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Business-Like: The Supreme Court's 2009-2010 Labor and Employment Decisions

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BY
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I. INTRODUCTION

The 2009-10 Term at the Supreme Court was a relatively quiet one for labor and employment law. Actually, shockingly quiet. In a Term that included major rulings on gun rights and money in politics,[1] a Term that marked the first year on the Court for Justice Sonia Sotomayor and the last year for Justice John Paul Stevens, the Court's work-related docket grabbed no headlines.

There were a few cases that looked like they might change the landscape. *Ontario v. Quon*[2] – which considered the scope of a government employee's reasonable privacy expectations in a pager provided by his

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1. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

2. 130 S. Ct. 2619 (2010).

employer – could have been a significant decision for employee privacy rights in the digital age. But it wasn't. *Lewis v. City of Chicago*[3] – which addressed the limitations period for disparate impact discrimination claims – could have given Justice Antonin Scalia the opportunity to further opine on the constitutionality of Title VII's disparate impact provisions.[4] But it didn't. In *New Process Steel, L.P. v. National Labor Relations Board*, the Court did hold that the two-member Board that issued hundreds of decisions during 2008 and 2009 lacked the authority to issue those decisions.[5] But even that case has caused relatively little disruption.

Of the remaining work-law cases that came to the Court, two resolved disputes over decisionmaking authority in interpretation of arbitration agreements,[6] and two involved correct interpretation of the Employee Retirement Investment Security Act (ERISA).[7] These cases did not significantly alter the law. As the following discussion of the cases reflects, about half of the decisions were unanimous or close to it, and about half split the Court. The collection of cases did not suggest a very clear pattern or trend in the Court's theoretical direction. As has been true throughout Chief Justice John Roberts' tenure, the decisions overall reflect a powerful deference to business interests.

II. *NEW PROCESS STEEL*

In *New Process Steel, L.P. v. National Labor Relations Board*, a divided Court held that two members do not constitute a quorum of the National Labor Relations Board (Board) with authority to exercise the delegated authority of the full Board.[8] The decision calls into some question nearly 600 Board opinions reached between January 1, 2008 and March 21, 2010. And yet, while the decision could have theoretically been enormously disruptive, its practical consequences have not been so drastic.

The National Labor Relations Act provides that:

> The Board is authorized to delegate to any group of three or more

3. 130 S. Ct. 2191 (2010).

4. In *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), Justice Scalia concurred separately to suggest that the constitutionality of disparate impact law was an issue the Court would have to confront in the future.

5. New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

6. Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847 (2010); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010). A third case, Union Pacific R.R. Co. v. Bhd. of Locomotive Eng'rs, 130 S. Ct. 584 (2010), resulted in a brief, unanimous interpretation of the Railway Labor Act's arbitration requirements.

7. Hardt v. Reliance Standard Ins. Co., 130 S. Ct. 2149 (2010); Conkright v. Frommert, 130 S. Ct. 1640 (2010).

8. 130 S. Ct. 2635 (2010).

> members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.[9]

The dispute in *New Process Steel* involved an interpretation of this text.

In 2007, the Board included only four sitting members. One seat was vacant, and two of the sitting members were on recess appointments that would expire at the end of the year.[10] Just before the end of 2007, the four Board members delegated all of the Board's powers to a three-member subset of the group.[11] This decision was taken expressly to preserve the Board's authority to function, even when only two members remained. The Board reasoned that 1) National Labor Relations Act (NLRA) section 3(b) expressly says that the Board can delegate all of its powers to a three-member subset,[12] and 2) a majority of the authority-holding Board can constitute a quorum.[13] Thus, if three Board members held the delegated authority of the full Board, then when only two Board members remained, those two members would constitute a quorum and could continue to do the work of the Board while waiting for appointment of new members.

For twenty-seven months, until March 27, 2010, this two-member "quorum" operated as the Board, deciding almost 600 cases, including one that sustained unfair labor practice complaints against New Process Steel.[14] New Process challenged the Board's authority to act with only two members. The Seventh Circuit upheld the two-member Board's authority, and the Supreme Court granted certiorari to resolve a split in the circuits over the authority of a two-member Board to issue binding decisions.[15]

The Court, in a five to four decision authored by Justice Stevens, reversed the Seventh Circuit, concluding that the Board must include at least three members to exercise authority. The Court reasoned that the best reading of the Act's somewhat confusing language is that a "group" to which the full Board delegates authority must maintain a membership of three for the delegation to remain valid. Thus, two members can operate as a quorum of a Board that actually still has three members – for example if

9. 29 U.S.C. § 153(b).
10. *New Process Steel*, 130 S. Ct. at 2638.
11. *Id.*
12. *See* 29 U.S.C. § 153(b) (2006).
13. *New Process Steel*, 130 S. Ct. at 2638-39.
14. *Id.* at 2639.
15. *Id.*

one member is ill, or must recuse himself from a particular decision. As soon as the number of Board members drops below three, this quorum provision is no longer applicable, however, because the two members are no longer part of "a group of three or more members" as required by the first sentence of the section. The majority found that this reading gives effect to all of the statutory language, while alternative readings make some of the language redundant or nonsensical.[16]

Justice Stevens' majority opinion supplemented this reading of the section's text with the observation that when Congress amended the statute in 1947, it specifically increased the Board quorum from two to three members.[17] To permit an interpretation of the language that rests Board authority in two members, reasoned the Court, would be entirely inconsistent with this legislative intent.[18] Moreover, the possibility that a two-member Board could exercise Board authority indefinitely under the interpretation urged by the government and favored by the dissent troubled the majority deeply.

Justice Kennedy authored a dissenting opinion that was joined by Justices Breyer, Ginsburg, and Sotomayor.[19] The four dissenters observed that the NLRA is supposed to ensure efficient resolution of labor disputes.That purpose is better served, they argued, by interpreting section 3(b) to permit a two member quorum of a properly designated three member group to exercise Board authority.[20] The dissent noted that nothing in the NLRA suggests that a delegation of power to three Board members expires when one of those three Board members holding delegated authority leaves the Board.[21] In fact, the dissent argued, the majority's reading of the Act did quite the opposite of harmonizing all of the statute's language. Instead, the requirement that the Board include three members for a two-member quorum to have authority ignored the "vacancy" clause of section 3(b) entirely. That provision states that "a vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board."[22] Taking a very different view of legislative intent than that of the majority, the dissenting opinion focused on Congress'

16. *New Process Steel*, 130 S. Ct. at 2640-41.

17. *Id.* at 2638.

18. *Id.* at 2644.

19. *Id.* at 2645 (Kennedy, J., dissenting).

20. *Id.* (Kennedy, J., dissenting).

21. *Id.* at 2646 (Kennedy, J., dissenting).

22. *Id.* The majority responded to this point by noting that the section distinguishes between "the Board" and a "group" on the Board. Two members can serve as a quorum of a group of three, but cannot serve as a quorum of the Board. *Id.* at 2640-41.

intent that the Board continue to operate even under "suboptimal" circumstances, like those presented by the twenty-six-month period in which only two Board members were serving.[23]

As a case study in statutory interpretation, *New Process Steel* is a good example of the failure of "neutral" interpretative methods to answer hard questions.[24] Both the majority and dissent laid claim to the most reasonable interpretation of the plain language of the statute. Both agreed that the language of section 3(b) is confusing at best. Both also drew heavily on arguments about congressional intent. And both ultimately had to turn to policy justifications outside of the statute to explain their decisions. The majority focused on the trouble posed by a Board of only two members exercising authority indefinitely. The dissenting Justices were more concerned about the disruption that could be created by an interpretation that calls into question the finality and precedential impact of hundreds of NLRB decisions.[25] As of now, however, the practical impact of the case has not been so dramatic. All of the sixty-nine cases pending in the Courts of Appeals at the time of the decision were remanded to the Board for reconsideration, and the resulting delay is necessarily disruptive for parties involved with those cases.[26] In terms of developing precedent, however, the Board today includes four members, and the decisions reached by the two-member Board have, thus far, been upheld by the current Board.[27]

III. WHO DECIDES: JUDGE OR ARBITRATOR?

Arbitration got quite a bit of attention from the Court during the 2009 Term. The two arbitration disputes that arose in the context of the workplace involved the division of responsibility between courts and arbitrators for interpretation of arbitration agreements. In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court emphasized that courts are responsible for determining the threshold question of whether

23. *Id.* at 2649 (Kennedy, J., dissenting).

24. *See* Catherine L. Fisk, The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, But Didn't, Address in *New Process Steel LLC v. NLRB* 6-9 (U.C. Irvine School of Law Research Paper No. 2010-22, 2010), *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693979>.

25. *See* 130 S. Ct. at 2646 (Kennedy, J., dissenting).

26. Press Release, Nat'l Labor Relations Bd., Supreme Court Rules Two-Member Board Lacked Authority to Issue Decisions (June 17, 2010), *available at* <http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2752.pdf>.

27. A Westlaw search conducted November 16, 2010 showed seventy-three decisions of the NLRB issued since the Court's decision in *New Process Steel* in which an earlier Board decision was reaffirmed "for the reasons stated" in the previous decision.

and when the parties entered a contract.[28] In *Rent-a-Center v. Jackson*, however, a five Justice majority concluded that the parties to an arbitration agreement may agree to submit to arbitral authority even matters – such as unconscionability – that have traditionally been viewed as the province of the courts.[29] In a third arbitration decision that arose out of a commercial dispute but will likely affect future employment agreements, the Court held that an arbitration agreement that is silent as to whether it permits class arbitration of claims cannot be interpreted to authorize classwide arbitration.[30] What all of these decisions share is an emphatic focus on arbitration agreements as contracts and manifestation of party consent as a central focus of inquiry.

A. Granite Rock Co. v. International Brotherhood of Teamsters

Petitioner Granite Rock Company (Granite Rock) was a California concrete and building materials company that employed about 800 people.[31] Some of Granite Rock's employees were represented by respondent International Brotherhood of Teamsters, Local 287 (the Local).[32] When the contract between Granite Rock and the Local expired at the end of April 2004, the parties tried to negotiate a new collective bargaining agreement. Their efforts hit an impasse and, on June 9, the Local members initiated a strike in support of their contract demands. The strike ended on July 2, when the parties reached agreement on a new collective bargaining agreement.[33] The new agreement contained a no-strike clause, but it did not say anything specific about union members' liability for any strike-related damages Granite Rock may have incurred before the new collective bargaining agreement was negotiated but after the prior collective bargaining agreement had expired.[34]

Contrary to advice from the International Brotherhood of Teamsters (the International or IBT), the Local did not demand a separate back-to-work or hold harmless agreement with Granite Rock as a condition of returning to work.[35] After the Local's members voted to ratify the collective bargaining agreement on July 2, the International advised the

28. 130 S. Ct. 2847, 2856-57 (2010).
29. 130 S. Ct. 2772, 2779 (2010).
30. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *see also supra* note 6.
31. *Granite Rock*, 130 S. Ct. at 2853.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 2854.

Local not to honor its agreement to return to work on July 5 and instead to continue the strike until Granite Rock agreed to hold the striking workers harmless from liability for the June strike. Granite Rock informed the Local that it would view a continuation of the strike to be a violation of the new contract's no-strike clause, but IBT and the Local responded by announcing a company-wide strike.[36]

On July 9, 2004, Granite Rock sued the International and the Local in the district court, seeking an injunction against the ongoing strike and asking for strike-related damages. Granite Rock argued that the Local violated the collective bargaining agreement's no-strike provision with the July 6 strike, and asked the district court to enjoin the strike because the hold-harmless dispute giving rise to the strike was an arbitrable grievance.[37] The unions responded that the collective bargaining agreement had not been validly ratified on July 2, and, thus, Granite Rock could not raise claims under the no-strike clause.[38]

On August 22, while the parties were still debating the validity of the July 2 ratification in court, the Local conducted a second ratification vote on the collective bargaining agreement, and on September 13 the unions called off their strike.[39] Granite Rock, no longer seeking injunctive relief, continued its suit for damages, amending its complaint to add a novel claim against the International for tortious interference under § 301(a) of the Labor Management Reporting Act (LMRA).[40] While the suit was moving through the court, in December, 2004, the parties executed the collective bargaining agreement, making it retroactive to May 1, 2004.[41]

The International and the Local both moved to dismiss Granite Rock's suit.[42] The International argued that § 301(a) only supports a federal breach of contract action and does not encompass the tort claim that Granite Rock alleged. The Local's motion asked the court to send the dispute over the collective bargaining agreement's ratification date to arbitration. The district court dismissed Granite Rock's tortious interference claims, but concluded that whether the agreement had been ratified on July 2 or August 22 was an issue for the court to decide.[43] The question was submitted to a jury, which reached a unanimous verdict that the Local ratified the

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 2854-2855.
40. *Id.* at 2855.
41. *Id.* at 2861, 2867.
42. *Id.* at 2851.
43. *Id.*

collective bargaining agreement on July 2, 2004. On appeal, the Ninth Circuit affirmed the district court's dismissal of Granite Rock's tortious interference claims against IBT, but it reversed the district court on the issue of whether the ratification date was a matter for judicial or arbitral resolution.[44] The Supreme Court granted certiorari on both questions.

The Court unanimously affirmed the Ninth Circuit's holding that the LMRA does not encompass a federal common law claim for tortious interference with contract.[45] Granite Rock argued that adding a tortious interference cause of action to the federal common law contract claims that § 301(a) permits would best serve the goals of "industrial peace and economic stability."[46] While the Court condemned the International's alleged conduct, it observed that Granite Rock could have pursued remedies under existing federal and state law, and thus expansion of federal common law remedies was unnecessary and unwise.[47]

The question of whether the ratification date was a matter for decision by the court or by an arbitrator occupied most of the Court's decision. Justice Thomas wrote for a seven Justice majority that, on the facts of this dispute, the question was one for the courts. The majority opinion emphasized what it described as "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'"[48] In the majority's analysis, the question of when the collective bargaining agreement was ratified was intimately tied to whether the parties had in fact consented to arbitrate the applicability of the no-strike provisions. Having reached that conclusion, the majority dismissed arguments by the International and the Local that emphasized the federal policies favoring arbitration of labor disputes and the Court's prior statements that "'any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.'"[49]

The majority noted that all parties agreed that the arbitration clause only covered disputes that "arose under" the agreement. Accordingly, the ratification date dispute was only arbitrable if it could be characterized as "arising under" the collective bargaining agreement. Whether the dispute "arises under" the agreement depends on whether the agreement was in

44. 546 F.3d 1169, 1170-78 (2008).

45. *Granite Rock*, 130 S. Ct. at 2866.

46. *Id.* at 2864.

47. *Id.* at 2864-65.

48. *Id.* at 2857 (quoting Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

49. *Id.* at 2857 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)).

force at the time – in other words, depends on the ratification date. Because determination of the ratification date was, in its view, a necessary precursor to resolving whether the parties agreed to arbitrate the no-strike claim, the Court concluded that it was an issue properly resolved by a court rather than an arbitrator.[50]

The majority refused to consider the Local's argument that the December 2004 agreement reached by the parties rendered the collective bargaining agreement effective as of May 1, 2004 (the date the prior agreement expired) and thus answered the timing question on which the Court focused its attention. The majority concluded that because the court of appeals had not ruled on the merits of this argument, and it was not raised in the Local's opposition to Granite Rock's petition for certiorari, "the argument is properly 'deemed waived.'"[51]

Justice Sotomayor, joined by Justice Stevens, dissented from the Court's conclusion about whether it was for a court or an arbitrator to decide the formation date of the collective bargaining agreement.[52] In the dissenters' view, the parties clearly agreed in the new contract to have an arbitrator decide this issue. Because the agreement executed by the parties in December of 2004 made the new contract effective retroactive to May 1, 2004, the agreement was effective when the Local went on strike in July, and its arbitration clause was thus operative at that date.[53] Consequently, concluded the dissent, the dispute between the Local and Granite Rock about when the contract was ratified was one that arose under the contract and should be decided by the arbitrator. On this view, what was important was that the dispute over the ratification date arose after the collective bargaining agreement's effective date of May 1, 2004.[54] The ratification date was not a formation dispute subject to judicial resolution; it was simply a defense that went to the merits of whether the Local was privileged to go on strike at a time when it arguably had not ratified the contract. That defense was part of the grievance for the arbitrator.[55]

As to the Court's position that this retroactive effectiveness argument had been waived, the dissenters agreed that it was "regrettable" that the factual point had not previously been raised, but argued that it could not simply be ignored.[56] The entire case, observed the dissent, turned on the

50. *Id.* at 2860-61.
51. *Id.* at 2861 (citing SUP. CT. R. 15.2).
52. *Id.* at 2866 (Sotomayor, J., dissenting).
53. *Id.* at 2867 (Sotomayor, J., dissenting).
54. *Id.* (Sotomayor, J., dissenting).
55. *Id.* at 2868 (Sotomayor, J., dissenting).
56. *Id.* at 2868-69 (Sotomayor, J., dissenting).

premise that the parties disputed the existence of a binding contract at a particular point in time.

> Because it is instead undisputed that the parties executed a binding contract in December 2004 that was effective as of May 2004, we can scarcely pretend that the parties have a formation dispute. Consideration of this fact is "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'"[57]

B. Rent-a-Center West, Inc. v. Jackson

While *Granite Rock* emphasized that questions about the formation of an arbitration agreement ordinarily should be resolved by courts rather than arbitrators, the five Justice majority in *Rent-a-Center, West, Inc. v. Jackson* held that the question of whether an arbitration agreement was "unconscionable" – ordinarily one that would fall within a judge's interpretive ambit – could be assigned by contract to an arbitrator.[58]

The case arose out of an employment discrimination suit filed in federal court by Antonio Jackson, a former employee at Rent-a-Center (RAC). Jackson's employment contract with RAC contained an arbitration clause requiring arbitration of all disputes, including discrimination claims, and stating that

> [t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all of any part of this Agreement is void or voidable.[59]

RAC moved under the Federal Arbitration Act (FAA) to dismiss or stay the district court proceedings and compel arbitration in light of this provision.[60] When Jackson opposed the motion, arguing that the arbitration agreement was unenforceable because it was unconscionable, RAC responded that the court could not consider the unconscionability claim because the agreement assigned even that threshold evaluation to the arbitrator.[61] The district court granted RAC's motion, but a divided panel of the Ninth Circuit reversed, concluding that "where 'a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the

57. *Id.* (quoting Ohio v. Robinette, 519 U.S. 33, 38 (1996) (quoting Vance v. Terrazas, 444 U.S. 252, 258, n.5 (1980)).

58. 130 S. Ct. 2772, 2779 (2010).

59. *Id.* at 2779.

60. *Id.*; *see* 9 U.S.C. §§ 3, 4 (2006).

61. *Rent-a-Center*, 130 S. Ct. at 2779.

court.'"[62]

The Court's opinion, written by Justice Scalia, began by observing that the FAA "places arbitration agreements on an equal footing with other contracts," meaning that they are subject to the same basic contract law principles as other types of contracts.[63] The FAA also establishes procedures that define the relationship and division of authority between federal courts and arbitrators. In particular, the Court's opinion noted, the FAA requires courts to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."[64] This means that courts typically address threshold questions about formation of the arbitration agreement. If, however, the parties choose to assign those threshold questions to the arbitrator, nothing in the FAA prohibits that contractual choice.

The Court moved from those basic statements of the applicable law to a description of the agreement entered by Jackson and RAC.. The majority described the agreement as including two relevant provisions: one, a provision defining the claims covered by the agreement to arbitrate and the second, a provision delegating resolution of covered claims to an arbitrator.[65] In seeking to compel arbitration, the Court explained, RAC was asking the courts to enforce the second provision.[66] And the courts must enforce that delegation provision, the Court continued, because Jackson's challenge was to the first provisison; he never specifically challenged *the delegation* provision of the agreement.

In reaching its conclusion, the majority took a path of reasoning that was not argued by either party in briefs or at argument before the Court. Rather than considering what showing would be necessary to demonstrate intent to subject threshold questions to arbitration, which is the question the parties had focused on,[67] the Court expanded on a line of cases about the severability of arbitration provisions.[68]

It is a well-settled principle, the majority noted, that "'an arbitration provision is severable from the remainder of the contract.'"[69] Moreover, the

62. *Id.* at 2776 (quoting Jackson v. Rent-a-Center West, Inc., 581 F.3d 912, 917 (9th Cir. 2009)).

63. *Id.*

64. *Id.*

65. *Id.* at 2778.

66. *Id.* at 2779.

67. *See* text accompanying notes 74-77 *infra* (discussing the dissenting opinion).

68. *See* Karen Halverson Cross, Letting the Arbitrator Decide Unconscionability Challenges, *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552966>.

69. *Rent-a-Center* 130 S.Ct. at 2778 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006)).

Court observed, neither party had asked the Court to disrupt a line of cases holding that, under the FAA, a challenge to the enforceability of an agreement to arbitrate is distinct from a challenge to the enforceability of a contract containing an arbitration agreement.[70] These prior cases had involved contracts that were on the whole unrelated to arbitration but that included arbitration agreements within them, while in this dispute the entire contract being challenged was itself an arbitration agreement.[71] But the Court construed the "delegation clause" assigning the arbitrator responsibility for determining the threshold question of enforceability as "an additional, antecedent agreement."[72] Jackson's challenge had been to the entire arbitration agreement, not to that separate delegation clause. Therefore, the majority concluded, delegation to the arbitrator of the decision about the contract's enforceability had never really been challenged and so had to be accepted as valid under the FAA.[73]

Justice Stevens' angry dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, criticized the majority for adopting an "infinite severability rule" that was not urged by either party nor compelled by precedent.[74] The dissent agreed with the majority opinion that the threshold question of arbitrability may be assigned to an arbitrator in certain circumstances. One such circumstance is when the parties' intent to assign the determination of arbitrability to the arbitrator is "clear and unmistakable."[75] In this case, the dissent argued, that standard was not met. "Respondent's claim that the arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator."[76] This is how the case should have been resolved, Justice Stevens argued. The majority chose instead to interpret "the delegation clause as a distinct mini-arbitration agreement divisible from the contract in which it resides" and then to conclude that Jackson's challenge to the entire arbitration agreement was not sufficient to constitute a challenge to the "particular sentences" constituting the delegation provision.[77]

Jackson is a hard case to place into any broader context. It certainly may open the door for employers to insist that even threshold matters such

70. *Id.*

71. *Id.* at 2779.

72. *Id.* at 2777-78.

73. *Id.* at 2779-81. The Court declined to consider the arguments that Jackson made in his merits briefs about the unconscionability of the delegation provision because the challenge was brought "too late." *Id.* at 2781.

74. *Id.* at 2781, 2787-88 (Stevens, J., dissenting).

75. *Id.* at 2783.

76. *Id.* at 2784.

77. *Id.* at 2787.

as unconscionability must always be delegated to arbitration. But the decision itself did not actually suggest that this would always be permissible. Indeed, if Jackson had challenged the right sentences in the contract, his challenge might have been successful. What the decision does seem to do is to both emphasize the parties' intent in the formation of the contract while frankly ignoring the employee's intent through its hypertechnical litigation rule that plainly thwarted Jackson's intent.

Future parties can avoid Jackson's specific mistake, but the Court's refusal in both *Rent-a-Center* and *Granite Rock* to consider on the merits the arguments put forward by the employees reflects an approach that is much harder to avoid.

IV. EXPLORING ERISA

The Court dealt with two very different issues under the Employee Retirement Income Security Act of 1974 (ERISA)[78] during the 2009 Term. One involved a very straightforward question of statutory interpretation about appropriate circumstances for the award of attorney's fees in an ERISA dispute.[79] The other was a more controversial ruling that a benefits plan administrator who has incorrectly interpreted the plan is nonetheless entitled to deference in its follow-on interpretation of the same terms.[80]

A. Hardt v. Reliance Standard Life Insurance Co.

Section 1132(g) of ERISA provides that "a reasonable attorney's fee and costs" are available "to either party" at the court's "discretion."[81] In *Hardt v. Reliance Standard Life Insurance Co.*, the Court held that this provision gives a district court discretion to award fees so long as "the fee claimant has achieved 'some degree of success on the merits.'"[82]

Petitioner Bridget Hardt was an executive assistant at textile manufacturer Dan River, Inc.[83] She was diagnosed with carpal tunnel syndrome, and when surgeries on her wrists failed to alleviate her neck and shoulder pain, Hardt stopped working in January 2003. In August of that year, Hardt applied for long-term disability benefits. Respondent Reliance Standard Life Insurance Company (Reliance) had authority for determining

78. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at scattered sections of titles 26 and 29 U.S.C. (2006)).

79. Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149 (2010).

80. Conkright v. Frommert, 130 S. Ct. 1640 (2010).

81. 29 U.S.C. § 1132(g) (2006).

82. *Hardt*, 130 S. Ct. at 2152 (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 694 (1983)).

83. *Id.*

whether a claimant employed by Dan River qualified for benefits. Reliance ultimately concluded that Hardt was disabled from her regular work (though not necessarily from all work) and that she was entitled to temporary disability benefits for twenty-four months.[84]

Over the course of that twenty-four months, Hardt's symptoms worsened and expanded, and one of her doctors diagnosed her with a progressively worsening small-fiber neuropathy.[85] Despite her worsening condition, and a decision by the Social Security Administration to award Hardt disability benefits, Reliance notified her that her plan benefits would expire at the end of the twenty-four-month period because they did not consider her "totally disabled from all occupations."[86]

Hardt filed an administrative appeal. She gave Reliance all of her medical records, the information she had provided the Social Security Administration when they assessed her disability status, and an updated questionnaire from one of her physicians.[87] Reliance asked Hardt to supplement this material with a "functional capacities" evaluation that it would use to assess what jobs she could or could not perform. Reliance did not ask the evaluator it hired to review Hardt for neuropathic pain, even though the company was aware of her neuropathy diagnosis. Because the evaluators were not aware of Hardt's neuropathy, they concluded that her efforts on the functional capacity evaluations were "submaximal" and that the evaluations were invalid.[88]

Reliance next hired a physician and a vocational rehabilitation counselor to assist in its determination of whether Hardt was entitled to benefits. The physician, instead of examining Hardt, reviewed some – but not all – of her medical records.[89] He concluded she should expect her health to improve. The vocational counselor performed a labor market study based on the state of Hardt's health two years earlier, and found eight suitable employment opportunities. Based on this information, Reliance concluded that its decision to terminate Hardt's benefits was correct.[90]

After exhausting her administrative remedies, Hardt filed suit against Reliance, alleging that the company had violated ERISA by wrongfully denying her claim for long-term disability benefits.[91] The parties filed

84. *Id.*
85. *Id.* at 2153.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2153-54.

cross-motions for summary judgment, and the district court denied both.

The district court first rejected Reliance's request for summary judgment affirming the denial of benefits, finding that Reliance had based its decision on incomplete, vague, contradictory, and conclusory information and that the company had improperly ignored evidence that Hardt presented in support of her case.[92] The court also denied Hardt's motion for summary judgment, which argued that Reliance's denial of benefits was unreasonable as a matter of law. The court said that it was "inclined to rule in Ms. Hardt's favor," but that it was going to give Reliance a chance to fix the problem itself initially.[93] If Reliance did not consider all of the evidence in support of Hardt's application within thirty days and reevaluate its decision, the court explained, it would then issue judgment in her favor. After conducting the review the court required, Reliance found that Hardt was eligible for long-term disability benefits. The company also paid her $55,250 in accrued, past-due benefits.[94]

At that point, Hardt asked the court for attorney's fees and costs under § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."[95] Applying the Fourth Circuit's interpretation of that provision, the district court focused its inquiry initially on whether Hardt was a "prevailing party" in the dispute. The court concluded that she had prevailed and ultimately awarded fees.[96] The Fourth Circuit reversed, finding that Hardt did not meet the definition of a "prevailing party."[97] The Supreme Court granted certiorari to resolve 1) whether § 1132(g) requires a party to have prevailed for an award of fees and 2) what the appropriate standards for fee-shifting under § 1132(g) should be.

The Court observed that federal statutes that include fee-shifting provisions that deviate from the "American Rule" requiring each party to pay its own attorney's fees take several forms.[98] Some permit awards of fees only to a "prevailing party."[99] Others will shift fees to a "successful" litigant or a "substantially prevailing party."[100] And some, like ERISA's §

92. *Id.* at 2154.
93. *Id.*
94. *Id.*
95. *Id.* (citing 29 U.S.C. § 1132(g)).
96. *Id.* at 2154-55.
97. *Id.* at 2155.
98. *Id.* at 2156-57.
99. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598, 601-03 (2001) (citing examples); Ruckelshaus v. Sierra Club, 463 U.S. 680, 684, n.3 (1983) (same).
100. *Hardt*, 130 S. Ct. at 2157 & nn.4-5 (citing cases).

1132(g)(1), provide the district court with discretion about fee awards.[101] Given this variety of fee-shifting statutes, the Court concluded, the lower courts had erred in importing a "prevailing party" requirement into § 1132(g)(1). The words "prevailing party" do not appear in § 1132(g)(1) and there is nothing else in the text to suggest such a limitation. In fact, the text of the section suggests just the opposite; § 1132(g)(1) gives district courts "discretion" to award attorney's fees "to either party."[102]

The Court went on to caution that the discretion thus given to the district courts was not unbounded. Instead, courts should assume that Congress meant to abide by "'historic fee-shifting principles and intuitive notions of fairness.'"[103] These notions of fairness are satisfied "if the court can fairly call the outcome of the litigation some success on the merits."[104] Given the facts of this case, the Court concluded, it was quite reasonable for the court to exercise its discretion to award attorney's fees to Hardt.[105]

B. Conkright v. Frommert

Under longstanding precedent, an ERISA plan administrator who is given discretion to interpret a plan's terms is entitled to deference in the exercise of that discretion.[106] In *Conkright v. Frommert* a divided Court held that an administrator's "single honest mistake" in interpreting an ERISA pension plan does not justify withholding deference for subsequent related interpretations of the plan.[107]

The case involved allegations by a group of Xerox employees that the company's pension plan and its administrators violated ERISA when they determined how to account for past distributions in calculating the employees' current benefits.[108] These employees had left Xerox in the 1980s and received lump-sum distributions of retirement benefits they had earned until then. They were subsequently rehired, and the plan administrator interpreted the plan to require a benefit-calculation method that reduced the employees' present benefits by the amount that the

101. *Id.* at 2157-58 & n.7 (citing examples); *see* 29 U.S.C. § 1132 (g)(1).

102. *Hardt*, 130 S. Ct. at 2156; *see* 29 U.S.C. § 1132 (g)(1).

103. *Hardt*, 130 S. Ct. at 2158 (quoting *Ruckelshaus*, 463 U.S. at 686).

104. *Id.*

105. *Id.* at 2159. Justice Stevens wrote a separate concurrence to note that he maintained his disagreement with the Court's interpretation of the Clean Air Act in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and would not rest the conclusion in this case on any reliance on that interpretation of a different statute. Instead, he would focus on the language of § 1132(g)(1) and the facts that led the district court to exercise appropriate discretion in this instance. *Id.* (Stevens, J., concurring).

106. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109-11 (1989).

107. 130 S. Ct. 1640, 1644 (2010).

108. *Id.* at 1645.

previously paid-out benefits would theoretically have attained if the money had remained in the company's investment fund.[109] The employees challenged that approach to calculating their benefits and sued the plan administrator under ERISA.[110]

The district court found for the administrator, but the Second Circuit reversed, holding that the interpretation was unreasonable and that the employees had received inadequate notice of the method to be used.[111] On remand, the plan administrator proposed a new approach. This one calculated the current value of the past distribution using an interest rate fixed at the time the distribution had been made.[112] The plan administrator argued that the district court should accord this interpretation deference and accept it as reasonable. The district court disagreed. Concluding that the plan was ambiguous, the district court refused to give deference to the administrator the second time around, and instead adopted the interpretation of the plan proposed by the employees.[113] The Second Circuit affirmed, noting particularly that "a court need not apply a deferential standard 'where the administrator ha[s] previously construed the same [plan] terms and we found such a construction to have violated ERISA.'"[114]

The Supreme Court reversed in a five to three decision authored by Chief Justice Roberts.[115] Continuing his famous affinity for baseball terminology, the Chief Justice criticized the standard applied by the lower courts as a "'one-strike-and-you're-out' approach."[116] The majority concluded instead that the plan administrator's original mistake did not justify eliminating or reducing the deference owed to that administrator by a reviewing court.[117] Looking to the trust law principles that traditionally guide interpretation of ERISA plans, the majority concluded that they were "unclear on the narrow question before us."[118] In light of that lack of clarity, the majority found that the rule of deference to plan administrators in ERISA law is sufficiently powerful that the kind of "good-faith mistake"

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 1646 (quoting Frommert v. Conkright, 535 F.3d 111, 119 (2d Cir. 2008)).
115. *Id.* at 1644. Justice Sotomayor did not participate in the consideration or decision of the case. *Id.* at 1652.
116. *Id.* at 1646.
117. *Id.* at 1651-52. For the standard the Court wished to apply, see Metropolitan Life Ins. Co.v. Glenn, 554 U.S. 105 (2008); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).
118. *Conkright*, 130 S. Ct. at 1647.

involved in this dispute could not create an exception to it.[119] If there had been evidence of bad faith, the majority noted, that would have been a different case.[120] Here, though, the benefits of efficiency and uniformity in the administration of benefit plans that flow from deference to plan administrators outweigh any concern about unreasonable plan interpretations.[121]

Justice Breyer dissented, in an opinion joined by Justices Stevens and Ginsburg. The dissenters looked to governing trust principles and concluded that in fact trust law forbids continued deference to an administrator who has already been found to have abused his or her discretion.[122] Justice Breyer criticized the majority's reliance on the honesty of the administrator's mistake, arguing that it will unnecessarily complicate judicial review by requiring courts to make a determination of whether a mistake was "honest" or not.[123]

The opinions in *Conkright* split along ideological lines, and also differed quite profoundly in their descriptions of the factual background to the case. Chief Justice Roberts focused on the "honesty" of the plan administrator and expressed outrage at the plan interpretation proposed by the employees and adopted by the lower courts, describing the interpretation as actuarial "heresy."[124] The dissent, by contrast, focused on the lack of notice to employees about the accounting method chosen by the plan administrator and described the consequences for affected employees of applying the interpretation first adopted by the plan administrator – consequences that could have meant a difference in pension payout of thousands of dollars annually.[125] Whether the decision will have significant consequences for other pension plan administrators or beneficiaries will be, as *Conkright* itself proved to be, a very fact-specific question.

V. TIMELINESS IN DISPARATE IMPACT CHALLENGES

Justice Antonin Scalia authored the opinion for a unanimous Court in the only employment discrimination case of the Term. *Lewis v. City of Chicago* presented the Court with the question of when the clock starts running for a plaintiff bringing a Title VII disparate impact challenge to an

119. *Id.* at 1647-49.
120. *Id.* at 1648.
121. *Id.* at 1649-50.
122. *Id.* at 1655-59 (Breyer, J., dissenting).
123. *Id.* at 1659 (Breyer, J., dissenting).
124. *Id.* at 1650.
125. *Id.* at 1652-53, app. at 1661-62 (Breyer, J., dissenting).

employer's use of an exam cut-off score to draw multiple successive applicant pools.[126]

In July 1995, over 26,000 applicants took a written examination that was part of the process for applying to serve in the Chicago Fire Department.[127] The City scored the exams and announced in January, 1996 that it would begin drawing randomly for further interviews from among those "well-qualified" applicants who scored between eighty-nine and one hundred on the written test. Those applicants who scored below sixty-five on the test received a rejection letter at that same time. For the applicants whose scores fell between sixty-five and eighty-eight, the City notified them that they had been deemed "qualified" for further interviewing and would remain on the eligibility list, but that, based on projected hiring needs, it was unlikely they would ever be called.[128]

Over the course of the next six years, the City selected groups of applicants from the eligibility list, each time but the last filling its pool of interviews with applicants from the "well-qualified" group. During the final selection, a number of applicants who had scored in the "qualified" range were added to the interview pool.[129]

On March 31, 1997, Crawford Smith, an African-American who scored in the "qualified" range and had not been selected for further interviews, filed a charge of discrimination with the EEOC challenging the City's cut-off scores.[130] In July 1998, the EEOC issued right-to-sue letters to Crawford and five other "qualified" applicants, and two months later, the group filed a class action suit against the City. The suit alleged that the City's practice of selecting for advancement through the interview process only applicants who scored eighty-nine or above had a discriminatory disparate impact on African-Americans in violation of Title VII.[131]

The City sought summary judgment on the ground that petitioners had not filed EEOC charges within 300 days after their claims accrued. The City argued that the only practice that had caused any disparate impact was the practice of dividing the applicants into "qualified," "well-qualified" and "not-qualified" categories. Since that had occurred in January 1996, and EEOC charges had not been filed until more than a year later, the plaintiffs' claims were time-barred, according to the City.[132]

126. 130 S. Ct. 2191, 2195 (2010).
127. *Id.* at 2195.
128. *Id.* at 2195-96.
129. *Id.* at 2196.
130. *Id.*
131. *Id.*
132. *Id.*

The district court denied the motion, applying a "continuing violation" theory because of what it called the City's "ongoing reliance" on the 1995 test results.[133] In the court's view, the January 1996 sorting and the selection of interviewees was part of a single, ongoing practice, all of which fell within the time for challenge. The case went to a bench trial, with the City stipulating that using the cut-off of eighty-nine had a significant disparate impact, but arguing that it was justified by business necessity. The district court ruled for the petitioners. The Seventh Circuit reversed, agreeing with the City that the suit was time-barred.[134]

The Supreme Court reversed. Writing for the Court, Justice Scalia explained that both the district court and the court of appeals had analyzed the problem incorrectly. Under the disparate impact provisions of Title VII, added to the statute by Congress in 1991, "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer '*uses* a particular employment practice that causes a disparate impact' on one of the prohibited bases."[135] Applying that language to the facts presented, the Court concluded that "the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance" was an "employment practice" and that the City "use[d]" that practice each time it selected a new group of candidates to proceed further in the process.[136]

The Court rejected the City's argument that the only possible violation of Title VII occurred in the initial 1996 ranking of the test-takers. The City was mistaken in relying on a line of disparate treatment cases that had barred claims as untimely when those claims focused on the present effects of prior discriminatory acts.[137] The difference here, reasoned the Court, was that those cases failed because the plaintiffs could not show present or recent discriminatory intent, and disparate treatment cases require intent to be shown within the limitations period.[138] In a disparate impact case, where intent to discriminate is not an element of the claim, all that a plaintiff need show is that the challenge practice was "used" within the relevant time period. In reaching this conclusion, the Court rejected the City's argument that the rule announced in *Lewis* would leave employment practices open to indefinite challenge. The alternate rule, noted Justice Scalia, would mean

133. *Id.*

134. Lewis v. City of Chicago, 528 F.3d 488, 491 (2008).

135. *Lewis*, 130 S. Ct. at 2197 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

136. *Id.* at 2198-99.

137. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); Lorance v. AT & T Techs., Inc., 490 U.S. 900 (1989); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

138. *Lewis*, 130 S. Ct. at 2199.

that an employment practice with a disparate impact would be permanently insulated from challenge 300 days after its first use. Neither outcome, he noted, makes perfect sense.[139]

The decision in *Lewis* was most surprising because its author, Justice Scalia, had less than a year earlier raised questions about the constitutionality of Title VII's disparate impact provisions.[140] To the extent that this opinion altered the operation of disparate impact law at all, it might have opened the door for a slightly higher number of impact cases by establishing a standard for timeliness that is more expansive than that applied to disparate treatment claims.

VI. EMPLOYEE PRIVACY AND WORKPLACE TECHNOLOGY

A unanimous Court concluded in *City of Ontario v. Quon*, that a governmental employer had not violated the Fourth Amendment's ban on unreasonable searches and seizures when it read personal text messages sent to and from a pager owned by the employer and issued to an employee.[141] While noting that "the case touches issues of far-reaching significance," the opinion avoided settling the contours of government employees' privacy expectations in new technology.[142]

The police department of the City of Ontario, California had a written computer policy providing that the City could monitor employees' email and internet use without giving notice to the employees.[143] The policy had been in place for some time when the City issued its employees – including Jeff Quon, a sergeant and SWAT team member – pagers that could send and receive text messages. The computer policy did not specifically include text messaging in its coverage, but the City did advise its employees that it would treat text messages that same way it treated emails.[144]

The City gave its SWAT team members these pagers so that they could communicate and respond to emergencies more efficiently.[145] It was clear, however, that the City understood that employees might use the pagers for some personal communication. Ontario paid a flat rate for a certain monthly allotment of characters sent on the pager and overages beyond those allotments resulted in fees. For a time, the City permitted

139. *Id.* at 2200.
140. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009) (Scalia, J., concurring).
141. 130 S. Ct. 2619, 2624 (2010).
142. *Id.*
143. *Id.* at 2625.
144. *Id.*
145. *Id.*

employees themselves to pay the fees associated with any overages they accrued.[146] After some time, however, the supervisors collecting the overage fees balked at the responsibility, and the City decided to audit the texts being sent to determine whether they were or were not work-related and whether the city would need to increase the monthly allotment in its contract.[147] This audit revealed that many of the texts Quon sent were not work-related and that some were sexually explicit. Further investigation showed that the majority of the messages Quon sent during work time were not work-related.[148]

Quon, together with other officers affected by the investigation, filed suit under 42 U.S.C. § 1983, arguing that the City's decision to read his text messages was an unreasonable search and seizure in violation of the Fourth Amendment.[149] The district court concluded that Quon had a reasonable expectation of privacy in the text messages and held a jury trial on the question of whether the City's purpose for the audit was reasonable. The jury concluded that it was, and the district court dismissed the claims.[150] The Ninth Circuit reversed, holding that the search was unreasonable because the same purpose could have been served by less intrusive means.[151]

Justice Kennedy's opinion for the Court reviewed the unsettled state of the Supreme Court's precedent on the privacy expectations of government employees and concluded that this case did not require the Court to resolve any uncertainty in the field. In what Justice Scalia's harsh concurrence described as an "excursus" and a "digression,"[152] the opinion went on to observe that rapidly evolving technology makes it difficult to pin down the precise contours of a reasonable privacy expectation and to opine that society's expectations about privacy will likely evolve as technology evolves.[153] In part because of these evolving ideas, the Court resolved the question presented in this case by assuming, without deciding,

146. *Id.*

147. *Id.* at 2626.

148. *Id.*

149. *Id.* The plaintiffs also sued the company that had provided the pagers and had responded to the City's request for transcripts of Quon's texts, arguing that the company had violated the Stored Communications Act. The Supreme Court denied certiorari on the questions raised by that aspect of the litigation. *Id.* at 2626-27.

150. *Id.*

151. *Id.* at 2627.

152. *Id.* at 2635 (Scalia, J., concurring). Justice Stevens also wrote separately to "highlight" that the Court's decision did not resolve the best way to evaluate the reasonableness of an employee's privacy expectations. *Id.* at 2633-34 (Stevens, J., concurring).

153. *Id.* at 2627-30.

both that Quon had a reasonable expectation of privacy and that reviewing text messages was in fact a search. The Court then concluded that the search conducted by the City was reasonable in any event.[154]

The Court found that the search had been legitimately justified when it began because the City's "non-investigatory, work-related purpose" of determining whether its monthly contract with the text provider was appropriate to ensure that employees weren't paying for work-related use and the City wasn't paying an exorbitant amount for personal use that resulted in overage fees.[155] Given this reasonable goal, the Court concluded, the scope of the City's search was not overly intrusive. The Court firmly rejected the Ninth Circuit's conclusion that the City was required to conduct the "least intrusive" search possible.[156]

VII. CONCLUSION

The collection of labor and employment cases the Court considered during the 2009 Term seems unlikely to significantly change either work life or work law. The statutory interpretation cases, with the exception of *New Process Steel*, were unanimous and involved relatively limited provisions of their respective statutes. *New Process Steel* presented a much more controversial decision, but not one whose application will reach beyond the specific question the case presented. In several cases that involved allocation of decisionmaking authority – whether between courts and arbitrators or between courts and pension plan administrators – the Court emphasized the priority of efficient private ordering over expansive judicial review.

During this relatively quiet employment Term, the Court itself underwent historic personnel change. Justice Sonya Sotomayor sat for her first Term. And at the end of the Term, Justice Elena Kagan took the seat of retiring Justice John Paul Stevens. Moreover, the Court granted certiorari in several very important employment discrimination cases, including what may be the most important employment case the Court has taken or will take in decades, *Wal-Mart Stores, Inc. v. Dukes*.[157]

154. *Id.* at 2630-32.
155. *Id.* at 2631.
156. *Id.* at 2632.
157. No. 10-277, 2010 WL 3358931 (Dec. 6, 2010).