2019-2020 United States Supreme Court Update

Akron Bar Association

Labor & Employment Law Section

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Presented by

Karen D. Adinolfi, Esq., Roetzel & Andress

and

Latha M. Srinivasan, Esq., FirstEnergy

Bostock v. Clayton County, Georgia, et al.

A Brief History of Title VII and Claims of Discrimination Based on LGBTQ Status

How Did We Get to Bostock?

- **Title VII**
  - Prior to the *Bostock* decision, the Supreme Court had not recognized sexual orientation, gender identity, or transgender status as protected under Title VII.
  - Long-standing and sufficient circuit split which made the issue ripe for SCOTUS review.
  - **1984:** Seventh Circuit interpreted "sex" as traditional chromosomal pattern and reversed district court's decision, which had found that a pilot's termination following M2F gender reassignment surgery violated Title VII. *Ulane v. Eastern Airlines,* 581 F. Supp. 821 (N.D. Ill. 1983), rev'd, 742 F. 2d 1081, 35 FEP 1348 (7th Cir. 1984), cert denied, 471 U.S. 1017 (1985).
  - **1989:** Supreme Court expanded the concept of what constitutes "sex discrimination" beyond discrimination based solely on one's biological sex, holding that Title VII prohibition against sex includes sex-stereotyping and discrimination based on gender. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).
  - Despite the *Price Waterhouse* decision, prior to the mid-2000's, courts routinely denied claims by LGBT individuals, interpreting their claims as attempts to add sexual orientation and gender identity to the scope of Title VII, which was largely still interpreted using traditional definition of "sex" (biological/chromosomal)

How Did We Get to Bostock?

- **Things Slowly Begin to Change In the Lower Courts**
  - **2008:** Applicant in midst of male-to-female transition whose offer was rescinded the day after he told his supervisor of his transition was found to be protected under Title VII under a sex stereotyping theory, based on the supervisor's comments. *Schroer v. Billington,* 577 F. Supp.2d 293 (D.D.C. 2008)
  - **2011:** Eleventh Circuit applied Title VII principles to plaintiff's right to equal protection of the law, holding that discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender. *Glenn v. Brumby,* 663 F.3d 1312 (11th Cir. 2011)

How Did We Get to Bostock?

The EEOC Becomes Involved – Federal Employees

- **April 2012**: EEOC extended its interpretation of Title VII to provide protection for transgender individuals. *Macy v. Holder,* 2012 WL 1435995 (EEOC Apr. 20, 2012).
  - Found that claims rooted in "gender identity, change of sex, and/or transgender status are cognizable under Title VII's sex discrimination prohibition."
  - Overruled nearly 40 years of EEOC decisions that had continuously rejected sex discrimination claims by transgender employees

How Did We Get to Bostock?

- ## The EEOC after *Macy*
  - **May 2013:** Intentional misuse of employee's new name and pronoun may cause harm to employee, and may constitute sex based discrimination and/or harassment. *Jameson v. U.S. Postal Service,* EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013).
  - **April 2014:** A sex discrimination allegation involving the failure to revise agency records pursuant to changes. *Complainant v. Dept. of Veteran Affairs,* EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).

How Did We Get to Bostock?

- **EEOC after *Macy* (cont'd)**
  - **July 2015**: EEOC now interprets Title VII to provide protection for all LGBT individuals. *Complainant v. Anthony Foxx, Secretary, Dep't. of Transportation,* EEOC Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (July 16, 2015)
    - "We conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."
    - "Sexual orientation is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."

How Did We Get to Bostock?

2012 EEOC Strategic Enforcement Plan (SEP)

- Tracking gender identity and sexual orientation appeals in the federal sector;
- Issuing federal sector decisions that hold gender identity- and sexual orientation-related complaints can be brought under Title VII through the Federal EEO Complaint Process, where the EEOC has appellate adjudicatory authority;
- Issuing guidance and instructions for processing complaints of discrimination by LGBT federal employees and applicants;
- Providing technical assistance to federal agencies in developing gender transition policies and plans;
- Providing trainings and outreach to the public (more than 350 events in the first three quarters of 2014 where LGBT sex discrimination issues were discussed).

How Did We Get to Bostock?

- ## EEOC Federal Litigation
  - Sept. 2014- EEOC filed first of two sex discrimination lawsuits on behalf of transgender individuals (others followed):
    - In both cases, the EEOC set forth multi-pronged theories of sex discrimination that employer discriminated based on sex in violation of Title VII by firing an employee because she was transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.
    - Case #1: The employer fired employee after she began to present as a woman and informed them that she was transgender. The matter was settled out of court in April 2015. (*EEOC v. Lakeland Eye Clinic*, M.D. Fla. Civ. No. 8:14-cv-2421-MSS-AEP filed Sept. 25, 2014).

How Did We Get to Bostock?

- **EEOC Federal Litigation**
  - Case #2 - Michigan: In 2013, the employee gave the employer a letter explaining she was undergoing a gender transition from male to female, and would soon start to present in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, the employer fired the transgender employee, telling her that what she was "proposing to do" was unacceptable.
    - The employer's motion to dismiss was denied, and the EEOC amended its complaint. (*EEOC v. RG & GR Harris Funeral Homes*, E. D. Mich. Civ. No. 2:14-cv-13710 (filed Sept. 25, 2014).
    - Aug. 2016: The case was dismissed based on an exemption created by the Religious Freedom Restoration Act
    - EEOC appealed to Sixth Circuit.
    - January 2017: ACLU filed a motion to intervene, which was granted in March 2017.

How Did We Get to Bostock?

- **EEOC Federal Litigation**
  - Case #2 cont'd
    - March 2018: Sixth Circuit ruled that the employer unlawfully discriminated against the plaintiff when it fired her after she told the employer that she would begin presenting as a woman because she is transgender. The decision reversed the lower court's decision, which held that religious belief was sufficient to exempt the employer from anti-discrimination laws.
- At least five appeals courts have said gender identity should be protected under federal civil rights law. The Trump Justice Department last year reversed Obama-era guidance on that issue and argued transgender workers should not be protected.
- Justice Kennedy's resignation from the Supreme Court made tension and uncertainty surrounding workplace protections for LGBT workers seem likely to persist, particularly because the Trump administration was expected to choose a more conservative replacement. He was replace by Justice Brett Kavanaugh, his former law clerk.

How Did We Get to Bostock?

- **Sixth Circuit**
  - 2004--Sixth Circuit holds that Title VII applies to transgender people, based on their reading of the sex stereotyping provisions of *Price Waterhouse*. *Smith v. City of Salem, Ohio,* 378 F.3d 566 (6th Cir. 2004).
  - 2005--Sixth Circuit upholds officer's transgender discrimination award based on improper sex stereotypes. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).
  - But, 2006-- Sixth Circuit in *Vickers v. Fairfield Medical Center* dismissed a claim by an employee perceived as gay (his orientation was never disclosed), determining that Title VII does not protect sexual orientation. 453 F.3d 757 (6th Cir. 2006) (employee's harassment "reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility" but does not fit within the prohibitions of Title VII).
  - 2014: *EEOC v. RG & GR Harris Funeral Homes*

How Did We Get to Bostock?

Gender Dysphoria and the Americans with Disabilities Act

- Gender Dysphoria: the condition of feeling one's emotional and psychological identity as male or female to be opposite to one's biological sex.
- *Blatt v. Cabela's Retail Inc.* (United States District Court, E.D. Penn., Case No. 5:14-cv-04822)
  - 2017: in landmark ruling, the district court ruled that a transgender woman's employment discrimination claim under the Americans with Disabilities Act (ADA) can move forward.
  - First time a court has ruled that transgender people are not categorically barred from seeking relief from discrimination under the ADA.
  - The DOJ under both Presidents Obama and Trump have argued that gender dysphoria should be covered under the ADA, because it results from a physical impairment that is NOT excluded by the ADA

How Did We Get to Bostock?

Back to the EEOC

- In a March 1, 2016 press release, the EEOC announced that it filed two separate lawsuits related to gay employees being subjected to hostile work environments.
  - EEOC's first two sex discrimination cases based on sexual orientation.
  - EEOC's Philadelphia District Office filed suit in U.S. District Court for the Western District of Pennsylvania against Scott Medical Health Center (gay male employee), and, in a separate suit, in U.S. District Court for the District of Maryland, Baltimore Division, against Pallet Companies, dba IFCO Systems NA (lesbian employee).
  - These cases represented the EEOC's attempts to broaden the reach of Title VII to specifically include sexual orientation discrimination under the hostile work environment theory.

15

How Did We Get to Bostock?

Pallet Companies

- June 2016: Pallet Companies, doing business as IFCO Systems, paid $202,200 and provided significant equitable relief to settle the case brought by the EEOC.
- EEOC had charged that a lesbian employee at IFCO's Baltimore facility was repeatedly harassed by her supervisor because of her sexual orientation. Her supervisor made numerous comments to her regarding her sexual orientation and appearance, such as "I want to turn you back into a woman" and "You would look good in a dress," according to the suit. EEOC also alleged that the supervisor also made sexually suggestive gestures to her.
- According to the EEOC's complaint, IFCO also retaliated against the female employee by firing her just days after she complained to management and called the employee hotline to report the harassment.

16

How Did We Get to Bostock?

Scott Medical Health Center

- The District Court denied the employer's motion to dismiss based on the argument that Title VII does not apply to sexual orientation
  - In its ruling, the Court found that sexual orientation discrimination is a type of discrimination "because of sex," barred by Title VII. "There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."
  - The Court concluded, "That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate."

17

How Did We Get to Bostock?

Trump Administration Intervention in Private Lawsuit

- Gay male sky-diving instructor told a female client that he was gay. He was terminated for telling her. The employee states that he only mentioned it because he was going to be tightly strapped to her.
- On July 27, 2017, the Trump Administration's Department of Justice filed an *amicus* brief in the Second Circuit (*Zarda v. Altitude Express*) stating that Title VII of the Civil Rights Act of 1964 does not cover employment "discrimination based on sexual orientation."
- "The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts."

18

How Did We Get to Bostock?

- *En banc* Second Circuit 10-3 decision
  - "Although sexual orientation discrimination is 'assuredly not the principal evil that Congress was concerned with when it enacted Title VII,' 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils…In the context of Title VII, the statutory prohibition extends to all discrimination 'because of … sex' and sexual orientation discrimination is an actionable subset of sex discrimination."
  - 2nd Circuit joined the Seventh Circuit, which in April 2017 ruled that Indiana educator Kimberly Hively had been fired due to her sexual orientation and was protected by Title VII. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).
- Employer filed *writ of certiorari* with Supreme Court in May 2018.

19

Bostock v. Clayton County

- Opinion issued on June 15, 2020
- Actually, three cases from three different circuit courts of appeals
  - *Bostock v. Clayton County* – Eleventh Circuit – long-term employee fired for "conduct unbecoming" after he began participating in a gay recreational softball league – Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay.
  - *Zarda v. Altitude Express* – Second Circuit – employee fired days after mentioning he was gay to a customer – Second Circuit allowed claim to proceed following a motion to dismiss arguing that Title VII does not prohibit discrimination based on sexual orientation.
  - *Stephens v. R.G. & G.R. Harris Funeral Homes* – Sixth Circuit – employee, who presented as a male upon hire, fired after she informed the employer she was planning to live and work as a female – Sixth Circuit allowed claim to proceed following a motion to dismiss arguing that Title VII does not prohibit discrimination based on gender identity.

Bostock v. Clayton County

- Common issue on all three cases was this question:

What is the "ordinary public meaning" of Title VII's that it is "unlawful . . . For an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."

In other words, does the term "sex" in Title VII include homosexuality or transgendered status?

Bostock v. Clayton County

- The opinion (authored by Justice Gorsuch and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan), instead of relying primarily on Supreme Court precedent such as *Price Waterhouse*, started with the premise that the term "sex" means the biological distinctions between male and female.
- No real mention or discussion of "sex stereotyping," which had been a key issue among the lower courts.
- Majority opinion uses the concept of "but for" causation to make its point. Thus, "so long as the plaintiff's sex was one but-for cause of [the employment] decision, that is enough to trigger the law."

Bostock v. Clayton County

Some Key Takeaways

- It is "impossible" to discriminate against a person for being gay or transgender without discriminating against that person based on sex, thus violating Title VII. "An employer who fires an individual for being homosexual or transgender fires the person for traits or actions it would not have questioned in members of a different sex."
- "Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."

Bostock v. Clayton County

- But what about the employer who fires all employees, male and female, who are gay or transgender? Is it "because of sex," then?
- "Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII."
- Thus, if an employer discriminates against employees because they are gay or transgender, the employer must intentionally discriminate against individual men and women "in part" because of sex, which is a violation of Title VII.

Bostock v. Clayton County

- The opinion goes on to conclude that "these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individuals men and women in part because of sex."
- Thus, discrimination on the basis of homosexuality or transgender status is discrimination based on sex, which violates Title VII.

Bostock v. Clayton County

- Vigorous and strident dissents from Justices Alito, Thomas, and Kavanaugh.
- Justices Samuel Alito and Clarence Thomas accused the majority of hiding behind the "textualist school of statutory interpretation." Specifically, the dissent wrote, "[t]he Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should 'update' old statutes so that they better reflect the current values of society."

Bostock v. Clayton County

What Comes Next?

- Continued refinement of the mixed-motive analysis in Title VII cases.
- Challenges based on the Religious Freedom Restoration Act.
- Continued efforts at federal and state level to pass legislation the codify this decision.
  - 27 states, including Ohio, do not have any protection for LGBTQ employees, and after *Bostock*, that situation will remain for employers with less than 14 employees.
    - While Ohio courts defer to judicial interpretations of Title VII, it will be curious to see if this is one of them.
  - Larger municipalities and other political subdivisions more likely to have protections in their ordinances.
  - Many employers have taken it upon themselves to include these protections.

Other Employment Law Cases from the 2019-20 Term

Topics:

- **Religious exemptions**
  - Ministerial exception for teachers at private, religious schools
  - ACA birth control coverage mandate
- **ADEA and public employees**
- **ERISA**
  - Retirement plans
- **DACA**

Religious Exemptions

Our Lady of Guadalupe School v. Morrissey-Berru (Ministerial exception to antidiscrimination in employment)

- HOLDING: In a 7-to-2 decision, the Supreme Court ruled in *Our Lady of Guadalupe School v. Morrissey-Berru* (Sotomayor, J. and Ginsberg, J., dissenting) that the "ministerial exception," which shields religious employers from anti-discrimination lawsuits, foreclosed the adjudication of two discrimination lawsuits brought by Catholic school teachers.

Our Lady of Guadalupe School v. Morrissey-Berru

- JUDICIAL HISTORY – *HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL v. EEOC* (2012):
  - Court unanimously held that the "ministerial exception" protected a religious school's First Amendment right to choose its own religious teachers by exempting these institutions from anti-discrimination laws when employees are deemed "ministers." In Hosanna-Tabor, the Court set out a loose framework for when the ministerial exception should apply, specifically refusing to adopt any sort of rigid legal test. These factors included:
  - whether the employer held the employee out as a minister by bestowing a formal religious title;
  - whether the employee's title reflected ministerial substance and training;
  - whether the employee held herself out as a minister; and
  - whether the employee's job duties included "important religious functions."

Our Lady of Guadalupe School v. Morrissey-Berru

- In *Hosanna-Tabor,* the Court held that the plaintiff qualified as a "minister" under the ministerial exception. Applying this four-factor analysis, the Court considered the plaintiff's title in that case, "Minister of Religion, Commissioned," as well as her intensive formal religious training and education. The Court cited the fact that plaintiff was responsible for teaching religion and participating with students in religious activities. Accordingly, the Court determined that the plaintiff qualified as a "minister," under the exception and therefore, her employment discrimination claim could not be decided by the courts.
- While Hosanna-Tabor provided a loose framework for determining whether the ministerial exception applies, the exact implications and boundaries of the exception, as well as the weight that should be placed on each factor, was uncertain.

Our Lady of Guadalupe School v. Morrissey-Berru

- The *Morrissey-Berru* decision now provides more clarity concerning when the ministerial exception applies.
- In this case, one of the teachers, Kristen Biel, sued under the Americans with Disabilities Act (ADA) after she learned she had breast cancer and her contract was not renewed.
- The other teacher, Agnes Morrissey-Berru, sued under the Age Discrimination in Employment Act (ADEA), alleging her employer demoted her and failed to renew her contract in order to replace her with a younger teacher.
- Both religious employers invoked the ministerial exception and successfully moved for summary judgment at the district court level, but in both cases the Ninth Circuit reversed, reasoning that the teachers did not have the formal title of "minister," had limited formal religious training and ministerial backgrounds, and lacked the credentials to invoke the ministerial exception.

Our Lady of Guadalupe School v. Morrissey-Berru

- The Supreme Court reversed the Ninth Circuit.
  - Ninth Circuit incorrectly utilized a more stringent and formulaic interpretation of *Hosanna-Tabor* when finding that neither Ms. Biel nor Ms. Morrisey-Berru fell within the ministerial exception.
  - The four factors in *Hosanna-Tabor* were not to be treated as "checklist items to be assessed and weighed against each other in every case" and that the factors discussed therein were never intended to impose any "rigid formula."
  - Instead, the Court stated that courts should "take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception."

Our Lady of Guadalupe School v. Morrissey-Berru

- Court's wholistic approach (versus a rigid formulaic approach):
  - Both teachers' employment agreements and faculty handbooks specified that they were expected to carry out the school's mission of developing and promoting a Catholic faith community and imposed commitments regarding religious instruction, worship, and personal modeling of the faith and explained that their performance would be reviewed on those bases.
  - The teachers taught religion in the classroom and worshipped and prayed with the students.
  - The Court was not concerned that the teachers' titles did not include the term "minister."
  - Given all of these circumstances, the Court held that Ms. Biel and Ms. Morrisey-Berru fell squarely within the ministerial exception, and that, therefore, their discrimination claims under the ADA and ADEA were barred.
  - "What matters, at bottom, is what an employee does," the Court said.

Our Lady of Guadalupe School v. Morrissey-Berru

- Broad implications beyond a religious school setting:
  - Religious institutions of varying types will now have a strong argument for protection against discrimination claims brought by their employees who perform a wide array of faith-based functions for the organization.

Little Sisters of the Poor v. Pennsylvania (ACA birth control coverage mandate)

- By a vote of 7-2 (Ginsberg, J. and Sotomayor, J. *dissenting*), the Supreme Court rejected a challenge from two states that had argued that the new rules violate both the Affordable Care Act (ACA) and the federal laws governing administrative agencies.
- HOLDING:
  - Federal administrative agencies have authority under the ACA to promulgate religious and moral exceptions.
  - Federal administrative agencies can consider the Religious Freedom Restoration Act (RFRA) when promulgating rules and regulations.
    - ACA does not specifically exempt RFRA
    - Regulations implementing the contraceptive mandate qualify as "federal laws" under RFRA
    - The Court cited their previous decisions in the Hobby Lobby and Zubik cases.

Little Sisters of the Poor v. Pennsylvania

- HISTORY: This case was the third one involving the ACA's birth-control mandate to come to the Supreme Court.
- The mandate is not expressly created by the ACA, which instructs health plans to provide coverage for "additional preventive care and screenings" for women.
- The Health Resources and Services Administration (HRSA), a division of the Department of Health and Human Services, issued guidelines that require health plans to provide access to FDA-approved birth control at no cost to the women covered by the plans.
- The federal government excused churches and other houses of worship from having to comply with the mandate; it also created an "opt-out" process for religious nonprofits that objected to having to comply (*Zubik v. Burwell*, 2016).
- In 2014, in *Burwell v. Hobby Lobby*, the Court ruled that a corporation owned by a devoutly religious family that objected to having to provide female employees with access to contraceptives could also opt out of the mandate.

Little Sisters of the Poor v. Pennsylvania

- Little Sisters of the Poor facts:
  - Trump administration issued new rules that extended the exemption from the birth-control mandate to cover private employers that have religious or moral objections to providing their female employees with access to contraceptives.
  - Two states, Pennsylvania and New Jersey, went to federal court to challenge the expansion, arguing that the new rules violate both the Affordable Care Act and the federal laws governing administrative agencies.
  - A federal district court agreed and blocked the government from enforcing the rules anywhere in the United States, and a federal appeals court upheld that ruling.
  - The Trump administration and the Little Sisters of the Poor, a Catholic religious group that works with the elderly, requested and were granted certiorari by the Supreme, and the Justices heard oral argument by telephone in May 2020.

Little Sisters of the Poor v. Pennsylvania

- Justice Thomas' majority opinion:
  - Rejected the states' argument that the exemptions violate the ACA because that law only authorizes HRSA to identify what preventive care health plans must provide, not to create exemptions from that care. The ACA, Thomas observed, gives HRSA "virtually unbridled discretion to decide what counts as preventive care and screenings." That discretion, Thomas continued, is "equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines."
  - Thomas disagreed that the majority's conclusion will make it harder for women to obtain free access to birth control, as Congress intended. Congress, Thomas stressed, could have enacted specific language in the ACA requiring health plans to cover birth control, but it didn't; instead, it gave HRSA broad authority "without any qualifications." Therefore, Thomas posited, Congress, rather than HHS and the other executive branch departments, should bear the blame for any lack of coverage for women.

Little Sisters of the Poor v. Pennsylvania

- Justice Thomas' majority opinion (cont'd):
  - Because the rules creating the exemptions were consistent with the ACA, the Court did not need to weigh in on the government's argument that the exemptions were either required or authorized by the Religious Freedom Restoration Act.
  - It was appropriate for the departments to consider RFRA because "the potential for conflict between the contraceptive mandate and RFRA is well settled." Indeed, Thomas noted, the Supreme Court's earlier decisions involving the mandate "all but instructed the Departments to consider RFRA going forward."
  - Dismissed the states' arguments that the exemptions were invalid because the government did not follow the proper procedures when it enacted the rules finalizing the exemptions in 2018. Among other things, the states had contended that there was no indication that the departments had "maintained an open mind" because the final rules closely resembled the earlier version of the rules – suggesting that the departments had not taken any comments on the interim rules seriously. All that matters, Thomas made clear, is whether the departments followed the criteria outlined in the Administrative Procedure Act, which outlines the process that an agency must follow when issuing new rules, and they did.
  - Government "had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption," and the "rules promulgating these exemptions are free from procedural defects."

ADEA

Babb v. Wilkie (ADEA)

- The Petitioner, Noris Babb, a female over the age of 50, worked as a pharmacist for the Department of Veterans Affairs. Two other female pharmacists were denied promotions and filed charges with the EEOC. Babb provided statements and testified in support of those charges.
- Babb alleged that as a result of her participation in the EEO proceedings, she was denied advancement and forced to agree to a schedule that was disruptive to her department. When she could not meet the schedule requirement, one of her credentials was removed and she was disqualified from future promotions.
- A female pharmacist under the age of 30 received a promotion instead of Babb.

Babb v. Wilkie

- Babb sued the VA under Title VII and the Age Discrimination in Employment Act, alleging gender-plus-age discrimination and retaliation.
- The district court granted summary judgment to the VA.
- On appeal, Babb argued that she should have been allowed to demonstrate that illegal discrimination or retaliation was a "motivating factor" behind the adverse employment action. The Eleventh Circuit Court of Appeals affirmed the lower court, citing precedent that federal sector employees' claims under the ADEA or Title VII require that a plaintiff show that illegal discrimination or retaliation was a "but for," not merely a "motivating" factor in the employment decision.

Babb v. Wilkie

- The United States Supreme Court granted certiorari to the following issue: Does the ADEA require a federal sector plaintiff to prove that age was a "but-for" cause of the challenged personnel action?
- Kind of, as an 8-1 decision by the United States Supreme Court explains.

Babb v. Wilkie

- The relevant provision of the ADEA applicable to federal sector employees reads:

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . Shall be made free from any discrimination based on age."

- A plain reading of that text supports a conclusion that age does not need to be a "but-for" cause of the employment decision to be a violation, reversing the Eleventh Circuit Court of Appeals.
- However, "but-for" causation is important in determining the appropriate remedy for a violation.

Babb v. Wilkie

- Most notably, a plaintiff cannot obtain compensatory, or pain and suffering, damages without showing that age discrimination was a "but-for" cause of the employment decision.
- Justice Thomas wrote a dissenting opinion stating that the majority's reading of the statute is too broad and "disrupts the settled expectations of federal employers and employees."

ERISA

Thole v. U.S. Bank, N.A. (ERISA)

- The plaintiff and others brought a class action lawsuit against U.S. Bank and others over alleged mismanagement of a defined benefit pension plan during the period 2007-2010, and making a claim under the Employee Retirement Income Security Act of 1974 (ERISA).
- Specifically, the class alleged that the banks breached their fiduciary duties and caused the plan to engage in prohibited transactions with a subsidiary company. As a result, the class claimed, the plan suffered significant losses and became underfunded in 2008.

Thole v. U.S. Bank, N.A.

- The district court granted the banks' motion to dismiss in part, but allowed the class to proceed with their claim that the banks engaged in a prohibited transaction by investing in a subsidiary.
- When the plan subsequently became overfunded in 2014, the district court dismissed the case, finding that the class lacked a concrete interest in any monetary relief that the court could award to the plan.
- On appeal the Eighth Circuit Court of Appeals affirmed.
- The United States Supreme Court granted certiorari.

Thole v. U.S. Bank, et al.

- The issue before the Supreme Court was as follows:

Must a plaintiff demonstrate individual financial loss or the imminent risk of financial loss in an ERISA plan in order to seek injunctive relief or a restoration of plan losses caused by fiduciary breach?

The answer is yes.

Thole v. U.S. Bank, et al.

- The 5-4 majority, led by Justice Kavanaugh, hold that the plaintiffs lack standing to sue in federal court because, whether they won or lost, they would still receive the same monthly benefits they were already entitled to receive.
- As participants in a defined-benefit plan, the plaintiffs received a fixed payment each month, notwithstanding any changes to the value of the plan or the investment decisions of the plan's fiduciaries.
- Thus, the poor decisions by the fiduciaries did not cause any actual injury to the plaintiffs' case, which is required to challenge the fiduciaries' actions in court.

Thole v. U.S. Bank, et al.

- Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, argued that the decision precludes retirees from bringing a federal lawsuit to stop or cure plan mismanagement until their pensions are on the verge of default.
- This, she concluded, conflicts with both common sense and long-standing precedent.

Retirement Plans Committee of IBM v. Jander (ERISA)

- The *Fifth Third Bancorp v. Dudenhoeffer* case, issued by the Supreme Court in 2014, held that fiduciaries to an employee stock ownership plan (ESOP) are not entitled to a presumption of prudence regarding decisions to buy or hold employer stock.
- Instead, for a plaintiff to state a claim for breach of the fiduciary duty of prudence based on inside information, a plaintiff need only "plausibly allege that a prudent fiduciary in the defendant's position would not have concluded that [an alternative action] would do more harm than good to the fund."
- This is a pleading standard, which is "context-specific" rather than a generalized presumption standard.

Retirement Plans Committee of IBM v. Jander

- IBM offers to its employees an ERISA-qualified ESOP, which is invested predominantly in IBM stock and has as a fiduciary the Retirement Plans Committee.
- In 2015 lawsuits were filed alleging that IBM fraudulently concealed problems in its microelectronics unit, which artificially inflated IBM's reported value.
- By continuing to invest in IBM stock despite allegedly knowing that the market price was artificially inflated due to the fraudulent scheme, the plaintiffs argued that the fiduciaries breached their duty of prudence under Section 504 of ERISA.

Retirement Plans Committee of IBM v. Jander

- The district court dismissed the lawsuit for failure to state a claim, finding that the plaintiffs had not alleged facts showing that the fiduciaries" could not have concluded" that publicly disclosing the alleged fraud or halting further investments of IBM stock would have been more likely to harm the fund than to help it.
- Despite amendment to the complaint, the district court against dismissed the lawsuit, finding a prudent fiduciary could have found the proposed alternative likely to do more harm than good.
- The Second Circuit Court of Appeals reversed, finding that when a drop in value of the stock is inevitable, it is far more plausible that a prudent fiduciary would prefer to limit the effects of the stock's artificial inflation through prompt disclosure.

Retirement Plans Committee of IBM v. Jander

- The United States Supreme Court granted certiorari, with the following issue:

Do generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time satisfy the "more harm than good" pleading standard for ERISA claims that the Court established in the Dudenhoeffer case.

- In a *per curiam* opinion, the court vacated the judgment below and remanded the case to the Second Circuit to determine whether to entertain the parties' argument on ERISA's duty of prudence.

DACA

DHS v. Regents of the University of California, et al. (DACA)

- HOLDING: U.S. Department of Homeland Security's (DHS) decision in 2017 to rescind the Deferred Action for Childhood Arrivals (DACA) program violated the Administrative Procedures Act (APA) because it was implemented without the required Notice and Comment and without publication of a final rule that articulates the reasonable basis for the agency's actions. As such, the Court ruled that DHS's action was arbitrary and capricious.
- Did NOT make any rulings on substantive legality of the DACA program.

DHS v. Regents of the University of California, et al.

- WHAT IS DACA? Eligible DACA recipients were brought to the U.S. as young children and grew up without legal status. In 2012, DHS granted them deferred enforcement action and employment authorization. There are 700,000 DACA recipients in the U.S.
- DACA Checklist and Eligibility
  - Entered the United States before age 16 and before June 15, 2007.
  - Entered without inspection or did not have legal immigration status as of June 15, 2012.
  - Continually physically present in the United States for at least five years as of June 15, 2012.
  - Under age 31 as of June 15, 2012 (can file later as long as the age requirement was met as of this date).
  - Be at least age 15 at time of application (there are some minor exceptions).
  - Attending a U.S. high school, or graduated from a U.S. high school, or obtained a U.S. GED equivalent, or attending a career or vocational job training program, or honorable discharge from the U.S. military.
  - Good moral character (and continuing beyond June 15, 2012).
  - All criteria must have been met as of June 15, 2012.

DHS v. Regents of the University of California, et al.

- What does this decision mean for employers?
  - Challenges With Timely Renewal of Work Authorization for DACA Employees
    - One of the challenges of the DACA-based employment authorization document (EAD) is that DHS does not grant automatic continuing work authorization merely because an extension was timely filed. Instead, an employee whose work authorization is based on DACA must have their new plastic EAD work permit in their hand the day before their current work authorization expires, or they must be temporarily laid off. This has caused a lot of disruption for employers and DACA employees as there is no grace period.
    - DHS does encourage DACA recipients to file their DACA and EAD renewal at least 150 days prior to expiration. However, agency processing delays have still resulted in unintended terminations.
    - Once approved by DHS, both the Deferred Action status and work authorization are approved for up to 2 years at a time.
  - Future of DACA Program
    - While this decision provides temporary relief for employees whose work authorization is based on DACA, President Trump and DHS have announced that they intend to clarify the basis for their termination of the program in order to obtain court approval. We have not seen the end of DACA litigation. If the program is terminated, DACA employees may or may not have a grace period, which may force employers to discharge any DACA employees due to lack of work authorization.