

**Supreme Court of the United States
Employment Law Commentary
2008 Term**

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Nahomi Harkavy, my wife and colleague, reviewed this article with her keen eye for detail and nuance and with a sense of humor befitting her status as a 2009 winner of The New Yorker's cartoon caption contest. I thank her, as well as Michael G. Okun and J. David James, for their helpful comments. I also acknowledge the Workplace Prof Blog, <lawprofessors.typepad.com/laborprof_blog>, as an excellent resource I consult daily. I take full responsibility, of course, for the content and tone of this work and for any errors in it.

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The 2008 Term of the Supreme Court of the United States, forged in volatile economic times and framed on a changing political palette, not only reaffirmed the Court's interest in employment-related cases, but also revealed a growing institutional confidence in shaping employment law. While a fully coherent approach to employment disputes continued to elude the Court, it was not for lack of trying, as the Justices decided nearly a dozen cases treating some aspect of the employment relationship. Notably, these cases, many of which were determined by closely divided votes, mirror a deep philosophical fracture portrayed more broadly across the spectrum of the Court's work. All in all, therefore, the 2008 Term was one of high interest for both the employment bar and the general public, as well as one of considerable consequence for workers, employers, and labor organizations.

This paper first comments briefly on the scope of the Court's work during the 2008 Term and the place of employment law in it. Next, the major portion of the paper is devoted to the term's decisions arranged by broad topics. The *italicized paragraphs* preceding and following the cases offer my personal take on the decisions and their likely impact on employees, employers, and labor unions. Following that review of decisions is a listing of the Court's grants of certiorari in employment-related cases to be argued and decided in the 2009 Term. The paper concludes with some personal observations about the doctrine and direction of the Court's employment jurisprudence and the changing character of the employment relationship itself.

A. Preliminary Comments

*While the Court continued to function in the lengthening shadow of the 9/11 terrorist attack on our nation, e.g., Republic of Iraq v. Beaty, 556 U.S. ---, 173 L. Ed. 2d 1193, 129 S. Ct. 2183 (2009)(construing Emergency Wartime Supplemental Appropriations Act) and Ministry of Defense, etc. of Iran v. Elahi, 556 U.S. ---, 173 L. Ed. 2d 511, 129 S. Ct. 1732 (2009)(construing waiver under Victims of Trafficking and Violence Protection Act of 2000), there is no mistaking its current focus on employment-related matters. Of the 74 full dress merits decisions reported during the 2008 Term, 10 of them plus one *per curiam* decision substantially involve employment-related issues. Another 4 of the merits opinions bear materially on how employment disputes are to be resolved. Aside from criminal law and procedure, no other substantive area of the law commanded as much attention from the Court as employment law. Whether the Court's focus will be diverted elsewhere by disputes stemming from the Great '08 Recession, or by the lingering effects of our nation's response to the 9/11 attack, or even by President Obama's new federal administrative agency initiatives and personnel appointments, is yet to be seen. There is every reason to believe, however, that employment issues will continue to be an important component of the Court's work during the coming terms.*

In addition to the sheer volume of employment cases, another striking feature of the 2008 Term is the high percentage of those cases that were closely decided. The Court divided 5 to 4 in 5 of the 11 employment-related cases and 6 to 3 in another one. Looking at the entire term, 21 of the 74 merits decisions the Court split 5 to 4, and significant issues in two other cases were decided by the same margin. See generally, "End of Term Statistical Analysis - October Term 2008" at SCOTUSblog accessible at <www.scotusblog.com/wp> (June 30, 2009 post.) The employment cases thus mirror a notable division in the Court on a myriad of other issues across the entire body of its work. Only two of the employment cases were decided unanimously. Although the punditry's common view is that the replacement of Justice Souter by Justice Sotomayor will not modify the Court's current split or significantly affect how the major issues of the day are resolved, the only sure prediction is that the chemistry of the Conference is invariably altered by a change in its membership. Whether the newly constituted Conference will heal, aggravate or let fester the current fracture in the Court is quite likely to fascinate watchful Court mavens in the terms to come. In the meantime, there is simply no telling what effect the substitution of Justice Sotomayor for Justice Souter will have on the Court's interest in, approach to and resolution of employment related disputes.

Under Chief Justice Roberts, the pace of the Court's work generally has quickened modestly in comparison to the latter terms under the late Chief Justice Rehnquist. Not only did the 2008 Term produce an increase of about 10% in the number of grants of certiorari, but the oral arguments also were scheduled a bit differently (three per day on some occasions), and the decisions were spaced a bit more evenly through the term, thus avoiding the ritual blockbuster week at the end of June that has marked many prior terms. While some observers have ventured that the Chief Justice intends to increase the number of cases for decision on the

merits, there is no meaningful indication yet that the Court will return to the 100-plus decisions that it regularly handed down each year prior to the 1993 Term. Nonetheless, one relatively safe conclusion is that, given the extent of federal employment legislation, the boomer generation's exit from the active workforce, the changing ethnic and racial demographics of our nation and President Obama's more aggressive approach to law enforcement at the federal agency level, the Court's opportunities to express an interest in employment law will abound over the next several years. Whether and how the Court chooses to express such an interest is the stuff of speculation.

Finally, the tone of the Court's employment decisions seems to be more shrill than usual. Maybe it is my imagination, but the pointed criticisms and aggressive language that heretofore have been the hallmark of some of Justice Scalia's opinions are now being employed by Justices on both sides of the Court's philosophical divide. This type of judicial dueling contrasts unfavorably with the notion encouraged by some members of the Court, including the Chief Justice himself, that the Court is one that seeks a middle ground in a collegial way. Based on a full reading of all the opinions in this term's employment cases, however, that notion is not evidenced in the tone and content of the 2008 Term's opinions. Not only is it difficult to discern much middle ground in the philosophical chasm between the Court's two camps, but also the voices heard across that divide in the Court's opinions are often raised ones betraying a sense of deep frustration, if not personal pique. Perhaps one explanation for the higher decibel level employed on occasion by members of the dissenting group of Justices Stevens, Souter, Ginsburg and Breyer is that they are trying, in what Professor Lani Guinier recently deemed a form of "demosprudence," to lift their voices to a broader audience in order to obtain justice beyond the confines of the Court's jurisprudence. L. Guinier, "Supreme Court Foreword: Demosprudence through Dissent," 122 Harv. L. Rev. 4 (2008). That approach in turn has prompted, either by anticipation or response, more hardened rhetoric from the Chief Justice and has provoked Justice Alito to employ some louder language and launch some personally-directed arguments of his own. None of this cacophony from the Court is necessarily unhealthy or unprecedented over the Court's long history. But it is noteworthy for its departure from what has been the norm of a more muted debate about the direction of employment law for the past two decades or so. Listen for yourselves as you read the opinions.

B. Employment Discrimination

The Court's employment discrimination decisions are among the most consequential in recent years. Most notably, they signal a new understanding of the meaning of illegal discrimination itself. Aside from this doctrinal transformation, these decisions significantly alter how one proves discrimination in some categories of cases. In what was probably the most politically charged decision of the 2008 Term, the Court grappled with a municipality's challenges in diversifying its fire department, and in the course of doing so, it reshaped the contours of a disparate treatment Title VII claim. Barely beneath the surface of that decision are significant subtexts that could erode disparate impact theory and diminish further any role

for affirmative action, notwithstanding Congress' explicit embrace of both concepts in Title VII itself.

Lower in public profile, but just as important for employment lawyers, is the Court's decision in a case defining the burden of proving a violation of the Age Discrimination in Employment Act ("ADEA.") Again, the Court judicially reformulated the definition of discriminatory cause by requiring plaintiffs in an age case to prove "but-for" causation. Yet another definitional case is one in which the Court circumscribed the meaning of discrimination by excluding from coverage past conduct that, like interest on a zero coupon or "flower" bond, has no observable consequences until the present. Finally, the Court's decision to protect employee statements in a case involving internal employer investigations added useful definition to the opposition clause of section 704 of Title VII.

For pragmatically inclined employers, workers, employment practice liability insurers, and practitioners, as well as for more doctrinally sensitive observers from academe and elsewhere in the profession, the 2008 Term's employment discrimination decisions refined the law in a manner that invites the most careful scrutiny from all of us.

Ricci v. DeStefano, 557 U.S. ---, 174 L. Ed. 2d 490, 129 S. Ct. 2658 (2009)

The Court decided that a municipal employer's race-conscious action in discarding promotion test results is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken that action, it would have been liable under Title VII's disparate impact provisions.

The following is a truncated version of the factual setting of this case. In 2003, pursuant to a civil service merit system under its charter, the City of New Haven relied on promotion examinations developed and administered by an independent consultant, the results of which are assessed and certified by the city's Civil Service Board ("CSB"), to identify the most qualified candidates for promotion to lieutenant and captain in its fire department. Under the City's collective bargaining agreement with its firefighters' union, candidates for these promotions needed a certain level of experience, training and education to sit for the written examination (accounting for 60% of a candidate's total score) and to take an oral examination (accounting for 40% of a candidate's total score.) The examinations were scored by panels of independent assessors, trained by the consultant and superior in rank to the positions for which the tests were given. All of these assessors were from outside the state, and two-thirds of them were minorities.

In November and December of 2003, 77 candidates completed the lieutenant examination - 43 whites, 19 blacks and 15 Hispanics. Of those, 25 whites, 6 blacks and 3 Hispanics passed. Under the city charter's "rule of three" requiring each vacancy to be filled from among the highest three scorers, only the top 10 candidates were eligible for promotion to

the 8 positions then vacant. All 10 top scorers were white. At the same time 41 candidates completed the captain examination - 22 whites, 8 blacks and 8 Hispanics. Of those, 16 whites, 3 blacks and 3 Hispanics passed. Under the "rule of three," only 9 candidates (7 white and 2 Hispanic) were eligible for the 7 available vacancies. In January of 2004, after City officials expressed concern about the racially disparate impact of these test results, the CSB met to consider certifying the results and began hearing arguments for and against certification. The CSB met again on February 5, 2004, to hear additional arguments - some for certification, some for a validation study and some for throwing out the test altogether. At three more CSB meetings over the next several weeks witnesses with testing, firefighting and race and culture expertise offered their views of the City's testing methodology and procedure. At the final CSB meeting the City's counsel argued against certification based in part on the tests' inconsistency with Title VII's disparate impact provisions. The Mayor's representative also argued against certification, and the City's human resources director urged that the test results be discarded. Other witnesses, including both the union's president and the lead plaintiff in this case, firefighter Frank Ricci, urged that the results be certified. With one member recused, the CSB deadlocked 2 to 2, thereby resulting in a decision not to certify the examination results.

Following the CSB decision 18 firefighters (17 white and 1 Hispanic) who passed the examinations, but were denied promotions when the CSB failed to certify the test results, sued the City, several officials and the two anti-certification CSB members under 42 U.S.C. 1983, claiming a violation of their rights under the Equal Protection Clause of the Fourteenth Amendment. These individuals also filed charges with the Equal Employment Opportunity Commission ("EEOC"), and, after receiving right-to-sue letters, amended their complaint to allege a violation of Title VII's disparate treatment provisions.

The district court, on cross-motions for summary judgment, ruled for the City in a lengthy opinion, concluding that the City's motivation to avoid making promotions based on a test with a racially disparate impact does not, as a matter of law, constitute intentional disparate treatment under Title VII. Concluding also that the City's action was not based on race, because the test results were discarded for everyone and nobody was promoted, the district court also rejected plaintiffs' equal protection claim. The Second Circuit affirmed, after briefing and argument, in a one-paragraph unpublished summary order. Thereafter, the Court of Appeals withdrew that order, issuing in its place a nearly identical *per curiam* opinion adopting the district court's reasoning. Three days later the Court of Appeals voted 7 to 6 to deny rehearing *en banc* over the written dissents of Judges Jacobs and Cabranes. The Court granted certiorari, finding it prudent and appropriate to address the interpretation of what the majority deemed two unreconciled provisions of Title VII and few precedents addressing the issue.

The Supreme Court, in a 5 to 4 decision, reversed the Second Circuit, holding that the City's discarding of the promotion tests violated Title VII's disparate treatment provisions. Justice Kennedy's opinion for the majority first reviews Title VII's disparate treatment and disparate impact provisions and holds that before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate

impact, the employer must have a "strong basis in the evidence" to believe that it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action. Concluding that the City's rejection of the promotion tests was race-based and would violate Title VII's disparate treatment provisions absent a valid defense, the Court then examines disparate impact liability as a defense, looking to the Court's equal protection decisions for guidance.

From the Fourteenth Amendment precedents involving school desegregation and federal contracting, the majority gleans the standard that there must be a strong basis in the evidence for any race-conscious remedial action. Finding the same competing interests at play under both Title VII and equal protection theory (*i.e.*, eliminating employer discriminatory conduct versus doing away with all governmentally imposed discrimination), the Court adopts the strong-basis-in-evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate treatment and disparate impact provisions.

Applying the newly crafted standard to this case, the Court concludes that the City's rejection of the promotion tests cannot satisfy it for the following four reasons. First, even though the test results yielded a *prima facie* disparate impact showing, there is, according to the Court, no substantial basis in the evidence that the exams were not job related and consistent with business necessity or that there existed an equally valid and less discriminatory alternative to the test. Accordingly, a statistical showing of disparate impact, without more, fails to demonstrate a strong basis in the evidence for a race-conscious action. Second, noting the detailed steps the City paid for and took to develop and administer the tests and the painstaking analyses of its questions by independent experts, the Court concludes that the record contradicts the City's argument that the tests were not job related, consistent with business necessity and otherwise deficient. Third, the Court finds that testing and scoring alternatives were unsupported by the record evidence or were themselves violative of Title VII's disparate treatment provision. In like manner, Justice Kennedy observed that the evidence about alternatives was contradictory, and thus insufficient to support a conclusion that the City could have used (in place of examinations) an assessment center to evaluate the candidates' behavior in typical job tasks. Fourth, noting the plaintiffs' expectations about promotions based on the City's testing protocol, the majority concluded that fear of litigation alone cannot justify the City's reliance on race to the detriment of those who passed the exams and qualified for promotions. Accordingly, the Court concluded not only that the lower courts erred in granting summary judgment for the City, but that the plaintiffs are also entitled to summary judgment on their motion without remand for further proceedings. Justice Kennedy observed finally that if the City later faces a disparate impact claim as a result of certifying the test results, it can, in light of the Court's holding here, avoid liability based on the strong basis in the evidence that, had it not certified the results, it would have been subject to disparate treatment liability.

Justice Scalia filed a concurring opinion observing that the Court's resolution of this case simply postpones what he deems the "evil day" when it must confront whether the disparate impact provisions of Title VII are consistent with the Constitution's guarantee of

equal protection. Justice Scalia suggests that because disparate impact theory requires employers to make decisions based on the racial outcomes of neutral policies, it implicates the federal government in racial discrimination that the Constitution prohibits.

Justice Alito, joined by Justices Scalia and Thomas, filed a concurring opinion countering the dissenters' recitation of the factual background of the case. This concurrence posits that even if the dissent's legal analysis were correct, the white firefighters should still prevail on the basis of all the evidence of record showing that the City's real reason for scrapping the test (a position spearheaded by the Mayor, according to Justice Alito) was its desire to placate a politically important racial constituency, including a vocal black minister who also had served on the City's Board of Fire Commissioners. Accordingly, Justice Alito's opinion concludes that the plaintiffs were entitled to summary judgment in any event on their Title VII disparate treatment claim.

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, dissented in an opinion expressing the view that the record demonstrates that a rational jury could infer that the City rejected the test results because of multiple flaws in the tests and not solely because the higher scoring candidates were white. Putting the case in the historical context of overt racial discrimination against blacks in the firefighting profession generally and in New Haven particularly, Justice Ginsburg concludes that the Court's disregard of Title VII's disparate impact provisions in this case, measured against its embrace of them in *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d. 158, 91 S. Ct. 849 (1971), deprives the majority's order and opinion of "staying power." 174 L. Ed. 2d at 525.

After reciting the background facts of this case and reviewing *Griggs* and its progeny, as well as the amendments to Title VII in the Civil Rights Act of 1991, the dissenters conclude that there is no inherent tension between Title VII's disparate impact and disparate treatment provisions and that an employer's attempt to comply with the former does not violate the latter, particularly when the employer discards tests that are of doubtful consistency with business necessity. The dissent also criticizes the "strong basis in evidence" standard adopted by the Court, disagreeing with the majority that equal protection analysis is apt and that any lesser standard would promote quotas. After criticizing the majority's failure to remand for application of the Court's new standard by the trial court, Justice Ginsburg argues that New Haven had ample cause to believe that the selection process was flawed and not justified by business necessity when measured under a proper standard of review. The dissent stresses that the City simply adhered to the union's preference for an evaluation system that most municipal employers do not use - particularly because the other systems are more reliable and less discriminatory. Accordingly, the dissent opines that the City had good cause to fear disparate impact liability, given the tests' multiple deficiencies. Viewing the Court's decision as resting on the false premise that the City's rejection of the tests was based on a statistical disparity and nothing else, Justice Ginsburg refutes much of Justice Alito's concurrence and concludes that this case, while presenting an "unfortunate" situation, does not show race-based discrimination in violation of Title VII.

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The political reverberations from this case - beginning with blanket coverage by the media on the day of decision and continuing through the Senate hearings on Justice Sotomayor's nomination (at which Frank Ricci and other plaintiffs appeared as witnesses at the behest of Senate Republicans who voted against her nomination) - mark this decision as the most memorable one of the 2008 Term, at least so far as the general public is concerned. For the employment bar, the case is one of obvious consequence, though its significance is even more profound when seen as part and parcel of a judicial redefinition of what it means to discriminate in violation of Title VII. But, more on that in the concluding remarks in the final section of this paper. Infra, p. 48.

The majority's thinly disguised disdain for disparate impact discrimination - which emerges openly in Justice Scalia's concurrence - appears to be part of a more ambitious agenda (extending beyond employment law) to whittle "discrimination" down to its most narrow connotation - and consequently its most limited effect. See, e.g., Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. ---, 174 L. Ed. 2d 140, 129 S. Ct. 2054 (2009) (Voting Rights Act "now raises serious constitutional questions") (dictum). Indeed, Justice Scalia's Ricci concurrence ominously portends a showdown over the the legality of disparate impact theory generally. 174 L. Ed. 2d at 155. For an insightful take on this point, see C. Shanor, "Three Campaigns in the Disparate Impact/Equal Protection War," 37 Labor and Employment Law, No. 4 at p. 4 (Summer 2009). It is fairly clear that there are four votes for granting certiorari in such a case, but there is apparently some doubt about whether there are five votes on the current Court for holding that Title VII's disparate impact provisions violate the equal protection principle read by the Court into the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954). A successful constitutional challenge to the disparate impact aspect of Title VII would not only modify established doctrine, but also would encourage employers and unions to alter employee selection processes, thereby permitting tests and screening devices fair in form, but unjustly discriminatory in effect. In short, the demise of disparate impact theory could return applicant assessment and employee retention and promotion practices to the pre-Griggs era where those in the minority found it difficult, if not impossible, to enjoy genuine equal opportunity. That is why Justice Scalia's portent of the "evil day" of reckoning is so disturbing.

From an analytical standpoint, the Court's ultimate disposition of the case seems deeply flawed. Assuming that the Court's strong basis in the evidence standard calls for reversal of the Second Circuit's judgment affirming the district court's grant of summary judgment to the City, where should that leave the case? Presumably the question then becomes what actually motivated the City to discard the test results. Again assuming that the Court properly rejected fear of disparate impact liability as the City's reason, that may very well leave the City's motivation precisely as Justice Alito described it: a desire to placate a politically influential local religious figure who is black. That characterization, of course, begs

*the critical question whether New Haven's desire to placate a powerful religious figure in the city's black community was motivated by politics or race. Is not this question quintessentially one for the jury? Is it the Supreme Court's province (particularly as the one court furthest removed from New Haven's situation) to determine the factual issue of actual motivation? Just posing these questions leaves a bad taste about the Court's grant of summary judgment for the plaintiffs. The better disposition would have been to reverse the Second Circuit's judgment and remand for determination of plaintiffs' motion in accordance with the Court's opinion. (Indeed, that precise course of action is what Justice Thomas' opinion held that the Court should do in 14 Penn Plaza LLC v. Pyett, 555 U.S. ---, 173 L. Ed. 2d 398, 129 S. Ct. --- (2009), *infra* p. 19. The Court's own summary judgment determination here is thus not only inconsistent with its practice elsewhere this term, but more importantly, it also draws into question whether its summary disposition violates the Seventh Amendment.*

On a more practical level the decision is fraught with additional difficulty. Prominent management representatives, including an official of the National League of Cities, say that this decision lacks "bright line guidance," limits flexibility in employee selection techniques, and "is going to be good for employment lawyers." S. Greenhouse, The New York Times, p. A13 (June 30, 2009). Underlying this problem and many of the others posed by the Court's decision is a factual element that remains mostly unexamined, but loaded with doctrinal, political and legal significance: the largely overlooked fact that several black firefighters actually passed the required examinations. The reason why these black firefighters were not eligible for promotion (while only non-blacks were) is that New Haven's so-called "rule of three" effectively forbids treating all passing candidates equally. Instead, the rule gives an advantage to higher scoring candidates, even though all candidates who passed - including the black firefighters - had cleared the City's testing hurdle. Nowhere does the Court suggest that the examinations had been validated throughout the entire range of scores. Thus, while it might be taken as true that passing the tests validly measures leadership skills, that does not mean that within the passing range the higher scoring candidates are necessarily better qualified as leaders. Nor would such an unvalidated assumption be a reasonable basis for expecting to be chosen over other candidates who passed simply because of a higher score on a written examination. Yet, Justice Kennedy's majority opinion is premised in part on what he says is the white firefighters' expectations about New Haven's use of the tests. What his opinion does not say is whether those expectations have to do with passing the tests or taking refuge in the more dubious rule of three. In any event, the validity of using examination scores as New Haven did is yet to be assessed definitively on its merits, and news accounts after the Court's decision indicate that some of the black firefighters intend to mount just such a challenge.

Finally, that this case happened to involve municipal liability does not limit its reach. Employers in both the public and private sectors are subject to the Court's newly minted standard for analyzing discrimination claims of all kinds. One possible effect of such a broadly applied decision is the reappearance and growth of what was, during the heyday of disparate impact litigation, a cottage industry of employee exam developers, administrators

and employee testing mavens. On the other hand, some municipal employment observers have suggested that New Haven was an outlier in using written tests and that this decision will discourage such testing and encourage the growth of assessment centers. In either event, human resources professionals are likely to proliferate and prosper from this ruling, while employers try to sort out its meaning and effect on their workplace diversity efforts. A more ominous consequence of the decision may be an increase in legal and political challenges from both minorities and majorities to employer selection procedures. Employers can thus take little comfort from the Court's ruling in this case, for it is likely to embolden disaffected white employees to challenge diversity initiatives. And, to make matters worse, it does nothing to determine the degree of protection, if any, the law affords for voluntary diversity efforts.

Gross v. FBL Financial Services, Inc., 557 U.S. ---, 174 L. Ed. 2d 119, 129 S. Ct. --- (2009)

The Court decided that a plaintiff in an ADEA case must prove by a preponderance of the evidence that his age was the "but for" cause of the challenged adverse employment action.

Jack Gross began working for FBL Financial Group, Inc. ("FBL") in 1971 and by 2001 held the position of claims administration director. In 2003, when Gross was 54, FBL reassigned him to the job of claims project coordinator and transferred many of his former duties to Lisa Kneeskern (who was in her early forties and had previously been supervised by Gross), whom FBL assigned to the newly created position of claims administration manager. Gross and Kneeskern received the same salary, but Gross considered his reassignment and loss of duties as a demotion.

Gross filed suit in April of 2004 (presumably after exhausting his administrative remedies), alleging that his reassignment violated the ADEA. At trial Gross introduced evidence suggesting that the reassignment was indeed based at least in part on his age. FBL defended on the grounds that the reassignment was part of a corporate restructuring and that the new position was better suited to Gross' skills. Over FBL's objections the district court charged the jury that it must return a verdict for Gross if he proved that his age was a motivating factor in his demotion to the coordinator position - i.e., if his age played a part or role in FBL's decision. The district court also instructed that the verdict must be for FBL if it proved that it would have demoted him regardless of his age. The jury returned a verdict for Gross, awarding him \$46,945 in lost compensation.

The Eighth Circuit reversed and remanded for a new trial, holding that the instructions were incorrect under Justice O'Connor's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), which the Eighth Circuit had previously identified as the controlling opinion in that case. According to the Court of Appeals, only upon Gross' presentation of direct evidence of age discrimination could the burden shift to FBL.

Thus, the Eighth Circuit held that the instructions were flawed because they permitted a verdict for Gross upon a preponderance of *any* form of evidence. Because Gross had conceded that he had not presented direct evidence of discrimination, the mixed motive instruction was improper and the jury should have been instructed to determine whether Gross had proved that his age was the determining factor in the reassignment. The Supreme Court thereafter granted certiorari on the question of whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction.

The Supreme Court, in a 5 to 4 decision, vacated the Eighth Circuit's decision in an opinion by Justice Thomas. The Court begins its opinion with an acknowledgment that the question presented by the parties is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction in a non-Title VII case. Nonetheless, Justice Thomas then says that before reaching that question, the Court "must" first determine whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim under the ADEA. The Court ultimately answers only the anterior question it posed and not the question presented by the petition for certiorari. Its answer to its own question is no - that is, a plaintiff is *never* entitled to a burden shifting instruction in a mixed-motives age discrimination case.

Pointing out that Title VII and the ADEA are distinct statutes with differing provisions as to causation and that the Court had never held that Title VII's burden-shifting framework is applicable to ADEA claims, Justice Thomas concludes that the Court's interpretation of the ADEA is not governed by its prior decisions in Title VII cases such as *Price Waterhouse and Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (2003). Focusing on the ADEA's text, Justice Thomas concludes that, unlike Title VII, it does not authorize mixed-motives discrimination claims. Congress' use of "because of" as the operative phrase in the ADEA means "by reason of" or "on account of" according to the ordinary dictionary usages cited by Justice Thomas. From that definition, the Court reasons that to establish a disparate treatment age discrimination claim, a plaintiff must prove that age was the "but-for" cause of the employer's adverse action. And from that premise the Court says that it follows, based on the general rule of burden allocation and an absence of Congressional direction to the contrary, that a plaintiff retains the burden of persuasion to establish that age must have been the *determinative* factor for an employer's decision, not just *a factor* among others.

Finally, the Court rejects the argument that *Price Waterhouse* controls this case. First noting that it is far from clear that the Court would have the same doctrinal approach were it to consider *Price Waterhouse* today, the majority also claims that its burden shifting framework has been hard to apply. Seeing no benefit to extending *Price Waterhouse* to ADEA claims, Justice Thomas finds the case unpersuasive. Accordingly, the Court vacates the Eighth Circuit's decision and remands the case for further proceedings consistent with its opinion.

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented on the

principal ground that the Court in *Price Waterhouse* and Congress in the Civil Rights Act of 1991 rejected a "but-for" causation standard in construing statutory language identical to the ADEA's. Moreover, the dissent expresses profound disagreement with the Court's reaching out to decide a question that the litigants neither presented nor briefed and that the United States urged the Court not to decide without the written views of all interested parties. The dissent then parses the Court's Title VII precedents and concludes that the ADEA's identical operative language should be construed in like manner. Justice Stevens points out that when Congress amended Title VII in the wake of *Price Waterhouse*, it rejected the but-for causation standard, stressing that the amendments did not alter the statute's operative causation language. The dissent also answers the majority's concern about the workability of the burden shifting framework by pointing out Congress' embrace of it in Title VII suits, which comprise the vast majority of mixed-motives cases. Finally, the dissent would answer the question actually presented by the parties as follows based on the *Desert Palace* decision: A plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

Justice Breyer filed a separate dissent that Justices Souter and Ginsburg joined. While expressing his agreement with Justice Stevens' dissent (which he joined), Justice Breyer offers the additional explanation that but-for causation is particularly inappropriate in discrimination cases, where the vagaries of motivation differ so dramatically from the more objective and knowable facts in physical tort cases. Justice Breyer also notes with approval an affirmative defense for the employer where it would have taken the same action regardless of its otherwise illicit motivation. The opinion ends by approving the district court's jury instructions as seeming both appropriate and lawful.

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In terms of options available to lawyers and trial judges for analyzing and determining age discrimination cases, the Court's decision here limits the menu. No longer will plaintiffs in ADEA cases be able to rely on the mixed-motives framework for trying to convince a factfinder that the employer violated the law. Moreover, it appears that prima facie evidence of unlawful age bias may not, standing alone, carry the day past a pre-trial summary judgment or presumably a Rule 50 motion for judgment as a matter of law at trial. What the Court seems to be saying to the district courts is that ADEA plaintiffs must forecast or present a preponderance of evidence in support of the proposition that but for the employee's age, the employer would not have taken the challenged action. Further, the Court's disapproval of the trial court's instruction in this case indicates that it will not be enough for a plaintiff to show that age was a motivating factor; instead, what is now required is preponderant evidence that age was a determining factor.

For a Court majority that disclaims the "activist" label and purports only to be umpiring disputes brought to it, this decision proves quite the contrary. As noted above, the petition for certiorari presented a question that the Court chose not to answer. However, instead of dismissing the writ as improvidently granted, or perhaps posing its own question

for briefing and argument as it has done in other cases, e.g., Order of June 29, 2009 in Citizens United v. Federal Election Commission, No. 08-205, the Court, in disregard of its own prudential certiorari protocol, cf., Sup. Ct. Rules 14.1 and 15.2, reached out to decide an issue the parties neither briefed nor argued. By doing so, the Court engaged in judicial lawmaking that bespeaks what many may regard as an unseemly lack of institutional humility. Observers may, of course, draw their own conclusions about the majority's claim to judicial restraint while engaging in the umpiring pretense.

*Beyond its hubris in summarily deciding a question it conjured on its own from the case, the majority then put its personal gloss on the words Congress had carefully chosen to express what it means to discriminate in violation of the ADEA. As Justice Breyer's opinion so keenly observes, determining whether an employer has taken a challenged action "because of" age (or some other prohibited factor under other statutes) does not textually or otherwise compel a finding of "but for" causation. 174 L. Ed. 2d at 137. Indeed, because non-physical motivation is not objectively perceptible and is often aroused and animated by more than a single factor or reason, the majority's requirement of a "determining" or "but-for" cause is unrealistic psychologically. And, more to the point here, the newly minted rule is also contrary to the expressly stated intent of Congress in the ADEA to redress the specific problems of older workers and to "prohibit arbitrary age discrimination." 29 U.S.C. 621(b). To be sure, the mixed-motives framework was originally a judicial construct that does not appear explicitly in the ADEA's text. But neither does the majority's own artificial construct of age as a "but-for" factor appear *in haec verba* in the statute. Given the common understanding of statutory causation in the lower courts and Congress' acquiescence in that established judicial practice for so many years, it ill becomes the Court to repeal that understanding - especially without the benefit of full briefing by the parties and interested amici. All in all, the Court's exercise of the Judicial power in this case is not one of its exemplary moments.*

**AT&T Corporation v. Hulteen, 556 U.S. ---, 173 L. Ed. 2d 898,
129 S. Ct. 1962 (2009)**

The Court decided that an employer does not necessarily violate the Pregnancy Discrimination Act ("PDA") provisions of Title VII when it pays pension benefits calculated on an accrual rule that is part of a bona fide seniority system and that gives less retirement credit for pre-PDA maternity leave than for medical leave generally.

For nearly a century AT&T Corporation and its affiliates ("ATT") have provided pensions and other benefits based on a seniority system that relies on an employee's term of employment - i.e., her period of service at the company minus uncredited leave time. Prior to April 20, 1979, the effective date of the PDA, pregnancy leave was treated as personal - and mostly uncredited - leave time, while employees on disability leave got full service credit for their absences. Prior to enactment of the PDA, this treatment of female employees had been regarded as lawful under the Court's construction of Title VII in *General Elec. Co. v. Gilbert*,

429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1978) (Exclusion of disabilities related to pregnancy is not sex-based discrimination under Title VII.) When the PDA superseded *Gilbert*, ATT adopted a policy that provided - prospectively, but not retroactively - service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities. Noreen Hulteen and three other women who had received less service credit for pregnancy leave before the adoption of ATT's post-PDA policy, along with their union, filed charges with the EEOC alleging discrimination on the basis of sex and pregnancy. In 1998 the EEOC issued a reasonable cause letter and a notice of right to sue. All of the charging parties thereafter filed suit in the Northern District of California.

The district court, on cross-motions for summary judgment, ruled that post-PDA benefit calculations that incorporate pre-PDA accrual rules treating pregnancy differently from other forms of leave violate Title VII. The Ninth Circuit affirmed *en banc*, concluding that calculation of service credit excluding time spent on pregnancy leave violates Title VII. The Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit's decision and those of two other circuits.

The Supreme Court, in a 7 to 2 decision, reversed the Ninth Circuit in an opinion by Justice Souter, holding that because ATT's pension payments accord with the terms of a *bona fide* seniority system and because an employer does not violate the PDA by calculating benefits under a discriminatory accrual rule applicable only pre-PDA, these payments are insulated from challenge under Title VII. The Court concludes that ATT's benefit calculation rule is protected by section 703(h) of Title VII, which, as construed in *Teamsters v. U.S.*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), insulates seniority systems that are *bona fide* (i.e., have no discriminatory terms.) Because the PDA cannot be read as applying retroactively, the benefit calculation rule which was lawful pre-PDA under *Gilbert* cannot now be made unlawful retroactively. Further, the Court distinguished *Bazemore v. Friday*, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986), on the grounds that it did not involve a seniority system subject to section 703(h) and that the employer (in contrast to ATT) did not eliminate the discriminatory practice when the law changed. Finally, Justice Souter also noted that because the plaintiffs here were not affected by a compensation practice that was discriminatory pre-PDA, the recent amendment to section 706(e) by the Lilly Ledbetter Fair Pay Act of 2009 is not applicable. Accordingly, because ATT's seniority system is *bona fide*, its operation in this case insulates the benefit calculation from challenge, and the Ninth Circuit's judgment to the contrary is reversed.

Justice Stevens filed a concurring opinion reaffirming his dissent in *Gilbert* and expressing his agreement with much of Justice Ginsburg's dissent in this case. Nonetheless, Justice Stevens, concluding that he "must accept" *Gilbert's* interpretation as the governing law before the PDA, joins the Court's opinion because this case involves rules that were in force only prior to the PDA.

Justice Ginsburg, joined by Justice Breyer, dissented, expressing the view that ATT

committed a current violation of Title VII by failing post-PDA to discontinue reliance on calculations that differentiate based on gender. Justice Ginsburg's dissent explores both the history of *Gilbert's* rise and fall, stressing Congress' conclusion in the PDA that discrimination based on pregnancy *is* discrimination against women. Conceding that the PDA does not require redress for past discrimination, Justice Ginsburg points out, nonetheless, that it does protect women after April of 1979 against repetition or continuation of pregnancy-based adverse treatment. In Justice Ginsburg's view, the better reading of the PDA is that ATT was required to stop relying on the pregnancy classification immediately upon enactment of the statute. Further, the benefit calculation rule here is not protected by section 703(h) because, unlike the situation in *Teamsters, supra*, ATT's seniority system was not *bona fide* in the sense that it was neither neutral on its face nor in its intent. In Justice Ginsburg's view, Congress disapproved of *Gilbert* to the extent that it intended no continuing reduction of women's compensation based on *Gilbert's* incorrect and (in Justice Ginsburg's word) "astonishing" premise that pregnancy discrimination is not sex-based.

Justice Ginsburg notes that her view is influenced also by the facts that plaintiffs here are seeking only modest relief, that they do not seek any compensation for past injury, that their claims are limited to prospective relief and that the effect on ATT would neither be excessive nor unmanageable. Finally, citing and excerpting from the late Chief Justice Rehnquist's opinion in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003), Justice Ginsburg puts the PDA in the historical context of societal attitudes about pregnant women and concludes that it is reasonable to infer that Congress intended that women's pension payments would not be diminished by any pretense that pregnancy discrimination displays no gender bias. Accordingly, the dissenters would affirm the Ninth Circuit's judgment in this case and would also explicitly overrule *Gilbert* so it can generate no further mischief.

* * * *

In several prior reviews of the Court's work, I have mentioned retirement of the baby boomer generation as a phenomenon that the Court would have to face in construing the antidiscrimination statutes. Here at last is precisely one of those situations, this one involving exclusively formerly pregnant female workers. The Court, however, failed to appreciate the meaning of present-day sex discrimination against this discrete subset of boomers and thus consigned these women to a leaner retirement solely because of their gender.

This decision is another example of the Court's reformulation of the definition of what it means to discriminate. Here, the majority is confronted by plainly differential treatment of women because of their sex. Nonetheless, the Court carves out of the statutory definition of discrimination an employer's continuing failure to credit pregnant women's service solely because that failure was once regarded as lawful (when the women were pregnant, but not yet entitled to any payment of benefits.) Perhaps this narrowed definition of discrimination will not have much play in the workforce because of the relatively few circumstances in which it is

likely to arise. As a doctrinal matter, however, insulating clear discrimination from statutory coverage runs counter to the PDA's original intent to override Gilbert and to require employers to treat women in the workforce as equals after the PDA's enactment. By viewing the situation of these women retrospectively and failing to heed the PDA's injunction not to discriminate after its enactment, the majority puts the decision on shaky ground both logically and doctrinally.

Aside from questions about the doctrinal soundness of the Court's ruling, the free market workplace context of the Court's ruling raises additional doubt about its correctness under Title VII. Particularly during the heady times of the 1990's and early 2000's, years-of-service calculations under benefit plans have been changed or supplemented retroactively in order to meet the demands of the highly competitive and often overheated executive compensation market. Examination of financial statement footnotes in corporate filings with the Securities and Exchange Commission should reveal that acquisition of constructive service credit in order to attract and retain (mostly male) executives, if not commonplace, has certainly been a recognized practice. Moreover, even if employers have difficulty altering the service requirements under Treasury-qualified plans, arrangements for supplemental non-qualified reimbursement payments are not out of the question in privately negotiated compensation deals. In any event, by singling out pre-PDA service credit as unworthy of modification in compensating their formerly-pregnant female employees, the Court enables present day discrimination against these workers, perpetuates the original discrimination against them, and breathes new life into the Gilbert doctrine that the PDA plainly sought to eradicate. This decision looks like a prime candidate for legislative overruling in the manner of the Lilly Ledbetter Fair Pay Act of 2009. For an insightful look at the effect of legislative overrides and the creation of "shadow precedents" like Gilbert, see D. Widiss, "Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides," 84 Notre Dame L. Rev. 511 (2009) referred to by Professor Richard Bales in his June 19, 2009, posting at Workplace Prof Blog, <lawprofessor.typepad.com/2009/06/widiss-on-gross-and-statutory-overrides.html>.

Crawford v. Metropolitan Gov't of Nashville, etc., 555 U.S. ---, 172 L. Ed. 2d 650, 129 S. Ct. 846 (2009)

The Court decided that the "opposition" clause in Title VII's anti-retaliation provision covers an employee's report of discrimination in answer to her employer's questions during an interview conducted as part of its internal investigation into rumors of sexual harassment.

In 2002 the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") began interviewing some of its employees as part of an investigation into rumors of sexual harassment by its school district's employee relations director, Gene Hughes. Vicky Crawford, a Metro employee for 30 years, was asked by a Metro human resources officer

whether she had witnessed any inappropriate behavior by Hughes. Crawford responded by describing several instances of verbal and physical sexual harassment. Two other employees also reported being sexually harassed by Hughes. Metro took no action against Hughes, but it fired Crawford and the two other complaining witnesses after completing the Hughes investigation, saying that Crawford was discharged for embezzlement. Crawford filed a charge with the EEOC and later a lawsuit claiming that Metro had retaliated against her in violation of both the opposition and participation clauses of section 704 of Title VII.

The district court granted Metro's summary judgment motion, holding that Metro did not violate the opposition clause because Crawford had not instigated or initiated any complaint, but had merely answered questions by investigators in a complaint someone else initiated. The court also concluded that her claim failed under the participation clause because the employer's investigation had not occurred in connection with a pending EEOC charge. The Sixth Circuit affirmed for essentially the same reasons. The Supreme Court granted certiorari in light of a circuit conflict, particularly as to the opposition clause.

The Supreme Court unanimously reversed the Sixth Circuit's judgment and remanded the case for further proceedings. Justice Souter's opinion for all members of the Court except Justices Thomas and Alito (who concurred in a separate opinion by Justice Alito) holds that Title VII's antiretaliation provision extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Focusing on the opposition clause, Justice Souter notes that the word "oppose" in section 704 is undefined and thus carries its ordinary dictionary meaning of resisting or contending against. Crawford's statements about Hughes' conduct thus come within the meaning of "oppose," which Justice Souter says goes beyond actively provoking the dialogue and covers answering someone else's questions. According to the Court, nothing in the statute requires a "freakish" rule protecting an employee's report on her own initiative, but leaving unprotected one who reports the same discrimination in the same words when asked a question. The Court thus adopts the position urged by the United States and explained by an EEOC Guideline: When an employee communicates her belief that an employer has engaged in discriminatory activity, that communication virtually always constitutes opposition to the activity.

The Court rejects Metro's argument for the Sixth Circuit's "active, consistent" opposition rule based on employer fear of retaliation claims, noting that employers have a strong inducement to ferret out and stop discriminatory activity in order to minimize the prospect of vicarious liability for a supervisor's harassment. Indeed, Justice Souter claims that a contrary ruling here could undermine Title VII's primary objective of avoiding harm to employees, if workers thought they had to keep quiet to avoid being penalized for speaking out in answer to an employer's questions. Because Crawford's conduct is therefore covered under the opposition clause, the Court does not reach her claim that the Sixth Circuit also misread the participation clause. In remanding the case, the Court notes that Metro's other defenses were never reached by the district court and are thus open on remand.

Justice Alito, joined by Justice Thomas filed an opinion concurring in the Court's judgment and agreeing with the Court's primary reasoning based on the Government's position. The point of the concurrence, however, is that the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous "purposive" conduct. Relying on dictionary definitions of "oppose" and noting that section 704's text describes protected conduct that is "purposive," Justice Alito expresses the view that the Court's holding would not necessarily extend to silent opposition or to opposition expressed to co-workers or outside of the employment situation. Noting an increase in retaliation charges at the EEOC, Justice Alito remarks that an expansive interpretation of the Court's holding would likely cause this trend to accelerate. Accordingly, the concurring Justices remind that the Court's holding reaches only purposive conduct (what Justice Alito describes here as an employee who testified in an internal investigation) and does not answer any issue beyond that.

* * * *

As a result of this decision, employers retain a powerful weapon for enforcing Title VII in their workplaces as well as for defending themselves against liability. While many count this case as a win for employees, viewed through a wider lens it is a shared victory. This decision encourages employees to respond frankly when they are interrogated and thus provides employers with a powerful investigative tool to minimize or eliminate discrimination, while providing a defense against hostile environment and other employee claims of wrongdoing. Employment practices liability insurance carriers should love this decision, too, for precisely the same reason as their insureds. By the same token, the ruling concomitantly protects from illicit reprisal employees who must submit to their employer's internal investigations. Thus, taking a longer view of the case, the Court has reasonably construed the opposition clause of Title VII section 704 to the benefit of employer and employee alike.

The Court's Title VII holding here stands in contrast with its First Amendment decision in Garcetti v. Ceballos, 547 U.S. 410, 164 L. Ed. 2d 689, 126 S. Ct. 1951 (2006), where the internal statements of an assistant district attorney made in the course of his employment were held to be constitutionally unprotected. Here on the other hand, Vicky Crawford also spoke under color of her status as an employee; yet her statements were deemed protected. To be sure, in the present case, unlike in Garcetti, Congress has provided explicit protection against retaliation for certain employee speech. Moreover, in Garcetti, the Court was purporting to protect a law enforcement agency's discretion to manage its operations. These differences, among others, serve to harmonize Garcetti with the present case. Nonetheless, an air of inconsistency lingers over the juxtaposition of these decisions. The most convenient conclusion is that the unanimous decision in this case casts further doubt on the Court's already dubious ruling in Garcetti.

One somewhat nettlesome aspect of the Court's decision is its failure to come to grips

explicitly with Justice Alito's suggestion that the holding is limited to "purposive" conduct on the part of the employee who reports misconduct. The difficulty is how to tell whether an employee is simply reporting an observation or opposing an illicit practice. The difference was obvious in this case, for Vicky Crawford made clear that she did not participate in or condone what she was reporting about Hughes' harassment. But what about cloudier circumstances like laughing along with verbally offensive jokes, or participating in the dissemination by computer of inappropriate materials, or even fraternizing in suggestive fashion with the target of the investigation? In such cases it becomes more difficult to conclude that a report in answer to an investigator's question falls within the opposition clause. On the other hand, when employees are obliged to come forward with reports of what they have observed and heard, they should be protected from reprisal under section 704 of Title VII because the effect of their reports is ultimately to oppose the reported practice, even if their responses do not comfortably fit within the "purposive" standard suggested by Justice Alito's concurrence. In any event, the "purposive" gloss put forth by Justice Alito was not embraced by the Court, and it is not clear that it could command a majority if it arises as an issue in a future case.

C. Labor Relations

For the first time in many terms, the Court devoted considerable attention to labor-management relations. In taking up the issue of where statutory discrimination claims of employees working under a collective bargaining agreement may be heard, the Court arguably altered the law in a manner that is likely to spawn a cottage industry of advocates debating the meaning of labor contracts and the competing merits of public courts and private arbitration tribunals. Whether the Court's stroll into the intersection of labor relations, arbitration and employment discrimination signals a broader interest in privatizing the resolution of employment claims is uncertain. Clearly enough, however, reinvigoration of the union movement and the prospect of regulatory change may provide additional opportunities for the Court to refine how discrimination cases get resolved.

In other less visible, but sharply contested, labor cases, the Court dealt with two persisting problems for labor organizations, one involving their income from payroll deductions and the other involving litigation expenditures under union shop agreements. On the income side, the Court upheld a state law restriction on payroll deductions for union dues, thus making it more difficult for public employee unions to assure their levels of income. On the expense side, the Court upheld a local union's service fee imposed on nonmembers that is used in part to pay its national union's litigation expenses largely for the benefit of other affiliated locals. Just as remarkable, perhaps, as the rulings themselves is the fact that the Court expressed an interest in resolving these issues in the first place. As the decline of unionization has flattened out (due in part to vigorous organizing in the public employment and personal service sectors), the Court seems once again to regard labor-management issues as relevant and thus worthy of its attention. Whether the Justices' focus on labor

relations and internal union issues is a fleeting gaze or a deeper stare is yet to be told.

14 Penn Plaza LLC v. Pyett, 555 U.S. ---, 173 L. Ed. 2d 398, 129 S. Ct. --- (2009)

The Court enforced a provision in a collective bargaining agreement that clearly and unmistakably requires bargaining unit members to arbitrate their claims under the Age Discrimination in Employment Act.

Steven Pyett and a group of other employees of Temco Service Industries, Inc. ("Temco"), a maintenance service and cleaning contractor, worked as night watchmen and in similar capacities at the entrances and lobbies of buildings in New York City owned by 14 Penn Plaza LLC ("LLC"). The LLC was a member of the Realty Advisory Board on Labor Relations, Inc. ("RAB"), a multiemployer bargaining association for the City's real estate industry. Local 32BJ of the Service Employees International Union ("Union"), the exclusive bargaining representative of employees in the City's building services industry, had a collective bargaining agreement ("CBA") with RAB that prohibited employment discrimination based on "any characteristic protected by law," including specifically any claims under the Age Discrimination in Employment Act ("ADEA"). The CBA required that all claims of employment discrimination "shall be subject to the [CBA's] grievance and arbitration" procedures. . . as the sole and exclusive remedy" for violations of the contract's no-discrimination provision. The CBA further directs that arbitrators "shall apply appropriate law" in making decisions on such discrimination claims.

In August of 2003 the LLC engaged an affiliate of Temco to provide licensed security guards to staff its buildings' entrances and lobbies. Because this action rendered unnecessary the services performed by Pyett and his colleagues, Temco reassigned them to less desirable jobs as night porters and light duty cleaners, allegedly resulting in lost income and emotional distress. At the employees' request the Union filed a grievance alleging, among other things, a violation of the CBA's ban on age discrimination. After failing to obtain relief in the grievance process and an initial arbitration hearing, the Union withdrew the age discrimination claims, believing that its consent to the new contract for the licensed security guards foreclosed a legitimate objection to reassignment of the aggrieved employees. While the Union continued to pursue the employees' other claims about seniority, promotion and overtime, Pyett and his colleagues filed a charge (referred to as a "complaint" in the Court's decision) with the EEOC alleging a violation of the ADEA by the LLC and Temco. Upon the EEOC's dismissal of the charge one month later, Pyett and the other charging parties sued the LLC and Temco, alleging that their reassignment violated the ADEA and state and local laws prohibiting age discrimination.

The district court denied the employers' motion under sections 3 and 4 of the Federal Arbitration Act ("FAA") to compel arbitration of the employees' claims because even a clear and unmistakable union-negotiated waiver of a judicial forum is unenforceable in the Second

Circuit. On the employers' interlocutory appeal under section 16 of the FAA, the Second Circuit affirmed, and the Supreme Court granted certiorari to address an unresolved issue dividing the circuits as to the enforceability of a union-negotiated waiver of a judicial forum for a federal age discrimination claim.

The Supreme Court reversed in a 5 to 4 decision, holding that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the ADEA is enforceable as a matter of federal law and that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), does not forbid such enforcement. Justice Thomas' opinion for the majority focuses first on the labor relations aspect of this case. The opinion concludes that the collectively bargained decision of the employees' union and their employer to require arbitration of employment discrimination claims is a mandatory subject of bargaining under the National Labor Relations Act ("NLRA") and is no different from other decisions made by the parties in designing their grievance machinery. Rejecting the employees' argument that waivers of a judicial forum for litigating statutory rights is outside the scope of the bargaining process, the majority reminds that under the NLRA courts generally may not interfere with the parties' freedom of contract. Concluding that its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), enforcing an individual's agreement to arbitration of ADEA claims, "fully applies" in the collective bargaining context, the Court determines that an examination of the NLRA and ADEA yields a straightforward answer to the issue in this case: there is no basis in the ADEA for striking down a freely negotiated clause in the CBA requiring that age discrimination claims be arbitrated. In Justice Thomas' words, "Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice." 173 L. Ed. 2d at 411.

The majority next holds that the CBA's arbitration provision is fully enforceable under the *Gardner-Denver* line of cases. Justice Thomas points out that *Gardner-Denver* involved only the preclusive effect of an arbitration that determined a *contractual*, not statutory, claim - an issue different from the one posed here concerning the preclusive effect of a collectively bargained agreement that expressly covers both statutory *and* contractual discrimination claims. Because *Gardner-Denver* and its progeny involved employees who had *not* agreed, either individually or through their bargaining agents, to arbitrate their statutory claims, the narrow principle underlying those cases does not control the outcome here.

Recognizing the dicta in the *Gardner-Denver* line of cases that criticized arbitration of statutory claims, the majority finds that the Court's prior skepticism about arbitration rests on a misconceived view that the Court has since abandoned. First, the majority observes that arbitration is not tantamount to a waiver of statutory claims, but is merely an agreement to determine those claims in an arbitral, instead of judicial, forum. Justice Thomas also points out that the Court no longer mistrusts arbitration as an alternative means of dispute resolution of statutory claims, though he takes pains to note that the Court's embrace of arbitration in this case shows fidelity to the ADEA's text and is not simply a judicial policy favoring arbitration. Second, the majority concludes, contrary to dicta in *Gardner-Denver*, that arbitrators are

capable of resolving statutory discrimination claims and that the informal and streamlined features of arbitration do not make it inadequate or otherwise discredit it as a forum to resolve statutory claims. Third, while the majority recognizes that a union's control over the grievances of individual employees presents a conflict-of-interest, it rejects any attempt to judicially graft a no-conflict limit onto the ADEA and regards such an argument as a collateral attack on the NLRA. In any event, according to the majority, Congress has, through the duty of fair representation under the NLRA and direct union liability under the ADEA, provided remedies for situations where unions are "less than vigorous" in defense of their members' claims of discrimination under the ADEA.

Finally, the Court rejects the employees' argument that the CBA does not clearly and unmistakably require arbitration of ADEA claims, as that argument was not made in the lower courts and is contrary to the premise on which certiorari was sought. In like fashion, the majority rejects, as a basis for determining the issue presented by the petition for certiorari, the employees' argument that the CBA operates as a prohibited waiver of substantive rights (because the CBA precludes a federal lawsuit and the union can block arbitration of a claim) - thus leaving the employees without any remedy for a federal right. Justice Thomas points out that this issue was neither presented by the petition nor fully briefed and that it involves contested factual allegations, as the record suggests, for example, that the Union allowed the employees to pursue the arbitration even after it declined to participate. Accordingly, the majority concluded that it was not in a position to resolve the "substantive waiver" issue, particularly in light of its hesitation to invalidate arbitration agreements on the basis of speculation. Accordingly, the Court reversed the Second Circuit's judgment and remanded the case for further proceedings consistent with the majority opinion.

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented, expressing the view that *Gardner-Denver* requires that the employees be permitted to bring their ADEA action in court. Regarding the right to sue under the ADEA as one that cannot be waived as part of the collective bargaining process, the dissent points to the existence of overlapping remedies against discrimination, a collective bargaining agreement's concern only with contractual rights, and the focus of labor agreements on collective rights, not individual rights. Having held in *Gardner-Denver* that a union could not waive an employee's right to a judicial forum for his statutory rights, the dissent argues that *stare decisis* requires adherence to that holding regardless of the Court's more favorable view of arbitration in recent years. Justice Souter next argues that the majority's regard of *Gardner-Denver's* holding as a narrow one runs counter to the unanimous conclusion of the courts of appeals (save for the Fourth Circuit) and cannot be reconciled with the Court's own statements in *Gardner-Denver* and elsewhere indicating that the right to a judicial forum cannot be waived by the collective bargaining process. Finally, Justice Souter criticizes the majority's argument that *Gardner-Denver's* concern about a union's conflict of interest in pursuing a grievance based on individual statutory rights is a policy matter best left to Congress, pointing out that Congress has assumed for the last 35 years that the right to a judicial forum it had conferred by statute cannot be waived through collective bargaining.

Justice Stevens filed a separate dissenting opinion expressing his view that the majority's holding is grounded in a preference for arbitration that leads it to disregard the binding precedent of *Gardner-Denver*. Only by reexamining the statutory question through the lens of a policy favoring arbitration is the Court able to reach a result different from *Gardner-Denver*, according to Justice Stevens. Such a reassessment, he stresses, is for Congress, rather than the Court. In Justice Stevens' opinion, the competing arguments about judicial versus arbitral forums were resolved in *Gardner-Denver* and, absent intervening amendments to the ADEA or the NLRA, the Court is bound by what it previously held.

* * * *

At its jurisprudential heart this case purports to be about the primacy of the NLRA. That is why I have included it in the Labor Relations portion of the paper instead of the Employment Discrimination part. The essence of what Justice Thomas' opinion says is: The courts shall not tinker with the freedom of contract principle that permits employers and unions to bargain and agree about how workplace disputes are to be resolved - even when those disputes involve rights for which Congress has provided a judicial forum for their enforcement. In effect, the majority holds that the sanctity of a private bargain trumps the availability of a public judicial forum for enforcing federal statutory rights. The utter irony of such unyielding fidelity to a national labor policy favoring the collective bargaining process fairly leaps from the pages of Justice Thomas' opinion. Whether the Court will hold bargaining rights in such high esteem in other circumstances (e.g., claims by unions alleging violations of section 8(a)(5) of the NLRA or requests for bargaining orders as a remedy for employer unfair labor practices) remains suspect, however. As Justice Stevens observed in his dissenting opinion, the majority's fondness for arbitration as a means of privatizing resolution of discrimination claims may have unduly animated its disposition of this case.

The immediate common reaction to this decision is that collective bargaining agreements that have complementary no-discrimination and arbitration clauses will be enforced and that unionized employees will have to litigate their statutory discrimination claims in the grievance and arbitration procedure provided under the labor agreement. That may not turn out to be true, for the most important issue in the case - what happens when the union controls access to the arbitration process - was left unresolved by the Court. At the very end of Justice Souter's opinion he hedges the Court's ruling by leaving for another day the issue of a substantive waiver by a conflicted union. From a practice standpoint, therefore, this case resolved very little and may be of limited effect. Indeed, the most likely consequence of the Court's decision may take place at the bargaining table. Both unions and management may have some incentive to bargain for a more robust arbitration procedure that will expressly cover statutory discrimination claims and provide enough protections for individual claimants that the procedure will pass muster (with the present Court, at least) despite any conflict of interest on the part of the union.

As to the merits of permitting waivers of judicial enforcement of ADEA rights in a labor agreement, the Court's decision rests on an impoverished rationale. Its resolution of the tension between free collective bargaining and full judicial enforcement of protections against discrimination is, to be charitable, open to serious question. The availability of a judicial remedy for individual victims of discrimination is a bedrock feature of the ADEA, Title VII and other anti-discrimination statutes. Indeed, providing Article III judges was an important element of the original Title VII, lest Southern juries be permitted to nullify what Congress required of employers. It would have been unthinkable at the time Title VII and the ADEA were enacted that employers and unions could privatize enforcement of federal law through collective bargaining and force employees into arbitration of their statutory rights. Even years later, so concerned was Congress about waivers of statutory rights that it enacted the Older Workers Benefit Protection Act amendments to the ADEA to regulate the circumstances in which individuals could waive their federal age discrimination rights. While one might argue that the waiver train left the station in Gilmer, that case says nothing at all about waivers that are not individually made. Moreover, even from a purely contractual perspective, what do employees gain as consideration when their judicial forum rights are bargained away by their union and employer? If the answer is higher wages, fuller benefits or other consideration exchanged at the bargaining table, might there be satellite litigation over the parties' bargaining history to assure that the statutory right was not short-changed? Given this context, even if the majority correctly distinguished away Gardner-Denver's precise holding (a dubious proposition as the dissenters point out), the Court would have been more faithful to Congressional intent had it held that individuals are entitled to their day in court unless they have individually, knowingly, clearly and unmistakably waived the judicial forum in favor of some other means of resolution.

Ysura v. Pocatello Education Association, 555 U.S. ---, 172 L. Ed. 2d 770, 129 S. Ct. --- (2009)

The Court upheld a state's ban on payroll deductions by local governmental employers for political activities.

Idaho's Right to Work Act, which covers both public and private employees, authorizes employers to deduct union fees from an employee's wages with the worker's signed written authorization. In 2003 Idaho amended the statute by prohibiting payroll deductions for "political activities." Shortly before the amendment's effective date several labor organizations sued the Idaho secretary of state and attorney general in their official capacities, claiming that the ban on political payroll deductions was unconstitutional under the First and Fourteenth Amendments.

The district court concluded that as to public employers at the state level, the ban was valid because Idaho itself paid to set up and maintain the payroll deduction plan and the First Amendment did not compel the State to subsidize union speech. The district court, however,

struck down the ban as it applied to private employers and local governments because the State had failed to identify any subsidy it provided to those employers to administer the payroll deductions. Neither side challenged the district court's ruling as to private and state-level employees. As to local government employers, the Ninth Circuit affirmed, striking down the ban because Idaho did not actually operate or control their payroll systems. The Supreme Court granted certiorari without expressly noting any circuit split.

The Supreme Court reversed by a 6 to 3 vote. Chief Justice Roberts' opinion for a majority of five Justices holds that "nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities." The majority first rejected the Unions' argument that Idaho's ban singles out political speech and should thus be subject to strict scrutiny under *Davenport v. Washington Bd. of Ed. Ass'n*, 551 U.S. 177, 168 L. Ed. 2d 71, 127 S. Ct. 2372 (2007). Relying on the Court's prior refusal to embrace a First Amendment obligation to fund political expression, and noting that the parties agreed that Idaho was not constitutionally obligated to provide payroll deductions at all, the majority concluded that the ban does not abridge any union right of free speech and is not subject to strict scrutiny. Needing only a rational basis to sustain the ban, the Chief Justice found sufficient the State's interest in "avoiding the reality or appearance of government favoritism or entanglement with partisan politics." 172 L. Ed. 2d at 778. Also noting that the ban furthers the government's interest in distinguishing between internal governmental operations and private speech, the majority concluded that permitting payroll deductions for some purposes, while banning them for political activities is "plainly reasonable." *Ibid.* Accordingly, guided by *Davenport, supra*, the majority concluded that the ban does not suppress union speech; it simply declines to promote it in the interest of separating political activities from public employment. In a footnote, the Chief Justice found unpersuasive Justice Breyer's arguments that Idaho here banned a deduction that it had tolerated in an existing system and that the ban effectively stifles union speech by depriving the unions of funds needed to express their ideas. The Chief Justice simply noted that checkoff does not have any particular tenure and that a state's decision not to assist in funding is not tantamount to a direct limitation of expression.

Having concluded that Idaho's ban on payroll deductions for political activities passes constitutional muster, the majority found the ban valid at the level of local governmental employers. The majority rejected the union's argument that the ban obstructs speech at the local level even as it declines to facilitate speech at the state level. Finding the union's distinction unpersuasive, the majority holds that the same deferential review (i.e., rational basis) applies at both levels because cities, counties and political subdivisions are creatures of the states and not sovereign entities themselves. The majority also rejected the lower courts' analogy of local governments to private entities, as well as the absence of a state subsidy for local payroll deduction systems, noting that it is "immaterial" how states allocate funding or management responsibilities between different levels of government. In no case must the states - at whatever level - affirmatively assist political speech by allowing payroll deductions for political activities.

Justice Ginsburg concurred in the judgment and joined the Chief Justice's opinion that in this particular context there is no distinction for constitutional purposes between state and local governmental employers. Having determined that local government employers should be viewed in the same manner as state employers, and noting the parties' agreement that a ban at the state level on dues checkoff for political activities is valid, Justice Ginsburg declined to join the majority's broader discussion about whether the ban is constitutionally justified.

Justice Breyer filed a separate opinion concurring in part and dissenting in part. In his view, the case should be remanded so that the lower courts can decide whether the parties appropriately raised matters concerning the ban's even handed application to politically related deductions (i.e., singling out labor-related deductions). If so, the lower courts should first consider those issues before the Court can say whether the ban is constitutional.

Justice Stevens dissented in an opinion for himself only. In his view the ban is not reasonably calculated to further Idaho's interest in separating government operations from partisan politics, but was intended to make it more difficult for unions to finance political speech. Accordingly, Justice Stevens would find the entire amendment to Idaho's Right to Work Act unconstitutional because the amendment's ban discriminatorily targets union speech. His opinion also notes, without extended discussion, disagreement with the majority's analysis of the constitutional issue as applied to local governmental employers. Believing that the way a state structures its relationship with its local governmental subdivisions may affect the Court's constitutional analysis, Justice Stevens notes the significance of this relationship for other cases.

Justice Souter dissented in an opinion no one else joined. Because the case came to the Court after the unions' failure to raise the issue of viewpoint discrimination in the Ninth Circuit, and because Justice Souter believes that this issue is the key one in the case (though not one on which certiorari was sought), he would dismiss the writ of certiorari as improvidently granted.

* * * *

The most obvious take on this case is that labor unions may have an even harder time expressing their political ideas. Brushing aside that consequence as being the inevitable result of a First Amendment that distinguishes between (forbidden) prohibitions on speech and (permissible) bans on public funding that effectively curtail speech, the Court effectively provides a constitutional carte blanche to states wanting to ban payroll checkoff for political activities. Whether other states have both the inclination and political muscle to enact bans like Idaho's, however, is far from certain, so the practical effect of this case outside of Idaho cannot be predicted.

As a matter of judicial craftsmanship, the Chief Justice's majority opinion is a bit too spare. A more complete discussion of the history and structure of the states' relationship to

their local governmental entities seems called for in light of Justice Stevens' trenchant comments on the significance of this structure for constitutional analysis. Similarly, the Chief Justice's footnote treatment of the issue of discrimination against union speech - as opposed to other forms of political speech - is hardly satisfying, given the centrality of that issue to the unions' case. On this point, Justice Souter's view is, perhaps, the most sensible. The matter of real significance - Idaho's targeting of union speech - is not cleanly raised in this case, and the Court should have simply dismissed the writ as improvidently granted.

Finally, that the majority is so solicitous here of Idaho's interest in separating partisan politics from government operations is remarkable in light of the seemingly contrary view of the Chief Justice and Justices Scalia, Thomas and Alito regarding West Virginia's interest in separating partisan politics from the state judiciary in Caperton v. Massey Coal Co., 556 U.S. ---, 173 L. Ed. 2d 1208, 129 S. Ct. 2252 (2009). In Caperton, these same Justices found West Virginia's interest in taking partisan politics out of governmental operations insufficient under the Fourteenth Amendment's Due Process Clause to overturn a state court ruling in favor of a company whose owner contributed millions of dollars to support of the election of a member of the state court majority. To be sure, distinctions abound between this case and Caperton; yet, the fundamental disparity in treatment of a state's interest in keeping partisan politics out of governing cannot be blinked away so easily. See generally, P. White, "Relinquished Responsibilities," 123 Harv. L. Rev. --- (2009 forthcoming).

Locke v. Karass, 555 U.S. ---, 172 L. Ed. 2d 552, 129 S. Ct. --- (2009).

The Court decided that a local union may, consistent with the First Amendment, charge nonmember employees a service fee that ultimately funds national litigation expenses benefitting other affiliated locals, so long as (a) the litigation expenses would be chargeable if incurred locally and (b) the litigation charge is reciprocal in nature.

Under a collective bargaining agreement between the State of Maine and the Maine State Employees Association (a local union affiliated with the Service Employees International Union ["SEIU"]), nonmember employees represented by the local must, as a condition of continued employment, pay the local a service fee equal to the portion of union dues attributable to representational activities. This service fee includes a charge representing an affiliation fee paid to SEIU insofar as the charge helps to pay for national litigation expenses of a chargeable kind (i.e., related to collective bargaining or contract administration activities.) The chargeable portion of the fee includes an amount that helps SEIU pay for litigation activities directly benefitting other SEIU locals or the national organization itself (again only insofar as the activities are of a chargeable kind.) In real dollar terms, the nonmember charge for these so-called "extra-unit" litigation expenses was considerably less than one dollar per month.

In 2005 a group of the local's nonmembers challenged the service fee in an arbitration, and in 2006 an arbitrator found all aspects of that fee to be lawful. Before the arbitrator's

award, however, the nonmember group sued, claiming that the First Amendment prohibits charging them with any portion of the national litigation expenses that does not directly benefit the local. The district court upheld the fee on summary judgment, and the First Circuit affirmed. The Supreme Court granted certiorari in light of the uncertainty among the circuits as to the propriety of charging nonmembers for a union's national litigation expenses.

The Supreme Court unanimously affirmed the judgment of the First Circuit in an opinion by Justice Breyer. After reviewing the Court's precedents approving nonmember service fees for national union affiliation fees attributable to chargeable activities where there is some indication that the fees may ultimately inure to the benefit of the local by virtue of its affiliation with the national union, the Court construed this principle to cover the costs of litigation under the same limitations. Finding no logical basis for differentiating between litigation expenses and other national expenses, the Court rejected the nonmember group's understanding of the Court's prior decisions. Applying the precedent of *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991), Justice Breyer first stressed that the national litigation activity in this case bears an appropriate relation to collective bargaining. Second, while noting that the litigation activity is outside the local unit, Justice Breyer stressed that it ultimately may inure to local members' benefit on a reciprocal basis by virtue of the local's access to the national union's resources. And, the opinion notes that no one claimed here that SEIU would treat the Maine local differently from other locals, so the existence of reciprocity is not in dispute in this case.

Justice Alito, joined by the Chief Justice and Justice Scalia, filed a concurring opinion noting that because reciprocity was not at issue here, the Court's decision does not reach the question of what "reciprocal in nature" means as applied to litigation expenses that do not directly benefit the nonmembers' local. The concurrence also finds "considerable force" in the argument of the United States that a local has the burden of proof in demonstrating a true pooling arrangement for national litigation expenses, though Justice Alito concedes that the question of who has the burden of establishing true reciprocity was not before the Court in this case.

* * * *

It is irresistibly tempting to say that what the Court tooketh away from labor unions on the income side in Ysura, it gaveth back to them on the expense side in Locke. But such symmetry between the two decisions is illusory. For starters, the downside potential for unions looks far more substantial in Ysura than any upside in Locke, so one can hardly regard the decision in the latter case as a "makeup call" by a Roberts Court that only purports to call balls and strikes. Litigation expenses, while crucial to the mission of labor organizations, do not now constitute a large portion of union expenditures. The ability to collect service fees for political purposes, on the other hand, is more critical to a labor organization's viability. The more likely practical effect of the Court's decision in Locke is that "free riders" and their sponsor in this case, the National Right to Work Committee, simply

have one less weapon in their campaign against organized labor. As a consequence, unions may have a slightly easier time waging the more vital political battles (in non-right-to-work states) to maintain both dues checkoff and service fees for collective bargaining and contract administration purposes. While the victory for unions in this case is not a large one, unions will undoubtedly conclude that it certainly beats the alternative.

As Justice Alito's concurrence implies, there are three certain votes for certiorari on the question of who has the burden of proof on the issue of establishing "reciprocity" sufficient to permit charging one local's nonmembers with expenses for litigation directly benefitting another affiliated local. Notwithstanding the Court's attempt to put to rest high cost litigation over the tiny portions of services fees at stake, therefore, this decision portends more, not less, litigation - a consequence that embodies the potential for greater mischief for labor organizations.

The Court's relative unanimity obscures a couple of broader points. First, there is reason to believe that labor and management may squabble at the bargaining table over inclusion of service fee deductions in union contracts. On the other hand, that issue may lose some significance if unions having the digital capability to do so convince their constituents to authorize electronic payroll or bank account deductions without the need for involving an employer's administrative machinery. Second, this decision is not likely to lessen the likelihood that unions and at least some of their bargaining unit members will continue to dispute precisely which expenses are chargeable and which ones are not. Workers' payments to unions have always been a fertile field for the anti-union forces to plow, and there is little doubt that their interest in causing further havoc for labor unions will wane. Finally, it is worth noting that although both of the points just mentioned remain unresolved by this case, it is far from certain that there will be sufficient political support for enacting statutes like the one Idaho put into play here. Accordingly, it appears that the Court did not do much to stabilize labor relations by its decision in this case.

D. Employee Benefits

The Court dealt with a variety of nuts-and-bolts issues under various employee benefit laws during the 2008 Term. Although these decisions were neither widely reported in the public press nor closely watched by much of the employment bar, they promise to have a material impact in some relatively small, but important, corners of our employment jurisprudence.

CSX Transportation, Inc. v. Hensley, 556 U.S. ---, 173 L. Ed. 2d 1184, 129 S. Ct. --- (2009)

The Court decided that an employer is entitled to a jury instruction in a suit under the Federal Employers' Liability Act requiring proof that an injured employee's

fear of developing cancer was "genuine and serious."

Thurston Henley, who worked for 33 years as an electrician for what was the former L&N Railroad, now CSX Transportation, Inc. ("CSX"), was regularly exposed on the job to a solvent that is known to cause a form of brain damage ultimately resulting in Henley's employment-related disability. He also contracted the noncancerous lung-scarring condition known as asbestosis, allegedly from exposure to asbestos on the job. Henley sued his employer for negligence in the Tennessee state courts under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. 51, *et seq.*, seeking damages for economic injuries and for pain and suffering based on, among other things, his fear of developing lung cancer in the future.

Near the close of a three week trial CSX requested two instructions relating to Henley's fear of cancer. One instruction, based on *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 155 L. Ed. 2d 261, 123 S. Ct. 1210 (2003), puts the burden on Henley to demonstrate that his fear of developing cancer is genuine and serious. The other proposed instruction details a number of ways Henley can prove that his fear was genuine and serious. The trial court denied both of CSX's requests and gave the Tennessee pattern instruction for pain and suffering damages. The jury deliberated for two hours and awarded Henley \$5 million in damages. The Tennessee Court of Appeals affirmed, describing the *Ayers* decision as specifically limited to the issue of whether an FELA plaintiff with asbestosis can recover for fear of cancer. Instead of reading *Ayers* as requiring a "genuine and serious" instruction, the lower appellate court said that the trial courts are to serve as "gatekeepers" by ensuring that fear of cancer claims do not go to a jury unless there is credible evidence of a genuine and serious fear. CSX petitioned for certiorari, claiming that the Tennessee Court of Appeals misread and misapplied *Ayers*.

The Supreme Court, in a *per curiam* decision, granted the petition for certiorari (and the motions of the American Tort Reform Association, the Association of American Railroads and the Washington Legal Foundation for leave to file amicus briefs) and, without briefing on the merits or oral argument, summarily reversed the judgment of the Tennessee Court of Appeals. Concluding that the trial court's refusal to give an instruction on the "genuine and serious" standard and the Tennessee Court of Appeals' affirmance conflicts with *Ayers*, the Court held that trial courts "must give such instructions upon a defendant's request." 173 L. Ed. 2d at 1189.

The Court first observed that *Ayers* expressly recognized jury instructions as one of several verdict control devices in cases where a plaintiff seeks fear of cancer damages. Criticizing the Tennessee Court of Appeals for regarding an instruction as futile, the *per curiam* opinion observes that juror rationality under a court's instructions will restrain the raw emotions that accompany cancer claims. Further the Court concluded that just because *Ayers* recognized sufficiency of the evidence review as another form of verdict control, jury instructions are a separate and important protection against "unbounded liability on asbestos defendants in fear-of-cancer claims." *Ibid.* at 1191. Accordingly, the Court held that, in accordance with *Ayers*, a trial judge "must" upon defendant's request instruct the jury about a

plaintiff's "genuine and serious" fear of cancer.

Justice Stevens dissented in an opinion expressing the view that the footnote in *Ayers* listing jury instructions as a verdict control device (along with review of the damages evidence for sufficiency and particularized verdict forms, *Ayers, supra*, 538 U.S. at 159, n. 19), spoke to the *availability* of an instruction and did not mean that the failure to give one would be *per se* reversible error. Noting that *Ayers* merely made fear-of-cancer damages cognizable under the FELA and did not displace state pain and suffering instructions with a required federal common law instruction, Justice Stevens also raises questions about the mandate of the Court's decision - *e.g.*, is it also *per se* error for a trial court to fail to use the other verdict control devices listed in the *Ayers* footnote? While Justice Stevens says that the verdict in this case may well justify careful review, *Ayers* itself does not compel what he terms the Court's "error correction." Accordingly, Justice Stevens concludes that the Court's summary disposition of this case was unwise and that the Court simply should have stayed its hand.

Justice Ginsburg dissented in an opinion expressing the view that while *Ayers* would support an instruction simply using the language of that case, the more elaborate "defense-oriented" instructions requested by CSX were rightly refused by the trial court. Because nothing in *Ayers* required the Tennessee courts to fashion a different instruction, Justice Ginsburg dissented from the Court's summary reversal and indicated that she would deny the petition for certiorari.

* * * *

The Court's summary reversal is a bit of a surprise, given the carefully limited nature of what it said in Ayers only six years ago about the role of jury instructions. As both of the dissenting opinions correctly point out, the precise language of the Court's opinion in Ayers suggests - but does not require - the use of a "genuine and serious" jury instruction in asbestosis cases involving a claim for fear-of-cancer damages. But Henley's claims in this case involved a fear based on more than exposure to asbestos. He alleged that he was disabled from employment by on-the-job exposure to a toxic solvent. Moreover, there is no way to know from the jury's verdict in this case what portion of the verdict is attributable to Henley's fear of cancer. The case, therefore, was a poor candidate for determining whether the failure to give a jury instruction concerning the genuineness and seriousness of a plaintiff's claimed fear of cancer is reversible error as a matter of law. And yet, the Court not only granted CSX's petition for certiorari, but it also summarily reversed the verdict in Henley's favor without briefing on the merits or oral argument.

What may account for the Court's precipitous approach to the question of a jury instruction is the size of the verdict here, as well as the massive number of workers exposed to asbestos elsewhere. If that is the case, confronting those issues in a more straightforward manner in a case that presents the issues in cleaner fashion seems called for. By granting review here in such muddled circumstances and then overturning in summary fashion a jury

verdict that had been carefully reviewed by the Tennessee Court of Appeals, the Court disdains Tennessee's careful supervision of its jury verdicts, demeans the role of the juries themselves and erodes the authority that derives from the Court's thoughtful and limited exercise of its power of review. Not only that, but it appears from a close reading of Ayers that, as a matter of construing its own precedent, the Court got it wrong in concluding that the failure to give a "genuine and serious" instruction is required by Ayers. Justice Stevens' plain construction of the exact words in the Ayers' opinion seems the more plausible one. If the Court believes that such an instruction should be required as a verdict control device - and that is certainly a respectable position - that question should be briefed, argued and determined in a proper case.

Finally, on remand the Tennessee courts could conclude that its trial court's error in refusing the requested instruction was harmless, particularly in light of CSX's own failure to request a particularized verdict form that would have exposed any untoward emotional response from the jury on the fear-of-cancer claim. The Court thus failed to resolve the dispute between Mr. Henley and CSX and, as Justice Stevens' dissent points out, its per curiam opinion leaves more unanswered questions in its wake.

**Kennedy v. Plan Administrator for DuPont Savings and Investment Plan,
555 U.S. ---, 172 L. Ed. 2d 662, 129 S. Ct. 865 (2009)**

The Court decided that ERISA did not invalidate an ex-spouse's waiver of pension plan benefits embodied in a divorce decree that was not a QDRO (qualified domestic relations order), but that the plan administrator properly disregarded the waiver because it conflicted with the designation of her as beneficiary made by her former husband in accordance with the plan's documents.

William Kennedy, a former employee of E. I. DuPont de Nemours & Company, participated in his employer's savings and investment plan (the "Plan"), an employee benefit pension plan under ERISA. Following his marriage to Liv Kennedy in 1971, he signed a form in 1974 designating Liv to take benefits under the Plan, but naming no contingent beneficiary in the event she disclaimed her interest. William and Liv divorced in 1994 subject to a decree that divested Liv of all interests in the proceeds from any of William's pension plans. William did not, however, remove Liv as the named beneficiary under the Plan (even though he named his daughter Kari Kennedy as beneficiary under the employer's retirement plan.) Upon William's death in 2001, Kari, acting as executrix of William's estate requested the employer to pay the Plan's account balance of about \$400,000 to the estate. The employer, however, paid that balance to Liv, relying on William's designation form.

The estate sued the employer and the Plan administrator, claiming that the divorce decree amounted to a waiver by Liv of her interest in the benefits, ruled that the defendants had violated ERISA by paying the benefits to Liv. The district court, on summary judgment,

ordered payment to the estate, relying on Fifth Circuit precedent that permits waivers of benefits under ERISA plans. The Fifth Circuit, nonetheless, reversed on the ground that Liv's waiver constituted an assignment or alienation of benefits that could not be honored as a qualified domestic relations order ("QDRO") under ERISA's anti-alienation provisions. 29 U.S.C. 1056(d)(3). The Supreme Court granted certiorari to resolve a circuit split over a divorced spouse's ability to waive pension plan benefits through a divorce decree not amounting to a QDRO. Following the grant of certiorari, the Court asked for additional briefing on the question whether a beneficiary's federal common law waiver of plan benefits is effective where it is inconsistent with plan documents.

The Supreme Court affirmed the judgment of the Fifth Circuit in a unanimous opinion by Justice Souter. The Court first held that because Liv did not attempt to direct her disclaimed interest to the estate or anyone else, her waiver of that interest in a divorce decree did not constitute an assignment or alienation rendered void under ERISA. Rejecting the Fifth Circuit's broad reading of "assigned" and "alienated" as questionable and freighted with odd consequences, the Court refers to the common law's spendthrift trust as an analogy to the ERISA limitation. Because the common law contemplates disclaimers by the beneficiary of a spendthrift trust and because ERISA was written with an eye on the common law, the Court concludes that the Fifth Circuit's reading of ERISA is too broad. Noting with approval the position of the United States that the Treasury regulations also contemplate disclaimers so long as a disclaiming beneficiary does not try to direct her interest to another person, the Court finds that interpretation of ERISA to be controlling in these circumstances. In like manner, Justice Souter finds unavailing the employer's other arguments based on ERISA's language and on its preemption provision.

Second, the Court held that the Plan administrator was not required to honor Liv's waiver and that it did its statutory duty under ERISA by paying the benefits to Liv in conformity with the plan documents - namely William's designation of Liv as beneficiary. Finding no exception in ERISA permitting a plan administrator to depart from its duty to act in accordance with plan documents, the Court concludes that ERISA's bright line requirement permits employers to establish a uniform administrative scheme with standard procedures for processing claims and disbursing benefits. Because this system provides employees with a clear set of rules for designating beneficiaries, plan administrators have no justification for enquiries into an employee's intent. They are simply to act in accordance with the plan documents. In this case, William's designation was made in accordance with the Plan and its summary plan description (both of which are documents governing the Plan.) On the other hand, Liv's disclaimer of her interest in the Plan's benefits was not made in the way provided by the Plan (i.e., as a "qualified disclaimer" having the effect of switching the beneficiary to an alternate designated by the employee, all as permitted under 26 U.S.C. 2518). Fully embracing the "plan documents rule," therefore, the Court concludes that the Plan administrator properly distributed the benefits to Liv in accordance with the Plan documents.

* * * *

The equities in this case do not line up perfectly with the result reached by the Court. Is it fair, for instance, for Liv to get the double dip of benefits from William under a negotiated divorce decree plus benefits from William's savings and investment plan that she expressly disclaimed under that decree - just because her ex-husband failed to designate a contingent beneficiary or file a new designation form? For a Court bent on honoring freedom of contract, it would seem that Liv's contract with William to disclaim her interest in Plan benefits, presumably in return for other consideration under the divorce decree, might have played a greater role in deciding the case. Instead, the Court's unyielding rationale apparently is that because a plan administrator has to act in accordance with plan documents and because the form William signed designating Liv as his beneficiary is a plan document, the administrator had no choice but to pay the benefits in accordance with William's direction.

As guidance for plan administrators and for lawyers representing employees and their spouses, the Court's decision is notable for its certainty and clarity. Or, to be more precise, it is clear as far as it goes. Indeed, Justice Souter's opinion reserves decision on more questions than it resolves. For instance, the effect of a waiver when (unlike Liv's waiver here) it is consistent with plan documents is expressly left unresolved by the Court. Likewise, the Court declines to express any view about whether William's estate could have brought suit against Liv in state or federal court to obtain the benefits after distribution to her. And finally, the Court expressed no view regarding the ability of a plan participant to sue under 29 U.S.C. 1132(a)(1)(B) where the terms of the plan do not conform to ERISA and the participant seeks to recover under the terms of the statute. The employee benefits corner of the bar should stay busy sorting out the answers to these undetermined issues.

E. Adjective and Sundry Cases

*The Court decided a number of other cases, many involving non-employment issues, that bear in some material way on the employment relationship. Several of these cases are discussed in summary fashion because of their tenuous connection to employment law or their relative unimportance to most practitioners. Still other issues that have little or no substantive bearing on employment and labor law - for example, whether the Government must prove that an employee knew that the means of identification used to secure employment (*i.e.*, counterfeit alien registration and Social Security cards of a fictitious person) belonged to another person in a prosecution for aggravated identity theft under federal law, Flores-Figueroa v. United States, 556 U.S. ---, 173 L. Ed. 2d 853, 129 S. Ct. --- (2009) - are beyond the scope of this paper.*

In the first case discussed in this section, the Court made a landmark change in the way Rule 12(b)(6) motions to dismiss are to be viewed and determined. That case, as explained more fully below, promises to have a major impact on the way employment law is practiced, at least in the short term. Two other cases involve issues under the Federal

Arbitration Act that do not directly implicate employment law, but are of interest to the employment bar because of the increasing role arbitration is playing in resolving employment disputes.

Ashcroft v. Iqbal, 556 U.S. ---, 173 L. Ed. 2d 868, 129 S. Ct. 1937 (2009)

The Court decided that to survive a motion to dismiss under F. R. Civ. P. 12 (b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face in the sense that the court may draw the reasonable inference that the defendant is liable for the misconduct alleged.

Javid Iqbal, a Muslim citizen of Pakistan working in New York City, was arrested shortly after the 9/11 terrorist attack on New York on charges of conspiracy to defraud the United States and fraud relating to identification documents. Iqbal was one of more than 1000 people questioned by the FBI about suspected links to the attack or terrorism in general. Deemed to be a person of "high interest," he was placed in pretrial detention for six months in the Administrative Maximum Special Housing Unit at the Metropolitan Detention Center in Brooklyn, New York. Iqbal was kept in lockdown 23 hours per day, spending the other hour outside his cell in handcuffs and leg irons accompanied by a four-officer escort. Iqbal pleaded guilty to the criminal charges, served a term of imprisonment and was then removed to Pakistan, after which he filed suit in the Eastern District of New York against a number of federal officials and corrections officers.

Iqbal's complaint, based on *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), alleges unjustified physical and verbal abuse, including strip searches, body cavity searches, kicking, punching, dragging and other offenses for no reason and when he posed no risk to others or himself. The complaint alleges with respect to FBI Director Robert Mueller and former Attorney General John Ashcroft that they approved the policies under which Iqbal was unlawfully designated a person of high interest and detained under restrictive conditions of confinement. The complaint also alleges that these two defendants also knew, condoned and willfully and maliciously agreed to subject Iqbal to these harsh conditions of confinement as a matter of policy solely on account of his race, religion and national origin and not for any legitimate penological interest. The complaint names Ashcroft as the "principal architect" of the policy and Mueller as "instrumental" in its adoption, promulgation and implementation.

Ashcroft and Mueller moved to dismiss the complaint under F.R. Civ. P. 12(b)(6) for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The district court denied the motion, accepting the complaint's allegations as true and holding, in accordance with *Conley v. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957), that it could not conclude there was "no set of facts" on which Iqbal would be entitled to relief against the defendants. On an interlocutory appeal, the Second Circuit acknowledged that *Conley's* "no set of facts" test had been "retired" by *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 167 L. Ed. 2d 929, 127 S. Ct. 1955 (2007), but it concluded that Iqbal's complaint adequately alleged Ashcroft's and Mueller's personal involvement in decisions which, if true, violated Iqbal's rights. Judge Cabranes' concurring opinion urged the Supreme Court to review the appropriate pleading standard for this case because of its unprecedented national security context. The Supreme Court granted certiorari.

The Supreme Court, in a 5 to 4 decision, reversed the judgment of the Second Circuit in an opinion by Justice Kennedy. The Court held first that the Second Circuit had jurisdiction to consider the interlocutory appeal, concluding that the district court's denial of the motion to dismiss was a final decision under the collateral order doctrine because its disposition turned on abstract rather than fact-based issues. Justice Kennedy next reviewed the elements of a *Bivens*-type discrimination claim, concluding that a plaintiff must prove that each defendant acted with a discriminatory purpose. In this case the Court, rejecting Iqbal's argument based on supervisory liability, concluded that Iqbal had to plead sufficient factual matter to show that each defendant adopted and implemented the detention policies not for a neutral investigative reason, but for the purpose of discriminating on account of race, religion or national origin.

Turning to Iqbal's complaint, the Court first holds that to survive a motion to dismiss, a complaint must allege sufficient facts to state a plausible - not just conceivable - claim for relief against the defendants. While plausibility is not akin to a probability requirement, Justice Kennedy stresses that more than sheer possibility that a defendant has acted unlawfully is required, noting elsewhere that Rule 8(a)(2) requires that a party "show," not just allege, that it is entitled to relief. The Court also stresses that judges are not to accept as true allegations of legal conclusions, noting that while the Federal Rules of Civil Procedure departs from a code pleading regime, it "does not unlock the doors of discovery" with nothing more than conclusions. 173 L. Ed. 2d at 884. Likewise, the Court instructs the bench and bar that only plausible claims may survive Rule 12(b) motions and that determining plausibility will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ibid*. The Court then concludes that, much like the deficient antitrust complaint in *Twombly*, the complaint filed by Iqbal fails to cross the threshold from the conceivable to the plausible. The Court holds that the complaint fails to allege facts plausibly showing that Ashcroft and Mueller purposefully adopted a detention policy for high interest individuals because of their race, religion or national origin. All the complaint plausibly suggests is that the defendants sought to keep suspected terrorists in the most secure conditions pending their clearance - a motive that is not unlawful. Whatever serious misconduct by other officials may have occurred, there is nothing to link Ashcroft or Mueller to it. Finally, the Court makes clear that the plausibility standard of *Twombly* is applicable to all civil actions, that careful case management of discovery is no basis for a more relaxed pleading standard, and that a plaintiff alleging discrimination is not entitled by virtue of the reference in Rule 9 to general allegations of intent to defeat a motion to dismiss without allegations that meet the test of Rule 8(a)(2).

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented, expressing

the view that the Court incorrectly rejected supervisory liability as a cognizable claim under *Bivens* and that the Court incorrectly concluded that Iqbal's complaint failed to satisfy Rule 8(a)(2). The dissent first posits that the Court has eliminated altogether supervisory liability in *Bivens* claims and is especially critical of that aspect of the decision because it was made without full briefing and argument. Second, the dissent reads the complaint as alleging that Ashcroft and Mueller each were aware of the discriminatory policy and were deliberately indifferent to it. Justice Souter says that those allegations must, even under *Twombly*, be taken as true and that the sole exception to the "take as true" rule "lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's trip to Pluto, or experiences in time travel." 173 L. Ed. 2d at 895. Because Iqbal's allegations about Ashcroft and Mueller are factual and not confined to naked legal conclusions and because they describe conduct that is illegal, the complaint is sufficient on its face. Agreeing that the allegations chosen for illustration by the majority, standing alone, do not state a plausible claim for relief, Justice Souter points to other specific allegations about Ashcroft's being the principal architect of the detention policy and Mueller's being instrumental in adopting and executing the policy carried out by the corrections officers. These allegations, when viewed with Iqbal's other specific averments that the chief of the FBI antiterrorism unit and the special agent in charge of the Bureau's New York City field office implemented an overtly discriminatory policy targeting Arab Muslim men (including Iqbal), are not conclusory, according to the dissent. To the contrary, they sufficiently link Ashcroft and Mueller to their subordinates' discrimination.

Justice Breyer filed a separate dissent agreeing with Justice Souter (whose opinion he joined), but pointing out that, like the majority, he believes it important to prevent unwarranted litigation from interfering with the Government's work. In Justice Breyer's view, however, there is no justification for interpreting *Twombly* as the majority has, for the trial courts can structure discovery to diminish the risk of unduly burdening public officials.

* * * *

*In terms of immediate and substantial impact on employment litigation, this case wins the prize for the 2008 Term's most consequential. Discarding more than a half-century of familiar analysis under Conley v. Gibson, *supra*, and paying scant heed to more than seven decades of settled understanding under Rule 8(a)(2)'s notice pleading regime, an intrepid majority of Justices established a new analytical framework for determining motions to dismiss under Rule 12(b)(6). From now on, in all civil cases, presumably including employment cases based on Title VII and the other federal antidiscrimination laws, a plaintiff must allege in his pleading sufficient factual matter to convince a trial judge that the complaint for relief is plausible, not just conceivable. In short, trial judges are to act as gatekeepers, permitting discovery only in those cases where the judge can, based on her common sense and experience, reasonably infer that the defendant is liable for the misconduct alleged. Moreover, the Court stresses that in assessing complaints under this standard, allegations amounting to legal conclusions or those simply parroting statutory phraseology are not entitled to be*

regarded as true for purposes of the motion. Only what the trial judge determines are factual allegations will be entitled to be taken so. Both trial judges and the appellate courts that review them will thus enjoy a freer hand in dismissing employment discrimination claims under this new regime. This case thus effectively, albeit not explicitly, overrules Swierkiewicz v. Sorema N. A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002). Compare Fowler v. UPMC Shadyside, --- F. 3d --- (3d. Cir. August 18, 2009) (No. 07-4285, Slip Op. at p. 16) with comments collected by Professor Richard Bales and posted shortly after the Iqbal decision at Workplace Prof Blog, supra, (May 19, 2009).

As this paper is being written, less than three months after the Court's decision, Iqbal's promise of early dismissals has already come true. According to The New York Times, the Iqbal decision was cited 500 times in the first two months after its announcement, and both trial and appellate courts have been busy applying the case, often dismissing employment-related claims that do not meet the new test of plausibility. A. Liptak, "Sidebar," The New York Times, July 21, 2009, p. A10. Cf., Sinaltrainal v. Coca-Cola Co., --- F. 3d --- (11th Cir., August 11, 2009)(No. 06-15851)(Dismissal of union leaders' Alien Tort Statute and Torture Victims Protection Act claims). Yet, applicability of the plausibility standard to employment discrimination cases may turn out to be fraught with special difficulty. That is most likely to be so where a plaintiff has exhausted an administrative remedy with the EEOC or other agency having responsibility for adjudicating charges of discrimination. For instance, where the EEOC has determined that there is reasonable cause to believe that a plaintiff's administrative charge was true, might not the mere allegation of such an agency decision make the claim a plausible one? Put differently, what will be the measure of a trial judge's discretion to disregard a "reasonable cause" determination by the EEOC - especially where that administrative decision was made after some administrative investigation, including witness interviews, document reviews and on-site inspections? Likewise, if a plaintiff has filed parallel charges with a state agency that, after investigation, determines an employer's explanation to be a pretext for discrimination, would an allegation of such a decision guarantee that a complaint will survive a motion to dismiss? To be sure, there is ample authority raising questions about the admissibility at trial or on summary judgment of these types of federal and state agency determinations. But where a trial court is simply performing a threshold plausibility assessment on a motion to dismiss, it is difficult to understand why an agency's analogous determination should be wholly excluded from consideration (assuming it has been properly alleged in the complaint.) In any event, one can easily see that while the Iqbal Court committed its newly crafted plausibility determination to the trial judges, application of that rule may prove more troublesome in practice than in its conception.

Aside from its inconsistency with the Federal Rules' notice pleading philosophy and its disregard of the Seventh Amendment's application to the operation of those rules, cf., Statement of Justices Black and Douglas, Sup. Ct. Order of January 21, 1963 reprinted at 28 U.S.C.A., pp. 33-34, the Court's adoption of a new rule in a case stemming from the immediate aftermath of the 9/11 attack on New York City seems not only unnecessary and possibly unwise, but also ambitious to a fault. There may indeed be a decent argument applicable to a

narrow range of cases like Iqbal's that high federal officials should not be unduly diverted from their important tasks by unwarranted complaints, as Justice Breyer concedes in his dissenting opinion. But the special context of national security provides no persuasive ground for changing the rules for all civil cases - and particularly in those cases where the Conley standard has been understood and applied without much complaint for more than 50 years. As Justice Ginsburg reportedly told a group of federal judges during this summer's recess, "[i]n my view, the court's majority messed up the federal rules" in a ruling she characterized as important and dangerous. A. Liptak, supra at p. A10. The Court might have crafted an exception to protect the interests it identified, or it might have embraced what Justice Breyer says the trial courts can do as case managers. But to superimpose a plausibility requirement on Rule 8(a) - which may make some sense in cases involving national security and may even be compelling in antitrust litigation where animus is not at issue - in employment cases is neither sensible, efficient nor consistent with federal law. In employment discrimination cases, where an employer's unknown (and often unknowable) motive is the core of the case, plaintiffs simply have no reliable way to plead anything other than a conclusion about what caused an employer's decision in hiring, firing, promotions and the like. To require more is to make the trial judge a pre-discovery fact finder in disregard of the Seventh Amendment, the Federal Rules of Civil Procedure and sound judicial sense.

The majority's procedural blinders also obscure from its view the Court's statutory obligation in Title VII cases to eradicate discrimination and promote equal opportunity. In its zeal to insulate John Ashcroft and Robert Mueller in the rather unusual circumstances of this Bivens-type case, the Court gave insufficient weight to the consequences of applying its decision in other areas of federal law. Specifically, the majority takes no account whatsoever of Congress' original intent, as expressed above, in enacting the antidiscrimination laws. The practical consequences of the Court's mistake are clear: summary dismissals on the pleadings will stymie enforcement of legislative policy and deter many a worthy claim from being examined in discovery and possibly heard and determined on the merits. Is that what thoughtful employers really want? One would like to believe that employers and employees share an interest in ferreting out discrimination - even where employers may do so for their self-interest in avoiding liability down the road. To be sure, some employee claims are little more than carping and may be obviously unworthy, but they can be dismissed on the pleadings under the current Conley standard. Even for those borderline complaints that pass the Conley test, expensive scatter-gun discovery does not inevitably have to follow. In cases where a complaint alleges a conceivable, but somewhat implausible, scenario, as Justice Breyer's opinion points out, a trial judge with competent management skills can strictly limit discovery and invite early partial or full summary judgment motions, thereby minimizing the employer's costs and providing it with a dismissal on the merits. In short, the Court (pardon the mixed legal metaphors) could have wielded a scalpel instead of a machette in dealing with the problem of fishing expeditions based on barebones pleadings.

Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. ---, 174 L. Ed. 2d 382, 129 S. Ct. --- (2009)

The Court decided that an injured seaman may recover punitive damages under general maritime law for his employer's failure to provide maintenance and cure.

Edgar L. Townsend, a crew member of the *Motor Tug Thomas*, fell on the deck of the tugboat and injured his arm and shoulder. Atlantic Sounding Co., Inc. ("AS"), the tug's owner, advised Townsend that it would not pay "maintenance and cure" - that is, an owner's obligation to provide food, lodging and medical services to a seaman injured while serving the ship. AS then filed an action seeking declaratory relief to that effect. Townsend filed his own action under the Jones Act and general maritime law, alleging wrongful termination, negligence, unseaworthiness and an arbitrary refusal to pay maintenance and cure. Townsend also counterclaimed in the declaratory judgment action seeking punitive damages for the denial of maintenance and cure.

The district court consolidated the cases, and AS moved to dismiss the punitive damages claim. The district court denied the motion on the basis of Eleventh Circuit precedent determining that punitive damages are available in an action for maintenance and cure. The court, however, agreed to certify that question for interlocutory appeal, and the Eleventh Circuit agreed with the district court that Townsend could pursue a punitive damages claim for the willful withholding of maintenance and cure. Because that decision conflicted with rulings from other circuits, the Supreme Court granted certiorari.

The Supreme Court, in a 5 to 4 decision, affirmed the judgment of the Eleventh Circuit and, in an opinion by Justice Thomas, held that there is no legal obstacle, either under the Jones Act or the Court's prior cases, to a seaman's seeking punitive damages for breach of the duty of maintenance and cure under general maritime law. The Court reasoned that punitive damages have long been available at common law for wanton, willful and outrageous behavior, that the common law punitive damages tradition extends to maritime law, and that nothing in maritime law undermines applicability of the punitive damages rule in a maintenance and cure context. The Court also concluded that neither the Jones Act nor the Court's prior ruling in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990), eliminates or limits the general maritime remedy of punitive damages for the willful or wanton failure to comply with the duty of maintenance and cure.

Justice Alito, joined by the Chief Justice and Justices Scalia and Kennedy, dissented, expressing the view that the Court, acting under an implied duty to develop a common law for maritime disputes, established a framework for analyzing maritime disputes in *Miles* and that permitting injured seamen to seek punitive damages for denial of maintenance and cure is inconsistent with the principle of uniformity of relief that *Miles* demands. Thus, because modern seamen are no longer reliant solely on the courts for relief (given extensive statutory protections in the Jones Act and other legislation) and because punitive relief is not available in

a Jones Act claim, the requirement of uniformity that underlies *Miles* precludes punitive damages for breach of the general maritime duty of maintenance and cure.

* * * *

*For those employment lawyers dealing with claims of injured maritime employees, the lesson of this case is clear and unequivocal: an employer proceeds at the peril of punitive damages by knowingly denying maintenance and cure to its injured employees. While the dissenting opinion makes a compelling contextual argument about the role of general maritime law in the modern era of statutory regulation, the absence of an explicit limitation on punitive relief either in a federal statute or in *Miles* itself trumps Justice Alito's valiant effort to expand *Miles*' reach. Justice Thomas' opinion, therefore, appears not only to reach a more just and humane result, but it also is more faithful to the Court's duty to develop and maintain a coherent body of maritime law. Congress may, if it disagrees with the result, put limits on, or even eliminate, punitive damages in maintenance and cure claims. Until then, maritime owners beware!*

For the employment bar generally, this case provides a window (albeit a translucent one that some would even say approaches opaque) onto the Justices' attitudes about punitive damages generally. What we see through this window defies useful generalizations. The Court has on several occasions in recent years reviewed punitive damages issues, with the unsatisfying result that due process and other limitations on punitive relief are difficult to distill from the large number of individual opinions and even harder to apply in the trial courts. This case does nothing to clarify either those limitations or the Justices' rationale for what it has wrought. Nonetheless, the opinions in this case do illustrate a division in the Court that, before the retirement of Justice Souter, slightly favored relaxed limits on punitive damages. Now that the Court is newly constituted, there may be another attempt outside the maritime area to "clarify" the law yet again. Despite the marginal utility of this case in such an attempt, the prospect of trying to bring some coherence to the area of punitive relief is bound to whet the interest of employment lawyers and their clients.

Vaden v. Discover Bank, 556 U.S. ---, 173 L. Ed. 2d 206, 129 S. Ct. --- (2009)

The Court decided that a federal court could not compel arbitration of a credit card debtor's counterclaim in a bank's state court collection suit where the whole controversy failed to qualify for federal subject matter jurisdiction.

Discover Bank's servicing affiliate sued in Maryland state court to recover past-due charges from Betty Vaden, a credit cardholder. Discover's claim arose solely under state law. Vaden's answer alleged that Discover's finance charges, interest and late fees violated state law. Discover then filed a petition in federal court under section 4 of the Federal Arbitration Act ("FAA") seeking to compel arbitration of Vaden's counterclaims. FAA section 4 authorizes

district courts to entertain such petitions if the court would have jurisdiction, save for the arbitration agreement, over a suit arising out of a controversy between the parties.

The district court ordered arbitration, and the Fourth Circuit remanded the case initially for the district court to "look through" the petition to the underlying controversy and determine whether the case arose under federal law for purposes of subject matter jurisdiction under 28 U.S.C. 1331. Vaden conceded that her state law claims were completely preempted by the Federal Deposit Insurance Act, and the district court thus held that it had federal question jurisdiction and again ordered arbitration. The Fourth Circuit affirmed on the ground that the complete preemption doctrine overrode the well-pleaded complaint rule and that even though the federal claims arose in Vaden's counterclaims, the district court nonetheless had subject matter jurisdiction.

The Supreme Court granted certiorari and, reversing the judgment of the Fourth Circuit in a 5 to 4 decision, held (a) a federal court may "look through" a petition under FAA section 4 to determine whether it is predicated on a controversy that arises under federal law, but (b) it may not entertain such a petition based on a counterclaim when the whole controversy between the parties does not qualify for federal court adjudication. Justice Ginsburg's majority opinion reasons that the text of FAA section 4 supports looking through a petition under that section to the controversy between the parties and that "controversy" in the statute means the underlying dispute and not, as Vaden claims, the immediate dispute over arbitrability. In this case, because the whole controversy between Discover Bank and Vaden arose from the bank's suit to collect a debt, a claim that does not qualify for federal court jurisdiction, the judgment of the Fourth Circuit was erroneous. That Vaden's counterclaim is entirely preempted does not, according to the Court, transform the counterclaim into a federal claim; it is still just an aspect of the underlying dispute over the debt. While remanding the case for further proceedings in state court, Justice Ginsburg notes that Discover Bank may yet ask the state court to enforce the arbitration clause, as the FAA is binding on both federal and state courts.

Chief Justice Roberts, joined by Justices Stevens, Breyer and Alito, filed an opinion concurring in the the Court's holding about looking through a section 4 petition to the controversy between the parties, but dissenting from the Court's additional holding that "controversy" means the underlying dispute described in Discover Bank's complaint and not the controversy over Vaden's counterclaims (which are concededly governed by federal law and thus subject to arbitration.) Criticizing the Court's approach as impractical, not straightforwardly based on the FAA and confusing for the trial courts, the Chief Justice concludes that the judgment of the Fourth Circuit was correct and should not have been reversed.

* * * *

The practical effect of this decision in cases like Betty Vaden's may be muted by enactment of legislation akin to the so-called "arbitration fairness" bills pending in Congress. To the extent that such proposed legislation would put strict limits on arbitration of employer-

employee disputes, the impact of this case in the employment area may be similarly confined to the kinds of cases that survive the proposed Congressional prohibitions. In the meantime, this case does have implications for the employment bar. It is conceivable, for instance, that employer suits to enforce covenants not to compete or non-disclosure agreements might spawn counterclaims for unlawful discharge under federal law, thereby implicating the rule of this case that a federal court will have to determine the nature of the actual underlying controversy between the employer and employee. While that decision was fairly straightforward in the simple debt collection case decided here, it might be more vexing in the context of an employer's claim against a discharged employee.

*Chief Justice Roberts' concurring and dissenting opinion makes a compelling case for looking through to the controversy over what is arguably governed by federal law - in this case Vaden's counterclaims. His reading of what the FAA means, while not necessarily superior to the majority's view from a textual standpoint, is supported by a number of practical considerations that trial judges would appreciate in "looking through" petitions seeking to compel arbitration. Most assuredly, his approach would make the "look through" an easier task than what the Court's decision will require of district court judges. Given the two plausible constructions of FAA section 4, one can reasonably conclude that the Chief Justice's view is the one better suited for fair and easy adjudication. An interesting sidelight is that Justice Stevens, who criticized the Court for its penchant for arbitration in 14 Penn Plaza LLC v. Pyett, *supra*, joined the Chief Justice's opinion favoring arbitration in this case.*

Arthur Andersen LLP v. Carlisle, 556 U.S. ---, 173 L. Ed. 2d 832, 129 S. Ct. --- (2009)

The Court decided that appellate courts have jurisdiction under section 16(b) of the FAA to review the denials of a stay pending arbitration sought under FAA section 3 and that a litigant who was not a party to the relevant arbitration agreement may invoke FAA section 3, if the relevant state contract law allows the litigant to enforce the arbitration agreement.

Wayne Carlisle and two other owners of a construction equipment company sought to minimize their income taxes from their sale of their company. They engaged in a "leveraged option strategy" tax shelter effectuated through newly created LLC's that purchased stock warrants under an investment management agreement between the LLC's and an investment adviser. The investment management agreement provided that any controversy arising out of the agreement would be settled by arbitration. The taxpayers' accountant, auditor and tax adviser, Arthur Andersen LLP, had introduced them to the investment adviser who oversaw the transactions. The warrants turned out to be virtually worthless, and the Internal Revenue Service determined that the strategy was an illegal tax shelter. After settling with the IRS, the taxpayers filed a diversity action against the investment adviser (which thereafter filed for bankruptcy), Arthur Andersen LLP, and others participants in the tax shelter scheme, alleging a

variety of fraud-related claims. The defendants moved under section 3 of the FAA to stay the action pending arbitration under the investment management agreements.

The district court denied the stay motions. The defendants filed an interlocutory appeal, and the Sixth Circuit dismissed it for want of jurisdiction. The Court granted the defendants' petition for certiorari.

The Supreme Court, in a 6 to 3 decision, reversed the judgment of the Sixth Circuit in an opinion by Justice Scalia. The Court first concluded, based on the text of the applicable statutory provisions, that the Sixth Circuit had jurisdiction to review the denial of the stay motions. The Court reasoned that any litigant who asks for a stay under FAA section 3 is entitled under FAA section 16 to an immediate appeal - regardless of whether the litigant is eligible for the stay. Justice Scalia rejected the taxpayers' parade-of-horribles argument about fact-intensive inquiries and frivolous appeals, opting for the simple threshold determination of whether a litigant invoked section 3 in a denied stay request and suggesting that the appellate courts have the tools to minimize the impact of abusive appeals.

The Court also ruled that the Sixth Circuit erred in determining that litigants who are not parties to the underlying arbitration agreement are ineligible for relief under FAA section 3. Concluding that nothing in the FAA alters the state contract law background regarding the scope of arbitration agreements (including the question of who is bound by them), and noting that traditional principles of state law permit a contract to be enforced by or against nonparties, the Court holds that the Sixth Circuit erred in categorically making nonparties ineligible for relief under FAA section 3. Finally, Justice Scalia rejected the taxpayers' arguments based on dicta in the Court's prior decisions, concluding that it suffices that no federal law bars a state from permitting the defendants from enforcing an arbitration agreement against the nonparty taxpayers. Accordingly, the Court remanded the case in order to decide whether equitable estoppel may be used to enforce the investment management contract's arbitration provision against the nonparty taxpayers here.

Justice Souter, joined by the Chief Justice and Justice Stevens dissented, expressing the view that the better reading of the applicable statutory provisions disallows the defendants' interlocutory appeal. Because interlocutory appeals are a matter of "limited grace," it is probable that Congress did not intend to grant nonsignatories to an arbitration agreement a right to such an appeal. Favoring a bright line rule that asks whether a section 3 movant is a signatory, the dissenters would hold that the defendants had no right, as nonsignatories, to move for a stay with the consequence that the Sixth Circuit had no jurisdiction to entertain their appeal.

* * * *

The promise of this decision is more litigation. The rule proposed by the dissent limiting stays and appeals to those who are parties to an arbitration agreement certainly has

the allure of minimizing disputes over which litigants are eligible to seek relief under the FAA. As a consequence of failing to adopt such a bright line limitation, the Court is inviting disputes over the eligibility of nonsignatories to litigate their entitlement to statutory relief, including appeals from stay denials. Yet, as a matter of statutory construction, Justice Scalia's take on the language of the FAA appears to be less strained than the dissenters and more faithful to Congress' somewhat opaque intent on the question of relief for those who are not parties to an arbitration agreement. Accordingly, whatever the consequences may be for common law satellite litigation over eligibility for FAA relief, Justice Scalia's majority opinion is hard to criticize from a purely legal standpoint.

For employment lawyers this case does nothing to clear up the uncertainties of employment arbitration under the FAA. While it eliminates one source of controversy - by permitting non-parties to seek relief under the FAA - it invites disputes over eligibility for such relief from individual bargaining unit members, local unions and state federations (where internationals are the signatories) and from affiliates of signatory employers (e.g., parents, subsidiaries, even trade associations, perhaps.) Although the greater impact of this case is likely to be felt outside the employment area, it is not inconceivable that the decision will reverberate in a number of situations under collective bargaining agreements.

U.S. ex rel. Eisenstein v. City of New York, 556 U.S. ---, 173 L. Ed. 2d 1255, 129 S. Ct. --- (2009)

The Court decided that the 30 day time limit for filing an appeal under F.R. App. P. 4(a)(1)(A) applies when the United States declines to intervene in an employee's qui tam action under the False Claims Act.

Irwin Eisenstein and four other employees of New York City sued to challenge a fee charged by the City to nonresident workers, claiming that deduction of the fee from the workers' pay deprived the United States of tax revenue in violation of the False Claims Act ("FCA"). The United States elected under the FCA not to intervene to prosecute the action, although it requested continued service of the pleadings. The district court subsequently granted the City's motion to dismiss. The relators filed a notice of appeal 54 days later, and the Second Circuit dismissed the appeal as untimely because the 30 day limit of F.R. App. P. 4(a)(1)(A) applied to the case. The Court granted certiorari to resolve a circuit conflict as to the applicability of this 30 day period versus a 60 day period under F.R. App. P. 4(a)(1)(B) when the United States is a party to the case.

The Supreme Court unanimously affirmed the Second Circuit's judgment in an opinion by Justice Thomas. The Court held that although the United States is aware of and is minimally involved in every FCA action, it is not a "party" for purposes of the appellate filing deadline unless it has exercised its right under the FCA to intervene in the case. The Court reasoned that while the United States retains limited monitoring and oversight rights under the

FCA when it elects not to intervene in a *qui tam* action, these rights do not make it a "party" in the legal dictionary sense and that to rule otherwise would make the right of intervention superfluous. Only by exercising its right to intervene does the United States become a "party" for purposes of permitting the 60 day deadline to apply in a *qui tam* action appeal, according to the Court.

* * * *

This case resolves definitively the question of which appeal period applies in a qui tam action where the United States has declined to intervene. The practice rule is now clear, and no further comment is necessary.

Haywood v. Drown, 556 U.S. ---, 173 L. Ed. 2d 920, 129 S. Ct. 2108 (2009)

The Court decided that a state statute shielding corrections officers from inmate suits for damages under Section 1983 violates the Supremacy Clause because under Section 1983 "all persons" who violate federal rights while acting under color of state law could be liable for damages.

* * * *

This case is one, I am confident, that the late Chief Justice Rehnquist would have characterized as one of his flowers "born to blush unseen," quoting, as he was wont to do, from Thomas Gray's Elegy Written in a Country Church-Yard. In this 5 to 4 decision that provoked sharply competing exegeses of the Supremacy Clause and our federal system from Justice Stevens (for the majority) and Justice Thomas (for the dissenters), the Court concluded that the states generally may not divest their courts from jurisdiction over section 1983 suits targeting state employees. While overlooked by many, this decision could prove to be a significant one in the governmental employment area. As a result of the Court's decision, it is more clear now than ever that, whatever its motives may be, a state cannot strip its courts of jurisdiction to entertain federal claims it considers at odds with state policy. Accordingly, a state may not provide its governmental employers refuge from federal law by divesting its state courts from jurisdiction over federal claims against such employers - even where it also prohibits its courts from hearing analogous state claims.

F. Grants of Certiorari for the 2009 Term

The Court has so far granted certiorari in the following employment-related cases to be argued and decided in the 2009 Term. Notable by their absence from the current argument docket are cases directly involving federal antidiscrimination statutes.

Union Pacific Railroad Co. v. Brotherhood of Locomotive Trainmen, etc., No. 08-064. The question presented involves the circumstances in which a court may set aside an arbitration award of the National Railroad Adjustment Board made in a grievance proceeding under the Railway Labor Act.

Conkright v. Frommert, No. 08-810. The question presented is whether a district court must defer to a plan administrator's interpretation of an ERISA pension plan's terms made outside the context of a claim for benefits and whether the court has allowable discretion to adopt any reasonable interpretation of the plan's terms made in the course of calculating benefits due because of an ERISA violation. Justice Ginsburg twice denied a stay in this case sought by the plan administrator of the Xerox Corporation Pension Plan during the 2008 Term. *Conkright v. Frommert*, 556 U.S. ---, 173 L. Ed. 2d 865, 129 S. Ct. --- (2009) (Ginsburg, J.)

Granite Rock Co. v. Teamsters, No. 08-1214. The questions presented are whether an employer can state a claim of tortious interference against a union that was not a signatory to a collective bargaining agreement with the employer and whether a court or an arbitrator is to determine the existence of a collective bargaining agreement.

Weyhrauch v. United States, No. 08-1196. The question presented is whether, in a prosecution to convict a state employee for depriving the public of its right to his "honest services" under a mail fraud statute, the Government must prove that the employee violated a disclosure duty imposed by state law. Justice Scalia had previously dissented during the 2008 Term from the Court's denial of certiorari in another "honest services" prosecution of an employee of the City of Chicago, urging the Court to review the question presented here. *Sorich, et al. v. U.S.*, 556 U.S. ---, 173 L. Ed. 2d 645, 129 S. Ct. --- (Scalia, J., dissenting from denial of certiorari)

Graham County Soil & Water Conservation District v. U. S. ex rel. Wilson, No. 08-304. The question presented is whether an audit and investigation performed by a state or its subdivision is an "administrative report, audit or investigation" within the meaning of the public disclosure jurisdictional bar in the False Claims Act.

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., No. 08-1198. The question presented in this non-employment case is whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act.

Jones v. Harris Associates LP, No. 08-856. The question presented in this non-employment case is whether an investor's claim that a mutual fund investment adviser breached a fiduciary duty by charging excessive compensation is cognizable under the Investment Company Act of 1940.

Concluding Observations

From the welter of employment decisions during the 2008 Term emerge some broader jurisprudential points worth discussing here. In doing so, my purpose is not to minimize the important practical consequences of the Court's work this term, much of which is treated above in the case summaries. Instead, my hope here is to encourage some serious thought about what the Court is doing and where it may be going in the area of employment and labor law.

*First, one can, upon careful examination, see a profound doctrinal transformation in progress. In crafty incremental steps, and usually without acknowledgment of any doctrinal subtext, a bare majority of the Court is, over the protest of a solid group of dissenters, judicially amending the very core of employment discrimination law. It is all too easy to focus on the Court's seductive rhetoric, particularly its characterizations of prior holdings, and thereby miss the rumblings of a tectonic shift in how the anti-discrimination statutes are being construed. All of the employment decisions this term, except for Crawford, *supra*, tend to prove this point. Yet, practitioners who read the cases purely as tea leaves for their clients may understandably overlook a more profound change being wrought by a clever cadre of Justices whose agenda may be much more ambitious than simply calling balls and strikes. That is why some pause over these cases is useful. At the risk of making an overtly political - albeit non-judgmental - observation about the state of our employment law, my own conclusion is that, for good or ill (depending on one's viewpoint), the Reagan revolution endures - at least in the federal judiciary, if not in the executive agencies.*

The most glaring example of a real normative shift is the redefinition of discrimination being wrought by a pretty firmly coalescent majority. This recrafting of doctrine cannot be explained away as one that is driven by differences between the ADEA and other statutes. Nor can this refinement be said to rest more generally on the difference between age as a condition shared by all and race (or gender, religion and ethnicity) as the special status of a "discrete and insular minorit[y]." United States v. Carolene Products Company, 304 U.S. 144, 158, n.4, 82 L. Ed. 1234, 58 S. Ct. 778 (1938). To the contrary, the Court's dominant majority has made clear that its agenda to circumscribe the reach and effect of the antidiscrimination principle extends beyond age to whatever status Congress chooses to protect. It is apparent that the end game is to confine the meaning of discrimination itself to a narrow form of disparate treatment motivated decidedly by a biased or hostile intention, regardless of the protected status of the target.

Quite disturbingly, there is no indication in the Court's opinions that it has considered the consequences of such a confining definition of discrimination during a period of profound

upheaval in workplace demographics. As white males become the newest minority in the nation's labor force, the Court's decisions provide a more alluring basis than ever for so-called "reverse" discrimination claims - that is, claims made on the other side of the looking glass from existing precedents based mainly on discrimination against non-white minorities and women. Aside from this demography-driven consequence, the broader question is whether and how our nation's workplaces can adjust to these societal changes. Is that really a judicial matter? Or is it one better suited for assessment and oversight by Congress? It would seem that the question of what discrimination means and how it should be tailored to shifting workplace demographics is an issue that would profit from the type of democratic deliberation and compromise that only Congress can provide. When it comes to redefining the law to fit the times, our Constitutional history contemplates that legislation is preferable to judicial opinions. Accordingly, a greater dose of judicial humility from the Court would be a welcome tonic for these times.

*Second, many of the Court's more controversial decisions affecting employment-related litigation appear to be fragile. One has the feeling in looking at the Court's work in the employment area that while it purports to establish lasting principles of governance, the grounds under several of its fractured rulings are so uncertain or insubstantial that it is not reasonable to expect these rulings to endure. For example, as noted above, Gross and Hulteen, *supra*, appear to be prime candidates for Congressional overruling in a manner similar to Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 167 L. Ed. 2d 988, 127 S. Ct. 2162 (2007). Moreover, with respect to Iqbal, *supra*, the Notice Pleading Restoration Act of 2009, S.B. 1504, introduced by Senator Arlen Specter (D. Pa.), has already been read twice and referred to the Senate Judiciary Committee. See <thomas.loc.gov/cgi-bin/query/z?c111:S.1504> That bill would overturn Iqbal and expressly restore the Conley standard to Rule 12(b)(6) motions. *Ibid.*; *but see also*, D. Widiss and R. Bales references at Workplace Prof Blog, *supra*, p. 14.*

*The prospect of legislative overruling, however, is not the only measure of how fragile are some of the Court's employment rulings. Troublesome language in other cases, such as what appears in Justice Alito's concurrence in Crawford, *supra*, may be effectively minimized, if not overruled, by federal agency rules or practices. More generally along these lines, the EEOC may assume a more significant role in shaping employment law during an Obama administration that promises (or threatens, depending on one's perspective) more vigorous law enforcement in the area of civil rights. Still other controversial decisions may be revisited by the Supreme Court itself to the extent that stare decisis does not foreclose such reconsideration. The recent change in the Court's membership makes that prospect slightly more likely, perhaps. Yet another example of how the Court's precedents may be eroded or even ignored involves alternative dispute resolution. In this shadowy corner of our jurisprudence, employees and employers will undoubtedly continue to resolve disputes - and thereby create a private common law of sorts - based partly on their own interests, no matter what the Supreme Court says the prevailing law is. To that largely unknowable extent, the Court's decisions - and particularly the more closely contested ones - may be sapped of some*

force in the everyday world. And, finally, employers with a more progressive agenda, or those just trying to get ahead of the curve in the diverse world of the new millenium, may simply disregard some of the limits on the discrimination laws that the Court has newly crafted. In short, the prediction by Justice Ginsburg in Ricci, supra, about the "staying power" of the Court's ruling in that case may turn out to be the most prescient view of what an activist Court has wrought in several of its decisions in the 2008 Term.

Third, there is virtually nothing in the Court's opinions this term openly acknowledging the obvious and substantial changes afoot in the nature of the employment relationship itself. Employment law moved slowly over many centuries from its origins as tribal-based rules through a feudal view of employment as an aspect of domestic relations (when household servants and retainers owed loyalty to the owner of the estate who in turn owed a reciprocal duty of care to them) to what has been essentially a contract-based relationship during the Anglo-American common law era. In turn, the contractual view of employment has been framed by a social structure that (not wholly unlike the feudal arrangement) has promoted the virtues of mutual loyalty between employer and employee. In this new century, however, the law now appears to be on the cusp of another transformative change involving two features. Over the past several decades there has been legislatively spun a vast web of statutory employment regulations that envelope - and often trump - the contractual rules of the common law era. Additionally, it appears that the common law itself is evolving from the purely contractual toward the quasi-contractual, where the parties' rights and duties are measured as much by equitable precepts as by rules of conduct. At some point, the Court may confront, even if only indirectly, this evolution of the employment relationship itself.

But even greater change is apace that affects the nature of the employment relationship. We are now seeing a mobile and peripatetic workforce of increasingly rootless individuals reliant on instant access to information through rapidly evolving forms of communication. Most importantly, the new workforce appears to be less committed to long-term relationships with employers. As a result, temporary employment, day laborers and independent contractors also serve to erode the traditional employment relationship. Purely anecdotally, my observation is that seniority is not widely regarded an ultimate reward, and loyalty to others is not a hallmark of the generations comprising much of the current labor force. These are employees who (at least until the Great '08 Recession) are likely to move to wherever they can find more short-term comfort, be it better weather, following a spouse or partner, pursuing a personal passion or simply avoiding boredom. These characteristics, too, have an obvious impact on employee loyalty - one of the foundations of the old contract-based common law of employment.

Perhaps most disturbingly, socialization of our nation's children (the workforce of a tomorrow not far away) no longer takes place mostly in the schools. It now often occurs in virtual and solitary fashion in front of a screen displaying on one's PDA, laptop or desktop some social networks like LinkedIn or Facebook. To the extent, therefore, that employees have to interact with other human beings - namely, their supervisors and co-workers - in a physical

place of work (and most workplaces are still physical in nature as well as hierarchical in structure), they may be ill-equipped to deal with the real and real-time context in which employment disputes arise. How the law develops to deal with differently socialized employees whose loyalties are no longer employer-oriented is yet to be seen in the Court's decisions, and this term was no exception. Nonetheless, the Court, as well as the other branches of government, will soon come face-to-face with the realities of an employment relationship based less on mutual consideration and loyalty and more on individual assessments of risk and reward. It is not too early to be thinking about the law's response to such profound change.

Fourth, there are a few not-so-subtle hints in Pyett and Arthur Anderson, supra, that some members of the Court are less than thrilled about the growth of private dispute resolution in the employment area. These rumblings of dissatisfaction with the spread of compelled binding arbitration highlight the ongoing tension between public enforcement of the civil rights laws and private and efficient resolution of workplace disputes. This issue poses special difficulties for the employment law bar. It is hard enough for employment lawyers to keep up with the large number of court decisions that are generated in applying the increasing web of federal discrimination and benefits law. That difficulty is magnified geometrically by the increasing number of cases that are being resolved both in arbitration and mediation, for the outcomes in these private forums are often confidential and almost never published widely. As our employment law precedents lose their transparency, therefore, lawyers who have to advise clients will be increasingly deprived of that richer understanding of how the employment statutes are being applied in the real world. From a counseling standpoint in particular, the growth of private dispute resolution, whatever its merits, poses problems of its own. Does this largely unguided development of a private common law of arbitration awards and mediated settlements mean that the Court's decisions are less pertinent? Not really, but it does mean that the impact of what the Court does in the employment realm will be to some degree filtered through the bar and the ADR professionals, instead of being refined more publicly by the lower courts. Whether this problem is so profound that the Court will alter its approach to dispute resolution in the employment field is doubtful. But arbitration and mediation will undoubtedly be phenomena to watch carefully in the next decade or so.

One final point - actually, an exhortation to the employment bar: It is high time for employment law to assume its rightful place as a cornerstone of 21st century American jurisprudence and for the employment bar to assume greater responsibility as public educators. After year upon year of preaching about how important work is in our lives and how central the Supreme Court's employment cases are to modern American law, it is now appropriate to draw some lessons from the wealth of evidence on these points. One lesson is that employment lawyers have been remiss in educating state bar officials about the centrality of employment law to our jurisprudence. How many states have an employment component in their bar examinations? How many states teach new lawyers in their general practice CLE curriculum anything about handling employment disputes? For that matter, how many law students graduate with a J.D., but without grounding in the basics of employment law? Another lesson is that the employment bar has overlooked educating the general public about

such an important area of the law. For instance, most individuals in the labor force know little about their rights and duties as workers. In the private sector, more than 92% of the workforce lacks a collective bargaining representative and all the worker education that unions provide. Perhaps most troubling is that our children leave high school without the faintest idea about their rights and responsibilities in a workforce they are about to enter, and I daresay that few college programs fill that knowledge gap adequately.

So, as we continue to regard the Supreme Court's work in the employment area with the care and respect it is due, one hopes that we will also think about effective ways to educate the bar and the public about the significance of the employment relationship in modern life and how that relationship is being shaped legislatively, judicially and privately. To fail in that task would be to invite an ineffective, inefficient and, most importantly, unjust employment jurisprudence.

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Shortly after this paper was prepared, the senior Senator from Massachusetts, Edward M. Kennedy, z"l, died. In recognition of his central role in enacting so many of our employment laws that give meaning to the phrase "with liberty and justice for all," Nahomi joins me in dedicating this work to Senator Kennedy's memory and the causes for which he labored.

Jonathan R. Harkavy
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