AROUND THE LABOR AND EMPLOYMENT LAW WORLD IN 60 MINUTES

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I. RAISING THE BAR FOR TITLE VII RETALIATION CLAIMS

Last June, the United States Supreme Court raised the bar for retaliation claims under Title VII of the Civil Rights Act of 1964 ("Title VII") claims by requiring "but-for" causation, a higher burden of proof than the less demanding "motivating factor." This decision requires that plaintiffs prove that the desire to retaliate was the but-for cause of the challenged employment action.

A. University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013)

1. Facts.

Dr. Nassar, a doctor of Middle Eastern descent, worked under an agreement with the University of Texas Southwestern Medical Center where he worked as both a member of the University's faculty and as a physician at a local hospital.

Dr. Nassar complained about his direct supervisor's harassment at the University. Dr. Nassar reported to the Department Chair that his supervisor was biased against him due to his religion and ethnic heritage and as a result, relentlessly scrutinized his billing practices and work habits. Dr. Nassar tried to negotiate a deal where he could work at the hospital without having to stay on at the University. Dr. Nassar was told this would be possible so he sent his resignation letter to the University stating that he wanted to resign due to the harassment.

When the hospital extended the offer of employment to Dr. Nassar, the Department Chair at the University stated it was inconsistent with the agreement between the University and the hospital. The hospital then withdrew the offer. Dr. Nassar filed suit alleging status-based discrimination and retaliation. Dr. Nassar alleged the Department Chair retaliated against him as a result of his complaining about the harassment.

2. District Court.

Jury found for Nassar on both claims.

3. Fifth Circuit.

Vacated the discrimination claim verdict but affirmed as to retaliation and held that but-for causation was not required for retaliation. The Fifth Circuit reasoned that retaliation claims, like status-based claims, only require a showing that retaliation was
the motivating factor for the adverse employment action, not the but-for cause.

4. Supreme Court.

Vacated and remanded for further proceedings. This case presents one question:

What causation standard is applicable to claims of unlawful employer retaliation under Title VII?

But-for causation – requires the plaintiff to show that the desire to retaliate was the but-for cause of the adverse employment action. In deciding the causation requirement, the Court examined the 1991 amendment to Title VII which allows the use of motivating factors in Title VII discrimination claims. What the Court found telling was that retaliation was not addressed. The Court also noted that the Americans with Disabilities Act (“ADA”), passed a year before the amendment, includes an anti-retaliation provision. With this in mind, the Court opined that if Congress wanted to address retaliation in the 1991 amendment, they clearly could have, and would have in fact done just that. The Court concluded that the fact that Congress decided not to address retaliation in the 1991 amendment was evidence that Congress did not intend the 1991 amendment to apply to Title VII’s retaliation section.

Furthermore, the Court reviewed its ruling in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), where it held that the Age Discrimination in Employment Act (“ADEA”) required but-for causation. This decision hinged on the “because of” language in the ADEA as it related to discrimination. The same language is also included in Title VII’s anti-retaliation provision. It is unlawful for an employer to retaliate because of certain protected activity. Therefore, applying Gross, the Court concluded that Title VII retaliation claims require the higher burden of proof that the desire to retaliate was the “but-for” cause of the challenged employment action.

5. What does this mean for employers?

a. Retaliation is the most common type of discrimination alleged nationally. In 2013, the Equal Employment Opportunity Commission (“EEOC”) received a total of 93,727 charges, which is less than those filed in each of the previous three years. However, retaliation claims continue to rise. 33.6 percent of the overall charges, 31,478, were based on Title VII retaliation. Nassar has been considered by many employers to be a victory because it will likely result in less retaliation lawsuits against employers since but-for causation is much more difficult to prove. This helps because even when the claim
for the underlying discrimination is dismissed, a retaliation claim can still stand.

b. However, employers should not celebrate too soon. To avoid retaliation claims in the first place, employers should review policies and procedures, educate employees, and be sure to quickly investigate and address any complaint of retaliation. Furthermore, employers should get in the habit of documenting each step leading up to taking an adverse employment action. This will aid in staving off any suspicion that the adverse action was taken out of retaliation.


In a recent Kentucky Court of Appeals case, Asbury College appealed a jury decision that awarded Powell, a former employee, $380,000 on her retaliation claim. Asbury College alleged that the jury instructions improperly invoked the motivating factor analysis for Powell's retaliation claim instead of the but-for standard articulated in Nassar.

The court upheld the jury's decision for Powell. Nassar was decided four months after Powell's trial concluded. But while the court did not allow Asbury College to file Nassar as supplemental authority, the court still discussed how Nassar clarified key issues when deciding a retaliation claim.

The court considered that while the lesser standard, which was law at the time, was used in the jury instructions, it also included the stricter, new requirement articulated in Nassar. The relevant portions of the jury instructions included:

- Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action; and
- But for her complaining about gender discrimination she would not have suffered the adverse employment action.

Therefore, the court concluded that the instructions were not improper and that Asbury College was not prejudiced by the instruction.


In a recent case from the Eastern District of Kentucky, an employee alleged that he was not promoted because he filed a report of sexual harassment against his supervisor.

Turner filed a complaint with the Cabinet's Civil Rights Compliance Branch, and the Branch determined the allegations were unfounded.
Because federal courts must give state agencies acting in a judicial capacity the same preclusive effect as it would have in courts of that state, the court held that Turner's retaliation claim under Kentucky law was precluded.

However, Turner's federal claim under Title VII was not precluded. The court first determined that Turner clearly engaged in protected activity by filing a sexual harassment complaint. But the issue was causation. The court relied on Nassar, and required but-for causation. Turner claimed that his supervisor intentionally allowed a job opening to expire so Turner could not apply. However, it turned out that the position was withdrawn due to a state-wide hiring freeze.

Therefore, the court determined that Turner failed to show that he did not receive his promotion because of the protected activity. Furthermore, the court noted that when the position was back up, Turner did not take further steps to apply. Since Turner could not carry the but-for burden required in Title VII retaliation cases, the court granted the Cabinet's summary judgment motion.

II. HARASSMENT AND THE "EMPOWERED STANDARD"

In June 2013, the United States Supreme Court held in a 5-4 decision that in a case of harassment liability, an employee qualifies as a supervisor and the employer will incur liability only where the employer has empowered the employee to take tangible employment actions against the victim.

A tangible employment action includes anything that would effect a significant change in employment status. Examples include: hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision that causes a significant change in benefits.

Vance v. Ball State University, 133 S.Ct. 2434 (2013).

A. Facts.

An African-American catering assistant at Ball State University, Maetta Vance, claimed that she was harassed by a fellow employee, a catering specialist, because of her race. Vance claimed the catering specialist was her "supervisor" because she directed her day-to-day responsibilities. However, there was no evidence of the fellow employee's authority to fire, demote, promote, discipline, or take other tangible employment actions against Vance.

B. District Court.

Granted summary judgment to the University, holding that Vance's co-worker was not a supervisor since she did not have the authority to hire, fire, demote, promote, transfer or discipline. Furthermore, the court found that the University could not be held liable for the employee's conduct since it responded reasonably to the incidents.
C. Seventh Circuit.

The Seventh Circuit affirmed the District Court's decision and determined that directing day-to-day responsibilities was not enough to make the harasser a "supervisor" under Title VII. And just as the District Court held, the Seventh Circuit found that the University was not negligent.

D. Supreme Court: Affirmed.

This case presents the question: Who qualifies as a "supervisor" in a case where an employee asserts a workplace harassment claim under Title VII?

The Court acknowledges the confusion since the term "supervisor" has various meanings and is oftentimes very nebulous. The Court concluded that the best way to understand what is meant by "supervisor" is to consider an interpretation that fits within the framework adopted in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

The Court stated that while those two cases do not resolve the question of who is considered a "supervisor," the answer is implicit in the characteristics of the framework adopted in both cases. In each case, the Court reasoned, there is a sharp line between co-workers and supervisors that centers around who has the authority to take tangible employment actions. In Ellerth, the alleged harasser hired and promoted the victim, therefore no question about the harasser's status was raised. With Faragher, one of the harassers clearly was a supervisor due to the fact that he hired the employees, supervised their work, and disciplined them. While the second harasser had less authority, he still made disciplinary decisions and had input on employee evaluations.

The Court recognized the importance of defining "supervisor" due to a circuit split. On one hand, some circuits held that an employee was not a supervisor unless they had the power to hire, fire, demote, promote, transfer, or discipline the victim. On the other hand, some circuits followed EEOC Enforcement Guidance, which determined who a "supervisor" was by how much direction they had over the victim's daily work.

The Court rejected the "nebulous" definition of a "supervisor" in the EEOC Enforcement Guidance in favor of the "clear distinction" set out in Ellerth and Faragher.

E. What Does This Mean for Employers?

In Vance, the Court narrowed the definition of "supervisor." This helps employers in two ways.

First, the ruling gives a more concrete definition to the term "supervisor" and effectively resolved a circuit split. The term "supervisor" does not
appear in Title VII; therefore, its definition has been somewhat vague. This definition is important to employers since an employer's liability hinges on the status of the harasser. An employer may be held vicariously liable for the harassment of a supervisor. However, if the harasser is a co-worker, an employer is only liable if the employer was negligent with respect to the offensive behavior.

Second, the Court chose to narrow the definition so a "supervisor" is not just one who oversees an employee's daily activities. Instead, to be a "supervisor" for purposes of triggering vicarious liability in a harassment claim under Title VII, an employee must be empowered by the employer. The employer must have empowered the employee to take tangible employment actions such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision that causes a significant change in benefits.

F. What Should Employers Do?

1. Review the job duties of managers or supervisors to assess who may be empowered to take tangible employment actions, thus able to trigger vicarious liability should a harassment claim arise.

2. Review harassment policies and procedures. Educate all employees about these policies, including how to prevent and report harassment in the workplace. Train supervisors about how to identify and prevent workplace harassment, as well as handle complaints.

III. WORKPLACE BULLYING

A. What Is "Bullying"?

1. Bullying is a pattern of behavior that is becoming increasingly prevalent in the workplace. The Healthy Workplace Campaign describes workplace bullying as "repeated health-harming mistreatment that takes one or more of the following forms: verbal abuse, offensive behaviors that are threatening, humiliating or intimidating, or work interference or sabotage that prevents work from getting done."

2. New 2014 Workplace Bullying Institute Survey Statistics: 27 percent of working adults in America have experienced bullying = 37 million; 21 percent have witnessed bullying; 33 percent comes from co-workers; and 56 percent comes from supervisors.

B. Why Is Bullying a Problem for Employers?

1. Effects on those bullied – Stress-related health complications including: hypertension, auto-immune disorders, depression, anxiety, loss of sleep, low self-esteem.
2. Effects on those who witness bullying – feelings of intimidation, anxiety, and fear.

3. Cost to employers:
   a. Direct costs to the bottom line: workers' comp and lawsuits.
   b. Indirect costs: tension on the job, decreased productivity, high turnover, absenteeism, poor customer relations, low morale.
   c. There is a direct link between bullying and violence in the workplace.

C. The State of the Law

1. Kentucky has not currently enacted the specific law against bullying, known as the Healthy Workplace Bill.

2. Some unions across the country are beginning to include provisions to protect their members against abusive supervision and bullying in their collective bargaining agreements.

3. The Kentucky Civil Rights Act ("KCRA") and Title VII protect people against unlawful harassment when it's based on certain improper grounds and amounts to unlawful employment discrimination. The problem however, is that bullying is "status blind" so the KCRA and Title VII afford little protection.

D. What Can Employers Do?

1. Evaluate your workplace. Are there certain groups that have a higher turnover rate, or requests for transfer?

2. Establish a policy. According to a Society for Human Resource Management survey, 56 percent of companies have some sort of anti-bullying policy in their handbook or code of conduct. Include a definition of bullying, examples, and clear instructions on how to lodge a complaint. Lay out a detailed complaint investigation procedure, outline consequences, and promise no retaliation.

3. Educate employees about the signs and how to report bullying in the workplace.

4. Enforce the policy. Once the policy is in place, be sure it is followed and enforced uniformly.
IV. JOINT EMPLOYER LIABILITY

In a recent Sixth Circuit case, the court held that a general contractor could be held liable under a Title VII discrimination claim brought by the sub-contractor's employees. Since the general contractor exerted significant control over the sub-contractor's employees, the court reasoned it was a joint employer for purposes of Title VII liability.


A. Facts

Skanska USA Bldg., Inc., ("Skanska") was the general contractor for the construction site of a hospital in Tennessee. One of Skanska's subcontractors, C-1, Inc. ("C-1"), hired a man named Maurice Knox as well as several other African-American males to operate the temporary elevator on the construction site. The contract between Skanska and C-1 stated that the operators were to be supervised by C-1. However, in reality, while on the worksite the operators' daily responsibilities were directed by Skanska. Skanska employees supervised the operators, set their hours, and trained them.

On the site, the men were harassed because of their race through name calling and graffiti that appeared at the worksite. Knox and his fellow employees repeatedly complained about the treatment but no action was taken. Knox was later let go. The EEOC sued Skanska for creating a hostile work environment and for retaliating against Knox in violation of Title VII. Knox later joined the suit.

B. District Court: Granted Summary Judgment to Skanska

C. Sixth Circuit

Reversed and remanded for further proceedings. The question before the Sixth Circuit was: Is Skanska a joint employer of the operators, and thus liable under Title VII?

While Skanska did not employ the operators directly, the court determined that the joint employer theory applied.

The court stated that entities are joint employers if they "share or co-determine those matters governing essential terms and conditions of employment." These essential matters include the ability to hire, fire, discipline employees, affect compensation or benefits, and supervise their work.

Skanska effectively controlled the operators and determined the essential terms and conditions of employment. Skanska routinely directed and supervised the operators' work, set the operators' schedule and assigned daily tasks. Furthermore, when the operators complained about issues, they complained to Skanska employees who handled their complaints.
While the contract provided that C-1 would play a more active role in supervising the operators, the court reasoned that C-1 was basically a non-entity on the site and had minimal oversight over the operators.

D. What Does This Mean for Employers?

Control is king. The contract between Skanska and C-1 stated that C-1 would supervise the operators. However, due to the reality of the worksite, and Skanska’s control over the worksite, the court held that Skanska was a joint employer for purposes of liability under Title VII.

For employers who operate in industries where contractor relationships are common, such as construction, the lesson is that the contract is not what counts. Look at the reality of the workplace and assess which entity effectively controls the sub-contractor’s employees to determine whether joint employer liability may be an issue should there be a Title VII claim.

V. REDEFINING "DISABILITY" UNDER THE KCRA AND THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT (“ADAAA”)

In June 2013, the American Medical Association declared obesity as a disease. On the heels of that announcement, the Kentucky Court of Appeals held in Pennington v. Wagner’s Pharm., Inc., that obesity could be considered a disability.


A. Facts

Melissa Pennington worked for Wagner’s as a food truck operator. Pennington stood at 5’4” and weighed 425 pounds, making her morbidly obese. In April 2007, after ten years of working for Wagner’s, Pennington was fired due to her “personal appearance.” After she was terminated, Pennington filed a suit alleging that she was wrongly discriminated against because of her weight in violation of the KCRA.

B. Circuit Court

Granted Wagner’s summary judgment motion and found that Pennington’s obesity was not a disability pursuant to the KCRA since it was not caused by an underlying physiological condition as defined in EEOC guidance.

C. Appellate Court

Vacated the lower court’s order and remanded. The question before the appellate court was: Is Pennington disabled as defined by the KCRA?

The KCRA is fashioned after the ADA and prohibits discrimination by employers due to an employee’s disability. It was undisputed that Pennington was qualified to perform her job, and that an adverse
employment action was taken. Therefore the only barrier that remained for Pennington to prove a \textit{prima facie} case of discrimination was whether Pennington was disabled as defined in the KCRA. A "disability" under the KCRA is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual; a record of such an impairment; or being regarded as having such an impairment."

Based on the testimony of a weight loss doctor, the court rejected the trial court's conclusion that Pennington's obesity was not the result of a physiological condition. Specifically, the court relied on the doctor's response, "morbid obesity like [Pennington's] is caused by a cluster of often unknown physiological abnormalities and that morbid obesity like hers is in itself an abnormal physical condition or disease."

The court went on to decide that Pennington's impairment affected the body systems since she suffered from diabetes, a disorder of the endocrine system. Lastly, the court opined that Pennington's impairment substantially limited major life activities since she suffered from sleep apnea, which affected the activity of breathing, had problems caring for herself, and would likely have a shortened life expectancy due to her weight.

Since Pennington established a \textit{prima facie} case of discrimination, Wagner's had to show it had a legitimate, nondiscriminatory reason to terminate her. In this case, the court decided the issue should go to a jury since there were conflicting facts. Pennington alleged it was due to her "personal appearance" and Wagner's claimed it was because she did not generate sales.

D. What Does This all Mean for Employers?

This case could have a huge impact on employers as it seems to echo the recent findings of the American Medical Association and could prove to be a glance into what the future holds. With this case, Kentucky is expanding the number of medical conditions that may be protected as a "disability" under the KCRA. As with other recognized conditions, employers should be diligent and use caution when taking any employment action against an employee based on their weight.

VI. EMPLOYEE SECRET RECORDINGS IN THE WORKPLACE

Secret audio and video recordings by employees are becoming more and more prevalent in the workplace. There are federal and state laws that place restrictions on wiretapping and eavesdropping, and may impose criminal penalties. Generally speaking, such laws deal with one party listening in on the conversation of others without their knowledge, and have been used to regulate electronic recordings of both telephone and face-to-face conversations. Below are a couple of examples of how courts view an employer's policy that prohibits an employee from surreptitiously recording conversations at work.

1. Facts.

Plaintiff was an African-American female who asserted that her employer retaliated against her due to her engagement in protected activities under Title VII, and discriminated against her in violation of Ohio law. The defendant employer had a policy prohibiting its employees from recording conversations without the other person's knowledge. The employee asserted that she had opposed what she believed were unlawful employment practices. She recorded her conversations with the employer's customers, several doctors, and other company employees to create evidence for a possible lawsuit. After the employee brought a lawsuit alleging discrimination, the recordings were produced by the employee during discovery. The employer then investigated the recordings and determined that the employee cast the company in a poor light, and none of the other parties to the conversations had knowledge that they were being recorded. The employer determined that the employee had violated its policy, been disloyal, and she was therefore terminated. The employee then amended the complaint in her lawsuit to bring a claim of retaliation.

2. Southern District of Ohio.

The district court granted summary judgment for the employer on the retaliation claim because the employee had failed to establish a prima facie case of retaliation. Also, even if she had done so, the employee did not rebut the employer's proffered non-pretextual reasons for the termination: (1) that she failed to meet the requirements in a performance improvement plan, and (2) she violated the company's policy on unauthorized recordings.

3. Sixth Circuit.

Affirmed. The court assumed for purposes of its opinion that the employee could make a prima facie case; however, it held that the employee did not establish that the employer's decision to terminate her for violating its recording policy was a mere pretext. The court determined that the company decision maker had listened to the recordings and investigated them. And, it concluded that the objective evidence supported a finding that the employee had violated company policy, such violation could result in termination, and that the decision maker had this information when he decided to terminate the employee.

The employee also alleged that her recordings could not serve as a legitimate basis for her termination because they were protected activity under Title VII. The court relied upon the holding in Johnson v. University of Cincinnati, 215 F.3d 561, at 580 (6th Cir.
that the manner of an employee's opposition to alleged discrimination must be reasonable. The employee asserted her conduct was reasonable because the recordings were not illegal, she did not disclose confidential information nor circulate the recordings outside of the litigation, and they did not disrupt the business operations. Her arguments were rejected by the court. In doing so, the court concluded that the employee did not provide evidence of why she needed to violate the company's recording policy in order to oppose the employer's alleged discriminatory conduct. Thus, the court held that the employee's recordings were not reasonable or protected.


1. **Facts.**

Whole Foods enacted a policy that prohibited employees from recording conversations in the workplace, including the store front, by tape recorder or other recording device. The policy indicated its goal was to "prevent a chilling effect" on "spontaneous and honest dialogue, especially when sensitive or confidential matters are being discussed."

2. **Held.**

The policy did not violate an employee's right to engage in protected concerted activity under the NLRA. Because the policy only prohibited recordings by tape recorders or recording devices, the employees were still free to discuss and engage in protected concerted activities. The policy also addressed legitimate business concerns and only applied to employees when on work time.

C. **What Can Employers Do?**

1. Like Ohio, Kentucky is a "one-party consent" state, which means that it is permissible for an individual to record a conversation to which they are a party without informing the other party that they are doing so.

2. Various courts have indicated that employers may implement a policy prohibiting secret workplace recordings as long as there is a legitimate business reason for doing so (i.e., to protect trade secret and proprietary or other confidential information, to facilitate open and honest workplace communications). The policy, however, cannot infringe on employee's right to engage in
“protected concerted activity” under the National Labor Relation Act.

3. If an employer determines that it wants to implement a policy against unauthorized recordings, then draft the policy carefully considering all updated federal and state case law. Also, consider including a statement of the purpose of the policy indicating the legitimate business interest sought to be protected, and provide specific examples of the prohibited conduct (i.e., tape recording, videotaping, use of phone to take audio or video recordings). DO NOT implement the policy in response to union activity or protected concerted activity.

4. Managers and employees should be trained on the policy, and the employer should consistently enforce it.

VII. FLSA CLASSIFICATION AND EXEMPTIONS

The Fair Labor Standards Act ("FLSA") governs the basic minimum wage and overtime pay for most private and public employees. The law requires employers pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of 1 ½ times the regular rate of pay for all hours over forty worked in a workweek. In 2014, the Obama administration furthered its agenda to increase workers' wages by proposing a raise to the federal minimum wage and attempting to narrow the FLSA's "white collar" exemptions.

A. Exemptions

Section 13(a)(1) of the FLSA provides an exemption from overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt some computer employees. To qualify for the "white-collar" exemption, employees must be paid at least $455 per week on a salary basis and their job duties must meet specific tests. In general, their duties must include managing a part of the enterprise and supervising other employees or exercising independent judgment on significant matters or require advanced knowledge. Job titles do not determine whether employees are exempt from the overtime requirement.

On March 13, 2014, President Obama signed a presidential memorandum directing the Department of Labor to update the FLSA exemptions to expand the protections of overtime pay to millions of workers.

B. Independent Contractor v. Employee

Since 2011, the Department of Labor has targeted employer misclassification of employees as independent contractors.

On November 12, 2013, the Senate introduced the Payroll Fraud Prevention Act of 2013 ("PFPA"). The law is intended to reduce
"intentional misclassification" which amounts to payroll fraud. The PFPA proposes new notice requirements and new penalties.

C. In Kentucky, the payment of wages is governed by KRS Ch. 337. These rules include:

1. Every employer shall post a summary of the wage and hour laws in a conspicuous and accessible place where people are employed. KRS 337.325.

2. Employers shall grant their employees a reasonable period for lunch as close to the middle of the day as possible, but no earlier than three hours and no later than five hours after the work shift commences. KRS 337.355.

3. No employer shall require any employee to work without a rest period of at least ten (10) minutes during each four (4) hours worked. KRS 337.365.

4. No employer shall employ any of his employees for a work week longer than forty (40) hours, unless such employee receives compensation for his employment in excess of forty (40) hours in a work week at a rate of not less than one and one-half (1 ½) times the hourly wage rate at which he is employed. KRS 337.285. There are exceptions.

VIII. KENTUCKY'S SAME-SEX MARRIAGE RECOGNITION IS UNCERTAIN

In June 2013, the United States Supreme Court struck down the federal law that proclaimed marriage could only exist between a man and a woman. In Kentucky, a federal district court judge declared that same-sex marriages would be recognized by law in February, but that decision may be in jeopardy.


A. Facts

New York state citizens Edith Windsor and Thea Spyer wed in Ontario, Canada, in 2007. Spyer died in 2009, leaving her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but the Defense of Marriage Act ("DOMA") barred her from doing so. Windsor paid $363,053 in estate taxes, then brought a lawsuit seeking a refund.

The State of New York recognized the marriage between Windsor and Spyer. Yet, DOMA defined "marriage" as a union between a man and a woman for over 1,000 federal laws and programs.
B. District Court

The Southern District of New York granted Windsor's motion for summary judgment and declared Sect. 3 of DOMA unconstitutional.

C. Second Circuit: Affirmed the lower court's ruling.

D. Supreme Court

On June 26, 2013, the Supreme Court ruled that Sect. 3 of DOMA was unconstitutional. The Court explained that the individual states have long had the responsibility of regulating and defining marriage. The Supreme Court struck down DOMA, stating that it is a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

As of January 1, 2014, seventeen states and the District of Columbia legally recognize same-sex marriage. The Supreme Court ruled that by denying recognition to same-sex couples who are legally married, federal law discriminated against them. This decision means that same-sex couples who are legally married must now be treated the same under federal law as married opposite-sex couples.

E. What Does This Mean for Kentucky?

1. Kentucky Constitution – Sect. 233A.

"Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. (Text ratified on November 2, 2004.)"


U.S. District Judge John G. Heyburn, II issued an opinion that Kentucky's ban on recognizing same sex marriages violated the Constitution's equal-protection clause in the Fourteenth Amendment by treating gay and lesbian persons differently in a way that demeans them.

a. March 4, 2014 – Governor Steve Beshear announced that the state will hire outside attorneys to appeal the decision.

b. The future of same-sex marriage in Kentucky remains uncertain.

IX. GINA

The Genetic Information Non-Discrimination Act of 2008 ("GINA") protects Americans against discrimination based on their genetic information in health insurance and employment situations. Under Title II of GINA, employers may not
discriminate against employees or applicants because of genetic information. An employer may not use genetic information of the employee or applicant, or the employee's or applicant's family members, to make an employment decision.

A. **Equal Employment Opportunity Commission v. Fabricut, Inc.**

Facts: On May 7, 2013, the EEOC filed its first-ever GINA lawsuit in Oklahoma. The EEOC alleged that Fabricut withdrew an offer of employment because the company believed the applicant had or was predisposed to develop carpal tunnel syndrome on the basis of a post-offer medical exam that requested family history. Subsequent to the filing of the lawsuit, the parties agreed to a $50,000 settlement.


Facts: On May 16, 2013, the EEOC sued a nursing and rehabilitation center alleging violations of the Americans with Disabilities Act and GINA. According to the lawsuit, Defendant Founders conducted pre-employment and annual medical exams of its applicants and employees. During this process, Founders requested family medical history.

C. What Does This Mean for Kentucky?

1. **EEOC v. Nestle Prepared Foods, 2012 WL 1888130 (E.D. Ky. May 23, 2012).** Nestle former employee Michael Peel filed an EEOC charge alleging he was discriminated against based on his disability, genetic information, and retaliated against. Nestle claimed it discharged Peel because he took excessive breaks during his shift. Peel alleged that Nestle requested family medical history, including genetic information, during a fitness-for-duty exam and used that information when deciding to terminate his employment. The EEOC sought to enforce a subpoena served to Nestle requesting the names and contact information of physicians to whom Nestle referred individuals for medical examinations and all names of individuals who had submitted to medical examinations. The District Court refused to enforce the subpoena, finding that the charge did not warrant an investigation into facility-wide employment practices.

2. The EEOC will continue to enforce GINA.

3. Kentucky employers should beware of family medical history requests.
X. NATIONAL LABOR RELATIONS ACT (NLRA)


1. Facts.

On August 30, 2011, the National Labor Relations Board (NLRB) published a final rule that required all employers subject to the NLRA to post a notice to employees, in a conspicuous place, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures. 29 C.F.R. §104.202. In conjunction with this rule, the NLRB invoked three enforcement mechanisms to ensure compliance by employers:

a. An employer's failure to post the notice is an unfair labor practice;

b. The Board may suspend the six-month limitations period for filing any unfair labor practice charge unless the employee received actual or constructive notice that the conduct complained of is unlawful; and

c. The Board may consider an employer's knowing and willful refusal to comply with the requirement to post the employee notice rule as evidence of unlawful motive in a case in which motive is an issue.

In response to the NLRB's posting rule, trade associations and other organizations representing employers across the country filed complaints claiming that the rule violated the NLRA and the First Amendment of the United States Constitution.

2. District Court.

The court struck down the first and second enforcement mechanisms noted above, and upheld the third mechanism. The NLRB's authority to promulgate the posting rule was upheld under §6 of the NLRA.


Affirmed in part and reversed in part. This case presented two questions:

a. Are the enforcement provisions in the posting rule lawful?

   NO. The court evaluated the three enforcement provisions striking each one down.
b. Does the NLRB have the authority to promulgate the posting rule?

UNDECIDED. The court passed on the opportunity to rule on whether or not the Board had the authority to promulgate a posting rule. Rather, after finding all three enforcement mechanisms invalid, the court posed one last question: whether to sever the enforcement mechanisms and leave intact the remainder of the posting rule? The court ruled "that the Board would not have issued a posting rule that depended solely on voluntary compliance."

B. Chamber of Commerce of U.S. v. N.L.R.B., 721 F.3d 152 (4th Cir. 2013)

1. Facts.

After the NLRB promulgated the posting rule, a rule that would require employers subject to the NLRA to post an official Board notice informing employees of their rights under the Act, the Chamber of Commerce of the United States and the South Carolina Chamber of Commerce sought injunctive relief.

2. District Court.

Granted summary judgment to the Chamber of Commerce finding that the NLRB exceeded its authority, in violation of the Administrative Procedure Act (APA).


The court applied the analysis in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984), and then examined the text of §6 of the NLRA, the structure of the NLRA, the history of the NLRA, and the history of evolving congressional regulation in the area to determine whether Congress clearly and unambiguously withheld the power to impose notice posting requirements from the NLRB. The court noted that Congress included notice posting requirements in a number of other federal labor laws, but had not delegated such authority to the NLRB. The court found that if Congress intended to grant such a power to the NLRB, then it could amend the NLRA to do so.

4. Did the Board exceed their authority?

YES. After finding that Congress had not delegated notice posting authority to the NLRB, the court likewise found that the Board had exceeded its authority by promulgating the notice posting rule. The Court went on to label the NLRB as a "reactive entity" without the authority to promulgate proactive rulemaking. The NLRA expressly grants the Board only reactive roles: conducting representation elections and resolving unfair labor practice
charges after a complaint has been filed. Accordingly, the Board exceeded their authority and the notice posting rule was struck in its entirety.

5. The NLRB is not seeking Supreme Court review of the two U.S. Court of Appeals decisions invalidating the NLRB's Notice Posting Rule.

6. What does this mean for employers?

The D.C. Circuit stated that the NLRB was free to post the same information on its website that was included in the notice. The workplace poster remains available on the NLRB website. The NLRB is implementing other technology to provide this information to the public, which is further discussed below.


1. Facts.

Noel Canning, a bottler and distributor of Pepsi-Cola productions, had a long collective bargaining relationship with Teamsters Local 760 (the Union) before their most recent agreement expired in April 2010. The parties engaged in negotiations to enter into a new collective bargaining agreement. After a final negotiation, Noel Canning and the Union thought they were in agreement as to certain terms pertaining to pay increases. However, the parties discovered the following day that they were in disagreement over a cap that Noel Canning placed on the amount of the pay increase that a member could devote to their pension plan. The Union subsequently ignored Noel Canning's cap and let the members vote on the Union's proposal with no cap, which the members ratified. Thereafter, Noel Canning refused to execute a written agreement embodying the terms ratified by the membership. Based on Noel Canning's conduct, the NLRB issued an order on February 8, 2012 stating that Noel Canning violated §§5 and 8(a)(1) of the NLRA by refusing to reduce to writing and execute a collective bargaining agreement reached with the Union.

2. ALJ.

Ruled that parties had reached an agreement and Noel Canning's refusal to execute the agreement violated §§5 and 8(a)(1) of the NLRA and ordered Noel Canning to sign the collective bargaining agreement. The Board affirmed these findings.

3. Circuit Court.

Vacated the ALJ's order. The outcome of the case turned on one pivotal question: Did the NLRB have a quorum when the Board issued its February 8, 2012 order?
4. Did the NLRB have a quorum when the Board issued its February 8, 2012 order?

NO. The court ruled that President Obama's appointments of three NLRB Members were constitutionally invalid. The court analyzed the issue under the Recess Appointments Clause and concluded that the President could only make recess appointments during a formal intersession recess (a recess between the end of one session of Congress and the start of another), and may do so only in order to fill the vacancies that arose during the intersession recess in which the appointment was made. In sum, since all three of the President's appointments were invalid and left the Board with only two members, the Board did not have a quorum. Thus, the Board's administrative ruling that the company had engaged in an unfair labor practice was vacated.

5. U.S. Supreme Court review.

The D.C. Circuit holding was appealed and the Supreme Court granted certiorari on June 24, 2013. Oral arguments were conducted on January 13, 2014 and the outcome, which could significantly alter the relationship between the President and Congress where appointments are concerned, is pending.


The D.C. Circuit's decision has no precedential value in the Sixth Circuit. The most significant impact is on the past and future operations and decisions of the NLRB, which are being heavily debated.

D. "Quickie" Election Rules Proposed by NLRB

On February 5, 2014, the National Labor Relations Board (NLRB) announced that it is proposing quickie election rules to expedite the union election process. The Board announced a rule very similar to the one proposed several years ago, which was struck down for lack of a quorum. Two of the most controversial amendments that have been proposed include: 1) consolidating all election related appeals into a single post-election appeals process; and 2) streamline pre- and post-election procedures to facilitate agreement and eliminate unnecessary litigation.

The proposed rules again raise questions as to the NLRB's authority to implement these changes and whether they are consistent with congressional intent. A final rule is anticipated by the end of 2014.
XI. TECHNOLOGY UPGRADES IN GOVERNMENT

A. Filing Complaints Online

1. OSHA.

On December 5, 2013, OSHA announced that workers can now electronically submit a whistleblower complaint. This electronic process is currently limited to whistleblower claims within the purview of twenty-two statutes, which can be found on OSHA’s website.

2. NLRB.

The Board's proposed quickie-election rule allows for electronic filing and transmission of electronic petitions and other documents. This amendment has not been adopted yet, but if it is, the NLRB will be another example of governmental agencies jumping on the electronic bandwagon.

3. EEOC.

Does not have an online charge filing process; however, it does have an online Assessment System for employees to utilize to determine whether the EEOC is the correct agency for the employee to file a charge.

B. Check out that App

1. NLRB app.

On August 30, 2013, the NLRB announced the launch of a free mobile app, available on iPhone and Android smartphones, which provides employers, employees, and unions with information about their rights and obligations under the NLRA. While the NLRB's posting rule was struck down by the Fourth and D.C. Circuit, this app is here to stay.

2. U.S. Department of Labor Wage and Hour app.

On May 9, 2011, the DOL announced the release of its first application for smartphones, a timesheet app that allows users to track their work hours, breaks, and overtime hours to ensure they are getting compensated correctly. Unfortunately, the app is currently only compatible with the iPhone. The DOL is exploring updates and other opportunities to expand the app as well as bring it to other smartphone operating systems, so be on the lookout.