standards Act (FLSA). This roundup summarizes the Court's decisions during the 2017-18 Term that impact employers and previews employment cases upcoming in the 2018-19 Term.

2017-18 Term – Decided Cases

Epic System v. Lewis, Ernst & Young v. Morris* and *National Relations Board v. Murphy Oil USA (consolidated cases)

This group of cases posed the question as to whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration and waive class and collective proceedings is enforceable under the Federal Arbitration Act (FAA), notwithstanding the provisions of the National Labor Relations Act preventing employers from limiting employees' rights to engage in "concerted activities" in pursuit of their "mutual aid or protection." In an "epic" decision, the Court held that class action waivers in employee arbitration agreements are enforceable. For an in-depth analysis of that holding, read our recent article found here.

Janus v. American Federation of State, County, and Municipal Employees, Council 31

In 1977, the Supreme Court held in *Abood v. Detroit Board of Education* that a union representing government employees could require non-members to pay an "agency" fee, which is a percentage of full union dues, generally because the non-members benefited from the union's efforts. The *Janus* case raised the following question: Should *Abood* be overruled and public-sector agency fee arrangements be declared unconstitutional under the First Amendment?

Mark Janus works as a child support specialist employed by the Illinois Department of Healthcare and Family Services. Janus is represented by, but not a member of, AFSCME Council 31. Janus did not want to join the union because he opposed various public policy positions that it took. Nonetheless, the union required that Janus, as a non-member, pay an agency fee as a condition of his employment with the State of Illinois. Janus sued, alleging that requiring him to pay an agency fee violated the First Amendment. Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Clarence Thomas, and Neil Gorsuch agreed with Janus's argument. Justice Alito, who authored the majority opinion, opined that "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command…" and "measures compelling speech are at least as threatening" as those that involve restrictions on what can be said.

The *Janus* decision is expected to have a significant impact on public sector unions. No doubt, public sector employees who are non-members will take advantage of the *Janus* decision and will likely stop paying agency fees to the union that represents them. Unions may also begin "marketing" to enforce non-union members to continue their financial support. We may also see state legislatures entering the fray to enact laws to protect unions from being forced to offer full benefits to non-members. *Janus* applies only to public sector employees.

Therefore, unless an employee works in a state with a right to work law, private sector employees can still be required to pay union dues as a condition of employment.

CNH Industrial N.V. v. Reese

In *CNH Industrial N.V. v. Reese*, the Supreme Court explained in a per curium opinion and without hearing oral argument, that collective bargaining agreements (CBAs) between employers and unions are interpreted under ordinary principles of contract law, including when determining whether a contract is ambiguous. Before the Court issued its decision in *M&G Polymers USA, LLC v. Tackett*, 574 U.S. (2015), the Sixth Circuit had applied "*Yard-Man* inferences," relying on evidence beyond the language of the contract, to determine that the CBA at issue in the case provided for the union members' insurance benefits to be vested for life. In *Tackett*, the Court had rejected the *Yard-Man* inferences because their application "distort[ed] the text" of CBAs and conflicted with the traditional rule that contracts must be construed according to their plain language. As such, in *CNH Industrial NV*, the Supreme Court reversed the Sixth Circuit's decision because it could not be "squared with *Tackett*." The Supreme Court explained that *Yard-Man* inferences are not ordinary principles of contract interpretation and that the CBA's silence regarding the issue of vesting meant that, like the other benefits of the union members, those insurance benefits terminate when the CBA itself terminates.

China Agritech v. Resh

In *China Agritech v. Resh*, the Supreme Court issued a unanimous decision on June 11, 2018, holding that individuals cannot stack class action lawsuits one after another. In *American Pipe & Construction Co. v. Utah*, the Court held that the timely filing of a defective class action suspends the applicable statute of limitations as to the individual claims of purported class members. The Supreme Court opined that while its decision in *American Pipe* means that the statute of limitations in a class action case is tolled as to individual class members, this tolling *does not* extend to the filing of a subsequent class action based on the same facts and circumstances.

Digital Realty Trust, Inc. v. Somers

In *Digital Realty Trust, Inc. v. Somers*, the question at issue was whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's statutory definition of "whistleblower." In a favorable decision for employers, the Court held that to sue for a violation of Dodd Frank's anti-retaliation provision (15 U.S.C. § 78u-6(h)(1)(A)), a whistleblower must first report a violation of the securities laws to the SEC. Section 78u-6(a)(6) defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission." The Court opined that the clear statutory definition of "whistleblower" provides the answer.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*, perhaps better known as the "baker case," the Court held that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause. This was a very narrow decision which focused on the Commission's conduct when investigating the charges of discrimination that Charlie Craig and David Mullins filed after Jack Philips, the cake shop owner, declined to make their wedding cake on the grounds that he does not create wedding cakes for same-sex weddings because of his religious beliefs. The Commission found in favor of Craig and Mullins, and the Colorado Court of Appeals subsequently affirmed the Commission's ruling.

The case wound its way to the Supreme Court where the question at issue was: does the application of Colorado's public accommodations law to compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violate the Free Speech or Free Exercise Clauses of the First Amendment? In the Court's narrow holding, the court found that a commissioner's remarks during the

administrative proceedings relating to the discrimination charge evinced a bias against religion that violated the First Amendment's Free Exercise Clause. "To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere," Justice Kennedy said. "This sentiment is inappropriate for a commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law – a law that protects discrimination on the basis of religion as well as sexual orientation," Justice Kennedy wrote in the majority opinion. But the question all court watchers wanted answered was this: Does the First Amendment protect the baker's right to deny services to same sex-couples? That constitutional question went unanswered in *Masterpiece Cakeshop*; thus, it is unlikely that the decision will have any far-reaching impact.

Encino Motorcars, LLC v. Navarro

In *Encino Motorcars, LLC v. Navarro*, the Court considered whether service advisors at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the FLSA's overtime pay requirements. In a tight 5-4 decision, the Court held that service advisors at car dealerships are exempt from the FLSA's overtime pay requirements because they are "salesm[e]n . . . primarily engaged in . . . servicing automobiles" under 29 U.S.C. § 213(b)(10)(A).

The exemption ruling is not that memorable, but the Court's reasoning may have far-reaching impact on courts' interpretation of FLSA exemptions. The Court rejected the Ninth Circuit's conclusion that FLSA exemptions should be construed narrowly in holding that service advisors were not exempt. The Court explained that the Ninth Circuit had used a "flawed premise that the FLSA pursues its remedial purpose at all costs." The Court noted that the FLSA has more than two dozen exemptions, and the court said that those exemptions are as much a part of the FLSA's purpose as the overtime pay requirement and that courts must read the exemptions, *fairly* not *narrowly*.

The Court also rejected the Ninth Circuit's reliance on a 1966-67 Department of Labor Occupational Outlook Handbook and the FLSA legislative history, both of which the Court found unpersuasive; thus, the Court abandoned the position held for more than 70 years that the exemptions to overtime under the FLSA must be narrowly construed for a "fair interpretation."

2018-19 Term – Cases Pending

The 2018-19 Term begins on October 1, 2018. We can look forward to another banner year of interesting employment-related cases pending before the Court that employers should keep an eye on in the coming months. The Court has granted certiorari in the case of *Varela v. Lamps Plus, Inc.* to determine whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

The Court has also granted certiorari in *BNSF Railway Co. v. Loos* to determine whether a lost wages damages award to a former railroad employee is subject to withholding or taxation under the Railroad Retirement Tax Act. In *New Prime, Inc. v. Oliveira*, the Court will once again take up an issue related to the Federal Arbitration Act (FAA). Section 1 of the FAA provides that the FAA does not apply "to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The questions at issue are: (1) whether a dispute over the applicability of the Section 1 exemption must be resolved by a court or an arbitrator; and (2) whether Section 1 of the FAA applies to independent-contractor agreements.

In *Mount Lemmon Fire District v. Guido*, the Court will consider whether, under the Age Discrimination in Employment Act (ADEA), the same 20-employee minimum that applies to private employers also applies to

political subdivisions of a state, as the Sixth, Seventh, Eighth, and Tenth Circuits have held, or whether the ADEA applies instead to all state political subdivisions of any size, as the Ninth Circuit held in this case.

We will keep you apprised as the Court considers these other questions in the coming session, and we will analyze the impact such decisions may have on your business.