Recent Developments in Labor and Employment Law: Is the Law of the Workplace Drifting Rightward?

College of Labor and Employment Lawyers
Fourth and Eleventh Circuits Annual Program
Charleston, SC, February 2, 2019

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I. Principled Decision-making?

A, Respect for Precedent

1. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), holding that an agreement to arbitrate any and all claims arising out of employment on an individual basis only is enforceable, rejecting the view of the National Labor Relations Board and the Seventh and Ninth Circuits that it violated Section 8(a)(1) of the National Labor Relations Act.

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes " 'individual attempts at conciliation' " through arbitration. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Id. at 1627 (citations omitted).

2. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which not only stood for 41 years but had been reaffirmed by the Court directly on at least four occasions, *Locke v. Karas*, 555 U.S. 207 (2009); *Lenhert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. BRAC*, 466 U.S. 435 (1984), and applied to analogous areas such as unified state bar associations, *Keller v. State Bar of California*, 496 U.S. 1 (1990) and state university student activity fees *Board of*

Regents v. Southworth, 529 U.S. 217 (2000).

> An important factor in determining whether a precedent should be overruled is the quality of its reasoning, and as we explained in *Harris*, *Abood* was poorly reasoned . . .
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> *Abood* went wrong at the start when it concluded that two prior decisions, *Railway Employes v. Hanson*, and *Machinists v. Street*, "appear[ed] to require validation of the agency-shop agreement before [the Court]." Properly understood, those decisions did no such thing. . . .
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> Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. . . .
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> *Abood* 's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. . . . *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. . . .
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> If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked.
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> *Abood* also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as

wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."

Overlooking the importance of this distinction, *Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.. . . .

In sum, as detailed in *Harris, Abood* was not well reasoned.

Id. at 2479-81 (citations omitted).

B. Reliance on Stability in the Law

1. *Janus*

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling.

In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.

Id. at 2485 (citations omitted).

2. *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018), holding that car dealership service advisers are exempt "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles" under the FLSA. This was the second time this case was before the Court and the second time the Court reversed the Ninth Circuit's holding that service advisers were not exempt. In its first decision, the Court emphasized employer reliance on a Labor Department

opinion letter issued in 1978, that service advisers were usually exempt, a position that DOL moved away from in 2011 when it issued a regulation that such employees were not exempt:

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, see 29 U.S.C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016).

C. Is this surprising?

1. Recall *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009):

Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.

Id. at 178-79 (footnote and citations omitted).

2. At least the Court is sometimes transparent in its motivation. *See University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013):

The proper interpretation and implementation of § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over

16,000 in 1997 to over 31,000 in 2012. Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

In addition lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. Yet there would be a significant risk of that consequence if respondent's position were adopted here.

Id. at 358-39 (citations omitted).

3. And let's not forget about *A T & T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), the forerunners of *Epic Systems*. As I said in delivering the review of the Supreme Court's decisions to the ABA Labor & Employment Law Section annual meeting in 2013:

In finding in the FAA a mandate to enforce arbitration agreements according to their terms, the Court has made it clear that it knows who drafts these agreements. In *Concepcion*, after cataloguing deficiencies in arbitration as a forum for handling class actions in a manner I have characterized as analogous to the deficiencies of arbitration as a forum for handling statutory claims in *Alexander v. Gardner-Denver Co.*, which the Court now views as long discredited, the Court concluded, "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."

But a class action waiver can act as a license to steal. Consider the following hypothetical. A credit card issuer decides to increase its profits by adding a $1.00

charge to every card holder's monthly bill. The bill does not expressly show the extra charge. It just gets added to the total due. I suspect that most credit card holders do not check their issuer's addition when they get their monthly statements. The issuer, of course, is counting on that. Even if some card holders notice and complain, the issuer can simply claim that there was a computer error in addition and refund the $1.00 while keeping the hundreds of thousands of other dollars it took in. And if a card holder notices that the same computer error is made every month, the card holder's sole recourse is to bring an individual claim in arbitration for a few dollars. The only realistic way to attack the theft is with a class action but after *Concepcion*, that measure is unavailable as a matter of federal law because the Court is certain that the issuer would not bet the company with no effective means of review. Nowhere does the Court even consider, much less express concern with, whether the card holder would have consented to giving the issuer such a license to steal or whether Congress intended to preclude a state from stopping such a theft. The Court's sole concern is with the perspective of the credit card issuer, cell phone company and employer – the party with the bargaining power to impose whatever terms it wishes on the weaker party.

Martin H. Malin, *The Labor and Employment Law Decisions of the Supreme Court's 2012-13 Term*, 29 A.B.A. J. LAB. & EMP. L. 203, 211-12 (2014) (footnotes omitted).

II. A Deep Dive into *Janus*

A. The holding: Compelling members of a bargaining unit of public employees represented by an exclusive representative to pay agency fees to that representative violates their First Amendment rights of free expression and association. Collective bargaining is political speech, akin to lobbying, and compelled subsidization of such speech is compelled speech forbidden by the First Amendment. To the extent that *Abood* found such compelled subsidization justified, it erred in equating agency fees with exclusive representation. The two are not linked and any justification for exclusive representation does not extend to agency fees. There are less restrictive means available to prevent free riding.

B. The coming turmoil

1. Attacks on Exclusive Representation

From the Right: *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *petition for cert. filed* No. 18-766 (Dec. 13, 2018); *Uradnik v. Inter Faculty Organization*, No. 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff'd*, No. 18-3086 (8th Cir. Dec. 3,

2018), *pet. cert. filed* No. 18-719 (Dec. 4, 2018), docketed for conference on Feb. 15, 2019; *Reisman v. Associated Faculties of the University of Maine*, 2018 WL 6312996 (D. Maine Dec. 3, 2018), *appeal filed*, No. 18-2201 (1st Cir. Dec. 7, 2018).

From the Left: *Sweeney v. Rauner*, No. 1:18-cv-01362 (N.D. Ill.), *available at* http://www.local150.org/wp-content/uploads/2018/02/cmplt.ex_.A.02-22-18.pdf.

2. Can Unions Be Compelled to Extend the Benefits of Membership to Bargaining Unit Members Who Elect Not to Join?

Bane v, California Teachers Ass'n, 156 F. Supp. 3d 1142 (C.D. Cal. 2015), *appeal dismissed as moot*, 891 F.3d 1206 (9th Cir. 2018) - pre-*Janus* decision finding no constitutional violation where union provided benefits including disability insurance, free legal representation, life insurance and disaster relief to members only and limited voting in union elections to members only;

Branch v. Commonwealth Employment Relations Board, No. SJC-12603 (Mass. Argued Jan. 8, 2019). Under Massachusetts statute, non-members who are assessed agency fees have a right to vote on contract ratification but no other rights to participate in exclusive representative decision-making or governance. Appellees , represented by RTW, argue that the Constitution requires that they be afforded such rights.

3. Class Action Suits to Claw Back Fees Paid Prior to *Janus*

Riffey v. Rauner, 873 F.3d 558 (7th Cir. 2017), *vacated and remanded for reconsideration in light of Janus*, 138 S. Ct. 2708 (2018), *on remand* 910 F.3d 314 (7th Cir. 2018), *rehearing en banc denied* Jan. 4, 2019 - denying class action status to plaintiffs in *Harris v. Quinn*, 134 S. Ct. 2618 (2014) on ground that plaintiffs failed to satisfy Rule 23(b)(3)'s requirement that common issues predominate over individual issues and that a class action would be a superior vehicle for resolving the claims; not reaching the Rule 23(a) issues.

Danielson v. AFSCME Council 28, 2018 WL 6520729 (W.D. Wash. Nov. 28, 2018), *appeal docketed* No. 18-36087 (9th Cir. Dec. 28, 2018) - holding union not liable under 42 U.S.C. § 1983 for agency fees paid prior to *Janus*, because, although not entitled to qualified immunity as a private actor, union did establish a defense of good faith reliance on a presumptively-valid state law and Supreme Court precedent binding at the time, i.e. *Abood*.

4. Restrictions on Resigning Union Membership and Revoking Due Deduction Authorizations

Compare McCahon v. Penn. Turnpike Comm'n, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) (*pre-Janus* decision granting preliminary injunction against enforcement of a maintenance of membership provision in a CBA that allowed members to resign from union only during a 15-day window prior to expiration of a three-year CBA, reasoning that the term compelled membership in violation of the First Amendment) *with Smith v. Superior Court*, 2018 WL 6072806 (N.D. Cal. Nov. 16, 2018) (denying preliminary injunction requested by union member who had agreed to pay dues through the date that the cba expired, opining that he could not use the First Amendment as a sword to avoid contractual obligations that were valid under state law).

5. CBA Indemnification Provisions

Compare Wessel v. City of Albuquerque, 299 F.3d 1186 (10th Cir. 2002) *and Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992) (both holding that cb indemnification provisions were void as contrary to public policy) *with Locke v. Karass*, 425 F. Supp. 2d 137 (D. Me. 2006) (upholding narrowly tailored indemnification provision).

See California Senate Bill 866 (signed by the Governor on June 27, 2018, right after *Janus* issued), provides that exclusive representatives control dues checkoff authorizations and their revocation. Dues checkoff authorizations may be revoked in accordance with the terms of the authorization. Employers are required to deduct dues from employees pay upon request by the exclusive representative and representation by the exclusive representative that it has a valid authorization. Exclusive representatives need not provide the employer with the actual authorization. Exclusive representatives must indemnify employers for any claims made by employees over deductions where the employer relied on the information supplied by the exclusive representative. Employers are required to refer employees seeking to revoke their dues checkoff authorizations to the exclusive representative.

6. Impact Beyond Labor Law

Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017), *vacated and remanded in light of Janus*, No. 17-886, 2018 WL 6272044 (U.S. Dec. 3, 2018). Eighth Circuit rejected claims by Fleck that North Dakota's integrated bar violated his First

amendment Right not to associate and that North Dakota Bar's requirement that bar members affirmatively opt out of paying for bar association's political and ideological activities violated his First Amendment rights. Eighth Circuit relied on *Abood* and *Keller*, but Supreme Court vacated and remanded for reconsideration in light of *Janus*.

7. Impact on *Garcetti v. Cebalos*, 547 U.S. 410 (2006)

When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the employees, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

Janus, 138 S. Ct. at 2474

8. Impact on *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) and its progeny.

III. A Deep Dive into *Epic Systems*

A. Reinterpreting the NLRA

D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012), *rev'd in relevant part*, 737 F.3d 344 (5th Cir. 2013). In reversing the Board, the two-judge Fifth Circuit majority did not question the Board's interpretation that NLRA Section 7 includes a right of employees to band together to litigate to improve their working conditions. Instead, the court found that the policies of the FAA favoring arbitration outweighed competing NLRA policies.

Board precedent and some circuit courts have held that the provision protects collective-suit filings. "It is well settled that the filing of a civil action by employees is protected activity ... [and] by joining together to file the lawsuit [the employees] engaged in concerted activity." *127 Rest. Corp.*, 331 NLRB 269, 275–76 (2000). "[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of

employment is 'concerted activity' under Section 7" of the NLRA. *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir.2011). An employee's participation in a collective-bargaining agreement's grievance procedure on behalf of himself and other employees is similarly protected. *City Disposal*, 465 U.S. at 831–32.

These cases under the NLRA give some support to the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7. To stop here, though, is to make the NLRA the only relevant authority. The Federal Arbitration Act ("FAA") has equal importance in our review. Caselaw under the FAA points us in a different direction than the course taken by the Board.

737 F.3d at 356-57.

In *Murphy Oil USA*, 361 N.L.R.B. 774 (2014), *rev'd in relevant part*, 808 F.3d 1013 (5th Cir. 2015), dissenting Board Member Miscimarra agreed that "that the NLRA affords protection to two or more employees who, while acting in concert, initiate or participate in one or more non-NLRA legal claims for the purpose of mutual aid or protection." *Id.* at 795 (Miscimarra, Member dissenting in part). Similarly, dissenting Member Johnson agreed, "It is certainly true that Section 7 generally protects concerted employee efforts 'to improve their working conditions through resort to administrative and judicial forums.'And it is also true that a lawsuit initiated by multiple employees is concerted activity within the meaning of Section 7 because such a lawsuit is 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.' *Id.* at 812 (Johnson, Member, dissenting in part).

The NLRB and lower court decisions disagreed over whether employer-imposed requirements of arbitration on an individual basis only interfered with, restrained or coerced employees in their Section 7 right to collectively pursue improved working conditions through litigation and whether to the extent that it did, it must yield to weightier policies under the FAA favoring arbitration. The Supreme Court could have easily followed the lead of the Fifth Circuit and the dissenting Board members in this regard. Instead, Justice Gorsuch went beyond the arguments presented to the Court and radically narrowed the scope of Section 7 itself:

The employees direct our attention to the term "other concerted activities for the purpose of ... other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist [ing] labor

organizations," and "bargain[ing] collectively."And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to " 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.' "All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment*, 858 F.3d at 414-415 (Sutton, J. concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

Epic Systems, 138 S. Ct. at 1625. Notably, Justice Gosruch quoted Judge Sutton completely out of context. Judge Sutton, like the Board dissenters in *Murphy Oil*, and like the Fifth Circuit majority in *D.R. Horton*, opined that resort to litigation to improve working conditions was protected by Section 7. He wrote:

Employees engage in each of the listed activities—organization, unionization, collective bargaining, electing representatives—on their own collective initiative. The same can be said about a group of employees filing a lawsuit or set of lawsuits against their employer. All of these self-directed, collaborative activities are part of the "freedom of association [and] self-organization" that Section 7 protects. *Id.* § 151. But class litigation is not something that employees just do. The use of collective procedures is limited by statute, by the rules of the forum, and, yes, by waiver. Section 7 prevents employers from interfering with employees' attempts to assert their own interests through collective action; it does not create an affirmative right to use or pursue courtroom procedures that the law carefully limits.

B. The Beginning of the Dismantling of the Administrative State?

Kisor v. Shulkin, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted sub nom Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837 (Dec. 10, 2018). Applying *Auer v. Robbins*, 519 U.S. 452 (1997) and its progeny, the Federal Circuit deferred to the Board of Veterans Appeals (BVA) interpretation of its regulations allowing the reconsideration of claims for veterans' benefits "any time after VA issues a decision . . . if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim . . ." The BVA

found the evidence presented by Kisor was not relevant and the court, finding the word "relevant" as used in the regulation ambiguous deferred to the agency's interpretation of its own regulation. The Supreme Court has granted certiorari to consider whether to overrule *Auer*.

United States v. Grundy, 695 Fed. Appx. 639 (2d Cir. 2017), *cert. granted* 138 S. Ct. 1260 (2018) (argued Oct. 2, 2018). Defendant was convicted of violating the Sex Offender Registration Notification Act of 2006 (SORNA) by traveling interstate while knowingly failing to register as a convicted sex offender. SORNA requires convicted sex offenders to register before completing their sentence of imprisonment or, if not sentenced to prison, within three business days of their being sentenced. With respect to sex offenders who were sentenced or who completed their sentences prior to SORNA's enactment, SORNA directs the attorney general to promulgate regulations governing their registration. The Court granted certiorari to determine "[w]hether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine." The last time the Supreme Court struck a federal statute as an unconstitutional delegation of legislative authority to the executive branch was in 1935, although some concurring opinions of Justice Scalia suggested that OSHA's rulemaking authority may be an unconstitutional delegation. At oral argument, Grundy's counsel characterized SORNA as "combining criminal law-making and executive power with no standard to guide the Attorney General's discretion" and "can be distinguished from every delegation that has previously been upheld by this Court due to a combination of its total lack of standards and the nature and power -- nature and significance of the delegated power." But the Court could use the case to revive the non-delegation doctrine that has been dead for more than eight decades.

Casino Pauma v. NLRB, 888 F.3d 1066 (9th Cir. 2018), *petition for cert. filed* No. 18-873 (Jan. 8, 2019). In enforcing NLRB unfair labor practice orders against an Indian tribe-owned casino operated on tribal land, the Ninth Circuit reasoned that the NLRA did not expressly exclude Indian tribes from the definition of employer – in contrast to federal and state governments – and, because of this silence, the NLRB's determination that the NLRA covers tribal employers was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In its petition for certiorari, Casino Pauma asked the Court to reconsider *Chevron*.

Note: Florida has already done so. Section 2 of Amendment 6 to the Florida Constitution, approved by voters this past election day, provides, "Judicial interpretation of statutes and rules. In interpreting a state statute or rule, a state court or an officer

hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

C. Further limiting judicial ability to police arbitration mandates.

The problem with this line of argument [relying on the FAA's savings clause] is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' " At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

Epic Systems, 138 S. Ct. at 1622 (citations omitted).

D. Where is the Court Going?

Henry Schein, Inc. v. Archer and White Sales, Inc., 2019 WL 122164 (U.S. Jan 8, 2019) -

Justice Kavanaugh's first Supreme Court opinion - parties contract provided for arbitration under AAA rules except for actions seeking injunctive relief. Archer and White sued seeking, inter alia, injunctive relief. AAA commercial arbitration rules provide for the arbitrator to resolve questions of arbitrability but the lower courts denied Schein's motion to compel arbitration on the ground that the claim that the matter was arbitrable was "wholly groundless." The Supreme Court, in a unanimous opinion reversed.

New Prime, Inc. v. *Oliveira*, 2019 WL 189342 (U.S. Jan. 15, 2019) - contract purported to designate Oliveira as an independent contractor and provided for arbitration of all disputes including issues of arbitrability. FAA § 1 exempts from the Act's coverage "contracts of employment of seaman, railroad employees or any other class of workers engaged in foreign or interstate commerce." The First Circuit held that the question of whether the FAA applied was for the court, rather than an arbitrator to decide and that the § 1 exemption did not incorporate the common law employee - independent contractor distinction. The Supreme Court affirmed.

The Court held that a court, rather than an arbitrator, must decide whether the contract is excluded from the FAA by § 1, even if the contract purports to empower the arbitrator to resolve that issue. "[T]o invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum." Slip. Op. at 4. The Court then reasoned that the phrase "contracts of employment" must be read as it was understood when Congress enacted the FAA in 1925. " At that time, a 'contract of employment' usually meant nothing more than an agreement to perform work. As a result, most people then would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." *Id.* at 7.

Perhaps with a view toward the sexual orientation and sexual identity cases under Title VII whose cert. petitions were pending before the Court (see § VII.A *infra*), Justice Ginsburg concurred cautioning, "Congress, however, may design legislation to govern changing times and circumstances. . . . [S]ometimes words in statutes can enlarge or contract their scope as changes in law or in the world require their application to new instances or make old applications anachronistic." Slip. Op., concurring op. at 1-2 (quotation marks and citations omitted).

Varela v. Lamps Plus, Inc., 701 Fed. Appx. 670, 2017 WL 3309944 (9th Cir. 2017), *cert. granted* 138 S. Ct. 1697 (2018) (argued Oct. 29, 2018) - contract required arbitration but was silent as to whether arbitration could proceed on a class basis. Ninth Circuit, applying California law, interpreted the contract against the drafter and concluded that arbitration could proceed on a class basis.

IV. But That's Not All; Return to *Encino Motorcars*. The case concerned a narrow technical question interpretation of a narrow overtime exemption and the Court could have resolved it as such,. But the Court added the following provocative statement:

> The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." The narrow-construction principle relies on the flawed premise that the FLSA " 'pursues' " its remedial purpose " 'at all costs.' " But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement.
>
> *Encino*, 138 S. Ct. at 1142.

V. That's still not all. *CNH Industrial N.V. v. Reese*, 138 S. Ct. 761 (2018). Understanding *CNH Industrial* takes us back three years to the Court's decision in *M & G Polymers USA LLC v. Tackett*, 135 U.S. 926 (2015), which in turn takes us back another 22 years to the Sixth Circuit's decision in *UAW v. Yard-Man, Inc.* 716 F.2d 1476 (6th Cir. 1983).

> ERISA requires that pension benefits vest after a specified period of time. But welfare benefits, such as retiree health insurance and life insurance, only vest as a matter of contract. In *Yard-Man* and subsequent decisions, the Sixth Circuit had effectively created a presumption that retiree health insurance provided for in collective bargaining agreements were intended to vest for life. Different circuits took diverse approaches to this issue with the Seventh Circuit at the other end of the spectrum, taking the view that retiree health insurance is presumed to expire with the expiration of the CBA. In *Tackett*, the Court overruled the Sixth Circuit's approach:
>
> > We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. "Where the words of a contract

in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." In this case, the Court of Appeals applied the *Yard–Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. As we now explain, those inferences conflict with ordinary principles of contract law.

. . . . .

[T]he Court of Appeals derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits. . . . Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case. *Yard–Man* relied on no record evidence indicating that employers and unions in that industry customarily vest retiree benefits. Worse, the Court of Appeals has taken the inferences in *Yard–Man* and applied them indiscriminately across industries.

135 S. Ct. at 933. 935 (citations omitted).

In *CNH Industrial*, the Sixth Circuit determined that the CBA language concerning retiree medical insurance was ambiguous. It found the contract's general duration clause ambiguous, employing reasoning comparable to its reasoning in *Yard-Man* and progeny. The Supreme Court would have none of it.

In this case, the Sixth Circuit held that the same Yard–Man inferences it once used to presume lifetime vesting can now be used to render a collective-bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting. This analysis cannot be squared with *Tackett*. A contract is not ambiguous unless it is subject to more than one reasonable interpretation, and the Yard–Man inferences cannot generate a reasonable interpretation because they are not "ordinary principles of contract law," *Tackett, supra*, at ——, 135 S.Ct., at 937. Because the Sixth Circuit's analysis is "Yard–Man re-born, re-built, and re-purposed for new adventures," 854 F.3d, at 891 (Sutton, J., dissenting), we reverse.

138 S. Ct. at 763.

Compare the Court's approach to the interpretation of CBAs in *Tackett* and *CNH Industrial* to its approach in the *Steelworkers Trilogy*.

The labor arbitrator's source of law is not confined to the express provisions of the

contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) .

Recall *14 Penn Plaza, LLC v. Pyett*. "Parties generally favor arbitration precisely because of the economics of dispute resolution. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." *14 Penn Plaza LLC v. Pyett*, 556. U.S. 247, 257 (2009).

Compare this view of labor arbitration to the view expressed in the *Trilogy*. "T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement. 363 U.S. at 581.

Is the Court now viewing CBAs as just ordinary commercial contracts? If an arbitrator is tasked with interpreting the retiree health insurance provision in a CBA, is the arbitrator bound to apply "ordinary principles of contract law," as defined in *Tackett* and *CNH Industrial*? *See RBC Precision Prods., Inc.*, 127 Lab. Arb. (BNA) 675 (2009) (Malin, Arb.).

VI. Labor and Workers go 0 for 5 in the 2017-18 Supreme Court Term: *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018). The Court unanimously held that Dodd-Frank's protections for whistleblowers do not cover individuals who have reported wrongdoing only to their employers, and not to the SEC. 15 U.S.C. § 78u-6 is headed, "Securities' Whisteblower Incentives and Protection." It defines "whisteblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission." *Id.* § 78u-6(a)(6). It provides monetary awards to whistleblowers who voluntarily provided information which led to a successful enforcement action. *Id.* § 78u-6(b). Its anti-retaliation provision provides, "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--(i) in providing information to the Commission in accordance with this section;(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . " *Id.* § 78u-6(h)(1)(A). Sarbanes-Oxley protects internal reporting of violations. But, reasoned Justice Ginsberg writing for the Court, Dodd-Frank's protection for internal reporting is limited to whistleblowers as the terms is defined in Dodd-Frank and Dodd-Frank requires reporting to the SEC to be a whistleblower.

VII. But, as of January 15, 2019, workers are 2 and 0 in the Court's current term.

A. *New Prime*, *supra*.

B. *Mount Lemmon Fire District v. Guido*, 139 S.Ct. 22 (2018). The Court held unanimously that the ADEA covers state and local employers of any size, rejecting the employer's argument that the 20-employee threshold that applies to private employers should be read into the public sector as well. Another Ginsburg opinion driven by statutory text. The ADEA provides, "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State...." 29 U.S.C. § 630(b).

VII. A Few Lower Court Cases to Watch.

A. Sexual Orientation and Sexual Identity under Title VII

1. *Hively v. Ivy Tech.*, 853 F.3d 339 (7th Cir. 2018) (en banc). The Seventh Circuit becomes the first circuit court of appeals to overrule its prior decisions and to hold that discrimination because of sexual orientation is

discrimination because of sex under Title VII.

The majority's reasoning: 1. Hively alleges that if she were a man sexually attracted to women she would not have been rejected but because she is a woman sexually attracted to women she was rejected. This is straight-forward sex discrimination. 2. Discrimination on the basis of sexual orientation is the ultimate in discriminatory sex stereotyping recognized as actionable under Title VII in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). It is discrimination against an individual who does not conform to the stereotype of how that individual should behave. 3. Discrimination because of sexual orientation is actionable under the theory that anti-discrimination provisions prohibit discrimination based on the characteristics of a person with whom the claimant associates, analogous to *Loving v. Virginia*, 388 U.S. 1 (1967), and applied toTitle VII in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986) and *Holcolm v. Iona College*, 521 F.3d 130 (2d Cir. 2008). 4. That Congress may not have had discrimination on the basis of sexual orientation in mind when it enacted Title VII is irrelevant as the statute reaches many kinds of discrimination that were not the specific targets of Congress at the time of enactment, as the Supreme Court expressly recognized in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998).

Judge Posner concurring: Title VII as enacted did not prohibit discrimination because of sexual orientation but it is appropriate for the court to, in effect, update the statute in light of contemporary understandings. Those understandings are exemplified by the cases culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Judge Flaum, concurring: Discrimination on the basis of sexual orientation is necessarily discrimination in part on the basis of sex. Dictionaries define homosexuality as having sexual desire for a person of the same sex or of one's own sex. "One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless." 853 F.3d at 358 (Flaum, J., concurring).

Judge Sykes dissenting: "Statutory interpretation is an objective inquiry that looks for the meaning of the statutory language conveyed to a reasonable person at the time of enactment. *Id.* at 361 (Sykes, J. Dissenting). In common ordinary usage, in 1964 and now, the word "sex" refers to biologically male or female. When Congress has wanted to protect sexual orientation, it has expressly so stated. When state and local governments have prohibited discrimination on the basis of sexual orientation, they have added it as a separate protected characteristic; they have not defined it as sex discrimination. "An employer who refuses to hire homosexuals is not drawing a line based on the job applicant's sex. He is not

excluding gay men because they are men and lesbians because they are women. His discriminatory motivation is independent of and unrelated to the applicant's sex. Sexism (misandry and misogyny) and homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics. Simply put, sexual-orientation discrimination doesn't classify people by sex; it doesn't draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women." *Id.* at 365.

2. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *petition for cert. filed* No. 17-1763 (May 29, 2018). The majority, concurring and dissenting opinions largely reiterate the analyses in the separate opinions in *Hively* (except for Judge Posner's). Most significantly, although *Ivy Tech* did not petition for cert., Altitude Express did.

3. *Bostock v. Clayton County*, 723 Fed. Appx. 964, 2018 WL 2149170 (11th Cir. May 10, 2018), *rehearing en banc denied* 894 F.3d 1395 (11th Cir. 2018) (2 judges dissenting), *petition for cert. filed* No. 17-1618 (May 25, 2018).

4. *EEOC v Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *petition for Cert. filed* No. 18-107 (June 24, 2018). Holds that discrimination because of sexual orientation is discrimination because of sex in violation of Title VII.

In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004),the Sixth Circuit held actionable a Title VII claim by Smith alleging that, born biologically a male, Smith was a transsexual diagnosed with gender identity disorder and, as part of the treatment, was expressing a more feminine appearance on a full-time basis. The complaint alleged that the Salem, Ohio Fire Department fired Smith because of this. The Sixth Circuit held that Smith had a claim for illegal sex stereotyping, i.e. that Smith was fired for failing to conform to the stereotype of how men should act.

In *Harris Funeral Home*, Stephens, an embalmer/funeral director was allegedly fired after advising the owner of the company that, although born biologically male, Stephens had been diagnosed with gender identity disorder, was preparing for gender transition surgery and in preparation would be expressing as a woman, using a feminine first name and dressing as a woman. The district court had held that the EEOC stated a claim for illegal gender stereotyping but rejected the EEOC's separate count in the complaint that discrimination on the basis of transgender status was discrimination on the basis of sex. The Sixth Circuit reversed that aspect of the district court's opinion.

The Sixth Circuit analogized to *Hively*, asking would Stephens had been fired if Stephens had been a biological woman desiring to follow the woman's funeral director dress code instead of the man's. Since the answer was no, then as a transgendered individual, Stephens was fired because of sex. The Sixth Circuit also analogized to authority holding that discrimination against an individual for converting religions is discrimination on the basis of religion regardless of whether the discriminator harbors animus to members of the religion to which the individual converted. The court further reasoned that discrimination against a transgendered person necessarily amounts to prohibited sex stereotyping.

Harris Funeral Homes is a closely held corporation and it argued that employing a transgendered funeral director conflicted with its owner's Christian faith, a faith that called him to the funeral business. Such an application of Title VII, Harris Funeral Homes argued, violated the Religious Freedom Restoration Act. The Sixth Circuit rejected the argument. The court held that Harris had not shown that continuing to employ Stephens would substantially burden its free exercise of religion and, even if it did, the EEOC had a compelling government interest in preventing sex discrimination in employment, with enforcement of Title VII the least restrictive means of achieving that interest.

As of this writing, the cert. petitions in *Zarda*, *Bostock*, and *Harris Funeral Homes* have been scheduled for Supreme Court discussion and postponed several times. The Obama Justice Department sided with the EEOC and the claimants but the Trump Justice Department has switched positions. If the Court grants cert., the most significant question will not necessarily be whether it will reverse *Zarda* and *Harris* (perhaps the first significant consequence of the replacement of Justice Kennedy with Justice Kavanaugh), but how it will do so. Will it follow the lead of Judge Syke's dissent which will be the most conservative way to hold that sexual orientation and sexual identity are not the same as sex under Title VII, or will it go further by rejecting stereotyping as illegal discrimination per se or rejecting the theory of associational discrimination (*Parr* and its progeny) or recognizing a broad religious objection defense to Title VII liability?

B. Disparate Impact and the ADEA: The disparate impact provision of the ADEA makes it illegal for an employer " to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). In contrast, the disparate treatment provision makes it illegal "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. *Id.* § 623(a)(2). The en banc Eleventh Circuit reasoned that because 623(a)(2) makes it illegal for an employer "to limit, segregate or classify his employees," in contrast to 623(a)(1)'s prohibition on discriminating "against any individual" the ADEA protects only incumbent employees

against disparate impact discrimination. Job applicants are protected against disparate treatment but, the court held, there may be no ADEA disparate impact claims with respect to hiring. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.32d 958 (11th Cir. 2016) (en banc). A panel of the Seventh Circuit disagreed. *Kleber v. Carefusion Corp.* 888 F.3d 868 (7th Cir. 2018), *reversed on rehearing en banc granted* , 2019 WL 290241 (7th Cir. Jan. 23, 2019).

C. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc), *petition for cert. filed*, No. 18-272 (Aug. 30, 2018). Rizo, a woman who was paid less than her male counterparts, sued for violation of the Equal Pay Act.. The employer defended on the ground that the disparity was due to the salaries they were paid in their prior jobs. The employer argued that the this fell within the EPA's exception for "a differential based on any other factor other than sex." The Ninth Circuit rejected the defense. The court wrote, "We conclude, unhesitatingly, that 'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing 'endemic' sex-based wage disparities, would create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed. As explained later in this opinion, the language, legislative history, and purpose of the Act make it clear that Congress was not so benighted. Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages. " *Id.* at 460. As with *Zarda*, *Bostock*, and *Harris Funeral Homes*, the Court has scheduled the case for discussion and postponed it several times.

D. The D.C. Circuit finally decides *Browning-Ferris*. *Browning-Ferris Industries of Cal., Inc. v. NLRB*, 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018). The court held that joint employer status is to be determined applying common law agency principles. Because common law agency principles are not matters within the NLRB's expertise, NLRB determinations are not entitled to *Chevron* deference. The court concluded that the Board's determination that joint employer status may result from the putative joint employer's authority to control the employee's terms and conditions of employment even though it has not exercised that authority directly and immediately was consistent with common law principles of agency. The court further held that the Board's determination that control may be indirect was also consistent with common law principles of agency. However, the court held that the Board failed to distinguish between indicia of joint employer status and routine aspects of any contractor relationship, such as setting the basic ground rules and expectations for the third-party contractor. "For example, the Board treated as equally relevant to employer status (i) evidence that Browning-Ferris supervisors 'communicated detailed work directions to employees on the stream,' which may well have dictated a term or condition of employment, and (ii) Browning-Ferris's and

Leadpoint's use of a 'cost-plus contract,' a frequent feature of third-party contracting and sub-contracting relationships." The court also faulted the Board for not articulating how Browning-Ferris controlled terms of employment that allowed for meaningful collective bargaining. The court remanded to the Board for further proceedings. Note - in reaction to the decision, the Board extended the deadline for the filing of comments with respect to its proposed joint employer rulemaking.

E. Recent Supreme Court Grants of *Certiorari*

1. *Davis v. Ft. Bend County*, 893 F.3d 300 (5th Cir, 2018), *cert. granted* No. 18-525 (Jn. 11, 2019). The Fifth Circuit held that filing a charge with the EEOC is not a jurisdictional pre-requisite to filing a Title VII suit. Although filing a charge is required, the plaintiff's failure to do so is an affirmative defense that must be pled by the defendant and, in this case, the defendant waived it by waiting too long to raise it. The Fifth Circuit's holding is in accord with the First, Second, Third, Sixth, Seventh, Tenth and D.C. Circuits. The Fourth, Ninth and Eleventh Circuits have held that filing a charge with the EEOC is a jurisdictional prerequisite and the failure to do so may not be waived. The Court granted cert. to resolve the conflict.

2. *Newton v. Parker Drilling Mgmt. Servs., Ltd.* 881 F.3d 1078 (9th Cir. 2018), *cert. granted* No. 18-389 (Jan. 11, 2019). The Ninth Circuit held that California wage and hour laws apply to drilling platforms on the outer continental shelf off the coast of Santa Barbara. The case turns on interpretation of the Outer Continental Shelf Lands Act which states, "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area." 42 U.S.C. § 1333(a)(2)(A). The Ninth Circuit rejected Parker Drilling's argument that for state law to be "applicable," it must fill a gap in federal law, a gap that did not exist because of the FLSA. The Ninth Circuit's decision conflicts with some, but not all, precedent from the Fifth Circuit. Between them, the Fifth and Ninth Circuits cover the entire outer continental shelf. The Supreme Court granted cert. to resolve the potential conflict between the circuits.