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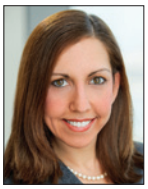
Labor Relations

Expert Analysis

Transgender Protections, EEOC Subpoenas, WARN Act Creditors, Arbitration

This is the first of two columns discussing U.S. Supreme Court decisions from the 2016-17 term impacting labor and employment law. This month we review rulings pertaining to protections for transgender individuals; the standard of review of a district court's decision to enforce or quash an Equal Employment Opportunity Commission (EEOC) subpoena; whether priority rules for Worker Adjustment and Retraining Notification (WARN) Act creditors apply in the context of a structured dismissal of a bankruptcy proceeding; and whether a state court rule that disfavors arbitration agreements violates the Federal Arbitration Act (FAA). While three of these cases did not arise in the labor and employment context, their dispositions have implications for employers.



By **David E. Schwartz**

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Transgender Protections

In *Gloucester County School Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016), the Supreme Court put off a major decision on transgender rights. The court remanded the case to the Fourth Circuit in the wake of the Trump administration's rescission of Obama-era guidance concerning protections for transgender students in public schools.

In *Grimm*, a local school board banned a transgender student who identified as male from using boys' restrooms at his high school. The student sued the school board for discrimination under Title IX of the Education Amendments Act of 1972, which prohibits discrimination on the basis of sex under any education program or activity receiving federal financial assistance. The Department of Education's regulations implementing Title IX permit the provision of separate toilets "on the basis of sex." Since the student was biologically female, the district court concluded the school board's requirement that he use the girls' restrooms did not amount to discrimination under Title IX.

> In 'Auer', the court held an agency's interpretation of its own ambiguous regulation should be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.

The Fourth Circuit reversed, finding the Department of Education's interpretation of its own regulation in an opinion letter dated Jan. 7, 2015 was entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The opinion letter concluded that, if a school opts to separate students in restrooms

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on the basis of their sex, a school generally must treat transgender students consistent with their gender identity. In *Auer*, the court held an agency's interpretation of its own ambiguous regulation should be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. Because the language of the regulation at issue was susceptible to more than one plausible reading—with the phrase "on the basis of sex" potentially alluding to either biological sex or gender identity—the Fourth Circuit deferred to the Department's interpretation.

Under President Trump, the U.S. Departments of Education and Justice issued joint guidance on Feb. 22, 2017 rescinding the Obama-era opinion letter. The current guidance provides that "there must be due regard for the primary role of the states and local school districts in establishing educational policy." Two weeks later, the Supreme Court vacated the Fourth Circuit's decision in *Grimm* and remanded the case in light of the new guidance.

Although not an employment law case, employers have been watching *Grimm* closely. Title IX cases often have a persuasive effect on a federal court analyzing a Title VII employment discrimination case. A Supreme Court ruling in this case would have given some clarity on the issue of whether, as argued by the EEOC, sex discrimination under Title VII includes discrimination on the basis of transgender status. For now, employers should take note of the EEOC's guidance on transgender bathroom usage, in which the EEOC set forth its position that denying equal access to a common bathroom corresponding to an employee's gender identity constitutes discrimination on the basis of sex.

EEOC Subpoenas

In *McLane Co. v. Equal Employment Opportunity Commission*, 137 S. Ct. 1159 (2017), the Supreme Court resolved a circuit split over the standard of appellate review applicable to a district court's decision to enforce or quash an EEOC subpoena. The court held such a decision should be reviewed for abuse of discretion and not de novo.

> In 'Jevic', the Supreme Court held that, in structured bankruptcy dismissals, courts may not depart from the priority order established by the U.S. Bankruptcy Code at the expense of WARN Act and other creditors without their consent.

In *McLane Co.*, the employer required new employees and those returning from medical leave to undergo a physical evaluation. The company allegedly terminated an employee after she failed such evaluation three times following maternity leave. That employee subsequently filed a sex discrimination claim with the EEOC under Title VII of the Civil Rights Act of 1964. When the employer refused to provide certain information subpoenaed by the EEOC, such as names and Social Security numbers of other employees asked to undergo the physical evaluation, the EEOC brought actions in federal court seeking enforcement of its subpoenas. The district court declined to enforce the subpoenas, finding the information sought by the EEOC "could not shed light on whether the [evaluation] represents a tool of … discrimination." The Ninth Circuit reversed, reviewing the district court's decision de novo and holding the district court erred in finding the requested information irrelevant to the EEOC's investigation.

However, the Supreme Court held the Court of Appeals should have reviewed the district court's decision to quash the EEOC's subpoena for abuse of discretion. First, the court set forth the longstanding appellate practice of reviewing district court decisions to enforce or quash an administrative subpoena for abuse of discretion. Second, the court found the decision whether to enforce an EEOC subpoena hinges on fact-intensive questions that the district court is better suited to answer.

On May 24, 2017, the Ninth Circuit, after reviewing the district court's decision for abuse of discretion, held the district court clearly erred when it concluded the EEOC did not need the information it requested from the company. "The governing standard is not 'necessity'; it is relevance," the Ninth Circuit said.

WARN Priority

In *Czyzewski v. Jevic Holding*, 137 S. Ct. 973 (2017), the Supreme Court held

that, in structured bankruptcy dismissals, courts may not depart from the priority order established by the U.S. Bankruptcy Code at the expense of WARN Act and other creditors without their consent.

Jevic arose when a trucking company filed for Chapter 11 bankruptcy. A group of terminated truck drivers commenced a class action adversary proceeding for WARN Act violations, and received a judgment the drivers claimed was worth $12.4 million. About $8.3 million of that amount counted as a priority wage claim under §507(a)(4) of the Code, and was therefore entitled to payment ahead of general unsecured claims. In a second lawsuit in the bankruptcy case, a committee of unsecured creditors brought fraudulent-conveyance claims against the private equity firm that acquired the trucking company and that firm's lender. That suit resulted in a settlement that called for a structured dismissal of the bankruptcy, pursuant to which the truck drivers would receive nothing on their WARN Act claims, but lower-priority general unsecured creditors would be paid. The Bankruptcy Court found that because the proposed payouts would occur pursuant to a structured dismissal rather than an approved plan, the failure to follow ordinary priority rules did not bar approval of the settlement. The Bankruptcy Court approved the settlement in light of the "dire circumstances" facing the trucking company's estate. A federal district court and the Third Circuit Court of Appeals affirmed that decision.

The Supreme Court reversed, holding the Bankruptcy Court could not alter the Code's distribution scheme at the expense of the WARN creditors absent their consent. The court required evidence of clear Congressional intent to make structured dismissal a means of achieving nonconsensual priority-violating distributions, but it found nothing in the Code evinced this intent. While conceding Code §349(b) (which contemplates restoration of the pre-petition financial status quo) allows a bankruptcy judge "for cause, [to] orde[r] otherwise," the court found this provision was intended to give flexibility to protect rights acquired in reliance on the bankruptcy case, rather than make distributions that violate the priority system. Finally, the court concluded that allowing a court to alter the priority rules without consent in a "rare case" would undermine the Code by creating uncertainty.

Arbitration

In *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 368 (2017), the Supreme Court ruled the Kentucky Supreme Court's clear-statement rule requiring powers of attorney to specifically entitle the representative to enter into an arbitration agreement violated the FAA. The court reasoned that under the FAA, arbitration agreements are on equal plane with other contracts and may not be singled out for disfavored treatment.

Though the Supreme Court in *Clark* showed its continued willingness to rule against state laws that appear to preempt the FAA, the Court has not yet ruled on how the FAA interacts with the National Labor Relations Act (NLRA). In *National Labor Relations Board v. Murphy Oil USA* (No. 16-307), the court is set to settle a circuit split over the viability of the National Labor Relation Board's position, first set out in *D.R. Horton*, 357 NLRB No. 184 (2012), that requiring workers to sign arbitration agreements waiving their right to file class actions as a condition of employment violates workers' collective action rights under the NLRA. The Seventh and Ninth Circuits have found the NLRA's guarantee of employees' rights to concerted activity supersedes the FAA, while the Fifth Circuit has said it does not. Employers eagerly await the high court's ruling later in 2017.