Supreme Court of the United States
Employment Law Commentary
2010 Term

Jonathan R. Harkavy

Dedication

This article is dedicated to the memory of Herbert Robinson, z"l, who died last summer. Cousin Herb, as we knew him, was a first cousin to Nahomi's mother and a trusted counselor and caring presence for her family. Herb was a graduate of City College (from which he also received an honorary doctorate later in life) and received his law degree from Harvard Law School in 1940. Herb began his career as an assistant U.S. Attorney in Boston working on antitrust issues in the retail department store industry. During his service in the Army in World War II, he met and married his wife Alice, a student at Woman's College (later the University of North Carolina at Greensboro.) After the war, Herb founded what became a prominent, though small, law firm in New York City. In addition to a nationwide commercial litigation practice in which he popularized anti-kickback suits, Cousin Herb was a public-spirited philanthropist and community leader. Always a staunch defender of civil liberties and an inveterate political progressive, he also served the New York community for many years on the boards of several organizations, including Jewish Family Services of New York. Herb was also a life fellow of the Pierpont Morgan Library.

Herb Robinson was also a raconteur of the first rank. Having crossed paths with so many in public life, he had tons of wonderful stories and never missed an opportunity to recount one. "Gregarious" does not do justice to describe Herb's personality. A jaunty fellow, too, Herb was a member of the Friars Club, where he once took me for a pre-theater snack. But, Cousin Herb's real passion was books. He was a well-known bibliophile who amassed a collection of more than 50,000 volumes, including many rare treasures, over his lifetime. In 1997 he gave a portion of his extensive law library to Harvard Law School. Today, the "Herbert Robinson Anglo-American Rare Law Book Collection" resides in Langdell Hall, only a few feet away from where I work during the summers preparing this annual manuscript and doing other academic research and writing. What a special reminder for me every day of a lawyer who made a difference for the better not just in our family, but in the world at large!

So, it is with great respect and admiration - and more than a twinge of sadness - that I dedicate this manuscript to the memory of a real mensch, Herbert Robinson.

Acknowledgments

Nahomi Harkavy read this article with her keen editorial eye for detail, measured and informed perspective on the larger issues and infinite patience with her husband, the author. Thanks also to Professor Jon Hanson and his assistant Carol Igoe of the Harvard Law School for their kindness in hosting me again this summer. I am, of course, solely responsible for the content and tone of the article and for any errors in it.

Supreme Court of the United States
Employment Law Commentary
2010 Term

Jonathan R. Harkavy

The 2010 Term of the Supreme Court of the United States put a spotlight on the significant - though oddly unheralded - role that employment law plays in our country's economy and in our citizens' daily lives. One of the nation's keenest (and self-described "obsessive") Court observers recently characterized this term as "straight-up dull." Emily Bazelon, "Chamber of Pain," *The New York Times Magazine*, p. 9 (August 7, 2011.) My own judgment, however, is that what the Justices did in the employment area was consequential, if not downright exciting. Through a number of employment-related cases, a cohesive and assertive majority of the Court fashioned the law to fit its socio-economic (if not overtly political) view that the employment relationship ought to be deregulated. In doing so, the Court continued to pursue what the Reagan revolution began and the Tea Party followers hope to complete. But more about that later. For Court observers of all political stripes, the 2010 Term's smorgasbord of decisions provides a feast to be savored and debated for months to come.

The first section of this article describes briefly the scope of the Court's work during the 2010 Term and the place of employment law in it. The second section, constituting the bulk of the manuscript, is devoted to the major employment-related decisions of the term. The cases are arranged by familiar broad topics, and a summary of my personal take on each decision is offered in the *italicized paragraphs* following each case. That commentary suggests, among other things, the likely practical impact of these decisions on employees, management, benefit providers and labor organizations. Third, there is a brief section (prepared before the so-called "long conference" in late September) listing the grants of certiorari in employment-related cases to be argued and decided in the upcoming 2011 Term. The concluding section of the article offers some additional personal observations about the Court's work in the employment and labor area, with particular emphasis on the larger currents that move the Court.

I. The Scope of the Court's Work in the 2010 Term.

Employment cases, while not dominating the Court's docket, certainly commanded a significant share of the Justices' attention during the 2010 Term. Also noteworthy was the broad range of issues the Court confronted and decided, despite the complete absence of any labor relations cases. While some Court-watchers will undoubtedly note the relative unanimity on the Court about the results in these cases, the real story is that the philosophical fault line

between the majority and dissenting blocs is actually just as distinct as it has ever been for well more than a decade.

The case statistics for the 2010 Term affirm the Court's continued interest in employment-related issues. Of the 85 opinions filed during the term, 3 were *per curiam* dismissals and 7 were *per curiam* decisions made without briefing or argument. Of the remaining 75 full dress opinions, 8 cases directly involved employment issues and another 6 dealt with issues such as arbitration, immigration and income taxes that promise to have a bearing on litigation of employment disputes or a discernible effect on employers and working people. All told, therefore, nearly 20% of the entire merits docket of the 2010 Term had something significant to do with employment. When one factors out the criminal cases, it is apparent that the Court is maintaining a watchful interest in issues relating to employers and employees and the ways in which they resolve their disputes.

The Court's employment law work, aside from the numbers, comprised a wide variety of issues ranging from the four discrimination and retaliation cases (one of which was among the few "blockbuster" cases of the term) to a couple of important cases involving employee benefits litigation to a duo of public employment disputes. In addition to this range of substantive employment matters, the Court decided another *qui tam* case, and reviewed tax, immigration and attorneys' fees questions that bear directly on litigation of employment controversies. Finally, the Court also decided a case about class waivers in arbitration that may also affect how employment disputes are litigated. One can readily see that, taken together, this term's group of decisions, while *sans* a labor case, was not lacking in variety or breadth.

The appearance of unanimity about employment issues, while notable, is more notably misleading. To be sure, of the 8 direct employment decisions, the Court unanimously agreed on the disposition of 6 of them. In like manner, of the 6 additional cases bearing on employment relations, the Court agreed unanimously on the disposition of 4 of them. Lest one conclude that this unanimity about dispositions marks a crossing point over the divide between the majority and dissenting blocs, however, a closer look reveals the same philosophical differences that have marked every term since the so-called (and inaptly tagged) "conservative" majority assumed power. Most remarkably, the Chief Justice appears to be firmly *primus inter pares* among the Justices. Except for one case under the Federal Employers Liability Act, Chief Justice Roberts was in the majority in every one of the 14 employment-related cases. As a practical matter, that means he made the majority writing assignments in all these cases except the one in which he dissented - and he wrote the dissent in that one! As a result, Justice Sotomayor was shut out of all majority writing assignments, as was Justice Ginsburg, except in the case in which the Chief Justice dissented. On the other hand, the Chief Justice assigned Justice Scalia to write 3 out of the 4 employment discrimination and retaliation decisions, as well as the important arbitration class waiver case.

Pause now for a caveat about how one must regard the Court's oversight of employment law: No matter how significant the Court's decisions may seem, they need to be

considered as but a feature of the greater landscape of the employment relationship. Law is, after all, only one force among many that affects how that relationship functions. Consider, for instance, the effect of the increase in the eligibility age for full Social Security benefits just as the sizable post-war Baby Boomer generation is nearing retirement. To complicate the matter, at the same time these older workers are losing their incentive to retire, domestic job prospects are bleaker due to NAFTA, globalized manufacturing, fabrication and distribution and the Great Recession of 2008. When the recent wave of immigration, the number of troops offshore and the incarceration rate for young adult males are factored into the workforce equation, competition to seek, obtain and retain the vastly smaller number of available civilian non-farm jobs is more dogged than ever. Lastly, the shift from a producer-to-consumer and from a manufacturing-to-service economy has consequences for those job seekers, old and young, whose skills and training do not match basic requirements for the newer positions. All these forces affecting the employment relationship put matters of law and jurisprudence in a more modest perspective.

That said, the importance of the 2010 Term's employment cases should not be understated. While many observers would agree with Emily Bazelon's assessment of the 2010 Term as a dull one, *supra*, p. 1, that characterization does not bear much weight when one looks more thoroughly at this term's decisions. True enough, this term's cases provided few real surprises, and they certainly failed to attract much notoriety outside the bar, except for the flurry of media coverage of the Wal-Mart class action decision. Yet, in terms of how the Court's work is likely to affect employers, employees, labor unions, benefits providers and the employment bar, this term's decisions were both revealing and consequential. But, make your own judgment upon reviewing the following decisions.

II. Decisions of the 2010 Term.

A. Employment Discrimination

The blockbuster employment discrimination case of the term, *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. ---, 180 L. Ed. 2d 374, 131 S. Ct. 2541 (2011), might be placed by some in an adjective or procedural law category, as it purports to be a class action decision, albeit on singular facts. But because the *Wal-Mart* decision so profoundly affects the substantive reach of Title VII of the Civil Rights Act of 1964 ("Title VII"), it seems better suited in the substantive category of employment discrimination. Regardless of how and where one places it, the *Wal-Mart* case, as one will see below, is emblematic of the Court's continuing effort to deregulate the employment relationship.

The other substantive employment discrimination decisions involved the scope of retaliation (or reprisal) claims, the definition of the charge-filing requirement under the Fair Labor Standards Act of 1938 ("FLSA"), and the use of so-called "cat's-paw" evidence to sustain a charge of reprisal discrimination. Many observers have remarked that it was a good

year for employees in these last three decisions, as the Court appeared to construe the discrimination statutes with an eye toward their humanitarian purposes. Some credit, of course, is always due for interpreting the law as Congress has expressly or obviously intended. But, as the final section of this manuscript observes at greater length, it would be a mistake to conclude that the Court is now a worker-friendly forum - or even a "balanced" one. In any event, as the reader will see below, the employment discrimination cases generated a notable amount of interpretive controversy.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, 180 L. Ed. 2d 374, 131 S. Ct. 2541 (2011)

The Court decided that certification of a nationwide class of present and former employees claiming gender discrimination was inconsistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

Betty Dukes, Christine Kwapnoski and Edith Arana (along with four other women who are no longer parties), purporting to represent a class of approximately 1.5 million female present and former employees, sued Wal-Mart Stores, Inc. ("Wal-Mart") for gender discrimination under Title VII. Their suit claims (a) that local managers' discretion over pay and promotions is exercised disproportionately in favor of men in violation of the disparate impact prohibition in section 703(k) of Title VII and (b) that Wal-Mart's refusal to regulate its managers' discretion violates the disparate treatment prohibition in section 703(a) of Title VII. The complaint seeks declaratory and injunctive relief, back pay and punitive damages, but no compensatory damages. Based on the claim that Wal-Mart's supervisory structure and corporate culture permits gender bias to affect the way in which local managers exercise their supervisory discretion, plaintiffs sought to represent all present and former female employees who have been subjected to this common discriminatory practice.

Wal-Mart operates four types of retail stores in seven nationwide divisions in turn comprising 41 regions of 80 to 85 stores apiece. Each of the stores has between 40 and 53 departments and 80 to 500 staff positions. Pay and promotion decisions are admittedly committed generally to the broad discretion of local store managers who, as found by the lower courts in this case, exercise that discretion in a "largely subjective manner." Hourly wages may be increased within limits set at the corporate level. Salaries of managerial employees are regulated by higher corporate officials. As to promotions, Wal-Mart permits store managers to apply their own subjective criteria in selecting candidates for "support managers," the first step to management. Thereafter, admission to the corporate management training program additionally requires satisfaction of objective criteria such as above-average performance, one year's tenure in the current position and willingness to relocate. Otherwise, regional and district managers are authorized by Wal-Mart to use their own judgment in selecting candidates for management training. Further promotions are similarly at the discretion of an employee's superiors after prescribed objective factors are satisfied.

In the district court plaintiffs relied on statistical, anecdotal and expert evidence of a corporate culture of gender bias raising questions of fact and law common to the class. Wal-Mart unsuccessfully moved to strike much of this evidence, and the trial court, with minor modifications, certified the class sought, despite Wal-Mart's contentions that Rule 23(b)(2) does not apply to backpay claims and that those claims could not be managed without depriving Wal-Mart of its right to present certain statutory defenses. The Ninth Circuit, *en banc*, substantially affirmed, accepting in large part the reasoning of the district court. The Court of Appeals did exclude from the class those former employees who had left Wal-Mart prior to the filing date of the complaint and remanded for reconsideration the punitive damages portion of the certification. As to manageability, the Ninth Circuit saw no reason why Wal-Mart could not present its defenses in random sample cases from which an extrapolation of backpay relief could be made. The Supreme Court granted certiorari to consider whether class certification was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

The Court reversed the Ninth Circuit, deciding unanimously that the class should not have been certified under Rule 23(b)(2) because monetary relief was not merely incidental to available injunctive and declaratory relief.

The Court split 5 to 4, however about the propriety of certifying the class at all under Rule 23(a)(2). Justice Scalia's opinion, joined by the Chief Justice and Justices Kennedy, Thomas and Alito, reasons first that "commonality" under Rule 23(a)(2) requires that class members have suffered the same *injury*, not just violation of the same provision of the law. The claims must depend on a common contention of such a nature that it is capable of classwide resolution. Viewing Rule 23 as more than a "mere pleading standard," Justice Scalia says that its application necessarily entails "some overlap" with the merits of plaintiffs' claim. In this case that means proof of commonality overlaps with the contention that Wal-Mart engaged in a pattern or practice of gender discrimination, according to the majority. The Court posits that plaintiffs here wish to sue about literally millions of employment decisions at once. Justice Scalia's response to that wish is that "[w]ithout some glue holding together the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why I was disfavored*." Slip op., p. 12 (emphasis in original).

The majority opinion concludes that there is no evidence that Wal-Mart operated under a general policy of discrimination. Entirely discounting evidence from plaintiffs' sociological expert that Wal-Mart's strong corporate culture makes it vulnerable to gender bias, the Court ignores this "social framework" analysis because the expert could not reliably determine how stereotypes affected Wal-Mart's employment decisions and because his testimony might not have even met the standards of reliability for expert testimony at all. As to plaintiffs' evidence of a corporate policy that allows discretion by local supervisors over employment matters, Justice Scalia opines that one supervisor's invalid use of discretion does "nothing" to demonstrate the invalidity of another's. Accordingly, a party seeking certification of a nationwide class cannot show that all Title VII claims will in fact depend on the answers to

"common" questions. Furthermore, plaintiff's statistical showing of gender disparities in promotions and hiring does not, in the majority's view, prove the store-by-store disparity on which the Court says plaintiff's theory of commonality depends. Likewise, plaintiffs' anecdotal evidence is deemed "too weak" to raise any inference that all individual discretionary decisions are discriminatory. Not only did plaintiffs fail to tender enough affidavits, but the variations in how managers exercised their discretion highlighted in their anecdotal evidence also demonstrates the absence of even a single common question as required by the majority's interpretation of Rule 23(a)(2).

The Court next held (unanimously as noted above) that plaintiffs' backpay claims may not be certified under Rule 23(b)(2) where, as here, individualized monetary relief is not incidental to injunctive or declaratory relief. Though all members of the Court joined this holding, the dissenters did not join the Court's opinion on this point. Noting first that the text of the rule applies only when a single injunction or declaratory judgment would provide relief to each class member, Justice Scalia's opinion concludes that (b)(2) cannot apply to individualized awards of monetary damages. The majority finds that this interpretation of the rule is consistent with its history as a rule that derived from the equity courts. Hinting at constitutional due process issues if Wal-Mart were denied a right to litigate individualized monetary claims, Justice Scalia also finds that the majority's construction of (b)(2) is consistent with the rule's structure. Indeed, the Court posits that individualized monetary claims "belong" in the (b)(3) category because of its mandatory procedural protections (*e.g.*, best notice, superiority of class method and opportunity to opt-out provisions.)

Justice Scalia also rejects plaintiffs' view that their monetary claims do not predominate here. Again pointing to (b)(3)'s protections as mandatory for individualized monetary relief, the Court opines that plaintiffs' position that a predominating request for an injunction permits certification under (b)(2) is simply inconsistent with the text of Rule 23 itself. Justice Scalia also points out that plaintiffs' view to the contrary would create perverse incentives for class representatives to place valid claims at risk, citing plaintiffs' own strategy in this case not to include claims for compensatory damages. His opinion also underscores that trial courts would have to constantly reevaluate the class roster, again citing what happened in this case when the Ninth Circuit itself eliminated those former employees who had left Wal-Mart before the complaint was filed. Additionally, the Court finds irrelevant plaintiffs' point that backpay is equitable in nature, as Title VII, while distinguishing between backpay and other forms of relief, does not itself categorize all these remedies as "equitable." Finally, the Court notes that there may be some forms of incidental monetary relief flowing to the class as a whole on a non-individualized basis that might qualify for (b)(2) treatment, but that is certainly not the case here.

The majority opinion closes with some broad propositions. First, Justice Scalia says that Wal-Mart is "entitled to individualized determinations of each employee's eligibility for backpay." Indeed, Justice Scalia remarked that the Court specifically disapproves of the "novel project" of using what he calls a "Trial by Formula" to calculate the class' recovery by

extrapolating from claim determinations by a special master based upon random samples of class members. Finally, the opinion asserts that because the act enabling the Federal Rules forbids abridging, enlarging or modifying any substantive right, a class "cannot be certified" on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, filed a dissenting opinion. While agreeing with the holding that class certification is inappropriate under (b)(2), the dissent disagrees with the Court's ruling on commonality under Rule 23(a)(2), concluding that the district court's identification of a common question (*i.e.*, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination) was "hardly infirm." In the dissenters' view, the Ninth Circuit's judgment based on its (b)(2) ruling should be reversed and the case should be remanded for the trial court to determine whether the proposed class meets the (b)(3) requirements.

On the issue of commonality under (a)(2), the dissenters found that the district court properly identified statistically significant disparities in both promotions and compensation and identified anecdotal evidence suggesting that gender bias "suffused Wal-Mart's company culture." Moreover, the dissent notes plaintiffs' expert appraisal, using regression analyses, that these disparities can be explained "only by gender discrimination and not by . . . neutral variables." Slip op., p. 5. Justice Ginsburg reminds that a practice of delegating large discretion to supervisors to make personnel decisions, uncontrolled by formal standards, has long been know to produce disparate effects. Where managers are predominately of one gender and are steeped in a corporate culture that perpetuates gender stereotypes, the risk of discrimination is heightened. This showing was sufficient for certification under (a)(2), according to the dissenters.

Justice Ginsburg also criticizes the majority's emphasis on differences in individual claims as an inappropriate blurring or conflation of (a)(2)'s commonality requirement and (b)(3)'s predominance requirement. Instead, the dissent's focus is on what unites the class, not what differentiates the claims of its members. Wal-Mart's practice of delegating discretion over pay and promotions is a uniform policy that produces discriminatory outcomes. That is the common question that satisfies (a)(2). That is all that (a)(2) demands and the fact that each class member's unique circumstances will ultimately determine her entitlement to relief should not, in the dissent's view, factor into the (a)(2) determination.

* * * *

In an economy that increasingly is dominated by large multi-state employers with thousands of employees and hundreds of supervisors making hundreds of thousands of individual employment decisions, the importance of this decision can hardly be overstated. Consider for a moment these astonishing facts: One out of every 220 persons (counting every man, woman and child) in the United States is a current Wal-Mart employee. That is another

way of saying that Wal-Mart employs 1.4 million people in its 3400 U.S. stores out of a total current U.S. population of approximately 311 million. In workforce terms, the statistic is even more astounding. Out of our civilian labor force of 154 million people (including teenagers 16 and over), Wal-Mart employs 1 out of every 110 individuals - nearly one percent of the nation's entire workforce. See, www.bls.gov/news.release/empsit.t01.htm. Given Wal-Mart's footprint, the Court's decision effectively exempting it from the class action provisions of the Federal Rules of Civil Procedure transforms the decision from a mere procedural one to a case that materially impairs the reach of the equal employment opportunity laws.

Justice Ginsburg has, in my judgment, much the better of the argument on commonality under (a)(2). Yet, her opinion for the dissenters could have been more compelling, particularly from one whose illustrious background in and intimate knowledge about litigating gender discrimination class actions provide such rich treasure for argument. For instance, the characterization of Wal-Mart's corporate decision to delegate discretion to a largely male group of supervisors and then use that delegation as a liability shield smacks of willful blindness to the inevitable consequences of its corporate act. Adopting anti-discrimination policies, conducting meetings with supervisors and proclaiming its interest in diversity does nothing but mask the critical corporate decision to compensate and promote its employees on a basis that was virtually bound to produce discriminatory results. The dissent could have, in such terms, pointed out that this is indeed the "glue" that Justice Scalia says should bind the class to a common question of law or fact.

As a practical matter, the clear Congressional purpose to eradicate gender discrimination is left impoverished as a result of this decision. Pitched the way it is on his singular take on (a)(2)'s commonality requirement, Justice Scalia's opinion makes it virtually impossible to challenge on a basis broader than a particular store a corporate decision vesting in local managers the power to exercise corporate control over personnel decisions. Does this mean that the victims of Wal-Mart's corporate gender discrimination must file 3400 separate class actions? Perhaps so, but query whether that is what the Advisory Committee on Rules, the Court itself and Congress had in mind when class actions were created to further the mandate of the Rules that there be a speedy and just determination of civil actions. There is simply nothing in the Rules themselves or in any prior case to suggest a de maximus *limitation on class actions. If anything, the presumption goes the other way, for the Rules were manifestly intended to make possible precisely what the plaintiffs in this case proposed.*

Justice Scalia's majority opinion also refuses to come to grips with plaintiffs' allegations of corporate discrimination. Conflating the merits of the case with the determination of commonality, the Court closes its eyes and ears to the possibility that Wal-Mart's practice of vesting its mostly male local managers with subjective discretion over pay and promotion decisions could itself be an "unlawful employment practice" within the meaning of Title VII. Most assuredly, that allegation meets the test of plausibility in order to avoid dismissal. By positing that plaintiffs failed to demonstrate the "glue" necessary to bind the putative class together (vivid phrasing that, like most metaphors, does nothing to advance

analysis), the majority bloc is simply fashioning its own limit on a Federal Rule of Civil Procedure. In short, what Congress tacitly intended to permit, the majority now expressly forbids. So, one can fairly infer that the majority seeks to convince its audience that this is a class action ship that is, to borrow some current phraseology, too big to sail.

From a public policy standpoint, the Court's decision makes little sense. That's no surprise. After all, here are the five majority Justices, whose collective experience as litigators or trial judges is either non-existent or antiquated, micromanaging complex litigation on their own. By effectively preempting the case management function of the federal district courts - which the Federal Rules of Civil Procedure invested in the trial judges, not the Supreme Court - the majority is simply substituting its own policy preference for that of Congress and the Advisory Committee on Rules. Even more troublesome is the underlying consequence that gender discrimination by the largest employers may escape discovery and correction, a matter that Congress clearly did not intend in prohibiting gender discrimination in employment. This double-whammy from a public policy perspective marks this decision as one that is simply wrong on virtually every level.

Thompson v. North American Stainless, LP, 562 U.S. ---, 178 L. Ed. 2d 694, 131 S. Ct. 863 (2011)

The Court decided that discharging the fiance of an employee who filed a charge of discrimination constitutes unlawful retaliation under Title VII and that the statute grants the discharged employee a cause of action.

Eric Thompson and his fiancee, Miriam Regalado, were employees of North American Stainless, LP ("NAS") in 2003 when Regalado filed a charge alleging sex discrimination with the Equal Employment Opportunity Commission ("EEOC"). Three weeks after the EEOC notified NAS of Regalado's charge, NAS fired Thompson. Thereafter, Thompson filed a charge of discrimination with the EEOC, and after unsuccessful conciliation efforts, he sued NAS under Title VII, alleging that NAS had fired him in order to retaliate against his fiancee for filing her prior charge.

The district court granted NAS' motion for summary judgment, concluding that Title VII does not permit third party retaliation claims. After a panel of the Sixth Circuit reversed the district court's decision, the *en banc* Sixth Circuit affirmed the district court on the ground that Thompson did not engage in any statutorily protected activity and was thus not in the class of persons for whom Congress created a retaliation cause of action. The Supreme Court granted certiorari.

The Court, in a unanimous opinion by Justice Scalia (except for Justice Kagan, who took no part in the consideration or decision of the case), reversed the Sixth Circuit. The Court

concluded that Thompson's firing constituted unlawful retaliation under Title VII and that the statute granted Thompson a cause of action. Justice Scalia's opinion first assumes that NAS fired Thompson in order to retaliate against his fiancee for engaging in the protected conduct of filing a charge of discrimination. Finding it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired, Justice Scalia concludes that Thompson's firing meets the Court's explanation of Title VII's prohibition of unlawful retaliation set forth in *Burlington Northern, etc. v. White*, 548 U.S. 53 (2006). While finding some force in NAS' argument that prohibiting third party reprisals will lead to difficult line-drawing problems (e.g., social friends, co-workers, boyfriends or girlfriends), the Court said it did not think that these problems justify a categorical rule eliminating third party retaliation. As Justice Scalia put it, "a preference for clear rules cannot justify departing from statutory text."

The second issue is whether Thompson may sue NAS for the alleged violation of Title VII. That is, does the statute grant Thompson a cause of action? Examining section 706 of Title VII, which simply says that a civil action may be brought by the person "claiming to be aggrieved," Justice Scalia finds that Thompson's claim undoubtedly meets the minimal Article III standing requirements of injury in fact caused by the defendant and remediable by the courts. Rejecting as too expansive the *dictum* in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), that Title VII's "aggrieved" requirement is co-extensive with Article III, the Court concluded that the term "aggrieved" must be construed more narrowly than the outer boundaries of constitutional standing. On the other hand, the Court also rejected NAS' argument that the person aggrieved refers only to the employee who engaged in the protected activity (in this case Regalado, not Thompson). Instead, the Court found a middle ground in the "zone of interests" test under the Administrative Procedure Act. Accordingly, the Court held that the term "aggrieved" in Title VII incorporates the zone of interests test, enabling suits by any plaintiff with an interest arguably sought to be protected by the statute, but excluding plaintiffs whose interests are unrelated to Title VII's prohibitions. In this case, because Thompson was an employee of NAS and because Title VII has a purpose to protect employees from their employers' unlawful actions, Thompson was within the zone of interests sought to be protected by the statute. In Justice Scalia's words, Thompson is not an accidental victim - *i.e.* collateral damage - of NAS' unlawful act, for hurting him was the unlawful act by which NAS sought to punish Regalado. Thus, Thompson is a "person aggrieved" with standing to sue.

Justice Ginsburg, joined by Justice Breyer, wrote a short concurrence to add a "fortifying" observation: That the Court's decision accords with the longstanding views of the EEOC and that the EEOC's views are consistent with agency interpretations of analogous statutes, such as the National Labor Relations Act.

* * * *

Justice Scalia's opinion admirably tries to provide some measure of guidance for

employers, employees and the bar. That is a difficult task when it comes to defining the scope of third party retaliation, for it is a virtually unbounded concept. While concluding that Title VII's anti-retaliation provision "is simply not reducible to a comprehensive set of clear rules," Justice Scalia does provide some useful bookends: He says that the Court expects that firing a close family member "will almost always" violate Title VII, while inflicting a milder reprisal on a mere acquaintance "will almost never do so." Given these parameters, the significance of any act of retaliation will often depend on the particular circumstances of each case, with an emphasis on judging from an objective point of view.

The standing to sue point turned out to be more troublesome, at least to Justice Scalia, than the scope of third party reprisals. On the standing point, however, the Court put to rest once and for all the familiar employer argument that only an employee who engages in protected activity himself is a person aggrieved who can sue under section 704. If Congress had intended that result, it could have said "person claiming to have been discriminated against" instead of the broader phrase encompassing all persons claiming to be aggrieved. So, while rejecting the dictum that being aggrieved is co-extensive with the minimal requirements of Article III standing, the Court charts a middle course using the familiar "zone of interests" test from an established line of cases under the Administrative Procedure Act. That path seems a sensible one that is both compatible with enforcement of Title VII's social policy and tethered to recognized limits on who can seek that enforcement.

Although this decision may be counted as a clear victory for employees, it does nothing to slow the refashioning of substantive employment discrimination law that has been a project of a majority of the Justices for the past several terms. While some credit is due to the Court for construing retaliation claims as generously as Congress intended, the effect is simply to maintain access to the courts as a means of enforcing the law generally. This decision is not a signal that the Court is prepared to construe the substantive prohibitions of Title VII and similar laws in a less restrictive fashion. See, R. Moberly, "The Supreme Court's Anti-Retaliation Principle," 61 Case Western Res. L. Rev. 375 (January 2011), accessed on June 30, 2011 at papers.ssrn.com/sol3/papers.cfm?abstract_id=1680046. This decision thus merits two cheers instead of three.

Staub v. Proctor Hospital, 562 U.S. ---, 179 L. Ed. 2d 144, 131 S. Ct. 1186 (2011)

The Court decided that an employer is liable for the discriminatory act of a supervisor that is a proximate cause of an adverse employment action, even where the decision to take the adverse action is made by another unbiased supervisor.

Vincent Staub was employed by Proctor Hospital ("Proctor") as an angiography technician until Proctor fired him in late April of 2004. While employed by Proctor, Staub was a member of the U.S. Army Reserve, which required him to attend one drill weekend per

month and to participate in two or three weeks of annual full-time training. These obligations did not sit well with Staub's immediate supervisor, Janice Mulally and her boss, Michael Korenchuk. Mulally and Korenchuk both expressed disdain for Staub's military duties, and Korenchuk knew that Mulally was "out to get" Staub. Mulally deliberately scheduled additional shifts for Staub without notice. In January of 2004 Mulally issued a disciplinary "corrective action" warning to Staub that he claimed was false.

Three months later Angie Day, one of Staub's co-workers, complained to Linda Buck, Proctor's vice president of human resources and Garrett McGowan, the COO, about Staub's frequent unavailability and his abruptness. McGowan directed Buck and Korenchuk to develop a plan to address the unavailability issue, but three weeks later (before they did so) Korenchuk told Buck that Staub had left his desk without informing his supervisor in violation of the January corrective action. Staub contended that the accusation was false because he had left Korenchuk a voicemail notification that he was leaving his desk. Buck, however, relied on Korenchuk's accusation and, after reviewing Staub's personnel file, fired him for violating the January disciplinary action.

Staub challenged the firing through Proctor's grievance process, claiming that Mulally had fabricated the allegations underlying the January discipline because of her hostility to his military obligations. Buck discussed the matter with another personnel officer, but did not follow up with Mulally before deciding to adhere to her firing decision. Staub then sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), alleging that his discharge was motivated by hostility to his military obligations. He contended that Mulally and Korenchuk (but not Buck) had the requisite hostility and that their actions influenced Buck's ultimate discharge decision.

In the district court, a jury found that Staub's "military status was a motivating factor in [Proctor's] decision to discharge him" and awarded Staub $57,640.00 in damages. The Seventh Circuit reversed, holding that under circuit precedent Staub's "cat's-paw" case could not succeed unless Mulally and Korenchuk exercised such "singular influence" over Buck that her decision was the product of "blind reliance." Because Buck had ostensibly relied at least in part on her own review of Staub's file and on her conversation with Day, that was enough to establish as a matter of law that her decision was not wholly dependent on the advice of Mulally and Korenchuk. The Supreme Court, having granted review of two prior cat's-paw cases that were dismissed before decision, *BCI Coca-Cola Bottling Co. v. EEOC*, 549 U.S. 1334 (2007) (dismissing writ of certiorari in case from Tenth Circuit); and *Hill v.Lockheed Martin Logistics Management, Inc.,* 543 U.S. 1132 (2005) (dismissing writ of certiorari in case from Fourth Circuit), granted Staub's petition for certiorari.

The Court, in an opinion expressing the unanimous judgment of eight participating members (Justice Kagan recused), reversed the Seventh Circuit. Justice Scalia's opinion for the Court holds that if a supervisor performs an act that is motivated by antimilitary animus intended by that supervisor to cause an adverse employment action, and if that act is a

proximate cause of the ultimate employment action, then the employer is liable under USERRA.

Justice Scalia's opinion first notes that an employer is most obviously liable when a company official who makes the firing decision personally acts out of hostility to the employee's military service. In that situation, there is no question that "a motivating factor" in the employer's action exists. The problem here is that Buck, the deciding official, had no such discriminatory animus, but was influenced by the prior January disciplinary action imposed by Mulally and Korenchuk, both of whom did have such animus. Before turning to the parties' arguments, Justice Scalia began by explaining that in construing USERRA's phrase "a motivating factor in the employer's action," the Court starts from the premise that when Congress creates a federal tort, it adopts the background of general tort law. According to Justice Scalia, intentional torts such as employment discrimination generally require that the actor intend the consequences of the act and not simply the act itself.

The Court first rejects Staub's argument that the January discipline caused by Mulally and Korenchuk sufficed to establish the tort. Although those supervisors had the requisite anti-military animus, their actions did not constitute a "denial" of employment as USERRA requires. On the other hand, the opinion also rejects Proctor's contention that an employer is not liable unless the *de facto* decisionmaker (in this case, Buck) is motivated by discriminatory animus. So long as another company agent (in this case Mulally and Korenchuk) intended, for discriminatory reasons, that an adverse employment action occur, the earlier agent has the *scienter* required for liability under the statute. Justice Scalia notes specifically that the earlier agent be a proximate cause of the harm, even if not the only proximate cause. Additionally, the deciding official's judgment cannot, by virtue of its having occurred later, be deemed a "superceding" cause. Criticizing Proctor's suggested construction of the statute as implausible, Justice Scalia stresses the "improbable consequence" that an employer could isolate a personnel official from an employee's supervisors, vest authority to make adverse decisions in that official and ask the official to review employee personnel files before taking any adverse action. That would effectively shield the employer from the discriminatory recommendations of supervisors that were designed and intended to produce the adverse action - an implausible result under the text of USERRA, according to the Court.

Moreover, the Court declines to adopt the "hard-and-fast" rule urged by Proctor and supported by the concurring Justices that an employer's independent investigation relieves the employer from liability by having what Justice Scalia terms a "claim-preclusive" effect. Likewise, the Court pointedly rejects the notion posited by Justice Alito's concurrence that the Court's failure to adopt such an independent investigation immunity reflects a "straying" from USERRA's text. And, finally, Justice Scalia finds "speculative and implausible" Justice Alito's prediction that employers will disfavor applicants and employees with military obligations in order to avoid the possibility of cat's-paw liability. So, applying its analysis to the facts of this case, the Court concluded that the Seventh Circuit's judgment must be reversed. While liability was clear to the Court, it was "less clear" whether the jury's verdict should stand or whether

Proctor should get a new trial. Any variance between the district court's jury instruction and the Court's rule of decision should be considered by the Seventh Circuit to determine if it is harmless error or if the variance warrants a new trial. Accordingly, the case was remanded for further proceedings consistent with the Court's opinion.

Justice Alito, joined by Justice Thomas, concurred in the judgment solely because, in their view, there was sufficient evidence that Buck had effectively delegated part of her decision-making authority to Korenchuk and that she simply accepted Korenchuk's accusation at face value. Given the chronology of the firing immediately on the heels of Korenchuk's report and the evidence of anti-military animus on Korenchuk's part, Justice Alito agreed that the Seventh Circuit had erred in rejecting the jury's verdict. In virtually all other respects, however, the concurrence disagreed with the Court's approach to liability in a cat's-paw case. As Jutice Alito would have it, a plaintiff should always be required to demonstrate an improper motive on the part of the person with authority to make the adverse employment decision. Only because Buck had effectively delegated part of her authority to Korenchuk in this case was there a basis for Justices Alito and Thomas to concur in the judgment.

* * * *

The importance of this decision obviously transcends USERRA cases. As Justice Scalia's opinion underscores, other anti-discrimination statutes are "very similar" to USERRA in defining the legal prohibition that employers must obey at their peril. This decision is, therefore, a template for a wide variety of employment discrimination claims and merits the most careful attention of employers, labor organizations, employees and their lawyers.

On its merits, the Court's unanimous judgment is assuredly sound. The more contentious issue is whether Justice Scalia or Justice Alito has the better of the statutory construction argument. For starters, Justice Scalia's interpretation is well-anchored to the text of USERRA. Indeed, the operative text neither says nor fairly implies anything to suggest that Proctor was correct in claiming that it could not be liable based on Buck's lack of animus. The phrase "a motivating factor in the employer's action" says nothing explicitly about the identity of the company agent with the illicit motive. Nor does the statute expressly say that an adverse employment action has to have only a single motive. Had Congress intended to limit liability to the situation where the ultimate decision-maker is the biased agent, it could have said so. It did not do that here or, for that matter, in other anti-discrimination laws such as Title VII. That is why the cat's paw is actionable in a wide variety of cases like this one.

From the standpoint of the public policy underlying USERRA, the Court is also on firm footing. This decision implements precisely what Congress intended - it protects employees from adverse consequences stemming from their military obligations. Justice Alito's practical concern that employers will systematically disfavor applicants with military duties is properly dispatched by Justice Scalia's rather tart observation that such a policy would violate USERRA and is, in any event, both speculative and implausible. Moreover, the clarity of the Court's

holding should provide welcome guidance to employers in dealing with reservists and others who are obligated to perform military duties. And, beyond that, employers now know how to de-claw the cat's paw by carefully instructing the entire supervisory staff, whether they have deciding power or not, about the requirements of USERRA and how best to live with those requirements in the workplace.

Finally, as a matter of craftsmanship, Justice Scalia's opinion generally follows his own admonitions to be clear and concise in order to provide meaningful guidance about the requirements of the law. The holding itself is set forth in language that is plain and simple, though a couple of terms of art have to be explained further in two footnotes near the end of the opinion. Despite the clarity of its holding, the decision portends further conflict. Justice Scalia carefully limited the cat's-paw analysis to supervisors, noting that the Court was expressing no view about employer liability based on a co-worker's discriminatory report to a deciding official. Moreover, observing that Staub grieved his discharge, Justice Scalia also noted that the Court was expressing no view about whether Proctor would have an affirmative defense if Staub had not pursued the company's grievance process. While perfectly understandable in the present case, these two caveats about the Court's central holding foreshadow additional cat's-paw litigation.

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. ---, 179 L. Ed. 2d 379, 131 S. Ct. 1325 (2011)

The Court decided that an oral complaint satisfies the statutory requirement that a complaint be "filed."

Kevin Kasten sued his former employer, Saint-Gobain Performance Plastics Corp. ("Saint-Gobain") based on the allegation that the employer fired him for making an oral complaint about the location of its timeclocks. Saint-Gobain put its timeclocks between the work area and the location where workers don and doff their work-related protective gear. In a related suit the district court agreed with Kasten's complaint that Saint-Gobain's location of the timeclocks prevented workers from receiving credit for donning, doffing and walking to and from their work areas. Kasten claimed in the present case that he had repeatedly called attention to the location issue in accordance with the employer's internal grievance-resolution procedure. He also claimed that he told his shift supervisor, lead operator and various managers about his contention and that these complaints led the employer to discipline and ultimately fire him. Saint-Gobain, on the other hand, denied that Kasten made any "significant complaint" about the timeclock location and that it fired him because of his failure to use the timeclock after being warned to do so.

The district court granted Saint-Gobain's motion for summary judgment because it concluded that the FLSA did not protect oral complaints. The Seventh Circuit affirmed on the same basis, and the Court granted certiorari in light of a conflict in the circuits about whether an oral complaint is protected activity under the FLSA's anti-retaliation provision.

The Supreme Court, in a 6 to 2 decision (with Justice Kagan recused), vacated the Seventh Circuit's decision and held that the FLSA's "filed any complaint" provision in its anti-retaliation prohibition, 29 U.S.C. 215(a)(3), includes oral, as well as written complaints. Justice Breyer's opinion for the Court conceded that the "filed any complaint" requirement, when considered in isolation, may be open to competing interpretations. But, when considered in conjunction with its purpose and context, the Court concludes that only one interpretation is permissible - and that is that oral complaints are protected conduct under the FLSA.

Noting first that competing dictionary definitions of "file" and "filed" do not necessarily limit the scope of the statutory phrase to written complaints, Justice Breyer cites a litany of legislative, judicial and administrative usages of the meaning of "filed" and concludes that the statutory phrase, taken by itself, cannot answer the question presented. Nor does the appearance of the word "filed" elsewhere in the FLSA and in other anti-retaliation statutes (many of which use different language about complaining to an employer) provide an answer. Justice Breyer thus concludes that the Court must look beyond the text alone to answer the question of whether an oral complaint is protected activity.

The Court, agreeing with the Government's submission, concluded that "[t]o fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Slip Op., p. 12. Justice Breyer opined that several functional considerations weigh in favor of permitting oral complaints. First, Congress intended that the FLSA's enforcement scheme be as effective as possible, so long as employers receive fair notice of employee complaints. Limiting the statute to written complaints could undermine the FLSA's objectives by inhibiting use of the law by the illiterate or less educated and by preventing use of hotlines, interviews and other oral methods of receiving information. In this regard Justice Breyer mentioned that the NLRA has been broadly interpreted in the same manner. Second, both the Secretary of Labor and the EEOC have consistently held the view that filing complaints covers both oral and written complaints. And, third, after applying these traditional methods of interpretation, the statute does not remain so ambiguous as to warrant application of the rule of lenity (which is pertinent because there are criminal sanctions in the FLSA.)

Finally, the Court declined to consider Saint-Gobain's alternative argument that Kasten complained to a private employer and not to the Government itself. Justice Breyer reasoned that Saint-Gobain had said nothing about this argument in its response to Kasten's petition for certiorari and did not mention it until its brief on the merits months later. Moreover, resolution of this alternative claim is not required to determine the oral-versus-written issue that the parties presented. Accordingly, the Court vacated the Seventh Circuit's judgment and remanded the case to allow the lower courts to decide "whether Kasten will be able to satisfy the [FLSA's] notice requirement." Slip op., p. 15.

Justice Scalia, joined by Justice Thomas (except for footnote 6), dissented. In their view the Seventh Circuit's judgment should be affirmed because the statute does not cover complaints to an employer at all. Both the plain meaning of "filed any complaint" and the context in which it appears makes clear, according to Justice Scalia, that the statute contemplates an official grievance filed with a court or agency - and not any type of complaint made by an employee to an employer. Arguing that the petition for certiorari fairly encompasses the private-versus-government issue, Justice Scalia concludes that the disputed phrase bears a specialized meaning linguistically, contextually and historically. Moreover, the dissent discounts deference to federal agencies and opines that Congress' purpose in encouraging complaints does not necessarily encompass complaints to an employee's own employer.

* * * *

This decision is not fully satisfying on multiple levels. First, regardless of how one sees the oral complaint issue, the Court punts the case back to the Seventh Circuit to determine whether a complaint (oral or written) made to an employer (as opposed to a governmental agency or a court) is what the FLSA contemplated by the phrase "filed any complaint." While Justice Scalia's dissent aptly observes that an affirmative answer seems likely on remand, it is a bit annoying to learn at this late date that the Court granted certiorari in a case where the employer failed to mention the "government/private employer" question from the time it lost that issue in the lower courts until its brief on the merits in the Supreme Court. Either this case was a poor vehicle for determining the full meaning of the statutory phrase (and review should have been denied) or the Court should have determined the entire matter here by making an exception to its policy of not deciding legal questions the parties fail to raise in their certiorari briefs.

On the merits, too, the decision is less than satisfactory. Indeed, it is quite tempting simply to agree with Justice Scalia that, given the precise language of the FLSA's anti-retaliation provision, the phrase "filed any complaint" excludes oral complaints made by an employee purely internally to his or her employer. After all, the normal connotation, if not definition, of "filing" conjures something in writing, or at least something more than casual conversation. Moreover, Justice Breyer's detailed attempt to demonstrate that textually there is no answer to whether "filed any complaint" encompasses oral complaints is not compelling. In fact, some of his arguments tend to prove the contrary. Perhaps the better decision would have been to hold that, until Congress indicates otherwise, use of the word "file" or its derivatives means in writing or electronically, but excludes purely oral applications. That would put the burden on Congress to say what it means - if it really means that oral complaints suffice.

Count this case as a "win" for plaintiffs, if you will. But, in the greater scheme of things, it is not a victory with much significance. If anything, this decision just embellishes an

illusion that the Court is approaching employment issues in an even-handed manner. As Professor Richard Moberly, a former employment law practitioner, has aptly observed, the Court's anti-retaliation cases exemplify its concern about law enforcement. R. Moberly, "*The Supreme Court's Anti-Retaliation Principle,"* supra. *But this decision and retaliation cases like it do nothing to show that the Court is being even-handed when it comes to defining the substantive scope of the discrimination prohibitions or the reach and effectiveness of remedies when an employer violates the law.*

B. Labor Relations

"Just wait until next year" is nearly all that one can say about the 2010 Term's work in the area of labor relations. The Court failed to decide on the merits a single case directly construing or even arising under the labor relations statutes. Toward the end of the term, however, the Court did grant certiorari in a potentially important dispute over whether a union is required, pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), in addition to an annual fee notice to unionized workers, to send a second notice when adopting a temporary, mid-term fee increase. *Infra*, section III. Any further hardships imposed on labor unions could be devastating. Union membership is now at a 70-year low, a mere 6.9% of the private sector workforce and approximately 11.9% of the nation's total workforce. *See, www.bls.gov/news.release/union2.nr0.htm.* Indeed, unionization rates range down to a mere 3.2% of the total workforce in North Carolina. *Ibid*. In this context, the fee notice case has the potential to debilitate unions even further, and both employers and unions will be watching the case closely.

As for the lull in labor relations decisions during the 2010 Term, I find that entirely unsurprising, somewhat misleading and probably short-lived. Given the political changes at the National Labor Relations Board ("NLRB") and its reconsideration of a number of decisions made by the predecessor Board, it is a bit early for issues that are percolating in the Courts of Appeals and at the NLRB itself to be ripe for Supreme Court review. That will soon change, however, as issues of both administrative law and substantive labor law will undoubtedly emerge in the coming terms ready for ultimate determination by the Court. Some of these issues, such as the scope of remedial discretion in the complaint being pursued by the NLRB's General Counsel in the dispute over where Boeing's Dreamliner will be built, are highly charged both legally and politically. In a different vein, though prospects for labor law reform currently appear dim, the political pendulum will undoubtedly swing again, and when it does, there may be more work for the Court in the offing. So, while the 2010 Term was a quiet one for labor issues, this inactivity obscures the still-titanic struggle between workers and management going on at the grass-roots level and in other forums. Accordingly, my judgment is that the present lull is likely one before a storm of activity in the next few terms affecting labor organizations, employers and employees alike.

C. Public Employment.

Given the increasing percentage of employees in the public sector, it is no surprise that the Court continues to turn its attention to public employment issues. One decision dealt with application of the Petition Clause of the First Amendment to a reprisal claim. The other case involved potential privacy restrictions on background checks of employees with access to sensitive information. In both cases the Court sided generally with the governmental employers.

Borough of Duryea, Pennsylvania v. Guarnieri, 564 U.S. ---, 180 L. Ed. 2d ---, 131 S. Ct. 2488 (2011)

The Court decided that a government employee's retaliation claim under the Petition Clause of the First Amendment must relate to a matter of public concern.

Charles Guarnieri, chief of police for the borough of Duryea, Pennsylvania, was fired by the borough council and later ordered reinstated by an arbitrator after he filed a union grievance. The arbitrator found that the council had committed procedural errors in firing Guarieri, but that the chief had also engaged in misconduct by attempting to intimidate council members. The arbitrator imposed a disciplinary suspension prior to reinstatement. When Guarnieri returned to the job, the council issued 11 directives to him so that he would understand what was expected of him. These directives concerned, among other things, use of the police car only for official business, working overtime without permission, and smoking in the municipal building. Guarnieri filed a second grievance challenging these directives, and the arbitrator instructed the council to modify those that were vague or were contrary to the borough's collective bargaining agreement with the police union. Guarnieri then sued the borough, the council and individual council members under 42 U.S.C. 1983, claiming that issuing the directives was retaliation for filing the first union grievance in violation of the Petition Clause of the First Amendment. After the suit was filed the council denied Guarnieri's request for $338 in overtime pay. When the U.S. Department of Labor investigated and concluded that Guarnieri was entitled to the pay, the council offered him a check for it. He declined and amended his complaint, claiming that his lawsuit was also a "petition" under the First Amendment and that the initial denial of pay was retaliation for having filed it.

At trial the district court instructed the jury that the grievance and lawsuit were protected activities, and Guarnieri won a verdict of $45,000 in compensatory damages and $24,000 in punitive damages for the directives, $28,000 in punitive damages for the overtime denial and $338 in compensatory damages for the overtime itself. The district court also awarded Guarnieri $45,000 in attorneys' fees. The defendants appealed on the ground that the grievances and lawsuit did not address matters of public concern. The Third Circuit rejected that argument, concluding that petitioning the government by filing a lawsuit or grievance is protected activity even if it addresses a matter of private concern. Accordingly, the court of

appeals affirmed the judgment as to compensatory relief, though it found insufficient evidence to sustain the award of punitive damages. The Supreme Court granted certiorari to resolve a circuit conflict about whether a public employee's petitioning under the First Amendment must be related to a matter of public concern in order to be actionable.

The Court unanimously vacated the judgment of the Third Circuit and remanded the case for further consideration. Justice Kennedy's opinion, joined by all members of the Court except for Justices Scalia and Thomas, holds that a government employer's retaliatory actions against an employee do not give rise to liability under the Petition Clause unless the employee's petition relates to a matter of public concern. The Court first concludes that the "public concern" requirement that is applicable to claims under the Speech Clause should apply to Petition Clause claims because of the close connection and substantial commonality between rights under those two clauses. A "cautious and restrained" approach to protecting public employees' speech is just as relevant in Petition Clause cases, as both types of claims involve the same governmental interest in avoiding disruption and other intrusions into internal governmental affairs. To avoid encouraging employees to circumvent the public concern rule's protections through petitioning, the Court concludes that the same rule should apply to both claims under both clauses.

Justice Kennedy's opinion also rejects Guarnieri's claim that the public concern rule is inappropriate in light of the private nature of many petitions. Relying on the history of the Petition Clause, the Court points out that petitions have been frequently used to address a wide range of public issues and that an employee's use of petitioning assumes an added dimension when seeking to advance political, social or other ideas of interest to the community as a whole. The Court also posits that using the public concern rule will protect both governmental and employee interests alike. After reciting the familiar framework for balancing a public employee's rights against a governmental employer's interests, the Court recites that whether a petition relates to a matter of public concern will depend on its content, form and context, as revealed by the record as a whole. Justice Kennedy stresses that the forum in which a petition is lodged will also be relevant, meaning that using an internal grievance procedure may not satisfy the rule. Because the parties did not fully brief application of the public concern rule to the facts of this case, the Court declines to consider how it should apply. Accordingly, the case is remanded for further consideration in light of the Court's opinion.

Justice Thomas concurred in the judgment. His separate opinion expresses serious doubt that lawsuits are "petitions" within the original meaning of the First Amendment. He also agrees with Justice Scalia that the public concern doctrine has no relation to the right to petition and should not be imported into the Petition Clause. In his view the proper distinction is between petitions addressed to the government as sovereign (which are protected) and those addressed to the government as an employer (which are not protected.) In no event, however, would petitioning be protected if it is especially disruptive of governmental interests. Justice Thomas, accordingly, would remand the case for the kind of analysis he proposes.

Justice Scalia filed a separate opinion concurring in the judgment in part and dissenting in part. His opinion disagrees with the Court's view that precedents confirm that lawsuits are "petitions" within the meaning of the First Amendment. Moreover, he finds it "quite doubtful" that a lawsuit is constitutionally protected activity under the Petition Clause, based on the history of petitioning. Justice Scalia also disagrees with the Court that the public concern doctrine should apply to retaliation claims under the Petition Clause. He would hold instead that the Petition Clause protects public employees against retaliation where their petitions are addressed to the government in its capacity as a sovereign and not as an employer. Accordingly, Justice Scalia thinks that the Third Circuit's judgment should be reversed as to the union grievance because it is the epitome of a petition addressed to an employer. The portion of the judgment upholding the lawsuit portion of the retaliation claim should, however, be affirmed because he cannot say that the 1983 claim was addressed to the government as an employer.

* * * *

While the Court settled one issue about governmental employee claims under the First Amendment's Petition Clause, it opened the door wide to the prospect of gutting "petition" claims entirely. The potential for another hit against public employees, therefore, should not be lost on observers of the Court. Here's why: Just as important as what the Court did in this case is what it said it was not going to do here. The Court assumed that filing a lawsuit is the same as petitioning under the First Amendment. That assumption is a major component in what provoked the two separate opinions of Justices Scalia and Thomas. Both of the separate opinions rightly point out that the central premise that Guarnieri's suit was protected as a "petition" under the First Amendment is a proposition that the Court has never decided. And, rather unsurprisingly, both Justices Scalia and Thomas said that they regard that proposition as a "doubtful" one.

As to the issue the Court did decide, the vote was actually 8 to 1 with a somewhat surprising dissenter. Justice Scalia, of all people, made the best case that the public concern limitation should not apply in Petition Clause cases. Although he proposed a much more effective way to keep public employees from suing their employers, credit is due to his attempt to counter the Court's decision to apply the public concern doctrine to Petition cases generally. Justice Scalia seems to have the better of the argument on this narrow point, for it is the petitioning itself, and not the content of the petition, that appeared to motivate the Duryea borough council to retaliate against Guarnieri. The chief's "in your face" stance on the overtime claim, for instance, surely was part of the calculus in the council's response to the lawsuit, regardless of the merits of the overtime pay claim. At the very least, a jury could plausibly find so. Engrafting a "public concern" requirement onto the right to petition, therefore, not only looks unfaithful to the text of the First Amendment, but on a practical level it also appears disconnected from the gist of petitioning and the government's response to it in these circumstances. Even aside from the history of petitioning, which does not support the Court's ruling, the better course would be to maintain the distinction that the founders

established between speaking publicly and petitioning the government. A public concern requirement might make sense in the former; it does not appear to be sensible as a limit on the latter.

Finally, it is a little surprising that everyone assumes that the Council's conduct was, in fact, not a matter of public concern. Although the Council's actions in the face of Guarnieri's attack did involve a single employee, that really understates the public importance of what the Council is alleged to have done. After all, this one employee was the borough's chief of police. Moreover, the Council's petulant response to the arbitrator's rulings, its issuance of detailed directives, its reaction to the Department of Labor investigation and its about-face on the overtime issue could, perhaps, be regarded as a matter of public concern because of alleged multiple improprieties in carrying out its public responsibilities. Had the Court so found, this case would hardly have been a good vehicle for examining the public concern limitation on First Amendment employee cases.

National Aeronautics and Space Administration v. Nelson, 562 U.S. ---, 178 L. Ed. 2d 667, 131 S. Ct. 746 (2011)

The Court decided that the Government may, in the course of background checks on federal contract employees, ask the employees about treatment or counseling for recent illegal-drug use and pose open-ended questions to the employees' designated references without violating any constitutional privacy interest in avoiding disclosure of personal matters.

Robert M. Nelson, Jr. and twenty-seven other plaintiffs work at the Jet Propulsion Laboratory ("JPL"), a facility owned by the National Aeronautics and Space Administration (NASA) and operated by the California Institute of Technology ("Cal Tech") under a government contract. Indeed, the JPL, the lead NASA center for deep space robotics and communications, is staffed exclusively by employees of Government contractors, like a majority of NASA's workforce. Many of the plaintiffs have worked at JPL for decades, and none has ever been the subject of background checks used for Government employees. Several years following the 9/11 attack the Government mandated that contract employees with long-term access to federal facilities complete a standard background check, typically the National Agency Check with Inquiries ("NACI".) In 2007 JPL notified its workforce that anyone failing to complete the NACI process by October of that year would face termination by Cal Tech.

The NACI process has long been the standard background investigation for prospective civil servants. Standard Form 85, the Questionnaire for Sensitive Positions, seeks biographical information and includes a question whether the employee has "used, possessed, supplied, or manufactured illegal drugs" in the last year. If the answer is yes, the employee must provide details, including information about any treatment or counseling received. After the Form 85 is

on file the Government runs the information through databases, including the FBI's, and sends out form questionnaires to former employers, schools, and in the case of landlords and references. the Investigative Request for Personal Information, Form 42, a two-page document that takes 5 minutes to complete. The form asks if the reference has any reason to question the honesty or trustworthiness of the employee or knows of any adverse information about alcohol or drug abuse, mental or emotional stability or other matters. All responses to the SF-85 and Form 42 are subject to the protections of the Privacy Act that forbids the Government (subject to certain exceptions) from disclosing such records without the employee's written consent.

Two months before the October 2007 compliance deadline plaintiffs brought suit, claiming that the background check process just summarized violates a constitutional right to informational privacy. The district court denied their motion for a preliminary injunction, but the Ninth Circuit granted an injunction pending appeal and later reversed the district court's order. The Ninth Circuit held that portions of the SF-85 and Form 42 are likely unconstitutional and should be enjoined because the questions about drug treatment or counseling furthered no governmental interest and the Form 42's open-ended and highly private questions were not sufficiently narrowly tailored. The Ninth Circuit denied rehearing *en banc*, with five dissenting judges. The Supreme Court granted certiorari.

The Court, in an opinion by Justice Alito joined by all members of the Court except Justices Scalia and Thomas (who filed concurring opinions) and Justice Kagan (who was recused), assumed without deciding, that a constitutional right of informational privacy exists for purposes of this case. The Court ruled first that the SF-85 and Form 42 inquiries are reasonable in light of the governmental interests at stake. Justice Alito stressed that the Government is acting in its proprietary capacity here, not in its sovereign capacity. The Government's interest in secure facilities and a competent workforce, especially where the public is funding work critical to NASA's mission, justifies a reasonable inquiry into workers' backgrounds. And, inquiries like those made on the SF-85 are routinely used in the private sector. Accordingly, the Court concluded that SF-85's treatment or counseling questions reasonably seek to separate out drug users who are not trying to overcome their problems in order to further NASA's interest in managing its internal operations, just as any reasonable employer would do. Likewise, Form 42's open-ended questions directed to employee-designated references are reasonably aimed at identifying capable employees who will faithfully conduct the Government's business. In so finding, the Court rejected plaintiffs' "least restrictive means" argument that the Government must demonstrate that its inquiries are narrowly tailored to further its interests. In this case, it is enough that the inquiries reasonably further the government's interests in secure facilities and a competent workforce.

Justice Alito also concluded that in addition to being reasonable in furthering governmental interests, the information obtained from these inquiries of employees and their designees is also subject to substantial protections against public disclosure. Various federal laws, such as the Privacy Act, 5 U.S.C. 552a, for instance, include protections that shield the collected information from unwarranted disclosure and further provide numerous safeguards,

such as written consent, before personal information can be disclosed. In light of these substantial protections, Justice Alito specifically rejected plaintiffs' argument that they are too porous.

Justice Scalia, joined by Justice Thomas, filed a separate opinion concurring in the judgment that background checks of government contractors do not offend the Constitution. Rather than reach that conclusion on the basis of an assumption that the contractors had a privacy interest, Justice Scalia would hold simply that no federal constitutional right to informational privacy exists. His opinion is a stirring critique of plaintiffs' position as well as the Court's willingness to assume that such a position has merit. Nothing in the Fourth Amendment, the Due Process Clause or the Court's prior decisions supports the Court's assumption that such a right may exist, according to Justice Scalia. And, making that assumption does real harm because it is coy about the underlying question of whether such a right exists, harms the Court's image by rendering a hypothetical opinion, provides no guidance for the lower courts because it decides nothing about the scope of any privacy right, and ultimately will increase the number of lawsuits claiming violation of the assumed right. Justice Scalia's penultimate sentence sums up his exasperation: "The plaintiff's claim has failed today, but the Court makes a generous gift to the plaintiff's bar." Scalia Slip op., p. 11.

Justice Thomas filed a separate concurring opinion expressing his agreement with Justice Scalia's conclusion that the Constitution "does not protect a right to informational privacy" and stressing that no provision of the Constitution mentions such a right and that the Due Process Clause is not a "wellspring of unenumerated rights against the Federal Government." Thomas Slip Op., p. 1.

* * * *

In view of the fact that virtually all major competitors of the Government in the private sector utilize background checks inquiring into drug use and rehabilitation efforts, this decision putting the Government on the same footing as its major competitors in the job market is hardly a surprise. Nevertheless, the case might have been a more difficult one if the constitutional right involved were more clearly established. But here, the Court simply assumed the existence of a constitutional right to informational privacy - a rather flimsy assumption in this day and age. After all, as our children and grandchildren demonstrate every moment they use social networking that this is an age of informational free-flow, those who utilize these informational channels must do so with rather low expectations of personal privacy. Accordingly, inquiries about how one is handling her or his illegal-drug use hardly seem out of place, at least from a privacy perspective.

From the standpoint of a public employer such as NASA, which deals every day with the most highly technical, expensive and cutting edge scientific equipment and skills, there can hardly be a quarrel that scarce public funds should not be squandered on workers whose drug-related habits make them untrustworthy or even incompetent. While one might concede

that the inquiries on the SF-85 and the Form 42 are, indeed, intrusive, that is only a part of the calculus. The other part is whether that intrusiveness is countervailed by the need for information about the workers entrusted with public assets. The Court's conclusion seems almost self-evident to all of its members - and probably to most readers of the decision in this case. Indeed, Justice Scalia's prediction of a "dramatic" increase in litigation over the right of informational privacy seems a bit overblown in light of the limited circumstances in which the existence of such a right would outweigh the assertion of a governmental interest.

Consider for a moment this informational privacy decision in light of another personal privacy case decided by the Court in a non-employment context. "Intriguing" is my reaction to the juxtaposition of assuming the existence of a constitutional right of informational privacy for working persons in this case with Federal Communications Commission v. AT&T, Inc., 562 U.S. ---, 179 L.Ed. 2d 132, 131 S. Ct. ---- (2011), infra section II E, deciding that a corporation (which is regarded as a "person" for other purposes - including unlimited electoral spending) has no right of "personal privacy" under FOIA . To be sure, there is much to differentiate the two situations both legally and factually, so that many readers may not think it odd for the Court to regard these privacy "rights" so differently. Nonetheless, I find it worthwhile to note that the Court travels quite different paths in these two cases to reach the same destination - an unenforceable interest in personal privacy for both human and fictional "persons."

D. Employee Welfare and Pension Benefits.

Employee benefits continue to be the source of a multitude of legal issues in this highly regulated area of employment law. The Court dealt with summary plan descriptions in a case involving remedies under the Employee Retirement Income Security Act of 1974 ("ERISA"). In the other benefits decision, the Court, over a vigorous dissent, determined how juries should be instructed about causation in a railroad worker's injury case.

CIGNA Corp. v. Amara, 563 U.S. ---, 179 L. Ed. 2d 843, 131 S. Ct. 1866 (2011)

The Court decided that ERISA section 502(a)(1)(b) does not authorize relief for misrepresentations in a summary plan description.

CIGNA Corporation ("CIGNA") changed its pension plan in 1998 from a defined benefit plan paying longtime employees a retirement annuity of about 60% of their salaries to a defined contribution plan to which CIGNA would make an initial contribution equal to the present value of an employee's already-earned plan benefits plus annual contributions of a percentage of their salary. CIGNA told its employees through a newsletter in November 1997 that it intended to establish in 1998 this new "account balance" pension plan retroactive to January 1, 1998, to take the place of the existing defined benefit plan that would end on December 31,1997.

The November 1997 newsletter extolled the benefits of the new plan to the employees and represented that Cigna "will not" get cost savings from the change of plans. In fact, however, the new plan saved Cigna $10 million annually (which it said later it devoted to other employee benefits). And, the plan made a significant number of employees worse off in a number of ways. For example, the initial deposit calculation ignored the old plan's valuable early retirement benefits and also adjusted the deposit downward to account for employee longevity. Moreover, the new plan shifted the risk of falling interest rates from the employer to the employee. Based on these failures to disclose, among others, a class of beneficiaries sued the employer and the plan, claiming that the defendants had violated ERISA by failing to make adequate disclosures about the pension plan changes.

The district court found that CIGNA's descriptions of the changes were incomplete, inaccurate and intentionally misleading. The trial court concluded that CIGNA's representations and omissions made between November 1997 and the effective date of the plan in December of 1998 violated ERISA's provisions requiring (a) written notice by the plan administrator of an amendment providing for a significant reduction in the rate of future benefit accruals and (b) accurate and comprehensive SPD's written so that an average participant can understand the proposed changes. Finding further that plaintiffs' evidence raised a presumption of likely harm to the class that CIGNA did not rebut, the district court concluded that relief to the class was warranted. The district court decided not to invalidate the plan amendments, but to reform some of their terms under the provision of ERISA 502(a)(1)(B) permitting recovery of benefits "under the terms of the plan." The trial court declined to utilize its putative authority under ERISA 502(a)(3) to award "appropriate equitable relief" to redress violations or enforce plan provisions. On cross-appeals, the Second Circuit affirmed. The Supreme Court granted CIGNA's petition for certiorari to consider whether the showing of "likely harm" is sufficient to entitle plan participants to recover benefits on the basis of faulty disclosures.

The Court (with Justice Kagan recused) unanimously concluded that ERISA 502(a)(1)(B) did not authorize relief for misrepresentations in the summary plan descriptions. Justice Breyer's opinion, joined by all except Justices Scalia and Thomas, concludes that because representations made in SPD's were not made as part of or "under" a plan, the district court's reformation of plan terms under 502(a)(1)(B) was inappropriate. The Court rejected the Solicitor General's suggestion that the Court was simply enforcing plan terms, for the SPD disclosures are not part of any plan. Moreover, ERISA distinguishes between the authority of a plan sponsor (who creates the plan's terms and can amend them only in accordance with the statute) and the plan administrator (who manages the plan and provides participants with SPD's.)

Justice Breyer's opinion, however, goes on to point out that because what the district court did here closely resembles three forms of traditional equitable relief (reformation of the plan's terms, estoppel as to accrued benefits and equitable compensation as a surcharge for a breach of trust), that is the kind of relief authorized by ERISA 502(a)(3). Accordingly, the

case was remanded to determine whether the plan participants can show actual harm caused by the misrepresentations under the theory of equitable relief the district court may apply. In suggesting the various ways in which the district court might justify relief to the plan participants, Justice Breyer also points out that the plaintiffs need not demonstrate detrimental reliance on the misrepresentations if the basis for the relief is reformation or surcharge and not estoppel.

Justice Scalia, joined by Justice Thomas, filed a separate opinion, concurring in the judgment that 502(a)(1)(B) does not authorize relief for misrepresentations in an SPD and expressing the view that there is no justification for saying anything more than that in vacating the judgment and remanding the case. Justice Scalia's opinion goes on to criticize at some length the Court's consideration of how relief might be provided by the district court under section 502(a)(3), concluding that the question had been neither decided nor argued in the trial court, was not briefed and argued on certiorari in the Supreme Court and that there are other ways for plaintiffs to prevail, if they are indeed entitled to do so after consideration in the lower courts.

* * * *

Adding to the muddle of ERISA decisions that, taken as a whole, do not meet the definition of a coherent body of law, the Court in this case purported to decide only that summary plan descriptions are not "plans" themselves for purposes of obtaining relief under section 502(a)(1)(B). Going beyond this precise question that the petition for certiorari presented, Justice Breyer's opinion for the majority suggests that participants and beneficiaries might utilize 502(a)(3)'s "appropriate equitable relief" provision to secure the relief it could not obtain under (a)(1)(B). Justice Scalia's criticism of the Court's gratuitous opinion about a section of ERISA that neither the lower courts nor the parties drew into question has some merit. Though Justice Breyer may be correct in his analysis of 502(a)(3), it is hard to square that advice with the generally sound practice of deciding only what the parties put in front of the Court.

On the merits, two points are important. First, the Court makes clear that SPD's are neither the equivalent of nor a part of a "plan" within the meaning of ERISA. While that holding does not in any way lessen the need for precision in drafting SPD's, it does clarify, once and for all, that no one - either participants, administrators or sponsors, can use the SPD's to supplant or even supplement plan language. Second, the Court made clear, albeit in what might be regarded as a dictum, that a participant or beneficiary need not prove detrimental reliance on misrepresentations in an SPD in order to obtain either plan reformation or monetary relief through surcharge as "appropriate equitable relief" under ERISA 502(a)(3). This ruling clarifies and resolves a conflict in the circuits and clears the way for trial courts to grant relief more freely when they find that material misrepresentations have been made in SPD's.

CSX Transportation, Inc. v. McBride, 564 U.S. ---, 180 L. Ed. 2d 637, 131 S. Ct. 2630 (2011)

The Court decided that common law "proximate cause" standards are not applicable to cases under the Federal Employer's Liability Act ("FELA") and that a railroad may thus be liable if its negligence played any part in bringing about an employee's injury.

Robert McBride, a locomotive engineer employed by CSX Transportation, Inc., was assigned to a local run involving switching cars and operation of an unusual engine configuration of wide-body and smaller cabs. McBride protested that the configuration was unsafe because it required constant use of hand-operated brakes for the switching maneuvers. He was told to take the train "as is." About ten hours into his run he injured his hand using the independent hand brake. He never regained full use of his hand, despite two surgeries and extensive physical therapy. McBride sued for compensation under the FELA, alleging that CSX was negligent in requiring him to use unsafe equipment and in failing to train him to operate that equipment.

The district court instructed the jury that if it found CSX "was negligent" and that the "negligence caused or contributed to" McBride's injury, a verdict for him would be in order. The court rejected CSX's proposed instruction that would have required plaintiff to show that its negligence was the proximate cause of his injury. It also rejected CSX's proposed charge defining proximate cause. Instead, the district court used the Seventh Circuit's pattern instruction that McBride requested, which says that a defendant causes or contributes to plaintiff's injury if its negligence "played a part - no matter how small - in bringing about the injury." The jury returned a verdict for McBride and awarded him $275,000, with a reduction of one-third of that amount attributed to McBride's own negligence. The Seventh Circuit affirmed the district court's judgment, holding that this relaxed proximate cause instruction is proper in FELA cases based on the Supreme Court's own words in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). The Supreme Court granted certiorari to decide whether the causation instruction approved by the lower courts (which does not include the term "proximate cause") is proper in FELA cases.

The Court, in a 5 to 4 decision, affirmed the judgment of the Seventh Circuit and held that the "played any part" causation charge approved by the Court in *Rogers, supra*, is the proper standard for FELA cases. Justice Ginsburg's majority opinion makes clear that it is not error in an FELA case to refuse a charge embracing stock "proximate cause" terminology and that juries are properly instructed, as Congress has prescribed, that a defendant railroad caused a worker's injury if its negligence "played a part - no matter how small - in bringing about the injury."

The majority reasoned first rejected CSX's argument that *Rogers* was narrowly focused

on contributory negligence or other multiple causes and thus did not more broadly displace common law formulations of proximate cause. After restating the *Rogers* case at length, Justice Ginsburg concludes that it is "most sensibly read" as a comprehensive statement of the FELA's causation standard, pointing out that the *Rogers* opinion had expressly rejected the state court's reasoning that, apart from contributory negligence, the railroad's own negligence was too indirect to establish causation. The majority then demonstrates that this understanding of *Rogers* is not only consistent with the FELA itself, but also has been applied consistently in the circuits and in the overwhelming majority of state courts and has been accepted as settled law for decades. Discarding or restricting this understanding of *Rogers* would thus ill serve *stare decisis*.

The Court then reasons that based on more than fifty years of experience under *Rogers*, there is little cause for concern, as argued by CSX, that the "any part" instruction will open the door to unlimited liability. Indeed, Justice Ginsburg reminds that CSX did not identify even one trial in which the *Rogers* instruction generated an absurd or untoward award. Concluding that the statute's "in whole or in part" language is straightforward, the Court suggests that worries about an "in part" instruction's being unlimited are not justified. Juries have no warrant to award damages on a "but for" basis, as "reasonable foreseeability of harm" is an essential ingredient of a finding of FELA negligence in the first place. A mere "but for" case, therefore, should not be submitted to a jury, according to the Court.

The Chief Justice, joined by Justices Scalia, Kennedy and Alito, dissented, concluding that the "played any part" test is no limit at all and is simply "but for" causation permitting boundless liability. The dissenters instead would impose a common law "proximate cause" standard in FELA cases. Explaining that Congress abrogated the common law in only four specific ways in the FELA, none of which modified the rule of proximate cause, the Chief Justice argues that there is no statutory basis for departing from the common law rule for this federal tort claim. The statutory reference to "in whole or in part" refers only to the abrogation of contributory negligence, not to the definition of causation itself, according to the dissent. Utilizing the same logic, the Chief Justice says that the Court's reliance on *Rogers* is incorrect, for that case simply affirms that as between an employer's and an employee's comparative negligence, even the slightest negligence on the part of the railroad can make it liable. That language, therefore, is not a rejection of proximate cause, but an affirmation of it, according to the dissenters.

The dissent further notes that even though federal courts of appeals have read *Rogers* to support the Court's holding, their views run counter to a number of state courts that apply common law proximate causation to FELA cases. According to the Chief Justice, therefore, the law is not as settled as the Court would have it. Lastly, the dissenters criticize the causation standard approved by the Court as ineffective to answer a multitude of questions that arise in trying to decide whether a railroad's negligence caused an employee's injury. Finding "foreseeability of harm" to be both needlessly rigid and too opaque to be useful, the Chief Justice argues that proximate cause would supply the necessary vocabulary for answering the

difficulties his opinion illustrates.

* * * *

Despite a lively and thorough dissent by the Chief Justice, the majority's adoption of the "played any part no matter how small" test for whether a railroad's negligence "caused or contributed to" an employee's injury in an FELA case is more compelling because it is faithful to the statute's language and to Congress' acquiescence in its consistent application over more than 50 years of practice. Indeed, as a practical matter, hardly anything about how FELA cases are litigated will likely change as a result of this decision. FELA juries will continue to be instructed in much the same way they have been for decades in most jurisdictions. If the Court's reading of the law has wandered as far astray from the FELA as the dissenters portray, Congress can pass corrective legislation altering the causation standard in which it has knowingly acquiesced for more than half a century. In short, while the Chief Justice makes some cogent jurisprudential points about negligence and causation generally, his argument misses the mark. The precise question here is what Congress meant when it passed the FELA. On that score (and that is the only score that matters in a statutory interpretation case), Justice Ginsburg's majority opinion appears to be spot on.

It is no wonder that the Chief Justice decided to write the dissent himself and devoted so much effort to it. After all, this case was regarded as one of the major business cases of the term, though it was dressed in the guise of a simple causation question. As the case turned out, Justice Thomas voted with the more progressive bloc for a change, and that transformed Chief Justice Roberts' effort into a rather blatant plea to a business-friendly Congress. This case is yet another example of an attempt to deregulate a federal tort regime that has been in place, without so much as a peep from Congress, for nearly six decades - two generations of workers. It is hardly a secret here that the Chief Justice meant to change the shape of the strike zone and not simply call the pitches.

E. Sundry Other Decisions.

The Court rendered a number of decisions that bear directly on employer-employee relations, but defy traditional categorization. In a False Claims Act ("FCA") case the Court grappled with how to regard information obtained under the Freedom of Information Act ("FOIA") in connection with attempts to ferret out fraud against the federal government. Indeed, this case was one of several that construed FOIA, but are not candidates for separate treatment in this paper. In *Milner v. Department of the Navy*, 562 U.S. ---, 179 L. Ed. 2d 37, 131 S. Ct. 1259 (2011), the Court held that a request for explosives maps and other data about a naval base was not exempt from disclosure under FOIA's "internal personnel rules and practices" exemption because it encompasses only records relating to employee relations and human resources issues. Also, in *Federal Communications Commission v. AT&T, Inc.*, 562 U.S. ---, 17- L. Ed. 2d ---, 131 S. Ct. 1177 (2011), the Court held that corporations do not have

"personal privacy" for purposes of protecting their information from disclosure under FOIA's exemption covering an "unwarranted invasion of personal privacy." While these two decisions may merit close attention on other levels, they do not warrant further discussion here except for my inability to resist noting a wonderful bit of judicial wit: The Chief Justice, in one of the great ironic valedictories in the United States Reports, offers solace to the defendant in rejecting its claim for personal privacy in the FOIA case just mentioned: "We trust that AT&T will not take it personally." Slip op., p. 12.

The Court also dealt with how to regard for tax purposes newly graduated doctors in medical residencies - are they students or employees? And, in an important non-employment decision bound to have a direct effect on resolution of employment disputes, the Court refused to enforce a state prohibition on class action waivers in consumer arbitrations. Finally, it is worth noting without extended discussion that in a Section 1983 case the Court unanimously held that the "policy or custom" requirement for liability under *Monell v. New York City Dept. of Social Servs*., 436 U. S. 658 (1978), is applicable in cases seeking injunctive or declaratory relief as well as in cases for monetary damages. *Los Angeles County, California v. Humphries*, 562 U.S. ---, 178 L. Ed. 2d 447, 131 S. Ct. 460 (2010).

Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. ---, 179 L. Ed. 2d 825, 131 S. Ct. 1885 (2011)

The Court decided that a federal agency's written response to a FOIA request is a "report" within the meaning of the public disclosure bar of the False Claims Act.

Daniel Kirk was employed by Schindler Elevator Corporation ("Schindler") and a predecessor for 25 years until he resigned in 2003 in response to what he saw as an effort by Schindler to force him out. Schindler, an elevator and escalator manufacturer, had contracted with the United States hundreds of times in the last decade under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 ("VEVRAA"). That act requires contractors to furnish annual reports about employment of qualified covered veterans. In March of 2005 Kirk sued Schindler under the FCA and amended his complaint in 2007. Kirk alleged that Schindler had submitted hundreds of claims for payment under government contracts valued at more than $100 million that falsely certified compliance with VEVRAA.

In support of his complaint, Kirk pointed to information his wife, Donna Kirk, had received from the Department of Labor in response to three FOIA requests for Schindler's annual VEVRAA reports. Schindler moved to dismiss because, among other things, the FCA's public disclosure bar then in effect deprived the district court of jurisdiction. The district court granted the motion, concluding that Kirk's claims were based on public disclosures in an administrative "report" or "investigation" under the FCA. The Second Circuit vacated and remanded, holding that an agency's response to a FOIA request is neither a report nor an

investigation within the meaning of the public disclosure bar of the FCA. The Supreme Court granted certiorari in light of a circuit conflict on this point.

The Court, in a 5 to 3 decision (Justice Kagan recused), reversed the Second Circuit's decision and ruled that the Department of Labor's written responses to Donna Kirk's FOIA requests are "reports" within the meaning of the public disclosure bar of the FCA. Justice Thomas' majority opinion, noting that the FCA does not define "report," looks first to the word's "ordinary" meaning by consulting a number of dictionaries, as well as the whole text of the public disclosure bar. Failing to find any basis in the text for adopting a narrower definition of "report" than its ordinary or primary meaning, Justice Thomas then concludes specifically that a written agency response to a FOIA request falls within the ordinary meaning of "report." The basis for this conclusion is that agency responses "give" information and notify the requester of the agency's resolution of the request. Moreover, documents attached to those responses (such as the VEVRAA reports here) are deemed to be disclosed "in" the agency's "report." Justice Thomas' opinion also rejects Kirk's arguments that the "drafting history" of the public disclosure bar contradicts the Court's holding and that extending the bar to FOIA responses will engender unusual consequences (such as two employees being treated differently on the basis of receiving the same document from different sources or the prospect of employers themselves making FOIA requests to head off FCA liability). Finally, Justice Thomas makes the practical observation that no party offered the Court a principled means of defining"report" in a workable way and that the Court is thus obliged to adhere to construing undefined terms in accordance with their "ordinary meaning." Accordingly, the Court remanded the case to determine whether Kirk's suit was in fact based upon the allegations or transactions disclosed in the reports.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented on the ground that the Second Circuit's thorough explanation of why a response to a FOIA request should not automatically be deemed a "report" under the public disclosure bar is faithful to the text, context, purpose and history of the statute itself. As Justice Ginsburg points out, Kirk was simply seeking corroboration for his allegations about Schindler. The Department of Labor here merely responded in ministerial fashion to Kirk's wife's request, and its response hardly bears the look of an agency "report" to or about anyone. In the end, Justice Ginsburg explicitly invited Congress to address the newly fashioned limits on a whistleblower's ability to substantiate her or his allegations.

* * * *

The lasting importance of this case is uncertain. As Justice Thomas' opinion points out in the first footnote, during the pendency of the case Congress amended the public disclosure bar in the Patient Protection and Affordable Care Act, 124 Stat. 119 (2010). Because Congress made the amendment applicable only to cases commenced after its effective date, the significance of this case would seem to be limited to the universe of pending cases, not

new ones. With that caveat in mind, there is much to criticize in what the Court did here, regardless of the limits on its precedential and practical value.

The Court continues to chip away at the private remedial core of the False Claims Act in a way that leaves the law more ineffective than ever as a remedy for whistleblowers and ultimately less likely as a deterrent to fraud upon the government. The Congress that passed the FCA would not be happy with the majority's reinterpretation of its intent, but that Congress, of course, is no longer in session. So, without a hint of modesty or any suggestion of deference to Congress, the Court constructed yet another roadblock to relief in a qui tam action. And, that may not be the worst of the majority opinion.

What's left lurking in Justice Thomas' opinion may easily be as important as the decision itself. First, there is the question whether a relator's obtaining information from an independent source is still barred under the public disclosure limitation if the information had also been released in response to a FOIA request to someone else. The capacity for mischief is obvious, as employers could routinely request their own incriminating information in order to forestall FCA qui tam actions. Second, the Court left open the question whether Kirk's suit was actually based on allegations in the disputed report. That is essentially a factual question on which the relator (the plaintiff) can lose this case in still another way. Third, a question was raised about whether records that a relator obtains without a request (because FOIA requires them to be released) might be treated differently from records that an employee-relator requests. Not only does Justice Thomas find no merit in this anomaly, but he indicates that the Court is not deciding whether records that are released without a FOIA request fall outside the public disclosure bar. On all these questions, the Court's opinion seems to be a broad hint that it is prepared to expand the public disclosure bar at any convenient opportunity. It is hard to see, absent the recent amendment to the public disclosure bar, how qui tam actions can remain a deterrent to fraud and an incentive for employees to uncover it. The majority's open hostility to such claims is one more indication of its desire to deregulate the employment relationship.

Mayo Foundation, etc. v. United States, 562 U.S. ---, 178 L. Ed. 2d 588, 131 S. Ct. 704 (2011)

The Court decided that a Treasury Department rule subjecting doctors' stipends in a medical residency program to FICA payroll taxes was a reasonable interpretation of the Internal Revenue Code.

The Mayo Clinic and the Mayo Foundation for Medical Education and Research ("Mayo") pays annual stipends to doctors in Mayo's residency programs. The program provides additional education for persons with medical degrees, primarily through hands-on experience, for three to five years leading to board certification in various specialties. Residents take part in a structured educational program, attend lectures and conferences and read textbooks and journal articles, but spend the bulk of their time caring for patients under the

supervision of senior residents and attending physicians. In addition to stipends that range from $41,000 to $56,000 in 2005, Mayo also provides its residents with health and malpractice insurance and paid vacation time.

Congress enacted the Federal Insurance Contributions Act ("FICA") to fund retirement, disability and other benefits under the Social Security and related programs. Under 26 U.S.C. 3101 (for employees) and 26 U.S.C. 3111 (for employers), FICA imposes a tax on "wages," a term that encompasses all remuneration for "employment." The term "employment" covers "any service" by an employee for the person employing him. The FICA exempts from these taxes service performed by students. The Treasury Department has applied this exemption to those who work for their schools "as an incident to and for the purpose of pursuing a course of study there." In 2005 the Treasury Department, in response to a flood of claims resulting from a court ruling against its case-by-case approach to the student exemption, adopted a rule that an employee's service is "incident" to his studies (thus exempting the employer from FICA withholding) when the educational aspect of the relationship is "predominant" in comparison to the service aspect. The Department also adopted a categorical rule that full-time employment is not "incident" to one's studies, even where the services embody an educational aspect. After adoption of this full-time employment rule, Mayo withheld FICA taxes on the stipends it paid in 2005.

Asserting that its residents were entitled to the student exemption under section 3210(b)(10) of the FICA and that the Treasury Department's amended rules implementing that section were invalid, Mayo filed suit seeking a refund of moneys withheld and paid during the second quarter of 2005. The district court granted Mayo's motion for summary judgment, concluding that the Treasury Department's full-time employment rule was inconsistent with the statutory student exemption. On the Government's appeal, the Eighth Circuit reversed, holding that the Department's amended regulation was a permissible interpretation of FICA. The Supreme Court granted certiorari.

The Court (with Justice Kagan recused) unanimously affirmed the Eighth Circuit, holding that the Treasury Department's full-time employee rule is, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reasonable construction of FICA section 3121(b)(10). Chief Justice Roberts' opinion for the Court first concluded that Congress has not directly addressed the precise question of FICA's application to services by medical residents as students. In doing so, the Court declined to apply a literal reading of the dictionary definition of "student" to the precise question about the applicability of section 3121 to medical residents.

Next, the Court turned to how the full-time employment rule should be evaluated. Rejecting Mayo's argument to apply a less deferential evaluation of the rule than what *Chevron* demands, the Court decided that *Chevron's* principles apply with full force to tax rules adopted by the Treasury Department under an explicit Congressional authorization to prescribe needful rules and regulations after notice-and-comment procedures. Applying *Chevron's* deferential

standard, the Court concluded that because the full-time employment rule sensibly focuses on a comparison of time spent working and time spent studying (instead of a more nuanced individualized inquiry into why medical residents do what they do) as a way to distinguish between workers who study and students who work, the rule "easily" satisfies *Chevron's* requirement not to disturb an agency rule unless it is arbitrary or capricious in substance or is manifestly contrary to the statute. Moreover, the rule avoids both uncertainty and wasteful litigation that would accompany the case-by-case approach urged by Mayo. Finally, the Court notes that the rule reasonably takes account of the Social Security Administration's concern that exempting medical residents from FICA might ultimately deprive them of disability and survivorship benefits.

* * * *

Of undoubted interest to many lawyers is the practical question lurking behind this decision: Whether medical residents are entitled to social welfare benefits ordinarily available to employees (i.e., Social Security disability and retirement benefits and unemployment benefits)? Both in its brief and at the oral argument, the Government assured the Court that the Social Security Administration had taken a consistent position that medical residents were considered employees and not students for purposes of accruing credit for these social welfare benefits. See, Transcript of Oral Argument, pp. 33-34 (November 8, 2010). Whether such assurance will survive the political and economic pressures currently affecting the Social Security system remains to be seen. After all, the Treasury Department changed its regard of the fault line between student and worker in this very case. In any event, that the Court took note of the Social Security Administration's position is pregnant with the notion that if that position changes, so might the Court's deference to the Treasury Department's interpretation of FICA.

On its face, this decision presents an issue of administrative law, and a rather pedestrian one at that. The Court here had no trouble sustaining the Treasury Department's categorical decision not to permit the statutory exclusion of services by students to apply to medical residents who work a full-time schedule with patients during their residency training. Were economic times not so difficult and tax revenues not so sparse, the agency rule might have had a more difficult time passing muster. Under the very relaxed standard of review applied by the Court, however, adoption of the full-time employment rule was "easily" deemed a reasonable interpretation by the Treasury Department of FICA.

Chamber of Commerce, etc. v. Whiting, et al., 563 U.S. ---, 179 L. Ed. 2d 1031, 131 S. Ct. 1768 (2011)

The Court decided that federal immigration law does not preempt the state employer licensing or electronic verification provisions of the Legal Arizona Workers Act.

Arizona enacted the Legal Arizona Workers Act of 2007, providing for suspension or revocation of business licenses of employers that knowingly or intentionally employ unauthorized aliens and requiring that all Arizona employers use the federal E-Verify system to confirm that their employees are legally authorized workers. This law was enacted against the background of federal laws regulating immigration and expressly preempting any state or local law imposing civil or criminal sanctions "(*other than through licensing and similar laws*) upon those who employ. . . unauthorized aliens." 8 U.S.C. 1324a(h)(2) (emphasis added).

Various civil rights and business groups, including the Chamber of Commerce of the United States of America ("CofC"), filed a pre-enforcement suit in federal court against those charged with administering the Arizona law. The basis of the suit was express and implied federal preemption of the license suspension and revocation requirements of the state law and implied preemption of the mandatory use of the federal E-Verify system. The district court held that Arizona's law was not preempted, and the Ninth Circuit affirmed on the basis of the savings clause in the preemption provision of the Immigration Reform and Control Act ("IRCA") and the further conclusion that no state provision was impliedly preempted by federal policy. The Supreme Court granted certiorari.

The Court held that the challenged provisions of Arizona law are not preempted by federal law, concluding that the licensing provisions fall squarely within IRCA's savings clause and that Arizona's regulation does not otherwise conflict with federal law. Chief Justice Roberts' prevailing opinion, joined in pertinent part by Justices Scalia, Kennedy, Alito and Thomas, recites the history of federal and state laws affecting immigrants in the workplace before rejecting the CofC's arguments. First, the Court notes that the text of the savings clause comfortably includes the kind of business licensing Arizona's statute addresses. Then, the Court concludes that even though Arizona's law operates to suspend or revoke licenses instead of granting them, it is "contrary to common sense" to regard that law as anything other than a "licensing" or similar law. Next, the Court rejects CofC's argument that the IRCA savings clause is applicable only after a federal IRCA adjudication. Likewise, the Court finds unavailing the arguments that the savings clause must be construed narrowly to preserve uniformity in immigration law enforcement. And finally, the Court's examination of IRCA's history leaves it unconvinced that the text of the savings clause expressly preempts Arizona's licensing law.

The Court also held that, based on the text of its law, Arizona's use of the E-Verify protocol does not conflict with the federal scheme. Chief Justice Roberts' opinion notes that the federal law setting up the E-Verify system contains no language circumscribing state action. Indeed, the opinion notes that the federal government has pointed to Arizona's use of E-Verify as an example of permissible use of that system. Accordingly, a majority of the Court concluded that Arizona's requirement to utilize the federal verification system is "entirely consistent" with the federal scheme.

Justice Thomas, however, declined to join additional portions of the Chief Justice's opinion that conclude that the licensing portion of Arizona's law is not impliedly preempted by federal law, that Congress did not intend federal law to be exclusive in addressing workplace problems with unauthorized aliens and that the Court's no-preemption ruling will neither upset any balance Congress has sought to strike nor encourage conscientious employers to violate the anti-discrimination laws. Likewise, Justice Thomas also declined to join additional portions of the Chief Justice's opinion on the E-Verify protocol that found that Arizona's law does not obstruct achieving any of the aims of the federal program and, in fact, is consistent with the federal government's encouragement and expansion of E-Verify.

Justice Breyer, joined by Justice Ginsburg, dissented, concluding that Arizona's law does not fall within IRCA's savings clause because it facilitates the creation of obstacles to enforcement of Congress' objectives in enacting IRCA. In Justice Breyer's view, the state law threatens compliance with federal anti-discrimination policy and subjects employers to a risk of erroneous prosecution. Accordingly, Justice Breyer would limit the savings clause exception solely to firms in the business of recruiting or referring workers for employment. Finally, Justice Breyer concludes that by making E-Verify mandatory, the state law is inconsistent with the voluntary nature of the federal program and is thus preempted by it.

Justice Sotomayor dissented in a separate opinion concluding that because Arizona has created a separate state mechanism for determining whether a person has employed an unauthorized alien, that law falls outside the savings clause of IRCA and is preempted. In her view (unlike both the Court and Justice Breyer's dissent), the only way for Arizona law to operate consistently with IRCA is for the savings clause to be read to permit licensing sanctions *following* a final federal determination that the employer has violated IRCA. Justice Sotomayor would also hold that federal law preempts Arizona's requirement that employers use the voluntary E-Verify program.

* * * *

The practical effects of this decision are quite obvious, as is the political fallout from it. While the latter is beyond the scope of this paper, the former hardly needs explication here. States that adopt laws like Arizona's (and there are several of them now) can anticipate a potentially costly spike in administrative enforcement, while employers in those states must educate their human resources people to comply fully with both state and federal requirements affecting documented and undocumented alien workers.

As an exercise in statutory construction, the Court's decision is assuredly a plausible one, though the result reached is by all means not the only one possible in light of IRCA's precise language. Indeed, as the dissenters properly point out, the language of the savings clause does not resolve the question of its application; the words simply raise what is meant by "licensing and similar" requirements. Given that the ultimate solution here is a legislative one, the Court's approval of constraints on the way federal law operates effectively puts the matter

squarely in the hands of both Congress and the states for a political resolution. Had the Court ruled in favor of preemption, there would be no room for debate in the several states, and Congress would have had a reduced incentive to craft its own solution to the problem of employment of unauthorized aliens. Now the issue must be confronted by Congress, lest the states make a hodge-podge of immigration policy. The dissenters may have the force of reason, logic and good sense on their side, but the Chief Justice's approach has the advantage of putting the hard questions right where they belong for resolution.

On June 22, 2011, Senator Robert Menendez introduced the Comprehensive Immigration Reform Act of 2011 (S. 1258), a bill that would, among many features overhauling federal immigration law, make the E-Verify system mandatory as a matter of federal law. See S. 1258 at thomas.loc.gov/cgi-bin/thomas. Moreover, the Court may soon have an opportunity to consider preemption of a more comprehensive Arizona law dealing more directly with immigration - possibly in violation of the Supremacy Clause. United States of America v. State of Arizona, --- F. 3d --- (No. 10-16645)(9th Cir., April 11, 2011). See generally, www.scotusblog.com/category/special-features/immigration/. Either or both of these recent developments could soon trump much of what the Court did in the principal case.

Fox v. Vice, etc., 563 U.S. ---, 180 L. Ed. 2d 45, 131 S. Ct. 2205 (2011)

The Court decided that, in a section 1983 action involving both frivolous and non-frivolous claims, a trial court may exercise wide discretion under 42 U.S.C. 1988 to grant reasonable attorneys' fees to a defendant only for the expense it would not have incurred but for the frivolous claims.

In an election for chief of police in Vinton, Louisiana the challenger, Ricky Fox, ran against the incumbent, Billy Ray Vice. Despite complaints by Fox about Vice's dirty electoral tricks, Fox won the election and Vice was convicted of criminal extortion for election-related conduct. Fox then sued Vice and the town of Vinton in state court. The suit alleged defamation, other state law claims and federal civil rights claims under 42 U.S.C. 1983. After removal and discovery, Vice moved for summary judgment on the federal claims. Fox conceded that those claims were "not valid" and the district court dismissed them with prejudice and declined to exercise jurisdiction over the state clams. The case was remanded to state court with the observation that any discovery and trial preparation may be used in the state proceedings. Vice sought an award of attorneys' fees under 42 U.S.C. 1988, claiming that Fox's claims were baseless and without merit. The claim for fees did not differentiate between the federal and state claims. (In a further cruel twist, Vice died during the course of this litigation, and his estate was substituted as the plaintiff.)

The district court granted the motion for fees in the amount of $46,681 on the ground that the federal claims were frivolous. According to the district court, separating the federal and state claims was not necessary because they arose out of the same transaction and were so interrelated that defending them entailed proof or denial of essentially the same facts. The Fifth

Circuit affirmed by a divided panel. The dissenting judge pointed out that because almost all of Vice's work would have been necessary without the dismissed federal claims, any fee award should have been much smaller. The Supreme Court granted certiorari based on a deepening circuit split about fee awards to a defendant under section 1988 when both frivolous and non-frivolous claims are asserted.

The Supreme Court unanimously vacated the Fifth Circuit's decision, concluding in an opinion by Justice Kagan that section 1988 serves to relieve a defendant of expenses attributable to frivolous charges. That a suit may include non-frivolous claims on which the defendant did not prevail does not "immunize" a plaintiff against having to pay for the fees that his frivolous claims imposed. As to determining what fees are fairly attributed to the frivolous claims, the Court adopts a "but for" approach by ruling on the basis of section 1988's limited exception to the American Rule (*i.e.*, that each side bear its own fees) that a defendant may recover fees only for the burden of fending off a frivolous claim against it. Any more expansive fee-shifting rule might furnish a windfall to defendants.

Justice Kagan stresses that fee-shifting should not result in a second major litigation and that the goal in awarding attorneys' fees is to achieve rough justice and not "auditing perfection." Moreover, appellate courts must give "substantial deference" to the trial court's superior understanding of the case and must avoid micromanagement of the decision on fees. In this case, because the lower courts failed to take proper account of the overlap of frivolous and non-frivolous claims, the case was remanded for further proceedings consistent with the Court's opinion that a defendant may not receive compensation for any fees he would have paid in the absence of the frivolous claims.

* * * *

While this decision does not directly involve substantive employment or labor issues, it is quite an important one for the labor and employment litigation bar. Many, if not most, employment discrimination suits are premised on complaints asserting multiple claims, some of which are meritless and may be jettisoned by plaintiffs' counsel or dismissed by the trial court after an initial round of discovery. Of course, claims that survive Rule 12(b) motions, particularly under the new regime of plausible pleading, are not candidates for being deemed frivolous at any later stage of the proceeding. But claims that proceed through discovery and are dismissed by counsel or the court are more likely to engender a fee application from defendants, just as Vice's estate pursued in this case.

The rule adopted by the Court and explained with clarity, precision and a sense of the practical by Justice Kagan, seems a sound one that appropriately relieves a defendant of unfair expense without imposing a substantial chilling effect on the assertion and prosecution of legitimate claims by a plaintiff. Justice Kagan's first term was marked by a number of recusals because of her prior service as Solicitor General of the United States, and her absence in a number of employment cases was apparent, if not decisive. Her opinion in this

case, with its respectful, but forceful, admonitions to the trial and appellate courts about handling fee applications brings a welcome new voice to the Court.

AT&T Mobility LLC v. Concepcion, etc., 563 U.S. ---, 179 L. Ed. 2d 742, 131 S. Ct. 1740 (2011)

The Court decided that the Federal Arbitration Act ("FAA") preempts (and thus makes unenforceable) California's rule that class action waivers in consumer arbitration agreements are unconscionable.

Vincent and Liza Concepcion bought cellphone service and a cellphone from Cingular Wireless (later AT&T Mobility LLC ["AT&T"]) in February of 2002. They signed an agreement providing for individual arbitration of all disputes between the parties. Their contract specifically required that they not pursue any claims in any purported class or representative proceeding. In most other respects, however, the arbitration agreement, as it was later revised, is most favorable to the consumer, as explained in some detail in the Court's opinion. Slip Op., p. 2.

The advertisement for the cellphone service, according to the Concepcions, promised that purchasers of the service would receive "free" phones. Although Cingular did provide a phone without charge, the Concepcions did have to pay $30.22 in sales tax based on the phone's retail value. In March of 2006 they sued AT&T in federal court for what they deemed as illegal sales practices. Two years later, after the complaint was consolidated with a class action alleging fraud and false advertising, AT&T moved to compel arbitration under the agreement the Concepcions had signed.

The district court denied the motion to compel arbitration under the Concepcion's agreement, finding the arbitration provision unconscionable under California law because of the class action waiver. The Ninth Circuit affirmed, ruling that the class waiver provision was unconscionable and holding that the FAA did not preempt its ruling because California law prohibits class waivers inside and outside of arbitration on the same basis. The Supreme Court granted certiorari.

The Court reversed the Ninth Circuit's judgment in a 5 to 4 decision. Justice Scalia's opinion for the majority (joined by the Chief Justice and Justices Kennedy, Thomas and Alito) holds that the FAA prohibits States from conditioning the enforceability of arbitration agreements on the availability of class-wide arbitration procedures. The Court concludes that California law (embodied in a state appellate ruling) deeming arbitration agreements unconscionable unless they permit class-based arbitration is an obstacle to accomplishing Congress' objectives in the FAA and is thus preempted. Justice Scalia reasons that the FAA reflects a liberal policy favoring arbitration and thus permits arbitration agreements to be invalidated under the savings clause in section 2 only by generally applicable contract defenses

and not by defenses that apply only to arbitration agreements.

The majority explains that California law holds class waivers in consumer arbitration agreements unconscionable if they are in adhesion contracts and involve small amounts of damages and if the party with the inferior bargaining power alleges a deliberate scheme to cheat consumers. Rejecting the Concepcions' claim that this California rule is simply a ground for revocation of any contract, Justice Scalia points out that the inquiry is more complex where a doctrine (such as duress or, as here, unconscionability) is applied in a manner that disfavors arbitration. Justice Scalia thus characterizes the California rule as one that interferes with the FAA's objectives because it interferes with the "principal purpose" of the FAA to ensure that private arbitration agreements are enforced according to their terms, as the text of the statute makes plain. After restating a myriad of ways that permitting the state rule to operate would frustrate the overriding purpose to enforce arbitration agreements, Justice Scalia concludes that the California rule simply is not the product of the parties' consent, but is manufactured by state judicial decisions and is thus inconsistent with the FAA.

As to the particulars of the state rule's interference with arbitration's favored status, Justice Scalia posits that class arbitration slows the process, sacrifices its informality, makes the process more costly, is more likely to generate a procedural morass, and "greatly increases risks to defendants." Slip op., p. 15. For instance, the absence of multilayered review that is available in the courts makes an erroneous imposition of damages more likely, a result that becomes unacceptable when thousand of claims are aggregated and decided at once. The majority bemoans that "faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." Slip op., p. 16. Noting that the FAA limits the grounds for vacating awards, the Court concludes that arbitration is poorly suited to the higher stakes of class litigation. Finally, acknowledging that small dollar consumer claims may go unresolved if class waivers are allowed, the Court says that is not the case here and that, in any event, the States cannot require a procedure that is inconsistent with the FAA.

Justice Thomas filed a concurring opinion, expressing the view that the FAA requires that an agreement to arbitrate must be enforced unless a party successfully challenges the formation of the arbitration agreement (such as by proving fraud or duress.) Although Justice Thomas says that he "reluctantly" joins the Court's opinion, his reading of the FAA, which was not fully developed by any party in this case, is the better view, according to him. Under this reading, the question would be whether the California rule relates to the making of the Concepcions' agreement. Because it does not and is thus not a ground for revocation within the meaning of FAA section 2, it is preempted.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented. In their view California law sets forth circumstances in which class action waivers in any contract (not just arbitration agreements) are unenforceable. Because this rule is consistent with the FAA's language and primary objective of streamlined adjudication, it is not an obstacle that justifies preemption. The dissent carefully points out that the state rule applies to arbitration and court

proceedings alike. Next, Justice Breyer opines that the rule is consistent with the FAA's basic purpose of ensuring enforcement of arbitration agreements by putting them on the same footing as other contracts.

The dissenters reject the majority's notion that California's rule would increase the complexity of arbitration procedures and thus discourage use of arbitration. Further, the California rule is not an attack directed at arbitration because class action procedures have been in use in California for many years. Justice Breyer wonders where the majority got the notion that individual arbitration is an attribute of arbitration itself, for Justice Scalia's opinion offered no explanation of it. Disputing that there is empirical support for the majority's criticism of class procedures in arbitration, the dissenters also remind that favoring class procedures for consumer claims applies to judicial and private adjudication alike and does not disfavor arbitration. Justice Breyer questions the criticism of class arbitration of small consumer disputes and its effect on the disputants, noting that the real inquiry is not the merits and demerits of class treatment, as that is a matter for the States, not this Court. Finally, posing the matter as one of federalism, the dissenters point out that California's law, because it is not inconsistent with the FAA, should be upheld and not preempted.

* * * *

The Court's decision, considered by many Court pundits as one of the momentous rulings of the term, is assuredly bound to resonate in the employment area. But first, consider the ironic juxtaposition of the majority and the dissenters.

Here is Justice Scalia on the side of nationalizing individual dispute resolution by completely preempting traditional state contract law. And, here is Justice Breyer extolling the virtues of federalism and trying to safeguard states' rights. The world must be upside down. What's going on seems to be wholly dependent on whose ox is being gored. In this case the business community (including employers, of course) feared that state law would infringe on the prerogative to keep consumers from banding together to litigate small-dollar individual claims arising out of a common fraud. With Justice Scalia to the rescue, corporate interests prevailed over individual interests, leading the Chamber of Commerce to regard this decision as one of the major business victories of the 2010 Term. See Robin Conrad, executive vice president of the National Chamber Litigation Center quoted in ChamberPost, accessed at http://www.chamberpost.com/2011/07/july-1-2011-the-week-that-was/.

How this decision will resonate in the employment area remains to be seen. It is possible that federal law may yet trump the result in this case. If Congress reverts to Democratic control in 2012 and Barack Obama is re-elected, watch for the resurrection of the recently aborted Arbitration Fairness Act (or something like it.) The pressure to pass such legislation has undoubtedly been given a boost by the decision in this case to ignore California's attempt to address unconscionability in adhesion contracts. Among the features of prospective legislation might be a prohibition on arbitration of any kind of consumer and

employee claims or, at the least, provisions making it easier to obtain class treatment in arbitrations of such claims.

Note once again that the majority in this case appears to be acting less like a referee and more like the author of the rules of the game itself. What is remarkable is that the Court openly bemoaned the prospect that corporate defendants might have to bear some risk of loss as a result of their corporate conduct. Regardless of whether that sentiment is justified, it ill befits judges to base their decisions on preferences and protections that are the province of Congress under our Constitution. As for Congress' own expression of a preference for arbitration in the FAA, that certainly was never intended to supersede a rule of state contract law that unconscionable agreements between parties of disparate bargaining power are unenforceable.

III. Grants of Certiorari for the 2011 Term.

Summarized below are four employment-related cases and one arbitration case in which the Court has so far granted certiorari as of July 30, 2011. The Court will shortly schedule all these cases for argument and decision during the 2011 Term.

While this eclectic group of certiorari grants poses interesting and potentially consequential issues for the employment bar, it is likely that they will be overshadowed by the Court's consideration of the constitutionality of the so-called "mandate" in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). A petition for certiorari was filed on July 26, 2011 on this very point. *Thomas More Law Center v. Barack Hussein Obama,* 564 U.S. --- (No. 10-2388)(2011). And, whatever the Court does during the next term will in like manner take place in the shadow of the 2012 electoral campaign - itself a mandate of sorts on the work of the Court. Maintaining an observer's focus on employment issues will thus be a greater-than-normal challenge in the coming term.

Coleman v. Maryland Court of Appeals, 564 U.S. ---, No. 10-1016 (2011)

The question presented is whether the self-care leave provision of the Family and Medical Leave Act ("FMLA") abrogated the States' 11th Amendment immunity.

The Fourth Circuit held that the states are immune from suit for violation of the FMLA's self-care provision in 29 U.S.C. 2612(a)(1)(D). The result is at odds with the Supreme Court's holding in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), that states are not immune from suit under the family members care provision of the statute. Certiorari was granted on June 27, 2011, and the case will be scheduled for argument during the 2011 Term.

Knox v. Service Employees International Union, 564 U.S. ---, No. 10-1121 (2011)

The question presented is whether a union's assessment of bargaining unit employees for a temporary mid-term increase in fees must, in addition to the annual *Hudson* fee notice, be preceded by a separate *Hudson* notice.

The Ninth Circuit reversed a trial court's ruling requiring the SEIU to send a second notice under *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986), for a proposed temporary mid-term increase in fees to create a union fund for a broad range of political expenses. A dissenting opinion argued that the annual *Hudson* notice alone was insufficient to protect nonmembers' First Amendment rights. The National Right to Work Legal Defense Foundation, Inc. is representing the petitioner in this case. Its petition for certiorari was granted on June 27, 2011, and the case will be scheduled for argument during the 2011 Term.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 564 U.S. ---, No. 10-553 (2011)

The question presented is whether the American with Disabilities Act's "ministerial exception" in 42 U.S.C. 12113(d) applies to an elementary school teacher who teaches primarily secular subjects at a parochial school.

Regarded by some as the most important religious freedom case in many years, this case involves application of secular law (here the retaliation provision of the Americans with Disabilities Act) to parochial-school teachers who teach primarily secular subjects. The Sixth Circuit vacated a trial court's dismissal of the EEOC's suit against a private religious elementary school based on the "ministerial exception" codified in the statute and, according to the trial court, rooted in the First Amendment. Posing a separation of church and state issue that can be viewed differently from religious and secular angles, the case has attracted an enormous number of *amicus* submissions and promises to be one of the most zealously contested controversies of the term. The Court granted certiorari on March 28, 2011, and scheduled the case for oral argument on October 5, 2011.

Minneci v. Pollard, 564 U.S. ---, No. 10-1104 (2011)

The question presented is whether a federal prisoner has an implied *Bivens* cause of action for damages against individual employees of private companies that contract with the federal government to provide prison services.

The Ninth Circuit reversed a district court decision dismissing a federal prisoner's Eighth Amendment claim arising out of injuries he suffered in a federal prison when he tripped over a cart near his prison workplace. Because of a split in the circuits about whether such claims could be brought under the *Bivens* doctrine against private employees alleged to be acting under

color of law, the Supreme Court granted certiorari on May 16, 2011. The case has been scheduled for argument on November 1, 2011.

CompuCredit Corp. v. Greenwood, 563 U.S. ---, No. 10-948 (2011)

The question presented is whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq., are subject to arbitration pursuant to a valid arbitration agreement.

Although this case from the Ninth Circuit is not an employment case, its resolution may have an impact on attempts by employees to avoid arbitration of workplace disputes under federal laws conferring a right to sue. The lower courts held in this case that federal law gave consumers a right to sue in court and that arbitration clauses in consumer agreements were thus not enforceable. If the Court reverses and holds that such claims are arbitrable, consumers with small claims under this statute will effectively have no viable remedy because such claims also cannot be arbitrated on a class basis because of *Concepcion, supra.* Consequently, employers might have a firmer basis on which to insist on arbitration of federal statutory workplace claims, including discrimination charges. The Court granted certiorari on May 2, 2011, and will schedule the case for argument during the 2011 Term.

*   *   *   *

IV. Additional Observations

Reality or illusion? How should one regard the mixture of worker and employer "victories" in the 2010 Term? Has the Roberts Court really shifted gears by approaching employment disputes in a more balanced manner? To be sure, this term yielded a number of employment law decisions that, if one were keeping a "winner" scorecard, an "x" would have to be placed in the plaintiff's "win" column on a number of cases. That result surprised many observers and has provoked speculation that the Court is veering away from the pro-employer stance it has taken in recent years. As I have previously noted, however, the scorecard approach to assessing the Court's work is simply not a fit instrument to tell us what is really going on in the Marble Palace. J. Harkavy, "Supreme Court Employment Decisions, 2009 Term" at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678784.* A closer look at the 2010 Term's decisions yields a bit more clarity about where the Court is heading and how it is getting there.

My judgment is that the first-blush reaction that the 2010 Term was a more "balanced" one is a mirage that disappears as one draws closer to the majority's spoken reasoning and unspoken agenda. What appears from the safe distance of the scorekeeper's table to be a "mixed" or "balanced" term between workers and employers is, upon thoughtful examination,

more illusion than reality. Indeed, it was a banner year for business interests, as the Chamber of Commerce of the United States of America and the National Chamber Litigation Center have touted. *See, www.chamberpost.com/2011/04/the-week-that-was-—april-29-2011/ and J. Biskupic, www.usatoday.com/news/wa...n/judicial/2011-06-28-supreme-court-end-of-term_n.htm?csp=34news (June 30, 2011).* Two decisions praised by the Chamber, *Wal-Mart* and *Concepcion*, are ones that are likely to have a direct, immediate and substantial impact on employment law. Perhaps the following observations will illuminate my judgment and provoke some richer thinking about the Court's work in the employment area. At least, that is my hope.

First, the Court's recent decision to close access to the Supreme Court building through the public entrance facing the Capitol (a decision that prompted an unusual criticism from some Justices, *see* "Statement Concerning the Supreme Court's Front Entrance" in a memorandum filed by Justice Breyer, joined by Justice Ginsburg, at 176 L. Ed. 2d, No. 6 at p. i (May 3, 2010)) offers a regrettable metaphor for the Court's continued attempt to close off access to the courts by persons seeking to challenge workplace decisions. From the newly minted restrictions on judicial class actions in *Wal-Mart v. Dukes* to the further narrowing of *qui tam* actions under the False Claims Act to limits on class arbitrations that business interests sought in *Concepcion*, the five Justices in the conservative majority justly earned the "pro-business" sobriquet suggested by many Court-watchers. While some may see a few plaintiff "wins" in the *Staub, Kasten* and *Thompson* cases, for example, as evidence of a more balanced approach, my sense is that this "balance" is illusory. A more penetrating look at what an aggressive majority on the Court has wrought over the past decade suggests that the pro-business label is well-placed and continues to stick. So far in the Roberts Court years, a pretty cohesive majority of five Justices has expressed continued support for dismantling regulatory restrictions on employers. These Justices have effectively refashioned federal employment law by reaching out to decide issues not squarely presented by parties seeking certiorari, by failing to act with appropriate regard for the expertise of Executive agencies charged with enforcing the employment laws, and most of all, by refusing to construe the employment statutes with a proper and principled measure of deference to the will of Congress. As a result of this majority's continued romance with the notion of *laissez-faire* in the workplace, the door to justice in the courts has continued to swing toward closure despite a few modest "wins" for plaintiffs.

Second, the Roberts Court majority persists in deciding issues of statutory construction in a way that pays little heed to what Congress manifestly sought to accomplish in the law being construed. Looking at many early Title VII cases, for example, one sees, in addition to reliance on statutory text, a healthy regard for Congress' objectives, as revealed in the law's drafting history and in its underlying public policy. Justices in these earlier cases were not ashamed to speak in terms of the moral imperative of equal opportunity that gives meaning to the text of the anti-discrimination laws. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Not so much these days, however. All the current Court needs is a dictionary and a socio-economic agenda in order to

decide a case. In short, the pretense of acting merely as an umpire and simply calling balls and strikes grows particularly tiresome when the majority bloc is actually reconfiguring the strike zone by altering or ignoring the meaning of what Congress obviously intended in enacting laws restricting an employer's power and authority in the employment relationship.

Indeed, the current manner of deciding many employment cases replicates how activist judges in the late Nineteenth Century altered the common law and fashioned the "employment-at-will" doctrine to fit the prevailing (and their own) social and economic views. *See generally,* J. Harkavy, "Deregulating Equal Employment Opportunity" accessed at *http://ssrn.com/author=1131469* (July 12, 2011). And, just look what we got as a result of this judicial hubris: the Gilded Age, with its conspicuous consumption, unjust concentration of power and money, and callous inattention to the welfare of the disempowered. *Cf.,* Alexander Keyssar, "The Real Grand Bargain, Coming Apart," *The Washington Post* (August 19, 2011). Only time will tell whether the current majority's romance with the same *laissez-faire* principles and its lack of regard for the moral imperative of equal opportunity will yield the same untoward consequences. Heaven forbid! In the meantime, it is well-nigh impossible to contend with a straight face that the Court is moving toward a more balanced approach to employment cases.

Nearly as difficult to swallow as its policy preference for deregulation is the majority's insistence in many cases that all it needs is an English (more precisely, American) dictionary to look up the *definition* of the words Congress used in order to determine what Congress *meant*. This definitional approach to statutory construction is a radical, ahistorical and unwelcome departure from the traditional and more nuanced method of interpretation employed by the Court before the current majority bloc coalesced. *See, e.g.,* A. Liptack, "Justices Turning More Frequently to Dictionary, and Not Just for Big Words," *The New York Times* (June 13, 2011). In the early years of Title VII, for instance, when the meaning of the law was first fleshed out in race and gender cases, the Court regularly looked to the ordinary meaning of the words of the statute and to the drafting history of those words and the Congressional policy objectives underlying the text. *E.g., Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971).* This traditional holistic approach to statutory interpretation - presumably what most of us were taught in our first year Legal Method courses - is not what the current "definitionists" in the majority bloc find useful in fashioning their view of the law. Instead, their approach is to look up the *definition* of words and infer Congress' *meaning* from whatever their choice of dictionary says. Of course, it is the prerogative of any majority of Justices to say what the law is, much like Humpty Dumpty's power to make words mean what he says they mean in Lewis Carroll's *Through the Looking-Glass, and What Alice Found There*, ch. 6 (1871). That a majority's "say-so" is the final one judicially, however, does not put the point beyond public debate - or, for that matter, beyond correction by Congress or by the Court itself. In any event, maintaining an illusion of a "balanced" approach to employment law is certainly much easier when, like Humpty Dumpty, one is in charge of saying what the words mean.

Finally, the emergence of a small coterie of Supreme Court specialists is, perhaps, another contributor to the perception that the Court is pursuing an agenda instead of deciding

controversies. Take a careful look at who is arguing and briefing the cases these days. One finds a new cottage industry of "litigation centers" and appellate specialists increasingly dominating both briefing and oral arguments on the Court's civil docket. Many of these lawyers, however, are more agenda-driven advocates than traditional client-driven attorneys. Is this development a healthy one for our jurisprudence? And, did the founders anticipate such issue-oriented lawyering when they defined the Court's jurisdiction? What this phenomenon reveals is that issues that might better be resolved politically are instead being pressed in front of a majority eager to determine them. The Court's docket is thus made up more of issues masquerading as cases, instead of controversies that turn on issues of law. Maybe that seems to some a distinction without a difference, but I see litigation of the former as a departure from Article III's scheme that the Court's jurisdiction is limited to "cases and controversies" and not an agenda of issues. In short, today's Supreme Court specialists are, wittingly or not, contributing to the perception that the Court's work, especially in areas that touch on the business world, appears more overtly political than judicial.

* * * *

These are, to be sure, pointed observations. But such judicial hubris as we have witnessed over the past several terms does not call for a wishy-washy reaction. Sharp debate and provocative observations, so long as they remain civil, are healthy for a functioning democracy, as well as for its thoughtful constituents. Indeed, in contrast to many other countries, the freedom to forge our future through open discourse and robust engagement is a principle for which we Americans should be thankful. And, modeling such debate and engagement to the generations behind us is a legacy that the founders surely must have hoped to engender. Therefore, I trust that these observations, however polemical they may seem to some, will be taken in the spirit in which they are offered - as grist for a productive conversation about how our Supreme Court is functioning.

And so, with gratitude for the patriotic service our Justices render, with admiration for their diligence, and with a watchful eye on the decisions they make, I gladly join with the employment bar in continuing to regard the work of the Supreme Court as part of our shared obligation as lawyers and citizens.

Jonathan R. Harkavy
August 19, 2011