View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 95 | Issue 2 Article 4

2006

Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits

Christine Neylon O'Brien
Boston College

Stephanie Greene
Boston College

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Civil Rights and Discrimination Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

O'Brien, Christine Neylon and Greene, Stephanie (2006) "Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits," *Kentucky Law Journal*: Vol. 95 : Iss. 2 , Article 4.
Available at: https://uknowledge.uky.edu/klj/vol95/iss2/4

This Essay is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

ESSAYS

Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits

Christine Neylon O'Brien[1] *& Stephanie Greene*[2]

I. INTRODUCTION

Two weeks after receiving a verdict in the amount of $40,000 in a sexual harassment case brought under Title VII of the 1964 Civil Rights Act, Jenifer Arbaugh saw that verdict vacated when the defendant's motion to dismiss the case for lack of subject-matter jurisdiction was granted.[3] The defendant employer claimed that it was not an "employer" as defined in Title VII because it had fewer than the required fifteen employees.[4] The district court granted the motion, holding that Title VII's fifteen-employee threshold is a jurisdictional requirement that can be raised at any time. The appellate court affirmed the dismissal, and Arbaugh petitioned the Supreme Court for relief.[5]

In *Arbaugh v. Y & H Corporation*, the United States Supreme Court considered whether the number of employees required for an employer to be covered by federal antidiscrimination statutes is a jurisdictional matter or a question that speaks to the merits of the claim.[6] The United States circuit courts of appeals were split on whether employee-numerosity requirements should impact federal subject-matter jurisdiction or whether they

---

1 Professor of Business Law, Boston College. B.A., Boston College, 1975; J.D., Boston College Law School, 1978.

2 Associate Professor of Business Law, Boston College. B.A., Princeton University, 1980,; J.D., Boston College Law School, 1984.

3 *See* FED. R. CIV. P. 12(h)(3). The Rule states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.*

4 Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2006).

5 *See generally* Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006).

6 The Supreme Court resolved the question in *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), a case that arose from the Court of Appeals for the Fifth Circuit, 380 F.3d 219 (5th Cir. 2004).

are merely elements going to the merits of a Title VII claim.[7] In reviewing this issue, the Supreme Court held that the employee-numerosity threshold is an element of a plaintiff's claim, not an issue that determines federal court subject-matter jurisdiction.[8]

The Court's decision has important implications for litigants. How the employee-threshold requirement is characterized may be critical to the outcome of a case, as it was for Jenifer Arbaugh. If the issue is characterized as jurisdictional, questions or objections may be raised at any time, by a party or a judge, and may result in dismissal for lack of subject-matter jurisdiction even after a court has entered a verdict for a plaintiff. As a jurisdictional issue, a judge would decide the question rather than a jury. By contrast, characterizing the number of employees as an element going to the merits of a case would require a defendant to move to dismiss for failure to state a claim before or during trial.[9]

The facts and history of the *Arbaugh* case reveal that the characterization of the employee-numerosity issue involves questions of fairness and judicial efficiency. Arbaugh litigated her case, received a verdict in her favor, only to see the verdict vacated when the defendant belatedly raised the paucity of employees as a basis of a motion for summary judgment.[10] To avoid this seemingly unfair and inefficient result, a judge should raise the subject-matter jurisdiction issue on her own.[11] In fact, at oral argument, Justice Kennedy questioned whether a judge should raise the issue of the number of employees on his own initiative or "just has to watch the case sail over the waterfall."[12] Characterizing the employee-numerosity requirement as one that goes to the merits of the case, as the United States Supreme Court did in *Arbaugh*,[13] requires the defendant employer to raise the question at the outset; otherwise, the defendant is deemed to have waived this defense to liability.

The problem of distinguishing jurisdictional claims from claims that go to the merits of a case also raises fairness and efficiency issues when state law claims are presented along with federal claims, as they were in *Arbaugh*. Dismissing the case for lack of federal subject-matter jurisdiction requires pendent state claims to be "chucked out"[14] because they are not properly

7 *See* discussion *infra* Part II.

8 *Arbaugh*, 126 S. Ct. at 1238–39.

9 *See* FED. R. CIV. P. 12(b)(6), 12(h)(2). Rule 12(h)(2) states: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits." *Id.*

10 *Arbaugh*, 126 S. Ct. at 1238.

11 *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 657 (2005).

12 Transcript of Oral Argument at 11, *Arbaugh*, 126 S. Ct. 1235 (No. 04-944) (Kennedy, J., commenting).

13 *See* discussion *infra* Part III.

14 Transcript of Oral Argument at 17, *Arbaugh*, 126 S. Ct. 1235 (No. 04-944) (Scalia, J.,

before the court. While some of these claims would be dismissed without prejudice, the plaintiff would be obliged to start litigation afresh in state court in order to have an opportunity for recovery, an unwelcome burden in terms of time and expense.

This Essay examines the *Arbaugh* case, its holding, and implications. Part II sets forth the two approaches from the federal circuit courts of appeals. Part III analyzes the facts and issues involved in the *Arbaugh* case and assesses the merits of the Supreme Court's decision. Part IV discusses the immediate effect that the Supreme Court's decision has had on subsequent cases.

II. The Circuit Split

Prior to the Court's decision in *Arbaugh*, scholars and the federal courts of appeals were divided on the appropriate characterization of the employee-numerosity question.[15] The Second, Third, and Seventh Circuits, as well as the District of Columbia Circuit, held that the employee-numerosity requirement is a matter of the merits.[16] The Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits held that the requirements for employer and employees are jurisdictional.[17]

The circuits that treated the employer and employee definitions as jurisdictional did so with little analysis or discussion, merely stating that the issue is jurisdictional without offering any rationale.[18] The facts and proce-

---

commenting).

15 *See* Wasserman, *supra* note 11, at 703 (advocating characterization of the question as one of the merits of a cause of action); Stefania A. DiTrolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 Seton Hall L. Rev. 1247 (2003) (discussing that whether a defendant is an "employer" as defined by Title VII is not purely a jurisdictional fact for the court to decide; where intertwined with the merits of the case, it should be for a jury to decide); Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. Chi. L. Rev. 1047, 1076 (2005) (arguing that the issue is properly characterized as jurisdictional); Susan J. McGolrick, *Supreme Court Rules Employee Threshold in Title VII Does Not Determine Jurisdiction*, 36 Daily Lab. Rep. (BNA) at AA-1 (Feb. 23, 2006) (noting that prior to the *Arbaugh* decision "federal appeals courts were split on whether employee-numerosity requirements were jurisdictional or not").

16 *See* Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 76–83 (3d Cir. 2003); Da Silva v. Kinsho Int'l, 229 F.3d 358, 366 (2d Cir. 2000); Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 677 (7th Cir. 1998); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623–25 (D.C. Cir. 1997).

17 *See* Hukill v. Auto Care, Inc., 192 F.3d 437, 444 (4th Cir. 1999); Scarfo v. Ginsberg, 175 F.3d 957, 960 (11th Cir. 1999); Armbruster v. Quinn, 711 F.2d 1332, 1335 (6th Cir. 1983), *overruled in part by* Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006); Childs v. Local 18, IBEW, 719 F.2d 1379, 1382 (9th Cir. 1983); Dumas v. Town of Mt. Vernon, 612 F.2d 974, 980 (5th Cir. 1980), *overruled in part by* Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006); Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980).

18 *See, e.g.*, *Scarfo*, 175 F.3d at 961 (assuming, without explaining, that the determination of whether a defendant is an "'employer' within the definition of Title VII is a threshold juris-

dure in *Hukill v. Auto Care, Inc.*[19] were similar to those in the *Arbaugh* case. In *Hukill*, the plaintiff employee had prevailed on a claim under the Family and Medical Leave Act (FMLA) and received an award from a jury. Post trial, the defendants sought to vacate the judgment and have the case dismissed for lack of subject-matter jurisdiction, arguing that the defendant was not an employer within the meaning of the FMLA because it did not have at least fifty employees as required by the Act.[20] The Court of Appeals for the Fourth Circuit stated that "a district court lacks subject-matter jurisdiction over an FMLA claim if the defendant is not an employer as that term is defined in the FMLA."[21]

Courts that rejected the jurisdictional approach to the employee-threshold issue emphasized that the federal courts have jurisdiction, provided a claim is non-frivolous and arises under federal law.[22] Judicial administration reasons further supported characterizing the numerosity requirement as an element of a claim rather than a jurisdictional requirement. In *Sharpe v. Jefferson Distributing*, the court stated, "[s]urely, the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail."[23] The Court of Appeals for the Third Circuit agreed, stating:

> [holding the requirement to be jurisdictional] would require a federal court to determine whether a company had fifteen employees during the relevant period, even if the parties so stipulated. To require a federal court to engage in such a fact-intensive inquiry *sua sponte*—which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets—appears to be a waste of scarce judicial resources . . . .[24]

---

dictional issue"); *Childs*, 719 F.2d at 1382 (dismissing Title VII claim because plaintiff did not present evidence that defendant had at least fifteen employees); *Owens*, 636 F.2d at 287 ("It is true that Congress maintained a 15-employee limitation in Title VII, and that this limitation is jurisdictional."). *But see Nesbit*, 347 F.3d at 76–83 (suggesting and then rejecting several plausible arguments, including a commerce clause argument and statements on jurisdiction in other Supreme Court cases, for making the fifteen-employee requirement jurisdictional).

19 *See generally Hukill*, 192 F.3d 437.

20 *See id.* at 438.

21 *Id.* at 441.

22 *See* Papa v. Katy Indus., 166 F.3d 937, 939–40 (7th Cir. 1999); Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 677 (D.C. Cir. 1998); *accord* EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623 (D.C. Cir. 1997) ("Because the [ADA] claim arises under the laws of the United States and is neither 'immaterial and made solely for the purpose of obtaining jurisdiction' nor 'wholly insubstantial and frivolous,' the district court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331.") (quoting Bell v. Hood, 327 U.S. 678, 682–83 (1946)).

23 *Sharpe*, 148 F.3d at 677–78.

24 Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003).

The court stated that it doubted "Congress intended such a result."[25]

In *Da Silva v. Kinsho International*,[26] the Court of Appeals for the Second Circuit identified three important purposes for which the distinction between jurisdiction and merits must be clarified.

> First is the obligation of a court, on its own motion, to inquire as to subject matter jurisdiction and satisfy itself that such jurisdiction exists. Second is a federal court's authority to exercise supplemental jurisdiction . . . over claims not within federal jurisdiction, a power available only as to claims that properly invoke the court's subject matter jurisdiction. Finally, a judgment rendered by a court lacking subject matter jurisdiction is subject to collateral attack as void . . . .[27]

In the *Da Silva* case, the court found that "the institutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject-matter jurisdiction."[28] The court was concerned with the adjudication of pendent state claims as well as the obligation on the court to make its own determination regarding subject-matter jurisdiction.[29]

III. Facts and Judicial History in *Arbaugh v. Y & H Corp.*

A. Federal District Court

In 2000–2001, Jenifer Arbaugh worked as a bartender-waitress at the Moonlight Café, incorporated in the State of Louisiana under the name Y & H Corporation after its two officers, directors, and shareholders, Yalcin Hatipoglu and Hassan Khaleghi.[30] Arbaugh asserted that she was forced to resign in February 2001 because of a hostile work environment created by Yalcin Hatipoglu. In the trial before a magistrate judge at the district court level, the jury awarded her $40,000 in damages.[31] Shortly after that award, the defendants filed a motion to dismiss based upon lack of subject-

25 *Id.*

26 Da Silva v. Kinsho Int'l, 229 F.3d 358 (2d Cir. 2000).

27 *Id.* at 361–62.

28 *Id.* at 365 (citing Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 Cal. L. Rev. 200 (1984)).

29 *Id.*

30 Arbaugh v. Y & H Corp., No. 01-3376, 2003 U.S. Dist. LEXIS 5568, at *2–3 (E.D. La. Apr. 2, 2003). Yalcin Hatipoglu was a listed defendant in the plaintiff's action for sexual harassment under Title VII as well as the subchapter S corporation, Y & H. The wives of Yalcin and Hassan were also shareholders.

31 *Id.* The damages included $5,000 for backpay, $5,000 compensatory, and $30,000 in punitives. Arbaugh v. Y & H Corp., 380 F.3d 219, 221–22 (5th Cir. 2004).

matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3).[32] The defendant's motion was converted to a motion for summary judgment under Rule 56 and the motion was granted.[33] The district court noted that the plaintiff bore the burden of showing that there was subject-matter jurisdiction. Following post-trial discovery, the court focused its decision on facts determining whether certain individuals qualified as employees within the meaning of Title VII.[34] Finding that the individuals in question did not qualify as employees, the court concluded that there was no genuine issue of material fact and that the defendant employer was entitled to judgment as a matter of law.[35]

B. The Court of Appeals for the Fifth Circuit

The Court of Appeals for the Fifth Circuit affirmed the decision of the district court, finding that the defendant's "failure to qualify as an 'employer' under Title VII deprives a district court of subject-matter jurisdiction."[36] The appellate court concluded that the trial court properly followed precedent within the circuit regarding the characterization of the question about the number of employees in a Title VII case.[37] The court recognized that several federal circuit courts of appeals characterized the employee-numerosity issue as one going to the merits of the case. Nevertheless, the Fifth Circuit was bound by its precedent that the issue was jurisdictional.[38]

The Fifth Circuit had addressed the precise issue raised in *Arbaugh* in several cases. In *Dumas v. Town of Mt. Vernon*,[39] *Womble v. Bhangu*,[40] and *Greenlees v. Eidenmuller Enterprises*,[41] the court found that in a case involving a claim under Title VII, a plaintiff's failure to establish that the defendant had fifteen or more employees deprived the court of subject-matter jurisdiction.[42] Viewing the issue as jurisdictional, the appellate court ex-

32 *Arbaugh*, 2003 U.S. Dist. LEXIS 5568, at *1.

33 *Id.* at *2.

34 *See infra* note 42.

35 *Arbaugh*, 2003 U.S. Dist. LEXIS 5568, at *11, *29.

36 *Arbaugh*, 380 F.3d at 224 (citing Dumas v. Mt. Vernon, 612 F.2d 974, 980 (5th Cir. 1980), *overruled in part by* Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006)).

37 *Id.*

38 *Id.* at 224–25.

39 *Dumas*, 612 F.2d 974.

40 Womble v. Bhangu, 864 F.2d 1212 (5th Cir. 1989).

41 Greenlees v. Eidenmuller Enters., 32 F.3d 197 (5th Cir. 1994).

42 In these cases, however, as in other circuits taking the jurisdictional approach, the court merely assumed that employee-numerosity was a question of subject-matter jurisdiction without offering any justification for its conclusion. *See Greenlees*, 32 F.3d at 198 (stating that the court lacked subject-matter jurisdiction over Title VII claim if the defendant did not meet the definition of employer); *Womble*, 864 F.2d at 1213 ("If Bhangu did not meet the statutory definition of 'employer,' then the court *did* lack subject matter jurisdiction over him.");

amined the trial court's reasoning in determining that the employer did not have the required fifteen employees.[43] The appellate court agreed with the lower court's conclusion that the employer did not have at least fifteen employees during the relevant time period and thus affirmed the motion to dismiss for lack of subject-matter jurisdiction.[44]

C. Decision of the United States Supreme Court

On February 22, 2006, the Court issued a unanimous opinion written by Justice Ginsburg.[45] The Court recognized that "whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a

---

Dumas, 612 F.2d at 980 (concluding that the dismissal of a Title VII claim for lack of subject-matter jurisdiction was proper where the defendant lacked employer status). *See* discussion *supra* notes 13–15 and accompanying text.

In *Arbaugh*, the court rejected the plaintiff's argument that *Clark v. Tarrant County, Texas*, 798 F.2d 736 (5th Cir. 1986), should apply. *Arbaugh*, 380 F.3d at 224. In *Clark*, the court held that "[w]here . . . questions concerning subject matter jurisdiction are intertwined with the merits, the court should not dismiss [a Title VII claim] for lack of subject matter jurisdiction unless the claim is frivolous or clearly excluded by prior law." *Clark*, 798 F.2d at 739. In *Arbaugh*, the appellate court held that because the issue was first addressed in *Dumas*, that precedent was binding, and to the extent that *Clark* conflicted with the precedent established in *Dumas*, *Clark* must be viewed as non-binding. *Arbaugh*, 380 F.3d at 224–25. Other circuits taking the jurisdictional approach to the employee-numerosity issue also struggled with the question of jurisdictional issues being intertwined with the merits of the case and concluded that such mixed cases should be decided on the merits. *See* Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1258 (11th Cir. 1997); Wheeler v. Hurdman, 825 F.2d 257, 259 (10th Cir. 1987).

43 *Arbaugh*, 380 F.3d at 230. The Court of Appeals for the Fifth Circuit noted that the lower court used an economic realities test to assess the employment status of several individuals. The Fifth Circuit had adopted and followed a hybrid economic realities/common law control test from the Court of Appeals for the District of Columbia. *See* Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979). Use of the test in the Fifth Circuit was well-settled. *See, e.g.*, Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986); Mares v. Marsh, 777 F.2d 1066, 1067–68 (5th Cir. 1985). Subsequent to the time when the federal district court decided *Arbaugh*, the United States Supreme Court decided *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). In *Clackamas*, the United States Supreme Court adopted a six-factor test advanced by the EEOC to determine whether a director/shareholder is an employee. *Id.* at 449–50. The factors are: whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; whether and, if so, to what extent the organization supervises the individual's work; whether the individual reports to someone higher in the organization; whether and, if so, to what extent the individual is able to influence the organization; whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; whether the individual shares in profits, losses, and liabilities of the organization. *Id.* In *Arbaugh*, the court found that the trial court's conclusion on the status of various individuals as employees would have been the same if the factors adopted by the Supreme Court in *Clackamas* were used. *Arbaugh*, 380 F.3d at 230.

44 *Arbaugh*, 380 F.3d at 231.

45 Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006). Justice Samuel Alito replaced Justice Sandra Day O'Connor after the oral arguments took place, but neither participated in the *Arbaugh* decision. *See* McGolrick, *infra* note 90.

close question."[46] The Court concluded, however, that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."[47]

The Court noted that in approaching the question of whether the employee-numerosity issue is jurisdictional or an element of the merits, it needed to be cautious about its use of the word "jurisdiction," because courts had frequently used the term too loosely.[48] Noting that cases are sometimes dismissed "for lack of jurisdiction" without regard to whether federal subject-matter jurisdiction or failure to state a claim was at issue, the Court referred to such instances as "'drive-by jurisdictional rulings,' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit."[49]

The Court recognized Congress's intent to grant broad subject-matter jurisdiction to the federal courts over issues involving Title VII and that federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[50] Furthermore, the Court stated that Congress's intent to provide a federal forum for Title VII claims is strengthened by Title VII's specific jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3).[51]

Against this background, the Court provided three reasons to support its conclusion that the employee-numerosity issue is not jurisdictional. First, the Court stated that "subject-matter jurisdiction, because it rests on the court's power to hear a case, can never be forfeited or waived."[52] If the employee-numerosity issue is characterized as jurisdictional, the courts would be required to raise the issue on their own initiative. This requirement, according to the Court, is not supported by the text of Title VII.[53] Second, because an employee-numerosity issue often turns on contested facts, the Court saw the question as an element for the jury to decide rather than the judge.[54] Finally, the Court reasoned that dismissing a case for want of subject-matter jurisdiction based on the number of employees would unduly interfere with pendent state claims that had been fully tried to a jury.[55] These three points, according to the Court, support a conclusion that the

46 *Arbaugh*, 126 S. Ct. at 1245 (citing Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000)).

47 *Id.*

48 *Id.* at 1242.

49 *Id.* at 1242–43 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)).

50 *Id.* at 1239 (citing 28 U.S.C. § 1331).

51 *Id.*

52 *Id.* at 1244 (citing United States v. Cotton, 535 U.S. 625, 630 (2002)).

53 *Id.*

54 *Id.*

55 *Id.*

employee-numerosity issue must be treated as an element of a claim and not as a subject-matter jurisdictional prerequisite unless Congress amends Title VII to indicate otherwise.[56]

IV. The Federal Courts Apply *Arbaugh*

Since the Supreme Court issued its opinion in *Arbaugh*, numerous courts have discussed and applied the decision in employment discrimination and other contexts. A survey of the first wave of subsequent federal court decisions indicates that *Arbaugh* will have a broad impact because the cases relate to all areas of federal court jurisdiction. The Court's bold pronouncement in *Arbaugh*—that statutory definitions and provisions are not issues of subject-matter jurisdiction unless characterized as such by Congress—has necessitated that the lower federal courts announce their own realignment of the issues where their past precedent is in conflict with the Supreme Court's current bright-line rule. Following the Court's warning in *Arbaugh* about "drive-by jurisdictional rulings," courts must proceed with new awareness when employing the term "jurisdictional."

The federal courts have the power to decide if they have jurisdiction pursuant to a constitutional or congressional grant. Once a federal court assumes jurisdiction in a case, it will determine if the requisite elements of cause(s) of action are established, and consequently, whether the plaintiff's case has merit. Where a defect has not been classified by Congress as one of subject-matter jurisdiction, the courts must deal with the issue as one of the merits of the claim until such time as Congress decides to change the classification. Procedurally, where the matter is not jurisdictional, the courts must convert a defendant's motion to dismiss for lack of subject-matter jurisdiction to another appropriate motion, such as one for summary judgment, thus disposing of the case on its merits. In contrast, where an issue is one of subject-matter jurisdiction, the courts are obliged to raise the question even if the parties do not, and to deal with the question at any time, even after a decision on the merits has been reached.

A. Securities Laws and the Extraterritorial Reach of RICO

The range of cases affected by *Arbaugh* is evident from a brief review of recent federal cases. In *Partington v. American International Specialty Lines Insurance Co.*, the Court of Appeals for the Fourth Circuit examined the impact of *Arbaugh* in a case alleging violations of the Securities Act of 1933 and various state law claims.[57] As the Fourth Circuit noted, the Supreme Court in *Arbaugh* "clarified the distinction between the requirements for

56 *Id.* at 1245.

57 Partington v. Am. Int'l Specialty Lines Ins. Co., 443 F.3d 334 (4th Cir. 2006).

federal subject matter jurisdiction and the elements of a federal claim of relief."[58] In light of the previous "lack of clarity" in the case law regarding this distinction, the Court in *Arbaugh* felt called upon to establish a "'readily administrable bright line' to resolve future confusion."[59] The *Partington* Court applied the bright line from *Arbaugh* to permit plaintiff Partington's individual verdict against the defendant Charterhouse and its insurers to stand because the federal district court had federal-question jurisdiction and jurisdiction under the Securities Act of 1933.[60] This was so even though Partington had not purchased the securities for himself and the language in the 1933 Act referred to a "person purchasing."[61] The Fourth Circuit found that Congress did not intend to make this language a jurisdictional limitation on the federal courts' power to hear 1933 Act claims.[62] Because of the absence of a clear intent to restrict or limit jurisdiction of the federal courts through this provision, the court concluded that the "plaintiff's purchase [is] an ingredient of the claim for relief."[63] Since the provision was an element of the case, rather than a matter of subject-matter jurisdiction, it was too late for the defendants or the court to raise it.

In *Ayyash v. Bank Al-Madina,* the United States District Court for the Southern District of New York was faced with various motions to dismiss. The defendants were all Lebanese nationals employed by banks that the plaintiff alleged defrauded him of money in violation of, inter alia, the Racketeer Influenced and Corrupt Organizations Act (RICO).[64] One such motion, brought pursuant to Federal Rule of Civil Procedure 12(b)(1), related to the lack of subject-matter jurisdiction under RICO in light of the limited extraterritorial reach of the statute.[65] The plaintiff relied upon the "conduct" test to establish jurisdiction, namely that the conduct material to the completion of the fraud, and that directly caused the injury, occurred in the United States.[66] The district court noted that the Supreme Court's decision in *Arbaugh* "may require that the Court of Appeals review its treatment of the question of RICO's extraterritorial effect" because *Arbaugh* presumes that a limitation on coverage is "nonjurisdictional" unless

58 *Id.* at 339.

59 *Id.* (quoting *Arbaugh*, 126 S. Ct. at 1245).

60 *Partington*, 443 F.3d at 339–40. Partington obtained a default judgment against the appellants. *Id.* at 339.

61 *Id.* at 340 (citing *Arbaugh*, 126 S. Ct. at 1245 n.11).

62 *Id.*

63 *Id.* at 339.

64 Ayyash v. Bank Al-Madina, No. 04 Civ. 9201(GEL), 2006 WL 587342 (S.D.N.Y. Mar. 9, 2006).

65 *Id.* at *1, *4 (citing North-South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1052 (2d Cir. 1996)).

66 *Id.* (quoting *Al-Turki*, 100 F.3d at 1052).

Congress characterizes it as jurisdictional.[67] In the past, the Second Circuit had characterized the limits on RICO's extraterritorial application as a constraint on a court's subject-matter jurisdiction.[68] The district court in *Ayyash* noted the significant consequences that result from labeling an issue jurisdictional, as detailed in *Arbaugh*. Specifically, the court noted that the issue cannot be waived, can be raised at any time even after trial, and that factual disputes regarding jurisdictional matters are frequently resolved by judges prior to trial.[69]

B. Labor and Employment Cases

1. Procedural Implications of "Employer" Status.—Several cases involving allegations of labor or employment discrimination have also discussed the impact of the Supreme Court's decision in *Arbaugh*. A case from the Court of Appeals for the Fifth Circuit, *Minard v. ITC Deltacom*,[70] extensively quoted the Supreme Court's decision in *Arbaugh*.[71] This was due, perhaps in part, to the fact that *Arbaugh* arose from the same circuit, but also to the fact that the cases have significant similarities. *Minard* involved the definition of "eligible employee" under another equal employment opportunity statute, the Family and Medical Leave Act of 1993 (FMLA).[72] The statute "entitles [such] eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons including a serious health condition that makes the employee unable to perform the functions of the position."[73] An "employer" under the statute is "engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees."[74]

The plaintiff Minard requested FMLA leave "to undergo surgery to treat a serious medical condition."[75] She received a memorandum that stated she was an "eligible employee," that she had a right to the leave, and

67 *Ayyash*, 2006 WL 587342, at *4 n.2 (quoting Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006)).

68 *Id.* (quoting *Al-Turki*, 100 F.3d at 1051).

69 *Id.* (quoting *Arbaugh*, 126 S. Ct. at 1243–45). The district court in *Ayyash* denied the defendant's motion to dismiss and permitted discovery to proceed, but limited to jurisdictional issues. *Ayyash*, 2006 WL 587342, at *8.

70 Minard v. ITC Deltacom, 447 F.3d 352 (5th Cir. 2006).

71 *See id.* at 353, 355–57 (quoting *Arbaugh*, 126 S. Ct. at 1235, 1238, 1245).

72 29 U.S.C. § 2601 (2006).

73 *Minard*, 447 F.3d at 353 (citing 29 U.S.C. § 2612(a)(1)(d)).

74 *Id.* (citing 29 U.S.C. § 2611(4)(i)). The definition of employer applies if the employer has fifty employees or more "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." *Id.* Excluded from "eligible employee" is "any employee who is employed at a worksite at which or within 75 miles of which, the employer employs less than 50 employees." *Id.* (citing 29 U.S.C § 2611(2)(b)(ii)).

75 *Id.* at 354.

that the leave "would be counted against her annual FMLA entitlement."[76] When Minard sought to return to work as entitled under the statute, the defendant employer terminated her because he had discovered that she was not eligible under the Act at the time she requested the leave.[77] This was so because she worked at a field sales office and the company employed less than fifty employees at or within seventy-five miles of her worksite.[78] Minard filed suit under the FMLA, and amended her complaint to include that the employer was equitably estopped from denying that she was an eligible employee because she had relied to her detriment upon the employer's representation that she was covered by the protections of the statute.[79]

The district court granted the employer's motion for summary judgment, finding that the defendant was not an "employer" and that the FMLA and the doctrine of equitable estoppel did not apply.[80] On appeal, the Court of Appeals for the Fifth Circuit interpreted the district court's ruling as a determination that the court lacked subject-matter jurisdiction because Minard was not an eligible employee.[81] Reviewing the matter *de novo*, the Fifth Circuit relied upon the Supreme Court's decision in *Arbaugh*.[82] There, the court noted, the numerical qualification or threshold in Title VII's definition of "employer" did not "circumscribe federal court subject-matter jurisdiction."[83] Rather, "the employee-numerosity requirement relates to the substantive adequacy of Arbaugh's Title VII claim."[84] The *Arbaugh* Court established a bright-line rule that statutory threshold limitations on coverage will not affect subject-matter jurisdiction explicitly required by Congress.[85]

The Court of Appeals for the Fifth Circuit in *Minard* concluded that the definition section of FMLA, which defines thirteen terms and contains the fifty employee threshold, is similarly "a substantive ingredient of a plaintiff's claim for relief, not a jurisdictional limitation."[86] The court noted that the definition section did not explicitly make these elements jurisdictional, that it was separate from the jurisdictional section, and that the Supreme Court in *Arbaugh* explicitly abrogated previous circuit court decisions find-

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* at 354–55.

81 *Id.* at 355.

82 *Id.*

83 *Id.* at 355–56 (citing *Arbaugh*, 126 S. Ct. at 1238).

84 *Id.* at 356 (citing *Arbaugh*, 126 S. Ct. at 1238–39).

85 *Id.* (citing *Arbaugh*, 126 S. Ct. at 1245).

86 *Id.*

ing such employee-numerosity requirements to be jurisdictional.[87] In addition to *Arbaugh*, the *Minard* court noted another post-*Arbaugh* case where the Eleventh Circuit applied *Arbaugh*'s bright-line rule that the employee-numerosity requirement in Title VII is an element of the merits rather than one of subject-matter jurisdiction.[88]

With respect to the plaintiff's equitable estoppel argument, the appellate court concluded that the employer "unintentionally made a definite misrepresentation to Ms. Minard that she was an 'eligible employee' under FMLA at the time she requested leave; that she reasonably relied upon that misrepresentation in taking leave," and thus the case was remanded to the trial court to determine whether the plaintiff had medical alternatives to surgery.[89] This was a material issue of fact relevant to whether she relied to her detriment upon the employer's misrepresentation in deciding to take the leave.

The *Minard* decision illustrates the direct impact of *Arbaugh* upon cases that involve employee-threshold requirements under other equal employment opportunity statutes. Rather than allowing dismissal for lack of subject-matter jurisdiction, the plaintiff was allowed her day in court to prove that she had a FMLA claim. In *Minard*, unlike *Arbaugh*, the defendant timely raised the employee-threshold defense at the pleadings stage. However, the fact that the defendant explicitly misrepresented that Ms. Minard was qualified at the time she decided to take the leave allows her to assert that the employer should be equitably estopped from denying her eligibility. The Fifth Circuit remanded to give the plaintiff an opportunity to provide factual documentation that she had other treatment options that she could and would have pursued in order to avoid the leave and retain her position, had she been correctly informed that she was not eligible for the leave.[90]

Two cases from Texas involving challenges to "employer" status, as in *Arbaugh*, further illustrate the procedural and tactical implications of the Supreme Court's decision. In *Simons v. Harrison Waldrop & Uhereck, LLP*, the defendant moved to dismiss an Age Discrimination in Employment Act (ADEA) case, arguing that the court lacked subject-matter jurisdiction because the plaintiff did not prove by a preponderance of the evidence that defendant was an "employer" under the ADEA.[91] The district court noted

87 *Id.* at 357.

88 *Id.* (citing Faulkner v. Woods Transp., Inc., 174 F. App'x 525 (11th Cir. 2006)).

89 *Id.* at 359.

90 *Id. See also* Susan J. McGolrick, *FMLA, Fifth Circuit Holds 50-Employee Threshold for FMLA Coverage Not a Jurisdictional Limit*, 76 Daily Lab. Rep. (BNA) at AA-1 (Apr. 20, 2006) (noting that Fifth Circuit reinstated Melissa Minard's FMLA claim and "held that she may proceed with her equitable estoppel claim based on the company's representation to her before she underwent surgery that she was eligible to take FMLA leave").

91 Simons v. Harrison Waldrop & Uhereck, LLP, No. Civ.A. V-05-71, 2006 WL 763619

that in light of *Arbaugh*, employee-numerosity requirements are not a limitation on the jurisdiction of the federal courts; rather, they are "a substantive ingredient of a . . . claim for relief."[92] The district court explicitly extended the Supreme Court's conclusion regarding Title VII to the ADEA and also noted that plaintiff's pleadings were sufficient to establish this element for purposes of a Rule 12(b)(6) motion.[93] It is interesting to note that the plaintiff's affidavit asserted that the defendant employed twenty or more employees, including partners, in order to meet the employee-numerosity threshold under the ADEA.[94] The plaintiff still may encounter significant barriers to establishing that the defendant is an "employer," because of her inclusion of partners in the employee count.[95] The second decision, *King v. Enterprise Leasing Co. of DFW*, also involved denial of a 12(b)(1) motion.[96] In *King*, the district court responded to the defendant's motion that because it was not the plaintiff's "employer" under Title VII and other federal and state statutes, the court lacked subject-matter jurisdiction.[97] The court denied the 12(b)(1) motion in light of *Arbaugh* since it perceived the "employer" issue in *King* as analogous to that in *Arbaugh*.[98] Again in *King*, as in *Simons*, once the defendant's motion fell under Rule 12(b)(6), the court was required to accept well-pleaded facts in the plaintiff's complaint as true, and the plaintiff survived that motion.[99]

2. Procedural Implications of Arbaugh *in Wage and Hour Cases.*—In another labor case, *Fernandez v. Centerplate/NBSE*, the Court of Appeals for the District of Columbia Circuit affirmed a federal district court's dismissal of a

(S.D. Tex. Mar. 24, 2006).

92 *Id.* at *1 (quoting Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1238 (2006)).

93 *Id.* at *1–2.

94 *Id.* at *2.

95 In light of the Supreme Court's decision in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449–50 (2003), whether partners are classified as employees or employers would depend upon the right to control as elucidated by the EEOC's six factor test. *See* discussion *supra* note 43; Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L.J. 781, 825 (2003) (discussing criteria for determining partners as employees and *Clackamas* decision); Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites 'Control' as the Key to Distinguishing Employers from Employees under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761, 787–92 (2003) (discussing when partners may be employees).

96 King v. Enter. Leasing Co. of DFW, No. 3:05-CV-0026-D, 2006 WL 784885 (N.D. Tex. Mar. 28, 2006).

97 *Id.* at *1.

98 *Id.* The "employer" issue in *King* was somewhat different from *Arbaugh* because it did not involve the number of employees. *Id.*

99 *Id.* at *2. This does not mean that King will win her case, for as the court noted, the defendants could still obtain summary judgment or defeat King's claims at trial. *Id.* at *5.

Fair Labor Standards Act (FLSA) case.[100] The plaintiff there sought federal-question jurisdiction for what was essentially a violation of a collective bargaining agreement.[101] The Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the case, but its rationale in doing so was different, hinging on the distinction between matters of subject-matter jurisdiction and the elements or merits of a plaintiff's claim that were outlined by the Supreme Court in *Arbaugh*.[102] Although the plaintiff Fernandez still lost her case, her right to be heard in federal court on the part of her claim arguably covered by a federal statute was upheld. The appellate court in *Fernandez* agreed with the plaintiff's argument that the dismissal should not be based upon Rule 12(b)(1) subject-matter jurisdiction. Instead, the court converted the dismissal to a summary judgment for the defendant employer under Federal Rule of Civil Procedure 56.[103] The court of appeals noted that the plaintiff's claim was one that arose "under the laws of the United States and [wa]s neither 'immaterial and made solely for the purpose of obtaining jurisdiction' nor 'wholly insubstantial and frivolous.'"[104]

> [F]ailure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law . . . it must be decided after and not before the court has assumed jurisdiction over the controversy.[105]

The appellate court indicated that the district court should have granted the motion for summary judgment, a motion that would have reflected the failure on the merits rather than on jurisdiction. In reaching its conclusion, the court cited the Supreme Court's holding in *Arbaugh* that unless Congress specifies that a limitation on statutory coverage is jurisdictional, it should be treated as "an element of a plaintiff's claim for relief."[106]

---

100 Fernandez v. Centerplate/NBSE, 441 F.3d 1006, 1007 (D.C. Cir. 2006).

101 *Id.*

102 *Id.* at 1007, 1009 (citing Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006)).

103 *Id.* at 1009–10 (citing *Arbaugh*, 126 S. Ct. at 1244 n.10).

104 *Id.* at 1009 (quoting EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623 (D.C. Cir. 1997)).

105 *Id.* (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

106 *Id.* (citing *Arbaugh*, 126 S. Ct. at 1245). The appellate court in *Fernandez* addressed the plaintiff's claim that FLSA provides "federal question jurisdiction to review [an employer's] alleged breach of a collective bargaining agreement." *Id.* at 1008. On this question, the court found that since FLSA does not contain a provision authorizing enforcement of a collective bargaining agreement, and no FLSA violation occurred, Fernandez's dispute regarding the enforcement of a collective bargaining agreement "must be dismissed for lack of subject matter jurisdiction." *Id.* at 1008–10. The plaintiff strove to show that the employer had not paid her time and one-half for hours worked in excess of eight per day under the umbrella of an FLSA claim in order to pursue the matter in federal district court. As the circuit court

3. Exhaustion Requirements.—Several federal district court cases have discussed the Supreme Court's decision in *Arbaugh* with respect to statutory requirements that a plaintiff timely exhaust his or her administrative agency remedies before proceeding to federal court. Two such cases arose in the federal district court in Maryland. The first, *Walton v. Guidant Sales Corp.*, was brought pursuant to the Americans with Disabilities Act (ADA).[107] In *Walton*, the plaintiff sought to bring his claim in federal district court despite his tardy filing of an EEOC claim. The court noted that the plaintiff failed to exhaust his administrative agency remedies because he failed to file a formal charge within 300 days of his termination.[108] Despite the plaintiff's argument that he thought he had filed a charge within the time limit such that the statute of limitations should be equitably tolled, the district court found that the filing of a sworn charge with the EEOC is a mandatory prerequisite to the validity of the charge, and the evidence presented regarding his interaction with the EEOC did not give rise to equitable tolling of the deadline.[109] Walton's case was dismissed, but in its decision, the court stated that exhaustion is not a matter of subject matter jurisdiction; rather, it is a question of law that the judge must decide.[110] The district court wrote that in light of the Supreme Court's recent decision in *Arbaugh*, where "the employee-numerosity requirement of Title VII [was deemed to be] an ingredient of the plaintiff's claim and not a jurisdictional prerequisite," the practice of characterizing the failure to exhaust as a failure of subject-matter jurisdiction is called into question.[111] As the district court noted, the characterization of the exhaustion issue is important because if it were cast as a question of subject-matter jurisdiction, then every federal judge "would be required to inquire *sua sponte* into whether every employment discrimination plaintiff filed a timely administrative charge."[112]

---

noted, however, FLSA merely requires that a covered employee receive time and one-half for hours worked in excess of forty hours in a calendar week. It was undisputed that the employer had complied with the statutory requirement of overtime for work in excess of forty hours per week. The plaintiff adopted a bootstrap approach, arguing that because the employer violated the collective bargaining agreement with her union regarding overtime pay for work in excess of eight hours per day, it also violated the FLSA. *Id.* at 1007. She relied upon language in a Department of Labor regulation that she asserted "brought unpaid overtime compensation for hours worked in excess of a daily rate . . . under the coverage of the FLSA." *Id.* at 1008 n.1. The circuit court noted that the relevant language of the regulation simply indicated that FLSA did not relieve an employer of contract obligations, but found that this did not provide a basis for using FLSA to enforce the contract. *Id.*

107 Walton v. Guidant Sales Corp., 417 F. Supp. 2d 719 (D. Md.), *aff'd*, No. 06-1351, 2006 WL 2974337 (4th Cir. Oct. 17, 2006).

108 *Id.* at 720, 723–24.

109 *Id.* at 724.

110 *Id.* at 721 n.2.

111 *Id.* (citing *Arbaugh*, 126 S. Ct. at 1245).

112 *Walton*, 417 F. Supp. 2d at 721 n.2.

Another exhaustion case, *Brown v. McKesson Bioservices Corp.*, involved various claims including retaliation brought under Title VII of the Civil Rights Act of 1964.[113] The plaintiff acted pro se when filing complaints with the state human rights commission, the Equal Employment Opportunity Commission, and the state unemployment commission.[114] In addressing motions to dismiss or for summary judgment in the case, the district court cited the Supreme Court's decision in *Arbaugh*, and indicated that the instant court's previous treatment of motions to dismiss for failure to exhaust administrative remedies as governed by Rule 12(b)(1) "might be incorrect."[115] The district court elaborated on the proper procedural treatment, namely that where a motion regards an issue of subject-matter jurisdiction, the proper motion is governed by Rule 12(b)(1) "and a court can consider matters outside of the pleadings in its analysis."[116] In contrast, on issues characterized as "a failure to state a claim, a court may consider only the pleadings unless it converts the motion to one for summary judgment."[117]

V. Conclusion

The *Arbaugh* Court established a bright-line rule to classify what are matters of subject-matter jurisdiction and what are not. The Court seemed compelled to draw a bright line, at least in part because of the significant consequences of classifying an element as one of subject-matter jurisdiction, but also because the rule would generally impact the jurisdiction of the federal courts in all types of cases, not just those pertaining to employment discrimination. The Court in *Arbaugh* held that the employee-numerosity threshold in Title VII, and implicitly in other employment discrimination statutes, is not a provision that must be met for the federal courts to have subject-matter jurisdiction in a case because Congress did not explicitly make it so. Nonetheless, the legislature is free to amend the statutes to make such thresholds a matter of subject-matter jurisdiction in the future.

113 Brown v. McKesson Bioservices Corp., No. Civ.A. KDC2005-0730, 2006 WL 616021, at *1–2 (D. Md. Mar. 10, 2006).

114 *Id.*

115 *Id.* at *3 (citing *Arbaugh*, 126 S. Ct. 1235).

116 *Brown*, 2006 WL 616021, at *3.

117 *Id.*