PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

JOINT EMPLOYERS, MEDICAL JOINTS, AND THE MARK OF THE BEAST: A REVELATORY YEAR IN LABOR AND EMPLOYMENT LAW

WILLIAM R. CORBETT, LSU Law

PLAN OF COVERAGE

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

I. Fun Cases

II. Supreme Court—a very lean year

III. Hot Topics

IV. Various federal appellate court decisions

Fun Cases

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Laurinaitis v. World Wrestling Entertainment, Inc. **(D. Conn.)**

Road Warrior Animal and 51 former wrestlers and 2 referees suing for everything in the world. Claim that WWE misclassified them as independent contractors.

Fun Cases

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Lifter v. Cleveland State University*, 707 Fed. Appx. 355 (6th Cir. 2017).**

Law professor claimed that dean retaliated (1st Amendment) against him for his union organizing activities by giving him a raise of $666—you got it—the Mark of the Beast.

Dean successfully explained the raise amount as a bottom-tier raise based on performance indicators—had been $727 before adjustment of merit pool.

Fun Cases

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Massasoit Indus. Corp. v. Massachusetts Comm'n Against Discrimination **(Mass. App. 2017)**

Age discrimination—replacing 74-year-old custodian with 68-year-old

Fun Cases

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017).**

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017).**

- **Sex discrimination charge**
- **EEOC investigation—issued subpoenas asking for pedigree information throughout nation.**
- **District judge refused to enforce subpoenas**
- **Issue: What is standard of appellate review of district court's ruling on motion to quash subpoenas?**
- **Only 9th Circuit had applied de novo standard.**
- **S. Ct. held abuse of discretion is proper std.**
- **On remand—9th Circuit again reversed district court judge.**

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

ERISA exempts "church plans" from regulation of employee benefit plans.

Petitioners were 3 church-affiliated nonprofits that run hospitals and healthcare facilities. They offered defined-benefit pension plans for employees.

Issue: Must church have originally established plan to qualify for church plan exemption?

Holding: No. The later-enacted language requiring only that the plan be "maintained" by a principal purpose organization prevailed.

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Artis v. Dist. of Columbia, No. 16–460, 2018 WL 491524 (Jan. 22, 2018) (Title VII and state law claims; federal court dismissed case after Title VII claim dismissed on summary judgment)

Whether 28 U.S.C. § 1367(d) provides a grace period of 30 days or "stops the clock" on the statute of limitations.

"The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. 1367(d).

The Court held that the language "shall be tolled" should be given the usual meaning that the limitations clock stops the day the claim is filed in federal court and restarts from that point 30 days after dismissal.

Four justices dissented.

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Pending*: Epic Systems Corp. v. Lewis, NLRB v. Murphy Oil USA, Inc., Ernst & Young, LLP v. Morris.*

Consolidated cases raise issue of whether a mandatory arbitration agreement that prohibits assertion of class or collective claims violates Section 7 of the National Labor Relations Act

Oral arguments—opening day Oct. 2

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Pending: *Somers v. Digital Realty Trust Inc.*

Issue: Whether whistleblower claims under Dodd-Frank Act can be asserted only after first disclosing information to the Securities & Exchange Commission.

9th Circuit in this case held extends to those who report internally first or to SEC.

5th Circuit held other way in *Asadi v. G.E. Energy (USA)* (definition of whistleblower means must report externally).

U.S. Supreme Court

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Cert. Granted:

***Janus v. AFSCME Council*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, No. 16-1466 (Sept. 28, 2017) (whether nonunion workers in public sector can be required to pay fee for bargaining services).**

***Encino Motorcars v. Navarro*, 845 F.3d 925, *cert. granted*, No. 16-1362 (Sept. 28, 2017) (whether service advisers at car dealerships are exempt from overtime).**

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

- Sexual Orientation Discrimination—*Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2016) (en banc).
- 7th Circuit became first circuit in nation to hold that "because of . . . sex" in Title VII includes sexual orientation.
- Follows from EEOC decision in *Baldwin v. Foxx* in 2015.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Sexual Orientation Discrimination—

***Franchina v. City of Providence*, No. 16-2401, 2018 WL 550511 (1st Cir. Jan. 25, 2018).**

City firefighter alleged sex-based harassment. She was a lesbian, and much of the harassment invoked her sexual orientation.

The First Circuit panel held that plaintiff's claim was actionable under a sex-plus theory in which the plus characteristic is her sexual orientation. In such a claim the plaintiff must prove that the employer took an adverse employment action *at least in part* because of the employee's sex.

In a footnote, the court cited *Hively v. Ivy Tech* as support for the proposition that "the tide may be turning" for Title VII's protections.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

WHO IS AN EMPLOYER?

Issues of employer-independent contractor and joint employers

NLRB is at the eye of this storm—

***Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017) overturning *Browning-Ferris Industries of Calif.*, 362 NLRB No. 186 (2015).**

4th Circuit case under *FLSA—Hall v. DIRECTV, LLC*, 846 F.3d 757 (4th Cir. 2017), *cert. denied*, No. 16–1449, 2018 WL 311311 (Jan. 8, 2018).

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

WHO IS AN EMPLOYEE?

U.S. Magistrate Judge held that a Grubhub driver was an independent contractor rather than an employee in *Lawson v. Grubhub, Inc.,* No. 15-cv-05128-JSC, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018). The court applied the California *Borello* test. The court bemoaned that the determination of status is an all-or-nothing test—a worker is an employee and gets all the protections afforded by law or is an independent contractor and gets none. The court observed that, with the advent of the "gig economy," the legislature may want to address "this stark dichotomy."

The California Supreme Court is considering replacing the *Borello* test in a case in which it heard oral arguments on Feb. 6, 2018. *Dynamex Operations West v. Superior Court*.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

- Obama-Era Rules Under the Trump Administration
- The Persuader Rule-DOL announced that it is rescinding
- The FLSA White Collar Exemptions-DOL Request for Information published on July 26, 2017, now reviewing comments.
- DOL filed motion to stay the appeal in 5th Circuit, which was granted.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Obama-Era Rules Under the Trump Administration

The Fiduciary Rule-Requires brokers to work under a fiduciary duty when working with retirement investors—must act in client's best interest

DOL has proposed extension of transition period from Jan. 1, 2018 to July 1, 2019. During the transition period, fiduciaries may meet the conditions of the Best Interest Contract Exemption and the Principal Transactions Exemption if they comply with "impartial Conduct standards." During the transition period, DOL and IRS will not enforce the rule by pursuing claims against fiduciaries "working diligently and in good faith" to comply.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Obama-Era Rules Under the Trump Administration

EEO1-Pay Data Reporting required more extensive pay data in annual EEO reporting; proposal would have required private employers with 100 or more employees, including certain government contractors, to report summary data on wages and hours worked categorized by sex, race, and ethnicity

Office of Information and Regulatory Affairs (within the Office of Management and Budget) on Aug. 29 announced it would stay and review.

EEO-1 deadline for 2018 is March 31. The existing EEO-1 form collects workforce data by sex, race, and ethnicity across 10 occupational categories.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Tip-pooling: The Wage and Hour Division of the DOL proposed on Dec. 4, 2017, rescinding the 2011 regulation that prohibits service industry employers from requiring front-of-house employees, such as servers, to share tips with back-of-house employees, such as cooks and dishwashers.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

- **EEOC's Wellness Plan Rules under ADA and GINA**
- ***AARP v. U.S. EEOC*, 2017 WL 3614430 (DDC Aug. 22, 2017).**
- **District court did not vacate rules but remanded to EEOC for reconsideration.**
- **EEOC failed to provide reasoned explanation for 30% incentive levels.**
- **On motion of the AARP, the court in December 2017 amended its judgment, vacating the rules, but staying the vacatur until Jan. 1, 2019. *AARP v. U.S. EEOC*, 2017 WL 6542014 (DDC Dec. 20, 2017).**

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

STATES' RIGHTS!

Barbuto v. Advantage Sales & Marketing, LLC, 78 N.E.3d 37 (Mass. 2017).

Employee terminated for positive drug test--medical marijuana.

Sued under Mass. state handicap discrimination law.

Court refused to hold that accommodation was unreasonable per se because it entailed a violation of federal law when it was legal under state law.

HOT Issues!

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Linkletter v. Western & Southern Financial Group, Inc.*, 851 F.3d 632 (6th Cir. 2017).**

The Fair Housing Act provides a claim for a terminated employee.

Employee signed online petition supporting women's shelter. Fired by employer.

Unlawful to interfere with person aiding or encouraging another in exercise of rights under FHA

Americans With Disabilities Act

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Credeur v. Louisiana, through Office of Attorney General*, 860 F.3d 785 (5th Cir. 2017).**

Telecommuting for unlimited period of time is not reasonable accommodation when employer defines regular office attendance as an essential function of the job. Regulation lists 7 considerations in determining essential functions, and greatest weight is accorded to employer's judgment.

Plaintiff's claim failed because she could not establish that she was a "qualified individual with a disability."

Americans With Disabilities Act

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017).**

Employers need to be careful about adjusting employee activities based on perceived needs due to a disability.

In this case, did not schedule video editor for much work or time in electronic digital recording room because of cramped conditions.

Americans With Disabilities Act

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Severson v. Heartland Woodcraft*, Inc., 872 F.3d 476 (7th Cir. 2017), *petition for cert. filed*, 17-1001 (Jan. 18, 2018).**

Whether employer violates ADA by refusing to grant long-term medical leave beyond what is required by FMLA.

No. "The ADA is an anti-discrimination statute, not a medical leave entitlement."

Discrimination Theories

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

US EEOC v. Autozone, 860 F.3d 564 (7th Cir 2017), reh'g denied

The EEOC argued that deprivation of employment opportunities or adverse employment action was inherent in the act of segregating the employee.

42 U.S.C. § 2000e-2(a)(2), declares it unlawful "to limit, segregate, or classify . . . employees . . . in any way which would deprive or tend to deprive any individual of opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

7th Circuit found no actionable adverse employment action where transfer involved no reduction in pay or benefits.

Race Discrimination

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

- ***EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (11th Cir. 2016).**
- **Applicant was hired and then offer of employment rescinded when she refused direction to stop wearing her hair in dreadlocks.**
- **Disparate treatment vs. disparate impact**
- **What is race? Immutable characteristics**
- **Statutory interpretation**

Religious Discrimination

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Mark of the Beast!

***EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017), cert. petition filed Sept. 12, 2018. Conference on 2/16**

Employee refused to use biometric hand scanner at work, and employer insisted, explaining employee's erroneous interpretation of Revelation.

Religious Discrimination

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

Mark of the Beast!

EEOC v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017), cert. petition filed Sept. 12, 2018.

Revelation 13:15 The second beast was permitted to give breath to the image of the first beast, so that the image would also speak and cause all who refused to worship it to be killed. 16 And the second beast required all people small and great, rich and poor, free and slave, to receive a mark on their right hand or on their forehead, 17 so that no one could buy or sell unless he had the mark—the name of the beast or the number of its name....

COMPUTER FRAUD AND ABUSE ACT (CFAA) AND STORED COMMUNICATIONS ACT (SCA)

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 314 (2017).**

"[W]hether the 'without authorization' prohibition of the CFAA extends to a former employee whose computer access credentials have been rescinded but who, disregarding the revocation, accesses the computer by other means." *Nosal*, 844 F.3d at 1029. Yes.

FLSA

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

***Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191 (6th Cir. 2017).**

Whether the employer was entitled to the statutory good-faith defense based on its reliance on a 2005 WHD letter opinion.

No. The statutory defense also requires that the employer acted both "in conformity with" the Letter and "in good faith."