Federal Law Update

State Bar of Texas
27th Annual Labor & Employment Law Institute

Labor & Employment Law Section
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Agenda

Really simple:

- Supreme Court Drama and Decisions
  - Linda Headley

- Federal Court Antics and Authority
  - Kathy Butler

Supreme Court Drama and Decisions

Supreme Court

- With the death of Reagan-appointee Antonin Scalia, Republican and Democrat appointees are evenly split on the Court:

Republican Appointees	Democrat Appointees
Roberts (Bush #43, Age 61)	Ginsburg (Clinton, Age 82)
Thomas (Bush #41, Age 69)	Breyer (Clinton, Age 78)
Kennedy (Reagan, Age 79)	Sotomayor (Obama, Age 61)
Alito (Bush #43, Age 65)	Kagan (Obama, Age 55)

What Antonin Scalia's Passing Means for the Court

Leaves Court in limbo as to important cases pending before the Court.

- **Three of the remaining eight Justices are 78 years mature or older and could be replaced within the next eight years (Kennedy, Ginsburg and Breyer).**
- **Will we or won't we have a hearing on President Obama's nomination of Judge Merrick Garland?**
- **In interim -- all pending cases are at risk of not being fully decided by the court due to risk of 4 -4 split –and it is already happening...**
- **The future of the Court is likely in the hands of the next President**

Trends at the Court

- Court likes:
  - Arbitration
  - Retaliation/Whistleblower claims
  - ERISA issues
- Court is not so fond of the EEOC
- Class actions--unclear

9 decisions in 2015

8 so far in 2016

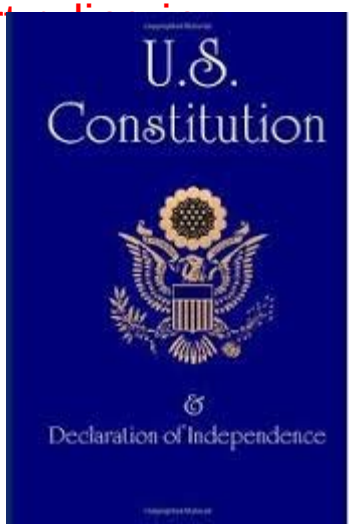
***United States v Texas, et al*:**

- June 24, 2016
- Whether President Obama exceeded his powers in trying to shield millions of illegal immigrants from deportation?

    - Through EO-- President Obama sought to provide aid to immigrants illegally in the United States
    - 26 states sued Administration over Executive Order
    - Texas federal judge, Andrew Hanen, struck down EO and enjoined administration's enforcement of the EO
    - Fifth Circuit Upheld
    - SCOTUS deadlocked with 4-4 decision leaving lower court [illegible] place

- Justice department is now asking for rehearing after Court has full complement of 9 Justices

    For Court to grant rehearing is "exceedingly rare..."



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Green v Brennan

When does SOL run for filing constructive discharge claim?

- May 23, 2016
- Issue: Determine clear rule for assessing timeliness of charges/claims alleging constructive discharge

- Facts:
  - ✓ Marvin Green worked for Postal Service
  - ✓ Filed compliant internally with EEO office: denied promotion due to race
  - ✓ Then filed internal charges: retaliated against due to his complaint about race
  - ✓ 6 months later Green was subject of investiga
    - Intentionally delayed mail
    - Improper handling of mail
    - Sexual harassment of female employee

UNITED STATES POSTAL SERVICE™

Green v Brennan

Which Date Controls for Constructive Discharge Claim?

- **December 2009**: settles claim--includes paid leave leading to resignation/retirement
- Green resigns/retires effective March 31, 2010--**but gives notice of same on February 9**
- Green is still involved in internal matters for EEO complaint at time and later sues for discrimination alleging constructive discharge due to retaliation.
- Postal service says claim is time barred as date when settled is start date, **December 2009**—so out of time...

Green v Brennan

- Question:
  - Is SOL start date December 2009, February 2010 or March 2010?
  - Is SOL start date the date of resignation (or notice of resignation) or date of last discriminatory act?

- Holding: Date when notice of resignation given is start date (Feb 2010)

  ...and that encompasses the last act of discrimination

CRST v EEOC
Award of $4 million in Attorneys' Fees

May 19, 2016

Facts:

- Trucking company sued by EEOC for Title VII violations in subjecting 270 female employees to hostile work environment
- D Ct grants SJ based primarily on EEOC's failure to meet pre-suit obligations to conduct reasonable investigation and bona fide conciliation of claims ***--"wholly abandoning its statutory duties",*** which was unreasonable, thus making an award of fees appropriate
- Fee award of **$4 million**
- EEOC appeals to 8th circuit: lower court exercised abuse of discretion in fees award because CRST not a prevailing party as *did not prevail "on the merits" of the claims*

CRST v EEOC
Award of $4 million in Attorneys' Fees

- 8th Circuit reverses award and remands case as to 2 Ps
- Once remanded claims are withdrawn or settled, parties move for dismissal, ***reserving issue of award of fees.***
- CRST files bill of costs seeking fees as "prevailing party"
- D Ct awards fees stating that:
  - dismissal of claims due to EEOC's failure to satisfy statutory duties *was a dismissal on the merits* and *CRST was the prevailing party* under Title VII and entitled to award of fees.
- Fee award was then **$4,694,442.**

- Back to 8th circuit: agreed with EEOC - EEOC's duties are **not** elements of Title VII claim, so CRST is ***not prevailing party***.

Jason Miller Collection August 10, 2013

CRST v EEOC
Award of $4 million in Attorneys' Fees

Parties next go to Supreme Court:

*Whether a favorable ruling on the merits is a necessary predicate to a finding that a Defendant is **a prevailing party** for purposes of an award of attorneys fees under Title VII?*

Holding: Resolving a split in the circuits, regarding Court's definition of "prevailing party", Court stated that:

" a defendant need not obtain a favorable judgment on the merits in order to be a prevailing party" under Title VII. ... A defendant may prevail even if final judgment rejects plaintiff's claim for a nonmerits reason.

CRST v EEOC
Award of $4 million in Attorneys' Fees

- Decision is victory for defendant employers
- Draws clear focus to EEOC obligation to engage in pre-suit investigations and conciliation of claims before filing a lawsuit
- Clear warning to the EEOC to take statutory obligations seriously...

Fisher v University of Texas

Fisher II:

Whether UT's affirmative action policies are "narrowly tailored" to achieve a diverse student body encompassing a "broad array of qualifications/ characteristics"?

Background:

UT has struggled to achieve a lawful program to promote its goal of a diverse student body.

- Hopwood v Texas invalidated UT's then diversity program (1996)

- Texas legislature then passed "Top Ten% Law" to grant admission to top ten per cent of high school class graduates. Result: Not satisfactory in terms of achieving diversity.

- Next UT sought to achieve more diversity by providing a second level of review for applicants who did not make top 10% cut and this review included race as a factor for selection under personal achievement prong : race is a "factor of a factor of a factor"...

Fisher v University of Texas

- Fisher, a white female, sought application to UT in 2008 and was denied. She sued saying admissions program violated Equal Protection Clause of 14th Amendment of the US Constitution. Case went to Supreme Court and Court found that case should be remanded to Fifth Circuit for application of the strict scrutiny standard of review.

- Fifth Circuit again considered claims and determined UT program passed constitutional muster.

Back to SCOTUS with this case, Fisher II.

Fisher v University of Texas

With Scalia not on the Court and Justice Kagan having recused herself as she worked on Fisher I while in Solicitor's office, 7 justices decided the case.

Holding: UT's race-conscious admissions program in use when Fisher applied to UT is lawful under the Equal Protection Clause.

Court found that UT:

(1) articulated concrete and precise goals including destroying stereotypes, promoting cross-racial understanding, preparing students for a diverse workforce and society and cultivating leaders. Thereby establishing a compelling educational benefit for the student body, and

(2) UT had provided a reasoned and principled explanation for its decisions to pursue these goals, supported by multi-year studies and analysis.

Fisher v University of Texas

Take-aways:

- **Period of great uncertainty regarding the future of affirmative action has ended** with increased confidence that such programs can exist without risk.

- **Institutions with race-conscious admissions programs need to articulate specific goals and reasons for valuing diversity** and be prepared to document how less race-conscious alternatives do not meet the stated goals. Need to always be prepared *to* ***defend the practices with significant evidence of steps taken over an extended period of time to satisfy goals*****.**

- Decision is **not directly applicable to private employers** seeking to reap benefits of diverse workforce as **Title VII prohibits use of race as a motivating factor in employment decisions.**

- Employers wanting to lawfully pursue diversity and inclusion in the workplace, **cannot take race into account in making decisions** and must resort to other means to expand recruitment and retention options --training, affinity groups, advocate programs, outreach programs and the like.

Friedrichs v California Teachers Assn.
4 – 4 Split: Lower Court Decision Stands

- Decided March 29, 2016
- Teachers sought to overturn *Abood v Detroit Bd of Educ* which allows public employers to **require non-union workers to pay union fees** as long as not used to fund political or ideological activities

Issue: Whether compulsory union fees violate First Amendment

- *Affects 23 states*

Justice Scalia was likely the swing vote in favor of the plaintiffs in the Friedrichs case.

4-4 split with one page decision effectively affirms 9th Circuit's decision against the plaintiffs and in favor of 'fair share' fees.

On April 8 -- Plaintiffs filed a *petition for rehearing* once Court has full complement of 9 justices.

Tysons Foods v Bouaphakeo
Use of Statistical Study Upheld

March 22, 2016
FLSA case
6 – 2 decision

Issue:

Whether **use of statistics to determine damages in class action v assessing individual damages per each plaintiff** was in conflict with Dukes decision?

- Review of $5.8 million jury award upheld by 8th circuit
- Verdict based on use of statistics to determine damages instead of assessing individual damages for over 3,000 employees
- Tysons argued use of statistics resulted in “trial by formula” contrary to S Ct’s decisions in Dukes and Comcast decisions

Tysons Foods v Bouaphakeo
Use of Statistical Study Upheld

- Employees sued:
  - Work in the kill, cut and retrim department of Tysons pork processing plant in Iowa
  - Not paid for Tysons donning and doffing of protective gear and
  - for time spent walking to work area

Tysons Foods v Bouaphakeo
Use of Statistical Study Upheld

Tysons Problems:

- **Failed to keep records** of donning & doffing and walking time; a violation of FLSA record-keeping requirements
- **No Daubert challenge** to statistical expert
- **No rebuttal expert**
- Would not agree to biforcate trial between liability / damages

Tysons Foods v Bouaphakeo
Use of Statistical Study Upheld

- As a result of Tyson's failure to keep records of donning and doffing time --Ps were forced to rely on **"representative evidence":**

- Enter Dr. Mericle, factory time and motion expert:
  - analyzed how long various activities (donning, doffing and walking) took 444 employees–
  - then averaged the time to determine how much time should be added to the time sheets of the employee Plaintiffs
  - to decide who worked over 40 hours in a week and thus the value of the class-wide recovery

Tysons Foods v Bouaphakeo
Use of Statistical Study Upheld

In FLSA actions-- inferring time worked from study such as Mericle *is permissible* as long as the study is *otherwise admissible:*

"At no point did Tysons record the time each employee spent donning and doffing"

Montanile v Nat'l Elevator Ind. Benefit Plan
No Recovery from Third Parties by ERISA Plans

January 20, 2016

***Montanile v Board of Trustees of Nat'l Elevator Industry Health Benefit Plan*:**

Can an insurer **ERISA fiduciary** assert equitable lien if no particular fund is in beneficiary's possession when claim is asserted?

- Problem: Plaintiff had spent the money.
- Answer from Court: You cannot have a lien against nontraceable assets spent on *"wine, women and song"...* (as opposed to a house or car or bank account...")
- Not appropriate equitable relief because of that difference...
- Blow to ERISA plans who seek to recover payments for benefits paid to participants who sustain injuries caused by third parties.

Campbell-Ewald Co. v Gomez
Unaccepted Offer of Judgment Cannot Moot Case

January 20, 2016

Campbell-Ewald v Gomez: **Can defendants "pick off" named plaintiffs in class actions** by offers of complete relief in settlement?

Considered **Genesis Healthcare question:**

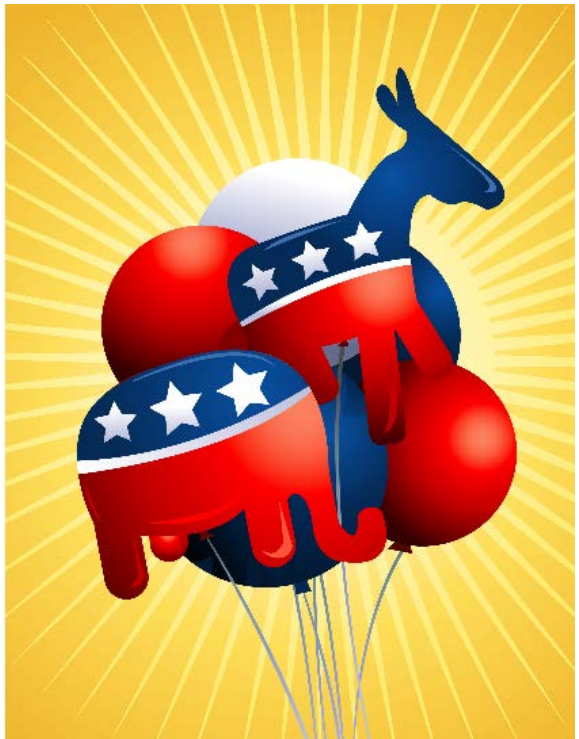
Whether an unaccepted offer to settle the named plaintiff's claim is sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of others similarly situated?

- Justice Ginsburg in Campbell addressing the Genesis question squarely affirmed the 9th Circuit, holding that: an unaccepted offer to satisfy plaintiff's individual claims cannot render the individual or class claims moot.
- Consistent with Rule 68 which only provides for penalty of payment of offeree's costs if unaccepted offer is more favorable than ultimate judgment.
- Open question: Whether result would be different if full amount of offer were deposited in account payable to Plaintiff and Court entered judgment on that amount?

Supreme Court and the Election

Many important issues could be decided in the next Administration:

- All executive orders issued by President Obama
- Home health care workers and overtime protections
- Ambush elections
- Changes to FLSA overtime rules
- Government contractor blacklisting
- Joint employer



Federal Court Antics and Authority

Thank You