

The Top 5 Employment Cases Of 2017

By **Vin Gurrieri**

Law360, New York (December 19, 2017, 6:08 PM EST) -- A Texas federal court's invalidation of the Obama administration's controversial expansion of overtime pay for white collar workers and divergent rulings by two federal circuit courts over whether federal anti-discrimination law covers sexual orientation bias were among the highlights of 2017 for employment law observers.

Here are five of the year's seminal court cases.

Overtime Rule Cut Down

In the last year of his presidency, President Barack Obama and then-Labor Secretary Thomas Perez finalized an expansion of the Fair Labor Standards Act's overtime exemptions for executive, administrative and professional, or EAP, workers — a rule that was designed to boost wages for millions of white collar professionals.

The rule would have doubled the minimum salary required to qualify for the exemption from \$23,660 annually to just over \$47,476 per year. It also increased the overtime eligibility threshold for highly compensated workers from \$100,000 to about \$134,000 and created an index for future increases.

But the regulation came under harsh fire almost immediately. Texas, Nevada and 19 other states quickly filed suit challenging the rule, and their case was consolidated with a similar lawsuit lodged by various business groups.

After first blocking the rule from taking effect in November 2016, U.S. District Judge Amos Mazzant invalidated the rule in its entirety in August, saying in part that the salary level set by the DOL was so high that it flouted Congress' intention that the overtime exemption apply to employees who perform "bona fide executive, administrative or professional capacity" duties.

By setting the salary level where it did, the DOL effectively eliminated the so-called duties test for determining which workers are eligible for the EAP exemption, which it lacked the authority to do, the judge said.

"This time last year, some employers had already started implementing changes [based on the rule]," said John Fullerton of Epstein Becker Green PC. "It's a huge relief for employers not to have to worry about those changes — at least for the time being."

The case is *State of Nevada et al. v. U.S. Department of Labor et al.*, case number 4:16-cv-00731, in the U.S. District Court for the Eastern District of Texas.

A Galaxy of Sex Orientation Cases

One of the U.S. Equal Employment Opportunity Commission's stated priorities in recent years has been advancing its position that Title VII's existing bar on discrimination based on sex necessarily protects against sexual orientation bias.

A sharp split has developed over that issue as courts have considered it in various cases.

In April, the Seventh Circuit became the first appellate court to adopt the EEOC's position when it revived a suit by professor Kimberly Hively accusing Indiana's Ivy Tech Community College of denying her promotions because she is a lesbian. That decision came just a few weeks after the Eleventh Circuit rejected a bid by former Georgia Regional Hospital security guard Jameka Evans to revive her suit alleging she was discriminated against because she is a lesbian. The U.S. Supreme Court recently declined to take up the case.

The Second Circuit, meanwhile, held an en banc rehearing in deceased gay skydiver Donald Zarda's suit in September to consider whether it — like the Seventh Circuit did — should overturn its precedent that Title VII bars sexual orientation discrimination. The court has yet to issue an opinion, but is expected to do so in the near future.

Camille N. Khodadad of Much Shelist PC noted that the U.S. Department of Justice "interestingly" took the position in the Zarda case that Title VII's sex discrimination prohibition does not include discrimination based on sexual orientation — a stance that is "diametrically opposed" to the EEOC's current interpretation of the law and shows that even federal agencies disagree over the issue.

"In fact, in its [amicus] brief, the Justice Department stated: 'The EEOC is not speaking for the United States,'" Khodadad said. "Ultimately, the Supreme Court will need to resolve the conflict among the federal appellate courts and determine whether sexual orientation discrimination is barred by Title VII."

Akerman LLP partner Matt Steinberg, who hosts the firm's employment law podcast, said the unsettled concept of sexual orientation discrimination under Title VII "is one of the most important questions" facing employment law practitioners.

He also noted that the debate over the issue at the federal level is occurring as numerous states are passing their own statutes protecting LGBT individuals and companies are implementing internal policies that protect people against bias based on sexual orientation.

"For a number of reasons, a lot of employers are already starting to adopt the EEOC's position and prohibit sexual orientation discrimination," Steinberg said, noting that those companies have determined that getting out in front on the issue helps their social footprint as well as their ability to attract and retain talent.

The cases are *Kimberly Hively v. Ivy Tech Community College*, case number 15-1720, in the U.S. Court of Appeals for the Seventh Circuit; *Melissa Zarda et al. v. Altitude Express dba Skydive Long Island et al.*, case number 15-3775, in the U.S. Court of Appeals for the Second Circuit; and *Evans v. Georgia Regional*

Hospital et al., case number 17-370, in the Supreme Court of the United States.

Justices Set Standard for EEOC Subpoena Reviews

In April, the U.S. Supreme Court ruled 7-1 that the Ninth Circuit used an incorrect standard to evaluate whether grocery distributor McLane Co. Inc. had to turn over workers' personally identifiable information in response to a subpoena from the EEOC, which had been issued as part of a gender bias investigation.

Writing for the majority, Justice Sonia Sotomayor said that district courts' decisions over whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not de novo, which was the standard used in McLane's case by the Ninth Circuit.

Both the EEOC and McLane had taken the position before the high court that the Ninth Circuit was wrong to use the de novo standard instead of the more deferential standard of review. But the EEOC, unlike McLane, argued that the Ninth Circuit would have reached the same conclusion under either framework.

Justice Ruth Bader Ginsburg issued a partial dissent, saying she agreed with the majority that the abuse of discretion standard is generally the way courts should review agency subpoenas, but that the Ninth Circuit's opinion in this case still should have been affirmed.

Timm Schowalter of Sandberg Phoenix & Von Gontard PC, said that even though the case made it all the way to the Supreme Court, it ultimately "was much ado about nothing" since the high court "didn't hone in" on the standard for the EEOC's subpoena power as outlined in a 1984 high court ruling in EEOC v. Shell Oil.

If anything, Schowalter said, the McLane decision "bolstered" the high court's ruling in Shell. The justices in that case said in part the term "relevant" should be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."

"Most district courts already used the abuse of discretion standard," Schowalter said. "The decision really relied on the language of Shell Oil, which has made life difficult for employers and defense attorneys."

Schowalter also said he's "certain that the EEOC will rely on Justice Ginsburg's concurrence as well as language in Justice Sotomayor's opinion" in future cases involving its subpoena authority.

The case is McLane Co. Inc. v. Equal Employment Opportunity Commission, case number 15-1248, in the Supreme Court of the United States.

EEOC Settles Landmark Age Bias Suit

In arguably the year's most high-profile employment trial, the EEOC faced off against Texas Roadhouse in a case accusing the restaurant chain of engaging in a pattern or practice of discriminating against older job applicants by predominantly hiring front-of-house employees, like hosts and bartenders, who were under 40.

But in February, a Massachusetts jury deadlocked on the question and the case ended in a mistrial. After

the parties sparred some more over when a retrial would occur, among other issues, they ultimately settled the case in late March, with Texas Roadhouse agreeing to pay \$12 million and implement various policy changes.

The age discrimination case was unique for its novel use of the Age Discrimination in Employment Act as a sort of de facto collective action on behalf of 11 named claimants and, had the case continued, potentially hundreds more who were allegedly rejected for jobs based on their ages.

"The next trend in employment litigation will be around age discrimination," Steinberg said, noting that individuals today "are working much longer than they used to both because they want to and because they have to" and that the EEOC has warned employers "to be careful about stereotyping what workers can do and what workers can learn to do."

Steinberg added that the case underscores the EEOC's commitment to making age discrimination an enforcement priority, saying the agency took the case all the way to trial and, after a mistrial was declared, appeared "ready, willing and able to go to trial again."

The EEOC itself acknowledged the case's importance when it was included on a list of the top 10 ADEA cases the agency has been involved in. The list was released in July as part of the EEOC's year-long celebration of the ADEA's 50th anniversary, which the agency has used to spotlight the issues faced by older workers.

Khodadad noted that "importantly, Texas Roadhouse did not admit that it engaged in any unlawful behavior" as part of the settlement.

"Against that backdrop, this case stresses the need for employers to review their employment practices and policies to ensure that employees over 40 years of age are treated the same as similarly-situated younger employees, whether in the hiring or post-hiring process," she said.

The case is Equal Employment Opportunity Commission v. Texas Roadhouse Inc. et al., case number 1:11-cv-11732, in the U.S. District Court for the District of Massachusetts.

Door Opens for Medical Marijuana Accommodations

In July, Massachusetts' highest court ruled that employees can sue for disability discrimination if they are fired or otherwise punished for using medical marijuana, reviving plaintiff Cristina Barbuto's suit accusing her former employer Advantage Sales & Marketing LLC of handicap discrimination by firing her because of her medical marijuana use to treat Crohn's disease.

In its ruling, the Massachusetts justices said that patients like Barbuto who legally use marijuana for medical purposes can haul their employers into court if they are fired from their jobs because they tested positive for the drug. The panel also said that allowing for the use of medical marijuana could potentially be a reasonable accommodation for an employee's disability if that employee has been legally prescribed marijuana.

Steinberg said the ruling was significant because a court recognized within a specific statute language that medical marijuana users could plausibly seek reasonable accommodations.

"The question has not been decided as to what degree an employee can argue in court that an employer

should be required to accommodate the use of medical marijuana,” Steinberg said. “The interesting question over time will be if an employee can establish as a reasonable accommodation that an employer has to allow them to come into work even when they may potentially be under the influence. The employee could argue that, by virtue of the type of medical marijuana they are taking, that it has no effect on their job performance and the employer will have to prove that [allowing] it is an undue hardship.”

Steinberg was careful to note that such an argument would necessarily have some caveats, like in a situation where an employee drives as part of their job or operates dangerous machinery.

The case is *Cristina Barbuto v. Advantage Sales & Marketing LLC and Joanne Meredith Villaruz*, case number SJC-12226, in the Massachusetts Supreme Judicial Court.

--Editing by Pamela Wilkinson and Kelly Duncan.