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First Circuit Court of Appeals Rules on Two Questions of First Impression Regarding the Federal Arbitration Act

By David W. Garland and Jonathan L. Shapiro

Introduction

On May 12, 2017, in *Oliveira v. New Prime, Inc.*[1], a panel of the First Circuit Court of Appeals ruled on two questions of first impression in the circuit regarding the Federal Arbitration Act ("FAA" or "Act")[2] *First*, when a federal district court is confronted with a motion to compel arbitration under the FAA, and the parties have delegated questions of arbitrability to the arbitrator, must the court first determine whether the FAA applies or must it grant the motion and let the arbitrator determine the applicability of the FAA? *Second*, does Section 1 of the FAA[3] (which exempts contracts of employment of transportation workers from the Act's coverage (the "§ 1 exemption")) apply to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship?

As to the first question, the First Circuit panel held unanimously that the applicability of the FAA is a threshold question for the district court to determine before compelling arbitration under the Act. In so holding, the First Circuit joined the Ninth Circuit Court of Appeals, which previously had reached the same conclusion when faced with the same question.[4] The Eighth Circuit Court of Appeals, however, has held that the arbitrator (and not a district court) has the power to determine his or her own jurisdiction where the parties agreed to allow the arbitrator to determine threshold questions of arbitrability.[5] The Supreme Court of the United States will need to step in in order to resolve this circuit split.

With regard to the second question, two of the three judges on the panel held that Section 1 does apply and that the parties' contract was exempt from the FAA. In so holding, the First Circuit panel reached the opposite conclusion from most district courts nationwide that have considered the issue.

Facts of the Case

Dominic Oliveira ("Oliveira") was an alumnus of the Student Truck Driver apprenticeship program offered by New Prime, Inc. ("Prime"), which operated an interstate trucking company and recruited and trained

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[1] 2017 U.S. App. LEXIS 8474 (1st Cir. May 12, 2017).
[2] 9 U.S.C. §§ 1-16.
[3] 9 U.S.C. § 1.
[4] *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011).
[5] *Green v. SuperShuttle Inter., Inc.*, 653 F.3d 766 (8th Cir. 2011).

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new drivers. After completing the program and receiving his Commercial Driver's License, Oliveira created Hallmark LLC ("Hallmark") and signed an Independent Contract Operating Agreement between Prime and Hallmark. The contract specified that the relationship between Prime and Hallmark was that "of carrier and independent contractor and not an employer/employee relationship" and that "[Oliveira is] and shall be deemed for all purposes to be an independent contractor, and not an employee of Prime."[6] Under the contract, Oliveira retained the rights to provide transpiration services to companies other than Prime, refuse to haul Prime loads, and determine his own driving times and delivery routes. The contract also contained an arbitration clause pursuant to which the parties agreed to arbitrate "any disputes arising under, arising out of or relating to [the contract], . . . including the arbitrability of disputes between the parties."[7] Finally, the contract specified that any arbitration between the parties would be "governed by the commercial Arbitration Rules of the American Arbitration Association [(AAA)]."[8]

Oliveira alleged that even though the contract purported to make him an independent contractor, Prime exercised significant control over his work: it required him to transport Prime shipments, mandated that he abide by its procedures, and controlled his schedule. He claimed that he was unable to work for any other trucking companies and that while he worked for Prime, the company underpaid him. As a result, Oliveira stopped working for Prime as an independent contractor but, just a few months later, he was rehired by Prime as a company driver. He further alleged that his job responsibilities as a company driver were substantially identical to those he had had as an independent contractor and that Prime continued to underpay him.

Oliveira filed a class action against Prime, asserting that Prime violated the Fair Labor Standards Act ("FLSA")[9] and the Missouri minimum wage statute by not paying truck drivers minimum wage. Oliveira brought other claims as well, including a class claim for breach of contract or unjust enrichment and an individual claim for violation of Maine labor statutes.

[6] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *4-5.
[7] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *5.
[8] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *5 n.6.
[9] 29 U.S.C. §§ 201-219.

The Proceedings Below

Prime moved to compel arbitration under the FAA. In response, Oliveira argued that he could not be personally bound by the contract between Prime and Hallmark – including its arbitration clause – because he was not a party to that contract.[10] Oliveira argued that the motion to compel arbitration should be denied because the contract was exempted from the FAA under § 1 and that the court (not the arbitrator) was required to decide the question of the applicability of the § 1 exemption. Prime responded that Oliveira could be personally bound by the Prime-Hallmark contract because Oliveira and Hallmark were "one and the same."[11] Prime also argued that the § 1 exemption does not include independent-contractor agreements and that, in any event, whether the § 1 exemption even applied was up to the arbitrator, not the court.

The district court agreed with Oliveira and concluded that the question of the applicability of the § 1 exemption was for the court to decide.[12] It held that it could not answer whether the exemption applied to this particular case because the § 1 exemption does not apply to independent contractors and discovery was needed to evaluate whether Oliveira was an independent contractor or an employee of Prime.[13] Accordingly, the district court denied Prime's motion to compel arbitration and permitted discovery on Oliveira's employment status.[14]

The First Circuit's Analysis

Before directly addressing the two questions at issue, the First Circuit briefly outlined the statutory framework surrounding the FAA. Congress enacted the FAA in 1925 to "combat deep-rooted judicial hostility towards arbitration agreements."[15] Section 2 underscores the broad policy favoring arbitration agreements by declaring that an arbitration agreement in "a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[16] Section 3 of the FAA permits a party to obtain a stay of federal-court litigation pending arbitration and Section 4 authorizes district courts to grant motions to compel arbitration.[17] Section 1 of the FAA, however, limits the reach of the

[10] *Oliveira*, 2017 U.S. App. LEXIS 8474, at **6-7.
[11] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *7.
[12] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *8.
[13] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *8.
[14] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *8.
[15] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *8.
[16] *Oliveira*, 2017 U.S. App. LEXIS 8474, at **8-9 (quoting 9 U.S.C. § 2).
[17] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *9 (citing 9 U.S.C. §§ 3-4).

FAA by providing that it shall not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[18] The Supreme Court has interpreted Section 1 to "exempt[] from the FAA ... contracts of employment of transportation workers."[19]

Who Decides Whether the § 1 Exemption Applies?

The parties relied on dueling out-of-circuit precedent to support their respective positions. Prime relied on the Eighth Circuit's decision in *Green v. SuperShuttle International, Inc.*[20] to support its position that the arbitrator must decide whether the § 1 exemption applies; Oliveira relied on the Ninth Circuit's decision in *In re Van Dusen*[21] to support his position that the district court decides the issue. The First Circuit in *Oliveira* evaluated both decisions and ultimately agreed with the Ninth Circuit's holding (and Oliveira's position).[22]

In *Green*, shuttle-bus drivers alleged that the defendant bus company misclassified them as franchisees instead of classifying them properly as employees.[23] When the defendant moved to compel arbitration under the FAA pursuant to the arbitration clause in the parties' contracts, the plaintiffs argued that their contracts were exempted from the FAA by virtue of the § 1 exemption.[24] The Eighth Circuit upheld the district court's grant of the defendant's motion, calling the "'[a]pplication of the FAA's transportation worker exemption ... a threshold question of arbitrability'" in the parties' dispute.[25] The Eighth Circuit concluded that the parties had agreed to allow the arbitrator to determine threshold questions of arbitrability – including the § 1 exemption – because their agreements incorporated the AAA rules, which provide that the arbitrator has the power to determine his or her own jurisdiction.[26]

In *Van Dusen*, the Ninth Circuit determined that characterizing the applicability of the § 1 exemption as a question of arbitrability was a flawed starting premise.[27] Like the facts at issue in *Oliveira*, in *Van Dusen*, a class of interstate truck drivers alleged that the defendant trucking company had misclassified its drivers as independent contractors in order to circumvent the FLSA.[28] The defendant moved to compel arbitration; the plaintiffs opposed, relying on the § 1 exemption.[29] The district court ordered arbitration, concluding that the arbitrator needed to decide whether the § 1 exemption applied in the first instance.[30] The plaintiffs then sought mandamus relief before the Ninth Circuit, which ultimately declined to issue such relief because "the district court's conclusion was not clearly erroneous in light of the dearth of federal appellate authority addressing the issue and the general federal policy in favor of arbitration."[31] Nevertheless, the Ninth Circuit articulated why "'the best reading of the law requires the district court to assess whether [the §] 1 exemption applies before ordering arbitration'" under the FAA.[32] Because a district court's authority to compel arbitration exists under the FAA only where the FAA applies, the Ninth Circuit explained that "'a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions.'"[33] Concluding that the question of whether the § 1 exemption applies does not fit into the definition of "questions of arbitrability," the Ninth Circuit explained that:

> In essence, [the d]efendants and the [d]istrict [c]ourt have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of *whether the parties can invoke the authority of the FAA*. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from

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[18] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *9 (quoting 9 U.S.C. § 1).

[19] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *9 (quoting *Century City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001)).

[20] 653 F.3d 766.

[21] 654 F.3d 838.

[22] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *10-16.

[23] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *10 (citing *Green*, 653 F.3d at 767-68).

[24] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *10 (citing *Green*, 653 F.3d at 768).

[25] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *10 (citing *Green*, 653 F.3d at 769).

[26] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *10-11 (citing *Green*, 653 F.3d at 769).

[27] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *11.

[28] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *11 (citing *Van Dusen*, 654 F.3d at 840; *Van Dusen v. Swift Transp. Co.*, 830 F.3d 893, 895 (9th Cir. 2016) (later appeal in the same case)).

[29] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *11 (citing *Van Dusen*, 654 F.3d at 840).

[30] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *11 (citing *Van Dusen*, 654 F.3d at 840).

[31] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *12 (citing *Van Dusen*, 654 F.3d at 845-46).

[32] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *12 (quoting *Van Dusen*, 654 F.3d at 846).

[33] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *12 (quoting *Van Dusen*, 654 F.3d at 843).

> the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.[34]

Having evaluated the two competing cases, the First Circuit said that it was "persuaded that the Ninth Circuit hit the nail on the head [in *Van Dusen*], and . . . therefore [the court held] that the issue of whether the § 1 exemption applies presents a question of 'whether the FAA confers authority on the district court to compel arbitration' and not a question of arbitrability."[35] Indeed, the Ninth Circuit noted that "'[t]he supreme Court defines 'questions of arbitrability' as questions of 'whether the parties have submitted a particular dispute to arbitration.'"[36] Thus, the First Circuit explained that determining whether the § 1 exemption applies to the contract does "not entail any consideration of whether Prime and Oliveira have agreed to submit a dispute to arbitration; instead, it raises the 'distinct inquiry' of whether the district court has the authority to act under the FAA – specifically, the authority under § 4 to compel the parties to engage in arbitration."[37] The question of the court's authority to act under the FAA was therefore "an 'antecedent determination' for the district court to make before it could compel arbitration under the Act."[38]

Finally, the First Circuit also rejected the idea that the AAA rules call for a different result: "[n]othing in the AAA rules – including the power to determine the arbitrator's jurisdiction – purports to allow the arbitrator to decide whether a federal district court has the authority to act under a federal statute."[39] Thus, the First Circuit joined the Ninth Circuit in concluding that "the question of whether the § 1 exemption applies is an antecedent determination that must be made by the district court before arbitration can be compelled under the FAA."[40]

A. *Does the § 1 exemption Apply to Independent Contractors?*

The district court had concluded that discovery was needed to determine whether Oliveira was an independent contractor or employee of Prime during the time his contract was in place because, as the district court correctly noted, "'courts generally agree that the § 1 exemption does not extend to independent contractors.'"[41] Thus, the First Circuit next considered whether the § 1 exemption extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships.[42]

The First Circuit majority began its analysis by reiterating that § 1 provides that nothing in the FAA "shall apply to *contracts of employment* . . . [of transportation workers],[43] and noting that Prime did not dispute that Oliveira is a "transportation worker" within the meaning of the § 1 exemption.[44] Also, the First Circuit majority said that because Prime had treated its contract with Hallmark as one between Oliveira and Prime, it would do the same.[45] Accordingly, the majority said it would limit its focus to "the issue of whether an agreement between a trucking company and an individual transportation worker cannot be a 'contract of employment' within the meaning of § 1 if the agreement establishes or purports to establish an independent-contractor relationship."[46]

Before reviewing the statutory text, the First Circuit majority first dispensed with Prime's reliance on district court cases which had considered the issue and concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship.[47] The majority noted that the district court decisions either "simply assume, explicit or implicitly, that independent-contractor agreements are not contracts of employment under § 1" or have simply "'go[ne] with the group consensus' . . . without adding any independent analysis."[48] And, those district courts that have offered any

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[34] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *12-13 (quoting *Van Dusen*, 654 F.3d at 844).

[35] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *13 (quoting *Van Dusen*, 654 F.3d at 844).

[36] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *13 (quoting *Van Dusen*, 654 F.3d at 844) (quoting *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002)) (other citations omitted).

[37] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *13-14 (quoting *Van Dusen*, 654 F.3d at 844).

[38] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *14 (quoting *Van Dusen*, 654 F.3d at 843).

[39] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *16.

[40] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *16.

[41] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *16-17.

[42] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *18.

[43] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *18 (quoting 9 U.S.C. § 1; citing *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 119 (2001)).

[44] *Oliveira*, 2017 U.S. App. LEXIS 8474, at **18-19.

[45] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *19.

[46] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *19 (quoting 9 U.S.C. § 1).

[47] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *19 & n.16 (collecting cases).

[48] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *19-20 (citations omitted).

independent analysis have generally offered two reasons for reaching the conclusion: first, that the interpretation is "consistent with the 'strong and liberal federal policy favoring arbitral dispute resolution'"[49]; second, that such a rule "is justified by the narrow construction that the Supreme Court has instructed courts to give the § 1 exemption."[50] But after taking a "fresh look" in this case, the First Circuit majority was unpersuaded by the district courts' reasoning because those courts did not closely examine the statutory text – which it called the "critical first step in any statutory-interpretation inquiry."[51]

Turning to the statutory text, the First Circuit majority said that, because Congress did not provide a definition, it would give the phrase "contracts of employment" its "'ordinary meaning'" at the time Congress enacted the FAA in 1925.[52] To do that, the majority consulted dictionaries from 1925 that defined the term "contracts of employment."[53] It concluded that those dictionaries support Oliveira's argument: that the ordinary meaning of the phrase "contracts of employment" contained in § 1 means "agreements to perform work" and "do not suggest that 'contracts of employment' distinguishes employees from independent contractors."[54] Other authorities from that era also support that definition, including treatises and court decisions, suggesting further that the phrase can encompass agreements of independent contractors to perform work.[55]

The First Circuit majority noted that the contrary interpretation advocated by Prime – which would draw a line based on the precise employment status of the transportation worker – would have been a strange one for Congress to draw given its "'demonstrated concern with transportation workers and their necessary role in the free flow of goods'" at the time when it enacted the FAA.[56] Indeed, as the majority explained, "[b]oth individuals who are independent contractors performing transpiration work and employees performing that same work play the same necessary role in the free flow of goods."[57] As a result, the majority concluded that "the contract is excluded from the FAA's reach" and "exempt from the FAA" because it is "an agreement to perform work of a transportation worker."[58]

Having held that the contract was exempt, the First Circuit majority addressed the two justifications offered by some district court decisions that have concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship. First, the majority acknowledged that the Supreme Court cautioned in *Circuit City* that the § 1 exemption must "be afforded a narrow construction," but the majority disagreed with the notion that that instruction foreclosed its conclusion that the § 1 exemption applied to transportation-worker agreements that establish or purport to establish independent-contractor relationships.[59] *Circuit City* was distinguishable because the Supreme Court had announced the need for a narrow construction of the § 1 exemption in the context of rejecting the defendant's contention that the meaning of the phrase "engaged in . . . commerce" exempted from the FAA all employment contracts falling within Congress's commerce power.[60] The First Circuit majority explained that the Supreme Court's statement that § 1 "'exempts from the FAA only contracts of employment of transportation workers'" was based on the '"precise reading'" of that provision, and "nothing" *in Circuit City* suggests that the need for a narrow construction would override the plain meaning of

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[49] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *20 (quoting O*wner-Operator Indep. Drivers Ass'n v. Swift Transp. Co*., 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003)).

[50] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *20 (citing *Owner-Operator Indep. Drivers Ass'n v. United Van Lines*, *LLC*, No. 4:06CV219 JCH, 2006 U.S. Dist. LEXIS 97022, at *10 (E.D. Mo. Nov. 15, 2006)).

[51] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *21.

[52] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *21 (quoting *United States v. Stefanik*, 674 F.3d 71, 77 (1st Cir. 2012); citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

[53] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *22-23 (citing *Sandifer v. U.S. Steel Corp*., 134 S. Ct. 870, 876 (2014) (consulting "[d]ictionaries from the era of [statutory provision's] enactment" to espy ordinary meaning of undefined term); *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word 'now,' as understood when the [statute] was enacted.")).

[54] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *22-23 (citing *Webster's New International Dictionary of the English Language* 488 (W.T. Harris & F. Sturges Allen eds., 1923); *Webster's Collegiate Dictionary* 329 (3d ed. 1925)).

[55] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *23 & n. 20 (citations omitted).

[56] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *25 (quoting *Century City*, 532 U.S. at 121).

[57] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *25.

[58] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *25.

[59] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *26 (quoting *Century City*, 532 U.S. at 118).

[60] *Oliveira*, 2017 U.S. App. LEXIS 8474, at **27-28 (citing *Century City*, 532 U.S. at 114, 118).

the phrase "contracts of employment."[61] Second, the First Circuit majority stated that it was not persuaded by the broad federal policy favoring arbitration, as a policy could not "override the plain text of a statute."[62]

For those reasons, the majority held that "transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1," and specifically limited its holding such that it "applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration."[63] Because the First Circuit majority held that the case fell within the § 1 exemption, the FAA did not apply, and that the court lacked jurisdiction under U.S.C. § 16(a)(1)(B) to hear the interlocutory appeal.[64] Thus, it affirmed the district court's denial of Prime's motion to compel arbitration, and dismissed the appeal for lack of appellate jurisdiction.[65]

The Concurring and Dissenting Opinion

Judge Paul J. Barbadoro concurred with the majority's conclusion that the applicability of the § 1 exemption was a threshold matter for the district court to decide; however, Judge Barbadoro disagreed with the majority's decision to "take on the difficult issue of whether transportation-worker agreements that purport to create independent-contractor relationships are exempt from the Federal Arbitration Act."[66] According to Judge Barbadoro, the second question was an issue that need not be decided now because the district court had held that discovery was necessary to ascertain whether Oliveira was an employee or independent contractor.[67] Judge Barbadoro explained that if the case were remanded to the district court to proceed with discovery, the district court might conclude that Oliveira was actually an employee of Prime's and, if that were the case, then neither the First Circuit nor the district court "would have any occasion to categorically decide whether all transportation-worker agreements purporting to create independent-contractor relationships qualify for the § 1exemption."[68] Judge Barbadoro was also "particularly reluctant" to delve into this issue because it presented a "challenging question of statutory interpretation" and the statute itself "provides little guidance," and most district courts that have considered the issue have concluded that the exemption does not apply.[69] Accordingly, Judge Barbadoro would have remanded the § 1 exemption to the district court so that discovery could proceed and the court would reach its decision on Oliveira's status.[70]

In a footnote, the First Circuit majority considered the approach advocated by Judge Barbardoro, and said that it was not a "viable option" because the district court had ordered discovery based on its conclusion that the § 1exemption did not extend to independent contractors.[71] The majority stated that if that legal conclusion is incorrect, then there would be no need for discovery in the first place. Thus, the majority said it would not "adopt an approach that assumes away one of the live issues on appeal simply because the issue is a difficult one."[72]

What Happens Next?

Because the First Circuit dismissed the interlocutory appeal and denied Prime's motion to compel arbitration, Oliveira, as of now, may pursue his claims in federal court, including his FLSA claim. It is too early to predict whether Oliveira will ultimately prevail or whether the case will be dismissed or perhaps settle. Prime may decide to appeal for rehearing *en banc* or file a petition to the U.S. Supreme Court to hear its case. Whether or not the Supreme Court would grant *certiorari* in this case – or whether Prime would even file such a petition – is unknown. But the circuit split with respect to the First Circuit's first holding (that the applicability of the FAA is a threshold question for the district court to determine before compelling arbitration under the Act) can only be resolved by the U.S. Supreme Court. If the Supreme Court were to consider the issue, the rationale articulated by the First Circuit (following the rationale from the Ninth Circuit's *Van Dusen* decision) is well-reasoned and should carry the

[61] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *27-28 (citing *Century City*, 532 U.S. at 119).

[62] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *29.

[63] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *30-31.

[64] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *31.

[65] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *31.

[66] *Oliveira*, 2017 U.S. App. LEXIS 8474, at **31-32 (Barbadoro, J., concurring in part and dissenting in part).

[67] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *32 (Barbadoro, J., concurring in part and dissenting in part).

[68] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *32-33 (Barbadoro, J., concurring in part and dissenting in part).

[69] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *33 (Barbadoro, J., concurring in part and dissenting in part).

[70] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *37 (Barbadoro, J., concurring in part and dissenting in part).

[71] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *18 n.13.

[72] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *18 n.13.

day: if the Eighth Circuit's rationale from *Green* were to apply, then a district court could compel arbitration under the FAA before determining whether it has authority to act under the FAA, even in a case where it might not have such authority.[73]

With respect to the First Circuit's second holding – that Section 1 of the FAA applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship – the First Circuit was not afraid to separate itself from the legion of district courts that have held otherwise by reviewing dictionaries, treatises and other authorities from 1925 to ascertain the meaning of the phrase "contracts of employment." No other circuit court has had occasion to consider this issue, but those courts and potentially the U.S. Supreme Court may find its analysis persuasive. Only time will tell if its conclusion will be embraced or shunned by other courts.

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[73] *Oliveira*, 2017 U.S. App. LEXIS 8474, at *15 n.11.

Seventh Circuit Holds that Collective Bargaining Agreements May Not Restrict an Employee's Right to Sue in Court unless They Contain Clear and Unmistakable Terms

By Mark J. Swerdlin

Introduction

The Fair Labor Standards Act ("FLSA") requires employers to pay at least minimum wage for all hours worked by non-exempt employees engaged in interstate commerce.[1] Additionally, non-exempt employees who work more than 40 hours in a workweek must be paid at least one and one-half times their regular rate.[2] When employers violate the FLSA, employees may pursue a private cause of action in court. However, collective bargaining agreements ("collective bargaining agreement") almost always, and employment contracts often, require that arbitration-related grievance procedures be exhausted before an employee can sue in court.[3]

Grievance and arbitration provisions are typically included in collective bargaining agreements to provide employees with a fair and simple, quick and efficient means for addressing work-related issues as compared to judicial proceedings, which may take several years and lots of money to resolve the same issues.

This article, after summarizing the development of the law, reviews the Seventh Circuit's decision in *Vega v. New Forest Home Cemetery, LLC.* – one of the most recent court cases addressing a challenge to the doctrine that collective bargaining agreement grievance procedures must be exhausted before an employee may take a work-related claim to court. It will also examine how the Seventh Circuit's analysis aligns with prior Supreme Court decisions reviewing the "exhaustion" standard and additionally, how the Third Circuit recently provided employers with a safeguard, stating that arbitration can still be compelled even if an arbitration provision is not clear and unambiguous. Lastly, this article will briefly discuss how employers can strategically draft collective bargaining agreements to ensure that they comply with the standards set forth in both the Third and Seventh Circuits.

Development of the Law of Exhaustion

Republic Steel Corp. v. Maddox: Origin of the Exhaustion Requirement

In *Republic Steel Corp. v. Maddox*,[4] an employee sued his employer for severance pay allegedly due him under the collective bargaining agreement in effect at the time of his layoff. The Court held that the employee's failure to utilize the grievance procedure set forth in the collective bargaining agreement required dismissal of his suit: "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must use the contract grievance procedure agreed upon by employer and union as the mode of redress."[5]

Alexander v. Gardner-Denver Co.: Contractual and Judicial Remedies?

In *Alexander v. Gardner-Denver Co.*,[6] the Supreme Court held that an arbitrator's rejection of a Title VII claim under the collective bargaining agreement does not preclude the grievant from seeking a judicial remedy, *i.e.*, the employee who loses an arbitration alleging a violation of the collective bargaining agreement's non-discrimination clause may still proceed to court to "relitigate" his case under Title VII.[7] In reaching this conclusion, the Court addressed a number of arguments advanced by the employer in support of its argument that the plaintiff was not entitled to a trial *de novo* on his Title VII claim.

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[1] 29 U.S.C. § 206(b).

[2] 29 U.S.C. § 207(a)(1).

[3] *See McCoy v. Maytag Corp.*, 495 F.3d 515, 524-25 (7th Cir. 2007).

[4] 379 U.S. 650, 654 (1965).

[5] 379 U.S. at 652.

[6] 415 U.S. 36, 1974 U.S. LEXIS 95 (1974).

[7] Courts have extended the *Gardner-Denver* holding—arbitration is no bar to subsequent litigation—to other statutes. *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (FLSA); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (42 U.S.C. § 1985); *Marshall v. N.L. Indus.*, 618 F.2d 122093 (7th Cir. 1980) (OSHA); *Lewis v. Merrill Lynch, Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986) (42 U.S.C. § 1981).

First, the Court rejected the argument that, under the preclusion of remedies doctrine, the case could not proceed in federal court. It held that Title VII indicated an intent on the part of Congress to permit parallel remedies for discrimination prohibited by that law and that the private right of action granted was not only essential to fostering the purposes of the law but supplemented rather than supplanted other remedies.[8] Second, the plaintiff was not precluded from proceeding under the election of remedies doctrine (which may force a litigant to choose between legally or factually inconsistent remedies) because the remedies sought were legally different—one contractual, the other statutory—and, therefore, not inconsistent.[9]

Next, the Court held that there may be no prospective waiver of an employee's substantive rights under Title VII. It noted that, although an individual employee might waive his cause of action under Title VII as part of a settlement agreement to remedy substantive violations of Title VII, no settlement agreement was involved in the case before it. The Court also stated that "[i]n no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII."[10]

Finally, the Court held that deferral to the award of the arbitrator was inappropriate. It reasoned that deferral would be inconsistent with the Congressional intent of vesting in the federal courts responsibility for the enforcement of Title VII. It supplemented this reasoning by noting the unsuitability of arbitrators in interpreting and applying federal statutory law (as opposed to interpreting and applying a contract) and the limited procedural protections extended in an arbitration proceeding, as compared with judicial factfinding.[11] The Court did, however, state that "[t]he arbitral decision may be admitted as evidence [in the judicial proceeding] and accorded such weight as the court deems appropriate";[12] but refused to adopt any standards as to the weight to be accorded.[13]

Gilmer v. Interstate Johnson-Lane Corp.: A Question about Alexander v. Gardner-Denver Co.

In 1991, the Supreme Court decided a case that appeared to bring into question the continued viability of the basic holding of *Alexander v. Gardner-Denver. Gilmer v. Interstate Johnson-Lane Corp.*,[14] involved a clause that provided for compulsory arbitration of "any controversy arising out of . . . employment or termination of employment." When the employee was terminated, he sued in federal court alleging his termination violated the ADEA, and his employer moved to compel arbitration. The Court, after reviewing the ADEA's legislative history, held that nothing in that statute expressly precluded the arbitration of civil rights claims, treated the arbitration clause as a selection by both parties of a particular forum to hear all employment disputes, and found no inconsistency between the policy of enforcing the parties' selection of a forum and the ADEA's other policies.

Gilmer's analysis of *Alexander v. Gardner-Denver* and its progeny was limited. The Court noted that *Gardner-Denver* did not involve an agreement to arbitrate statutory claims and focused on the fact that labor arbitrators had not been authorized by the parties to resolve statutory claims, just contractual claims. The Court also said there was a distinction because arbitration in *Gardner-Denver* and its progeny involved collective bargaining agreements, where the claimants were represented by unions. Thus, unlike the case in which an individual has agreed to arbitration, *Gardner-Denver's* progeny reflected a concern about tension between collective representation and individual statutory rights.

Subsequent to *Gilmer*, a split developed in the federal appellate courts as to whether *Alexander v. Gardner-Denver* survived *Gilmer*, the majority of the courts adopting the view that *Gardner-Denver* remained good law.[15] However, in *Austin v. Owens-Brockway Glass*

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[8] *Alexander v. Gardner-Denver Co.*,415 U.S. 36, 45–49.

[9] 415 U.S. at 49–51.

[10] 415 U.S. at 52, n.15.

[11] 415 U.S. at 56–59.

[12] 415 U.S. at 60.

[13] 415 U.S. at 60, n.21.

[14] 500 U.S. 20 (1991).

[15] *See Peterson v. BMI Refractories*, 132 F.3d 1405 (11th Cir. 1998) (arbitration clause does not bar federal statutory claim unless, inter alia, individual employee has agreed to arbitration: "the union having agreed for the employee during collective bargaining does not count."); *Harrison v. Eddy Potash, Inc*., 112 F.3d 1437 (10th Cir. 1997) (*Alexander v. Gardner-Denver Co.* remains applicable in collective bargaining context); *Varner v. National Super Mkts*., 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997) (under *Alexander v. Gardner-Denver Co.*, plaintiff not required to exhaust remedies under collective bargaining agreement before proceeding with statutory claim); *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995) (plaintiff not required to exhaust remedies under collective bargaining agreement before proceeding with statutory claim).

Container Inc.,[16] the Fourth Circuit held that *Gilmer* substantially undercut *Gardner-Denver* and that employees covered by a collective bargaining agreement providing for arbitration of discrimination claims could be required to resort exclusively to that procedure to resolve statutory claims.

Wright v. Universal Maritime Service Corporation: Continued Confusion over Gardner-Denver

In *Wright v. Universal Maritime Service Corporation*,[17] Wright, an employee covered by a multi-employer collective bargaining agreement brought suit in federal district court alleging that the refusal of a number of employers to hire him because of an earlier work-related injury violated the Americans with Disabilities Act of 1990 (ADA). The collective bargaining agreement contained a clause providing for final and binding arbitration of all disputed matters and another clause that stated: "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law."

The Supreme Court framed the issue as "whether a general arbitration clause in a collective-bargaining agreement . . . requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act."[18] Conceding that there was "obviously some tension between" *Gardner-Denver* and its progeny and *Gilmer* and its progeny, the Court, nonetheless, failed to finally diffuse that tension. It first held that the presumption favoring arbitration was not applicable to suits involving alleged violation of a federal statute because, although arbitrators may be in a better position to interpret a collective bargaining than the courts, courts are an appropriate forum for interpreting federal statutes. Still, the Court acknowledged that parties could draft a collective bargaining agreement that explicitly provided that an employee would be required to pursue his federal statutory claims through the grievance-arbitration procedure, thereby raising the issue of whether a union, as part of the collective bargaining process, may waive an individual employee's right to a federal forum. But the Court found that it was unnecessary to resolve that issue because the arbitration clause in question did not present a "clear and unmistakable" waiver of that right:

14 Penn Plaza LLC v. Pyett: Waiver or Right to Judicial Forum

In *14 Penn Plaza LLC v. Pyett*,[19] the collective bargaining agreement provided, inter alia:

> § 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) *as the sole and exclusive remedy for violations*. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[20]

When employees covered by the agreement filed suit in federal district court alleging that their employer had violated the ADEA in assigning jobs, the employer filed a motion to compel arbitration under the agreement. The district court denied the motion concluding that, under Second Circuit precedent, even a clear and unmistakable waiver of the right to pursue statutory claims in a judicial forum was unenforceable.[21] The Second Circuit affirmed,[22] holding that "[a] union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable."[23] After granting a petition for certiorari, the Supreme Court reversed.[24]

Having determined in *Gilmer* that the ADEA generally did not preclude arbitration of claims arising under its

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[16] 78 F.3d 875 (4th Cir. 1996)*, cert. denied,* 519 U.S. 980 (1996).

[17] 525 U.S. 70 (1998).

[18] 525 U.S. at 72.

[19] 556 U.S. 247 (2009).

[20] 556 U.S. at 252 (emphasis supplied).

[21] *Pyett v. Pa. Bldg. Co*., 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. May 31, 2006).

[22] *Pyett v. Pa. Bldg. Co*., 498 F.3d 88, 92 (2d Cir. 2007).

[23] *Pyett v. Pa. Bldg. Co*., 498 F.3d at 92.

[24] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). Justice Thomas delivered the opinion of the Court and was joined by the Chief Justice and Justices Scalia, Kennedy, and Alito. Justice Stevens filed a dissenting opinion and joined the in the dissenting opinion of Justice Souter, to which Justices Ginsburg and Breyer also subscribed.

provisions, the *14 Penn Plaza* Court looked to whether that general principle applied equally to arbitration under a collective bargaining agreement—and concluded that it did, so long as the agreement "to arbitrate statutory antidiscrimination claims be 'explicitly stated' in the collective-bargaining agreement."[25] The Court then turned to the question left unanswered in *Wright v. Universal Line*—whether a union, as part of the collective bargaining process, may waive an individual employee's right to a federal forum for resolution of a statutory discrimination claim. It concluded that the National Labor Relations Act authorized the parties to bargain about the issue; they did so and voluntarily agreed to the waiver; nothing in the ADEA precludes the bargain; ergo, the courts have no right to interfere.[26]

The Court also held that enforcement of the collective bargaining agreement's clause requiring arbitration of the discrimination claims was not precluded by the Court's decisions in *Gardner-Denver* and its progeny. Quoting in part from the *Gilmer* decision, the majority opinion in *Penn Plaza* pointed out:

> that the *Gardner-Denver* line of cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." Those decisions instead "involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.[27]

Post-14 Penn Plaza Cases

Although the Court in *Wright v. Universal Marine* concluded that the contract there did not contain a clear and unmistakable waiver of an employee's right to a judicial forum for the resolution of discrimination claims, and the Court in *14 Penn Plaza* held that the contract there did contain such a waiver, neither decision enunciated any standards to be utilized in the determination.[28]

Two cases decided by the Fourth Circuit subsequent to *Wright* offer not very helpful suggestions as to what might suffice; a third is more instructive. In the first,[29] the court noted that the "clear and unmistakable" standard could be met if the arbitration clause explicitly provided that the employees would "submit to arbitration all federal causes of action arising out of their employment,"[30] or, even if the arbitration clause was general in nature, if the agreement explicitly incorporated the statutory anti-discrimination requirements.[31] In the second, the Fourth Circuit held that satisfaction of the standard requires that the parties demonstrate an explicit intent "to incorporate in their entirety the 'discrimination statutes at issue[.]' "[32] The court stated:

> There is a significant difference, and we believe a legally dispositive one, between an agreement not to commit discriminatory acts that are prohibited by law and an agreement to incorporate, *in toto*, the anti-discrimination statutes that prohibit those acts. We believe that where a party seeks to base its claim of waiver of the right to a federal forum on a claim of "explicit incorporation," of the relevant federal anti-discrimination statute into the terms of the [collective bargaining agreement], a simple agreement not to engage in acts violative of that statute . . . will not suffice.[33]

In the third Fourth Circuit case, *Singletary v. Enersys, Inc.*,[34] an employee brought suit against his former employer seeking damages for alleged wrongful termination

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[25] 556 U.S. at 258.

[26] 556 U.S. at 258.

[27] 556 U.S. at 264 (citations and footnotes omitted).

[28] Since the Court's decision in 14 Penn Plaza, both the Fifth Circuit and the Tenth Circuit have acknowledged that a collective bargaining agreement may constitute a waiver of an employee's right to seek a judicial forum regarding statutory claims but only where there the agreement, by express reference to the statute(s), provides for contractual resolution of statutory claims and authorizes the arbitrator to resolve those claims. *See Mathews v. Denver Newspaper Agency LLP*, 2011 U.S. App. LEXIS 11454 (10th Cir. May 17, 2011); *Ibarra v. UPS*, 695 F.3d 354 (5th Cir. 2012). In both of tghese cases, no waiver was found.

[29] *Carson v. Giant Food, Inc*., 175 F.3d 325 (4th Cir. 1999).

[30] 175 F.3d at 331.

[31] 175 F.3d at 332.

[32] *Brown v. ABF Freight Sys., Inc*., 183 F.3d 319, 322 (4th Cir. 1999).

[33] 183 F.3d at 322.

[34] 57 Fed. Appx. 161(4th Cir. 2003).

of employment in violation of the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). The collective bargaining agreement, which generally provided for arbitration of disputes which arose under it, included the following language:

> Any and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement.

The trial court denied the employer's motion to dismiss and compel arbitration, finding that the language was too general and "devoid of any 'specific reference to arbitration of employee claims against [the employer] under the ADA, FMLA, or state law governing wrongful termination of employment,' "[35] and did not explicitly incorporate any anti-discrimination statutes.

The Fourth Circuit reversed, finding that the language satisfied the first arm of the court's test for waiver of a right to federal forum—that the arbitration clause explicitly provide that employees would "submit to arbitration all federal causes of action arising out of their employment." The court stated that although the language was quite broad, "it could not be more clear."[36] In the eyes of the court, the language of the clause encompassed "the entire set of [statutory employment] claims, leaving no room for courts and litigants to speculate on the margins about which claims are covered and which are not."[37]

The *Vega* Decision

Summary of the District Court's Decision

New Forest Home Cemetery, LLC ("New Forest") employed Luis Vega, a seasonal employee, for five years before terminating him in June 2015.[38] The collective bargaining agreement between New Forest and the Service Employees International Union contained mandatory procedures requiring that any disputes "concerning pay, hours [,] or working conditions" be determined through arbitration proceedings.[39] Upon Vega's termination, New Forest discovered that Vega lacked a valid Social Security number and withheld Vega's final paycheck, claiming it "did not know how to lawfully make payment to him without such a number."[40] Vega sued claiming that New Forest violated 6(b) of the FLSA by "failing to pay him the wages owed for his last two weeks of work."[41]

The U.S. District Court for the Northern District of Illinois entered summary judgment in favor of New Forest because, while Vega was attempting to enforce his rights under the FLSA and not the collective bargaining agreement, there is a "generally established rule that a union member must follow the [collective bargaining] agreement's established grievance procedures before [he] can bring a lawsuit."[42] The court found that Vega satisfied the first step in the grievance procedure when he "attempted to reach [his union representative] by telephone on multiple occasions," but failed to comply with the remaining three steps. Having not exhausted his contractual remedies, the District Court held that Vega could not pursue his FLSA claim in court.

Vega's Arguments on Appeal

On appeal to the U.S. Court of Appeals for the Seventh Circuit, Vega challenged the district court's determination that the collective bargaining agreement precluded him from seeking statutory remedies in court before exhausting the collective bargaining agreement's grievance procedures. Specifically, Vega argued that his rights under the FLSA were "independent of his rights under [the] collective bargaining agreement," and could not be waived by contract. In support, cited the Supreme Court's holding in*Barrentine v. Arkansas-Best Freight Sys., Inc.*,[43]—that employees' "statutory rights are distinct from [their] contractual rights and as such must be analyzed separately."[44] Vega urged the Seventh Circuit to accept this line of reasoning because while substantive collective bargaining agreement rights are always subject to the grievance procedures, his FLSA rights were independent and unrelated to his contractual rights and should not have been treated as such. In the alternative, Vega argued that FLSA claims cannot be waived at all. Vega cited *Barrentine* in attempt to demonstrate that employees can bring FLSA claims in court even if collective bargaining agreement grievance procedures state otherwise. Thus, Vega contended that the district court erred in stating that he could not pursue his FLSA claim in court because the FLSA was not subject to the grievance procedures in the first place.

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[35] 57 Fed. Appx. at 163.
[36] 57 Fed. Appx. at 164.
[37] 57 Fed. Appx. at 164.
[38] *Vega*, 2017 U.S. App. LEXIS 8503, at *2.
[39] 2017 U.S. App. LEXIS 8503, at *2.
[40] 2017 U.S. App. LEXIS 8503, at *2.
[41] 2017 U.S. App. LEXIS 8503, at *3.
[42] 2017 U.S. App. LEXIS 8503, at *4.
[43] 450 U.S. 728, 734-37 (1981).
[44] *Vega*, 2017 U.S. App. LEXIS 8503, at *7 (citing *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734-37 (1981)).

The Seventh Circuit's Decision

Consistent with the decisions of its sister circuits and the U.S. Supreme Court in *14 Penn Plaza*, and *Wright v. Universal Maritime Service Corp.*, the Seventh Circuit rejected New Forest's argument that the collective bargaining agreement's grievance procedures included FLSA claims and reversed the district court's ruling. The Seventh Circuit held that the district court overlooked the "fundamental point" that "an employee's statutory rights are distinct from his contractual rights and as such must be analyzed separately with respect to his right to enforce them in court."[45]

With respect to the enforceability of collective bargaining agreement grievance procedures, the court stated that questions regarding an employee's substantive rights under the collective bargaining agreement will always require the employee to first comply with the collective bargaining agreement's terms before pursuing a claim through the judiciary. But when an employee's statutory and contractual rights are not one and the same, courts have to take a closer look at the actual language of the agreement. However, this does not suggest that statutory waivers are never enforceable. Vega's alternate contention that FLSA claims are never subject to arbitration provisions was rejected because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum."[46]

After analyzing several Supreme Court decisions that grappled with the issue of whether a collective bargaining agreement could compel an employee to use grievance procedures to resolve statutory claims, the court adopted the rule set forth in *14 Penn Plaza LLC.,* which made clear that while an agreement may restrict this right, it must do so "in clear and unmistakable terms." New Forest countered that, because the collective bargaining agreement defined "grievance to include disputes over pay, it necessarily requires statutory claims on the same subject" be submitted through the same process.

Responding to this argument, the court looked at three recent cases. In *Jonites v. Exelon Corp.*, the Seventh Circuit held that the contractual language in that case "was not an 'explicit' waiver of an employee's right to sue under the FLSA" because it was highly generalized and did not reference the FLSA at all.[47] Similarly, in *Wright v. Universal Maritime Service Corp.*, the Supreme Court analyzed language that provided for arbitration of all "matters under dispute." Because there was not a statutory incorporation provision elsewhere in the agreement, the Court held that this language was not clear and unmistakable.[48] In contrast, in *14 Penn Plaza*, the Court ruled in favor of the employer but only because the language "incorporated a variety of statutory anti-discrimination provisions into the agreement and provided that '[a]ll such claims shall be subject to the grievance and arbitration procedure ... as the sole and exclusive remedy for violations.'"[49]

The Seventh Circuit concluded that Vega's claim was more comparable to *Jonites* and *Wright*, and distinguishable from *14 Penn Plaza*, noting that unlike the agreement in *14 Penn Plaza*, the collective bargaining agreement between New Forest and the union did not contain any language that clearly or unmistakably waived an employee's right to resolve FLSA claims in court. The court observed that, while Vega's FLSA claim was associated with his pay and the collective bargaining agreement governed pay-related disputes, the language did not clearly include FLSA matters because the statute was not referenced anywhere in the agreement.[50] The actual grievance procedure "include[d] disputes over pay, hours, [and] working conditions," which could arguably include FLSA claims since both govern wages. However, the Seventh Circuit rejected New Forest's interpretation because the language of the agreement "could be thought to mean a claim over the requirements of the contract itself rather than one about what the FLSA requires."[51] Ultimately, the court held that "[u]nder no sense of the phrase 'clear and unmistakable' can the agreement be read to compel an employee to resolve his rights under FLSA through the grievance process."[52] Based on this reasoning, the district court's grant of summary judgment was reversed and remanded.

A Tiny Exception to the "Explicit Waiver" Standard

Back in 1990, the U.S. Court of Appeals for the Third Circuit recognized an exception to the clear and unmistakable waiver standard. In *Vadino v. A. Valey Engineers*,[53] that court assessed an employee's claim that his rights were breached under the FLSA when his employer failed to pay him overtime at the rate that was promised under the

[45] 2017 U.S. App. LEXIS 8503, at *7.

[46] 2017 U.S. App. LEXIS 8503, at *3 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[47] 2017 U.S. App. LEXIS 8503, at *10.

[48] 525 U.S. at 80-82.

[49] 556 U.S. at 252 (emphasis added).

[50] *Vega*, 2017 U.S. App. LEXIS 8503, at *11.

[51] *Vega*, 2017 U.S. App. LEXIS 8503, at *11.

[52] 2017 U.S. App. LEXIS 8503, at *11.

[53] 903 F.2d 253 (3d Cir. 1990).

collective bargaining agreement. Even though the agreement's arbitration provision did not clearly and unmistakably waive FLSA claims, the court held that the procedures must be exhausted because the FLSA claim was "inevitably intertwined with the interpretation or application of" the collective bargaining agreement.[54] The Third Circuit "established this narrow rule to prevent [plaintiffs] from circumventing applicable statutes of limitations and contractually binding grievance procedures set out in a collective bargaining agreement."[55] However, in the years that followed, the court had applied the exception on only one occasion to dismiss a plaintiff's FLSA claim.

More recently, in May 2017, the Third Circuit again considered the exception, this time ruling in favor of the employee. In *Jones v. Does*, several employees argued, among other things, that they were not compensated during meal breaks, in violation of the FLSA.[56] The court[57] held that the employees did not have to first exhaust the collective bargaining agreement's grievance procedures because (1) the collective bargaining agreement did not contain any clause providing that "meal periods and breaks shall be free and uninterrupted" and (2) the disputes were based on the facts surrounding the actual meal breaks, and those factual disputes could not be transformed "into disputes over provisions of the collective bargaining agreement."[58]

These Third Circuit cases make clear that while the Supreme Court has limited the inquiry into whether the actual collective bargaining agreement language is clear and unmistakable, there is case law that supports a more employer-friendly interpretation. Notably, district courts in the Tenth Circuit have also plied the exception recognized in *Vadino*.[59]

Comment

This case is certainly of significance to employers who are parties to collective bargaining agreements which include mandatory grievance and arbitration provisions. Given the Seventh Circuit's affirmation of the "clear and unmistakable" standard set out in previous Supreme Court decisions, employers should ensure that their agreements contain provisions that explicitly waive the right to pursue statutory claims in court before exhausting grievance procedures.

14 Penn Plaza established that a collective bargaining agreement may waive and employee's right to see judicial remedies for violation of statutory rights so long as the obligation to arbitrate allegations of statutory violations is "explicitly stated" in the collective bargaining agreement. It does not, however, provide any guidelines for language that will satisfy that standard.[60] The case sets forth an example of language that the Court *assumed* constituted an explicit statement of intent to arbitrate statutory violations—language that expressly states that "There shall be no discrimination ... by reason of ... characteristic protected by law[;]" specifies, by name, the laws to which it refers[;] and goes on to provide that "[a]ll such claims shall be subject to the grievance and arbitration procedures ... as the *sole and exclusive remedy* for violations" (emphasis supplied). In *Wright v. Universal Maritime Service Corporation*, the Court gave an example of an agreement that would *not* satisfy the "explicitly stated" standard—an agreement providing for arbitration of all disputes arising under the agreement and a clause stating that "no provision or part of this Agreement shall be violative of any Federal or State Law."

To date, the only other contract language found to have satisfied the "explicitly stated" standard is that in the Fourth Circuit's decision in *Singletary v. Enersys, Inc.*:

> Any and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement.

It is difficult to understand how the language in *Singletary* which provides for arbitration of claims arising under "federal or state employment law" differs in substance from the language of *Wright v. Universal Maritime Service Corporation*, which provides for arbitration of actions "violative of any Federal or State Law." Indeed, one can reasonably foresee that another court, faced with an identical agreement, would reach the opposite conclusion.

The Seventh Circuit's decision in *Vega v. New Forest Home Cemetery* does not, except in the most general terms, explain why the agreement in that case did not

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[54] *Vadino*, 903 F.2d at 266.

[55] *Jones*, 2017 U.S. App. LEXIS 8695, at *7 (citing *Vadino*, 903 F.2d).

[56] *Jones*, 2017 U.S. App. LEXIS 8695, at *17.

[57] The Seventh Circuit assessed whether the claim depended "on the disputed interpretation of a collective bargaining agreement provision." *Jones*, 2017 U.S. App. LEXIS 8695 at *7.

[58] *Jones*, 2017 U.S. App. LEXIS 8695, at *16.

[59] *See Patton v. Stolle Mach. Co., LLC.*, 2015 U.S. Dist. LEXIS 112326, at *8 (D. Colo. Aug. 25, 2015).

[60] Because the issue had not been raised below, the Court refused to consider whether the collective bargaining agreement before it "clearly and unmistakably" required the employees to arbitrate their ADEA claims. As had the lower courts, the Court merely assumed that the contractual waiver was "clear and unmistakable."

satisfy the "explicitly stated" standard (though few would argue that the court did not reach the correct decision). The contract negotiator must, therefore, await further decisions to fully understand what is required to satisfy the standard. Until that time, consider including the following in the agreement:

- a provision that the employer will comply with named federal, state and local laws (e.g. the Fair Labor Standards Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act, [state and local laws by name or citation]); *etc.*
- an affirmative statement that any dispute regarding the interpretation or application of the provisions described in the preceding sentence will be subject to the grievance and arbitration procedure under the agreement and that that procedure will be the employee's *exclusive remedy.*
- an affirmative grant of authority to the arbitrator of jurisdiction over the interpretation and application of federal, state, and local law.

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Robotics and Automation in the Workplace

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Introduction

It is indisputable that technology has a major impact on daily life in the 21st century and will continue to do so. The Pew Research Institute's 2014 Future of the Internet survey uncovered wide agreement that robotics and artificial intelligence will permeate most aspects of daily life by 2025, including health care, transportation, customer service, and home maintenance.[1] Yet, when it comes to the workforce, experts disagree as to whether technology will ultimately create or displace more jobs. Of the 1,896 experts surveyed by the Pew Research Institute, 48 percent envisioned a future in which robots and related technologies displaced blue- and white-collar workers, leading to further income inequality and unemployment.[2] However, 52 percent of experts responded that even if robots took over human jobs, technology would lead to the creation of new jobs and industries.[3] Other studies have painted a similar picture, such as Oxford's 2013 study, which indicated that 47 percent of American jobs are at "high risk" of being taken over by computers in the next 10 to 20 years.[4] Experts indicate that industries hit the hardest may include automotive, manufacturing, and food services.[5]

Even though the full impact of robotics and automation on the workplace may be unknown, one thing is certain – employers should be aware of potential legal landmines and start planning now. This article focuses on areas of employment law that may see the biggest impact, and key issues employers should consider when integrating these new technologies.

Examples of Robotics and Automation

Robotics and automation are beginning to impact a wide swath of industries. Self-driving vehicles have already received widespread coverage. Many transportation companies and automobile manufacturers are committing significant resources to developing and rolling out these technologies. Last year the White House predicted that automation may eventually replace 1.3 to 1.7 million heavy and tractor-trailer truck-driving jobs.[6] Manufacturing is another area where workers are already commonly working beside robots and automated technology. Retailers even use robots to quickly and efficiently fulfill and ship online orders.[7]

But robots are not just taking on manual labor and manufacturing roles; they are also performing human resource related tasks, such as conducting job interviews and acting as customer service representatives.[8] The medical field has also seen an influx of robots performing neurological, orthopedic, and general surgery – and even

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[1] Aaron Smith & Janna Anderson, *AI, Robotics, and the Future of Jobs*, Pew Research Center (August 6, 2014), *available at* http://www.pewinternet.org/2014/08/06/future-of-jobs/.

[2] Smith, et al., *supra* note 1.

[3] Smith, et al., *supra* note 1.

[4] Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?* University of Oxford (Sept. 17, 2013), *available at http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf*.

[5] Christie Nicholson, *Our Rising Robot Overlords: What Is Driving the Coming Upheaval* (August 24, 2011), *available at* http://www.zdnet.com/article/our-rising-robot-overlords-what-is-driving-the-coming-upheaval/.

[6] Alana Semuels, *When Robots Take Bad Jobs*, The Atlantic (February 27, 2017), available at https://www.theatlantic.com/business/archive/2017/02/when-robots-take-bad-jobs/517953/.

[7] Sam Shead, *Amazon Now Has 45,000 Robots in its Warehouses*, Business Insider (Jan. 3, 2017), *available at* http://www.businessinsider.com/amazons-robot-army-has-grown-by-50-2017-1.

[8] *See, e.g.,* Cameron Scott, *As Robots Evolve the Workforce, Will Labor Laws Keep Pace?* Singularity Hub (Mar. 16, 2014), *available at* https://singularityhub.com/2014/03/16/robots-entering-the-workforce-but-are-labor-laws-keeping-up/ (discussing "Sophie" the human resources interviewing robot that measures interviewees' "psychological responses" to questions, such as their eye movement, along with their verbal answers); *see also* News Release, *Lowe's Introduces LoweBot – The Next Generation Robot to Enhance the Home Improvement Shopping Experience in the Bay Area*, PR Newswire (Aug. 30, 2016), *available at* http://www.prnewswire.com/news-releases/lowes-introduces-lowebot—the-next-generation-robot-to-enhance-the-home-improvement-shopping-experience-in-the-bay-area-300319497.html (discussing Lowe's new robot that can assist employees and customers by, for example, helping them locate products in the store).

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reducing surgical complications by up to 80 percent.[9] Without question, robotics and automated technology are permeating many industries, and they will continue to do so in the years to come.

Potential Issues of Workplace Compliance

Ongoing technological developments in areas such as robotics and automation could have a potentially significant impact on several areas of labor and employment law. In some ways, these technologies may improve opportunities for individuals in the workforce, but they also may lead to widespread displacement of certain workers and new areas of liability.

Wage and Hour

Several areas of wage and hour law are likely to be impacted by technological advancements in robotics. With the incorporation of robots, more employees may be able to perform their jobs remotely through telemanipulation. Employees may perform jobs by controlling robots or automated systems from different rooms, worksites, states, or even countries than where the robot is physically located. However, when workers perform their jobs remotely there can be wage and hour consequences. Most employees in the United States are covered by federal employment laws, such as the Fair Labor Standards Act[10] (FLSA), in addition to the wage and hour laws implemented by many states and municipalities. Generally, the law of the state where the work is performed applies. For example, the California Supreme Court has held that even when an employee may live and work primarily out of state, California's wage and hour laws may apply when the employee performs work within the state for an entire day.[11] Employers may now have to ensure compliance with employment laws in additional, or even multiple, jurisdictions for the same employee within a given pay period. If employees travel consistently and work remotely, this could further complicate the application of employment laws. As remote work trends develop, perhaps an argument can be made that the location of the robot is where the physical work is actually being performed.

These technologies will also likely create jobs where employees have substantial downtime, e.g., an employee simply oversees a robot performing its job and only has to respond when an error occurs. In theory, remote employment could substantially reduce the amount of compensable time worked by eliminating the obligation to compensate employees for down-time formerly spent at the workplace. However, under current employment laws, like the California Labor Code, "on-call" time may still be compensable depending on the amount of control the employer exerts over the employee's ability to engage in personal activities.[12]

Workplace Displacement

The main concern for most individuals in the workforce is the potential displacement of jobs by robots and automation. While employers are not prohibited from redesigning their workforce to eliminate human jobs, employers should plan for and take appropriate steps to ensure a smooth transition. For example, where human jobs have been eliminated, employers could provide severance agreements in exchange for releases from employees who are affected by a reduction in force (RIF), or retrain employees for alternative positions within the company. For employers with more than 100 employees, replacing the workforce with robots may trigger legal obligations under the Worker Adjustment and Retraining Notification Act[13] (WARN Act). Under the WARN Act, certain employers may be required to provide 60 days advance notice to employees, union representatives, and state and local government officials if they decide to (1) close a plant that would result in a loss of 50 or more employees during a 30-day period, or (2) institute a mass lay-off at a site that would result in a loss of 500 or more employees (or in the case of 50 to 499 employees, if 33 percent of the active workforce is affected). In addition, some states, such as California, have a state WARN Act with which an employer may have to comply.[14]

Discrimination

Mass lay-offs may also have an unintended consequence on a protected group of individuals. Courts recognize two separate theories of discrimination in the workplace: disparate treatment and disparate impact. The traditional understanding of discrimination that is familiar to most lay persons is the disparate treatment theory, where an employer intentionally discriminates against an employee on the basis of a protected characteristic, such as the employee's race, sexual orientation, gender, disability, age, religion, etc. However, even when an employer has

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[9] Denise Johnson, *The Impact of Robots Replacing Humans in the Workplace*, Carrier Management (Aug. 27, 2015), *available at* http://www.carriermanagement.com/features/2015/08/27/144510.htm.

[10] 29 U.S.C. § 201 et seq.

[11] Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1206 (2011).

[12] Mendiola v. CPS Security Solutions, Inc., 60 Cal. 4th 833, 840 (2015).

[13] 29 U.S.C. § 2101 et seq.

[14] *See, e.g.*, California Worker Adjustment and Retraining Notification Act, Cal. Lab. Code § 1400 et seq.

no discriminatory animus, there is a danger that the policies, practices, rules or other systems used in a RIF may appear innocuous or neutral on their face, but result in a disproportionate impact on a protected group. A reduction in force that disproportionately impacts a protected group, such as older workers or women – two groups that have historically been underrepresented in the technology and engineering field, may lead to disparate impact discrimination claims on either individual or class-action bases.

Accommodations for Employees with Disabilities

Under the Americans with Disabilities Act[15] (ADA), employers are required to provide reasonable accommodations to qualified employees with disabilities.[16] Generally, this means providing an accommodation that does not cause an undue hardship to the employer's operations.[17] With the introduction of advanced robotic systems and related technologies, there may be a significant increase in the number and types of jobs that persons with disabilities will be able to perform. In addition, we are likely to see the idea of what accommodations are "reasonable" evolve over time. Robotics and automation will probably become more affordable as they become the norm; thus, expanding the reasonable accommodation options for employees, and making some undue hardship defenses less viable for employers. For example, in the foreseeable future, it may be a reasonable accommodation for an employer to provide employees who are confined to a wheelchair or have lifting restrictions with exoskeletons that will assist them with performing manual operations. Thus, an employer's obligation to engage in an interactive discussion may include the consideration of expanded accommodation options inspired by creative new technologies.

Health and Safety

The federal Occupation Safety & Health Act[18] (OSHA), as well as some equivalent state statutes - such as the California Occupational Safety and Health Act of 1973[19] (Cal/OSHA), dictate health and safety standards for workplaces. Currently, OSHA does not have any standards that specifically target robotics and automation in the workplace.[20] One concern is that workers performing their jobs alongside robotic systems could be injured by the system itself or by human error. Whereas heavy robots used to typically do their work within a safety cage, companies are more commonly using collaborative, light-weight robots that work alongside their human counterparts. Such proximity may increase the physical interaction between workers and machines.[21] As companies incorporate these technologies, they should ensure appropriate safety mechanisms and training programs are in place, including presence or proximity detectors that halt all robotic motion when they detect the presence of body parts or other objects in close proximity to the robot, or to moving or otherwise hazardous parts. Additionally, experts actually report a positive impact on safety due to robotics – the increase in automation has actually led to the fall of workplace fatality rates.[22] Robots and automation may also be used to protect workers from repetitive stress injuries or to improve ergonomics.

What Should Employers Do?

Robotic technology, which was once just the stuff of science fiction, is closer to reality than many people may realize. Recent booms in development, such as improvements in cloud computing, sensor technology and data analytics, coupled with falling prices, have led to exponential growth in robotics, automation and artificial intelligence. Employers in all industries should start planning now.

As companies incorporate robotics and automation into their labor pools, they should involve their human resources and legal departments to consider potential areas of risk or liability. Human resource and legal professionals can help strategize how to overcome potential workplace issues and implement policies and procedures to reduce risk. Companies at the forefront of this new

[15] 42 U.S.C. § 12101 et seq.
[16] 42 U.S.C. § 12112 et seq.
[17] 42 U.S.C. § 12112 et seq.
[18] 29 U.S.C. § 651 et seq.
[19] Cal. Lab. Code § 6300 et seq.

[20] However, note that OSHA did issue such guidelines in 1987, which are now vastly outdated. *See* OSHA, *Guidelines for Robotics Safety*, Instruction Pub. No. STD 01-12-002 (PUB 8-1.3), (Sept. 21, 1987) ("OSHA Guidelines"), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1703. In addition, Section IV: Chapter 4 of OSHA's Technical Manual also addresses Industrial Robots and Robot System Safety (*available at* https://www.osha.gov/dts/osta/otm/otm_iv/otm_iv_4.html) and OSHA's Concepts and Techniques of Machine Safeguarding, OSHA 3067 (1992) (Revised) contains a chapter on Robotics in the Workplace *(available at* https://www.osha.gov/Publications/Mach_SafeGuard/toc.html).
[21] OSHA Guidelines, *supra* n.20, at App. A, sec. A-5.
[22] OSHA Guidelines, *supra* n.20, at App. A, sec. A-2.

technological revolution may also consider working to shape the development of legislation and related regulations.

Employers should also consider taking proactive steps to plan for potential workforce displacement events. For example, employers may develop training programs to help workers develop complementary skills and knowledge, or move into different roles that are not being automated.

Despite the unique workplace issues created by technological advancements, employers who are proactive will likely see positive impacts on their business as a result of robotics and related technologies.

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SUPREME COURT REVIEW

High Court Reverses Circuits on Definition of "Church Plan"

Advocate Health Care Network, v. Stapleton, Nos. 16-74, 16-86, 16-258, 2017 U.S. LEXIS 3554 (U.S. June 5, 2017)

In December 0f 2015, the Third Circuit, addressing an issue of first impression among the U.S. Courts of Appeals, held that a retirement benefit plan maintained by a church agency may not qualify for ERISA exemption as a "church plan" unless the plan was also *established* by the church with which the agency is affiliated. *Kaplan v. St. Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015). See NP Lareau "Plans Established by Church Agency Not "Church Plans," Exempt from ERISA" 16 Bender's Lab. & Empl. Bull. 31 (February 2016). In other words, if the benefit plan was established not by the church, but by the agency itself, it cannot claim church plan status.

When Congress enacted ERISA in 1974, § 3(33) defined a church plan, in relevant part, as follows:

> (A) The term "church plan" means (i) a plan established and maintained for its employees by a church . . . , or (ii) a plan described in subparagraph (C).
>
> * * *
>
> (C) . . . [A] plan in existence on January 1, 1974, shall be treated as a "church plan" if it is established and maintained by a church . . . for its employees and employees of one or more agencies of such church . . . and if such church . . . .

In 1980, Congress amended § (33) to provide, in relevant part:

> (A) The term "church plan" means a plan established and maintained . . . for its employees . . . by a church . . . .
>
> (C) For purposes of [paragraph 33]—
>
> > (i) A plan established and maintained for its employees . . . by a church . . . includes a plan maintained by an organization . . . the principal purpose or function of which is the administration of a plan . . . for the provision of retirement benefits . . . for the employees of a church . . . if such organization is controlled by or associated with a church . . . .

Neither the original definition of a church plan nor the amended definition resolve the question raised in . *Kaplan v. St. Peter's Healthcare System*: whether a church agency may maintain a tax exempt church plan that it, itself, established; i.e., a plan that was not *established* by a church.

The Third Circuit answered the question in the negative, relying on the statutory language, which, it held, was determinative: "the statute has a plain meaning, and that meaning sets the result." The court reasoned:

> Prior to 1980, a plan needed to be established *and* maintained by a church. The 1980 amendments provided an alternate way of meeting the maintenance requirement by allowing plans maintained by church agencies to fall within the exemption. But they did not do away with the requirement that a church establish a plan in the first instance.

810 F.3d 175, 180 (emphasis in original).

Commenting on the decision, the Bulletin observed that "alternative interpretations of the statutory language are plausible" and that other courts might be persuaded to reach the opposite conclusion. However, the next U.S. appellate decision to address the issue, *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. March 17, 2016), agreed with *St. Peter's*. In *Stapleton*, the Seventh Circuit stated:

> [T]he question presented in this case is: does a plan established by a church-affiliated organization . . . qualify as a church plan under ERISA?
>
> This same question is springing up across the country and although the district courts have heretofore been divided with no rulings from the circuit courts, the Third Circuit, just a short while ago, became the first circuit court to weigh in on the debate, siding with the district court in this case below that a church-affiliated organization such as Advocate cannot establish an ERISA-exempt plan. . . . Today this Circuit weighs in on the debate, siding with our colleagues on the Third Circuit.

A short time later, the Ninth Circuit joined the Third and Seventh Circuits in holding that a plan maintained by an organization affiliated with a church does not qualify as a church plan unless the plan was established by the church. *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016).

In *Advocate Health Care Network, v. Stapleton*, Nos. 16-74, 16-86, 16-258, 2017 U.S. LEXIS 3554 (U.S. June 5, 2017), a unanimous (Justice Gorsuch took no part in the consideration or decision of the cases) Supreme Court reversed. Justice Kagan, who wrote for the Court first pointed to the language of the amended §1002(33)(C)(i), noting:

> That is a mouthful, for lawyers and non-lawyers alike; to digest it more easily, note that everything after the word "organization" in the third line is just a (long-winded) description of a particular kind of church-associated entity—which this opinion will call a "*principal-purpose organization*." The main job of such an entity, as the statute explains, is to fund or manage a benefit plan for the employees of churches or (per the 1980 amendment's other part) of church affiliates.

(2017 U.S. LEXIS 3554, at *7, emphasis supplied).

Employing algebraic substitution to reduce the pertinent part of the statute to "user-friendly form," Justice Kagan comes up with the following:

> Under paragraph (A), a "'church plan' means a plan established and maintained . . . by a church."
>
> Under subparagraph (C)(i), "[a] plan established and maintained . . . by a church . . . includes a plan maintained by [a principal-purpose] organization."

(2017 U.S. LEXIS 3554, at *9-10). From that point, resolution of the issue was a simple exercise in logic:

> Start, as we always do, with the statutory language—here, a new definitional phrase piggy-backing on the one already existing. The term "church plan," as just stated, initially "mean[t]" only "a plan established and maintained . . . by a church." But subparagraph (C)(i) provides that the original definitional phrase will now "include" another—"a plan maintained by [a principal-purpose] organization." That use of the word "include" is not literal—any more than when Congress says something like "a State 'includes' Puerto Rico and the District of Columbia." Rather, it tells readers that a different type of plan should receive the same treatment (i.e., an exemption) as the type described in the old definition. And those newly favored plans, once again, are simply those "maintained by a principal-purpose organization"—irrespective of their origins. In effect, Congress provided that the new phrase can stand in for the old one as follows: "The term 'church plan' means a plan established and maintained by a church [a plan maintained by a principal-purpose organization]." The church-establishment condition thus drops out of the picture.
>
> Consider the same point in the form of a simple logic problem, with paragraph (A) and subparagraph (C)(i) as its first two steps:
>
> Premise 1: A plan established and maintained by a church is an exempt church plan.
>
> Premise 2: A plan established and maintained [*12] by a church includes a plan maintained by a principal-purpose organization.
>
> Deduction: A plan maintained by a principal-purpose organization is an exempt church plan.
>
> Or, as one court put the point without any of the ERISA terminology: "[I]f A is exempt, and A includes C, then C is exempt." Just so. Because Congress deemed the category of plans "established and maintained by a church" to "include" plans "maintained by" principal-purpose organizations, those plans—and all those plans—are exempt from ERISA's requirements.

(Footnote and citations omitted).

State Lacked Personal Jurisdiction over FELA Claims by Employees Who Did Not Work in State

BNSF Railway Co v. Tyrrell, 2017 U.S. LEXIS 3395 (May 30, 2017)

In *Daimler AG v. Bauman*, 2014 U.S. LEXIS 644 (U.S. Jan. 14, 2014), the Supreme Court held that a German

corporation could not be sued in California for injuries allegedly suffered in Argentina by workers employed by the corporation's subsidiary. Rejecting the plaintiff's arguments that the German corporation's activities of importing and distributing its products in California was sufficient to confer jurisdiction, the Court held that even if it "were to assume that [the subsidiary] is at home in California, and further to assume [the subsidiary]'s contacts are imputable to [the corporation], there would still be no basis to subject [the corporation] to general jurisdiction in California, for [the corporation]'s slim contacts with the State hardly render it at home there.

In *BNSF Railway Co v. Tyrrell*, the Court reinforced that opinion, holding that the Federal Employers' Liability Act (FELA), which makes railroads liable in money damages to their employees for on-the-job injuries, did not confer personal jurisdiction in Montana state courts over a claim for damages where the employees were not injured in Montana, did not reside there, and BNSF was not incorporated and did not maintain is principal place of business in the state. The Court first rejected the argument that §56 of the FELA conferred jurisdiction, concluding that the section did not speak to personal jurisdiction and served merely as a venue prescription. It further concluded that Montana's attempt to assert jurisdiction on the basis of BNSF's contacts with the state (it has over 2000 miles or railroad and employs over 2000 workers) were precluded by the 14th Amendment.

Supreme Court May Review State Immunity under USERRA

Clark v. Virginia of State Police, 2017 U.S. LEXIS 3016 (U.S. May 15, 2017)

Jonathan Clark Clark, a sergeant in the Virginia State Police (VSP) and a captain in the United States Army Reserve, was deployed or mobilized in support of the military's "Operation Enduring Freedom" between April 2008 and January 2011. Upon his return to the VSP, Clark alleges that his superiors engaged in a pattern and practice of harassment, retaliation and discrimination because of his military service. On August 19, 2011, Clark complained in a formal administrative grievance that VSP had violated his USERRA rights. A hearing officer appointed by the Commonwealth of Virginia agreed and ordered VSP to remove the disciplinary charges from his personnel file.

Nonetheless, according to Clark the harassment continued apace. On January 20, 2015, Clark filed a complaint in Virginia state court, alleging that VSP's conduct violated USERRA. VSP responded by arguing that Clark's USERRA claims were barred by the Eleventh Amendment to the United States Constitution. The Supreme Court of Virginia ultimately sustained Virginia's 11th Amendment argument, holding that, despite Congress' amendment of USERRA to provide state employees a right of action in state court against their state-agency employers, nonconsenting state agencies remain immune to suits for *in personam* damages.

Clark filed a petition for certiorari with the Supreme Court and, on May 15, the Court invited the Acting Solicitor General to file briefs expressing the views of the United States on the issues raised.

RECENT DEVELOPMENTS

ADA

Promotion Not A Reasonable Accommodation

Brown v. Milwaukee Bd. of School Directors, 855 F.3d 818 (7th Cir. May 4, 2017)

Sherlyn Brown ("Brown") was an assistant principal with the Milwaukee Public Schools ("Milwaukee Schools"). When she began to experience knee pain, her doctor diagnosed her with severe arthritis and recommended that she be moved to a job with limited mobility requirements. Milwaukee Schools accommodated Brown by changing her work location and modifying her job duties so that she no longer would need to physically intervene with students. After Brown underwent knee replacement surgery, she injured her knee again while restraining an unruly student. Following a medical leave of absence, Brown returned to work with the limitation that she should avoid contact with potentially combative students.

Because an assistant principal position involves student contact, Milwaukee Schools discussed with Brown the possibility of assigning her to an alternative position that did not involve contact with students. Brown applied for two positions that did not involve interaction with students who might be unruly, but Brown was not selected for either position. Brown remained on a medical leave of absence, but after she exhausted the three years of leave to which she was entitled under Milwaukee Schools' policies, she was terminated.

Subsequently, Brown filed suit in federal court for the Eastern District of Wisconsin, claiming that Milwaukee Schools had violated the Americans with Disabilities Act ("ADA") by failing to accommodate her disability and, then, terminating her. Following discovery, both Brown and Milwaukee Schools moved for summary judgment. The district court granted Milwaukee Schools' motion and denied Brown's.

Brown appealed to the Seventh Circuit Court of Appeals. In her appeal, Brown contended that Milwaukee Schools should have accommodated her disability involving her knee by reassigning her to a vacant position. All but one of the vacant positions Brown identified as being ones she could have performed involved interaction with students. Although Brown argued that she could perform a position involving student interaction, the Seventh Circuit disagreed. Because Brown's doctor had restricted her from being in proximity with potentially unruly students and all students are potentially unruly, the appeals court reasoned she was not qualified to perform those positions.

With respect to the one vacant position that did not involve interaction with students (a Title I Coordinator position), the Seventh Circuit found that Milwaukee Schools was not required to offer Brown the position because it constituted a promotion, as the position would have increased Brown's pay grade and salary as well as her job responsibilities. The Seventh Circuit explained that the ADA does not require an employer to reassign a disabled employee to a vacant position that would constitute a promotion.

Accordingly, because the undisputed facts demonstrated that Milwaukee Schools acted on the basis of the restrictions imposed by Brown's doctors and no reasonable accommodation of her disability was possible, the Seventh Circuit affirmed the district court's grant of summary judgment.

Additional Leave Not Reasonable Accommodation

Delgado Echevarria v. AstraZeneca Pharm. LP, 2017 U.S. App. LEXIS 7774 (1st Cir. May 2, 1017)

Taymari Delgado Echevarria ("Delgado") worked as a hospital specialist for AstraZeneca Pharmaceutical, LP ("Astra Zeneca"). After Delgado was diagnosed with severe depression and extreme anxiety, her doctor recommended that she refrain from working. Delgado's doctor estimated that she would need to be on leave for approximately five months. Delgado sought short-term disability ("STD") under AstraZeneca's benefit policies, and Delgado was awarded STD benefits, which continued until the end of April, 2012.

After her STD benefits terminated, AstraZeneca informed Delgado that she would need to return to work by mid-May or the company would presume that she had resigned her employment. Instead of returning to work, Delgado's doctor provided additional documentation to AstraZeneca in which Delgado's doctor stated she was unable to work at the time and requested that she remain on leave for twelve months. AstraZeneca determined that the information from Delgado's doctor did not support continuing her STD benefits, and AstraZeneca reiterated that Delgado needed to return to work by mid-May. Delgado failed to do so. Two months later, Delgado was informed that due to a company reorganization her position was being eliminated, and she was offered a severance package.

Delgado did not accept AstraZeneca's offer, but, instead, filed suit in the federal district court for Puerto Rico, claiming that AstraZeneca had violated the Americans with Disabilities Act ("ADA") and Puerto Rican law by failing to reasonably accommodate her disability and by retaliating against her for seeking an accommodation. The district court granted summary judgment in favor of AstraZeneca, and Delgado appealed to the First Circuit Court of Appeals.

On appeal, Delgado argued that the request for an additional twelve months of leave was a reasonable accommodation, which should have been provided to her by AstraZeneca. In addressing Delgado's argument, the First Circuit noted that a leave of absence or a leave extension can constitute a reasonable accommodation under the ADA. However, in Delgado's case, the appeals court found that she had failed to sufficiently demonstrate that she would have been able to return to work after any extended leave expired. Although Delgado's doctor submitted a form estimating that her period of incapacity would be twelve months, the court of appeals pointed out that Delgado had failed to submit any medical documentation that she would have been able to return to work after the twelve month period.

Moreover, even if Delgado had done so, the First Circuit questioned whether a request for such a lengthy period of leave constituted a facially reasonable accommodation, especially when coupled with her prior five month leave period. The court noted that a number of other circuit courts had concluded that leave periods of less than twelve months were not on their face reasonable. As the appeals court explained, a request for a lengthy period of leave imposes what the court characterized as "obvious burdens" on an employer by needing to cover an absent employee's job responsibilities.

In Delgado's case, the court of appeals found that Delgado had failed to show that her requested accommodation of twelve months of leave was facially reasonable.

Accordingly, the First Circuit held that AstraZeneca was properly granted summary judgment on Delgado's ADA disability discrimination claim for failure to accommodate. The appeals court pointed out, however, that its ruling was a narrow one and dictated by the facts of the case. The First Circuit cautioned that its decision did not mean that in different circumstances, a similarly lengthy period of time could not be a reasonable accommodation.

In addition to affirming the district court's dismissal of Delgado's failure to accommodate claim, the First Circuit also addressed the district court's dismissal of Delgado's claim that AstraZeneca had retaliated against her for seeking a reasonable accommodation. Although there was a temporal proximity between Delgado's request for additional leave and her letter of termination, the First Circuit explained that close temporal proximity standing alone cannot satisfy a plaintiff's burden of establishing that the employer's adverse job action was retaliatory. In Delgado's case, the court of appeals found that Delgado had failed to show that the reason AstraZeneca advanced for her termination, i.e., that her position was eliminated and Delgado was unable to return to work after her short term disability leave expired, was a pretext for retaliation against her. Accordingly, the First Circuit upheld the district court's dismissal of Delgado's ADA retaliation claim, as well as her remaining claims under Puerto Rican law.

NLRA

Sixth Circuit Joins Fray over Mandatory Arbitration Clauses

NLRB v. Alternative Entertainment, Inc., 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017)

In *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), the National Labor Relations Board held that an employer who requires employees to sign an agreement precluding them from bringing, in any forum, a class or collective action regarding wages, hours, and terms and conditions of employment violates the NLRA because it deprives employees of the *substantive* statutory right to engage in concerted activities for their mutual aid and protection. The Board held that the right to bring a class or collective action was substantive, rejecting D.R. Horton's argument that the right to bring a class or collective action was purely procedural. On appeal, a panel of the Fifth Circuit, split 2-1, disagreed, finding that "[t]he use of class action procedures . . . is not a substantive right" and that the Board had failed to give appropriate weight to the Federal Arbitration Act ("FAA"). *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 358 (5th Cir. 2013).

By the end of 2013, two other circuits were in agreement with the Fifth Circuit that the Board's position was wrong. The Eighth Circuit, in *Owen v. Bristol Care Inc*., 702 F.3d 1050 (8th Cir. 2013), held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA. The Eighth Circuit noted that it ''owe[s] no deference'' to the Board's reasoning [in *D.R. Horton*] because it has ''no special competence or experience in interpreting the [FAA].'' The Second Circuit, in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), also held that, in the context of an FLSA claim, a class-action waiver provision in an arbitration agreement should be enforced in accordance with its terms.

In 2014, the Board reexamined the issue in *Murphy Oil USA, Inc*., 361 N.L.R.B. No. 72, 2014 NLRB LEXIS 820 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* 37 S. Ct. 809, 196 L. Ed. 2d 595, 85 U.S.L.W. 3344 (U.S. Jan. 13, 2017), and, in a well-reasoned opinion, affirmed its original position. The Board reasoned that the NLRA is "*sui generis,*" not "simply another employment-related federal statute.[,]" and because protection for collective action lies at the heart of the NLRA, the Board concluded that the FAA must yield.

After the Board's decision in *Murphy Oil*, two circuits agreed with its position and the Supreme Court granted certiorari. In *Lewis v. Epic Systems Corp*., 823 F.3d 1147[23] the Seventh Circuit held that a mandatory agreement requiring employees to waive the right to bring a class or collective action violates the NLRA. Three months after the *Epic Systems* decision, the Ninth Circuit expressly agreed with the position adopted by the Seventh Circuit. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. Cal. Aug. 22, 2016).

Now the Sixth Circuit has chimed in, agreeing with the position of the Seventh and Ninth Circuits (and the Board). In *NLRB v. Alternative Entertainment, Inc*., 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017), that court, affirming the Board, stated:

> we join the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable. Such a provision violates the NLRA's guarantee of the right to collective action and, because it violates the NLRA, falls within the FAA's saving clause.

[23] 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016).

Second Circuit Affirms Board Holding that Ban on Employee Recordings Unlawful

Whole Foods Market Group., Inc. v. NLRB, 2017 U.S. App. LEXIS 9638 (2d Cir. June 1, 2017)

Whole Foods Markets maintain a written policy that prevents employees from "recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules" without management approval. Applying the framework it enunciated in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004), the Board concluded: (1) that the employee recording of events that take place at or near the workplace may, in certain circumstances, protected activity; and (2) that, because Whole Foods' no-recording policies prohibited all recording without management approval, "employees would reasonably construe the language to prohibit" recording protected by Section 7.

On appeal to the Second Circuit, Whole Foods argued that the purpose of the policy was to promote employee communication in the workplace. The court rejected the argument:

> despite the stated purpose of Whole Foods' policies-to promote employee communication in the workplace-the Board reasonably concluded that the policies' overbroad language could "chill" an employee's exercise of her Section 7 rights because the policies as written are not limited to controlling those activities in which employees are not acting in concert.

Accordingly, the court affirmed the Board's decision.

Title VII

Sexual Orientation Discrimination under Title VII Remains Hot-Button Issue

Zarda v. Altitude Express, Inc., No. 15-3775 (2d Cir. May 25, 2017)

In less than month this spring (March 10-April 4, 2017), three of the U.S. Circuit Courts of Appeal addressed the issue of whether discrimination on account of an individual's sexual orientation is precluded by Title VII. In the first, *Evans v. Georgia Regional Hospital,* 850 F.3d 1248 (11th Cir. Mar. 10, 2017), the Eleventh Circuit held that it was not. In the second, *Anonymous v. Omnicom Grp., Inc*., 852 F.3d 195 (2d Cir. 2017), a Second Circuit panel agreed, but only because it was constrained by circuit precedent. The concurring opinion in the Second Circuit case argued strongly that the issue should be revisited *en banc* and the circuit precedent overturned. In the third, the Seventh Circuit, sitting *en banc*, became the first federal appellate court to hold that Title VII prohibits discrimination on the basis of sexual orientation. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). In doing so, the *en banc Hively* court, in large part, adopted the theories advanced in the concurring opinion of the Second Circuit's decision in *Omnicrom*.

On May 25, 2017, the Second Circuit also decided it would review the issue *en banc*, agreeing to review a panel decision in *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), in which the court rejected the argument that sexual orientation discrimination was prohibited under Title VII. As with the decision in *Omnicrom*, the panel in *Zarda* relied upon earlier circuit precedent as precluding review of the issue. Oral argument in *Zarda* is set for September 26, 2017.

Finally, it should be noted that a request for *en banc* review by the Eleventh Circuit in *Evans v. Georgia Regional Hospital* has been filed and is currently pending before that court. The Bulletin will continue to closely follow these cases.

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2017

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Oct. 19-20	NELI: Affirmative Action Briefing	Washington, DC
Oct. 25	NELI: Affirmative Action Workshop	San Francisco, CA
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