REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES (2001-2006 TERMS)

by

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Question Presented: Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employments, be cloaked with First Amendment protection because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen," in accordance with this Court's holdings in Pickering v. Bd. of Educ., 391 U.S. 563 (1968,) and Connick v. Myers, 461 U.S. 138 (1983)?

Mr. Ceballos filed an employment grievance after he suffered retaliatory employment actions in response to his criticism of the accuracy of an affidavit. Mr. Ceballos' criticism was in the form of a memo, one that was indisputably drafted in conjunction with his workplace duties. Moreover, during a hearing on the defense's motion to challenge the validity of the warrant that issued despite Mr. Ceballos' misgivings, Mr. Ceballos testified as to his reservations concerning the warrant.

Justice Kennedy, writing for the five Justice majority of the Court, used as a backdrop for the case, the idea that a citizen is necessarily required to give up some freedoms as part and parcel of working for the federal government. In analyzing the case, the Court first had to decide in what capacity Mr. Ceballos spoke. If he spoke in his capacity as a private citizen in regard to a matter of public concern, then the oft-cited case, Pickering v. Board of Education, Township High School District 2005, 391 U.S. 563 (1968), protected his statements. However, should the Court find, as it did, that Mr. Ceballos spoke in his capacity as a public employee, then Connick v. Myers, 461 U.S. 138 (1983), left Mr. Ceballos exposed to retaliatory employer actions with no consequence to the employer, although the Court did concomitantly limit the scope of acceptable employer reactions to the statements at issue: "A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." Put another way, the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Notably, the Court rejected the notion "that employers can restrict employees' rights by creating excessively broad job descriptions."

The practical import of Garcetti may well be that employers are forced to increase the quality of their internal grievance procedures, lest their employees be tempted to air their issues with the media. Should the employee take his or her complaints to the media and the complaints are a matter of public concern, then the employee is immune from adverse employment actions predicated on that exercise of First Amendment rights. The scope of Garcetti may be bound by state and national whistleblower statutes. Note that the First Amendment, after Garcetti, remains separate and discrete from whistleblower

statutes. Had the Court affirmed the Ninth Circuit and found for Mr. Ceballos, the result would be a dramatic increase in the incidence of constitutional claims subsequent to the firing of public employees.

II. Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. ___, 126 S. Ct. 2931, 2006 U.S. LEXIS 4895 (2006), *aff'g*, 364 F.3d 789 (6th Cir. 2004) (en banc).

Question Presented: Whether the correct standard for an "adverse employment action" under Title VII is: 1) a "materially adverse change in the terms of employment," 2) an adverse action that is "reasonably likely to deter," or 3) an "ultimate employment decision."

Justice Breyer delivered the opinion of the Court. This case presented the Court with an opportunity to clearly work its way through a Title VII claim and set forth unambiguous standards. Here, Mrs. White was a forklift operator for Burlington Northern, and in the course of her employment, was subjected to sexual harassment by her supervisor. In the days preceding her complaint to higher-ups about the sexual harassment, Mrs. White was removed from her post as a forklift operator and assigned to standard laborer tasks. She then filed a complaint with the EEOC alleging gender discrimination and retaliation for her prior complaint; Burlington Northern summarily suspended her for insubordination for 37 days following the filing of her EEOC complaint. Though Burlington Northern reinstated her and compensated her for the pay lost during the suspension, Mrs. White filed another EEOC claim. Having exhausted her administrative remedies, Mrs. White asserted in federal court her eligibility for Title VII protection stemming from the allegedly retaliatory suspension and removal from her post as a forklift operator.

The Sixth Circuit affirmed the jury's award of compensatory damages for Mrs. White, and in so doing, applied precisely the same standard used in substantive discrimination offenses: the plaintiff bears the burden of proving an "adverse employment action," expounded as a "materially adverse change in the terms and conditions" of employment. The Circuits had split on the scope of the offending action and the degree to which it inflicted harm.

The Supreme Court drew a sharp distinction between the anti-discrimination and the anti-retaliation provisions of Title VII. The anti-discrimination provision is limited by Congress to the place of employment, the specific phraseology being: "compensation, terms, conditions, or privileges of employment" and "status as an employee." The anti-retaliation provision, however, contains no such limiting language. The Court, attributing to Congress intent and knowledge of the disparity in wording, interpreted the anti-retaliation provision to have a much broader scope, namely to protect the employee's ability to pursue statutory remedies. Note, this provision only comes into play when an objective standard has been met; the retaliatory action must have been materially adverse to a reasonable employee, that is, the reasonable employee must so fear the actions of the employer that he or she is unwilling to lodge a charge of discrimination. Interestingly, the Court discusses Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), because it

mentions "tangible employment action[s]" as a prerequisite for a class of actions under Title VII; even so, the Court finds Ellerth inapposite to the instant case because it did not discuss the scope of the anti-discrimination provision.

Justice Alito concurred separately, and would limit the anti-retaliation provision to be applicable only insofar as it relates to employment. Additionally, he urges the Court to consider the degree of the discrimination inflicted and the resulting level of retaliation that the employer may be able to inflict *sans* liability. That is, for grave discrimination, the employer may be able more severely punish the employee without discouraging the employee from invoking his or her statutory remedies, while for relatively minor forms of discrimination, the employer would be forced to act in a less egregious manner.

III. IBP, Inc. v. Alvarez, 546 U.S. 21 (2005), 126 S. Ct. 514, 163 L. Ed. 2d 288, 2005 U.S. LEXIS 8373 (2005), *aff'g*, Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), *and aff'g in part, rev'g in part, remanding*, Tum v. Barber Foods, Inc., d/b/a Barber Foods, 331 F.3d 1 (1st Cir. 2003).

Question Presented: Whether time spent walking between the location where protective clothing is donned and the actual work station, and time spent waiting at safety equipment distribution stations are compensable under Section 4(a) of the Portal-to-Portal Act of 1947 as an exception to Section 3 of the Fair Labor Standards Act of 1938.

In a series of Supreme Court decisions prior to 1947, the Court broadly defined the term "work" under the Fair Labor Standards Act (FLSA). In an effort to more clearly identify what is, and is not, compensable work under the FLSA, the Congress in 1947 passed the Portal-to-Portal Act. That Act exempts from FLSA coverage two categories of activities performed before or after an employee's principal activities, unless such activities are integral and indispensable to those principal activities. The two exempted categories of activities are (1) time spent by an employee "walking, riding, traveling to and from the actual place of performance of the principal activity or activities" of the employee's job; and (2) time spent by the employee on activities performed before or after the principal activities in a work day. Such activities are often called "preliminary" and "postliminary". In addition, the Act provides that some activities that might otherwise be considered to be compensable work need not be compensated if the time spent on them is *de minimis*.

In 1956, the Supreme Court issued an opinion in Steiner v. Mitchell, 350 U.S. 247 (1956), in which it held that the specific acts of putting on and taking off mandatory protective clothing were integral and indispensable to the employee's principal activities, and hence compensable. Id. at 256.

Against this backdrop these two cases arose, Alvarez v. IBP, Inc. and Tum v. Barber Foods, Inc., one a slaughterhouse and the other a poultry plant. In the Alvarez case, the meat processing plant, in addition to standard safety equipment like hardhats,

hairnets, earplugs, and gloves, some of the employees wore special protective equipment, including chain-link metal aprons and plexiglass armguards. IBP required that the equipment be stored in company locker rooms, where the gear was typically donned. It paid employees from the first piece of meat handled to the last, as well as four minutes of clothes-changing time.

In the First Circuit case, Tum v. Barber Foods, the employees at a poultry processing plant were required to don and doff mandatory safety gear before and after their shifts. Barber Foods only paid employees by the hour from the time they punched in to the time they punched out, and the employees were not compensated for time spent walking to work stations after donning protective gear, nor were thy compensated for time spent walking from work stations to changing areas.

The Supreme Court had to determine in these two cases (1) whether walking time by employees both after donning and prior to doffing unique protective gear was compensable time and (2) whether time spent waiting to don and doff such gear was compensable time.

Relying upon the "continuous workday" regulations of the U.S. Department of Labor, the unanimous Court held that the workday for which a non-exempt employee must be compensated begins the moment an employee performs any task or activity that is "integral and indispensable" to a "principal activity" of that employee. Applying that reasoning to the specifics of these cases, the Court found that the time spent walking to and from the production area after donning integral and indispensable protective gear, the time spent waiting to doff such gear, and the time actually spent doffing such gear, all constituted compensable work under the FLSA. The Court stated: "[W]e hold that any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA."

The Court ruled that time spent waiting to don gear, even if that gear is unique, integral, and indispensable, does not count as a compensable time under the FLSA unless the employer required its employees to report at a particular time and because of that requirement, the employees had to wait to don their gear.

IV. Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006), 126 S. Ct. 1195, 163 L. Ed. 2d 1053, 2006 U.S. LEXIS 1816 (2006), *vacating* 129 Fed. Appx. 529 (2005).

Question Presented: Whether an employer's reference to an African-American job applicant as "boy" is per se evidence of employment discrimination.

The defendant employer had two openings for managerial positions, and plaintiffs, who are African-American, were passed over for the positions. The employees

sued, alleging that their supervisors repeatedly called them "boy" resulting in violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.

The Eleventh Circuit held that "boy" standing alone is not a basis for a racial discrimination complaint. The Court's per curiam decision reversed the Eleventh Circuit on this matter and asserted that there were instances where "boy" could be evidence of "discriminatory animus," depending, *inter alia*, on the context, inflection, and custom: "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign."

The Court delved into a discussion of whether the Eleventh Circuit's standard of superior qualifications as evidence of discrimination – when "the disparity in qualifications is so apparent as to virtually jump off the page and slap you in the face." The Court did not endorse this language but found no occasion to establish a standard.

See also, Brooks v. County Comm'n of Jefferson County, Ala., 446 F.3d 1160 (11th Cir. 2006).

Ms. Brooks, who is white, filed a Title VII claim against respondent, her employer. At trial, respondent won a motion for summary judgment and petitioner appeals. The court traces through the burden-shifting framework erected to establish prima facie cases of discrimination, which may be rebutted by a legitimate non-discriminatory reason, which the petitioner may then rebut by exposing it as a pretext. When this analysis was applied to the case, the court assumed that a prima facie case of discrimination had been made, that the employer gave a valid reason for hiring a different worker – she had better qualifications than the petitioner – but the court was unwilling to conclude that the respondent's answer was a pretext for unallowable discrimination. The court did not conclude as such because the petitioner did not "show that the disparities between the successful application's and her own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" (citing Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)). The court claims that this language is blessed by the Supreme Court in Ash v. Tyson, although the Supreme Court specifically passed on a chance to decide the qualifications standard.

V. Arbaugh v. Y&H Corp., d/b/a The Moonlight Cafe, 546 U.S. 500 (2006), 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 2006 U.S. LEXIS 1819 (2006), *rev'g and remanding*, 380 F.3d 219 (5th Cir. 2004).

Question Presented: Whether Title VII's requirement that an employer have fifteen or more employees limits federal court subject matter jurisdiction, or otherwise is simply an element in a Title VII claim for relief.

Justice Ginsburg delivered the opinion of the Court. The Court held that Title VII's employee-numerosity requirement is an element in the plaintiff's claim for relief, and not a jurisdictional requirement.

Plaintiff Jenifer Arbaugh brought sexual harassment and constructive discharge claims against her former employer, a restaurant owned by Y&H Corp. She sued for a Title VII violation. After a jury verdict was awarded in Mrs. Arbaugh's favor, Y&H filed a motion to dismiss for lack of subject matter jurisdiction, alleging that the court lacked subject matter jurisdiction because Y&H did not employ fifteen or more people as required by Title VII. The trial court found that Y&H did not meet the employee-numerosity requirement of Title VII and dismissed Mrs. Arbaugh's claim. The Fifth Circuit affirmed, holding that failing to qualify as an employer under Title VII defeats subject matter jurisdiction.

An objection to subject matter jurisdiction may be raised at any time, even after the trial has concluded whereas objections that a complaint fails to state a claim may only be raised during trial. Thus, if the employee-numerosity requirement is simply an element in a claim for relief, the trial court should not have dismissed Mrs. Arbaugh's case because Y&H did not raise the objection until after the trial.

The Court found nothing in the text of Title VII indicating that the employee-numerosity requirement was meant to be jurisdictional in nature. Indeed, the employee-numerosity requirement appears in a separate provision from Title VII's jurisdictional provision. The Court determined that the employee-numerosity requirement is simply an element in a plaintiff's claim for relief, also noting that the resulting "unfairness and waste of judicial resources" if the employee-numerosity requirement was construed as a jurisdictional requirement provides a compelling policy argument for the Court's construction of the provision.

VI. Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006), 126 S. Ct. 1246, 163 L. Ed. 2d 1069, 2006 U.S. LEXIS 1821 (2006), *rev'g*, 107 Fed. Appx. 18 (9th Cir. 2004).

Question Presented: In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

Mr. McDonald is the sole shareholder and president of JVM Investments, Inc. JVM and Domino's entered into several contracts for four restaurants to be leased to Domino's. Domino's failed to execute estoppel certificates required under the contract. JVM and Domino's reached a settlement as to the breach of contract. Mr. McDonald then brought this suit, in his personal capacity, claiming Domino's breached its contracts with JVM out of racial animus.

In an opinion written by Justice Scalia, in which all other members of the Court joined except Justice Alito, who took no part in the consideration of the case, the Court held that a plaintiff must have rights under the contract that he seeks to "make and enforce" under § 1981 to state a valid claim.

Under § 1981, all persons under the jurisdiction of the United States have the right to "make and enforce contracts" without respect to race. The Court held that § 1981 did not protect the "insignificant right to act as an agent for someone else's contracting," but the right to enter into contracts on one's own behalf. Therefore, a plaintiff must have rights under the contractual relationship used as a basis for a § 1981 claim. The Court noted that the "whole purpose of corporation and agency law…[is] that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." Mr. McDonald, thus, failed to state a sufficient § 1981 claim.

VII. Mohawk Indus., Inc. v. Williams, 547 U.S. ___, 126 S. Ct. 2016, 164 L. Ed. 2d 776, 2006 U.S. LEXIS 4507, *vacating and remanding*, 411 F.3d 1252 (11th Cir. 2005).

Question Presented: Whether a corporation and its agents, which do not conduct or participate in the affairs of any larger enterprise, constitute an "enterprise" for the purposes of §§1961-1968 of the Racketeer Influenced and Corrupt Organizations Act (RICO).

The Court rescinded its writ of certiorari as improvidently granted, vacated the Eleventh Circuit's decision, and remanded the case to the Eleventh Circuit for proceedings consistent with Anza v. Ideal Steel Supply Corp., 547 U.S. ___, 126 S. Ct. 1991, 164 L. Ed. 2d 720, 2006 U.S. LEXIS 4510, *rev'g in part, vacating in part, and remanding*, Ideal Steel Supply Corp. v. Anza, 373 F.3d 521 (2d Cir. 2004). The Court in Anza found that the wire and mail fraud allegedly committed by Anza, Ideal Steel's main competitor, did not cause direct enough harm to Ideal Steel so as to confer standing to Ideal Steel under RICO. The Court relied heavily on an earlier case, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992), which rejected a low requirement of the outlawed actions under RICO being but-for causes of the harm, and opted for a higher bar of proximate cause. Thus, for a company to invoke RICO against another company and join with the government as an injured party with standing, the alleged actions by the offending company must directly and immediately precipitate the harm done to the injured company.

Mohawk is one of a series of cases filed around the country as class actions under RICO on behalf of a class of legal workers, arguing that their employer, by knowingly recruiting and hiring illegal workers, artificially depress their wages and that the class is entitled under RICO to retroactive wage increases and treble damages. Recently, one of these cases, filed in Washington State against Zirkle Fruit Company, settled for $1.3 million. In McCabe v. Ernst & Young, LLP, 2006 U.S. Dist. LEXIS 524 (D.N.J., January 6, 2006), the federal district court in New Jersey dismissed such a case, and the matter is now pending on appeal before the Third Circuit.

In the Mohawk case, arising out of its carpet factory in Georgia, the plaintiffs alleged in their complaint, *inter alia*, that the carper-maker "knowingly and recklessly accepted" false documents for illegal employees, that Mohawk employees traveled to the

Brownsville, TX area to recruit illegal immigrants, that Mohawk made incentive payments to employees and other recruiters to locate illegal workers, that Mohawk employees and others transported illegal workers from the Texas border to the Northern Georgia Mohawk plan, that Mohawk took steps to shield illegal workers from detection by law enforcement by hiding them in barrels or other containers at the plants, and that Mohawk when it had to fire illegal workers who had been found to lack proper documentation, rehired said workers under different false names.

The district court found that Mohawk and the recruiters constituted "an enterprise" under RICO, and that question was certified for immediate appeal pursuant to § 1292(b), to the Eleventh Circuit which affirmed. Thus, the Supreme Court when it granted cert, was confined to the sole issue certified from the district court to the court of appeals.

The Court heard oral argument in Mohawk on April 26, 2006. Pivec, "Immigration Dispute Hits Courts", 5/22/2006 NLJ S1, (Col. 2). The argument revolved around the question whether a corporation that contracts out a service, such as recruiting, can be part of an illegal "enterprise" under RICO. In 1996, the Congress had expanded RICO specifically to include violations of the immigration laws, including the hiring of illegal workers. The Court never decided the certified question, but rather vacated the Eleventh Circuit's decision and remanded the case to the Eleventh Circuit to consider in light of the Court's holding on June 5th in Anza v. Ideal Steel Supply Corp., another RICO case. In Anza the Court discussed at some length the differences between "but-for" causation and proximate cause. The Court in Anza referred back to its 1983 discussion of causation under the federal antitrust Clayton Act in Associated Gen. Contractors of Cal. v. Cal. State Bd. of Carpenters, 459 U.S. 519 (1983), in which the Court had held that a plaintiff had a right to sue under § 4 of the Clayton Act if the plaintiff made the required showing that the defendant's violation not only was a "but-for" cause of his injury, but was the proximate cause as well. See also, Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992) (holding that the Clayton Act's reasoning "applies just as readily to §1964(c) [RICO].") Thus, the Eleventh Circuit in Mohawk has, in effect, been instructed to reconsider whether it should permit such a suit by parties who have been injured only indirectly.

VIII. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. ___, 126 S. Ct. 2455, 2006 U.S. LEXIS 5162 (2006), *rev'g and remanding*, 402 F.3d 332 (2d Cir. 2005).

Question Presented: Whether the Individuals with Disabilities Education Act (IDEA)'s fee-shifting provision, 20 U.S.C. § 1415(i)(3)(B) authorizes an award of expert fees to parents prevailing in an action thereunder.

The IDEA neither textually authorizes an award of expert fees nor did Congressional intent countenance such an award to prevailing parents. The text of the statute, of course, is the most important determinant in ascertaining the scope of the statute; when plain and unambiguous, the text is dispositive. The disputed text in the

instant case allows for the award of "reasonable attorneys' fees as part of the costs" to parents of a disabled child that prevail in an action under the Act. The Court discards the argument that "costs" should be read in isolation to include all costs associated with the action, inclusive of experts' fees. Likewise, the Court, in accordance with the Second Circuit, determined "costs" to be a term of art, a term that does not normally include experts' fees. See 28 U.S.C. § 1920 (statute governing the taxation of costs to be awarded in federal court, with an enumeration of what constitutes "costs"). Were Congress to have meant the more expansive term "expenses," then Congress, so goes the reasoning, would have worded the statute to read "expenses."

The IDEA was passed pursuant to Congress' Spending Power and doles out money to school districts that accept the terms and conditions of the IDEA. As such, the IDEA functions much like a contract. When viewed in this light, the Court employs a strict standard by which to determine Congressional intent: "whether...a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." That is, does "the IDEA furnish[] clear notice regarding the liability at issue in this case[?]" Given the absence of Congressional legislative history or any other snippet of information that may put state officials on notice of the IDEA's allowance of an award of expert fees, the Court refused to rule in favor of the parents due to the lack of notice contained in the statute. See W. Va. Univ. Hosps. v. Casey, 499 U.S. 81 (1991) (A disputed footnote at play in Murphy meant only that "attorneys' fees" did not include experts' fees.); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). In short, the focus is *ex post* and on what the state officials would realize the stakes to be instead of *ex ante* and what Congress intended.

Nor did the Court find persuasive the suggestion that finding for the respondent would further the purposes of the Act, holding the argument to be too general to be of any use.

The legislative history of the statute clearly favored awarding the experts' fees, but the Court declined to allow a less-valued tool of statutory interpretation override those devices more reliable, legitimate, and suited to the purposes at hand.

Justice Ginsburg concurred in the outcome but disagreed with the Court's reliance on the "notice" requirement attendant to Spending Clause cases. She writes that Congress passed the IDEA under § 5 of the Fourteenth Amendment, so the amount of reliance afforded by the Court to the "notice" requirement should be attenuated. Nevertheless, she agrees that a singular comment in the Conference Report is insufficient to overcome the overwhelming arguments for a disallowance of the experts' fees. Congress, she concludes, is free to amend the text to reflect what it proclaimed itself to have intended.

Justice Breyer dissented, writing that the single excerpt from the Conference Report should be dispositive in this case. "I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended." He also picks up and follows the scent of the argument that allowing

the award of experts' fees furthers the purposes of the IDEA. Parents, he argues, should not be forced to shell out hundreds of dollars to ensure their child's right to a "free" and "appropriate" education, terms stated in the Act's purposes, without the possibility of recovery; presumably he worries about a chilling effect on parental action under IDEA.

IX. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 2006 U.S. LEXIS 1814 (2006), *rev'g and remanding*, 894 So. 2d 860 (Fla. 2005).

Question Presented: Whether the legality of a contract containing an arbitration agreement should be considered by an arbitrator or by a court.

Justice Scalia delivered the 7-1 opinion of the Court. Justice Thomas filed a dissenting opinion. Justice Alito took no part in the consideration of the case.

The respondents brought suit, alleging that the deferred-payment transaction agreements that they entered into with petitioner check cashing service were made illegal under Florida law because of usurious interest rates. The agreements contained arbitration agreements.

The Court held that when an entire contract is being challenged, and not specifically its arbitration provisions, an arbitrator should consider the challenge. Section 2 of the Federal Arbitration Act provides that arbitration agreements are valid, irrevocable and enforceable. The Court found that the decisions in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and Southland Corp. v. Keating, 465 U.S. 1 (1984), set forth three propositions:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.

The Court thus held that an arbitrator should consider the claim of the contract's illegality. The Court further held that putative contracts are included within § 2 of the Federal Arbitration Act; the determination of whether an arbitrator or a court should hear a case does not depend on whether the contract is voidable or void.

Justice Thomas dissented emphasizing his view that the Federal Arbitration Act does not apply to state court proceedings.

X. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006), 126 S. Ct. 1503, 164 L. Ed. 2d 179, 2006 U.S. LEXIS 2497 (2006), *vacating and remanding*, 395 F.3d 25 (2d Cir. 2005).

Question Presented: Whether the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which prohibits certain class action lawsuits alleging fraud or misrepresentation in connection with a purchase or sale of securities, preempts state law class action claims alleging fraud by members who were deceived into holding securities.

Justice Stevens delivered the opinion of the Court, in which all other Justices joined, except Justice Alito, who did not participate in the proceedings. The Court held that the SLUSA preempts state law class action claims where the alleged fraud or omission does not result in the purchase or sale of a security.

Respondent, a former Merrill Lynch broker, brought action in federal court, applying state law, alleging a breach of fiduciary duty. Respondent argues that Merrill Lynch supplied its brokers with misleading information in order to manipulate stock prices. As a result, respondent, and other Merrill Lynch brokers, relied on such reports in deciding not to sell their stocks. Had accurate information been available, both respondent and other brokers would have sold their securities much sooner.

The Court began by examining the language of the Securities and Exchange Commission Rule 10b-5, which prohibits fraud "in connection with the purchase or sale of any security." Because such broad language invited vexatious litigation and settlement suits, the Court narrowed the rule's scope in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (holding that standing under 10b-5 could be granted only to those who had actually bought or sold a security). In the decades that followed, potential litigants began bringing such claims under state law in order to avoid the narrow standing requirement articulated in Blue Chip Stamps. Congress then passed the SLUSA, which prohibited litigants from bringing state class action suits alleging Rule 10b-5 violations. Respondent argues that this language should be read in accordance with Blue Chip Stamps. According to the language of the SLUSA, only actual buyers or sellers of securities are prohibited from bringing state law class action suits.

The Court disagreed, saying that the Court in Blue Chip Stamps relied not on the language of Rule 10b-5 in limiting the scope of standing for private remedies, but rather on policy considerations. In construing precedents from the history of such litigation, the Court held that the alleged fraud must merely be coincidental to the securities transaction, thus broadening the scope of the SLUSA's reach. The Court also relied on canons of statutory of interpretation. Finding that the language of Rule 10b-5 and the class action limitations were identical, the Court argued that Congress had desired and anticipated a broad construction of the language of the SLUSA.

Justice Stevens noted that a contrary finding would diverge from the general purpose of the SLUSA. The Court held that if respondent's argument was accepted, claims that are prohibited under federal law could be brought under state law. Such a result runs counter to the purpose of a uniform set of standards for class action lawsuits involving securities.

XI. Martin v. Franklin Capital Corp., 546 U.S. 132 (2005), 126 S. Ct. 704, 163 L. Ed. 2d 547, 2005 U.S. LEXIS 9234 (2005), *aff'g*, 393 F.3d 1143 (10th Cir. 2004).

Question Presented: Whether the district court acted within its discretion in declining to award fees and expenses to the plaintiffs pursuant to 28 U.S.C § 1447(c), when the defendants possessed objectively reasonable grounds to believe the removal was proper.

Plaintiff Martin sought attorneys' fees, relying upon 28 U.S.C. § 1447(c), which states, in relevant part, that the remand of an improperly removed case "may require payment of just costs and any actual expenses, including attorneys' fees, incurred as a result of the removal." The District Court and Tenth Circuit did not award the attorneys' fees, finding that there was an objectively reasonable basis for the defendant to believe he could remove the case to federal court.

Chief Justice Roberts, writing for the unanimous Court, upheld the lower courts' determinations that attorneys' fees should not be awarded pursuant to § 1447(c) when there is an objectively reasonable basis for removal. The Court based its holding on the fact that § 1447(c) does not provide that a remand order "shall" require an award of attorneys' fees, but instead provides an order "may" require an award. The Court developed the "objectively reasonable basis" standard to recognize Congress' purpose in deterring improper removals while preserving the right of defendants to remove generally.

XII. Sereboff v. Mid Atl. Med. Servs., 547 U.S. ___, 126 S. Ct. 1869, 164 L. Ed. 2d 612, 2006 U.S. LEXIS 3954 (2006), *aff'g in relevant part*, 407 F.3d 212 (4th Cir. 2005).

Question Presented: Whether a claim by a planned fiduciary for reimbursement from a plan beneficiary from money received by third party constitutes "equitable relief" under § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA).

Chief Justice Roberts delivered the opinion for a unanimous Court. This reimbursement is properly classified as "equitable relief" under § 502(a)(3) of ERISA. Under the health insurance plan agreed to by the parties, the Sereboffs, as beneficiaries, were to reimburse Mid Atlantic Health Services, the insurer, in the event that the Sereboffs were injured by a third party, Mid Atlantic covered the expenses, and the Sereboffs recovered from the third-party damages for the injuries caused. Such a scenario unfolded, and Mid Atlantic filed suit to recover from the Sereboff's settlement with the third party for expenses it incurred. However, the Sereboffs challenged Mid Atlantic's ability to recover, saying that this type of recovery was not "equitable relief" under § 502 (a)(3) of ERISA.

Section 502(a)(3) allows for a fiduciary "to obtain...appropriate equitable relief...to enforce...the terms of the plan." A recent Supreme Court case, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), found a roughly parallel type of recovery to not be equitable; in Knudson, the insurance company's attempted to recover

from a tort settlement with a third party, but the settlement money was held in a trust and out of the beneficiaries' possession. The Court found the small divergence between the facts of Knudson and the present case significant. In the present case, applying a "familiar rule of equity" allows Mid Atlantic to recover a specified amount, an amount kept separate from the Sereboff's general assets. In effect, Mid Atlantic had a lien on that amount at the time of signing. Of course neither party could determine if the amount would ever materialize. The Sereboffs asserted that the "familiar rule of equity" was limited only to the facts of the original case, Barnes v. Alexander, 232 U.S. 117 (1914), contingent attorney's fees. The Court likewise dismissed that argument because the Barnes Court had attached no special significance to attorney's fees *qua* attorney's fees in determining the outcome of the case.

XIII. Whitman v. Dep't of Transp., 547 U.S. ___, 126 S. Ct. 2014, 164 L. Ed. 2d 771, 2006 U.S. LEXIS 4508 (2006), *vacating and remanding*, 382 F.3d 938 (9th Cir. 2004).

Questions Presented:

1) Whether 5 U.S.C. 7121(a) bars an employee from seeking judicial redress of his claims by mandating that the negotiated procedures of a federal collective bargaining agreement be the exclusive procedure for the resolution of disputes where, as here, the employee would otherwise have independent grounds for a court's review of his claims.

2) Whether federal employees may be awarded equitable relief under the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*, for constitutional claims brought against their employer.

Mr. Whitman works for the Federal Aviation Administration and is subject the FAA's drug and alcohol testing regimen. Upon being called for a drug test that Mr. Whitman felt was nonrandom, Mr. Whitman commenced this action in federal district court instead of resorting to the measures laid out by the FAA for the resolution of its employees' claims.

The Court, in a per curiam opinion, did not decide whether Mr. Whitman had to follow the procedures laid out in the Civil Service Reform Act and adopted by the FAA, but remanded the case for further proceedings as several questions pertaining to federal jurisdiction and preclusion were unanswered by the Ninth Circuit.

XIV. United States v. Georgia, 546 U.S. 151 (2006), 126 S. Ct. 877, 163 L. Ed. 2d 650, 2006 U.S. LEXIS 759 (2006), *rev'g and remanding*, 120 Fed. Appx. 785 (11th Cir. 2004).

Question Presented: Whether Congress acted properly under § 5 of the Fourteenth Amendment by abrogating state Eleventh Amendment immunity as applied to suits brought by prison inmates under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*

Justice Scalia delivered the opinion for the unanimous Court. Justice Stevens, joined by Justice Ginsburg concurred. The Court held that "[i]nsofar as Title II creates a private cause of action for damages against States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." (emphasis in original).

The petitioner, Tony Goodman, a paraplegic inmate, brought suit in the United States District Court for the Southern District of Georgia, claiming the conditions of his confinement violated Rev. Stat. § 1979, 42 U.S.C. § 1983 and Title II of the ADA. The District Court dismissed his § 1983 and Title II claims, finding that his allegations were vague and did not constitute sufficient notice. The Eleventh Circuit found that petitioner's § 1983 claims did contain sufficient facts to support Eighth Amendment claims and remanded the cases to permit petitioner to amend his complaint.

The ADA specifically provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." § 12202. The Court noted that under § 5 of the Fourteenth Amendment, Congress is clearly given the power to create private remedies against the States for "actual" violations of the Fourteenth Amendment. Therefore, they held that "[i]nsofar as Title II creates a private cause of action for damages against States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." (emphasis in original). The Court held that because the Eleventh Circuit found petitioner's claims to have some merit as violations of the Eight Amendment, and that because the same conduct would constitute violations of the ADA, that he could bring a suit for money damages against the State.

Justice Stevens concurred, noting that other constitutional rights are applicable in the prison context and relevant to the abrogation issue.

XV. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006), 126 S. Ct. 1281, 164 L. Ed. 2d 26, 2006 U.S. LEXIS 2024 (2006), *vacating and remanding*, Indep. Ink v. Ill. Tool Works, Inc., 396 F.3d 1342.

Question Presented: Whether, under Section 1 of the Sherman Act, 15 U.S.C. § 1, when a plaintiff asserts that the defendant unlawfully "tied" goods by conditioning a patent license on the licensee's purchase of a non-patented good, must the plaintiff prove the defendant's market power in the market for the tied good or is market power presumed by the defendant's possession of a patent on the tied good.

Illinois Tool Works sells patented printer cartridges that use special, though unpatented, ink. It sells its wares to manufacturers, and as part of the bargain, extracts a promise from the manufacturers to use only Illinois Tool Works' ink in the cartridges. Independent Ink developed ink that was chemically the same as Illinois Tool Works'. Independent Ink filed this suit alleging violations of §§ 1 and 2 of the Sherman Act, 15

U.S.C. §§ 1, 2, stemming from Illinois Tool Works' "tying" of its ink to the sale of its cartridge.

Justice Stevens delivered the opinion of the Court. The Court abandoned its previous line of economic thinking whereby patent holders were presumed to have market power by virtue of their ability to be the sole distributors of their good, noting that the "strong disapproval" expressed by the Court in the past toward such tying arrangements has "substantially diminished." The Court finds that a requirement of economic data reflecting the actual market power of the patent holder more accurately presents the Court with the information necessary to apply federal antitrust statutes. In other words, the Court realized that there may be times when the per se rule is too exclusive and destroys arrangements that may otherwise be legitimate.

XVI. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006), 126 S. Ct. 1211, 163 L. Ed. 2d 1017, 2006 U.S. LEXIS 1815 (2006), *aff'g and remanding*, 389 F.3d 973 (2004).

Question Presented: Whether, despite Congress' findings that a Schedule I drug has a high potential for abuse, is unsafe for human consumption, and its importation and distribution would violate an international treaty, the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq*., requires the government to allow this drug's importation, distribution, possession, and use.

The respondent church initially brought this action for an injunction against the enforcement of a ban on their use of hoasca, a hallucinogen regulated under Schedule 1 of the Controlled Substances Act (CSA). The respondent claimed that the ban on hoasca violated their rights under the Religious Freedom Restoration Act (RFRA) because it was an essential part of a tea the church used in their communion service. The Government conceded that the ban on hoasca substantially burdened respondent's ability to freely exercise their religion, but argued that the ban advanced three compelling governmental interests: preventing the drug from being used for non-religious purposes, ensuring the health of church members, and compliance with the United Nations Convention on Psychotropic Substances. On appeal the 10th Circuit affirmed the lower court's holding in favor of the church finding that while the church had shown that a ban on hoasca would substantially burden the exercise of their religion, the government had not shown that the government's interest in banning hoasca was sufficiently compelling.

Chief Justice Roberts delivered the opinion of the court affirming the 10th Circuit's decision. The Court found that under the RFRA the federal government cannot substantially burden the exercise of religion unless it satisfies a two part test: 1) the burden on religion is in furtherance of a compelling governmental interest; and 2) the burden is the least restrictive means of furthering the compelling governmental interest. The Court held that the government failed to satisfy the first part of this test and did not show that there is a sufficiently compelling interest in banning the use of hoasca.

XVII. Woodford v. Ngo, 126 S. Ct. 2378; 165 L. Ed. 2d 368; 2006 U.S. LEXIS 4891 (2006), *rev'g and remanding* Ngo v. Woodford, 403 F.3d 620 (9th Cir. 2005).

Question Presented: Does a prisoner satisfy the Prison Litigation Reform Act's Administrative exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal?

Though not an employment law case per se, Woodford is notable for some relevant language regarding the application of the ADEA:

Respondent next suggests that the PLRA exhaustion requirement was patterned on §14(b) of the Age Discrimination in Employment Act of 1967, (ADEA), 81 Stat. 607, codified at 29 U. S. C. §633(b), and §706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 260, as redesignated and amended, 42 U. S. C. §2000e–5(e), but these are implausible models. Neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision.

In *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), we considered §14(b) of the ADEA, which provides that, if a State has an agency to redress state-law age-related employment discrimination claims, an ADEA claim may not be brought in federal court "before the expiration of sixty days *after proceedings have been commenced* under the State law." 29 U. S. C. §633(b) (emphasis added). This provision makes no reference to the exhaustion of state remedies, only to the "commencement" of state proceedings, and this provision leaves no doubt that proper commencement of those proceedings is not required. As we noted, see *Oscar Mayer*, 441 U. S., at 759, §14(b) of the ADEA states that the requirement of commencement is satisfied merely by sending the state agency a signed statement of the pertinent facts, and §14(b) explicitly provides that the commencement requirement does not entail compliance with any other state procedural rule, including a deadline for initiating the state proceeding, *id*., at 760. We see little similarity between §14(b), which merely requires the commencement of state proceedings and explicitly does not require timely commencement, and42 U. S. C. §1997e(a), which expressly requires exhaustion of available administrative remedies with no reference to a federally based limiting principle.

Section 706(e) of Title VII is also fundamentally different from the PLRA exhaustion provision. As interpreted by this Court, §706(e) means that a complainant who "initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency, within240 days of the alleged discriminatory event . . . ." EEOC v. Commercial Office Products Co., 486 U. S. 107, 110–111 (1988). Following the reasoning of Oscar Mayer, we held that this filing requirement did not demand that the charge submitted to the state or local authority be filed incompliance with the authority's time limit. 486 U. S., at 123–125. Because §706(e) of Title VII, refers only to the filing of a charge with a state or local agency

and not to the exhaustion of remedies, §706(e) cannot be viewed as a model for the PLRA exhaustion provision.

XVIII. Howard Delivery Serv. v. Zurich Am. Ins. Co., 126 S. Ct. 2105, 165 L. Ed. 2d 110, 2006 U.S. LEXIS 4678 (2006) *rev'g and remanding* Howard Delivery Serv. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv.), 403 F.3d 228 (4th Cir. 2005).

Question Presented: May a creditor seek priority status in a bankruptcy case to recover unpaid premiums owed for legally-required workers' compensation insurance?

The Court reversed the Fourth Circuit's decision to award fourth-level priority in a bankruptcy proceeding to a workers' compensation insurer. The Court ruled that under the Bankruptcy Code § 507(a)(5) fourth-level priority is for fringe benefits that are a substitution for wages. Premiums due for workers' compensation is not a fringe benefit that is a substitution for wages it is a form of liability insurance.

XIX. Lincoln Prop. Co. v. Roche, 126 S. Ct. 606, 163 L.Ed.2d 415, 2005 U.S. LEXIS 9037 (2005) *rev'g and remanding* Roche v. Lincoln Prop. Co., 373 F.3d 610 (4th Cir. 2004).

Questions Presented:

> 1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).
>
> 2. Whether a limited partnership's citizenship for diversity subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

The Court reversed the Fourth Circuit's decision to remand the case to state court and held that federal jurisdiction was proper because diversity existed between the "real parties to the controversy." The plaintiff/lessees brought suit in state court against the defendant/out-of-state landlord for defects in their apartment. The landlord moved to remove the matter to federal court based on diversity jurisdiction. The Fourth Circuit held that complete diversity did not exist because the defendant failed to show that resident affiliates of defendant who had been joined as defendants by plaintiff were not real parties to the controversy. The Supreme Court unanimously rejected the holding of the Fourth Circuit. The Court held that none of the resident defendants joined by the plaintiff were necessary to achieve a "just adjudication" of the matter. The Court found that because the defendant admitted liability for the property occupied by the plaintiff, and the fact that it is common for real estate owners to work through networks of

affiliates to manage distant properties, his presence was sufficient for the just adjudication contemplated by Federal Rule of Civil Procedure 19.

REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES (2004-2005 TERM)

I. Smith v. City of Jackson, 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410, 2005 U.S. LEXIS 2931, 73 U.S.L.W. 4251 (2005), *affirming*, 351 F.3d 183 (5th Cir. 2003).

Question Presented: Whether disparate-impact claims are cognizable under the Age Discrimination in Employment Act (ADEA).

The Court held that disparate-impact claims are permitted under the ADEA but affirmed the lower court's ruling because the officers failed to set forth a valid disparate-impact claim. Justice Stevens gave the opinion of the Court in which Justices Scalia, Souter, Ginsburg, and Breyer joined in part. Concurrences were filed by Justices Scalia and O'Connor. Justices Kennedy and Thomas joined O'Connor in her concurrence. Justice Rehnquist took no part in the decision.

This case arose when the City of Jackson granted pay raises to all police officers and dispatchers in order to raise salary levels to the regional average. Because the salaries of officers with less than five years on the force were comparably lower to the regional average than those of officers with more seniority, the newer officers received greater percentages of their former pay than those with more seniority. Most, but not all, of the officers who were over the age of 40 were in the latter group and thus received less of a percentage increase than the younger officers. The older officers filed a disparate-impact suit under the ADEA claiming they were "adversely affected" by the plan.

The Court compares the language of the ADEA to the language of Title VII of the Civil Rights Act of 1964. The Court notes that the ADEA has a narrower scope regarding disparate-impact liability than does Title VII for two reasons. First, § 4(f)(1) of the ADEA, 81 Stat. 603, allows any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age." Title VII has no such language. Second, the Civil Rights Act of 1991 contained an amendment to Title VII which expanded disparate-impact liability under Title VII. This amendment modified the Court's holding in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) which limited disparate-impact liability. The amendment did not apply to the language in the ADEA; therefore, Wards Cove is still the proper articulation of disparate-impact liability under the ADEA.

The Court states that under Wards Cove, in order for an employee to claim disparate-impact liability under the ADEA, they are "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities;" identifying general practices is not sufficient. Id. at 656. The plaintiffs in this case failed to point to specific practices as required.

The Court also held that the decision to grant larger raises to the newer employees was based on a "reasonable factor other than age" and was allowable under § 4(f)(1) of the ADEA.

Justice Scalia issued a concurrence in which he states that he would give deference to the Equal Employment Opportunity Commission's view that disparate-impact claims are allowable under the ADEA. Justice O'Connor (joined by Justices Kennedy and Thomas) would have affirmed the lower court ruling that disparate-impact claims are not recognized under the ADEA.

II. Graham County Soil & Water Conservation Dist. v. Wilson, 545 U.S. 409, 125 S. Ct. 2444, 2005 U.S. LEXIS 4845, 73 U.S.L.W. 4544 (2005), *reversing and remanding*, United States v. Graham County Soil & Water Conservation Dist., 367 F.3d 245 (4th Cir. 2004).

Question Presented: Whether individual retaliation claims under 31 U.S.C. § 3730(h) (False Claims Act (FCA)) are governed by the six-year statute of limitations set forth in 31 U.S.C. § 3731(b)(1).

In a 7-2 decision, with the opinion of the Court written by Justice Thomas, the Supreme Court held that the six-year statute of limitations of the FCA did not apply to retaliation claims brought under § 3730(h) but, rather, the most closely analogous state limitation period would apply. The Court remanded for consideration the issue of which state statute of limitations is the most closely analogous. Justice Stevens filed a concurrence and Justice Breyer, joined by Justice Ginsburg dissented.

The FCA makes it unlawful for persons to make false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a). The statute originally only allowed suits by the Attorney General or by private individuals bringing qui tam actions in the Government's name. In 1986, the statute was amended to allow suits by private individuals for retaliation when the retaliation was in response to assisting an FCA proceeding. 31 U.S.C. § 3730(h). The amendments also altered the six-year statute of limitations provision of § 3731(b)(1). The relevant sections of the new statute of limitations provision provide that "(b) A civil action under section 3730 may not be brought – (1) more than 6 years after the date on which the violation of section 3729 is committed…"

In December 1995, Wilson reported that her employer, Graham County Soil and Water Conservation District, submitted false claims for payment to the United States. She assisted federal officials in the investigation of those claims. She alleges that her employer began harassing her from 1996 to 1997 until she was finally forced to resign in March 1997. She brought both qui tam and retaliation suits against her employer in January 2001. The defendants contend that the retaliation claim is barred by the three-year statute of limitations for retaliatory-discharge actions under North Carolina law. See

354 N.C. 220, 554 S.E.2d 344 (2001). They claim that the six-year statute of limitations of the FCA does not apply to § 3730(h) claims.

The Court notes that when a federal statute does not "expressly suppl[y] a limitations period," the most closely analogous state limitations period is used. The Court holds that the reading suggested by § 3731(b)(1) is that the six-year statute of limitations applies only to sections (a) and (b) of § 3730. Section 3731 states that the statute of limitations accrues on "the date on which the violation of section 3729 is committed." Because a retaliation complainant is not required to allege a violation of § 3729 but merely that he was retaliated against in furtherance of an FCA claim, the Court finds that the statute of limitations would be without a starting point if applied to § 3730(h). The Court further reasons that because § 3731(c) uses the same language as § 3731(b)(1) while only referring to §§ 3730(a) and (b), it is reasonable that the statute of limitations provision was also meant to only apply to those sections. The Court also reasons that statutes of limitations generally start running when the cause of action accrues. If the defendants' reading was adopted, the statute of limitations would begin to run, and possibly be tolled, before the cause of action occurs.

III. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361, 2005 U.S. LEXIS 2928, 73 U.S.L.W. 4233 (2005), *reversing and remanding*, 309 F.3d 1333 (11th Cir. 2002).

Question Presented: Whether retaliation claims are included in the implied private right of action of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.

In this 5-4 decision, the Supreme Court held that retaliation claims are cognizable under Title IX where the retaliation by a funding recipient is in response to a complaint of sex discrimination. Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, delivered the opinion of the Court. Justice Thomas filed a dissent in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.

Jackson alleges that he lost his position as the coach of the girl's basketball team in retaliation for complaining that the girl's team was the victim of sex discrimination. He complained that they were not receiving equal funding and equal access to facilities.

Title IX reads "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Court held that retaliation is included in Title IX's prohibition against sex discrimination Retaliation is an intentional act and is also discrimination because it is a form of differential treatment. In addition, the Court held that retaliation in this context is discrimination "on the basis of sex" because it was in response to a complaint of sex discrimination. The Court notes that Title IX's prohibition of discrimination has repeatedly been construed broadly by the Court in previous cases and that Congress intended for it to be construed this way. Congress knew that the Court had construed a general prohibition against racial discrimination broadly in Sullivan v.

Little Hunting Park, Inc., 396 U.S. 229 (1969) (holding that a general racial discrimination prohibition included retaliation claims brought by those who acted on behalf of protected groups), and could expect the same treatment of the term in Title IX. Because Congress did not specifically list *any* prohibited practices, the Court dismisses the Board of Education's (hereinafter Board) argument that Title IX would have specifically mentioned retaliation. Justice Thomas disagrees in his dissent; he believes that because Congress has specifically mentioned retaliation in other discrimination statutes that they would have mentioned it in Title IX if they intended for it to be included.

The Board also argued that, in this instance, the retaliation was not covered under Title IX because the retaliation was not against the victim of the discrimination but, instead, a third party. Justice Thomas' dissent notes that "on the basis of sex" naturally means "on the basis of the plaintiff's sex, not the sex of some other person." The Court finds, however, that because the statute is broadly worded and because it is important that individuals continue to report Title IX violations, even those who are not the victims of the original discrimination may bring a retaliation claim under Title IX.

The Court also dismissed the Board's argument that because Title IX was enacted under the Spending Power, the recipients of the funding have to be on notice that they could be liable, which, in this case, they were not. Justice Thomas takes this position in his dissent saying that conditions on Congress' Spending Power are required to be unambiguous. The majority writes that the Board should have been on notice that it could not retaliate in relation to a sex discrimination claim because the Board should have been aware that Title IX's prohibition has consistently been interpreted broadly.

It would appear that the decision resolves the dispute involving retaliation claims under § 1981. But see, Hart v. Transit Management of Racine, 2005 U.S. App. LEXIS 22057 (7th Cir. 2005) (holding that § 1981 does not support a cause of action of retaliation for opposing race discrimination).

IV. Spector v. Norwegian Cruise Line Ltd., 545 U. S. 119, 125 S. Ct. 2169, 2005 U.S. LEXIS 4655, 73 U.S.L.W. 4429 (2005), *reversing and remanding*, 356 F.3d 641 (5th Cir. 2004).

Question Presented: Whether Title III of the Americans with Disabilities Act of 1990 (ADA) is applicable to foreign cruise ships.

The Supreme Court held, in this fractured opinion, that the ADA is applicable to foreign cruise ships except in cases where applying the statute would interfere with a ship's internal affairs in which case a clear statement of congressional intent is necessary. Justice Kennedy delivered an opinion of which Parts I, II-A-1, and II-B-2 are for the Court. Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connor, dissented. Justice Thomas filed an opinion concurring in part, dissenting in part, and concurring in the judgment in part.

The plaintiffs, disabled individuals who were customers of Norwegian Cruise Lines, sued under Title III of the ADA alleging discrimination on the basis of disability. One allegation was that many of the ship's cabins, including the more desirable units, were inaccessible to the disabled. Norwegian Cruise Line is a Bermuda Corporation with a principal place of business in Florida and serves primarily United States residents. The two boats here at issue are registered in the Bahamas.

The ADA requires removal of "architectural barriers, and communication barriers that are structural in nature" if the removal is "readily achievable." 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C). The plurality of the Court believes that barrier removal which leads to a "permanent and significant modification to a ship's physical structure" could relate to the internal affairs of the ships if it makes it impossible for the ship to comply with the International Convention for the Safety of Life at Sea (SOLAS) or other regulations. The Court's previous cases have held that, if a statutory requirement interferes with a foreign-flag ship's internal affairs, a clear statement of congressional intent for the statute to apply is required. The majority notes that any physical alteration that would make the ship unable to comply with regulations would not be "readily achievable" and thus would not be required under the language of the ADA itself. The Court disagrees as to whether resort to the clear statement rule would ever be necessary or if the "readily achievable" requirement under the ADA would prevent any changes that relate to the internal affairs of the cruise ships.

Justice Ginsburg wrote separately to note that she believes the clear statement rule to be that statutes should not be applied when they interfere with principles of international law, not merely the internal affairs of an entity. Justice Thomas writes that the statute should not be applied to require any structural changes because the ADA does not include a clear statement of intent for its regulations to apply to the foreign ships.

The dissenting justices would not apply Title III to the foreign cruise ships at all. In their opinion, the statute's requirements interfere with the internal affairs of the ship and thus a clear statement of congressional intent is required in order for the statute to be applied.

V Comm'r v. Banks, 543 U.S. 426, 125 S. Ct. 826, 160 L. Ed. 2d 859, 2005 U.S. LEXIS 1370, 73 U.S.L.W. 4117 (2005), *reversing and remanding*, 345 F.3d 373 (6th Cir. 2003); 340 F.3d 1074 (9th Cir. 2003).

Question Presented: Whether, under the Internal Revenue Code, plaintiff's attorney's fees, paid on a contingent fee basis, are considered to be taxable income to the plaintiff.

The Supreme Court held, in a unanimous opinion (8-0), that contingent fees paid to a plaintiff's attorney are considered taxable income to the plaintiff whenever the plaintiff's recovery itself constitutes income. Chief Justice Rehnquist took no part in the decision.

This decision is a consolidation of two lower court cases: Banks v. Comm'r, 345 F.3d 373 (6th Cir. 2003) and Banaitis v. Comm'r, 340 F.3d 1074 (9th Cir. 2003). Banks sued on a contingency basis alleging employment discrimination under 42 U.S.C. §§ 1981 and 1983 after being terminated from his position as an educational consultant. The suit was settled for $464,000 and Banks paid $150,000 of that amount in attorney's fees. On appeal, the Court of Appeals for the Sixth Circuit held that the net amount of the settlement received by Banks was taxable income but the $150,000 paid to the attorney was not.

Banaitis sued his former employer, the Bank of California and its successor Mitsubishi Bank, also on a contingency basis, after he was discharged from his job as a vice president and loan officer. Banaitis alleged willful interference with his employment contract and that he was discharged because he refused to breach his fiduciary duty to his customers. Upon settlement, Banaitis received $4,864,547 and his attorney received an additional $3,864,012. On appeal, the Court of Appeals for the Ninth Circuit held that the attorney's fees were not taxable income because, under Oregon law, contingency fees are not anticipatory assignments but rather partial transfers of property in the lawsuit.

The Court relies on the anticipatory assignment doctrine developed in previous cases to determine that attorney's fees are considered part of plaintiff's income. Under that doctrine, "a taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party." See, e.g., Lucas v. Earl, 281 U.S. 111 (1930). The principle behind the doctrine is that persons who earn the income and enjoy the benefits derived from the income should be taxed on the income. The Court agrees with the Commissioner's argument that a contingent fee arrangement should be considered an anticipatory assignment and that the anticipatory assignment doctrine should govern this case.

In an anticipatory assignment case, the question of whether the recovery constitutes income is determined by asking "whether the assignor retains dominion over the income-generating asset." In litigation recoveries, the causes of action are the income-generating assets. Thus, according to the Court, attorney's fees are income for tax purposes because the plaintiff retains dominion over the cause of action during litigation.

The Court notes that it is irrelevant whether or not the dollar amount of the attorney fees are known in advance. The Court also rejects respondents' argument that the relationship between attorney and client is a partnership, stating that the relationship is rather a principal-agent relationship and, as such, fees paid directly to the agent are still considered income of the principal. The Court does not consider the issue of whether applying the anticipatory assignment doctrine to contingent fee cases would be inconsistent with fee shifting provisions.

VI Garrison S. Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949, 2005 U.S. LEXIS 2007, 73 U.S.L.W. 4137 (2005), *reversing and remanding*, 321 F.3d 791 (9th Cir. 2003).

Question Presented: Whether the California Department of Correction's (CDC) unwritten policy of segregating new and transferred prisoners on the basis of their race violates the prisoner's constitutional right to the equal protection of the laws.

The Ninth Circuit applied a deferential standard and held that the CDC's racial segregation policy was constitutional. The Supreme Court reversed and remanded for a determination of the constitutionality of the policy under strict scrutiny. Justice O'Connor delivered the opinion in which she was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Stevens filed a dissenting opinion in which he agreed with the Solicitor General's amicus submission in which he urged that the Court find the policy to be unconstitutional on the basis of the current record. Justice Stevens opined that a remand was only appropriate for the resolution of the issue of qualified immunity. Justice Thomas dissented with Justice Scalia joining. In his dissent, Justice Thomas opined that the CDC's policy is constitutional.

The Ninth Circuit had held that the CDC policy was reasonably related to legitimate penological interests as CDC had argued that the policy was necessary to prevent violence caused by racial prison gangs. The Court, speaking through Justice O'Connor, held that the policy was subject to strict judicial scrutiny since it was based on a racial classification and, to survive constitutional strict scrutiny, the racial classification must be narrowly tailored to further CDC's compelling interests. The Court further rejected the holding that the CDC's expertise in the unique area of managing a prison did not warrant deference to the CDC's decision to rely upon a racial classification as a means of controlling prison violence.

VII Rousey v. Jacoway, 544 U.S. 320, 125 S. Ct. 1561, 161 L. Ed. 2d 563, 2005 U.S. LEXIS 2933, 73 U.S.L.W. 4277 (2005), *reversing and remanding*, 347 F.3d 689 (8th Cir. 2004).

Question Presented: Whether 11 U.S.C. § 522(d)(10)(E) allows Individual Retirement Account (IRA) assets to be exempted from bankruptcy estates.

The Supreme Court, in a unanimous opinion written by Justice Thomas, held that IRAs fall under § 522(d)(10)(E) and may be exempted by debtors from bankruptcy estates because they provide a right to receive "on account" of age and they are considered "similar plan[s] or contract[s]" under the statute.

11 U.S.C. § 522(d)(10)(E) allows a debtor to exempt from his bankruptcy estate his "right to receive - (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service…"

The Court notes that in order to be exempted the IRAs must meet three requirements: "(1) the right to receive payment must be from 'a stock bonus, pension, profitsharing, annuity, or similar plan or contract'; (2) the right to receive payment must be 'on account of illness, disability, death, age, or length of service'; and (3) even then,

the right to receive payment may be exempted only 'to the extent' that it is 'reasonably necessary to support' the accountholder or his dependents." Only the first two requirements are at issue in this case.

The Court reaffirmed its implication in Patterson v. Shumate, 504 U.S. 753 (1992) that IRAs similar to the Rousey's could be exempted under § 522(d)(10)(E). The first element was met because the IRAs were "similar plans or contracts" under § 522(d)(10)(E) since they shared the common characteristic of the plans listed by providing an income that serves as a substitute for wages. The Court bolstered its finding that § 522(d)(10)(E) includes IRAs by noting that clauses (i) – (iii) of § 522(d)(10)(E) referred directly to 26 U.S.C. § 408 which includes IRAs. The Court noted that Congress would not have referred to IRAs in their exception to § 522(d)(10)(E) if it had not intended to include IRAs within § 522(d)(10)(E). The Court held that the IRAs also satisfied the second requirement since the right to receive is "because of" age (the Court interprets "on account of" to mean "because of" based upon the common understanding of the term). Although the Rouseys have access to the funds before they reach age 59 1/2, they only have access to the funds minus the 10% tax penalty. The Court found that the tax penalty prevented access to the entire account.

VIII Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S. Ct. 2129, 161 L. Ed. 2d 1008, 2005 U.S. LEXIS 4348, 73 U.S.L.W. 4393 (2005), *reversing and remanding*, United States v. Andersen, 374 F.3d 281 (2004).

Question Presented: Whether jury instructions on 18 U.S.C. §§ 1512(b)(2)(A) and (B) were proper when they substituted "impede" for "dishonesty" and did not address the need for the destruction of documents to be related to an official proceeding in order to be included under § 512.

The Supreme Court held, in a unanimous opinion delivered by Chief Justice Rehnquist, that the jury instructions were improper because they did not properly convey the elements of § 1512(b).

Arthur Andersen LLP, served as an auditor for Enron. When Enron's accounting practices came under scrutiny, Arthur Andersen LLP urged Enron's employees to destroy documents pursuant to Enron's document retention policy. Documents continued to be destroyed until Enron was officially served a subpoena for production of the documents. Defendant was indicted under §§ 1512(b)(2)(A) and (B). The instructions given to the jury, at trial, did not convey the requirement of dishonesty nor did they include the requirement of a nexus between the persuasion to destroy the documents and a particular official proceeding.

To determine if the jury was properly instructed, the Court was tasked with interpreting the meaning of "'knowingly…corruptly persuade' another person 'with intent to…cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding'" as the relevant language appears in §§ 1512(b)(2)(A) and (B). The Court notes that it is important to exercise restraint in determining the breadth

of a federal criminal statute so that the public has fair warning of what activities are criminalized and what the penalties will be. The Court finds that the proper meanings of the terms "knowingly" and "corruptly" are the natural meanings of the terms. The terms combine to mean that the individual must be "conscious of wrongdoing" to be convicted under §§ 1512. The Court also finds that the persuasion must be related to a particular official proceeding.

The Court holds that because the jury was not instructed on the necessity of the individual being "conscious of wrongdoing" and because the instructions failed to convey the required relationship between the destruction of documents and a particular official proceeding, the instructions were improper.

IX Tenet v. Doe, 544 U. S. 1, 125 S. Ct. 1230, 161 L. Ed. 2d 82, 2005 U.S. LEXIS 2202, 73 U.S.L.W. 4182 (2005), *reversing*, 329 F.3d 1135 (9th Cir. 2003).

Question Presented: Whether Totten v. United States, 92 U.S. 105 (1876) bars the maintenance of estoppel and due process claims resulting from the failure of the Central Intelligence Agency (CIA) to provide financial assistance as allegedly promised in exchange for espionage services.

The Supreme Court, in a unanimous opinion written by Justice Rehnquist, held that Totten v. United States, 92 U.S. 105 (1876) is not limited to breach of contract claims, but that it bars all claims that require the existence of a secret espionage agreement with the Government.

Jane and John Doe brought estoppel and due process claims arising out of an alleged espionage agreement with the CIA. They claimed that the CIA promised to provide them with financial security for life if they remained in their home country and acted as spies for the United States. After acting as espionage agents for the CIA for a period of years, the Does were moved to the United States and were provided with financial assistance from the CIA. John Doe agreed to a discontinuation of these benefits during his employment but, upon being laid off, requested the benefits to be reinstated. The CIA denied his request. The Does claim that the CIA violated their due process rights by denying the reinstatement and by not providing a fair review of their claims.

In Totten, the plaintiff alleged that he had a contract with President Lincoln to spy behind Confederate lines during the Civil War. He was suing to recover compensation for those services. The Court held that public policy barred the suit because the requirement that the contract be kept secret was implied from the nature of the contract itself and allowing a suit would undermine this implied condition.

The Court rejected the United States' argument that Totten prohibited only breach of contract claims, holding that Totten applies to all claims that require proving the existence of confidential espionage agreements.

The Court also rejected the court of appeals' finding that United States v. Reynolds, 345 U.S. 1 (1953) made Totten into "an early expression of the evidentiary 'state secrets' privilege" and held that Reynolds' mere reliance on Totten did not restrict Totten's broad holding that all suits requiring the existence of a secret espionage agreement with the Government could not be maintained. In fact, the Court relied upon both Reynolds and Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981) to show that Totten's broad holding had been repeatedly affirmed.

The "state secrets privilege" was held to be an insufficient protection of confidential espionage agreements and, as such, the Court held that all claims giving rise to the question of whether a secret espionage agreement existed are not maintainable.

In a side issue, the Court held that although under Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998) the jurisdictional question raised by the Tucker Act, 28 U.S.C. § 1491(a)(1), would normally have to be decided before the case could be looked at on the merits, it would be inconsistent with the purpose of the Totten rule to allow pre-trial proceedings to resolve a jurisdictional question where the rule is designed to preclude all judicial inquiry. As such, the United States' claims were dismissed without first answering the jurisdictional question.

X Bates v. Dow Agrosciences LLC, 544 U.S. 31, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 2005 U.S. LEXIS 3706, 73 U.S.L.W. 4311 (2005), *vacating and remanding*, Dow Agrosciences LLC v. Bates, 332 F.3d 323 (5th Cir. 2003).

Question Presented: Whether state law claims for crop damages caused by a pesticide are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. § 136v.

Justice Stevens delivered the opinion of the Court in which six justices joined. Justice Thomas, joined by Justice Scalia, concurred in the judgment in part and dissented in part. Justice Breyer filed a concurring opinion. The Court held that state law claims that merely encourage labeling changes were not preempted by FIFRA.

Defendants, Texas peanut farmers, challenged a declaratory judgment saying that their various tort claims were preempted by § 136v(b) of FIFRA. The farmers alleged that Dow knew, or should have known, that the pesticide in question, labeled as "recommended in all areas where peanuts are grown," would hurt peanut crops grown in soils with pH levels of 7.0 or greater. The farmers brought various counterclaims to Dow's suit, including defective design, defective manufacture, negligent testing, breach of express warranty, fraud, and negligent-failure-to-warn.

7 U.S.C. § 136v allows states to regulate the use and sale of pesticides; however, subsection (b) provides that "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The Court found that § 136v(b) only prohibits labeling and packaging "requirements." Actions that motivates a label or packaging claim but do not

require it are not prohibited. The Court acknowledges that there are two conditions that must be met for a state rule to be preempted by FIFRA. "First, it must be a requirement '*for labeling or packaging*'; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is '*in addition to or different from* those required under this subchapter'" (emphasis added by the Court).

The Court stated that "a requirement is a rule of law that must be obeyed," and that "an event, such as a jury verdict, that merely motivates an optional decision is not a requirement." The Court held that, although a state law cannot impose requirements that are in addition to or different from the requirements in FIFRA, that state law does not have to explicitly adopt the exact standards of FIFRA. In addition, it was held that a state may provide remedies under state law that are not provided for under FIFRA. Relying on state independence and long-standing history of tort claims against pesticide manufactures, the Court also noted (Justices Thomas and Scalia disagreed) that there must be a presumption against preemption.

The Court found the farmers' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not preempted because they do not impose labeling or packaging requirements. However, the Court found that the fraud and negligent-failure-to-warn claims do impose requirements for labeling or packaging. It therefore remanded the question of whether these claims are "in addition to or different from" the requirements of FIFRA and, thus, preempted to the court of appeals.

XI Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020, 2005 U.S. LEXIS 4346, 73 U.S.L.W. 4397 (2005), *reversing and remanding*, 349 F.3d 257 (2003).

Question Presented: Whether § 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000 (RLUIPA) violates the Establishment Clause of the First Amendment.

In a unanimous opinion, written by Justice Ginsburg, the Supreme Court held that § 3 of RLUIPA is within the boundaries of permissible religious accommodation and, as such, is not in conflict with the Establishment Clause. Justice Thomas filed a concurring opinion.

Section 3 of RLUIPA provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless imposition of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc-1(a)(1). Plaintiffs were members of "nonmainstream" religions who were also inmates of Ohio institutions. They allege that the prison administrations violated RLUIPA by burdening their free exercise while in the institutions. The inmates allege that they were denied access to religious literature, group worship, and ceremonial items, they were forbidden from adhering to their religions' requirements on dress and appearance, and

they were not provided with a chaplain. The institutions claimed that RLUIPA was in violation of the Establishment Clause of the First Amendment.

The Court has held in previous cases that there is room for the government to make laws accommodating the free exercise of religion without violating the Establishment Clause. See, e.g., Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). The Court finds, in this case, that RLUIPA qualifies as this type of permissible accommodation of religion because it "alleviates exceptional government-created burdens on private religious exercise." The Court finds that Section 3 of RLUIPA can be applied without interfering with security or other concerns within institutions. However, the Court does limit the reach of RLUIPA by noting that, under previous cases, the Court has held that accommodations must not "override other significant interests." If requests for accommodation become excessive or begin to interfere with the operation of the institutions, the institution would not be required under RLUIPA to make the accommodations.

XII Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577, 2005 U.S. LEXIS 3478, 73 U.S.L.W. 4283 (2005), *reversing and remanding*, 339 F.3d 933 (9th Cir. 2003).

Question Presented: Whether a plaintiff claiming securities fraud must allege and prove a causal connection between the alleged misrepresentation and the loss suffered.

Justice Breyer delivered the opinion for the unanimous Court. The Court held that "loss causation" must be proven and that the plaintiffs' allegation that they paid artificially inflated prices for Dura Pharmaceutical's (hereinafter Dura) stock was not sufficient to prove or even plead "loss causation."

Plaintiffs purchased Dura's stock after Dura allegedly made false statements about pending FDA approval of their products which, plaintiffs claim, lead to artificially inflated stock prices. The Court held that, to prove securities fraud, the following elements must be proven: 1) "a material misrepresentation (or omission)," 2) "a wrongful state of mind," 3) "a connection with the purchase or sale of a security," 4) "reliance…," 5) "economic loss", and 6) "loss causation..." The Court holds that merely proving or pleading an inflated purchase price does not show economic loss or "loss causation." They note that many factors other than an inflated purchase price could lead to a drop in prices and economic loss. The Court finds that it is not enough for the inflated purchase price to be a condition of the loss; rather, it must cause the loss. Therefore, the plaintiffs failed to prove both "loss causation" and economic loss. The Court also held that the plaintiffs did not adequately plead the elements because merely alleging an inflated purchase price does not give the defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests."

XIII Jay Shawn Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 2005 U.S. LEXIS 4842, 73 U.S.L.W. 4460 (2005), *reversing and remanding*, People v. Johnson, 71 P.3d 270 (Cal. 2003).

Question Presented: Whether California can require a showing that it is "more likely than not" that the other party's peremptory challenges were improperly premised on a group bias in order to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (2003).

The Supreme Court held, 8-1, that requiring a showing of "more likely than not" at the initial stage of an objection to peremptory challenges goes beyond the boundaries of procedures that states are permitted to impose under Batson. Justice Stevens delivered the opinion of the Court.

This case arose during jury selection for a trial in which Johnson, an African American male, was accused of second-degree murder and assault of a Caucasian, 19-month old toddler. The prosecutor used peremptory challenges to strike all three African American members of the remaining jury pool, leaving an all-Caucasian jury. Without asking the prosecutor for an explanation for the strikes, the trial judge found that Johnson did not establish a prima facie case because he failed to show a "strong likelihood" that the challenges were based on group bias as required under People v. Wheeler, 22 Cal.3d 258 (1978).

In Batson, the Court set forth three steps to establishing a case of purposeful discrimination in jury selection. First, the defendant has to make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. The "burden [then] shifts to the State to explain adequately the racial exclusion" by offering race-neutral explanations for the strikes. Finally, the trial court decides if purposeful racial discrimination was proven. California required a showing of "more likely than not" at the first step in the proceedings.

The Court finds that, at the first step under Batson, an objector need only show enough evidence so that the trial judge may infer that discrimination has occurred. In Purkett v. Elem, 514 U.S. 765 (1995), the Court found that "it is not until the *third* step that the persuasiveness of the justification becomes relevant…" (emphasis in original). The Court goes on to hold that a prima facie case under Batson was sufficiently established by the inferences that discrimination occurred in this case.

XIV Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 2005 U.S. LEXIS 4658, 73 U.S.L.W. 4479 (2005), *reversing and remanding*, 361 F.3d 849 (2004).

Question Presented: Whether the Texas court's ruling that Miller-El failed to show by "clear and convincing evidence" discrimination on the part of the prosecution during jury selection was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and thus, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA), habeas relief may be granted.

The Supreme Court held 6-3, in an opinion delivered by Justice Souter that the Fifth Circuit's ruling was unreasonable and that Miller-El was entitled to habeas relief. Justice Breyer filed a concurrence and Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented.

During Miller-El's trial for capital murder, prosecutors used peremptory strikes against 10 of the 11 remaining black jurors. Miller-El objected, claiming the prosecutors' use of peremptory strikes was based impermissibly on race. Miller-El was originally denied a certificate of appealability by the Fifth Circuit. That decision was reversed by the Supreme Court in Miller-El v. Cockrell, 537 U.S. 322 (2003). On remand, the Fifth Circuit denied relief based on the merits.

AEDPA provides that habeas relief may only be granted if the state court's ruling was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The Court concludes that the cumulative effect of the evidence is clear and convincing evidence that impermissible discrimination occurred during jury selection and that it could not be concluded otherwise. One of the pieces of evidence that led the Court to this conclusion was that the prosecutors' neutral reasons for the strikes were pretextual. The prosecutors' allegedly struck some African-American panelists because of their position on the death penalty; however, Caucasian members of the panel with similar positions were allowed to serve on the jury. The Court also notes that the prosecution requested several jury shuffles (rearranging the order of the jurors) so that the African-American jurors were seated in the back and thus, had a greater chance of not serving. In addition, the Court states that the voir dire questions posed to African-American panelists were more often slanted than those posed to Caucasian panelists. Finally, the Court mentions that there is a strong history of prosecutors in Dallas County following a specific policy of excluding African-Americans from serving on juries. The Court found that all of this evidence pointed decisively to discrimination and that the Texas courts were unreasonable in concluding that discrimination was not sufficiently proven. The Court rejects Justice Thomas' contention that the Caucasian panelists were not "similarly situated" because they did not match *all* of the prosecution's reasons for striking the African-American jurors. The Court notes that no past cases have ever found that the individuals' situations must be absolutely identical in order to be considered "similarly situated."

Justice Breyer wrote separately to state his belief that the entire peremptory challenge system should be reconsidered.

Justice Thomas focused his opinion on the fact that the majority looked to evidence that was not introduced in the state court trial. Therefore, under AEDPA, the Supreme Court is not allowed to review that evidence. The question is whether "an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." 28 U.S.C. § 2254(d)(2) (emphasis added).

XV Tory v. Cochran, 544 U.S. 734, 125 S. Ct. 2108, 161 L. Ed. 2d 1042, 2005 U.S. LEXIS 4347, 73 U.S.L.W. 4404, *vacating and remanding*, 2004 Cal. LEXIS 751 (Cal. App. 2003).

Question Presented: Whether a permanent injunction prohibiting future speech regarding a public figure violates the First Amendment.

The Supreme Court held, 7-2, that: 1) the case was not moot as a result of Cochran's death; 2) Cochran's widow could be substituted as respondent; and 3) after Cochran's death, the injunction became an "overly broad prior restraint upon speech" in violation of the First Amendment. Justice Breyer delivered the opinion of the Court. Justice Thomas, joined by Justice Scalia, dissented.

This case arose when Tory repeatedly defamed Cochran claiming that Cochran owed him money. Tory had also "coerced" Cochran to pay him money to stop the defamation. The Court issued a permanent injunction prohibiting Tory from "picketing," "displaying signs…," and from "orally uttering statements" about Cochran or his law firm. Cochran passed away before the Supreme Court issued their opinion. Cochran's counsel moved to substitute Cochran's widow as respondent and that the case be dismissed as moot.

The Court allowed Cochran's widow to be substituted as respondent. The Court also held that the case was not moot because California law does not demand that an injunction becomes invalid upon a party's death, the injunction itself does not have language indicating that it would become invalid, and under California law, the only way to know whether an injunction is void is for a court to rule on the issue. The Court finds that it is no longer necessary to rule on the question originally presented in this case because the injunction can no longer achieve the intended result of protecting Cochran from being "coerced" into paying Tory money and, as such, became an "overly broad prior restraint upon speech, lacking plausible justification" which violates the First Amendment. The Court does, however, leave open the possibility that a new injunction "tailored to these changed circumstances" may be valid under the First Amendment.

Justices Thomas and Scalia would have dismissed the writ as improvidently granted because the changed circumstances "render[ed] the case an inappropriate vehicle for resolving the question presented."

XVI Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619, 2005 U.S. LEXIS 3701, 73 U.S.L.W. 4287 (2005), *affirming*, 336 F.3d 321 (4th Cir. 2003).

Question Presented: Whether a smuggling scheme with the effect of defrauding a foreign government of tax revenue is a violation of the federal wire fraud statute, 18 U.S.C. § 343 (2000).

The Supreme Court, in a 5-4 decision, held that the federal wire fraud statute is violated by a scheme that defrauds a foreign government of tax revenue. Justice Thomas,

joined by the Chief Justice and Justices Stevens, O'Connor, and Kennedy, delivered the opinion of the Court. Justice Ginsburg filed a dissent in which Justice Breyer joined fully, and in which Justices Scalia and Souter joined in part.

The petitioners ordered liquor by telephone from discount liquor stores in Maryland while in New York, which was then smuggled into Canada to avoid paying the excise taxes.

The federal wire fraud statute prohibits using interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343 (2000). The Court found that the petitioners' conduct fell within the two elements of the wire fraud statute at issue here. First, the Court said that Canada's right to the tax revenue was "property" within the meaning of the statute. Second, the Court found that smuggling the liquor into Canada by claiming they had no goods to declare was a "scheme or artifice to defraud."

Petitioners argued that even if their conduct was within the scope of conduct prohibited by the wire fraud statute, the common-law revenue rule precluded their prosecution because it would, in effect, be enforcing Canada's tax laws. The Court rejected this argument for two reasons. First, there was no common-law revenue jurisprudence as of 1952 (when § 1343 was enacted) that held that the revenue rule precluded prosecution by the United States for a fraudulent scheme to evade foreign taxes. Second, the purpose of the revenue rule do not lend itself to a finding that the prosecution should be barred in this case. The revenue rule was traditionally thought to have the purpose of preventing judicial evaluation of the laws of foreign countries. In this case, the purpose isn't to evaluate Canada's laws but to enforce a domestic statute.

The Court also noted that this interpretation of the statute would not give it extraterritorial effect (Ginsburg's concern in her dissent). "Their offense was complete the moment they executed the scheme inside the United States."

REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES (2003-2004 TERM)

I. Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 2004 U.S. LEXIS 4571, 72 U.S.L.W. 4516 (2004), *reversing and remanding*, Roark v. Humana, Inc., 307 F.3d 298 (5th Cir. 2002).

Question Presented: Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (ERISA), as construed by the Supreme Court in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), and its progeny, completely preempts state-law claims by ERISA plan participants or beneficiaries who assert that a managed care company tortiously "failed to cover" (i.e., pay for) medical care?

The Supreme Court, in a unanimous opinion written by Justice Thomas, held that respondents' causes of action, brought to remedy only the denial of benefits under ERISA-regulated benefit plans, fall within the scope of, and are completely preempted by ERISA § 502(a)(1)(B), and are thus removable to federal district court. Justice Ginsburg wrote a concurring opinion in which Justice Breyer joined.

Respondents, Juan Davila, and Ruby Calad brought suit in Texas state court alleging a violation of Texas Health Care Liability Act (THCLA) when their respective health plans refused to cover medical treatment. Davila claimed injury when his insurance plan refused to cover the drug Vioxx, and he was given Naprosyn, a cheaper alternative, which resulted in severe reaction and hospitalization. Calad was limited to a one-day stay in the hospital after major surgery, which resulted in post-surgery complications. The petitioner removed the state cases to federal court, which dismissed the claims. The court of appeals consolidated the cases and held that respondents' claims fall outside ERISA preemption of § 502(a)(2), allowing suits against a plan fiduciary for breach of a fiduciary duties, and § 502(a)(1)(B) which allows a beneficiary to bring civil actions to recover rights and benefits in which he is entitled under the plan.

The Supreme Court reversed the court of appeals under complete preemption principles, holding that "when the federal statute [such as ERISA] completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." Here, a denial of medical coverage implicates § 502(a)(1)(B) and "where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA."

Justice Thomas discussed the duties imposed by the THCLA and found that they did not arise independently of ERISA or the plan terms. In particular he noted, "[w]hen the petitioners denied respondents' medical requests, it was a denial of treatment that was not covered under the plan, and thus the denial of coverage would not be the proximate cause of any injuries arising from the denial; rather, the failure of the plan itself to cover

the requested treatment would be the proximate cause." Thus, the suits here do not rest on any legal duty outside of ERISA, and ERISA preemption applies.

The respondent's final argument was that, because THCLA was a state law regulating the insurance industry, it was saved from ERISA preemption under § 514(b)(2)(A), which provides that nothing in ERISA shall be construed so as to exempt any person from compliance with any state insurance law. Justice Thomas concluded, however, "permitting the state law claims to proceed would thwart congressional intent to create an exclusive, uniform regime of remedies" the overpowering federal policy of ERISA.

II. Cent. Laborers' Pension Fund v. Heinz**,** 541 U.S. 739, 124 S. Ct. 2230, 159 L. Ed. 2d 46, 2004 U.S. LEXIS 4028, 72 U.S.L.W. 4441 (2004), *affirming*, 303 F.3d 802 (7th Cir. 2002).

Question Presented: Whether an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during the period that a participant, after retiring, is employed by another firm in the same industry is a prohibited elimination or reduction of such benefits under the "anti-cutback" rule in Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1054(g), when applied to employees who retired prior to adoption of the amendment?

The decision was unanimous. Justice Souter wrote the opinion. Justice Breyer also wrote a concurring opinion, in which Chief Justice Rehnquist and Justices O'Connor and Ginsburg joined.

When plaintiff retired early, his pension plan stated that if he engaged in certain forms of employment, namely as a "union or non-union construction worker", he would be disqualified from receiving its benefits. It did not include work as a supervisor and he later took on a job as a supervisor. However, two years later the plan's definition of employment that would lead to exclusion changed to include a job in any capacity in the construction industry. He was informed that if he continued to work he would lose his benefits. He continued to work, and the benefits were suspended.

Suit was brought under the anti-cutback provision found at 29 U.S.C. § 1054(g). The statute provides that "a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accruing benefits."

The Court held that as a matter of common sense "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Thus the change in the plan violated ERISA's anti-cutback rule.

III. General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 124 S. Ct. 1236, 157 L. Ed. 2d 1094, 2004 U.S. LEXIS 1623, 72 U.S.L.W. 4168 (2004), *reversing*, 296 F.3d 466 (6th Cir. 2002).

Question Presented: Whether the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. § 621 et seq., forbids discriminatory preferences favoring older over younger workers?

The Supreme Court, Justice Souter writing for the majority, held in a 6-3 decision that the text, structure, purpose, and history of the Age Discrimination in Employment Act (ADEA), along with its relationship to other federal statutes, show that the statute is not meant to prohibit an employer from favoring an older employee over a younger one. Justices Scalia and Thomas each filed separate dissents, and Justice Kennedy joined Justice Thomas's dissenting opinion.

The defendant employer, General Dynamics, eliminated the company's policy to provide health benefits to subsequently retired employees, except as to then-current workers at least fifty (50) years old. Plaintiff employees, who were all over the age of forty (40) and thus protected by the ADEA, but who were under the age of fifty objected to the elimination of benefits and claimed that defendant's new policy was discriminatory with respect to compensation, terms, conditions, or privileges of employment because of their age in violation of 29 U.S.C. § 621(a)(1). The U.S. Equal Employment Opportunity Commission (EEOC) agreed with the plaintiff, and recommended that plaintiff and defendant settle informally. Although the district court termed defendant's actions as "reverse age discrimination," it disagreed with EEOC and asserted that "no court had the Sixth Circuit reversed, reasoning "that the prohibition of [age discrimination by] § 623(a)(1) . . . is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so."

In reversing the Sixth Circuit, the Supreme Court observed that 29 U.S.C. § 621(a)(1) could be broadly understood to prohibit age discrimination that affects younger workers, but that this interpretation does not "square with the natural reading" of the statute, and that "Congress's interpretive clues speak almost unanimously to an understanding of discrimination as directed against . . . older [workers]." The Court concluded that, "[T]he enemy of 40 is 30, not 50."

The plaintiffs argued, and Justice Thomas in dissent agreed, that the statute's "meaning is plain when the word 'age' receives its natural and ordinary meaning and the statute is read as a whole giving age the same meaning throughout." The majority found two mistakes with this argument. First, "it assumes that the word 'age' has the same meaning wherever the ADEA uses it, [and] . . . this presumption is not rigid and readily yields whenever . . . a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation without being confused." Second, "30 years of judicial interpretation" finding that § 623(a)(1) does not protect younger workers has "produc[ed] no apparent legislative qualms."

The plaintiff's second argument, adopted by Justice Scalia in his dissent, was that deference was due to EEOC as the agency charged with enforcing the ADEA. The majority disagreed, and found "deference to [an agency's] interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." Here, the majority concluded, "the [Equal Employment Opportunity] Commission is wrong," because "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA."

IV. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 2004 U.S. LEXIS 3236, 72 U.S.L.W. 4332 (2004), *reversing*, 305 F.3d 717 (7th Cir. 2002).

Question Presented: Does the four-year "catch-all" limitations period of 28 U.S.C. § 158 apply to new causes of action created by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which was codified at 42 U.S.C. § 1981(a) and (b)?

In a unanimous decision written by Justice Stevens, the Court held that the four-year statute of limitations applies to federal causes of action created by the Civil Rights Act of 1991.

Section 1981, first enacted by Congress in 1866, does not contain a statute of limitations. Accordingly, for decades the lower federal courts have had to determine state by state which state claim is most analogous to a claim under Section 1981, and then apply the analogous state statute of limitations. This practice resulted in the statute of limitations for Section 1981 claims being six years in at least one jurisdiction, Wisconsin, and being two, three, or four years in other jurisdictions. In 1990, Congress enacted 28 U.S.C. § 1658 which provides that where Congress has created a cause of action subsequent thereto without specifying a statute of limitations for said claim, the statute of limitations is four years. One year later, in 1991, Congress enacted the Civil Rights Act of 1991 which contained, among other provisions, the so-called Patterson override. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court held that racial harassment in the workplace was not actionable under Section 1981. The Patterson Court held that because of the language of Section 1981, the employment contract claims covered by Section 1981 were contract formation claims, that is, a refusal to make a contract. As racial harassment was not a contract formation claim, it was not actionable. The Court's analysis also precluded termination claims from § 1981's coverage. After Patterson, the lower courts held that a promotion claim would only be covered by Section 1981 if the promotion represented a distinctly different contractual employment relationship, thereby bringing the claim into the "making a contract" language of Section 1981.

In the 1991 Civil Rights Act, Congress amended the language of Section 1981 by defining the phrase "make and enforce contracts." The definition stated that the language covered the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. Thereafter, Edith Jones sued R.R. Donnelley & Sons Co., alleging a racially

hostile work environment and wrongful termination as well as wrongful denial of a transfer. None of those claims were actionable prior to the 1991 Civil Rights Act because of the holding in Patterson. As a result of the 1991 Civil Rights Act, Jones' claims were covered by § 1981. Ms. Jones filed her lawsuit after the Illinois state statute of limitations that the Seventh Circuit had held to be applicable to Section 1981 claims had lapsed, but less than four years after the alleged discriminatory events. Thus, the issue before the Court was whether 28 U.S.C. § 1658 applied. Jones argued that the claims of racial harassment were claims created by the 1991 Civil Rights Act. Because the 1991 Civil Rights Act followed the passage of 28 U.S.C. § 1658, the four-year statute of limitations applied and, in essence, trumped the Illinois statute of limitations. A unanimous Supreme Court, Justice Stevens writing, held that the 1991 Civil Rights Act made Jones' claims possible, and therefore the four-year statute of limitations applied.

V. Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 2004 U.S. LEXIS 4176, 72 U.S.L.W. 4493 (2004), *vacating and remanding*, Suders v. Easton, 325 F.3d 432 (3d Cir. 2003).

Question Presented: When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the Ellerth-Faragher affirmative defense?

The Supreme Court held in an 8-1 decision written by Justice Ginsburg that constructive discharge can create Title VII liability, and that the affirmative defenses laid out in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), can apply in such cases. Justice Thomas dissented.

The affirmative defense scheme set out in Ellerth and Faragher allows an employer to avoid strict liability for hostile work environment sexual harassment by a supervisor where no tangible employment action has been taken. To prevail under the affirmative defense, the employer must prove by a preponderance of evidence: 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

To establish a hostile-environment constructive discharge claim, the plaintiff must show working conditions so intolerable that a reasonable person would have felt compelled to resign. Even so, the employer may assert the Ellerth-Faragher affirmative defense to the constructive discharge claim unless the plaintiff quit in reasonable response to an "official" adverse action, such as "a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." On the other hand, when the constructive discharge, albeit caused by the supervisor's misconduct, does not involve an "official" action by the employer, then the extent to which the agency relationship aided the supervisor's misconduct is uncertain. Under those circumstances, the Court therefore held that the employer can avoid vicarious liability for the supervisor's bad acts by proving the affirmative defense.

In this case, the supervisor's misconduct including discussing people having sex with animals each time the plaintiff entered the room, making other lewd sexual remarks in her presence, grabbing his genitals and screaming vulgarities, and rubbing his rear end and remarking, "I have a nice ass, don't I?". Plaintiff resigned after she was accused of stealing her own examinations files, which she had suspected of having never been sent out for grading and thus false results being returned to her. The supervisors dusted the drawers with theft detection powder and when she sought to return the exams she was apprehended with blue hands, arrested, read her Miranda rights, and interrogated.

The Court remanded the case for determination whether the supervisors' conduct constituted an "official" action by the employer.

VI. Raymond B. Yates, M.D., P.C. Profit Sharing Plan, et al. v. Hendon, 541 U.S. 1, 124 S. Ct. 1330, 158 L. Ed. 2d 40, 2004 U.S. LEXIS 1836, 72 U.S.L.W. 4219 (2004), *reversing and remanding*, 287 F.3d 521 (6th Cir. 2002).

Question Presented: Does the working owner of a business (here, the sole shareholder and president of a professional corporation) qualify as a "participant" in a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA)?

The Court's decision, written by Justice Ginsburg with Justices Scalia and Thomas each concurring separately in the judgment, holds that a working owner may qualify for ERISA and the protections it affords. The Court rejects that one may only be either an "employer" or "employee" for the purposes of the statute.

The decision looks to legislative history and other statutes to bolster its holding. For example, it points to Title I of ERISA and related IRS provisions that "expressly contemplate the participation of working owners in covered benefit plans" and several Title I provisions that "partially exempt certain plans that working owners likely participate from otherwise mandatory ERISA provisions." Continuing the analysis, the Court states, "In sum, Title I's provisions involving loans to plan participants, by explicit inclusion or exclusion, assume that working-owners—shareholder-employees, partners, and sole proprietors—may participate in ERISA-qualified benefit plans."

ERISA's "anti-inurement" provision, found at 29 U.S.C. § 1103(c)(1), states that plan assets shall not inure to the benefit of employers. The anti-inurement provision, however, does not preclude coverage of working owners as plan participants. Instead, "the purpose of the anti-inurement provision…is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others. Those concerns are not implicated by paying benefits to working owners who participate on an equal basis with nonowner employees in ERISA-protected plans."

VII. Raytheon Co. v. Hernandez, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357, 2003 U.S. LEXIS 8965, 72 U.S.L.W. 4009 (2003), *vacating and remanding,* Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002).

Question Presented: Whether the Americans with Disability Act of 1990 (ADA), 104 Stat. 327, as amended, 42 U.S.C. § 12101 et seq., which makes it unlawful for an employer, with respect to hiring, to "discriminate against a qualified individual with a disability because of the disability of such individual," confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules?

The Supreme Court per Justice Thomas (with Justice Souter taking no part in the decision and Justice Breyer taking no part in the consideration or the decision of the case) held 7-0 that "Petitioner's proffer of its neutral no-rehire policy plainly satisfied its obligation under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent." The Court vacated and remanded the case because the Ninth Circuit improperly applied disparate-impact analysis to plaintiff's disparate-treatment claim.

Respondent, Joel Hernandez, worked for Hughes (later acquired by Raytheon) for twenty-five years. In 1991, respondent appeared to be intoxicated, and pursuant to company policy respondent took a drug test, which showed traces of cocaine in respondent's system. Because the drug use violated company policy, respondent was given a choice between resigning or being discharged; respondent chose to resign. In 2004, respondent applied for employment with petitioner, and he stated on his application that he had been a former employee. In addition to his application, respondent attached two reference letters, one from his pastor, which indicated respondent had been an active member of the church, and one from an Alcoholics Anonymous counselor stating that respondent was in recovery. Petitioner's employee, Ms. Bockmiller, reviewed respondent's employment file and found that respondent had resigned in 1991 in lieu of discharge and thus, in accordance with company policy, rejected respondent's application.

Respondent filed a charge with the Equal Employment Opportunity Commission (EEOC) charging petitioner with a violation of the ADA. The EEOC issued a right-to-sue letter, and respondent subsequently filed suit in district court alleging disparate treatment by petitioner. Petitioner moved for summary judgment, and in opposition to summary judgment, respondent argued if petitioners really did apply the no-rehire policy neutrally, then such policy has a disparate impact in violation of the ADA. The district court granted petitioners summary judgment in regard to the disparate treatment claim, but refused to hear the disparate impact claim because respondent failed to plead this theory in a timely manner. The Ninth Circuit agreed with the district court that "respondent failed timely to raise his disparate-impact claim." However, the Court of appeals held that respondent had asserted a prima facie case under McDonnell Douglas, and that petitioners no rehire policy was "unlawful as applied to former drug addicts." In conclusion, the "Court of Appeals held that petitioner's application…of its no-rehire policy was not a legitimate, nondiscriminatory reason for rejecting respondent's application [for rehire]."

The Supreme Court reversed and remanded the case because "the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims." Justice Thomas noted for the Court, "had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA, [and] petitioner's no-rehire policy is a quintessential legitimate...reason for refusing to rehire an employee who was terminated for violating workplace conduct rules." Once the court of appeals determined that petitioner articulated a legitimate, nondiscriminatory reason for its employment action, namely its no rehire policy, the proper analysis was to have respondent "prove disparate-treatment by offering evidence demonstrating that the petitioner's explanation is pretextual." Instead, the court of appeals focused on the disparate-impact petitioner's no rehire policy had on illegal drug user. The Supreme Court held "such an analysis is inapplicable to a disparate-treatment claim, [and]… to the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact…its judgment is vacated."

VIII. Sosa v. Alvarez-Machain, et. al., 542 U.S. 682, 124 S. Ct. 2739, 159 L. Ed. 2d 718, 2004 U.S. LEXIS 4763, 72 U.S.L.W. 4660 (2004), *reversing*, 331 F.3d 604 (9th Cir. 2003).

Questions Presented: (1) Whether the Alien Tort Statute (ATS), 28 U.S.C. § 1350, creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action? (2) Whether, to the extent that the Alien Tort Statute is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the act? (3) Whether an individual arrested in a foreign country may bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 2671 et seq., for false arrest, notwithstanding the FTCA's exclusion of "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), because the arrest was planned in the United States?

Justice Souter delivered the opinion of the fractured Court. It held that while the FTCA gives jurisdiction to federal courts over claims against the United States for injury caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment, it also limits its waiver of sovereign immunity. The FTCA excepts from the waiver of sovereign immunity any claim "arising in a foreign country. As stated in the opinion, "[t]he foreign country exception under the FTCA bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."

Speaking to the application of international law in U.S. courts, and more specifically when the Alien Tort Statute (ATS) is involved, "the domestic law of the United States recognizes the law of nations." Federal courts exercising jurisdiction under the ATS should not "recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized

nations than the historical paradigms familiar when sec. 1350 (the FTCA) was enacted." Furthermore, the Court held that when there is no treaty or controlling executive authority, the courts must look to customs and usage in international law as evidenced by the works of jurists and commentators; this practice stretched back to the Court's decision in The Paquete Habana.

Here, the plaintiff, a Mexican national, was abducted while in Mexico to stand trial in the United States. He sued in this case for false arrest. (There was a previous Supreme Court case involving the same set of facts, involving whether an extradition treaty between the United States and Mexico had been violated.) Applying the legal standards developed in the case, the Court found that the foreign country exception applied in plaintiff's suit against the United States under the FTCA. Despite the fact that decisions had been made in the United States regarding his capture, the Court rejected the "headquarters doctrine" whereby if the negligent activity occurred in the United States, even if the injury was suffered elsewhere, a person may sue. Furthermore, with regard to plaintiff's ATS suit against the Mexicans who aided the United States in his abduction, the Court held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy" under the ATS.

IX. Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820, 2004 U.S. LEXIS 3386, 72 U.S.L.W. 4371 (2004), *affirming*, 315 F.3d 680 (6th Cir. 2003).

Question presented: Does Title II of the Americans with Disabilities Act (ADA) exceed Congress's authority under § 5 of the Fourteenth Amendment, thereby failing to validly abrogate states' Eleventh Amendment immunity from private damage claims?

The Court held, in a 5-4 decision, that Title II of the ADA constitutes a valid exercise of Congress's power to enforce the Fourteenth Amendment, and therefore effectively abrogates states' Eleventh Amendment immunity to private suit. Justice Stevens wrote the majority opinion, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. Justice Souter also filed a concurring opinion in which Justice Ginsburg joined, and Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined. Chief Justice Rehnquist filed a dissenting opinion, in which Justices Kennedy and Thomas joined. Justices Scalia and Thomas also filed separate dissenting opinions.

Title II of the ADA provides that public entities shall not discriminate against qualified individuals with disabilities. Respondents George Lane and Beverly Jones were paraplegics who filed suit, alleging that the State of Tennessee violated their rights under Title II by denying them access to the state courts. Lane, who faced criminal charges, was required to appear in a courtroom located on the second floor of the county courthouse, which had no elevator. After having crawled up the courthouse steps for his first appearance, Lane refused to do so for his second appearance, and was arrested for failure to appear. Jones, a court reporter, claimed that she lost work opportunities and

was denied the ability to participate in the judicial process because she could not access the second floor of several county courthouses.

The State moved to dismiss on the grounds on Eleventh Amendment immunity. The district court denied the motion, and the State appealed to the Sixth Circuit. The appellate court held the case in abeyance pending the outcome of the Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). In Garrett, the Supreme Court held that Title I of the ADA failed to abrogate states' Eleventh Amendment immunity to private suit because Congress exceeded its power under § 5 of the Fourteenth Amendment to remedy disability discrimination in employment by the states. However, the Court in Garrett left open the question whether Title II of the ADA constituted a valid abrogation of states' Eleventh Amendment immunity.

The Sixth Circuit interpreted Garrett to "bar private ADA suits against states based on equal protection principles, but not those that rely on due process principles," specifically, the right of access to the courts protected by the Due Process clause. The Sixth Circuit therefore affirmed the lower court's finding that the plaintiffs' suit was not barred by the Eleventh Amendment.

The Supreme Court affirmed the Sixth Circuit. Writing for the majority, Justice Stevens noted that Congress can abrogate a state's Eleventh Amendment immunity under two conditions: first, Congress must unequivocally express its intent to abrogate that immunity, and second, Congress must act pursuant to a valid grant of authority. In this case, Congress expressed its intent to abrogate states' Eleventh Amendment immunity in 42 U.S.C. § 12202 of the ADA. It then acted under its broad Fourteenth Amendment enforcement power to prevent or remedy the Due Process violation of denying individuals with disabilities the right of access to the courts.

Congress's enactment of Title II was a valid exercise of that power because it exhibited "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Historically, there had been "pervasive unequal treatment [toward the disabled] in the administration of state services and programs, including systematic deprivations of fundamental rights." Furthermore, Congress had determined that laws predating the ADA had done little to relieve discrimination against the disabled with respect to allowing them access to public services. Finally, the prophylactic measures Congress took to address this harm were proportional to the harm itself because, despite prior legislation, the problem was "difficult and intractable," thereby warranting "added prophylactic measures in response."

REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES
(2002-2003 TERM)

I. In Gratz v. Bollinger, 539 U.S. 244, 2003 U.S. LEXIS 4801, 71 U.S.L.W. 4480 (2003), the Supreme Court held that the undergraduate admissions policies set forth by the University of Michigan violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and 42 U.S.C. § 1981. The University's policy is not narrowly tailored, granting 20 "points" out of a possible 100 for applicants who represent an underrepresented class, virtually guaranteeing admission to all minimally qualified minority candidates. This assignment of points did not allow for an individualized review of candidates and was not specifically designed to further the State's interest in diversity. Chief Justice Rehnquist delivered the opinion of the Court, with whom Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices O'Connor, Breyer, and Thomas also filed concurring opinions. Justices Stevens, Souter, Ginsburg, and Breyer, in part, dissent.

II. In Grutter v. Bollinger, 539 U.S. 306, 2003 U.S. LEXIS 4800, 71 U.S.L.W. 4498 (2003), the Court found that promoting diversity amongst law students at a state university is a permissible interest of the State, and as such, the State may advance this interest so long as the plan is narrowly tailored to avoid impermissible discrimination toward other ethnic groups. See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice O'Connor delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justices Scalia and Thomas joined in part. Justices Scalia, Ginsburg, and Thomas each filed a concurring opinion. Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia, Kennedy, and Thomas joined. Justice Kennedy also filed a dissenting opinion.

III. In Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 123 S. Ct. 1882, 155 L. Ed. 2d 928 (2003), the Court unanimously determined that the language of the Fair Labor Standards Act of 1938 did not preclude the defendant from removing plaintiff's FLSA claim to federal court. The FLSA reads, in relevant part, that "[a]n action to recover… may be maintained...in any Federal or State court of competent jurisdiction," 29 U.S.C. § 216(b). Justice Souter, writing for the Court, found that the term "maintain" means only the right to continue a legal action and was never intended to mean that the plaintiff could not remove. The defendant's right to remove under 28 U.S.C. § 1441(a) is not displaced by the plaintiff's right to "maintain" an action.

IV. The Court held in Desert Palace Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 2003 U.S. LEXIS 4422, U.S., No. 02-679 (2003), that direct evidence is not required in mixed-motive cases. Where an employee is terminated for legal and illegal reasons, no direct evidence must be produced as to the discriminatory reasons for the termination. Circumstantial evidence is sufficient according to 42 U.S.C. §§ 2000e-2(m), which only requires that the "complaining party demonstrate that...sex...was a motivating factor". Congress specifically changed this language in 1991 from its original wording, in an apparent attempt to unambiguously state that direct evidence is not required.

V. In Clackamas Gastroenterology Ass. PC v. Wells, 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (2003), the Court lays out in its 7 – 2 decision, written by Justice Stevens, nonexclusive factors to use in determining whether shareholders and directors of professional corporations are employees under the Americans with Disabilities Act for purposes of reaching the 15-employee threshold. The factors are: whether the firm can hire or fire them, extent to which firm supervises their work, whether they report to a superior in the firm, extent of their influence in the firm, written expression of parties' intent that they be employees, and whether they share in the firm's profits, losses, and liabilities. Justices Ginsburg and Breyer dissented.

VI. In State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. LEXIS 2713 (2003), Justice Kennedy, writing for a 6 – 3 majority, reaffirmed that punitive damages cannot be grossly excessive or unreasonable when compared to compensatory damages. See, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). Due process requirements pose restriction on the State's otherwise broad discretion to award punitive damages, the ratio between compensatory and punitive damages, while not explicitly set by the Court, must be within reason, generally a single-digit ratio. In State Farm, the facts did not warrant a $145 million punitive award where only $1 million in compensatory damages were awarded. Justices Scalia, Thomas, and Ginsburg wrote individual dissents.

VII In Green Tree Fin. Corp v. Bazzle, 539 U.S. 444 (2003); U.S., No. 02-634, the Court had to decide whether class-wide arbitration is permissible where an arbitration agreement is silent on arbitration of class action disputes. Where the terms of a contract require disputes to go to an arbitrator, disputes regarding the form of arbitration must also be determined by the arbitrator, according to the Federal Arbitration Act. Here, the Circuit Court granted class certification and required the class to go to arbitration. Green Tree claimed that the question of whether or not the disagreement could be settled as a class or whether class certification was allowable under the terms of the arbitration agreement should have been a matter for the arbitrator, not the courts to decide. Justice Breyer, writing for a plurality of the Court (three other Justices joined, Justice Stevens wrote a separate concurrence), found that the arbitrator should have been the governing body to decide whether or not class certification was appropriate. Chief Justice Rehnquist filed the dissent, joined by three other Justices, maintaining that the state law, not the FAA, governs state contractual disputes and arbitrations arising out of such disputes.

VIII In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491, 2002 U.S. LEXIS 9235 (2002), the Court held that the arbitrator, not district court should interpret the rules of arbitration for the designated arbitration forum. Procedural disputes are for the arbitrator, not district court judges to decide; however, questions of arbitrability, such as whether the arbitration clause is binding and whether the controversy is the type meant to be covered by the clause, are for the court to decide. The Supreme Court held that time limitations, such as the six year limitation in the Howsam case, are a procedural dispute to be determined by the forum arbitrating the case, not for the district court to determine whether or not the parties intended the case to be arbitrated

to begin with. Other procedural disputes included, but are not limited to: "notice, laches, estoppel, and whether other conditions precedent to an obligation to arbitrate has been met." Revised Uniform Arbitration Act § 6(c), comment 2, 7 U.L.A., 13.

IX. In a unanimous decision (Justice Thomas not participating), the Court held in PacifiCare Health Sys. Inc. v. Book, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 278, 2003 U.S. LEXIS 2714 (2003), that where an arbitration agreement is silent as to whether the term "punitive damages" is meant to include "treble damages" under the Racketeer Influenced and Corrupt Organizations Act the dispute must be submitted to an arbitrator to determine whether the arbitration agreement is enforceable or whether it is unenforceable because it would preclude meaningful relief for RICO violations.

X. In Jinks v. Richland County, S.C., 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed. 2d 631, 2003 U.S. LEXIS 324 (2003), the South Carolina Supreme Court found for the respondent in holding 28 U.S.C. § 1367 unconstitutional as applied to state political subdivisions. 28 U.S.C. § 1367(d) requires state courts to toll the statute of limitations period while a supplemental claim is pending in federal court and for 30 days after the dismissal of the claim, unless state law provides for more than 30 days. The Court, in an opinion written by Justice Scalia, unanimously found § 1367(d) constitutional. Justice Souter also wrote a concurring opinion. This decision explicitly did not hold that Congress has unlimited power to regulate practice and procedure in state courts, only that this section is constitutional. Justice Scalia's opinion states that Congress need not specifically mention in the text of legislation that the Act applies to local government (such as Richland County) because "municipalities are subject to suit as persons under § 1983."

XI. In Kentucky Ass'n of Health Plans Inc. v. Miller, 538 U.S. 329, 123 S. Ct. 1471, 155 L. Ed. 2d 631, 2003 U.S. LEXIS 2710 (2003), the Court clearly asserts that state laws regulating insurance providers are distinct and separate from laws regulating insurance policy and health care plans, both of which are regulated by federal law not state law may not preempt the federal law. Justice Scalia, writing for the unanimous Court, emphasizes that the laws must be "specifically directed toward" the insurance industry to fall within the protections of § 1144(b)(2)(A), which is the statutory exception permitting states to regulate the insurer. The Court leaves behind the old test/factors under McCarran-Ferguson and enumerates two requirements for a state law to be one "which regulates insurance": must be specifically directed toward entities engaged in insurance, and the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

XII. In Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535, 2003 U.S. LEXIS 2715 (2003), the Supreme Court upheld a Virginia statute banning cross burning done with the intent to intimidate another. The Court takes great care to distinguish the case at hand from R.A.V. v. St. Paul, 505 U.S. 377 (1992), stating that the Virginia law does not prohibit "speech directed toward one of the specified disfavored topics", R.A.V. at 391, rather it targets all cross burning that intimidates, regardless of the purpose for the intimidation. The majority found the law to be constitutional; however,

the Court was split on whether or not the cross burning itself is prima facie evidence of an intent to intimidate. Chief Justice Rehnquist, along with Justices Stevens, O'Connor, and Breyer, found that the jury instruction regarding prima facie intent to intimidate was unconstitutional, therefore the law was unconstitutional as applied to Black's case, but the statute itself does not violate the First Amendment. Justices Souter, Kennedy and Ginsburg found the statute to be unconstitutional on its face.

XIII. In Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 123 S. Ct. 1210155 L. Ed. 2d 261, 2003 U.S. LEXIS 1956, 71 U.S.L.W. 4197 (2003), the Court holds that where a railroad employee suffers from asbestosis caused by the negligence of the employer, that employer may be jointly liable for all of the employee's damages, without apportionment among other tortfeasors, and the employee is entitled to receive pain and suffering related to such illness. If the employer finds itself on the hook for the entirety of damages and it knows of a third party who contributed to the damage, it may seek indemnification from that third party. In the case at hand, the employees were able to recover for the fear of cancer as a result of the exposure to asbestosis, the Court is careful to point out the difference between these claimants and those with stand-alone mental anguish claims unrelated to a physical injury.

XIV. Brown v. Legal Found. of Washington, 538 U.S. 216, 123 S. Ct.1406, 155 L. Ed. 2d 376 (2003), stands for the proposition that, when determining whether a violation of the Fifth Amendment taking clause has been violated, one must look at the detriment to the one losing something, not at the gain to the state. In Brown, the State of Washington required that interest from certain client trust accounts be given to the state for the purpose of supporting indigent legal aid. The statute mandating this procedure specifically states that only money that would not otherwise be earning interest may be deposited into an interest bearing account, with the government being the recipient of such interest. The Court held, by means of Justice Stevens' opinion, that by definition the owner of the principal was not losing money as a result of the state taking this interest; therefore, no per se violation of the Fifth Amendment taking clause was found. Justices Scalia and Kennedy wrote dissenting opinions.

XV. In Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349, 2003 U.S. LEXIS 2492 (2003), the complainants argued that their Fourteenth Amendment right to Equal Protection was violated when the City failed to approve low-income housing developments in a certain area. The Court found that the rights of those individuals were not violated because it was through a required administrative process, allowing public opinion to determine the final decision of the city engineer, which prevented the housing project from being approved. No evidence was presented to suggest that city officials made discretionary decisions with a racial bias; in fact, the City had originally approved the development, it was through the efforts of a public referendum that the development plans were terminated.

XVI. In Black & Decker Disability Plan v. Nord, 538 U.S. 822, 123 S. Ct. 1965, 2003 U.S. LEXIS 4061, 71 U.S.L.W. 4405 (2003), the Court unanimously determined that administrators of plans covered by the Employee Retirement Income Security Act of

1974 do not have to give deference to the claimant's treating physician. Unlike the "treating physician rule" adopted by the Commissioner of Social Security which requires deference to the opinions of the treating physician when determining entitlement to social security benefits, plan administrators are not required to give such deference under ERISA; the Act guarantees all claimants a full and fair assessment of their claim as well as a clear communication of any reasons for the denial of the same claim. See generally 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(2002).

XVII. In Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953, 2003 U.S. LEXIS 4272 (2003), the Court found that when Congress explicitly invokes § 5 of the Fourteenth Amendment, Congress may prescribe legislation that will allow private suits against non-consenting States. Hibbs carefully carves out and exception to the long recognized immunity that states have enjoyed. In City of Boerne v. Flores, the Court set out a test that, in part, necessitates that the legislation must show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," 521 U.S. 507, 520 (1997). Here, the Court found such a congruence, holding that the States were in violation of individual's rights to not be discriminated against and that Congress promulgated a law that effectively minimized the States' discriminatory practices by allowing private suits for monetary damages.

XVIII. In Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 123 S. Ct. 2058, 2003 U.S. LEXIS 4277 (2003), the Court maintains that federal courts may exercise removal jurisdiction under the doctrine of complete preemption where the claim was brought under state law and also arises under federal statute. The Court, while recognizing that generally only the well-pleaded complaint is considered when determining if a case arises under federal law, holds that a state claim may be removed to federal court under two circumstances: "when Congress expressly so provides, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." Id. at 8. Mr. Anderson sought relief based upon supposed state usury violations of Beneficial National Bank. The Court found that the National Bank Act provided the exclusive cause of action for usury claims against national banks; therefore, Anderson's claim, although a state claim, was wholly displaced by the federal law, allowing for removal to federal court.

XIX. Sprietsma v. Mercury Marine, 537 U.S. 51, 123 S. Ct. 518, 154 L. Ed. 2d 466, 2002 U.S. LEXIS 9067 (2002), involves the Federal Boat Safety Act of 1971. The Act was established as a means of promoting safe boating and related recreational guidelines for manufacturers as well as individual operators of marine equipment. The lower courts found that the Federal Act pre-empted state law, which required that boats have a propeller guard and thus Sprietsma had not tort claim against Mercury Marine. Justice Stevens, writing for a unanimous Court, held that state common law is not, and was not intended to be, pre-empted by the Act where the Act was silent on the issue of propeller guards. The Act was not meant to be the only, or ultimate, safety guide on marine related safety issues, but rather the Act was written with the intention that it would supplement then existing state common law and promote some interstate uniformity where practicable.

XX. In Cook County v. Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 349, 2003 U.S. LEXIS 1957 (2003), the Court held that, unlike States, see Vermont Agency of Natural Res. v. Stevens, 529 U.S. 765 (2000) (holding that states are not "persons" under the False Claims Act and therefore not subject to *qui tam* actions), local governments are subject to *qui tam* actions under the federal False Claims Act. The Court defined the term "person", as used by the Act, to include political entities and corporations as well as natural persons. Section 3729 of the original Act, passed in 1863, included local governments. While the County argues that this inclusion was altered by the 1986 amendments, the Court holds that the recent amendments did not alter or redefine the meaning of "persons" and it is still read to include local governments.

XXI. In Meyer v. Holley, 537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753, 203 U.S. LEXIS 902 (2003), the Court unanimously held that, when asserting a vicarious liability claim, the corporation itself is liable for the tortious actions of its employees, not the officers and/or owners of the corporation in their capacity as such. Here, a salesman of a real estate company refused to sell a home to the Holleys for racially discriminatory purposes. The Holleys then sought to sue Meyer, the president, sole shareholder, and licensed officer/broker of the real estate company. The district court dismissed these claims against Meyer, finding that the Fair Housing Act did not provide for vicarious liability against officers/owners in their personal capacity. The Ninth Circuit found that the Fair Housing Act imposed strict vicarious liability principles and that Meyers could be held liable in his personal capacity. Justice Breyer, writing for the Court, remanded the case, noting that while the Act clearly provides for vicarious liability, nothing in its legislative history suggests that Congress meant to impose liability beyond the traditional standards recognized by the legal community.

XXII. The Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037, 2003 U.S. LEXIS 4418 (2003), is a per curiam decision in which the Court attempts to clarify its holding in United States v. Lopez, 514 U.S. 549 (1995), which the Alabama Supreme Court seems to have misinterpreted in the instant case. 2002 Ala. LEXIS 249 (Ala. 2002). The Court continues to hold that "Congress' Commerce clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice...subject to federal control.'" Citizens Bank, 539 U.S. at 56-57 (ellipsis in original). The Federal Arbitration Act requires that there be some evidence that the contract was "involving commerce." 9 U.S.C. § 2. This showing was made where Alafabco, Inc. engaged in business in several states other than Alabama and the loans from The Citizens Bank were secured through business assets, including inventory of goods assembled from out-of-state parts and raw materials.

XXIII. Nike, Inc. v. Kasky, 539 U.S. 654, (2003), U.S., No. 02-575, is a per curiam decision holding that "the writ of certiorari is dismissed as improvidently granted." Justice Stevens, in his concurring opinion with whom Justice Ginsburg joins and Justice Souter joins in part, holds that: 1) there was no final judgment from the California Supreme Court, see, 27 Cal. 4th 939, 45 P. 3d 243 (2002) 2) neither party has Art III standing, and 3) the Court must avoid ruling on novel constitutional questions prematurely. Justice

Breyer (joined by Justice O'Connor) dissents, finding that there is standing and no federal law/case bars the Court from hearing the matter and strongly emphasizing the need to not delay a decision where such an important 14th Amendment claim exists.

XXIV. In Miller-El v. Cockrell, 537 U.S. 322 (2003), 123 S. Ct. 1029, 154 L. Ed. 2d 931, 2003 U.S. LEXIS 1734 (2003), the Court examined when a state prisoner can appeal the denial or dismissal of his/her petition for writ of habeas corpus. Kennedy, writing for the Court in an 8-1 decision, maintains that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of the claims. The certificate of appealability should have been issued in this case and the Court remanded to the Fifth Circuit for further proceedings.

REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES
(2001-2002 TERM)

I. Eleventh Amendment

1. In Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533, 122 S. Ct. 999 (2002), the Court considered whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, tolls the statute of limitations for claims against non-consenting states that are asserted under § 1367 but later dismissed under the Eleventh Amendment. Justice O'Connor writing for a six-Justice majority, held that § 1367 does not toll the statute of limitations and that the University did not consent to the suit in federal court on petitioners' state law claims. The decision of the Minnesota Supreme Court, 620 N.W.2d 680 (Minn. 2001), was affirmed and the claims were dismissed.

2. The Court's unanimous opinion in Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 122 S. Ct. 1753 (2002), addressed two key issues. First, the Court held that 28 U.S.C. § 1331 provides federal courts with jurisdiction in cases where "'the Constitution and laws of the United States are given one construction and will be defeated if given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" The fact that § 252(e)(6) of the Telecommunications Act of 1996 does not specifically establish federal jurisdiction in this case is not enough to remove jurisdiction as established under § 1331. Second, the Court held that Ex parte Young "avoids an Eleventh Amendment bar to suit" in this case because Plaintiff's prayer for injunctive relief easily satisfied the Court's "'straightforward inquiry into whether [the] complainant alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Id. at 1760. Therefore, Verizon may sue the state commissioners in their official capacities. This opinion reversed that of the Fourth Circuit Court of Appeals, 240 F.3d 279 (4th Cir. 2001). *For an application of Verizon in subsequent cases, see* Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d 30 (1st Cir. 2002).

3. In Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 122 S. Ct. 1864 (2002), a cruise ship operator filed a private complaint with the Federal Maritime Commission after the South Carolina Ports Authority (an arm of the state) refused to allow one of its ships to dock. Justice Thomas's opinion for the five-Justice majority held that state sovereign immunity protected the Ports Authority from this kind of administrative adjudication: against a non-consenting state. Justice Thomas drew a comparison between the protection that the Eleventh Amendment provides non-consenting states in federal court and the state sovereign immunity that would prevent the Commission from "adjudicating complaints filed by a private party against a non-consenting State." This decision affirmed the Fourth Circuit's opinion below, 243 F.3d 165 (4th Cir. 2001).

4. In Lapides v. Bd. of Regents of the University Sys. of Georgia, 535 U.S. 613, 122 S. Ct. 1640 (2002), the Court considered whether a State's act of removing a lawsuit from state court to a federal court waives 11th amendment immunity. Lapides, a university professor, brought suit in state against the board of regents and other university officials alleging that the state had violated Georgia tort law and federal law. The defendants joined and removed the case to federal district court seeking dismissal. A unanimous Court, in an opinion written by Justice Breyer, held that when a State voluntarily agrees to remove a case to federal court, "it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." Id. at 619.

II. Title VII – Continuing Violations – Harassment Cases

1. In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002), the Court affirmed in part and reversed in part the decision of the Ninth Circuit Court of Appeals. 232 F.3d 1008 (9th Cir. 2000). The Court held that when an employee files a Title VII claim of discrimination based on a single or discrete act, he or she must file within the 180- or 300-day limitations period. "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. at 113. However, in the context of hostile work environment, "[p]rovided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for purposes of determining liability." Id. at 117. Employers do, however, have equitable defenses, such as "waiver, estoppel, and equitable tolling 'when equity so requires.'"

III. Statute of Limitations Discovery Rule - Fair Credit Reporting Act

1. In TRW Inc. v. Andrews, 534 U.S. 19, 122 S. Ct. 441 (2001), Justice Ginsburg, writing for the Court, held that the Ninth Circuit Court of Appeals, 225 F.3d 1063 (9th Cir. 2000), erred when it ruled that a generally applied discovery rule controlled in a federal case dealing with the Fair Credit Reporting Act (FCRA), unless Congress expressly legislated otherwise. The FCRA's applicable statute of limitations, 15 U.S.C. § 1681p, allowed an action to be brought "within two years from the date on which the liability arises." The exception to the rule allowed a claim to be brought two years after the date of discovery of misrepresentation when willful misrepresentation was involved. The Court held that 15 U.S.C. § 1681p evinced Congress' intent to preclude judicial implication of a discovery rule.

IV. Rule 8 – Strict Pleading Requirements Rejected

1. In Swierkiewicz v. Sorema, 534 U.S. 506, 122 S. Ct. 992 (2002), the Court considered whether a complaint in an employment discrimination suit must contain specific facts establishing a prima facie case of discrimination. Petitioner alleged that he was terminated because of his age, in violation of the Age Discrimination in

Employment Act of 1967, and because of his national origin, in violation of Title VII. Petitioner's claim was dismissed by the district court because he did not adequately allege a prima facie case of discrimination, and the Second Circuit affirmed, 5 Fed. Appx. 63 (2d Cir. 2001). The unanimous Court, per Justice Thomas, held that an employment discrimination complaint need not contain facts establishing a prima facie case but must contain only a short and plain statement of the claim showing that the pleader is entitled to relief.

V. ERISA

1. In Great West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 122 S. Ct. 708 (2002), the Court, per Justice Scalia, in a five Justice majority, held that § 502 (a)(3) of the Employee Retirement Income Security Act did not authorize an employee benefit plan to compel a beneficiary of the plan to make restitution. The Court found that petitioners sought to impose liability on respondents for a contractual obligation to pay money, relief that is not typically available in equity. The Court therefore held that petitioners were not authorized to make that request under § 02 (a)(3) and affirmed the judgment of the United States Court of Appeals for the Ninth Circuit, 208 F.3d 221 (9th Cir. 1997).

2. An Illinois law requiring HMOs to submit conflicts between the HMO and the insured's primary physician for "independent review" and to pay for recommended procedures was not preempted by ERISA. The five Justice majority opinion in Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151 (2002), held that because the Illinois independent review law "regulates insurance," it falls under ERISA's saving clause, and is not preempted. 29 U.S.C. § 1144(b)(2)(A). The Court affirmed the lower court's opinion, 230 F.3d 959 (7th Cir. 2000).

VI. OSHA - Preemption

1. In Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235, 122 S. Ct. 738 (2002), the Court considered whether the Occupational Safety and Health Act extended to working conditions that are regulated by other federal agencies. OSHA cited the respondent for three violations of the OSH Act when an explosion occurred while its employees were drilling a well in the territorial waters of Louisiana. The respondent challenged OSHA's jurisdiction to issue the citations on the grounds that section 4(b)(1) of the Act preempted OSHA jurisdiction because the Coast Guard had exclusive authority to enforce health regulations on navigable vessels. Justice Stevens, writing for the Court's 8-0 opinion, penned that "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction." Id. at 241. The Court found that the Coast Guard had neither affirmatively regulated the working conditions nor asserted comprehensive regulatory jurisdiction over working conditions on those vessels, and thus did not "exercise" its authority under section 4(b)(1) of the Act as codified in 29 U.S.C. § 653 (b)(1).

VII. EEOC – Relation Back Regulation

1. In Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145 (2002), a unanimous Court, per Justice Souter, held that the Equal Employment Opportunity Commission's relation-back regulation which allows an amendment to a charge to be filed after the time for filing has expired, "is an unassailable interpretation of § 706 of Title VII, 42 U.S.C. 2000e and [we] therefore reverse." Id. at 118. The Court reasoned that courts have consistently accepted later verification as reaching back to an earlier unverified filing where the statute or rule requires an oath. The Court therefore reversed the judgment of the court of appeals, 22 F.3d 505 (4th Cir. 2000), and remanded for further proceedings.

VIII. FLMA – Designation of Leave Regulation

1. In Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 122 S. Ct. 1155 (2002), the Court, per Justice Kennedy, in a five-Justice majority decision, held that the Department of Labor regulation, 29 C.F.R. § 825.700(a) (2001), is contrary to the Family and Medical Leave Act, and is beyond the authority of the Secretary of Labor. The regulation provides that if an employee takes medical leave and the employer does not timely designate the leave as FMLA leave, the leave taken does not count against the employee's FMLA entitlement. The Court reasoned that the regulation was invalid because it alters the FMLA's cause of action by relieving employees of the burden of proving impairment of their rights and resulting prejudice. The Court therefore affirmed the judgment of the Eighth Circuit, 218 F.3d 933 (8th Cir. 2000).

IX. ADA

1. In Toyota Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681 (2002), a unanimous Court per Justice O'Connor, held that the Sixth Circuit, 224 F.3d 840 (6th Cir. 2000), used an incorrect standard for determining disability under the Americans with Disabilities Act, when it focused on Respondent's inability to perform tasks associated with her job. The Court held that the central inquiry for determining disability under the ADA is whether the claimant is unable to perform tasks that are central to daily life. The Court found that the changes to the Respondent's life did not amount to restrictions that were central to every day life. The Court therefore reversed the Sixth Circuit's partial summary judgment in favor of Respondent.

2. The Court in Barnett v. US Airways, 535 U.S. 391, 122 S. Ct. 1516 (2002), held that the Americans with Disabilities Act does not require an employer to ignore a bona fide seniority system in order to accommodate a disabled employee. The Court pointed to the fact that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." Choosing accommodation over the seniority system could cause disruption in many other employees' expectations. However, the Court left open the possibility that an employee could demonstrate that "special circumstances" make the accommodation

"'reasonable' on the particular facts." Id. at 405. These circumstances could include evidence that the employer so often used its discretion or evidence of other exceptions in the seniority system that making an exception for a disabled person would not be disruptive. The opinion below was 228 F.3d 1105 (9th Cir. 2000).

3. The Court in Chevron U.S.A. v. Echazabal, 536 U.S. 73, 122 S. Ct. 2045 (2002), unanimously upheld an EEOC regulation interpreting the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. The regulation, 29 C.F.R. § 1630.15(b)(2), interpreted the ADA's language dealing with employers' affirmative defenses, 42 U.S.C. § 12113, to say that not only can an employer refuse to hire someone whose disability could be a "direct threat" to the health or safety of others, but could do so if the disability could be a direct threat to the employee him- or herself. This decision reversed the Ninth Circuit's holding, 226 F.3d 1063 (9th Cir. 2000).

X. Spending Clause

1. The Court in Barnes v. Gorman, 536 U.S. 181, 122 S. Ct. 2097 (2002), held that punitive damages are not available to private plaintiffs suing under § 504 of the Rehabilitation Act and § 202 of the Americans with Disabilities Act. Because the remedies for violations of those sections of the Acts are "coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Right Act of 1964, 42 U.S.C. § 2000d *et seq*.," and because Title VI is based in the Spending Clause, the Court applied contractual analysis to the Acts. As in the formation of any contract, both parties must be "*on notice*" of the extent of their liability before entering into that contract. Here, the party receiving federal funding was not on notice that it was liable for punitive damages, particularly because punitive damages are "not generally available for breach of contract." The Court reversed the Eighth Circuit's opinion below, 257 F.3d 738 (8th Cir. 2001).

2. In Gonzaga v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002), Gonzaga University, a private university, disclosed personal information about the Plaintiff student to a potential employer (he allegedly had committed a sexual assault). The Court held that the confidentiality provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, do not create rights privately enforceable under § 1983. According to the 5 Justice majority decision written by Chief Justice Rehnquist, Congress did not intend FERPA, which derives from Congress's spending power, to create individual rights—Congress did not "manifest an 'unambiguous' intent to confer individual rights;" rather, the Act focused on the policies and practices of the institution. Id. at 280.

XI. EEOC – Arbitration Agreement

1. In EEOC v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct 754 (2002), the Court considered whether an arbitration agreement between an employer and employee bars

the EEOC from pursuing judicial relief such as reinstatement, backpay, and damages. Justice Stevens, writing for a six Justice majority, found that once a charge is filed, the EEOC is in command of the process and has exclusive jurisdiction for 180 days. The Court stated that under Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the EEOC is not precluded from seeking equitable and classwide relief on behalf of an employee who signed an arbitration agreement. The Court therefore held that the EEOC can pursue victim-specific relief when the employee signed an arbitration agreement. The judgment of the Fourth Circuit, 193 F.3d 805 (4th Cir. 1999), was reversed. (*For a discussion in subsequent cases, see* Department of Fair Employment and Housing v. Harvest Buick Pontiac GMC, Inc., 2002 WL 1939172, (Cal.App. 6 Dist. Aug 21, 2002); Medical Air Technology Corp. v. Marwan Inv., Inc., 2002 WL 1827287, (1st Cir. 2002); Beiser v. Weyler, 284 F.3d 665, 667 (5th Cir. 2002))

XII. NLRB

1. In Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S. Ct. 1275 (2002), the Court considered whether the National Labor Relations Board (NLRB) may award backpay to an illegal alien as a remedy to a violation of the National Labor Relations Act (NLRA). Justice Rehnquist, writing for a five Justice majority, found that the NLRA can be equally applied to employment practices that affect illegal aliens, as it would not necessarily conflict with the terms of the Immigration and Nationality Act (INA). The Court stated however, that under Southern S.S. Co. v. National Labor Relations Board, 316 U.S. 31 (1942), the NLRB is obliged to take into account other equally important Congressional objectives. The Court further stated that the NLRB's remedy may be required to yield, if it "trenches upon a federal statute or policy outside the [NLRB's] competence to administer." The Court concluded that awarding backpay to illegal aliens in this case would trivialize immigration laws and encourage violations. The Court therefore reversed the judgment of the court of appeals, 237 F.3d 639 (D.C. Cir. 2001).

2. In BE&K Constr. Co. v. NLRB, 536 U.S. 516, 122 S. Ct. 2390 (2002), the Court considered whether the Sixth Circuit Court of Appeals erred "in holding that under Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)." BE&K, 536 U.S. at 524. The Court held that to so hold under the NLRA would in effect penalize such suits and held that the standard was thus invalid. The Court reasoned that there was nothing in the statutory text of § 158(a)(1) of the NLRA that required all reasonably based but unsuccessful suits filed with a retaliatory purpose be a per se violation of that section.

XIII. MSPB – Reliance On Other Disciplinary Actions

1. In United States Postal Service v. Gregory, 534 U.S. 1, 122 S. Ct. 431 (2001), Justice O'Connor, writing for a unanimous Court, held that the Merit System Protection Board (MSPB) may independently review prior disciplinary actions that are pending in grievance proceedings when determining the reasonableness of the penalty imposed on an employee. The Court held that to hold otherwise, "would, in many cases, effectively preclude agencies from relying on an employee's disciplinary history, which the Federal Circuit itself acknowledged to be an 'important factor' in any disciplinary decision." Id. at 8. The Court therefore vacated and remanded the judgment of the United States Court of Appeals for the Federal Circuit, 212 F.3d at 1298 (Fed. Cir. 2000). The Federal Circuit in turn, remanded the case to the Merit System Protection Board for further proceedings. 30 Fed.Appx. 955, 2002 WL 343417 (2002) (*not selected for publication in the Federal Reporter*, NO. 00-3123)

XIV. Evidence Standard – Totality of the Circumstances

1. In U.S. v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002), the Court reversed the holding of the Ninth Circuit and held that the "totality of the circumstances" should govern the analysis of determining whether the police officer had reasonable suspicion to believe that the respondent was engaged in illegal activity. The Court stated that "because the 'balance between the public interest and the individual's right to personal security'...tilts in favor of a standard less than probably cause in brief investigatory stops of persons or vehicles, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'" Id. at 273. The Court went on to state that the Ninth Circuit's holding departed sharply from the applicable case law by considering certain factors in isolation from each other rather than considering the "totality of the circumstances," and as a result reached the wrong result.

XV. Class Actions – Intervention

1. The Court in Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005 (2002), held that as long as non-named class members objected at a fairness hearing before the trial judge, those class members could appeal settlement decisions, even if they did not intervene previously. Justice O'Connor's opinion for the majority pointed to the fact that after a settlement has been reached, "nonnamed class members are parties to the proceedings in the sense of being bound by the settlement," Id. at 2015, and thus, must have the right to appeal. The Court thereby reversed the Fourth Circuit, 265 F.3d 195 (4th Cir. 2001). (*For a discussion is subsequent cases, see* Plain v. Murphy Family Farms, 296 F.3d 975, 979 (10th Cir. 2002); In re General American Life Ins. Co. Sales Practices Litigation, 2002 WL 2018807(8th Cir. 2002)).

XVI. Tip Income – Methods of Calculation for FICA Purposes

1. In U.S. v. Fior D'Italia, 536 U.S. 238, 122 S. Ct. 2117 (2002), the Court held that the "aggregate estimation" method of calculating restaurant employers' liability for unreported tip income for Federal Insurance Contribution Act (FICA) tax purposes

was reasonable. This method takes the restaurant's total receipts and applies the average tip rate for meals charged on credit cards. The Court ruled that this method was reasonable under § 6201(a) of the Internal Revenue Code, which authorizes the IRS "to make the inquiries, determinations, and *assessments* of all taxes...which have not been duly paid," and implicitly allows the IRS to determine the method by which those assessments are made. The Court reversed the lower court, 242 F.3d 844 (9th Cir. 2001).

XVII. Bivens – Corporate Defendants

1. In Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 122 S. Ct. 515 (2001), the Court declined to expand the holding of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), which held that a private cause of action existed against federal officers alleged to have violated a citizen's constitutional rights, to a private corporation operating a correctional facility under contract with the Bureau of Prisons for alleged violations of prisoners' constitutional rights. Chief Justice Rehnquist, writing for a five Justice majority, reversed the Second Circuit's holding 229 F.3d 374 (2d. Cir. 2000) reasoning that Bivens was intended to deter individual officers from committing constitutional violations. If suit were allowed against a corporate defendant, "claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." Id. at 71.

XVIII. SSA

1. In Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265 (2002), the Social Security Administration (SSA) interpreted the Social Security Act, 42 U.S.C. § 401, as requiring an "inability to engage in any substantial gainful activity" for no less than 12 months prior to an individual being considered disabled. The district court affirmed the Agency's decision not to pay benefits to an individual who returned to work after 11 months. The Court of Appeals for the Fourth Circuit reasoning that the 12 month duration in the statute applies to the word "impairment" and not the word "inability" Walton v. Apfel, 235 F.3d 184 (4th Cir. 2000), reversed. The Supreme Court, per Justice Breyer, unanimously held that the Agency's interpretation of the statute is lawful. The Court reasoned that in this case, the statute is silent with regard to the duration of the "inability," which creates ambiguity. The Court then stated that under Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), it must sustain the Agency's interpretation if it was based on a permissible construction of the statute. The Court concluded that the Agency's construction of the statute was permissible and reversed the judgment of the Fourth Circuit.

2. The Court in Gisbrecht v. Barnhart, 535 U.S. 789, 122 S. Ct. 1817 (2002), held that attorneys may enter into contingency fee arrangements with Social Security claimants. According to the majority opinion written by Justice Ginsburg, 42 U.S.C. § 406(b), which says that attorneys may receive a "reasonable fee, not in excess of 25 percent of accrued benefits … does not displace contingent-fee agreements within the

statutory ceiling." Rather, § 406(b) requires courts to review these fee agreements for reasonableness. The opinion reversed the Ninth Circuit, 238 F.3d 1196 (9th Cir. 2000).

Summary Review

I. Class Settlements

1. The Court in Henderson v. General American Life Insurance Company, 536 U.S. 919, 122 S. Ct. 2584, 153 L. Ed. 2d 773, 70 U.S.L.W. 3773 (2002) vacated the Eighth Circuit's ruling in Lewis & Ellis v. Gen. Am. Life Ins. Co. (in Re Gen. Am. Life Ins. Co. Sales Practices Litig.), 268 F.3d 627 (8th Cir. 2001). An "absent" class member moved to intervene in order to object to the settlement. That motion was denied, and the absent class member failed to object to the denial as improper in his brief to the district court. The Ninth Circuit had held that "[b]y failing to raise the intervention issue, [the plaintiff] has waived the issue and effectively conceded his non-party status. He is therefore ineligible to challenge the district court's determination that the class settlement is fair." 536 U.S. 919, No. 01-1068.

2. In Grimes v. Navigant Consulting Co., 536 U.S. 920, No. 01-1297 the Court vacated the lower court's ruling in *In re* Navigant Consulting Inc. Securities Litigation, 275 F.3d 616 (7th Cir. 2001). The Seventh Circuit dismissed class members' appeal from an order approving settlement. Those class members had no right to appeal the approval of the settlement where their post-judgment motion to intervene was untimely, and, therefore dismissed by the district court. 536 U.S. 920, No. 01-1297.

II. Continuing Violations

1. The Court also vacated the Ninth Circuit's ruling in UAL Corp. v. Fielder, 218 F.3d 973 (9th Cir. 2000). The Ninth Circuit used continuing violation theory to hold that an employer can be held liable for unlawful discriminatory actions—such as retaliation and hostile work environment—that happened beyond the 300-day limitations period, when those time-barred actions are closely related to actions that did occur in the 300-day period. 536 U.S. 919, No. 00-1397.

2. The Court vacated Madison v. IBP Inc., 257 F.3d 780 (8th Cir. 2000). In the case below, the Eighth Circuit also addressed continuing violations, holding that for employment discrimination claims brought under federal law, punitive damages are only available to plaintiffs for incidents occurring during the statute of limitations period, regardless of whether defendants' acts are continuing violations. 536 U.S. 919, No. 01-985.

III. Single Discriminatory Act

1. The Court vacated the First Circuit's ruling in O'Connor v. Northshore International Insurance Services Inc., 21 Fed. Appx. 15 (1st Cir. 2001). The plaintiff argued that she had been fired because she was a fundamentalist Christian. However, because she based her claim on a single incident and did not demonstrate that anyone with the power to terminate her or any other co-workers knew of her religious beliefs, she did not prove that her termination or harassment violated her rights under Title VII. 536 U.S. 919, No. 01-1205.

IV. ERISA

1. In Montemayor v. Corporate Health Insurance Inc., the Court vacated the Fifth Circuit's ruling in Corporate Health Insurance Inc. v. Texas Department of Insurance, 215 F.3d 526 (5th Cir. 2000). The Fifth Circuit held that a Texas law regarding independent review of decisions made by managed care organizations as to medical necessity or appropriateness of services was preempted by ERISA. The law was not exempt from the preemption by the savings clause of § 514(b)(2)(A) of ERISA because, while it related to insurance, it also "create[d] an alternative mechanism through which plan members may seek benefits due them under the terms of the plan—the identical relief offered under § 1132(a)(1)(B) of ERISA." 536 U.S. 935, No. 00-665.

V. FMLA

1. In Montgomery v. Maryland, 266 F.3d 334 (4th Cir. 2001), the Fourth Circuit held that the Family and Medical Leave Act (FMLA) "does not abrogate the sovereign immunity of the states," and that the Eleventh Amendment "bars suits by private plaintiffs for backpay and other forms of retroactive relief that are in reality claims against the state itself." Following the same argument, the court held that because the state is the real party in interest when an official is sued for damages for official acts under the FMLA, the Eleventh Amendment barred the suit against the officials in their individual capacities. 535 U.S. 1075, No. 01-1079, 122 S. Ct. 1958 (2002). The Supreme Court granted cert, vacated the judgment, and remanded the case to the Fourth Circuit for further consideration in light of Lapides v. Bd. of Regents of Univ. Sys. of Georgia, 122 S. Ct. 1640 (2002).

Dismissed

VI. Affirmative Action – Government Contracts

1. In Adarand Constructors Inc. v. Mineta, 534 U.S. 103, 122 S. Ct. 511 (2001), the Court granted certiorari review for a second time to consider whether the Tenth Circuit Court of Appeals was correct when it concluded that the Department of

Transportation Disadvantaged Business Enterprise program was consistent with the constitutional guaranty of equal protection. The program was designed to improve contracting opportunities for "disadvantaged business enterprises." In a Per Curiam opinion, the Court dismissed the writ for two reasons. First, the Court stated that in Adarand Constructors Inc. v. Slater, 22 F.3d 1147 (10th Cir. 2000), the lower court never considered whether the various race-based programs applicable to direct federal contracting could satisfy the strict scrutiny standard. Second, the Court stated that "to reach the merits of any challenge to statutes and regulations relating to direct procurement of DOT funds would require a threshold examination of whether the petitioner has standing to challenge such statutes and regulations." Id. at 514. Since the petitioner did not dispute the court of appeals' holding that petitioner lacked standing, the Court dismissed the writ of certiorari as improvidently granted.

VII. ADEA – Disparate Impact

1. On April 1, 2002, the Court dropped Adams v. Florida Power Corp., 535 U.S. 228, 122 S. Ct. 1290 (2002), from its docket. Had the Court ruled on this case, it might have determined whether disparate impact claims may be filed under the Age Discrimination in Employment Act (ADEA). The Eleventh Circuit ruled against the plaintiffs, 255 F.3d 1322 (11th Cir. 2001) holding that disparate impact claims may not be filed under ADEA, but that those claims might be successful under Title VII.

VIII. Eleventh Amendment - Jurisdiction

1. The Court dismissed the case of Mathias v. World-Com Technologies Inc., 122 S. Ct. 1958 (2002), as improvidently granted. The Court determined that the petitioners in the case had been the prevailing parties below, 179 F.3d 566 (7th Cir. 1999), and would not further review the case merely to address issues the petitioners saw as erroneous. In addition, the key issues in Mathias were subsequently addressed in the Court's opinion in Verizon Maryland, Inc. v. Public Service Commission of Maryland. 535 U.S. 1076, 122 S. Ct. 1753 (2002).