

2021 US Labor & Employment Webinar Week
Insights and Compliance Strategies for a New World

February 1 – 4, 2021



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2020 Employment Litigation Year in Review

February 1, 2021

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Presenters



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SCOTUS

2019/2020 Term

SCOTUS 2019/2020 Term

- Three separate decisions came before SCOTUS on appeal, but in each case, the employer was alleged to have fired an employee because of their sexual orientation or gender identity.



- ***Bostock v. Clayton County, Georgia***: County employee fired for “unbecoming conduct” after he began participating in a gay recreational softball league.
 - ***Altitude Express v. Zarda***: Skydiving instructor fired days after he mentioned that he was gay.
 - ***R.G. & G.R. Harris Funeral Homes Inc. v. EEOC***: A funeral home fired a transgender employee after six years of employment following her announcement that she would begin living openly as a woman.
- **Holding**: An employer who fires or otherwise discriminates against an individual simply for being gay or transgender does so “because of . . . sex,” in violation of Title VII of the Civil Rights Act of 1964.

SCOTUS 2019/2020 Term

- The Court provided an illustration of how it is impossible to discriminate against a person for being homosexual without also discriminating against that individual based on sex:

“Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.”

- The Court provided a similar example to illustrate this concept in the context of gender identity to show that the individual employee’s sex plays an “unmistakable and impermissible” role in the adverse employment decision.

SCOTUS 2019/2020 Term

- Implications
 - Review/revise handbooks, written policies, training materials, etc.
 - Review benefits
 - Consider how this ruling could affect other policies (i.e., bathroom policies, dress codes, etc.)
 - Stay up-to-date on lower court decisions (Ex: Tenth Circuit)
- SCOTUS put off for another day the resolution of how its decision regarding sexual orientation and gender identity discrimination may impact certain employers' religious liberty, as none of the employers in the cases before the Court raised such an argument.



SCOTUS 2019/2020 Term

- SCOTUS adopts broad interpretation of the “Ministerial Exception,” protecting religious schools against employment discrimination claims



Our Lady of Guadalupe School v. Morrissey-Berru: Two elementary school teachers at Catholic schools brought employment discrimination claims against the schools after each teacher’s employment was terminated (one based on age and one because she had requested a leave of absence to obtain breast cancer treatment).

- **Holding:** Because the two teachers were employed under agreements that set out the school’s mission to develop and promote a Catholic faith community, imposed commitments regarding religious instruction, worship, and personal modeling of the faith, and explained that teachers’ performance would be reviewed on those bases, these teachers fell squarely within the ministerial exception, and therefore, their discrimination claims were barred.



**Other Federal
Court Decisions**

ADA Accommodations

Adverse Employment Action

- *Exby-Stolley v. Bd. Of City Comm'rs* (10th Cir.)

Obesity as a Disability

- *Lumar v. Monsanto Co.* (5th Cir.)
- *Taylor v. Burlington N.R.R. Inc.* (9th Cir.)

Disability Not an Excuse for Misconduct

- *Clark v. Champion Nat'l Sec., Inc.* (5th Cir.)

• General Principles

- *Eshleman v. Patrick Indus, Inc.* (3rd Cir.)
 - Disability must be both “transitory and minor” to qualify under the exception to the “regarded-as” prong.
- *Wolf v. Strada* (2nd Cir.)
 - Inability to perform a specific job is not a substantial impairment on ability to work.



Discrimination/Harassment

- Ninth Circuit confirms that salary history may not be used to justify unequal pay
 - *Rizo v. Yovino* (9th Cir.)
- Background Checks / FCRA
 - *Walker v. Fred Meyer, Inc.*, (9th Cir.)
 - *Luna v. Hansen & Adkins Transport, Inc.* (9th Cir.)
- Liability for sexual harassment of customers?
 - *Yucis v. Sears Outlet Stores, LLC* (3rd Cir.)



Wage and Hour

- Employee must prove bonus should be included in FLSA regular rate of pay.
 - *Joshua Edwards, et al. v. 4JLJ LLC, et al.* (5th Cir.)
- "Day rate" pay method fails to satisfy the FLSA salary basis test for overtime exemptions
 - *Hewitt v. Helix Energy Solutions Group, Inc.* (5th Cir.)
- FLSA plaintiff must do more than estimate overtime hours
 - *Viet v. Le* (6th Cir.)





**Looking Ahead
2021**

COVID-19 Employment Litigation Topics to Watch

- FFCRA / FMLA Leave Violations
- Retaliation / Discrimination / Failure to Accommodate
- Remote Working as a Reasonable Accommodation
- Virus Exposure as a Public Nuisance
- WARN Act
- Force Majeure Clauses
- Vaccination Policies



SCOTUS 2020/2021 Term



- Computer Fraud and Abuse Act
 - *Van Buren v. United States*
- Affordable Care Act Individual Mandate
 - *California v. Texas and Texas v. U.S.*
- Religious Requests at Work

Questions? Please let us know.



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