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RECENT SUPREME COURT EMPLOYMENT LAW DEVELOPMENTS

Olati Johnson[1] and Douglas D. Scherer[2]

This article discusses recent employment law developments at the United States Supreme Court. Employment law cases took center stage during the October 1997 and 1998 Terms of the Supreme Court and important employment law cases were pending, or have been decided, during the October 1999 Term. This article briefly surveys the Court's employment law cases during the October 1997 Term, focusing more extensively on the Court's employment law cases during the October 1998 Term, and then discusses two very important employment law cases before the Court during the October 1999 Term, involving the constitutionality of the Age Discrimination in Employment Act of 1967 ("ADEA")[3] as applied to state government defendants, and proof of discrimination in ADEA cases and Title VII[4] disparate treatment cases.

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[3] 29 U.S.C. §§ 621-650 (1994).

[4] *See* 42 U.S.C. §§ 2000(e)(1)-2000(e)(17) (1994).

I. THE SUPREME COURT'S OCTOBER 1997 TERM EMPLOYMENT LAW CASES

Three sexual harassment cases reflect the progressive approach of the October 1997 Term.[5] In *Burlington Industries, Inc. v. Ellerth*[6] and *Faragher v. City of Boca Raton*,[7] the Court provided protection for victims of sexual harassment by imposing vicarious liability upon employers for supervisor harassment if a tangible employment action was taken (such as discharge, demotion, or undesirable reassignment). If no tangible employment action is taken, an employer can avoid vicarious liability for supervisor harassment only if it affirmatively proves that it acted reasonably "to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise . . . ."[8] In *Oncale v. Sundowner Offshore*

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[5] *See* ROBERT M. BELTON, THE SUPREME COURT'S 1997 TERM, 2 EMPLOYEE RTS & EMPLOYMENT POLICY J. 267 (1998). There is an excellent discussion of the Supreme Court's employment law cases during the October 1997 Term.

[6] 524 U.S. 742, 757 (1998).

[7] 524 U.S. 775, 807 (1998) in which the Court stated:

> In order to accommodate the principal of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in Burlington Industries, Inc. v. Ellerth . . . . An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

Id.

[8] *Ellerth*, 524 U.S. at 765:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with

Servs., Inc., the Court also held that the sexual harassment doctrine applies to same-sex sexual harassment.[9]

The October 1997 Term yielded a progressive interpretation of the Americans with Disabilities Act of 1990 ("ADA").[10] In *Bragdon v. Abbott*,[11] the Court held that an asymptomatic HIV

> complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Id.

Faragher and *Ellerth* should be distinguished from the October 1998 Term decision in Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). *Davis* was brought under Title IX of the Education Amendments Act of 1972, and not under Title VII of the 1964 Civil Rights Act. Title IX was held to allow a private damages action against a school board for student-to-student sexual harassment, but only where the school board is "deliberately indifferent to sexual harassment, of which [it has] actual knowledge, that is so severe, pervasive, objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650.

[9] 523 U.S. 75, 79 (1998) (holding "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII").

[10] *See* 42 U.S.C. §§ 12101-12213 (1990).

[11] 524 U.S. 624, 639-41 (1998). The Court noted:

> the medical evidence leads us to conclude that respondent's infection substantially limited her ability to reproduce in two independent ways. First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected . . . . Second, an infected woman risks infecting her child during gestation and childbirth, i.e., perinatal transmission . . . . The Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV

positive plaintiff was disabled under the ADA. *Bragdon* involved a dentist who discriminated against a patient, violating the public accommodation provisions of the ADA.[12] The significance of the case was its broad interpretation of the statutory phrase "substantially limits one or more of the major life activities of [an] individual."[13] The Court concluded that reproduction is a major life activity and thus, Sidney Abbott suffered a substantial limitation of this activity.[14]

A positive result for employees occurred in *Oubre v. Entery Operations, Inc.*,[15] in which the Court strictly applied the waiver provisions of the Older Workers Benefit Protection Act of 1990 ("OWBPA").[16] The Court held that a waiver of statutory claims under the ADEA is ineffective if there is non-compliance with the Act's "knowing and voluntary" waiver requirements.[17] The Court also held that, if such a waiver is ineffective, a former employee plaintiff need not "tender back" the settlement money

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> victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation.

Id.

[12] *Id.* at 628-29. *See also* 42 U.S.C. § 12182 (1990), providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

[13] 42 U.S.C. § 12102(2)(A) (1990). This section defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities such individual." *Id.*

[14] *Bragdon*, 524 U.S. at 638 (holding that "the plain meaning of the word 'major' denotes comparative importance" and "suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.") (citing the 9th Circuit in *Bragdon v. Abbot*, 107 F.3d 934 (9th Cir. 1997)).

[15] 522 U.S. 422 (1998).

[16] *See* Pub. L. No. 101-433, Title II, 104 Stat. 978 (1990) (codified at 29 U.S.C. §§621-34).

[17] 29 U.S.C. § 626(f)(1) (1990). This section provides in pertinent part that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary . . . . A waiver may not be considered knowing and voluntary unless at a minimum it complies with certain proscribed requirements." *Id.*

he or she received as a precondition to bringing an ADEA action.[18]

A decision favoring employees was issued in *Geissel v. Moore Medical Corp.*,[19] in which the Court interpreted the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")[20] in such a way that a person who terminated employment has the right to continue his or her medical insurance coverage with the former employer.[21] This applied even if that person is covered, at the time of termination, under the medical insurance of a spouse or other person.[22] The COBRA election right is lost only if the former employee subsequently obtains coverage under another medical insurance plan, after the date for electing COBRA coverage.[23]

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[18] *Oubre*, 522 U.S. at 428-29 (noting that "[s]ince Oubre's release did not comply with the OWBPA's stringent safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA claim. As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims").

[19] 524 U.S. 74 (1998).

[20] 29 U.S.C. §§ 1161-68 (1994). COBRA amended the Employee Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001-1461 (1994). Section 1161(a) is the general provision providing in pertinent part, "[t]he plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan." *Id.*

[21] *Geissel*, 524 U.S. at 80-81.

[22] *Id.*

[23] *Id.* at 86-87. The Court noted:

> Once the beneficiary's pre-existing condition is identified, a court need only look among the terms of the later policy for an exclusion or limitation peculiar to that condition. If either is found, COBRA continuation coverage is left undisturbed; if neither is found, the consequence of obtaining this later insurance is automatic.

Id.

II. THE SUPREME COURT'S OCTOBER 1998 TERM EMPLOYMENT LAW CASES

During the recently completed October 1998 Term, in *Sutton v. United Air Lines*,[24] *Murphy v. United Parcel Service, Inc.*,[25] and *Albertsons, Inc. v. Kirkingburg*,[26] the Court interpreted the word "disabled," under the ADA, in an employer friendly manner.

In *Sutton*, twin sisters with severe myopia applied for global pilot positions with United Air Lines.[27] Their corrected vision with eyeglasses was 20/20, but their applications were rejected because of their uncorrected vision, and thus they filed ADA complaints.[28] The Supreme Court concluded that they were not disabled under the ADA.[29] Although they suffered from a physical impairment, as required by the statute, they were not substantially limited in a major life activity.[30]

The key issue in *Sutton* was whether or not mitigating measures, such as the use of corrective eyeglasses, must be considered in determining if a person with a physical impairment has suffered a substantial impairment of a major life activity.[31] Therefore, because the *Sutton* sisters had 20/20 vision with eyeglasses, no major life activity was deemed to be impaired.[32]

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[24] 527 U.S. 471 (1999).
[25] 527 U.S. 516 (1999).
[26] 527 U.S. 555 (1999).
[27] *Sutton*, 527 U.S. at 475.
[28] *Id.*
[29] *Id.* at 478. The following definition of "disability" is set forth in the ADA: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2) (1990).
[30] Sutton, 527 U.S. at 482 (explaining that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - both positive and negative - must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act").
[31] *Id.* at 488.
[32] *Id.*

This case is not troubling when dealing with the topic of eyeglasses. However, it may be bothersome when dealing with assistive or prosthetic devices, and essential medication for physical or mental illness. It is an open question as to the extent to which a person with a serious physical or mental impairment is covered by the ADA, when the impairment may be mitigated in some way.

The Court in *Sutton* rejected an EEOC Interpretive Guidance and a Justice Department Guideline in concluding that mitigating measures are to be considered when determining if an individual with a physical or mental impairment suffered a substantial limitation of a major life activity.[33] In doing so, the Court almost certainly defined "disability" under the ADA more narrowly than Congress would have expected. Justice Stevens, in his dissent, wrote, "[t]he Committee Reports on the bill that became the ADA made it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures."[34]

Additionally, Justice Breyer, in his dissent, identified the choice made by the majority, as follows:

> We must draw a statutory line that either (1) will include within the category of persons authorized to bring suit under the Americans with Disabilities Act of 1990 some whom Congress may not have wanted to protect (those who wear ordinary eyeglasses), or (2) will exclude from

[33] *Id.* at 480. The EEOC Interpretive Guidance provided that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assitive or prosthetic devices." 29 C.F.R. 1630, app. § 1630.2(j) (1998). The Department of Justice guideline, also rejected by the Court, provided: "The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids or services." 28 C.F.R. 35, app. A, § 35.104. *Id.*

[34] *Sutton*, 527 U.S. at 499 (Stevens, J., dissenting). Justice Stevens noted more specifically that, "[t]he Court appears to exclude from the Act's protected class individuals with controllable conditions such as diabetes and sever hypertension that were expressly understood as substantially limiting impairments in the Act's Committee Reports . . . ." *Id.*

> the threshold category those whom Congress certainly did want to protect (those who successfully use corrective devices or medicines, such as hearing aids or prostheses or medicine for epilepsy). Faced with this dilemma, the statute's language, structure, basic purposes, and history require us to choose the former statutory line, as JUSTICE STEVENS (whose opinion I join) well explains.[35]

Sutton dealt with two additional ADA issues. First, it rejected the claim that the Sutton sisters suffered a substantial limitation in their major life activity of working.[36] Although they did not receive the global pilot positions they sought, they were not "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . [t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[37]

Second, the Court rejected the claim by the Sutton sisters that they were regarded as being disabled.[38] The ADA prohibits discrimination because an individual is "regarded as having . . . an impairment [that substantially limits one or more of the major life activities of such individual]."[39] The Court relied upon the text of the statute in concluding that a disability means that an individual is regarded by an employer as having a physical or mental impairment that substantially limits an important life activity.[40] The Court noted that being viewed as not meeting the specific physical requirements for a particular job, as in *Sutton*, did not equal an automatic disability.[41]

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[35] Sutton, 527 U.S. at 513 (Breyer, J., dissenting).
[36] *Id.* at 482.
[37] *Id.* at 491 (quoting from an EEOC regulation found at 29 CFR § 1630.2(j)(3)(i)).
[38] *Id.* at 475 (holding that "petitioners failed to allege properly that respondent 'regarded' them as having a disability within the meaning of the ADA").
[39] *Id.* at 477-78 (referring to 42 U.S.C. § 12102 (2) (1990)).
[40] *Sutton*, 527 U.S. at 489.
[41] *Id.* at 490. The Court stated:

Therefore, it was found that the Sutton sisters were not discriminated against because they were regarded as being disabled.[42]

Murphy involved a truck mechanic who was discharged by the United Parcel Service because of a medically controlled high blood pressure condition.[43] As in *Sutton*, there was a physical impairment, but not one that substantially limited a major life activity.[44] The correction of the impairment, through medication, prevented Murphy from being considered disabled under the ADA.[45]

Murphy was a replay of *Sutton*, with the exception that Murphy's hypertension was a serious medical condition that required control by medication. Like the sisters in *Sutton*, the Court concluded that Murphy was not disabled because his medication permitted him to function in a normal way in his

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> [t]here is no dispute that petitioners are physically impaired. Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing. They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working . . . Further, this requirement substantially limits their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which they argue is a 'class of employment.' In reply, respondent argues that the position of global airline pilot is not a class of jobs and therefore petitioners have not stated a claim that they are regarded as substantially limited in the major life activity of working.

Id.

[42] *Id.*

[43] *Murphy*, 527 U.S. at 518. The Court noted that the petitioner was first diagnosed with high blood pressure, i.e. hypertension, at the age of ten years old. With medication, petitioner's "hypertension does not significantly restrict his activities and . . . in general he can function normally and can engage in activities that other persons normally do." *Id.* (citing Murphy v. United Parcel Service, Inc., 956 F. Supp. 872, 875 (Kan. 1996)).

[44] *Id.* at 521 (noting that when the petitioner was medicated for his hypertension condition, he did not experience a substantial limitation of any major life activity).

[45] *Id.* at 522.

major life activities.[46] He was not substantially impaired in the major life activity of working, because he could work as a mechanic in jobs that did not require him to drive a truck.[47] This was an essential part of his former job that required him to obtain a U.S. Department of Transportation health certificate for operation of commercial vehicles.[48] Occasional driving of a commercial truck was required by his previous mechanic position, but would not be required for other mechanic positions.[49]

In *Albertsons*,[50] a truck driver was fired because he suffered from amblyopia, causing monocular vision. The Court held that mitigating measures must be taken into account in determining whether he suffered from a disability under the ADA.[51] In addition, a determination that a person is disabled under the ADA requires a case-by-case analysis.[52] In *Albertsons*, a possible mitigating measure may have partially corrected the plaintiff's amblyopia.[53] Internal corrective adjustments within his brain may have occurred, without medication, affecting the extent to which he was substantially impaired in a major life activity.[54] The fact that Kirkingburg's visual acuity was different from that

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[46] *Id.* at 521.
[47] *Murphy*, 527 U.S. at 522.
[48] *Id.*
[49] *Id.* at 524. The Court held:

> [t]he evidence that petitioner is regarded as unable to meet DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills. At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle - a specific type of vehicle used on a highway in interstate commerce.

Id.
[50] 527 U.S. 555 (1999).
[51] *Albertsons*, 527 U.S. at 566.
[52] *Id.*
[53] *Id.*
[54] *Id.* The Court stated that Kirkingburg's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability." *Id.*

of other people didn't necessarily mean that he was substantially impaired in the major life activity of seeing.[55]

In *Kolstad v. American Dental Association*,[56] the Court resolved the split among the circuit courts of appeals[57] concerning the standard for awards of punitive damages in Title VII actions, but provided employers with a good faith compliance defense against punitive damages awards based upon action taken by managerial agents.[58]

Punitive damages became available under Title VII for intentional discrimination through the Civil Rights Act of 1991,[59] following proof that a defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[60] In *Kolstad*, a sex discrimination promotion case, the Court rejected the lower court's "egregious misconduct" standard.[61] Instead, the plaintiff must prove that the employer's intentional discrimination occurred "with malice or reckless indifference to the [plaintiff's] federally protected

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[55] *Id.* at 567.

[56] 527 U.S. 526 (1999). Petitioner alleged that respondent's decision to promote her co-worker instead of petitioner, was an act of employment discrimination based on gender, which is proscribed under Title VII. In addition, the petitioner also introduced testimony at trial that Wheat (the hiring supervisor) told sexually offensive jokes and used derogatory terms to refer to some professional women. *Id.* at 531.

[57] *Kolstad*, 527 U.S. at 533. Compare the lower court decision in *Kolstad*, 139 F.3d 965 (D.C. 1998), with Luciana v. Olsten Corp., 110 F.3d 210, 219-220 (Cal.2d 1997) (rejecting contention that punitive damages require showing of "extraordinary egregious" conduct).

[58] *Id.* at 544. Good faith efforts at Title VII compliance require the employer to "demonstrate that it never acted in reckless disregard of federally protected rights." For instance, in some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability to punitive damages. *Id.*

[59] 42 U.S.C. § 1981.

[60] 42 U.S.C. § 198a(b)(1) (1991). *See Kolstad*, 527 U.S. at 533.

[61] *Kolstad*, 527 U.S. at 533. "A defendant must be shown to have engaged in some "egregious" misconduct before the jury is permitted to consider a request for punitive damages." The Court relied upon the structure of § 1981a to prove that Congress intended to limit punitive damages to exceptional cases. *Id.*

rights."[62] The Court explained that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."[63] The employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."[64]

In *Kolstad*, the Court also held that an employer is not vicariously liable for punitive damages based upon decisions of management agents "where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"[65] This vague good faith standard, presumably part of the plaintiff's burden of proof, will limit the situations in which punitive damages will be awarded.

The Court limited the availability of the employer defense of judicial estoppel in ADA actions in *Cleveland v. Policy Management Systems Corporation.*[66] Carolyn Cleveland was terminated from her job after she suffered a stroke.[67] She subsequently applied for and received Social Security Disability Insurance (SSDI) benefits.[68] She then sued her former employer under the ADA for disability discrimination on the theory that she could perform the essential functions of her job with reasonable accommodation.[69] The district court and court of appeals held that she was judicially estopped from pursuing her ADA claim because of her SSDI disability claim.[70]

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[62] *Id.* at 534.
[63] *Id.* at 536.
[64] *Id.*
[65] *Id.* at 545 (quoting Judge Tatel's dissent in the court of appeals decision below, in Kolstad v. American Dental Association, 139 F.3d 965, 974 (Tatel, J., dissenting) (1998)). The Restatement of Agency's "scope of employment" rule regarding Title VII punitive damages would reduce the incentive for employers to implement antidiscrimination programs. It would, in effect, penalize those employers who take the time to educate themselves and their employees on Title VII. *Id.*
[66] 526 U.S. 795 (1999).
[67] *Id.* at 798.
[68] *Id.*
[69] *Id.* at 799.
[70] Cleveland v. Policy Management Systems Corp., 195 F.3d 803 (5th Cir. 1999).

The Supreme Court disagreed, and held that seemingly inconsistent claims may be made for SSDI benefits under the Social Security Act and for disability discrimination under the ADA, because the two statutes have different purposes and definitions of disability.[71] The ADA contains a reasonable accommodation[72] requirement that is inapplicable to SSDI disability determinations,[73] which is a fact that is important to this action. Therefore, a person could be disabled for SSDI purposes because the applicable test is the ability to work, without consideration of reasonable accommodation, and at the same time that person could be a "qualified individual with a disability"[74] under the ADA, able to "perform the essential functions of the employment position . . . ."[75]

However, a plaintiff who makes an SSDI contention that she is disabled and subsequently files an ADA claim "must explain why that SSDI contention is consistent with the ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'"[76] The Court held that "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation."[77]

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[71] *Cleveland*, 526 U.S. at 802.

[72] *Id.* at 803. *See* 42 U.S.C. § 12111 (9)(B), which states in pertinent part: "reasonable accommodations may include: job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations . . . and other similar accommodations." *Id.*

[73] *Id.* The SSA receives more than 2.5 million claims for disability benefits yearly, since its budget is limited, the SSA does not have the resources to make the fact-specific inquiry into the matter of "reasonable accommodations." *Id.*

[74] 42 U.S.C. § 1211(8). The Act defines "qualified individual with a disability" as a disabled person "who . . . can perform the essential functions" of her job, including those who can do so only "with . . . reasonable accommodation." *Cleveland*, 526 U.S. at 801.

[75] *Cleveland*, 526 U.S. at 803-04.

[76] *Id.* at 795.

[77] *Id.* at 806.

In *Kumho Tire Company, Ltd. v. Carmichael,*[78] the Court gave federal trial courts additional discretion to exclude expert witness testimony in employment cases. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[79] a 1993 case dealing with scientific expert testimony, the Supreme Court confirmed the authority of federal district court judges to exclude expert witness testimony on the grounds of relevance and reliability. In *Kumho*, a products liability action from the October 1998 Term, the Court made it clear that the "gatekeeping function"[80] of the trial judge extends beyond scientific testimony to all expert witness, which increases the likelihood of exclusion of expert witness testimony in employment cases.[81] In determining if expert witness testimony is to be allowed, a "trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine the testimony's reliability."[82]

One lesson that the plaintiff's counsel learned from *Kumho* about employment law cases is that great care must be taken in selecting expert witnesses, especially when expert witness testimony is central to the proof of a case, because a case can be lost at the summary judgment stage if the trial judge relies upon *Kumho* and excludes the testimony of a crucial expert witness.

In *West v. Gibson,*[83] the Court approved EEOC authority to provide federal employees with compensatory damages at the

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[78] 526 U.S. 137 (1999).
[79] 509 U.S. 579 (1993).
[80] *Kumho*, 526 U.S. at 141. The main purpose of the "gatekeeping function" is to "ensure the reliability and relevancy of expert testimony [and] to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 151. *See also* FED. R. EVID. 702 (stating "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise").
[81] *Id.* at 152.
[82] *Id.*
[83] 527 U.S. 212 (1999). Gibson, the respondent, filed a complaint with the Department of Veterans Affairs alleging that the Department had discriminated

administrative stage. Title VII, as amended in 1972, authorizes the EEOC to provide "appropriate remedies" for employment discrimination against federal government employees.[84] As amended by the Compensatory Damages Amendment Act of 1991,[85] Title VII provides for awards of compensatory damages for victims of intentional discrimination, including victims who are employees of the federal government. In *West*, the Court described EEOC's administrative processing of federal employee charges as a "dispute resolution system"[86] that provides "administrative relief prior to court action,"[87] and concluded "[t]o deny that an EEOC compensatory damages award is, statutorily speaking, 'appropriate' would undermine this remedial scheme."[88]

Wright v. Universal Maritime Service Corporation[89] involved binding arbitration of statutory employment discrimination claims of union members. However, the decision offered limited guidance in a very complex area. In a unanimous opinion written by Justice Scalia, the Court considered the enforceability of a binding arbitration clause in a collective bargaining agreement, as applied to statutory employment discrimination claims.[90] The clause covered ". . . all matters affecting wages, hours, and other

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against him because it denied him a promotion on the basis of his gender. *Id.* at 216.

[84] 42 U.S.C. § 2000e-16(b).

[85] 42 U.S.C. § 1981a(a)(1) (1991). The statute states in pertinent part: "In an action brought by a complaining party under section . . . 717 [dealing with discrimination by the Federal Government] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory . . . damages . . . ." *Id.*

[86] *West*, 527 U.S. at 218. The purpose of the administrative process is to initially avoid the court, which will provide federal employees with quicker, less formal and cheaper resolution of disputes. If a party disagrees with the final disposition rendered by the agency, then a court would be an appropriate venue for the dispute. *Id.* at 219.

[87] *Id.* at 218-19.

[88] *Id.* at 219. Sponsors of the CDA stated that there was a need to create a new remedy that would potentially make victims whole and provide additional deterrence to intentional discrimination. *Id.*

[89] 525 U.S. 70 (1998).

[90] *Id.* at 72.

terms and conditions of employment . . . ."[91] The decision acknowledged that there is "some tension"[92] between *Alexander v. Garder-Denver*,[93] holding that a binding arbitration clause in a collective bargaining agreement does not prevent a union member from filing a Title VII action, and *Gilmer v. Interstate/Johnson Lane Corp.*,[94] a non-union case, in which an ADEA claim was subject to binding arbitration pursuant to a New York Stock Exchange rule.[95] In *Gilmer*, the Court held that, "statutory claims may be the subject of an arbitration agreement."[96]

Justice Scalia's opinion for the Court in *Wright* left open the question of whether or not a union member may be forced to submit statutory employment discrimination claims to binding arbitration under a collective bargaining agreement. On the facts of *Wright*, the binding arbitration clause in the collective bargaining agreement did not bind the union members because there was no "clear and unmistakable waiver"[97] of the right to a judicial forum.[98]

However, that did not necessarily mean that the binding arbitration clause would have been effective had there been a clear and unmistakable waiver because the Court also wrote, "[w]e do not reach the question whether such a waiver would be enforceable."[99] The *Wright* decision did not address the troublesome issue of the legality of binding arbitration clauses that are forced upon non-union employees as part of employment contracts that employees must sign to obtain or keep their jobs.

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[91] *Id.* at 73.
[92] *Id.* at 76. The apparent tension between the two cases is that *Gardner-Denver* stated that "an employee's rights under Title VII are not susceptible of prospective waiver," while *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived. *Id.* at 76-77.
[93] 415 U.S. 36, 40 (1974).
[94] 500 U.S. 20 (1991).
[95] *Gilmer*, 500 U.S. at 26.
[96] *Id.*
[97] *Wright*, 525 U.S. at 81.
[98] *Id.* at 82.
[99] *Id.*

Basic principles of federalism[100] were modified during the October 1998 Term by three Eleventh Amendment[101] sovereign immunity cases. One of these cases was *Alden v. Maine*,[102] in which the court held unconstitutional a provision of the Fair Labor Standards Act of 1938 ("FLSA")[103] that subjected states to suit in state court for violation of FLSA overtime provisions.[104] These federalism cases led to the extremely important ADEA case, *Kimel v. Florida Board of Regents*,[105] where the court held that the ADEA is unconstitutional as applied to state government defendants. *Kimel* and the three sovereign immunity cases from the October 1998 Term are discussed in Part III below. Also discussed in Part III is *Reeves v. Sanderson*,[106] a pending case with potentially dramatic significance for proof of the disparate treatment of cases under the ADEA and Title VII.

III. THE SUPREME COURT'S MOST IMPORTANT OCTOBER 1999 TERM EMPLOYMENT LAW CASES - *KIMEL* AND *REEVES*

In its October 1999 term, the Supreme Court decided two important employment law cases: *Kimel v. Florida Board of Regents*[107] *and Reeves v. Sanderson Plumbing.*[108] In *Kimel*, following its recent decisions limiting congressional power over

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[100] Alden v. Maine, 527 U.S. 706, 748 (1999). "Federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.*

[101] U.S. CONST. amend. XI, states in pertinent part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

[102] 527 U.S. 706.

[103] 29 U.S.C. §§ 201-219 (1938).

[104] *Alden*, 527 U.S. 706. The other two cases are Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), and College Savings Bank v. Florida Postsecondary Education Expense Board, 527 U.S. 666 (1999).

[105] 120 S. Ct. 631 (2000).

[106] 120 S. Ct. 2097 (2000).

[107] 528 U.S. 62, 145 L. Ed. 2d 522 (2000).

[108] 120 S. Ct. 2097 (2000).

States, the Court held that Congress lacked power under Section 5 of the Fourteenth Amendment[109] to make States subject to suits for violations of the ADEA. In *Reeves*, the court clarified the question of the framework of proof in disparate treatment cases in a decision that plaintiff's employment lawyers would likely find beneficial.

A. *Kimel v. Florida Board of Regents* and State Immunity from Federal Civil Rights Statutes

Kimel raised the question of whether the Eleventh Amendment, [110] which shields unconsenting states from suits by their own citizens and citizens of other states, prohibited Congress from making States subject to suit pursuant to the ADEA.[111] Congress has the power to abrogate States' sovereign immunity from suit if, (1) the statute clearly expresses Congress' intent to abrogate States' immunity, and (2) if Congress is acting pursuant to a constitutional provision which grants it the *power* to abrogate the immunity.[112] The majority of the courts of appeal had found that the States were not immune from suit under the ADEA,[113] but a divided panel of the Eleventh circuit in *Kimel* had sustained the state agency's claim of immunity.[114] A sharply

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[109] U.S.CONST. amend XIV, §5 states in pertinent part: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

[110] U.S. CONST. amend XI, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

[111] *See* Hans v. Louisiana, 134 U.S. 1 (1890).

[112] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996).

[113] *See, e.g.*, Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Board of Regents of the State of Tenn., 154 F.3d 296 (6th Cir. 1998); Keeton v. University of Nev. System, 150 F.3d 1055 (9th Cir. 1998); Scott v. University of Miss., 148 F.3d 494 (5th Cir. 1998); Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761 (7th Cir. 1998).

[114] *See* Kimel v. Florida, 139 F.3d 1426 (11th Cir. 1998); *see also* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (finding state agency immune from suit in federal court under the ADEA).

divided Supreme Court went the way of the minority of the Circuits, holding that although Congress had made its intent to abrogate States' immunity as to the ADEA unmistakably clear, Congress did not have the power to do so.

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[115] When enacted in 1967, the ADEA applied only to private employers,[116] but in 1974 when Congress amended the Fair Labor Standards Act, Congress extended the ADEA to the States by expanding the definition of employer contained in 29 U.S.C. § 630(b) to cover states and their agencies, instrumentalities and political subdivisions.[117] Congress also amended the FLSA enforcement provision, 29 U.S.C. § 216(b), which is incorporated by reference into the ADEA[118] and permits individuals to bring a civil action against "any employer (including a public agency)" in Federal or State court.[119] Elsewhere in the statute, "public agency" was specifically defined to include states and their agencies, and political subdivisions.[120] These provisions, the Court found, were sufficient to satisfy the requirement that immunity be "unmistakably clear in the language of the statute."[121]

However, the *Kimel* Court found that the ADEA had failed the second prong of the Eleventh Amendment inquiry, finding that Congress lacked power under Section 5 of the Fourteenth Amendment to enact the ADEA. This holding was, for the most

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[115] 29 U.S.C. § 623 (a)(1)(2000).
[116] *See* 29 U.S.C. § 6306(b)(164 ed., supp. III).
[117] Fair Labor Standards Amendments of 1974 (1974 Act) §28, 88 Stat. 74.
[118] 88 Stat. 61.
[119] 29 U.S.C. §216 (b) (2000).
[120] 29 U.S.C. §203 (x) (2000).
[121] Kimel v. Florida Board of Regents, 528 U.S. 62, 145 L. Ed. 2d at 536 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)) (in turn quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)) (internal quotations omitted). Only Justice Thomas, joined by Justice Kennedy, disagreed with this portion of the opinion, arguing that the "sequence of events" surrounding the enactment of the FLSA amendments made it less than clear that Congress understood the effect of these changes on the ADEA. *See* 145 L. Ed. 2d at 552 (Thomas, J., concurring in part and dissenting in part).

part, an outgrowth of the Court's landmark decision in *Seminole Tribe of Florida v Florida,*[122] in which the Court held, by a narrow majority, that Congress cannot abrogates States' immunity when acting pursuant to the Commerce clause and can only do so when passing legislation pursuant to the post-Civil War Amendments - the Thirteenth, Fourteenth, and the Fifteenth.[123] While the Court had already found in *EEOC v. Wyoming*[124] that the ADEA was a valid exercise of Congress' power under the *Commerce Clause,* after *Seminole Tribe,* in order to pass the second prong of the Eleventh Amendment inquiry, the ADEA must also have been a proper exercise of Congress' power pursuant to Section 5 of the Fourteenth

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[122] 517 U.S. 44 (1996).

[123] *See id.* at 66-67. At issue in *Seminole Tribe* was whether Congress had properly waived States' sovereign immunity as to the Indian Gaming Regulatory Act, a statute enacted pursuant to Congress' power under the Indian Commerce Clause, Art.I §8 c.3, which allowed resident Indian Tribes seeking to conduct certain gambling activities to bring suit where a state refused to negotiate in good faith. The Court agreed with Florida's claim that the Eleventh Amendment barred the Indian Tribe from bringing suit in federal court, finding that though the first prong of the Eleventh Amendment inquiry had been satisfied, the second prong had not. According to the Court, where Congress is acting pursuant to the Indian Commerce Clause it does not have power to abrogate States' immunity. In so concluding, the Court partially overruled is opinion in *Pennsylvannia v. Union Gas,* 491 U.S. 1 (1989), in which a plurality of the Court had found that the Interstate Commerce Clause granted Congress power to abrogate State sovereign immunity. According to the Court, the rationale of the *Union Gas* plurality "deviated sharply from our established federalism jurisprudence." Because the Commerce Clause, as part of Article I, was enacted prior to the Eleventh Amendment, it could not expand the Article III jurisdiction that the Eleventh Amendment was enacted to limit. The Court contrasted, however, statutes enacted pursuant to Congress' power under § 5 of the Fourteenth Amendment to "enforce, by appropriate legislation" § 1 of the Fourteenth Amendment. Because the Fourteenth Amendment was intended to fundamentally alter the relationship between the federal government and the States, that Amendment gave Congress authority to abrogate States' immunity. So while the Court partially overruled *Union Gas,* it specifically reaffirmed its prior holding in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress, in making Title VII of the 1964 Civil Rights Act applicable to the States in the 1972 amendments to the 1964 Civil Rights Act, had validly abrogated States' constitutional immunity.

[124] 460 U.S. 226 (1983).

Amendment, that is the power to enforce the substantive provision of the Fourteenth Amendment "by appropriate legislation."[125]

As the Supreme Court made clear in several recent non-employment cases, *City of Boerne v. Flores*[126] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[127] Congress' enforcement power under the Equal Protection Clauses was "broad . . . [but] not unlimited."[128] While Congress' Section 5 power goes beyond merely providing a cause of action for unconstitutional conduct and allows Congress the power to enact measures aimed at preventing the occurrence of future unconstitutional conduct, the Court in *Boerne*[129] and *Florida Prepaid*,[130] had found the statues at issue

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[125] 460 U.S. at 243.

[126] 521 U.S. 507 (1997).

[127] 527 U.S. 627 (1999).

[128] *Boerne*, 138 L. Ed. 2d at 647 (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970) (Black., J., dissenting)); *see also* Florida Prepaid v. College Savings Bank, 527 U.S. 627, 636 (1999).

[129] In *Boerne*, the Court held that the Religious Freedom Restoration Act, 42 U.S.C. § 2000b *et. seq.*, (RFRA) was an invalid exercise of the Section 5 power. *See* 138 L. Ed. 2d at 649. RFRA had been adopted in an attempt to deny effect to the Supreme Court's interpretation of the First Amendment Free Exercise Clause in Employment Division v. Smith, 494 U.S. 872 (1990). In finding RFRA constitutionally defective, the Court emphasized that it had been adopted in open defiance of Supreme Court pronouncements, and that its aim and scope were disproportionate to the harm that it sought to remedy. *Id.* at 646-47. According to the Court, RFRA - unlike prior legislation upheld by the Court that prohibited conduct not itself constitutional - was "so out of proportion to a supposed remedial or preventive objective that it cannot be understood as responsive to or designed to prevent unconstitutional behavior" and instead "appears . . . to attempt a substantive change in constitutional protections." *Id.* at 646. The Court found little evidence in the legislative record of unconstitutional conduct by States, and RFRA's scope was so vast, it "intrude[ed] at every level of government displacing laws and prohibiting official conduct of almost every description," that it could not fairly be said to be aimed at unconstitutional conduct. *Id.*

[130] In *Florida Prepaid*, the Court found that the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a), was an inappropriate Section 5 measure as applied to States. *See* 144 L. Ed. 2d at 593. Writing for the Court, Chief Justice Rehnquist held that Congress had failed to identify a pattern of patent

beyond Congress' Section 5 power. The principle set out in *Boerne*, and followed in *Florida Prepaid*, was that Congress could act to remedy or prevent constitutional conduct, but that this remedial or prophylactic aim must be congruent and proportional with the means or methods authorized by the statute.

Applying *Boerne* here, the Court found first that the ADEA proscribed "very little" conduct that was, in fact, unconstitutional.[131] Prior Court case law had made clear that age-based classifications, unlike those based on race and gender, are only unconstitutional where they lack any rational basis.[132] Further, the Court has never found a classification on the basis of age to violated the Equal Protection Clause.[133] Whereas prior case law had permitted States to make age-based classifications (even those based on inaccurate generalizations) where such classifications had a "rational basis," the ADEA placed a "broad restriction on the use of age as a discriminating factor, [thus] prohibit[ing] substantially more state employment decisions and

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infringement by the States, and that the Act's provisions were so out of proportion to any supposed remedial or prophylactic object that they could not be understood as responsive to or designed to prevent unconstitutional behavior. Accepting that patents were "property," the Court explained that infringement of such property could only violate the Fourteenth Amendment if such infringement was done without due process, i.e. in the absence of an adequate state remedy, and if the infringement was done willfully. Because the legislative record had failed to consider the availability of state remedies for patent infringement, and because the statue did not limit infringement actions to those that were intentional, the Act could not be said to "respond to a history of widespread and persisting deprivation of constitutional rights." *Id.* at 592.

[131] *Kimel*, 145 L. Ed. 2d. at 545 (2000).

[132] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (*per curiam)*. The *Murgia* Court rejected claims that age should be a suspect class, explaining that older individuals are not a "discrete and insular minority" (everyone who lives a normal life gets old, the Court reasoned), and that older people have not been subject to a history of intentional discrimination. *Id.* at 313.

[133] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (upholding provision of Missouri Constitution requiring judges to retire at age 70); Vance v. Bradley, 440 U.S. 93 (1973) (upholding federal statue requiring Foreign Service officers to retire at age 60); *Murgia*, 427 U.S. at 317 (upholding Massachusetts statutes requiring state police officers to retire at age 50).

practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[134] The Court found that petitioners' argument that limitations in the statute made it less broad and more in line with the prohibitions of the Equal Protection Clause was unconvincing.[135] As to the Act's "BFOQ" defense provision, which permitted employers to rely on age when it is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business,"[136] the Court relied on its holding in *Western Air Lines, Inc. v. Criswell*,[137] that the BFOQ defense incorporates the "reasonableness" standard contained in the rational basis test.[138]

The Court rejected a similar argument involving another provision of the ADEA, section 623(f),[139] which "allows employers to engage in conduct otherwise prohibited by the Act 'where the differentiation is based on a reasonable factor other than age.'"[140] The Court found that this exception actually reinforced the notion that the ADEA extended further than the constitution, by making clear that an employer could not rely on age as a proxy for other characteristics which the constitution, in contrast, permits.[141]

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[134] 145 L. Ed. 2d. at 544.
[135] *Boerne*, 521 U.S. at 529.
[136] *See id.* at 544-45 (citing 29 U.S.C. § 623 (a)(1)).
[137] 472 U.S. 400 (1985).
[138] 145 L. Ed. 2d. at 545. In *Western Air Lines*, 472 U.S. 400 (1985), the Court explained that the BFOQ defense was a very narrow exception to the ADEA's general prohibition of age discrimination, and that to properly invoke a BFOQ defense an employer must show that "all or nearly all employees above an age lack the qualifications required for the position" or that the age classification was necessary because "it is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job." 472 U.S. at 422-23. Accordingly, the *Kimel* Court concluded that "although it is true that the existence of the BFOQ defense makes the ADEA's prohibition of age discrimination less than absolute, the Act's substantive requirements nevertheless remain at a level akin to our heightened scrutiny cases under the Equal Protection Clause." *Kimel*, 145 L. Ed. 2d. at 545.
[139] 29 U.S.C. § 623(f) (2000).
[140] *Kimel*, 145 L. Ed. 2d. at 545.
[141] *Id.* (quoting 29 U.S.C. § 623 (f)(1)(2000)).

The Court's conclusion that the ADEA extended further than the constitution did not, however, end the Court's Section 5 inquiry. Congress may enact legislation that goes further than what the Constitution prohibits if such legislation is reasonably designed to prevent or remedy unconstitutional conduct. Relying on the analysis delineated in *Boerne* and *Florida Prepaid*, the Court examined the legislative record to determine the appropriateness of the ADEA, given the extent of the unconstitutional conduct, and found it lacking. According to the Court, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[142] The record did contain several passages suggesting that age discrimination was broadly practiced in government employment;[143] however, the Court characterized these as mere "isolated sentences clipped from floor debates and legislative reports."[144] The Court also dismissed petitioner's argument that the legislative history was sufficient because Congress had relied on a 1966 report from California regarding age discrimination in public employment in that state.[145] According to the Court, this report addressed primarily age discrimination in law enforcement and fire-fighting which, according to the Court's precedents, were not unconstitutional conduct and, further, evidence of discrimination in a single state could not support a finding that unconstitutional age discrimination "had become a problem of a national import."[146] Lastly, the Court rejected the argument, advanced by the United States, that Congress' extensive findings

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[142] *Kimel*, 145 L. Ed. 2d. at 530.

[143] *Id.* (citing 118 Cong. Rec. 24397 (1992)). "[T]here is ample evidence that age discrimination is broadly practiced in government employment." *Id.* at 7745; "Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees." *Id.*; "[T]here are strong indications that the hiring and firing practices of governmental units discriminate against the elderly . . . ." *Id.*

[144] *Kimel*, 145 L. Ed. 2d. at 546.

[145] *Id.* at 546-47.

[146] *Id.* at 547 (quoting Florida Prepaid v. College Savings Bank, 144 L. Ed. 2d. 575 (1999)).

of age discrimination in the private sector could support its application of the ADEA to the States.

The dissenters in this case, the same four that had dissented in every Eleventh Amendment case since *Seminole,* blasted the majority's opinion. The dissenters, in an opinion written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, announced their refusal to follow the restrictions on Congress' abrogation power spawned by *Seminole*, and asserted their continued belief that the decision in *Pennsylvania v. Union Gas* remained good law. The dissenters termed the Court's recent Eleventh Amendment jurisprudence, "such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."[147] The dissent faulted the majority for placing the Judicial Branch in the position of "constitutional guardian" of states sovereignty.[148] According to Justice Stevens, the constitutional system of equal representation in the Senate, and not the court, "provides the principal structural protection for the sovereignty of the several States."[149] In passing a statute, Congress "does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant."[150] Given this structure, and given the fact that the only textual limitation of sovereign immunity is on the "diversity jurisdiction of the federal courts," the dissent argued, the Court should not take it upon itself to substitute its views of federalism for those of Congress.[151]

After *Kimel*, it is not clear that Congress could reenact the ADEA so as to enable private litigants to bring an action against the States. The court not only demands a showing of a "widespread" pattern of unconstitutional conduct by States,[152] but

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[147] *Id.* at 552 (Stevens, J., dissenting).
[148] *Id.* at 548.
[149] *Id.* at 549.
[150] *Id.*
[151] *Id.* at 550.
[152] *Florida Prepaid*, 144 L. Ed. 2d at 592 (quoting *Boerne*, 521 U.S. at 526); *Kimel*, 145 L. Ed. 2d. at 546-47.

also shows no serious willingness to defer to Congress' judgment as to whether such a pattern exists.[153] Given the presumption often repeated in *Kimel*, that age discrimination is presumably constitutional, it is hard to imagine how Congress could compile a sufficient legislative record regarding a patter of "unconstitutional" conduct by States to survive this Court's review. The existence of state-based remedies for age discrimination in employment in almost every state (most of which were not in existence when Congress extended the ADEA to States in 1974) makes it additionally unlikely that the Court would uphold a new provision without some finding that these state remedies are inadequate.

The *Kimel* decision also casts into immediate doubt the ability of private litigants to bring suit under the Americans with Disabilities Act, a question on which the Court has recently granted certiorari. There is a lopsided split on the question, with most circuits finding that Congress has the power to abrogated States' immunity, and the Court has taken certiorari on a case raising the issue for the October 2000 term.[154] The ADA contains a clear statement of abrogation of States' immunity,[155] but like the ADEA, the terms of the ADA require employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability",[156] and prohibits conduct that is not prohibited by the Constitution itself. There are, nonetheless, strong reasons to suggest that, notwithstanding its decision in *Kimel*, the Court may find that Congress validly abrogates States immunity as to the ADA.

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[153] *See Kimel*, 145 L. Ed. 2d. at 546-47 (scrutinizing legislative record and finding it insufficient).

[154] *See* Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 146 L. Ed. 2d 479 (2000).

[155] 42 U.S.C. 12202 provides that a "State shall not be immune under the eleventh amendment to the constitution of the United States for an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."

[156] 42 U.S.C. § 12112 (b)(5)(A)(2000).

For one, the Court in *City of Cleburne v. Cleburne,*[157] unanimously found unconstitutional a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. While the court stated that all classifications on the basis of disability would not be deemed "quasi suspect," the Court found that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms."[158] Unlike with the ADEA where the Court, having found no constitutional violations in three challenges to age classifications, seemed to suggest that age classifications would rarely ever be found unconstitutional; given *Cleburne*, there is a stronger argument that the ADA reaches at least some unconstitutional conduct.

Additionally, the ADA contains an extensive legislative history on the need to remedy discrimination against people with disabilities. The statute makes explicit findings regarding the problems faced by people with disabilities, including that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities."[159] The legislative reports, floor statements and the hearings on the ADA, as well as a report of the United States Commission on Civil Rights that was before Congress,[160] specifically document the segregation of people with disabilities in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,"[161] the exclusion of people with disabilities

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[157] 473 U.S. 432, 446 (1985).

[158] *Id.* at 446.

[159] 42 U.S.C. § 12101 (a)(2). The first section of the statute details Congress' findings as to the problems and discrimination faced by people with disabilities, *see* § 12101(a)-(g), as well as Congress' "invo[cation]" of "the power to enforce the fourteenth amendment . . . in order to remedy the major areas of discrimination faced day-to-day by people with disabilities." *Id.* at § 12101(b)(4).

[160] *See* U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 23-26 (1983).

[161] S. REP. NO. 116, 102d Cong., 1st Sess. 11 (1989).

from public accommodations, including government buildings,[162] the inaccessibility of state-run accommodations such as public streets, sidewalks and public transportation,[163] and the poverty and segregation caused both by lack of access to transportation for people with disabilities,[164] and by the direct discrimination in employment against persons with disabilities.[165] Faced with a legislative record more extensive than the one at issue in *Kimel*, the Court may find the ADA is a proportional response.

Further, the standard that the ADA places on States is arguably less onerous, particularly in light of the Court's own willingness to strike down the disability-based classifications in *Cleburne*, than that at issue in the ADEA. Because the statute does not require States, and covered entities, to undertake actions that "requir[e] significant difficulty or expense" in light of the State's "overall financial resources" and "type of operation,"[166] it is arguably less taxing on States than the ADEA's prohibition of non-job related age classifications. Still, because a majority of the Supreme Court has shown itself highly skeptical of Congress' power to proscribe conduct involving non-suspect classes, the Court may find even the ADA's substantial legislative record insufficient to satisfy the standards applied in the most recent Eleventh Amendment cases.

Finally, it is worth noting that the Court's sovereign immunity decisions have implications for other employment

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[162] 135 CONG. REC. 8, 712 (1989) (remarks of Rep. Coelho).

[163] H.R. REP. No. 485, pt. 2, 101st Cong., 2d Sess. 84 (1990); AMERICANS WITH DISABILITIES ACT OF 1989: HEARING ON H.R. 2273 BEFORE THE SUBCOMM. ON CIVIL & CONST. RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 101st Cong., 1st Sess. 248, 271 (1989).

[164] H.R. REP. NO. 483 pt. 4, 101st Cong., 2d Sess. 25 (1990) ("Transportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full advantage of the services and other opportunities provided by both the public and private sectors").

[165] *See, e.g*, Senate Report, *supra* note 153; House Report, *supra* note 143; *see also* 42 U.S.C. § 12101(a)(5).

[166] 42 U.S.C. §12112 (b)(5)(A); *id.* §12111 (10).

statutes, most particularly the Equal Pay Act,[167] which prohibits sex-based wage differentials, and the Family Medical Leave Act of 1993,[168] which grants employees the right to unpaid leave to care for family members. While both statutes further the elimination of gender-based discrimination in employment, particularly true for the Equal Pay Act, they both reach conduct that goes beyond the intentional discrimination forbidden by the Constitution. Somewhat less at risk is Title VII of the Civil Rights Act of 1964.[169] State defendants have crafted arguments suggesting that Congress has failed to abrogate States' immunity for claims brought under Title VII disparate impact theory-established in *Griggs v. Duke Power*[170] and codified at 42 U.S.C. §2000e-2(k)(1)(A)(I) - which reaches conduct that the Constitution itself does not prohibit.[171] However, the only circuit to have addressed the issue is the Eleventh Circuit in *In re Employment Discrimination Litigation*[172] which rejected this challenge. The court held that the Supreme Court's decision in *Fitzpatrick v. Bitzer*[173] foreclosed the argument that Congress had not expressed its intent to abrogate States' immunity.[174] As to the second prong, the *Reynolds* court found that the substantial overlap between the Title VII disparate impact standard of proof and the proof required to establish intentional discrimination (see *infra* for discussion of disparate treatment standard), meant that Title VII easily satisfied *Boerne's* proportionality test.[175] Moreover, the court noted the existence of an extensive congressional record documenting the problem of race discrimination in public employment and the need to address unintentional discrimination in employment to avoid perpetuating past discrimination and discrimination in other sectors.[176]

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[167] 29 U.S.C. §206(d).
[168] 29 U.S.C. §2601 *et seq.*
[169] 42 U.S.C. §2000e.
[170] 401 U.S. 424 (1971).
[171] *See* Washington v. Davis, 426 U.S. 229 (1976).
[172] 198 F.3d 1305 (11th Cir. 1999).
[173] 427 U.S. 445 (1976).
[174] *In re Employment Discrimination Litigation*, 198 F.3d at 1317.
[175] *Id.* at 1322-23.
[176] *Id.* at 1323.

Finally, it is now clear that the Eleventh Amendment bar on suits against States under the ADEA cannot be circumvented by bringing a suit in state court. It had generally been assumed that the Eleventh Amendment immunity bar applied only to suits brought in federal court,[177] and thus that presumably, where an act remains a valid exercise of Congress' power under the Commerce Clause, such as in the case of the ADEA, one could bring an action against a state in state court. However, in the October 1998 term, in *Alden v. Maine*,[178] the Court held that while the Eleventh Amendment by its terms applied only in federal court, because sovereign immunity is a fundamental aspect of the sovereignty which the "States enjoyed before the ratification of the Constitution, and which they retain today," this immunity applied also in state courts.[179] *Alden* arose in the context of a challenge by a group of probation officers against their employer for violation of the overtime provisions of the Fair Labor Standards Act of 1938 ("FLSA").[180] The officers had originally brought the case in the United States District Court of Maine, but, while the suit was pending, the Court decided *Seminole Tribe*. Since the FLSA was adopted pursuant to Congress' power under the Commerce Clause, the district court dismissed the case.[181] The officers then refiled the action in state court. The state trial court dismissed the suit on the grounds of sovereign immunity, and the Maine Supreme Judicial Court affirmed.[182]

With the same narrow majority that has prevailed in all the recent Eleventh Amendment cases, the Court held in *Alden v. Maine* that Congress did not have power under Article I to subject non-consenting States to private suits in their own courts.[183] The Court went beyond the face of the plain language of the Eleventh Amendment, holding that state sovereign

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[177] *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.4, at 385 (1994) (citing *Nevada v. Hall* as support for this proposition).

[178] 527 U.S. 706 (1999).

[179] *Id.* at 713.

[180] 52 Stat. 1060, as amended 29 U.S.C. §201 *et seq.*

[181] *Alden*, 527 U.S. at 712.

[182] *Id.*

[183] *Id.*

immunity is not limited to the text of the Eleventh Amendment, but "inheres in the system of federalism established by the Constitution."[184] Moreover, nothing in the Necessary and Proper Clause, according to the majority, gave Congress the "incidental authority to subject the States to private suits as means of achieving objectives otherwise within the scope of the enumerated powers."[185] Looking at the historical record, the Court concluded that while the constitutional debates were silent to the issue of state immunity from suit in state court, this was because this immunity was "so well-established that no one conceived it would be altered by the new Constitution."[186] The language of the Eleventh Amendment explicitly addressed only federal court immunity because it was only that immunity that was called into question by Article III.[187] The Court also found support for its understanding of sovereign immunity in isolated statements in prior Court opinions that referred to sovereign immunity broadly, (without delineating whether that immunity was limited to state and federal courts), and that referred to States' immunity from private suits in their own courts.[188] Finally, the Court explained that sovereign immunity in state courts was consistent with the constitutional design, which, though granting broad powers to Congress, still requires that the States retain their status as "residuary sovereigns and joint participants in the governance of the Nation."[189] In the Court's view, limiting sovereign immunity only to federal courts would not properly respect the status of the States because it would still require subjecting States to suit by private parties, and would give Congress power over States' own courts, thus constituting an egregious intrusion into States' sovereignty.[190]

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[184] *Id.* at 730.
[185] *Id.* at 732.
[186] *Id.* at 741.
[187] *Alden*, 527 U.S. at 742-43.
[188] *Id.* at 745-46.
[189] *Id.* at 748.
[190] *Id.* at 749. According to the Court, "A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of

The *Alden* Court emphasized that one can still limit the reach of the Eleventh Amendment and the States' "inherent" sovereign immunity by relying on the doctrine of *Ex Parte Young*,[191] that is, by bringing an action for injunctive or declaratory relief against state officials in their official capacity to address an on-going violation of state law in state of federal court[192]. Thus, *Ex Parte Young* continues to provide a means *for* securing state compliance with federal law.

B. *Reeves v. Sanderson*: Proving Disparate Treatment

In *Reeves v. Sanderson Plumbing Productions*,[193] the Court clarified the framework of proof in disparate treatment cases after the confusion generated by its 1991 decision in *St. Mary's Honor Center v. Hicks*,[194] announcing that if a plaintiff has made out her prima facie case and the fact finder disbelieves the reasons put forward by the defendant for its action, a fact finder is permitted to find intentional discrimination. In addition, the *Reeves* Court also made clear that the standard for granting summary judgment mirrors the standard of judgment as a matter of law, and that under both standards the judge must, reviewing the record as a whole, draw all reasonable inferences in favor of the nonmoving party, and must respect the role of the fact-finder.[195] Accordingly, once a plaintiff has presented sufficient evidence to raise an issue of fact as to a defendant's proffered nondiscriminatory justification, summary judgment and judgment as a matter of law will ordinarily be inappropriate.[196]

The components of a plaintiff's burden in employment discrimination cases wherein direct evidence of discrimination is

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individuals." *Id.* The *Alden* Court also noted that even though States could assert sovereign immunity against private actions, they were still required to follow the Constitution and federal statutes "that comport with the constitutional design." *Id.* at 754-55.

[191] 209 U.S. 123 (1908).

[192] *Alden*, 527 U.S. at 747-48.

[193] 120 S. Ct. 2097 (2000).

[194] 509 U.S. 502, 511 (1993).

[195] *Reeves*, 120 S. Ct. at 2109-10.

[196] *Id.* at 2109.

not available was established in the Court's decisions in *McDonnelll Douglas Corp. v. Green*,[197] and *Texas Department of Community Affairs v. Burdine*.[198] The *McDonnell Douglas-Burdine* framework, which originated in Title VII cases and was soon widely applied by lower courts to other employment discrimination statutes such as the ADEA, as well as other discrimination statues, set out the now familiar three part framework for proving discrimination. The prima facie requirements vary depending on the factual situation and the action at issue.[199] In a failure to hire case, for example, a plaintiff would show: (1) membership in a protected group; (2) that she applied for the position and that she was minimally qualified for the position; (3) that despite her qualifications she was rejected; (4) and that after her rejection the position remained open and the employer continued to seek applicants with similar qualifications.[200] Proof of a prima facie case then shifts the burden of production to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[201] The defendant's reasons need not be proved by a preponderance of evidence, but the defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."[202] In order to prevail, the reasons must be legally sufficient to justify a judgment for the defendant.[203]

The confusion arises at the third part of the framework. If the plaintiff succeeds in disproving the defendant's legitimate non-discriminatory reason, the question becomes whether: (1) judgment must be entered in her favor; (2) judgment may be entered in her favor only if she proves that discrimination was the reason for the adverse action; or (3) whether judgment may be entered in her favor even without additional proof. Language in

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[197] 411 U.S. 792, 802 (1973).
[198] 450 U.S. 248, 253 (1981).
[199] *Reeves*, 120 S. Ct. at 2109.
[200] *McDonnell Douglas*, 411 U.S. at 802.
[201] *Id.*
[202] *Burdine*, 450 U.S. at 254-55.
[203] *Id.* at 255.

Burdine seemed quite clearly to suggest that a plaintiff may prevail "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence."[204] After *Burdine*, there was confusion on this point, with some courts of appeal holding that finding the reasons pretextual did not mandate a ruling for the plaintiff,[205] and others holding that a finding of pretext did mandate such a ruling.[206] In *Hicks*, the Court made clear that upon a showing of pretext, judgment as a matter of law for the plaintiff was *not* required.[207] But the *Hicks* decision itself generated additional confusion by its conflicting language on whether disproving pretext *could* support a finding for the plaintiff. While the Court on the one hand states that "it is not enough . . . to disbelieve the employer,"[208] and that the plaintiff must show "both that the reason was false, and that discrimination was the real reason,"[209] the Court also states that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."[210] The majority of the courts of appeal interpreted *Hicks* to allow a finding of discrimination upon proof of pretext.[211] Some, however, reconciled the conflicting language

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[204] *Id.* at 256 (emphasis added).

[205] *See, e.g.*, EEOC v. Flasher, 986 F.2d 1312 (10th Cir. 1992); Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991), *cert. denied*, 503 U.S. 945 (1992).

[206] *See, e.g.*, King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1994), *cert. denied*, 469 U.S. 1087 (1984).

[207] *Hicks*, 509 U.S. at 511.

[208] *Id.* at 519.

[209] *Id.* at 515.

[210] *Id.* at 511 (emphasis added).

[211] *See, e.g.*, Sheridan v. E.I. Dupont De Nemours & Co., 100 F.3d 1061, 1068-69 (7th Cir. 1997) (*en banc*); Shaw v. HCA Health Servs. Of Midwest, Inc., 79 F.3d 100 (8th Cir. 1996): Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995): EEOC v. Ethan Allen, Inc. 44 F.3d 116, 120 (2d Cir. 1994); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083

in *Hicks* as merely emphasizing that the ultimate burden of persuasion of intentional discrimination rests with the plaintiff.[212]

In *Reeves*, the Fifth Circuit reversed the district court's denial of defendant's post-verdict motion for judgment as a matter of law, pursuant to Fed.R.Civ.Proc. 50, and held that plaintiff had presented insufficient evidence to establish that his termination was in violation of the ADEA.[213] Roger Reeves, the fifty-seven year-old plaintiff, had been employed for 40 years at Sanderson, a company that manufactured toilet seats and covers. Reeves worked in a department of the company known as the Hinge room and was supervised by 35-year-old Joe Oswalt. Both Oswalt and Sanderson were supervised by 45-year-old Russell Caldwell, who was the manager of their department.[214] In the fall of 1993, Powe Chestnut, director of Quality control, conducted a review of procedures in the Hinge room and, finding productivity problems, placed Reeves on a ninety-day suspension. Almost three years later, in the summer 1995, Reeves' direct supervisor, Caldwell, informed Chestnut that the Hinge room had productivity problems, and suggested that they were due to serious absenteeism and tardiness. An audit conducted by the new Director of Quality Control revealed numerous timekeeping errors and misrepresentations. After the President of Human Resources conducted an independent review of the records and confirmed the findings of Quality control, the company President, Sandra Sanderson, dismissed both Caldwell and Reeves. The company then filled Reeves' position three successive times with men in their thirties.[215]

In June 1996, Reeves filed suit claiming that his termination violated the ADEA. The jury found in his favor and awarded him $35,000. The jury also found that the discrimination against him was willful. The district court granted Reeves an additional $35,000 in liquidated damages based on the jury's determination

(6th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994).

[212] *See, e.g., Sheridan*, 100 F.3d at 1068-69.

[213] Reeves v. Sanderson, 120 S. Ct. 2097, 2111 (2000).

[214] Reeves v. Sanderson, 197 F.3d 688, 690 (5th Cir. 1999).

[215] *Id.* at 690-91.

of willfulness, and $28,490.80 in front pay due to Reeves' two years of lost income.[216] The district court also denied the company's motion for judgment as a matter of law.[217]

The Fifth Circuit reversed, rejecting Reeves' evidence of discrimination and stating that even if the company's nondiscriminatory explanation for the termination were (shoddy record keeping), untrue,[218] Reeves could not prevail unless he also presented sufficient evidence that his age motivated the employment decision.[219] The panel then proceeded to find Reeves' evidence of discrimination insufficient as a matter of law.[220]

Reeves had presented evidence that Chestnut had made two age-related comments several months before he was fired, "namely (1) that Reeves was so old that he must have come over on the Mayflower," and (2) that he was "too damn old to do the job."[221] The panel found these statements insufficient to justify a jury finding of age discrimination because these comments were not made in the "direct context" of Reeves' termination, and because other individuals, not simply Chestnut, were responsible for Reeves' termination decision.[222] In addition, the individuals responsible for Plaintiff's termination were themselves over the age of fifty.[223] The court similarly found unpersuasive Reeves' argument that he was treated less favorably than the company's younger employees, a claim that Reeves sought to support by testimony that Chestnut treated him like a child; that Oswalt, who

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[216] *Id.* at 691.
[217] *Id.* at 691.
[218] *Id.* at 693. Reeves presented evidence that the company's explanation had changed between the time of discharge and the time of trial. At the time of discharge, the company, according to Reeves, had indicated to him that he "had caused a specific employee to be paid for time she had not actually worked" while at trial they had claimed that his "timekeeping mistakes had resulted in the overpayment of numerous employees." *Id.* To the Fifth Circuit, this minor inconsistency could "hardly be considered mendacious." *Id.*
[219] *Reeves*, 197 F.3d at 693.
[220] *Id.* at 693.
[221] *Id.* at 691.
[222] *Id.* at 693-94.
[223] *Id.* at 694.

was thirty-five, was not also put on probation in 1993 despite a similar law production level; and by the fact that only he was singled out in 1995 for an audit. The panel found this evidence unconvincing, pointing out that after the 1995 investigation, each of the three Hinge Room supervisors were accused of inaccurate record keeping, not simply Reeves.[224] Additionally, at the time Reeves was dismissed, "20 of the company's management positions were filled by people over the age of 50 including several employees in their late 60's."[225] And thus, the Fifth Circuit reversed the jury verdict and rendered judgment in favor of the company.[226]

In an unanimous opinion, written by Justice O'Connor, the Supreme Court reversed the decision of the Fifth Circuit. According to the Court, the Fifth Circuit erred by confining its review of the evidence to a showing that "Chestnut had directed derogatory, age based comments at petitioner and that Chestnut had singled out petitioner for harsher treatment than younger employees."[227] Such a formulation "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence."[228] The Court clarified that while *Hicks* held that disbelief of the employer's proffered reasons did not *compel* a finding of fact for plaintiffs, such a finding was *permitted.*[229] Furthermore, the Court noted, once the employer's reasons have been eliminated, "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[230] The Court cautioned however that plaintiff's prima facie case coupled with disbelief of the defendant's explanation will not "*always*" be adequate to sustain a jury's finding of liability:

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[224] *Id.*
[225] *Reeves*, 197 F.3d at 694.
[226] *Id.*
[227] *Reeves,* 120 S. Ct. at 2108.
[228] *Id.*
[229] *Id.* at 2109.
[230] *Id.* at 2108-09.

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and un-controverted independent evidence that no discrimination had occurred.[231]

According to the Court, the propriety of granting judgment as a matter of law will depend on a range of factors including the strength of plaintiff's prima facie case and the "probative value of the proof that the employer's explanation is false."[232]

The Court then held that the Fifth Circuit erred in granting judgment as a matter of law. Spelling out the proper method for review of Rule 50[233] and 56[234] motions, the Court explained that a court must look at the entire evidence in the record.[235] The Court emphasized however that, "the court must draw all reasonable inferences in favor of the nonmoving party [and] it may not make credibility determinations or weigh the evidence."[236] In the case at hand, the Court found that judgment as a matter of law was inappropriate because, in addition to establishing a prima facie case and creating an issue for the jury as to the defendant's proffered explanation, the plaintiff had introduced additional evidence of age-based discrimination. Because the Fifth Circuit not only misconstrued the nature of the plaintiff's burden in this case, but also failed to draw reasonable inferences in favor of plaintiff, it had erred in overturning the jury verdict.[237]

Significantly, Justice Ginsburg wrote separately to emphasize that, while the Court might have to refine its pronouncements in subsequent decisions, the Court's opinion suggests that once a

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[231] *Id.* at 2109.
[232] *Id.*
[233] FED. R. CIV. P. 50.
[234] FED. R. CIV. P. 56.
[235] *Reeves*, 120 S. Ct. at 2110.
[236] *Id.*
[237] *Id.* at 2110-11.

plaintiff has presented a prima facie case and "introduced . . . evidence" casting doubt on the employer's explanation, the case should "ordinarily not be taken from the jury."[238] As Justice Ginsburg's concurrence suggests, the *Reeves* decision could prove to the benefit of plaintiffs in employment cases by making it more difficult to grant summary judgment or reverse a jury verdict where an employee has, after presenting his or her prima facie case, at least raised sufficient factual issues as to the veracity of defendant's explanation.

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[238] *Id.* at 2112.

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