“Early Bird” Session

NINE OF DIAMONDS

SEEKING CRYSTAL-CLEAR CLARITY FROM THE SUPREME COURT OF THE UNITED STATES

Patrick F. Hulla (Moderator) – Ogletree Deakins (Kansas City)

Karen M. Morinelli – Ogletree Deakins (Tampa)

David L. Schenberg – Ogletree Deakins (St. Louis)
The Supreme Court decided numerous cases in 2018-2019 that are significant for employers, and the Court’s docket promises more such decisions in the coming months. The decisions are largely favorable to employers, including several that continue the strong trend in favor of arbitration. Among the other areas of employment law addressed, and to be addressed, by the Court are issues regarding: FLSA exemptions; Title VII administrative exhaustion; sexual orientation and gender identity discrimination; class actions; public sector law; traditional labor; retiree benefits; whistleblowing under Dodd-Frank; and federal agency deference.

Arbitration and the Epic Systems Effect

Last year in its Epic Systems decision the Court authorized class action waivers in mandatory workplace arbitration agreements and provided employers with a powerful tool to manage and ameliorate the risks of costly collective or class-based litigation. In its decision, the Court provided a measure of certainty that workplace arbitration agreements – if properly set up and carefully implemented – will be enforced. Yet, given the current state of our workplace culture, employers are now debating the pros and cons of using workplace arbitration agreements.

Some companies fear there will be an employee relations backlash from use of such a mandatory mechanism or because they have an aversion to the arbitration process in non-class or collective action situations. Based on these evolving trends, there will continue to be significant developments in the coming year relative to arbitration agreements.

In Lamps Plus, Inc. v. Varela, et al., No. 17-988 which was argued on October 29, 2018, the Court will again decide an issue regarding the Federal Arbitration Act (“FAA”). This case poses the issue of whether the FAA bars a broad interpretation of an arbitration agreement that allows prosecution of a class arbitration based solely on general language commonly used in arbitration agreements both in the courts and in the workplace.

In Lamps Plus, Frank Varela tried to file a class action complaint against his employer, Lamps Plus, after the company released his personal information in response to a phishing scam. Varela alleged negligence, invasion of privacy and breach of contract. Varela had signed an arbitration agreement as a condition of his employment. After he filed suit, citing his executed contract of employment, Lamps Plus moved to compel bilateral arbitration. The district court found that agreement to be a contract of adhesion and ambiguous as to whether it permitted class arbitration. The district court found that agreement to be a contract of adhesion and ambiguous as to whether it permitted class arbitration. It construed the ambiguity against the drafter, Lamps Plus, and allowed the arbitration to proceed on a class-wide basis. Lamps Plus appealed, arguing that it had not agreed to class arbitration, but the Ninth Circuit affirmed and ruled that the class arbitration could move forward.

The appeals court explained that because the agreement was capable of two reasonable interpretations, the district court was correct in finding ambiguity. Under California law it was also proper to construe the ambiguity against the drafter, particularly since it was a contract of adhesion. Further, it was a reasonable interpretation of the agreement to conclude that it covered legal disputes including class-wide claims, not just individual ones.
The upcoming decision in this case will be of great significance to employers involved in the drafting of arbitration agreements and what could be considered a contract of adhesion and what to avoid in drafting.

In *New Prime Inc. v. Oliveria, et al.*, No. 17-340 (argued on October 29, 2018 and decided on January 15, 2019), the Court was presented the issue of whether a court or an arbitrator must determine the applicability of § 1 of the FAA – which applies only to “contracts of employment” – to independent contractor agreements. In a rare win for plaintiffs seeking to avoid arbitration, the U.S. Supreme Court rejected a trucking company’s attempt to compel arbitration in a driver’s proposed minimum wage class action. The Court held that the FAA’s exemption for interstate transportation workers applies not only to employees, but also to those classified as independent contractors.

Section 1 of the FAA states that “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” are exempt from arbitration. In *New Prime*, the trucking company petitioned the Court to overturn the First Circuit’s ruling that the applicability of this Section 1 exemption was a question for the court and that the term “contracts of employment” included independent contractor agreements. The First Circuit’s opinion was criticized by employers in the trucking and shipping industries, who argued that it would effectively eliminate arbitration as a means for dispute resolution in those respective industries.

A unanimous Court, with Justice Kavanaugh recusing himself, held that courts must decide whether the Section 1 exemption applies before compelling a matter to arbitration. The Court also found that the First Circuit correctly held that it lacked authority to compel arbitration of the driver’s lawsuit because the FAA’s exception for “contracts of employment” referred to “agreements to perform work” and, thus, included independent contractor agreements.

Including independent contractors in the FAA’s Section 1 exemption, the Supreme Court’s decision will significantly impact employment disputes in the transportation and shipping industries. Both industries rely heavily on independent contractors. It also likely means that more of these disputes will be heard by a judge, rather than an arbitrator.

In *Henry Schein Inc. v. Archer & White Sales Inc.*, 17-1272 (argued October 29, 2018 and decided January 8, 2019), Justice Kavanaugh’s first written opinion, the Court once again has shown its strong preference for enforcing the terms of arbitration agreements as written by the parties. The Court held that when an arbitration agreement delegates the threshold question of arbitrability to an arbitrator, the arbitrator, not a court, should decide the question, even if it is clear to a court that the dispute is not covered by the arbitration agreement. This unanimous opinion continues the Court’s trend making clear that the terms of arbitration agreements, like any other contract, should be enforced as written and without policy considerations or exceptions.

*Henry Schein Inc.* is based on an anti-trust dispute in which the parties previously contracted for arbitration of any dispute arising under their contract. The arbitration agreement incorporated the American Arbitration Association’s arbitration rules, which provide that arbitrators have the power to resolve arbitrability questions. After the plaintiff filed suit in federal court, the defendant invoked the agreement and moved to compel arbitration. The plaintiff objected, arguing that the dispute was clearly not covered by the arbitration agreement.
The federal district court agreed and ruled that because the claim that the dispute was subject to arbitration was “wholly groundless,” the court, rather than an arbitrator, could resolve the arbitrability issue. The Fifth Circuit affirmed. (Previously, federal courts were split on whether a “wholly groundless” exception to the FAA existed.) The Fifth Circuit and other supporters of the exception had reasoned that the “wholly groundless” exception enables courts to block frivolous attempts to transfer disputes from the courts to arbitration. The Court rejected this rationale, holding that the FAA does not contain a “wholly groundless” exception. The Court further noted that a “wholly groundless” exception was inconsistent with prior precedent that an agreement to arbitrate the threshold question of arbitrability is simply an additional, antecedent agreement covered by, and to be enforced under, the FAA.

The Court summed up its holding as follows: “when the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” Reinforcing the Court’s precedent respecting the parties rights to agree to arbitrate and to designate the scope of that arbitration.

**FLSA Exemptions**

The specific holding in *Encino Motorcars v. Navarro* is that service advisors at car dealerships qualify as exempt employees under FLSA section 13(b)(10)(A). That section exempts from the overtime requirements “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.”

Of greater significance, however, is that the Supreme Court rejected its longstanding rule that FLSA exemptions should be narrowly construed. That rule created a presumption that employees were not exempt, unless the employer showed an exemption clearly applies. Without the “narrow construction” rule discarded, the exemptions will be interpreted according to ordinary rules of statutory construction.

**Title VII**

**Jurisdiction**

In *Fort Bend County v. Lois M. Davis 18-525*, the United States Supreme Court has agreed to resolve a growing split of authority among lower federal circuit courts regarding the requirement under Title VII of the Civil Rights Act of 1964 (“Title VII”) that individuals must file a charge of discrimination with the EEOC before bringing Title VII claims against their employer. Specifically, in granting cert on January 15, 2019, the Supreme Court is now set to decide the following issue: “Whether Title VII’s administrative-exhaustion requirement is a jurisdictional prerequisite to suit, as three circuits have held, or a waivable claim-processing rule, as eight circuits have held.”

The case stems from an appeal to the Fifth Circuit of a decision by a district court in the Southern District of Texas where the district court held that a plaintiff’s failure to file a charge with the EEOC before a lawsuit was not a jurisdictional requirement that prohibited the court from hearing the case. Rather, the district court determined that the administrative exhaustion requirement under Title VII is a “claims-processing” rule that can be waived by an employer if the issue is not timely asserted. The Fifth Circuit upheld the decision.
In Fort Bend County, Lois Davis brought claims against Fort Bend County, her former employer, alleging retaliation and religious discrimination under Title VII. Over four years into this litigation, Fort Bend County argued that Davis failed to exhaust the EEOC process on her religious discrimination claim. The district court held that the exhaustion requirement is jurisdictional and that Davis had failed to exhaust her administrative remedies, and therefore dismissed her religious discrimination claim. On appeal, the Fifth Circuit reversed, holding that the exhaustion requirement is not jurisdictional and that Fort Bend County had “forfeited its opportunity to assert this claim” based on its four-year delay.

The Fifth Circuit’s ruling in this case is consistent with the majority of other federal circuit courts’ interpretation of the administrative exhaustion requirements under Title VII. The First, Second, Third, Sixth, Seventh, Tenth, and D.C. Circuit Courts have all held that the administrative exhaustion requirements under Title VII are not jurisdictional, but rather an affirmative defense that can be waived by an employer if not timely raised. On the other side of the circuit split, the Forth, Ninth, and Eleventh Circuit Courts have all held that the administrative exhaustion requirement is jurisdictional, and that a federal district court has no authority to adjudicate Title VII claims if the plaintiff has not first filed a charge with the EEOC. Employers should pay close attention to the Court’s decision which is poised to be a game changer.

Sexual orientation

The Supreme Court may soon decide whether Title VII’s prohibition against discrimination because of “sex” includes a prohibition against sexual orientation discrimination and gender identity discrimination. In three different cases, the losing side at the Court of Appeals has asked the Supreme Court to decide the issue. The Court has calendared the cases – EEOC v. R.G. & G.R. Harris Funeral Homes; Bostock v. Clayton County Bd. of Cmm’rs; Zarda v. Altitude Express, Inc. – for consideration of the requests multiple times, only to defer each time to another date.

If the Court ultimately takes one or more of the cases, the outcome will have a major impact on federal discrimination law. Employers, of course, may already be subject to state and local laws prohibiting these categories of discrimination.

Class Actions

The Supreme Court has long held that the filing of a class action case tolls the statute of limitations for the claims of individual class members. This rule from American Pipe v. Utah serves judicial economy by assuring individuals who would be within the class that the statute of limitations will not run during the class action, meaning their otherwise timely claims will not be time-barred if class certification is ultimately denied.

Stacking Class Actions

In China Agritech v. Resh, the Supreme Court limited such tolling of the statute of limitations to individual claims. In other words, if class certification is denied in a case, would-be absent class members who could have timely filed individual claims prior to the class action may still timely do so under American Pipe. However, claims that would have been time-barred absent American Pipe tolling may be filed as individual claims, but may not be used to “stack” (try for another) class action.
Cy Pres Awards

In *Frank, et al. v. Gaos, No. 17-961* (argued on October 31, 2018), the issue is whether and in what circumstances a cy pres\(^1\) award in a class action – that supplies no direct relief to class members – nonetheless comports with the Rule 23 requirement that a settlement binding class members must be fair, reasonable, and adequate. The Supreme Court’s ruling likely will determine the legality of cy pres awards, and if approved, create guidelines for the appropriateness of cy pres awards in class action settlements.

Class Action Fairness Third-Party Defendant Removal

In *Home Depot U.S.A. v. Jackson, et al., No. 17-1471* (argued on January 15, 2019), the Court must decide when Defendants may remove a class action to federal court under the Class Action Fairness Act where Defendants file a counter-claim. The Court’s decision likely will determine if the Supreme Court’s earlier ruling in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941) – which held that a Plaintiff may not remove a counter-claim against it – extends to third-party Defendants bringing counter-claims.

Public sector

Union “fair share” fees.

In *Janus v. American Federation of State, County, and Municipal Employers, Council 31*, was a landmark decision in 2018 where the Supreme Court ruled that the First Amendment prohibits public employee unions from collecting membership fees, known as “fair share” or “agency fees,” from workers who do not wish to join. This decision overturns the Supreme Court’s 1977 decision in *Abood v. Detroit Board of Education* that had held exactly the opposite. The earlier opinion recognized that the inability to compel agency fees would create a situation in which workers reaped the benefits of union representation without having to contribute to that representation, and might lead to disruptive rivalries between unions. The Supreme Court’s reversal finds that public sector unions engage in political speech, that segregating union funds is not sufficient to render compelled agency fees from so financing political speech, and that it violates the First Amendment for the government to compel financing of political speech. The Supreme Court’s reversal of itself is a departure from the rule of stare decisis and may indicate that other long-standing rules similarly may be discarded.

ADEA

In its 8-0 decision in *Mount Lemon Fire District v. Guido, No. 17-587* (argued on October 1, 2018 and decided on November 6, 2018) the Court held that state and local governments are covered employers under the ADEA, regardless of the number of employees they have. The Court, which rarely sides in employment matters with the Ninth Circuit when other circuits disagree, unanimously adopted the Ninth Circuit’s reading of the statute. Four other Circuits held the opposing position. This decision will have a significant impact on smaller

\(^1\) The rule of cy-pres is a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect. Thus, where a testator attempts to create a perpetuity, the court will endeavor, instead of making the devise entirely void, to explain the will in such a way as to carry out the testator’s general intention as far as the rule against perpetuities will allow. So in the case of bequests to charitable uses; and particularly where the language used is so vague or uncertain that the testator’s design must be sought by construction. *Black's Law Dictionary Online Legal Dictionary 2nd Ed.*
public sector employers such as fire districts, law enforcement agencies and smaller special taxing districts that may employ few employees.

The case involved two firefighters who brought ADEA claims against their employer fire department. The trial court granted summary judgment on the ground that the fire department did not meet the 20 employee threshold for coverage under the ADEA. The Ninth Circuit reversed, holding that the threshold did not apply to state and local governments.

The key statutory language disputed by the parties was the ADEA's definition of "employer":

"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)."

Here, the Court adopted a plain reading of the statute, holding that the phrase "also means" is an "additive rather than clarifying" phrase. The Court stated that "also" is a term of enhancement that essentially created another category of "employer"—i.e., state and local governments regardless of their size. The Court rejected the fire department's argument that the definition's first sentence sets the baseline definition and the second sentence simply clarifies that state and local governments are included so long as they have at least 20 employees.

While this decision does not apply to private employers, it is still particularly notable as the Justices adopted a plain reading of the statute and did so unanimously and the case represents a rare situation in which the Supreme Court sided with the Ninth Circuit in an employment matter when all other Circuits deciding the issue were on the opposing side.

Traditional labor:

In addition to the Janus case, supra, the Supreme Court put an end to the Sixth Circuit's unique way of reading collective bargaining agreement provisions related to retiree benefits.

In CNH Industrial v. Reese, the Court reaffirmed that collective bargaining agreements should be interpreted like other contracts. In the case, the 1998 collective bargaining agreement provided for retiree health care benefits, but also stated that the entire agreement would terminate in May 2004. No special provision for the benefits was included.

When the agreement expired, a group of retirees filed suit, asking the court to declare their benefits were vested for life. The Sixth Circuit agreed with the retirees. In a prior case, the Sixth Circuit had announced that it would presume retiree health benefits set forth in a collective bargaining agreement vested for life where other benefits had specific termination dates and where the health benefits were tied to pension eligibility. The Supreme Court in M & G Polymers v. Tacket, had previously ruled those inferences could not be directly applied to find lifetime vesting. Instead, the Sixth Circuit held the inferences rendered CNH's collective bargaining agreement ambiguous, and that the court was therefore entitled to look to other evidence to determine whether the benefits were intended to vest for life. The Supreme Court reversed, saying that the collective bargaining agreement itself was clear, and that legal inferences could not be used to create an ambiguity where there was none.
**Whistleblowers**

The Dodd-Frank Act was passed in 2010 as a response to the financial crisis of 2008, and intended greater oversight of the financial system than previously provided by Sarbanes-Oxley.

In *Digital Realty Trust v. Somers*, however, the Supreme Court ruled that the anti-retaliation of Dodd-Frank applies only when whistleblowers report securities violations to the Securities and Exchange Commission. The Court thus strictly applied Dodd-Frank’s own definition of “whistleblower,” as written, and rejected the government’s arguments that the narrow reading would leave internal whistleblowers unprotected just because they did not also report to the SEC. More significantly, the Supreme Court also rejected the SEC’s own broader definition of whistleblower contained in its regulations. Without rejecting the *Chevron* rule that courts defer to a federal agency’s regulatory interpretation of a statute, the Supreme Court reiterated that rule’s limited application to situations in which the statute itself has not clearly answered the question.

**Agency Deference**

Administrative agencies implement the maze of federal regulations governing people and companies and play a particularly important role in regulating environmental, health, safety and employment issues.

The Court’s upcoming decision in *Kisor v. Wilkie*, 18-15 will address the *Auer* standard of deference that is applied by the courts to administrative agencies’ interpretations of their regulations. Depending upon the Court’s decision, these agencies may soon face greater scrutiny from the federal courts in their interpretation of their own regulations. Although *Kisor* involves the Department of Veterans Affairs, the ruling is anticipated to have broad implications for agency action, including agencies that regulate employment matters, such as the Department of Labor and the Equal Employment Opportunity Commission. This development could give businesses—particularly those in highly regulated industries—more opportunities to challenge, limit, or at least better anticipate their regulatory burden.

In *Kisor*, a Vietnam War veteran, James Kisor, is seeking disability benefits dating back to 1983 based on service records he contends the agency overlooked. The lower court deferred to the Department of Veterans Affairs’ interpretation that “relevant” means only information “noncumulative and pertinent” to the matter. Siding with the agency, the lower court rejected Kisor’s more commonsense interpretation that “relevance” means any fact with “any tendency to make a fact more or less probable” when the “fact is of consequence in determining the action.”

Notably, the agency only rendered its interpretation, defeating the claim, when it denied Kisor relief. In other words, the agency “interpreted” its own regulation to ensure that Kisor lost *after* Kisor initiated his challenge and in the context of his particular dispute not before. Therefore, neither Kisor nor any other veteran received advance warning that the Department of Veteran Affairs might adopt its own definition of “relevant” until it did. Despite

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2 The *Auer* standard holds that courts must defer to an agency’s construction of its own regulation unless that interpretation “is plainly erroneous or inconsistent with the regulation.” *Auer* deference often means that regulated companies receive no notice about how an agency will interpret and implement its own regulations. And, in turn, without notice, companies cannot comment on or oppose the agency’s regulatory guidance.

3 Kisor’s proposed definition tracks the Federal Rules of Evidence.
that, and consistent with the lenient Auer deference standard, the lower court deferred to the agency’s interpretation of “relevant” and declined to give the word its more natural meaning.

Kisor’s case illustrates, that Auer deference guides how agencies regulate the individuals and businesses subject to their jurisdiction. Agencies, particularly in the environmental, health and safety context, often make substantive policy changes through nonbinding guidance. Auer deference often increases regulatory uncertainty and burden on companies, while insulating agencies from challenge or correction through the federal courts. However, proponents of Auer deference contend that it improves agencies’ operations because it gives agencies the flexibility to implement their own vague regulatory guidance without interference from the judiciary.

The Court’s decision in Kisor may mean significant changes in the ways administrative agencies go about their work. The Court in Kisor agreed to hear the case only to address whether it should overrule Auer deference. If, the Court overrules Auer deference, it may reflect just the first step in a fundamental change about how the administrative agencies will operate in the future.

With only a few months left in the in this term, the last of the Supreme Court’s decisions promise to provide an interesting and enlightening view of the “new” Court and a clearer picture of what lies ahead.
Nine of Diamonds: Seeking Crystal-Clear Clarity From the Supreme Court of the United States

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SCOTUS 2018-2019
- Slow start
- Momentum from last term
- Kavanaugh impact
- What’s next?
Class Action Waivers

- Decision was a major victory for employers
- Resolved a circuit split that has been in place for six years
- Court held that class action waivers in arbitration agreements ARE enforceable

Class Action Waivers

- The Court’s opinion came down in a 5-4 decision authored by Justice Gorsuch
- “Congress...instructed that arbitration agreements must be enforced as written. While Congress is...free to amend this judgment, we see nothing suggesting it did so in the NLRA – much less manifested a clear intention to displace the [FAA].”
- Favors long-standing deference to the FAA
Class Action Waivers

- Background: *DR Horton* and progeny
- *Epic Systems*
- What now?

Current Developments

- #MeToo criticism of arbitration in popular media

The *New York Times* [https://nyti.ms/2yV6c26](https://nyti.ms/2yV6c26)

Opinion | OP-ED CONTRIBUTOR
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Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment
By GRETCHEN CARLSON  OCT. 10, 2017
State Law Proposals

- One state has banned all mandatory arbitration agreements. Any guesses as to which state?
- Include carefully worded carve out (“all claims that are not subject to arbitration as a matter of federal law or state law not preempted by federal law”)
Planning for Court Challenges

- Narrow or eliminate confidentiality provisions
- Allow for adequate discovery
- Provide for same statute of limitations and the same damages

Logistics of the Roll-Out

- Don’t bury in an employment agreement or employee handbook
- Attach, or clearly reference, rules that will govern any arbitration
Logistics of the Roll-Out

- Best practices
  - Centralized team for roll-out
  - Signed agreements maintained in 2 locations

Electronic Agreements

- How to prove electronic distribution of agreements to all employees?
- How to prove employee received and electronically acknowledged receipt?
Caution If Class Cases Are Pending

- Use caution when rolling out arbitration agreement while a class action is pending
- Courts may invalidate agreement on that basis alone
- Consider carving out pending class actions

Additional Arbitration Issues

- Three different cases on the enforceability of arbitration agreements at the U.S. Supreme Court
  1. *New Prime, Inc. v. Oliveira*
  3. *Lamps Plus, Inc. v. Varela*
**Henry Schein, Inc. v. Archer and White Sales, Inc.**

- Issue: whether a court can rule on arbitrability if the claim for arbitrability is “wholly groundless”
- Argued 10/29/18
- **Vacated and remanded**, 9-0, in an opinion by Justice Kavanaugh on January 8, 2019

**New Prime, Inc. v. Oliveira**

- Issue: whether the FAA applies to independent contractors in the transportation industry
- Argued 10/3/18
Lamps Plus, Inc. v. Varela

- Issue: whether class arbitration is permissible if agreement is silent on class proceedings
- Argued 10/29/18
- Reversed and remanded, 5-4, in an opinion by Chief Justice Roberts on April 24, 2019.

Yovino v. Rizo

- Holding
  - “[F]ederal judges are appointed for life, not for eternity”
  - Effectively, prior salary is a “factor other than sex” that may justify disparities that would otherwise violate the Equal Pay Act
- Interest
  - Some circuits (including now the 9th) allow it to be the justification. Others allow it only in limited circumstances.
**Encino Motorcars v. Navarro**

- **Holding**
  - Auto dealer service advisors are exempt
  - Rejects long-standing rule that FLSA exemptions should be narrowly construed

- **Interest**
  - Without a presumption against exemptions, it should be easier to establish that an exemption applies. Close calls are no longer defeats for the employer

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**Fort Bend County v. Davis**

- **Issue** – Whether the “exhaustion” requirement that a plaintiff file a Title VII claim with the EEOC prior to filing in court is “jurisdictional”

- **Status** – Argued 4/22/19

- **Interest** – If the “exhaustion” requirement is not jurisdictional, then employers may be subject to lawsuits they otherwise would not and that the EEOC has never processed
**EEOC v. R.G. & G.R. Harris Funeral Homes; Bostock v. Clayton County Bd. of Cmm’rs; Zarda v. Altitude Express, Inc.**

- **Issue** – Whether the Title VII prohibition against sex discrimination includes discrimination because of sexual orientation and gender identity
- **Status** – Cert. petitions repeatedly deferred
- **Interest** – Does an employer that discriminates based on sexual orientation or identity violate federal law?

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**China Agritech v. Resh**

- **Holding**
  - The filing of a class action lawsuit does not extend the time for any putative member to file a subsequent class action
- **Interest**
  - Further reduces the likelihood of class action in another case
Frank, et al. v. Gaos

- Issue – Whether a cy pres award – e.g. a payment to a charitable institution – in a class action can bind the class members
- Status – Argued 10/31/18. Supplemental briefing requested on Spokeo (technical violation).
- Interest – Any class action defendant needs to know whether a cy pres settlement can permanently resolve the claims of absent class members

Home Depot v. Jackson

- Issue – Whether a third-party counter-claim defendant is entitled Class Action Fairness Act protection
- Status – Argued 1/15/19
- Interest – Further defines the circumstances in which defendants may seek the protections of federal jurisdiction when faced with a class action
**Janus v. AFSCME, Council 31**

- **Holding**
  - It violates the First Amendment if public sector employees are required to pay union dues, even as a means with dealing with free riders

- **Interest**
  - Overruled a 1977 decision
    - Threat to *stare decisis* and thus to stability
  - Inside baseball
    - J. Alito technique of citing his own opinions

**Mount Lemmon Fire District v. Guido**

- **Holding**
  - The ADEA applies to state and local governments with fewer than 20 employees

- **Interest**
  - Whether small political subdivisions may have a statutory defense to age discrimination claims
**CNH Industrial v. Reese**

- **Holding**
  - Provision that collective bargaining agreement would terminate also applied to retiree benefit provision
  - Rejected 6th Circuit rule that retiree benefits are presumed to vest for life, unless there is contrary specific language

- **Interest**
  - Brings law regarding interpretation of collective bargaining agreements in the 6th Circuit in line with other circuits
  - A strong statement against creative rule-making, at least when the Supreme Court does not like the rule made

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**Digital Realty Trust v. Somers**

- **Holding**
  - Dodd-Frank does not protect employees internal whistleblowers who report securities laws violations only to company officials

- **Interest**
  - Limits company exposure under the anti-retaliation provision of Dodd-Frank
  - May drive plaintiffs to other retaliation claims
  - No deference to SEC
Kisor v. Wilkie

- Issue – The immediate issue is whether a veteran is entitled to certain VA benefits
- Status – Argued on 3/27/19
- Interest – The legal issue of more general interest is Auer deference – i.e., whether courts should continue to defer to federal agencies’ interpretation of their own regulation

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