What's Age Got to Do With It?

Recent Developments in Employment Law in the United States Supreme Court

By Eve Barrie Masinter and Melissa M. Mulkey

Introduction

OVER the last year and a half, we have witnessed the United States Supreme Court significantly reshape the landscape of labor and employment law. From a seminal decision regarding the application of the Age Discrimination in Employment Act[1] (ADEA) to claims of "reverse" age discrimination to the tax treatment of settlement proceeds in employment cases, the Supreme Court has given labor and employment lawyers much to consider. This article addresses the cases decided and pending before the Supreme Court and serves as a primer for practitioners on recent developments in employment law and litigation.

General Dynamics Land Systems, Inc. v. Cline[2]

In one of its most significant decisions in recent years, the Supreme Court finally answered the question of whether the ADEA supports a claim for reverse age discrimination. The Supreme Court found that the ADEA does not prohibit reverse age discrimination and that older workers in the protected class of forty and over can lawfully be favored over younger workers in the protected class.

In *General Dynamics*, a group of plaintiffs between the ages of forty and fifty challenged a decision made by General Dynamics to cease providing health benefits upon retirement to individuals presently working for the company but under the age of fifty at the time of retirement. These employees argued that the company's decision violated the ADEA because it "discriminate [d against them] . . . with respect to . . . compensation, terms, conditions, or privileges of employment, because of [their] age."[3] More simply, they argued that the proposal set forth by General Dynamics favored older workers in the protected class over younger workers in the protected class.

The district court rejected the claim on the grounds that the ADEA does not prohibit "reverse age discrimination" (i.e., the favoring of older employees).[4] A divided panel of the Sixth Circuit reversed, holding that the statutory language prohibiting discrimination "because of age" was so clear that if Congress had meant to limit coverage only to older employees against younger employees, it would have so indicated.[5] A somewhat divided Supreme Court reversed, holding that Congress enacted the statute to protect the rights of older employees, who were often seen as less productive because of their age. When analyzed using this interpretation, the Court concluded that younger

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[1] 29 U.S.C. §621 *et. seq.*
[2] 540 U.S. 581 (2004).
[3] 29 U.S.C. §623(a)(1).
[4] Cline v. General Dynamics Land Sys., Inc. 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000).
[5] Cline v. General Dynamics Land Systems, Inc., 296 F.3d 466, 472 (6th Cir. 2002).

workers could not claim the statute as legal protection against discriminatory policies used to favor older workers, even though both were in the "protected" class as defined by the ADEA.[6]

In reaching this conclusion, Justice Souter, writing for the majority, found that, although the language "in the abstract" could be open to a construction favored by the employees, such a reading would not "square with the natural reading of the whole provision prohibiting discrimination" or with Congress' "interpretative clues [which] speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones who are getting treated better."[7] This view was bolstered by the legislative history, which focused on the arbitrary stereotypes facing older employees. The opinion points out that "if Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40."[8] Given the legislative history, the majority concluded that the "ADEA's ban on 'arbitrary limits' thus applies to age caps that exclude older applicants, necessarily to the advantage of younger ones."[9]

Justice Scalia authored a brief dissent, focusing on the fact that the EEOC regulations supported the employees' view and that the statutory language itself "does not unambiguously require a different interpretation."[10] Justice Scalia also joined in Part II of the dissent authored by Justice Thomas (with Justice Kennedy joining Part II).

Justice Thomas' dissent is direct and to the point: the majority bypassed a straightforward statutory analysis by ignoring both the plain language of the statute and the legislative history in favor of what Justice Souter characterized as "social history." The dissenting opinions urge that because the prohibition against "discrimination because of age" is unambiguous and not restricted to discrimination because of relatively older age," the inquiry need not go beyond the language of the statute itself. To the extent it is necessary to consider the legislative history, the dissenters next point to the clear and unambiguous statement by Senator Yarborough, a sponsor of the ADEA, that "[t]he law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way [the] decision went."[11] Turning to the majority's "social history" analysis, Justice Thomas noted that if such reasoning were applied to the interpretation of Title VII (prohibiting race and gender discrimination), non-minorities would not receive protection under that statute, since the social factors behind Title VII establish that it was enacted to protect against discrimination directed toward minorities. Thus, the dissent concludes that both *McDonald*[12] (holding that Title VII prohibits reverse race discrimination) and *Oncale*[13] (holding that Title VII prohibits sexual harassment against men) would be wrongly decided using "social history" in place of traditional principles of statutory construction.

Despite the strong dissents, the Supreme Court's decision in *General Dynamics* answers a question that has been left open for some time: a cause of action for "reverse" age discrimination is not viable under the ADEA. Although a 46 year old may be "protected" under the language of the ADEA, that express protection is now limited. If a job action favors a 41 year old, the 46 year old may have a cause of action. If it favors a 51 year old, however, he or she does not.

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[6] 29 U.S.C. §631(a) states: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

[7] 540 U.S. at 601.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 602.

[11] *Id.* at 601.

[12] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1996).

[13] Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).

Pennsylvania State Police v. Suders[14]

In a long-awaited decision, the Supreme Court resolved a split in the circuit courts of appeal regarding the application of the *Ellerth/Faragher* affirmative defense to constructive discharge cases.[15] These companion cases presented the Court with the task of articulating the standard for imposing liability on an employer for sexual harassment by its supervisory employees. The Court articulated what is now known as the *Ellerth/Faragher* affirmative defense, which provides that an employer may avoid liability for harassment engaged in by its supervisory employees if it can demonstrate that (1) it had in place measures to prevent and promptly remediate workplace harassment, and (2) the employee unreasonably failed to take advantage of those measures. However, the Court also held that employers could not utilize this defense where the harassment culminated in a tangible adverse employment action. This critical issue made its way back to the Court after six years of litigation regarding the scope of the term "tangible adverse employment action."

Justice Ginsburg, writing for the 8-1 majority in *Pennsylvania State Police v. Suders*, held that the *Ellerth/Faragher* defense may be available in certain situations when constructive discharge is claimed. Unless an employer takes an official action that precipitates the constructive discharge, the affirmative defense should be available.[16]

Suders was hired by the Pennsylvania State Police (PSP) as a communications operator. Her three male supervisors subjected her to a barrage of sexual harassment, up to the date of her resignation. The harassment consisted of one of her supervisors discussing people having sex with animals and that young girls should be given instruction on how to gratify men with oral sex. Another supervisor sat next to Suders wearing spandex shorts, spread his legs apart, grabbed his genitals, and shouted out a vulgar comment inviting oral sex. Suders once told him that she didn't think he should be doing this. Rather than stopping, the supervisor responded by jumping on a chair and again performing the gesture with accompanying vulgarity. This same supervisor rubbed his rear end in front of Suders and remarked, "I have a nice ass, don't I?" Another supervisor told her the "village idiot" could do her job and then pounded furniture to intimidate her while wearing black gloves.

In June of 1998, one supervisor accused Suders of taking a missing accident file home with her. After that accusation, Suders approached the PSP's Equal Employment Opportunity (EEO) officer and told her she "might need some help." The EEO officer gave Suders her telephone number but never followed up with Suders. In August of 1998, Suders again contacted the EEO officer and stated that she was being harassed and was afraid. The EEO officer told her to file a complaint but did not tell her how to obtain the necessary form. Two days later, Suders' supervisors arrested her for theft, and she resigned from the force. The arrest occurred after Suders discovered that her supervisors had never forwarded her computer skills exams to be graded, and she learned that their reports that she had failed were false. She learned this when she came upon her exams in a set of drawers in the women's locker room. She removed the exams from the locker room. Upon finding that the exams had been removed, her supervisors devised a plan to arrest her for theft. They dusted the drawer in which the exams had been stored with a theft detection powder that turns hands blue. When Suders attempted to return the tests to the drawer, her hands turned blue. She was then apprehended by her supervisors and handcuffed. Her hands were photographed, and she was questioned. She had previously prepared a written resignation, which she tendered soon after her supervisors detained her. Her supervisors initially refused to release her

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[14] 124 S.Ct. 2342 (2004).

[15] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

[16] Suders, 124 S.Ct. at 2347.

and instead brought her to an interrogation room and gave her Miranda warnings and questioned her. When she reiterated that she wanted to resign, they let her leave. Theft charges were never brought.

Suders sued, alleging that she had been subjected to sexual harassment and was constructively discharged in violation of Title VII. At the close of discovery, the district court granted summary judgment, determining that the PSP was not vicariously liable for the supervisors' conduct. The district court relied on *Ellerth* and *Faragher* and found Suder's hostile work environment claims untenable as a matter of law because she unreasonably failed to avail herself of the internal reporting procedures and had not given the PSP an opportunity to respond to her complaints, resigning just two days after she first mentioned anything about harassment to the EEO officer. The district court did not address Suders' constructive discharge claim.[17]

The Third Circuit reversed and remanded, holding that even assuming the PSP could assert the affirmative defense, genuine issues of material fact existed concerning the effectiveness of the PSP's program to address sexual harassment. Next, the Third Circuit held that the district court erred in failing to recognize that Suders had stated a claim of constructive discharge due to the hostile work environment, which it determined constituted a tangible employment action precluding the *Ellerth/Faragher* affirmative defense. [18]

The Third Circuit decision in *Suders* added to the circuit split. The Seventh Circuit had recently concluded that "in circumstances where 'official actions by the supervisor...make employment intolerable,' we believe a constructive discharge may be considered a tangible employment action."[19] After reviewing the circuit split and considering the rationale of each position, the Seventh Circuit reached its conclusion based on the concern that equating constructive discharge with other types of tangible employment actions would impose liability on employers when the offending employee had not been empowered by the company to take the action(s) at issue. Thus, if the actions are occasioned by a co-worker, the constructive discharge will not be considered a tangible employment action, and the affirmative defense is available.

The Eighth Circuit previously held, in accord with the Third Circuit, that a constructive discharge can constitute a tangible employment action.[20] The Second Circuit held that a constructive discharge was not a tangible employment action.[21] The Sixth Circuit adopted the Second Circuit's holding in an unpublished opinion.[22] As noted by the *Robinson* Court, the First Circuit "has trod a middle ground and held that '[b]ecause the conduct differs from case to case,' there is 'no reason to adopt a blanket rule one way or the other.'"[23]

The Supreme Court held that to establish constructive discharge, the plaintiff must show that the abusive working environment became so intolerable that an employee's resignation qualified as a "fitting response." The employer is entitled to raise the *Ellerth/Faragher* affirmative defense, unless the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation.

The Court defined an official action sufficient to precipitate a resignation by providing examples: a humiliating demotion, an extreme cut in pay or a transfer to a position where the employee would face

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[17] *Id.* at 2349.

[18] Suders v. Easton, 325 F.3d 432 (3rd Cir. 2003).

[19] Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2909 (2004).

[20] Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960 (8th Cir. 2002); Jackson v. Arkansas Dept. of Educ., 272 F.3d 1020 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002).

[21] Jin v. Metropolitan Life Ins., No. 01-7013, 2002 WL 1394348 (2nd Cir. 2002); Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000).

[22] Turner v. Dowbrands, Inc., No. 99-3984, 2000 WL 924599 (6th Cir. 2000).

[23] Robinson, 351 F.3d at 334 *citing* Reed v. MBNA Mtg. Sys., Inc., 333 F.3d 27, 33 (1st Cir. 2003).

unbearable working conditions. Writing for the majority, Justice Ginsburg cited two recent circuit court decisions which provided examples of the differences between official and unofficial precipitating acts.[24] In *Reed*, a supervisor made repeated sexual comments and sexually assaulted plaintiff, and plaintiff quit, claiming she was constructively discharged. Justice Ginsburg observed that the *Ellerth/Faragher* defense was not precluded in *Reed* because the supervisor's behavior "involved no official actions." In *Robinson*, on the other hand, plaintiff complained she was sexually harassed by a judge. She was to be transferred to another judge after she complained but was told that "her first six months [with the new judge] probably would be hell" and that it was in her "best interest to resign." She then resigned. In that case, Justice Ginsburg noted that the supervisor's action of transferring her constituted an official act precipitating her resignation, thus precluding the affirmative defense.[25]

While the Court remanded *Suders* over genuine issues of material fact, the majority suggested that Suders' arrest, immediately prior to her resignation, would constitute a sufficient precipitating official action. Justice Ginsburg criticized the Third Circuit for leaving pleading allocations and burdens of proof to the district courts, stating, "[w]e see no cause for leaving the district courts thus unguided." The Court's opinion, however, also failed to give any significant guidance on the appropriate burdens of proof in a sexual harassment constructive discharge case. Justice Thomas, dissenting, took issue with the majority's lenient definition of constructive discharge, arguing that the requirements were so low that it bore little resemblance to an actual discharge.[26]

Raytheon Co. v. Hernandez[27]

In *Raytheon*, the Supreme Court disappointed many practitioners by declining to decide the issue upon which it had granted *certiorari*: whether the Americans with Disabilities Act (ADA)[28] confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules. The Court sent the decision back to the Ninth Circuit due to its failure to apply the proper standard for evaluating the plaintiff's claims. In so doing, the Court reminded us why careful pleading is often the greatest challenge presented in these cases.

The *Raytheon* case involved an appeal from the Ninth Circuit's reversal of a grant of summary judgment in favor of Raytheon in claims brought by a former employee, Joe Hernandez. Hernandez worked for Hughes Missile Systems (later acquired by Raytheon) for 25 years. In July of 1991, Hernandez tested positive for cocaine while on the job, an offense which was grounds for his immediate termination. Rather than being terminated, however, Hernandez was given the option to resign, which he chose to do. This was noted in his personnel file and, pursuant to an "unwritten" policy, resulted in his ineligibility for rehire.

Two and a half years later, in January of 1994, Hernandez applied to be rehired with Hughes. He was not selected for rehire based on the unwritten policy against rehire of individuals who had resigned in lieu of termination. Hernandez filed suit under the ADA, alleging that he was denied employment based on his record of drug addiction.

The Ninth Circuit determined that Hernandez met his *prima facie* burden of demonstrating that he had a record of disability (drug addiction), applied and was qualified for the position, and he was not hired because of his record of disability (because there were disputed issues of fact as to whether the employer knew of the alleged

[24] Reed, 333 F.3d at 27; Robinson, 351 F.3d at 317.
[25] Suders, 124 S. Ct. at 2356.
[26] *Id.* at 2357.
[27] 540 U.S. 44 (2003).
[28] 42 U.S.C. §12101, *et seq.*

disability at the time of its decision).[29] In examining whether the employer met its burden of articulating legitimate nondiscriminatory reasons for its actions, the Ninth Circuit held that "Hughes' unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction."[30] Thus, the Ninth Circuit held that not only had Hernandez provided sufficient evidence to proceed to a jury on his failure to hire claim but also that "a policy that serves to bar the re-employment of a drug addict despite his successful rehabilitation violates the ADA."[31]

The Supreme Court reversed and remanded, holding that, while the plaintiff articulated his claim only under the disparate treatment model, the Ninth Circuit mistakenly analyzed the issue under a disparate impact formula. Justice Thomas, writing for the *Raytheon* Court, explained where the court of appeals went wrong:

> In other words, while ostensibly evaluating whether petitioner had proffered a legitimate, nondiscriminatory reason for failing to rehire respondent sufficient to rebut respondent's *prima facie* showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate treatment claims.[32]

The Supreme Court confirmed that a "no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."[33] The Court then sent the case back to the Ninth Circuit for further proceedings.[34] According to the Supreme Court, the plaintiff is the master of his claim: since he brought a disparate treatment claim, the Court could not, in rejecting summary judgment, analyze the case under the disparate impact framework.

Jones v. R.R. Donnelley & Sons Co.[35]

In *Jones*, the Supreme Court resolved a split among the circuit courts concerning the proper limitations period for racial harassment and termination claims under the Civil Rights Act of 1866[36] and determined that the four-year "catch-all" statute of limitations implemented pursuant to 28 U.S.C. §1658 governs rather than the applicable statute of limitations from the forum state.

In *Patterson*,[37] the Supreme Court held that §1981 "extends only to the formation of a contract, not to problems that may arise later from the conditions of continuing employment." Subsequently, Congress amended §1981 by way of the Civil Rights Act of 1991, specifically making it applicable to "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[38] Between those two events, in 1990, Congress enacted a uniform catch-all statute of limitations for "civil actions arising under an Act of Congress" ***enacted after*** the effective date of the statute and for

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[29] Hernandez v. Hughes Missile Systems Co., 298 F.3d 1030, 1035 (9th Cir. 2002).
[30] *Id.* at 1036.
[31] *Id.* at 1036-1037.
[32] Raytheon, 540 U.S. at 51.
[33] *Id.*
[34] On remand, Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564 (9th Cir. 2004), the Ninth Circuit held that the plaintiff presented sufficient evidence to withstand summary judgment on his disparate treatment claim and ordered a jury trial on the issue.
[35] 541 U.S. 369(2004).
[36] 42 U.S.C. §1981.
[37] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).
[38] 42 U.S.C. §1981(b).

which a specific limitations period is not provided.[39]

The employees argued that because, based on the Supreme Court's ruling in *Patterson*, no cause of action "existed" prior to the enactment of the Civil Rights Act of 1991, the four-year limitations period should be utilized for these claims. In contrast, the employer urged that the applicable state law statute of limitations, the two-year period, was appropriate because §1658 was only intended to encompass new enactments, not amendments to existing statutes.

The Supreme Court reversed the Seventh Circuit and agreed with the plaintiff employees. The Court found that the term "arising under" utilized in the catch-all statute of limitations was not clear on its face. Thus, the Court looked to the legislative history behind the catch-all statute of limitations to ascertain the meaning of this phrase. The Court determined that the Congressional intent behind the four-year limitations period was to put an end to the confusion in applying state or federal law to the limitations period for certain claims. The Court then determined that, in light of this intent, it would apply the catch-all period whenever a post-1990 enactment created a new cause of action. The Court went on to determine that the claims asserted by the employees were those created by the 1991 Act and not those found in the original Act.

Because the claims asserted were those found in the post-1990 enactment, the four-year period applied, not the two-year period under the applicable state law. Rather than establish a bright line test in instances where a cause of action could arise under both a pre-1990 and post-1990 enactment, the Supreme Court "split" the cause of action. The limitations period that will apply in such instances will now be dictated by a court's determination regarding under which version of the law the cause of action arose.

[39] 28 U.S.C. §1658.

Scarborough v. Principi[40]

One of the harder fought issues in the wake of employment discrimination cases typically concerns attorneys' fees. In this case, the Supreme Court addressed the process by which an individual can seek to recover attorneys' fees against a governmental agency. The Court rejected the position advanced by the Justice Department and ruled that a timely-filed application for attorneys' fees filed pursuant to the Equal Access to Justice Act (EAJA)[41] may be amended after the 30-day deadline to allege that the government's position was not substantially justified. The EAJA allows parties that prevail in litigation brought by or against the federal government – including governmental agencies such as the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission (EEOC) – to apply for payment of their attorneys' fees incurred during the litigation. The statute requires that the party applying for fees file, within 30 days of the judgment, an application showing that the applicant is a prevailing party entitled to receive an award, itemizing the amount sought, and alleging that the government's position in the case was not substantially justified.[42] The Justice Department urged that the wording of the EAJA requires the application to state all essential elements at the time of filing. The Supreme Court held, relying on the Federal Rules of Civil Procedure, that the "not substantially justified" language is simply a pleading requirement which is subject to the relation-back doctrine. A timely-filed application may be amended to properly allege that the government's position was not substantially justified.

Clackamas Gastroenterology Associates v. Wells[43]

[40] 541 U.S. 401 (2004).
[41] 28 U.S.C. §2412.
[42] 28 U.S.C. §2412(d)(1)(A)-(B).
[43] 538 U.S. 440 (2003).

In *Clackamas*, the Supreme Court was tasked with deciding whether physician-shareholders of a professional medical corporation were employees within the meaning of the ADA for purposes of determining whether the corporation was a "covered entity" (i.e., one employing fifteen or more "employees"). The Ninth Circuit rejected the defendant's argument that, although the physicians were members of a professional corporation, the physicians should actually be regarded as partners, because it considered the decision to incorporate to be voluntary, presumably to obtain advantages in terms of taxes and a shield from individual civil liability. Having elected to incorporate and accept those benefits, the physicians would not be permitted to have the "best of both possible worlds."[44] The appellate court noted that the physicians actively participated in the management and operation of the medical practice and had employment agreements with the corporation. Notwithstanding the fact that they were shareholders and directors of the corporation, the Ninth Circuit held that they were employees for the purposes of the ADA, and thus, the defendant corporation had the requisite fifteen or more employees and was a "covered entity."[45]

The Supreme Court reversed the Ninth Circuit's holding that any use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership."[46] Instead, the Supreme Court followed the EEOC's position that the common law test of control determines whether one is an employee. The High Court articulated six factors relevant in determining whether a shareholder-director is an employee: (1) whether the organization can hire or fire the person or set rules and regulations for the person's work; (2) whether, and to what extent, the organization supervises the person's work; (3) whether the person reports to someone higher in the organization; (4) whether, and to what extent, the person is able to influence the organization; (5) whether the parties intended the person to be an employee, as evidenced in written agreements or contracts; and (6) whether the person shares in the profits, losses, and liabilities of the organization.[47] Although the Court surmised that the factors as applied to the findings appeared to lead to the conclusion that the shareholders-directors were not employees of the clinic, it declined to make that pronouncement and remanded to the Ninth Circuit for consideration under its announced factors.[48]

Tennessee v. Lane, et al[49]

Although not an employment decision, the Supreme Court's analysis in *Tennessee v. Lane* may have far-reaching implications on the application of 11th Amendment immunity on a range of employment cases against governmental entities. In *Lane*, the Supreme Court held that Title II of the ADA constitutes a valid exercise of Congress' authority under §5 of the 14th Amendment of the United States Constitution because Title II was congruent and proportional to its object of enforcing the right of access to the courts. The Court limited its holding, however, to that class of cases implicating the fundamental right of access to the courts. The Court specifically noted that it need go no further as to any other public services or programs.

Two paraplegics filed the action for damages and equitable relief under Title II, alleging that the state of Tennessee and a number of its counties had denied them physical access to that state's courts in violation of Title II. The two individuals who brought the suit used wheelchairs for

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[44] Wells v. Clackamus Gastroenterology Assoc., 271 F.3d 903, 905 (9th Cir. 2001).
[45] *Id.* at 906-909.
[46] *Id.* at 905.
[47] Clackamas, 538 U.S. at 449-50.
[48] The Ninth Circuit in turn remanded. Wells v. Clackamas Gastroenterology Assoc., P.C., 332 F. 3d 1177 (9th Cir. 2003). This case remains pending in the district court of Oregon, 3:99-CV-00406-AS.
[49] 541 U.S. 509 (2004).

mobility. George Lane, one of the plaintiffs, alleged that he was compelled to appear on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When he returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers. He was subsequently arrested and jailed for failure to appear. The other plaintiff, Beverly Jones, a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses and, as a result, had lost both work and an opportunity to participate in the judicial process.

The district court denied the state's motion to dismiss, which was based on 11th Amendment immunity grounds. The Sixth Circuit held the appeal in abeyance pending the Supreme Court's decision in *Board of Trustees of University of Alabama v. Garrett*.[50] Subsequent to the Supreme Court's decision in *Garrett*, the Sixth Circuit determined that neither Jones nor Lane's claims were barred, as they were based on due process. On rehearing, the panel filed an amended opinion explaining that due process protects the right of access to the courts and finding that the evidence before Congress when it enacted Title II established that physical barriers in courthouses and courtrooms had the effect of denying disabled people the opportunity for such access.[51]

The Supreme Court first found that Congress had, in Title II of the ADA, unequivocally expressed its intent to abrogate a state's 11th Amendment immunity. Next, in finding Title II a valid exercise of Congress' §5 enforcement power, the Court focused on the fact that Title II, as opposed to Title I, sought to enforce a variety of basic constitutional guarantees other than the prohibition of disability discrimination. Citing to historical experience documented in decisions of the Supreme Court and other courts, as well as a Civil Rights Commission Report before Congress showing that approximately seventy-six percent of public ser-vices and programs in state-owned buildings were inaccessible and unusable by disabled persons, the majority found that the volume of such evidence before Congress in enacting Title II far exceeded the record in the Court's last term decision in *Hibbs*.[52]

The Supreme Court specifically stressed that the remedy Congress chose under Title II was a limited one and that Congress only required the states to take reasonable measures to remove architectural and other barriers to accessibility. The Court found this duty to accommodate perfectly consistent with the well-established due process principle that, within limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard in its courts. "Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end."[53]

The Court's opinion relied on Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."[54] The majority, as noted by the dissent, did not address Title III of the ADA, which provides for access to public facilities.[55]

In his dissent, Chief Justice Rehnquist noted that the decision was irreconcilable with *Garrett* and the well-established principles that *Garrett* embodies. The Chief Justice noted that the record before the Court contained the same evidence rejected in *Garrett* and that there was no person in this case who was actually denied a constitutional right to access in a given judicial

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[50] 531 U.S. 356 (2001). The *Garrett* Court ruled that the 11th Amendment barred private monetary damage actions for alleged state violations of Title I of the ADA, which prohibits employment discrimination against individuals with disabilities.

[51] Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003).

[52] Lane, 124 S.Ct. at 1990-92 *citing* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

[53] Lane, 124 S.Ct. at 1994.

[54] 42 U.S.C. §12132.

[55] 42 U.S.C. §12181, *et seq*.

proceeding. Justice Rehnquist stated "we have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance."[56] Finally, the dissent criticized the Court's "as applied" analysis which posits a hypothetical statute never enacted by Congress that applies only to courthouses. Justice Scalia stated in his dissent: "When it goes beyond enforcement to prophylaxis, however, I shall consider it *ultra vires*. The present legislation is plainly of the latter sort."[57]

Thus, when considering access to the courts, the United States Supreme Court rejected 11th Amendment immunity. Whether 11th Amendment immunity under Title III of the ADA will be abrogated for access to public facilities is an issue for another term.

Central Laborers' Pension Fund v. Heinz[58]

In *Heinz*, the Supreme Court held that §204(g) of the Employee Retirement Income Security Act of 1974 (ERISA)[59] prohibits an amendment to a pension plan that expands the definition of "disqualifying employment" and triggers suspension of the payment of early retirement benefits already accrued by plan participants. The respondents, collectively referred to by the Court as "Heinz," were retired participants in a plan administered by Central Laborers' Pension Fund. Heinz retired from construction positions after accruing enough pension credits to qualify for early retirement payments under a "service only" pension scheme that awarded the same monthly benefits they would have received had they retired at the usual age. According to the terms of the retirement plan, beneficiaries were prohibited from certain "disqualifying employment" after they retired, and the monthly payments made to the beneficiaries were to be suspended if they engaged in such forbidden work. When Heinz retired in 1996, the plan defined "disqualifying employment" to include a job as a construction worker but not as a supervisor. After retiring, Heinz took a job as a construction supervisor, and the plan continued to pay out monthly benefits accrued under the "service only" pension scheme. In 1998, an amendment expanded the plan's definition of "disqualifying employment" to include any job "in any capacity in the construction industry (either as a union or non-union construction worker)." The retirement plan construed this amendment to cover Heinz's employment as a supervisor and suspended Heinz's monthly benefit payments. Heinz sued, claiming this suspension violated ERISA's "anti-cutback" provision, which prohibits any pension plan amendment that would reduce a participant's "accrued benefit." The district court dismissed Heinz's claims. The Seventh Circuit reversed and held that imposing new conditions on rights to accrued benefits violates the anti-cutback rule.[60] The Supreme Court affirmed unanimously.

The principal issue before the Supreme Court was whether the plan's amendment had the effect of "eliminating or reducing an early retirement benefit." The Court's central concern was the fact that the 1998 amendment to the plan did cause Heinz's benefits to suffer and "undercut" Heinz's reliance on the terms under which retirement was planned.[61]

The Court rejected the Plan's argument that the anti-cutback provision only applies to amendments directly altering the dollar amount of a retiree's monthly pension payment. In essence, the Plan argued that so long as the dollar amount received by the retiree is not reduced by a post-accrual plan amendment and payment is merely suspended, there has been no violation of the anti-cutback rule. The Court openly rejected

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[56] Lane, 124 S.Ct. at 2002.
[57] *Id.* at 2013.
[58] 541 U.S. 739 (2004).
[59] 29 U.S.C. §1001, *et seq.*
[60] Heinz v. Central Laborers' Pension Fund, 303 F.3d 802 (7th Cir. 2002).
[61] Heinz, 541 U.S. at 739.

this assertion and held that the altering of the conditions imposed on receipt of benefits 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment. The Court found that while ERISA expressly allows suspension of payments to retirees who engage in disqualifying employment, it does not permit those conditions to be imposed retroactively after the benefits have already accrued.[62]

The Plan relied heavily on a separate section of ERISA,[63] which it claimed retroactively authorized amendment of suspension provisions. The Court also rejected this argument and responded that §203(a) addresses the vesting of employee benefits, as opposed to the "anti-cutback" rule which sets forth requirements for benefit accrual. Simply put, the Court held that "[j]ust because §203(a)(3)(B) failed to forbid [amending suspension provisions retroactively,] would not mean that §204(g) allowed it."[64]

Supporting its opinion with authoritative IRS regulations that adopt an identical reading of the anti-cutback provision, the Supreme Court stated that "[s]o far as the IRS regulations are concerned...the anti-cutback provision flatly prohibits plans from attaching new conditions to benefits that an employee has already earned."[65]

Aetna Health Inc. v. Davila, and CIGNA Healthcare of Texas Inc. v. Calad[66]

The Supreme Court in these consolidated cases reaffirmed the broad scope of ERISA preemption. Respondents sued their respective Health Maintenance Organizations (HMOs) for alleged failures to exercise ordinary care in the handling of certain coverage decisions in violation of a duty imposed by the Texas Health Care Liability Act (THCLA). One respondent was a participant in an ERISA-regulated employee benefit plan, and the other was a beneficiary. Their plan sponsors had entered agreements with Aetna Health Inc. and CIGNA Healthcare of Texas, Inc. to administer the plans. The issue before the Supreme Court was whether the respondents' causes of action were completely preempted by ERISA. The Court, reversing the Fifth Circuit, held that the causes of action were completely preempted by ERISA and removable to federal court.[67]

Respondents' claims arose from decisions not to provide coverage for certain treatment and services recommended by their treating physicians. They brought suit in Texas state court against their HMOs under THCLA and argued that the HMOs' refusal to cover recommended services violated a "duty to exercise ordinary care when making health-care treatment decisions" and that these refusals "proximately caused their injuries." The HMOs responded by removing the cases to federal district court and arguing that the claims fell within the scope of ERISA and were, therefore, completely preempted by the statute. Both district courts agreed and refused to remand the cases to state court.[68] Both respondents refused to amend their complaints to bring specific ERISA claims, and the district courts dismissed their claims with prejudice. Respondents appealed to the Fifth Circuit, which consolidated the cases with several others raising similar issues. The Fifth Circuit concluded that under *Pegram,*[69] the HMOs were being sued for mixed eligibility and treatment decisions that were not fiduciary in nature and did not fall within the scope of ERISA. The Fifth Circuit further held that the claims did not fall under ERISA since complete preemption is limited to situations where the states duplicated the causes of action listed in ERISA §502(a). According to the Fifth Circuit, the THCLA does not fall under the scope of §502(a)

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[62] *Id.* at 739.
[63] §203(a)(3)(B).
[64] Heinz, 541 U.S. at 739.
[65] *Id.*
[66] 124 S. Ct. at 2488.
[67] Aetna, 124 S. Ct. at 2502.
[68] Davila v. Aetna U.S. Healthcare, Inc., 2001 WL 34354948 (N.D. Tex. 2001); Calad v. Cigna Healthcare of Texas, Inc., 2001 WL 705776 (N.D. Tex. 2001).
[69] Pegram v. Herdrich, 530 U.S. 211 (2000).

because, unlike ERISA, it does not provide an action for collecting benefits.[70]

In reversing the Fifth Circuit, the Supreme Court determined that it must examine the complaint, the THCLA and the various plan documents. After its examination, the Court held that the respondents only complained about denials of coverage promised under the terms of ERISA-regulated plans. These complaints did not involve legal duties that arose independently of ERISA or the terms of the employee benefit plans. In essence, any liability under the THCLA would exist only because of the administration of ERISA-regulated benefit plans.[71]

The Court also rejected the Fifth Circuit's reasoning that the respondents asserted a "tort claim for tort damages" rather than a "contract claim for contract damages" and that the respondents were not seeking reimbursement for benefits denied. The Court held that distinguishing between preempted and non-preempted claims based on the particular "label" affixed to them would "elevate form over substance and allow parties to evade the preemptive scope of ERISA" simply by relabeling their contract claims as claims for tortious breach of contract.

The Court also rejected respondents' arguments that the THCLA is a law that regulates insurance and that §514(b)(2)(A) of ERISA saves their claims from pre-emption. Section 514(b)(2)(A) of ERISA provides that "[n]othing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities." The Court held that §514(b)(2)(A) must be interpreted in light of the congressional intent to create an exclusive federal remedy in ERISA, and allowing respondents to proceed with their state-law suits would pose an obstacle to that intent.[72]

The Court distinguished its decision in *Aetna* from *Pegram,* in which the Court held that state tort-type laws may have application to aspects of "mixed eligibility" decisions that implicate both whether the benefit is covered under the terms of the plan and what the treatment for the medical condition should be. In *Pegram*, the plaintiff sued, both for medical malpractice and for breach of an ERISA fiduciary duty, her physician-owned-and-operated HMO (which provided medical coverage through her employer pursuant to an ERISA-regulated benefit plan) and her treating physician. Since the plaintiff's treating physician was also the person charged with administering her benefits and deciding whether certain treatments were covered, the *Aetna* Court cited to the *Pegram* opinion and reasoned that the physician's "eligibility decision and the treatment decision were inextricably mixed."[73] Further, the *Pegram* Court determined that the decision as to what the treatment should be was not an ERISA administrative decision and, therefore, state law was not preempted. The Court then concluded that "Congress did not intend [the defendant HMO] or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians."[74]

Further distinguishing *Aetna* from *Pegram*, the Court stressed that the *Aetna* petitioners were neither respondents' treating physicians nor the employers of respondents' treating physicians. Hence, the coverage decisions in *Aetna* were purely eligibility decisions governed by ERISA.

City of San Diego v. Roe[75]

In a *per curiam* decision, the Supreme Court clarified and refined the Court's position in *Pickering* and *Connick*[76] regarding a public employee's right to engage in public speech and the government employer's right to protect its legitimate

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[70] Roark v. Humana, Inc., 307 F.3d 298 (5th Cir. 2002).

[71] Aetna, 124 S. Ct. at 2496-2497.

[72] *Id.* at 2500.

[73] *Id.* at 2501 citing Pegram.

[74] *Id.* citing Pegram at 231.

[75] 125 S. Ct. 521 (2004).

[76] Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983).

interests in performing its mission. Roe, a pseudonymous plaintiff, was employed as a police officer by the City of San Diego, and also operated a retail auction site on eBay under the user name "CodeStud3@aol.com" ("CodeStud3"). Numerous auctions conducted by Roe stated that he was a police officer from California, although none of the auctions specifically made reference to his employment with the city or its police department.[77]

Although running an eBay auction site in and of itself would likely not have resulted in the termination of Roe's employment with the city, the products sold, along with the method of "marketing," were his downfall. Roe was selling, through eBay, videos of himself in an unmarked police uniform engaging in sexual acts, including masturbation. Roe was also selling custom made-to-order sex videos and his used underwear. All of Roe's transactions were conducted using his user name CodeStud3, which is a reference to a police high priority radio call "Code 3."

During a visit to eBay's website, one of Roe's supervisors found an authentic official police uniform used by the San Diego Police Department (SDPD) for sale by CodeStud3. Using an eBay provided web link, the supervisor clicked to see the other items that CodeStud3 had for sale or auction. He found videotapes for sale in the adult-only section of eBay and, after examining the items, recognized Roe's photograph on the box of one of the sexually-explicit videos.

The supervisor informed other department officials in Roe's line-of-command, and the SDPD commenced an internal investigation. One of the detectives working on the matter requested a custom-made video from CodeStud3 in which Roe would depict a traffic stop scenario. The detective also ordered a pair of underwear from Roe. Roe, using his CodeStud3 identity, forwarded both the custom-made video and the underwear to the detective, at which time, he was confronted by his supervisors. Roe admitted to his SDPD supervisors that his eBay user name was CodeStud3 and that he was selling the videos and police paraphernalia. The SDPD ordered Roe to cease displaying, manufacturing, distributing, or selling any sexually explicit materials or engaging in any similar behaviors via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public.

Roe removed and discontinued selling some of the items but continued to list his seller profile, which described the first two sexually-explicit videos that he had produced, listed the prices of his existing videos, and the prices of custom-made videos. The SDPD, after discovering Roe's failure to comply with its order, began termination proceedings and ultimately dismissed Roe for continuing to sell those items and for disobeying lawful orders.

Roe filed suit against the city under 42 U.S.C. §1983, alleging that his termination violated his First Amendment right to free speech. The district court granted summary judgment in favor of the city because Roe had not demonstrated that selling authentic official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under the Supreme Court's decision in *Connick*. The Ninth Circuit reversed the district court's holding, finding that, "Roe's conduct fell within the protected category of citizen commentary on matters of public concern." The Ninth Circuit based its decision on the premise that "Roe's expression was not an internal workplace grievance, took place while he was off-duty and away from his employer's premises, and was unrelated to his employment."[78]

The Supreme Court found that the Ninth Circuit's reliance on *Treasury Employees*[79] to qualify Roe's activities as matters of public concern was misguided and

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[77] Roe, 125 S. Ct. at 523.

[78] Roe v. City of San Diego, 356 F.3d 1108, 1110, 1113-1114 (9th Cir. 2004).

[79] United States v. Treasury Employees, 513 U.S. 454 (1995).

inappropriate. *Treasury Employees* established that speech that is unrelated to an individual's employment and has no effect on the mission or purpose of the employer may be protected speech. The Court found that Roe's actions were outside the scope of *Treasury Employees*.[80]

Relying on the *Pickering* and *Connick* decisions, the Supreme Court agreed with the city's argument that Roe's speech "is contrary to its regulations and harmful to the proper functioning of the police force." Although *Pickering* established a balancing test "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission," the Supreme Court concluded that not all statements made by a public employee are entitled to balancing under *Pickering*. Applying the *Pickering* test to any and all speech made by a public employee would compromise the proper functioning of government offices. The employee's speech must reach the threshold inquiry established in *Connick*, and implicit in *Pickering*, that "a public employee's speech must touch on a matter of 'public concern'" and not on matters of personal interest.[81]

The Court synthesized its previous definitions of "public concern" in *Cox* and *Time, Inc.*, holding that "public concern is something that is a subject of legitimate news interest; that is subject of general interest and of value and concern to the public at the time of publication."[82] The Supreme Court affirmed the district court's finding that the city was within its rights as an employer to terminate Roe for his actions, stating,

> Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image. The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community.[83]

Thus, simply stated by the Court, Roe's "expressions" did not qualify as a matter of public concern under any view of the public concern test, and therefore, the threshold to receive the benefits of the *Pickering* balancing test were not met.

Commissioner of Internal Revenue v. Banks[84]

In the companion cases of *Banks v. CIR*[85] and *Banaitis v. CIR*,[86] the Supreme Court recently addressed an issue that has created one of the biggest obstacles to the amicable resolution of employment disputes: taxes. The Court has now resolved the burning question of whether employees receiving settlement funds can be taxed for both the portion they receive and the portion paid to their attorneys as attorneys' fees under a contingent-fee agreement. The Court answered that question in the affirmative, finding that money paid to attorneys as part of the settlement with the plaintiffs under a contingent-fee agreement is taxable income. The recently-passed American Jobs Creation Act ("the Act"), however, contains a provision which *relieves* plaintiffs who settle or win court awards under a wide range of federal and state civil rights statutes from having to pay taxes on the attorney fee portions of their settlements and awards.[87] Nevertheless, the Court determined that, due to the prospective application of the Act, its provisions did not pertain to the respondent-

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[80] Roe, 125 S. Ct. at 524.

[81] *Id.* at 525.

[82] *Id. citing* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and Time, Inc. v. Hill, 385 U.S. 374 (1967).

[83] Roe, 125 S. Ct. at 526.

[84] 125 S.Ct. 826 (2005).

[85] 345 F.3d 373 (6th Cir. 2003), *writ granted*, 124 S.Ct. 1712 (2004).

[86] 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 1713 (2004).

[87] American Job Creations Act of 2004, to be codified in 12 U.S.C. §121(d)(10).

employees before it.[88] Therefore, anomalous treatment of plaintiffs who received settlements prior to October 23, 2004, the effective date of the Act, and those who are lucky enough to receive funds from a settlement or from an award lawsuit after that date, will result from this decision.

The cases before the Court involved settlements paid to two employees by their former employers after filing wrongful discharge claims. Under both settlement agreements, the employers paid a substantial portion of the settlements to the employees' attorneys. Each employee-plaintiff had a contingent-fee agreement with their attorneys. The IRS came calling, and the employees were told they had to include the amounts paid to their attorneys as income, even though the attorneys paid taxes on those same dollars. The net result was that the employees received approximately thirty cents on the dollar of the settlement amounts. The employees each took the matter to tax court and lost; however, they found relief in the circuit courts which sided with their argument that, because the statutes under which they brought suit provide for an award of attorneys' fees, taxing the employees for that award offends the notion of fairness. Because the circuit courts were split on this issue, the Supreme Court decided to hear the matter and, balancing fairness against the Tax Code, determined the Tax Code should prevail. Before this decision, the split in the circuits was as follows: the Fifth, Sixth, and Eleventh Circuits had held that contingency fees are excludable.[89] The Third, Fourth, Seventh, Ninth, Tenth, and Federal Circuits had taken the opposite view.[90]

The Court declined to address whether its ruling would apply to claims brought under federal statutes that authorize fee awards to prevailing plaintiffs' attorneys. However, the Court acknowledged that a consequence of fee-shifting can be that the amount granted in attorneys' fees exceeds damages awarded to plaintiffs who may actually lose money if then required to pay taxes on the entire amount. Because the Court left open the issue of how statutory attorney fee awards should be treated, there is some hope for those taxpayers who received statutory attorney fee awards prior to the effective date of the Act. While the Act renders the Court's ruling in this case essentially irrelevant to employment and civil rights cases, more litigation may be expected on the statutory fee-shifting issue and in cases brought outside the employment context. There is also a continued movement to further reform the tax code to make non-economic or emotional-distress damages in employment and civil rights cases non-taxable as in personal injury cases.

Jackson v. Birmingham Board of Education[91]

On November 30, 2004, the Supreme Court heard oral argument in *Jackson*, and the Court's much anticipated decision will resolve a split in the circuits regarding whether Title IX implies a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

Jackson involves an appeal from the Eleventh Circuit's decision affirming the dismissal of Roderick Jackson's complaint alleging a claim of retaliation under Title IX.[92] Jackson was a physical education teacher at a Birmingham, Alabama, high

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[88] The Court acknowledged that the Act may cover future taxpayers in respondents' position.

[89] *See* Foster v. U.S., 249 F.3d 1275 (11th Cir. 2001); Srivastava v. Comm'r, 220 F.3d 353 (5th Cir. 2000); Estate of Clarks v. U.S., 202 F.3d 854 (6th Cir. 2000).

[90] *See* Campbell v. Comm'r, 274 F.3d 1312 (10th Cir. 2001); Kenseth v. Comm'r, 259 F.3d 881 (7th Cir. 2001); Young v. Comm'r, 240 F.3d 369 (4th Cir. 2001); Benci-Woodward v. Comm'r, 219 F.3d 941 (9th Cir. 2000); O'Brien v. Comm'r, 38 T.C. 707 (1962), *aff'd*, 319 F.2d 532 (3d Cir. 1963) (*per curiam*).

[91] 309 F. 3d 1333 (11th Cir. 2002), cert. granted, 124 S. Ct. 2834 (2004).

[92] 20 U.S.C. §1681, *et seq.*

school whose duties included coaching the girls' basketball team. Jackson believed that his players were being denied equal funding and equal access to sports facilities and equipment based on their gender in violation of Title IX. After Jackson complained to school administrators about gender discrimination against his team, he began receiving negative performance evaluations and was eventually removed as the girls' basketball coach.

Jackson filed suit, claiming retaliation in violation of Title IX. Both the district court and the Eleventh Circuit ruled that neither Title IX nor its implementing regulation implies a private right of action for retaliation. In reaching its decision, the Eleventh Circuit relied heavily on *Alexander v. Sandoval*,[93] wherein the Supreme Court held that Title VI does not imply a right of action for private litigants to sue recipients of federal funds for disparate impact violations. (Title IX was patterned after Title VI.)

Jackson presents some interesting issues and elicited *amicus curiae* briefs from (1) the United States, urging that the Supreme Court resolve the split and find that a claim for retaliation exists under Title IX "to achieve Congress' non-discrimination goals" and (2) the American Bar Association, asserting that protection of third parties such as teachers and coaches from retaliation is critical to the effective enforcement of Title IX. The Supreme Court may limit the rule of *Sandoval* that regulations cannot infer a private right of action and find that a retaliation claim is permissible under Title IX. However, it is important to note that for the *Jackson* plaintiff, and those future claimants similarly situated, to be able to move forward with a claim under Title IX, the Supreme Court will have to decide not only that a claim for retaliation is implicit in Title IX but also that such claims may be asserted by third parties who are not direct victims of discrimination.

[93] Alexander v. Sandoval, 532 U.S. 275 (2001).

Smith v. City of Jackson, Mississippi[94]

In its second venture into this particular fray, the Supreme Court again agreed to resolve the split in the circuit courts of appeal about whether disparate impact claims can be brought under the ADEA. In a "disparate impact" case, an employee need not prove that the employer acted with discriminatory intent, but can establish a violation of law by proving that an employer's otherwise neutral employment practice has a disparate impact on a group of employees in a protected class. Should the Supreme Court join the majority of circuits in finding that the ADEA does not recognize disparate treatment claims, this decision, along with its decision in *Cline*, would result in a fundamental reordering of the landscape for age discrimination claims. While virtually every employment discrimination law is analyzed in the same fashion as Title VII claims, the ADEA will stand alone in compelling a unique and individual analysis for claims of age discrimination.

The history of the Supreme Court's journey into this issue dates back to *Hazen Paper Co. v. Biggins*.[95] In *Hazen Paper*, the Court clarified that in order to establish a claim for disparate treatment, the employee must establish that his protected trait – not an alleged proxy for that trait – actually played a role in the process and had a determinative effect on the outcome. The Court reversed the jury verdict in favor of the employee and remanded for consideration of whether there was sufficient evidence that the employee was terminated based on age, not simply due to the employer's desire to prevent his retirement benefits from vesting. The Court specifically noted in its decision that it "ha[s] never decided whether a disparate impact theory of liability is available under the ADEA."[96] This dicta has led many circuit courts to conclude that the Supreme Court

[94] 351 F.3d 183 (5th Cir. 2003), cert. granted, 124 S.Ct. 1724 (2004).

[95] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

[96] *Id.* at 610.

was signaling that it would ultimately reject such claims.

The Supreme Court agreed to directly take up this issue in December 2001, when it granted review in *Adams v. Florida Power Corp.*[97] The Eleventh Circuit joined the First, Fifth, Seventh and Tenth Circuits in holding that the ADEA does not recognize an age discrimination claim predicated on disparate treatment. [98] The Supreme Court took the case to resolve the split in the circuits, with the Second, Eight, and Ninth Circuits concluding such claims were cognizable.[99] Inexplicably, however, the Supreme Court reversed its course and dismissed the case without deciding the issue,[100] leaving the split unresolved.

On March 29, 2004, the Supreme Court once again agreed to resolve the circuit court split and granted review of the Fifth Circuit's decision in *Smith.*[101] The Court did not reverse course, and it heard arguments on November 11, 2004. In *Smith*, the plaintiffs were police officers and dispatchers over the age of 40, who claimed that the public employer's performance pay plan granted substantially larger pay increases to employees under the age of 40. Under the pay plan, employees with five or fewer years of tenure received proportionately greater raises than those with more than five years of tenure. Plaintiffs offered statistical proof that average pay increases differed by age and that older employees received smaller raises than younger employees. The trial court held that the disparate impact theory could not be used in an ADEA case, and the Fifth Circuit affirmed.

The Supreme Court, with *Cline* and *Smith* could reshape the entire approach to age discrimination claims, which would have a broad impact on employment litigation far into the future.

CONCLUSION

These cases illustrate the Supreme Court's continuing efforts to address the ever-growing expanse of employment law. The Supreme Court has simultaneously attempted to narrow certain claims, such as age discrimination, and permitted other more controversial areas, such as sexual harassment law, to evolve and expand. In the case of employment law and litigation, there is one thing practitioners know for certain, change is inevitable.

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[97] Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (U.S. Dec. 3, 2001).

[98] Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Smith v. City of Jackson 351 F.3d 183 (5th Cir. 2003); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996).

[99] Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686 (8th Cir. 1983); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981).

[100] Adams v. Florida Power Corp., U.S., No. 01-584 (dismissed 4/1/02).

[101] Smith v. City of Jackson, Mississippi, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S.Ct. 1724 (2004).