The Supreme Court Term from the Labor and Employment Perspective

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In the first half of this year, several cases were decided at the Supreme Court of the United States that did not explicitly arise under labor and employment law. Nevertheless, the Supreme Court's holdings in those cases may have a significant impact on this practice area. The Supreme Court also denied cert. in several employment cases that raised questions under its prior holdings. The cert. denials in these cases means that its prior holdings remain good law for now. Some of the most notable cases are summarized below.

In *Van Buren v. United States*, No. 19-783 (Jun. 3, 2021), in a 6-3 decision, Justice Barrett authored the majority opinion, which held that "[a]n individual exceeds authorized access [under the Computer Fraud and Abuse Act of 1986 ("CFAA")], when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders or databases—that are off-limits to him." The case involved a former police officer who, in violation of police department policies limiting use of certain databases to law enforcement purposes, allegedly committed a felony violation of the CFAA when he ran a search in a law enforcement license plate database in exchange for payment. The Court found that the CFAA did not "cover" people like the officer who "have improper motives for obtaining information that is otherwise available to them." Interestingly, the Court noted that a broad interpretation of the statute would criminalize a "breathtaking amount of commonplace computer activit[ies]," such as "send[ing] a personal e-mail or read[ing] the news." Although employers have other tools in their toolbox with regard to improper use of information, the Court's decision resolved a Circuit split and significantly narrowed the applicability of the CFAA to employment cases. The decision suggests that employers should review employee computer policies to further define the computer activities that are and are not authorized to ensure protection of sensitive data.

In *Tanzin, et al., v. Tanvir*, et al., No. 19-071 (Dec. 10, 2020), Justice Thomas, in a unanimous opinion, held that the Religious Freedom Restoration Act ("RFRA") of 1993's express remedies provision "permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities" for violating litigants' rights to free exercise of religion under the First Amendment. This case involved three Muslim men who argued that their religious freedom was violated by an FBI agent who allegedly placed them on the no-fly list after they refused to become FBI informants. The men stated that their religious beliefs prohibited them from assisting the FBI in this way. Although this case is not a pure employment case, this decision may open the door to employment suits against government employers in their individual capacities for money damages when their conduct violates RFRA.

In *California, et al., v. Texas, et al.*, No. 19-840 (Jun. 17, 2021), one of the most high profile cases of the term, the Court was confronted with the question of whether reducing the required coverage under the Affordable Care Act ("ACA") to zero rendered the minimum coverage provision unconstitutional. The Fifth Circuit previously held that the elimination of the individual mandate, when Congress reduced the required amount of health coverage to zero in the Tax Cuts and Jobs Act of 2017, resulted in parts of the ACA being unconstitutional. The Court, in a 7-2 decision, reversed and remanded the Fifth Circuit's ruling. Ultimately, the Court did not reach the question of the minimum coverage provision's constitutionality because it held that the plaintiffs lacked standing to bring the claims. Employers covered by the ACA, then, must continue to comply with all ACA provisions.

Notably, SCOTUS denied cert. in three employment related cases, which had the effect of affirming its prior holdings. When denying cert in *Collier v. Dallas County Hospital District, dba Parkland Health & Hospital System*, No. 20-1004 (May 17, 2021), a case from the Fifth Circuit regarding whether the display of the N-word might create a hostile work environment under Title VII of the 1964 Civil Rights Act, the Court reaffirmed its holding in *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) that a single use of an epithet may not be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment. The Court affirmed its holdings in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) and *First Options of Chi., Inc. v.*

Kaplan, 514 U.S. 938 (1995) that, where there is "clear and unmistakable" evidence of an agreement to arbitrate "arbitrability" a court will not disregard that evidence, when it denied cert. in *Piersing v. Domino's Pizza Franchising LLC,* No. 20-695 (Jan. 25, 2021). The question presented in *Piersing*, a case from the Sixth Circuit, was whether a non-signatory of an arbitration agreement may enforce the agreement's terms against a signatory. The denial of cert. in *Piersing* also appears to reiterate SCOTUS's decision in *GE Energy Conversion France SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), where it held a non-signatory may enforce an agreement to arbitrate against a signatory based on the equitable estoppel doctrine. With its decision not to take up *Employer Solutions Staffing Group, LLC*, et al., v. Scalia, No. 20-660 (Feb. 22, 2021), a case from the Ninth Circuit addressing whether joint employers have a right to indemnification or contribution from each another where there is a collective, willful failure to pay overtime under the Fair Labor Standards Act, the Court reaffirmed its decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where it rejected the argument that where joint and several liability is found, contribution must also exist.

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