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

**and**

# A PREVIEW OF THIS TERM (2005-2006)

**by**

**ROBERT B. FITZPATRICK, ESQ.**
**ROBERT B. FITZPATRICK, PLLC**
**Suite 660**
**Universal Building North**
**1875 Connecticut Avenue, N.W.**
**Washington, D.C. 20009-5728**
**(202) 588-5300 (telephone)**
**(202) 588-5023 (fax)**
**fitzpatrick.law@verizon.net (e-mail)**
**http://www.robertbfitzpatrick.com (website)**

TABLE OF CASES

Cases Page

**Review of the 2004-2005 Term**



**Preview of the 2005-2006 Term**

Smith v. City of Jackson, 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 Beyer 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 (joined by Justice O'Connor) 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.

Comments:

Graham County Soil & Water Conservation Dist. v. Wilson, 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. §3731 reads 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.

Comments:

Jackson v. Birmingham Bd. of Educ., 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 of Education 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 dismisses 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.

Comments:

Spector v. Norwegian Cruise Line Ltd., 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 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.

Comments:

Comm'r v. Banks, 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.

Comments:

Garrison S. Johnson v. Cal., 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 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 Court reversed the Ninth Circuit's holding that the California Department of Correction's (CDC) racial segregation policy was unconstitutional using a deferential standard and remanded the case for a determination of the constitutionality of the policy under the standard of 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 peneological 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.

Comments:

Rousey v. Jacoway, 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 their 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.

Comments:

Arthur Andersen LLP v. United States, 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 § 1512.

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.

Comments:

Tenet v. Doe, 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.

Comments:

Bates v. Dow Agrosciences LLC, 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.

In this unanimous decision, 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. 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. They 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.

Comments:

Cutter v. Wilkinson, 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.

Comments:

Dura Pharmaceuticals, Inc. v. Broudo, 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."

Comments:

Jay Shawn Johnson v. California, 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.

Comments:

Miller-El v. Dretke, 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).

Comments:

Tory v. Cochran, 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."

Comments:

**CASES TO BE CONSIDERED THIS TERM (20045-2006)**

IBP, Inc. v. Alvarez, 339 F.3d 894 (9th Cir. 2003), *cert granted*, 125 S. Ct. 1292, 161 L. Ed. 2d 104, 2005 U.S. LEXIS 1451, 73 U.S.L.W. 3494 (2005).

Tum v. Barber Foods, Inc., 331 F.3d 1 (1st Cir. 2003), *cert granted*, 125 S. Ct. 1292, 161 L. Ed. 2d 104, 2005 U.S. LEXIS 1451, 73 U.S.L.W. 3494 (2005).

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.

Comments:

Arbaugh v. Y & H Corp., 380 F.3d 219 (5th Cir. 2004), *cert granted*, 125 S. Ct. 2246, 161 L. Ed 1057, 2005 U.S. LEXIS 3951, 73 U.S.L.W. 3671 (2005).

Question Presented: Whether Title VII's requirement that an employer have fifteen or more employees limits federal court subject matter jurisdiction.

Comments:

Whitman v. Dept. of Transportation, 382 F.3d 938 (9th Cir. 2004), *cert granted*, 125 S. Ct. ___ (2005).

Questions Presented:

1) "Whether 5 U.S.C. 7121(a)'s provision that the negotiated grievance procedures of a federal collective bargaining agreement be 'the exclusive *administrative* procedures' to resolve grievances precludes an employee from seeking direct *judicial* redress when he would otherwise have an independent basis for judicial review of his claims."
2) "Whether the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*, precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer."

Comments:

Carpenter's Health and Welfare Trust v. Vonderharr, 384 F.3d 667 (9th Cir. 2004), *inviting the Solicitor General to file a brief*, 125 S. Ct. 1830, 2005 U.S. LEXIS 3322, 73 U.S.L.W. 3619 (2005).

Question Presented: Whether, after the Supreme Court's decision in Great-West Life & Ann. Ins. V. Knudson, 534 U.S. 204 (2002), monetary relief is still available under the Employee Retirement Income Security Act of 1974 (ERISA).

Comments:

Domino's Pizza, Inc. v. McDonald, 107 Fed. Appx. 18 (9th Cir. 2004), *cert granted*, 125 S. Ct. 1928, 2005 U.S. LEXIS 3539 (2005).

Question Presented: Under § 1981, can an individual without a contractual relationship with the defendant sue to seek recovery for personal injuries that are separate from any damages of the contractual party?

Comments:

Buckeye Check Cashing, Inc. v. Cardegna, 894 So. 2d 860 (Fla. 2005), *cert granted*, 2005 U.S. LEXIS 4859, 73 U.S.L.W. 3733 (2005).

Question Presented: Whether an arbitration clause is enforceable when the validity of the entire contract is being challenged.

Comments:

Garcetti v. Ceballos, 361 F.3d 1168 (9th Cir. 2004), *cert granted*, 125 S. Ct. 1395, 161 L. Ed. 2d 188, 2005 U.S. LEXIS 2082 (2005).

Question Presented: Whether a public employee's job-related speech is protected by the Fourth Amendment when the content is of public concern.

Comments:

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341 (Fed. Cir. 2004), *cert granted*, 125 S. Ct. 1396, 161 L. Ed. 2d 189, 2005 U.S. LEXIS 2083 (2005).

Question Presented: Whether a jury verdict may be reviewed for sufficiency of evidence where: 1) a motion for judgment as a matter of law was made before jury submission, 2) where that motion was never renewed, 3) and where a motion for a new trial was not made.

Comments:

Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 389 F.3d 973 (10th Cir. 2004), *cert granted*, 125 S. Ct. 1846, 161 L. Ed. 2d 723, 2005 U.S. LEXIS 3326, 73 U.S.L.W. 3619 (2005).

Question Presented: Whether, under the Religious Freedom Restoration Act of 1993, the federal government is enjoined from enforcing the Controlled Substances Act and the United Nations Convention on Psychotropic Substances as they apply to the importation, possession, and use of hoasca, a drug used in religious ceremonies.

Comments: