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Supreme Court Employment Law Cases 2001-02 Term

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SUPREME COURT EMPLOYMENT LAW CASES 2001-02 TERM

BY
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I. INTRODUCTION

Writing the annual review of Supreme Court employment law decisions for *Employee Rights and Employment Policy Journal* is not an easy task. First, it is certainly hard to follow the quality work produced by those that have enjoyed this task before me. In re-reading the prior reviews in preparation to write this article, I was struck by the quality of the analysis and the many insights that the prior reviewers provided. Second, it is not an overstatement to suggest that each analysis of the decisions issued by Supreme Court in the 2001-02 term could be turned into a separate law review article. Finally, this was a busy term for the Supreme Court in the employment area. Eighteen of the seventy-five cases decided by the Court (24 percent), involved employment law issues. These eighteen cases are almost double the number of employment law cases decided during the last two terms.

Facing this somewhat daunting task, I have opted for a bit of

simplicity. Instead of trying to provide a detailed analysis of each case, a task for which I feel unprepared and which, undoubtedly, others will take on over the course of the next few years, I set two simple objectives for the article. First, the article will summarize each of the cases. My intent is to provide those unfamiliar with the cases a brief review of the facts and a summary of the Court's reasoning. Parts II through VI provide this discussion, grouping the cases by subject area.

Second, in Part VII, the article provides a "big picture" analysis of the various cases. My intent is to identify trends, issues, interesting aspects and features of the Court's term. My objective is to aid in our understanding of the patterns that might affect the Court's treatment of future employment law cases.

II. EMPLOYMENT DISCRIMINATION

Employment discrimination continues to be the employment law area drawing the most attention from the Supreme Court. In the 2001-02 term, the Court decided seven cases involving employment discrimination.

A. Americans with Disabilities Act

1. *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[1] petitioner, Ella Williams claimed that Toyota Manufacturing violated the Americans with Disabilities Act (ADA)[2] by failing to provide her with a reasonable accommodation. Shortly after beginning work at Toyota's engine fabrication assembly line, Williams developed carpal tunnel syndrome.[3] Her doctor issued permanent work restrictions, which included avoidance of repetitive use of her hands and arms and use of vibratory tools.[4] Williams continued to work at the plant during the next five years, performing a variety of jobs.[5] She was physically capable of performing the assigned job, and her performance, by all accounts, was satisfactory.

1. 534 U.S. 184 (2002).
2. 42 U.S.C. §§ 12191-12213 (2000).
3. *Toyota*, 534 U.S. at 187.
4. *Id.* at 187-88.
5. *Id.* at 188-89.

In 1996, the employer announced that the employees performing the job to which Williams was assigned were to rotate through all four processes related to that job. The new assignments required Williams to hold her hands and arms up around shoulder height for several hours at a time. Soon after beginning the new tasks, Williams began to experience pain in her neck and shoulders. After consulting with Toyota's in-house medical service, Williams requested that Toyota accommodate her medical condition by allowing her to only perform the two tasks in her job that did not require her to hold her arms and hands up for several hours.[6]

Accounts conflicted as to what occurred next. Williams argued that Toyota refused her request and forced her to continue performing all the tasks associated with her job. Toyota argued that Williams simply began to miss work on a regular basis. It was undisputed, however, that before Williams was terminated, she had been placed under a "no-work-of-any-kind" restriction by her treating physicians.[7]

Williams filed suit against Toyota alleging that the company violated the ADA by failing to reasonably accommodate her disability. Williams claimed that her physical impairment substantially limited her in: (1) performance of manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working. Williams also claimed that she was disabled under the ADA because she was regarded as having a substantially limiting impairment and she had a record of such impairment.[8]

The district court found that Williams was not disabled because she was not substantially limited in any major life activity; thus, the court granted summary judgment in favor of Toyota.[9] Williams appealed with respect to all of the activities except playing with children, gardening, and housework. The Sixth Circuit reversed and found that Williams was disabled since she could not "perform repetitive work with her hands or arms extended at or above shoulder level for extended periods of time."[10] The Sixth Circuit held that Williams merely had to demonstrate that she was substantially limited in a class of manual activities that affected her ability to perform at

6. *Id.* at 189.
7. *Id.* at 190.
8. *Id.*; *see* 42 U.S.C. §§ 12102(2)(B), (C) (2000).
9. *Toyota,* 534 U.S. at 190.
10. Toyota Motor Mfg., Ky., Inc. v. Williams, 224 F.3d 840, 843 (6th. Cir. 2000), *rev'd*, 534 U.S 184 (2002).

work to prove her disability.[11]

The Supreme Court unanimously held that the Sixth Circuit applied an incorrect standard in determining whether Williams was disabled. The Court stated that to determine if a person is substantially limited in the performance of manual tasks the impairments must "prevent or restrict the plaintiff from performing tasks that are of central importance to most people's daily lives."[12] The Court reached this conclusion by evaluating Department of Health, Education, and Welfare Rehabilitation Act regulations, as well as the Equal Employment Opportunity Commission's (EEOC) regulations. Under the EEOC regulations, the term "substantially limited" is defined as, among other things, "unable to perform a major life activity that the average person in the general population can perform."[13] Citing *Webster's Dictionary*, the Court concluded that the term "major" in the context of "major life activity" means important.[14] The Court also concluded that "manual tasks unique to any particular job are not necessarily important parts of most people's lives."[15] Under this standard, Williams was not disabled because the performance of repetitive work with hands and arms extended at or above shoulder level for extended periods of time was not a task of central importance to most people's daily lives.[16]

The Court's decision raises a number of interesting questions. In *Toyota*, the Court confirmed that the analysis under the ADA is an individual case-by-case approach.[17] Employers will not know for quite some time, until enough case law is developed, whether a specific impairment will satisfy the "disability" requirements of the ADA. This is likely to generate a substantial amount of apprehension in the business community.

To illustrate this point, one need go no further than the Court's treatment of the very impairment involved in *Toyota* – carpal tunnel syndrome. The Court made clear that individuals with carpal tunnel syndrome are not barred from bringing ADA claims.[18] The Court pointed out that the syndrome has a number of different levels of

11. *Id.*
12. *Toyota*, 534 U. S. at 198.
13. 29 C.F.R. § 1630.2(j) (2001).
14. *Toyota*, 534 U.S. at 195.
15. *Id.* at 201.
16. *Id.*
17. *Id.* at 198-99.
18. *Id.* at 199.

severity, indicating that in some situations the condition could amount to a disability under the ADA.[19]

By making it clear that the question whether an impairment constitutes a disability must be answered by analyzing not only the effect of the impairment in the workplace, but also the effect of the impairment in activities outside of the workplace, the Court's decision may have two unintended and perverse consequences. First, looking at the effect of the impairment on activities outside the workplace appears to make it more difficult for employers to determine whether an employee is covered by the ADA.[20] For example, consider an employee who suffers from an impairment, but who has managed, despite severe pain, to perform her job duties while at work. However, at home, the employee is totally unable to perform some basic activities. To find out whether the individual satisfies the ADA's definition of disability, the employer will have to inquire in much more detail about the employee's private life. This leads to the second perverse consequence. Employees will be put in a position of having to share more details of their personal lives with their employers. It is hard to imagine that the more liberal members of the Court intended this result when they joined the unanimous *Toyota* decision.

2. *Chevron, U.S.A. Inc. v. Echazabal*

In *Chevron U.S.A., Inc. v. Echazabal*,[21] the Court considered the validity of an EEOC regulation allowing employers to refuse to hire a disabled individual whose performance on the job would present a "direct threat" to that individual's own health. The plaintiff, Mario Echazabal, began working for contractors doing business with Chevron at one of Chevron's refineries in 1972.[22] Over the next twenty-four years, Echazabal twice applied for a job with Chevron. In both instances, Chevron offered to hire Echazabal contingent on his passing a physical examination. Echazabal failed the examinations both times. The doctors found a liver condition, which they said would be aggravated by exposure to chemicals at the refinery. Ultimately, Chevron rescinded the job offer and directed the

19. *Id.*

20. *See* Jonathan R. Mook, *Supreme Court Clarifies Scope of ADA, but Uncertainties Remain*, 2 BENDER'S LAB. & EMPLOY. BULL. 75 (2002).

21. 122 S. Ct. 2045 (2002).

22. *Id.* at 2047.

contractor to reassign Echazabal to a job without exposure to harmful chemicals or to remove him from the refinery altogether.[23]

Following his termination, Echazabal filed suit claiming that Chevron violated the ADA. Chevron defended its decision under an EEOC regulation permitting the defense that a worker's disability on the job would pose a "direct threat" to his health.[24] The district court granted summary judgment for Chevron, but the Court of Appeals for the Ninth Circuit reversed.[25] According to the Ninth Circuit, the EEOC's "direct threat" regulation exceeded the scope of permissible rulemaking. The court reasoned that the ADA explicitly recognizes an employer's right to adopt an employment qualification barring anyone whose disability would place others in the workplace at risk, while saying nothing about threats to the disabled employee himself or herself. The Ninth Circuit concluded that "by specifying only threats to 'other individuals in the workplace,' the ADA makes clear that the 'direct threat' defense does not apply to threats to a disabled employee's own health and safety."[26]

The Supreme Court, in a unanimous opinion written by Justice Souter, reversed the Ninth Circuit. The Court first looked at the statutory language, recognizing that the ADA allows an employer to raise an affirmative defense where the employer acted under a qualification standard that is "shown to be job-related for the position in question and consistent with business necessity."[27] The Court noted that the statute goes on to state that such a qualification standard "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[28] Finally, the Court noted that the EEOC, by regulation, had carried the defense one step further in allowing an employer to screen out a potential employee with a disability for risks on the job to the employee's own health or safety.[29]

The Court's opinion can be divided into two parts. In the first part, the Court responded to the plaintiff's argument that because the

23. *Id.* at 2047-48.

24. *Id.* at 2048. *See* 29 C.F.R. § 1630.15(b)(2) (2001) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.").

25. 226 F.3d 1063 (9th Cir. 2000), *rev'd*, 122 S. Ct. 2045 (2002).

26. *Id.* at 1066-67.

27. 122 S. Ct. at 20 (quoting 42 U.S.C. § 12113(a) (2000)).

28. *Id.* (quoting 42 U.S.C. § 2113(b) (2000)).

29. *Id.* at 2049 (quoting 29 § C.F.R. § 1630.15(b)(2) (2001)).

statute referred only to the health and safety of others, an employee's threat to self was not implicated.[30] The Court gave three reasons for rejecting the plaintiff's argument. First, the Court noted, the statutory language itself did not establish its exclusiveness. The harm-to-others provision was better understood as an example of legitimate qualifications. The "may include" language in the statute supported this contention.[31] Also missing from the statute, said the Court, was "that essential extrastatutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication."[32]

Second, the plaintiff failed to identify any series of terms that included both threats to others and threats to self to support the position that Congress chose to include one but not the other.[33] The plaintiff argued that Congress, in adopting the threat-to-others formulation in the ADA, expressly omitted the threat-to-self regulatory language of the EEOC's Rehabilitation Act regulations, which like those of the ADA extended the affirmative defense to qualifications addressing employees' threat to self.[34] The Court rejected this argument, noting that because the EEOC was only one of many agencies interpreting the Rehabilitation Act, its regulations "did not establish a clear, standard pairing of threats to self and others," so as to present Congress with an unequivocal combination on which to premise a negative inference.[35] Finally, the Court noted that the plaintiff's interpretation was problematic because it provided no "stopping point to the argument that by specifying a threat-to-others defense Congress intended a negative implication about those whose safety could be considered."[36]

In the second, and I submit more significant, part of the opinion, the Court discussed the validity of the EEOC regulations and the response to the "paternalism" argument made by the plaintiff. Applying the principles of judicial deference as established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[37] the

30. *Id.* at 2049-50.
31. *Id.* at 2050.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 2051; see also EEOC's View of 'Direct Threat' Defense Upheld as Reasonable Interpretation of ADA, 70 U.S.L.W. 1742 (June 11, 2002).
36. *Echazabal*, 122 S. Ct. at 2051.
37. 467 U.S. 837 (1984).

Echazabal Court found the EEOC regulation to be a reasonable interpretation of the ADA. The EEOC's interpretation was reasonable, since it was likely to reduce time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the Occupational Safety and Health Act of 1970.[38]

The Court also rejected the plaintiff's argument that the regulation was unreasonable because it was based on the kind of workplace paternalism the ADA was meant to outlaw.[39] The Court recognized that the ADA protects disabled individuals from the paternalistic reasons that led employers to deny them employment opportunities. However, the Court disagreed with the plaintiff to the extent that such a concern on the part of Congress could be interpreted to require employers to "place disabled workers at a specifically demonstrated risk."[40] Instead, the Court noted, in enacting the ADA Congress "was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes."[41]

The Court noted that the regulation in question was directed exactly towards this concern. The regulation requires that the direct threat defense be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job.'"[42] To provide a context to its decision, the Court distinguished two earlier cases that raised similar issues, albeit under different statutes: *Dothard v. Rawlinson*,[43] and *Automobile Workers v. Johnson Controls, Inc.*[44] According to the Court, those two cases "were concerned with paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments."[45]

While a defeat for the employee, the *Echazabal* decision is not

38. *Echazabal*, 122 S. Ct. at 2052.
39. *Id.* at 2052-53.
40. *Id.* at 2052.
41. *Id.*
42. *Id.* at 2053 (quoting 29 C.F.R. § 1630.2(r) (2001)).
43. 433 U.S. 321 (1977).
44. 499 U.S. 187 (1991).
45. *Echazabal*, 122 S. Ct. at 2053 n.5.

necessarily anti-plaintiff. First, the case may have narrow implications because of its facts. It is hard to imagine that there will be many cases in which employees will seek employment in jobs they know will place them at a health and safety risk. Similarly, it is also unlikely that there will be many cases in which an individual is a threat to self but not to others.[46]

Second, while the Court found against the plaintiff, the Court also provided a strong endorsement of the EEOC's ADA regulations. The Court noted that since Congress had not spoken "exhaustively on threats to a worker's own health," the agency's regulation will be given deference "so long as it makes sense of the statutory" language.[47] As discussed above, the Court found the regulations to be reasonable for "unsurprising" reasons.[48] One of these reasons was the employer's concern that hiring an individual who might be a threat to him or herself could amount to a violation of the Occupational Safety and Health Act of 1970.[49] In responding to the plaintiff's argument that this reason was not legitimate, the Court commented on the role of an agency facing a potential conflict between two statutes. The Court noted, "Courts would, of course, resolve the tensions if there were no agency action, but the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in [the ADA]."[50]

Whether the case in its narrower point turns out to be pro- or anti-plaintiff depends in part on how lower courts interpret the EEOC's regulation. The Court remanded the case to the Ninth Circuit to consider whether Chevron's decision to exclude Echazabal from the workplace was an "individualized medical inquiry required by the regulation."[51] Thus, unanswered are such questions as: What showing is required to establish a threat to self; is this assessment evaluated based on the information available when the decision was made or at the time of litigation; and who decides where experts disagree – the judge or the jury?

46. *See* Jonathan R. Mook, *Supreme Court Rules that Disabled Workers Have no Right to Endanger Themselves*, 2 BENDER'S LAB. & EMP. BULL. 363, 367 (2002).

47. *Echazabal*, 122 S. Ct. at 2051-52.

48. *Id.* at 2952.

49. 29 U.S.C. §§ 651-78 (2000).

50. *Echazabal*, 122 S. Ct. at 2052.

51. *Id.* at 2047.

3. *US Airways, Inc. v. Barnett*

In *US Airways, Inc. v. Barnett*,[52] the Supreme Court settled a long running dispute over the interplay between seniority systems and the ADA. The uncertainty of the relationship between the ADA and seniority systems stemmed largely from the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*.[53] In that case, the Court held that "in the context of Title VII religious discrimination an employer need not adapt to an employee's special worship schedule as a 'reasonable accommodation' where doing so would conflict with the seniority rights of other employees."[54]

Under the ADA, employers must make reasonable accommodation to an otherwise qualified individual with a known physical or mental disability, unless the employer can demonstrate that the accommodation would impose an undue hardship.[55] Seniority provisions often allow employees to transfer to vacant, better-quality positions. The ADA, however, lists "reassignment to a vacant position" as one example of a reasonable accommodation.[56] Several lower courts interpreted the *Trans World Airlines* case to mean that seniority systems under collective bargaining agreements trump the ADA.[57]

In a 5-4 decision the Court, in an opinion written by Justice Breyer, held that there is a rebuttable presumption that an accommodation that conflicts with a seniority system is unreasonable; however, the presumption may be overcome if the employee presents evidence of special circumstances that make an exception to a seniority rule reasonable in a particular case.[58] The plaintiff has the burden of proving the special circumstances that make departure from a seniority system reasonable, while the employer need only present evidence that a seniority system exists.[59]

52. 122 S. Ct. 1516 (2002).

53. 432 U.S. 63 (1977).

54. *US Airways*, 122 S. Ct. at 1524 (citing *Hardison*, 432 U.S. at 79-80).

55. 42 U.S.C. § 12112(b)(5)(A) (2000).

56. *Id.* § 12111(9)(b).

57. *See* David v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000) (accomdation of no overtime work or selective overtime violated collective bargaining agreement and thus was not required by ADA); Feliciano v. State of Rhode Island, 160 F.3d 780 (1st Cir. 1998)(employer's failure to accommodate employee's disability by atuomatically reassigning employee to a position in violation of right of person who received the position under process outlined in collective bargaining agreement does not violate ADA).

58. *US Airways*, 122 S. Ct. at 1523.

59. *Id.* at 1524.

The *US Airways* case arose when Robert Barnett injured his back while working in the cargo department for the petitioner US Airways.[60] After his injury, Barnett used U.S. Airways' seniority system to transfer to a less demanding position in the mailroom.[61] Two years later, Barnett learned that US Airways intended to open his position to enable a more senior employee to displace him. Barnett asked US Airways to make an exception to the seniority policy to allow him to keep his position, but US Airways refused. Barnett brought suit against his employer claiming that US Airways discriminated against him by denying him a reasonable accommodation.[62]

US Airways argued that the ADA only required equal treatment of disabled individuals with non-disabled individuals and that allowing the ADA to trump a seniority system could create a preference for persons with disabilities.[63] The Court, however, noted that the ADA "[r]equires preferences in the form of reasonable accommodations that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy."[64]

The majority also offered guidelines for employees bringing such claims. For instance, the majority stated that the employee can overcome the seniority system presumption by demonstrating (1) that the employer, having retained the right to change the seniority system unilaterally, changes the system so often that employees' expectations that the system will be followed are reduced, or (2) that the system contains so many exceptions that one more exception for individuals with disabilities will not matter.[65]

Justice O'Connor concurred, although she disagreed with the majority's method for determining whether reassignment to a vacant position which violates a seniority system is an unreasonable

60. *Id.* at 1519.

61. *Id.* US Airways seniority policy was part of a unilaterally adopted system, as opposed to a collectively bargained agreement. The policy stated that "the Agent Personnel Policy Guide is not intended to be a contract (express or implied) or otherwise to create legally enforceable obligation for continued employment on the part of either US Air or its employee.... US Air reserves the right to change any and all of the stated policies and procedures at any time, without advance notice." See Respondent's Brief at 2, US Airways v. Barnett, 122 S. Ct. 1516 (2002).

62. *US Airways*, 122 S. Ct. at 1519.

63. *Id.* at 1520.

64. *Id.* at 1521.

65. *Id.* at 1525.

accommodation.[66] Justice O'Connor believed the issue of whether the ADA trumps a seniority system turns on whether the seniority system is legally enforceable.[67] According to Justice O'Connor, in a legally enforceable seniority system, a position does not become vacant if the seniority system entitles another employee to it; however, if an employer has an unenforceable policy the position would be vacant, because the employee expecting assignment under the seniority system would not have a contractual right to the position. Justice O'Connor cited legislative history to emphasize the requirement that the position be vacant.[68]

In one of two dissenting opinions, Justice Scalia, joined by Justice Thomas, opined that seniority systems always trump the reasonable accommodation provision of the ADA.[69] According to Justice Scalia, the ADA requires employers to "modify or remove" barriers that burden a disabled individual.[70] However, the ADA does not require modification of policies and practices that apply equally to all employees. For example, Justice Scalia noted, the ADA does not require an employer to pay a disabled employee more money.[71] Justice Scalia also took issue with the majority's rationale that when employers make exceptions to seniority systems, one more exception "will not likely make a difference."[72] He reasoned that "[e]ven when seniority systems contain exceptions, employees expect these to be the only exceptions."[73]

A second dissenting opinion was written by Justice Souter. Joined by Justice Ginsburg, Justice Souter disagreed with the majority's conclusion that a reassignment to a vacant position will most likely be unreasonable when it violates the terms of a seniority system.[74] Justice Souter pointed out that unlike Title VII and the Age Discrimination in Employment Act, nothing in the ADA insulates seniority rules from the reasonable accommodation requirement.[75]

66. *Id.* at 1526-27 (O'Connor, J., concurring).

67. *Id.* at 1527.

68. "The Committee also wishes to make clear that reassignment need only be to a vacant position – 'bumping' another employee out of a position to create a vacancy is not required." *Id.* (quoting S. Rep. No. 101-116, at. 32 (1989)).

69. *Id.* at 1528 (Scalia, J., dissenting).

70. *Id* at 1529.

71. *Id.*

72. *Id.* at 1531.

73. *Id.*

74. *Id.* at 1532 (Souter, J., dissenting).

75. *Id.*

Justice Souter also referred to the legislative history of the ADA which contained various references explaining that seniority protections contained in collective bargaining agreements were only "a factor" in deciding the reasonableness of the accommodation. According to Justice Souter, it was significant that Congress, knowing full well of the enforceability of collective bargaining agreements, still gave those agreements no more weight than any other factor in making the reasonableness determination.[76] Thus, it must be the case, argued Souter, that seniority provisions unilaterally imposed by the employer could not be given greater weight than those negotiated in a collective bargaining agreement.[77]

Unlike the other two ADA decisions in the 2001-02 term, the decision in *US Airways* reveals a very divided court. Not only was this a 5-4 decision, but the two concurring opinions make it clear that the Court is far from resolving this issue.

In addition to addressing the interplay between seniority systems and the ADA's reasonable accommodation requirement, the Court's decision is significant in at least two respects. First, it appears that seven Justices agreed with Justice Breyer's dismissal of the employer's argument that the ADA does not require preferences but instead demands only equal treatment of the disabled and non-disabled. This argument had been adopted by some lower courts in support of the conclusion that there is no "affirmative action" requirement in the ADA.[78] Justice Breyer rejected the argument, stating that the ADA clearly envisioned that the reasonable accommodation language would, in some situations, require "the employer to treat an employee with a disability differently, i.e., preferentially."[79]

Second, in what may prove to be a problem for future plaintiffs, the Court included some interesting language distinguishing between reasonable accommodation and undue hardship. Justice Breyer noted that the ADA referred to an "undue hardship on the operation of the business."[80] Accordingly, Justice Breyer pointed out, an accommodation "could prove unreasonable because of its impact, not

76. *Id.*

77. *Id.*

78. *See, e.g.*, Fossell v. Georgia Ports Auth., 906 F. Supp. 1561 (S.D. Ga. 1995) ("nor, for that matter, does the ADA require 'affirmative action in favor of individuals with disabilities. . . '").

79. *Id.* at 1521.

80. *Id.* at 1522 (quoting 42 U.S.C. § 12112(b)(5)(A) (2000)).

on business operations, but on fellow employees – say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent."[81] This distinction appears to suggest that plaintiffs will have to establish that an accommodation is not only reasonable in terms of its direct effect on the employer, but also in terms of its effects on other employees.

The Court's distinction between reasonable accommodation and undue hardship has implications regarding the burden of proof in ADA cases. The Court discussed with approval the "practical way" in which various lower courts had allocated the burden of proof in ADA cases. According to Justice Breyer, a plaintiff, to survive a summary judgment motion, need "only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[82] The defendant then needs to show "specially (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[83]

The *US Airways* decision leaves unanswered a number of important questions. For example, although the Court recognized the importance of seniority systems and established a presumption in their favor, the Court also made clear that plaintiffs can overcome this presumption. Indeed, the Court provided plaintiffs with a couple of scenarios where the presence of a seniority system will not truncate the accommodation requirement of the ADA. The Court noted that where the employer has not consistently applied the seniority system, or where one more exception is unlikely to matter given the other exceptions already applicable to the seniority system, the plaintiff may be able to establish that an exception to the seniority system qualifies as a reasonable accommodation.[84] As Justice Scalia pointed out in his dissenting opinion, it is hard to know "what this means."[85]

Similarly, it is unclear how the rebuttable presumption will apply to different kinds of seniority provisions, in particular those unilaterally imposed by the employer and those negotiated as part of a collective bargaining agreement. Both the concurring opinion by Justice O'Connor and the dissent by Justice Souter noted the possible

81. *Id.* at 1522.
82. *Id.* at 1523.
83. *Id.*
84. *Id.* at 1525.
85. *Id.* at 1531 (Scalia, J., dissenting).

implications of this distinction.

Finally, the Court did not provide any guidance for cases involving seniority systems that also include ability as a factor. It is fairly common for seniority provisions, at least those negotiated as part of collective bargaining agreements, to include provisions allowing the employer to consider seniority and ability in making personnel decisions.[86] How will the *U.S. Airways* presumption apply in those cases? Potentially, where ability can be factored in, ability may truncate seniority in every possible occasion. Is the *US. Airways* presumption weakened in such cases?

B. Title VII

1. *Edelman v. Lynchburg College*

Section 706(e)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), requires a complainant to file a charge with the EEOC within 180 days from the time of the alleged unlawful employment practice, or within 300 days if the charging party institutes proceedings with a state or local agency.[87] Section 706(b) requires the complainant to verify a charge, such that the charge is "in writing under oath or affirmation . . ."[88] The issue before the Supreme Court in *Edelman v. Lynchburg College*[89] was the "validity of an EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired."[90]

In *Edelman*, the plaintiff, Leonard Edelman, was a professor at Lynchburg College ("Lynchburg"), which denied him tenure on June 6, 1997.[91] On November 14, 1997, Edelman faxed a letter to the EEOC claiming discrimination on the basis of gender, national origin, and religion, but Edelman did not verify the fax through an oath or affirmation.[92] On November 26, 1997, Edelman's lawyer requested an interview with an EEOC investigator and stated his understanding that the interview would not compromise the filing date of November

86. *See* City of Fond Du Lac, 69-2 Lab. Arb. Awards (CCH) ¶ 8520 (1969) (Robert Moberly, Arb.) (discussing seniority systems that allow for consideration of ability and qualifications).

87. 42 U.S.C. § 2000e-5(e)(1) (2000).

88. *Id.* § 2000e-5(b).

89. 122 S. Ct. 1145 (2002).

90. *Id.* at 1147.

91. *Id.*

92. *Id.*

14, 1997.[93] An EEOC employee replied to Edelman that he should arrange an interview, and reminded Edelman that a charge must be filed within the requisite time period, which, in Edelman's case, was 300 days.[94] After the interview, the EEOC sent a Form 5 Charge of Discrimination to Edelman that he was to verify.[95] The EEOC received the verified Form 5 on April 15, 1998, which was 313 days after Lynchburg had denied tenure to Edelman.[96] The EEOC forwarded the Form 5 to Lynchburg, and issued a right to sue letter to Edelman.[97]

Edelman sued Lynchburg under state law and under Title VII.[98] Lynchburg moved to dismiss, claiming that Edelman's failure to verify the charge within the 300-day period was a bar to subject matter jurisdiction.[99] Edelman claimed that the appropriate filing date was November 14, 1997, and pursuant to an EEOC regulation,[100] his subsequent "verification on the Form 5 related back to the letter."[101]

The district court dismissed the Title VII complaint and remanded the state law claims, finding that the November 14 letter was not a "charge," since "neither Edelman nor the EEOC treated it as one."[102] The Fourth Circuit affirmed, holding that reading sections 706(b) and 706(e)(1) together, "[b]ecause a charge requires verification . . ., and because a charge must be filed within the limitations period, . . . it follows that a charge must be verified."[103] Thus, "the plain language of [Title VII] foreclosed the EEOC regulation allowing a later oath to relate back to an earlier charge."[104]

The Supreme Court reversed, holding "the EEOC's relation-back regulation to be an unassailable interpretation of § 706. . ."[105]

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1148.
99. *Id.*
100. 29 C.F.R. § 1601.12(b) (2001).
101. *Edelman*, 122 S. Ct. at 1148.
102. *Id.*
103. *Id.* (quoting 228 F.3d 503, 508 (4th Cir. 2000)).
104. *Id.*
105. *Id.* at 1152. The Court also remanded to determine whether Edelman's November 14 letter was a "charge." Because the EEOC failed to notify Lynchburg within 10 days of receiving the November 14 letter, "the significance of the delayed notice . . . would be open on remand." *Id.* at 1153.

Writing for the Court, Justice Souter proffered several reasons for upholding the relation-back regulation. First, the Court disagreed with the Fourth Circuit's approach that read sections 706(b) and 706(e)(1) together, because the two provisions have "quite different objectives."[106] The objective of the time limitation in section 706(e)(1) "is to encourage a potential charging party to raise a discrimination claim before it gets stale."[107] On the other hand, the objective of the verification requirement in section 706(b) is to "protect ... employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury."[108] Therefore, the Court found that a "charge" does *not* necessarily require an oath.[109]

Second, the Court upheld the relation-back regulation because it "not only [was] a reasonable one, but the position [the Court] would adopt even if there were no formal rule and [the Court was] interpreting the statute from scratch."[110] Thus, the Court refused to discuss the appropriate degree of deference to give to the regulation, because no deference was necessary.[111]

Third, the Court upheld the regulation because it was consistent with the policy of Title VII, which is to have laypersons initiate the process.[112] The relation-back provision prevents a layperson from forfeiting his or her rights, because a layperson might not know that a charge must be verified.[113] Furthermore, the employer's interests remain protected because it need not respond until the complainant supplies verification.[114]

Fourth, the Court upheld the relation-back regulation because it was consistent with its decision in *Becker v. Montgomery,*[115] which allowed for a later cure of a signature defect on a notice of appeal. The Court stated, "There is no reason to think that the relation back of the oath here is any less reasonable than the relation back of the

106. *Id.* at 1149.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 1150.
111. *Id.* at 1150 n.8.
112. *Id.* at 1150.
113. *Id.*
114. *Id.*
115. 532 U.S. 757 (2001).

signature in *Becker*."[116]

Finally, the Court upheld the regulation because it was consistent with legislative history.[117] In other contexts, the legislative history showed approval of "accepting later verification as reaching back to an earlier, unverified filing."[118] In addition, Congress had often amended Title VII, but never cast doubt on the relation-back regulation.[119] Therefore, the Court upheld the EEOC's interpretation of section 706 in the relation-back regulation.[120]

Justice O'Connor concurred, opining that the EEOC did not "adopt the most natural interpretation of Title VII's provisions," but that the regulation should still be upheld out of deference to the agency.[121] Justice O'Connor believed that the best, but not the only, reading of Title VII required a charge to be "made under oath or affirmation within the specified time," because sections 706(b) and 706(e)(1) were both subsections of the same section and should be read together.[122] Yet Justice O'Connor still found the regulation to be "reasonable" because it protected laypeople and was consistent with common law practice.[123] Justice O'Connor concluded that the regulation was entitled to *Chevron* deference.[124]

The majority's decision provides much needed uniformity for statutory filing periods in employment discrimination cases. Eric Schnapper, a University of Washington law professor who represented Edelman before the Supreme Court, said that the relation-back rule created a "real practical problem" that "needed to be sorted out."[125] In addition, Schnapper believed the decision was "a signal to lower courts not to be creating barriers to Title VII charges."[126]

As in *Toyota* and *Echazabal*, the case illustrates the tension in the Court regarding deference to agency action. Justice Souter referred to the deference issue as an "insignificant issue in this

116. *Edelman*, 122 S. Ct. at 1151.
117. *Id.* at 1151-52.
118. *Id.* at 1152 n.12.
119. *Id.* at 1152.
120. *Id.*
121. *Id.* (O'Connor, J., concurring).
122. *Id.* at 1154.
123. *Id.*
124. *Id.* at 1154-55.
125. *See* Fawn H. Johnson, EEOC: *Supreme Court Sustains EEOC Rule Allowing Late Charges to 'Relate Back,'* DAILY LAB. REP. (BNA), Mar. 20, 2002, at AA-3.
126. *Id.*

case."[127] He went on to say that the EEOC rule was not only reasonable, "but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch."[128] Accordingly, concluded Justice Souter, "there is no occasion to defer and no point in asking what kind of deference, or how much."[129] Whether the comments by Justice Souter could be interpreted as a more deferential standard of review is not clear. It is clear, however, that the justices continue to wrestle with the deference issue if not in principle, certainly in application.

The concurring opinions by Justice Thomas and Justice O'Connor addressed this issue. Justice Thomas read the majority opinion as saying that since the EEOC had clear authority to issue a procedural regulation, and the regulation was not proscribed by the statute and in conformity with the Administrative Procedure Act, the Court should uphold the agency rule.[130]

Justice O'Connor's concern with agency authority was more evident, as she made it clear that the EEOC interpretation of the statute regarding the filing requirements was not "the most natural interpretation."[131] Ultimately she concurred with the majority, but under a more limited rationale. Echoing Justice Thomas, Justice O'Connor focused on the procedural nature of the rule, and on the statute's ambiguity.

2. *National Railroad Passenger Corp. v. Morgan*

Under Title VII, a plaintiff "shall" file an employment discrimination charge with the EEOC either 180 or 300 days after an "alleged unlawful employment practice occurred."[132] In *National Railroad Passenger Corp. v. Morgan*,[133] the Court confronted the interpretation of this statutory language where an employee alleged that the employer had engaged in a number of specific discriminatory acts (e.g., hiring him as an electrician helper instead of as an electrician, and refusing to allow him to participate in a training program),[134] and "consistently harassed" him on account of his race.[135]

127. *Edelman*, 122 S. Ct. at 1150.
128. *Id.*
129. *Id.*
130. *Id.* at 1153 (Thomas, J., concurring).
131. *Id.* (O'Connor, J., concurring).
132. 42 U.S.C. § 2000e-5(e)(i) (2000).
133. 122 S. Ct. 2061 (2002).
134. *Id.* at 2068 & n.1.

The Court held that Title VII precludes recovery for discrete acts of discrimination or retaliation that occur outside of the statutory period, but that consideration of the entire scope of a hostile work environment claim is appropriate even if some of the events fall outside the 180- or 300-day statutory period.[136]

The plaintiff in *National Railroad Passenger Corp.* had been hired as an electrician helper at Amtrak's Oakland Maintenance Yard. Over the course of the next five years, the plaintiff had numerous run-ins with management which he characterized as racially motivated. After his termination, the plaintiff filed his EEOC charge and later commenced a lawsuit alleging race discrimination, racial harassment and retaliation under Title VII. The trial court granted summary judgment in part to Amtrak. According to the trial court, the company could not be held liable for conduct occurring outside the 300-day filing period.[137]

The Ninth Circuit reversed on the basis of its interpretation of the continuing violation doctrine, which "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.' "[138] According to the Ninth Circuit, under the continuing violation doctrine, the plaintiff would succeed in his claim if he could demonstrate either "a series of related acts one or more of which are within the limitations period," or "a systematic policy or practice of discrimination that operated, in part, within the limitations period."[139] The Ninth Circuit held that the plaintiff had sufficiently demonstrated a genuine issue of fact as to whether a continuing violation existed.[140] However, because the district court did not allow events occurring in the pre-limitations period to be presented to the jury for purposes of liability, the Ninth Circuit remanded the case and ordered a new trial.[141]

The Supreme Court, in an opinion by Justice Thomas, noted that in cases involving the timely filing requirement of Title VII, the Court had followed a "strict adherence" to the statutory requirements, since doing so had been "the best guarantee of evenhanded

135. *Id.* at 2068.
136. *Id.* at 2077.
137. *Id.* at 2068-69.
138. *Id.* at 2069 (quoting 232 F.3d 1008, 1014 (9th Cir. 2000)).
139. *Id.* (quoting 232 F.3d at 1015-16).
140. *Id.*
141. *Id.*

administration of the law."[142] Justice Thomas began his analysis by looking at the statutory language. Under Section 2000e-5(e)(1), a charge "shall be filed within" 180 or 300 days "after the alleged unlawful employment practice occurred."[143] According to Justice Thomas, the critical questions under this section are: "What constitutes an "unlawful employment practice" and when has that practice occurred. The majority's opinion embarked to answer both of these questions with respect to "discrete discriminatory acts" and "hostile work environment claims."[144]

With regard to discrete acts, the Court unanimously rejected the plaintiff's arguments that since the statute requires filing of a charge within the specified number of days after an "unlawful employment practice," and since the word "practice" connoted an ongoing violation that can last over a period of time, discriminatory events that occurred outside the statutory periods ought to be considered in assessing employer liability under Title VII.[145] The Court advanced a number of arguments. First, the Court noted, in explaining the sorts of actions that qualify as unlawful employment practices, the statute includes numerous discrete acts.[146] Second, the Court had in the past interpreted the term "practice" to apply to a discrete act or single "occurrence," even in cases where there was a connection among various discrete acts.[147] The Court concluded that "each discrete discriminatory act starts a new clock for filing charges alleging that act."[148] Accordingly, the plaintiff could only file a charge to cover discrete acts that "occurred" within the appropriate time period.[149] The Court noted, however, that the time period for filing a charge is subject to "equitable doctrines such as tolling or estoppel,"[150] allowing plaintiffs some flexibility even in cases involving discrete discriminatory acts. The Court warned, however, that the equitable doctrines were to "be applied sparingly."[151]

Although in unanimous agreement with respect to discrete discriminatory acts, the Court was sharply divided on the hostile

142. *Id.* at 2070.
143. 42 U.S.C. § 2000-e5(e)(1) (2000).
144. *National R.R. Passenger Corp.*, 122 S. Ct. at 2070.
145. *Id.* at 2071, 2077.
146. *Id.* at 2071.
147. *Id.*
148. *Id.* at 2072.
149. *Id.* at 2073.
150. *Id.* at 2072.
151. *Id.*

environment claim. Joined by Justices Stevens, Souter, Ginsburg and Breyer, Justice Thomas concluded that hostile environment claims should be treated differently in the application of the filing period.

Justice Thomas first recognized that hostile environment claims were "different in kind from discrete acts."[152] "Their very nature," he indicated, "involves repeated conduct,"[153] which occurs "over a series of days or perhaps years."[154] Accordingly, the question with regard to hostile environment claims became whether a court may, for the purposes of determining liability, review all actionable hostile conduct, including those acts that occur outside the filing period.[155]

Justice Thomas noted that Title VII requires only that a plaintiff file a charge within a certain number of days "after the alleged unlawful employment practice occurred."[156] Since a "hostile environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice,'" continued Justice Thomas, "it does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory period."[157] So long as "an act contributing to the claims occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."[158] "A court's task," Justice Thomas added, "is to determine whether the acts about which an employee complains are part of the same actionable hostile environment practice, and if so, whether any act falls within the statutory time period."[159] Turning to the case at hand, the Court affirmed the Court of Appeals finding that "the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers."[160]

Before concluding, the Court attempted to provide protection for employers who fear hostile environment claims extending over long periods of time. The Court noted that since the filing period is not a jurisdictional prerequisite to a Title VII suit, the filing period is

152. *Id.* at 2073.
153. *Id.*
154. *Id.*
155. *Id.* at 2074.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 2076.
160. *Id.*

subject to "waiver, estoppel, and equitable tolling 'when equity so requires.'"[161] The Court also noted that an employer in this situation may raise a laches defense if a plaintiff unreasonably delays filing suit and as a result prejudices the defendant.[162] The Court, however, did not say how these doctrines are to be applied and what the consequences will be if the defenses are successfully raised.[163]

Justice O'Connor wrote for the dissenting and concurring justices. In a paragraph joined by Chief Justice Rehnquist and Justice Breyer (who also joined the majority opinion), Justice O'Connor addressed the Court's treatment of discrete discriminatory acts. In response to the Court's comment that filing a timely charge with the EEOC was not a jurisdictional requirement, but instead was subject to equitable doctrines such as waiver, estoppel and equitable tolling, Justice O'Connor noted that claims involving discrete discriminatory acts should be subject to "some version of the discovery rules."[164] In particular, noted Justice O'Connor, "the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act."[165]

In the rest of her opinion, joined by Justices Rehnquist, Scalia, and Kennedy, Justice O'Connor disagreed with the Court's treatment of hostile environment claims. The dissenting opinion maintained that the fact that hostile environment claims are comprised of a series of acts in no way supports extending the filing period to include pre-limitations period events. Such an extension would enable plaintiffs to "sleep on [their] rights."[166]

As with other cases in this area, the Court's decision in *National Railroad Passenger Corp.* answers some questions and leaves many others open. The Court expressly indicated that the opinion did not address the timely filing question with respect to "pattern or practice" claims brought by private litigants.[167] Similarly, the Court left open the question when, in discrete discriminatory acts cases, the time

161. *Id.*

162. *Id.* at 2077. *See* Brown-Mitchell v. Kansas City Power & Light Co., 267 F.3d 825, 827 (8th Cir. 2001)("for laches to apply defendant must persuade the court that (1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit and (2) prejudice to the defendant resulted from the delay").

163. *Id.*

164. *Id.* at 2078 (O'Connor, J., concurring in part & dissenting in part).

165. *Id.*

166. *Id.* at 2078-79.

167. *Id.* at 2073 n.9.

period begins to run. The Court recognized that an issue that may arise is "whether the time begins to run when the injury occurs as opposed to when the injury reasonable should have been discovered."[168] Finally, by making it clear that equitable doctrines may be used to extend the filing period for discrete acts, and to protect employers from stale hostile environment claims, the Court opened the door for future litigation.[169]

3. *Swierkiewicz v. Sorema, N.A.*

The Supreme Court in *Swierkiewicz v. Sorema, N.A.*[170] addressed "whether a complaint in an employment discrimination lawsuit must allege specific facts that would establish a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green.*"[171]

In *Swierkiewicz*, the plaintiff, Akos Swierkiewicz, was a 53-year-old native of Hungary.[172] He worked for Sorema, a French reinsurance company headquartered in New York. After six years as a senior vice-president and chief underwriting officer,[173] Swierkiewicz was demoted and his duties were transferred to a 32-year-old employee.[174] The CEO stated his desire to "energize" the underwriting department.[175] Swierkiewicz claimed that his replacement was less qualified and less experienced.[176] After his demotion, Swierkiewicz was isolated and excluded from business decisions, before ultimately being terminated.[177]

Swierkiewicz sued Sorema for national origin discrimination under Title VII and for age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA).[178] The district court dismissed his complaint because Swierkiewicz did not adequately allege a prima facie case, since the circumstances alleged

168. *Id.* at 2073 n.7.

169. *See, e.g.*, Shields v. Fort James Corp., 305 F.3d 1280 (11th Cir. 2002)(remanding to district court with directions to allow employer to plead laches as a defense in a hostile work enviornment race discrimination case).

170. 534 U.S. 506 (2002).

171. 411 U.S. 792 (1973).

172. *Swierkiewicz*, 534 U.S. at 508.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 509.

178. 29 U.S.C. §§ 621-34 (2000).

did not support an inference of discrimination.[179] The Second Circuit affirmed the dismissal because Swierkiewicz's complaint failed to allege the elements of a prima facie case under *McDonnell Douglas*.[180]

The Supreme Court reversed. It held that "an employment discrimination complaint need not include such facts [to make out a prima facie case under *McDonnell Douglas*] and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" which is the standard required under Rule 8(a)(2) of the Federal Rules of Civil Procedure.[181]

To plead a prima facie case of employment discrimination under *McDonnell Douglas*, as the Second Circuit required, a plaintiff must allege that he is a member of a protected class, he was otherwise qualified for the job, he suffered an adverse employment action, and the circumstances supported an inference of discrimination.[182] The Supreme Court disagreed with this pleading requirement, and stated, "The prima facie case of discrimination under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement."[183]

In addition, the Court found it inappropriate to require a complaint to plead the *McDonnell Douglas* criteria because *McDonnell Douglas* does not apply to all employment discrimination cases.[184] *McDonnell Douglas* only applies when the plaintiff does not have direct evidence, but discovery might uncover direct evidence.[185] Thus, according to the Court, it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered."[186] The Court noted that a prima facie case is a "flexible evidentiary standard," and therefore "should not be transposed into a rigid pleading standard for discrimination cases."[187]

The Court found that requiring the plaintiff to plead the elements of a *McDonnell Douglas* prima facie case conflicts with Rule 8(a)(2) of the Federal Rules of Civil Procedure.[188] Rule 8(a)(2) only

179. *Swierkiewicz*, 534 U.S. at 509.
180. *Id.*
181. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).
182. *Id.* at 510.
183. *Id.*
184. *Id.* at 511.
185. *Id.*
186. *Id.* at 511-12.
187. *Id.* at 512.
188. *Id.*

requires a complaint to include "a short and plain statement of the claim showing that a pleader is entitled to relief."[189] In *Conley v. Gibson*,[190] the Supreme Court explained that the complaint must merely "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[191] While Rule 9 requires heightened pleading standards for fraud and mistake, the Court found that employment discrimination cases do not require this heightened standard, and thus a complaint of employment discrimination "must satisfy only the simple requirements of Rule 8(a)."[192] Finally, the Court concluded that Swierkiewicz's "complaint easily satisfie[d] the requirements of Rule 8(a) because it [gave] respondent fair notice of the basis for petitioner's claims."[193]

Swierkiewicz resolved a circuit split over the pleading requirements for an employment discrimination complaint. While appellate courts should have agreed on the proper pleading requirements after *Conley*, the Court in *Swierkiewicz* held once and for all that Rule 8(a) governs the complaint, and the prima facie case under *McDonnell Douglas* is only an evidentiary standard.

C. Arbitration of Employment Discrimination Claims: EEOC v. Waffle House, Inc.

In *EEOC v. Waffle House, Inc.*[194] the Supreme Court considered whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the ADA.[195]

In *Waffle House*, Eric Baker agreed in his application for employment with Waffle House to arbitrate any dispute or claim arising out of his employment.[196] Shortly after he began his position as a grill operator, he suffered a seizure at work and Waffle House

189. *Id.*
190. 355 U.S. 41 (1957).
191. *Id.* at 47.
192. *Swierkiewicz*, 534 U.S. at 513.
193. *Id.* at 514.
194. 534 U.S. 279 (2002).
195. *Id.* at 282.
196. *Id.*

discharged him.[197] Baker did not initiate arbitration proceedings; instead filed a charge of discrimination with the EEOC claiming his discharge violated the ADA.[198]

The EEOC filed an enforcement action in district court under section 107(a) of the ADA[199] and section 102 of the Civil Rights Act of 1991,[200] but Baker was not a party to the suit.[201] The EEOC sought injunctive relief, plus specific relief for Baker, including backpay, reinstatement, compensatory damages, and punitive damages.[202]

Waffle House filed a petition under the Federal Arbitration Act (FAA)[203] to either stay the suit and compel arbitration or to dismiss the suit.[204] The district court denied Waffle House's motion based on its finding that Baker's actual employment contract did not contain an arbitration provision.[205]

The Court of Appeals held that the arbitration agreement between Baker and Waffle House did not foreclose suit by the EEOC because the EEOC was not a party to the contract and because the EEOC has independent statutory authority to bring suit.[206] However, the Court of Appeals found that the policy goals of the FAA which favor enforcing private arbitration agreements outweighed the EEOC's purpose of protecting the public interest when the EEOC seeks victim-specific relief, and therefore the EEOC's remedies in an enforcement action should be limited to injunctive relief when an employee signs a mandatory arbitration agreement.

The Supreme Court reversed and remanded the case.[207] The Court held that "the EEOC has the authority to pursue victim specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes."[208] Thus, even if an employee signs a mandatory arbitration agreement, the EEOC still has the authority to sue the employer for the full range of remedies, including backpay,

197. *Id.* at 283. Interestingly, the stated reason for firing Baker was Waffle House's concern with Baker's benefit and safety. Arguably, Waffle House had a strong defense under the Court's decision in *Echazabal.*

198. *Id.*

199. 42 U.S.C. § 12117(a) (2000).

200. *Id.* § 1981(a).

201. *Waffle House*, 534 U.S. at 283.

202. *Id.* at 283-84.

203. 9 U.S.C. §§ 1-16 (2000).

204. *Waffle House*, 534 U.S. at 284.

205. *Id.*

206. 193 F.3d 805 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002).

207. *Waffle* House, 534 U.S. at 298.

208. *Id.* at 295.

reinstatement, compensatory and punitive damages for the individual employee.[209]

The Supreme Court proffered several reasons for its decision. First, the Court noted that the amendments to Title VII, including the 1991 amendment, "unambiguously authorize the EEOC to obtain the relief that it seeks in its complaint if it can prove its case against [Waffle House]."[210] Further, the Court cited *Occidental Life Insurance Co. of California v. EEOC*[211] and *General Telephone Co. of Northwest v. EEOC*,[212] for the proposition that a cause of action brought by the EEOC does not merely derive from the rights of an aggrieved individual, but is rather a separate cause of action.[213] Thus, the EEOC may pursue backpay, reinstatement, compensatory and punitive damages, regardless of the existence of an arbitration agreement between the employee and employer.[214]

Second, the Court stated that the purpose of the FAA was "to place arbitration agreements on the same footing as other contracts."[215] The Court stressed that the language of the contract defined the scope of disputes subject to arbitration.[216] Accordingly, "nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."[217] Thus, so long as the EEOC is not a party to the arbitration contract, the EEOC may still bring suit against the employer.[218]

Third, the Court noted that the EEOC is "the master of its own case," and has "authority to evaluate the strength of the public interest at stake."[219] The agency, not the courts, should determine whether public resources should be used to recover victim-specific relief, and if the agency so chooses, it may proceed in a judicial forum.[220]

209. *See id.* at 297.

210. *Id.* at 287. The Court analyzed Title VII to define the EEOC's authority in this ADA case because the EEOC has the same powers under the ADA as it has under Title VII. *Id.* at 285-86.

211. 432 U.S. 355 (1977).

212. 446 U.S. 318 (1980).

213. *Waffle* House, 534 U.S. at 287-88.

214. *Id.* at 287.

215. *Id.* at 289 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

216. *Id.* at 294.

217. *Id.*

218. *Id.* at 295-96.

219. *Id.* at 291.

220. *Id.* at 291-92.

Fourth, the Court found that not allowing the EEOC to pursue victim-specific relief would be both over-inclusive and under-inclusive.[221] It would be over-inclusive because punitive damages actually serve a great public function by punishing the employer, and such damages may have a greater impact on the employer than injunctive relief.[222] Punitive damages serve a public function, which is the purpose of the EEOC's involvement.[223] Further, allowing the EEOC to only pursue injunctive relief would be under-inclusive because "injunctive relief, although seemingly not 'victim-specific,' can be seen as more closely tied to the employee's injury than to any public interest."[224] Finally, the Court mentioned that the issue remained open "whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek."[225]

Justice Thomas dissented, arguing that the majority's decision conflicted with the FAA and the principle that "the EEOC must take a victim of discrimination as it finds him."[226] Justice Thomas asserted that while the EEOC had the statutory right under Title VII to bring suit, it was not entitled to obtain a particular remedy.[227] The Court, not the EEOC, should determine the appropriate remedy.[228] Justice Thomas stated two reasons supporting his position that by allowing the EEOC to obtain victim-specific remedies, the Court impermissibly allowed the EEOC to do "on behalf of Baker" that which Baker could not do for himself.[229]

First, Justice Thomas asserted, "To the extent that the EEOC is seeking victim-specific relief in court for a particular employee, it is able to obtain no more relief for that employee than the employee could recover for himself by bringing his own lawsuit."[230] He noted that the EEOC may not recover victim-specific relief if the employee has waived or settled a discrimination claim, and thus the EEOC should not be allowed to obtain victim-specific relief for Baker since

221. *Id.* at 294-95.
222. *Id.*
223. *Id.* at 295.
224. *Id.* (citing *Occidental*, 432 U.S. at 383).
225. *Id.* at 297.
226. *Id.* at 298 (Thomas, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined Justice Thomas in dissent.
227. *Id.* at 301.
228. *Id.*
229. *Id.* at 298, 300, 304.
230. *Id.* at 305.

Baker waived his right to a judicial forum by entering the arbitration agreement.[231]

Second, Justice Thomas argued that allowing the EEOC to do on behalf of Baker that which Baker could not do for himself contravened the "liberal federal policy favoring arbitration agreements embodied in the FAA."[232] Under the Court's holding, Justice Thomas asserted, an arbitration agreement between an employee and an employer was reduced to a nullity,[233] and an employer would be faced with the difficult task of "defending itself in two different forums against two different parties seeking precisely the same relief."[234] Therefore, employers utilizing arbitration agreements would, under the majority's holding, be under a serious disadvantage, which discourages the use of arbitration agreements and is inconsistent with the policies of the FAA.[235]

Justice Thomas further argued that the majority's opinion may allow the EEOC to obtain victim-specific relief for an employee in court after the employee has already settled.[236] This could discourage employers from entering settlement agreements and "frustrate Congress' desire to expedite relief for victims of discrimination."[237]

In conclusion, Justice Thomas found that "the EEOC's statutory authority to enforce the ADA can be easily reconciled with the FAA."[238] Congress encouraged the use of arbitration to resolve ADA disputes,[239] so the EEOC should follow the intent of Congress and resolve disputes through arbitration.[240]

Evaluating the implications of this case depends in part on what one believes will be the likely outcome of the Court's decision. The majority was concerned that if it were to decide that the EEOC was bound by Waffle House's arbitration agreement, the enforcement machinery crafted by Congress would have been seriously compromised. The EEOC would have been left with a weaker enforcement power, because without the possibility of victim specific

231. *Id.*
232. *Id.* at 308. (Thomas, J., dissenting) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
233. *Id.* at 308-09.
234. *Id.* at 309.
235. *Id.* at 310.
236. *Id.* at 311.
237. *Id.* at 312.
238. *Id.* at 313.
239. *Id.*
240. *Id.* at 314.

relief its lawsuits would have been "devoid of any real clout."[241] Employers would have continued the rush initiated in the 1990s by the Court's decision in *Gilmer*[242] to incorporate arbitration requirements in employment contracts, knowing that both the employee and the EEOC will be unable to litigate any discrimination claims. By allowing the EEOC to continue to seek victim-specific relief, even when the employee was bound by the arbitration agreement, the Court might have been trying to prevent such an outcome.

On the other hand, as pointed out by Justice Thomas' the Court's decision might have the effect of eviscerating the arbitration agreement and placing employers using arbitration agreements in the worst possible scenario of having to defend themselves in "two different forum against two different parties seeking precisely the same relief."[243] Implicit in this argument is the assumption that the threat of EEOC litigation is substantial enough to affect employer decisions whether to utilize arbitration agreements.

The EEOC files a very small number of lawsuits each year,[244] suggesting that Justice Thomas' concerns are unwarranted. It also appears unlikely that employers will turn away from arbitration agreements because of the likely small possibility that the EEOC will choose to litigate on its own.

An important question raised by the Court's decision is whether the EEOC will be allowed to pursue a claim in cases where the employee has actually gone through arbitration. Will an arbitration award trump the EEOC's right to litigate? This important issue, left unanswered by the Court, is likely to generate further litigation.

III. EMPLOYEE BENEFITS

A. FMLA: Ragsdale v. Wolverine World Wide, Inc.

In *Ragsdale v. Wolverine World Wide, Inc.*,[245] the first Family and

241. Thomas Osborne, EEOC v. Waffle House, Inc.: *The Right Decision for the Right Reasons*, 53 LAB. L.J. 53, 59 (2002).

242. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

243. *Waffle House*, 534 U.S. at 309 (Thomas, J., dissenting).

244. *See id.* at 290 n.7.

245. 122 S. Ct. 1155 (2002).

Medical Leave Act (FMLA)[246] case decided by the Supreme Court, the Court was asked to decide whether a Department of Labor (DOL) regulation implementing the FMLA was valid. The plaintiff, Tracy Ragsdale, was diagnosed with cancer. Pursuant to the leave plan of her employer, Wolverine World Wide, Inc. ("Wolverine"), she received seven months of unpaid sick leave.[247] However, Wolverine did not notify Ragsdale that twelve weeks of this leave would count as FMLA leave.[248] After she was on leave for thirty weeks, Wolverine refused to grant Ragsdale more leave or part-time work and terminated her.[249]

Ragsdale sued Wolverine relying on a DOL regulation which provided, "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."[250] Thus, Ragsdale argued, her thirty weeks of leave did not count against her FMLA leave entitling her to twelve additional weeks.[251]

The district court granted summary judgment for Wolverine, finding that the regulation conflicted with the FMLA because the FMLA only requires twelve weeks of unpaid leave.[252] The Eighth Circuit affirmed.[253] The Supreme Court affirmed, holding that "the regulation is contrary to the Act and beyond the Secretary of Labor's authority."[254]

The standard the Court applied reflected a limit on the deference given to the Secretary. "A regulation cannot stand if it is 'arbitrary, capricious, or manifestly contrary to the statute.'"[255] The Court found that the regulation was contrary to the FMLA for many reasons. First, the Court stated, "[E]ven assuming the additional notice requirement is valid, [an issue left undecided by the Court] the categorical penalty the Secretary imposes for its breach is contrary to the Act's remedial design."[256] The provision categorically penalized

246. 29 U.S.C. §§ 2601-54 (2000).
247. *Ragsdale*, 122 S. Ct. at 1158-59.
248. *Id.* at 1159.
249. *Id.*
250. *Id.* at 1159, 1161 (quoting 29 C.F.R. § 825.700(a) (2001)).
251. *Id.* at 1159.
252. *Id.*
253. 218 F.3d 933 (8th Cir. 2000), *aff'd*, 122 S. Ct. 1155 (2002).
254. 122 S. Ct. at 1159.
255. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).
256. *Id.* at 1161.

an employer by "denying it any credit for leave granted before notice," and requiring the employer to award an additional twelve weeks of unpaid leave if it failed to individually notify an employee that certain leave would count against the FMLA allotment.[257] Second, the Court found that the penalty was unconnected to any prejudice suffered by the employee, because the employee was not even required to show that she would have acted differently had the employer provided individual notice.[258] Third, the Court found the categorical penalty to be incompatible with the FMLA's comprehensive remedial scheme.[259] According to the Court, "the regulation establishes an irrebuttable presumption that the employee's exercise of FMLA rights was impaired."[260] Thus, the regulation fundamentally altered the FMLA by "reliev[ing] employees of the burden of proving any real impairment of their rights and resulting prejudice."[261] For example, the Court noted that Ragsdale never showed that she would have taken less leave or intermittent leave had she received notice. Without the showing of prejudice, the regulation's categorical penalty was inappropriate.[262]

In response, the government justified the categorical penalty as a necessary administrative convenience. The Court dismissed this argument, noting that the FMLA's remedial scheme required a case-by-case examination.[263] In addition, the Court noted that even if the categorical penalty was within the Secretary's authority, "this particular rule would still be an unreasonable choice," because, when generalizations fail to apply in the majority of cases, a categorical rule is not justified.[264] In only a few cases is twelve additional weeks of leave a proper remedy, because many employees would take the leave even if they were notified that it would be counted against their FMLA allotment.[265]

Next, the Court stated that the penalty "subverts the careful balance" between employer and employee interests, which limited the total amount of unpaid leave in a 12-month period to twelve work

257. *Id.*
258. *Id.*
259. *Id.*
260. *Id* at 1162.
261. *Id.*
262. *Id.* at 1163.
263. *Id.* at 1162.
264. *Id.* at 1163.
265. *Id.*

weeks.[266] "Courts and agencies must respect and give effect to these sorts of compromises," the Court advised.[267]

Also, the Court found the regulation to be inconsistent with Congress' intent.[268] Section 2619 is the only FMLA provision addressing notice, and it requires an employer to post general notice about FMLA rights, with a willful violation resulting in a $100 penalty.[269] In contrast, the regulation provided a disproportionate penalty, even if the violation was inadvertent.[270]

Finally, section 2653 of the FMLA provided that "nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements of this Act."[271] The regulation, however, was in tension with section 2653 because compliance with the designation requirement was easier if the employer only offered twelve weeks of leave, because then all leave would be designated as FMLA leave.[272]

Justice O'Connor dissented and argued that the Secretary was justified in requiring individualized notice, answering a question the majority failed to address.[273] She noted that the Secretary determined there was a need for individualized notice, so that employees would know the FMLA applied to them, and could plan to take intermittent leave, or substitute paid leave.[274] Thus, Justice O'Connor argued, "[T]he Secretary's decision to require individualized notice is not arbitrary and capricious."[275] Further, Justice O'Connor believed that "nothing in this Act constrains the Secretary's ability to secure compliance with [the individualized notice] requirement by refusing to count the leave against the employer's statutory obligation."[276]

It is hard to underestimate the significance of *Ragsdale*. As the first FMLA case to reach the Supreme Court, *Ragsdale* provides some clues as to how the court might decide future FMLA's cases.

The *Ragsdale* decision shows a Supreme Court concerned with the possibility that DOL, through its regulatory authority, will try to

266. *Id.* at 1164.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* (quoting 29 U.S.C. § 2653 (2000)).
272. *Id.*
273. *Id.* (O'Connor, J., dissenting).
274. *Id.*
275. *Id.* at 1166.
276. *Id.* at 1165.

extend the substantive protections of the FMLA beyond what the Court considers to have been Congress' intent. If this is the case, we might observe a scenario similar to that reflected in the Court's disposition of cases under the ADA.

To the extent that employers understand the significance of *Ragsdale* in this way, as it appears they have,[277] we are likely to see an increase in litigation testing several other FMLA regulations enacted by the DOL. Employer advocates have suggested that following *Ragsdale* other FMLA regulations might be called into question.[278] For example, the DOL's definition of "serious health condition" under the FMLA is presently very broad allowing, according to management advocates, "an employee to take FMLA leave for almost any affliction for which he or she visits a doctor once and obtains a prescription."[279]

A DOL regulation prohibiting employers from counting FMLA leave against attendance records may also come under fire. The regulation prohibits employers from counting FMLA leave under "no fault" attendance policies.[280] This regulation could be subject to challenge if it were to be interpreted as, for example, allowing an employee with FMLA absences to claim to be entitled to a perfect attendance bonus in cases were the employer provides that incentive.[281]

Finally, all Courts of Appeals have rejected a DOL regulation which waives eligibility requirements if an employer failed to notify an employee about whether the employee was eligible for FMLA leave.[282] The Supreme Court, after *Ragsdale,* would seem more inclined to follow suit.

According to Renuka Raofield, an attorney for the National Partnership of Women and Families, two major issues were left open

277. Consider the statement by Ann Elizabeth Reesman, General Counsel of the management group Equal Employment Advisory Council, describing the ruling "as extremely significant" since it eliminated what management groups thought was "the most egregious extension" of the FMLA. *See Supreme Court Knocks Down DOL Rule Affecting Employers that Fail to Give* Notice, DAILY LAB. REP. (BNA), Mar. 20, 2002, at AA-1.

278. *See Enforcement of FMLA Notice Regulations Left Open* After Ragsdale, *Attorney* Says, DAILY LAB. REP. (BNA), Mar. 27, 2002, at C-1.

279. 29 C.F.R. § 825.114 (2002). *See Enforcement of FMLA Notice Regulations, supra* note 278.

280. 29 C.F.R. § 825.220(c)(2002).

281. See *Enforcement of FMLA Notice Regulations, supra* note 278.

282. *Id.* § 825.110(d) (2002). *See e.g.,* Woodford v. Community Action of Greene County, Inc., 268 F.3d 51 (2d Cir. 2001); Evanoff v. Minneapolis Public Schools, II Fed Appx. 670 (8th cir. 2001); Brungart v. Bell South Telecomms., 231 F.3d 791 (11th Cir. 2000).

by the majority's decision.[283] First, the Court failed to answer whether notice and designation regulations will be upheld in the future. Second, the Court failed to address what penalty for failure to comply with DOL regulations might be upheld.

In short, *Ragsdale* was the first case in which the Supreme Court addressed an FMLA issue, and the Supreme Court responded in a pro-employer manner. After *Ragsdale*, one wonders how diligent employers must actually be in abiding by the FMLA.

B. ERISA

1. *Rush Prudential HMO v. Moran*

In *Rush Prudential HMO v. Moran*,[284] the Supreme Court confronted the issue of whether the independent review provision of the Illinois Health Maintenance Organization Act[285] was preempted by the Employee Retirement Income Security Act (ERISA).[286] The Illinois HMO Act required health maintenance organizations (HMOs) to submit disputes with a patient's primary care doctor over the "medical necessity" of a proposed treatment to independent physician review and to cover the treatment if the outside reviewer found it necessary.

The plaintiff, an ERISA plan beneficiary, took advantage of the state statute when the HMO that provided benefits for her ERISA medical benefits plan refused to pay for a surgical procedure she had undergone. Under the procedures provided in the Illinois HMO statute, the claim was reviewed by an independent physician who found the procedure to be "medically necessary."[287] Rush refused to concede that the surgery was medically necessary and denied the plaintiff's claim. Plaintiff sued in state court for reimbursement under the Illinois HMO Act. Rush removed the case to federal court, arguing that the complaint stated a claim for ERISA benefits and was thus completely preempted by ERISA's civil enforcement provisions.[288]

The district court agreed with Rush, denying the claim on the

283. *Enforcement of FMLA Notice Regulations Left Open After Ragsdale*, *supra* note 278.
284. 122 S. Ct. 2151 (2002).
285. 215 ILL. COMP. STAT., ch. 125, §4-10 (2000).
286. 29 U.S.C. §§1001-1461 (2000).
287. *Rush Prudential*, 122 S. Ct. at 2157.
288. *Id.*

ground that ERISA preempted the Illinois independent review statute. The Court of Appeals for the Seventh Circuit reversed. The court found Moran's reimbursement claim under state law completely preempted by ERISA, and thus was properly removed to federal court. However, the Seventh Circuit did not agree that the substantive provisions of the Illinois's HMO act were preempted, because ERISA's insurance "saving clause" applied, saving the state statute from preemption. The court also found that the independent medical review requirement did not constitute a forbidden "alternative remedy" under prior Supreme Court precedent. The court noted that a state law that falls within the saving clause may nevertheless be preempted if the law conflicts with a substantive provision of ERISA, for example by creating an alternative remedy to ERISA's civil enforcement scheme. The court found, however, that the Illinois HMO act could not be characterized as creating an alternative remedy that conflicts with ERISA.[289]

The Supreme Court affirmed both aspects of the Seventh Circuit's decision. The 5-4 decision authored by Justice Souter described the statutory framework. ERISA is intended to "safeguar[d] . . . the establishment, operation, and administration"[290] of employee benefit plans by providing minimum standards that assure the equitable character and financial soundness of the covered plans. ERISA also expressly makes clear that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan, . . ."[291] The act also contains a "saving clause" which saves from this broad preemption any state laws regulating insurance, banking, or securities.[292]

The Court noted that it was "beyond dispute" that the Illinois HMO Act "relates to" employee benefit plans within the meaning of ERISA. As such, said the Court, it will be saved from preemption only if it also "regulates insurance."[293] The Court found that it did, saving the Illinois act from ERISA preemption.

The Court reached this conclusion based on a two part analysis. First, the Court inquired whether under a "common sense" understanding, the state act did not just have an impact on the

289. 230 F.3d 959 (7th Cir. 2000), *aff'd*, 122 S. Ct. 2151 (2002).
290. 29 U.S.C. §1001(a) (2000).
291. *Id.* §1144(a).
292. *Id.* §1144(b)(2)(A).
293. *Rush Prudential*, 122 S. Ct. at 2159.

insurance industry but also was "specifically directed toward that industry."[294] Insurance contracts, at their core, involve "the spreading and underwriting of a policyholder's risk."[295] The Illinois act did nothing more than make the independent medical review a requirement of the HMO contract, a contract that involved insurance because of its risk shifting functions. Accordingly, the Court concluded, the Illinois HMO Act regulated insurance because it was directed at the HMO industry as insurers that assume the financial risk of providing the promised benefits. The HMO's status as a provider of the health care benefits did not alter the Court's analysis. "Nothing in the saving clause requires an either-or-choice between health care and insurance in deciding a preemption question, and as long as providing insurance fairly accounts for the application of state law, the saving clause may apply."[296]

In addition to this "common sense" analysis the Court evaluated the state statute under the McCarran-Ferguson Act.[297] Under the McCarran-Ferguson Act, which spares "the business of insurance" from federal regulation, a state law is considered as regulating "the business of insurance" where the practice or provision transfers policyholder risk; is an integral part of the policy relationship between the insurer and insured; and is limited to entities within the insurance industry.[298]

The Court noted that since the factors listed in the McCarran-Ferguson Act were "guideposts," a state law need not meet all three conditions to be within ERISA's saving clause. The Court concluded that the Illinois act satisfied the second and third factors. Regarding the second factor, the Court noted, the independent review requirement affected the "policy relationship between the insurer and the insured" since it translated "the relationship under the HMO agreement into concrete terms of specific obligation or freedom from duty."[299] Regarding the third factor, the Court found that the law targeted "a practice . . . limited to entities within the insurance industry." Since the state statute regulated the application of HMO contracts and provided for review of claims' denials, "it is clear that

294. *Id.* at 2159.

295. *Id.*

296. *Id.* at 2160.

297. 15 U.S.C. §1012 (2000). The McCarran-Ferguson Act provides that the business of insurance be subject to state regulation.

298. *Rush Prudential*, 122 S. Ct. at 2163.

299. *Id.* at 2164.

[the Illinois HMO Act] does not apply to entities outside the insurance industry."[300]

Having decided that the Illinois law fell under the "saving clause," the Court addressed Rush's contention that the law was preempted anyway because "congressional intent is so clear that it overrides a statutory provision designed to save state law from being preempted."[301] According to Rush, the state law should have been preempted because it provided an "alternative remedy" of the kind that the Court itself had disparaged in prior rulings.[302] Rush argued that the independent medical review and the requirement that the plan adhere to the decision made at the review level amounted to an alternative remedy which subverted congressional intent. The Supreme Court disagreed. The Court noted that while the independent medical review procedure "may well settle the fate of a benefit claim," the Illinois act "does not enlarge the claim beyond the benefits available" under ERISA.[303]

Rush then argued that the Illinois law interfered unreasonably with Congress' intention to provide an uniform federal regime of rights and obligations under ERISA. In particular, Rush argued, the independent review requirement created a sort of arbitration that impermissibly supplanted the availability of judicial review and the deferential standard of review of benefits denials. The Court rejected both arguments. First, the Court noted, the independent review requirement under the statute was significantly different from arbitration. The reviewer did not have free-ranging power to construe contract terms, but instead confined the review to the question of whether the procedure was "medically necessary."[304] The Court likened the independent review to a second opinion instead of to arbitration. Second, the Court indicated that the Illinois law did not clash with any deferential standard for review, since ERISA itself says nothing about a standard and nothing in the federal statute requires that medical necessity decisions be "discretionary."[305]

Justice Thomas, joined by the Chief Justice and Justices Scalia and Kennedy, dissented, criticizing the majority for taking the "unprecedented step" of allowing an ERISA plan beneficiary to

300. *Id.*
301. *Id.*
302. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 11 (1987).
303. *Rush Prudential*, 122 S. Ct. at 2167.
304. *Id.* at 2169.
305. *Id.*

"short circuit ERISA's remedial scheme by allowing her claim for benefits to be determined in the first instance through an arbitral-like procedure provided under the Illinois law, and by a decisionmaker other than a court."[306] Justice Thomas argued that the Court's decision was in conflict with the Court's precedents, and undermined the national uniformity of ERISA's civil enforcement scheme providing for judicial review of benefit denials in federal or state court.

Justice Thomas warned the Court of the possible consequences of its ruling. Justice Thomas noted the possible detrimental effect of this decision on health care providers' efforts to control upward spiraling costs, and the possible disincentive the decision created to the formation of employee health benefit plains.[307]

Given that, as the Court noted, similar laws exist in at least forty other states,[308] the impact of *Rush Prudential* cannot be underestimated. The decision should embolden states who have not enacted such laws to do so, and may also motivate those states with existing laws to expand them to at least incorporate procedures similar to those under the Illinois law.

In doing so, however, state legislatures should be cautious. First, because this was a 5-4 decision, it is not clear how strong the Court's feeling is in this area. Second, the Court indicated that there are limits to its willingness to "save" these state laws. In rejecting Rush's argument that the Illinois law unreasonably interfered with the uniform federal regime intended under ERISA, the Court cautioned that an independent review requirement "with procedures so elaborate, and burdens so onerous, might undermine" ERISA's scheme and thus be preempted under federal law.[309]

2. *Great-West Life & Annuity Insurance Co. v. Knudson*

In *Great-West Life & Annuity Insurance Co. v. Knudson,*[310] the Supreme Court encountered the issue of whether section 502(a)(3) of ERISA,[311] which authorizes civil actions, allows a health plan to

306. *Id.* at 2171-72 (Thomas, J., dissenting).

307. *Id.* 2177-78.

308. *Id.* at 2161 (citing Aspen Health Law and Compliance Center, Managed Care Law Manual 31-32 (Supp. 6, Nov. 1997)).

309. *Id.* at 2168.

310. 534 U.S. 204 (2002).

311. 29 U.S.C. § 1132(a)(3) (2000).

enforce a reimbursement provision of an ERISA plan.[312]

In *Great-West*, the defendant, Janette Knudson, was rendered quadriplegic after a car accident.[313] Because her then-husband was employed by the plaintiff, Earth Systems, Inc., Janette was covered by the Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. ("the Plan").[314] The Plan covered $411,157.11 of Janette's medical expenses, most of which were paid by Great-West Life & Annuity Insurance Co.[315] The Plan contained a reimbursement provision that gave it the right to recover from the beneficiary any payment for benefits paid by the Plan that the beneficiary became entitled to recover from a third party.[316]

Subsequent to the accident, the Knudsons sued the car manufacturer and several other alleged tortfeasors.[317] The parties to that lawsuit settled for $650,000.[318] The money was primarily attributed to a trust for Janette's medical expenses ("the Special Needs Trust") and to pay attorney's fees, but $13,828.70 was reserved for past medical expenses, which was to satisfy Great-West under the reimbursement provision.[319] Apparently dissatisfied with this amount, Great-West filed suit against the Knudsons seeking injunctive and declaratory relief under section 502(a)(3) to enforce the reimbursement provision and compel payment of the $411,157.11. Great-West added Earth Systems and the Plan as plaintiffs.[320]

The district court refused to compel the payment because "the Plan limited its right of reimbursement to the amount received by [the Knudsons] from third parties *for past medical treatment*, an amount that the state court determined was $13,828.70."[321] The Ninth Circuit affirmed, but for different reasons, and held that the relief sought by the plaintiff was not equitable relief, and thus was not authorized under section 502(a)(3).[322] Under section 502(a)(3), a

312. *Great West*, 534 U.S. at 206. Section 502(a)(3) authorizes a civil action, "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132 (a)(3) (2000).

313. 534 U.S. at 206.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 207.

318. *Id.*

319. *Id.* at 208.

320. *Id.* at 208-09.

321. *Id.* at 209 (emphasis in original).

322. *Id.* at 209-10.

participant, beneficiary, or fiduciary can bring a civil action "to obtain other appropriate equitable relief to enforce the terms of the plan."[323] In other words, section 502(a)(3) only applies when equitable relief is sought.

The Supreme Court held that the plaintiffs were merely seeking legal relief in that they sought to impose "personal liability on [the Knudsons] for a contractual obligation to pay money," and, thus, the plaintiffs could not bring an action under section 502(a)(3).[324] The Court relied on *Mertens v. Hewitt Associates,*[325] in which it held that "equitable relief' in ' 502(a)(3) must refer to 'those categories of relief that were . . . *typically* available in equity' . . . ."[326]

The Court systematically disposed of all of the plaintiffs' arguments. First, the plaintiffs argued that they merely sought to enjoin the Knudsons' failure to reimburse the Plan. The Court stated that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity."[327] Thus, since the plaintiffs merely sought specific performance of a contract, their suit was not actionable under section 502(a)(3).[328]

Second, the plaintiffs argued that their suit was allowed under section 502(a)(3) because they sought restitution. The Court found that the restitution sought in this case was a *legal* remedy.[329] Although restitution can be either a legal or an equitable remedy, the classification depends upon the nature of the relief sought.[330] The Court stated, "[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."[331] Here, the funds that the plaintiffs claimed entitlement to were not in the defendants' possession,[332] and the plaintiffs sought to impose personal liability on the defendants, so the suit was not authorized.[333]

323. *Id.* at 211 (quoting 29 U.S.C. § 1132(a)(3) (2000)).
324. *Id.* at 230.
325. 508 U.S. 248, 256 (1993).
326. 534 U.S. at 211 (emphasis in original).
327. *Id.* at 210-11.
328. *Id.* at 210-18.
329. *Id.* at 210-19.
330. *Id.* at 214.
331. *Id.*
332. *Id.*
333. *Id.* at 218.

Third, the Court refused to accept the United States' argument as *amicus* that the common law of trusts gave the plaintiffs equitable remedies such that they could bring a section 502(a)(3) claim.[334] The Court characterized the trust remedies as "inapposite" and found the trust analogy did not give the plaintiffs a separate equitable action.[335] Therefore, because the only relief that Great-West and Earth Systems sought was legal relief, the Court held that section 502(a)(3) did not authorize the action.[336]

Justice Stevens dissented and argued that an inclusive reading of section 502(a)(3) showed that "Congress intended the word 'enjoin,' as used in section 502(a)(3)(A), to authorize any appropriate order that prohibits or terminates a violation of an ERISA plan... "[337] Furthermore, he read "other" in section 502(a)(3)(B) as intended to enlarge the scope of remedies available rather than contract a judge's remedial authority.[338] Finally, he argued that such an inclusive reading of section 502(a)(3) would accomplish "Congress' goal of providing a federal remedy for violations of the terms of plans governed by ERISA."[339]

Justice Ginsburg also dissented and argued that the majority erred in relying on the "ancient classification" of law versus equity in interpreting section 502(a)(3).[340] According to Justice Ginsburg, the majority's holding conflicted with Congress' goals in enacting ERISA, because the strict classification of an equitable claim may mean that suits involving the interpretation of an employee benefit plan will have to be heard in state court, rather than federal court.[341] Instead, Justice Ginsburg suggested looking at the "substance of the relief" and reading "equitable" to mean "whether relief of that kind was '*typically*' available in equity."[342] While the majority also relied on *Mertens*, Justice Ginsburg stressed that the Court should look at the entire *category* of relief sought, not whether a remedy was exclusively available in equity.[343] Accordingly, since Great-West sought

334. *Id.* at 219.
335. *Id.*
336. *Id.* at 221.
337. *Id.* at 222 (Stevens, J., dissenting).
338. *Id.*
339. *Id.* at 223.
340. *Id.* at 224 (Ginsburg, J., dissenting).
341. *Id.*
342. *Id.* at 228 (Ginsburg, J., dissenting) (quoting *Mertens*, 508 U.S. at 256.) (emphasis in original).
343. *Id.*

restitution, and restitution was a category of relief that was typically available in equity, then Great-West's claim to enforce the reimbursement provision should be allowed in federal court.[344]

The result of the Supreme Court's decision in *Great-West* is a possible limitation on the federal court's ability to interpret ERISA plan provisions. Of course, the Court left open the possibility that Great-West could sue the trustee of the Special Needs Trust, since the plaintiff would then be suing for particular funds that are in the defendant's possession.[345] Thus, the availability of a federal cause of action under section 502(a)(3) may now depend upon the named defendant.

C. Taxes, Pensions and Social Security Benefits

1. *Social Security Taxes: United States v. Fior D'Italia, Inc.*

U.S. v. Fior D'Italia, Inc.,[346] involved a dispute between the Internal Revenue Service (IRS) and a restaurant/employer over the calculation of the Social Security tax owed on employee tip income. Employers must pay Federal Insurance Contribution Act (FICA) taxes (Social Security taxes), calculated as a percentage of the wages, including tips, that their employees receive.[347] The employer in this case paid this tax based on the total amount of tips reported by its employees. This amount, however, was significantly lower than the amount of tips that appeared on the restaurant's credit card charge slips. The IRS conducted a compliance check and assessed the employer additional FICA taxes on what it deemed was unreported tip income.[348]

This assessment was made using an "aggregate estimation" method, under which the IRS simply divided total tips charged on credit cards by total credit charge receipts.[349] This amount ("tip rate") was multiplied by the restaurant's total receipts, to obtain an estimate of total tips.[350] The restaurant sued for a refund, arguing that the tax statutes did not authorize the IRS to use its "aggregate estimation"

344. *Id.*
345. *See id.* at 220.
346. 122 S. Ct. 2117 (2002).
347. 26 U.S.C. §§ 3101, 3111, 3121(q) (2000).
348. 122 S. Ct. at 2121.
349. *Id.*
350. *Id.* at 2121-22.

method, but instead required the IRS first to determine the tips that each individual employee received and, second, to use that information in calculating the employer's total FICA liability.[351]

In a 6-3 decision, the Supreme Court sided with the IRS. First, the Court concluded that there was nothing in the statutory language that could be interpreted to prevent the IRS from using the "aggregate estimation" method.[352]

Second, the Court rejected the restaurant/employer's argument that the "aggregate estimation" method was unreasonable.[353] According to the employer, the "aggregate estimation" method will sometimes include tips that should not count in calculating FICA taxes.[354] This method, argued the employer, can overstate the actual amount of tips because it fails to account for a number of possibilities (e.g., that some customer do not leave tips and that cash customers tend to leave lower tips).[355] The Court dismissed these arguments, noting that those considerations did not show that the aggregate estimation method "falls outside the bounds of what is reasonable."[356]

Finally, the Court rejected the employer's argument that the IRS was putting its aggregate estimate method to improper use, that is, that the IRS was abusing its power. According to the Court, the "abuse of power" argument "does not constitute a ground for holding unlawful the IRS' use of aggregate estimates."[357] The Court noted that the employer had not demonstrated that in this case that the IRS had acted illegally.[358] The Court refused to find an agency action unreasonable in all cases simply because of the general possibility of abuse.[359]

2. *Coal Industry Retiree Health Act: Barnhart v. Sigmon Coal Co.*

Barnhart v. Sigmon Coal Co.[360] involved the Court's interpretation of the Coal Industry Retiree Health Benefit Act of 1992.[361] The 1992 Act is a complex regulatory framework which

351. *Id.* at 2122.
352. *Id.* at 2123.
353. *Id.* at 2125.
354. The Code exempts tip amounts of less than $20 in a month. I.R.C. §3121(a)(12)(B).
355. *Fior D'Italia*, 122 S. Ct. at 2117, 2125-27.
356. *Id.* at 2125.
357. *Id.* at 2126.
358. *Id.*
359. *Id.* at 2127.
360. 122 S. Ct. 941 (2002).
361. 26 U.S.C. §§ 9701-08, 9711-12, 9721-22 (2000).

attempts to deal with the problem of severely underfunded pension plans in a shrinking coal industry.[362] The regulatory scheme generally requires an employer with connections to the retirees to assume responsibility for their benefits, and gives the authority to the Commissioner of Social Security to assign beneficiaries among a statutory group of defined entities. The dispute arose out of an assignment of beneficiaries by the Commissioner to the Jericol Mining Co., who twenty years earlier had acquired the assets of a now defunct company. Jericol objected, arguing that the 1992 Act did not authorize the specific assignment.

Under the 1992 Act, "signatory operators," companies that had been signatories to industry-wide agreements before the enactment of the act, were to assume responsibility for their retirees. While the company whose assets Jericol acquired had been a signatory, Jericol had never been a signatory.[363] The Commissioner, however, determined that Jericol was a "successor-in-interest" and could be treated as if it were a signatory. Jericol argued that the Commissioner's position did not have a basis in the statute. While the statute allowed pension liability to be assigned to successors in interests of related persons, it was silent as to the liability of successors in interest of signatory operators. Since Jericol was a successor in interest to a signatory operator, the Commissioner exceeded her statutory authority in making the pension liability assignment.[364]

The Commissioner responded that such a reading of the statute would lead to an absurd outcome, imposing liability for retirees' benefits on a successor-in-interest to a related person of a signatory, but not to a successor-in-interest to the signatory. The Court was not moved by this argument. According to the majority opinion, authored by Justice Thomas, the statute was unambiguous, thus ending the Court's inquiry. He noted that the 1992 Act had been the result of a difficult political compromise, which although at first blush appeared to lead to absurd outcomes, might be based on specific trade-offs reached by Congress during the legislative process. The Court's role, noted Justice Thomas, "is to interpret the language of the statute enacted by Congress."[365] Justice Thomas concluded, "We have stated

362. *See* William Funk, *Supreme Court News*, 27 SPG ADM. & REG. LAW NEWS 6 (2002).
363. *Barnhart*, 122 S. Ct. at 949.
364. *Id.*
365. *Id.* at 950.

time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "[366]

3. *Social Security Act: Gisbrecht v. Barnhart and Barnhart v. Walton*

In *Gisbrecht v. Barnhart*,[367] the Court upheld a provision in a federal statute that allows lawyers to charge up to 25 percent of the past-due benefits awarded to their Social Security disability clients.[368] The attorneys involved in the case represented three individuals in their actions seeking Social Security disability benefits under Title II of the Social Security Act.[369] Pursuant to contingent-fee agreements standard for Social Security claimant representation, the three individuals had agreed to pay their lawyers 25 percent of all past-due benefits recovered.[370] The district court declined to give effect to the attorney-client fee agreement. Instead, the court employed a "lodestar" method, under which the number of hours reasonably devoted to each case is multiplied by a reasonable hourly fee.[371] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court.[372]

Congress has regulated the permissible fees for representation of individuals claiming Social Security benefits since 1965 through the enactment of the Social Security Amendments.[373] For judicial proceedings the Amendments provide for "a reasonable fee. . . not in excess of 25 percent of the . . . past-due benefits" to successful claimants.[374]

The question, according to the Court, was whether "the contingent-fee agreement between claimant and counsel, if not in excess of 25 percent" is presumptively reasonable under the statute, or whether "courts should begin with a lodestar calculation?"[375] In an 8-1 opinion authored by Justice Ginsburg, the Supreme Court sided

366. *Id.* at 956.
367. 122 S. Ct. 1817 (2002).
368. 42 U.S.C. § 406(b)(1)(A) (2000).
369. *Id.* §405(g).
370. *Gisbrecht*, 122 S. Ct. at 1822.
371. *Id.* at 1823.
372. *Gisbrecht v. Apfel*, 238 F.3d 196 (9th Cir 2000), *rev'd*, 122 S. Ct. 1817 (2002).
373. 42 U.S.C. § 406 (2000).
374. *Id.* § 406(b)(1)(A).
375. *Gisbrecht*, 122 S. Ct. at 1820.

with the attorneys. The Court read the fee provision of the statute as intending to control, but "not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security claimants in court."[376] Instead, the Court noted, the statutory fee provision "calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases."[377] According to the Court, the 25 percent of the past-due benefits amounted to "one-boundary line."[378] Within that boundary the attorneys for the successful claimants must show that the fee sought "is reasonable for the services rendered."[379]

In *Barnhart v. Walton*,[380] the Court interpreted various statutory provisions of the Social Security Act dealing with the definition of disability. The Social Security Act authorizes payment for Title II disability insurance benefits and Title XVI Supplemental Security Income to individuals who have an "inability to engage in any substantial gainful activity by reason of any medically determinable . . . impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months."[381]

The Social Security Administration has read the term "inability"to include a "12 month" requirement, thus allowing a claimant to receive benefits only where the "inability" has lasted, or is expected to last, for at least twelve months.[382] The agency interpreted the term "expected to last" as applicable only when twelve months had not yet passed since the onset of the inability.[383] In cases where the inability did not last twelve months the Administration automatically assumed that the claimant had failed to meet the twelve months duration requirement and thus was not entitled to Social Security disability benefits.[384]

The case involved a claimant who applied for Social Security disability benefits and supplemental security income after having developed schizophrenia and associated depression, which caused him to lose his job as a full time teacher. Because the claimant began

376. *Id.* at 1828.
377. *Id.*
378. *Id.*
379. *Id.*
380. 122 S. Ct. 1265 (2002).
381. 42 U.S.C. §423(d)(1)(A) (2000).
382. *Walton*, 122 S. Ct. at 1268.
383. *Id.*
384. *Id.*

to work on a part time basis eleven months after loosing his teaching job, the Social Security Administration found that he was not entitled to benefits.[385]

In an opinion which primarily focused on the question of the appropriate deference due administrative agencies, the Court first held that the statute did not unambiguously forbid the Social Security Administration regulation.[386] While the statute could be subject to other interpretations, it did not prohibit the interpretation attached by the agency. The Court then found that the Administration interpretation was reasonable in view of its compatibility with the statute's objectives, the frequent intervention by Congress in reenacting other relevant statutory provisions without making any changes to the provision at issue, and the long period of time over which the interpretation had been in place.[387]

Gisbrecht and *Walton* may prove to be significant cases, albeit for very different reasons. By allowing attorneys to recover a greater amount, albeit capped at 25 percent, than under the lodestart method *Grisbrecht* should increase the interest of lawyers in taking these cases, making it easier for employees to obtain the benefits they might be entitled to under the Act.[388]

Grisbrecht leaves some important issues unanswered. For example, although in *Gisbrecht* the Court clearly rejected the lodestart method for calculating attorney fees, it indicated that in reviewing the reasonableness of the contingent fee, courts could examine the hours spent as a factor. The Court, however, did not provide any guidance as to what should the relationship be between hours worked and the contingent fee. As noted by a practitioner in the area, "If an attorney only wins 1 in 5 cases taken to federal court, should that attorney be entitled to an hourly fee 5 times the average

385. *Id.*

386. *Id.* at 1269.

387. *Id.* The Court rejected two other arguments raised by the claimant. First, the claimant argued that his part-time job from month 11 to month 12 should not have counted against him because it was part of the "trial work" period that the statute grants to those "entitled" to disability benefits. Second, he argued that even though he returned to work before the end of the 12 month period, his "impairment" and his "inability" could have been "expected to last" more than 12 months, entitling him to receive benefits. The Court rejected both of these arguments as inconsistent with the Administration's regulations. *Id.* at 1272-73.

388. "The biggest benefit of the decision is that there are attorneys who will be willing to take these types of cases." Statement by Jeffrey White, who wrote the amicus brief for the Washington D.C.-based Association of Trial Lawyers of America, in support of the attorneys seeking to uphold the contingent-fee agreement. 1 No. 22 ABA JOURNAL E-REPORT 7 (June 7, 2002).

charged by federal court attorneys. Or is the purpose of examining the time log merely to determine whether the attorney had worked hard enough on the case to merit the contingent fee . . . If the latter, doesn't that undermine the whole concept of the contingent fee?"[389]

Similarly, at face value *Walton*, by limiting the definition of disability, makes it somewhat harder for employees to obtain certain kinds of Social Security benefits. The greater significance of *Walton* might however be in the area of judicial deference to administrative agencies. As discussed later,[390] this concern has generated interest among legal commentators who have noted the potential significance of *Walton* in this area.[391]

IV. HEALTH AND SAFETY: *CHAO V. MALLARD*

The Occupational Safety and Health Act (OSHAct)[392] requires covered employers to provide their employees with a safe working environment. Section 4(b)(1) of the OSHAct, however, states that the Act does not apply where "other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."[393] The issue before the Supreme Court in *Chao v. Mallard* was whether the Occupational Safety and Health Administration's (OSHA) jurisdiction was preempted by U.S. Coast Guard regulations.[394]

The case arose when an explosion on board an uninspected barge, the "Mr. Beldon," killed four workers and injured several others during oil drilling operations in Louisiana waters. With respect to uninspected vessels, such as the Mr. Beldon, the Coast Guard has authority to issue regulations pertaining to, among other things, emergency equipment and cooking and heating areas on the vessel.[395] Pursuant to its statutory authority, the Coast Guard inves-

389. *See* Mark Weissburg, *Gisbrecht v. Barnhart: Contingent Fees Prevail Over Lodestart Method*, *available at* <http://ddbchicago.com/gisbrecht.html> (last visited Jan. 31, 2003).

390. *See infra* notes 518-21 and accompanying text.

391. *See e.g.*, Charles H. Kock, *Judicial Review of Administrative Policy Making*, 44 WM. & MARY L. REV, 375, 401 (2002) (pointing out that in *Walton* Justice Breyer appears to have solidified his position "that policymaking within the agency's delegated authority would have special force even if not developed through notice and comment rulemaking, *i.e.* not embodied in a legislative rule."); Thomas Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 566, n.615 (2002) (discussing the exchange between Justices Breyer and Scalia in *Walton*).

392. 29 U.S.C. §§ 651-78 (2000).

393. *Id.* § 653(b)(1).

394. 534 U.S. 235 (2002).

395. 46 U.S.C. §§ 6101-04, 6301-08 (2000).

tigated the marine casualty and wrote a report.[396] The Coast Guard's report did not accuse the respondent, owner of the barge, of violating any Coast Guard regulations. The Coast Guard's report also noted that the Guard did not "regulate mineral drilling operations in state waters."[397] Based on information from the Coast Guard, OSHA cited the respondent for three violations of the OSHAct. The citations alleged that respondent failed promptly to evacuate employees on board the drilling rig, failed to develop and implement an emergency response plan to handle anticipated emergencies, and failed to train employees in emergency response.[398]

The respondent argued that Section 4(b)(1) of the OSHAct preempted OSHA jurisdiction because the Coast Guard had exclusive authority to enforce the standards on the barge and that the vessel was not a workplace within the meaning of the section 4(a) Act. The petitioner, Secretary of Labor, argued that because the Coast Guard had not exercise its statutory authority, the Act did not preempt OSHA jurisdiction.

The Administrative Law Judge found that the barge was a "workplace" within the meaning of the OSHAct.[399] The ALJ also held that the Coast Guard had not preempted OSHA jurisdiction because the Coast Guard did not exercise its statutory authority to regulate the working condition at issue. The Occupational Safety and Health Review Commission declined to review the ALJ's decision and assessed a financial penalty against respondent.[400] The Fifth Circuit reversed and held that the Coast Guard had exclusive jurisdiction since the Coast Guard had issued regulations concerning life preservers and emergency instructions, among others.[401]

The Supreme Court considered both issues presented by the respondent and held, in an 8-0 decision,[402] that the Act did not preempt OSHA's jurisdiction because (1) the Coast Guard did not affirmatively regulate the working conditions at issue and (2) the Coast Guard did not assert comprehensive regulatory jurisdiction over working conditions on uninspected vessels.[403] The Court also

396. *Mallard*, 534 U.S. at 237.
397. *Id.* at 237-38.
398. *Id.* at 238.
399. *Id.* at 239.
400. *Id.*
401. 212 F.3d 898, 900 (5th Cir. 2000), *rev'd*, 534 U.S. 235 (2002).
402. 534 U.S. at 239. Justice Scalia did not participate in the decision.
403. *Id.* at 244-45.

found that the barge was a workplace within the meaning of the Act.[404]

The Court found that the Coast Guard did not affirmatively regulate the working conditions since the Coast Guard did not have regulations pertaining to dangers from oil drilling operations on uninspected barges in inland waters, the drilling operations that were the working conditions at issue. With respect to this type of uninspected vessel, the Coast Guard only regulated matters relating to marine safety, such as fire extinguishers and emergency locating equipment. The Court held that the Coast Guard had to regulate the conditions that were the cause of the incident to preempt OSHA jurisdiction.[405]

The Court also found that the Coast Guard's regulations did not affect occupational safety or health concerns faced by inland drilling operations on uninspected vessels; thus, the regulations were not comprehensive. The Coast Guard regulations with respect to uninspected vessels were purely general marine safety regulations and were insufficient to oust OSHA of jurisdiction.[406]

Lastly, the Supreme Court held that the barge was a workplace. The Court held that although the barge was anchored in navigable waters, the barge was still a workplace because it was located within the State of Louisiana.[407]

While factually unique, and thus unlikely to have a broad impact, the Court's decision in *Mallard* is significant in at least two ways. First, as a result of this decision, courts and regulatory agencies should narrowly interpret the provisions of section 4(b)(1) of the OSHAct. That an agency issues regulatory standards pertaining to portions of a particular workplace does not mean that the Court will interpret this as an exercise of authority (for purposes of section 4(b)(1)) for all portions of that particular workplace. The agency should ensure that its standards focus on the particular workplace it wishes to regulate, as well as the particular conditions of that workplace.[408]

Second, the Court in *Mallard* adopted a broad definition of what

404. *Id.* at 245.

405. *Id.* at 241-42.

406. *Id.* at 243-44.

407. *Id.* at 245.

408. Justice Stevens noted that although the Coast Guard addressed conditions pertaining to certain classes of uninspected vessels did not mean that all OSHA regulations of all uninspected vessels had been preempted. *Id.* at 244.

constitutes a workplace under the OSHAct. Not too long ago, OSHA faced major criticism regarding its attempt to assert authority over home work.[409] The Court's agreement with the agency's broad definition of what constitutes a workplace may prove relevant if those standards reemerge.

V. CIVIL SERVICE REFORM ACT: *USPS V. GREGORY*

The Supreme Court granted certiorari in *United States Postal Service v. Gregory*[410] to consider whether, under the Civil Service Reform Act of 1978 (CSRA),[411] the Merit Systems Protection (Board) may independently review prior disciplinary actions subject to ongoing grievance procedures in determining the reasonableness of a penalty given in a subsequent disciplinary action.[412]

The CSRA allows eligible employees to appeal serious disciplinary actions, such as termination, to the Board.[413] The respondent, Maria Gregory, a former letter technician for the United States Postal Service,[414] was a "preference eligible" employee covered by the CSRA because she previously served in the Army.[415]

The Postal Service terminated the respondent in November of 1997 after she deliberately overestimated her necessary overtime.[416] The Postal Service also based its decision to terminate Gregory on three previous disciplinary violations that were still pending in grievance proceedings pursuant to a collective bargaining agreement between Gregory's union and the Postal Service.[417]

Under the CSRA, Gregory could appeal her termination to the Board, or seek injunctive relief through the grievance procedure that was negotiated in the collective bargaining agreement, but she could not do both.[418] Gregory appealed to the Board.[419] Under the CSRA, an employing agency bears the burden of proving its charge by a

409. *See OSHA Formulizes Policy Exempting Home Offices from Safety Inspections*, LAB. REL. WEEK (BNA), Mar. 2, 2000, at 249.

410. 534 U.S. 1 (2001).

411. 5 U.S.C. §§ 7512-13 (2000).

412. Gregory, 534 U.S. at 12.

413. *Id.* at 5.

414. *Id.* at 5-6.

415. *Id.* at 7.

416. *Id.*

417. *Id.* at 6-7.

418. *Id.*

419. *Id.*

preponderance of the evidence when the agency's disciplinary action is challenged before the Board.[420] According to procedures used by the Board for nineteen years, this requires proving "not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it."[421] The Board Administrative Law Judge upheld Gregory's termination, finding that she did overestimate her overtime, and that the termination was reasonable in light of this violation and her prior violations.[422] The ALJ independently analyzed the three prior disciplinary actions that were the subject of pending grievances under the approach established in *Bolling v. Department of Air Force.*[423] *Bolling* requires de novo review of prior disciplinary actions unless: "(1) [the employee] was informed of the action in writing; (2) the action is a matter of record; and (3) [the employee] was given the opportunity to dispute the charges to a higher level than the authority that imposed the discipline."[424] Because Gregory's three prior disciplinary actions met those three criteria, Board review was limited to determining whether the employing agency's action was clearly erroneous.[425] The ALJ found no clear evidence of error in upholding Gregory's termination.[426] Gregory petitioned the Board for review of this decision, and while this appeal was pending, an arbitrator resolved one of Gregory's three prior grievances in Gregory's favor.[427] The Board refused to review the ALJ's determination.[428]

The United States Court of Appeals for the Federal Circuit held that "prior disciplinary actions that are subject to ongoing proceedings may not be used to support a penalty's reasonableness."[429] Since Gregory still had two grievances pending, the Federal Circuit reversed the Board's determination that the penalty was reasonable.[430]

The Supreme Court held that the Board need not adopt the Federal Circuit's rule to meet the minimum standards for review of

420. *Id.*
421. *Id.*
422. *Id.* at 8.
423. 8 M.S.P.B. 658 (1981).
424. 534 U.S. at 9 (quoting *Bolling*, 8 M.S.P.B. at 660-61).
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.*
429. 212 F.3d 1296, 1298 (Fed. Cir. 2000), *vacated*, 534 U.S. 51 (2001).
430. *Id.* at 1299.

agency disciplinary actions set forth in the CSRA.[431] Under the CSRA, the Federal Circuit's review of the Board's decisions is limited to determining whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; obtained without procedures required by law, rule or regulation having been followed; or unsupported by substantial evidence."[432] This standard, the Court observed, is extremely narrow, allowing the Board wide latitude in reviewing agency disciplinary actions. Thus, the Board may consider past disciplinary actions against an employee even if challenges to those actions are still pending in grievance proceedings.[433] The Court refrained from deciding whether the *Bolling* test *actually* meets the statutory standard for review of prior disciplinary actions that is required by the CSRA.[434] The Court merely stated, "If the Board's mechanism for reviewing prior disciplinary actions is itself adequate, the review such an employee receives is fair."[435]

The Court reasoned that the Board has "wide latitude in fulfilling its obligation to review agency disciplinary actions," and thus the courts need only determine whether the Board met minimum standards from the CSRA.[436] Further, the Board has consistently independently reviewed prior disciplinary actions, so the Board's decision to continue this practice was not arbitrary.[437] The Court noted that, the Federal Circuit's rule would delay the Board's decision-making process or preclude agencies from relaying on an employee's disciplinary history.[438] In addition, the Court stated, independent review by the Board was not contrary to any law,[439] nor did it violate the CSRA's preponderance of the evidence standard.[440]

The National Treasury Employees Union argued as *amicus* that independent review of still pending prior disciplinary actions violated the CSRA's statutory scheme which provided for review of discipline

431. *Gregory*, 534 U.S. at 10.

432. 5 U.S.C. § 7703(c) (2000).

433. Gregory, 534 U.S. at 12. *Federal Employees: Justices Allow Prior Acts Still Being Grieved to be Considered in Review of Postal Firing*, DAILY LAB. REP. (BNA), Nov. 14, 2001, at AA-1.

434. *Gregory*, 534 U.S. at 5.

435. *Id.* at 7.

436. *Id.* at 11.

437. *Id* at 12-13.

438. *Id.* at 13.

439. *Id.*

440. *Id.* at 14-15.

before the Board or through a collectively bargained grievance procedure.[441] The Court responded that the "parallel structures of review" found in the CSRA still allow the Board broad discretion, so "the Board's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the reasonableness of the penalty as a whole."[442] Further, the Court noted, even though independent review of pending disciplinary actions may result in the Board reaching a different conclusion than the arbitrator, or result in unresolved grievances, such results are still fair because any employee who appeals still receives an independent Board review.[443]

The Court vacated the judgment of the Federal Circuit.[444] Because one of Gregory's disciplinary actions was overturned in arbitration, and given that the Board had a policy not to rely upon disciplinary actions that have been overturned in the grievance procedure, the Court remanded to determine the effect of the reversal on Gregory's termination.[445]

Justice Thomas wrote a separate concurrence, arguing that "the *Bolling* framework provides federal employees with more than adequate procedural safeguards."[446] First, he noted, the *Bolling* framework for collateral review of prior disciplinary actions does not conflict with any provision of the CSRA, because Congress did not provide for any review of minor disciplinary actions.[447] Second, Justice Thomas stated, the *Bolling* framework did not conflict with the CSRA's preponderance of the evidence standard because "[a]t most, the statute requires an agency to prove the existence of prior disciplinary actions; it does not place the burden on the agency to prove the facts underlying those actions."[448] Finally, Justice Thomas asserted, under the CSRA, the Board's review process and the collectively bargained grievance procedures were separate structures.[449] Therefore, "the Board need not wait for an employee's pending grievances to be resolved before taking account of prior

441. *Id.* at 15.
442. *Id.* at 16.
443. *Id.* at 16-17.
444. *Id.* at 18.
445. *Id.*
446. *Id.* at 20 (Thomas, J., concurring).
447. *Id.* at 20-21.
448. *Id.* at 23.
449. *Id.*

disciplinary actions in its assessment of the reasonableness of a penalty given in a subsequent disciplinary action."[450]

Justice Ginsburg concurred only in the judgment, agreeing that a remand was in order for four reasons.[451] First, the Board's reopening regulation allows either the Board or the employee to reopen a case at any time if a prior disciplinary action is reversed in a grievance proceeding.[452] Justice Ginsburg noted that "it might well be 'arbitrary and capricious' in such a situation for the Board to disregard the employee's revised record and refuse to reopen."[453] Second, Justice Ginsburg asserted that Gregory could have pursued an alternative arbitration forum.[454] Justice Ginsburg stated, "Gregory, having at her own option foregone arbitration proceedings, in which prior discipline could not weigh against her while grievances were underway, is not comfortably situated to complain that the procedure she elected employed a different rule."[455] Third, Justice Ginsburg agreed to remand because the Court reserved questioning the adequacy of the *Bolling* review.[456] Finally, Justice Ginsburg agreed to remand because of "the apparent, incorrect view of the Federal Circuit that the Postal Service itself could not take account of prior disciplinary action that is the subject of a pending grievance proceeding."[457]

The majority's decision may show a trend toward deference to Board decisions as opposed to judicial intervention, so long as the Board is reasonable and consistent in its judgments. The Court stated, "[T]he Board has broad discretion in determining how to review prior disciplinary actions and need not adopt the Federal Circuit's rule."[458] The Court further asserted, "The role of judicial review is only to ascertain if the Board has met the minimum standards set forth in the statute."[459] Finally, the Court noted that statutory review of Board decisions is limited by an "extremely narrow" arbitrary and capricious standard,[460] allowing the Board

450. *Id.* at 31 (Ginsburg, J., concurring).
451. *Id.* at 25-31.
452. *Id.* at 26-27.
453. *Id.* at 29.
454. *Id.* at 30-31.
455. *Id.* at 31.
456. *Id.*
457. *Id.* at 5.
458. *Id.* at 11.
459. *Id.*
460. *Id.*

"wide latitude in fulfilling its obligations to review agency disciplinary actions."[461] In light of these comments, one would expect the Court to show extreme deference to Board decisions under the CSRA.

Finally, the majority's decision may have interesting ramifications in the area of procedural due process. Under *Bolling*, the Board must engage in de novo review of prior disciplinary action unless "the employee was informed in writing of the disciplinary action, the action is on the record, and the employee had the opportunity to dispute the charges to a higher level than the official who imposed the discipline."[462] If those procedural due process requirements are met, then the Board will merely determine whether past agency disciplinary action was clearly erroneous.[463]

The Court refrained from deciding the soundness of this procedure,[464] despite Justice Thomas' concurring opinion that *Bolling* provided adequate procedural safeguards.[465] The *Bolling* procedure may lead to an agency superficially meeting the three *Bolling* requirements so that the agency action is merely subject to "clearly erroneous" review. Such a situation runs the risk of giving too much power to agency decisions, and not enough protection to employees who may have been treated unfairly. Therefore, the Court may soon address the soundness of the Board's *Bolling* procedure to resolve any dispute about the required level of procedural due process.

Arguably, the Court's decision in *Gregory* complicates the decision faced by federal employees facing disciplinary action. Potentially, in the aftermath of *Gregory*, and in cases where there might be grievances pending, employees will be less likely to appeal terminations to the MSPB, opting instead for using the grievance process. This is unlikely to happen, however. First, the MSPB's appeal process is free, which might encourage employees and unions to use it over the arbitration process. Second, the Supreme Court has previously held that under the CSRA, arbitrators are required to use the same interpretation as the MSPB in reviewing an agency's disciplinary decision.[466]

461. *Id.*

462. Bolling v. Dept. of Air Force, 8 M.S.P.B. 658, 660-61 (1981). *Federal Employees: Justices Allow Prior Acts Still Being Grieved to be Considered in Review of Postal Firing*, DAILY LAB. REP. (BNA), Nov. 14, 2001, at AA-1.

463. *Bolling*, 8 M.S.P.B. at 660.

464. *Gregory*, 534 U.S. at 17.

465. *Id.* at 20 (Thomas, J., concurring).

466. *See* Cornelius v. Nutt, 472 U.S. 648 (1985).

VI. ELEVENTH AMENDMENT: *RAYGOR* AND *LAPIDES*

Prior to 1990 federal courts applied a variety of methods to address claim preclusion problems for plaintiffs seeking to bring both federal and state law claims arising out of the same incident.[467] Plaintiffs included state claims in federal actions. If the federal court dismissed the claims on jurisdictional grounds, the plaintiff was left remediless if the statute of limitations on the state law claims expired while they were pending in federal court.[468] In 1990 Congress enacted 28 U.S.C. §1367(d), which tolls the limitations period for state law claims while a related action is pending in federal court.[469] However, in a 6-3 opinion, the Supreme Court held in *Raygor v. Regents of University of Minnesota*[470] that "§1367(d) does not toll the limitations period for state law claims asserted against non-consenting state defendants that are dismissed on Eleventh Amendment grounds."[471]

The case stemmed from a lawsuit initiated by the petitioners, Lance Raygor and James Goodchild, both former employees of the University of Minnesota. They filed ADEA and several state law claims against the University in federal court. The state law claims were filed pursuant to the court's supplemental jurisdiction over claims arising out of the "same transaction or occurrence" as claims within federal jurisdiction.[472] The federal district court dismissed their ADEA claims and declined to exercise jurisdiction over the state law claims. The petitioners attempted to re-file the state law claims in state court after the statute of limitations had expired.[473] The University argued that petitioner's state law claims were barred for two reasons: (1) the statute of limitations for the state claims had

467. *See e.g.*, Notrica v. Bd. of Supervisors, 925 F.2d 1211 (9th Cir. 1991) (district court should give consideration to the expiration of statute of limitations in deciding whether to dismiss supplemental claim); Bankshares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982) (refusing to dismiss supplemental claims unless defendant first agreed to waive the state statute of limitations). *See State Employees: Federal Rule Tolling Statute of Limitations Cannot Apply to State Employer*, DAILY LAB. REP. (BNA), Feb. 28, 2002, at AA-1; *Age Discrimination: Supreme Court Considers Federal Rule Tolling Statute of Limitations*, DAILY LAB. REP. (BNA), Nov. 27, 2001 at AA-1.

468. *See e.g.*, Notrica v. Bd. of Supervisors, 925 F.2d 1211 (9th Cir. 1991); Bankshares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982). *See State Employees: Federal Rule Tolling Statute of Limitations Cannot Apply to State Employer*, DAILY LAB. REP. (BNA), Feb. 28, 2002, at AA-1; *Age Discrimination: Supreme Court Considers Federal Rule Tolling Statute of Limitations*, DAILY LAB. REP. (BNA), Nov. 27, 2001 at AA-1.

469. 28 U.S.C. §1367(d) (2000).

470. 534 U.S. 533 (2002).

471. *Id.* at 548.

472. 28 U.S.C. § 1367(a) (2000).

473. *Raygor*, 534 U.S. at 537-38.

ended, and (2) section 1367(b) did not apply to toll the limitations period on the petitioner's state law claims while they were pending in federal court because, under the Eleventh Amendment, the federal court never had subject matter jurisdiction over the petitioner's ADEA claims.[474]

The Minnesota Supreme Court held that applying the tolling statute to non-consenting states "is an impermissible denigration of [respondent's] Eleventh Amendment immunity."[475] The United States Supreme Court also found the statute inapplicable, although for different reasons.

Justice O'Connor's opinion for the majority focused largely on the federalism issues present in the case. Justice O'Connor stated, "[A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the states."[476] When presented with an issue in a statute that raises serious constitutional doubt, the Court believed that Congress has to "make its intention to alter the constitutional balance between states and federal government unmistakingly clear in the statute's language."[477]

The majority relied upon two provisions in the statute as evidence that the tolling provision could not be applied to the states. The Court found that the statute did not expressly indicate that it covered claims asserted against state defendants and did not expressly provide that it applied to dismissal on Eleventh Amendment immunity grounds. Thus, the Court concluded, Congress failed to make clear its intent to alter the constitutional balance by applying the tolling provision.[478] Justice Stevens joined by Justices Souter and Breyer, in a dissenting opinion, wrote that section 1367(d) applies even to non-consenting states because the goal of the statute is to protect all of the plaintiff's state law claims.[479]

During oral argument several justices suggested methods that would preserve a plaintiff's state law claims while the claims against a

474. *Id.* at 538. The Supreme Court held in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), that the ADEA does not validly abrogate the States' sovereign immunity. *Id.* at 75.

475. *Raygor*, 534 U.S. at 539 (quoting 620 N.W.2d 680, 687 (Minn. 2001), *aff'd*, 534 U.S. 533 (2002)).

476. *Id.* at 544.

477. *Id.* at 543.

478. *Id.* at 544-45.

479. *Id.* at 549-55 (Stevens, J., dissenting).

non-consenting state are pending in federal court. Justice Ginsburg suggested that a plaintiff file a protective action in state court within the statute of limitations, so that the state law claims may be preserved while the action in federal court is pending.[480] Justice Scalia suggested that federal courts condition the dismissal of plaintiff's lawsuit on the defendant's agreement to waive the statute of limitations on the state law claim.[481]

This opinion may have great ramifications upon plaintiffs asserting claims in the labor and employment law area. In his dissenting opinion, Justice Stevens iterated that claims brought under anti-discrimination statutes will most likely be filed in state courts after this decision to avoid cost and confusion and to eliminate the risk that a time bar will attach to a claim dismissed from federal court on Eleventh Amendment grounds.[482] The problem for plaintiffs in actions against state governments is aggravated because at the time the suit is filed the Eleventh Amendment immunity issue may not be resolved. Over the last few years the Supreme Court has resolved the Eleventh Amendment immunity issue with respect to the ADEA,[483] the ADA,[484] and the Fair and Labor Standards Act.[485] However, the immunity question with regard to other statutes, such as the FMLA,[486] and the Rehabilitation Act, has not been addressed by the Supreme Court.

Raygor raises significant problems for litigants with claims against state governments in federal court. Professor Chemerinsky, for example, notes that after *Raygor*, "plaintiff counsel has only a few options: take the chance that the federal court will not dismiss the federal claims; if the federal claims are dismissed, hope that the federal court will use its discretion to retain jurisdiction over the state law claims; drop the federal court action and refile in state court; or keep the action in federal court and simultaneously file state claims in

480. *See Age Discrimination: Supreme Court Considers Federal Rule Tolling Statute of Limitaions*, DAILY LAB. REP. (BNA), Nov. 27, 2001 at AA-1.

481. *Id.*

482. *Raygor,* 534 U.S. at 554 n.15 (Stevens, J., dissenting). State courts have concurrent jurisdiction over Title VII and ADEA claims. *See* Felder v. Casey, 487 U.S. 131, 139 (1983).

483. Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

484. Garrett v. Board of Trustees, 531 U.S. 356 (2001).

485. Alden v. Maine, 527 U.S. 706 (1999).

486. Compare *e.g.* Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001) (holding that states may assert Eleventh Amendment immunity to claims under the FMLA) *with* Hibbs v. HMD Dept. of Hum. Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2618 (2002) (holding that FMLA claims are not subject to state's Eleventh Amendment imnmunity).

state court."[487]

In *Lapides v. Board of Regents of University System of Georgia*,[488] the Supreme Court faced the issue of whether a state waives its sovereign immunity under the Eleventh Amendment by removing a case from state court to federal court.[489] This issue, however, was limited to the context of state law claims where the state had already waived its immunity in state proceedings.[490] The issue was so limited in this case because, although the plaintiff asserted both federal and state law claims, his federal claim was invalid.[491]

In *Lapides*, a professor employed by the Georgia State University system sued the system's board of regents and university officials, in their personal and official capacities, under the Georgia Tort Claims Act and under 42 U.S.C. § 1983.[492] The professor alleged defamation and violation of due process because university officials placed allegations of sexual harassment in his personnel files.[493]

The defendants removed the case to federal district court, and then sought dismissal under the Eleventh Amendment.[494] The district court held that the state waived its immunity by removing the case from state court to federal court.[495] The Eleventh Circuit reversed, holding that Georgia state law was unclear about whether the Georgia attorney general had the legal authority to waive the state's immunity, so the appellate court allowed the state to assert its immunity.[496]

The Supreme Court held that a state waives its Eleventh Amendment immunity by removing a suit from state court to federal court.[497] The Court asserted that, under its precedent, generally, "a State's voluntary appearance in federal court amount[s] to a waiver of its Eleventh Amendment immunity."[498] In the case at hand, the state was *involuntarily* brought into the case. However, the state

487. Erwin Chemerinsky, *Court Continues to Focus on Sovereign Immunity*, TRIAL, Aug. 2002, at 66.

488. 122 S. Ct. 1640 (2002).

489. *Id.* at 1642.

490. *Id.* at 1641.

491. *Id.*

492. *Id.* at 1643.

493. *Id.*

494. *Id.*

495. *Id.*

496. 251 F.3d 1372 (11th Cir. 2001), *rev'd*, 122 S. Ct. 1540 (2002).

497. *Lapides*, 122 S. Ct. at 1642.

498. *Id.* at 1643.

voluntarily invoked federal jurisdiction and, because of this affirmative litigation conduct, the general rule applied such that the state waived its immunity.[499]

The Court noted several reasons that removal did not fall outside of this general rule. First, although recent cases, such as *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,*[500] seem to require a clear indication by the state to waive its immunity, affirmative litigation acts, such as removal, are sufficient to waive immunity.[501] The Court focused on a policy to avoid inconsistency and unfairness, such that a state is not to be given an unfair advantage in litigation tactics.[502]

Second, the Court found that a benign motive for removal does not make a difference in whether the state waived immunity.[503] Third, while Georgia argued that state law did not give the attorney general authority to waive the state's immunity, the Court asserted that the attorney general *voluntarily* invoked federal jurisdiction, which was sufficient to waive immunity.[504] The Court stated, "A rule of federal law that finds waiver through a state attorney general's invocation of federal court jurisdiction avoids inconsistency and unfairness."[505]

Finally, the Court noted that its decision provided a clear rule for states to follow to determine whether their conduct will be deemed to be a waiver. "[R]emoval is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum."[506]

The holding in *Lapides* overruled *Ford Motor Co. v. Department of Treasury of Indiana,*[507] where a state regained Eleventh Amendment immunity, even after the state lost in federal court, by showing that its attorney general lacked authority to waive immunity.[508] According to David J. Bederman, the attorney who represented Lapides, "The decision tells states that they cannot use

499. *Id.* at 1644.
500. 527 U.S. 666 (1999).
501. *Lapides*, 122 S. Ct. at 1644.
502. *Id.*
503. *Id.* at 1645.
504. *Id.*
505. *Id.*
506. *Id.* at 1646.
507. 323 U.S. 459 (1945).
508. *Lapides*, 122 S. Ct. at 1646.

the Eleventh Amendment as both a shield and a sword. They are being told that they cannot use sovereign immunity in a cynical way."[509]

VII. LESSONS LEARNED? MAYBE

A. Lesson #1: Preeminence of Employment Law

Employment law cases amounted to a significant portion of the Supreme Court's 2001-02 docket. Eighteen out of seventy-five cases (24 percent) decided by the Court either directly involved employment law statutes (e.g., Title VIII, ADA) or directly impact employment law issues (e.g., FICA, Social Security Act). As the number of cases the Court decides continues to decline, it is astonishing that in the 2001-02 term employment law comprised so much of the Court's docket.

B. Lesson #2: Unusual Allegiances - Strange Outcomes

One of the distinguishing features of this Court, whose membership has been unchanged for about eight years, is its very clearly delineated conservative/liberal lineup. In several areas, the Court's lineup is fairly predictable with Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas, forming the conservative wing of the Court; Justices Stevens, Souter, Breyer and Ginsburg on the liberal side; and Justice O'Connor providing the "swing" vote, but most of the time siding with the conservative block. This lineup has held in areas such as federalism and First Amendment jurisprudence.

One surprising aspect of the employment law cases is that this division does not hold too frequently. In only two of the eighteen employment law cases discussed in this article did the "usual" lineup of justices hold up: *Rush Prudential* and *Great-West Life* (the two ERISA decisions dealing with issues of preemption). On the other hand, there were eight unanimous decisions.

Justice Thomas sided with the liberal voting block of the Court in all of the Title VII cases, which could be characterized as pro-plaintiff in the sense that they make it easier for plaintiffs to meet procedural

509. *State's Voluntary Removal to Federal Court Waives Jurisdiction Protection*, DAILY LAB. REP. (BNA), May 14, 2002, at AA-1.

requirements. The three ADA decisions issued by the Court also included a somewhat unusual lineup of votes. All three ADA decisions could be characterized as limiting the extent of the ADA. Two of the decisions were unanimous, and in the other decision, two of the regularly "liberal" justices (Justices Stevens and Breyer) sided with three of the traditionally "conservative" justices (Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy).

This somewhat unusual voting pattern is further evidenced if we focus on the outcomes of the cases. One traditional way used to identify trends in the Court's voting behavior is by classifying the decisions as pro-employee or pro-employer. Clearly not all decisions can be easily categorized in that way, as employees' interests are pitted not directly against employers, but against an agency, or insurance plan, for example. Yet, if we look at those cases where the employer and employee interests were directly at odds, we observe further evidence regarding the difficulty of labeling this Court as pro-employee or pro-employer. There were eight cases that could be classified as clearly pitting employee interests against the interests of employers.[510] The Court was evenly split in this eights cases, four being decided in favor of the employees, and four decided in favor of the employers.

These observations suggest that the voting behavior of the Rehnquist Court, at least during this last term, does not appear to follow traditional "conservative/liberal" dimensions, or traditional pro-employee/pro-employer lines. What legal issues then explain, or appear to be motivating the Court? These are explored in the following subsections.

C. Lesson #3: The Question of Deference to Administrative Agencies

A close look at the employment law cases decided this last term reveals a certain degree of uneasiness in the Court regarding deference to administrative agencies. It appears that the issue of deference deeply divides the Court. The following examples illustrate this point.

510. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, (2002); US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002); Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002); Edelman v. Lynchbug College, 122 S. Ct. 1145 (2002), National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002), Swierkiewicz v. Sorema N.A., 534 U.S. 506, (2002); EEOC v. Waffle House, Inc., 534 U.S. 279, (2002); Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002).

In *Toyota*, when discussing the meaning of disability, the Court noted that the regulations interpreting the Rehabilitation Act of 1973 should be considered "persuasive authority" since Congress drew the ADA's definition of disability almost verbatim from the definition of "handicapped individual" under the Rehabilitation Act.[511] Regarding the EEOC regulations, however, the Court said that their persuasive authority was "less clear."[512]

Justice Souter appeared to respond to this statement, at least partially, not in *Toyota* but in *Echazabal*. In *Echazabal*, the Court upheld the EEOC's regulations allowing the employer to screen out a worker with a disability for on the job risks to that worker's own health or safety.[513] In the course of the opinion, Justice Souter managed to endorse the EEOC's ADA regulations. In responding to the plaintiff's argument challenging one of the reasons the EEOC had advanced to justify its regulation, the Court commented on the role of agency's regulation where there may be a conflict between two statutes. The Court noted, "Courts would, of course, resolve the tension if there were no agency action, but the EEOC's resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in [the ADA]."[514]

Ragsdale v. Wolverine World Wide, Inc.[515] is also instructive in this regard. While not disagreeing on the standard for evaluating the regulations issued by the Secretary of Labor in implementing the FMLA, the decision shows a Court deeply divided on the implementation of the deference standard. In framing the issue to be considered by the Court, the majority refused to consider whether Congress had spoken to the issue of FMLA notice. The Court instead seized on the penalty aspect of the regulation arguing that the regulation imposed a penalty contrary to the regulatory scheme envisioned by Congress.[516] In choosing to focus on the penalty, as opposed to the notice aspect of the case, the Court deprived the Secretary of Labor of at least some degree of deference. As the dissenting justices argued, had the Court started the analysis from the

511. *Toyota*, 122 S. Ct. at 689.
512. *Id.*
513. Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045, 2050 (2002).
514. *Id.* at 2052.
515. 122 S. Ct. 1155 (2002).
516. *Id.* at 1164-65.

notice aspect of the regulation the result might have been different.[517] The FMLA clearly gave the Secretary of Labor the authority to prescribe all regulations necessary to carry out the objectives of the act. The regulations under dispute in *Ragsdale* could have been understood as implementing that congressional mandate.

Arguably, the disagreement among the members of the Court could be just a function of the application of the *Chevron* standard, i.e., when and how a court should defer to administrative agencies. In this sense the tension may be more apparent than real, and may be entirely because different statutes involve differing degrees of delegation of authority to agencies, and are likely to lead to different results in the question of deference.

However, the Court's decision in one of the Social Security Act cases, *Barnhart v. Walton,*[518] raises some nagging concerns. In deciding that the Social Administration Administration's denial of disability insurance benefits was a proper interpretation of the statute, the Court, as might have been expected, followed the *Chevron* standard. However, toward the end of that section of the opinion the Court stated: "In this case, the interstitial nature of the legal questions, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."[519]

This passage in *Walton* has been described as "little short of astounding."[520] The above quoted language could be interpreted as creating a new step in the *Chevron* analysis, in which a court will have to decide whether *Chevron* is the "appropriate legal lens" to be used in reviewing the agency action. This threshold analysis, based, as the Court suggests, in factors like interstitial nature, expertise, importance and complexity, is a great concern to some commentators since it "projects a loosely-cabined juggle of multiple and indeterminate factors for determining in each case whether *Chevron* governs."[521]

517. *Id.* at 1165-69 (O'Connor, J., dissenting).
518. 122 S. Ct. 1265 (2002).
519. *Id.* at 1272.
520. See Robert Anthony, *Keeping* Chevron *Pure*, 5 GREEN BAG 2D 371 (2002).
521. *Id.* at 373.

Viewed in light of *Walton*, the Court's discussion of the deference issue in *Edelman*[522] acquires some added meaning. In holding the EEOC's relation-back regulation to be an unassailable interpretation of Title VII, the Court, in an opinion by Justice Souter, had the opportunity to discuss the question of deference to the administrative agency. Before discussing the merits of the EEOC's regulation, the Court labeled the deference issue "insignificant in this case,"[523] because the Court found the "EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much."[524] Although the Court ultimately agreed with the EEOC interpretation, Justice Souter's opinion in *Edelman* might be interpreted as suggesting that under some circumstances *Chevron* is not the "appropriate legal lens through which to view the legality of the Agency interpretation here at issue."[525]

It may be too early to say whether *Walton* is the first salvo in a new battle over the issue of deference to agencies. One thing appears clear, however, that there exist deep disagreements in the Court with regard to the deference issue.

D. Lesson #4: Narrowing the ADA

It is very clear that the Court has settled on a very narrow reading of the ADA. All three ADA cases, *Toyota*, *Echazabal*, and *US Airways*, represent narrow interpretations of various statutory terms. For example, in *Toyota* the Court narrowed the application of the Act's protections by making it more difficult for plaintiffs to prove substantial limitation in the major life activity of performance of manual tasks. The Court made it clear that the ADA is only meant to apply to people with severe mental or physical impairments. As a result of this decision, it will be harder for plaintiffs to prove that they

522. Edelman v. Lynchburg College, 122 S. Ct. 1145 (2002).

523. *Id.* at 1150.

524. *Id.* Justices O'Connor and Scalia, while concurring in the judgment were quick to respond to the majority opinion on this last point, however. Justice O'Connor began by disagreeing that the "EEOC has adopted the most natural interpretation of Title VII's provisions regarding the filing" of charges of discrimination. However, Justice O'Connor deferred to the agency's interpretation "because the statute is at least somewhat ambiguous." *Id.* at 1153-54 (O'Connor, J., concurring).

525. *Walton*, 122 S. Ct. at 1272.

are disabled under the ADA.[526]

Similarly, the impact of the decision in *US Airways* limits the protections available to disabled individuals under the ADA. By holding that there is a rebuttable presumption that an accommodation that conflicts with seniority systems is unreasonable, and that the plaintiff possesses the burden of proving the special circumstances that make departure from seniority systems reasonable while the employer merely must present evidence that a seniority system exists, the Court placed seniority systems as an additional hurdle that plaintiffs might have to address in their ADA complaints.[527]

E. Lesson #5: Easing Procedural Requirements Under Title VII

While narrowing the reach of the ADA the Court, interestingly, appeared to have expanded, primarily through procedural means, the reach of Title VII. In *Edelman*, *National Railroad*, and *Swierkiewicz*, the Court eased procedural and substantive hurdles faced by plaintiffs in Title VII litigation.[528] In *Edelman* and *Swierkiewicz* the Court facilitated Title VII claims, by upholding the validity of an EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired, and by finding that an employment discrimination complaint need not allege facts making out a prima facie case under *McDonnell Douglas* but need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief,"[529] which is the standard required under Rule 8(a)(2) of the Federal Rules of Civil Procedure. Perhaps of more significance is the Court's decision in *National Railroad*, in which the Court held that Title VII precludes recovery for discrete acts of discrimination or retaliation that occur outside of the statutory filing period, but that consideration of the entire scope of a hostile work environment claim is appropriate even if some of the events fall outside the 180 or 300 day statutory period.

526. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

527. US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002).

528. Edelman v. Lynchbug College, 122 S. Ct. 1145 (2002); National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002); Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).

529. *Swierkiewicz*, 534 U.S. at 509.

F. Lesson # 6: Waffle House – A Speed Bump or a Road Block?

Over the last several terms, the Court had sent a very strong signal in favor of expanding the availability and enforceability of employment agreements requiring the arbitration of employee claims.[530] The *Waffle House* case represents somewhat of a move in the opposite direction. In holding that "the EEOC has the authority to pursue victim specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes,"[531] the Court might have slowed down the stampede towards the adoption by employers of employment arbitration agreements. Whether this development turns out to be a significant hurdle or a minor speed bump depends in part on how aggressive the EEOC takes on its role of enforcing workers' rights under the various anti-discrimination statutes.

G. Lesson #7: An Uncertain Future for the FMLA

The *Ragsdale* decision shows a Supreme Court concerned with the possibility that the Department of Labor, through its regulatory authority, will try to extend the substantive protections of the FMLA beyond what the Court considers to have been Congress' intent. If this is the case, we might observe a scenario similar to that reflected in the Court's disposition of cases under the ADA. To the extent that employers understand the significance of *Ragsdale* in this way, as it appears they have,[532] we are likely to see an increase in litigation, with employers challenging several other DOL regulations regarding the FMLA.

H. Lesson #8: Interesting Side Note

In what might turn out to be no more that a footnote to the 2001 term, an interesting exchange took place between Justice Ginsburg and Justice Scalia in one of the Social Security cases. In *Grisbrecht*,

530. *See* Ann C. Hodges & Douglas D. Scherer, *The Employment Law Decisions of the October 2000 Term of the Supreme Court: A Review and Analysis*, 5 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 391, 415-16 (2001).

531. EEOC v. Waffle House, Inc., 122 S. Ct. 754, 760-61 (2002).

532. Consider the statement by Ann Elizabeth Reesman, General Counsel of the management group Equal Employment Advisory Council, describing the ruling "as extremely significant" since it eliminated what management groups thought was "the most egregious extension" of the FMLA. *Supreme Court Knocks Down DOL Rule Affecting Employers that Fail to Give Notice*, DAILY LAB. REP. (BNA), Mar. 20, 2002, at AA-1.

the Court upheld a provision in a federal statute that allows lawyers to charge up to 25 percent of the past-due benefits awarded to their Social Security disability clients.[533] In his dissenting opinion Justice Scalia noted that "[t]he fee agreements in these Social-Security cases are hardly negotiated; they are akin to adherence contracts."[534] "It is uncontested," continued Justice Scalia, "that the specialized Social Security bar charges uniform contingent fess . . . which are presumably presented to the typically unsophisticated client on a take-it-or-leave-it basis."[535]

In the majority opinion, Justice Ginsburg did not miss this opportunity. She noted that the very objection raised by Justice Scalia, had been unsuccessfully leveled by the more liberal side of the Court in recent cases where the Court had upheld the validity of arbitration agreements. "Exposure to court review, plus the statute's twenty-five percent limitation, however, provide checks absent from arbitration adherence provisions this Court has upheld over the objections that they are not 'freely negotiated.'"[536]

I. Lesson #9: A Case that Wasn't

This term the Court took the unusual step of dismissing a case after it had granted certiorari and after having heard oral argument, on the basis that certiorari had been improperly granted. *Adams v. Florida Power Corp.*[537] raised the long debated question of whether disparate impact claims are available under the ADEA. The Court granted review in December 2001 and heard oral argument on March 20, 2002. Twelve days later the Court announced that it had dismissed the case in a curt order saying only that "The writ of certiorari is dismissed as improvidently granted."[538]

Adams involved a challenge by a group of workers age 40 or older to a series of reductions in force made by Florida Power. The plaintiffs alleged that more than 70 percent of the workers selected for discharge were age forty or older. By dismissing the case, the Court let stand the ruling of the Court of Appeals for the Eleventh

533. Gisbrecht v. Barnhart, 122 S. Ct. 1817, 1820 (2002).
534. *Id.* at 1830 (Scalia, J., dissenting).
535. *Id.*
536. *Id.* at 1825-27.
537. 255 F.3d 1322 (11th. Cir. 2001), *cert. dismissed*, 535 U.S. 228 (2002).
538. 535 U.S. 228 (2002).

Circuit, which found that disparate impact claims may not be brought under the ADEA.

The Court's dismissal of this case might suggest either that the Court is not sure how to deal with the substantive questions involved, or that the Court is too divided to reach any kind of decision. In any event, it is unlikely that the dismissal will be last word from the Court regarding this issue.