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Labor of Law: 'Masterpiece' and the Employer Perspective | EEOC Sexual Harassment Hearing | Plus: Who Got the Work

Catch up on what the employment bar is saying about the Supreme Court's Masterpiece Cakeshop ruling, and the EEOC is preparing for a hearing next week about sexual harassment in the workplace. Thanks, always, for reading Labor of Law.

By **Erin Mulvaney** | June 08, 2018 at 09:55 AM

Welcome to Labor of Law. The U.S. Supreme Court's Masterpiece Cakeshop ruling this week wasn't as sweeping as many thought it could be. Let's look at what employers can—and can't—take from the opinion. Meanwhile, the NLRB says it will move forward with joint-employment rule-making this summer and the EEOC next week is talking about sexual harassment in the workplace. We've got the latest L&E headlines below, and scroll down for who got the work in some big new cases.

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➤➤ *I'm Erin Mulvaney in Washington, D.C., covering labor and employment from the Swamp to Silicon Valley.* ***Follow this weekly newsletter*** *for the latest analysis and happenings. If you have a story idea, feedback or just want to say hi, I'm at* ***emulvaney@alm.com*** *and on Twitter* ***@erinmulvaney****. Thanks always for reading. Let's get started.*

Masterpiece Cakeshop: What It Does and Does Not Tell Employers

A baker refuses a wedding cake to a gay couple, citing his religious beliefs and defending his right to refuse service. This Colorado case—complete with First Amendment, religious accommodation and discrimination questions—naturally made its way to the Supreme Court. Yet, the much-anticipated ruling in Masterpiece Cakeshop was narrow, fact-specific and offers no clear guidance. My colleagues Marcia Coyle and Tony Mauro wrote about the outcome and some of the interesting questions **here**, **here** and **here**. **Gibson, Dunn & Crutcher**'s **Ted Olson** says **he doesn't see** any precedential value in the ruling.

➤➤ *For employers, is there any takeaway?*

"The big takeaway is capital letters NOTHING," **Littler Mendelson's Emily Haigh** in New York told me this week. But she added, "The fact that we are taking nothing away is something. That is significant in and of itself."

Haigh puts it like this:

“The Supreme Court ruling was just as significant for what it did not do. It did not create a religious exception to the public accommodation law. Public accommodations are still alive and well. Although the case was not about employee/employer relations, requests for religious accommodation should be taken with tolerance and respect. It’s a reminder to employers.”

Haigh says the case comes at a time as new questions are being raised over the scope of LGBT protections in employment law. Federal appeals courts are divided over whether Title VII protects against sexual orientation discrimination. A New York-based skydiving company **last week petitioned** the U.S. Supreme Court to take up the issue in the case Altitude Express Inc. v. Zarda.

➤➤ *Even though Masterpiece was a narrow ruling there is an equally “narrow strand” employment attorneys can take away…*

Employment attorneys might take something else away from Masterpiece, says **Jay Holland**, chair of the labor, employment and whistleblower practice at **Joseph, Greenwald & Laake**. He says a key issue in the case focused on the fact members of the Colorado Commission on Civil Rights made disparaging comments toward religious protections.

“I could see the tables being turned to say that in a parallel situation, where a plaintiff brings a discrimination case and a commissioner or judge shows hostility because of who they are and their claims,” Holland said. “At the least the Supreme Court recognized and determined in this case that an individual was entitled to a fair and unbiased hearing as it pertains to their claim of discrimination.”

Holland says “stray remark” doctrines haven’t been successful in the past to prove discrimination, but rather a pattern of severity. The Supreme Court’s Masterpiece ruling could give more weight to arguments against judges or commissioners making such comments.

Hostile comments could be evidence of an unfair hearing and unfair process, Holland says. “It gives a strand for either employees or employers depending on where the offensive remarks lie.” He adds: “I think it’s a narrow strand.”

Lawyers across practices will be watching Monday to see what the Supreme Court does with another case that tees up how an employer dealt with LGBT issues: **Arlene’s Flowers, Inc. v. Washington** has a similar fact-pattern to Masterpiece. The case is on the court’s private conference today—and we could get an order Monday. The Washington Post **has this snapshot** of how the justices could rule. Stay tuned!

EEOC Guidance on Sexual Harassment

The U.S. Equal Employment Opportunity Commission is meeting in Washington next week to address sexual harassment in the workplace, following up on a task force led by chair **Victoria Lipnic** and Democratic commissioner **Chai Feldblum** (at left). The commission will meet at its headquarters to hear from experts

in academia, labor attorneys—plaintiff and management side—and advocacy groups. A report released in 2016 includes recommendations on the subject of sexual harassment. The panelists will include **Debra Katz** from **Katz, Marshall & Banks** and **Kathleen McKenna** from **Proskauer Rose**.

Meanwhile… Trump-nominated EEOC members are in the middle of a political stalemate in the U.S. Senate, **Bloomberg Law reports.** **Janet Dhillon**, former Burlington Stores general counsel, the nominee for chair, and West Point professor **Daniel Gade** have been waiting for confirmation since late last year. Sources told Bloomberg that the nomination of Feldblum, an Obama appointee, for another five-year term has tripped up the process. The Democrats want her confirmation as a package deal with Dhillon and Gade, and a handful of GOP senators won't budge.

It's unclear whether **Trump's nominee** for EEOC general counsel—**Sharon Gustafson**—will fall under the same stalemate. In the meantime, that leaves the agency with a Democratic majority a year and a half into the Trump administration.

➤➤ **The National Labor Relations Board**, however, is in full swing with its Republican majority. I wrote about Chairman **John Ring**'s plan for rule-making on joint employer standards. Ring, **a former Morgan, Lewis & Bockius** partner, says it's already in motion, and there could be a notice as soon as this summer. You can read his letter to Democratic senators and my article **here**. Bloomberg BNA has more on the rule-making proposal—and tension at the agency—**here**.

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Tell me what you think: If you've had a chance to read and digest NLRB GC Peter Robb's **new guidance memo on handbook rules**, I'd love to hear from you.

Who Got the Work

>> The EEOC **is suing Walmart** for alleged discrimination against two former employees who are deaf. The **complaint** was filed in Washington federal district court. Walmart is represented by **Littler Mendelson**. A Walmart spokesman said in a statement: "We do not tolerate discrimination of any kind. We take this seriously and will respond appropriately to the complaint."

>> Walmart, meanwhile, has settled a transgender worker's discrimination lawsuit in North Carolina federal district court. "While we have strong anti-discrimination policies, we are glad we could resolve this matter with Ms. Bost," a Walmart spokesman **told**Reuters. A team from Littler Mendelson's Charlotte office **represented** the retailer.

>> IBM is being sued in the Western District of Texas for alleged age discrimination. Here's a link to **the complaint**, filed by Austin's **Wright & Greenhill** and the Pittsburgh firm **Lamberton Law Firm**. "IBM complies with all applicable laws, and we will defend this case vigorously," a company spokesman said.

>> Five cheerleaders are suing the Houston Texans NFL team. The plaintiffs "file this action to recover compensation for the countless hours worked but not recorded or paid; for the discriminating failure of the multi-billion dollar Houston Texans franchise to pay a reasonable wage

to the women on the team." The complaint continued: "Today, these women come before this court to hold the Houston Texans and the NFL at large accountable." The law firms **Allred, Maroko & Goldberg,** with **Spurlock & Associates,** brought the complaint. Read the **filing here**. The New York Times has more **here**.

Promotions, New Hires and New Offices

>> **Fisher Phillips** **hired** **Jessica Thompson** as an associate in the firm's Irvine office. Thompson focuses on wrongful termination, harassment, discrimination, wage and hour and retaliation matters. She previously was at **Murtaugh Treglia Stern & Deily.**

>> **Jeff Dinerstein** joined **Morgan, Lewis & Bockius** in Houston. Dinerstein, who focuses on merger and acquisition work for private equity firms, previously was at **Jones Day**. **The Texas Lawyer** reports that Morgan Lewis has made 11 lateral hires in Houston over the last year.

>> **Ogletree, Deakins, Nash, Smoak & Stewart** is betting that Maine's largest city is big enough for two national labor and employment firms, The American Lawyer **reports**. Ogletree joins **Littler Mendelson**, which **moved to Maine in 2015**, in establishing offices in Portland.

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Around the Water Cooler…

Banks have paid out some of the largest settlements in wage theft disputes in the last decade, a recent **report found**. JPMorgan Chase, Bank of America and Wells Fargo had some hefty settlements, according to the Good Jobs First report. **Jeff Brecher**, head of the wage-and-hour practice at **Jackson Lewis**, said the law that governs overtime eligibility isn't black and white. As a result, "There's a lot of gray, and that's a breeding ground for litigation," he said. [**Wall Street Journal**]

• Uber lawyers say the Supreme Court ruling in Epic Systems defeats a group of drivers' class certification in a consolidated case before the Ninth Circuit. It was one of hundreds of cases put on hold waiting in the decision. **Gibson, Dunn & Crutcher**'s **Ted Boutrous** is lead counsel for Uber. [**The Recorder**]

• An ex-associate who accused **Steptoe & Johnson LLP** of unequal pay based on gender has dropped her case in light of last month's U.S. Supreme Court decision upholding employment contracts that bar class actions. [**The Recorder**]

• Q&A: **Lieff Cabraser's Kelly Dermody** on gender-pay cases, arbitration and more. "While the legal climate may look more grim, there is a shifting culture of feedback in social media and the consumer market. People are saying, "Wait a minute. Workplace secrecy is a really terrible thing for employees." And it's not just a terrible thing for workers individually, it's a bad thing for society." [**The Recorder**]

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• Pay transparency could close the gender gap, but there are also cons. Tech company Fog Creek Software, Inc. has tried the tactic of being open about showing how much everyone makes. What's at stake? [**Bloomberg**]

• The #MeToo movement's impact on human resources: "It created this HR level of activity like nothing we've ever seen," said **Johnny Taylor**, chief executive officer of the Society for Human Resource Management. [**NPR**]

• Mandatory sexual harassment training is now required in New York state. It joins other states and local governments, including California and Connecticut, and follows the #MeToo movement and scandals that sprung from the Harvey Weinstein scandal. [**New York Law Journal**]

• What employers need to know about implicit bias training. **Holland & Knight**'s **Erika Royal** writes: "More effective training will be less reactive and less focused on addressing only legally actionable conduct. Instead, more effective anti-discrimination training would encourage all employees to take ownership of workplace culture issues." [**Daily Business Review**]

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*That's all for this week. Send your tips, story ideas or feedback to **emulvaney@alm.com**. Thanks for reading!*