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3 Key Employment Law Issues To Keep An Eye On

By **Lovita Tandy and Bonnie Burke** (September 28, 2018, 12:16 PM EDT)

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Employment lawyers dare not turn away from their news feeds lest they miss the next critical event in key employment issues playing out in recent months. Exactly how is sexual orientation discrimination to be treated under Title VII? A circuit split on the issue leaves many questioning the circular explanations and wondering when and how the U.S. Supreme Court will resolve the issue. The status of employment-related arbitration agreements seemed settled until three Supreme Court cases this term illustrated that large questions still loom. Even the joint employer liability analysis appears to be shifting under sinking sand. Give us a few minutes and we will catch you up on these happenings and more.

Sexual Orientation Discrimination

Does Title VII Protect Against Sexual Orientation Discrimination?

Last year, in Hively v. Ivy Tech Community College[1] the Seventh Circuit became the first federal court of appeals to explicitly recognize sexual orientation discrimination as an illegal type of sex discrimination under Title VII. The plaintiff, Kimberly Hively argued that her former employer violated Title VII when it fired her and refused to promote her to a full-time teaching position because she was a lesbian. The majority relied on two theories to hold that sexual orientation discrimination violates Title VII's prohibition against discrimination because of sex. The first theory relied on the comparative method familiar to employment law practitioners. The majority held that if everything remained constant except the plaintiff's gender (in other words if the plaintiff was a man married to a woman as opposed to a woman married to a woman) and the college would have promoted a similarly situated male, then such conduct could constitute sex discrimination.[2] The second theory, the associational discrimination theory, flows from the Loving v. Virginia[3] decision wherein the Supreme Court held that states could not prohibit interracial marriage. Subsequently, courts relied on Loving to hold that Title VII prohibited adverse employment actions based on an employee's interracial associations. If such conduct is prohibited based on race, the Seventh Circuit reasoned, then it is also prohibited based on sex because the "text of the statute draws no distinction ... among the different varieties of discrimination it addresses."[4]

Of course, the opinion drew a strongly worded dissent. Writing for the dissent, Judge Diane Sykes took issue with the above points, among other things. As to the comparative method, the dissent argued that

the appropriate comparison is between a homosexual woman and a homosexual man. Thus viewed, she opined, it becomes clear that any disadvantage is not because of sex, but because of sexual orientation — a concept that is not embodied in the term sex.[5] As to the associational theory, the dissent rejected any attempt to draw a parallel between anti-miscegenation laws and the case at hand. Judge Sykes noted that anti-miscegenation laws were intended to perpetuate white supremacy and therefore were inherently racist. In contrast, sexual orientation discrimination was not intended to perpetuate the supremacy of one sex over the other.[6]

The debate over sexual orientation discrimination touches on other bedrock themes arising from Supreme Court jurisprudence over the last half century. For example, courts grapple with how to reconcile sexual orientation discrimination claims with Price Waterhouse's admonition that gender stereotyping is a form of sex discrimination.[7] The central question is whether any distinction exists between gender stereotyping discrimination and sexual orientation discrimination. The Hively majority held that while the Seventh Circuit had once described the line between the two as "gossamer-thin," the court now concluded that there was no line at all.[8]

In contrast, and in Evans v. Georgia Regional Hospital, a case decided less than a month before Hively, the Eleventh Circuit held that Title VII does not prohibit discrimination based on sexual orientation, but that gender stereotyping discrimination — which this court viewed as different in kind from sexual orientation discrimination — is prohibited by the statute.[9] The majority made little effort to explain how it distinguished between the two concepts. It simply noted that any sexual orientation discrimination claim under Title VII was foreclosed by its precedent. In his concurrence, however, Judge William Pryor asserted that the distinction was one between behavior (whether an employee conforms to observable behaviors associated with her gender) and status (whether one is heterosexual or homosexual).[10] In his view, recognizing a claim for sexual orientation discrimination is tantamount to creating a new protected status on par with those enumerated in the statute (such as race, gender and religion) and only Congress can add new protected categories to the statute.[11]

Here too, the majority opinion drew a strongly worded dissent. Judge Robin Rosenbaum provided a succinct analysis supporting the dissent's conclusion that sexual orientation discrimination and gender stereotyping are one and the same:

> So when an employer discriminates against an employee solely because she is a lesbian, the employer acts against the employee only because she is sexually attracted to women, instead of being attracted to only men, like the employer prescriptively believes women should be. This is no different than when an employer discriminates against an employee because she is an aggressive or "macho" woman or solely because she is a transgender woman. In all cases, the employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be. And so the employer discriminates against the employee "because of . . . sex."[12]

The decision in Evans foreclosed the matter of Bostock v. Clayton County Board of Commissioners.[13] There, a Clayton County employee alleged that he was wrongfully terminated because of his sexual orientation and for gender stereotyping in violation of Title VII. The district court held that the Eleventh Circuit's decision in Evans "foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination protected by that Act" and affirmed the magistrate judge's report and recommendation to grant the county's motion to dismiss.[14] Though the plaintiff's complaint also raised allegations of gender stereotyping, the Eleventh Circuit held that the plaintiff failed to appeal the district court's decision on that basis and had abandoned the claim. After

the Eleventh Circuit affirmed the district court's decision, the plaintiff filed a petition for certiorari to the U.S. Supreme Court. Perhaps Bostock can accomplish what Evans could not.[15]

To date, two additional circuits have followed the Seventh Circuit in recognizing claims of sexual orientation discrimination. In Zarda v. Altitude Express Inc.,[16] a sky diving instructor alleged wrongful termination based on sexual orientation discrimination. The Second Circuit held that "sex is necessarily a factor in sexual orientation" and "sexual orientation is a function of sex."[17] Applying the Supreme Court's reasoning in Price Waterhouse, the court held that taking an adverse employment action based on the assumption that men should be attracted to women is "directly related to our stereotypes about the proper roles of men and women."[18] The court further opined that associational discrimination constitutes discrimination "because of ... sex."[19] Likewise, in U.S. Equal Employment Opportunity Commission v. R.G. &. G.R. Harris Funeral Homes Inc.,[20] a former funeral home employee claimed she was terminated because she was transgender and undergoing gender reassignment. The court held that the termination "falls squarely within the ambit of sex-based discrimination" because "it is analytically impossible to fire an employee based on the employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[21]

If the Supreme Court grants certiorari and hears R.G. &. G.R. Harris Funeral Homes, Zarda or Bostock, jurisdictions across the country may have some of the answers they need in navigating sexual orientation under Title VII.

Employee Arbitration Agreements and Waivers

Three cases involving arbitration issues are among the employment law cases to capture the Supreme Court's attention this term. The court ruled in one case in May and its decisions on the remaining two cases are expected in the upcoming weeks.

Enforceability of Class or Collective Action Arbitration waivers

The first case, Epic Systems Corp. v. Lewis, Ernst & Young LLP et al v. Morris et al., and National Labor Relations Board v. Murphy Oil USA Inc., et al,[22] involves the enforceability of class or collective action waivers in arbitration agreements. This question created a significant circuit split. The Second, Fifth and Eighth Circuits held that these waivers are generally enforceable.[23]

The Seventh and Ninth Circuits, however, held that such waivers were not enforceable.[24] This determination was not based on language in the Federal Arbitration Act. Both courts of appeal looked to the National Labor Relations Act to support the restriction. Section 7 of the NLRA[25] contains language guaranteeing employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" and both courts held that restricting access to class or collective action arbitration was an illegal restraint on this right.[26] As the Ninth Circuit explained, employees' rights under the NLRA "include[] the substantive right to collectively seek to improve working conditions through resort to administrative and judicial forums ... [and] an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually."[27] Thus, while such waivers might be allowable under the FAA, they could not be enforced due to conflicting direction from the NLRA.[28]

In Epic Systems, the Supreme Court rejected this analysis. It instructed that any claim of irreconcilable conflict between two statutes must be supported by some "clear and manifest" intent that Congress intended one statute to displace another.[29] Here, the court noted that it "has never read a right to

class actions into the NLRA — and for three quarters of a century neither did the National Labor Relations Board."[30] Instead, the court explained that "[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."[31]

The court also rejected the related argument that class or collective arbitration waivers cannot be enforced in the employment context based on the language in the FAA's savings clause. Under the savings clause, a court may refuse to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract."[32] The plaintiffs argued that the language applied here because the agreement was illegal under the NLRA. The Supreme Court held, however, that even if the agreement was illegal under the NLRA, a court could not rely on the savings clause to refuse enforcement. The savings clause, "recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts. . . . [t]he 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.'"[33] By arguing that arbitration agreements are unenforceable because they require individualized arbitration instead of arguing that the contract to arbitrate was procured by an act of fraud, duress or in some other manner applicable to all contracts, the plaintiffs framed the issue in a manner that placed the agreement beyond the reach of the savings clause.

Pending Supreme Court Employee Arbitration Cases

Later this term, the Supreme Court will decide what language is required to authorize class arbitration. Specifically, in Lamps Plus Inc. v. Varela,[34] the Supreme Court will consider "[w]hether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements." In the case below, the Ninth Circuit panel majority held that plaintiffs could pursue class arbitration under the terms of the arbitration agreements they signed as a condition of employment.[35] The agreement made no explicit reference to class arbitration. After analyzing the agreement as a whole, the Ninth Circuit found the language ambiguous on the issue of the permissibility of class arbitration. Relying on basic contract interpretation principles, the court construed the ambiguity against the employer because it was the party that had drafted the contract.[36] The dissent was a brief two sentences "I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684–85, 130 S.Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010)." In Stoltz-Nielsen S.A., the Supreme Court held that courts may not presume consent to class action arbitration from "mere silence on the issue."[37]

Also before the Supreme Court this fall is New Prime Inc. v. Oliveira.[38] Truck driver Dominic Oliveira brought a Fair Labor Standards Act class action claiming that New Prime failed to pay truck drivers minimum wage. New Prime sought to compel the action into arbitration but the FAA contains an exemption for contracts of employment of transportation workers.[39] The plaintiffs argued that the exemption covers both employees and independent contractors and, therefore, their claim is not subject to arbitration. The First Circuit agreed holding that "transportation-worker agreements that establish or purport to establish independent-contractor relationships are 'contracts of employment' within the meaning of the § 1 exemption."[40] In addition to considering the applicability of this exemption to independent contractor agreements, the Supreme Court will consider whether the arbitrator or the court should determine whether the exemption applies. The First Circuit held that, "when confronted with a motion to compel arbitration under § 4 of the FAA, the district court, and not the arbitrator, must decide whether the § 1 exemption applies."[41] In its view, a question about the applicability of the exemption requires an analysis of whether the court has the authority to act under

the statute. Thus, unlike questions of arbitrability (the susceptibility of certain subject matters to arbitration) this question cannot be resolved by an arbitrator.[42] In fact, referring the issue to the arbitrator assumes that he has the very authority at issue.

Joint Employer Status

Two recent decisions challenge our now familiar notions of how to determine joint employer status under the Fair Labor Standards Act. Federal appellate courts do not apply a uniform standard when determining joint employer status under the FLSA. Most, however, use an approach based on tests originally developed to determine whether an individual was an employee or an independent contractor.[43] These tests call for an analysis of factors such as the power to hire and fire, the power to supervise and control the individual's work, and the degree of the individual's economic dependence on the putative employer.

In Salinas v. Commercial Interiors Inc., the Fourth Circuit advised that tests developed to determine independent contractor status should be abandoned because they "(1) improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers; and (2) incorrectly frame the joint employment inquiry as a question of an employee's 'economic dependence' on a putative joint employer."[44] In contrast, the main inquiry under the U.S. Department of Labor regulations is whether the two putative employers are "completely dissociated."[45] This requires analysis of whether two companies "share or codetermine the essential terms and conditions of a worker's employment" not whether the individual is an employee at all.[46]

The court went on to articulate a new test for determining joint employer status under the FLSA, one it viewed as a rooted in the regulations' fundamental question of whether the two entities are not completely disassociated. Under this test courts should consider six factors:

1. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share or allocate the power to direct, control or supervise the worker, whether by direct or indirect means;

2. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share or allocate the power to — directly or indirectly — hire or fire the worker or modify the terms or conditions of the worker's employment;

3. The degree of permanency and duration of the relationship between the putative joint employers;

4. Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

5. Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

6. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools or materials necessary to complete the work.[47]

Likewise, in 2015, the National Labor Relations Board advocated a broader definition of joint employer status under the National Labor Relations Act. The employees in Browning-Ferris Industries of California Inc.[48] worked at Browning-Ferris Industries' Santa Clara County, California, recycling facility. Browning-Ferris contracted with Leadpoint Business Services to provide the labor. The NLRB held that Browning-Ferris was a joint employer, in part, because it reserved the right to determine or codetermine various terms and conditions of employment. For decades prior to this decision, the NLRB standard required evidence that the putative joint employer actually exercised this right. Although the FLSA and the NLRA use different tests to determine joint employer status, the issue has drawn widespread attention because the Department of Labor may rely on Browning-Ferris to expand the definition of joint employer under the FLSA.

The new standard, however, was so broad as to create confusion for employers and the NLRB itself. In December 2017, the NLRB overruled its Browning-Ferris decision and returned to its former standard governing joint employer liability.[49] In Hy-Brand, the NLRB held that a joint employment relationship could exist only where one entity has actually exercised control over the essential employment terms of another entity's employees and had done so directly and immediately in a manner that was not limited and routine. This opinion was subsequently vacated.

In September 2018, however, the NLRB released a notice of proposed rulemaking that will give effect to the pre-Browning-Ferris standard.[50] Under the proposed rule:
an employer may be considered a joint employer of a separate employer's employees only if the two employers share and codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

The notice of proposed rule will remain open for comments until Nov. 13, 2018.

While joint employment and arbitration questions may be resolved in the months to come, sexual orientation protection remains an issue about which employers and their counsel must remain vigilant. While the circuit courts continue to debate the issue, local laws may also impact the position taken by employers, whether in litigation or company policies and procedures. Stay tuned, for the remainder of the year and beginning of 2019 promise to bring more excitement for this practice area.

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[1] 853 F.3d 339 (7th Cir. 2017) (en banc).

[2] Id. at 345-46.

[3] 388 U.S. 1 (1967).

[4] Hively, 853 F.3d at 349.

[5] Id. at 366-67.

[6] Id. at 368.

[7] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[8] Hively, 853 F.3d at 346.

[9] Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017).

[10] Id. at 1258-59.

[11] Id. at 1260-61.

[12] Id. at 1264-65.

[13] 723 Fed. Appx. 964 (11th Cir. 2018).

[14] Bostock v. Clayton County Board of Commissioners, 1:16-CV-1460-ODE, 2017 WL 4456898, at *2 (N.D. Ga. July 21, 2017).

[15] See Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) cert. denied 138 S. Ct. 557.

[16] 883 F.3d 100 (2d Cir. 2018).

[17] Id. at 112-113.

[18] Id. at 121.

[19] Id. at 112.

[20] 884 F.3d 560 (6th Cir. 2018).

[21] Id. at 575.

[22] ., __ U.S. __, 138 S.Ct. 1612 (2018).

[23] See Murphy Oil USA Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Owens v. Bristol Care, 702 F.3d 1050 (8th Cir. 2013); Sutherland v Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013).

[24] See Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147

(7th Cir. 2016).

[25] 29 U.S.C. §157 (2018).

[26] Lewis, 823 F.3d at 1155; Morris, 834 F.3d at 983-84.

[27] Morris, 834 F.3d at 983 (internal quotations and citations omitted).

[28] Id.

[29] Epic Sys. Corp., 138 S.Ct. at 1624 (internal quotations and citations omitted).

[30] Id. at 1619.

[31] Id. at 1625.

[32] 9 U.S.C. §2.

[33] Epic Sys. Corp., 138 S.Ct. at 1622 (internal citations omitted).

[34] 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018).

[35] Varela v. Lamps Plus Inc., 701 Fed. Appx. 670, 672 (9th Cir. 2017), cert. granted, 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018).

[36] Id. at 674.

[37] Stolt-Nielsen S.A., 559 U.S. at 687.

[38] __ U.S. __, 138 S. Ct. 1164, (2018).

[39] 9 U.S.C. § 1 (2018).

[40] Oliveira v. New Prime Inc., 857 F.3d 7, 24 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164, 200 L. Ed. 2d 313 (2018).

[41] Id.

[42] Id. at 15.

[43] Salinas v. Commercial Interiors Inc. 848 F.3d 125, 135 (4th Cir. 2017).

[44] Id. at 137.

[45] 29 C.F.R. §791.2 (2018).

[46] Salinas, 848 F.3d at 139.

[47] Id. at 141-42.

[48] 362 N.L.R.B. No. 186 (2015).

[49] Hy-Brand Indus. Contractors Ltd., 365 NLRB No. 156 (N.L.R.B. Dec. 14, 2017), reconsideration granted, order vacated, 366 NLRB No. 26 (N.L.R.B. Feb. 26, 2018).

[50] See The Standard For Determining Joint-Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. Ch.1).