FEDERAL CASE LAW UPDATE

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STATE BAR OF TEXAS
LABOR & EMPLOYMENT SECTION

27th ANNUAL
LABOR AND EMPLOYMENT LAW INSTITUTE

August 19-20, 2016
Houston, Texas

Chapter 1

I. INTRODUCTION

During 2015 through present we have seen continued significant decisions from the Supreme Court in the labor and employment arena. This paper discusses these decisions, sets out the employment cases pending before the Court, and summarizes 2015 Fifth Circuit decisions.

II. 2015 - 2016: LAWS, REGULATIONS AND EXECUTIVE ORDERS

The gridlock in Congress continued in the 114th Congress for 2015. The year saw only laws proposed by the Republican-controlled House or Senate that were a reaction to actions of the Administration regarding joint employer, micro units, quickie elections, ACA and the EEOC's transparency and wellness rules. No significant employment-related laws were passed.

Agencies continued to dominate the employment law space with new rules or regulations or administrative guidelines, interpretations or decisions issued as to:

- persuader activities, Final Rule http://www.littler.com/publication-press/publication/department-labor-issues-long-awaited-persuader-activity-final-rule,
- elections,
- joint employer standards http://www.littler.com/publication-press/publication/dol-issues-guidance-joint-employment-under-flsa,
- micro-units, and
- worker misclassification.

Pending or proposed rules expected in 2016 include:

- white collar exemption regulations http://www.littler.com/publication-press/publication/dols-white-collar-overtime-rule-advances,
- EEO-1 Report changes,
- draft guidelines or rules regarding retaliation, and
- ADA and GINA wellness rules.

Probably the two most important 2015-2016 regulations or rules include the recently-issued persuader rule and the soon-to-be issued white collar exemption regulations.

Finally, President Obama has continued enacting Executive Orders to address his initiatives as to government contractors including the "blacklisting rule" (addressing arbitration, paycheck information and disclosure of labor law violations), and paid sick leave for government contracts http://www.littler.com/publication-press/publication/dol-issues-proposed-rule-implementing-paid-sick-leave-federal.

III.
<u>2015 - 2016: SUPREME COURT DECISIONS</u>

Introduction

The death of Justice Scalia in February of 2016, leaves the Supreme Court in limbo as to important cases pending before the Court. http://www.littler.com/publication-press/publication/what-are-short-and-long-term-employment-law-implications-supreme-court Prior to Justice Scalia's death, the Supreme Court issued a number of decisions. Two decisions have been issued following his death, *Tysons* Foods and *California Teachers* Association and these decisions reflect the impact of Judge Scalia's death. A discussion of recent decisions follows:

A. STATISTICAL STUDY IS VALID IN FLSA CASE WHERE EMPLOYER HAD NO SUPPORTING RECORDS.

***Tysons Foods v.* Bouaphakeo, No. 14-1146, March 22, 2016**. This case involved a hybrid **class and collective action case which** sought review of a $5.8 million jury award in a case brought on behalf of workers at a pork-processing facility in Storm Lake, Iowa.

At issue were the decisions of the trial and appellate courts which upheld a verdict based on the use of statistics to determine damages instead of assessing individual damages for each plaintiff in a class of over 3,000 employees. Tyson asserted that the 8th circuit decision upholding the verdict and the lower court's certified class conflicted with the Supreme Court's decisions in *Dukes* and *Comcast* which should have ended class certification based on establishing liability and damages via a class-wide theory of "trial by formula."

The Supreme Court upheld by a 6-2 vote the certification of a class of employees who alleged that the employer failed to pay them for donning and doffing protective gear and for time spent walking to their work area. The reliance on "representative evidence" to determine the additional time that each employee worked, was acceptable, <u>when the employer had failed to keep adequate records</u>.

At issue was the use of a study performed by Dr. Kenneth Mericle (a factory time and motion expert) who analyzed how long various donning, doffing and walking activities (444) took a number of employees, then averaged the time to determine how much time should be added to timesheets of each employee to determine which class members worked more than 40 hours a week and thus the value of the class-wide recovery.

Tysons complained that the use of this statistical analysis was contrary to the Supreme Court's ruling against formulaic analysis to determine liability. The Court rejected Tyson's argument noting that the Dukes' holding did not establish a broad proposition that representative sampling is never permissible in establishing class-wide liability.

Justice Kennedy, in writing the majority opinion, noted that, "in FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the court so long as the study is otherwise admissible," further noting that, "the fairness and utility of statistical methods in contexts other than those present here will depend on facts and circumstances particular to those cases."

Justice Roberts wrote a concurring opinion and Justices Thomas and Alito dissented.

The case will go back to the lower court to determine who among the over three thousand Tysons workers in the class is entitled to share in the $2.9 million verdict, which was not worker specific. Justice Roberts in his concurrence questioned whether there was any way for the lower court to split up the verdict and noted that if a determination of individual shares was beyond reach, the verdict might have to be set aside.

Due to Justice Scalia's death prior to the issuance of the decision, he had no part in the final decision. Justice Scalia authored the *Wal-Mart/Dukes* decision and was a strong critic of class actions.

B. SPLIT DECISION: LOWER COURT DECISION FOLLOWING ABOOD STANDS.

***Friedrichs v. Calif. Teachers Assn.*, No. 14-915, March 29, 2016.** In a 4-4 split, the Supreme Court, in a one-page per curiam opinion, affirmed the Ninth Circuit in this case. A group of California teachers sought to overturn the Supreme Court's decision in *Abood v. Detroit Board of Education* which allowed public employers to require non-union workers in union-represented bargaining units to pay union fees, as long as such fees are not required to fund political or ideological activities. This split decision with no opinion is a direct result of Justice Scalia's absence on the Court.

C. NO RECOVERY FROM THIRD PARTIES BY ERISA PLANS.

***Montanile v. National Elevator Industry Health Benefit* Plan, No. 14-723, January 20,** 2016. In *Montanile*, the U.S. Supreme Court dealt a blow to ERISA plans that seek to recover health benefits paid to participants who sustain injuries caused by third parties.

The fact pattern in *Montanile* was unremarkable and frequently recurring: an ERISA plan participant received health coverage for injuries sustained in a car accident, received a recovery in an underlying action relating to the accident, and the plan then requested reimbursement based on plan terms requiring Montanile to repay the plan out of the settlement he received. After unsuccessfully attempting to resolve his reimbursement obligations with the plan, Montanile's counsel dispersed the settlement monies to Montanile, who quickly spent the settlement (or, at least portions of it).

The plan brought an action under ERISA Section 502(a)(3), which provides in part that an ERISA plan fiduciary may obtain "**appropriate equitable relief**" to enforce ERISA plan terms. These three words have received perhaps more attention from the Supreme Court than any other provision of ERISA over the past 30 years, with the Court continually refining its interpretation of the phrase in cases involving ERISA plans as both plaintiffs and defendants. In erecting a framework to analyze claims arising under Section 502(a)(3), the Supreme Court has repeatedly referred back to olden times when the legal system was divided into two different sets of courts with different remedial powers: courts in law and equity. Though such courts merged long before the passage of ERISA, the Supreme Court interpreted "appropriate equitable relief" to mean the categories of relief "typically available in equity." *Mertens v. Hewitt Assocs.*, 508 US, 248, 256 (1993). This test in turn required an examination of old legal treatises explaining the various forms of equitable relief available in "the days of the divided bench." Therefore, the outcomes under Section 502(a)(3) depended on whether the Supreme Court could find an analogue in the basis for relief and type of remedy sought in a Section 502(a)(3) action.

Remarkably, in just 15 short years prior to M*ontanile*, the Court has had three separate occasions to analyze the phrase "appropriate equitable relief" as it applied to ERISA plan reimbursement cases. The first was *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Knudson*, the Supreme Court, in a 5-4 decision, rejected an ERISA plan's attempt to enforce plan reimbursement terms in a situation where the injured plan participants did not actually receive the underlying tort recovery – instead, that recovery had been placed in a special needs trust and was also in the custody of counsel, neither of whom were named by the ERISA plan in its lawsuit. The Court rejected the plan's claim as not "typically available in equity" because it sought "legal restitution" rather than "equitable restitution." The difference turned on the fact that equitable restitution required a plaintiff to obtain relief over a particular fund in the possession of defendant, rather than a general money judgment for the same amount against the individual's general assets. That decision drew a sharp dissent from Justice Ginsberg, who criticized the majority's seemingly archaic and formalistic analysis, believing that Congress did not use the word "equitable" with the notion of reintroducing those antiquated legal doctrines.

ERISA plans fared better in *Sereboff v. Mid-Atlantic Medical Services*, 547 U.S. 356 (2006). *Sereboff* presented a similar third-party reimbursement scenario, only this time the defendant had possession of the settlement fund from which the plan sought reimbursement. The Court thus distinguished *Knudson*, and analogized the plan's claim to an "equitable lien by agreement," a category of relief "typically available in equity." An "equitable lien by agreement" is an agreement by one party to convey a specific fund or property to another before that fund or property exists. Most ERISA plan reimbursement clauses, if drafted properly, constitute an "equitable lien by agreement." Such liens are valid if they identify a particular fund over which the plan has rights, specify the portion of the fund to which the plan is entitled, and are enforced as against a fund in the defendant's possession or control. Notably in *Sereboff*, the Supreme Court rejected the Sereboffs' assertion that "strict tracing" principles – the plaintiff's ability to "trac(e)" the asset into its products or substitutes," or "trace his money or property to some particular funds or assets," were relevant in cases involving equitable liens by agreement. Said another way, in equitable restitution cases, it was often the case that the plaintiff had to identify a specific piece of property or asset it possessed and that defendant wrongfully took, and would be required to "trace" that asset from when plaintiff possessed it to the time defendant wrongfully took possession. This was called "strict tracing" of the asset into defendant's hands. The Court flatly found that such requirements did not apply in situations involving equitable liens by agreement like those contained in ERISA plans. Lower courts' interpretation of that part of *Sereboff* ultimately led to the dispute in *Montanile*.

Conspicuously left open in *Sereboff*, was the question of whether enforcement of such ERISA plan clauses, though arising properly in equity, was nevertheless "appropriate" within the meaning of the phrase "appropriate equitable relief" in Section 502(a)(3).

The Court took up that question in *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013). The core question in *McCutchen* was whether the word "appropriate" in the phrase "appropriate equitable relief" allowed courts to disregard ERISA plan terms and fashion "appropriate relief" on a case-by-case basis, ostensibly on the basis of various equitable doctrines, depending on the fairness of the particular situation in which the plan sought reimbursement. The Court agreed with the plan that such doctrines could not be used to override clear plan language, and thus solidified *Sereboff* and ERISA plans' reimbursement rights.

Montanile presented a situation not found in the prior Supreme Court reimbursement cases, but one that is not uncommon: a plan member who spends a tort recovery before the plan is able to protect its reimbursement rights. A circuit split developed on whether plans could pursue an "equitable lien by agreement" under Section 502(a)(3) notwithstanding a participant's act of ignoring the lien and spending the money. Many of these courts rely on *Sereboff's* "strict tracing" language to support the conclusion that dissipation did not affect the plans' right to relief. Two circuits held that such action by ERISA plan beneficiaries stripped the claim of its equitable nature, and converted it to a legal claim – a mere money judgment against a defendant's general assets.

The Supreme Court in *Montanile* agreed with the minority view and, much as it had in *Knudson*, employed technical rules of equity to find against the plan. The Court found that relief "typically available in equity" means that a remedy could be enforced only against an intact fund or traceable proceeds (e.g. a car or house) emanating from that fund or, perhaps, "comingled funds." As the Court noted, "A defendant's expenditure of the entire identifiable fund on nontraceable items (like food or travel) destroys an equitable lien." The Court once again examined old equity treatises and doctrines and focused on the fact that equitable remedies were often directed at a particular thing, as opposed to taking the form of a general monetary recovery from a defendant's assets. And the Court noted "the plaintiff could not attach defendant's general assets instead because these assets were not part of the specific thing to which the lien attached."

The Court appeared to set aside the issue of whether the dissipation of the tort recovery was "wrongful" conduct by the ERISA plan member. Instead, the Court found such conduct—wrongful or not—did not change the analysis and conclusion that relief in such a situation was not "typically available in equity." Justice Ginsburg, the lone dissenting member, noted the patent unfairness of rewarding a plan member's flagrant breach of plan terms, and wondered rhetorically "What brings the Court to that bizarre conclusion?"

The Court considered and rejected the plan's argument that similar forms of relief existed in equity over dissipated assets, finding that those forms of relief were not "typical" in equity and were simply a product of the equity courts' ancillary ability to provide legal relief.

The Court also rejected the plan's argument that *Sereboff's* "strict tracing" language meant the plan could recover regardless of dissipation, noting instead that nothing in *Sereboff* altered the requirement that "the plaintiff must still identify a specific fund in the defendant's possession to enforce the lien."

Lastly, and perhaps in the opinion's weakest moment, the Court cast aside the plan's policy arguments, which focused on ERISA plan solvency and the creation of perverse incentives whereby ERISA plan participants can simply defeat equitable liens by breaching the very plan language under which they accepted the benefits coverage. The Court casually suggested that it would normally be quite easy for the plan to prevent dissipation of settlement funds, and that the decision will not pose much hardship or additional costs on plans. This section of the opinion (which Justice Alito notably refused to joint) is startlingly naive. While it is true that ERISA plans are at times aware of recoveries or potential recoveries before or shortly after they occur, often they are not. Often ERISA plans are met with resistance at every turn and do not even learn about settlements or recoveries until long after they occur, despite diligent pursuit of information regarding them. In short, encouraging ERISA plan participants to dissipate recoveries on non-traceable items creates poor incentives and invariably will raise litigation costs. The Court weakly supported its conclusion in this regard by noting that the plan had 14 days' notice that the participant's lawyer might disperse the funds to the participant but did not object, and then waited six months to actually bring suit. Seemingly, though, under the court's analysis, it would have made no difference if the plan participant's lawyer gave 48 hours' notice and the plan sued much sooner.

Takeaways

The result in *Montanile was not entirely surprising, given that the Court in* Knudson had laid the groundwork for such a result. It remains to be seen whether personal injury lawyers and their clients will seize on *Montanile* and attempt to frustrate plan reimbursement claims by hiding the ball on settlement and quickly spending the funds in such a way as to avoid plans' claims. It similarly remains to be seen whether ERISA plans will continue to provide coverage at all in third party liability situations, given that plans are not required under ERISA to extend such coverage in the first place. Moreover, even under the majority opinion, it appears plans have avenues of relief in the event settlement funds are spent on "traceable" items. However, these avenues will undoubtedly result in more litigation costs and perhaps invasive discovery into ERISA plan members' finances. A further result is likely to be greater (and more prompt) activity by ERISA plans in securing injunctive relief to preserve settlement funds intact and prohibit plaintiffs from benefiting from their own breach of plan terms. This may, in turn, make settlement of such claims more difficult. In short, while the result in *Montanile* is a blow to ERISA plans, it may have negative consequences for both plans and participants alike.

D. An Unaccepted Offer of Judgment Cannot Moot a Case, But What About Payment of Complete Relief?

***Campbell-Ewald Co. v. Gomez*, No. 14-857, January 20, 2016.**

A divided U.S. Supreme Court ruled in *Campbell-Edwald Co. v. Gomez*[1] that an unaccepted settlement offer or offer of judgment is a legal nullity that cannot moot a case. However, the Court left open the possibility that payment of complete relief may suffice.

<u>Factual Background and District Court Proceedings</u>

The U.S. Navy contracted with Campbell to develop a multi-media recruiting campaign that included sending text messages to young adults if they "opted in" to receiving such marketing solicitations. Campbell used a subcontractor to identify the cell phone numbers of such individuals. The subcontractor sent a text message to Jose Gomez ("the plaintiff") encouraging him to explore opportunities in the Navy. The plaintiff filed a nationwide class action against Campbell in federal court in Los Angeles claiming that he had not consented to receiving such solicitations and alleging violation of the Telephone Consumer Protection Act ("TCPA")[2]. The plaintiff sought treble damages for a willful and knowing violation, an injunction against Campbell's involvement in unsolicited messaging, and attorneys' fees and costs.

Early in the case, Campbell made a settlement offer and a Rule 68 offer of judgment to the plaintiff, both offering $1,503 per message (three times the maximum statutory damages of $500) plus costs, and a stipulated injunction. Attorneys' fees were not recoverable by statute. The plaintiff did not accept the settlement offer or the offer of judgment, which automatically lapsed under Rule 68. Campbell then moved to dismiss the case for lack of subject matter jurisdiction, arguing that the unaccepted offers provided the plaintiff with complete relief and there was no longer a "case or controversy." In opposition, the plaintiff argued that the Rule 68 offer was an improper attempt to pick off his claim before he had the opportunity to move for class certification.

The district court observed that there was no dispute that the settlement offer and offer of judgment would have fully satisfied the plaintiff's individual claims.[3] In the absence of Ninth Circuit authority on point, the district court followed the Third, Fifth and Tenth Circuits and held that the Rule 68 offer could not moot the putative class action prior to class certification, applying the

[1] 577 U.S. _______ (2016).

[2] 47 U.S.C. §227(b)(1)(A)(iii).

[3] *Gomez v. Campbell-Ewald Co.*, 805 F. Supp.2d 923, 927 (D.C. Cal. 2011).

"relation-back doctrine." This doctrine provides that class claims relate back to the date of the filing of the complaint for the purposes of a subsequent motion for class certification if the named plaintiff's claims are found to be moot.[4] The district court reasoned that otherwise the defendant could "make an end-run around a class action simply by virtue of a facile procedural 'gotcha,' i.e., the conveyance of a Rule 68 offer of judgment to 'pick off' the named plaintiff prior to the filing of a class certification motion."[5] Without further analysis, the district court also held that the unaccepted settlement offer did not moot the plaintiff's claim and denied the motion to dismiss.[6]

Ninth Circuit Decision

The Ninth Circuit affirmed the district court's decision, focusing on the fact that the plaintiff had not accepted the Rule 68 offer or the settlement offer. As a result, the court held that the offers were legal nullities that could not moot the plaintiff's claim.[7]

The Ninth Circuit also ruled that the relation-back doctrine prevented the plaintiff's class claims from being rendered moot. In so ruling, it distinguished the Supreme Court's decision not to apply the relation-back doctrine in *Genesis HealthCare Corp.*,[8] as that the case involved a FLSA collective action, not a Rule 23 class action. Class certification under Rule 23 creates a class with an independent legal status, and relating class certification back to the date the complaint was filed would save the class claims from being moot. In contrast, in a FLSA collective action, relating conditional certification back to the date the complaint was filed would not save any claims from being moot In contrast, in a FLSA collective action, relating conditional certification back to the date the complaint was filed would not save any claims from being moot because conditional certification does not create a class, but only results in the issuance of notice to putative collective action members who may later opt in as plaintiffs.[9]

[4] The Court relied on *Weiss v. Regal Collections*, 385 F.3d 337, 347-48 (3d Cir. 2004); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920 (5th Cir. 2008), and rejected the approach of the Seventh Circuit. *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994).

[5] 805 F. Supp.2d at 930.

[6] Thereafter, Campbell won dismissal of the case on summary judgment on the ground that as a government contractor, it was immune from liability under the doctrine of derivative sovereign immunity. On appeal, the Ninth Circuit reversed this holding, and the Supreme Court affirmed the reversal, holding that because Campbell had not followed the government's instructions and sending the message to the plaintiff violated federal law, Campbell's derivative sovereign immunity defense failed.

[7] The Ninth Circuit relied on its then recent decision in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 950 (9th Cir. 2013) (adopting Justice Kagan's dissent in *GenesisHealthCare Corporation v. Symczyk*, 133 S. Ct. 1523; 185 L.Ed. 2d 636; 2013 U.S. LEXIS 3157 (2013)).

[8] The Ninth Circuit relied on its decision in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), which was issued four months after the district court decision in *Campbell-Ewald*. *Pitts* applied the relation-back doctrine to preserve jurisdiction over a class claim for damages which, while not inherently transitory in nature, was found to be acutely susceptible to being rendered moot by a Rule 68 offer.

[9] 68 F.3d at 875-76 (citing *Genesis HealthCare Corp.*, 133 S.Ct. at 1529).

<u>A Majority of the U.S. Supreme Court Affirmed the Ninth Circuit, Holding That an Unaccepted Settlement Offer or Offer of Judgment Cannot Moot a Case</u>

The United States Supreme Court granted review to address the issue not reached in the Supreme Court's April 2013 decision in *Genesis HealthCare* – whether an unaccepted offer to satisfy the named plaintiff's individual claim is sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of similarly situated individuals. Justice Thomas, writing for the majority in *Genesis HealthCare*, declined to reach this issue because the plaintiff in that case failed to preserve it in the lower courts. As a result, the *Genesis HealthCare* majority assumed, without deciding, that an unaccepted offer which provides complete relief moots a plaintiff's claim, and then held that the FLSA collective action was no longer justiciable based on the collective action allegations alone. Justice Kagan dissented in that case (joined by Justices Ginsburg, Breyer and Sotomayor), arguing the Court should have reached and resolved the issue by ruling that an unaccepted offer of judgment is a legal nullity that cannot moot a case.[10]

With the question squarely presented in this case, Justice Ginsburg, joined by the *Genesis HealthCare* dissenters and Justice Kennedy, affirmed the Ninth Circuit, holding that an unaccepted offer to satisfy the named plaintiff's individual claims cannot render the individual or class claims moot. The majority reasoned that a case becomes moot only when it is impossible for a court to grant any effectual relief to the prevailing party. When a plaintiff rejects a settlement offer or a Rule 68 offer of judgment, the offer becomes a legal nullity under the basic contract law principles and the case proceeds as if it were never made. The majority observed that this was consistent with Rule 68 which expressly provides that a Rule 68 offer is deemed withdrawn if not accepted within 14 days of service, with the only sanction being payment of the offeree's costs if the unaccepted offer is more favorable than the ultimate judgment.

The Court majority distinguished three railroad tax cases relied on by Campbell, noting that they were found moot because the railroads paid the full amount demanded into a bank account in the plaintiffs' names pursuant to a statute that extinguished the tax obligation upon such a payment. The majority also distinguished several declaratory and/or injunctive relief cases held moot after the underlying property was returned, cash forfeited, and trademark infringement dispute resolved by a covenant not to sue by the trademark owner, on the ground that , in contrast,

[10] By the time of the decision in *Campbell*, the First, Second, Fifth, Seventh, and Eleventh Circuits had held that an unaccepted offer cannot moot a plaintiff's claim, with all of the decisions decided after *Genesis HealthCare* adopting the Kagan dissent. *Bais Yaakov v. Act, Inc.*, 798 F.3d 46, 52 (1st Cir. 2015); *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 315 (5th Cir. 2015); *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015); *Tanasi v. New Alliance Bank,* 786 F.3d 195, 200 (2d Cir. 2015); *Stein v. Buccaneers Ltd. Partnership* 772 F.3d 698, 703 (11th Cir. 2014). The Third, Fourth and Sixth Circuits held that an unaccepted offer can moot a plaintiff's claim *Warren v. Sessoms & Rogers, P.a.*, 676 F.3d 365, 371 (4th Cir. 2012); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004).

after the offers to the plaintiff to settle his claim for damages for past harm expired in this case, he was left with nothing. The Court declined to decide whether the result would have been different if Campbell deposited the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the court entered judgment in that amount.

Justice Thomas (who authored the majority's ruling in *Genesis HealthCare*) concurred in the judgment, although he disagreed with the reliance on contract law principles. In his view, whether there is a case or controversy derives from the traditional limitations on the power of common law courts. Historically, according to the common law of tenders (the precursor to Rule 68), a mere offer to settle a case would not extinguish it. Rather, a defendant had to offer to pay the entire claim and produce the sum in an unconditional manner. In the state and federal courts, such a tender was considered an admission of liability, so a defendant could not deny liability and effectuate a tender. Here, because Campbell offered to pay the plaintiff's claim but took no further steps to make payment, the unaccepted offer did not extinguish the plaintiff's claim. Justice Thomas declined to speculate whether all of the common law formalities (i.e. an admission of liability) had to be followed to moot a case.

<u>In the View of the Dissenters, Because There Was No Dispute That Campbell Would Pay the Amount Offered, the Case Was Moot</u>

Chief Justice Roberts dissented, joined by Justices Scalia and Alito. Chief Justice Roberts wrote that Campbell offered to pay the plaintiff the maximum amount recoverable, but the plaintiff wanted more – for a federal court to say he was right. In Chief Justice Roberts' view, federal courts exist to resolve real disputes – cases or controversies – not to rule on entitlement to relief that has already been offered. The Chief Justice asserted that the plaintiff must have a personal stake, which is shown by standing to sue – a personal injury allegedly due to the defendant's unlawful conduct that is likely to be redressed by the requested relief. Here, Campbell agreed to redress the injury fully without forcing the plaintiff to litigate. As a result, the plaintiff could not show an injury in need to redress by the court and there was no need for the court to expound and interpret the law and no case or controversy under Article III. Nor did the plaintiff have standing based on his class action allegations because a plaintiff does not have standing to seek relief based solely on the injuries of others.

While Chief Justice Roberts conceded that Rule 68 by its terms does not extinguish cases upon a plaintiff's failure to accept an offer of complete relief, he noted that here there was also a settlement offer. In his view, whether the settlement offer was a legal nullity under contract law principles is irrelevant to the "case or controversy" analysis. He explained that the court's precedents have not required a plaintiff's acceptance or the defendant's admission of liability. Chief Justice Roberts further reasoned that the fact that Campbell had not paid up should not change the analysis. There was no evidence that it could not pay, and had there been any such evidence, the issue could be addressed by Campbell's depositing a certified check with the trial court. Chief Justice Roberts observed that the case was limited to its facts insofar as the majority did not reach the issue of whether payment of complete relief would moot a case.

Justice Alito wrote separately to clarify that he dissented because there was no real dispute that Campbell would pay the plaintiff what was offered. If there had been such a dispute, then the case would not have been moot. Justice Alito noted that a defendant could make clear that it will pay over the money by handing the plaintiff a certified check or depositing the requisite funds in a bank account in the plaintiff's name. The defendant could also deposit the money with a district court or other intermediary on the condition that the payment be released after the court dismisses the case as moot.

Practical Guidance

The majority, concurring and dissenting opinions in *Campbell* suggest that a defendant interested in providing complete relief to extinguish a plaintiff's case in either a single plaintiff or class or collective action should consider the following:

1. Make a settlement offer in addition to a Rule 68 offer. The *Campbell* majority noted that the only penalty for rejecting a Rule 68 offer that provides for complete relief is the possibility of paying the other side's costs if the offer exceeds the ultimate judgment. Chief Justice Roberts conceded this point, but pointed to the fact that a settlement offer had also been made.

2. Make sure that the settlement offer and Rule 68 offer provide complete relief. This is essential to mooting a claim. Thought must be given to how to frame the relief where attorneys' fees are recoverable by statute. In some jurisdictions, such as the District of Maryland, if plaintiffs wish to recover attorneys' fees in the litigation, they are required to provide quarterly statements to defendants listing their fees incurred to date. As a result, since defendants will have precise information from Plaintiffs' counsel about their amount of fees, it will be easier for defendants to make a full payment that includes attorneys' fees in those jurisdictions.

3. Pay the relief by certified check payable to the plaintiff and deposit it with the Court or pay it to the plaintiff, or deposit the funds in an account payable to the plaintiff. The majority reasoned that the plaintiff was left with nothing after rejecting the offers, and distinguished the cases cited by the dissent as involving situations in which full relief was in fact provided. The concurring and dissenting opinions noted that the case may have come out differently had Campbell taken further steps to pay the money to the plaintiff.

4. Consider the pros and cons of asking the Court to enter judgment on the amount. The majority noted that it need not decide whether the result would be different had Campbell paid the money into court and the court entered judgment on that amount. Justice Alito's dissent stated that he believes that the Court's prior precedents established that the entry of a judgment is not required under those circumstances.

5. Consider the pros and cons of making an admission of liability. This requires careful analysis, especially

where class and collective action claims have been or may be asserted. The majority noted that Campbell continued to deny liability in its stipulated injunction, further underscoring that there remained a case or controversy. Justice Thomas' concurrence declined to reach the issue of whether an admission of liability was necessary to moot a claim. The dissent noted that an admission of liability is unnecessary if the plaintiff is provided with complete relief.

6. If a defendant successfully moots a named plaintiff's individual claim by paying complete relief, what is the result for the alleged class claims? The majority suggested that the relation-back doctrine could be applied to salvage the class claims (*Genesis HealthCare* rejected the application of the relation-back doctrine in collective actions). The dissenters would decline to allow a named plaintiff to have standing based on the injuries of others, to share attorneys' fees among class members or to achieve a class incentive award in addition to damages for the individual claim.

E. DIRECT TV: CONCEPCION DECISION GOVERNS AND FAA TRUMPS STATE LAW BARRING CLASS ACTIONS

On December 14, 2015, in *DirecTV, Inc. v. Impurgia*, the U.S. Supreme Court reversed a California State Court of Appeal decision that had invalidated an arbitration provision based on language from the agreement rendering the entire arbitration provision unenforceable if the "law of your state" makes class-arbitration waivers unenforceable. The Supreme Court found that the California court's interpretation of the phrase "law of your state" was unique to arbitration contracts and violated the requirement of the Federal Arbitration Act (FAA) that arbitration contracts be placed on equal footing with other contracts. As a result, the California Court of Appeals' interpretation was preempted by the FAA. While not arising from an employment law case, this shows that the Supreme Court will not necessarily accept a state court's claim that generally applicable principles of contract law preclude enforcement of an agreement governed by the FAA. Instead, the High Court will scrutinize the state court's rationale to see whether arbitration agreements are disproportionately affected by the application of the state rule.

Facts and Procedural History

DIRECTV, Inc. ("DIRECTV"), entered into service agreements with its customers that contained a mutual agreement to arbitrate claims. The mandatory arbitration provision, expressly governed by the FAA, contains a class arbitration waiver, but also provides "(i)f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration provision] is unenforceable." Despite the arbitration provision, two customers brought suit in California state court seeking damages for early termination fees they claimed violated California state law. DIRECTV sought to enforce the arbitration provision, but the trial court denied the request and DIRECTV appealed.

The California Court of Appeal analyzed whether the law of California makes the class-arbitration waiver unenforceable and therefore renders the entire arbitration provision unenforceable. Although the Court of Appeal acknowledged that the California Discover Bank rule – which rendered class-arbitration waivers in consumer contracts unenforceable – was preempted by the FAA in *AT&T Mobility LLC v. Concepcion* ("Concepcion"), 563 U.S. 333, 352 (2011), it nevertheless found the class-arbitration waiver was unenforceable under California state law. The Court of Appeal reasoned that by using the phrase "law of your state," the parties were referring to California law without regard to preemption by the FAA. This was because: (1) "the law of your state" provision was paramount to the more general provision invoking the FAA; and (2) because the company had drafted the language, any ambiguity should be construed against the drafter. The California Supreme Court denied discretionary review, and the U.S. Supreme Court granted DIRECTV's petition for writ of certiorari.

The U.S. Supreme Court's Analysis

Justice Breyer, who wrote the majority opinion, recognized the Court's analysis must focus on whether the California Court of Appeal's decision placed arbitration contracts on equal footing with other contracts and, more specifically, whether the decision was based on "grounds as exist at law or in equity for the revocation of any contract" – the standard required by Section 2 of the FAA. The majority found the California Court of Appeal's Interpretation would not apply to contracts other than arbitration agreements and was therefore not a valid ground to refuse to enforce the provision.

In concluding that the Court of Appeal's interpretation was unique to arbitration contracts and did not place arbitration contracts on equal footing with other contracts, the Supreme Court found the contract was not ambiguous. Rather, the Court determined that the phrase "the law of your state" could only mean "valid state law" and neither party, nor the dissent, cited any case from California or elsewhere interpreting similar language to apply to an *invalid* state law. Next, although at the time the parties entered into the contracts at issue the *Discover Bank* rule was still valid. The Court noted that, under California's general contract principles, references to "California law" should incorporate changes in the law retroactively. As a result, the Supreme Court concluded that the "law of your state" language should be interpreted in light of the *Discovery Bank* rule's subsequent invalidation by *Concepcion*.

The Supreme Court further pointed out that nothing in the Court of Appeal's decision suggests that a California court would interpret the "law of your state" language the same way in any other context, other than in regards to an arbitration agreement, or that a California court would interpret the language to include state laws preempted by federal law. Instead, the Court of Appeal's opinion focused only on arbitration.

The Court also disagreed with the Court of Appeal's conclusion that the *Discover Bank* rule maintained legal force, despite being invalidated by *Concepcion*. As Justice Breyer wrote, "[t]he view that state law retains independent force even after it has been authoritatively invalidated by [the U.S. Supreme Court] is one courts are unlikely to accept as a general matter and to apply in other contexts."

Lastly, the Court found that the Court of Appeal's argument that the "law of your state" language was paramount to the more general provision adopting the FAA, simply begs the question how to interpret the words "the law of your state."

The Supreme Court therefore concluded the California court's analysis did not place arbitration contracts on equal footing with all other contracts, and thus failed to give "due regard . . . to the federal policy favoring arbitration." Accordingly, the Court of Appeal's interpretation was preempted by the FAA and reversed.

Conclusion

The latest pro-arbitration decision from the U.S. Supreme Court is significant for several reasons. As an initial matter, it is interesting that the majority opinion – which interprets "the law of your state" language in light of *Concepcion* – is authored by Justice Breyer and joined by Justice Kagan, both of whom dissented in *Concepcion*. The Court is more unified in its position here in relation to the FAA's preemptive effect over state law contract defenses that purport to apply to contracts generally.

Second, it is evident by the decision that the Court will heavily scrutinize opinions that purport to rely upon the FAA's "Savings Clause" to invalidate arbitration agreements. Lower courts may not simply pay lip-service to treating arbitration agreements like any other contracts. To the contrary, a court must engage in a sincere analysis establishing that it is placing arbitration contracts on equal footing with other contracts.

Finally, it appears from the Court's opinion that parties seeking to invalidate arbitration agreements under the Savings Clause, and overcome the federal policy favoring arbitration agreements, must be prepared to show that the grounds for nullifying an arbitration contract would apply the same way in other contexts.

F. THE SUPREME COURT RULES IN FAVOR OF THE ADMINISTRATION AND THE AFFORDABLE CARE ACT SURVIVES

On June 25, 2015, the U.S. Supreme Court has once again ruled in favor of the Affordable Care Act (ACA). At issue in *King. v. Burwell* was whether the landmark legislation allows federal subsidies to be given to low-income consumers residing in the 34 states that did not set up their own health insurance Exchange. In a 6-3 decision, the Court answered in the affirmative, preserving subsidies for millions of Americans who purchased their health insurance through a Federal Exchange. Affirming the decision of the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court opined that the tax credits are, indeed, available to individuals in states that use a Federal Exchange. The majority decision was written by Chief Justice Roberts, and joined by Justices Kennedy, Ginsberg, Breyer, Sotomayor, and Kagan, while Justices Scalia, Thomas and Alito dissented.

The 6-3 ruling was a huge victory for the Administration, preserving the President's signature domestic policy from fundamental disruption and disarray. Unlike the Court's prior ruling upholding the ACA's "individual mandate," *King v. Burwell* did not involve a constitutional question, but rather a question of statutory interpretation. Petitioners argued that the ACA statute directs that tax credits are only available for consumers who purchase their insurance through "an Exchange established by the State under [42 U.S.C. §18031] of the law." Accordingly, the petitioners contended that the Federal Exchanges (established pursuant to a different section of the ACA) operating in states that did not set up their own Exchanges does not qualify as "an Exchange established by the State under [§18031]," so consumers in such states should not receive any tax credits. However, under the IRS rule implementing the ACA tax credit provision, a Federal Exchange operating in a state that did not set up its own Exchange would qualify as "an Exchange established by the State under [42 U. S. C. §18031]," so individuals in such states *would* receive tax credits.

The Court rejected petitioners' argument, concluding that, when read in context, the phrase "an Exchange established by the State" is ambiguous, in part because other sections describe the Federal Exchange and the State Exchange interchangeably, or by using the term "such Exchange." Given that the text is ambiguous, the Court turned to the broader structure of the ACA, concluding that the statutory scheme compels the Court to reject the petitioners' argument because it would destabilize the individual insurance market in any state with a Federal Exchange, and likely create the very "death spirals" that Congress designed the ACA to avoid. The Court's majority displayed great concern that the combination of no tax credits and an ineffective coverage requirement could well push a state's individual insurance market into such a death spiral. The majority opinion cited one study predicting that premiums would "increase by 47 percent and enrollment would decrease by 70 percent."

The Court writes: "If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish 'such Exchange.' §18041. And by using the words 'such Exchange,' the Act indicates that State and Federal Exchanges should be the same."

The Court acknowledged that whether those credits are available on Federal Exchanges is a question of deep "economic and political significance."

The political stakes could not have been higher. In the months and weeks leading up to the decision, Congressional Republicans were preparing legislation to "bridge" a decision that would have ruled the federal subsidies were not available to the millions of Americans who are currently receiving them. Congressional Republicans themselves were challenged by the task of trying to "bridge" efforts to minimize the potential disruption with their long-standing objective of dismantling the ACA. The Supreme Court's decision today negates the need for such bridge legislation, and will likely slow momentum for wholesale changes to the ACA. The prospect for piecemeal changes to ACA, however, remains, and efforts to repeal or shape provisions—including the 2018 "Cadillac plan" excise tax—continue.

With the ACA once again having survived the Supreme Court's scrutiny, the focus returns to implementation. The debate on the ACA in Congress did not end with the *King v Burwell* decision.

G. Supreme Court Holds That Employers Can Be Liable For Failing to Provide Religious Accommodation Even When They Have No Actual Knowledge That Religious Accommodation was Required

The U.S. Supreme Court's June 1, 2015 decision in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* resulted in an expected outcome but provided an unexpectedly small amount of practical guidance for employers. The Court held that to avoid summary judgment in a religious accommodation case, a job applicant with a bona fide need for religious accommodation must prove only that a prospective employer's desire to avoid the accommodation was a motivating factor in its decision not to hire her. She need not prove the employer had actual knowledge of her need for religious accommodation. In an 8-1 decision, the Court definitively establishes:

- Title VII "affirmatively obligates" employers to make exceptions to neutral employment policies to accommodate employees' religious beliefs and practices;
- A failure to make such an exception is a form of disparate treatment: it is ***intentional*** discrimination "because of" religious practice;
- The U.S. Court of Appeals for the Tenth Circuit erred when it inserted an "actual knowledge" requirement into Title VII's prohibition against disparate treatment on the basis of religious practice; and
- An employer who makes an employment decision "***with the motive of avoiding [a religious] accommodation***" violates Title VII, even if the applicant or employee needing accommodation never requested accommodation ***and*** the employer lacks actual knowledge that accommodation is needed because of religion.

But the decision provides no explicit practical guidance to employers about how best to handle a suspicion that a particular candidate may need a religious accommodation to do a job. Instead, the Court simply says:

Thus the rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward. An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (although he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.

Unfortunately, as explained below, the facts of *Abercrombie* allowed the Court to cease its analysis before explaining what sort of fact pattern – other than an unheeded request for accommodation or a manager's admission – might form a sufficient basis from which to infer improper motivation for an employment decision. Accordingly, while some best practices are articulated below, a discussion of the specific facts *Abercrombie* presents is warranted.

What Happened in *Abercrombie*?

The Interview. The *Abercrombie* case began when a young Muslim woman interviewed for a salesperson/model job at defendant's store wearing a hijab (headscarf) that covered her hair but not her face, neck or shoulders. The hiring manager testified she assumed the applicant was Muslim when she interviewed her because of her headscarf. There was some discussion about the defendant's dress and grooming requirements in the interview, but neither the hiring manager nor the applicant mentioned the scarf. The manager thought the applicant was a good candidate for the position, but she did not know if the applicant could work for defendant while wearing a scarf. She consulted her district manager, advising him that she had a Muslim applicant who had worn a headscarf to her interview. The district manager, who claimed the hiring manager did <u>not</u> mention the candidate was Muslim, said the defendant could not make any exceptions to defendant's "Look Policy," which prohibited employees from wearing "caps" in the workplace. He testified he would have said the same thing if he had known the religious reason for wearing the scarf. The hiring manager never called the applicant back.

The District Court. The EEOC sued on applicant's behalf, claiming failure to accommodate. Both sides moved for summary judgment. Among other things, the defendant argued the EEOC failed to establish a *prima facie* case of discrimination because the applicant had not explicitly requested a religious accommodation. While recognizing the Tenth Circuit had not yet held whether something other than a direct, explicit request from an employee or applicant could trigger the duty to accommodate, the district court relied on cases from the Eighth, Ninth, and Eleventh Circuits and the Southern District of Florida to conclude the duty to accommodate arises when the employer has enough information, either from the employee or applicant or from some other source, to be aware a conflict exists between the employee's or applicant's religious observance or practice and a job requirement. The district court found that the hiring manager's testimony demonstrated she had adequate notice of the applicant's need from the applicant's appearance at the interview. No formal request was necessary. After drawing this conclusion, the district court rejected the defendant's undue hardship defense and granted the EEOC summary judgment on liability, leaving nothing to resolve except damages. The applicant had obtained another, higher-paying job, so back pay was not at issue. A jury awarded $20,000 in compensatory damages.

The Tenth Circuit. The U.S. Court of Appeals for the Tenth Circuit not only reversed the grant of summary judgment to the EEOC, but it also ordered the district court to grant summary judgment to the defendant. The court's opinion focused entirely on the second prong of the plaintiff's *prima facie* case:

> In reaching our conclusion that [the company] is entitled to summary judgment, we resolve a question vigorously contested by the parties; specifically, whether, in order to establish a prima facie case under Title VII's religion-accommodation theory, a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule. We answer that question in the affirmative. Consequently, because [the applicant] did not inform [the company] prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the EEOC cannot establish its prima facie case.

The Tenth Circuit supported its conclusion with its own prior precedent, its interpretation of cases from other circuits, select language from EEOC regulations, and certain cases addressing the interactive process in the context of the Americans with Disabilities Act (ADA).

The Tenth Circuit's extremely detailed reasoning was, however, far less important than the starkness of its conclusion: an accommodation claim could not move past summary judgment unless the plaintiff personally informed the employer that he or she: (1) engaged in a particular practice; (2) did so *for religious reasons*; and (3) needed an accommodation to do (or continue to do) the job in question—in other words, that the practice was "inflexible" and conflicted with work. An employer was neither expected, *nor allowed*, to assume—as the interviewer in the *Abercrombie* case did—that an employee's dress or grooming practice had a religious motivation and might need to be accommodated—even if the need for accommodation seemed obvious at the time of the interview.

This strict notice requirement created a split in the circuits as the Eighth, Ninth, and Eleventh Circuits allow an applicant or employee to establish the second prong of a *prima facie* case of religious failure to accommodate if he or she can show the employer was aware of a conflict between the employee's religious practice and a job requirement, regardless of how or from whom the employer gathered the knowledge. Indeed, the Eighth Circuit described the level of notice required to meet the second prong of the *prima facie* case by saying, "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'"

The Supreme Court. The EEOC sought certiorari on the following question:

> [W]hether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

The Supreme Court answered the question presented in the negative. Justice Scalia, writing for the majority, began with the basic fact that Title VII's disparate treatment provision makes discrimination "because of" religion an unlawful employment practice. An employee or applicant establishes the existence of such an unlawful employment practice if he or she demonstrates religion, which includes religious practice, was a "motivating factor" in an employer's decision. However, unlike the ADA, Title VII does not "impose a knowledge requirement" on the decision-maker. To the contrary, Title VII's intentional discrimination provision "prohibit[s] certain *motives*, regardless of the state of the actor's knowledge." For example, a manager could know with certainty an applicant would need a religious accommodation, but decide not to hire the applicant for completely unrelated reasons. The same manager could merely suspect another applicant would need a religious accommodation and refuse to hire the applicant because he does not wish to go through the hassle of accommodating. Assuming the applicant really did need a religious accommodation, the manager with knowledge would not have violated Title VII, but the manager acting on his speculation would have violated the statute. In simplest terms, Title VII's "disparate treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability."

In *Abercrombie*, the hiring manager ***admitted*** that the no-hire decision was based on a series of assumptions about a possible need for a religious accommodation. No inference of improper motive was necessary. By securing the admission, the EEOC demonstrated the applicant's need for accommodation was a motivating factor in the decision not to offer her a job. Accordingly, the Tenth Circuit erred in granting the company summary judgment. Justice Scalia devotes the final paragraphs of the majority opinion to rejecting the company's alternative argument that religious accommodation should be treated as a matter of disparate impact rather than disparate treatment, and stating in unequivocal terms that Title VII's religious accommodation provision "requires otherwise-neutral employment polices to give way to the need for an accommodation."

Where Do Employers Go From Here?

The only additional information Justice Scalia provides about how an applicant or employee who has been deprived of a reasonable accommodation would go about proving motive is in a footnote:

> While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is

> not met unless the employer at least suspects that the practice in question is a religious practice – i.e. that he cannot discriminate "because of" a religious practice unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew – or at least suspected – that the scarf was worn for religious reasons. The question therefore has not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

The assertion about this point being unargued is curious in the wake of an oral argument that focused on multiple hypotheticals designed to ferret out exactly how an employer should react when an applicant presents in dress suggesting the need for religious accommodation. The above proclamation certainly leaves open more questions than it answers:

- Should the *prima facie* case for religious accommodation claims change?
- Exactly how much and what kind of motive evidence will a plaintiff need to escape summary judgment in the absence of either an explicit request for accommodation or an admission from a manager?
- To what extent will the employer's articulation of a legitimate non-discriminatory reason for hiring someone other than the applicant with a religious accommodation need trump evidence of improper motive?
- Should employers go out of their way to hire supervisors who are religiously illiterate in order to avoid accommodation claims based on what supervisors "suspected"?

The first three questions will need to be answered in future litigation, but we believe the fourth must be answered in the negative. To the contrary, while employers need not educate their managers on the finer points of religious beliefs and practices, they do need to educate them about the obligation to provide religious accommodation. Now is the time to foster a culture that is receptive to religious accommodation.

The *Abercrombie* decision leaves no doubt that Title VII requires employers to work actively to make exceptions to their neutral employment policies in order to accommodate religious practices. When faced with a possible need for accommodation, an employer needs to focus first and foremost on whether accommodation is possible – not how to avoid making the accommodation. And employers should turn to the issue of undue hardship only *after* considering reasonable accommodation possibilities. If an employer currently lacks a comprehensive policy on religious accommodation and a procedure for implementing the policy's assurances, now is the time to adopt both.

Managers charged with hiring for jobs in which many different types of religious dress and scheduling needs could be accommodated – ***and that is most jobs*** – need to be trained to think about a need for religious accommodation, whether known or suspected, the same way they think about an applicant's race, color, sex, or national origin – ***as a non-issue***. If an applicant requests an accommodation during the interview, the manager needs to be prepared to ask only enough questions to understand the request and either make note of it for his or her own future post-hire consideration or pass on to Human Resources for further analysis. If a manager suspects – based on the employee's garb or some other non-verbal cue – that an employee may need a religious accommodation, the manager should be well informed about the obligation to provide such accommodation so that he or she can truthfully testify the suspicion was no more than a fleeting thought that did not impact the hiring decision. If the company selects another candidate, the manager or Human Resources should carefully document the legitimate, non-discriminatory reasons for the selection. Finally, either the manager or Human Resources should work hard to close the loop with each and every rejected candidate, providing appropriate, non-discriminatory reasons for the decision not to hire.

Hiring for jobs where common types of religious accommodation might be difficult or impossible poses a tougher challenge. While all of the principles articulated in the last two paragraphs remain true, the employer should take particular care in drafting both the job description and the posting for the position. For example, if the position requires an employee to work a minimum of eight hours between 9:00 a.m. and 5:00 p.m. each day of every weekend, and shift swapping, shift splitting, the use of paid time off and other similar accommodations are not viable options, then both the job description and the posting should clearly reflect these scheduling requirements.

The hiring manager should also consider specifically informing each applicant of the scheduling requirements during the interview and asking whether the applicant "has a problem" with them. Both Justice Alito and Justice Sotomayor used this question during the *Abercrombie* oral argument. Nothing in the Court's opinion suggests it is inappropriate. If an applicant responds by raising a religious accommodation issue, the hiring manager needs to know what to do: namely, either speak briefly with the applicant about exactly what religious accommodation would be needed, or let the applicant know the manager will pass the need along to Human Resources for further consideration and follow up.

If the employer hires the applicant who has expressed a need for accommodation, then the groundwork will already be set for the accommodation process. If the employer does not select the applicant, then either the manager or Human Resources can reject the applicant, providing the true reason for the rejection, be it another's superior qualification or the undue hardship involved with accommodating religion. Either way, the employer will have treated the applicant with respect and minimized any concerns about improper motivations.

H. Supreme Court Rules Plan Fiduciaries Owe a Fiduciary Duty to Periodically Review Plan Investments.

In a unanimous decision on May 18, 2015, the U.S. Supreme Court in *Tibble v. Edison International* held that plan fiduciaries owe an ongoing duty to review plan investments periodically to ensure compliance with their obligations under the Employee Retirement Income Security Act (ERISA). In doing so, the Court reversed the Ninth Circuit's holding that the statute of limitations for challenges to the continued offering of an investment option begins running only at the time the investment option is selected by an ERISA plan fiduciary (absent a change in circumstances), but stopped short of defining any specific obligations apart from a "continuing duty to monitor investments and remove imprudent ones." The decision reinforces the importance of maintaining and documenting a formal program for review of all investment options under an individual account plan.

Factual and Procedural Background

The respondent company sponsored and maintained a 401(k) savings plan ("the Plan"). The Plan held $3.8 billion in assets for the approximately 20,000 participants in the Plan. In 2007, several individual participants in the Plan brought a class-action suit, alleging that the Plan's fiduciaries violated their duty of prudence under ERISA by offering numerous mutual funds as investment options, because they had high hidden fees and expenses. Plaintiffs argued that the Plan would have been able to obtain virtually identical, but lower-priced, mutual funds.

ERISA requires that plan fiduciaries discharge their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

But under a separate provision within ERISA, an action for breach of fiduciary duty must be brought within six years of:

> (A) the date of the last action which constituted a part of the breach or violation, or
>
> (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation.

In *Tibble*, the district court allowed the suit to proceed with respect to mutual funds that were added as investment options in 2002, since six years had not yet elapsed when the Plan participants filed their complaint in 2007. Then, the district court later ruled in favor of the participants on the merits, holding that the defendants "had not offered any credible explanation for offering retail-class, *i.e.*, higher priced mutual funds that cost the Plan participants wholly unnecessary administrative fees." With respect to other mutual funds, however, the district court rejected the claims as time-barred, since more than six years had elapsed since those funds had been added to the Plan (as a result of collective bargaining negotiations with a union representing the company's employees).

Both the plaintiffs and the defendants appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court's decision with respect to both the validity of the claims for the 2002 funds, and the dismissal of the claims related to the 1999 funds. The Ninth Circuit wrote that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render section 413(1)(A) meaningless."[9] Although the panel opinion was later amended in minor ways, the essential holdings remained, and were eventually appealed to the U.S. Supreme Court.

What Duties Do Plan Fiduciaries Owe?

On several occasions, the Supreme Court has stated its view that ERISA jurisprudence is derived from the common law of trusts. And in the Court's short eight-page opinion in *Tibble*, Justice Breyer faulted the Ninth Circuit for failing to adequately consider principles of trust law when it rejected the plaintiffs' claim for breach of fiduciary duty with respect to the mutual funds added in 1999. Not only is there a duty of "prudence" to select appropriate investment choices at the outset, but the Court held that there is a "continuing duty" to monitor those investment selections to "remove imprudent ones."

In other contexts, the Court has rejected a "continuing violation" theory under federal statutes protecting employee rights. But in this context, the Court relied heavily on the fiduciary nature of the relationship between the Plan and the participants, which it repeated was based on trust principles. On that basis, the Court held that "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." As the Ninth Circuit alluded to in its earlier opinion, the effect of such a holding on ERISA § 413(1)(A) could greatly expand the number and type of breach of fiduciary duty claims that can be pursued under ERISA § 404. Going forward, plaintiffs will have significantly broader opportunities to assert claims based on decisions made long ago, so long as plans have failed to comply with their ongoing duties to review and monitor the investment selections contained in their plans.

What Next?

The Court's opinion does little more than remand the case for further consideration. It offered no opinion as to the frequency with which plan administrators must review investment portfolios, or any guidance as to the level of review that administrators must undertake.

The Court's primary directive to the Ninth Circuit was simply that it should do more to "recogniz[e] the importance of analogous trust law" when evaluating the case on remand. Given the ambiguous nature of this directive, it is difficult to determine whether the case will ultimately be resolved in favor of the plaintiffs with respect to the older offerings. But in any event, the decision could lead to additional litigation defining the specific nature of the fiduciary duty to monitor plan investment options.

Practical Considerations

In light of the Supreme Court's ruling, many employers may wonder whether the investment options being offered under their plans are being adequately reviewed to comply with ERISA's fiduciary requirements. Employers may therefore want to consider the following steps:

- Assess the composition of investment review committees under ERISA plans, and the frequency of their meetings.
- Inform investment review committees (or other fiduciaries with such responsibilities) of their obligations to carefully—and regularly—review the soundness of the investment options offered to participants.
- Have investment fiduciaries maintain records that demonstrate their careful consideration of the available investments in company 401(k) portfolios.
- Maintain negotiation records when involved in collective bargaining relating to investment options under the plan subject to negotiations.
- Continue monitoring legal developments as they proceed and as case law addresses specific ongoing duties of plan fiduciaries.

I. SUPREME COURT CONFIRMS THAT EEOC CONCILIATION EFFORTS ARE SUBJECT TO JUDICIAL REVIEW.

On April 29, 2015, in a unanimous decision, the U.S. Supreme Court resolved a circuit split in holding that the Equal Employment Opportunity Commission's (EEOC) attempts to conciliate a discrimination charge prior to filing a lawsuit are judicially reviewable. In *Mach Mining, LLC v. EEOC*,[1] the Supreme Court vacated a decision by the U.S. Court of Appeals for the Seventh Circuit that had held the EEOC's conciliation effort during the administrative charge process was not judicially reviewable and not an affirmative defense to be used against the agency.[2] Although Title VII provides the EEOC with "wide latitude" to choose which informal conciliation methods to employ, the Supreme Court found the statute also provides "concrete standards" for what the conciliation process must entail.

Specifically, the Court held that, to comply with its statutory conciliation obligations, the EEOC must inform the employer about the specific discrimination allegation(s) and such notice must describe what the employer has done and which employees (or class of employees) have suffered. The Court further held the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. However, while the Court held that judicial review of these requirements is appropriate, the scope of that judicial review is "narrow." A court will merely conduct a "barebones review" of the conciliation process and the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

Significantly, a court is not to examine positions taken by the agency during the conciliation process. The Court noted that while a sworn affidavit from the EEOC stating that it has performed these obligations would generally suffice to show that it has met the conciliation requirement, where an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a reviewing court will be tasked with conducting “the fact-finding necessary to resolve that limited dispute.” Ultimately, the Court held, where a court finds for an employer on the issue of the EEOC’s failure to conciliate, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. While some courts in the past have imposed the remedy of dismissal of a lawsuit based on failing to meet its conciliation obligation, that drastic measure appears to have been eliminated based on the Court’s decision.

Procedural History

In 2011, the EEOC filed a lawsuit against Mach Mining, alleging it had discriminated against women in its hiring practices. Mach Mining denied the allegations and asserted the affirmative defense that the EEOC did not conciliate in good faith prior to bringing suit. The EEOC moved for partial summary judgment on this affirmative defense and argued that, based on the Seventh Circuit's decision in *EEOC v. Caterpillar, Inc.*,[3] the conciliation process was not subject to judicial review. The district court denied the EEOC's motion, relying on decisions from other circuits permitting an employer to challenge the EEOC's conciliation efforts, holding that "the EEOC's conciliation process is subject to at least some level of judicial review and that review would involve at least a cursory review of the parties' conciliation." Based on the importance of the issue, the district court certified an interlocutory appeal of the court's order to the Seventh Circuit.

In December 2013, the Seventh Circuit held the sufficiency of the EEOC’s conciliation efforts were not judicially reviewable, becoming the first federal circuit to foreclose an employer's ability to use the implied affirmative defense that the EEOC failed to conciliate prior to bringing suit.[4] The Supreme Court agreed to review this case, and consider whether and to what extent a court may enforce the EEOC’s mandatory duty to conciliate discrimination claims before filing suit.

The Supreme Court's Analysis

In reversing the Seventh Circuit's decision, the Supreme Court held “a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit" but “the scope of that review is narrow, thus recognizing the EEOC’s extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case.”[5]

The Supreme Court noted that it applies a “strong presumption” favoring judicial review of administrative action, and that absent judicial review, the EEOC’s compliance with the law would rest in the EEOC’s hands alone despite the fact that legal lapses and violations occur, especially so when they would have no consequence.

The Supreme Court also set forth the standard for the scope of judicial review of the EEOC’s conciliation efforts. Because Title VII requires the EEOC to afford the employer a chance to discuss and rectify a specified discriminatory practice, the EEOC must inform the employer about the specific discrimination allegation. Such notice must describe what the employer has done and which employees (or class of employees) have suffered. Then, the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. Previously, different circuits used different standards in reviewing the EEOC's conciliation efforts.[6] The scope of judicial review set forth by the Court allows the EEOC to exercise the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. The Court held that a sworn affidavit from the EEOC stating that it has performed its conciliation obligations should suffice to show that it has met the conciliation requirement. "If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the fact finding necessary to decide that limited dispute."[7]

In adopting this as the proper scope of judicial review, the Supreme Court rejected the proposed standards of review advocated by both the EEOC and Mach Mining. The EEOC had argued for the most minimalist form of review of its conciliation efforts imaginable, asserting that the two letters it sent to the company established that it had met its obligation to attempt conciliation. The EEOC sent its first letter to Mach Mining after it issued its reasonable cause determination and notified the company that "[a] representative of this office will be in contact with each party in the near future to begin the conciliation process."[8] The EEOC sent a second letter about a year later, stating that the legally mandated conciliation attempt had "occurred" and failed. The Supreme Court rejected the EEOC's argument, noting that these "bookend letters" failed to prove that conciliation efforts actually took place in the interim and that to treat these letters as sufficient would be "simply to accept the EEOC's say-so that it complied with the law." More is required for appropriate judicial review.

Mach Mining, in turn, argued that the Court should do a deep dive into the conciliation process and suggested that the Court adopt the "negotiated in good faith" standard set out in the National Labor Relations Act (NLRA). Under this approach, the EEOC would have to notify the employer in every case of the minimum it would take to resolve the claim; lay out the factual and legal basis for all its positions, including the calculations underlying any monetary request; and refrain from making "take-it-or-leave-it" offers. The Court, however, rejected the analogy between the NLRA and Title VII, and noted that Mach Mining's proposed standard conflicts with the latitude Title VII gives the EEOC to pursue voluntary compliance with the law's commands. Furthermore, the Court noted that Mach Mining's suggested approach would impinge on Title VII's protection of the confidentiality of conciliation efforts, as it would necessitate the disclosure and use of evidence of such efforts in a later Title VII suit. The Court held that allowing disclosure of the efforts taken during the conciliation process would undermine the conciliation process itself, because confidentiality promotes candor in discussions and thus enhances the possibility for agreement.

Finally, the Supreme Court also set forth the remedy in the event a reviewing court determines the EEOC failed to conciliate. Specifically, if the reviewing court determines the EEOC failed to meet its statutory obligations (*i.e.*, provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim), the court should order the EEOC to undertake the mandated efforts to obtain voluntary compliance, and stay the litigation while this occurs.

What This Means for Employers

Based on the Supreme Court's holding, the EEOC's conciliation efforts are subject to judicial review and employers can raise the EEOC's failure to conciliate as an affirmative defense. However, there is a relatively minimal burden on the EEOC to establish it has met its duty to conciliate. Moving forward, according to the Court, only a "barebones review" of conciliation efforts will be required, leaving the EEOC with "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them." Employers thus face the potential risk that the EEOC will make extreme settlement demands during the conciliation process, with the potential threat of litigation, particularly when employers are faced with reasonable cause findings based on the agency's systemic investigation. Moving forward, a court will only look "to whether the EEOC attempted to confer about a charge and not to what happened (*i.e.* statements made or positions taken) during those discussions." Moreover, in the event of a subsequent EEOC lawsuit, the remedy if the employer successfully raises the "failure to conciliate" defense is not dismissal. Rather, the EEOC merely will be required to undertake the mandated conciliation efforts. Despite these concerns, it remains in the best interest of both the employer and the EEOC to engage in good-faith conciliation efforts at the charge phase prior to any potential litigation between the parties.

J. THE HEAVY BURDEN OF LIGHT DUTY: *YOUNG V. UPS*

On March 25, 2015, the U.S. Supreme Court issued its much-anticipated decision in *Young v. UPS*,[11] which employer and employee groups alike hoped would clarify whether employers must provide light duty and other workplace accommodations to pregnant employees in the same manner they provide accommodations to employees who are injured on the job. While the majority opinion did not answer this question directly, the Supreme Court provided a framework for pregnant employees challenging workplace accommodation policies and practices under Title VII of the Civil Rights Act ("Title VII"), as amended by the Pregnancy Discrimination Act ("PDA").

In this 6-3 decision, the Court held that a pregnant employee can establish a *prima facie* case of disparate treatment by showing, under the familiar *McDonnell Douglas* burden-shifting framework, that: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate

[11] 1355 S.Ct. 1338; 2015 U.S. LEXIS 2121 (March 25, 2015).

her; and (4) the employer accommodated others "similar in their ability or inability to work." If these elements are established, an employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason must be more than an employer's claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer's reason is pretextual. The Court provided examples of how this could be done in the PDA context.

Brief History of the PDA

In 1976, the Supreme Court in *General Electric Co. v. Gilbert* considered whether an employer violated Title VII's sex discrimination provision by providing employees with non-occupational sickness and accident benefits, but specifically excluding disabilities arising from pregnancy. The district court in *Gilbert* ruled against the company and found that normal pregnancy, while not necessarily either a "disease" or an "accident," was indeed disabling for a certain period, and that 10-20% of pregnancies lead to miscarriage or other complications. The employer's cost of including such benefits might indeed be higher for women than it was for men, but the district court held that fact could not save the employer from being in violation of Title VII on the basis of sex for making the distinction in its plan. The U.S. Court of Appeals for the Fourth Circuit affirmed. The Supreme Court, however, overturned the Fourth Circuit decision in *Gilbert* and held that the disability benefits plan did *not* violate Title VII because the plan treated male and female employees alike in that it covered "exactly the same categories of risk." The Supreme Court then reasoned that, although pregnancy-related disabilities constitute a unique risk to women, the failure to compensate women for the risk did not destroy the parity of benefits between men and women.

In 1978, Congress expressed its displeasure with the Supreme Court's decision in *Gilbert* by enacting the Pregnancy Discrimination Act. The first clause of the PDA specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000e(k). The PDA's second clause states that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."

The interpretation of "other persons" in the PDA's second clause was central to the Supreme Court's decision in *Young,* where the Court grappled with the following questions: Does this clause mean that courts must compare workers *only* with respect to the work limitations they suffer? Does it mean courts must ignore all other similarities or differences between pregnant and non-pregnant employees? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

Facts and Procedural History of the *Young* Case

The plaintiff, Peggy Young, worked as a part-time delivery driver for United Parcel Service (UPS) in Landover, Maryland. Although all drivers were required to be able to lift items weighing up to 70 pounds as an essential function of their jobs, the plaintiff's duties generally included carrying lighter letters and packages. After the plaintiff became pregnant, she asked for a brief leave of absence. Shortly thereafter, she submitted a doctor's note with a recommendation that she not lift more than 20 pounds and she asked for an accommodation to work light duty. The company denied these requests, but also denied her return to work on the basis that lifting more than 20 pounds was an essential function of her job. Notably, UPS, as do many employers, provided employees who had on-the-job injuries with light-duty assignments. Additionally, the company regularly provided light duty or other accommodations to certain other categories of employees (such as those who had disabilities under the ADA and drivers who lost DOT certification and were unable to drive). Employees who did not fall into any of these categories—whether male or female—were not eligible for light-duty assignments. Because Young did not, she remained on an unpaid leave of absence. She then filed a lawsuit against the company, arguing that the PDA requires employers to provide pregnant employees with light-duty work if they provide similar work to other employees in other circumstances. The U.S. District Court for the District of Maryland granted summary judgment for UPS, finding that Young had failed to establish her *prima facie* case of discrimination under the PDA.

On January 9, 2013, the Fourth Circuit upheld the district court ruling in *Young* that: (1) UPS did not "regard" a pregnant employee as disabled under the Americans with Disabilities Act (ADA); and (2) employers are not required under the PDA to provide pregnant employees with light-duty assignments so long as the employer treats pregnant employees the same as non-pregnant employees with respect to offering accommodations. The Fourth Circuit expressed concern that reading the PDA too broadly would result in granting pregnant employees a "most-favored-nations" status over others, including employees, males and females, who would receive no accommodations for off-the-job injuries. Therefore, the Fourth Circuit held that the company's policy was lawful under the PDA because, "where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the PDA."

On April 8, 2013, Young filed a petition for *certiorari* in the U.S. Supreme Court on the following question: "Whether, and in what circumstances, the Pregnancy Discrimination Act . . . requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'"

The Supreme Court's Position on the Parties' Arguments and the Resulting Decision

Both Young and the U.S. Solicitor General argued that if an employer accommodates even one or two non-pregnant employees, the employer must, as a matter of law, provide this same accommodation to all pregnant employees, irrespective of any other criteria. The Supreme Court rejected this interpretation, reasoning that Congress did not intend to grant pregnant employees such an unconditional "most-favored-nations" status any time an employer accommodates a small subset of non-pregnant employees. In rejecting their arguments, the Court explained that although the phrase "other persons" is not defined in the statute, it does not mean that an employer must treat pregnant employees the "same" as *any* single other person who is similar in ability or inability to work.

The Solicitor General also urged the Court to give deference to the EEOC's July 14, 2014 ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES. In the Guidance, the EEOC addressed the definition of "other persons" in the PDA's second clause. Specifically, the Guidance states that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)." The Supreme Court declined to give the Guidance the deference the United States requested,[12] taking issue with the consistency and thoroughness of it, as well as the fact that the EEOC issued the Guidance after the Supreme Court had already granted *certiorari* in this case.

The Supreme Court also rejected the company's position on the second clause of the PDA, however, which was that the clause merely clarifies that sex discrimination includes pregnancy discrimination. Under this view, an employer may have a facially neutral policy, such as a policy that accommodates employees with work-related injuries, because pregnant employees or non-pregnant employees with injuries unrelated to work are treated the same (neither group is entitled to light duty). In rejecting this interpretation, the Court found that UPS's reading would render the first clause of the PDA prohibiting discrimination superfluous. The Court also explained that the company's interpretation ignores the "unambiguous" intent of Congress in passing the PDA—to overturn the holding and reasoning of *Gilbert*, where the Court had taken a position similar to that asserted by the company (*i.e.*, that the facially nondiscriminatory plan covered the same categories of risks for both male and female employees).

Refusing to accept the position of either party, the Supreme Court held that the answer was somewhere in between. The Court explained that a pregnant employee can establish a *prima facie* case by alleging the employer denied a request for an accommodation and the employer accommodated others "similar in their ability or inability to work." If the employee can do so, the employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason normally cannot consist of a claim that it

[12] Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), a court *may* give "rulings, interpretations and opinions" of an agency charged with the mission of enforcing a particular statute deference by reason of their body of experience and informed judgment. The Supreme Court did not give such deference in this case.

is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. The Court reasoned that, "[a]fter all, the employer in *Gilbert* could in all likelihood have made just such a claim," and Congress expressly overruled that decision. Then, to prevail, a pregnant employee must show that the employer's legitimate, nondiscriminatory reason is pretextual. The Court explained that a plaintiff could reach a jury on this issue by providing significant evidence that the employer's facially neutral policies impose a "significant burden" on pregnant employees *and* that the employer's legitimate, nondiscriminatory reasons are not "sufficiently strong" to justify the burden. The Court went further to provide an example of a pregnant employee showing that an employer accommodated a *large* percentage of non-pregnant employees while failing to accommodate a *large* percentage of pregnant employees. Indeed, the Court highlighted that UPS had multiple policies that accommodated non-pregnant employees in various categories who had restrictions similar to Young's, which suggests that the employer's reasons for failing to accommodate pregnant employees were not sufficiently strong. The Court limited this particular approach to circumstantial cases arising under the PDA, while noting that it was consistent with its approach in similar cases under other statutes.

In remanding the case to the Fourth Circuit, the Court held that Young has in fact established a *prima facie* case of discrimination because UPS had three separate accommodation policies (on-the job, ADA, DOT) that, when taken together, demonstrate a genuine dispute as to whether the company provided more favorable treatment to at least some categories of employees under similar circumstances. The Court also noted that these policies, at least arguably, significantly burden pregnant employees. On remand, the Fourth Circuit is tasked with considering the strength of the employer's justifications for the accommodation policies related to categories other than those who are pregnant. The Supreme Court declined to decide whether Young had met her burden of showing that UPS's reasons for treating her differently were pretextual.

Next Steps for Employers

In light of the Supreme Court's *Young* decision, the EEOC's current enforcement position, the expansion of the ADA (such that it may now include shorter-term complications arising from pregnancy), and the increasing number of states providing ADA-like accommodation protections for pregnant employees, employers should take a careful look at their accommodation policies and practices, and to whom they extend those policies and practices. Specifically, employers that have policies that provide accommodations or other types of benefits to categories of employees—where pregnancy is not one of those categories—need to ensure they have legitimate, nondiscriminatory reasons for doing so. While the Court left open the question of what constitutes such a legitimate, nondiscriminatory reason, it did hold that cost alone would not "normally" meet the standard. Furthermore, if the categories of employees to whom those accommodations or other benefits are offered constitute a substantial number of employees, but still exclude pregnant employees, the risk of denying such benefits to pregnant employees will be high.

There are many open questions following the majority's opinion in *Young*. For example, although the Supreme Court rejected the notion that an employer is *per se* required to provide light duty to a pregnant employee simply because it provides light duty to one set of employees injured on the job, it is unclear at what point the refusal to provide a similar accommodation to a pregnant employee constitutes a pretext for discrimination. In *Young*, the Court highlighted UPS's "multiple policies" that accommodate non-pregnant employees with lifting restrictions, implying that UPS has sufficient light duty positions available. Indeed, the Court queried: "Why, when the employer accommodated so many, could it not accommodate pregnant women as well?" On remand, UPS will answer this question and the Fourth Circuit will determine whether to send the case to a jury, which appears likely.

In addition, the Supreme Court did not articulate what evidence is necessary to prove that an employer's policies impose a "significant burden" on pregnant employees or what evidence is necessary to prove that an employer's legitimate, nondiscriminatory reasons are "sufficiently strong" to justify such a burden without violating the PDA. The dissent also raises a concern about whether the *Young* majority has commingled disparate treatment claims, where motive is required, with disparate impact claims, which deal with the effects of otherwise facially neutral policies or decisions. Time will tell whether this distinction will lead to a difference in how these types of claims are pled by plaintiffs and litigated in the courts.

Notably, the Supreme Court also declined to express a view about whether changes made to the ADA in 2008 would someday limit the holding of this case. From a practical perspective, it is indeed worth considering: if the broadened ADA can now be interpreted to cover short-term impairments as disabilities, even when related to healthy pregnancies (which are not considered disabilities under the ADA), would the accommodation obligation of the ADA then render the PDA framework moot?

As is true with all accommodation issues, an employer's policies and processes are key to avoiding and defending claims, even if the ultimate answer in a particular situation is that the requested accommodation is not available at that time, or would impose an undue hardship on the business. Moreover, as mentioned, the Supreme Court in *Young* did not outright reject an employer's ability to have a light-duty policy reserved just for employees who are injured on the job. What *Young* does show, however, is that employers excluding pregnant employees from discussions about available reasonable accommodations—when other categories of employees remain eligible for such accommodations—run a significant liability risk.

K. SUPREME COURT SIDES WITH THE DEPARTMENT OF LABOR IN "RULEMAKING" CHALLENGE

The U.S. Supreme Court handed the U.S. Department of Labor (DOL) a victory in a battle over whether the agency's reversal of its stance on the exempt status of mortgage loan officers was subject to public notice and comment. In *Perez v. Mortgage Bankers Association*,[13] the Court held that the DOL's 2010 Administrator's Interpretation concluding that mortgage loan officers do not qualify for the Fair Labor Standards Act (FLSA) administrative exemption was not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA). The decision has implications far beyond the question of whether mortgage loan officers are exempt from the overtime requirements of the FLSA. In rejecting the argument that a federal agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation, the Court removed a significant potential impediment to an agency making important policy changes through so-called "sub-regulatory" guidance.

Those looking to the Supreme Court to rein in federal agency "rulemaking" were no doubt disappointed by the decision. At issue in the case was the scope of the APA and its application to "interpretative" as opposed to "legislative" rules by an agency. Under the APA, legislative rules, which have the force and effect of law, are subject to traditional notice-and-comment periods, during which the agency publishes a notice of proposed rulemaking in the *Federal Register*, and stakeholders are invited to provide input on the proposal. Agencies are required to take all comments into consideration in formulating the final rule, and any amendments to the rule are similarly subject to notice-and-comment requirements. In contrast, the Court in *Perez v. Mortgage Bankers Association* noted that "Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement 'does not apply' to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" In an opinion written by Justice Sonia Sotomayor, the Court acknowledged that the term "interpretive rule" is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate.

Interpretive rules are considered to be the agencies' explanations of their own rules or laws they are charged with implementing and enforcing. These rules often take the form of enforcement guidance, FAQs, agency manuals, opinion letters and interpretive bulletins. The absence of a notice-and-comment requirement makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. Critics of such interpretive rules claim that the lines between legislative and interpretive rules are often blurred, and that agencies improperly issue interpretive guidance to avoid notice-and-comment requirements.

In *Mortgage Bankers Association*, the DOL's Wage and Hour Division in 1999, and again in 2001, issued opinion letters stating that mortgage loan officers do not qualify for the FLSA administrative exemption. When the DOL promulgated revised FLSA regulations in 2004, the Mortgage Bankers Association (MBA) requested a new opinion interpreting the revised regulations. In 2006, the DOL issued an opinion letter finding that

[13] 135 S.Ct. 1199; 2015 U.S. LEXIS 1740 (March 9, 2015).

mortgage loan officers fell within the administrative exemption under the 2004 regulations. Four years later, the Wage and Hour Division again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage loan officers. The Division's 2010 Administrator's Interpretation concluded that mortgage loan officers "have a primary duty of making sales for their employers, and, therefore, do not qualify" for the administrative exemption. These DOL interpretations were all issued without notice and comment.

The MBA filed a complaint in federal district court challenging the 2010 Administrator's Interpretation, arguing that it was procedurally invalid in light of the D. C. Circuit's decision in *Paralyzed Veterans of America v. D.C. Arena L.P*, 117 F. 3d 579 (D.C. Cir. 1997). Under the *Paralyzed Veterans* doctrine, if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." The D.C. district court granted summary judgment in favor of the DOL, but the D.C. Circuit reversed the lower court's decision. Rejecting the government's call to abandon the *Paralyzed Veterans* doctrine, the D.C. Circuit concluded that the 2010 Administrator's Interpretation had to be vacated.

The Supreme Court sided with the DOL, holding that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA. The Court concluded that because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." According to the Court, the *Paralyzed Veterans* doctrine "creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces." Regardless of whether that requirement is wise policy or not, the Supreme Court held that it is the responsibility of Congress or the administrative agencies, not the courts, to impose such an obligation.

The Supreme Court was not persuaded by MBA's argument that the *Paralyzed Veterans* doctrine "simply acknowledges" the fact that when an agency significantly alters a prior, definitive interpretation of a regulation, it is effectively amending the regulations. The Court refused to equate an interpretation of regulation with an amendment to the regulation. Moreover, the Court held that the MBA waived its alternative argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. However, the Court did acknowledge that there may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions.

What recourse then do regulated entities have to challenge agency action that comes in the form of an interpretative rule? The Court opined that the APA contains a variety of constraints on agency decision-making—the arbitrary and capricious standard being among the most notable.

Though regulated entities may not be without recourse to challenge agency interpretations, the *Mortgage Bankers* decision gives agencies greater rein to alter policy outside of the constraints of the notice-and-comment process. Those calling for more transparency and public input into agency decision-making may find these goals more difficult to achieve in light of the decision. However, another avenue to challenge agency action may be opening as concurring opinions by Justices Alito, Scalia and Thomas called for reexamination of whether courts should defer to an agency's interpretations of its own regulations.

In his short concurring opinion, Justice Alito sympathized with the concerns that may have prompted the *Paralyzed Veterans* doctrine, which he characterized as: "the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations."

Justice Scalia wrote that while the APA exempts interpretive rules from notice-and-comment requirements, "this concession to agencies was meant to be more modest in its effects than it is today." By supplementing the APA with judge-made doctrines of deference, Justice Scalia concludes "we have revolutionized the import of interpretive rules' exemption from notice-and-comment rule-making . . . . Interpretive rules that command deference *do* have the force of law." Justice Thomas similarly called into question a line of precedents, beginning *with Bowles v. Seminole Rock & Sand Co*., 325 U. S. 410 (1945) requiring judges to defer to agency interpretations of regulations.

Whether this line of cases and judicial deference to agency interpretations will be reexamined in the future by the Supreme Court remains to be seen. In the wake of the *Mortgage Bankers* decision, this much is clear: Executive agencies are not required to use notice-and-comment procedures when it changes its interpretation of its own regulations. This may pave the way for even more policy changes from the DOL and other federal agencies outside of the notice-and-comment "rulemaking" process.

For lenders, the impact of the decision is even more immediate and significant. Lenders relying on the DOL's 2006 opinion letter that mortgage loan officers fall under the FLSA's administrative exemption after the DOL's 2010 Administrator's interpretation was vacated by the D.C. Circuit may now be at risk. Other employers that rely on outdated guidance from federal agencies may also find themselves at risk. Tracking policy changes made through both the public rulemaking process as well as through sub-regulatory guidance becomes even more important for employers.

L. SUPREME COURT REJECTS THE YARD-MAN INFERENCE VESTING LIFETIME BENEFITS FOR UNION RETIREES

In *M&G Polymers USA, LLC v. Tackett*,[14] the U.S. Supreme Court overturned three decades of precedent by the U.S. Court of Appeals for the Sixth Circuit, unanimously ruling that, when no specific provision in a collective-bargaining agreement ("CBA") addresses the duration of retiree benefits, reviewing courts may not infer that the parties intended those benefits to vest for life. All nine justices agreed courts must apply "ordinary principles of contract law" to determine the parties' intent.

The Court split sharply, however, regarding which of those principles are salient. Five justices emphasized principles that weigh *against* a finding of lifetime benefits, including the principle that courts should not construe ambiguous writings to create lifetime promises and that general durational clauses apply to provisions governing retiree benefits. Four concurring justices, by contrast, emphasized principles that weigh *for* a finding of lifetime benefits, including the observations that survivor-benefits clauses and provisions that retirees "will receive" healthcare benefits may suggest an intent to provide lifetime benefits. Thus, although it is clear that *M&G Polymers* is an employer-friendly decision, the decision unsettles the law concerning retiree benefits for all Circuits, including those that have traditionally been more employer-friendly. The full impact of the decision will only be understood as lower courts address which "ordinary principles of contract law" are most critical.

Since 1983, the rule in the Sixth Circuit has been that retiree benefits vest for life unless there is specific plan or CBA language to the contrary.[15] Known as the "*Yard-Man* inference," this presumption had been extended throughout the years to find lifetime vesting of retiree benefits—even in cases where employers negotiated contract language arguably intended to prevent vesting. Although *Yard-Man* was binding only in the Sixth Circuit, the *Yard-Man* inference has also influenced the law in other jurisdictions.

The series of events that would overturn *Yard-Man* began in 2000, when M&G entered into a CBA with the Union[16] representing bargaining-unit employees at the plant. M&G and the Union also entered a Pension, Insurance, and Service Award Agreement ("P&I Agreement") that provided for retiree health care benefits subject to renegotiation after three years. The parties returned to the bargaining table and, in 2005, incorporated into their CBA a Letter of Understanding pertaining to the P&I Agreement that (1) referenced prior employer-contribution caps to retiree health benefits contained

[14] 135 S.Ct. 926; 2015 U.S. LEXIS 759 (Jan. 26, 2015).

[15] *See Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

[16] United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

in the CBAs of M&G's predecessors, (2) imposed new caps to employer contributions, and (3) could require retirees to begin contributing to their premiums starting January 1, 2006.[17]

Invoking the P&I Agreement, in December 2006, M&G announced a requirement that retirees contribute to the cost of their health care benefits, pursuant to the Letter of Understanding. Three named retirees filed a class-action lawsuit against M&G and its company-sponsored health plans, alleging that the new requirement breached the CBA and violated the Labor Management Relations Act ("LMRA"), and the Employee Retirement Income Security Act ("ERISA"). After the case wound through the trial and appellate courts, the Sixth Circuit ultimately applied the *Yard-Man* inference to affirm that preceding CBAs vested a right to lifetime contribution-free retiree health care benefits for those who retired before M&G and the Union renegotiated their contract in 2005.[18]

In vacating the Sixth Circuit's decision, the Supreme Court unequivocally rejected the *Yard-Man* inference, reasoning that it "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."[19] Specifically, the Court criticized the premises underlying the *Yard-Man* inference, which are not rooted in the facts of any particular labor negotiation and which detract from the fundamental aim of contract interpretation—to discern the intent of the actual parties to the agreement:

- Although the Supreme Court noted that courts may look to known industry customs or usages to determine the meaning of a contract, it faulted the Sixth Circuit for assuming—without factual support and as applied across multiple industries—that employers and unions customarily vest retiree benefits.

- The Court rejected the *Yard-Man* premise that retiree health care benefits are a form of deferred compensation and therefore intended to continue for as long as the beneficiary remains a retiree, because this interpretation directly contradicts the ERISA definition of deferred compensation.

- The Court chided the *Yard-Man* inference's disregard of general durational clauses, such as a CBA's expiration date, which, under ordinary contract principles, would apply to provisions governing retiree benefits.

- Similarly, the Court found the *Yard-Man* inference incompatible with the principle that contract obligations generally end when a CBA expires.

- In the same vein, the Court condemned the *Yard-Man* inference's inversion of the traditional contract-interpretation

[17] *Tackett v. M&G Polymers USA, LLC*, 523 F. Supp. 2d 684, 689 (S.D. Ohio 2007).

[18] *Tackett v. M&G Polymers USA, LLC*, 733 F.3d 589 (6th Cir. 2013).

[19] 2015 U.S. LEXIS 759 at *18.

principle that courts should not construe ambiguous contracts to create lifetime promises.

What Does This Mean for Employers?

By annihilating the *Yard-Man* inference, *M&G Polymers* clearly strengthens employers' hands; the only remaining question is, how much? The Court remanded the case to the Sixth Circuit to apply ordinary principles of contract law. The majority opinion, as noted above, emphasizes those principles that militate against a finding of lifetime benefits. A concurring opinion by Justice Ginsburg (joined by Justice Breyer, Justice Sotomayor, and Justice Kagan), however, directs attention to contract-interpretation principles that could support the opposite conclusion, noting that because pension plans vest as deferred compensation under ERISA, a CBA provision that links retirees' entitlement to health care benefits to their receipt of pension benefits may suggest a right to lifetime benefits. The concurring justices also reasoned that contractual language conferring survivor benefits to a retiree's surviving spouse until death or remarriage may also suggest a right to lifetime benefits. The full significance of *M&G Polymers* will only be known after lower courts apply this conflicting guidance in future cases.

For now, however, there are several practical lessons employers may draw from the opinion:

- There is a benefit to including unambiguous contract language in a CBA that retiree benefits are for the duration of the CBA only. By gutting the *Yard-Man* inference, the Supreme Court made clear that such language will be enforced.

- There is still a reason to include "reservation of rights" clauses in summary plan descriptions and other communications to employees relating to retiree benefits, to support CBA language incorporating the benefit plans by reference, and to avert fiduciary misrepresentation claims that arise when retirees are allegedly misled into thinking they have lifetime benefits.

- As a failsafe, employers should maintain detailed records of their contract negotiations with unions that reflect the parties' positions throughout bargaining, as this can lend valuable extrinsic evidence of the parties' intent.

Employers in pending litigation over lifetime benefits should recognize that they have increased leverage after *M&G Polymers*, but should be careful not to overplay their hand. *M&G Polymers* removes a presumption in favor of lifetime benefits, but it still provides courts or juries with plenty of latitude to find that the parties to a CBA agreed to such benefits.

M. SUPREME COURT CONTINUES TO ADVANCE BROAD VIEW OF WHISTLEBLOWER PROTECTIONS

Various whistleblower laws protect employees who "lawfully" disclose confidential information in good faith to bring to light illicit or illegal activity. Generally, therefore, employees do not receive whistleblower protections when they obtain or disclose the information illegally. A recent U.S. Supreme Court case however, demonstrates an exception to that rule. In *Department of Homeland Security v. MacLean*,[20] the Court held that an air marshal who disclosed confidential information in direct violation of Transportation Security Administration (TSA) regulations was entitled to whistleblower protection. Specifically, the Court held that the exemption in the Federal Whistleblower Protection Act (WPA) excluding disclosures "specifically prohibited by law" from receiving protection does *not* apply to disclosures prohibited solely by agency regulations or by statutes that authorize agencies to promulgate regulations. Instead, under the WPA, in order to be excluded from protection, a disclosure must be prohibited by the specific text of a statute. Although the ruling applies only to federal employees, the Court's analysis may shed some light on its view of whistleblower protections generally.

Background

The case involved an air marshal who made unauthorized disclosures concerning reductions in air marshal deployment patterns that, in his view, jeopardized security. The TSA fired him on the basis that TSA regulations prohibited such disclosures because it was "Sensitive Security Information." The air marshal challenged the termination of his employment on the grounds that he reasonably believed the leaked information disclosed "a substantial and specific danger to public health or safety" and thus was protected under the WPA. 5 U.S.C. § 2302(b)(8)(A). The government argued not that the air marshal was wrong on the merits of his case, but rather that his disclosure was carved out of the WPA's protection, which exempts from protection disclosures that are "specifically prohibited by law." Specifically, the TSA argued that the air marshal was not entitled to protection because TSA regulations prohibited the unauthorized disclosure of "[s]pecific details of aviation security measures . . . [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 CFR §1520.7(j). Alternatively, the government argued, the disclosure was prohibited by the Aviation and Transportation Security Act (ATSA), which authorized the TSA to promulgate the regulation that barred the disclosure.

The Decision

The Supreme Court rejected the government's argument that TSA regulations prohibiting the air marshal's disclosure satisfied the WPA's "by law" exemption. The decision turned on the fact that the WPA's exemption applied to disclosures "specifically prohibited by law" rather than disclosures "specifically prohibited by law**, rule, or regulation**," a phrase used elsewhere within the WPA. Because Congress had applied broader protection to other actions, the Court reasoned, the exclusion of "rules and regulations" from the WPA's exemption indicated that Congress intended to exclude them from the exemption. The Court also rejected the argument that the authorization of the ATSA exempted the disclosures, holding, "[t]his statute does not prohibit

[20] 135 S.Ct. 913; 2015 U.S. LEXIS 755 (Jan. 21, 2015).

anything. On the contrary, it authorizes something."

Implications

Although ostensibly a narrow ruling affecting only federal employees, *MacLean* continues the trend of expanding whistleblower protections generally. The Supreme Court has taken a broad view of whistleblower protections over the last decade. A recent example of the Court's expansive view of whistleblower protections is *Lawson v. FMR, LLC*, 571 U.S. ___, 134 S. Ct. 1158 (2014), in which the Court held generally that the Sarbanes-Oxley Act's (SOX) whistleblower protections apply to contractors of publicly traded companies. Notably, in *MacLean*, where the Court was forced to acknowledge legitimate and grave concerns relating to terrorism and national security, the Court nevertheless came down in favor of the intent and "purpose of the whistleblower statute", and left it to Congress to move to protect the interests of national security.

As for general application to private employers, it is worth noting that most whistleblower protections apply the broader language distinguished by the Court in *MacLean*. The whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, for example, prohibit retaliation for lawful disclosures protected by "law, rule, or regulation subject to the jurisdiction of the [Securities and Exchange] Commission." Although Dodd-Frank excludes from whistleblower protection employees who obtain the information they disclose via *criminal* means, that exception does not extend to information obtained in violation of civil laws. An employee who obtains and discloses information by violating a protective order, for example, could still be a whistleblower under Dodd-Frank.

The question of just how far an employee can go in taking confidential information in brazen violation of employer rules or regulations is worth watching, as *MacLean*'s preference for broad employee protection differs from other recent decisions. In *Tides v. The Boeing Co.*, 644 F. 3d 809 (9th. Cir. 2011), the Ninth Circuit held that an employee's leak to the media was not protected under SOX's whistleblower provision because SOX protected internal complaints and disclosures to federal agencies or Congress, but not to the media. Similarly, the New Jersey Supreme Court recently held that the qualified privilege for a whistleblower employee taking employer documents to support an employment discrimination suit does not apply to a criminal indictment. *Quinlan v. Curtiss Wright Corp.*, 52 A.3d 209 (N.J. 2010). The U.S. Supreme Court's clear support for the "purpose and intent" of whistleblower laws signals that employers should be wary of relying too heavily on such protections.

Recommendations for Employers

To help protect themselves against the continued expansion of whistleblower protection, employers should work with knowledgeable counsel to take the following critical measures:

- Update and strengthen anti-retaliation policies and procedures to encourage employees to use internal complaint procedures so that employees may be more likely to attempt to resolve a concern internally before taking it directly to the government.

- Ensure that supervisors at every level are trained in the employer's anti-retaliation policies. Employers need to make sure that their managers understand how employee workplace complaints may be interpreted as whistleblower complaints and that minor workplace decisions could create a basis for a whistleblower case. If employees fear coming forward internally, they may be more likely to take concerns directly to the government.

- Ensure a clear process is in place to manage internal reports. Research has shown that few reports of misconduct are made through dedicated helpline systems. Unless the supervisors and managers who receive the majority of such reports properly escalate those reports, the company will be unable to act to rectify the problem.

- Develop an investigation protocol, and use it. Effective and lawful investigations are key to defending against a retaliation or discrimination suit. A well-designed investigation system will ensure that the important legal and compliance issues are identified, tracked and properly resolved.

- Ensure that compliance concerns, risk areas and cultural commitments to ethics and integrity are properly addressed by the employer's Code of Conduct. Companies should ensure these policies and principles are communicated and implemented at all levels. Employees who fear retaliation or distrust their managers are unlikely to report misconduct internally. Employers should foster a workplace where employees feel comfortable raising potentially unlawful or unethical conduct.

- Secure confidential information and limit its dissemination to those who have a need to know. An employee who, in good faith, misinterprets information for which he or she may not have the full context or full understanding, may become a whistleblower.

IV. CASES PENDING ON 2016 SUPREME COURT DOCKET

***United States v. Texas, et al.*, No. 15-674, in the U.S. Supreme Court.**

On January 19, 2016, the Court announced it will consider whether President Obama exceeded his powers in trying to shield millions of illegal immigrants from deportation, stepping into one of the most contentious topics in the nation's political debate. As noted on the SCOTUS Blog: "Issue: (1) Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the

Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2) whether the guidance is arbitrary and capricious or otherwise not in accordance with law; (3) whether the guidance was subject to the APA's notice-and-comment procedures; and (4) whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3."

***MHN Government Services Inc., et al. v. Zaborowski, et al.*, No. 14-1458, in the U.S. Supreme Court.**

Defense contractor, Managed Health Network Inc., seeks court review of a Ninth Circuit ruling affirming a lower court's decision to deny MHN's motion to compel arbitration in a putative class action. The trial court ruled that the contract was "so permeated with unconscionability" that there was no ability to remove unconscionable provisions and still have a meaningful document. As a result the court invalidated the agreement.

MHN's petition to the court highlighted the "flagrant hostility to arbitration" of the California courts, observing that California uses one severability rule for contracts in general and another that disfavors enforcement of arbitration agreements.

A key question for the Court is whether California's arbitration-only severance rule is trumped by the Federal Arbitration Act.

***Green v. Brennan*, No. 14-613, in the U.S. Supreme Court.**

Green presents the Court with the question of timeliness for filing a constructive discharge claim. Green was a postmaster whose constructive discharge claim was determined to be time barred.

The question for consideration of the Court is whether to calculate such time to file a charge as running from the time of resignation or from the earlier date when the final allegedly unlawful act by the employer occurred.

***Fisher v. Univ. of Texas at Austin*, No. 14-981, in the U.S. Supreme Court.** In a case that potentially could have broad reaching effects on company initiatives regarding diversity, the Court has once again agreed to take up the question of whether the 5th Circuit applied the level of scrutiny directed by the Court in *Fisher I*: asking the 5th Circuit to apply "exacting scrutiny" to determine whether the University's affirmative action policies are "narrowly tailored" to achieve a diverse student body encompassing a "broad array of qualifications and characteristics."

***Zubik v. Burwell*, No. __________, in the U.S. Supreme court.** The Court has agreed to settle a widespread dispute between the Obama administration and religious non-profits over insurance coverage under the Affordable Care Act (ACA)for birth control. The petitions of seven non-profit organizations ask the Court to overturn the lower court decisions that would force the groups to take action to opt-out of the requirement, rather than receiving the blanket exclusion granted to churches and other solely religious institutions under ACA. This case builds on the Court's earlier *Hobby-Lobby* decision.

V.
FIFTH CIRCUIT DISCRIMINATION CASES

A. GINA

***Ortiz v. City of San Antonio Fire Department,* No. 15-50341 November 18, 2015.** The *Ortiz* decision may be the first published GINA decision from the Fifth Circuit. In the decision, the Court affirms summary judgment in favor of the City of San Antonio. Mr. Ortiz worked for the fire department for over 30 years, first as a firefighter and then as a paramedic. Since 2002, the collective bargaining agreement between firefighters and the City of San Antonio has provided for a "mandatory wellness program for all employees," to be approved by the Union and the City

Ortiz was unhappy with the "mandatory" nature of the program, and on occasion refused to submit to some of the medical tests required by the wellness program, including a stress test. When Ortiz refused to comply with the testing required, he was placed in an alternate duty program where he was not allowed to perform overtime and was monitored. Ortiz was placed on alternate duty on two occasions. The employee filed an EEOC claim under GINA and then brought suit. The district court held, and the 5th Circuit affirmed, that the employer's wellness program, and the medical tests taken pursuant to the program were not illegal under GINA as a matter of law, nor were they retaliation under GINA.

B. RACE AND NATIONAL ORIGIN

***Crisp v. Sears Roebuck & Co.,* No. 15-50214, 2015 WL 5817648 (5th Cir. Oct. 6, 2015).** Plaintiff Crisp was employed as a regional sales manager for Sears Roebuck from 2004 to 2011. Crisp was terminated after an internal investigation of his region revealed that he had violated Sears's markdown policy by ordering his district managers to stop taking markdowns without his approval, that is, to stop reporting merchandise lost, missing, or damaged, in order to inflate the region's profit margin. Crisp's national origin discrimination claims arise out of comments made during the internal investigation by Sears's National Loss Prevention Manager, Paul Jankowski, who allegedly compared Crisp to Hitler.

During Jankowski's investigation, he allegedly told another employee that "Crisp was managing the region 'like Hitler,' the district managers were 'like Nazis,' and that they were treating the store managers 'like Jews.'" The Court indicated that it was willing to accept the Defendants' argument that the "comments do not relate to Crisp's German origin, but rather were comments about his autocratic (that is, fascist) management style" and even referenced as analogous the "'Soup Nazi' from *Seinfeld* who earned that nickname not for his national origin, but instead for his tyrannical management of his soup line." Additionally, while there was no evidence that Crisp's German origin was known to Jankowski, Crisp did assert that Jankowski also referenced his own Polish background and said that he was "going to get that bastard Charlie Crisp." Crisp did make a complaint to Sears's Office of Compliance and Ethics, but did not mention any of the comments about Hitler, Nazis, or any other national origin remarks, instead complaining about the confidentiality of the investigation and a threat to his personal safety.

The Court's analysis centered on whether or not these comments "were made by an individual with authority over [the termination] decision." Though Jankowski did not have influence over the termination decision, the Court stated that there may be some situations where an investigator's discriminatory animus may be imputed to the formal decision maker. The Court stated, however, that there is no such imputation "when the plaintiff admits to the facts that would otherwise be tainted by the fact finder's animus." In this case, Crisp admitted that he ordered his district managers to stop taking markdowns in violation of company policy. Thus, the Court affirmed the district court's grant of summary judgment in favor of the defendants, holding that Crisp's admission of the violation removed "any discriminatory taint in the investigation's fact finding."

***Rogers v. Pearland Independent School District*, No. 14-41115 (5th Cir. June 28, 2016).** In this case, an individual applied twice to work as a master electrician for the school and was rejected The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the school district on the grounds that the plaintiff failed to establish a *prima facie* case. Specifically, he could not show that someone outside his protected class was hired instead of him, and comparator, under nearly identical circumstances, was not treated more favorably.

C. RETALIATION

***Brandon v. The Sage Corporation*, No 14-51320, (5th Cir. Dec. 10, 2015).** This is a case involving a retaliation claim under Title VII brought by a company supervisor. Sage owns and operates truck driving schools, including a San Antonio campus where Brandon was employed as the Director. Brandon's lawsuit asserts that she was retaliated against by a high ranking company manager who threatened to cut Brandon's pay by 50% when the high ranking manager discovered that Brandon had hired a driver trainer that was "cross-gendered." Brandon's retaliation claim alleged, among other things, that the threat to cut her pay was an adverse employment action. The district court granted summary judgment and Brandon appealed.

The Fifth Circuit affirmed the District Court's ruling, finding that the high ranking manager did not supervise Brandon, and therefore, was not in a position to cut her pay. According to the 5th Circuit, a reasonable person in the plaintiff's shoes would not feel dissuaded from supporting a discrimination complaint of the driver trainer. The court applied an objective reasonable person test.

Two key points about this case. First, context matters. In this case, Brandon was of sufficient rank in the company that she should have realized that the high ranking manager did not have the power or authority to cut her pay. Only the company president had the authority to cut her pay. Had the plaintiff been a non-supervisory employee, the result may have been different.

Second, the 5th Circuit in footnote 2 declined to say one way or the other that sexual orientation was a protected category under Title VII. The Court noted that the plain language of Title VII does not cover sexual orientation, but it declined to state whether the driver trainer had a claim under Title VII and that claim was not before the court.

***EEOC v. Rite Way Service Incorporated*, No. 15-60380 (5th Cir. April 8, 2016)**

It has long been the law in the Fifth Circuit and other circuits that an employee that complains of an employer's discriminatory act or policy (i.e. affirmatively opposes discrimination) can invoke Title VII's anti-retaliation clause as long as the employee "reasonably believed" that the employer's act or policy violated Title VII. In this case, the EEOC sought to lessen this standard in a retaliation case where the plaintiff did not actively complain but rather passively responded to an employer's investigation into an alleged discriminatory act by a supervisor. The Fifth Circuit rejected the EEOC's argument and held that the same "reasonable belief" standard applies in what it deems a "reactive opposition" case.

The EEOC nonetheless prevailed on appeal as summary judgment in favor of the employer was reversed on grounds that there was a fact issue regarding the reasons why she was fired. Accordingly, the EEOC lost on the legal issue but prevailed on appeal by getting the summary judgment reversed.

D. RELIGION

***Nobach v. Woodland Village Nursing Ctr., et al.*, No. 13-60378 (5th Circuit, Aug. 20, 2015).**

This case arises from Kelsey Nobach filing a religious discrimination lawsuit against her former employer, Woodland Village Nursing Center. After a federal district court trial, the jury found in favor of Nobach and awarded her damages. Woodland appealed. After a *de novo* review, the Fifth Circuit overturned the district court. The Supreme Court granted Nobach's writ of certiorari and remanded back down to the Fifth Circuit with instructions to apply the "because of" causation for religious discrimination expounded on in *EEOC v. Abercrombie*, a case it had just decided. Reviewing the case again, the Fifth Circuit affirmed its decision to reverse the district court's decision. The facts are as follows:

> Kelsey Nobach worked as an activities aide at Woodland Village Nursing Center ("Woodland"). On September 19, 2009, while Nobach was escorting a patient back to her room, a Certified Nursing Assistant ("CNA") approached and informed Nobach that the patient had requested the Rosary be read to her. Nobach refused and told the employee it was contrary to her religious beliefs. The patient subsequently complained to Nobach's head supervisor, Woodland's Activities Director, Lynn Mulherin. At the time, Mulherin did not know which employee had refused the patient's request and conferred with the Woodland's Director of

Operation, James Williams. Williams investigated and ascertained that Nobach was the employee who refused to read the Rosary and instructed Mulherin to discipline Nobach and her direct supervisor, Lorrie Norris for the incident. Mulherin advised Williams that instead she planned to terminate Nobach.

Five days later on September 24, 2009, Mulherin called Nobach into her office and told her she was terminated for failing to read the Rosary to a patient. Although Nobach had been subject to discipline on four prior occasions, Mulherin was explicit; the earlier write-ups were a non-factor. Nobach would have been terminated for this incident alone. It was at this time that Nobach claimed that her refusal was due to her religious beliefs--Nobach was a former Jehovah's Witness and still adhered to the belief that one does not conduct rout prayers. Mulherin responded that she did not care if it was against her religion. It was insubordination.

Nobach sued Woodland claiming religious discrimination under Title VII of the Civil Rights Act of 1964. After a jury trial, a verdict was returned in Nobach's favor. Woodland moved for a judgment as a matter of law asserting that there was insufficient evidence to support a Title VII violation. The district court denied Woodland's motion and the jury awarded Nobach $55,200.00. Woodland appealed.

The Fifth Circuit Court of Appeals considered Woodland's appeal. It deemed the determinative question to be whether Nobach produced sufficient evidence to support a jury finding that Woodland was motivated by Nobach's religious beliefs before it discharged her. The Court concluded she had not. It reversed and vacated the district court's decision and remanded for entry of judgment.

Nobach petitioned for and was granted a writ of certiorari from the United States Supreme Court. SCOTUS had just decided *EEOC v. Abercrombie*, another religious discrimination case where it determined that if an employee's religious practice or belief is a *motivating factor* in an adverse employment that is sufficient to show a violation of Title VII. In light of this decision, the Supreme Court vacated and remanded *Nobach* for reconsideration.

Applying the Supreme Court's causation standard, the Fifth Circuit affirmed its decision to reverse the district court's decision. The record showed no evidence that prior to her discharge, Nobach told Woodland about her religious beliefs or asked for an accommodation. More expansively, there was no evidence to show that Woodland *knew* about her religious beliefs or a need for an accommodation before it made the decision to terminate. Nobach told only the CNA—a non-managerial employee with no decision making authority-- that she could not read the Rosary due to her religious beliefs. This was not persuasive. Moreover, Nobach made no claims or presented any evidence that the CNA told a decision-maker why Nobach refused to read the Rosary.

Therefore, despite the fact that Woodland clearly terminated Nobach for her refusal to perform the rosary, the jury did not have a legally sufficient evidentiary basis for finding that Woodland intentionally discriminated against Nobach because of her religion.

Takeaways

Woodland was fortunate in this result. If the record has indicated in any fashion that management had knowledge of Nobach's religious beliefs prior to termination, the outcome would be reversed. Employers do not want to be this close to the edge of legality. The merest hint that Woodland had knowledge of Nobach's religious conflict would have sunk Woodland's appeal. For example, if Nobach had mentioned her beliefs to a supervisor in passing, or if Williams had learned from the CNA during his investigation the reasons behind Nobach's refusal; the Fifth Circuit most likely would have decided differently.

Before terminating an employee for reasons that might have an obvious religious implication, Employers should investigate first. They need to confirm that the employee has not mentioned conflicting religious beliefs or need for an accommodation to any decision maker or member of management. If there is any indication of religious conflict, they should suspend termination and contact counsel. Because although Woodland prevailed, it was a pyrrhic victory—they may have had a legal victory, but it was accompanied by significant litigation costs.

E. AGE

***Squyres v. The Heico Co., LLC et. al.*, 782 F.3d 224 (5th Cir. April 2, 2015).** This is an age discrimination case in which the Fifth Circuit Court of Appeals upheld the trial court's decision to grant the employer's summary judgment motion. Specifically, the Plaintiff told his fleet manufacturing business to the Defendant in 2008. As part of the sale, the Plaintiff was retained as a Vice President of Sales and Marketing for a three year term. When the contract renewal came up in 2011, Defendant declined to renew the contract, but offered Plaintiff a lesser-paid independent contractor sales position, which he rejected. Accordingly, the Plaintiff's employment ended when the contract expired in 2011. On appeal, two of the three judges assumed that Plaintiff could still satisfy the "adverse action" prong of his *prima facie* case because the failure to renew the contract was essentially an adverse action. Nevertheless, all of the judges on appeal agreed that the Defendant established legitimate reasons for terminating Plaintiff's employment, and Plaintiff failed to establish pretext.

***Peterson v. Bell Helicopter Textron, Inc.*, 2015 U.S. App. LEXIS 9342 (5th Cir. June 4, 2015).** Plaintiff was terminated during a company-wide reduction-in-force in 2008. The Plaintiff sued Bell Helicopter under the Age Discrimination in Employment Act (ADEA) and Chapter 21 of the Texas Labor Code. The district court granted the employer's motion for summary judgment on the ADEA claim but denied it for the Chapter 21 claim. The ADEA includes a "but for" standard of discrimination, while Chapter 21 had a more lenient "motivating factor" standard. At trial, the jury found that age was a motivating factor in the Plaintiff's termination, but that Bell Helicopter would have terminated him even in the absence of age discrimination. As a result, the trial court dismissed Plaintiff's claim for money damages. Following post-judgment briefing, the trial court entered injunctive relief for Plaintiff and awarded attorneys' fees of almost $340,000. On appeal, the Fifth Circuit Court of Appeals reversed the award on the grounds that the Plaintiff was not entitled to injunctive relief because he failed to pursue it until after trial.

***Wooten v. McDonald Transit Associates, Inc*., 2015 U.S. App. LEXIS 10098 (5th Cir. June 10, 2015).** On a panel rehearing, the Fifth Circuit Court of Appeals vacates a prior decision. This was an ADEA case involving a default judgment entered by the district court. In a 2-1 panel opinion on January 2, 2015, the Fifth Circuit reversed the trial court's order granting default judgment on the grounds that the evidence introduced in a default judgment hearing could not be used to correct an otherwise deficient complaint. On rehearing, the Fifth Circuit holds that the complaint, although bare in its allegations, satisfies Rule 8 of the Federal Rules of Civil Procedure, and therefore, the evidence at the default hearing to bolster the complaint was not necessary. Thus, the Fifth Circuit found that because the complaint itself was sufficient, the default judgment was correct, and the employer has he burden to prove that the default judgment should be set aside. In this case, the employer did not provide any evidence to explain why it failed to answer the lawsuit in the first place.

F. DISABILITY

***Williams v. J.B. Hunt Transport, Inc*., No. 15-20610 (5th Cir. June 20, 2016)**

In this case, a commercial truck driver/employee (while at home, not while he was driving) fainted due to an irregular heartbeat. His doctor took him off driving duty and he was placed on a temporary leave of absence. While he was on leave, the driver went to another doctor, who without the benefit of the first doctor's diagnosis and notes, certified that the employee was healthy enough to drive. However, when the employer received the information from the first doctor, the employer sent that information to a third doctor, and the third doctor withdrew the driver/employee's medical certificate due to evidence of the driver's fainting spell. All of the doctors' actions were pursuant to the DOT regulations that regulate the medical examination processes applicable to commercial truck drivers. The driver/employee could have appealed the medical decisions to the DOT, but there was no evidence in the record that he appealed. Eventually the employer terminated the driver after his leave of absence expired and his medical certificate was not reinstated. The driver filed suit under the ADA alleging disability discrimination. The district court dismissed for lack of jurisdiction, holding that the driver failed to exhaust his administrative remedies by appealing the doctor's decisions to the DOT using the DOT's administrative and regulatory process. The Fifth Circuit of Appeals held that the district court was wrong to dismiss the case for lack of jurisdiction and explained that failure to exhaust administrative remedies is not a jurisdictional defect. However, the Fifth Circuit ultimately affirmed the trial court and found that summary judgment would have been in order because there was no evidence that the Plaintiff was "otherwise qualified" for the commercial truck driver position. He was not qualified because his lacked a medical certificate to drive a commercial truck under the DOT rules.

G. FAIR LABOR STANDARDS ACT

***Bodle and Meech v. TXL Mortgage Corp., et al.*, 788 F.3d 159 (5th Cir. June 1, 2015).** Plaintiffs filed a case under the Fair Labor Standards Act (FLSA) for unpaid overtime wages against their employer in federal court. In a previous state court lawsuit, the employer had sued the Plaintiffs for unfair competition and breach of a non-compete agreement. As part of the settlement of that state court lawsuit, the Plaintiffs generally released any claims they might have against their employer under federal law. There was no mention of their FLSA claims in the settlement. In the federal FLSA case, the employers moved for summary judgment on the grounds that the Plaintiff released their FLSA claims in the settlement of the prior state court lawsuit. The district court agreed with the employer, and granted its motion for summary judgment. On appeal, the Fifth Circuit reversed the district court's ruling on the grounds that there was nothing in the record showing there was a bona fide dispute over hours worked and compensation owed in the state court litigation and therefore, the generic settlement and release of claims did not extend to the FLSA claims.

***Steele v. Leasing Enterprises, Ltd.*, No. 15, 20139 (5th Cir. June 14, 2016)**

The U.S. Court of Appeals for the Fifth Circuit concluded that an employer may not deduct more than the actual credit card fees associated with liquidated credit card tips for employees without compromising the tip credit taken by the employer against the employee's wages. This is an important decision for employers with operations in the Fifth Circuit because it endorses for the first time other courts' conclusions that certain deductions may be made against an employee's tips by an employer without disturbing the tip credit, but illustrates the danger in overreaching in those deductions.

The Fair Labor Standards Act (FLSA) permits an employer to pay a tipped employee up to $5.12 less than the minimum wage—called the tip credit—so long as the employer complies with all of the relevant provisions associated with taking the tip credit, including notice, ensuring an employee always earns enough to cover the minimum wage, and that the employee is entitled to keep all of his received tips, absent a valid tip pool. Courts and the Department of Labor (DOL), however, have long allowed for an exception related to credit card fees.

In *Myers v. Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999), one of the leading credit card tip fee cases, the Sixth Circuit held that an employer may subtract a sum from an employee's charged gratuities if that sum reasonably compensates the employer for its outlays sustained in clearing the tip through a credit card processing company. The Sixth Circuit noted that while some deductions may exceed the expense incurred, the employer need only prove that, in the aggregate, the amounts collected from its employees over a definable time period have reasonably reimbursed the employer for no more than its total expenditures associated with the credit card tip collections.

In the *Steele* matter, however, the employer's 3.25% deduction from the credit card tips always exceeded the actual charges incurred by the employer in liquidating the credit card tips through a processing company (in one year the total aggregate, annual overpayment for the entire restaurant was $7,500). The employer attempted to argue that other charges, such as the cost of the company to have cash on hand to process the credit card tips on a daily basis, should be allowed. The Fifth Circuit made clear, however, that employers are not required to liquidate credit card tips on a daily basis, and that the regulations permit the settling of tips on a pay period by pay period basis. Because the cost of having cash on hand was not a fee directly attributable to its required cost of dealing in credit, and instead were internal business decisions related to employee demand and security issues, charging the employee for the costs of cash deliveries for liquidating tips violated the FLSA's tip credit provisions.

The result of this narrow error, according to the Fifth Circuit, was that the employer could not take advantage of the tip credit at all. Presumably, this would mean that the employer could owe up to $5.12 per hour for every work hour for each tipped employee who was over charged the credit card processing fee. The Fifth Circuit's endorsement of this windfall is a stark reminder that employers should be very cautious when deducting any amount from an employee's tips.

H. EMPLOYMENT-AT-WILL AND GUN LAWS

***Swindol v. Aurora Flight Sciences Corp.*, No. 14-60779, _____, __, 2015.**

Robert Swindol ("Swindol") worked for Aurora Flight Sciences Corporation ("Aurora") in Mississippi. He parked his car in Aurora's parking lot with a firearm locked inside. Aurora's managers learned about the firearm and fired Swindol later the same day for violating a company policy forbidding firearms on company property.

Mississippi's like Texas, adheres to the employment-at-will doctrine. As the Mississippi Supreme Court has held, employment at will means employers may fire employees "for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible." *McArn v. Allied Bruce-Terminix Co., Inc.,* 626 So. 2d 603, 606 (Miss. 1993).

However, Mississippi has a statute that provides as follows:

> Except as otherwise provided in subsection (2) of this section, a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area. Miss. Code Ann. § 45-9-55(1).

Moreover, subsection (5) of this statute exempts public and private employers from liability in some circumstances. The subsection provides as follows:

> A public or private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the

> transportation, storage, possession or use of a firearm covered by this section. *Id*. At § 45-9-55(5).

Although the Mississippi Supreme Court has not expanded the exceptions after *McArn*, the court has been clear that the legislature has the authority to create new exceptions. *See, e.g., Kelly v. Miss. Valley Gas Co.*, 37 So. 2d 874, 876 (Miss. 1981).

Swindol sued Aurora in the United States District Court in Mississippi. He asserted there was diversity jurisdiction under 28. U.S.C. §1332. Swindol brought state-law claims for wrongful termination and defamation. Aurora moved to dismiss Swindol's complaint under Rule 12(b)(6). The district court granted the motion, dismissing Swindol's wrongful discharge claim with prejudice and his defamation claim without prejudice. Swindol appealed.

The issue presented before the Fifth Circuit was whether in Mississippi, an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 49-9-55. The court stated that in order to address the issue, they must analyze the following questions: (1) whether Aurora firing Swindol violated the statute, (2) if Aurora firing Swindol violated the statute, whether it can be remedied in this action despite the employment-at-will doctrine, (3) whether the statute is sufficient to create in exception to the Mississippi employment-at-will doctrine, and (4) whether Section 45-9-55(5) bars this suit.

The Fifth Circuit found that there was no state-law authority to guide the Court in deciding how the Mississippi statute affects the employment-at-will doctrine of Mississippi. The court stated that the Mississippi Supreme Court was the only court that could definitively decide whether the well-settled *McArn* doctrine has been affected by Section 45-9-55. The Fifth Circuit noted that the Court may certify an unsettled question of state law to a state's highest court when that court has a procedure permitting such questions to be posed. *See* 17A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE §4248 (3d ed. 2015). The Court determined that the requisite factors existed to justify certification of the following question to the Mississippi Supreme Court: *Whether in Mississippi an employer may be liable for wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55.*

Importantly, in its earlier decision of the *Parker v. Leaf River* case, a different panel of the Fifth Circuit held that the Mississippi law allowing for storage of firearms in the employee's vehicle does not give rise to a public policy exception that would overcome the doctrine of employment at will upholding the lower court's dismissal for failure to state a claim. Now a different panel of the Fifth Circuit has taken an about face and certified this question to the Mississippi Supreme Court. In doing so, it is holding the mandate issued in *Leave River* pending further guidance in the *Swindol* case. The *Leaf River* case should not be relied on, at present, in the Fifth Circuit.

I. General

Non-Competition, Non-Solicitation, and Non-Disclosure

***Cardoni v. Prosperity* Bank, No. 14-20682 (5th Cir. Oct. 29. 2015).** This case provides valuable insight into the Fifth Circuit's analysis of choice of law provisions as they relate to non-competition, non-solicitation, and non-disclosure employment agreements. Here, a Texas bank entered into employment agreements with several Tulsa, Oklahoma-based bankers after the Texas bank's acquisition of the banker's Oklahoma bank. The employment agreements contained non-competition, non-solicitation, and non-disclosure agreements, as well as, a Texas choice of law provision and Texas forum selection clause. Shortly after the agreements were executed, the bankers decided to resign from the Texas bank and go to work for a neighboring Oklahoma-based bank in Tulsa. The banker's sued the Texas bank in Oklahoma state court seeking a declaration that the agreements were void and the Texas bank countersued in Texas State court seeking a declaration that the agreements were valid and for breach of contract. The cases were consolidated in federal court based on diversity jurisdiction and in Texas based on the forum selection clause. In applying Texas's choice of law analysis, the district court denied the Texas bank's request for injunctive relief holding that Oklahoma law applies to the non-competition and non-solicitation agreements because the choice of law provision would contravene fundamental policy of Oklahoma; thus, the Texas bank did not have a substantial likelihood of prevailing on the merits. Additionally, despite the district court holding that Texas law applied to the breach of non-disclosure claim because it would not contravene fundamental policy of Oklahoma, it denied the Texas bank's request for injunctive relief due to the bank not establishing likelihood of success or irreparable injury.

The Fifth Circuit affirmed in part, and reversed and remanded in part. Specifically, the Court affirmed the district court's determination that the validity of the non-competition clause should be evaluated using Oklahoma law because Oklahoma has a fundamental public policy against the enforcement of most noncompetition agreements. Further, applying Oklahoma law, the Court affirmed that the non-competition clause likely does not qualify for Oklahoma's "sale of goodwill" exception for enforceability of non-compete agreements because the employees owned an insignificant amount of the Oklahoma bank's stock; thus, there is not a likelihood of success on the merits. In determining that Oklahoma law applied, the Court found that Oklahoma has the more significant relationship with this case and that its law would govern absent the choice of law provision because the banker's performed most of their work for the Texas bank in Oklahoma. Further, it found that Oklahoma had greater interest in whether the covenants are enforced because the employees were Oklahoma residents working in Oklahoma. However, even though the Court found that Oklahoma has the more significant relationship with this case, as well as, greater interest in whether the covenants are enforced, the Court reversed the district court's ruling that the non-solicitation provision be determined using Oklahoma law because the application of the chosen Texas law would not contravene a fundamental policy of Oklahoma. The Court noted that Oklahoma has a clear policy against the enforcement of noncompetition agreements, but takes a different attitude toward the enforceability of nonsolicitation agreements. Moreover, in following *Desantis*, the Court held that the non-solicitation clause does not violate Oklahoma's fundamental public policy even though applying Texas law may lead to the enforcement of the clause that would be invalid under the nuances of Oklahoma law. Thus, the Court remanded to the district court for a determination of the non-solicitation agreements enforceability under Texas law and whether the equitable factors warrant a preliminary injunction. Lastly, the Court did not find clear error in the district court's individualized assessment of whether disclosure had occurred or was likely to occur in this case; thereby denying injunctive relief of the non-disclosure agreement. The Court pointed to several Texas cases which have made it clear that Texas has yet to expressly adopt the "inevitable disclosure" doctrine.

***Wooten v. McDonald Transit Associates, Inc.*, 775 F.3d 689 (5th Cir. 2015)** addresses the pleading requirements at issue in the context of a default judgment. Specifically, the court held that a default judgment may not be taken based on a complaint that fails to meet federal pleading standards for plausibility, even if the plaintiff later presents evidence at a hearing on the default judgment establishing plausible claims.

Plaintiff filed a complaint against his former employer making allegations of age discrimination, but pleading few facts in support of his claims. After the employer failed to appear or answer, the clerk entered a default, and Plaintiff moved for a default judgment. At a hearing to prove up damages for a default judgment, Plaintiff elaborated on the allegations in his complaint, presenting evidence explaining the circumstances underlying his claims of age discrimination.

Following the hearing, the district court entered a default judgment in Plaintiff's favor. After the default judgment was entered, the employer retained counsel to challenge the judgment. The district court denied the motion to set aside the default judgment.

On appeal, the Fifth Circuit held 2-1 (Judge Weiner dissenting) that the district court had erred in granting the default judgment because of the deficiencies in Plaintiff's pleadings. The Fifth Circuit determined that the allegations in the complaint were "impermissibly bare" to support a default judgment, as they failed to meet the federal pleading standards for plausibility under Rule 12(b)(6). The Fifth Circuit further held that the evidence taken at the default judgment hearing could not cure the "fatally defective" pleadings, explaining that such a result would be contrary to the text of the Federal Rules of Civil Procedure, past precedent, and the policies underlying default judgments.

***Jenkins v. City of San Antonio Fire Department*, 784 F.3d 263 (5th Cir. April 20, 2015).** In this case, the Fifth Circuit Court of Appeals construes the 90-day period in which to file suit after receipt of the Notice of Right to Sue from the Equal Employment Opportunity Commission (EEOC). The Court held that if the date of receipt is unknown, courts should apply a presumption that the plaintiff received the notice within three days after the EEOC issued the notice.

***Gate Guard Services, L.P. and Steindorf v. Thomas Perez, Secretary, Dep't of Labor,* 2015 U.S. App. LEXIS 11480 (5th Cir. July 2, 2015).** In this case, the Defendant contracted with oil companies to provide gate guard for drilling sites. Defendant classified the guards as independent contractors. The Department of Labor (DOL) found that the Defendant had misclassified these employees and demanded millions in back wages. The Defendant refused to pay and litigation ensued. The District Court granted Summary Judgment in favor of the Defendant under the Equal Access to Justice Act's (EAJA) substantially-justified bad faith provision but denied fees under the EAJA's bad faith provision. See 28 U.S.C. § 2412(b) and (d).

Both sides appealed the decision. The Fifth Circuit Court of Appeals held that the DOL's conduct was sufficient to merit an award under the bad faith provision of the EAJA, and therefore, reversed and remanded with instructions to award additional sanctions against the DOL. The Court explained that there were several errors during the DOL's investigation. For example, the lead investigator had not been trained in the area, destroyed evidence, ambushed a low-level employee without counsel, and demanded a grossly inflated multi-million dollar penalty. Moreover, in litigation, the government opposed routine case administration motions, refused to produce relevant information, and stone-walled the deposition of its lead investigator.

***McVay v. Halliburton Energy Services, Inc.,* 2015 U.S. App. LEXIS 6661 (5th Cir. April 22, 2015).** An employee of Halliburton downloaded and copied proprietary documents shortly before he left his employment. Although the employee denied it, Halliburton discovered evidence of electronic downloads and paper copying shortly before the employee left. Halliburton filed an arbitration demand and the case was thereafter arbitrated. The arbitrator awarded Halliburton money demands, attorneys' fees, and enjoined the employee from using any of the documents he took from Halliburton. The district court affirmed he arbitration award. The only issue on appeal was whether the injunction portion of the award was definitive enough such that it could be confirmed, or whether it was "so perfectly executed . . .that a mutual, final, and definite award was not made. *See* 9 U.S.C. § 10(a)(4). The Fifth Circuit Court of Appeals affirmed the district court judgment and held that the injunction, when viewed in context of the case facts, was definite enough to withstand scrutiny under Rule 65 of the Federal Rules of Civil Procedure.

***State of Texas v. EEOC,* No. 14-10949 (5th Cir. June 27, 2016)**

In this case, the State of Texas appealed the district court's order dismissing the action for lack of subject matter jurisdiction. Texas's complaint sought a declaration that the EEOC Enforcement Guidance on criminal background checks violates the Administrative Procedure Act. The EEOC had not initiated any legal proceedings against the State regarding the subject of felony hiring bans. The district court dismissed the complaint and held that Texas lacked standing because Texas could not show a substantial likelihood of harm. Specifically, it noted that "although the EEOC had statutory authority to investigate Title VII charges against Texas, it had no authority to bring an enforcement action against the State" because that authority belonged only to the Attorney General of the United States. The Court found that Texas has standing to sue the EEOC over this enforcement guidance and the guidance was a "final agency rule" subject to judicial challenge. The Fifth Circuit reversed the district court and the case has been remanded for a determination on the merits – i.e. whether the guidance is legal under Title VII.

***Gomez v. Ericsson*, No. 15-41479 (5th Cir. July 8, 2016)**

The question in this case is whether a severance agreement was governed by ERISA. Specifically, a salesman was terminated, and he was offered a severance agreement, which in exchange for a release and other covenants, the salesman would receive certain severance benefits. The salesman signed the agreement, which required him to return all of company property. When the salesman returned his laptop, the company noticed that the salesman had wiped the hard drive clean. And, the hard drive before it was wiped clean contained a lot of raw data the company needed to continue sales efforts. The company refused to pay the severance benefits on grounds that the employee failed to return all property. A lawsuit ensued and the district court ruled in favor of the employer. The Fifth Circuit Court affirmed the district court's decision. It explained that the severance plan was governed by ERISA, and the plan administrator did not abuse its discretion in refusing to pay severance benefits based on the salesman's failure to return all company property.

***Nicholson v. Securitas Security Services USA, Inc.*, No. 15-10582 (5th Cir. July 18, 2016)**

In this joint-employer case, the plaintiff was employed by a security company as a receptionist and assigned to a client of the security company. After only a few days of employment, the client asked the security company to take the employee off the assignment because the employee was unable to perform technology-related tasks. The plaintiff in this case is an 83 year old woman. The contract between the security company and the client gave the client absolute discretion to remove any of the security company's employees from the assignment. After the client asked for the removal of the plaintiff, the security company terminated her after it was unable to find another assignment for her. The plaintiff filed suit for age discrimination against both the security company and its client. The client settled with plaintiff, leaving only the security company as the party defendant. The district court entered summary judgment in favor of the security company. The Fifth Circuit reversed and remanded this case and found that there were two employment decisions made in this case. The first was the security company's decision to remove the plaintiff from the assignment at the request of the client. The second decision was terminating her employment. The plaintiff raised a genuine issue of material fact as to the first decision because the evidence showed that the security company should have investigated the reasons why the client removed her from the assignment. It did not investigate the reason; rather, it simply removed her from the assignment and did not ask any questions. However, the second decision seemed legitimate because there evidence showed that the security company had no other jobs to assign to the plaintiff.

***Combs v. City of Huntington*, No. 15-40436 (5th Cir. July 15, 2016)**

Here, the Fifth Circuit reviewed a reduced award of attorneys' fees based on the limited success of the plaintiff at trial. She sought over $300,000 on multiple causes of action, but ultimately the jury awarded her only $5,000 on a single count of sex discrimination under Title VII. On the one semi-successful claim Plaintiff sought over $90,000 in attorney's fees. The court awarded fees, but awarded only $25,000 in fees. Plaintiff appealed the reduced fee award. The Fifth Circuit vacated the case and remanded and found that the district court erred by taking a strictly proportional approach to awarding fees. Here the approach was 5 times the $5,000 in damages awarded by the trial court, and nothing in prior Fifth Circuit precedents require such a strictly proportional application. While the trial court was correct in reducing the amount sought based on the very limited success, ultimately the trial court applied the wrong approach in arriving at the fee award. The case was remanded for further consideration of the correct fee award

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