RECENT DEVELOPMENTS IN FIFTH CIRCUIT EMPLOYMENT LAW

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This year, the United States Supreme Court and the Fifth Circuit tackled a variety of employment issues ranging from typical Title VII discrimination claims to hot political topics, such as employing undocumented aliens. In so doing, the courts produced an abundance of published opinions that serve to

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guide the interactions between employers and employees and govern the rights and responsibilities of each. The cases selected for discussion herein are intended to provide an overview of the issues faced by the courts and to highlight precedential significance, emerging trends, and general areas of interest.

I. TITLE VII

Title VII litigation continues to be a staple among the types of employment matters regularly considered by the Fifth Circuit. Indeed, within this survey period, the circuit published approximately ten Title VII opinions (and wrote over sixty unpublished opinions). Of particular note this year was the effect of the Supreme Court's decision in *Thompson v. North American Stainless, LP*, which effectively broadened the category of potential employment litigants by allowing third-party reprisal claims.[1] In addition, the Fifth Circuit addressed other employment claims relating to third parties' rights in the context of Title VII.

Also of interest—perhaps more in the context of local politics than employment law—was the Fifth Circuit's opinion in *Jackson v. Watkins*, in which the court affirmed judgment in favor of Dallas County and its District Attorney, Craig Watkins, for terminating seasoned prosecutor, Rick Jackson.[2]

A. Thompson v. North American Stainless, LP

In early 2011, the United States Supreme Court rendered a decision that expanded the potential pool of Title VII retaliation claimants.[3] Miriam Regalado filed a sex-discrimination charge against her employer, North American Stainless (NAS).[4] Three weeks after Regalado filed her complaint, NAS fired her fiancé, Eric Thompson.[5] Thompson then filed his own charge of discrimination and subsequent lawsuit under Title VII, asserting that NAS fired him to retaliate against Regalado for filing her sex-discrimination charge.[6]

The district court granted summary judgment in favor of NAS, holding that third-party retaliation claims were not permitted by Title VII.[7] The Sixth Circuit affirmed, reasoning that Thompson was not entitled to sue for retaliation

1. *See* Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 869-70 (2011).
2. *See* Jackson v. Watkins, 619 F.3d 463 (5th Cir. Sept. 2010) (per curiam); Miriam Rozen, *Third Discrimination Suit Filed Against Dallas County DA, Office*, TEX. LAW. (Dec. 3, 2007), http://www.law.Com/jsp/tx/PubArticleTX.jsp?id=900005497205 (discussing three separate reverse race-discrimination lawsuits filed against Dallas County DA, Craig Watkins, by Caucasian former prosecutors).
3. *Thompson*, 131 S. Ct. at 868-70.
4. *Id.* at 867.
5. *Id.*
6. *Id.*
7. *Id.*

because he "did not 'engag[e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado.'"[8]

The Supreme Court granted certiorari, framing the legal inquiries as follows: (1) "did NAS's firing of Thompson constitute unlawful retaliation?"; and (2) if so, "does Title VII grant Thompson a cause of action?"[9] The Court had little difficulty answering the first question in the affirmative.[10] Relying on prior precedent, the Court explained that "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'" and concluded that no reasonable worker would engage in protected activity if she knew her fiancé would be fired as a result.[11] Thus, Regalado would have an actionable retaliation claim against NAS, so the Court turned to the next inquiry, namely, whether Thompson would have an actionable reprisal claim as well.[12]

To reach its conclusion, the Court analyzed the statutory definition of the term "person aggrieved," which called for consideration of both the broadest and narrowest possible definitions.[13] Ultimately, the Court concluded that under Title VII, a person aggrieved is someone who "falls within the 'zone of interests' sought to be protected by the statutory provision."[14] Applying this test, the Court determined that Thompson properly fell within the zone of interests protected by Title VII because (1) "[h]e was an employee of NAS, and [(2)] Title VII's purpose is to protect employees from their employers' unlawful actions."[15]

The Court declined to classify a "fixed class of relationships for which third-party reprisals are unlawful."[16] Instead, the Court emphasized that prior precedent calls for an analysis which "depend[s] upon the particular circumstances."[17] Hence, the question remains open whether adverse employment actions taken against an employee's girlfriend, boyfriend, or close friend will constitute unlawful retaliation actionable by those persons.[18] Nonetheless, *Thompson* broadens the scope of employees who can bring retaliation claims to include at least some third parties affected by the protected activity engaged in by another.

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8. *Id.* (quoting Thompson v. N. Am. Stainless, LP, 567 F.3d 804, 807 (6th Cir. 2009)).
9. *Id.*
10. *Id.* at 867-68.
11. *Id.* at 868 (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006)).
12. *Id.* at 869.
13. *Id.* at 869-70.
14. *Id.* at 870 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).
15. *Id.*
16. *Id.* at 868.
17. *Id.* (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006)).
18. *Id.* Justice Ginsburg points out that the EEOC Compliance Manual counsels that "Title VII 'prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights.'" *Id.* at 871 (Ginsburg, J., concurring) (alteration in original) (quoting EEOC COMPLIANCE MANUAL § 8-II(c)(3) (1998)).

B. Zamora v. City of Houston

In *Zamora v. City of Houston*, Lieutenant Manuel Zamora and his son, Officer Christopher Zamora, brought a Title VII lawsuit against the City of Houston, claiming race discrimination and retaliation.[19] With respect to Christopher's retaliation claim, the lower court granted summary judgment in favor of the City of Houston, explaining that he had not participated in protected activity; rather, his claim was based upon the protected activity engaged in by his father, Manuel.[20]

Based on existing Fifth Circuit precedent, the district court held that Christopher's allegations were not sufficient to establish a prima facie case of retaliation because he did not demonstrate "retaliation because of *his own* protected activity."[21] In light of the Supreme Court's decision in *Thompson*, however, the Fifth Circuit vacated and remanded the case to allow the district court to reconsider Christopher's reprisal claim.[22] On remand, the City of Houston filed a renewed motion for summary judgment, which was denied.[23] Thus, even within a few months of the Supreme Court's decision, the Fifth Circuit and lower courts experienced the effects on the scope of potential third-party reprisal claims when applying *Thompson*.

C. Hernandez v. Yellow Transportation, Inc.

Rubin Hernandez (Hispanic), John Ketterer (Caucasian), and Abram Trevino (Hispanic) brought discrimination, retaliation, and hostile work environment claims against their employer, Yellow Transportation, Inc.[24] The district court granted summary judgment in favor of Yellow Transportation on all claims.[25] All three employees appealed.[26]

To support his hostile work environment claim, Ketterer argued he was a member of a protected class because of his association with minority black and Hispanic employees.[27] The court rejected this argument, holding that Ketterer failed to produce sufficient evidence to demonstrate that the company knew or should have known that he was being harassed because of such associations.[28] Indeed, evidence existed to the contrary, namely, that Ketterer was harassed (at

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19. Zamora v. City of Houston, 425 F. App'x. 314, 315 (5th Cir. May 2011) (per curiam).
20. *Id.* at 316.
21. *Id.*
22. *Id.* at 317.
23. Zamora v. City of Houston, No. 4:07-CV-4510, 2011 WL 4067860, at *1, *5 (S.D. Tex. Sept. 13, 2011).
24. Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 649 (5th Cir. Feb. 2012), *superseding prior opinion*, 641 F.3d 118, 122-23 (5th Cir. May 2011).
25. *Id*. at 650.
26. *Id.*
27. *Id.* at 649-50, 654.
28. *Id.* at 654-55.

least in part) for reasons unrelated to his association with minorities.[29] Thus, insufficient evidence existed to demonstrate that the harassment was race-based (through Ketterer's associations with minorities or otherwise).[30] Interestingly, on remand, the court eliminated its note that to date, it has "not ruled on the extent of association necessary between a member of one race and a member of another race against which the employer discriminates in order for the member of the former race to have an actionable hostile work environment claim."[31]

As seen in other cases during the survey period, Hernandez's and Trevino's hostile work environment claims also implicated third-party interests.[32] Both men complained about some incidents of harassment directed at them and other incidents directed at their coworkers.[33] By comparison, the court explained that in the realm of *sexual* harassment claims, harassment of women other than the plaintiff is relevant.[34] In the context of *racial* harassment claims, however, cross-category discrimination (e.g., evidence of harassment towards black employees used to support claims of a hostile work environment towards Hispanic employees) is potentially relevant only "when there is a sufficient correlation between the kind of discrimination claimed by a plaintiff and that directed at others."[35] The court refrained from reaching a bright-line rule in this regard, instead stating that "a wide array of considerations are to be examined" concerning "how evidence of the workplace environment for one category of employees can be used to support the claims under Title VII for another category."[36]

These fine distinctions addressed in *Hernandez* reflect the extremely nuanced nature of Title VII employment case law. Though the broad-stroke framework (*McDonnell Douglas*) remains seemingly intact, application of that framework to race, sex, and retaliation claims continues to be a moving target for district courts and practitioners alike.

D. Barker v. Halliburton Co.

In *Barker v. Halliburton Co.*, the Fifth Circuit addressed yet another third-party interest issue.[37] Tracy Barker worked in Iraq as a civilian contractor for Halliburton.[38] While working overseas, Tracy was sexually assaulted by a

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29. *Id.* at 655.
30. *Id.*
31. Yellow Transp., Inc. v. Hernandez, 641 F.3d 118, 128 (5th Cir. May 2011), *withdrawn and superseded on reh'g*, 670 F.3d 644 (5th Cir. Feb. 2012). Though the court has specified that relationships have to be "personal" in order to effectuate actionable third-party harassment, it has not provided much more clarity than that. *See id.* at 129.
32. *Yellow Transp., Inc.*, 670 F.3d at 651-52.
33. *Id.*
34. *Id.* at 653.
35. *Id.*
36. *Id.*
37. *See* Barker v. Halliburton Co., 645 F.3d 297, 299 (5th Cir. June 2011).
38. *Id.*

federal employee and was also sexually harassed by fellow Halliburton employees.[39] Tracy and her husband, Galen, sued Halliburton.[40] Tracy claimed sexual harassment and retaliation under Title VII, along with various state law tort claims.[41] Galen brought a claim for loss of consortium.[42] Halliburton moved for summary judgment on Galen's claim, asserting that such a claim could not be derivative from another person's Title VII claim.[43] The district court agreed, and Galen appealed.[44]

The Fifth Circuit affirmed summary judgment in favor of Halliburton, explaining that Texas law permits a loss of consortium claim when it derives from a successful *tort claim*, not a *federal civil rights claim*.[45] The court further expounded:

> [F]or a claim alleging deprivation of a constitutional right, an individual plaintiff must prove that the defendant violated his personal rights. A third party may not assert a civil rights claim based on the civil rights violations of another individual. Title VII of the Civil Rights Act protects employees' constitutional rights and was enacted to prevent employment discrimination or harassment. The statute provides a right of action to the employee only and the law does not permit for derivative tort claims for third-party injuries.[46]

Thus, although the Fifth Circuit has expanded some third-party claims in the Title VII arena, derivative claims of the type considered in *Barker* remain excluded.

E. Jackson v. Watkins

Rick Jackson sued Dallas County and its District Attorney, Craig Watkins, when Jackson was terminated from his employment as a prosecutor after nearly seventeen years.[47] Jackson claimed his termination was unlawfully based on race (Caucasian) in violation of Title VII.[48] Defendants moved for summary judgment, asserting four legitimate, nondiscriminatory reasons for terminating Jackson's employment.[49] The district court found that Jackson failed to rebut each of the proffered reasons for the termination.[50]

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 299-300.
46. *Id.* at 300 (citations omitted).
47. Jackson v. Watkins, 619 F.3d 463, 464 (5th Cir. Sept. 2010) (per curiam).
48. *Id.* at 465.
49. *Id.* at 466.
50. *See id.* at 466-67.

On appeal, Jackson argued that in order to survive summary judgment, Fifth Circuit precedent did not require him to rebut all of the proffered reasons.[51] The court disagreed, explaining it has long held that "a plaintiff 'must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates.'"[52] Thus, because the court found that Jackson failed to rebut even *one* of the four proffered reasons for his termination, summary judgment was proper, and the lower court's decision was affirmed.[53]

Although this opinion did not add much in the way of new law within the Fifth Circuit, the case did drum up local media interest in Dallas County after allegations that Watkins replaced numerous, experienced Caucasian law enforcement employees with significantly less qualified African-Americans.[54] Interestingly, Watkins once again came under fire recently when he dismissed at least seven prosecutors, some of whom claimed to have been terminated as a result of their political leanings.[55]

II. EQUITABLE TOLLING

A. Harris v. Boyd Tunica, Inc.

Plaintiff Ber'Neice Harris alleged that Boyd Tunica, Inc. (Boyd Tunica) discriminated against her on the basis of her religion when the company terminated her employment as a revenue auditor for the Sam's Town Casino.[56] The EEOC mailed Harris a "right to sue" notice on December 11, 2008, which explained that she had the right to file a lawsuit within ninety days of receiving the letter.[57] Harris hired a lawyer.[58] As a result of a calendaring error committed by her attorney's paralegal, Harris's complaint was not filed until April 8, 2009—well outside the ninety-day filing deadline.[59] Boyd Tunica moved to dismiss the plaintiff's complaint, arguing the untimeliness of her filing.[60] The district court agreed and rejected Harris's argument that the filing period should be equitably tolled due to the inadvertence of her attorney and his staff.[61]

Because neither party disputed the fact of the untimely filing, the sole issue before the court was whether the district court abused its discretion in

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51. *See id.* at 467.
52. *Id.* (quoting Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 220 (5th Cir. 2001)).
53. *See id.* at 468.
54. *See* Rozen, *supra* note 2.
55. *See* Diane Jennings & Tanya Eiserer, *Dallas DA Craig Watkins Dismisses 7 Prosecutors*, DALL. MORNING NEWS (Dec. 31, 2010), http://www.dallasnews.com/news/crime/headlines/20101231-dallas-da-craig-watkins-dismisses-7-prosecutors.ece.
56. Harris v. Boyd Tunica, Inc., 628 F.3d 237, 238 (5th Cir. Dec. 2010).
57. *Id.*
58. *Id.*
59. *Id.* at 238-39.
60. *Id.* at 239.
61. *Id.*

declining to toll the ninety-day filing period.[62] Title VII requires that a plaintiff file her civil action within ninety days after she receives a right to sue notice from the EEOC.[63] The ninety-day filing requirement operates like a statute of limitations (not a jurisdictional prerequisite) to which equitable tolling applies in "rare and exceptional circumstances."[64] "Courts have typically extended equitable tolling where 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'"[65] The doctrine of equitable tolling does not apply, however, in circumstances involving garden-variety excusable neglect, even when the neglect is caused by the party's lawyer or staff and not by the plaintiff herself.[66]

Because a party is bound by the acts of her lawyer, the district court properly dismissed Harris's case due to an untimely filed complaint.[67] Though seemingly unfair to Ms. Harris, the court strictly construed the statutory filing deadline, leaving the plaintiff without a remedy, except perhaps to sue her lawyer for malpractice.[68] This case should serve as a stark reminder to employment practitioners everywhere: MAKE SURE TO CALENDAR ALL DEADLINES PROPERLY!

B. Granger v. Aaron's, Inc.

Plaintiffs Angel Granger and Casey Dixon Descant claimed that their supervisor, Kennard Williams, engaged in a pattern of sexual harassment, which led them to resign from their employment with Aaron's, Inc. (Aaron's) in 2007.[69] Each plaintiff had 300 days from her resignation to file a charge of discrimination with the EEOC.[70] On November 7, 2007, the attorney for Granger and Descant incorrectly submitted claims to the Office of Federal Contract Compliance Programs (OFCCP), not the EEOC.[71] Over the next several months, the attorney made multiple phone calls to the OFCCP and was assured that the claims were being investigated.[72] The OFCCP never notified the attorney (or his clients) that the complaints had been filed with the wrong agency.[73] During the pendency of the OFCCP investigations, the plaintiffs'

62. *Id.*
63. *Id.* (citing 42 U.S.C. § 2000e-5(f)(1) (2006)).
64. *Id.* (quoting Teemac v. Henderson, 298 F.3d 452, 457 (5th Cir. 2002)).
65. *Id.* (quoting Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 96 (1990)).
66. *See id.* at 240.
67. *Id.*
68. *See id.*
69. Granger v. Aaron's, Inc., 636 F.3d 708, 709 (5th Cir. Mar. 2011).
70. *Id.*
71. *Id.*
72. *Id.* at 710.
73. *Id.*

300-day period to file complaints with the EEOC expired.[74] Eventually, the OFCCP concluded its investigation and closed the files because Aaron's is not a federal contractor.[75] OFCCP transferred the complaints to the EEOC, who then issued right to sue letters to both women.[76] Plaintiffs sued, and Aaron's moved to dismiss on the grounds that Granger and Descant had failed to timely file charges of discrimination with the EEOC.[77] The plaintiffs argued that their claims had been "constructively filed" with the OFCCP and, alternatively, "that the district court should equitably toll the 300-day deadline because of the OFCCP's representations that it was processing their claims."[78]

On appeal, the Fifth Circuit declined to rule on the issue of constructive filing and instead affirmed the district court's decision on the basis of equitable estoppel.[79] The court began with a reminder that the 300-day filing requirement is not a jurisdictional prerequisite, but rather, operates like a statute of limitations.[80] As a result, the rule is subject to equitable doctrines such as waiver, estoppel, and equitable tolling.[81] Still, the court reminded, such doctrines should be applied "sparingly."[82]

Here, while the court emphasized its position that equitable tolling generally should not be applied in situations of attorney error or neglect, it held that this particular fact scenario was distinguishable because the lawyer did exercise due diligence in pursuit of his clients' claims, albeit with the wrong agency.[83] Accordingly, the Fifth Circuit determined the lower court did not abuse its discretion in allowing equitable tolling to be applied in this case.[84]

The court seems to acknowledge that its conclusion is somewhat inconsistent with its opinion in *Harris*.[85] But, the court defended its decision by adding, "[T]his case presents sufficiently rare circumstances (we trust) to support the district court's application of equitable tolling."[86] Thus, the rare application of equitable tolling remains intact, and practitioners should take care to ensure they are knowledgeable about procedural hurdles encountered in the employment arena as to avoid costly mistakes. There is no guarantee the court will give you the same leniency carved out here.

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 711. In its discussion, the court noted that conflicting authority exists regarding the proper standard of review to be applied in equitable tolling cases. *See id*. at 711-12. Though some cases suggest a de novo review, the appropriate standard is "abuse of discretion," which was applied in the *Harris* case. *Id*.
80. *Id.* at 711.
81. *Id.*
82. *Id.* at 712 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)).
83. *Id.*
84. *Id.* at 713.
85. *See id.*
86. *Id.*

III. AGE DISCRIMINATION IN EMPLOYMENT ACT AND RELATED CASES

Not surprisingly, the Fifth Circuit saw little in the way of Age Discrimination in Employment Act (ADEA) litigation since the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[87] Indeed, the Fifth Circuit published only two opinions regarding age discrimination cases during the survey period, and even one of those was decided on a procedural issue.[88] Because of the limiting nature of *Gross*'s "but-for" standard, as well as the inapplicability of Title VII's "motivating factor" analysis to age discrimination claims, the declination in ADEA litigation witnessed this year likely will be a continuing trend.

A. Moss v. BMC Software, Inc.

Michael Moss, a 68-year-old commercial transactions and information technology lawyer, "submitted his application for an in-house Staff Legal Counsel position" with BMC Software, Inc. (BMC) in September 2006.[89] After BMC selected a younger candidate for the position, Moss sued for age discrimination under the ADEA.[90] The district court granted summary judgment in favor of BMC and concluded that Moss failed to show that he was clearly more qualified than the younger candidate.[91] Moss also failed to set forth any direct evidence of discrimination.[92]

Moss established a prima facie case of age discrimination, and BMC advanced a legitimate, nondiscriminatory reason for not hiring him.[93] Accordingly, the case turned on a pretext analysis.[94] To make an adequate showing of pretext in a fail-to-hire case, the unsuccessful applicant must show that he was "'clearly better qualified' (as opposed to merely better or as qualified)" than the selectee.[95] Such a showing requires evidence that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."[96] Here, Moss lacked experience with the three specific types of transactions that comprised the primary responsibilities of the position in question, while the selectee had been performing those exact types of transactions in her prior job.[97]

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87. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009).
88. *See* Ligon v. LaHood, 614 F.3d 150, 152 (5th Cir. Aug. 2010); Moss v. BMC Software, Inc., 610 F.3d 917, 919 (5th Cir. July 2010).
89. *Moss*, 610 F.3d at 920.
90. *Id.* at 921.
91. *Id.* at 921-22.
92. *Id.* at 922.
93. *Id.* at 923.
94. *Id.* at 922.
95. *Id.* (quoting EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1444 (5th Cir. 1995)).
96. *Id.* at 923 (quoting Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 280-81 (5th Cir. 1999)).
97. *Id.* at 926.

Moss asserted that age was a motivating factor in BMC's decision not to hire him.[98] Relying on the Supreme Court's decision in *Gross*, however, the Fifth Circuit explained that Title VII's "motivating factor" standard does not apply in ADEA cases.[99] Instead, an ADEA plaintiff must prove that age was the "but-for" cause of the disputed employment action.[100] Moss was unable to make such a showing, and accordingly, the circuit upheld the district court's decision to grant summary judgment in favor of BMC.[101]

B. Ligon v. LaHood

Jack Ligon worked as a Designated Engineering Representative (DER) for the Federal Aviation Administration (FAA).[102] DERs are independent contractors certified by the FAA to examine, test, and inspect private airplanes.[103] Each DER may only certify technical data relating to aircraft within his delegated authority.[104] For many years, Ligon had more than 540 areas of delegated authority.[105] After failing to show activity in several areas, however, the FAA significantly reduced Ligon's areas of delegation.[106] Ligon filed suit, alleging discrimination and seeking reinstatement of his areas of delegated authority as well as damages and other relief pursuant to the ADEA.[107] The district court dismissed Ligon's action, holding that Ligon, as an independent contractor, was not an employee of the FAA within the meaning of the ADEA.[108] Before reaching the merits of Ligon's case, the Fifth Circuit first considered the issue of subject matter jurisdiction.[109]

The court explained, "[i]t is well settled that the review of any order of the FAA Administrator must be taken in a court of appeals."[110] In addition to lacking jurisdiction over direct challenges to FAA orders, district courts also cannot consider damages claims that are "inescapably intertwined with a review of the procedures and merits surrounding an FAA order."[111] In other words, a plaintiff cannot "circumvent the exclusive jurisdiction of the court of appeals" by dressing up his attack on an administrative decision and calling it something else.[112]

98. *Id.* at 928.
99. *Id.*
100. *Id.*
101. *See id.*
102. Ligon v. LaHood, 614 F.3d 150, 152 (5th Cir. Aug. 2010).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 153.
107. *Id.*
108. *Id.*
109. *See id.*
110. *Id.* at 154.
111. *Id.* at 155 (quoting Zephyr Aviation, L.L.C. v. Dailey, 247 F.3d 565, 572 (5th Cir. 2001)).
112. *Id.*

After surveying various circuit court decisions on similar issues, the Fifth Circuit concluded that Ligon's ADEA claim was "inescapably intertwined" with a challenge to the procedure and merits of the FAA's reduction of his designations of authority because it called for a review of the same evidence the FAA used in making its decision.[113] Essentially, Ligon sought to challenge the merits and procedures of the FAA administrator's order.[114] Such a challenge must be raised with the court of appeals, not the district court.[115]

Thus, the district court's decision was reversed with respect to Ligon's claims that his reduction in delegations violated the ADEA, and the court remanded the case with instructions to enter judgment dismissing such claims for lack of jurisdiction.[116]

Interestingly, though not necessary in light of the court's ability to dispose of this case on procedural grounds, the Fifth Circuit made the following substantive note:

> *Because the ADEA does not authorize a mixed-motive age discrimination claim*, [citing *Gross*], Ligon's ADEA claim would fail once it was determined that the FAA order reducing his areas of authority was warranted. That is, his ADEA challenge does not raise any issues that could not be addressed by a court of appeals in reviewing the merits and procedure of the order itself.[117]

Thus, even without the jurisdictional limitation at issue here, it seems likely that the effects of *Gross* would have also limited Ligon's substantive claims.

C. Jones v. United States

Just a few months after *Ligon*, the Fifth Circuit once again addressed the issue of subject matter jurisdiction in the context of employment claims brought against the FAA.[118] This time, Kennedy Jones, a former FAA employee, sued under Title VII and § 1981, asserting that the FAA's denial of his DER application was retaliatory for having engaged in Equal Employment Opportunity (EEO) protected activity.[119]

The court referenced the *Ligon* opinion and its "indistinguishable" fact pattern.[120] The parties did not dispute that the FAA's denial of Jones's DER application constituted a "final order" of the FAA Administrator; thus, the

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113. *Id.* at 157.
114. *See id.*
115. *See id*. The court noted, however, that Ligon asserted other allegations not associated with his reduction in delegations of authority. *See id.* Those claims were properly before the district court and appropriately dismissed on the basis of his independent contractor status. *Id.* at 157 n.2.
116. *Id.* at 158.
117. *Id.* at 157 n.3 (emphasis added).
118. *See* Jones v. United States, 625 F.3d 827, 828-29 (5th Cir. Nov. 2010) (per curiam).
119. *Id.* at 829.
120. *Id.*

lower court lacked jurisdiction to review it.[121] Further, Jones's Title VII and § 1981 claims were "inescapably intertwined with a challenge to the procedure and merits of that final order."[122] Accordingly, bound by its precedent in *Ligon*, the court lacked subject matter jurisdiction over Jones's case.[123] It is unclear why the Fifth Circuit felt compelled to publish a separate opinion on this companion case. The analysis and conclusion regarding jurisdiction were the same under Title VII and § 1981 as they were under the ADEA.[124]

IV. FAIR LABOR STANDARDS ACT

During the survey period, Fair Labor Standards Act (FLSA) litigation was impacted significantly by the Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*[125] As discussed below, the Court's decision to allow oral complaints to satisfy the protected activity in which an employee can engage for purposes of an FLSA retaliation claim will likely increase the number of lawsuits of this variety. As a result of the *Kasten* decision, employers should take steps to ensure that supervisors and other managerial employees are prepared to identify employee gripes that could be viewed as "complaints" within the meaning of the FLSA antiretaliation provision.

A. Kasten v. Saint-Gobain Performance Plastics Corp.

Plaintiff Kevin Kasten brought a retaliation suit under the FLSA against his former employer, Saint-Gobain Performance Plastics (Saint-Gobain), alleging he was terminated based on oral complaints he made about the location of the company's time clocks.[126] Specifically, Kasten complained that the time clocks were situated in an area that prevented workers from receiving credit for the time they spent putting on and taking off their work-related protective gear.[127] Saint-Gobain denied Kasten had made "any significant complaint" about the time clock location.[128] Instead, the company reasoned that it fired Kasten because he refused to record his time as directed after being repeatedly warned.[129] The district court entered summary judgment in favor of Saint-

121. *Id.* at 830.
122. *Id.*
123. *See id.*
124. *Compare id.* at 828-30, *with* Ligon v. LaHood, 614 F.3d 150 (5th Cir. Aug. 2010).
125. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011).
126. *Id.* at 1329.
127. *Id.* at 1329-30. In a related suit, the district court agreed and found that Saint-Gobain's placement of the time clocks violated the FLSA. *Id.* at 1329.
128. *Id.* at 1330.
129. *Id.*

Gobain, and the Seventh Circuit affirmed.[130] The Supreme Court granted certiorari.[131]

The sole question before the Court was whether an oral complaint of a violation of the FLSA constitutes protected activity under the Act's antiretaliation provision.[132] After considering the statutory language in context and in conjunction with the Act's purpose, the Supreme Court held that it did.[133]

The Court began by considering the plain language of the FLSA, which prohibits employers from discharging or otherwise discriminating against any employee "because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to [the Act]."[134] Looking at dictionary definitions, statutes, regulations, and judicial opinions, the Court determined that "the text, taken alone, [could not] provide a conclusive answer to [its] interpretive question."[135]

The Court then turned to "functional considerations," including the Act's basic objectives for protecting employees as well as providing employers with fair notice of complaints.[136] Ultimately, the Court explained that "[t]o fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."[137] Indeed, this definition includes oral, as well as written, complaints.[138]

Thus, the Court held that the Seventh Circuit erred in determining that oral complaints were insufficient to fall within the statutory phrase "filed any complaint" under the FLSA's antiretaliation provision.[139] The case was then remanded for the lower court to determine whether Kasten's particular complaints satisfied the definition.[140]

The Court left open the issue of whether a complaint—either oral or written—must be made to a government agency rather than to a private employer.[141]

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130. *Id.*
131. *Id.*
132. *Id.*
133. *See id.* at 1331.
134. *Id.* at 1329 (alteration in original) (quoting 29 U.S.C. § 215(a)(3) (2006)).
135. *Id.* at 1331-33.
136. *Id.* at 1333-34.
137. *Id.* at 1335.
138. *Id.*
139. *Id.* at 1336.
140. *See id.*
141. *See id.*

B. Thibault v. BellSouth Telecommunications, Inc.

In *Thibault*, the Fifth Circuit had the opportunity to analyze the definition of "employee" in the context of the FLSA.[142] Louis Thibault, Jr. brought suit against BellSouth Telecommunications, Inc. (BellSouth) and other defendants, claiming overtime compensation due to him for electrical work he performed in the wake of Hurricane Katrina.[143] The defendants contended that because Thibault was an independent contractor, not an employee as defined by the FLSA, he was not entitled to overtime compensation.[144] To determine Thibault's status, the court considered the following factors: (a) the permanency of the work relationship; "(b) the degree of control exercised by the alleged employer[s]; (c) the skill and initiative required to perform the job;" (d) the relative investments of the parties; and (e) the worker's opportunity for profit and loss.[145] The court relied heavily on its analysis in an earlier case, which considered the same question regarding welders.[146] Because all five factors weighed in favor of Thibault's independent contractor status, the court held that summary judgment was proper.[147] Thibault's FLSA claims were dismissed.[148]

C. Songer v. Dillon Resources, Inc.

Several commercial truck drivers sued the defendants, truck leasing companies, claiming entitlement to overtime under the FLSA.[149] The defendants denied their claims, asserting that because the work performed by the drivers fell within the Motor Carrier Act (MCA) exemption to the FLSA, overtime pay was not required.[150]

The FLSA requires that employers compensate employees engaged in commerce for time and a half if they work more than forty hours per week.[151] But certain employers are exempt from this overtime requirement.[152] Of particular applicability in this case is the MCA exemption,

> which states that the FLSA's overtime requirement "shall not apply . . . to . . . any employee with respect to whom the Secretary of Transportation has

142. *See* Thibault v. BellSouth Telecomms., Inc., 612 F.3d 843, 844 (5th Cir. July 2010).
143. *Id.* at 844-45.
144. *Id.* at 845.
145. *Id.* at 846.
146. *See id.* at 846-48 (mirroring the court's analysis in *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993)).
147. *Id.* at 849.
148. *Id.*
149. Songer v. Dillon Res., Inc., 618 F.3d 467,468 (5th Cir. Sept. 2010).
150. *Id.* at 470.
151. *Id.* at 471.
152. *Id.*

> power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49 [of the MCA.]"[153]

Application of this exemption "depends both on the class to which the employer belongs and on the class of work involved" in his job.[154]

The court first considered whether the plaintiffs were employed by carriers whose transportation of property was subject to the Secretary's jurisdiction.[155] The plaintiffs asserted that one of the carriers, a leasing company, did not fall into this category.[156] The defendants, however, asserted that because the other two carriers did fall under the Secretary's jurisdiction and those carriers were joint employers with the leasing company, then all of them fell within the MCA exemption.[157] Acknowledging that Fifth Circuit precedent on this issue was limited, the court turned to other jurisdictions for guidance.[158] Based on that case law, the court determined that the Secretary's jurisdiction extended to leased drivers and the leasing companies that employed them.[159]

Next, the court looked at "whether the [p]laintiffs 'engage[d] in activities . . . directly affect[ing] the operational safety of motor vehicles in the transport of property in interstate commerce.'"[160] The court agreed with the district court's conclusion that "the drivers could have been called upon to drive in interstate commerce during their employment" and accordingly, the Secretary could retain jurisdiction over their activities, making them exempt from receiving overtime pay.[161]

Because the drivers were covered by the MCA exemption, no overtime was warranted, and summary judgment was properly granted in favor of the defendant trucking companies.[162] Obviously, this opinion has very limited applicability and will not have widespread effects on FLSA jurisprudence.

D. Martin v. PepsiAmericas, Inc.

In another action for unpaid overtime wages allegedly due under the FLSA, the Fifth Circuit held that set-offs should not be allowed unless the money being set off can be considered wages that the employer prepaid to the employee.[163]

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153. *Id.* (omissions and alteration in original).
154. *Id.* at 472.
155. *Id.*
156. *Id.*
157. *Id.*
158. *See id.* at 472-73.
159. *See id.* at 473.
160. *Id.*
161. *Id.* at 475.
162. *See id.* at 475-76.
163. *See* Martin v. PepsiAmericas, Inc., 628 F.3d 738, 742-43 (5th Cir. Dec. 2010).

The plaintiff, Karen Martin, initially worked for PepsiAmericas, Inc. (Pepsi) as an hourly-wage-earning route settlement clerk.[164] Martin received overtime pay for any hours worked in excess of a forty-hour work week.[165] In January 2004, Pepsi promoted Martin to a salaried supervisory position.[166] The parties dispute whether Martin's salary was intended to cover all hours worked or only a forty-hour work week.[167] Two years later, Martin was laid off.[168] Upon termination of her employment, Martin entered into a severance agreement and received various benefits in exchange for her agreement not to file any claims or lawsuits against Pepsi.[169] Notwithstanding this agreement, Martin filed suit to recover unpaid overtime wages allegedly due to her under the FLSA.[170] The district court granted Pepsi's motion to dismiss after determining that Martin's maximum recovery was less than the value of her severance package, which would be set off against any potential damages award.[171] Martin appealed.[172]

On appeal, the Fifth Circuit expressed general disfavor about set-offs and explained that they should only be used if the set-off can be considered wages that the employer prepaid to the employee.[173] Here, Pepsi made severance payments to Martin in return for a release of claims, not as wages for time worked.[174] Thus, the court concluded, Pepsi was not entitled to a set-off because the money paid was not a wage payment, advance or otherwise.[175] Because the district court improperly set off the value of Martin's severance package against her potential recovery at trial, the court reversed the district court's dismissal and remanded the case for further proceedings.[176]

Generally speaking, an employer cannot assert set-offs or bring counterclaims against an employee in a case brought to enforce the FLSA's overtime provisions.[177] This opinion is in keeping with that rule.[178]

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164. *Id.* at 739.
165. *Id.* at 740.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.* at 742.
174. *See id.* at 742-43.
175. *Id.* at 743.
176. *Id.*
177. *See id.* at 742.
178. *See id.* at 742-43.

V. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects veterans and Reserve component members from employment discrimination and provides reemployment rights with a pre-service employer following qualifying military service.[179] Particularly in light of the perpetual state of war in which the United States finds itself, USERRA is an extremely important statute. No one deserves protection from discrimination and other civil rights violations more than those individuals who protect and defend those very rights at home and abroad.

A. Staub v. Proctor Hospital

Vincent Staub was employed as an angiography technician by Proctor Hospital while also serving as a member of the United States Army Reserve.[180] Staub's commitment to the Army Reserve "required him to attend drill one weekend per month and to train full time for two to three weeks a year."[181] Staub's immediate supervisors, Janice Mulally and Michael Korenchuk, fostered animosity towards his military obligations.[182] In 2004, Staub was fired by Linda Buck based upon a prior reprimand made by his immediate supervisors.[183] Staub sued Proctor under USERRA, claiming that his termination was motivated by hostility to his military reservist obligations.[184]

The Seventh Circuit reversed judgment in favor of Staub, holding that Staub's case represented "a 'cat's paw case,' meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision."[185] Under Seventh Circuit precedent, such a case could not succeed without showing that the decision to terminate was the result of "blind reliance" on those with improper motives.[186]

Under USERRA, like Title VII, discrimination is established when an unlawful factor is "a motivating factor for any employment practice, even though other factors also motivated the practice."[187] When the decision-maker himself is unlawfully motivated, discrimination clearly exists.[188] When the

179. *See* 38 U.S.C. § 4311 (2006).
180. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189 (2011).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 1190.
185. *Id.*
186. *Id.*
187. *Id.* at 1191.
188. *See id.*

decision-maker does not carry discriminatory animus but is influenced by someone else who does, however, the result is less obvious.[189]

Relying on principles of agency and tort law in conjunction with Title VII precedent, the Supreme Court held "that if a supervisor performs an act motivated by antimilitary animus that is *intended* . . . to cause an adverse employment action [(e.g., employee reprimand)], and if that act is a proximate cause of the ultimate employment action [(e.g., termination)], then the employer is liable under USERRA."[190]

"Both Mulally and Korenchuk were acting within the scope of their employment when they took the actions that allegedly caused Buck to fire Staub."[191] Further, evidence existed that those actions were motivated by their hostility towards Staub's military obligations.[192] Evidence also existed that Mulally's and Korenchuk's actions were causally connected to Buck's decision to fire Staub and that they "had the specific intent to cause Staub to be terminated."[193] Based on the Court's analysis, therefore, it reversed the Seventh Circuit's judgment, and the case was remanded to the trial court.[194]

B. Carder v. Continental Airlines, Inc.

In a case of first impression, the Fifth Circuit held that USERRA does not create a cause of action for hostile work environment against military service members.[195]

In this case, various Continental Airlines, Inc. (Continental) pilots alleged violations of USERRA, including allegations that management "(1) placed onerous restrictions on taking military leave and arbitrarily attempt[ed] to cancel military leave; [and] (2) made derisive and derogatory comments to pilots about their military service."[196] Continental moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that USERRA does not provide for a hostile work environment or harassment cause of action.[197]

In its opinion, the Fifth Circuit pointed to the statutory language, citing the definition of the term "benefit of employment," which includes "any advantage, profit, privilege, gain, status, account, or interest" (including wages or salary) associated with employment.[198] Based on that language, and in contrast to the language used in Title VII and other employment statutes, the court found that

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189. *Id.*
190. *Id.* at 1191-94 (footnote omitted).
191. *Id.* at 1194.
192. *Id.*
193. *Id.*
194. *Id.* at 1194-95.
195. *See* Carder v. Cont'l Airlines, Inc., 636 F.3d 172, 174 (5th Cir. Mar. 2011).
196. *Id.*
197. *Id.*
198. *Id.* at 175.

the term did not include the absence of harassment, hostility, insults, or other similar words or comments.[199]

The court concluded by emphasizing that:

> [N]othing in this opinion alters the ability of service members to sue under USERRA for the denial of contractual benefits of their employment on the basis of military service as defined in the statute. All that we hold is that service members may not bring a freestanding cause of action for hostile work environment against their employers.[200]

VI. MISCELLANEOUS SUPREME COURT DECISIONS

This Term, the United States Supreme Court heard at least two additional cases that significantly impact employers and employees nationwide. One case, *Wal-Mart Stores, Inc. v. Dukes*, decertified one of the largest class actions in our nation's history.[201] The other, *Chamber of Commerce of the United States v. Whiting*, has implications in the context of federalism as well as employment law because it provided that the doctrine of preemption did not prevent a state from implementing its own rules for governing the employment of undocumented aliens.[202]

A. Wal-Mart Stores, Inc. v. Dukes

This survey period, the Supreme Court tackled what Justice Scalia described as "one of the most expansive class actions ever."[203] In this case, the district court and the Ninth Circuit Court of Appeals certified a class of approximately 1.5 million plaintiffs comprised of current and former Wal-Mart employees who alleged that discretionary decision-making by local supervisors resulted in discriminatory actions against women.[204] Importantly, the plaintiffs claimed that the alleged discrimination was "common to *all* Wal-Mart's female employees" and that a "uniform 'corporate culture' permit[ted] bias against women" in a way that affected "every woman at the company."[205] The Supreme Court granted certiorari to determine whether certification of the class was consistent with Federal Rules of Civil Procedure 23(a) and 23(b)(2).[206]

First, the Court set forth the requirements of a Rule 23(a) class action, namely: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of

199. *See id.* at 177-79.
200. *Id.* at 182.
201. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).
202. *See* Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1973 (2011).
203. *Dukes*, 131 S. Ct. at 2547.
204. *Id.*
205. *Id.* at 2548.
206. *Id.* at 2547.

representation.[207] Then, the Court explained that the proposed class must meet at least one of the three requirements included in Rule 23(b).[208] Here, the plaintiffs "rel[ied] on Rule 23(b)(2), which applies when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate'" to the class as a whole.[209]

Ultimately, the case turned on the element of commonality. The Court stated:

> In this case, proof of commonality necessarily overlaps with [plaintiffs'] merits contention that Wal-Mart engages in a *pattern or practice* of discrimination. That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision." Here [plaintiffs] wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[210]

The Court emphasized the conceptual gap between an *individual's claim* of discrimination and an otherwise unsupported allegation that a company has a *policy* of discrimination.[211] Here, because Wal-Mart had no uniform testing procedure or other objective policy applicable to all women,[212] the Court could not bridge the gap.

In sum, the Court agreed with Chief Judge Kozinski, who authored the dissenting opinion for the Ninth Circuit, and quoted his conclusions:

> [The plaintiffs] held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.[213]

In the second portion of the opinion, the Court concluded that the plaintiffs' claims for backpay "were improperly certified under Federal Rule of Civil Procedure 23(b)(2)" because claims for monetary relief cannot be certified under that rule unless such relief is "incidental to the injunctive or declaratory

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207. *See id.* at 2548.
208. *Id.*
209. *Id.* at 2548-49.
210. *Id.* at 2552 (citation omitted).
211. *See id.* at 2552-53.
212. *Id.* at 2554. To the contrary, the plaintiffs complained that the discriminatory practices resulted from supervisory discretion. *Id.*
213. *Id.* at 2557.

relief" sought by the class.[214] Instead, Wal-Mart is entitled to individualized determinations of each employee's entitlement to backpay.[215]

Although the decision favored Wal-Mart, the plaintiffs are not without redress. They can still pursue individual claims of discrimination against Wal-Mart.[216] Obviously, if the plaintiffs do so, Wal-Mart could face astronomical legal fees (and cumulative settlement dollars) defending more than 1.5 million gender discrimination cases.

B. Chamber of Commerce of the United States v. Whiting

During the survey period, the Supreme Court faced a hot topic central to political debates regarding illegal immigrant workers.[217] In this case, the Supreme Court upheld an Arizona law that imposes harsh penalties on businesses that hire illegal immigrants, concluding that such a law is not preempted by the federal Immigration Reform and Control Act (IRCA).[218]

As background, federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens."[219] Arizona recently enacted a statute, the Legal Arizona Workers Act, which provides for the suspension or revocation of licenses of employers that knowingly or intentionally employ unauthorized aliens.[220] The Arizona statute also requires employers use a federal electronic verification system to confirm the legal status of all workers.[221] Thus, the question arose as to whether the Arizona law conflicted with the IRCA, and the Chamber of Commerce, along with various business and civil rights organizations, brought suit.[222]

Writing for the majority, Chief Justice Roberts detailed the federal statutory framework and historical background governing employment of aliens.[223] Next, the Court introduced the Arizona statute and explained its facets.[224]

Affirming the lower courts' decisions, the Supreme Court explained that the IRCA's express preemption clause specifically excludes a state's right to govern employment of unauthorized aliens through the use of licensing laws.[225] This is precisely what the Arizona law purports to do.[226] Accordingly, the

214. *Id.*
215. *Id.* at 2560.
216. *See id.* at 2560-61.
217. *See* Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011).
218. *See id.* at 1973, 1987.
219. *Id.* at 1973 (omission in original) (quoting 8 U.S.C. § 1324a(h)(2) (2006)).
220. *Id.*
221. *Id.*
222. *Id.* at 1974, 1977.
223. *See id.* at 1973-75.
224. *See id.* at 1975-76.
225. *See id.* at 1977.
226. *See id.* at 1978.

Court held that "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."[227]

Next, the Court addressed the plaintiffs' alternative argument that the State statute is impliedly preempted because it conflicts with federal law.[228] The Court rejected this argument, explaining that "Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority."[229]

In conclusion, the majority stated: "Because Arizona's unauthorized alien employment law fits within the confines of IRCA's savings clause and does not conflict with federal immigration law, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed."[230]

The *Whiting* decision seems to give great latitude to states, affording them the opportunity to broadly construe licensing provisions designed to discourage, and even prohibit, employment of undocumented workers. Many other conservative states will likely follow in the footsteps of Arizona.

227. *Id.* at 1981.
228. *Id.*
229. *Id.*
230. *Id.* at 1987.