EMPLOYMENT LAW UPDATE

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TABLE OF CONTENTS

1. TEXAS CASE LAW UPDATES 1
   1.1. Same-Sex Sexual Harassment 1
   1.2. Disability Discrimination 1
   1.3. Compelled Self-Publication Theory in Defamation Cases 2
   1.4. Employers' Duty Standard in Negligence Cases 2
   1.5. Discoverability of Attorney-Billing Information 3

2. UPDATES TO TEXAS LAW 3
   2.1. Changes to the Texas Uniform Trade Secrets Act 3
   2.2. Texas Labor Code Updates 3

3. FEDERAL UPDATES TO EMPLOYMENT LAW 4
   3.1. Equal Employment Opportunity Commission 4
      3.1.1. Strategic Enforcement Plan 4
      3.1.2. Proposed Enforcement Guidance on Harassment 5
      3.1.3. Proposed Guidance on Training 5
   3.2. Fair Labor Standards Act Claims 5
   3.3. U.S. Supreme Court 6
      3.3.1. 2016 – 2017 Term 6
      3.3.2. 2017 – 2018 Term 7

EMPLOYMENT LAW UPDATE

1. TEXAS CASE LAW UPDATES

In recent years, the Texas Supreme Court has issued opinions on a variety of issues, including same-sex sexual harassment, the duty of employers in negligence cases, and the compelled self-publication theory for defamation claims.

1.1. Same-Sex Sexual Harassment

On April 6, 2018, the Texas Supreme Court issued a decision assessing what evidence is necessary to support a same-sex sexual harassment claim. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018). The majority and dissent disagreed on the applicable legal standard and its effect on evidence that a middle-school teacher was subjected to extensive "rude, crass, and hostile" behavior by a co-worker. This case does three main things: (1) sets the legal standard for same-sex sexual harassment claims under Texas law; (2) excludes certain actions from the protected activity standard for retaliation claims; and (3) explores how courts should consider evidence in determining whether claims should be allowed to proceed to trial. The majority and dissent agreed that Title VII protects employees from harassment specifically "because of" their sex and that words or actions with "sexual content or connotations" may or may not meet that standard. However, the majority and dissenting justices sharply disagreed on the legal standard for proving "because of" sex.

The majority held that "[m]otivation, informed by context, is the essential inquiry," and concluded that without evidence of unlawful motivation, references to female anatomy do not prove sexual harassment. Even with evidence of specific sexual comments, gestures, and other actions, the employee could not demonstrate that the harassing actions were motivated by sexual desire for the employee or general hostility to women in the workplace, or that they were disproportionately aimed at the employee and women. The majority focused on the harasser's "personal animus" toward employees and the harasser's "significant, similar inappropriate conduct toward both male and female co-workers" as evidence that the harassing conduct was not based on the employee's gender.

The dissent, on the other hand, found the issue was "whether the defendant harassed the plaintiff 'because of' her gender, not why the defendant harassed the plaintiff 'because of' her gender." According to the dissent, the harasser's sexual comments, particularly those specifically referring to the employee's female anatomy, could be, as determined by a hypothetical reasonable jury, "because of" the employee's sex.

The majority determined that a thirteen-page grievance letter submitted by the employee to the school's principal, portraying "four dozen incidents of harassment," was not protected activity. The letter described "bullying," "embarrassing," and "rude" conduct, but was insufficient to put the School District on notice that the employee was complaining about gender-based harassment. Accordingly, any actions taken by the School District between the submission of the employee's grievance letter and her filing a discrimination charge with the EEOC could not be unlawful retaliation.

This case also expanded the sufficiency of evidence standard. To reach trial, employees need to show government immunity was waived. Relying on a standard that "mirrors that of a traditional summary judgment," the Court asked whether the employee raised issues of material fact that are best answered by a jury. Because the School District presented adequate evidence to rebut any presumption of discrimination, the employee was obligated to provide evidence that the School District's explanation was pretext. A key difference between the majority and dissenting opinions was the treatment of harassing behavior that was facially neutral, not sexual, in tone. The majority put a strong emphasis on reading all harassing behavior in the context of a larger story, accusing the dissent of cherry-picking "raunchy details" to find a question of fact. The dissent found that evidence of gender-based harassment gave context and background to other instances of harassment that may not appear gender-based on the surface.

Potential impact for employers: The Court's decision effectively heightens the burden for plaintiffs to demonstrate same-sex sexual harassment under the TCHRA. This could result in the filing of such claims in federal court rather than state. Because the Court's decision departs from trends in federal case law, employers should continue to assess potential liability for sexual harassment claims under the more expansive Title VII standards established by federal courts.

1.2. Disability Discrimination

In *Green v. Dallas County Schools*, Green, an employee of the Dallas County School District, suffered from a heart condition. 537 S.W. 3d 501 (Tex. 2017). As a result of his heart medication, Green had urinary incontinence. After asking the bus driver to stop several times, Green was unable to control his bladder and wet himself on a school bus. No students were on the bus. Green was terminated soon after. He sued the School District, alleging he was terminated based on his urinary incontinence.

The trial court entered judgment on the jury's verdict in favor of Green and awarded $41,000 in lost pay and $125,000 in compensatory (emotional suffering) damages. The Court of Appeals reversed the trial court, holding Green offered no evidence he was terminated "because of" his heart condition. That court

held that Green's incontinence was not itself a disability and required Green to prove that the heart condition caused the urinary incontinence for which he was fired.

On May 12, 2017, the Texas Supreme Court found Green had been terminated because of a disability, and held that the Court of Appeals' error was its failure to recognize Green's urinary incontinence as a disability itself, not that it required Green to prove the cause of his disability. The evidence supported a finding that Green was terminated because of urinary incontinence, a disability. The incontinence itself was a disability because it was a side effect of the underlying condition. Although Green had not clearly argued this to the Court of Appeals, he did mention that the incontinence was part of his disability. The Texas Supreme Court reversed and remanded the case for further proceedings.

This case is notable for its potential impact on employers because of the Supreme Court's decision to tie the side effect of a disability to the underlying disability, thereby widening the potential for discrimination claims based on a more attenuated disability than that actually alleged.

1.3. Compelled Self-Publication Theory in Defamation Cases

On February 7, 2017, the Texas Supreme Court settled a split amongst Texas courts about the self-publication theory in defamation cases. *Exxon Mobil Corp., et al. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). In that case, an employee, Rincones, was terminated from employment after he failed a drug test. He maintained he did not use drugs and claimed there must have been negligence in the testing. Rincones sued his employer under a defamation theory, claiming that his termination for a positive drug test constituted defamation because he would be compelled to publish the defamatory reasons for termination to prospective employers when asked why he left his former employment.

To maintain a defamation claim, a plaintiff must prove that the defamatory statement was published to a third party. Plaintiff-employees have attempted to satisfy this element by arguing that they are compelled to self-disclose the reasons for his or her termination when seeking employment with subsequent employers. The Supreme Court rejected the theory, holding that an employee's self-publication of defamatory statements cannot satisfy the publication element of a defamation claim. The Court further confirmed that there is no independent cause of action for compelled self-publication defamation under Texas law.

The Court analyzed other state courts that had considered the theory and concluded that the majority of those courts had rejected its application. Additionally, the Court reasoned that adopting such a theory could chill the honest evaluation and communication between employers and employees about the employee performance. Finally, the Court believed that accepting the compelled self-publication theory would "unacceptably impinge on the at-will doctrine" and is therefore "incompatible with Texas's at-will employment system." Moving forward, defamation plaintiffs will be required to show that the defendant actually published a defamatory statement to a third party to maintain a cause of action.

1.4. Employers' Duty Standard in Negligence Cases

In 2017, the Texas Supreme Court addressed the standard of duty for employers in negligence cases. *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499 (Tex. 2017). In *Pagayon*, an employee was fist fighting with a co-worker inside an Exxon-owned convenience store. The co-worker died from complications in the treatment of his injuries from the fight. A manager had previously instructed that the two employees be kept apart by assigning separate shifts. When one employee worked late, the two co-workers were present at the store at the same time.

A jury awarded the family of the deceased nearly $2,000,000 in damages and apportioned 75% of the fault to ExxonMobil for negligent supervision. The 14th Court of Appeals affirmed the finding of liability against Exxon. On June 23, 2017, the Supreme Court reversed the lower courts and rendered judgment in Exxon's favor based on its view that the lower courts had held Exxon to a duty standard that was far too broad. However, the Court did not announce a generally applicable duty rule for employers. Instead, the Court provided a list of factors to consider on a case-by-case basis to determine an employer's duty in negligence cases. The Court followed the Third Restatement of Torts, allowing courts to consider a variety of principles and policies to find whether a duty exists under certain circumstances.

The Court identified several factors for lower courts to consider in determining whether an employer owes any duty to prevent harm in such direct negligence cases:

1. The risk of wrongful employee conduct;
2. The foreseeability of harm;
3. The likelihood of harm;
4. The burden on the employer;
5. The severity of harm; and
6. The social utility gained.

In weighing these factors, the Court held that, as a matter of law, Exxon owed no duty and could not be held liable for negligent supervision. Because the Supreme Court expressly declined to establish a generally applicable duty rule for employers, Texas employers should review their personnel policies and practices, including those related to hiring, training, and discipline, to best prepare for preventing and defending

against such negligence claims. Employers should proceed with caution; although Exxon ultimately won, it had to spend significant funds and appeal all the way to the Texas Supreme Court to do so.

1.5. Discoverability of Attorney-Billing Information

The Texas Supreme Court recently held that attorney-billing information of the defendant, including information about hourly rates and aggregate attorney fees, is not relevant or discoverable where the defendant is not using its own fees as a comparator nor seeking to recover any portion of its attorneys' fees. *In re National Lloyds Insurance Co.*, 532 S.W.3d 794 (Tex. 2017). In many employment disputes, the recovery of reasonable attorney's fees is an element a prevailing plaintiff-employee can recover. Some plaintiffs attempt to show the reasonableness of their counsel's rates and fees by comparing them to the rates and amounts billed by the employer's counsel.

Counsel representing employers should keep a copy of this opinion handy for resolving discovery disputes over production of rates and invoices.

2. UPDATES TO TEXAS LAW

The 85th Regular and Special Legislative Sessions did not specifically focus on employment issues, but some Texas laws have been added or updated. This handful of new Texas laws and updates took effect on September 1, 2017.

2.1. Changes to the Texas Uniform Trade Secrets Act

Two events from 2016 led to changes to the Texas Uniform Trade Secrets Act. First, on May 11, 2016, Congress enacted the Defend Trade Secrets Act (DTSA). For the first time, companies now have a federal private right of action for misappropriation of trade secrets. The DTSA aligns closely with the Uniform Trade Secrets Act, which has been adopted in some form in almost every state, and applies to misappropriation that occurs on or after the signing date. The DTSA explicitly states it is not to be construed to preempt any other provision of law. The first temporary restraining order under the DTSA was granted in June 2016.

On May 20, 2016, the Texas Supreme Court released a decision in *In re M-I LLC*, the first opinion interpreting the Texas Uniform Trade Secrets Act. 505 S.W.3d 569 (Tex. 2016). M-I Swaco, an oilfield services company, alleged that a former employee and his current employer, National Oilwell Varco (NOV), misappropriated M-I Swaco's trade secrets. At the temporary injunction hearing, before M-I Swaco's witness testified about the trade secret information, M-I Swaco asked the trial judge to exclude NOV's corporate representative from the courtroom. The Texas Supreme Court recognized that both sides had valid points and ultimately did not decide whether NOV's representative should have been excluded from the courtroom.

These two events caused the Texas legislature to pass changes to TUTSA in May 2017. These changes included a definition of the term "willful and malicious misappropriation," which is necessary for an award of exemplary damages and attorneys' fees: "intentional misappropriation resulting from the conscious disregard of the rights of the owner of the trade secret." The legislature also expanded the definition of "Trade Secret" to bring TUTSA in line with DTSA: All forms of information including "business, scientific, technical, economic, or engineering information… whether tangible or intangible and whether or how stored, compiled, memorialized physically, electronically, graphically, photographically, or in writing."

Lastly, the changes codified the Texas Supreme Court's Seven Factor Balancing Test from In re M-I LLC. Parties who have been sued for misappropriation should be permitted to participate and hear evidence against them, and should only be excluded subject to the court's consideration of:

1. The value of the owner's alleged trade secret;
2. The degree of competitive harm an owner would suffer from the dissemination of the owner's alleged trade secret to the other party;
3. Whether the owner is alleging that the other party is already in possession of the alleged trade secret;
4. Whether a party's representative acts as a competitive decision maker;
5. The degree to which a party's defense would be impaired by limiting that party's access to the alleged trade secret;
6. Whether a party or a party's defense would be impaired by limiting that party's access to the alleged trade secret; and
7. The stage of the action.

2.2. Texas Labor Code Updates

The Texas legislature added Section 21.0595 to the Texas Labor Code, addressing leave protection for foster parents. This section of the Code states that if an employer has a leave policy that allows employees to take personal leave to care for or otherwise assist a sick biological or adopted child, it will also apply to foster parents. It is now unlawful for employers to have a leave policy allowing an employee to take leave to care for a biological or adopted child, but does not provide that same leave for foster parents. This statute does not affirmatively require leave policies; however, if an employer has a leave policy, that policy must also apply to foster parents. Leave policies should not specifically exclude foster children, or list only biological or adopted children as covered.

Section 451.0025 of the Labor Code was also amended to specifically waive sovereign or governmental immunity from suits for workers' compensation retaliation claims brought by first responders such as firefighters, peace officers, and emergency medical services personnel. First responders are defined as public safety employees or volunteers whose duties include rapid emergency response. Unlike claims of private employees under Chapter 451, there is a limitation of damages provision for these claims.

One change effecting an employer's policies regarding veteran's employment preferences also came into play with the Labor Code updates. Texas law allows private employers to adopt policies giving preference in employment decisions regarding hiring, promotion, and retention of a veteran over another qualified applicant or employee. Employers with such policies may now notify the Texas Veterans Commission and the Texas Workforce Commission of their policies so the employer can be included on the commission's website recognizing employers who give veterans preference.

3. FEDERAL UPDATES TO EMPLOYMENT LAW

Recent decisions from the White House, the United States Supreme Court, and updates from federal agencies have impacted employment law.

3.1. Equal Employment Opportunity Commission

3.1.1. Strategic Enforcement Plan

On October 17, 2016, the EEOC approved an updated SEP for fiscal years 2017-2021. This new SEP builds on the agency's prior plan issued in December 2012. In it, the EEOC reaffirms its commitment to six overarching substantive priorities, while also focusing on several specific areas of law.

Of particular interest, the EEOC intends to emphasize "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." In other words, the EEOC intends to ratchet up scrutiny of employers with respect to fair employment practices in the "gig economy."

Like its predecessor, the updated SEP recognizes that additional substantive issues may be relevant in certain parts of the country, or in the agency's federal sector program. It therefore instructs district directors and regional attorneys to review and update, if needed, District Complement Plans and Federal Complement Plans, to ensure that directives at the field offices account for locally-significant issues while still reflecting the national directives. The six substantive priorities were:

1. eliminating barriers in recruiting and hiring;
2. protecting vulnerable workers and underserved communities from discrimination;
3. addressing selected emerging and developing issues;
4. ensuring equal pay protections for all workers;
5. preserving access to the legal system; and
6. preventing systemic harassment.

While these six umbrella priorities remain essentially unchanged, the EEOC has announced increased emphasis on a handful of substantive areas. As mentioned above, the new priority with the broadest reach is likely the EEOC's announced focus on "complex employment relationships and structures in the 21st century workplace." With this change, the SEP acknowledges the continuing evolution of the workforce brought about by the gig economy, as more and more people work in alternative or contingent arrangements, including on-demand jobs. The EEOC plainly intends to take a much closer look at these types of relationships, including staffing agencies and independent contractors, than it has in the past.

The SEP also fires a warning shot on equal pay. While the EEOC will maintain its focus on gender-based pay discrimination, it plans to address disparities that persist on other grounds, including race, ethnicity, and disability. Equal pay has been a central theme this past election season, and the EEOC intends to expand the reach of this existing national priority to all workers.

In the SEP, the EEOC identified two additional "emerging and developing issues" to be prioritized. In light of recent events, the EEOC intends to focus on "backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent." This enhanced focus also extends to workers who may be "perceived to be members of these groups, as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities."

As another developing issue, the EEOC is narrowing its focus for claims under Americans with Disabilities Act to "qualification standards and inflexible leave policies that discriminate." The emerging priorities in the SEP join several issues retained from 2012, including accommodations for pregnancy-related limitations and protections for LGBT employees.

The SEP also provides further insight into other enforcement aims. Concerning the EEOC's goal of preserving employee access to the legal system, the agency previously targeted "retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges … and failure to retain records required by EEOC regulations." In the new SEP, the EEOC is removing "retaliatory actions" from conduct that it

deems a potential barrier to the legal system. The EEOC explains that it is deleting "retaliatory actions" because the term was undefined, resulting in inconsistent agency action. Nonetheless, the EEOC will continue to focus on questionable waivers, releases, and arbitration agreements, as well as recordkeeping and "significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights."

Finally, the EEOC is revising the priority concerning vulnerable workers to permit district offices, and the federal sector program, to identify particular groups or underserved communities. These offices can recommend communities for "focused attention, based on how the EEOC can most effectively utilize government resources to address the local issues of concern for these groups." By way of example, the EEOC notes that discrimination against Native Americans could be an appropriate focus for certain offices in implementing this priority.

In sum, the SEP offers a preview into the EEOC's expected enforcement priorities as the agency refines its focus and adapts to developing issues.

3.1.2. Proposed Enforcement Guidance on Harassment

According to the EEOC's 2017 Proposed Enforcement Guidance on Harassment, a comprehensive harassment policy includes:

- ✓ An unequivocal statement that harassment based on any legally protected characteristic is prohibited;
- ✓ An easy-to-understand description of prohibited conduct, including examples;
- ✓ A description of the organization's harassment complaint system;
- ✓ A statement that employees are encouraged to report conduct that they believe constitutes unlawful harassment even if they are not sure that the conduct violates the policy;
- ✓ A statement that the employer will provide a prompt, impartial, and thorough investigation;
- ✓ A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible;
- ✓ A statement that employees are encouraged to respond to questions or to otherwise participate in investigations;
- ✓ A statement that information obtained during an investigation will be kept confidential to the extent possible;
- ✓ An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and
- ✓ An unequivocal statement that retaliation is prohibited and will not be tolerated

3.1.3. Proposed Guidance on Training

According to the EEOC's 2017 guide, harassment training is most effective when it is tailored to the organization and audience. Accordingly, the agency states that when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes descriptions of unlawful harassment and conduct that, if left unchecked, might rise to the level of unlawful harassment as well as examples that are tailored to the specific workplace and workforce. The training should also include information about employees' rights and responsibilities if they experience, observe, or otherwise become aware of conduct that they believe may be prohibited. It is helpful for an employer to provide explanations of the complaint process and of the range of possible consequences for engaging in prohibited conduct.

The EEOC's guide states that harassment training should be:

- ✓ Championed by senior leaders;
- ✓ Repeated and reinforced regularly;
- ✓ Provided to employees at every level and location of the organization;
- ✓ Provided in all languages commonly used by employees;
- ✓ Tailored to the specific workplace and workforce;
- ✓ Conducted by qualified, live, interactive trainers, or, if live training is not feasible,
- ✓ Designed to include active engagement by participants; and
- ✓ Routinely evaluated by participants and revised as necessary.

The EEOC believes that because supervisors and managers have additional responsibilities with respect to harassment, they may benefit from additional training. Effective harassment training for supervisors and managers includes information about how to prevent, identify, stop, report, and correct harassment, such as identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment; easy-to-understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of; clear instructions about how to report harassment up the chain of command; and explanations of the confidentiality rules associated with harassment complaints. This explanation should include an unequivocal statement that retaliation is prohibited and will not be tolerated.

3.2. Fair Labor Standards Act Claims

All employees are entitled to overtime except those who are exempt. The primary exemptions are

executive, administrative, professional, outside sales, computer, and those who are highly compensated. Claims involving overtime pay under the Fair Labor Standards Act (FLSA) are popular for numerous reasons. First, there is no requirement that a claimant must first file with the government in order to proceed with their claim. The three year statute of limitations, and the fact that intent is not necessary to prove for an FLSA claim make these claims more prevalent. FLSA claims also allow for liquidated damages, attorneys' fees, and potentially collective actions.

On May 21, 2018, the United States Supreme Court addressed a split among circuit courts regarding class waivers in FLSA claims. In *Epic Sys. Corp. v. Lewis*, No. 16-285, the Court held that the Federal Arbitration Act allows enforcement of arbitration agreements limiting proceedings to an individual basis only, and barring class proceedings. In *Epic*, three employees signed arbitration agreements prohibiting bringing collective actions in court, but the employees later sued their employers for wages allegedly due to the employees and others "similarly situated" being subjected to the same pay practices. A five Justice majority concluded the arbitration agreements to arbitrate disputes individually, and forego collective actions, were binding. Based on this holding, employers would be wise to consider using an arbitration agreement with a class waiver.

Additionally, the FLSA may be expanding in the near future. The Department of Labor pressed for changes to the FLSA in 2016. The Final Rule was to be published in the Federal Register and take effect December 1, 2016, and was expected to impact eleven million workers. The proposed changes included an increased minimum salary level from $455 a week to $913 a week, and a requirement that the salary level be updated every three years, based on either percentiles of earnings for full-time salaried workers or based on changes in inflation.

However, on November 22, 2016, the DOL's Overtime Regulations were enjoined by Judge Amos Mazzant of the Eastern District of Texas, Sherman Division. The lawsuit was originally filed by the State of Nevada and 20 other states, and was consolidated with another case filed by 50 business organizations challenging the Final Rule. The injunction applies nationwide and to all aspects of the Regulations – including the minimum salary and three-year increase provisions. The Court held that, because Congress defined the exemptions with regard to duties without a minimum salary level, the DOL could not raise the minimum thresholds that overtook the duties tests. Judge Mazzant concluded that the DOL did not have the authority to raise the minimum salary threshold in a way that overtook the duties tests and created "essentially a de facto salary-only test."

Even more recently, on November 6, 2017, the Fifth Circuit stayed the DOL's appeal, entering the following order: "IT IS ORDERED that the unopposed motion of Appellants, United States Department of Labor, R. Alexander Acosta, the Wage and Hour Division of the Department of Labor, Mary Ziegler and Bryan Jarrett, to stay this case pending the outcome of the new rulemaking is GRANTED."

3.3. U.S. Supreme Court

The Supreme Court of the United States issued several opinions from late 2016 though present that impact employers in Texas and nationwide.

3.3.1. 2016 – 2017 Term

Some of the more publicized labor and employment Supreme Court cases during the 2016-2017 term included *BNSF Railway Co. v. Tyrrell*, where the Court held that the Federal Employers' Liability Act (FELA) does not address whether state courts may exercise personal jurisdiction over railroads; *Advocate Health Care Network v. Stapleton*, a case in which the Court determined that the "church plan" exemption of ERISA applies to plans that are maintained by a qualifying church-affiliated organization, even of that organization did not originally establish the plan; and *Coventry Health Care of Missouri, Inc. v. Nevils*, which determined that the Federal Employees Health Benefits Act preempts state laws that prohibit insurance companies from claiming the proceeds of personal injury settlements pursuant to their contracts, and the express preemption clause of the Act, do not violate the supremacy clause. *BNSF RR Co. v. Tyrrell*, 581 U.S. ___ (2017); *Advocate Health Care Network v. Stapleton*, 581 U.S. ___ (2017); *Coventry Health Care of Missouri, Inc. v. Nevils*, 581 U.S. ___ (2017).

The term also included several decisions involving FLSA claims and federal agencies like the EEOC. In *Green v. Brennan*, 136 S. Ct. 1769 (2016), a postal service worker complained that he was denied a promotion because he was black. After this complaint was made, the employer accused him of intentionally delaying mail. The employee and USPS agreed that USPS would not pursue criminal charges, and the employee would either retire or accept a position in a new location. Ninety-six days after signing the agreement, and forty-one days after resigning, the employee filed an EEOC charge for unlawful constructive discharge. The Supreme Court vacated the Tenth Circuit's ruling, finding that the statute of limitations for a Title VII constructive discharge claim begins to run on the date of the employee's notice of resignation, not on the date of the last alleged discriminatory act by the employer.

In his dissent, Justice Clarence Thomas wrote that only an employer's discriminatory action constitutes a "matter alleged to be discriminatory" under Title VII. If

the employer's actions were taken more than 45 days before the plaintiff's EEOC charge, that claim is untimely. The majority's view expanded the constructive discharge doctrine by allowing it to have a different limitations period than other claims brought under Title VII.

In 2016, the Supreme Court also answered the question of whether a fee award is available after the dismissal of a case for failure to satisfy pre-suit obligations. *CRST Van Expedited v. EEOC*, 136 S.Ct. 1642 (2016). In *CRST*, the EEOC filed a sexual harassment suit on behalf of 270 female employees. When the EEOC failed to make the women who wished to continue with the suit available for deposition after two years, the court granted six of CRST's motions to dismiss. CRST then filed a bill of costs against the EEOC for $4,560,285.11. The fee award was granted by the district court and reversed by the Eighth Circuit.

Anthony Kennedy, writing for a unanimous decision for CRST, found that employers may be considered prevailing parties for purposes of an attorneys' fee award, even if they do not win "on the merits," but an employer must show that the EEOC's litigation was "frivolous, unreasonable or groundless" to support such an award. Nothing from Congress' statutory language indicated that it intended to limit parties' opportunities to collect fees to only those instances where they prevailed on the merits, especially since doing so would prevent parties from obtaining fees on claims that were dismissed as frivolous.

In *Tyson Foods*, the Supreme Court also addressed an FLSA claim, ultimately holding that if an employer does not keep detailed pay records, FLSA Plaintiffs may use statistical sampling as evidence to establish hours worked, so long as the experiences of the sample group are "probative as to the experiences of all" the plaintiffs. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). In Tyson, employees who were required to wear protective gear in the kill, cut, and re-trim departments of the pork processing plant, did not record the time each employee spent donning and doffing their gear. The employees sued under the FLSA and sought certification of their federal claims as a collective action. The court concluded that common questions, such as whether donning and doffing were compensable, were susceptible to class-wide resolution even if not all of the workers wore the same gear.

The employees relied on a study performed by Dr. Mericle, an industrial relations expert, to show that they each worked more than 40 hours a week, including the time spent changing into and out of their protective gear. Dr. Mericle conducted videotaped observations and analyzed how long various donning and doffing activities took. Based on these studies, he averaged and estimated the time it took for various departments to don and doff their protective gear, which ranged from 18 to 21.25 minutes per day. These estimates were added to each employee's timesheet. The jury awarded $2.9 million based on this additional time.

The Eight Circuit and Supreme Court affirmed the jury award, confirming that donning and doffing are compensable under FLSA. Because each class member could have relied on Dr. Mericle's sample and study to establish liability, it was not improper to use this method to establish liability on behalf of the class.

3.3.2. 2017 – 2018 Term

Among the many high profile decisions handed down by the U.S. Supreme Court during its 2017-2018 term, some cases directly impacted labor and employment. In a case that garnered national attention, the Supreme Court narrowly held that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018). In that case, the owner of a Colorado bakery told a same-sex couple that he would not create a cake for their wedding because of his personal religious views. The couple sued the bakery under the Colorado Anti-Discrimination Act, which prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public." The opinion centered on the idea that the Colorado law prohibiting discrimination against gay people had to be applied in a neutral manner with regard to religion. The Majority also acknowledged that from the baker's perspective, creating cakes was a form of artistic expression and a component of his sincere religious beliefs.

In *McClane*, the Supreme Court held that a trial court's decision whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not de novo, by Courts of Appeals. *McLane Co. Inc. v. EEOC*, 137 S. Ct. 1159 (2017).

In *Encino Motorcars*, the Court found that service advisors at car dealerships are "salesm[e]n … primarily engaged in … servicing automobiles," such that they are exempt from the Fair Labor Standards Act's overtime-pay requirements. *Encino Motorcars, LLC v. Navarro*, 584 U.S. ___ (2018).