Federal Bar Association
Labor and Employment Law Section
Summer 2013

The Labouring Oar

From the Chair

My year is almost over, and it has been an honor to serve you as the Labor & Employment Law Section Chair. I am very pleased with the success of our 5th Bi-Annual Labor & Employment Law Conference, held in New Orleans, La. on May 2-3, 2013. We were fortunate to have some tremendous speakers, including U.S. District Judge Susie Morgan, Eastern District of Louisiana and U.S. Magistrate Judge Michael J. Newman, Southern District of Ohio who served on our "Views from the Bench" panel, as well as U.S. District Judge Karen Wells Roby, Eastern District of Louisiana, who presented a very informative and entertaining ethics program. Indeed we were blessed to have so many great speakers, including Al Latham from the firm of Paul Hastings. Mr. Latham and his firm were honored at our luncheon with the Board's Award for Outstanding Speaker, together with Deputy Chair Danuta Panich, who also received the award after many years of speaking on behalf of our section. I would like to again thank all of our wonderful speakers, as well as our sponsors: Stone Pigman, Jones Walker, Gordon Arata, Phelps Dunbar, and the Corporate and Association Counsel Division.

Good news! For those of you that may have missed the program and are in need of CLE hours, the 5th Bi-Annual Labor & Employment Law Conference was recorded, and we anticipate that it will soon be available for you to purchase. There will be several packages available so you can purchase various portions of the conference, without having to purchase the entire conference. Please check back soon!

U.S. District Judge Susie Morgan and U.S. Magistrate Judge Michael J. Newman at the 5th Bi-Annual Labor and Employment Law Conference.

As usual, your board has been very busy. Recently, the section's Special Committee on Employee Benefits, chaired by Nancy Bloodgood, presented a webinar on the Affordable Care Act. We are also busy planning future webinars, so stay tuned. The section's presentation proposal was selected for the upcoming Annual Meeting and Convention in San Juan, Puerto Rico. I hope everyone will be able to attend "Trends in Labor and Employment Law: A Panel Discussion" on Friday, Sept. 27, 2013 from 11:30 a.m. to 12:30 p.m. Jose R. Gonzalez-Nogueras, a partner in one of the sponsoring firms, JimÇnez, Graffam & Lausell, will moderate an outstanding panel which includes

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A Look at What's Inside

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There Must be Limits to EEOC ADEA Director Investigations

By Mark Casciari and Suzanne Courtheoux

This article addresses the limitations on Equal Employment Opportunity Commission (EEOC) director charge investigations under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

It is well settled that the federal government has only limited authority. As the Supreme Court stated in *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566, 2577 (2012): "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." The same limitation applies to the EEOC, of course, because the authority of any federal agency is a function of its enabling statutes.

The ADEA gives the EEOC the authority to investigate covered employers, employment agencies and labor organizations, even where no charge of discrimination has been filed. 29 U.S.C. §§ 623, 626(a). The statute gives the EEOC the authority to subpoena witnesses and records under Sections 6(a) and 7(a) of the ADEA, 29 U.S.C. § 626(a). Those sections incorporate the authority to investigate and subpoena under Sections 9 and 11 of the Fair Labor Standards Act, 29 U.S.C. §§ 209, 211; *see also*, 29 C.F.R. §§ 1626.15, 1626.16. Section 7(a) of the ADEA, 29 U.S.C. § 626(a), however, gives the EEOC the power to undertake only those investigations that are "necessary or appropriate" for the administration of the ADEA.

The question thus becomes—what are the limitations on what is "necessary or appropriate"?

Judges normally become involved in EEOC ADEA investigations when the EEOC seeks to enforce a subpoena. What follows are the points of inquiry of a federal practitioner who wishes to place limits on what is "necessary or appropriate." We do not restrict ourselves to ADEA cases, because district courts address EEOC investigatory authority under other discrimination statutes and those decisions are helpful precedent:

- **Purpose.** As a precondition to enforcement of an EEOC subpoena, "the EEOC must show that its investigation is for a legitimate purpose authorized by Congress." *EEOC v. Group Health Plan*, 212 F. Supp. 2d 1094, 1096 (E.D. Mo. 2002). In *Group Health Plan*, the EEOC was investigating a charge of a retiree under the Americans with Disability Act, 42 U.S.C. § 12101 *et seq*., who was not a protected party under the statute. The district court found that the investigation was not for a legitimate purpose and denied the EEOC's request to enforce its subpoena. By analogy, therefore, if the EEOC's age discrimination investigation is targeted at conduct that does not implicate the ADEA, its subpoena would not be enforced.
- **Relevance.** If a legitimate purpose exists, the EEOC's subpoena must seek information "relevant" to that purpose. In *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700-01 (7th Cir. 2002), the court held that it would enforce an EEOC subpoena under the ADEA if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably *relevant*." *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 700-01 (7th Cir. 2002) (internal quotations omitted, emphasis added). The court in that case found that the EEOC was entitled to gather facts necessary to determine whether it can proceed to enforcement. *Id.*
- **Focus.** Another way of understanding the relevance precondition to subpoena enforcement is to require the EEOC to state the focus of its investigation, and then to inquire if the requested information is connected to that focus. In the Title VII context, 42 U.S.C. § 2000e *et seq*., there certainly can be no finding of relevance where there is no stated focus to the investigation, or the stated focus is disconnected from the requested information. *See generally EEOC v. Packard Electric Div., Gen. Motors Corp.*, 569 F.2d 315 (5th Cir. 1978).
- **Fishing Expedition.** The EEOC may not enforce a subpoena to troll for each and every potential act of age discrimination by an employer. Again in the Title VII context, the "relevance" requirement "should not be interpreted so broadly as to render the statutory language a nullity." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (internal quotations omitted). The relevance requirement "is designed to cabin the EEOC's authority and prevent fishing expeditions." *Id*. The EEOC must have a realistic expectation, not just an idle hope, that it will discover something in the information it subpoenas. *Id.*
- **Balancing Cost Versus Benefits.** Courts may weigh the relevance of the information sought against the burden of subpoena compliance. Courts have refused to enforce subpoenas where they found that the information sought was, if relevant at all, so marginally relevant that it did not justify the burden of compliance. *United Air Lines*, 287 F.3d at 653-54; *EEOC v. ABM Janitorial-Midwest, Inc.,* 671 F. Supp. 2d 999, 1005 (N.D. Ill. 2009) (Title VII).
- **Bad Faith.** The broad power to initiate an investigation under the ADEA means that the courts do not necessarily look at the source of the information that caused the EEOC to investigate. However, the courts will drill down if there is evidence that enforcing the subpoena would be an abuse of the court's process, such as evidence of the EEOC's bad faith or intent to harass. *EEOC v. Dillard's Dep't Stores, Inc.*, No. 3-97-CV-0986, 1998 WL 25548 (N.D. Tex. Jan. 9, 1998) (ultimately allowing the enforcement of an EEOC subpoena in an age discrimination investigation initiated based on a newspaper article).

Constitutional Limitations. The Fourth Amendment to the U.S. Constitution also places limits on administrative investigatory powers. The Fourth Amendment requires that information sought by the EEOC and other administrative agencies "be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted)*; see also Donovan v. Lone Steer,*

Inc., 464 U.S. 408, 414-15 (1984); *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946).

Practitioner Takeaways. Targets of EEOC investigations under the ADEA will become increasingly concerned with EEOC investigatory overreach, as federal government power expands. It is important for practitioners to realize when the EEOC is exceeding the scope of its statutory authority to investigate under the ADEA. Practitioners should not think that the EEOC has a blank check. Our federal system limits EEOC power to investigate, and those limitations should be enforced, lest they become a nullity. ■

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Attendees enjoy the 5th Bi-Annual Labor and Employment Law Conference.

the Hon. Daniel Dominiguez, U.S. District Court, District of Puerto Rico; Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board; and our own vice-chair, Karleen Green, a partner in a sponsoring firm for our L&E Conference, Phelps Dunbar LLP. Of course, we continue to bring you our newsletter, *The Laboring Oar*, our "Circuit Updates" by email blast, and we are busy planning for the 6th Bi-Annual Labor & Employment Law Conference.

Regarding San Juan, Puerto Rico, the Labor & Employment Law Section would like to invite all section members to attend our board meeting scheduled for Friday, September 27, 2013 from 2:15 p.m. to 3:15 p.m. We plan on offering a gourmet coffee/dessert bar for all who attend. Of course, we will also conduct official board business, to include the presentations of the "Author of the Year" award and the Chair's Award. We will also elect our officers, and Board members for the upcoming fiscal year. For anyone interested in becoming more active in your section, including an appointment to a committee, I invite you to take a look at our by-laws, posted on our section's website. If there is a particular committee or position in which you are interested, please contact myself or Vice-Chair Karleen Green. Working with a committee is often the first step toward becoming a board member, an officer, or even serving as our section's chair.

We are always looking for section members to help with our many activities. As always, I thank you for allowing me to serve as your section chair. If anyone would like information about our section, upcoming events, or if you would like to serve or have any ideas on how we can better improve, please do not hesitate to contact me. See you in San Juan! ■

Congressional Update

James D. Noel

Paycheck Fairness Act Reintroduced

Senator Barbara Mikulski (D-Md.) and Representative Rosa DeLauro (D-Conn.) reintroduced in their respective chambers the Paycheck Fairness Act (S. 84 and H.R. 377) to shrink the pay gap between men and women.

The sponsors maintain that because women earn 77 cents for every dollar earned by a man for equal work, there must be corrective action to fix the disparity that costs both women and their families approximately $434,000 on average over the course of their lives. Employers would be required to demonstrate that any disparity complained of is related to job performance and not to the gender of the employee. The legislation also would prohibit employers from retaliating against employees who communicate by salary information with coworkers. Strengthening remedies for pay discrimination by increasing compensation women can seek would allow them not only to seek back pay, but also punitive damages for pay discrimination.

House GOP leadership is not likely to bring up for a vote any time soon, but House Democrats used a procedural move to force them to go on record opposing the bill. Employee Paycheck Protection Act: (H.R. 175) stems from Knox v Service Employees International Union. Public sector unions cannot compel non-members to fund the union's political and social speech without proper notice. Unions would be required to provide notices to all employees covered by a collective bargaining agreement, explaining how the fees are apportioned. Such notices would explain how the union calculated the share of such dues or fees that are for non-political costs related to collective bargaining. Unions cannot require non-members to pay dues or fees unless the non-member has provided affirmative consent.

Fair Pay Act Reintroduced

The Lilly Ledbetter Fair Pay Act (S. 168) would require employers to provide equal pay for jobs that are comparable in skill, effort, responsibility, and working conditions. The bill would also require employers to give their workers the information they need to determine when jobs are undervalued.

Senators introduced bills to curtail activities of the National Labor Relations Board in light of the Appeals Court decision holding the Board has operated without a quorum since 2012. If passed, the bills would do the following:

The Advice and Consent Restoration Act would both block the pay of any board member not confirmed by the Senate and would block the board from taking any action until these appointees are legally confirmed.

NLRB Freeze Act of 2013 would stop the board from enforcing all rules, regulations and decisions issued since January 2012.

Restoring Constitutional Balance of Powers Act of 2013 would prohibit the Board from enforcing or implementing decisions and regulations without a constitutionally confirmed Board or director. Under the bill, the Board would be forbidden from using funds to undertake or enforce any actions that began on January 4, 2012, the date of the recess appointments.

The Social Networking Online Protection Act (SNOPA) Reintroduced

SNOPA is intended to protect the users of social networking sites from having to divulge their personal information to employers. SNOPA also protects both employees and applicants, and those facing disciplinary action from being required to give passwords or other information used to access their online accounts.

Federal Right-to-Work Bill Introduced

On January 31, Senator Rand Paul (R-Ky) introduced legislation to amend the National Labor Relations Act to prohibit the use of union security clauses in collective bargaining agreements. Under the National Right-to-Work Act (S. 204), employers across the country could no longer condition employment on the payment of union dues or fees. The bill would also amend the Railway Labor Act to the same effect.

On March 5th, 2013 similar legislation was introduced in the House

The Employee Free Choice Act was introduced in Congress in 2009 but was withdrawn in the face of a threatened filibuster by opponents of the bill. It has not been reintroduced since then.

OSHA Revised Hazard Communication Standard

OSHA's revised Hazard Communication Standard requires mandatory training for many employers on the new requirements for chemical labeling as well as the new Safety Data Sheets by Dec. 1, 2013. In November of 2012, OSHA issued a guidance document regarding the responsibility of temporary agencies and the host employer to ensure that training, hazard communication, and record-keeping requirements are fulfilled. ■

James D. Noel is a capital member of the Labor and Employment Law Practice Group at McConnell Valdes LLC in Puerto Rico. He serves as co-chair of the Federal Bar Association Labor and Employment Law Section Committee on Legislation and Congressional Relations.

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  Carolyn Bell, *Assistant U.S. Attorney, West Palm Beach*

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  Benjamin Dusing, *Member*, *Adams, Stepner, Wolternmann & Dusing PLLC*

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Retaliation Claims are Serious, on the Rise, and the Subject of an Important 2013 U.S. Supreme Court Decision—the Nassar Case

By Rosemarie Hill

Among the toughest advice we are called upon to give our clients is how an employer may legally interact with an employee who has engaged in protected activity under any employment-related law without being accused of illegal retaliation. Illegal retaliation claims substantially expand the coverage of many statutes, as plaintiffs can amend their initial complaints to include illegal retaliation claims based on events that occurred post-complaint. So how does an employer discipline an employee who has made a discrimination complaint in the workplace, filed a lawsuit, or brought a charge to the Equal Employment Opportunity Commission (EEOC) or the resemblant state or municipal agency without acting illegally? How does that employer handle job references about a former employee who has taken a similar action?[1]

In a workplace, fact-driven analysis, why is retaliation advice a difficult area to navigate? On a practical basis, any employer has concerns on how to evaluate, promote, demote, discipline, or even terminate an employee who has taken part in a protected activity under the law. Such an employee may well claim that any adverse action against him or her is based not on a legitimate non-retaliatory reason, but on illegal retaliation.

It is difficult territory for employer and employee alike—an employee may be on high alert with worry that he will be terminated for engaging in protected activity or he may decide he has a "free pass" once he has made a complaint. Conversely, an employer will fear a retaliation claim if, in the normal course of business, it has to discipline an employee who has made a complaint, particularly one who appears to purposely underperform afterwards. In addition, both employer and employee must take responsive action and manage the post-complaint actions taken by an accused, other management, and peer employees toward a complaining employee.

The first and perhaps most important advice we might provide a client regarding retaliation is that the importance of these claims should not be underemphasized because **an employee can lose her underlying claim, but still win her retaliation claim.** Such a possibility is very significant to employer and employee, and a consideration for any post-complaint actions.

As part of the pragmatic advice we give our clients on these various scenarios, we will undertake a legal analysis of the various anti-retaliatory laws and decisions. Most federal and many state employment-related laws prohibit retaliation against individuals who oppose any practice prohibited by those laws, including Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and other laws such as the Family Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).[2] These laws all recognize an employee's right to file a claim for retaliation.

Statutory protections from employment-related illegal retaliation (as well as common law protection in many states) are far more extensive than those that many of us handle on a regular basis. Protected activity that forbids illegal retaliatory action can include any action that, e.g., opposes discrimination or harassment under Title VI, the ADEA, the ADA; requests or utilizes legitimate leave under the FMLA, workers' compensation, or USERRA laws; exercises any right under the provisions of certain employee benefit plans; receives benefits under the Patient Protection and Affordable Care Act (ACA—which notably amended the Fair Labor Standards Act (FLSA) to include additional anti-retaliation provisions); blows the whistle under a number of statutes, including, e.g., the Safe Drinking Water Act,[3] the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act,[4] or the FDA Modernization Act, which amended the Federal Food, Drug, and Cosmetic Act.[5] Again, there is a private cause of action in most of these and other employment-related statutes that forbid retaliatory action.

Most retaliation provisions are based on the foundation that employees or former employees must be allowed to make claims, participate in internal or outside investigations and hearings, or complain of an illegal practice without recrimination for that activity. In other words, engaging in a "protected activity" must not result in illegal retaliation against the engager. The courts basically have decreed that any action that would discourage an employee from making a claim under most of the employment-related laws may be deemed as illegal retaliation. The U.S. Supreme Court has said that the anti-retaliation provisions intend to stop employer interference with "unfettered access to Title VII's remedial mechanisms."[6]

What is the standard of proof for maintaining or defending a retaliation claim? It probably goes without saying (a fact that does not alter the importance of the advice) that each law is different and must be analyzed carefully. This article examines such an analysis under Title VII, as both an often-litigated exemplar and because the U.S. Supreme Court in June 2013 made a sea change in the prosecution and defense of retaliation claims under that law. The Court held in *University of Texas Southwestern Medical Center v. Nassar*, that plaintiffs bringing retaliation claims under Title VII must prove that the unlawful workplace discrimination they complained of was the "but-for" cause of the alleged retaliatory employment decision, rather than merely a motivating factor in the decision.[7] That holding, depending on your viewpoint, is either a brilliant, long-needed decision for employers or is anathema to the struggling employee facing illegal retaliation.

A prima facie case of retaliation is established in Title VII cases if a plaintiff shows that she engaged in a protected activity, the employer was aware of the activity, and it took an adverse action against her in response to the protected activity (i.e. causal relationship). Title VII prohibits discrimination "because of" the employee's status in a protected category, i.e., her race, color, religion, sex or national origin. To prove causation for an underlying discrimination claim, she must prove only that her status in a protected category was a "motivating factor" in an adverse employment decision.

As discussed above, Title VII also prohibits employers from retaliating against the employee who engaged in protected activity. But courts have differed as to whether the proper standard of causation for such a retaliation claim requires proof only that a retaliatory motive was a "motivating factor" in the challenged adverse employment decision or that it was the "but-for" cause. The *Nassar* case presented that question and the **Court ruled that retaliation claims under Title VII are subject to the higher "but-for" standard of proof (as is applied in age discrimination claims), rather than the lower standard applicable to Title VII underlying discrimination claims.**

The Court stated that it had to consider "causation in fact" in the *Nassar* case—proof that the defendant's conduct did in fact cause the plaintiff's injury. It further said that such an analysis was the standard requirement of any tort claim, and that discrimination under Title VII was such a claim. The standard requires the plaintiff to show that the harm would not have occurred in the "absence of—that is, but for—the defendant's conduct."[8]

The *Nassar* holding relied on the analysis in *Gross v. FBL Financial Services,*[9] a case brought under the ADEA that held that the relevant portion of the ADEA provided that it was unlawful for an employer to take an adverse employment action against any employee "because of" his or her age. The Court pointed out that in *Gross* it explained that the ordinary meaning of "because of" was "by reason of" or "on account of." In its *Nassar* analysis, the Court noted that Title VII's anti-retaliation provision appeared in a different section than its ban on status-based discrimination, and its language, in part, was:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[10]

The Court then held that such language, as with the ADEA language at issue in *Gross*, made it unlawful for an employer to take adverse employment action against an employee "because of" certain criteria (protected activity). Further, that given the lack of a meaningful textual difference between the text in the Title VII retaliation language and the ADEA language in *Gross*, the proper conclusion in *Nassar*, as in *Gross*, was that Title VII retaliation claims require proof that the desire to retaliate was the "but for" cause of the challenged employment action.

The *Nassar* opinion explained the Court's declination to defer to the EEOC's causation standard, as set forth in its guidance manual, because the agency's explanations for its position lacked persuasive force. The Court believed that in light of the increasing number of retaliation claims, a lessened causation standard ("motivating factor" instead of "but for") would mean more frivolous claims and would "siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment."[11] A strong dissent by Justice Ginsburg stated that the majority had seized on a statutory provision that was adopted to strengthen Title VII and "turned it into a measure reducing the force of the ban on retaliation." The dissent noted that it believed jurors would puzzle over the dual standard between discrimination and retaliation under Title VII.[12]

In sum, retaliation is serious business and requires our attention to well serve our clients' needs. Retaliation lawsuits and charges are growing at a phenomenal rate. For example, the EEOC announced in its 2011 annual statistics that retaliation claims represented the largest percentage of all claims brought to that agency. This was also true in 2010, and in 2009 retaliation claims matched race claims at 36% of total claims brought. Many employment-related charges or lawsuits now contain a retaliation claim either at inception or later. The *Nassar* and *Gross* decisions change the analysis of these claims, at least under Title VII and the ADEA. ■

Rosemarie Hill chairs the Labor and Employment Section of Chambliss Bahner & Stophel in Chattanooga, Tennessee. She counsels national, regional, and local clients in all areas of employment law, including hiring, firing, and disciplinary actions. She answers daily questions relating to discrimination claims, medical and other leave, wages and overtime pay, and of course, retaliation claims. She is a member of the American College of Trial Lawyers and represents her clients in federal and state courts and before various governmental agencies.

Endnotes

[1]A retaliation claim may be made by a former employee as well (although it is not clear that all laws with anti-retaliation provisions include former employees, the EEOC's stance is that adverse, illegal retaliation actions can occur after the employment relationship has ended).

[2]*See, e.g.*, 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 2615 (FMLA); 42 U.S.C. § 2000ff-6(f) (GINA); 29 U.S.C. § 158(a)(4) (NLRA); 29 U.S.C. § 660(c)(1) (OSHA); 42 U.S.C. § 2000e-3(a) (Title VII); 38 U.S.C. § 4311(b) (USERRA)

[3]49 U.S.C. § 60129(b)(3)(B)

[4]7 U.S.C. § 26

[5]21 U.S.C. § 399d(a)

[6]*Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)

[7]*Univ. of Texas Sw. Med. Ctr. v. Nassar*, 12-484, __ U.S. __, 2013 WL 3155234 (U.S. June 24, 2013)

[8] *Nasser*, 2013 WL 3155234, at *6..

[9]557 U.S. 167 (2009).

[10]*Id.* at *9 (quoting 42 U.S.C. § 2000e-3(a)).

[11]*Id.* at *13.

[12]*Id.* at *17.

2013 Supreme Court Decisions Affecting Class Waivers in Employment Arbitration Agreements

By Kathlyn Perez Bethune

With the rise in multi-plaintiff litigation in the employment arena, especially Fair Labor Standards Act collective actions, employers are eager to identify strategies to manage their class, mass and collective action exposure and associated costs. As a result, more and more employers are requiring employees to sign arbitration agreements as a condition of employment. Under these agreements, employees agree that any claims arising out of their employment will be resolved in arbitration, rather than by the courts. Increasingly, class and collective action waivers have also been included in these agreements, requiring that claims in arbitration proceed on behalf of an individual employee, rather than as a class or collective action.

Two 2013 Supreme Court decisions provide guidance to employers seeking to enter into arbitration agreements with employees, including those containing class waivers. However, because neither of these arbitration cases arose in the employment context, some uncertainty still exists regarding the enforceability and bounds of class waivers in arbitration agreements with employees. The Supreme Court may ultimately be called upon to weigh in on class waivers as they specifically relate to employment laws.

***Oxford Health Plans LLC v. Sutter,* 569 U. S. ____ (2013), 2013 WL 2459522 (June 10, 2013).**

The very first sentence of *Sutter*, penned by Justice Kagan, sums it up: "Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Id.* at *1 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U. S. 662, 684 (2010)).

Dr. Sutter was a pediatrician who provided medical services to members of Oxford's health insurance network. The contract between Oxford and Sutter included a broad arbitration agreement that provided: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration ...." Despite the absence of any explicit reference to class arbitration in the agreement, the arbitrator in *Sutter* interpreted the phrase "all such disputes" to include class claims, and he therefore concluded that the text of the agreement authorized class arbitration.

Oxford argued that the arbitrator's decision allowing class arbitration should be vacated, relying on the Supreme Court's 2010 decision in *Stolt-Nielsen SA v. AnimalFeeds International,* 130 S. Ct. 1758 (2010), which it claimed held that arbitration could not proceed on a class-wide basis without a "*sufficient contractual basis*" that the parties intended class arbitration. *Id.* at * 6. In *Stolt-Nielsen*, the Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is *a contractual basis* for concluding that the party agreed to do so." 559 U.S. at 684 (emphasis added). There, the parties had stipulated that they had never reached an agreement on class arbitration, and therefore the Supreme Court held that an arbitration panel had exceeded its powers when it ordered a party to submit to class arbitration.

In *Sutter,* the Supreme Court refused to overturn the arbitrator's decision, holding that the arbitrator had not exceeded his authority in authorizing class arbitration. *Id.* at *6. The Court distinguished its *Stolt-Nielsen* decision to "overturn the arbitral decision there because it lacked *any contractual basis* for ordering class procedures, not because it lacked in Oxford's terminology, *a 'sufficient' one." Id.* (emphasis added).

Sutter offers an important reminder to employers: in drafting arbitration agreements, your intent should be clear from the text of the agreement so arbitrators cannot read into the agreement a result the parties never intended. Courts generally will not overturn an arbitrator's decision unless there is literally no contractual basis for the arbitrator's decision. If an employer and employee intend to preclude class treatment of claims that arise under the agreement, then best practice—and the best way to avoid arbitrator misinterpretation—is to simply and clearly say so.

***American Express v. Italian Colors Restaurant,* 570 U. S. ____ (2013), 2013 WL 3064410 (June 20, 2013).**

On June 20, 2013, the Supreme Court released *American Express Co. v. Italian Colors Restaurant,* a class action case brought by merchants challenging an alleged American Express tying arrangement as violating federal antitrust law. The plaintiffs all signed agreements to arbitrate with American Express that included a class action waiver, but they argued they should not be bound by the waiver because the only financially viable way to pursue an antitrust claim would be via a class action. Without the class action vehicle, plaintiffs claimed that there would be no incentive to challenge American Express's arguably illegal practices.[1]

Like *Sutter*, the opinion, written by Justice Scalia, starts from the basic tenet that arbitration is a matter of contract law. Consistent with contract interpretation principles, the Supreme Court has stated its support for "'rigorously enfor[cing]' arbitration agreements according to their terms." Id at *3 (citing *Dean Witter Reynolds Inc. v. Byrd,* 470 U. S. 213, 221 (1985)). In *American Express*, the contract between the parties was clear: there "shall be no right or authority for any Claims to be arbitrated on a class action basis." Given this clear language and the mandate that the contract should be interpreted according to its terms, the Supreme Court held that parties can, via arbitration agreements, agree to waive the right to bring a class action, even where doing so would be the only financially viable way to bring a claim.

Upon finding that the plaintiffs agreed to waive their rights to bring a class action, the Court addressed what is known as the "effective vindication" exception to enforcing an arbitration agreement: for "public policy" reasons the court may still invalidate the agreement if it operates "as a prospective waiver of a party's right to pursue statutory remedies." *Id.* at *6 (emphasis in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985)).

The plaintiffs argued that enforcing the waiver was against public policy because without the class action procedure, they would be denied "effective vindication" because there would be "no economic incentive to pursue their antitrust claims

individually in arbitration." *Id*. at *5. However, the Supreme Court found this argument unpersuasive, noting that the effective vindication exception precluded a "prospective waiver of a party's right to *pursue* statutory remedies." *Id*. at ___ (quoting *Mitsubishi Motors*, supra, at 637, n. 19) (emphasis added by Court in *American Express*). The plaintiffs clearly retained the opportunity to bring their antitrust claims, just not in a court and not as a class action.

The Court emphasized that the "effective vindication" exception could apply if the parties had prospectively waived *any right* to bring a claim, or the filing fees and administrative costs of arbitration were so high that the plaintiffs did not have access to the forum. However, the Court distinguished the opportunity to pursue a claim from the opportunity to successfully pursue a claim: the fact that "it is not worth the expense involved in proving [the claim] does not constitute the elimination of the *right to pursue* that remedy." *Id.* at at 5, 7 (emphasis in original).

The dissent, written by Justice Kagan, harshly criticizes the reasoning and result of the majority opinion. Arguing that the merchants' antitrust cases (brought individually) would be a "fool's errand" resulting in no effective vindication of their substantive rights, the dissent characterizes the majority's holding as "a betrayal to our precedents, and of federal statutes like the antitrust laws." Dissent at *1. This reasoning is perhaps difficult to rectify with Justice Kagan's majority opinion in *Sutter*, which relied as a principle tenant on the fact that "[a] n arbitrator may employ class procedures only if the parties have authorized them." *Sutter* at *1 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U. S. 662, 684 (2010)). While *Sutter* did not raise issues of "effective vindication," the dissent in *American Express* certainly strays from the notion that the parties' agreement to employ or waive the class action procedure controls.

How Will These Rulings Be Interpreted in the Employment Context?

Sutter (and its predecessor *Stolt-Nielsen*) suggests that the best practice for employers seeking to avoid employee class and collective actions is to provide that exclusion clearly in the arbitration agreement. Under *American Express*, explicit class action waivers with employees should generally be upheld, even where the practical result maybe to discourage pursuit of a claim.

However, *American Express* does not give employers carte blanche to impose onerous arbitration agreements and class waivers on employees. Employers need to keep in mind that the "effective vindication" theory (though undercut by *American Express*) is still alive and well. The limits of the doctrine are unclear because the Supreme Court did not use it to invalidate the arbitration agreement in that case, but it did leave the door open for the exception to apply where an arbitration agreement prospectively waives the right to pursue a claim at all. Depending on the facts of the case, high arbitration costs, or an onerous choice of venue or law provision could preclude a litigant from effectively vindicating a federal statutory right. *Green Tree Financial Corp.-Ala. v. Randolph* 531 U. S. 79, 90 (2000); *see also Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985). Also, any attempt to require an employee to waive certain types of damages that are specifically allowed by federal statute, shorten the statute of limitations or improperly shift fees/costs to the employee may be subject to challenge. *See e.g. Booker v. Robert Half Int'l, Inc*., 413 F.3d 77 (D.C. Cir. 2005) (invalidating clause in arbitration agreement purporting to waive punitive damages for racial discrimination claim). But, *American Express* holds that the mere fact that the potential damages for a federal employment claim do not make the case financially attractive is insufficient to invalidate an otherwise lawful arbitration agreement.

Some federal agencies and courts may attempt to distinguish *American Express* because it is not an employment case. For example, prior to the *American Express* decision, the National Labor Relations Board took the position that the mere existence of a broad class waiver in an employee arbitration agreement constitutes a violation of the National Labor Relations Act because it purportedly requires employees to waive their statutory right to engage in concerted activity. *In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). The *American Express* case was decided while *D.R. Horton* was pending before the Fifth Circuit. In response to the Supreme Court's ruling, the NLRB submitted a letter to the Fifth Circuit attempting to distinguish *American Express* because it does not "address that core NLRA right" to "pursue work-related claims concertedly in a judicial or arbitral forum." Fifth Circuit Case No. 12-60031, R. Doc. 00512287456 (Filed 06/26/2013).

The Fifth Circuit's decision in *D.R. Horton* has been much anticipated, and is still pending at the time of this writing, but its significance is falling behind the curve given that several federal circuits have declined to follow the NLRB's *Horton* decision and have specifically upheld the waiver of class or collective actions in employee arbitration agreements. This is especially true in light of the *American Express* ruling. The general consensus seems to be that "even if Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action [as with an FLSA case], surely the employee has the power to waive participation in a class action as well." *Owen v. Bristol Care, Inc*., 702 F.3d 1050, 1053 (8th Cir. 2013); *see also Vilches v. Traveler's Cos.,* 413 F. App'x 487, 494 n.4 (3d Cir. 2011); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2011); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus. Inc.,* 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 503 (4th Cir. 2002).

To avoid the "effective vindication" argument related to an employee's statutory right to make a complaint to an administrative agency, arbitration agreements should not attempt to waive employees' rights to file a complaint with the EEOC, NLRB or other federal, state or local agencies designated to investigate complaints of harassment, discrimination or other statutory violations. *Owens*, 702 F.3d at 1051. The agencies then have the right to bring suit against the employer in the name of the agency, which right is unaffected by any agreement between the employee and the employer.

WAIVERS continued on page 10

WAIVERS continued from page 9

Given the recent Supreme Court rulings further bolstering the FAA and the use of arbitration agreements, employers should consider their options in pursuing a mandatory arbitration agreement with employees. Though not bullet-proof, the following may be relevant to a factual determination of whether an employment arbitration agreement and/or class waiver will be upheld or invalidated under current case law:

1. Does the arbitration agreement express a clear intent to waive an employee's right to bring a class or collective action against the employer?
2. Does the arbitration provision allow employees to redress complaints through government agencies, such as the EEOC, DOL or NLRB?
3. Would pursuing arbitration result in an employee being unable to bring a claim because it would be cost-prohibitive?
4. Does the arbitration provision require fee shifting in favor of the prevailing party, thus making the employee liable for fees and costs if the employer prevails?
5. Does the arbitration provision attempt to take away statutory rights from the employee, such as choice of venue, choice of law, available remedies, shortened statute of limitations, etc.? ■

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Endnotes

[1]*American Express* builds upon the 2011 Supreme Court decision in *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), which held that a California state law prohibiting contracts that unfairly exculpate one party from its wrongdoing, such as class action waivers in consumer contracts, could not usurp the FAA and invalidate the class action waiver plaintiffs' agreed to in their contract. *American Express* applied that holding to class waivers related to federal law claims.

Fate of NLRB Recess Appointments Now in Hands of Supreme Court

By Carie A. Torrence and Sara B. Kalis

On June 24, 2013, the U.S. Supreme Court agreed to hear a case that will determine whether President Obama's three 2012 recess appointments to the National Labor Relations Board (NLRB or board) were constitutional. The appointments at issue—members Sharon Block, Terence Flynn, and Richard Griffin—were made in January 2012 without Senate confirmation, pursuant to the Recess Appointments Clause. A finding that these appointments were unconstitutional could have far-reaching consequences, potentially invalidating hundreds of Board decisions.

D.C. Circuit Holds Recess Appointments Unconstitutional

The case at issue was brought by Noel Canning, a bottler and distributor of Pepsi-Cola products. Noel Canning was engaged in negotiations for a new collective bargaining agreement with Teamsters Local 760 (the union). At the end of the negotiations, the parties disagreed over the terms of the final agreement, and the union filed an unfair labor practice charge against Canning. Affirming an administrative law judge's findings, the board held that Canning violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to reduce to writing and execute a collective bargaining agreement. Canning appealed the board's decision to the D.C. Circuit Court of Appeals.

After first dispensing with the questions unrelated to the constitutional issues, the D.C. Circuit turned to the constitutional arguments asserted by Noel Canning, namely, that the Recess Appointments Clause is inapplicable to the above presidential appointments because: 1) the Senate was not in "recess" at the time of the putative appointments; and 2) the vacancies did not "happen" during a Senate recess.[1]

The Recess Appointments Clause provides that "[t]he president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Canning argued that at the time of the appointments, the Senate was not in "the recess" between sessions and, therefore, the appointments were unconstitutional. The board, on the other hand, argued that the Recess Appointments Clause permits appointments during intrasession breaks. The court rejected the board's interpretation and held that "the recess" is limited to intersession recesses, which "refers to the time period between sessions that would end with the ensuing session of the Senate." Because the board conceded that the appointments were not made during the intersession recess, the court held that the appointments were invalid from their inception.

Although it was not necessary for the court to address Canning's second argument, it chose to do so and found that the appointments were likewise invalid because the vacancies did not "happen" during the recess. As to this second argument, the Court found the phrase "that may happen" meant the president could only exercise his Recess Appointment Power during the same recess in which the vacancy arose. The Court stated in support of its decision: "There is no reason the framers would have permitted the president to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations."

The Court ultimately vacated the board's order, holding the board did not have a quorum when it issued the order because the president's appointments were invalid. The Court specifically found the Recess Appointments Clause was inapplicable to the president's actions because the Senate was not in "recess" at the time of the appointments and the vacancies did not "happen" during the recess of the Senate.

Third Circuit Holds Prior Recess Appointment Unconstitutional

On May 16, 2013, the Third Circuit followed the D.C. Circuit's reasoning in *Noel Canning* and found the recess appointment of former NLRB member Craig Becker invalid because the Senate was not in recess at the time President Obama appointed Becker in March 2010.[2] Like the D.C. Circuit, the Third Circuit, in *New Vista Nursing*, focused on the text of the Recess Appointments Clause and held that the meaning of "recess" is limited to the time between official sessions of the Senate. The Third Circuit, however, chose not to address the issue of when a vacancy "happens" in order for the position to be eligible for a recess appointment. Because Becker's appointment was invalid and he was one of the three-member quorum to decide *New Vista Nursing*, the Third Circuit invalidated the board's decision, holding that the panel lacked three validly appointed members.

Issues Before the Supreme Court

The Obama administration's petition to the Supreme Court presents two questions: (1) whether the Recess Appointment Power may be exercised during a recess that occurs within a session of the Senate, or rather, is limited to recesses that occur between enumerated sessions of the Senate; and (2) whether the power may be exercised to fill vacancies that exist during a recess, or instead, is limited to vacancies that arise during that recess. In addition, the Supreme Court directed the parties to brief whether the Recess Appointment Power may be exercised when the Senate is convening every three days in pro forma sessions.

Potential Impact

The *Noel Canning* decision has implications far beyond that particular case. If the Supreme Court affirms the D.C. Circuit's opinion, all board action since the recess appointments were made in January 2012, and until the board has a quorum, are potentially impacted. This includes numerous controversial and precedent-departing decisions issued over the last year relating to social media issues, the obligation to disclose witness statements to a union, the limitation of confidentiality requirements during investigations, continuation of dues deduction after contract expiration, and limitations on off-duty access policies to name a few. In addition, given the recent *New Vista Nursing* decision, legal challenges to board action could reach back as far as the recess appointment of Craig Becker in 2010. Not only would such a decision put prior decisions at risk for invalidation, but it would prevent the board from acting on current and

future cases until the Senate confirms a quorum.

The *Noel Canning* decision also potentially impacts recess appointments to other agencies. In its petition for certiorari, the Obama administration noted that the ruling could invalidate other presidential recess appointments as far back as World War II.

Current Status of the Board

On July 20, the Senate voted to confirm a slate of nominees to the board. The newly confirmed board does not include recess appointees Block and Griffin. ■

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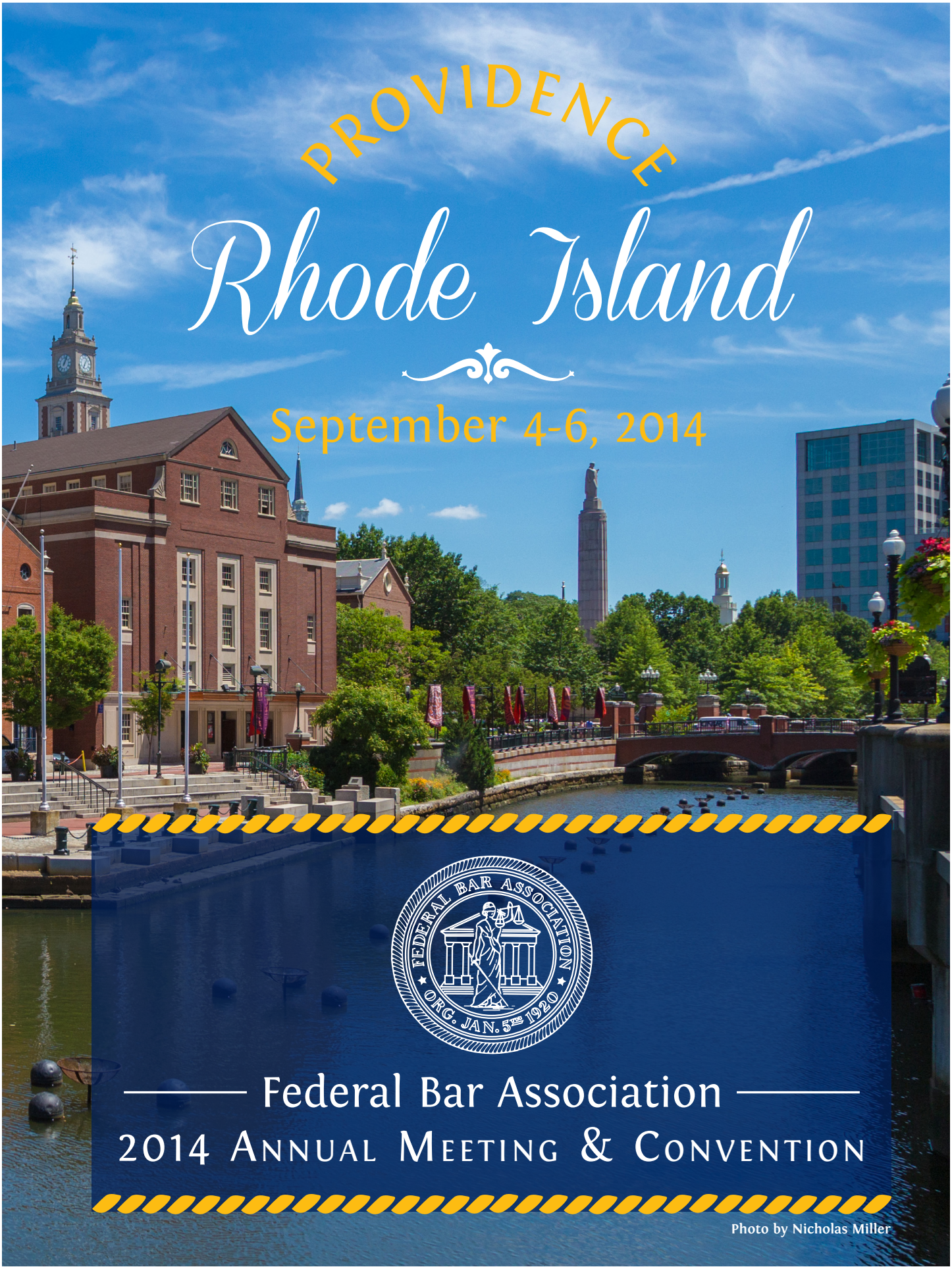
Endnotes

[1]*Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

[2]*NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3rd Cir. May 16, 2013).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