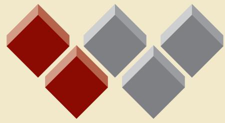

Wimberly Lawson
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Briefly

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EEOC AND JUSTICE DEPARTMENT ON OPPOSITE SIDES OF CLASS ACTION WAIVER AND SEXUAL ORIENTATION ISSUES

Edward H. Trent...

"Not only is it interesting that the federal agencies are taking opposite positions, but the cases involve issues extremely critical to the employment community."

A somewhat interesting situation has resulted from the change in administrations, with the National Labor Relations Board (NLRB) and the Department of Justice (DOJ) taking opposite positions in a couple of important pending court cases. In October, two arguments will be heard in a U.S. Supreme Court case that is actually a consolidation of several cases on the issue of whether workplace arbitration agreements that ban class actions violate the National Labor Relations Act because they restrict the employees' right to engage in "concerted activities."

When the NLRB case was originally filed, the government supported the NLRB position that class and collective bans violated federal labor law. The change in administrations resulted in a new position, however, with the acting Solicitor General telling the justices that his office had reconsidered the issue with the arrival of the new Administration. "We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in *Murphy Oil*, gave adequate weight to the Congressional policy favoring enforcement of arbitration agreements as reflected in the FAA." On the other hand, NLRB General Counsel Richard Griffin, whose term expires in November, a former union official, will argue the case on behalf of the NLRB shortly before the Board itself changes from a Democratic to a Republican majority. One Republican nominee has been confirmed by the Senate, and the other is expected to be confirmed soon.

A similar situation has arisen in an employment discrimination case involving sexual orientation. In late July, the DOJ took the position that gay, lesbian and bi-sexual workers are not covered by Title VII of the 1964 Civil Rights Act consistent with long standing case law. The DOJ stated its interpretation in an *amicus* brief submitted to the U.S. Court of Appeals for the Second Circuit. Since 2015, the Equal Employment Opportunity Commission (EEOC) in contrast, has interpreted Title VII's prohibition against sex discrimination encompasses sexual orientation and gender identity bias. As of the beginning of the year, more than 3,000 sexual orientation charges were pending before the EEOC. The EEOC also is investigating some 300 cases that include transgender discrimination claims.

According to EEOC Acting Chair Victoria Lipnic, the EEOC will maintain its current position and see eventually what the Supreme Court has to say about it. Lipnic does note that Congress has not acted to expressly include sexual orientation protections in Title VII, and various bills that would have made that interpretation have not passed Congress. Further, Lipnic acknowledges that there is no doubt that Congress was not contemplating sexual orientation discrimination when it passed the Civil Rights Law in 1964.

The federal appeals courts are currently split on the issue. Lipnic notes some questions raised recently by the courts reviewing this issue such as: "What does it mean if a term has changed over time culturally? What does it mean for courts having to follow precedent?" So, should courts "update" Title VII based on apparent cultural shifts or should that be the exclusive province of Congress as mandated by the Constitution? The Supreme Court will ultimately answer these questions.

Editor's Note: Not only is it interesting that the federal agencies are taking opposite positions, but the cases involve issues extremely critical to the employment community. Employers have increasingly favored requiring employees to arbitrate their legal claims rather than taking them to court, and the potential for banning class actions in arbitration agreements has made the decision more attractive to

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

Jerome D. Pinn ....

"Many employers already had made big changes to comply with the anticipated rules."

TEXAS COURT NULLIFIES OBAMA-ERA O/T RATE HIKE: WHAT'S NEXT?

On August 31, 2017, in *Nevada v. U.S. Department of Labor*, 2017 WL 3780085 (S.D. Tex.), a federal court in Texas formally nullified the Obama administration's dramatic revisions to the federal overtime rules. The court held that the previous Administration exceeded the authority Congress gave it when it dramatically expanded the number of people entitled to overtime pay by more than doubling the minimum salary requirement for the "white collar" exemptions. The same court had previously granted an injunction, preventing the rules from going into effect as scheduled late last year. Many employers already had made big changes to comply with the anticipated rules. But the Court's latest decision - capped by an announcement from the U.S. Department of Justice that it would not file an appeal, even though the previous administration had announced that it would appeal the injunction - made it final. The $47,476/year minimum salary that employers would have had to pay in order for an employee to be considered exempt from overtime is no more: the law now reverts to the former level of $23,660/year, coupled with an examination of the employee's actual job duties.

Prior to the Court's ruling, Secretary of Labor Alexander Acosta already had published a notice indicating that the Department was contemplating changes to the new overtime rules. The court's decision certainly relieves pressure to make further changes, but the Department of Labor (DOL) will likely decide to revisit the overtime rules, last revamped in 2004 during the George W. Bush Administration. A request for information is underway as the DOL suggests that it intends to build a record for new rule-making. Some of the key issues include what methodology to use for determining new salary thresholds, as well as the impact on the companies that implemented the 2016 regulations anyway. In his confirmation hearing, DOL Secretary Acosta suggested that the DOL may issue rules with a more moderate salary threshold increase, probably in the low $30,000 range.

KNOW YOUR ATTORNEY
EDWARD H. TRENT

EDWARD H. TRENT is a Member of Wimberly Lawson Wright Daves & Jones, PLLC in the Knoxville, Tennessee office of the firm, which he joined in 2011. His practice includes labor and employment law matters in both state and federal court and before state and federal agencies. Ed's broad range of experience includes jury trials in employment discrimination cases, including the defense of appeals before federal and state appellate courts, day-to-day preventative counseling and advice, training for supervisor and human resources personnel on managing the workplace and complying with federal, state and local employment laws and regulations. Ed also works with churches on child protection issues and employment law matters, and is actively involved with religious liberty issues. He filed an *amicus brief* in the case of *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694 (2012), upholding the "ministerial exception" to the application of state and federal employment laws to religious organizations, and in *Hobby Lobby v. Burwell*, 1345 S.Ct. 2751 (2014), upholding the religious liberty rights of business owners in a challenge to the Affordable Care Act's Contraception Mandate. Ed received his Bachelor of Science degree in Accounting from the University of Florida and his law degree from Duke University School of Law. He has been admitted to practice in the United States District Court, Eastern and Middle Districts of Tennessee, Northern, Middle, and Southern Districts of Florida, the United States Court of Appeals, Sixth and Eleventh Circuit, and the United States Supreme Court. Ed has an *AV Preeminent®* Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity - and since 2011 he has also been listed in *The Best Lawyers in America®* in the fields of Employment Law/Management and Litigation/Labor & Employment. In 2016 Ed was named *Lawyer of the Year* by *Best Lawyers* for Employment Law/Management, Knoxville. Ed is also *Board Certified in Labor and Employment Law* by The Florida Bar.

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Mary Celeste Moffatt

"In an unusual part of the consent decree, UPS agreed to include the requirement that Human Resources personnel seek legal counsel before firing a worker who has reached the end of a medical leave of absence."

UPS SETTLEMENT REMINDS EMPLOYERS OF "MAXIMUM LEAVE" ISSUES

UPS has just settled a lawsuit brought by the Equal Employment Opportunity Commission (EEOC) alleging the company's inflexible leave policy discriminated against disabled workers. The fact pattern of the lead claimant shows the type of situations that generate these issues. An employee took a 12-month leave of absence, returned to work for a few weeks, but then required more time off. She claims she could have returned to work after an additional two-week leave, but UPS fired her for exceeding its 12-month maximum leave policy. The case is *EEOC v. United Parcel Serv.*, Inc., No. 1:09-cv-05291 (N.D. Ill.). The consent decree was entered August 8, 2017.

UPS argued that its 12-month leave maximum was a permissible policy in furtherance of the essential job functions which included "the ability to regularly attend work without missing multiple months." After almost eight years of litigation, the case was settled before being finally resolved. The EEOC has consistently argued against employer maximum leave policies and addressed its position in a May 2016 resource document.

In an unusual part of the consent decree, UPS agreed to include the requirement that Human Resources personnel seek legal counsel before firing a worker who has reached the end of a medical leave of absence. The consent decree also required the same Human Resource personnel attend several training courses regarding ADA (Americans With Disabilities Act) compliance and the interactive process. UPS also agreed to pay just under the amount of $2 million to be distributed among more than 70 workers affected.

Editor's Note: This firm has provided numerous articles in previous newsletters giving employers suggestions on how to avoid the problems faced by UPS. These potential solutions include adding wording into the policies or to individual employees near the end of their maximum leave that they must reapply for any extensions of their leave, and any such extensions are to be considered provided they are reasonable and do not work an undue hardship on the company. Case law suggests that extensions need not be for an indefinite period, but the issues are so controversial that advice of counsel is helpful.

L. Eric Ebbert

"The destruction of evidence can determine the outcome of a case."

RECORD RETENTION POLICIES AND TEXT MESSAGING

Employers should not be surprised that issues are now arising concerning text messages that are similar, if not identical, to issues over the last few years pertaining to retention of e-mails. In significant litigation, each side seeks copies of the other parties' relevant e-mails to prove its case. Legal rules require employers to retain documentary evidence-including e-mails and probably text messages--at the point the employer reasonably should have known that the evidence may be relevant to anticipated litigation. An employer who fails to retain evidence is not only potentially subject to the assessment of fines, attorneys' fees and costs, but could also be subject to an adverse inference known as "spoliation," in which the other party gains a favorable inference that the lost evidence would have benefitted its case. The destruction (failure to preserve) of evidence, therefore, could determine the outcome of a case.

For many years, employers have struggled with the use of e-mails, and the business practice essentially developed that it would be impractical to prohibit their use, but that certain record retention policies were necessary. The same situation applies today to text messaging. In theory, the legal rules that apply to e-mails also apply to text messages.

Employers may implement various approaches regarding the use and preservation of text messages. Possible approaches include prohibiting their use, obtaining and maintaining copies, or requiring the use of employer-provided equipment. There may be technical solutions to these issues, but in some cases, employers depend upon each employee to comply with the employer's policies.

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employers. Transgender and sexual orientation issues have received far greater attention of late in both litigation and public discourse. It should be noted that on the issue of sexual orientation discrimination, even if the courts do not accept the EEOC's position that sex orientation issues is a form of sex discrimination, existing law generally forbids discrimination based on sex stereotyping as explained this past spring in a decision by the U.S. Court of Appeals for the Eleventh Circuit (covering Florida, Georgia, and Alabama). Some transgender employees have successfully brought claims under the concept of sex stereotyping based on the particular facts of their cases, even if discrimination on the basis of "gender identity" or "gender non-conformity" is not generally prohibited.

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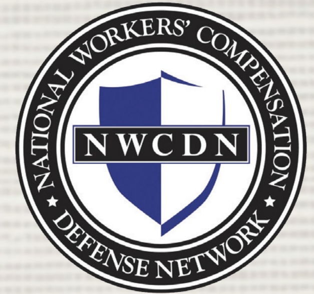

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