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Review of Labor and Employment Law Decisions from the United States Supreme Court's 2010-11 Term

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I. Introduction

In the 2010–11 term, the U.S. Supreme Court decided nine significant labor and employment cases. Although some of these cases affected only the construction of a specific statute or constitutional provision, several of them addressed issues likely to affect the interpretation and implementation of a wide range of federal employment laws. Most of these decisions, rather than definitively resolving a question, raise a range of new issues likely to be litigated for years to come. Thus, for practitioners and academics alike, recognizing the new questions that have now been raised is at least as important as understanding what matters the Court put to rest.

II. *Wal-Mart Stores, Inc. v. Dukes*[1]

The most publicized and least clear employment decision of the term was *Wal-Mart Stores, Inc. v. Dukes*. The plaintiffs alleged that the retail giant had engaged in gender-based discrimination in pay and promotions, and sought to represent a class of about 1.5 million women who worked at Wal-Mart stores throughout the country.[2] The district court certified such a class, and a sharply divided en banc Ninth Circuit substantially affirmed that order.[3]

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1. 131 S. Ct. 2541 (2011).

2. *Id.* at 2547.

3. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd in relevant part*, 603 F.3d 571, 628 (9th Cir. 2010) (en banc), *rev'd*, Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011).

The Supreme Court overturned the certification order on three distinct grounds. First, by a 5–4 majority the Court held that certification was improper because the plaintiffs failed to establish that there were "questions of law or fact common to the class," as required by Federal Rule of Civil Procedure 23(a)(2).[4] Second, the Court held unanimously that in cases seeking individualized monetary awards, a class must be certified under Rule 23(b)(3), not (as had been common in employment discrimination cases) under Rule 23(b)(2).[5] Third, the Court unanimously agreed that in a class action seeking monetary relief, a defendant ordinarily has a right to demand individualized hearings regarding whether a particular class member was a victim of unlawful conduct and regarding the amount of monetary relief to which the individual is entitled.[6]

The *Dukes* decision seems likely to affect class actions to enforce any federal labor or employment law. Whether the decision will affect collective actions is already being litigated in the lower courts.[7] The opinion also raises important questions regarding the type of evidence that can be relied on to establish the existence of systemic intentional discrimination.[8]

A. Commonality

The Court's discussion of Rule 23(a)'s commonality requirement is unlike most Supreme Court decisions. Ordinarily, the Court grants review to decide a specific, identified question of law, and in resolving that issue, the Court establishes a standard to control similar future cases. In *Dukes*, on the other hand, the majority's discussion of commonality reads much like a district court decision, piling reason upon reason for concluding that the requisite commonality was not established.[9] Many of the majority's objections to the class are no more than a paragraph long; some are set out in only a sentence or two. This cascade of arguments, although often written in the pointed style for which Justice Scalia is renowned, does not set forth specific standards to guide the lower courts.

Evaluating the Court's commonality analysis is complicated by the truly unique circumstances of the case. The proposed class action would have challenged the conduct of thousands of managers who worked in approximately 3,400 different stores.[10] The promotion and

4. *Dukes*, 131 S. Ct. at 2548, 2558 (quoting FED. R. CIV. P. 23(a)(2)).
5. *Id.* at 2557.
6. *Id.* at 2560.
7. *See infra* Part II.D.
8. For further analysis of this issue, see Mary Dunn Baker, *Certification Statistical Analyses Post*–Dukes, 27 A.B.A. J. LAB. & EMP. L. 471 (2012).
9. *Dukes*, 131 S. Ct. at 2551–57.
10. *Id.* at 2555.

payment practices involved tens of millions of decisions over several years. The sheer magnitude of the class claims posed unprecedented difficulty for class representatives seeking to establish the existence of common issues.[11] In addition, the nature of the underlying discrimination claim—at least as described by the majority opinion—was quite unusual. The plaintiffs seemingly neither argued that there was a pattern and practice of widespread intentional discrimination nor asserted that a general practice (such as a promotion test, or the use of a highly subjective interview standard) had a disparate impact on women. Rather—or, at least, in the eyes of the majority—the plaintiffs claimed that Wal-Mart had no standard practices or covert discriminatory policy, but had simply allowed each of the thousands of managers to make salary and promotion decisions on whatever basis they pleased.[12] Plaintiffs claimed it was that very lack of company-wide standards that had somehow led to significant differences in the overall wages and promotion rates of men and women. It is unclear how much the Court's various objections stemmed from either the class size or the nature of the plaintiffs' claims, and thus might not apply (or might have less force) if a proposed class was smaller, or a plaintiff were advancing a more traditional and specific theory of liability.

B. Pattern or Practice of Intentional Discrimination

For more than four decades, class actions involving employment discrimination claims have been repeatedly certified and successfully litigated.[13] Many of these concerned a practice that (if it occurred) was clearly unlawful, such as intentional discrimination on the basis of race or gender. The common question in these cases was whether that type of unlawful action was in fact widespread. If such intentional discrimination was found to be sufficiently common to constitute a pattern or practice, the burden of proof would shift to the defendant to prove that any particular class member was not a victim of discrimination.[14]

Much of the Court's decision is consistent with continuing to regard such cases as presenting a common question. The opinion repeatedly refers to pattern or practice cases and the burden of proof shift resulting from a finding of such systemic discrimination.[15] Thus, a claim that there was a pattern or practice would evidently satisfy *Dukes'*

11. *Id.* at 2552.

12. *Id.*

13. *See, e.g.*, Godbolt v. Hughes Tool Co., 63 F.R.D. 370 (S.D. Tex. 1972) (race discrimination).

14. *See, e.g., Dukes*, 131 S. Ct. at 2561 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977)).

15. *See, e.g., id.* at 2552, 2552 n.7, 2561.

requirement that there be "a common contention" that would be "central to the validity of each one of the claims in one stroke."[16]

It was never particularly clear from lower court decisions just how widespread discrimination had to be to constitute a pattern or practice. The Court's opinion describes the requisite showing in inconsistent loose language that seems likely to provoke disputes about what must be shown to establish a pattern or practice. The opinion refers, for example, to a showing that intentional discrimination is "typical"[17] (a standard that might mean a majority of all decisions) or is an employer's "standard operating procedure"[18] (a standard that sounds more like perhaps three-quarters of all decisions). Plaintiffs' expert had acknowledged he was unsure whether 0.5% or 95% of employment decisions at Wal-Mart were the result of stereotyped thinking.[19] Whether it was 0.5% or 95%, the Court stated, "is the essential question on which [plaintiffs'] theory of commonality depends."[20] Actually, the question is how much *more* than 0.5% is required. There are many levels of discrimination greater than 0.5% but less than 95%; it is unclear whether the opinion means commonality requires something more than 0.5%, or no less than 95%, or (most likely) something in between. The Court also refers repeatedly (but not invariably) to a showing that discrimination was the employer's "policy" or "general policy."[21] This suggests a plaintiff would have to prove that discrimination was not merely widespread, but also centrally directed and endorsed. No such showing had been required in the past. Although it seems unlikely that the majority intended to change the standard for establishing a pattern or practice, the opinion may well stir up new disagreements in this area.

At times, the decision describes what the plaintiffs failed to show in a manner that invites an attack on any Rule 23 pattern or practice certification. The class representatives, the Court held, failed to demonstrate that there was "a system pervaded by impermissible intentional discrimination."[22] The evidence did not "establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[23] "[A] uniform employment practice . . . would provide the commonality needed for a class action . . . . "[24] It was "impossible to say that examination of all the class members' claims for relief will

16. *Id.* at 2551.
17. *Id.* at 2555 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158 (1982)).
18. *Id.* at 2552 n.7 (quoting *Teamsters*, 431 U.S. at 358).
19. *Id.* at 2553.
20. *Id.* at 2554.
21. *Id.* at 2553–56.
22. *Id.* at 2555 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988)).
23. *Id.* at 2555.
24. *Id.* at 2554.

produce a common answer to the crucial question *why was I disfavored.*"[25] "[I]t is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[26] These passages suggest that, to obtain certification, a plaintiff must adduce evidence that *all* (or almost all) decisions were the result of intentional discrimination, or perhaps show that systemic discrimination occurred at every single one of the defendant's 3,400 stores. Under this view, the common question a plaintiff would have to establish would not be whether there was a pattern or practice of intentional discrimination. Rather, the question would be whether every one of the adverse promotion and wage decisions affecting class members was the result of intentional discrimination. That common issue would be more than a question "central to the validity of each one of the claims" as required by Rule 23(a)(2); the common question actually would have to *be* the validity of every claim. But that would be inconsistent with other portions of the opinion explaining that the class representative need only show the existence of a single common *question.*[27]

One passage in the opinion suggests that commonality can be defeated by the mere possibility that, in response to evidence of a company-wide pattern or practice, the employer might offer, as an explanation for an apparent pattern of discrimination, different defenses for particular class members, stores, or supervisors. Specifically, the Court stated:

> Even if [statistical proof] established . . . a pay or promotion pattern . . . in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of *issue* exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store.[28]

On this account, the plaintiffs would be required to establish not merely that there was *a* common issue, but that *the* issue, including whatever defenses the employer might offer, would be common to the entire class. If that is what Rule 23 demands, it would seem to bar company-wide class actions, even in a single plant with multiple decisionmakers, simply because those officials might, for example, offer different explanations for why they were all paying women less than comparable men. That conclusion, however, seems inconsistent with much of the rest of the opinion.

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25. *Id.* at 2552 (emphasis in original).
26. *Id.* at 2555.
27. *See, e.g., id.* at 2556.
28. *Id.* at 2555 (second emphasis added).

C. The Required Amount of Proof of Systemic Discrimination

The opinion makes clear that, by requiring the existence of a question of law or fact common to the class, Rule 23(a)(2) does more than establish a pleading requirement. Where, for example, plaintiffs contend the common question concerns the legality of a class-wide promotion requirement, plaintiffs must offer evidence that the requirement was indeed utilized. Similarly, where plaintiffs allege the existence of a pattern or practice of intentional discrimination, *Dukes* holds that the class representative must adduce some evidence that such a pattern or practice actually exists.[29]

How much evidence the Court requires is far from clear. The opinion refers, variously, to whether the evidence adduced would be "significant proof" of a pattern or practice,[30] would "establish that [the plaintiffs'] theory can be proved on a classwide basis,"[31] or would "raise any inference that all the individual, discretionary personnel decisions are discriminatory."[32] The plaintiffs were faulted for having failed to provide "convincing proof of a companywide discriminatory . . . policy."[33] These passages could be read as requiring anything from merely some evidence of a pattern or practice, to proof showing by clear and convincing evidence that such a pattern or practice actually exists.

The existence of some evidentiary requirement is not new. Plaintiffs' counsel in pattern or practice class actions have generally understood that they ought to introduce at least some evidence of discrimination at the certification hearing. Some lawyers have gone further, attempting to amass and introduce at that hearing essentially the same evidence they intend to offer at trial. After *Dukes* it may be imprudent to do any less.

Precisely because of *Dukes*' evidentiary requirement, it will be more difficult for a district court to limit a class representative's pre-certification discovery. In the absence of any clear indication in *Dukes* as to how much (if at all) its requirement differs from the degree of proof required to prevail at trial or to survive summary judgment, plaintiffs now have a substantial argument that prior to a certification hearing, they are entitled to essentially the same discovery they would get post-certification. Thus, the standard that worked to the advantage of the defendant in *Dukes* may, in this regard, be unfavorable to future defendants.

In any event, as the amount of discovery and evidence offered at the certification hearing increases in response to *Dukes*, the certifica-

29. *See id.* at 2551–52.
30. *Id.* at 2553–54.
31. *Id.* at 2555.
32. *Id.* at 2556.
33. *Id.*

tion hearing and decision will increasingly resemble an actual trial on the merits. If the factual findings in a certification decision were law of the case as to the merits, the certification hearing would *be* the trial on the merits. At the least, a certification decision based on compelling evidence of a pattern or practice may leave little doubt as to the outcome of a trial. To the extent that the district judge at the certification hearing moves closer to deciding the merits of the class claim, and to the extent that pre-certification discovery unearths much of the evidence that would be adduced at trial, those changes will moot the issue of what degree of a showing is needed to obtain certification and thus obtain a trial on the merits, which was the very issue in *Dukes*.

D. Collective Actions

Collective claims under the Age Discrimination in Employment Act (ADEA)[34] and the Fair Labor Standards Act (FLSA)[35] are treated and certified as collective actions under the provisions of those statutes, rather than certified as Rule 23 class actions.[36] Potential claimants must affirmatively opt into a collective action. While Rule 23(a)(2) requires a showing of a question "common to the class,"[37] final certification of a collective action requires a showing that the claimants to be included within that action are "similarly situated"[38] to the original plaintiffs. Although *Dukes* does not literally apply to a collective action, defendants are already arguing that at least some of the reasoning in the Supreme Court's decision should be utilized in deciding whether to certify a collective action.[39]

Efforts to invoke *Dukes* to defeat collective actions are likely to raise a number of distinct questions. In an FLSA case in which the existence of some common general practice (e.g., not paying workers for certain walking time) is undisputed, the *Dukes* commonality analysis seems unlikely to help defendants because those practices would be similar to disparate-impact claims, which the Court regarded as presenting a quintessential common question.[40] On the other hand, ADEA collective actions in which plaintiffs allege a pattern or practice of intentional age-based discrimination present a claim similar to a Title VII pattern or practice case. The relevance of *Dukes* in such cases will depend on the differences between the Rule 23 commonality requirement and the ADEA similarly-situated requirement. An FLSA claim that a number of low-level managers repeatedly misstated the hours worked by employees seems somewhere in between.

34. 29 U.S.C. §§ 621–34 (2006).
35. *Id.* §§ 201–19.
36. FED. R. CIV. P. 23.
37. FED. R. CIV. P. 23(a)(2).
38. *See* FED. R. CIV. P. 23(b)(3) Advisory Committee's Note (1966).
39. *See, e.g.*, Troy v. Kehe Food Distribs., Inc., 276 F.R.D. 642, 651 (W.D. Wash. 2011).
40. *See* Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2554–57 (2011).

There typically are two types of certification decisions in a collective action. The first is a tentative certification that merely permits notice to the relevant group of workers advising them of the possibility of opting into the collective action. The second and final certification requires a conclusion that the new claimants are in fact similarly situated to the named plaintiffs. Defense attempts to invoke *Dukes* may be accorded different treatment at these two distinct stages.

E. Statistical Evidence

The *Dukes* plaintiffs offered statistical evidence indicating that both across the company as a whole and within each of the employer's regions, on average, women were paid less and promoted less often than men. The Court dismissed this as insufficient to raise an inference of widespread discrimination because "[a] regional pay disparity, for example, *may be* attributed to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[41] The fact that women in a 100-store region made five percent less than comparable men might be a statistical fluke, derived solely from the fact that at only ten stores women made only half as much as men. That mere possibility, the Court insisted, was fatal to the statistical evidence's probativeness.[42] The Court did not point to any defense evidence that the disparities were in fact concentrated in "a small set" of stores; rather, the Court reasoned, the statistics had to be rejected simply because it was possible to imagine some sort of an explanation.[43]

This method of evaluating (and dismissing) statistical evidence, however, was expressly rejected by the Supreme Court twenty-five years ago in *Bazemore v. Friday*.[44] The plaintiffs in *Bazemore* had offered evidence that black employees who worked in the various county offices of a state agency earned significantly less than comparable white workers.[45] The Fourth Circuit rejected that evidence, reasoning that the disparities could have arisen simply because black workers happened to be concentrated in counties where the salary levels were lower.[46] *Bazemore* held that the statistical evidence could not be dismissed on that ground.[47] A defendant or court could not rely on mere speculation about the possibility of a benign (or less systemic) explanation; rather, the *Bazemore* Court held, there had to be evidence demonstrating that the exculpatory theory was actually true. *Dukes* relies on precisely the sort of hypothetical explanation *Bazemore*

41. *Id.* at 2555 (emphasis added).
42. *Id.* at 2554.
43. *Id.* at 2556.
44. 478 U.S. 385 (1986).
45. *Id.* at 399.
46. *Id.* at 400–01.
47. *Id.* at 400.

held legally insufficient. Lower courts will have to deal with the evident inconsistency between these two Supreme Court decisions.

F. Anecdotal Evidence

The Court concluded that the plaintiffs' anecdotal evidence was insufficient "to raise any inference that all the individual, discretionary personnel decisions [were] discriminatory."[48] The opinion noted that the plaintiffs' 120 affidavits detailing instances of discrimination represented only "about 1 for every 12,500 class members,"[49] and that there were no affidavits regarding more than ninety percent of the Wal-Mart stores. The opinion contrasted those anecdotes with the record in *International Brotherhood of Teamsters v. United States*,[50] which contained anecdotal evidence from one of every eight class members.[51] The Court's analysis might mean only that the anecdotal evidence in *Dukes* was insufficient by itself to meet the plaintiffs' burden. It is, however, likely to lead to general attacks on the use of anecdotal evidence unless the ratio of anecdotes to class members (or decisions) reaches a particular numerical level. The broader reading is encouraged by a pointed footnote comment that "when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all."[52] On the other hand, any implication that proof of discrimination by one supervisor is irrelevant to claims of discrimination by another supervisor would be inconsistent with the Court's 2008 decision in *Sprint/United Management Co. v. Mendelsohn*.[53] This aspect of the *Dukes* opinion suggests that it may be important whether an anecdote involved overt discrimination or discriminatory remarks. This is because incidents of the latter type reflect a (presumably well-informed) conviction on the part of the discriminating supervisor that, under the employer's actual policies, the official would not be punished for openly engaging in such discrimination.

G. Daubert

Invoking a "social framework" analysis, the plaintiffs' sociology expert testified that Wal-Mart had a "strong corporate culture that makes it vulnerable to gender bias."[54] In relying on that testimony, the district court had concluded that the standards in *Daubert v.*

48. *Dukes*, 131 S. Ct. at 2556.
49. *Id.*
50. 431 U.S. 324 (1977).
51. *See id.* at 331–32.
52. *Dukes*, 131 S. Ct. at 2556 n.9.
53. 552 U.S. 379 (2008).
54. *Dukes*, 131 S. Ct. at 2553 (internal quotation marks omitted). For commentary on social framework analysis, see Allan G. King & Syeeda S. Amin, *The Propensity to Stereotype as Inadmissible "Character" Evidence*, 27 A.B.A. J. LAB. & EMP. L. 23 (2011).

Merrell Dow Pharmaceuticals, Inc.[55] do "not apply to expert testimony at the certification stage of class-action proceedings."[56] The majority opinion tersely commented, "[w]e doubt that is so. . . . "[57] This remark leaves the lower courts in a quandary. Five members of the Supreme Court have hinted at how they might resolve this issue, but gave no explanation of either why they were inclined to do so or why they had decided to stop short of an actual determination of the question. In the final analysis, however, this question may prove of little practical importance. The purpose of *Daubert* is to prohibit a trial judge from admitting for consideration by a jury purportedly scientific evidence that lacks a substantial professionally recognized basis.[58] But where class certification is at issue, the judge applying *Daubert* will also be responsible for determining the persuasiveness of that evidence. The circumstances that would lead a judge under *Daubert* not to admit disputed scientific evidence would in any event convince that same judge that the evidence was unpersuasive.

H. Significance of an Employer's Written Anti-Discrimination Policy

In one provocative passage, the Court expressed surprising certainty that the existence of a written rule forbidding discrimination will prevent any substantial amount of discrimination in the absence of some covert, centralized policy encouraging discrimination. "[L]eft to their own devices, most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."[59]

Virtually all corporations of any size, of course, have such formal anti-discrimination policies. This portion of the opinion invites defendants to point to such policies, both in opposing class certification and in seeking summary judgment, as assertedly weighty evidence that little discrimination could have occurred. Plaintiffs, of course, can point out that this passage is on its face limited to cases in which managers are "left to their own devices,"[60] and assert that a pattern of discrimination was the result of some controlling, albeit hidden, policy.

I. Rules 23(b)(2) and 23(b)(3)

For forty years, employment class actions have been certified under Rule 23(b)(2). Although the appropriateness of a Rule 23(b)(2)

55. 509 U.S. 579 (1993).
56. *Dukes*, 131 S. Ct. at 2554.
57. *Id.*
58. *Daubert*, 509 U.S. at 592–94.
59. *Id.* at 2554.
60. *Id.*

class turns on whether final injunctive relief is appropriate,[61] lower courts generally believed that monetary relief could be awarded in such cases so long as the monetary awards were "incidental" to the injunctive relief. *Dukes* unanimously rejected that interpretation of Rule 23(b)(2),[62] holding that where there will need to be individualized determinations of the amount of monetary relief, a class action can only be certified under Rule 23(b)(3).[63]

Rule 23(b)(3) certification requires a finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members."[64] The impact of this aspect of *Dukes* will turn on how the lower courts now construe the term "predominate."[65] There are at least three different meanings that could be given to the predominance requirement.

First, it might be construed to refer simply to the number of questions—whether there are more questions common to the class than there are questions applicable only to particular individuals. Employment discrimination classes would almost never meet that standard because there would typically be only a few common questions (e.g., was there a pattern or practice of discrimination?), but at least as many individual questions as there are class members (e.g., was the class member a victim of discrimination? How much was the class member injured? Did the class member mitigate damages?).

Second, "predominates" could also be understood to refer to how much time would be needed to try all the factual issues, if, in fact, every one of those issues proceeded to trial. That would bar many employment discrimination class actions because the time needed to try the common question or questions (typically a few weeks) would usually be much less than the aggregate time needed to try every individual's claim (perhaps a few days for each class member).

The third possibility, under which class actions might continue without major changes, is that "predominates" would be construed as referring to what is likely to occur if the case actually were litigated. Decades of employment class actions illustrate that once there is a finding of a pattern or practice of discrimination (or a finding that a test or job requirement had an unlawful disparate impact), it is virtually unheard of for a defendant actually to insist on individual hearings. The existing evidence of systemic discrimination, together with the burden of proof shift, make it highly likely that an employer

61. *See* FED. R. CIV. P. 23(b)(3).
62. *Dukes*, 131 S. Ct. at 2557.
63. *Id.* at 2558.
64. FED. R. CIV. P. 23(b)(3).
65. The same term is used in 28 U.S.C. § 1367 (2006) regarding supplemental jurisdiction; it remains to be seen whether that will become important.

would lose most such individual hearings. In the few cases where employers have insisted on such hearings, the results have generally been disastrous for them as they have lost the overwhelming majority of those individual hearings, incurred large legal bills, and increased the ultimate cost of settling the case.

If a court anticipates, as will be true in most cases, that a finding of class-wide discrimination will be followed by a settlement, it could conclude that the common issues would predominate both in terms of the amount of discovery and the actual trial litigation. That possibility, of course, may lead defense counsel to insist at the certification hearing that they intend, if a pattern or practice is found, to try every single class member's case. A trial judge, however, might regard that sort of representation with a degree of skepticism. If the class were certified and there were a finding of a pattern or practice of discrimination, the defense attorney who made that representation could be in a very difficult position because the lawyer's credibility with the judge would be damaged if the client then wanted to settle rather than spend large sums to litigate individual claims.

Under Rule 23(b)(3), when a class is certified, Rule 23(c)(2)(B) requires class members be given notice (paid for by plaintiffs) and an opportunity to opt out of the class. There will probably be few class actions in which the plaintiffs' attorney is unable to pay for the notice; a lawyer who cannot afford a dollar per class member probably lacks the resources to handle the class action effectively. Whether class members choose to opt out is likely to turn on the content of the notice; the parties will presumably argue, for example, over whether the notice should warn putative class members of how little time they would have to file suit on their own if they opted out. In many class actions, plaintiffs' counsel is anxious to make contact with class members who may be potential witnesses. That may lead to disputes about whether the notice should invite class members to contact class counsel and whether plaintiffs' counsel would be given the names and contact information for all class members, both of which defendants may oppose.

J. Mandatory Individualized Hearings

In *Dukes*, the Court unanimously held that even when there is a proven pattern or practice of intentional discrimination, a defendant is entitled to a hearing as to whether any particular individual class member was a victim of discrimination, and as to the amount of monetary relief (or type of injunctive relief) warranted.[66] The Court rejected

66. *Dukes*, 131 S. Ct. at 2561.

the lower courts' proposal for what the Supreme Court termed a "Trial by Formula."[67] In the context of *Dukes*, such a requirement was fatal; the plaintiffs had never suggested that they could possibly try over a million individual cases.

Even prior to *Dukes*, however, there was no established practice of denying defendants such hearings primarily because they rarely asked for them. It seldom made sense for defendants to try a significant number of such individual claims; if individual discovery and hearings were seriously litigated, the defendants were likely to fare poorly. However, in cases in which (as in *Dukes* itself) the plaintiffs' attorneys clearly lack the resources to try many individual claims, it could make sense for defendants to bluff and insist on such hearings. *Dukes* reminds defendants that they can demand such hearings, but does not change the economics of the situation. It may, however, have the effect of inviting defendants to engage in a war of attrition, requesting a large number of individualized hearings, even if it loses all of them, until the cost of litigating those hearings causes the plaintiffs' attorney (unable for the time being to collect the counsel fees it has earned) to run out of funds.

In many disparate-impact cases, individualized monetary relief hearings would not be appropriate. Where an employer has used a test held to have an unlawful disparate impact, it may be possible to ascertain the number of individuals who would have been hired or promoted if the test had no disparate impact, but it is often impossible to identify which particular applicants or employees would have been hired or promoted if another test had been used. In those cases, the total amount of back pay may be calculable, and the sum is typically divided equally among the class members or some portion of the class. In addition, a summary judgment motion regarding a particular claim might defeat an employer's request for an individualized hearing. For example, in *CIGNA Corp. v. Amara*,[68] there may well have been no genuine issue about which individuals were entitled to monetary relief.[69]

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67. *Id.* Justice Scalia noted that this method would consist of the following:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

68. 131 S. Ct. 1866 (2011); *see* discussion *infra* Part V.C.

69. *Id.*

III. *Thompson v. North American Stainless, LP*[70]

Thompson v. North American Stainless, LP presented a recurring problem in employment law: an employer that retaliates against one worker by dismissing another closely connected employee, usually a family member.[71] At the time of the events giving rise to the suit, the plaintiff, Eric Thompson, was engaged to a co-worker, Miriam Regalado, who filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC).[72] Shortly after Regalado filed that charge, the employer dismissed Thompson.[73] A sharply divided Sixth Circuit held that Thompson could not sue.[74] The lower courts had generally held that such a dismissed worker could not obtain relief under Title VII.[75] But in *Thompson*, the U.S. Supreme Court unanimously ruled that Title VII authorizes relief in this situation.[76]

In sustaining Thompson's claim, the Supreme Court reformulated the issue in a critical way. The lower courts had framed the question as whether such a dismissal would violate the rights of the terminated worker, here Thompson, and concluded that no such violation had occurred because the dismissed employee had not engaged in any protected activity. The Supreme Court instead saw the case as presenting two different issues: (1) whether the dismissal violated the rights of the individual who had engaged in protected activity, and (2) whether the dismissed worker could maintain an action to redress injuries suffered as a result of this violation of the rights of the other worker.[77]

A. *Illegality of Reprisals Against Third Parties*

The Court readily concluded, as counsel for the employer ultimately conceded, that such a retaliatory dismissal indeed violated the rights of the worker who had engaged in protected activity, Regalado, even though she herself had not been fired.[78] The Court utilized the standard in *Burlington Northern & Santa Fe Railway Co. v. White*,[79] which held that the anti-retaliation provision of Title VII forbids any retaliatory employer action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[80] Applying that standard, the *Thompson* Court held, "[w]e think it obvious that a reasonable worker might be dissuaded from

70. 131 S. Ct. 863 (2011).
71. *Id.*
72. *See id.* at 867.
73. *See id.*
74. *Id.*
75. *See, e.g.*, Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir.1998).
76. *Thompson*, 131 S. Ct. at 867.
77. *Id.* at 868–70.
78. *See id.*
79. 548 U.S. 53 (2006).
80. *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

engaging in protected activity if she knew that her fiancé would be fired."[81]

The Supreme Court declined to adopt a more specific rule beyond the general standard in *Burlington Northern* regarding what type of relationship between the two workers would be required to establish a violation.[82] In doing so, it stated, "[w]e expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."[83]

As a practical matter, this issue may not often be disputed. Almost all of the reported cases involving this problem have concerned dismissals of family members. An employer that wanted to punish a worker for protected activity would not bother to take action against a coworker unless there was a sufficiently clear connection between the two workers so that the punitive message would be clear to the worker who had actually engaged in the protected activity (and to others as well).

The *Burlington Northern* standard has been applied by the lower courts to retaliation claims under a wide variety of statutes other than Title VII (as well as to constitutional claims), so this sort of third-party reprisal will in all likelihood be held unlawful under almost all other laws.[84]

B. Third-Party Standing

The more difficult question in *Thompson* was whether Thompson could bring a lawsuit because he was injured by a violation, not of his own rights, but of Regalado's rights. Under the principle of *jus tertii* (not mentioned in the opinion, but clearly at issue), an individual cannot ordinarily maintain an action to redress injuries caused by a violation of the rights of another party. A person asserting an injury caused by the violation of someone else's rights usually lacks standing.[85] This, however, is only a judicially created prudential standing requirement, not the constitutionally mandated Article III standing requirement. Congress can create third-party standing and authorize such suits by statute.

The *Thompson* Court held that congressional authorization for such third-party lawsuits was contained in Title VII section 706(f)(1), which authorizes "a civil action . . . by the person claiming to be

81. *Thompson*, 131 S. Ct. at 868.

82. *Id.*

83. *Id.*

84. *See, e.g.*, McInnis v. Town of Weston, 458 F. Supp. 2d 7 (D. Conn. 2008) (*Burlington Northern* applied to ADEA claim).

85. This limitation does not apply to claims by the government on behalf of individuals; thus, the EEOC could have maintained the action in *Thompson* even if section 706(f)(1) did not authorize Thompson himself to sue.

aggrieved."[86] The Court concluded that the phrase "person . . . aggrieved" in Title VII has the same meaning as the identical phrase in the Administrative Procedure Act (APA)[87] section 702. Under the APA standard, a person is aggrieved if the individual "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[88] Applying that standard, the Court concluded that:

> [A]ccepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII.[89]

Given this reasoning, any person subject to adverse action as a "means of harming" someone else would be a "person aggrieved."

The applicability of *Thompson*'s standard of third-party standing to other laws will turn on and require an analysis of the particular statutory language authorizing suit. A number of statutes, in terms similar to Title VII and the APA, authorize suit by a person or party "aggrieved."[90] That phrase presumably will be given the same interpretation as in *Thompson*.[91] Several statutes, such as the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, allow for enforcement under Title VII itself, including section 706.[92] *Thompson* should be controlling here.

Thompson will likely be applied as well to FLSA section 16(b),[93] which provides that an employer is liable "to the employee or employees affected" by a violation of the Act.[94] A worker dismissed to punish another worker would obviously be "affected" by that retaliatory act. There is thus a strong argument that the FLSA authorizes suits by third-party victims. The Equal Pay Act,[95] in turn, utilizes the enforcement provisions of the FLSA. The Immigration Control and Reform Act (ICRA) section 1324b(b)(1) authorizes the filing of an administrative charge by "any person alleging that the person is adversely affected

86. 42 U.S.C. § 2000e-5(f)(1) (2006).

87. 5 U.S.C. §§ 551–59 (2006).

88. *Thompson*, 131 S. Ct. at 870 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).

89. *Id.*

90. *E.g.*, 29 U.S.C. § 626(c)(1) (2006) (ADEA); *id.* § 633a(c) (ADEA age discrimination claims by federal employees).

91. *See* Dembin v. LVI Servs., Inc., No. 11 Civ. 1888 (JSR), 2011 WL 5374148, at *2 (S.D.N.Y. Nov. 8, 2011).

92. *See, e.g.*, 42 U.S.C. § 12117 (2006).

93. 29 U.S.C. §§ 201–19 (2006).

94. *Id.* § 216(b).

95. *Id.* § 206(d).

directly by an unfair immigration-related employment practice," which would include violations of the anti-retaliation provisions of ICRA section 1324b(a)(5).[96] A third-party dismissal victim, such as Thompson, would clearly be "adversely affected." Section 1983 provides that a person who deprives any person of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[97] This, on its face, authorizes a suit by any person injured, and it is not limited to the particular person who was deprived, for example, of a constitutional right.

The Family and Medical Leave Act (FMLA)[98] poses a more difficult question. Section 107(a)(2) provides that an action against an employer may be maintained by "one or more employees," but section 107(a)(1) provides that an employer that violates section 105 shall be liable only to "any eligible employee affected."[99] Section 101(2) defines "eligible employee" to mean "an employee who has been employed . . . for at least 12 months . . . and [has] at least 1,250 hours of service with [the] employer during the previous 12-month period."[100] The provision authorizing the Secretary of Labor to seek monetary relief for individuals is similarly limited to payments "due to eligible employees," although actions by the Secretary for equitable relief do not have a similar restriction.[101] This suggests, at best, that a third-party victim could only bring a successful lawsuit if the victim were an "eligible employee."

Several statutes have only an implied cause of action, including Title VI, Title IX, and section 1981. It will be even more difficult to establish third-party standing under these statutes because there is no specific statutory language that could be said expressly to authorize suit by third-party victims.

For other statutes, it will be significant if, in the circuit in question, a previous interpretation has been based in part on the established construction of Title VII.[102] Because the third-party standing doctrine is essentially a federal rule of statutory interpretation, whether a state statute authorizes third-party claims would turn on state law, even if the claim arose in federal court. A number of lower court cases have presented a distinct but related question, whether white (or male) workers can sue if they are injured by a practice that discriminates against non-whites (or women). That would arise,

96. 8 U.S.C. § 1324(b)(1) (2006).
97. 42 U.S.C. § 1983 (2006).
98. 29 U.S.C. §§ 2601–54 (2006)
99. *Id.* § 2617(a)(1)–(2).
100. *Id.* § 2611(2)(A).
101. *See id.* § 2617(d)(1).
102. *E.g.*, EEOC v. Willamette Tree Wholesale, Inc., No. CV 09-690-PK, 2011 WL 886402, at *10 (D. Or. Mar. 14, 2011) (retaliation claims under Oregon statute "are analyzed under the same framework as Title VII retaliation claims").

for example, if an employer discriminated against a group of people (an entire department, for example) because most of its workers were women.[103]

IV. *Staub v. Proctor Hospital*[104]

In *Staub*, the Supreme Court addressed what is known as the "cat's paw" theory of discrimination.[105] This deals with the extent of employer liability when a biased official (typically a supervisor) influenced the decision of another official (typically a higher ranking supervisor or a human resources official), who took an adverse action against the plaintiff. In this common scenario, the latter official, often referred to as the "ultimate decisionmaker," does not have an unlawful motive. Employers have argued that they should not be held liable so long as the ultimate decisionmaker acted for lawful purposes, and that the motives of the biased official are thus legally irrelevant.

Prior to *Staub*, lower courts had been divided on separate issues raised by this situation.[106] First, the courts of appeals have utilized three distinct general standards, holding variously that the employer is liable only if the biased official: (a) influenced the ultimate decisionmaker; (b) caused the adverse action; or (c) in some sense exercised de facto control over the decisionmaker. The latter formulation, in the Fourth, Fifth, Seventh, and Eleventh Circuits, required a showing that the biased official exercise "singular influence" over the ultimate decisionmaker, or that the ultimate decisionmaker was a cat's paw (i.e., a witless dupe) of the biased official.[107] Second, many courts of

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103. The Second Circuit sustained such a claim in *Anjelino v. New York Times Co.*, 200 F.3d 73 (3d Cir. 2000); more recently, the district court in *Ferrell v. Johnson*, No. 4:09-cv-40, 2011 WL 1225907, at *1 (E.D. Tenn. Mar. 30, 2011), assumed that such a claim would be viable.

104. 131 S. Ct. 1186 (2011).

105. For further discussion on this theory, see Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes*, 60 S.C. L. REV. 383 (2008).

> Judge Posner . . . coined the term "cat's paw" liability to refer to employer liability resulting from subordinate bias. The term derives from the fable of the monkey and the cat by Jean de La Fontaine. The fable tells the tale of a conniving monkey that wants to eat chestnuts roasting in a fire. The monkey is unwilling to burn himself to get the chestnuts and instead convinces a cat to do his bidding. As the cat repeatedly burns its paws retrieving the chestnuts from the fire, the monkey sits back unharmed, devouring the chestnuts. The modern connotation of "cat's-paw" refers to "one used by another to accomplish his purposes." In the employment context, the monkey represents the biased subordinate, while the cat represents the employer who acts as the conduit to commit discriminatory adverse actions against the victimized employee.

Id. at 385 (internal citations omitted).

106. *See id.* at 386.

107. *See, e.g.*, Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908, 917 (7th Cir. 2007).

appeals had held that an employer could avoid liability if the ultimate decisionmaker had conducted some sort of "independent investigation," although the lower courts had divergent views about what constituted such an exculpatory independent investigation.[108]

Staub arose under the Uniformed Services Employment and Reemployment Right Act (USERRA).[109] The plaintiff alleged he had been fired because of his service in the U.S. Army Reserve. The case was tried under the Seventh Circuit's singular influence standard, and the jury returned a verdict for the plaintiff.[110] On appeal, the Seventh Circuit held that there was insufficient evidence to demonstrate the existence of the requisite singular influence.[111] The Seventh Circuit held that an employer is immune from liability so long as the ultimate decisionmaker relied in part on any information that came from someone other than the biased official. The Supreme Court unanimously overturned the Seventh Circuit decision. Justice Scalia's majority opinion established a new standard for resolving these cases, holding "if a supervisor performs an act motivated by [unlawful] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ."[112] Under *Staub*, a plaintiff must establish four elements: agency, discriminatory motive, an intent to cause the adverse action in question, and proximate causation.

A. Agency Standards

The core theory of the majority opinion is that an employer's liability in this situation is governed by agency law. A plaintiff must establish that the biased official was (under traditional standards of agency law) acting as an agent of the employer when the official took the action that was connected to the subsequent dismissal or other adverse action.

Citing *Burlington Industries, Inc., v. Ellerth*, the Court held an employer is responsible for the actions of an employee if the worker was acting within the scope of employment or if liability would for some other reason "be imputed to the employer under traditional agency principles."[113] The cited portion of *Ellerth* notes that liability

108. *See, e.g.*, EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 488 (10th Cir. 2006).

109. 38 U.S.C. §§ 4301–35 (2006).

110. The Seventh Circuit's singular influence standard allows "liability for an employment decision [to] be imputed to the employer only if a biased employee had a singular influence over the ultimate decisionmaker." Schandelmeier-Bartels v. Chi. Park Dist., 634 F.3d 372, 380 (7th Cir. 2011).

111. Staub v. Proctor Hosp., 560 F.3d 647, 659 (7th Cir. 2009).

112. Staub v. Proctor Hosp., 131 S. Ct 1186, 1194 (2011) (emphasis in original).

113. *Id.* at 1194 n.4 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998)).

may also be imputed to an employer if the biased official's action was "aided" by the official's position.[114] *Staub* noted, for example, that "[a] 'reprimand . . . for workplace failings' constitutes conduct within the scope of an agent's employment."[115] The vast majority of the cases raising this issue have involved a biased supervisor engaging in some traditional supervisory function. In light of *Staub*, however, it will be important for litigants to address whether a supervisor's conduct (e.g., providing information to higher officials) was within the scope of employment, or was "aided" by the supervisor's position.

The opinion in *Staub* expressly took no position regarding whether (or when) an employer could be held liable based on a discriminatory act by a co-worker that led to the ultimate decision.[116] There could be circumstances in which the actions of a co-worker would be within the scope of employment (e.g., the co-worker had an obligation to report certain misconduct) or in which the co-worker's position facilitated the discriminatory action. Cases raising this issue, however, appear to be fairly uncommon.

Because *Staub* is based on the general principles of agency law, which are generally presumed to govern interpretation of federal statutes, the decision is likely to be applied to other federal employment statutes. Constitutional claims, however, present two distinct issues. The first issue is whether *Staub* will govern the question of whether a constitutional violation has occurred at all. There is a good chance courts will conclude that *Staub* does control this issue. For example, if a government supervisor, acting for an unconstitutional purpose, causes another supervisor to dismiss an employee, a constitutional violation finding would be consistent with existing state action standards.[117] The second issue is whether *Staub* will control whether a city or county (in addition to the official who acted with an unconstitutional motive) is liable. That seems less likely, because municipal liability in section 1983 cases is not governed by traditional agency principles.[118]

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114. *Ellerth*, 524 U.S. at 744, 758.

115. *Staub*, 131 S. Ct. at 1194 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 798–99 (1993)).

116. *Id.* at 1194 n.4 ("We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.").

117. *See* Devore v. Cheney Univ. of Pa., No. 11-274, 2012 WL 10322, at *15 (E.D. Pa. Jan. 3, 2012).

118. *See* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978); Nagle v. Marron, 663 F.3d 100, 117 (2d Cir. 2011) (noting but not resolving applicability of *Staub* to municipal liability); Manuele v. City of Jennings, No. 4:10-CV-1655-JAR, 2012 WL 113538, at *9 (E.D. Mo. Jan. 13, 2012) (*Staub* not applicable); Teal v. City of Dahlonega, No. 2:09-CV-0187-RWS, 2012 WL 95555, at *3 (N.D. Ga. Jan. 12, 2012) (*Staub* not applicable).

B. Intent to Cause the Adverse Action

Intent is a new element not previously utilized by lower courts. The Supreme Court apparently requires[119] the plaintiff to establish that the biased official actually intended[120] to cause the particular adverse action.[121]

In holding that the record contained sufficient evidence of this element, the Court pointed to three things. First, one biased official stated she was trying to "get rid of" Staub, and others knew that the official was "out to get" him.[122] "Out to get" is a fairly general statement of malevolent intent, but the Court found it sufficient to justify an inference that the speaker wanted Staub dismissed. Second, a biased employee supervisor directed his adverse report about Staub to an official "responsible for terminating employees," and that official "fired Staub immediately."[123] Third, there was "no evidence that [the biased supervisors] intended any particular adverse action other than Staub's termination."[124] Although the "get rid of" comment is not common in these cases,[125] the second and third types of evidence are routine.

C. Proximate Cause

The Court's opinion explains that ordinarily the act of a biased supervisor will be the proximate cause of the adverse action if there is a direct relationship between the two, and that a showing of proximate cause is not defeated by the separate, intervening act of the ultimate decisionmaker. Specifically, the Court held:

> [T]he exercise of judgment by the [ultimate] decisionmaker does not prevent the earlier agent's action . . . from being the proximate cause of the harm. . . . The decisionmaker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm.

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119. *Staub*, 131 S. Ct. at 1192 n.2 (leaving open the question of whether the employer might be liable even though the discriminatory act caused an adverse action different from that intended by the biased official).

120. *Id.* at 1194 n.3 ("Under traditional tort law, 'intent . . . denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.'") (alterations in original) (quoting RESTATEMENT (SECOND) TORTS § 8A (1965)).

121. *Id.* at 1192 ("Animus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that [biased] agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA."); *id.* at 1193 (acts "that were *designed and intended* to produce the averse action") (emphasis in original); *id.* at 1194 (act of biased supervisor that "is *intended* by the supervisor to cause an adverse employment action") (emphasis in original).

122. *Id.* at 1194.

123. *Id.*

124. *Id.* at 1192 n.2.

125. *But see* Kurth v. City of Inkster, No. 10-11973, 2011 WL 6371085, at *4 (E.D. Mich. Dec. 20, 2011).

> A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable."[126]

These limitations on what could constitute a superseding cause are significant.[127]

The Court's opinion points to several types of biased supervisor acts as examples of conduct that would be a proximate cause of an adverse action, such as an "unfavorable entry on the plaintiff's personnel record"; a "biased report," "performance assessment[],"or "recommendation" "inform[ing]" other officials about the plaintiff's asserted misconduct; and a "reprimand . . . for workplace failings."[128] The petitioner's brief summarizes lower court decisions in an appendix that illustrates other ways in which actions by biased supervisors have led to adverse action against a plaintiff.[129] The two most common discriminatory acts resulting in adverse actions are giving inaccurate information to other officials and withholding important exculpatory information.[130]

D. Proof of Causation

Staub defines the allocation of the burden of proof regarding causation. In this regard, the opinion is based in part on the terms of USERRA, and thus might not apply to claims under other statutes, particularly the ADEA. The burden on the plaintiff, the Court repeatedly states, is to show that the unlawfully motivated act of the biased supervisor was a "causal factor of the ultimate employment action."[131] An employer will be liable unless "the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action [and] by the terms of USERRA it is the employer's burden to establish that . . . ."[132]

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126. *Staub*, 131 S. Ct. at 1192 (emphasis in original) (internal citations omitted).

127. The relevant provisions of the Restatement of Torts are summarized in the brief for petitioner. Brief for Petitioner, *Staub*, 131 S. Ct. 1186 (2011) (No. 09-400), 2010 WL 2690585.

128. *Staub*, 131 S. Ct. at 1191–94 (internal quotations omitted).

129. Brief for Petitioner, *supra* note 127.

130. For examples of the types of actions by biased officials that were held sufficient in post-*Staub* decisions, see the following: Ley v. Wis. Bell, Inc., 819 F. Supp. 2d 864, 873 (E.D. Wis. 2011) (biased supervisor's inaccurate information led to plaintiff's termination); Ridley v. Harris Cnty., No. H-09-1867, 2011 WL 1485661, at *8 (S.D. Tex. Apr. 19, 2011) (biased supervisor's negative evaluation cost plaintiff promotion); Memon v. Deloitte Consulting, LLP, 779 F. Supp. 2d 619, 640 (S.D. Tex. 2011) (biased supervisor's negative performance evaluation led to plaintiff's termination); *but see* Ordogne v. AAA Tex., LLC, No. H-09-1872, 2011 WL 3438466, at *5 (S.D. Tex. Aug. 5, 2011) (biased supervisor's report did not influence plaintiff's termination because decision-makers "independently" justified termination "entirely apart from [biased supervisor's] report").

131. *Staub*, 131 S. Ct. at 1193; *see also id.* ("a causal factor"); *id.* at 1194 ("causal factors").

132. *Id.* at 1193.

USERRA, like Title VII, provides that when a plaintiff shows that an unlawful purpose was "a motivating factor," the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of that impermissible factor.[133] The evident meaning of *Staub* is that in a USERRA case (and, presumably, in a case under any statute with a similar allocation of the burden of proof), the plaintiff need only show that the discriminatory conduct was *a* causal factor, and the burden would be on the employer to show that that conduct was nonetheless not a but-for cause. In a case under the ADEA, however, because of *Gross v. FBL Financial Services, Inc.*,[134] it seems likely that the burden would be on the plaintiff to show that the discriminatory action was a but-for cause of the adverse action.[135]

E. Independent Investigations

Staub expressly rejected the independent investigation defense that had previously been accepted by many lower courts.[136] The Court stated, "we are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of 'fault.' "[137]

Thus, even if an independent investigation (however defined) occurred, a supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.[138]

V. *Kasten v. Saint-Gobain Performance Plastics Corp.*[139]

Kasten concerned the construction of the FLSA anti-retaliation provision, section 215(a)(3), which forbids an employer from discriminating against an employee because the employee has "filed any complaint . . . under or related to [the Act.]"[140] In *Kasten*, the plaintiff complained to company officials that the timeclock location forced employees to don and doff work-related protective gear without being

133. 38 U.S.C. § 4311(c) (2006).

134. 557 U.S. 167 (2009) (rejecting mixed-motive theory for ADEA claims).

135. In comparison to the pre-*Staub* lower court standards, this is essentially a rule adopting the "influence" standard under statutes like USERRA and Title VII, and the "cause" standard under the ADEA.

136. *See, e.g.*, EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 488 (10th Cir. 2006).

137. *Staub*, 131 S. Ct. at 1193.

138. *Id.* Indeed, the district court in *Chisholm v. Memorial Sloan-Kettering* relied on *Staub* in excluding as irrelevant a defendant's evidence that it had conducted an independent investigation of its own actions. No. 09 Civ. 8211 (VM), 2011 WL 2015526, at *4 (S.D.N.Y. May 13, 2011).

139. 131 S. Ct. 1325 (2011).

140. 29 U.S.C. § 215(a)(3) (2006).

compensated.[141] Kasten was fired and he sued asserting he was terminated for orally complaining about the timeclock location. The Court reversed the Seventh Circuit's decision that Kasten's oral complaint was not protected and held that FLSA section 215(a)(3) applies to oral as well as written complaints.[142]

A. Method of Statutory Interpretation

Kasten may prove to be of broad importance because of the methodology the Court used in construing section 215(a)(3). The court of appeals, assuming that the term "filed" must have some specific meaning, concluded that "filed" meant filed in writing, and insisted it was compelled to apply that "plain language" even though the result seemed inconsistent with the statute's purpose.[143] The Supreme Court, rather than assuming that every word (or phrase) must have a single specific plain language meaning, recognized that a word (or phrase) might have several alternative meanings. Where that is the case, *Kasten* held, the language itself simply delineates the permissible possible interpretations. A court must then select from among those alternatives the construction that best advances the purpose of the statutory provision and the law as a whole.[144] The statutory purpose is irrelevant only when "the text, taken alone, . . . provide[s] a *conclusive* answer to our interpretive question."[145]

Kasten recognizes that words often have a range of different meanings and that the most common usage of a particular word is not the only possible, or necessary, meaning. The burden on the plaintiff in *Kasten* thus was not to prove that "file a complaint" *must* mean "file a written or oral complaint," but only to show that the phrase *could* have such a meaning. After noting that one dictionary defined "file" in a manner broad enough to include an oral complaint, the Court explained, "[t]his possibility is significant because it means that dictionary meanings, even if considered alone, do not *necessarily* limit the scope of the statutory phrase to written complaints."[146]

Kasten illustrates a range of ways of demonstrating the possible meanings of a term. One, of course, is dictionaries. There are scores of English-language dictionaries, and their definitions of the same word may vary widely. In the case of "file," most dictionaries have a definition that seems to refer to a written document, but the Court's ability to find even a single dictionary with a broader definition was

141. *Kasten*, 131 S. Ct. at 1327.

142. *Id.* at 1336.

143. Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834, 840 (7th Cir. 2009).

144. *Kasten*, 131 S. Ct. at 1330–33.

145. *Id.* at 1333 (emphasis added); *see also id.* at 1331 (text itself does not "necessarily" preclude protection of oral complaints).

146. *Id.* at 1331 (citation omitted).

sufficient to demonstrate that the term could refer to an oral complaint.[147] Resorting to a library with a good collection of dictionaries may prove important in future cases. The Court also pointed to instances in which statutes, opinions, or regulations used the term "file" to refer to an oral complaint or statement.[148] In addition, thoughtful consideration of common usage of a term or phrase (possibly with an illustration gleaned from a Google search) may be helpful. Both *Kasten* and the Court's earlier decision in *Crawford v. Metropolitan Government of Nashville*[149] illustrate how words may have in common usage a range of meanings that simply are not captured in dictionary definitions.

B. The Content of a Protected Complaint

To be protected by FLSA section 215(a)(3), an oral complaint must "put the employer on notice that [the] employee is asserting statutory rights under the [Act.]"[150] More specifically, the Court explained that "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."[151]

This standard has two elements. First, the standard (particularly the longer articulation) does not call for an actual reference to the FLSA; rather, it requires that the employee's complaint be about something the FLSA forbids, such as not being paid overtime (as opposed to, for example, a general gripe that "I don't make much money"). Second, the standard requires that the complaint indicate that the speaker (or writer) wants something to be done about the circumstances described. That seems less likely to be an issue, and appears at least similar to the standard for determining when a written statement to the EEOC constitutes a "charge" under *Federal Express Corp. v. Holowecki*.[152]

> [I]t must be reasonably construed as a request for the agency to take remedial action . . . . [T]he filing must be examined from the standpoint of an objective observer to determine whether, by a reasonable construction of its terms, the filer requests the agency to activate its machinery and remedial processes . . . .[153]

147. *Id.* at 1331.

148. *See id.* at 1331–32.

149. 555 U.S. 271, 277–78 (2009) (an employee can "oppose" discrimination in the workplace, and, thus, come under the protection of the anti-retaliation provision of Title VII, by responding to someone else's question about the discrimination, just as surely as by provoking the discussion).

150. *Kasten*, 131 S. Ct. at 1335 (alterations in original).

151. *Id.*; *see also id.* at 1334 ("[A] 'filing' is a serious occasion, rather than a triviality."). The same standard applies to written as well as oral complaints.

152. 552 U.S. 389 (2008).

153. *Id.* at 402.

It seems likely that, in this respect, decisions under *Holowecki* will be relied on in cases under *Kasten* and vice versa.

C. *Protection of Internal Complaints*

Kasten expressly did not resolve a distinct important question under the FLSA: whether section 215(a)(3) applies to an internal complaint, written or oral, made to an employer rather than to the federal government.[154] Justice Scalia, joined by Justice Thomas, addressed that issue and concluded that with respect to the FLSA, "filed a complaint" means filed a complaint with the government.[155]

There is a circuit split on this issue, and it seems likely that the Supreme Court will grant certiorari to resolve the matter when the question is presented by a suitable case. At this point, only the Second Circuit has held that "filed a complaint" refers solely to a complaint made to federal officials.[156] Nine other circuits have concluded that the statute applies to an internal complaint to an employer.[157] Most recently, the Fourth Circuit, relying in part on portions of the analysis in *Kasten*, held that section 215(a)(3) does protect internal complaints.[158]

D. *The* Kasten *"Weight" Doctrine*

The Court in *Kasten* also "[gave] a degree of weight to" the interpretation of the statute advanced by the Department of Labor (which enforces the FLSA) and the EEOC (which enforces the Equal Pay Act, which encompasses the anti-retaliation provision in the FLSA).[159]

The Court referred to two considerations in holding that the views of the agencies were entitled to a "degree of weight." First, the Court noted that the agencies' construction of the statute had existed for some time. The Department of Labor had advanced its interpretation in a lawsuit decided in 1961 and in a brief filed in 1996.[160] The Department's view was also demonstrated, the Court believed, by the Department's action in establishing "a hotline to receive oral complaints."[161] Reliance on an agency's practices as reflecting its presumed view of the

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154. *Kasten*, 131 S. Ct. at 1336.

155. *Id.* at 1337–40 (Scalia, J., dissenting).

156. Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993).

157. *See, e.g.*, Minor v. Bostwick Labs., Inc., No. 10-1258, 2012 WL 251926, at *13 (4th Cir. Jan. 27, 2012); Hagan v. Echostar Satellite LLC, 529 F.3d 617, 626 (5th Cir. 2008); Lambert v. Ackerley, 180 F.3d 997, 1003–05 (9th Cir. 1999) (en banc); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 44–45 (1st Cir. 1999); EEOC v. Romeo Cmty. Schs., 976 F.2d 985, 989–90 (6th Cir. 1992); EEOC v. White & Son Enters., 881 F.2d 1006, 1011 (11th Cir. 1989); Brock v. Richardson, 812 F.2d 121, 124–25 (3d Cir. 1987); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984); Brennan v. Maxey's Yamaha, Inc., 513 F.2d 179, 181 (8th Cir. 1975).

158. *Minor*, 2012 WL 251926, at *13.

159. *Kasten*, 131 S. Ct. at 1335; *see also id.* (finding that the agency positions "add force to our conclusion[s].").

160. *Kasten*, 131 S. Ct. at 1335.

161. *Id.*

law expands the significance of this line of analysis. The EEOC position had been included in a 1998 Compliance Manual and briefs filed in 1988 and 1996.[162] The Court explained that "[t]he length of time the agencies have held [those views] suggests that they reflect careful consideration, not '*post hoc* rationalizatio[n].'"[163] Second, the Court noted that the "agency views are reasonable" and "consistent with the Act."[164] This appears to be a relatively undemanding element.

What may be emerging here is the idea that under certain circumstances, the position of the agency responsible for enforcing or administering a statute, although not entitled to "deference," should be accorded "weight." This holding is not the traditional *Skidmore* deference;[165] the "weight" is not based on "the power to persuade" in the agencies' positions, the touchstone of *Skidmore* deference, but on having been consistently advanced for a significant period of time. The impact of *Kasten* weight is less than *Chevron*[166] or *Auer*[167] deference—it is not conclusive whenever reasonable—but more than the significance afforded an agency position under *Skidmore*.[168] This gives added force to the well-established positions of the EEOC and Secretary of Labor regarding a wide range of other employment law issues.

The *Kasten* weight doctrine finds additional support in the Court's decision in *New Process Steel, L.P. v. NLRB*.[169] In holding that the NLRB could not take action when it had only two members, the Court relied in part on the fact that, until recently, the Board's practice had been to insist that any Board panel have three members whose terms had not expired.[170]

The potential importance of the *Kasten* weight doctrine is illustrated by the Federal Circuit's decision in *Dell Products L.P. v. United States*.[171] The question in that case was how certain computer batteries should be classified for the purpose of determining the applicable import tariff.[172] The U.S. Customs Service had addressed the same type of issue in a slightly different context (computer speakers) in rulings in 2001 and 2008 and had been "consistent in its application" of the provision involved.[173] Relying on *Kasten*, the Federal

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162. *Id.*

163. *Id.* (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)).

164. *Id.* at 1335.

165. Skidmore v. Swift, & Co., 323 U.S. 134, 140 (1944).

166. Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

167. Auer v. Robbins, 519 U.S. 452, 457–58 (1997).

168. *Skidmore*, 323 U.S. at 140.

169. 130 S. Ct. 2635 (2010).

170. *Id.* at 2641–42 ("[T]he Board's longstanding practice is persuasive evidence that it is the correct one . . . . ").

171. 642 F.3d 1055 (Fed. Cir. 2011).

172. *Id.* at 1056–57.

173. *Id.* at 1060.

Circuit concluded that under those circumstances, "[t]he consistency of Customs' interpretation of [the tariff] enhances the persuasive power of that interpretation."[174]

VI. *Chamber of Commerce of the United States v. Whiting*[175]

In *Chamber of Commerce of the United States v. Whiting*, the Court rejected a challenge to the Legal Arizona Workers Act of 2007, which requires Arizona courts, in certain circumstances, to suspend or revoke the business license (including any certificate of incorporation) of an employer that twice knowingly or intentionally employed an unauthorized alien.[176] The Chamber of Commerce of the United States and a number of business and civil rights organizations challenged the statute, arguing that the legislation was preempted on several grounds by federal immigration laws.[177] The Supreme Court held that the Arizona law was not expressly preempted[178] by a federal statute that precludes the states from imposing "civil or criminal sanctions" on employers that employ unauthorized aliens, "other than through licensing laws."[179] Ordinary business licenses, and even certificates of incorporation, the Court held, are within the scope of the "licensing laws" exception.[180]

The Arizona statute also required employers to use the federal E-Verify system to confirm that their workers and job applicants were legally entitled to work.[181] The plaintiffs argued that this was inconsistent with the federal statute that forbade the Secretary of Homeland Security, in the absence of a prior violation of federal immigration law, to require employers to use the E-Verify system.[182] That prohibition, the Court held, did not preclude a state from imposing on employers the requirement that the Secretary of Homeland Security was forbidden to impose.[183]

A four-member plurality also rejected arguments that federal immigration law impliedly preempted the Arizona statute.[184] The plaintiffs contended that the state law would upset the balance that Congress sought to strike when it enacted the Immigration Reform and

174. *Id.*
175. 131 S. Ct. 1968 (2011).
176. *Id.* at 1970–71.
177. *Id.* at 1971.
178. *Id.* at 1981.
179. 8 U.S.C. § 1324a (h)(2) (2006).
180. 131 S. Ct. 1968, 1988 (2011).
181. ARIZ. REV. STAT. ANN. § 23-212(I) (2008).
182. *Whiting*, 131 S. Ct. at 1977.
183. *Id.* at 1987.
184. *Id.* at 1971. This portion of the opinion was joined by only four members of the Court. Three justices dissented, Justice Kagan recused herself, and Justice Thomas declined to join this portion of the majority opinion.

Control Act (IRCA).[185] IRCA's bar to the employment of unauthorized aliens was coupled with a prohibition against employment discrimination against aliens, and enacted against a background of federal law which forbids employment discrimination on the basis of national origin.[186] The prohibitions against those two forms of discrimination were thought necessary because of the danger that employers would seek to avoid liability for employing unauthorized aliens simply by refusing to employ all aliens, or by discriminating against national origin groups (e.g., Hispanics) which an employer might believe likely to include a significant number of unauthorized aliens.[187] The plaintiffs argued that the severity of the sanctions imposed by the Arizona statute would pressure employers into engaging in the types of discrimination forbidden by IRCA and Title VII.[188] The Supreme Court disagreed, however, and predicted that employers would simply choose to comply with both the state and federal requirements.[189]

VII. *NASA v. Nelson*[190]

In *NASA v. Nelson*, the Supreme Court assumed without deciding, as it had twice before,[191] that there is a constitutional interest in the confidentiality of personal information, but held that any such right had not been violated in the circumstances of the case.[192]

Nelson and the other plaintiffs worked at the Jet Propulsion Laboratory (JPL), which is owned by NASA but operated by the California Institute of Technology. Because the plaintiffs were employees of JPL, not NASA, they had not earlier been subject to government background investigations. Beginning in 2004, however, the federal government began to require standard background checks for contract employees with long-term access to federal facilities.[193] The Ninth Circuit held that the plaintiffs' constitutional rights were violated by two aspects of that background check: (1) a form which required employees who had used illegal drugs to disclose any drug treatment or counseling, and (2) a questionnaire sent to an employee's former employers and others which inquired whether the reference knew, regarding the employee, of "any adverse information" about several listed subjects "or other matters."[194]

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185. *Id.*
186. *Id.* at 1975; 8 U.S.C. § 1324b (2006).
187. H.R. REP. No. 99-682(I), at 68–69 (1986); H.R. REP. No. 99-682(II), at 11–12 (1986).
188. *Whiting*, 131 S. Ct. at 1984.
189. *Id.*
190. 131 S. Ct. 746 (2011).
191. Whalen v. Roe, 429 U.S. 589, 599–600 (1977); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977).
192. *Nelson*, 131 S. Ct. at 763–64.
193. *Id.* at 752.
194. *Id.* at 752–53.

The Court set out a three-part methodology for analyzing such informational privacy claims, although specifically reserving the question of whether the Constitution protects privacy concerns of this type. First, the Court examined the type and significance of the interest assertedly served by the government's efforts to obtain the private information.[195] That interest is especially substantial, the Court held, when the government acts as an employer dealing with its workforce, rather than seeking to regulate private conduct. Here, the interest was even greater because JPL did "important work . . . funded with a multibillion dollar [government] investment," overseeing space vehicles that are critical to NASA's mission.[196] For the purposes of this analysis, it did not matter whether the workers involved were employees of a federal contractor, rather than of the government itself.[197]

Second, the Court evaluated whether the inquiry regarding the confidential information was "reasonable" and employment-related.[198] Like any employer, the opinion explained, the government is entitled to have its projects staffed by "reliable, law-abiding persons who will efficiently and effectively discharge their duties."[199] The Court held that "questions about illegal-drug use are a useful way of figuring out which persons have these characteristics."[200] This reflects a broad view of the type of personal characteristics and information a government employer might permissibly seek. The Court made clear that acquisition of the requested confidential information need not be "necessary" to assure that a worker meets this standard, or the only possible method of determining whether that standard was met.[201]

Third, the Court considered whether the government's program avoided an "undue risk of public dissemination."[202] This seems to be the part of the (still hypothetical) constitutional standard that imposes the most significant limitation. This requirement is at least ordinarily satisfied if a statute or regulation imposes on government officials with access to personal information a legal duty not to make that information public. In this case, federal law only permitted disclosure of background check information to individuals when disclosure was necessary for evaluating the worker's fitness, or for some other purpose expressly authorized by law. Such routine uses of background information, the Court held, did not create any undue risk of public disclosure.[203]

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195. *Id.* at 757.
196. *Id.* at 759.
197. *Id.* at 758–59.
198. *Id.* at 759–60.
199. *Id.* (citation and quotation omitted).
200. *Id.* at 760.
201. *Id.*
202. *Id.* at 763.
203. *Id.*

It is important that the Court applied this test not only to information which the workers themselves were required to provide, but also to information known to, and obtained from, schools, landlords, or former employers.[204] The fact that someone other than the workers themselves already had access to the assertedly private information, even third parties who could themselves legally have made the information public, did not remove it from the (assumed) privacy protections.

VIII. *CIGNA Corp. v. Amara*[205]

In 1997, the CIGNA Corporation altered its pension plan in a manner that significantly reduced the benefits for certain employees, and materially increased the risk of reduced benefits for others.[206] The new plan saved the company $10 million annually. In materials sent to its employees at the time, however, CIGNA assured them that their benefits would not be cut and that the company would not receive any cost savings as a result of the change in the plan.[207] The employees sued[208] on behalf of approximately 25,000 plan beneficiaries claiming the employer's actions violated the Employee Retirement Income Security Act (ERISA).[209]

The district court concluded that CIGNA had violated its obligations under ERISA to provide beneficiaries with accurate information about their rights and to notify them of any significant reduction in the amount of future benefits.[210] The trial court, relying on ERISA section 502(a)(1)(B), deemed the inaccurate company statements to be part of the new benefit plan. It ordered class-wide relief, requiring that class members be permitted to retain (as they had been promised) the benefits that had accrued under the old plan prior to January 1, 1998, and that they receive as well the additional benefits subsequently provided by the new plan.[211] At the Supreme Court, CIGNA did not dispute the findings that it had violated ERISA but argued that a plan beneficiary could obtain relief only by showing detrimental reliance on the company's false statements.[212]

The Court held that the disputed relief could not be ordered under section 502(a)(1)(B).[213] That provision authorizes a civil action by a beneficiary to "recover benefits due him under the terms of his

204. *Id.* at 761.
205. 131 S. Ct. 1866 (2011).
206. *Id.* at 1871–72.
207. *Id.* at 1872–73.
208. *Id.* at 1870.
209. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461 (2006)).
210. *CIGNA*, 131 S. Ct. at 1870–71.
211. *Id.* at 1875–76.
212. *Id.* at 1880–82.
213. *Id.* at 1887–88.

plan . . . ."[214] The phrase "the plan," the Court held, referred only to the actual pension plan, whose terms were, of course, adverse to the plaintiffs. The misleadingly positive written materials which CIGNA had given its workers were not part of the actual plan, and section 502(a)(1)(B) provided only for enforcement of the plan as written, not of the plan as reformed by the court.[215]

The Supreme Court concluded, however, that section 502(a)(3), which permits a plaintiff "to obtain . . . appropriate equitable relief," could provide authority for the type of remedy ordered by the district court.[216] ERISA typically treats a benefit plan as a trust and the relevant officials as fiduciaries; claims by trust beneficiaries were actions in equity. Among the traditional equitable remedies available are reformation (including reformation of a contract), estoppel (holding a defendant to its representations), and surcharge (compensation for a loss resulting from a trustee's breach of duty). The standards governing each of these remedies differ, and those differences are likely to be important in future litigation.

The remedy of estoppel, the Court concluded, does require a showing of detrimental reliance.[217] As Justice Scalia noted in his separate opinion, individualized determinations of detrimental reliance by each plan participant would at the least raise challenging questions in a class action.[218]

The imposition on a trustee of a surcharge (monetary compensation for a loss resulting from a trustee's breach of duty) requires a showing that the breach resulted in actual harm to the trust beneficiary. Where, as in this case, the breach of duty was a failure to provide beneficiaries with accurate information, there would have to be a showing of a causal connection between those inaccuracies and harm to a beneficiary. Proof of detrimental reliance would be one method of establishing that causal connection, but it would not be the only way. The Court held, for example, that the necessary showing could be made by evidence that an injured employee who did not rely on or even read the false statements had assumed that fellow employees would have informed the employee if, for example, plan changes would likely be harmful.[219] In such a situation, the false statements, by misleading other workers into believing the plan would not be harmful and thus not warning the claimant, could be said to have caused the injury to the employee in question. Proof of that sort of causation, however, might also require some sort of individualized inquiry.

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214. 29 U.S.C. § 1132(a)(1)(B) (2006).
215. *Cigna*, 131 S. Ct. at 1876–78.
216. 29 U.S.C. § 1132(a)(3) (2006); *CIGNA*, 131 S. Ct. at 1876–80.
217. *Cigna*, 131 S. Ct. at 1880–82.
218. *Id.* at 1885.
219. *Id.* at 1881.

Reformation, on the other hand, seems to be the equitable doctrine that supports the sort of class-wide remedy in this case. Where reformation is sought, the violation is not the falsity of the statements (here, made to workers), but the failure to frame the underlying document (a contract or, in this case, a trust) in a manner that conforms to what has been openly announced. In such a situation, the remedy is to reform the contract or trust to match the representations that were made to the other party; that would support the type of class-wide remedy in this type of case, because employers usually make the same representations to all their workers. A defendant could defeat that remedy as to a particular beneficiary only by showing that the claimant was negligent in not realizing that the plan was different than the company's statements, that the negligence fell below a standard of "reasonable prudence," and that the negligence "violate[d] a legal duty."[220] It would probably be difficult for an employer to show that a worker was negligent in failing to recognize the inaccuracy of the employer's own false statements.

IX. *AT&T Mobility LLC v. Concepcion*[221]

A significant number of employers today require their workers, as a condition of employment, to agree to arbitrate most employment claims. Because such agreements are generally within the scope of the Federal Arbitration Act (FAA),[222] states cannot impose an outright ban on the arbitration of employment claims. The FAA, however, ordinarily permits the invalidation or limitation of arbitration agreements under state law that governs "the revocation of any contract."[223] For that reason, state unconscionability law has repeatedly been applied to arbitration agreements governing employment and other sorts of claims, so long as the state law does not single out and disfavor arbitration. In *Concepcion*, the Supreme Court held that state-law rules establishing even general contract defenses may be unenforceable under the FAA if they stand as an obstacle to the accomplishment of the FAA's objectives.[224]

Concepcion involved a claim by consumers that AT&T had engaged in fraud and false advertising by claiming that certain cell phones were free.[225] The contract signed by AT&T customers required them to arbitrate any disputes with the company and expressly barred arbitration of class claims.[226] California courts concluded that this

220. *Id.*
221. 131 S. Ct. 1740 (2011).
222. 9 U.S.C. §§ 1–14 (2006).
223. *Id.* § 2.
224. *Concepcion*, 131 S. Ct. at 1748.
225. *Id.* at 1744.
226. *Id.* at 1744–75.

prohibition was unconscionable, reasoning that the size of the individual claims was so small that few if any customers would pursue individual claims, leaving merchants free deliberately to cheat large numbers of consumers out of individually small sums of money.[227]

The Supreme Court concluded that this state-law unconscionability rule was inconsistent with the purposes of the FAA. Class arbitration, the Court reasoned, would necessarily be both lengthy and formalized, thus defeating the central goal of the FAA to facilitate the use of a speedy and informal arbitration process.[228] In addition, precisely because arbitration is informal, and subject to only limited judicial review, the Court thought potential defendants would be unlikely to agree to arbitration if class actions were required because they would not want to subject themselves to a possible error-prone process when the total value of the claims was substantial.[229] Potential plaintiffs, on the other hand, would probably favor arbitration class actions because it would be possible to obtain the assistance of class counsel in such proceedings, and because an aggrieved consumer could obtain relief without having to initiate an individual arbitration proceeding. The Court's conclusion that requiring class actions would reduce the use of arbitration reflected the majority's tacit understanding that whether contracts for the sale of consumer goods (like employment contracts) require arbitration is dictated by the merchant (or employer), not the consumer. Thus, the FAA's policy of encouraging the use of arbitration evidently requires that the legal standards governing arbitration agreements must favor vendors over consumers, or employers over employees, so that the party with the economic power to select or reject arbitration will decide in favor of using it. This seems an economically realistic, albeit somewhat distasteful, method of analysis.

Whether this decision will have a substantial effect in labor and employment cases was called into question by the January 2012 NLRB decision in *D.R. Horton, Inc.*[230] In *D.R. Horton*, the Board held that an employer limitation on the freedom of workers to participate in a class action would violate the statutory right to engage in "concerted activities."[231] Because that right applies to all covered employees, regardless of whether they belong to a union, the NLRB's decision, unless struck down, seems likely to limit the reach of *Concepcion* to workers who are not covered by the NLRA's right to engage in concerted activity.

227. *Id.* at 1745.
228. *Id.* at 1747–48.
229. *Id.* at 1745.
230. 357 N.L.R.B. No. 184 (2012).
231. *Id.* at *12; 29 U.S.C. § 157 (2006).

X. *Borough of Duryea v. Guarnieri*[232]

This decision resolved a disagreement among the courts of appeals regarding the scope of rights of government employees under the First Amendment's Petition Clause.[233] *Connick v. Myers*[234] had earlier held that the Free Speech Clause only protects the speech of government workers when they are speaking as citizens on a matter of public concern.[235] Although the Petition Clause applies to somewhat different types of activities than the Free Speech Clause, most circuits similarly had concluded that the Petition Clause protects petitioning by government employees only when the subject of the petition is a matter of public concern. Rejecting the contrary view of the Third Circuit, the Supreme Court held that the *Connick* standard governs Petition Clause claims.[236] Justices Scalia and Thomas in separate opinions argued that Petition Clause claims should not be limited by the *Connick* standard. They would have held that the Clause does not protect petitions addressed to the government as an employer.[237] This decision leaves the law where it was in most circuits.[238]

232. 131 S. Ct. 2488 (2011).
233. U.S. CONST. amend. I.
234. 461 U.S. 138 (1983).
235. *Id.* at 147.
236. *Guarnieri*, 131 S. Ct. at 2500–01.
237. *Id.* at 2501–02.
238. *See, e.g.*, Martin v. Del City, 179 F.3d 882 (10th Cir. 1999).