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1. SUPREME COURT DECISIONS

Title VII—Limitations for a constructive-discharge claim begins running *after* the employee provides notice of resignation

In *Green v. Brennan*, 578 U.S. ___, 136 S. Ct. 1769 (2016), the Supreme Court confronted the issue of whether the limitations period for a constructive-discharge claim of a federal employee begins when the alleged discriminatory conduct occurs or when the employee provides notice of his resignation.

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e. Title VII also prohibits an employer from retaliating against its employees for seeking relief from discrimination. *Id*. An employee must exhaust his administrative remedies prior to filing suit for Title VII violations. *Green*, 578 U.S. at ___, 136 S. Ct. at 1774. The first step of a federal employee's administrative remedies for discrimination is to "contact" an Equal Employment Opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory." *Id*. at ___, 136 S. Ct. at 1775–76; 29 CFR § 1614.105(a)(1).[1]

In 2008, Marvin Green was serving as the postmaster for Englewood, Colorado and had worked for the United States Postal Service for thirty-five (35) years. *Id.* at ___, 136 S. Ct. at 1774. He applied for a vacant postmaster position in Boulder, Colorado, which would have been a promotion from his current position. *Id*. However, he was not selected. *Id*. Green complained that he was denied the promotion due to his race. *Id*. After he complained, the relationship between Green and his supervisors deteriorated. *Id*.

On December 11, 2009, two of Green's supervisors accused Green of the criminal offense of intentionally delaying the mail. *Id*. The Postal Service's Office of the Inspector General (OIG) investigated this accusation and interviewed Green as part of this investigation. *Id*. After this interview, Green's supervisors reassigned Green to off-duty status until the OIG completed its investigation and resolved the matter. *Id*. When the OIG informed Green's supervisors that no further investigation or action was necessary, they continued to represent to Green that the investigation was still open. *Id*.

On December 16, 2009, the Postal Service and Green entered an agreement. *Id.* As part of this agreement, the Postal Service agreed not to pursue criminal charges, Green agreed to leave his Englewood postmaster position, and Green could either retire from his Englewood post or report for duty in Wamsutter, Wyoming effective March 31, 2010. *Id*. The Wyoming position paid considerably less than Green's salary as the Englewood postmaster. *Id*. Green submitted his resignation on February 9, 2010 with an effective date of March 31, 2010. *Id*.

[1] A private-sector employee must file a charge with the EEOC within 180 or 300 days after the unlawful act occurred. 42. U.S.C. § 2000e-5(e)(1).

On March 22, 2010, Green contacted an Equal Employment Opportunity (EEO) counselor, reported his unlawful discharge, and claimed that his supervisors alleged criminal charges and negotiated the settlement agreement in retaliation for his original complaint of discrimination. *Id*. at 1774–75. The date Green contacted the EEO counselor was forty-one (41) days after he submitted his resignation and ninety-six (96) days after signing the settlement agreement. *Id*.

When Green filed suit in the Federal District Court for the District of Colorado, the Postal Service moved for summary judgment on the basis that Green failed to timely contact an EEO counselor "within 45 days of the matter alleged to be discriminatory" as required by 29 CFR § 1614.105(a)(1). *Id*. at 1775. The Postal Service argued that the "matter alleged to be discriminatory" was the signing of the settlement agreement on December 16, 2009. *Id*. The District Court granted summary judgment for the Postal Service. *Id*. The Tenth Circuit affirmed. *Id*.

The Supreme Court began its analysis with the actual text of § 1614.105 and the definition of "matter." *Id*. Per Black's Law Dictionary, "'matter' simply means 'an allegation forming the basis of a claim or defense.'" *Id*. at 1776. (*citing* Blacks' law Dictionary 1126 (10th ed. 2014)). Based on this definition, the Court concluded that a "'matter alleged to be discriminatory" could refer to all of the allegations underlying a claim or discrimination, including the employee's resignation, or only to those allegations concerning the employer's discriminatory conduct." Because the text and definition of "matter" did not resolve the issue, the Court continued its analysis. *Id*.

The Court next turned to the "standard rule" for limitations periods, i.e., "a limitations period commences when the plaintiff has a complete and present cause of action." *Id*. (internal quotation marks and citation omitted). Additionally, "[a] cause of action does not become complete and present for limitations purposes until the plaintiff can file suit and obtain relief." *Id*. internal quotation marks and citation omitted).

The Court ultimately concluded that the "matter alleged to be discriminatory" for a constructive discharge claim includes the employee's resignation because (1) a resignation is part of the "complete and present cause of action" necessary in a constructive-discharge claim before a limitations period begins; (2) no language in § 1614.105 displaces or alters the standard rule for limitations; and (3) practical considerations support applying the standard rule of limitations. *Id*. at 1772–73. Therefore, the Court held that a constructive-discharge claim accrues and the limitations period begins to run when the employee gives his notice of resignation. *Id*. at 1782.

Title VII—to be a prevailing party for purposes of an award of attorney's fees does not require a favorable judgement on the merits of the case

In *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. ___, 136 S. Ct. 1642 (2016), the Supreme Court the Supreme Court clarified the meaning of "prevailing party" under Title VII of the Civil Rights Act of 1964 and unanimously held that a favorable ruling on the merits is not required for a defendant to be considered the prevailing party.

Title VII states that a district "court, in its discretion, may allow the prevailing party, other than the [Equal Employment

Opportunity] Commission or the United States, a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). Thus, before awarding attorney's fees, the district court must determine whether the party seeking fees is the prevailing party. *Id.*

The Supreme Court has indicated that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *CRST* 578 U.S. at ___, 136 S. Ct. at 1646 (*citing Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93, 109 S. Ct. 1486 (1989)). A plaintiff is the prevailing party when he "secured an enforceable judgment on the merits of a court-ordered consent decree . . . because he has received a judicially sanctioned change in the legal relationship of the parties." *Id*. (internal quotation and citation omitted). Conversely, prior to the *CRST* opinion, there was no test or guidance to determine when a defendant is the prevailing party in a civil rights claim. *Id*. It is clear that if the defendant is the prevailing party, it is to an award of attorney's fees if the plaintiff's claim is frivolous, unreasonable, or groundless or if the plaintiff continued litigation after it clearly became frivolous, unreasonable, or groundless. *Id*.

Section 706 of Title VII outlines the administrative requirements that must be followed by the Equal Employment Opportunity Commission (EEOC) prior to suit being filed. *Id*. at 1647. The EEOC must first provide the employer with notice of the charges and then must investigation the allegations. *Id*. After the investigation, if the EEOC has reasonable cause to believe a Title VII violation occurred, it try to informally address the issues through conference, conciliation, and persuasion. *Id*. If these informal methods fail, then the EEOC may file suit. *Id*.

In *CRST,* Monika Starke filed sexual harassment allegations with the EEOC. *Id*. The EEOC notified CRST of Starke's allegations. During the initial investigation into Starke's allegations, the EEOC discovered that four other women had filed EEOC complaints against CRST. *Id.* Informal methods of resolution failed. *Id*. The EEOC sued CRST on behalf of Monika Starke and a class of unidentified employees[2] on the basis of sexual harassment and sexually hostile and offensive work environment. *Id*. at 1647–48.

During discovery, the EEOC identified approximately 250 additional women who had sexual harassment claims. *Id* at 1648. Based on various motions filed by CRST, the district court ruled that all but sixty-seven (67) of the women's claims were barred for various reasons. *Id*. at 1648. As to the remaining claims, the District Court dismissed the case because the EEOC did not satisfy its § 706 pre-suit requirements of investigating the individual charges and attempting informal conciliatory methods as to each individual before filing the lawsuit. *Id*. at 1649. Because the case was dismissed, the district court held that CRST was the prevailing party awarded CRST over $4 million for attorney's fees. *Id*.

The Eighth Circuit affirmed the dismissal of all the claims except two and vacated the award of attorney's fees on the basis that CRST was no longer a prevailing party due to the reversal of the dismissal of the two claims. *Id*.

After remand, the EEOC withdrew one of the remaining claims and settled the

[2] Pursuant to § 706 of Title VII, the EEOC make seek relief for a group of aggrieved individuals without first obtaining class certification under Federal Rule of Civil Procedure 23. *CRST,* 136 S.Ct. at 1648.

other claim. *Id*. at 1650. At that point, CRST moved again for over $4 million in attorney's fees, which were again awarded by the district court. *Id*. The EEOC appealed again, and the Eighth Circuit concluded that for a defendant to be considered the prevailing party it must obtain a favorable determination on the merits; therefore, the Eighth Circuit reversed and remanded because CRST did not obtain a favorable determination on the merits. *Id*. at 1650–51.

The Supreme Court concluded that a defendant need not obtain a favorable judgment on the merits in order to be the prevailing party and entitled to an award of attorney's fees. *Id*. at 1651. In reaching this conclusion, the Court first discussed how "common sense undermines the notion that a defendant cannot prevail unless the relevant disposition is on the merits" based on the different objectives of a plaintiff and defendant coming to court. *Id*. "A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor." *Id*. Therefore, "[t]he defendant has . . . fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision." *Id*. As such, the Court concluded that a defendant may prevail even if plaintiff's claims are rejected on a nonmerits basis. *Id*. Additionally, the Court reached this conclusion because "[t]here is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when the courts dispose of claims on the merits." *Id.* at 1651–52. Therefore, the Court vacated the judgment of the Eighth Circuit and remanded the case for a determination of attorney's fees for CRST.

FLSA—Department of Labor not entitled to *Chevron* deference for its statutory interpretation of the term "salesman" due to its lack of explanation for the change in its position

In *Encino Motorcars v. Navarro*, 578 U.S. ___, 136 S. Ct. 2117 (2016), the Supreme Court analyzed whether the Department of Labor's (DOL) departure from its previous interpretation of the meaning of "salesman" under the Fair Labor Standards Act (FLSA) was arbitrary and capricious.

The FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week at a rate of at least one and one-half times the employee's regular pay. Encino, 578 U.S. at ___, 136 S.Ct. at 2122; 29 U.S.C. § 207(a). There are multiple exemptions to the FLSA's overtime pay requirement. *Id*.

In *Encino*, five (5) service advisors for the automobile dealership Encino Motorcars brought suit claiming they were entitled to overtime pay under the FLSA. *Id*. Section 213(b)(10)(A) of the FLSA exempts certain employees engaged in selling or servicing automobiles from overtime pay. *Id*.

In 1961, the FLSA contained a blanket exemption from the minimum wage and overtime pay provisions for all automobile dealership employees. *Id*. In 1966, this blanket exemption was repealed and replaced with a narrower exemption that only exempted salesmen, partsmen, or mechanics who sold or serviced automobiles from the overtime pay requirements. *Id*. In 1970, the Department of Labor (DOL) defined the statutory terms "salesman," "partsman," and "mechanic." *Id*. A "salesman" was defined to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the

vehicle or farm implements which the establishment is primarily engaged in selling." *Id*.; 29 C.F.R. § 779.372(c)(1) (1971). This definition excludes a service advisor because they sell repair and maintenance services and not the actual vehicles. *Id*. Therefore, after the DOL's 1970 interpretation, service advisors were not exempt employees. *Id*. In 1974, Congress amended the statutory language of § 213(b)(10)(A) to exempt salesmen, partsmen, or mechanics "primarily engaged in selling or servicing automobiles." *Id*. at 2123. In 1978, the DOL issued an opinion letter stating that service advisors were exempt employees under § 213(b)(10)(A). *Id*.

In 2011, the DOL reversed its position again and issued an opinion letter stating that the statutory term "salesman" means only an employee who sells automobiles and service advisors were not exempt employees under § 213(b)(10)(A). *Id*. In its opinion letter, the DOL did not provide much, if any, explanation for its change in position. *Id*.

The issue presented in *Encino* was whether the exemption of § 213(b)(10)(A) applies to service advisors. *Id*. at 2124. For the Court to resolve this issue, it had to determine what, if any, deference should be given to the DOL's 2011 interpretation of § 213(b)(10)(A). *Id*. "Agencies are fee to change their existing policies as long as they provide a reasonable explanation for the change." *Id*. at 2125. As part of the reasonable explanation, the agency must acknowledge the change in the position and establish good reasons for the change in the position. *Id*. at 2126. If an agency fails to provide a reasoned explanation for the change in its policy, its action are arbitrary and capricious and should not be afforded *Chevron* deference. *Id.*

The Court concluded that no deference should be given to the DOL's 2011 interpretation of the term "salesman" because the interpretation "was issued without reasoned explanation that was required in light of the Department's change in position." *Id*. at 2126. More specifically, the DOL failed to explain why the statute exempts employees who sold vehicles, but not employees who sold services. The Court vacated the judgment of the Court of Appeals and remanded with instructions for the Court of Appeals to interpret the statute without giving deference to the DOL's 2011 interpretation. *Id*. at 2127.

2. FIFTH CIRCUIT DECISIONS

FLSA—A restaurant may only offset the costs directly associated with credit card issue fees from the tips its servers receive via credit card

In *Steele v. Leasing Enterprises, Ltd*., 826 F.3d 237 (5th Cir. 2016), the Fifth Circuit considered whether the percentage of an offset taken by a restaurant from tips charged to a credit card may exceed the total credit card issuer fees and may include costs associated with paying the tips other than the credit card issuer fees.

Currently, the minimum wage under the Fair Labor Standards Act (FLSA) is $7.25 per hour. 29. U.S.C. § 206(a)(1). However, if an employee receives tips, an employer may pay $2.13 per hour as long as the total amount of tips equals or exceeds the minimum wage under what is called a "tip credit". 29 U.S.C. 203(m)(2), 206(a)(1); 29 C.F.R. §§ 531.52, 531.59. An employer is entitled to a tip credit only if the employee receives all tips. *Steele*, 826 F.3d at 242. An employer may deduct credit card issuer fees from tips charged to a credit card. *Id*. at 243.

Perry's Restaurants, LLC, which is owned by Leasing Enterprises, paid its servers who received tips $2.13 per hour and claimed the tip credit per the FLSA. *Id*. at 241. Perry's paid its servers the tips charged to a credit card in cash. *Id*. To facilitate the payment of these tips, Perry's had armored trucks delivering cash to each of its restaurants three times a week. *Id*. Perry's retained 3.25% of tips charged to credit cards. *Id*. According to Perry's, the 3.25% offset accounted for the credit card issuer fees and the costs associated with obtaining the cash to pay the tips to its servers. *Id*.

The Fifth Circuit concluded that "an employer only had a legal right to deduct those costs that are *required* to make a [credit card tip] collection." *Id*. at 245. Because "[c]redit card fees are a compulsory costs of collecting credit card tips," the Fifth Circuit concluded that an employer does not run afoul of § 203(m)'s requirement that an employee receive all of his tips by offsetting credit card tips with credit card issuer fees. *Id*. at 244. However, [a]llowing Perry's to offset employees' tips to cover discretionary costs of cash delivery would conflict with § 203(m)'s requirement." Therefore, Perry's offset, which included costs associated with paying credit card tips in cash, violated the FLSA.

3. TEXAS SUPREME COURT DECISIONS

FELA—Employer not negligent for failing to prevent exposure to mosquito-born infection

In *Union Pacific Railroad Company v. Nami*, ___ S.W.3d ___, 2016 WL 3536842 (Tex. 2016), the Texas Supreme Court analyzed whether a rail road company is liable for damages under the Federal Employers' Liability Act (FELA) for an employee getting West Nile virus.

Under FELA, railroad companies are required to provide their employees with reasonably safe work places. *Nami*, 2016 WL 3536842, at *2. Specifically, FELA provides that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence . . . of such carrier." *Id*.

In September and October of 2008, William Nami operated a tamping machine in Sweeny, Brazoria County, Texas for Union Pacific. *Id*. at *1. Sweeny is known as the "mosquito capital of the world," and the mosquito problem was exacerbated by the rain and standing water associated with Hurricane Ike. *Id*. Sweeny claimed to have been regularly bitten by mosquitos at work, both inside and outside the tamper cab, which had holes in its floors and walls and did not have a working air conditioner or door. *Id*.

In May of 2008, Union Pacific distributed a bulletin to its employees explaining West Nile virus, the spread of it by through mosquitos, the symptoms of the virus, and the importance of using mosquito repellant. *Id*. at *2. However, Nami did not receive a copy of this bulletin, nor did Union Pacific provide its employees with mosquito repellant. *Id*.

Nami began to experiences flu-like symptoms and was eventually diagnosed with West Nile virus and encephalitis, which resulted in some long term health issues and prevented Nami from working. *Id*. Nami brought suit against Union Pacific for failing to provide a safe workplace as required under FELA. *Id*. The jury attributed 80% liability to Union Pacific. *Id*. On appeal, Union Pacific argued that it did not ow Nami a legal duty to

protect him from mosquitoes based on the doctrine of *ferae naturae*. The court of appeals did not decide whether the doctrine was applicable and held that Union Pacific was liable for negligence because it created the conditions by not repairing the tamper cab and not mowing the right of way. *Id*.

Under the doctrine of *ferae naturae*, a property owner does not ow a duty of care to protect an invitee from indigenous wild animals. *Id*. at * 5. The Texas Supreme Court noted that mosquitos are considered to be wild animals. *Id*. Moreover, the Court noted that mosquitos are indigenous to Texas and are especially prevalent in south Texas. *Id*. at *6. The Court also noted that Nami's job did not increase his chances of contracting West Nile, Union Pacific's acts and/or omissions did not increase the chances of him contracting West Nile, and there was no evidence that Union Pacific could have done anything to prevent mosquitos in the area where Nami worked or could have reduced the risk of contracting West Nile. *Id.* at *7.

Therefore, the Court held that the doctrine of *ferae naturae* applied and Union Pacific did not have a duty to prevent Nami's mosquito-born infection. *Id*. at *7. As such, the Court concluded that Union Pacific was not negligent as a matter of law. *Id*.