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

and

A PREVIEW OF THIS TERM (2004-2005)

by

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Jones v. R.R. Donnelley & Sons Co., 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. § 1658 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 Section 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 Section 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.

Comments:

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 ever granted relief under the ADEA" for this type of discrimination. 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."

Comments:

Pennsylvania State Police v. Suders, 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.

Comments:

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."

Comments:

Raymond B. Yates, M.D., P.C. Profit Sharing Plan, et al. v. Hendon, 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."

Comments:

Aetna Health Inc. v. Davila, 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 Insurance 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.

Comments:

Cent. Laborers' Pension Fund v. Heinz**,** 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.
Comments:

Sosa v. Alvarez-Machain, et. al., 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.

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.

Comments:

Tennessee v. Lane, 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 Section 5 of the Fourteenth Amendment, thereby failing validly to 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 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 Section 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."

Comments:

CASES TO BE CONSIDERED THIS TERM (2004-2005)

1) Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724, 158 L. Ed. 2d 398, 2004 U.S. LEXIS 2386, 72 U.S.L.W. 3614 (2004).

Question Presented: Whether disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967 (ADEA)?

Comments:

2) Tax Cases

Banks v. Comm'r, 345 F.3d 373 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 1712, 158 L. Ed. 2d 398, 2004 U.S. LEXIS 2384 (2004).

Banaitis v. Comm'r, 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1712, 158 L. Ed. 2d 398, 2004 U.S. LEXIS 2384 (2004).

Question Presented: Whether, under Section 61(a) of the Internal Revenue Code, 26 U.S.C. § 61(a), a taxpayer's gross income from the proceeds of litigation includes the portion of his damages recovery that is paid to his attorneys pursuant to a contingent fee arrangement?

Comments:

3) Spector v. Norwegian Cruise Line, Ltd., 356 F.3d 641 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 26, 159 L. Ed. 2d 856, 2004 U.S. LEXIS 5002, 73 U.S.L.W. 3204 (2004).

Question Presented: Whether and to what extent Title III of the Americans with Disabilities Act applies to companies that operate foreign-flag cruise ships in United States waters?

Comments:

4) Jackson v. Birmingham Board of Education, 309 F.3d 1333 (11th Cir. 2002), *cert. granted*, 124 S. Ct. 2834, 159 L. Ed. 2d 266, 2004 U.S. LEXIS 4189, 72 U.S.L.W. 3749 (2004).

Question Presented: Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., encompasses redress for retaliation for complaints about unlawful sex discrimination?

Comments:

5) Veneman v. Livestock Marketing Association, et al., 335 F.3d 711 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 2389, 158 L. Ed. 2d 962, 2004 U.S. LEXIS 3700, 72 U.S.L.W. 3725 (2004).

Question Presented: Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. § 2901 et seq., and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree?

Comments: