

Supreme Court Employment Decisions 2009 Term

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This year's Supreme Court Employment Decisions, reviewed as usual by my wife, Nahomi Harkavy, is dedicated to the memory of Professor Albert J. Rosenthal, our employment law mentor. Professor Rosenthal was, in chronological order, President of the Harvard Law Review, a veteran of World War II, and Supreme Court law clerk for Justice Felix Frankfurter. Ever kind, modest and gracious, Al Rosenthal practiced law, served in various positions of public responsibility, and taught at Columbia Law School, where he befriended and mentored Nahomi and me. Professor Rosenthal volunteered his services - and mine when I was a brand new associate at a Wall Street firm - for the employment law project of the NAACP Legal Defense and Education Fund, Inc. in the late 1960's and early 1970's. With insight, precision, patience and an unyielding dedication to justice, Professor Rosenthal oversaw for the "Inc. Fund" the appellate briefing and argument of some of the founding decisions under the newly-enacted Title VII of the Civil Rights Act of 1964. After serving with great distinction as Dean of Columbia Law School, Professor Rosenthal continued to teach and mentor law students. Albert J. Rosenthal, z"l, died this year after a long life of distinguished service to our nation.

It is my bittersweet honor to write this article in loving memory of this kind and righteous man.

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The 2009 Term of the Supreme Court of the United States illustrated in unmistakable fashion the central role that workplace regulation plays in the lives of our citizens. The Court's determination of a broad range of employment-related issues maintained its focus on employment law that began several terms ago. Not only do this term's decisions affect a variety of policies and rules applicable to workers, employers and benefit providers, but the Roberts Court's unabashed interest in doctrinal development, revealed by a deeper look at its decisions, also is reshaping the employment relationship itself and altering how work-related disputes are to be resolved.

For the first term in nearly a decade, the Court appears to be emerging from the shadow of the September 11, 2001 attack on our nation. To be sure, judicial fallout from the consequences of that assault, including construction of the Patriot Act and the Military Commissions Act and application of *habeas corpus*, is still noticeable, particularly in detainee disputes, but these cases no longer dominate center stage on the Court's docket or capture headlines as they did in many of the past several terms. As a consequence, the Court has shown a renewed interest in doctrinal change generally, with a focus on employment law in particular. Most notably, this turn of events coincides with the coalescence of a reformist

majority led by Chief Justice Roberts. As Adam Liptak's recent review of the Roberts' Court's first five years points out, Justice Alito's succession to Justice O'Connor's seat has moved the Court rightward philosophically, making it (in Liptak's words) the "most conservative" Court in recent history. *The New York Times*, July 25, 2010, pp. 1, 20-23. This term's employment decisions do not contradict Liptak's assessment. In sum, the spotlight on the employment relationship during the 2009 Term was manifest not only in the employment and labor cases themselves, but also in a variety of non-employment decisions that are likely to have a bearing on workers and employers alike. For employment lawyers, therefore, the 2009 Term was a revealing and consequential one, to say the least.

This article first describes briefly the scope of the Court's work during the 2009 Term and the place of employment law in it. Next, the major employment-related decisions of the term, arranged by familiar broad topics, are summarized, with my personal take on each decision offered in the *italicized* paragraphs following each case. My case commentary is intended to suggest, among other things, the likely practical impact of these decisions on employees, management, benefit providers and labor organizations. Following the review of decisions 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 2010 Term that begins this fall. The concluding section of the article offers some additional personal observations about the Court's work in the employment and labor area, with a particular eye on the larger currents that move the Court.

I. The Scope of the Court's Work in the 2009 Term.

The eclectic range of questions presented in the Court's 2009 Term employment cases reflected many current concerns of the business community, organized labor and workers alike. Among other things, the Court fleshed out the division of jurisdiction between arbitrators and courts in determining challenges to the process of arbitration, breathed a whiff of new life into disparate impact suits challenging local government hiring and promotion tests, disapproved decisions made by less than a quorum of members of the National Labor Relations Board ("NLRB" or "Board"), limited the privacy expectations of public employees in their personal worktime text messages, and narrowed the operation of both the False Claims Act ("FCA") and the federal "honest services" law. The broad scope of the Court's work did not afford it an opportunity, as in the prior term, to concentrate on fashioning in any detail a particular corner of the law. But, one gets the impression that the controlling majority of the Court continued to take up the issues it deemed important to the business community and provided equity owners and management with a generally favorable batch of decisions.

The volume of employment-related decisions during the 2009 Term was noteworthy, if one adds to the modest number of traditional employment and labor cases a large cohort of adjective and other rulings bearing less directly on the employment relationship. Viewing the docket thusly, the Court decided 14 cases involving some principle of employment or labor law

or determining how employment and labor disputes are to be resolved. Looking at the Court's entire decision docket, and subtracting criminal and other non-substantive civil matters, cases related in some way to employment accounted for more than 20% of the civil merits docket, a remarkable figure. This focus on the workplace issues continues a trend over the last few terms and highlights the realization that work plays a central role in the lives of American families and businesses alike. Furthermore, from the grants of certiorari for cases to be argued in the coming term, it appears that, for better or worse depending on one's perspective, the Court intends to maintain some degree of concentration on employment issues.

In a small departure from the tendency of recent terms, the Court displayed a bit less overt divisiveness in its employment decisions. Of the 14 employment related cases, only 5 were decided by a bare majority vote of five Justices. Perhaps more noteworthy is the fact that 7 of the 14 employment cases were decided unanimously. It would be a mistake, however, to conclude that the Court's approach to employment issues is less fractured now or that the unanimity displayed during the 2009 Term will continue when a newly constituted Conference fully engages with the addition of Justice Elena Kagan. Indeed, it is more likely than not that employment cases will continue to divide the Justices along the same broad fault line that has split the Court on so many political and cultural issues of the day.

Lastly, viewing the 2009 Term's employment cases in the broader context of the Court's entire opinion docket, workplace issues - however consequential they may be - mostly pale in comparison to the overarching importance of cases such as *Citizens United v. Federal Election Commission*, 558 U.S. ---, 175 L. Ed. 2d 753, 130 S. Ct. --- (2010) (First Amendment right of corporations to spend their own funds on election campaign advertising), *McDonald v. City of Chicago*, 561 U.S. ---, 177 L. Ed. 2d 894, 130 S. Ct. --- (2010) (Personal right to bear arms applicable to state and local governments under the Fourteenth Amendment), *Bilski v. Kappos*, 561 U.S. ---, 177 L. Ed. 2d 792, 130 S. Ct. --- (2010) (Patentability of business method), and *Holder v. Humanitarian Law Project*, 561 U.S. ---, 177 L. Ed. 2d 355, 130 S. Ct. --- (2010) (Material support of foreign terrorist organization). Looking through this wider lens, therefore, one must be careful not to draw principles and trends from the employment cases that are broader than their confined context warrants. Despite this caveat, one can safely venture that what the Court did in the employment area this term seemed to be of a piece with its rightward tilt since the seating of Justice Alito. But, before engaging in more expansive observations about the Court's body of work (which is offered in the concluding section of this article), one should first digest the decisions themselves.

II. The Decisions of the 2009 Term.

A. Employment Discrimination

In contrast to the prior term's focus on the meaning of discrimination in a number of cases, the lone employment discrimination case ostensibly dealt with the discrete issue of

timeliness in disparate impact cases. As shown below, however, this decision may turn out to be consequential on multiple levels and thus bears a close look. Despite the dearth of traditional discrimination cases, two non-employment decisions treated issues that pop up with regularity in the employment area. While these cases do not warrant extended treatment, they should not be overlooked by the careful practitioner or interested observer.

In *Hemi Group, LLC v. City of New York*, 559 U.S. ---, 176 L. Ed. 2d 943, 130 S. Ct. --- (2010), the Court, in a 5 to 3 decision (Justice Sotomayor recused), the Court dismissed the City of New York's RICO claim for lost tax revenues against an on-line seller of cigarettes. Chief Justice Roberts' opinion, joined by Justices Scalia, Thomas and Alito, reasons that the City could not show that it lost the tax revenue "by reason of" the seller's failure under federal law to file customer information with the State (which forwards that information to the City.) Justice Ginsburg concurred in the result, but did not join the plurality's proximate cause analysis. The plurality's concern with proximate cause may find expression beyond the realm of RICO, most particularly as a means of confining an employee's claim for damages to the narrow circumstance where a violation of Title VII proximately and materially causes a compensable injury. Moreover, the plurality's rationale might also be useful to defendants in so-called "cats paw" cases, where evidence of bias may or may not be the proximate cause of an adverse employment action. That Justice Kennedy declined to join the Chief Justice's opinion (and, in fact, joined the dissenters), however, may temper the most ominous prospect of this decision. Nonetheless, a potential for mischief in the employment area lurks in this case.

In *Mac's Shell Service, Inc. v. Shell Oil Products, etc.*, 559 U.S. ---, 176 L. Ed. 2d 36, 130 S. Ct. --- (2010), the Court held in a unanimous opinion by Justice Alito that service station franchisees cannot recover for constructive termination of their franchises under the Petroleum Marketing Practices Act if the franchisor's wrongful conduct did not compel the franchisee to abandon its franchise. This holding replicates the Court's analogous conclusion that an employee "generally is required to quit her or his job" in order to recover for a constructive discharge under the employment discrimination statutes. 176 L. Ed. 2d at 47. Indeed, Justice Alito expressly relied on employment law as evidence of a "general understanding" about the doctrine of constructive termination. *Ibid.* Whatever misgivings some of the Justices previously expressed about requiring job abandonment as a condition of bringing a constructive discharge claim, the Court's unanimous embrace of Justice Alito's description of the general understanding about constructive termination bodes ill for any reconsideration of this doctrine in the employment area.

Lewis v. City of Chicago, Illinois, 560 U.S. ---, 176 L. Ed. 2d 967, 130 S. Ct. --- (2010)

The Court decided that a plaintiff who does not file a timely charge challenging the adoption of an employment practice may nonetheless assert a disparate impact claim in a timely charge challenging the employer's later application of that practice.

In July of 1995, the City of Chicago administered a written examination to more than 26,000 applicants seeking to serve in the city's fire department. After scoring the examination and reporting the results, the City announced in January of 1996 that it would begin drawing randomly from the "well qualified" applicants (those who scored 89 or above) for further assessment (physical ability, background, medical and drug test) for hiring. Those who scored below 65 were notified that they were not qualified, and those who scored between 65 and 88 were notified that they had passed, but would not likely be called for further processing. They were told, however, that their names would remain on the Eligible List of "qualified" applicants. Over the next six years the City drew eleven groups randomly from the "well qualified" pool until it was exhausted in the last draw (and it thereafter filled the remaining slots from the Eligible List of "qualified" applicants.)

Crawford M. Smith, a black applicant who passed the examination and was in the "qualified" pool, filed a charge of discrimination on March 31, 1997 after the City failed to hire him. After the EEOC issued right to sue letters to Smith and five other "qualified" black applicants in July of 1998, the group, on behalf of 6000 black applicants who scored in the "qualified" range, sued the City two months later, alleging that the practice of selecting only from the "well qualified" pool had a disparate impact on black applicants in violation of Title VII. The City moved for summary judgment on the ground that the applicants had not filed their charge within 300 days after their claims accrued. The district court denied the motion, concluding that the City's ongoing reliance on the test scores was a continuing violation of Title VII. The City stipulated in the final pre-trial order that the examination had a "severe disparate impact" on black applicants, but that the 89 cut-off score was justified by business necessity. The district court, after an 8-day bench trial, rejected the business necessity defense, ordered the City to hire 132 randomly selected class members and awarded backpay to be divided among the remaining class members. The Seventh Circuit reversed, holding that the suit was untimely because the earliest charge was filed more than 300 days after the only discriminatory act - namely, sorting the scores into the three categories. The court reasoned that all hiring decisions after that act were automatic and thus immaterial, as they were not the products of fresh acts of discrimination. The Supreme Court granted certiorari.

The Court, in a unanimous opinion by Justice Scalia, reversed the Seventh Circuit and ruled that the plaintiffs established a prima facie case of disparate impact discrimination under section 703(k) of Title VII by showing that the City used an employment practice that causes a prohibited disparate impact. Specifically, the Court held that by using the challenged practice of excluding qualified applicants who scored below 89, the City committed a violation of section 703(k), unless it could plead and prove an affirmative defense of business necessity. Reframing the timeliness issue as one of definition of disparate impact discrimination, Justice Scalia concluded that the applicants' claim satisfied the requirements of section 703(k)(1)(A)(i) of Title VII, reasoning that the exclusion of the "qualified" pool of applicants was an "employment practice" and that the City made "use" of it each time it selected a group for processing to the next level. Because each such use allegedly caused a disparate impact, the plaintiffs stated a cognizable Title VII claim. Rejecting the City's view of section 703 simply as

a burden of proof provision (as the section's title implies), the Court said that the section defines the elements of a disparate impact claim and that unless a defendant pleads and proves the affirmative defense of business necessity in that section, "the plaintiff wins simply by showing the stated elements."

Justice Scalia's opinion also rejected the City's argument that the only actionable discriminatory conduct was its use in 1996 of the examination results to create the three categories of applicants. The Court agreed that under *United Air Lines v. Evans*, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977), adoption of the 89 cutoff score and creation of the three classes may have been an act of disparate impact discrimination which went unchallenged and may now be treated as lawful. But, Justice Scalia points out that it does not follow that new violations could not occur when the City implemented its decision later on. Moreover, because plaintiffs in a disparate impact case need not prove discriminatory intent at all, the City's later use of its 1996 classification decision is not properly regarded under the *Evans* line of cases as a "present effect" of past discrimination. The present effects limitation is thus confined to disparate treatment cases and has no application here, even if that means that the reach of the two theories of liability is not coextensive (as the Seventh Circuit had reasoned.) As Justice Scalia emphasizes, the Court cannot rewrite Title VII to cover that which it thinks is necessary to achieve what it thinks Congress really intended.

As for the City's argument that plaintiffs litigated their claims only on a continuing violation theory (which was later abandoned) and thus failed to prove their case at trial on the different theory argued here, Justice Scalia said that such an argument is beside the point because the only question before the Court was whether plaintiffs had alleged a cognizable claim. That is all the Court holds, while pointing out that if the Seventh Circuit determines that the City's argument was preserved, then it may be available to the City on remand. The Court also rejected policy arguments by the City and its *amici* about employers having to defend on stale evidence or plaintiffs being induced to bring premature claims. While acknowledging that both parties' reading of Title VII may bring about puzzling results, Justice Scalia again says that it is not the Court's role to adopt a rule that produces the least mischief. Instead, the Court must give effect to the law as enacted by Congress, and if that effect is unintended, it is up to Congress to fix the problem. Finally, the Court left it to the Seventh Circuit to decide on remand whether the district court's judgment should be modified in light of plaintiffs' agreement with the City's argument that the judgment should not cover the first use of the scoring system because it was outside the limitations period for the earliest charge.

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The promise of this decision is less certainty about the validity of established hiring and promotion practices, a greater likelihood of more disparate impact challenges to those practices, and an almost certain rebirth of a cottage industry of statistical experts, testing mavens and, of course, lawyers specializing in prosecuting and defending disparate impact claims. While many commentators regard this case as a statute of limitations decision, my

take is somewhat different. What first appeared to be a cert grant involving a discrete question of timeliness of disparate impact claims morphed into a construction of section 703(k) that appears to invite challenges to existing - even longstanding - practices whose current use by employers causes an prohibited disparate impact. The immediate effect of this decision is salutary: It should result in a prompt self-examination by employers of the effects of their hiring and promotion protocols. Those employers who ignore this case will do so at their peril, for the Court's clarion reaffirmation of the disparate impact theory of discrimination appears as unequivocal as it is unassailable.

On the other hand, this is a more grudging decision than its unanimity suggests. First, the assignment of this opinion by the Chief Justice to Justice Scalia, an undisguised critic of discrimination theories that venture beyond the most obvious and egregious kinds of intentional treatment, set the stage for a less than robust appreciation of the disparate impact theory of discrimination. Second, as expected therefore, Justice Scalia treats the disparate impact form of discrimination as nothing more than a theory to which the Court need not have subscribed until Congress codified it in an amendment to section 703(k). To respond to that dictum adequately is beyond the scope of this article, but there is certainly a respectable point to be made that section 703(a)(2) itself is sufficient to support an ongoing disparate impact claim based on an employer's continuing use of a facially neutral classification having a disparate impact on its employees. The critical language of causation used in section 703(a) [i.e., "because of"] assuredly covers intentional discrimination, but does not, as Justice Scalia implies, necessarily exclude by its terms a claim of discriminatory impact. Third, Justice Scalia ominously raises, but ultimately leaves open, the question of how timeliness of class claims are to be computed. Slip Opin. at fn. 4. For purposes of this case only, his opinion assumes that the date of the earliest EEOC charge filed by a named plaintiff controls the timeliness of the class's claims. One can easily envision defense counsel salivating at the prospect of accepting this thinly veiled invitation to litigate the point in order to narrow the range of class members entitled to relief.

Looking at the effect of the decision on the parties themselves, the Court's opinion leaves something to be desired in its lack of finality. As noted in the case summary, Justice Scalia opened the door to an argument by the City on remand that plaintiffs litigated their claims on an abandoned theory of a single ongoing violation and that they failed to prove that the City's later "use" of the system it created in 1996 caused a disparate impact in violation of Title VII. What this prospect means for the plaintiffs is uncertain, as the case might have to be retried or, at the very least, the judgment might have to be amended after further hearings. In any case, it will be the better part of two decades before any black applicant can get relief from what the Court now holds is a cognizable claim of disparate impact racial discrimination. In light of Title VII's requirement in section 706 that claims be treated expeditiously, the ultimate result here is shamefully incomplete and tardy. Applicants who were in their 30's when they took and passed the examination are now in their late 40's and 50's, not the ideal time to begin a first responder career. In short, the Court did less than full justice to the parties by postponing a final result yet again.

B. Labor-Management Relations

Traditional labor law once again was in the limelight, with three cases involving some aspect of labor-management relations. In the first case discussed below (one that concerns administrative law as much as labor law) the Court's decision paves the way for the Board to accelerate the pace and scope of its work, thus providing fodder for the courts of appeals and possibly the Supreme Court itself on a variety of issues under the National Labor Relations Act ("NLRA"). The other two decisions involve arbitration nearly as much as they do labor relations, but they are more appropriately placed in this section of the article as labor relations cases because the Court was directly construing the NLRA in one case and a distinctive provision of the Railway Labor Act ("RLA") in the other one.

While none of these labor relations cases dealt with traditional unfair labor practice or representation case issues, the way is now cleared for the NLRB to accelerate its work on both "C" case and "R" case questions that have remained unresolved for the last several years. One can expect, therefore, an uptick in both trial and appellate work at the administrative and court of appeals levels over the next couple of years. With that increase in litigation should also come newly refined questions for the Supreme Court to wrestle with a few terms down the road. After several quiet terms in the area of labor relations, it will be refreshing (at least to older practitioners) to see this corner of employment law revitalized to some degree.

New Process Steel, L.P. v. National Labor Relations Board, 560 U.S. ---, 177 L. Ed. 2d 162, 130 S. Ct. --- (2010)

The Court decided that two remaining members of the Board did not constitute a valid quorum for exercising authority delegated by the Board to a three-member group under section 3(b) of the NLRA.

In 2007 the Board consisted of four members with one vacancy. Two of the sitting members were on recess appointments which would expire at the end of the year. To preserve the Board's authority to function, the four sitting members on December 27, 2007, delegated all of the Board's powers to a three-member group of Members Liebman, Schaumber and Kirsanow, expressing its opinion that after the expiration of Kirsanow's appointment on December 31, 2007, the remaining two members would constitute a quorum of the three-member group. The delegation terminated on March 27, 2010, when President Obama made two recess appointments to the Board.

During the 27 months when the Board functioned with two members, it decided almost 600 cases, including one that sustained two unfair labor practice complaints against New Process Steel, L.P., which sought review of both orders challenging the Board's authority to act with two members. The Seventh Circuit ruled in the Board's favor, concluding that the two members constituted a valid quorum of the three-member group to which the Board had

legitimately delegated all its powers. The Supreme Court granted certiorari to resolve a conflict among the circuits on this conclusion.

The Court, in a 5 to 4 decision, reversed the Seventh Circuit's judgment and held that section 3(b) of the NLRA requires that the delegee group maintain its membership of three in order to exercise Board authority. Accordingly, the additional language of that section permitting two members as a quorum of a three-member group became inapplicable upon the expiration of Member Kirsanow's term on December 31, 2007. Justice Stevens' opinion for the majority reasoned that, construing section 3(b) as a whole, the better reading of its delegation clause is that the delegee group must maintain a membership of three in order for the delegation to remain valid. According to the majority, this reading gives effect to all parts of section 3(b), is consistent with Congress' intent that the delegee group have three members, and is consistent with longstanding Board practice.

The majority also rejected the Government's argument that the group quorum provision permitting two members to act necessarily means that they can validly do so even when the group of three to which the Board delegated authority fails to exist. The Court also rejected the Government's analogy to quorum provisions for court of appeals panels, concluding that they are "worlds apart" from the "standing panel plenipotentiary" created by section 3(b). Finally, the Court was not persuaded by the policy argument that advancing the Congressional objective of Board efficiency justified approval of two member decisions. In so concluding, Justice Stevens stressed that section 3(b) had been amended to increase the delegation requirement from two to three members, thus casting doubt on Congress' intention to approve the pre-Taft-Hartley practice of two member panels.

Justice Kennedy, joined by Justices Breyer, Ginsburg and Sotomayor, dissented, concluding that the orderly operation of the NLRA is better respected and the statute is better construed by permitting a two member quorum of a properly designated three member group to issue orders. The dissenters note that nothing in the NLRA suggests that a delegation expires when one delegee's seat becomes vacant and that a contrary conclusion flies in the face of the vacancy provision in section 3(b). Contrary to the majority, the dissenters deny that the Court's reading of section 3(b) harmonizes all its parts, because it ignores the plain meaning of the vacancy clause. Further, Justice Kennedy points out that permitting two member orders is not inconsistent with Congress' intent that the Board keep operating under "suboptimal" circumstances, for the statute permits two member orders in other exigent circumstances, such as when a member is disqualified. Justice Kennedy also rejects the majority's view that the Board's historic practice necessarily means that two member quorum of a properly designated group cannot continue to function upon the expiration of the term of one member of the group. Finally, the dissenters take the majority to task for failing to reject explicitly the New Process' argument that the Board must have a quorum of three members at all times in order for any delegation of power to be effective.

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No substantive labor law principle was directly in controversy in this case, so its significance is really in the realm of administrative agency law, not labor-management relations. But the context of the case is so intimately related to the practice of labor law that a failure to include it here would be heresy of the first order.

This much-anticipated decision did not disappoint the employer and management side of the labor bar and their business community clientele. For more than two years employers and their counsel had steadfastly maintained that the two-member Board was not exercising legitimate authority. This case proved them correct, as a matter of law, if not (in the opinion of some observers from the other side of the fence) as a matter of common sense. Justice Stevens' careful parsing of the language of section 3(b) of the NLRA can hardly be faulted as an exercise of statutory interpretation. His effort to harmonize all the language of section 3(b) is persuasive, and his analysis (which included no legislative history) did not even draw a separate concurrence from Justice Scalia, whose methods of statutory interpretation ordinarily are at odds with Justice Stevens' approach. (Who knows, however, what might have happened if Justice Kagan had already taken Justice Stevens' seat when the case was argued and decided.)

And yet, the majority's inattention to the practical consequences of delegitimizing nearly 600 decisions makes one wonder whether the dissent's contrary view of the delegation clause is the more sensible one that Congress itself intended. To be sure, Justice Kennedy's interpretation of section 3(b) is a plausible one, but ultimately it is not as compelling textually as Justice Stevens' construction of the entire section. On the other hand, Justice Kennedy makes a good case for regarding the statute (not just one section of it) holistically, with the result that the majority's view is at war with the objective of the NLRA that the Board continue to function in order to foster industrial peace. Ultimately, text trumped policy when it came to garnering five votes, so Justice Stevens' close textual reading prevailed despite sensible grounds for a contrary result. Notably, the Court did leave open the propriety of the Board's delegation under section 3(d) of authority to the General Counsel, the matter on which the dissenters took Justice Stevens to task for failing to resolve explicitly. Given Justice Stevens' explanation in footnote 4, however, it seems unlikely that one could have successfully challenged the General Counsel's authority during the 26-month two member period.

For now, at least, the original crisis is past - except for those involved in the 600 or so cases that are subject to some further action upon remand from the Court. The NLRB has already begun handing down new decisions in some of these cases, as the new Board members are being assigned to panels of three (with Member Liebman and, until the end of his term on August 20, 2010, Member Schaumber.) While further challenges to these decisions are possible, it appears that the two-member decisions will be reissued without much difficulty or additional fanfare. Much more importantly, the NLRB will now be able to focus on a large number of issues that could not be resolved by the two Members during their tenure without other colleagues.

Granite Rock Co. v. Int'l B'hd of Teamsters, et al., 561 U.S. ---, 177 L. Ed. 2d 567, 130 S. Ct. --- (2010)

The Court decided (a) that the parties' dispute over the ratification date of their collective bargaining agreement was for the arbitrator to resolve and (b) that there is insufficient reason for the courts to recognize a federal common law cause of action for tortious interference with contract under section 301 of the Labor Management Relations Act, 1947,

Granite Rock Company ("GRC"), a building materials company with more than 800 employees working under different labor contracts with several unions, was a party to a collective bargaining agreement with Teamsters Local 287 ("Local 287") that expired in April of 2004. When negotiations over a new agreement reached an impasse, Local 287 members initiated a strike in support of their contract demands. The strike ended on July 2, 2004, when the parties reached an agreement on a new contract. Contrary to advice from the International Brotherhood of Teamsters ("IBT"), Local 287 did not make any separate back-to-work or hold-harmless agreement with GRC a condition of returning to work, nor was any such agreement in place when its members ratified the new contract. To secure such an agreement, IBT instructed Local 287 members not to honor their agreement to return to work on July 5 and instructed the local's leaders to continue the strike until GRC agreed to hold the striking workers harmless from liability for the June strike. GRC refused the request for such an agreement and told the local that it would view a continuation of the strike a violation of the new contract's no-strike clause. IBT and Local 287 responded by announcing a company-wide strike.

On July 9, 2004 GRC sued IBT and Local 287 in federal court seeking both damages and an injunction against the ongoing July strike, alleging that Local 287 was violating the new contract's no-strike clause and that the dispute over a hold-harmless agreement was an arbitrable grievance. The unions conceded that the district court had jurisdiction under section 301(a) of the Labor-Management Relations Act ("LMRA"), but asserted that the new contract was not validly ratified on July 2, 2004 or any pertinent time thereafter and that the no-strike clause was thus ineffective. The district court initially denied enforcement of the new contract's no-strike clause, and GRC moved to set aside that ruling. While that motion was pending, Local 287 conducted a second successful ratification vote on August 22, 2004, and the strike was called off on September 13, 2004, the day of the district court's hearing on GRC's motion. The district court granted the motion and permitted GRC to proceed on its damages claim, the request for an injunction having been mooted by the return to work. GRC amended its complaint to add federal tortious interference claims against IBT. The district court dismissed the tort claims, concluding that LMRA section 301(a) is limited to breach of contract causes of action. Further concluding that the parties' dispute over the proper ratification date (either July 2 or August 22) was an issue for the court and not for arbitration, the district court submitted

that issue to a jury. The jury ruled unanimously that Local 287 ratified the new contract on July 2, 2004, and the district court ordered the parties to arbitrate GRC's contract claims for strike-related damages.

The Ninth Circuit affirmed dismissal of the tortious interference claims against IBT. It disagreed, however, that the dispute over the ratification date was for the court. Reasoning that this issue was governed by the new contract's arbitration clause, that national policy favors arbitration and that GRC had implicitly consented to arbitration by suing under a contract requiring arbitration, the Court of Appeals reversed the district court's resolution of the ratification date issue. The Supreme Court granted certiorari.

The Court, in an opinion by Justice Thomas, (a) held by a vote of 7 to 2 that the ratification date issue was a matter for the district court and not an arbitrator to resolve and (b) held unanimously that the lower courts did not err in declining to recognize a new federal common law cause of action under LMRA section 301(a) for tortious interference with the new contract.

After restating the existing framework requiring courts to decide whether the parties have formed an agreement to arbitrate a particular dispute, the Court says that the parties here agreed that whether their ratification dispute was arbitrable was a decision for the district court. Rejecting Local 287's arguments and the rationale of the Seventh Circuit, Justice Thomas concluded that the federal policy favoring arbitration applies only after a court is persuaded that the arbitration agreement is validly formed, covers the dispute at hand and is legally enforceable. The policy-based presumption favoring arbitrability, therefore, does not override the principle that the courts may not submit to arbitration a dispute that the parties have not agreed to arbitrate. Because the questions central to Local 287's demand for arbitration involve when the new contract was formed and whether its arbitration clause covered the underlying dispute, those questions could not be decided by an arbitrator.

While recognizing that not every dispute about an agreement's ratification date would require judicial resolution, the date here would determine the issue of consent to arbitration, so it had to be judicially resolved, according to the Court. Justice Thomas rejected the argument that because the formation question was related to the underlying dispute, it must be arbitrable as a matter arising under the new contract. That argument, according to the Court, fails if the new contract was not in existence when the July strike began. Thus, the Court concluded that the Seventh Circuit erred in holding that it was not necessary for the district court to determine the ratification date in order to decide whether the parties had effectively agreed to arbitrate the strike claim. Justice Thomas added that Local 287 had, by failing to raise it on appeal, waived any argument that the parties later agreed that new contract had become effective when the old contract expired in May of 2004. Further, the Court concluded that the formation dispute could not be deemed to arise under a provision that does not fairly include controversies about when the contract came into existence. Finally, Justice Thomas rejected the argument that GRC consented to arbitration of the formation dispute by suing to enforce the no-strike clause,

largely because it was Local 287 that raised arbitration as an affirmative defense to GRC's request for an injunction.

The Court then held unanimously that GRC's claim that IBT tortiously interfered with the collective bargaining agreement is not cognizable under LMRA section 301(a). Justice Thomas' opinion rejected GRC's argument that failure to recognize such a claim would be inconsistent with federal labor statutes and the Court's own precedents. While affirming that the federal courts are to fashion a body of federal law for the enforcement of collective bargaining agreements, it cited with approval language from the lower courts that confines this authority to developing a common law of contracts. Accordingly, the Court said it would be "premature" to recognize a common law tort, assuming that section 301(a) would authorize such a move. Buttressing this conclusion, the Court, explaining that it did not mean to approve of IBT's actions, recounted a number of remedies it said had not been fully tested at the NLRB or on remand and even suggested that GRC might have a remedy under state law.

Justice Sotomayor, joined by Justice Stevens, dissented from the Court's conclusion about who should decide the formation date issue. In her view, the parties clearly agreed in the new contract to have an arbitrator decide. Because the agreement executed by the parties in December of 2004 made the new contract effective retroactive to May 1, 2004, it was effective when Local 287 went on strike in July and its arbitration clause was thus operative at that date. The dispute between Local 287 and GRC about when the contract was ratified is thus a dispute that arises under the contract and should thus be decided by the arbitrator. According to the dissenters, what is important is that the dispute over the ratification date arose after May 1, 2004, the effective date of the agreement. That being the case, the ratification date is not a formation dispute subject to judicial resolution; it is simply a defense that goes to the merits of whether the Union was privileged to go on strike at a time when it arguably had not ratified the contract. That defense is part of the grievance for the arbitrator, according to Justice Sotomayor. Finally, as to the Court's position that this retroactive effectiveness argument had been waived, the dissenters say that it is regrettable that it had not previously been raised, but it cannot now be ignored.

* * * *

This decision is a significant one for labor law practitioners on several levels. First, it supposedly clarified the division of jurisdiction between the courts and arbitrators on the threshold issue of whether the parties have effectively agreed to arbitrate a labor dispute. On that issue the Court essentially reaffirmed the traditional rule that the courts are to determine whether the parties have entered into a valid and effective agreement to arbitrate the underlying issue in dispute (even though factual issues involving time and timeliness had hitherto been considered by many to be for the arbitrators.) In a puzzling footnote, however, Justice Thomas noted that neither party argued that the issue of arbitrability of the parties' ratification dispute was for the arbitrator. Query whether the ambiguity in this footnote leaves that issue an unsettled one.

Second, the Court unanimously declined to recognize a new federal common law cause of action under LMRA section 301 for an international union's tortious interference with a collective bargaining agreement between one of its constituent locals and an employer. In doing so, however, the Court held out some hope (or conveyed a veiled threat, depending on one's point of view) that if other avenues for deterrence and redress of union misconduct are not available, the issue of recognizing a new federal labor tort could be revisited. Given the high tension of labor-management relations, the prospect of a viable claim against an international union for interference with a collective bargaining agreement was not wholly eliminated by this decision.

Finally, the Court, in declining to sustain GRC's tort claim, provided a useful roadmap to employers faced with what they regard as union misconduct under a collective bargaining agreement. If the remedial path to both equitable and legal relief were not clearly marked before this case, Justice Thomas' majority opinion certainly left a trail of broad hints about how to obtain such relief in the absence of a viable section 301 tort claim.

Union Pacific Rr. Co. v. B'hd of Locomotive Engineers, etc., 558 U.S. ---, 175 L. Ed. 2d 428, 130 S. Ct. --- (2010)

The Court decided that under the Railway Labor Act ("RLA"), the National Railroad Adjustment Board had jurisdiction to arbitrate employee disciplinary disputes, regardless of whether the parties had attempted to settle the disputes in conference as required by the RLA.

The "Carrier," Union Pacific Railroad Company, charged five of its employees with disciplinary violations, and the employees' union, the Brotherhood of Locomotive Engineers and Trainmen ("Union") grieved the discipline under the parties' collective bargaining agreement. Following exhaustion of the grievance proceedings and "conferencing" (*i.e.*, meeting to discuss possible settlement) of at least two of the disputes in accordance with the RLA, the Union sought arbitration before the First Division of the National Railroad Adjustment Board ("NRAB"). Neither party's submission to the NRAB mentioned conferencing of any of the five disputes. An industry representative on the arbitration panel raised an objection to the proceeding based on proof of conferencing in the record, and the neutral referee adjourned the hearing to permit the Union to submit such proof. The Union did so, though it maintained that the Carrier had waived the conferencing issue by not objecting in timely fashion. Approximately one year later the panel, over the dissent of two Union members, dismissed all five cases for want of "authority to assume jurisdiction" over the claims, though it observed that there was evidence supporting the Union's position on conferencing.

The Union filed a petition for review in federal district court on the grounds that nothing in the RLA itself or the NRAB's rules mandates dismissal for failure to allege and

prove conferencing of a grievance and that the Carrier had failed to raise this issue in its submissions. The district court affirmed the NRAB's dismissal orders, accepting the panel's description of the issue as jurisdictional. The Seventh Circuit, accepting the Union's view of the RLA's requirements, reversed, but rested its decision on the ground that the NRAB's proceedings were incompatible with constitutional due process of law. The Supreme Court granted certiorari to address the constitutional question.

The Court unanimously affirmed the Seventh Circuit's judgment in an opinion by Justice Ginsburg. After describing the statutory pattern of the RLA and the factual history of the grievances, the Court took note that the Union urged that the Court should, without addressing the constitutional issue, affirm the Seventh Circuit's judgment on the alternative ground that the NRAB had not followed the statute itself. That is precisely what the Court did, criticizing the Seventh Circuit for framing the issue as a constitutional one for reasons that Justice Ginsburg said were "far from apparent" to the Court. In short, the Court ruled first that the due process question about review of an NRAB ruling must await a case in which the issue is genuinely in controversy.

Turning to the statutory issue under the RLA, 45 U.S.C. 152 and 153, the Court held that the requirement to conference a "minor dispute" (*i.e.*, grievance) before arbitration is not jurisdictional in the sense that it "condition[s] the adjudicatory authority of the [NRAB]." Justice Ginsburg reasoned that conferencing is independent of the grievance process itself and that the duty to conference a dispute does not by its statutory terms affect the jurisdiction of the NRAB. That the NRAB's procedural regulations require conferencing of disputes is not authoritative because, according to the Court, Congress did not give the NRAB authority to adopt jurisdictional rules. Moreover, Justice Ginsburg pointed out that the rules do not exclude the sensible solution of adjourning a proceeding to cure any lapse in conferencing (a point the Carrier's counsel acknowledged at oral argument and some panels have actually required.) Finally, the Court read the RLA's and the NRAB's pleading requirements as claims processing instructions and not jurisdictional rules, noting that submission of proof of conferencing was not even identified by the parties as a question in dispute and that, in any event, it could not be regarded as jurisdictional.

* * * *

What began as a grant of certiorari to decide an important constitutional question about the operation of the RLA ended here as a straightforward unanimous statutory interpretation case involving a tiny corner of railroad labor law. The short of the matter is that a potential barrier to grievance arbitration of disciplinary disputes has been effectively removed by this decision. The Court's rather pointed criticism of the Seventh Circuit for framing the issue as a constitutional one in the face of a more obvious statutory construction question is notable, as is Justice Ginsburg's review of what the Court has said is (or is not) jurisdictional in past decisions, including some Title VII cases. No more needs to be said about the clear and unequivocal holding that conferencing of grievances is not a jurisdictional

requirement for arbitrating disciplinary grievances under the RLA. Aside from this clarification of the law, the Court's decision is not likely to arouse much interest, except among the relatively few RLA practitioners and an even smaller group of rail enthusiast lawyers (such as yours truly.)

C. Employee Benefits

The Court's two cases involving the Employee Retirement Income Security Act of 1974 ("ERISA") addressed a question about attorneys' fees and an issue about the scope of a plan administrator's discretion after wrongfully interpreting a plan provision. That description of these cases, however, understates their potential importance to the bench, bar and plan sponsors and administrators alike. While neither case generated much interest in the labor and employment bar (much less the general public), their potential for lasting significance can easily be overlooked. Both decisions thus bear close looks by employee benefits practitioners.

Hardt v. Reliance Standard Insurance, 560 U.S. ---, 176 L. Ed 2d 998, 130 S.Ct. --- (2010)

The Court decided that a district court has discretion to award fees to a benefits claimant who is not a prevailing party, so long as she obtained some measure of relief.

Bridget Hardt, an executive assistant to the president of Dan River, Inc., the textile manufacturer, was diagnosed with carpal tunnel syndrome after she began experiencing neck and shoulder pain in 2000. Hardt eventually stopped working in January of 2003 because surgery on both her wrists had not alleviated her pain. In August of 2003 Hardt sought long-term disability benefits from the employer's group plan, which was administered as to benefit determinations by Reliance Standard Life Insurance Company ("Reliance"). After Reliance first denied benefits based on its evaluation of Hardt's performance on a functional capacities examination, Hardt took an administrative appeal, and Reliance concluded that she was entitled to 24 months of temporary benefits because she was totally disabled from her regular occupation. During the pendency of Hardt's administrative appeal Hardt's symptoms worsened and she eventually applied for and received in February of 2005 Social Security disability benefits. Two months later Reliance notified her that the plan benefits would soon expire and that Hardt owed Reliance \$14,913.23 as an offset for her receipt of Social Security benefits. Hardt paid Reliance that offset and then filed a second administrative appeal under the plan along with a submission of updated medical and functional capacity evidence. After two further functional capacity evaluations and a review of some of her medical records by a physician hired by Reliance (who did not examine Hardt), Reliance concluded that its decision to terminate Hardt's benefits after 24 months was correct.

Hardt sued Reliance in federal court, alleging that it had violated ERISA in wrongfully denying her claim for plan disability benefits. The district court denied the parties' cross-motions for summary judgment, concluding that Reliance's determination was based on

incomplete information, as its evaluators had ignored much of what Hardt had submitted on her second appeal. While finding compelling evidence that Hardt was indeed totally disabled from any occupation, the district court concluded that Reliance should be given a chance to address the deficiencies in its approach before ruling in favor of Hardt. Reliance did so and concluded that Hardt was eligible for plan benefits, and it paid her \$55,250 in accrued past-due benefits (and presumably put her "on claim.")

The district court granted Hardt's application under 29 U.S.C. 1132(g)(1) for attorneys' fees, reasoning that she was a "prevailing party" based on the court's remand order. The Fourth Circuit vacated the attorneys' fees order, concluding that Hardt failed to establish she was a prevailing party because the remand order did not require Reliance to award benefits to her. The Supreme Court granted certiorari.

The Court, in an opinion by Justice Thomas, unanimously reversed the judgment of the Fourth Circuit, concluding that an ERISA fee claimant need not be a prevailing party to be eligible for an award of attorneys' fees under section 1132(g)(1) and that the claimant need only show some degree of success on the merits for such eligibility.

On the prevailing party issue, the Court found dispositive the fact that section 1132(g)(1), in contrast to the statute's next subsection, does not contain the term "prevailing party" as a limit on the court's discretion to award fees. The Fourth Circuit's grafting of that term of art onto a fee-shifting statute, in the words of Justice Thomas, more closely resembles inventing a statute rather than interpreting one. The Court's reasoning ends there, just with the text of the statute.

On the issue of how the trial court's discretion is to be exercised in awarding fees in this type of ERISA case, Justice Thomas concludes that the proper markers for exercising such discretion are those laid down in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983), a case construing broad discretionary language in the Clean Air Act. That decision posits that a claimant is not eligible by virtue of trivial success on the merits or a purely procedural victory, but that she must show some degree of success on the merits without having to conduct a lengthy inquiry about whether it was either "substantial" or on a "central issue." While rejecting Reliance's argument that a remand for further consideration by the plan administrator can never constitute success on the merits, Justice Thomas did note the possibility that the trial court could, after determining eligibility, consider the Fourth Circuit's multi-factor test in deciding whether to award fees. Turning to the facts of this case, Justice Thomas noted that while the trial court denied Hardt's summary judgment motion, it did find compelling evidence that she was totally disabled and was "inclined to rule" and would indeed rule in her favor unless Reliance "adequately" considered all of Hardt's evidence on remand. These facts, according to the Court, established that Hardt achieved more than trivial success or a purely procedural victory. That was enough for the Court to resolve this case without deciding whether a remand order, without more, constitutes some success on the merits sufficient for eligibility for a fee award under ERISA.

Justice Stevens wrote a brief concurring opinion expressing the view that *Ruckelshaus* should not be given special weight in interpreting this or any other statute, because its interpretation of the Clean Air Act was mistaken.

* * * *

The Court here deals with a situation that arises quite often and thus provides welcome guidance on a recurring issue of importance to benefits claimants and their counsel. Trial judges in particular will likely applaud the markers laid down by Justice Thomas' opinion in this case. But the utility of this decision goes beyond judicial proceedings. Increasingly, many of these long-term disability cases are resolved at mediation, particularly in jurisdictions where alternative dispute resolution is mandatory. The Court's ruling appears to undercut the argument of plan fiduciaries that they should not be responsible for a beneficiary's attorneys' fees because the beneficiary is not a prevailing party under a court order. On the other hand, having to deal with the issue of attorneys' fees at a mediation (both as to eligibility and amount) may complicate the negotiations and insert an awkward ethical issue into an already delicate process.

This decision could have been placed in the adjective case section, but the Court's interpretation of ERISA's language lends itself more to placement here. In any event, the rule laid down by the Court is not only in keeping with ERISA's remedial purposes, but it also provides an incentive for claimants to obtain counsel early in the process to assist them at the administrative stage and thereby afford plan administrators with a concomitant incentive to evaluate supplemented claims file with great care.

Conkright v. Frommert, 559 U.S. ---, 176 L. Ed. 2d 469, 130 S. Ct. --- (2010)

The Court decided that a single honest mistake in plan interpretation does not justify stripping an administrator of an ERISA pension plan of deference in exercising its discretionary authority for subsequent related interpretations of the plan.

Paul J. Frommert and a class of Xerox Corporation employees sued the Xerox Corporation pension plan and the plan's administrators for violating ERISA in determining how to account for past distributions when calculating their current benefits. These employees had left Xerox in the 1980's and received lump-sum distributions of retirement benefits they had earned until then. When they were rehired, the plan administrator initially interpreted the plan to require the "phantom account" method of calculating their benefits. That method reduced the employees' present benefits by the hypothetical growth that the previously distributed benefits would have attained if the money had remained in Xerox's investment funds. After the administrator rejected the employees' administrative challenges to that method, the employees sued the plan administrator under ERISA. The district court, applying a deferential standard of review, granted summary judgment against the employees. The Second

Circuit vacated and remanded, holding that the plan administrator's interpretation was unreasonable and that the employees had not been adequately notified about use of the phantom account method.

On remand the plan administrator adopted a new approach that calculated the current value of the past distribution by using an interest rate fixed at the time the distribution was made. The district court, declining to adopt a deferential standard of review, adopted an approach that would reduce the employees' benefits only by the nominal amount of their past distributions (without accounting for the time value of money.) The Second Circuit affirmed, concluding that the district court was correct in not deferring to the plan administrator's new approach. The Supreme Court granted certiorari on two issues, first, the district court's failure to defer to the plan administrator's action and second, the Second Circuit's deference to the district court's decision on the merits.

The Court, in a 5 to 3 decision (Justice Sotomayor recused), addressed only the first issue on which review had been granted. In an opinion by the Chief Justice, the Court reversed the judgment of the Second Circuit and held that the plan administrator's original mistaken interpretation did not justify eliminating or changing the deference owed by the district court to the administrator's subsequent interpretation of the plan under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) and *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 171 L. Ed. 2d 299, 128 S. Ct. 2343 (2008).

Chief Justice Roberts' opinion essentially holds that an administrator's prior violation of ERISA will not deprive it of the protection offered by the *Firestone-Met Life* rule of deference in later interpretations of the same plan terms. Characterizing the Xerox plan administrator's prior violation of ERISA as a "single honest mistake," the Court concluded that there is no exception to the rule of deference for such a prior violation. Stressing that there was no finding of bad faith on the part of the administrator, the Court concluded that principles of trust law did not require a contrary result. Chief Justice Roberts also stressed that a rule of deference protects the interests of efficiency, predictability and uniformity in the administration of benefit plans that expert witnesses testified are necessary to encourage the adoption of such plans. Moreover, serving those interests is no less important after an administrator's honest mistake, according to the Court. Finally, the Chief Justice characterized as "overblown" the argument that permitting deference here will disserve ERISA's purposes by encouraging unreasonable interpretations with virtual impunity. The Court noted that dishonest administrators are not entitled to deference and that, in any event, deference does not necessarily mean that an administrator's interpretation is immune from scrutiny. Accordingly, the Court remanded the case for further proceedings.

Justice Breyer, joined by Justices Stevens and Ginsburg, dissented, expressing the view that governing trust principles forbid additional deference to an administrator who has already been found to have abused its discretion. Delving deeply into trust law treatises and other materials, Justice Breyer concluded that there is not a single trust law case that requires a

court to defer to a trustee who has previously abused its discretion. The dissenters also criticize the Court's "one free honest mistake" rule as unprecedented under ERISA and impractical because determining a mistake's "honesty" will complicate judicial review. Because trust law provides the best guide to application of ERISA's principles and leaves to the courts the decision about how much weight to give to an administrator's remedy for its prior abuse of discretion, the dissenters would affirm the Second Circuit's judgment (as well as its use of an abuse of discretion standard in reviewing what the district court did.)

* * * *

The Court's indulgent approach to what it termed a single honest mistake by a plan administrator stems from the Chief Justice's framing of the facts. His frame cleverly (or, maybe too cleverly) obscures the human dimension of the plan administrator's original abuse of the discretion entrusted to it. As Justice Breyer's opinion explains, the phantom account method for calculating the offset to an employee's pension benefits had been in use for many years before the plan was amended in 1989. The plan administrator made what it claimed to be an inadvertent omission in the 1989 amendment: it failed to insert language describing the method of calculating the distribution offset. The returning employees, therefore, had no way to know that the phantom account method might still be used. The plan administrator's continued use of that method, as though it was still written into the plan, was an abuse of discretion in violation of ERISA, as the district court originally held and the Court assumed was the case.

To the Chief Justice, the "mistake" may have seemed inconsequential. For the employees themselves, however, the result was dramatic. In Paul Frommert's case the "mistake" meant his actual monthly pension was only \$5.31 per month, even though he had received a report from the plan administrator that his benefits were \$2482.00 per month. For the Chief Justice to frame the issue as how to treat a "single honest mistake" by a plan administrator glosses over the effect of the administrator's error and thus understates the significance of the district court's original conclusion that the plan administrator actually committed a violation of ERISA.

Chief Justice Roberts' fondness for baseball analogies was also on display again in his opinion. But, his reference to the "one-strike-and-you're-out" argument is a bit disingenuous and fares no better than the unfounded declaration at his confirmation hearing that Justices are like umpires who merely call the balls and strikes. Specifically, it is an overstatement for the Chief Justice to imply that the plan administrators will automatically lose cases and be held liable unless the rule of deference is applied notwithstanding a prior violation of ERISA. What would happen in real life is that administrators would have to defend their subsequent plan interpretations on the merits without the artificial shield against liability supplied by the rule of deference. Liability might be more likely, but it would not be automatic in such cases, as the Chief Justice's baseball phrase implies.

In any event, the Court's opinion is a prime example of going well beyond the neutral umpiring that one would expect from a court. Coming perilously close to judicial legislation, the Court's "one strike" exception for plan administrators is, as Justice Breyer's dissent explains at length, at odds with trust law and finds no explicit support in ERISA itself. On its merits, the rule crafted by the Court is a carrier of significant moral hazard. By shielding plan administrators against their "mistakes" (more precisely, their unreasonable exercises of the discretion entrusted to them), the incentive to act with the proper degree of care and fealty to the plan is reduced, leaving the employee-beneficiaries at greater risk.

As a practical matter, this decision seems to have left the law in a messier state. While administrators may think that they can escape liability for a "single honest mistake" as a result of this case, the reality is that the Court's opinion leaves the door open for challenges based on a plan administrator's competence, as well as his or her good faith. Litigation about whether an administrator's multiple erroneous interpretations is tantamount to an unfair exercise of discretion would be costly, as would litigation about whether the administrator had acted in bad faith or would not exercise its discretion fairly. The Court's opinion specifically points out that the district court made no findings here on the latter point, thus inviting that kind of argument in future cases, if not this one. In short, the effect of this decision on ERISA law settles one question, but only at the expense of raising others.

D. Arbitration

The Court dealt directly with arbitration in four cases. As noted before, because two of these decisions involved construction of labor relations laws, they are included as principal cases in section B above. The other two cases discussed below deal with two issues of considerable importance to litigants and lawyers alike. In the first case the Court attempted to clarify the division of authority between arbitrators and courts in determining challenges to arbitrability. You may judge for yourself whether the Court successfully completed that task or whether it left the law in a greater state of disarray. The second case concerned the availability of class arbitration under the Federal Arbitration Act ("FAA") where the parties' contract was silent on that point. In contrast to the first case, this time the Court was clear and unequivocal in its decision limiting class treatment. In both cases the same five Justices essentially voted for making arbitration a more welcoming forum for the business community.

Rent-A-Center, West, Inc. v. Jackson, 561 U.S. ---, 177 L. Ed. 2d 403, 130 S. Ct. --- (2010)

The Court decided that an employee's challenge to an arbitration agreement on the ground of unconscionability was for the arbitrator to determine where the agreement explicitly assigned that determination to the arbitrator.

Antonio Jackson signed a "Mutual Agreement to Arbitrate Claims" ("Agreement") on February 24, 2003, as a condition of his employment by Rent-A-Center, West, Inc. ("RAC".)

The Agreement required that all past, present or future disputes arising out of this employment, including claims for discrimination and claims for violation of federal law, be arbitrated. The Agreement also provided that the arbitrator would have exclusive authority to determine any dispute relating to the Agreement's enforceability or formation, including any claim that the Agreement was void or voidable.

On February 1, 2007 Jackson sued RAC in federal court under 42 U.S.C. 1981 for employment discrimination. On the basis of the arbitration provisions of the Agreement as described above, RAC filed a motion to dismiss or stay the action under section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. 3, and to compel arbitration under FAA section 4. 9 U.S.C. 4. Jackson opposed the motion on the ground that the Agreement was unconscionable under Nevada law. RAC responded that the arbitrator had exclusive authority to determine the unconscionability claim and that the claim lacked merit in any event.

The district court granted RAC's motion, finding (a) that the Agreement clearly and unmistakably [*sic*] gave the arbitrator the exclusive authority to decide whether the Agreement was enforceable and (b) that Jackson's challenge was to the Agreement as a whole and was thus for the arbitrator under *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 163 L. Ed. 2d. 1038, 126 S. Ct. 1204 (2006). Without oral argument a panel of the Ninth Circuit reversed, holding that where a party's challenge asserts a lack of meaningful assent because of the unconscionability of an agreement, the threshold question of unconscionability is for the court. (The Ninth Circuit also affirmed the district court's alternative conclusion that a fee-sharing provision in the Agreement was not unconscionable and remanded the case for consideration of Jackson's other unconscionability arguments.) Judge Hall dissented on the ground that the question of the Agreement's validity should have gone to the arbitrator as the parties' contract provided.

The Supreme Court reversed the Ninth Circuit's judgment on the arbitrability issue in a 5 to 4 decision. Justice Scalia's opinion for the majority held that under the FAA, where an agreement to arbitrate includes a provision that an arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that provision, the court considers the challenge, but if (as in this case) the party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator. Characterizing the Agreement as containing two arbitration provisions - one for all employment disputes between Jackson and RAC and the other for gateway questions of enforceability delegated to the arbitrator - the majority concludes that the courts must enforce the delegation provision under sections 3 and 4 of the FAA, unless such provision is unenforceable under section 2. Accordingly, Justice Scalia says that the question before the Court is whether the delegation provision is valid under FAA section 2.

The majority next concluded that the delegation provision is severable from the Agreement as a matter of substantive federal arbitration law. It ruled that even though the underlying Agreement is itself an arbitration agreement, that "makes no difference" in applying

the rule of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967) that, absent a specific challenge to the delegation provision, the FAA requires such provision to be treated as valid and that any consideration of a contract revocation defense, such as unconscionability, is for the arbitrator. Justice Scalia then concludes that the district court properly found that Jackson did not specifically challenge the delegation provision, but contested only the Agreement as a whole. Jackson's challenge to the delegation provision in his merits brief in the Supreme Court was deemed too late to be considered. Accordingly, the Court concluded that Jackson's challenge is for the arbitrator and not the court and that the Ninth Circuit's judgment to the contrary should be reversed.

Justice Stevens' dissent, joined by Justices Ginsburg, Breyer and Sotomayor, first examined the various lines of decisions about who decides what and concluded that questions about the validity of an arbitration agreement are usually matters for the court unless (a) the parties have demonstrated clearly and unmistakably an intent to have an arbitrator decide arbitrability or (b) the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part. Justice Stevens would have found that the parties here did not evince a clear and unmistakable intent to submit the question of arbitrability to the the arbitrator.

* * * *

The Court's embrace of arbitration in this case may gladden arbitration's most ardent advocates, but it does little to clarify an already wavy jurisdictional line between arbitrator and judge. For practitioners the lesson of this case is simple: Draft your challenges to arbitration with care and precision. As the Court noted, had Jackson challenged the delegation provision as being unconscionable, the court would have resolved the challenge. The linchpin of Justice Scalia's opinion, however, is that Jackson failed to draft his challenge that way. Instead, he claimed that the arbitration agreement as a whole was unconscionable. Thus, the Court's divide and conquer tactic of separating the delegation clause from the agreement and then holding that Jackson failed to aim his challenge at the clause itself permitted the majority to redraw the jurisdictional line between arbitrator and judge based on its unabashed preference for privatizing litigation of these disputes.

From a doctrinal standpoint, Justice Scalia's opinion for the Court lets nothing, including both the parties' uncertain intent as well as prior caselaw, stand in the way of crafting an application of established doctrine that now permits arbitrators to determine whether an arbitration provision itself is unconscionable - a task ordinarily for the courts. From a policy standpoint, permitting arbitrators to determine the scope of their own power is a risky proposition. Unlike judges, arbitrators constitute an unlicensed, ungoverned profession. To be sure, arbitrators often have considerable relevant experience, and there are also market restraints that apply to them, but because those restraints are essentially based on a scorecard approach, they are a hazardous substitute for judges, whose agenda is broader than trying to get picked for the next case. The shift toward arbitrability sanctioned by this

case, while not surprising in view of the majority's preference for private solutions over government regulation, is nonetheless a somewhat troubling (as well as puzzling) application of settled doctrine.

Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp., 559 U.S. ---, 176 L. Ed. 2d 605, 130 S. Ct. --- (2010)

The Court decided that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act.

Stolt-Nielsen S. A. ("SN") and other shipping companies providing compartmentalized (or "parcel") tankers for shipments of liquids in small amounts, contract with shippers, known as "charterers," by means of "charter parties," *i.e.*, standardized maritime contracts. AnimalFeeds Int'l Corp. ("AF"), a supplier of fish oil to animal-feed producers around the world used a charter party with SN that contained an arbitration clause requiring "any dispute" arising from the contract to be settled by arbitration under the Federal Arbitration Act ("FAA.") After a Department of Justice criminal investigation revealed a price-fixing conspiracy among SN and other shipping companies, AF and other shippers brought putative class actions against SN and other shipping companies alleging antitrust claims. Ultimately, these suits were consolidated, and the parties agreed that the underlying antitrust claims had to be arbitrated by virtue of the charter parties used by the disputants.

AF served the shipping companies with a demand for class arbitration, and the parties entered into an agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators under class arbitration rules adopted by the American Arbitration Association ("AAA.") One of the rules requires the panel to determine, as a threshold matter, whether the arbitration clause permits class arbitration. After empaneling the arbitrators, the parties stipulated that the charter parties' arbitration clause in this case was "silent" with respect to class arbitration, meaning that the parties had reached no agreement on the issue of class arbitration. After hearing evidence and argument, the panel concluded that the arbitration clause in these charter parties allowed for class arbitration.

SN and the shipping companies sought to vacate the panel's award on the ground that it exceeded the arbitrators' powers. The district court vacated the award, concluding that the panel's decision was in manifest disregard of the law because the panel failed to conduct a choice-of-law analysis and thus failed to apply the maritime law rule requiring contracts to be interpreted in light of custom and usage. The Second Circuit reversed, holding that the panel did not act in manifest disregard of either maritime or New York law on the availability of class arbitration. The Supreme Court granted certiorari.

The Court, in a 5 to 3 decision, concluded that the arbitration panel exceeded its powers by imposing its own policy views about class arbitration and, in an opinion by Justice Alito, reversed the contrary judgment of the Second Circuit. The Court begins by recognizing the

"high hurdle" to clear in seeking to vacate an arbitration award. But, Justice Alito concludes that what the arbitration panel did here was to impose its own view of sound policy regarding class arbitration, an act that exceeded the panel's powers. Because the parties' agreement was silent on the issue of class arbitration, the only proper task of the arbitrators was to identify the rule of law that would govern the situation. Without attempting to do so by looking to the FAA or to New York law or maritime law, the panel based its decision on a number of cases expressing what it believed to be the correct policy toward class arbitration. Accordingly, by imposing its own conception of sound policy, the panel acted beyond its powers.

The Court then decided that on the facts before it there could be only one possible outcome of a proper review, so there was no need to remand the case to the arbitrators. Instead, the Court ruled that because arbitration is a matter of consent and because the parties' here did not consent to class arbitration, then that remedy cannot be imposed on them. In so holding, the Court noted that the parties were baffled by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995), which neither controlled this issue nor even required that it be decided by the arbitrators themselves. Upon examination of the Court's prior decisions under the FAA, Justice Alito concluded that the parties agreement not to say anything about class arbitration did not constitute an agreement to engage in it. In doing so, the Court viewed the differences between bi-lateral and class arbitration as too substantial to presume that they were merely matters of procedure for the arbitration panel to decide. Instead, Justice Allito stressed that class arbitration is a matter of actual consent and thus must be justified by an express agreement of the parties on whom it is sought to be imposed.

Justice Ginsburg, joined by Justices Stevens and Breyer, dissented, expressing the view that the partial award of the arbitration panel is not fit for judicial review and the petition for certiorari should therefore be dismissed. The dissenters also concluded that if the merits of the case had to be reached, the Court should have affirmed the Second Circuit on the basis of the narrow standard of review applicable to awards under the FAA. In essence, Justice Ginsburg reasoned that the parties bargained for the arbitrator's construction of the broad arbitration clause and they should be bound by it and not subject to the Court's *de novo* determination of the merits of class arbitration.

* * * *

This decision has the potential to affect arbitration of employment disputes in multiple ways. First, no matter who decides arbitrability - judges or arbitrators - the touchstone is actual consent. (That being the case, one might ask how this principle can be squared with the result in Jackson, supra, involving an allegation of lack of meaningful assent due to unconscionability.) In any event, this case tends to disfavor arbitration of employee grievances in a non-union setting where the employer cannot prove that the employee's consent was knowing and uncoerced or even unaffected by a disparity of bargaining power. Arbitration agreements in employment applications and employer handbooks thus will continue to be highly suspect and difficult to enforce. Second, the decision affords employers little comfort in

defending against attempts by employees to certify class action discrimination or retaliation claims. It is difficult to see anything in the Court's ruling that would have a material effect on the suitability of discrimination cases for class treatment, given the standards of F. R. Civ. P. 23. Finally, this case may draw further attention to the prospect of passing the Arbitration Fairness Act (or some facsimile of it.) While reining in arbitral authority to impose class treatment in the absence of the parties' agreement, the idea that arbitrators might be able to impose class treatment in some cases may spark renewed interest in limiting arbitration of debtor claims, employment claims and other disputes where an obvious disparity of bargaining power makes actual consent almost impossible to prove.

Looking at the case through the other end of the kaleidoscope, employers and insurance fiduciaries of employee benefit plans may find something of value in the Court's opinion when they are defending arbitration of class claims dependent on individual employee reliance (such as ERISA, common law misrepresentation and securities regulation causes of action.) Although it might seem a purely hypothetical application of this case, defendants targeted for class treatment may still resist arbitration (assuming that plaintiffs are urging it) on the ground that they did not give actual consent to arbitrate each individual claim. Whether this argument will have any play in the unionized setting, where an employer's consent is manifested only in an agreement with one party - the union - poses another issue that the courts may have to determine in light of this decision.

E. Sundry Decisions

In several decisions that defy the traditional employment and labor categories, the Court dealt with a number issues of importance to employers and employees alike.

City of Ontario, California v. Quon, 560 U.S. --- 177 L. Ed. 2d 216, 130 S. Ct. --- (2010)

The Court decided that a governmental employer may, without violating the Constitutional ban on unreasonable searches and seizures, read text messages sent to and from a pager owned by the employer and issued to the employee.

Jeff Quon, a sergeant and SWAT team member employed by the City of Ontario, California police department, signed his employer's computer policy acknowledging that the City could monitor his email and Internet use without notice. The City thereafter issued to Quon and his fellow SWAT team members alphanumeric pagers capable of sending and receiving text messages to help the team mobilize and respond to emergencies more efficiently. Although the computer policy did not cover text messaging, the City advised its employees that it would treat text messages the same as emails for purposes of auditing them. Usage of each pager in excess of a monthly allotment of characters sent and received resulted in additional fees to the wireless service provider. After Quon exceeded his monthly allotment, a supervisor reminded him of the possibility of his messages being audited and suggested that Quon could

pay for the overages in lieu of auditing. Quon did so over the next few months, but the supervisor then said he was tired of being a collection agency. The City then contacted the service provider who supplied transcripts of messages sent and received by Quon and other employees who had exceeded the character allotments. Upon his supervisor's discovering that many of Quon's messages were not work-related and that some were sexually explicit, an internal affairs officer reviewed only Quon's work-time messages. That review showed that the vast majority of messages on work time were not work-related and that on an average work day Quon sent or received 28 messages, only 3 of which related to police business. Quon was then disciplined.

Quon and a number of other police officers filed suit under 42 U.S.C. 1983, alleging violation of his rights by the City under the Fourth Amendment and by the service provider under the Stored Communications Act ("SCA"), 18 U.S.C. 2701, et seq. (for turning over the transcripts to the City.) Quon's then-wife, from whom he was separated, a female police employee with whom he was romantically involved and a fellow SWAT team member also joined Quon's suit. Upon cross-motions for summary judgment, the district court dismissed the SCA claim against the service provider, but denied dismissal of the Fourth Amendment claims, concluding that Quon had a reasonable expectation of privacy in the text messages. Upon a jury's later determination that the City had audited the messages for the proper purpose of determining the propriety of employee payments for monthly overages, the district court dismissed the Fourth Amendment claims, too, because the search of the text messages was not an unreasonable one. The Ninth Circuit reversed, concluding that the search was unreasonable because its purpose could have been achieved by less intrusive means. The Supreme Court granted certiorari only as to the Fourth Amendment claim.

The Court unanimously reversed the judgment of the Ninth Circuit. Justice Kennedy's opinion for the Court first explained that the case could be resolved without determining whether Quon had a reasonable expectation of privacy in text messages on the pager issued to him because, assuming such an expectation, the search was a reasonable one. Nonetheless, before dealing with the reasonableness of the search, Justice Kennedy reviewed at length the parties' competing positions on Quon's expectation of privacy, concluding that because of rapidly evolving emergent communications technology, defining privacy expectations is an uncertain enterprise that will be largely shaped by the extent to which society recognizes these expectations as reasonable. That is why, in the Court's view, it should move slowly in this uncharted area, and that is why it was preferable to determine the case on a narrower ground. Accordingly, for purposes of this case, the Court assumed that Quon had a reasonable expectation of privacy in the text messages, that the City's review of the service provider's transcript of those messages was a "search" within the meaning of the Fourth Amendment, and that principles applicable to an employer's search of an employee's physical office applies with equal force "when the employer intrudes on the employee's privacy in the electronic sphere."

Justice Kennedy then concludes that the search of the transcripts was justified at its inception by reasonable grounds for suspecting that it was necessary for the noninvestigatory

work-related purpose of determining the efficacy of the monthly usage allowance so that employees were not paying for work-related usage and the City was not paying for extensive personal usage. Finding the scope of the search justified, the Court also determined that it was not overly intrusive. That the search revealed some intimate details of Quon's life did not make it unreasonable, for an employer would not expect such a review to intrude on those matters. Rejecting the argument that the City was bound to conduct the "least intrusive" search possible, the Court found that the City's conduct was justified by the circumstances and was not made unreasonable by any assumed violation of the SCA by the service provider. Finally, because the other plaintiffs did not argue that a search that was reasonable as to Quon could be unreasonable as to them, Justice Kennedy reasoned that their claim against the City could not prevail.

Justice Stevens wrote a short concurring opinion stating that while he joined the Court's opinion in full, he wanted to highlight that the Court had sensibly declined to resolve a lingering dispute over the correct approach to determining an employee's reasonable expectation of privacy.

Justice Scalia concurred in the judgment and in all but Justice Kennedy's lengthy explanation of the dispute over how to determine an employee's expectation of privacy. In Justice Scalia's view, the proper inquiry is not whether the Fourth Amendment applies to messages on a *public* employee's employer-issued pager, but whether it applies *in general* to messages on employer-issued pagers. The main thrust of the opinion, however, is a pointed and at times sarcastic criticism of Justice Kennedy's detailed "excursus" on privacy during changing times - an issue that Justice Scalia points out is not relevant in light of the Court's determination that the City's search was reasonable.

* * * *

Read closely, the Court's holding is a narrow one that does nothing to determine whether and to what extent a public employee has a privacy interest in text messages sent and received on employer-issued pagers. Although the "commentariat" has viewed this decision more broadly as limiting employee privacy rights and approving employer searches of pager messages generally, the fact-bound holding of the case does not support such a broad view. Indeed, given the City's specific interest in determining the fairness of who should pay for over-usage, resolution of the case on the issue of reasonableness was quite simple and not indicative of any conclusion about an employee's expectation of privacy. Nonetheless, as Justice Scalia points out (with a needlessly tart tongue), the trial courts may view this decision as a thinly-veiled hint about how they should be resolving the privacy issue.

In fairness to Justice Kennedy, his concern about the Court's getting ahead of a society that itself has not come to grips with the effects of rapidly evolving communications technology is a solid and serious one. Justice Scalia to the contrary, the signal sent by Justice Kennedy's opinion for the Court is one of caution, not one that the trial courts should decide the privacy

*issue in a particular manner. That strikes me as reasonable. Our collective angst about personal privacy in an age of public gadgets may be a generational phenomenon. Given that today's children, who appear to have their own set of norms about using pagers, phones, computers and other communications devices, are tomorrow's employees, there is much wisdom in Justice Kennedy's patient approach to determining the contours of an employee's zone of personal privacy. Appearing to recognize this generational divide, Justice Kennedy's opinion is reminiscent of his view about each generation's deciding for itself the meaning of due process, as explained in another personal privacy case he wrote about consensual homosexual sodomy. *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003)*

Turning from the philosophical to the practical, the takeaway from this case for public employees is that their expectations of privacy in communications sent or received on their employer's equipment is limited at best. While the Court is loathe to define those expectations, it is likely to be generous in giving governmental employers wide latitude in defining what is a reasonable search. Accordingly, employees run a risk of discipline if they use their employer's equipment for more than nominal and necessary personal use and especially if they use it in a manner similar to the unlucky SWAT team officer Jeff Quon.

Graham County Soil and Water Conserv. Dist. v. Graham, 559 U.S. ---, 176 L. Ed. 2d 225, 130 S. Ct. 1396 (2010)

The Court decided that the False Claims Act's reference to "administrative" reports in its public disclosure provision barring *qui tam* actions encompasses state and local sources, as well as federal sources.

Karen T. Wilson, an employee of the Graham County (N.C.) Soil and Water Conservation District ("District"), voiced concerns in 1995 to local officials about possible fraud in cleanup and repair work under contracts from the U.S. Department of Agriculture ("USDA") authorizing two counties to oversee that work after extensive floods. An accounting firm hired by Graham County to investigate Wilson's concerns issued an audit report identifying several potential irregularities in the county's administration of the cleanup contracts. Similar reports were issued thereafter by federal officials and by the North Carolina Department of Environment, Health and Natural Resources ("DEHNR"). Wilson thereafter filed suit alleging a *qui tam* claim that the District and local officials had violated the False Claims Act ("FCA") by submitting false claims for payments under the USDA contracts and also alleging that the District had retaliated against her for aiding the federal investigation of her claims. Wilson's retaliation claim was ultimately dismissed as untimely upon remand from the Court's first decision in this case. *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 162 L. Ed. 2d 390, 125 S. Ct. 2444 (2005).

The district court, on remand, dismissed Wilson's *qui tam* claim because it was based on allegations that had been publicly disclosed in the local audit report and in the state DEHNR

report, concluding that those reports were "administrative reports" within the meaning of the FCA's public disclosure bar. 31 U.S.C. 3730(e)(4)(A). The Fourth Circuit reversed, holding that only federal reports qualified as public disclosures under the FCA. The Supreme Court granted certiorari again in this case, this time to resolve a circuit conflict about the scope of the FCA's public disclosure bar.

The Court, in a 7 to 2 decision, reversed the Fourth Circuit's judgment and held that the FCA's public disclosure bar is not limited to federal sources. Justice Stevens' majority opinion concludes on the basis of the text, history and structure of the term "administrative" in the statute that it can cover public disclosures made in state and local reports. Finding nothing inherently federal in the term "administrative" and looking at the disclosure bar as a whole, the Court rejects using the maxim *noscitur a sociis* [essentially, a word is defined by the company it keeps, that is, the words nearby] to limit the term in like manner with the other federal sources in the statutory phrase (*i.e.*, "congressional" and "GAO"). That "administrative" is sandwiched between two federal sources is too short a list to limit the term to the company it keeps, according to Justice Stevens.

After reciting the history of the public disclosure bar as a compromise between no bar to *qui tam* suits at all and the more restrictive Government knowledge bar, the Court examined the legislative history in detail and concluded that it provides no evident legislative purpose that can guide resolution of the issue at hand. Likewise, the Court rejected Wilson's argument that construing the disclosure bar to cover state and local administrative reports will permit more fraud claims to go unremedied. While Congress wanted to strengthen the Government's hand in fighting false claims, it also wanted to bar a subset of lawsuits that lacked merit or were downright harmful. The Court also concluded that its construction of the term "administrative" would not lead to unintended results. It is possible that the Government will not learn about low-key local disclosures, but the touchstone of the statute is whether information has been publicly disclosed, not whether it "lands on the desk" of a Department of Justice attorney for investigation and prosecution. In any event, Justice Stevens notes that Wilson, like other whistleblowers, can still prevail on remand, despite the disclosure bar, if she is an original source of the information about fraud.

Justice Scalia concurred in the judgment and in the Court's opinion, except for the portion dealing with legislative history, concluding that such history makes no difference at all since the text of a law is all that matters in statutory interpretation.

Justice Sotomayor, joined by Justice Breyer dissented, concluding that the term "administrative" is limited to federal government sources. The dissenters not only find the term distinctly federal as used in the statute, but also conclude that the legislative history and context of the disclosure bar is less opaque and more supportive of the Fourth Circuit's reading of the statute. In short, the uncertainty in the legislative record counsels against a broad construction of the disclosure bar, according to Justice Sotomayor, particularly where the risk is that federal prosecution of false claims will be constrained beyond what Congress intended.

* * * *

Charles Dickens himself would be appalled by the history of Karen Wilson's simple retaliation case stemming from her report more than 15 years ago about fraud in the payment of flood remediation claims. Despite being vindicated as a whistleblower, she is yet to get a final and authoritative decision on the merits of her retaliation claim. In litigation that already rivals "Jarndyce v. Jarndyce," the Supreme Court has once again remanded her to the district court for further proceedings to determine whether she was an original source of the information and thus protected by the whistleblower provisions of the FCA.

The impact of this decision on employees and public employers is likely to be quite limited, although on its face the ruling appears to make FCA whistleblower actions more difficult to bring. As the Court notes at the outset of its opinion, the public disclosure bar has been amended yet again by a provision in the recently enacted (and hotly debated) health care legislation. Section 10104(j)(2) of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), replaces the statute construed by the Court in this case. In doing so, the statute does not say that it is retroactive and thus was deemed inapplicable to this case. While the prior version of the FCA construed in this case may yet be applicable to a number of existing whistleblower claims, the enduring impact of the Court's construction of a statutory provision that has been amended out of existence is not likely to be significant - except, perhaps, on Karen Wilson herself.

One notable and welcome feature of this decision is the civil manner in which competing views of how the FCA should be interpreted were expressed in the opinions of Justices Stevens and Sotomayor. These opinions mark a refreshing change from the harsh tone and snippy rhetoric I noted in assessing last term's cases. Maybe the lack of pointed (and sometimes ad hominem) barbs is because this case does not involve culture war issues and only concerns how a relatively obscure piece of federal legislation should be construed. My sense, however, is that the two Justices engaged in the debate in this case are former litigators who are comfortable in their own skins and are content to rely on the force of their reasoning to carry the day. Whatever the reason, the absence of vituperation sharpens the debate as far as this reader is concerned.

On the merits of the issue at hand, I believe that Justice Stevens and the majority got it wrong here. Given that the text of the FCA itself is not revealing, the most likely meaning intended by Congress is that it was thinking of federal disclosures when it enacted the public disclosure bar. Any broader reading draws into question the ability of the FCA to be a bulwark against fraud, and that has always been Congress' overriding concern. Without the aid of any Latin maxim, I simply do not read the public disclosure bar to include state and local administrative reports. That conclusion comports with a holistic view of the FCA's history and with a more sensible reading of the statutory text. In a case that Talmudic scholars would love, there are plausible arguments on both sides of the issue, so the Court's

reading is beyond criticism as an exercise in statutory construction. It just does not seem correct to me.

Skilling v. United States, 561 U.S. ---, 177 L. Ed. 2d 619, 130 S. Ct. --- (2010)

The Court decided that the federal "honest services" criminal statute is applicable only to bribery and extortion by employees and does not cover misrepresentation, fraud and other wrongful conduct.

Jeffrey Skilling, the chief financial officer of Enron just prior to its demise, was indicted under 18 U.S.C. 371, 1343 and 1346 for conspiring with other Enron executives to commit "honest services" wire fraud by depriving his employer and its shareholders of the intangible right of his honest services. The Government charged that Skilling and the other executives illicitly propped up Enron's stock price by manipulating the employer's publicly reported financial results and making false and misleading statements to deceive investors about Enron's true financial performance.

After Skilling's conviction by a Texas jury of conspiracy to commit honest services wire fraud, as described above, the Fifth Circuit affirmed the conviction. The Supreme Court granted certiorari on two issues and reversed the conviction. First, it held that pretrial publicity and community prejudice did not prevent Skilling from obtaining a fair trial. Second, it concluded unanimously (though by a divided vote as to rationale) that the jury improperly convicted Skilling of "honest services" wire fraud. The majority, in an opinion by Justice Ginsburg, reasoned that the intangible right to the honest services of an employee covers only bribery and kickback schemes, neither of which were at issue in Skilling's case. In doing so, the Court rejected the Government's argument that the statute should at least cover undisclosed self-dealing by employees. Justice Scalia, joined by Justices Thomas and Kennedy, concurred in reversing Skilling's conviction, but would hold that the honest services wire fraud provision is unconstitutionally vague.

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Together with Black v. U.S., 561 U.S. ---, 177 L. Ed. 2d 695, 130 S. Ct. --- (2010), involving Sir Conrad Black, the high-profile head of Hollinger International, Inc., and Weyhrauch v. U.S., 561 U.S. ---, 177 L. Ed. 2d 705, 130 S. Ct. --- (2010), this trilogy of cases confined the operation of the federal "honest services" law to cases involving employee bribery or kickback schemes. The Court's narrow construction of this federal criminal statute lessens the potential for civil claims based on a broad notion of theft of honest services by employees who commit fraud, deception or other intentional torts. For this reason, Jeffrey Skilling's case stands out as a limitation on the scope of civil actions available by shareholders, bondholders and even fellow workers against employees who services to their employers are dishonest or deceitful.

F. Adjective Decisions

The Court dealt with an issue important to counsel for prevailing parties in employment cases where the Government is a defendant, namely whether an award of attorneys' fees is subject to an offset to satisfy the client's pre-existing debt to the Government. Although the case was one based on a Social Security benefits claim, the approach to the general issue of offset against attorneys' fees has much wider importance. Another attorneys' fee case involved the measure of a trial court's discretion to enhance fee awards calculated by the lodestar method. The third adjective case raised a narrow question about appealability of an order requiring disclosure of evidence arguably subject to the attorney-client privilege. Because it arose in an interesting employment context, it merits brief treatment in this article. The final adjective ruling deals with the scope of immunity available to Public Health Service employees who are sued for constitutional torts in so-called *Bivens* actions.

One denial of certiorari requires mentioning. In *DTD Enterprises, etc. v. Wells*, 558 U.S. ---, 175 L. Ed. 2d 300, --- S. Ct. --- (2010), the Court declined to review the issue of whether a trial court may, without any inquiry into the merits of the case, impose the costs of class notification on a defendant because of its ability to pay. Justice Kennedy, joined by the Chief Justice and Justice Sotomayor, filed a statement concurring in the denial, but suggesting that the issue presented is one of constitutional significance and presumably would warrant treatment on the merits in a more appropriate case. With three votes already staked out on this issue, this denial of review is at least a hint to trial judges that imposition of class notification costs on a defendant because of its wealth, without any inquiry into the merits, is fraught with constitutional peril.

***Astrue, etc. v. Ratliff*, 560 U.S. ---, 177 L. Ed. 2d 91, 130 S. Ct. --- (2010)**

The Court decided that an award of statutory attorneys' fees payable by the Government to a litigant as a prevailing party is subject to an offset to satisfy the litigant's pre-existing debt to the Government.

Ruby Willows Kills Ree prevailed against the United States on a claim for Social Security benefits. Her attorney in that proceeding was Catherine Ratliff. The district court granted Ree's unopposed motion for attorneys' fees of \$2112.60 under section 204(d) of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412(d), but before paying that amount the Government discovered that Ree owed it a debt that predated the fee award. Accordingly, the Government, relying on statutory offset authority under 31 U.S.C. 3711 and 3716, sought an administrative offset against the award to satisfy a portion of the debt. Ratliff intervened to challenge the offset on the ground that the award belonged to her and could not be used to offset her client's debt.

The district court held that because the EAJA directs fees to be awarded to the "prevailing party" and not to that party's attorney, Ratliff lacked standing to challenge the offset. The Eighth Circuit reversed, concluding that, while its decision did not accord with a literal interpretation of the EAJA, fee awards in that circuit are regarded as awards to the prevailing parties' attorneys. In the face of a split of authority among the circuits, the Supreme Court granted certiorari.

The Court unanimously reversed the Eighth Circuit's judgment and held that an award of EAJA fees is, by the statute's plain text, made to the litigant and thus subjects that person to a federal administrative offset. Justice Thomas' opinion for the Court rejects the argument that the verb "award" incorporates the right of attorneys to receive fees. Relying on the dictionary meaning of the transitive verb "award," Justice Thomas concludes that to "award" a fee means to give or assign it by judicial determination and that this settled and natural construction does not incorporate counsel's ultimate receipt of funds. The Court also rejects reliance on fee awards under similar statutory schemes in the face of the particular text of the EAJA indicating that awards are made to parties and not lawyers. That the Government paid EAJA fees in Social Security cases directly to attorneys prior to 2006 did not alter the Court's conclusion, for that practice was more recently altered in cases where the litigant was indebted to the Government. Finally, the Court notes that the functionally equivalent operative language in 42 U.S.C. 1988 buttresses its plain text reading of the EAJA.

Justice Sotomayor, joined by Justices Stevens and Ginsburg, concurred, expressing the view that Congress likely did not consider the question presented here and that if it does at some future time, it probably would choose not to allow Government deductions from fee awards under the EAJA. Noting that offsets undercut the effectiveness of fee awards as an incentive to challenge unreasonable governmental actions and that EAJA awards, which average less than \$4000 per case, are an efficient means of improving access to the courts, Justice Sotomayor expressed reluctance to conclude that Congress would want EAJA awards to be offset for litigants' debts. Accordingly, while joining the Court's opinion based on its textual analysis, the concurring Justices stressed that the Court's decision "severely undermines" the estimable aim of the EAJA and invited Congress to clarify whether this effect is what it intended.

* * * *

As an exercise of statutory interpretation, the Court's conclusion seems unassailable. The text of the EAJA is an insuperable barrier to the more sensible conclusion that attorneys are the ultimate recipients of the fee awards and that offsetting litigants debts against such awards will imperil the reason for the awards themselves - namely, an incentive to take on cases for Social Security, veterans and other benefits, where the financial rewards are not great. Justice Sotomayor's concurrence strikes just the right note of faithful adherence to the statutory text coupled with a plea for Congressional action to cure a non-sensical statutory glitch.

For employment lawyers, the significance of this decision is uncertain on two accounts. First, it is possible that new or impending federal regulations may alter the Government's approach to offsets in EAJA cases, so the effect of the Court's construction of section 2412(d) may turn out to be limited in scope or time (or both.) Second, application of the Court's ruling to employment statutes will, under the Court's analysis, be text-specific. Whether the Government may use its administrative offset power in employment discrimination cases, therefore, will turn on the precise language of the statutes on which the underlying claims are founded. Most assuredly, for state and local employee claims under 42 U.S.C. 1983, a commonly used statute, the fee award language of 42 U.S.C. 1988 is, as the Court pointed out, the virtual equivalent of the EAJA, thereby indicating that offsets would be available in those cases. For the plaintiffs' bar, that counsels caution up front in taking on cases.

Perdue v. Kenny A., 559 U.S. ---, 176 L. Ed. 2d 494, 130 S. Ct. --- (2010)

The Court decided that a lodestar fee award under 42 U.S.C. 1988 in a civil rights action can be enhanced for superior attorney performance only in rare and exceptional circumstances.

This class action against various state officials in Georgia on behalf of 3000 children in the state's foster-care system involved claims that deficiencies in that system violated the childrens' federal and state constitutional and statutory rights. Upon referral by the district court to mediation, the parties entered into a consent decree, which the district court approved. The decree resolved all issues except for fees that class counsel were entitled to receive under 42 U.S.C. 1988. Counsel requested \$14 million in attorneys' fees, half of which was a lodestar calculation based on 30,000 hours of work, and the other half an enhancement for superior work and results. The district court awarded \$10.5 million. It found that the requested hourly rates were fair and reasonable, but that counsel's billing records were deficient in some respects. Accordingly, the court reduced the lodestar calculation to \$6 million, but then enhanced that award by 75% to the \$10.5 million figure. The Eleventh Circuit affirmed in reliance on circuit precedent, and the Supreme Court granted certiorari.

The Court, in 5 to 4 decision, reversed the judgment of the Eleventh Circuit and remanded the case for further proceedings consistent with the Court's opinion by Justice Alito about the standards applicable to enhancement of awards under federal fee-shifting statutes. While unanimously reaffirming that a lodestar calculation may be enhanced for superior attorney performance in extraordinary circumstances, Justice Alito's opinion for five members of the Court identified six "important rules" that inform a trial judge's discretion in making an enhanced award. First, a reasonable fee is one that is sufficient to induce a capable attorney to take on a meritorious civil rights case, but does not provide a form of economic relief to improve the financial lot of attorneys. Second, there is a strong presumption that the lodestar method yields a sufficient fee. Third, the Court has never sustained a lodestar enhancement for performance, but has repeatedly said that an enhancement may be awarded in rare and

exceptional cases. Fourth, an enhancement may not be based on a factor that is subsumed in the lodestar calculation (such as novelty or complexity of the case or the quality of an attorney's performance.) Fifth, the burden of proving an enhancement is necessary is on the fee applicant. Sixth, the fee applicant must produce specific evidence supporting the award so that the calculation is objective and can be reviewed on appeal.

In addition to the six rules that define the bounds of a trial court's discretion, Justice Alito stresses that the results obtained and the quality of an attorney's performance are treated as one factor because superior results are only relevant if they result from the applicant's superior performance and not from her opponent's inferior performance. Only where there is specific evidence that the lodestar would not be adequate to attract competent counsel may an enhancement be considered. Thus, an enhancement may be necessary where the hourly rate does not adequately measure the attorney's true market value; or where the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; or where such performance involves an exceptional delay in the payment of fees. But, the Court cautions, enhancements are not appropriate because the applicant has reduced her hourly rate and coupled that with a performance bonus or contingency.

Justice Breyer, joined by Justices Stevens, Ginsburg and Sotomayor, agreed with the majority's reaffirmation of a trial court's discretion to enhance a lodestar calculation for superior performance in a civil rights case, but dissented from both the disposition of this case and the Court's detailed disquisition on the standards applicable to lodestar enhancements.

* * * *

The Court's unanimous reaffirmation of a trial court's discretion to award enhanced lodestar calculations in civil rights cases is not only cold comfort to counsel in this monumental child foster-care class action, but is also a potentially empty gesture to bench and bar in light of the limits put on trial judges who bear the difficult task of calibrating fee awards to lawyer performance. By ominously pointing out that the Court has never approved a lodestar enhancement and by keeping that streak alive in this case, the majority sends a clear signal to trial judges that the presumption against enhancements is more than just "strong" - it is almost conclusive.

For employment lawyers especially, the majority's attitude toward enhancements of fee awards is significant, for there is little to distinguish between awards under 42 U.S.C. 1988 and awards under statutes such as Title VII, the ADEA and the ADA. While all of these statutes provide some guidance on entitlement to fees, they are uniformly silent on how those fees are to be calculated. So, it will ultimately be up to Congress to say whether the majority's self-constructed fee regime is consistent with the legislative purpose underlying these fee-shifting statutes. In the meantime, however, this decision is likely to increase satellite litigation over fees and may undercut the worthy purposes of fee awards in a wide variety of civil rights cases.

**Mohawk Industries, Inc. v. Carpenter, 558 U.S. --- 175 L. Ed. 2d 458,
130 S. Ct. --- (2009)**

The Court decided that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine.

Norman Carpenter, a former employee of Mohawk Industries, Inc., sued his former employer, alleging that it terminated him in violation of 42 U.S.C. 1985(2) and various Georgia state laws after he had told the company's human resources department by email that the company was employing undocumented immigrants. Unbeknownst to Carpenter at that time, Mohawk was the defendant in a class action alleging a conspiracy to drive down wages of its legal employees by knowingly hiring undocumented workers. Mohawk ordered Carpenter to meet its retained counsel in the wage case, and Carpenter claimed that counsel pressured him to recant the statements he had made in the email. Carpenter alleged that when he refused to do so, Mohawk fired him under false pretenses.

When plaintiffs in the wage case learned of Carpenter's suit, they sought an evidentiary hearing to explore his claims. Mohawk opposed that request, alleging that it fired Carpenter because he engaged in illegal conduct by trying to have Mohawk hire an undocumented worker. In the meantime, Carpenter filed a motion in his own case seeking to compel Mohawk to produce information about his meeting with Mohawk's counsel in the wage case and its termination decision. Mohawk opposed the motion by claiming that the information was protected by the attorney-client privilege. The district court agreed that the privilege applied, but concluded that Mohawk had waived it by its representations in the wage case. Mohawk filed a notice of appeal and a petition for a writ of mandamus. The Eleventh Circuit dismissed the appeal for lack of jurisdiction because the district court's discovery order was interlocutory and could be reviewed adequately on appeal from a final judgment. The Court of Appeals also dismissed the writ of mandamus, concluding that there was no clear usurpation of power or abuse of discretion by the district court. The Supreme Court granted certiorari to resolve a circuit conflict about the availability of collateral appeals in the attorney-client privilege context.

The Court unanimously affirmed the judgment of the Eleventh Circuit in an opinion by Justice Sotomayor holding that collateral order appeals are not necessary to ensure effective appellate review of orders adverse to the attorney-client privilege. While recognizing the importance of the privilege, the Court found that deferring review until after final judgment would not so imperil the privilege so as to justify the burdens of allowing immediate appeals of an entire class of orders. Justice Sotomayor pointed out alternatives to a collateral order appeal, such as seeking certification of an interlocutory appeal, applying for a writ of mandamus in exceptional circumstances, and even defying a disclosure order in incurring appealable sanctions that would avoid disclosure of the privileged information. Finally, the Court noted that any further avenue for obtaining immediate appeals from disclosure rulings should be

furnished, if at all, through the rulemaking process under the Rules Enabling Act, thus permitting a legislative-type airing of the issues. Justice Thomas filed a separate concurrence agreeing with the rulemaking point and arguing that it was not necessary for the Court to provide any further analysis.

* * * *

Justice Sotomayor's debut opinion is workmanlike and straightforward, sullied only slightly by Justice Thomas' somewhat petty dig at the breadth of her analysis (which all the other members of the Court joined without comment.) While not directly involving an employment law issue, the case is notable for labor and employment lawyers because of its bright-line rule forbidding collateral order appeals from discovery orders adverse to the attorney-client privilege. As litigators will attest, attorney-client privilege disputes in the realm of corporate discovery are not rare, so having the Court say once and for all that orders resolving these disputes cannot be appealed under the collateral order doctrine is a clarifying point of information about how a piece of employment litigation can proceed.

Hui v. Castaneda, 559 U.S. ---, 176 L. Ed. 2d 703, 130 S. Ct. --- (2010)

The Court decided that Public Health Service officers and employees are not personally subject to *Bivens* actions for harms arising out of conduct within the scope of their employment.

When Francisco Castaneda was detained by immigration officials at a federal correctional facility, he promptly told medical personnel there about a skin lesion that was aggravated and growing. The physician responsible for medical care at the facility was Dr. Esther Hui, a civilian employee of the U.S. Public Health Service ("PHS"). Castaneda persistently sought treatment for his worsening condition and for new symptoms consistent with metastatic cancer, but Dr. Hui and Commander Gonsalves, a PHS officer and administrator at the facility, denied requests by Castaneda, his physician's assistant and three specialists for a biopsy. After a fourth specialist recommended a biopsy, it was authorized, but immigration officials released Castaneda before it could be performed. One week later a biopsy did reveal penile cancer, and despite amputation and other treatment, the cancer had metastasized and Castaneda died within a year.

Three months before his death Castaneda sued the United States for medical negligence under the Federal Tort Claims Act ("FTCA"). The suit also alleged deliberate indifference to his condition by Dr. Hui and Commander Gonsalves in violation of his constitutional rights under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). Hui and Gonsalves claimed absolute immunity from *Bivens* liability under 42 U.S.C. 233(a) and moved to dismiss Castaneda's claims. The district court denied the motion, concluding that Congress intended in section 233(a) to preserve this type of action. The Ninth Circuit affirmed, concluding, in conflict with the Second Circuit, that the immunity statute does

not preclude *Bivens* actions. The Supreme Court granted certiorari to resolve this conflict as to PHS personnel. During the pendency of the Ninth Circuit appeal the United States filed a formal notice admitting its liability on the medical negligence claims under the FTCA.

The Supreme Court reversed in a unanimous opinion by Justice Sotomayor. The Court took pains to remark at the outset and the end of the opinion that its inquiry is a limited one that begins and ends with the text of section 233(a). That text says that the remedy against the United States for harms caused by PHS employees acting within the scope of their employment is exclusive of any other civil action. That is enough to preclude a *Bivens* claim, even though the statute predates *Bivens* itself. The breadth of the statute's language, according to the Court, easily accommodates "both known and unknown causes of action." 176 L. Ed. 2d at 711. This construction is supported by the need for a special *Bivens* exception under the Westfall Act, 28 U.S.C. 2679(b), which uses the same operative immunity language as section 233(a). After rejecting Castaneda's reliance on cases involving the availability of a *Bivens* remedy (an issue different from immunity), the Court found unpersuasive arguments based on the text of section 233, the breadth of the *Bivens* exception in the Westfall Act and the lack of a scope certification procedure under section 233. Neither any of these arguments nor public policy considerations undercut the Court's primary obligation to "read the statute according to its text."

* * * *

This is a profoundly sad and disturbing case. At least, that is my take as a fellow human being. Yet, the Court unanimously showed a stoic face in concluding that Congress simply has not provided an exception to immunity for claimants like Castaneda's estate. Difficult though it may be to put the human dimension of this case to the side, the Court, of course, has a point in applying the statute's text as it finds it. Nonetheless, implicit in Justice Sotomayor's penultimate paragraph is a plea for Congressional action addressing situations like the present one. For the time being, however, doctors and administrators at the Public Health Service will continue to be absolutely immune from constitutional tort claims based on their treatment of persons within the custody of the United States - no matter how indifferent the treatment may be or how dire the consequences of that indifference. As I said, this is a sad case.

III. Grants of Certiorari for the 2010 Term.

Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834. The question presented is whether an oral complaint of an alleged violation of the Fair Labor Standards Act is protected conduct under the statute's anti-retaliation provision.

NASA v. Nelson, No. 09-530. The question presented is whether the Government violated a federal contract employee's right to informational privacy when, in the course of a background investigation of the employee, it (i) asked the employee if he had received counseling or treatment for illegal drug use and (ii) asked the employee's designated references for any

adverse information about him that might have a bearing on his suitability for employment at a federal facility.

Staub v. Proctor Hospital, No. 09-400. The question presented is whether and, if so, in what circumstances an employer can be held liable for discrimination on the basis of the alleged unlawful intent of officials who caused or influenced, but did not make, the ultimate employment decision.

AT&T Mobility LLC v. Concepcion, No. 09-893. The question presented is whether the Federal Arbitration Act pre-empted a state's conditioning enforcement of an arbitration agreement on the availability of class arbitration, when such a procedure is assertedly not necessary to insure that the parties to the arbitration agreement can vindicate their claims.

Chamber of Commerce, etc. v. Candelaria, No. 09-115. The question presented is whether Arizona laws regulating the hiring of unauthorized aliens are pre-empted by federal law regulating the employment of aliens.

Thompson v. North American Stainless LP, No. 09-291. The question presented is whether Title VII forbids retaliating against a spouse, family member or other person closely associated with an employee who engages in protected activity, and if so, whether the third-party victim can enforce that prohibition in a civil action.

CIGNA Corp. v. Amara, No. 09-804. The question presented is whether participants in or beneficiaries of an ERISA benefits plan can recover benefits based on an inconsistency between the terms of the plan and an explanation of benefits in a summary plan description or similar document.

IV. Additional Observations

Woven into President Obama's new rug in the refurbished Oval Office are these words: "The arc of the moral universe is long, but it bends toward justice." So said Dr. Martin Luther King, Jr., in 1965, echoing the sentiment originally expressed in 1853 by Theodore Parker, the famed abolitionist Unitarian minister from Boston. Can the same be said in 2010 about the trajectory of our employment law?

Based on the Court's work in the employment area during the last few terms, both doubt and hope about workplace justice emerge from the welter of decisions. Doubt about the direction of the Roberts Court in employment cases certainly abounds in the majority's continuing romance with privatization of justice in the arbitration cases. Likewise, the majority's aggressive embrace of deregulation seen so vividly in the prior term's decisions narrowing the definition of discrimination engender further doubt about the just enforcement of our employment laws. On the other hand, a sliver of hope for more robust justice in the workplace can be seen in the disparate impact case this term, despite Justice Scalia's grudging

opinion for the Court. Moreover, Justice Kennedy's independent streak continues to put his vote in play in many closely decided cases. Nonetheless, a deep philosophical fracture persists between a fairly cohesive and activist majority bent on completing the Reagan Revolution's deregulation of our national economy and a dissenting minority that professes judicial humility and a principled deference to Congress.

Indeed, the fracture that exists among the Justices extends even to the question of public access to the Supreme Court Building itself. *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). Congress has noticed this unusually public division of opinion. A resolution sponsored by more than 30 Representatives, according to *The Washington Post*, would request the Court to open its front doors to the public. The constitutional force, not to mention the wisdom, of such a resolution is another matter. On the other side of the coin, the chasm between the two major political factions on the Court was slightly offset this term by an emergent standard of civilized disagreement exemplified best in Justice Sotomayor's opinions. Whether this more productive form of discourse will bear fruit - or even continue - is uncertain. The addition of Justice Kagan, reportedly a rigorous scholar, but also a reputed consensus-builder along the lines of Justice Brennan, will doubtlessly alter the personal chemistry within the Conference even further. It seems unlikely in the extreme, however, that the current philosophical divide over labor and employment matters will be bridged any time soon.

It is also worth observing that during the 2009 Term no individual Justice emerged as the "go-to" employment expert. That may be surprising to some observers, as both Justice Thomas and Justice Ginsburg have substantial backgrounds in employment law, the former having served as chair of the Equal Employment Opportunity Commission, and the latter having litigated a number of high-profile gender discrimination cases. While these two Justices certainly wrote their share of employment decisions, opinion assignments have been made in such a way that no single Justice has yet carved out this area of the law as a special domain. My own judgment is that it is a good thing that no Justice has become the default button for employment law. For when the Court acts and opines, it always does so in an institutional manner as a constitutional branch of government, not as a collection of individual legal specialists. Thus, the Court is neither remotely analogous to a law firm nor even akin to a law school faculty, where, in both cases, the efficiencies of specialization might be profitable or otherwise beneficial. Quite to the contrary: Despite its internal philosophical divisions, the Court's voice is a collegial one best heard in our constitutional democracy when all Justices speak as generalists.

Finally, what can be said about the manner in which the Court is construing our employment statutes? My judgment is that the majority's current vocabulary-based method of statutory interpretation continues to leave it open to the charge of acting like unelected judicial legislators. While paying little attention and even less deference to legislative history, structural context and underlying social policy, the Court instead has adopted the pretense of simply

finding a statute's meaning in its vocabulary. To be sure, a purely textual approach to a statute's meaning is sometimes sufficient, as was regrettably the case in *Hui v. Castaneda*, *supra*. But surely the function of the Supreme Court is to do more than look up words in a dictionary and apply their popular definitions to the facts. The job of the Court is to discern and apply what Congress intended. The text may well be the best guide to that intent, but sometimes the words are ambiguous and the phrasing (with apologies to Tom and Ray Magliozzi, a/k/a "Click" and "Clack") appears to be the work of "Paul Murky of Murky Research." In these instances the Court is unavoidably a lawmaking body when it fills the interstices of ambiguous statutes with authoritative meaning. In performing this uniquely judicial function, dictionaries are not adequate to the task. A more holistic approach to discerning legislative meaning is necessary, one that at least takes some account of legislative history, the context in which the disputed phrase is used and the social policies underlying the legislation. So long as the Court honestly weighs these matters with the text, it will do a better job of locating the meaning Congress intended and avoid crossing the line between interpreting and inventing the statute. In doing so, the Court will adhere more faithfully to its proper task of construing statutes instead of judicially legislating its own policy preferences.

So, I come back to Dr. King's and Theodore Parker's observation about the arc of the moral universe. What can be said about the trajectory of our employment laws? Despite the current majority's infatuation with deregulation and privatization, the preferences of these reformist Justices may not hold sway long, depending on what happens in the political arena. Moreover, there is a not-so-naive hope (logically based, I think, on how the judicial philosophies of the three most recently retired Justices transformed over the years) that a sounder and less politicized wisdom will come out of the new diversity of views within the Court. To borrow from the elegant King-Parker metaphor, the arc of our nation's employment laws will continue to bend toward justice only if the bench and bar together renew our commitment to their interpretation and enforcement as Congress meant. My own sense is that time is on the side of the moral imperatives underlying our labor and employment laws.

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