The 2007 Term of the Supreme Court of the United States provided fresh and persuasive evidence of the centrality of work in our lives and the significance of employment law in our jurisprudence during this first decade of the new century. Nearly one out of four civil cases on the Court's opinion docket involved disputes concerning some aspect of employer-employee relations. How the law regulates and affects the employment relationship thus continued to find detailed, if not fully coherent, expression in the Court's opinions during the 2007 Term. This paper first reviews the term's decisions arranged largely by subject matter. The italicized paragraphs preceding and following the cases offer some personal commentary on the decisions and their likely impact on workers, employers, and their lawyers, and more generally on our employment laws. Following this term's cases are brief summaries of the grants of certiorari in employment-related cases for the 2008 Term. The paper concludes with a brief observation about the structure of federal employment law in the wake of the Court's recent decisions.

The pace and scope of the Court's work in the employment area during the 2007 Term was nothing short of breathtaking. The quickened pace of decisions in this area was remarkable, particularly in view of an opinion docket of less than 75 cases. As noted above, employment cases outnumbered all other types of civil cases, thus demonstrating the Court's focused interest in this corner of the law. Yet, the employment decisions continued to be rendered in the shadow of cases of defining significance in a democratic republic, as well as in the persistent shadow of the current administration's response to the 2001 terrorist attack on our nation. To be quite blunt, the importance of this term's employment cases to workers and employers alike pales when compared, for example, to the preservation of habeas corpus during an undeclared war on terror, Boumediene v. Bush, 553 U.S. ---, 171 L. Ed. 2d 41 (2008), or to the Second Amendment right of individuals to possess handguns and operable firearms in the home for immediate self-defense, District of Columbia v. Heller, 554 U.S. ---, 171 L. Ed. 2d 637, 128 S. Ct. --- (2008), or to state imposition of voter identification requirements in order to prevent purported election fraud, Crawford v. Marion County Election Board, 553 U.S. ---, 170 L. Ed. 2d 574 (2008), or to the Eighth Amendment's prohibition of the death penalty in non-capital cases, Kennedy v. Louisiana, 554 U.S. ---, 171 L. Ed. 2d 525 (2008). While those decisions may have a deep and lasting political impact on our nation, the Court's work in the employment area this term, nonetheless, demonstrates a continuing regard by the Court for an undeniably major portion of our daily lives - the time we spend working as employees or employers. As our national workforce continues its rapid and multi-faceted demographic transformation and our economy continues its painful adjustment away from being a producer-creditor nation in a globalized market, the Court will undoubtedly have a wide range of opportunities to express its interest in the employment relationship and maintain the accelerated pace of its employment decisions.
The scope of the Court's employment law work was likewise remarkable in the eclectic range of cases involving substantive, prodedural, adjective and remedial issues. The employment opinion docket included for the first time in several years a case directly involving labor relations under the National Labor Relations Act ("NLRA"). But the focus of many of the employment decisions was on employee benefits and age discrimination, two areas directly related to the tectonic shift away from a baby boomer workforce to one increasingly dominated by Generation X'ers, many of whom, believe it or not, are now over 40 years old themselves. The decisions this term also dealt with nuts and bolts issues, such as the nature of a charge of discrimination and the admissibility of evidence in an employment discrimination case. Moreover, on a threshold question of who should decide employment-related disputes, the Court continued to look with favor on arbitration as an alternative - indeed, preferred - means of binding resolution. Finally, the Court, through its grants of certiorari in a number of employment cases for the impending term, effectively set the table for a continuing employment law feast beginning this October and continuing through next June. As the summary of certiorari grants in section F below demonstrates, the Court's heightened regard for employment issues is neither a one-term phenomenon nor one with a narrow focus.

For those who insist on keeping a scorecard, employees appeared at first blush to fare better this term than last. Indeed, employees "won" six and "lost" three of the ten decisions pitting them directly against their employers. (One decision cannot be characterized in win-or-lose terms.) Yet, despite suggestions from some commentators that the Court has shifted to a more pro-worker stance, most employment litigators know only too well that statistics do not often tell the whole story - or even portray a fair part of it. Cf. C. Dickens, Hard Times (for These Times), pp. 52-53 (1854) (Referring in poignant fashion to statistics as "stutterings.") When viewed more analytically than anecdotally, there was actually no such discernible shift in the Court's orientation as an employer-friendly forum. Indeed, a majority of the Justices was openly solicitous of corporate interests beyond the employment context during the 2007 Term. E.g., Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 552 U.S. --- (2008) (Securities Act class claims against third party that facilitated fraudulent scheme, but did not make representations directly to the class, held not actionable.) In most of the employment cases, however, the fault line simply did not involve larger issues of policy that might have revealed a particular orientation toward employer or worker. While the Court appeared to function more as a construction superintendent than an architect, that perception obscures what the Court was doing on a deeper level to alter the architecture of federal employment regulation. But, more on that topic in the concluding essay. For now, it is quite enough to observe that the Court's failure to embrace a holistic and more coherent approach to employment law leaves employment law in an uncertain, unstable and fragmented state, as it has been for many years. That may be wonderful for the employment bar, but it is unhealthy and inefficient for employers and, just as importantly, unfathomable and often unfair for working women and men.

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A. Employment Discrimination.

The Court's principal focus in the employment discrimination area centered on retaliation and on various issues about the substantive and procedural aspects of age discrimination. While the statutory retaliation cases yielded clear rulings protecting employees who complain about discriminatory practices, the Court declined, either for prudential or political reasons, to confront directly the more intriguing underlying question of whether retaliation is itself a form of discrimination. Instead, the Court invoked the doctrine of stare decisis to conclude that retaliation was actionable. In contrast to the statutory retaliation decisions, however, the Court concluded in the first case reviewed below that the Equal Protection Clause does not cover reprisal against a class of one employee in public employment.
In the age discrimination cases, the Court dealt with what constitutes a charge of discrimination, what principles govern the admissibility of evidence of discrimination, what constitutes disparate age treatment in disability pensions, and who has the burden of proof on an important statutory component of disparate impact cases. The guidance provided by these decisions will do much to shape how litigators will draft pleadings, frame discovery and craft trial submissions in an area of the law that occupies center stage as the boomer generation exits the workforce.

The Court also granted certiorari in *Huber v. Wal-Mart Stores, Inc.*, No. 07-480, but dismissed the writ pursuant to Supreme Court Rule 46.1 when the case settled privately. The issue on which certiorari had been granted was whether the reasonable accommodation requirement under the Americans with Disabilities Act ("ADA") required an employer to reassign an employee who could no longer do her job to a vacant equivalent position for which she was qualified, instead of requiring the employee to compete with other applicants for that position. 170 L. Ed. 2d at p. C-2 (January 14, 2008.) This reasonable accommodation issue is one that recurs with enough frequency that the Court is likely to find another opportunity to examine it in the near future.

*Engquist v. Oregon Dep't of Agriculture, 553 U.S. ---, 170 L. Ed. 2d 975, 128 S. Ct. --- (2008)*

The Court decided that the so-called "class-of-one" theory of equal protection under the Fourteenth Amendment does not apply in the context of public employment.

Anup Engquist, a food standard specialist since 1992 at a laboratory within the Oregon Department of Agriculture, experienced repeated problems with another Department employee, Joseph Hyatt. Engquist had complained to the person who hired her, Norma Corristan, that Hyatt had made false statements about Engquist and had otherwise made her life difficult. Corristan then directed Hyatt to attend diversity training and anger management training. In 2001 John Szczepanski, a Department executive, told a client that he could not "control" Engquist and that both she and Corristan "would be gotten rid of." Szczepanski then chose Hyatt over Engquist for a managerial job for which Engquist had greater experience in the relevant field, and later that year he eliminated Corristan's job during a round of budget cuts. In January of 2002 the Department notified Engquist that her job was being eliminated because of a reorganization. Engquist declined to exercise bumping rights under a collective bargaining agreement, refused a demotion and was found unqualified for the only other job at her level. Consequently, she was effectively laid off.

Engquist sued the Department, Szczepanski and Hyatt, alleging violations of the federal antidiscrimination laws, the Fourteenth Amendment and state law. Her equal protection claim under the Fourteenth Amendment alleged that the defendants had discriminated against her on the basis of her race, sex and national origin. She also alleged a so-called "class-of-one" equal protection violation, claiming that she was fired not because of her being a member of an identified class, but simply for "arbitrary, vindictive and malicious reasons." The district court granted partial summary judgment to the defendants, but allowed Engquist's equal protection claims to proceed, holding that being singled out because of Hyatt's and Szczepanski's animosity for reasons unrelated to any legitimate state objective stated a viable claim. At trial the jury rejected the race, sex and national origin claims, but found that Engquist had been treated differently without any rational basis and solely for arbitrary, vindictive or malicious reasons. Also finding for her on other claims, the jury awarded $175,000 in compensatory damages and $250,000 in punitive damages. The Ninth Circuit reversed, holding that the class-of-one theory of equal protection would unduly interfere in
state employment practices and would invalidate the practice of at-will public employment. The Supreme Court granted certiorari to resolve a circuit conflict over the availability of the class-of-one theory in public employment cases.

The Court, in a 6 to 3 decision, affirmed the Ninth Circuit, holding that the class-of-one theory is not available in public employment cases. Chief Justice Roberts' majority opinion begins by reaffirming that the Fourteenth Amendment protects persons, not groups, and that it generally applies to states acting as employers. Nonetheless, the majority's traditional view of the core concern of the Amendment as a shield against arbitrary classifications and the unique considerations applicable to governments acting as employers led it to reject the class-of-one theory in the public employment context. While the majority concedes that citizens do not lose their constitutional rights when they become governmental employees, those rights must be balanced against the realities of the employment context.

Distinguishing the Court's prior decisions recognizing a class of a single person (where, for example, a municipality refused to permit a resident to connect to a municipal water supply), the majority says that in non-employment cases there are objective standards for determining whether there is a rational basis for singling out the class of one person. In the employment context, however, treating individual employees differently is an accepted consequence of the discretion necessarily granted to employers, who have to make subjective and individualized decisions based on an array of factors that are hard to quantify or even articulate. Allowing class-of-one claims would, therefore, undermine the employer's discretion, repudiate the at-will doctrine in public employment, jeopardize governmental efficiency and force state and municipal employers to defend a multitude of claims. Declining, therefore, to constitutionalize every employment grievance, the Court affirms the judgment of the Ninth Circuit and concludes that the class-of-one theory is simply a "poor fit" in the employment context: "To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." Slip Op., p. 12.

Justice Stevens, joined by Justices Souter and Ginsburg, dissented, expressing the view that the majority has simply created an exception from the Fourteenth Amendment's protection applicable to state employees. Pointing out that Oregon offered no explanation for its treatment of Engquist and expressly disclaimed the existence of any workplace or performance-related rationale, the dissent finds no basis for differentiating this case from the Court's prior recognition of class-of-one claims singling out individuals for disparate treatment where there is no conceivable rational basis for doing so.

The dissent agrees that public employers make inherently discretionary decisions and that they must be free to exercise that authority, but Justice Stevens points out the clear distinction between an exercise of discretion and an arbitrary decision: A discretionary decision involves a choice amongst rational alternatives, while an arbitrary decision is one that rests on no rational justification at all. So, even a random choice or a coin flip between two rational alternatives would not violate an employee's rights, but a decision with no conceivable rational basis that rests solely on malice or vindictiveness should be a violation of equal protection. The dissent, therefore, asserts that the Court should have used a scalpel instead of a meat-axe in order to confine class-of-one claims to those involving a "complete absence of any conceivable rational basis" for the disparate adverse treatment of an employee. Dissent Slip Op., p. 6.

Justice Stevens' opinion also suggests that the at-will doctrine has been eroded legislatively and judicially and that preserving its "remnants" is a feeble justification for a broad exception to the Fourteenth Amendment's protection. Likewise, the dissenters acknowledge the majority's fear that public employers might have to defend class-of-one claims, but counter that such claims are relatively infrequent, are usually
asserted along with other claims, and are ordinarily dismissed well in advance of trial. The dissenters, therefore, find no compelling reason to carve arbitrary employment decisions out of the well-established category of equal protection violations, particularly when the familiar rational review standard can limit such claims to employer actions that are "wholly unjustified." *Id.*, p. 8.

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With municipal, state and federal governmental employment on the increase as our nation's population continues to grow, one might conclude that this case would be one of surpassing importance. But, the greater likelihood is that the Court's decision in this case, assuming it endures, will not make a discernible difference in the public workplace. What the Court's decision means is that reprisal against public employees will still be actionable, but only on the basis that it offends a federal or state statute or a collective bargaining agreement. Lawyers for the victims of retaliation at the hands of governmental employers will, therefore, simply have to look beyond the Constitution in counseling employees about their rights. Likewise, public employers will still have to train their managers to avoid reprisals against even the most troublesome workers. In short, this case does not issue a free pass to employers; in the majority's view, it only eliminates the Constitution as a source of rights and remedies for public employees.

But, think for a minute about the last statement: this case "only eliminates the Constitution as a source of rights and remedies for public employees." There is nothing in the text of the Equal Protection Clause of the Fourteenth Amendment that carves employment out of its reach. Indeed, the reference to "[n]o person" in relation to the equal protection of the laws indicates that arbitrary treatment of individuals - without regard to their membership in a group or class - is the target of the Clause's prohibition. Employer conduct that is not rationally based (for example, the groundless exercise of an employer's prerogative under the at-will doctrine) denies a person the full protection of the law and is thus precisely what the Equal Protection Clause prohibits. The Court's refusal to enforce the constitutional promise of equal protection is thus not just an employer-friendly gesture; it is a distressing failure of the Court's judicial duty under Article III of the Constitution.

From the perspective of local and state employees, such as law enforcement officers, firefighters, corrections officers, emt's and other first responders, this decision must be a disturbing one. Even more disappointing to these brave protectors of us all must be the majority's rationale that governmental efficiency in the service of profit is more important than treating employees in a rational, non-arbitrary manner. To be sure, having to defend spurious claims and justify employer actions may involve some unproductive use of public funds, but the Court's response to that problem was simply to blink away the Fourteenth Amendment, instead of trying to harmonize the parties' competing rights and interests (as it does in private sector cases through allocating proof burdens and other such techniques.) In any event, as a result of the Court's decision (and absent statutory protection), public employers are now constitutionally free - most notably in right-to-work states - to treat their police officers, firefighters and other employees arbitrarily and irrationally with impunity.

One unintended consequence of this decision is that it makes the argument for unionization of public employees more compelling. It would be a twisted irony, indeed, for this anti-employee decision to turn out to be a pro-labor harbinger. Almost lost in the blizzard of words about the case are two other ironic circumstances. First, there is, as noted above, Chief Justice Roberts' atextual and ahistorical opinion carving out a judicial exception to the Equal Protection Clause where none exists in either the text or context of the Clause. Second, there is the regrettable irony that a case exemplifying the plainest and most elementary form of discrimination - i.e., differentiating between similarly situated employees - is regarded by
a majority of Justices as falling outside the judicial construct of "discrimination." In summary, this decision appears to be a continuation of the approach taken by a majority of the Roberts Court to protect and enhance employer prerogatives, even in the face of a plainly applicable Constitutional prohibition.


The Court decided that "Section 1981" encompasses claims of retaliation against a person who complained about a violation of another person's contract-related right.

Hedrick G. Humphries, a black former assistant manager of a Cracker Barrel restaurant, sued the restaurant's owner, CBOCS West, Inc., claiming that it had discharged him because of racial bias and because he had complained to managers that a fellow assistant manager had fired Venus Green, another black employee, for race-based reasons. The suit alleged claims under Title VII and Rev. Stat. 1977, 42 U.S.C. 1981(a), commonly known as Section 1981 or just 1981.

The district court dismissed the Title VII claims on a procedural ground and granted CB's motion for summary judgment on the two 1981 claims. The Seventh Circuit upheld the grant of summary judgment on the 1981 race discrimination claim, but remanded the 1981 retaliation claim, rejecting CB's argument that 1981 does not encompass a claim of retaliation. The Supreme Court granted certiorari on the retaliation question.

The Court affirmed in a 7 to 2 decision. Justice Breyer's opinion for the Court concluding that 1981 encompasses retaliation claims is based in significant part on principles of stare decisis. The Court first explains that in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), it construed 42 U.S.C. 1982, a sister statute safeguarding equal property ownership rights, to permit a victim of retaliation to sue. Noting that the Court later made clear in Jackson v. Birmingham Bd. of Education, 544 U.S. 167 (2005), that Sullivan stands for the proposition that 1982 encompasses retaliation claims, Justice Breyer stresses that the sister statute has long been construed similarly because of their common language, origin and purpose. In light of these precedents, therefore, the Court does not find it surprising that the lower courts had concluded that 1981, as it stood at the time of Sullivan, encompassed retaliation.

Looking to the post-Sullivan amended text of 1981, Justice Breyer recites the familiar history of the Civil Rights Act of 1991, which was designed to overrule a number of Supreme Court decisions in the late 1980's. Justice Breyer focuses particularly on the new text protecting the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." That language, according to the legislative history cited by the majority, specifically protects the right to sue for "retaliatory conduct." H. R. Rep. No. 102-40, pt. 1, p. 93, n. 92, quoted at Slip Op., p. 7. Again, the lower courts responded by uniformly construing 1981 to include retaliation claims. Accordingly, the Court concludes that the view that 1981 prohibits retaliation is "well embedded" in the law, that considerations of stare decisis strongly support the Court's adherence to that view, and that those seeking a different interpretation (which would unsettle many precedents) bear a "considerable burden" of persuasion.

The Court then rejects CB's attempt to meet the burden of overcoming considerations of stare decisis. As to the text of 1981, the Court agrees that the language does not expressly cover retaliation, but that fact alone is not, in the majority's view, "sufficient to carry the day." Noting that this linguistic argument was apparent when Sullivan was decided, the Court opines that it is "too late in the day" to overturn Sullivan on a
ground that was known to the Court at that time. The Court also rejects CB's argument that by failing to include retaliation explicitly in the 1991 amendment, Congress intended that retaliation claims not be covered. The majority finds it far more plausible, in light of both Sullivan and the amended language confirming 1981's broader coverage, that there was no need to include the word "retaliation" in the statute. The Court likewise finds unavailing CB's argument that allowing retaliation claims under 1981 would permit plaintiffs to circumvent Title VII's mechanisms and undermine their effectiveness. Justice Breyer points to the necessary overlap between the two statutes which the courts have regarded as reflective of Congressional design, since Title VII was intended to supplement, not supplant, existing law.

Finally, the Court rejects CB's reliance on two recent decisions, noting first that the status/conduct distinction drawn in Burlington Northern Santa Fe Ry. v. White, 548 U.S. 53 (2007), was used only to explain why Congress might have wanted Title VII's explicit anti-retaliation provision to sweep more broadly (i.e., outside the workplace.) BNSF did not, however, suggest that status and conduct discrimination must be treated separately for all purposes. The Court likewise declines CB's invitation to reexamine Sullivan because the Court's current approach to statutory interpretation emphasizes text moreso than when Sullivan was decided. The majority expressly rejects reexamination of well-established prior law, even if one assumes that a change in interpretive approach has taken place. As the Court explains its application of stare decisis:

"Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends." Slip op., p. 14.

Justice Thomas, joined by Justice Scalia, dissented on the basis that the right of action implied under 1981 does not encompass claims of retaliation and that the Court's decision has no basis in the text and is not justified by principles of stare decisis. Justice Thomas asserts that discrimination is all that 1981 regulates (even though that term is not part of the text) and that retaliation is not a form of discrimination, despite the fact that reprisal is an intentional form of differentiating (i.e., discriminating) amongst people. Characterizing the majority's opinion to the contrary as "nonsense," Justice Thomas grounds his reasoning on the status/conduct distinction that he says the Court adopted in prior decisions. Finally, Justice Thomas, accusing the majority of "retreat[ing] behind the figleaf of ersatz stare decisis," concludes that none of the prior decisions of the Court or the lower courts warrants deference on what the dissent characterizes as a question of first impression.

The Court overlooked or, to be more charitable, chose not to employ a simple textual argument that would have bolstered its rationale and more squarely confronted Justice Thomas' purported reliance on the language of 1981. The text says that all persons shall have the "same right . . . to make and enforce contracts" as white persons. The phrase "same right" is unqualified - that is, the rights of both blacks and whites to make and enforce contracts are required to be identical. If the right to make and enforce contracts were limited only to status discrimination, it would not be the "same" in scope or effect as the rights then enjoyed by white citizens at the time of enactment. The right enjoyed by whites when the statute was passed was for the making and enforcement of their contracts to be free from "impairment" - whether impairment takes the form of class-based discrimination or conduct-based reprisal. Congress used neither "discrimination" nor "retaliation" to circumscribe the right it was conferring on all persons. Thus, to achieve the "same right" against impairment that white citizens enjoyed at the time of enactment, the right to make or enforce an employment contract must be safeguarded from reprisal against those seeking to vindicate it. Put conversely, if an employer can freely retaliate against one who is seeking to protect the right to enforce a contract in the workplace, then the target of the reprisal is assuredly not enjoying the "same
right" within the literal textual meaning of 1981. This argument (which would have dovetailed nicely with
the argument made by the United States on behalf of Humphries) is particularly resonant in view of the fact
that 1981 itself does not, as noted above, contain either the word "discrimination" or "retaliation."
Moreover, this view of the statute fits well with the majority's reasoning that the 1991 amendment (having to
do with the "enjoyment" of the benefits of the contractual relationship) confirms that 1981 covers retaliation
as well as discrimination.

Unsurprising though the Court's decision may be to some, it is nonetheless a welcome new
component in shaping the jurisprudence of employment discrimination. Making retaliation actionable under
Section 1981 insures more certain and thorough enforcement of the statute's underlying prohibition of
class-based discrimination. To some extent, this case is a breakthough decision indicating that a majority
can be put together to define discrimination in a way that promises best to eradicate it, as Congress clearly
intended. Nonetheless, as previously suggested, the Court's failure to rule squarely that retaliation is itself a
species of discrimination (i.e., retaliation intentionally differentiates in adverse fashion amongst similarly
situated individuals) leaves the jurisprudence of employment discrimination short of being fully coherent,
logical, stable and, ultimately, effective.

Notably, the outcome in this case finding retaliation actionable inexplicably differs from the outcome
in Engquist v. Oregon Dep't of Agriculture, supra, p. 2, where the target of workplace reprisal lost a
constitutional claim that she had been the victim of discriminatory treatment under the Equal Protection
Clause of the Fourteenth Amendment. Recognizing Section 1981 discrimination against Hedrick
Humphries, an individual target of reprisal regardless of his membership in a protected class, is
tantamount to recognizing discrimination against a class of one - the very position rejected by the Engquist
majority. To be sure, the Engquist majority was applying the Constitution and not a statute, but that should
not necessarily have made a dispositive difference in outcome. Indeed, a major component of the Engquist
majority's rationale for rejecting the class-of-one theory was that to do so would erode the at-will doctrine.
The same could easily be said with a straight face in this case; yet, the Court here ignored that concern in
holding that retaliation is a form of prohibited conduct under Section 1981 in private employment.
Theoretically at least, the most straightforward way to harmonize these inconsistent results is for the Court
to rethink its constitutional decision in Engquist. Because that prospect is so unlikely in the near term, this
anomaly is likely to endure as evidence of incoherence in the Court's employment discrimination
jurisprudence.


The Court decided that section 633a(a) of the ADEA prohibits retaliation against a federal
employee who complains of age discrimination.

Myrna Gomez-Perez, a 45 year old window distribution clerk at the Dorado, P.R. post office,
requested a transfer in October of 2002 to a post office in Moca, P.R., nearer to her ill mother. Following
approval of the transfer, Gomez-Perez worked in a part-time position in Moca for less than a month before
requesting a transfer back to her old job. Her request was denied because her supervisor had converted the
Dorado position to part-time and filled it with another employee. Gomez-Perez then filed a union grievance and a
Postal Service age discrimination complaint, after which her supervisor leveled groundless complaints at her,
falsey accused her of sexual harassment and reduced her hours. Her co-workers also, allegedly, told her to
go back to where she belonged. Gomez-Perez then filed suit claiming, among other things, that the Postal
Service had violated section 633a(a) of the Age Discrimination in Employment Act ("ADEA") by retaliating
against her for filing the discrimination complaint.

The district court granted summary judgment for the employer on the ground that the United States had not waived its sovereign immunity for ADEA retaliation claims. The First Circuit held that the Postal Reorganization Act had waived the Postal Service's immunity, but that section 633a(a) does not cover retaliation. The Supreme Court granted certiorari in view of a circuit conflict on the statutory coverage question.

The Court ruled in a 6 to 3 decision that the federal sector ADEA provision requiring that all personnel actions "shall be made free from any discrimination based on age" includes retaliation based on the filing of an age discrimination complaint. Justice Alito's opinion for the Court expressly follows the reasoning of Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (Retaliation claim could be brought under 42 U.S.C. 1982) and Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (Retaliation claim recognized under Title IX's antidiscrimination prohibition.) The federal sector ADEA provision, like the statutes involved in Sullivan and Jackson, all contain the same language providing remedies aimed at prohibiting discrimination, and in all three situations the context in which the language is used reveals that the statutory prohibition targeting discrimination encompasses retaliation as a differential response to a person who complains about discrimination.

Justice Alito's opinion finds the Postal Service's attempt to distinguish Jackson unpersuasive. First, the implied right of action for discrimination under Title IX did not, in the majority's view, give the Court greater leeway to imply a retaliation claim there. Indeed, the majority points out that it would be odd to interpret the express right of action under the ADEA more narrowly than an implied right of action under Title IX. Second, the Court rejected the argument that retaliation claims play a more important role under Title IX than under the ADEA. The language in Jackson about the importance of retaliation claims for teachers and coaches as advocates for their students simply addressed an argument that such claims should be limited to victims of discrimination. Those statements did not address whether discrimination encompasses retaliation. Third, the majority finds unavailing the distinction that the ADEA federal sector provisions were adopted in a context unlike Title IX. Justice Alito reviews the history of both provisions and concludes that in both cases Congress was thoroughly familiar with Sullivan and that it expected both statutes to be interpreted consistently with Sullivan's construction of Section 1982. Even more to the point, if Congress had Sullivan in mind in 1972 when it enacted Title IX, it is realistic to presume that it had both Sullivan and Title IX in mind just two years later when it enacted the federal sector provisions of the ADEA.

The majority finds no merit in the employer's argument that the absence in the federal sector provision of an express prohibition of retaliation, like that found in the private sector part of the ADEA, raises a strong presumption that the omission was intentional. Because the two provisions were neither considered nor enacted together, no such negative implication is raised by the difference in the provisions. Moreover, Justice Alito points out that the federal sector ADEA text is patterned on Title VII's federal sector language which itself does not incorporate Title VII's anti-retaliation provision. Where Congress decided not to pattern the federal sector portion of the ADEA after its private sector regime, the absence of an express prohibition on retaliation is of no moment. The Court sees even less merit in the employer's argument that recognizing retaliation would contravene section 633a(f). That argument, according to Justice Alito, is unsound because the Court's holding is based squarely on a section of the ADEA that is expressly excepted from coverage under section 633a(f). The Court next rejects the employer's argument that retaliation in the federal government can be addressed only through the Civil Service Commissions prohibitions on reprisals. Finding no direct evidence of such an intent, the Court declines to embrace the speculative notion that Congress expected the Civil Service Commission to fill the regulatory gap on retaliation. Finally, Justice
Alito concludes that sovereign immunity does not constrain the Court here, as section 633a(c) unequivocally waives such immunity for a claim brought by any person aggrieved to remedy a violation of section 633a(a). Accordingly, the Court reverses the judgment of the First Circuit and remands the case for further proceedings.

Chief Justice Roberts, joined by Justices Scalia and Thomas as to all but one part, dissented. In their view, while protection against discrimination may sometimes include protection against retaliation, it does not in this case because of the separate treatment of private sector retaliation under the ADEA and because Congress has always protected federal employees from reprisal under the Civil Service and thus did not intend for those employees to have a separate judicial remedy under the ADEA.

Justice Thomas, joined by Justice Scalia, filed a separate dissenting opinion joining all but the part of the Chief Justice's dissent dealing with whether discrimination includes retaliation. Justice Thomas' opinion expresses the view that discrimination and retaliation are separate concepts and that section 633a(a) provides no basis for implying a right of action for the latter.

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This decision brings symmetry in the prevention and redress of age discrimination to the private and federal workplaces. While employee advocates undoubtedly applaud the result, the decision draws attention to the undeniable anomaly that Congress provided an express remedy for retaliation against private employees, but did not do so in similar terms for federal employees. Putting that circumstance together with Chief Justice Roberts' view that Congress provides general protection against reprisal for federal employees through the Civil Service regime, there is surface appeal for the notion that the Court got it wrong here. On reflection, however, the more thoughtful and compelling view - and one that is more faithful to the meaning of "discrimination" as Congress used it - is that retaliation is a species of disparate treatment and is thus "discrimination" in the literal sense. Yet another textual argument favoring the employee in this case is that the disparate treatment that Gomez-Perez suffered was literally not "free from any discrimination based on age" in the sense that the Postal Service would not have treated Gomez-Perez in disparate fashion absent the age discrimination she had complained about. More focus by the majority on these textual arguments might have confronted with greater persuasive force the seductive structural argument advanced by the Chief Justice.

Except for the majority's failure to draw a bit more directly on the text of the ADEA, Justice Alito's opinion is a model of intricate persuasion. His opinion more than adequately defuses on non-textual grounds the dissenters' arguments, including the Chief Justice's reliance on Civil Service protection. Justice Stevens' assignment of the opinion to Justice Alito was thus a masterful move resulting in a powerful voice for the Court in what many thought would be a close case. Before concluding, however, that Justice Alito has abandoned the pool of Justices seeking to deregulate the private employment relationship, consider that this case deals only with federal employment where the free market has a lesser role to play. Consider also that Justice Alito has spent much of his professional life as a federal employee and undoubtedly has some personal appreciation for the particular difficulties faced by whistleblowers in government service. One should not, therefore, expect the same sympathetic vigor from him on behalf of employees in the private sector where, according to the deregulation Justices, the at-will doctrine needs protection and unfettered employer prerogatives are a necessity for businesses in competitive global markets for labor, goods and services. Nonetheless, credit is due to Justice Alito in this case for a thoughtful and detailed refutation of the difficult arguments advanced by the dissenters with whom he has ordinarily allied.

The Court decided that testimony about age discrimination by supervisors who played no role in the adverse employment action challenged by plaintiff is neither per se admissible nor per se inadmissible under the Federal Rules of Evidence.

Sprint/United Management Company ("Sprint") terminated Ellen Mendelsohn's employment in its Business Development Strategy Group as part of a company-wide reduction in force in 2002. Mendelsohn, a thirteen year employee, sued Sprint under the Age Discrimination in Employment Act and sought to introduce so-called "me too" evidence consisting of testimony from five former Sprint employees who claimed that their supervisors had discriminated against them because of their age. Three witnesses claimed that they heard supervisors or managers make remarks denigrating older workers. One of these witnesses, asserting that Sprint's intern program was a mechanism for age discrimination, would say that she had seen a spreadsheet suggesting that supervisors had considered age in making layoff decisions. Another witness would testify about receiving a negative evaluation, observing harassment because of age and being banned from working at Sprint because of his age. The fifth witness would testify that Sprint required him to get permission before hiring anyone over 40, that he had been replaced by a younger employee and that Sprint had rejected his subsequent employment applications.

None of the five witnesses offered by Mendelsohn worked in her group, nor had any of them worked under supervisors in her chain of command. Also, none of the witnesses reported hearing any of the discriminatory remarks alleged to have been made by Mendelsohn's direct supervisor, direct manager (the decisionmaker in Mendelsohn's termination) and group head. On these facts Sprint moved in limine to exclude the proffered testimony because it was not relevant under Rules 401 and 402 and any probative value it had was substantially outweighed by the danger of unfair prejudice, confusion of issues, jury misleading and undue delay.

The district court granted Sprint's motion in a minute order, excluding evidence from witnesses who were not "similarly situated" to Mendelsohn. At trial, however, the district judge orally explained that the minute order would not bar testimony about whether the reduction in force was a pretext for age discrimination. The Tenth Circuit, treating the minute order as a per se exclusion of evidence from witnesses with other supervisors, concluded that the district court had abused its discretion. The panel then determined that the proffered evidence was relevant and not unduly prejudicial, and it reversed and remanded for a new trial. The Supreme Court granted certiorari.

The Court reversed the Tenth Circuit, holding in a unanimous opinion by Justice Thomas that the Tenth Circuit erred in concluding that the district court had applied a per se rule excluding the "me too" evidence and that the case should have been remanded to the district court for clarification of the minute order. Justice Thomas stressed that the Court of Appeals did not afford the district court a sufficient degree of deference demanded by the trial court's familiarity with the case and its greater experience in evidentiary matters. Finding no basis in the district court's minute order that it was applying a per se rule of exclusion of "me too" evidence, Justice Thomas concludes that an appellate court should not presume that a trial judge intended an incorrect legal result when the judge's order is equally susceptible of a correct reading, particularly when the appellate standard of review is deferential.

The Court also concluded that "questions of relevance and prejudice are for the District Court to
determine in the first place” and that the Tenth Circuit further erred in determining those questions on its own. The opinion stresses that a district court "is virtually always" in a better position to assess the admissibility of evidence in the context of the case before it. Noting, however, relevance and prejudice are determined in particular factual contexts and are "generally not amenable to broad per se rules," Justice Thomas notes that had the district court applied a per se rule excluding the "me too" evidence, that would have been a reversible abuse of discretion. In this case, however, the Court found "no basis in the record" for concluding that the district court had applied a blanket rule.

The Court's opinion concludes with the notion that the relevance of "me too" evidence is "fact based" and depends on many factors, including "how closely related the evidence is to the plaintiff's circumstances and theory of the case." Likewise, the Court opines that prejudice also requires a "fact-intensive, context-specific inquiry." Accordingly, the Court posits that Rules 401 and 403 of the Federal Rules of Evidence do not make such evidence per se admissible or per se inadmissible and that the inquiry required by these rules is "within the province" of the trial court in the first instance. On this basis, the Court vacated the Tenth Circuit's judgment and remanded the case with instructions to have the district court clarify the basis for its evidentiary ruling under the applicable rules of evidence.

* * * *

Viewed solely from the standpoint of Supreme Court practice, this case is one that did not have to be decided, as explained more fully below. But, having granted the writ, the Court's opinion provides timely and useful guidance to trial and appellate judges, as well as to employment litigators faced with the everyday problems of how to regard evidence from co-workers and others who claim to have knowledge of discrimination in the workplace.

The Court simply could have vacated the Tenth Circuit's judgment or even dismissed the writ of certiorari as improvidently granted when it became apparent that the district court's order needed clarification. Instead, the Court used this case as a vehicle for framing in explicit terms how evidentiary decisions in employment discrimination cases are to be determined by the trial courts and reviewed by the appellate courts. On the appellate review part of the frame, Justice Thomas' opinion admonishes the courts of appeals to accord a considerable degree of deference to the trial courts on evidentiary matters. In this case, that deference required that the Tenth Circuit not construe the district court's minute order as one that excluded "me too" evidence on a per se basis.

As noted above, the Court's ruling on how the district court's order should have been reviewed might have sufficed for simply vacating the Tenth Circuit's judgment and remanding to the district court for clarification. Again, however, the Court went beyond the necessary and instructed the trial courts that "me too" evidence in an age discrimination case is neither per se admissible nor per se inadmissible. Although there is little to quarrel with on the merits of this dictum, its consequences should not be understated. Noting that the assessment of relevance and prejudice are fact-bound and context-specific, the Court's opinion makes it more likely that age discrimination cases with "me too" evidence will survive summary judgment motions. Trial judges will also be burdened with acquiring a greater understanding of the nuances of the workplace in order to make the context-specific determinations envisioned by Justice Thomas' opinion. And, the prospect of more expensive and time-consuming discovery in order to depose additional witnesses from both sides looms over all parties in these disputes. Perhaps the silver lining here is that the parties will have a heightened incentive to resolve their differences privately or in court-annexed mediation.

While this case involved age discrimination in employment, its enduring significance also lies in
application of its rationale across the board to "me too" evidence in other contexts. For employment lawyers, the takeaway from this case is that the attempt to carve "me too" evidence out of all employment discrimination cases has failed. Exclusion of this type of evidence will have to be determined on a case-by-case basis, with all the attendant expense and uncertainty of such an approach. Although district court judges may regard this decision with some trepidation, the Court has wisely put the burden of insuring a fair trial exactly where it belongs.


The Court decided that an employer defending a disparate impact claim under the ADEA bears the burdens of production and persuasion on the issue (which the Court holds is an affirmative defense) of whether an employer's action is based on "reasonable factors other than age."

Clifford Meacham and 27 other laid off employees of Knolls Atomic Power Laboratory ("Knolls") sued Knolls under the ADEA and state law, alleging both disparate treatment and disparate impact claims under the ADEA and state law. Knolls operates a federal government atomic laboratory, funded jointly by the U.S. Navy and the Department of Energy, to design prototype naval nuclear reactors and train Navy personnel to operate them as part of the nation's maintenance of its fleet of nuclear-powered warships. As the demand for naval nuclear reactors changed with the end of the Cold War, Knolls was ordered to reduce its workforce. Following reductions through voluntary buyouts, Knolls still had about 30 jobs to cut. It did so by relying in part on its managers' assessment of the remaining employees' performance, flexibility and critical skills. Scores on those three factors were added to points for years of service, and the totals determined who would be laid off. As a result of this process, 30 of the 31 employees selected for layoff were at least 40 years old. To support their disparate impact claim, the employees relied on a statistical expert's conclusion that results so skewed according to age could rarely occur by chance. Also, the expert concluded that the firmest statistical ties to layoff were scores over which the managers had the most discretion, namely flexibility and criticality.

A jury ruled for the employer on the disparate treatment claim, but found for the employees on the disparate impact claim. The Second Circuit affirmed, and after Knolls sought certiorari, the Supreme Court vacated the judgment and remanded for further proceedings in light of Smith v. City of Jackson, 544 U.S. 228 (2005), which was decided while Knolls' petition for certiorari was pending. On remand a panel of the Second Circuit ruled in Knolls' favor, holding that Meacham had not carried the burden of persuasion on the issue of whether the layoffs were based on a reasonable factor other than age. The Supreme Court again granted certiorari, this time based on a circuit split over who bears the burden of proof on the ADEA's provision in 29 U.S.C. 623(f) exempting from ADEA liability an employer's action "where the differentiation is based on reasonable factors other than age," the so-called RFOA provision.

The Court again vacated the Second Circuit's judgment in an opinion by Justice Souter, with Justice Breyer taking no part in the consideration or decision of the case. The Court held that an employer facing a disparate impact claim under the ADEA and defending on the basis of a reasonable factor other than age "must not only produce evidence raising the defense, but also persuade the factfinder of its merit." 171 L. Ed. 2d at 288. Justice Souter's opinion first reads the text of the RFOA as an affirmative defense, like its companion bona fide occupational qualification (BFOQ) provision. Absent any hint in the text to the contrary, the Court concludes that the language and structure of the statute is convincing evidence of Congress' intent to treat the RFOA as an affirmative defense as to which the party asserting it has the burden
of persuasion. In a footnote Justice Souter expressly declines to rely on EEOC regulations that he concludes do not clearly answer the question in this case. The Court also finds persuasive an amendment to a companion subsection by which Congress made clear that the text of section 623(f)(2) is to be read as an affirmative defense.

Justice Souter's opinion declines to embrace Knolls' argument that the RFOA simply elaborates on the definition of liability under section 623(a)(2) by negating the premise "because of age." Explaining that a prior decision had relied on the RFOA as a defense and not as an expression of liability, the Court concludes that the focus of the RFOA in a disparate impact case is on reasonableness as a justification, not on whether a non-age factor is at work. Similarly, the Court rejects the Second Circuit's view that the RFOA should be read like the "business necessity" enquire - i.e., that the burden of persuasion rests on the complaining party. Concluding that references in *Smith v. City of Jackson*, supra, have been read otherwise, Justice Souter regards the Court's prior language about the ADEA in disparate impact situations as not supportive, much less dispositive, of the question in this case. Finally, the Court finds the parade of horribles argument about "strike suit" litigation to be blunted by the burden on ADEA plaintiffs in disparate impact cases to isolate and identify the specific unlawful practice. And, the opinion suggests that employers should take comfort from the fact that the employer's burden will be light where the contested factor is reasonable and that their burden will only be significant where the reasonableness of the non-age factor is obscure. To the extent that the Court's decision affects how employers do business, it is up to Congress to alter the balance it set by writing the RFOA exemption in the "orthodox format of an affirmative defense." 171 L. Ed. 2d at 297. Hence, the Court remanded the case to the Second Circuit for a decision based on the proper placement of the burden of persuasion as to the reasonableness of the criteria used by Knolls.

Justice Scalia declined to join the Court's opinion, but concurred in its judgment. In his view the Court should simply have deferred to the EEOC's "unquestionably reasonable" position on the proper application of the RFOA. The Solicitor General's brief on behalf of the EEOC urges that the RFOA is an affirmative defense on which the employer bears the burden of persuasion and that in ADEA disparate impact cases the RFOA replaces the "business necessity" test on which plaintiffs have the burden of persuasion. Justice Scalia embraces those views as a matter of judicial deference to the agency charged with administering the ADEA.

Justice Thomas joined only a portion of the Court's opinion, but concurred in part in its judgment. In his view disparate impact claims are not cognizable under the ADEA and the RFOA is not principally relevant in disparate impact cases. Accordingly, he joined only those portions of the Court's opinion holding that the RFOA is an affirmative defense (when it arises in a disparate treatment case.) Because the claims here are disparate impact claims, therefore, Justice Thomas would affirm, even though the Second Circuit erred in placing the burden of proof on Meacham and his colleagues.

* * * * *

Litigating disparate impact age discrimination cases has always been a hazardous enterprise for plaintiffs and an expensive proposition for employers. One persistent uncertainty in disparate impact litigation has been the role of the RFOA statutory exception: Is it an affirmative defense on which the party asserting it has the burden of persuasion or is it an element of the claim as to which the plaintiff has that burden? The Court has regarded this question as a cert-worthy one for many years. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 at 408, n. 10 (1985) (Finding the question worthy of review, but not well posed in the case.) So, the decision here is a welcome interpretation of the ADEA that clarifies once and for all that the RFOA is indeed an affirmative defense and that employers have the burden of persuasion when
they rely on it.

The practical consequences of this decision, while not unexpected, are nevertheless significant for all litigants, but particularly for employers. Summary judgment for employers, already a difficult proposition after Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000), may become more elusive because trial judges will likely be wary of taking a reasonableness determination away from the jury. Discovery is likely to be more extensive, and thus more expensive, because prudent plaintiffs' counsel will be trying to negate the jury argument that a factor is "reasonable" by looking into its genesis, application and consequences. And, ultimately, the prospect of a lay jury determining whether the employer was acting on the basis of a "reasonable" factor should become an incentive for employers to resolve these disputes through mediation or some other alternative means. But these predictions are speculative, for it is unclear what impact (no pun intended) the Court's decision will have on age discrimination cases where the employer is relying on a facially neutral factor with discriminatory consequences.

Chief Justice Roberts' assignment of the Court's opinion to Justice Souter yielded a typically thorough, but somewhat stilted, interpretation of the statute. Perhaps the parsing of the RFOA and the detailed refutation of the employer's arguments are useful in nailing down a lasting interpretation of the RFOA. Yet, Justice Scalia's straightforward concurrence based on deference to the views of the EEOC (as expressed in the Solicitor General's brief) has the allure of simplicity, if not the promise of stability. So long as the EEOC takes a reasonable position on how the ADEA should be construed, Justice Scalia is, so he says, obliged to defer to the role Congress assigned to it. That is a helpful rationale for this case, but whether that convenient technique for deciding this kind of issue survives political change at the EEOC remains to be seen. In any event, not only was Justice Scalia by himself on the deference rationale, but Justice Thomas, who headed the EEOC before becoming a judge, concluded that the Second Circuit's judgment should be affirmed because of his outlier view that disparate impact claims are not even cognizable under the ADEA.


The Court decided that an EEOC intake questionnaire, supplemented by a charging party's affidavit requesting the agency to take action on her behalf, constitutes a charge of discrimination under the ADEA.

Paul Holowecki and thirteen other current and former employees of Federal Express Corporation ("FedEx") who were over the age of 40 sued FedEx claiming that two of its productivity programs discriminated against them in violation of the ADEA. The suit alleged that the two programs were a veiled attempt to force older workers out of employment before they would be entitled to receive retirement benefits. FedEx moved to dismiss the claims of one of the plaintiffs, Patricia Kennedy, on the ground that she had not filed her charge with the EEOC at least 60 days before filing suit, as required by 29 U.S.C. 626(d). Kennedy responded by claiming that she had filed a valid charge by submitting EEOC Form 283 ("Intake Questionnaire") to the agency within the required time period. Kennedy had attached to the form a signed affidavit alleging the discriminatory practices in greater detail.

The district court granted the motion to dismiss, determining that the documents Kennedy filed did not constitute a charge under the statute. The Second Circuit reversed, and the Supreme Court granted certiorari to consider whether Kennedy's filing was a charge.
The Court affirmed the Second Circuit's judgment in a 7 to 2 decision. Justice Kennedy's opinion for the majority concludes first, that a filing is deemed to be a charge under the ADEA if it can be reasonably construed to request agency action and appropriate relief on the filer's behalf. Second, the Court concludes that Kennedy's filing of the Intake Questionnaire and affidavit met that requirement.

The Court's opinion begins by admonishing the employment bar that, because the ADEA is distinct from Title VII and other statutes enforced by the EEOC, lawyers and litigants "must be careful not to apply rules applicable to one statute to a different statute without careful and critical examination. . . even if the EEOC forms and the same definition of a charge apply in more than one type of discrimination case." 170 L. Ed. 2d at 17.

Focusing first on the issue of what constitutes a "charge" and observing that the ADEA does not define the term, the Court concludes that the EEOC's procedural regulations "fall short" of a comprehensive definition of the same. In this case the Government took the position that while the EEOC's regulations do not state all the elements of a charge, an intake questionnaire can constitute a charge if it expresses the filer's intent to activate the EEOC's processes. Justice Kennedy's opinion defers to the agency's interpretation of its regulations as not comprehensively defining the elements of a charge because that position is not plainly erroneous or inconsistent with the regulations. Likewise, the majority, finding the regulations silent on the precise elements of a charge, accorded a deferential "measure of respect" to the EEOC's policy statements in its compliance manual and internal directives about what suffices as a charge. Excusing as unavoidable some uneven implementation of its position that a charge is filed when the filer requests agency action, the Court found that the EEOC's position had been binding on its staff for at least five years and that it was not framed for the specific purpose of aiding a party in this case. After finding no alternatives to the EEOC's "request-to-act" position within the Court's authority or expertise, therefore, the Court defers to the EEOC's position by concluding as follows:

"In addition to the information required by the regulations, i.e., an allegation and the name of the charging party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." 170 L. Ed. 2d at 22.

The Court stresses that the filing is to be regarded from the standpoint of an objective observer and is not one that requires a subjective determination as to the filer's state of mind. Acknowledging that the standard it approves is a "permissive" one and that the EEOC could adopt a different standard requiring a more explicit request from charging parties, Justice Kennedy notes that tightening the definition of a charge is a matter for the EEOC to decided "in light of its experience and expertise in protecting the rights of those who are covered" by the ADEA. Id. at 23. Lastly, the majority rejects FedEx's argument that the EEOC's failure to notify the employer and initiate conciliation precludes regarding the filing as a charge. Not only did the EEOC similarly reject this argument, but Justice Kennedy finds FedEx's reliance on the text of the ADEA "artificial" and its attempt to make the definition of a charge dependent on agency action over which the parties have no control illogical and impractical.

On the second issue - whether the filing in this case meets the standard approved by the Court - Justice Kennedy opines that the EEOC "says it does, and we agree." Id. at 24. Finding that the Form 283 was supplemented with a six page affidavit asking the EEOC to "please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment," the majority concluded that this filing is properly construed as a request to act. And, in
combination with the charging party's waiver of anonymity by checking a box on the Form 283 giving consent for the EEOC to disclose her identity to the employer, the Court regarded the entire filing as being within the definition of a charge adopted by the Court in this case.

The majority opinion ends with a section emphasizing that the EEOC's failure to treat the filing as a charge deprived both sides of the benefits of the ADEA's informal dispute resolution process and, in particular, gave "short shrift" to FedEx's interests by failing to notify it of the charging party's complaint until she filed suit. Accordingly, Justice Kennedy stresses that the district court can stay the proceedings to allow an opportunity for conciliation and settlement, even though his opinion notes that the dispute may now be in a "more rigid cast" than if conciliation had been attempted at the outset. Taking note of this "unfortunate" result, the majority urges the EEOC to determine what additional revisions to its forms and processes are necessary or appropriate.

Justice Thomas, joined by Justice Scalia, filed a dissenting opinion. The dissent characterizes the majority's opinion as one that decides that a charge is whatever the EEOC says it is. While Justice Thomas expresses disagreement with some of the majority's language, he agrees with the EEOC's position - as did the majority - that a charge means a writing that objectively indicates an intent to initiate the EEOC's enforcement process. The dissent gets to that position, however, by relying on a dictionary definition of the term "charge," as well as the ordinary and common understanding of that term in administrative and employment discrimination law. On the issue of whether the filing in this case meets the definition, Justice Thomas concludes that it does not because there is no objective indication that the employee intended to initiate the EEOC's processes. The failure to request a particular form of remedial action - in contrast to what Justice Thomas says is a mere request for help - is fatal to the filing as a charge. And, checking the box that waives the filer's anonymity is not, according to the dissent, a basis for broadening the form's narrow purpose. Contrasting the intake questionnaire with the EEOC's Form 5 ("Charge of Discrimination"), Justice Thomas finds that the form "chosen by the complainant" is strong evidence of her intent not to commence an EEOC enforcement process. Finally, the dissent points to the EEOC's failure in this case to treat this filing as a charge as an objective indication of an intent to invoke the agency's enforcement processes. Accordingly, the dissent notes the far reaching implications of this decision, namely that its failure to apply a clear and sensible rule for determining whether a filing is a charge renders its ruling of little use to complainants, employers or the EEOC itself.

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Justice Kennedy's majority opinion bears the most careful reading by the employment bar, as the Court speaks directly and explicitly to employment discrimination lawyers about how to construe and apply the various employment discrimination statutes. The lesson here is to regard each statute on its own terms, despite the fact that the EEOC may not adequately distinguish in its forms amongst the various laws it administers. Following this admonishment, the Court, in an ironic turnabout, simply defers to the EEOC's position (expressed in agency policy statements in its Compliance Manual and internal directives) that a valid charge is essentially any request that can be reasonably construed to request the agency to protect the employee's rights.

Approval of this admittedly permissive standard for determining the validity of a charge will put the burden of securing a more precise and predictable charge definition on Congress and the agency itself. A contrary decision by the Court in this case would have risked excluding unrepresented and untutored employees from the EEOC's coverage and the statute's protections. It is difficult to see real harm in the
Court's approach, except in one notable respect. That is, the failure of prompt notice to an employer of a filing that meets the definition of a charge arguably deprives the employer of the best opportunity to defend the charge and impairs the ability of all parties to conciliate their differences with the aid of the Commission. Ultimately, however, whether the EEOC processes the charge makes little difference, if any, when the charging party files suit, for at that point the employer is put on due process notice of claims against it through the pleadings. Nonetheless, the failure of early notice did not escape the Court's attention: In addition to his remarks to the bar at the outset of his opinion, Justice Kennedy took the unusual step of speaking directly to the EEOC near the end of the opinion. He urged the agency to determine what revisions to its forms are necessary or appropriate to avoid the "unfortunate" result of this case (where the EEOC failed to give timely notice to the employer, and the parties had no opportunity to conciliate.) The majority also suggested to trial judges that they can stay court proceedings to permit an opportunity for conciliation and negotiation. This "plug" for alternative dispute resolution undoubtedly reflects not only the success of the EEOC's mediation program, but also the efficient and welcome results achieved in court-annexed alternative dispute resolution in the federal courts.

This decision portrays yet again the central role of the EEOC in how the federal employment discrimination laws are enforced and underscores the significance of who determines the Commission's policies. The Court's deference to the EEOC's internal policy directives and Compliance Manual in the face of agency regulations that did not resolve the statutory question was remarkable. When contrasted with the Court's refusal to accord deference to the EEOC's regulation defining age discrimination in the next case and its respectful regard for, but rejection of deference to, the Compliance Manual in that case, one is left with the impression that deference to this agency is less a principled technique of statutory interpretation than it is a convenience to be used or disregarded on the way to a result. (That impression is fortified by Justice Scalia's vote not to defer to the EEOC here - as opposed to his vote to defer in the Meacham case, supra.) A less uneven approach to the doctrine of agency deference would add some coherence and predictability to the structure of federal employment regulation.


The Court decided that a state disability retirement plan that makes age a condition of pension eligibility and treats disabled workers differently in light of their pension status does not necessarily discriminate because of age.

Kentucky's special retirement plan for state and county employees in hazardous positions (e.g., law enforcement officers, firefighters, paramedics and correctional officers) makes these employees eligible for "normal retirement" benefits one of two ways: (a) after 20 years of service or (b) after 5 years of service if the employee has attained the age of 55. Either way, the pension benefit for "normal retirement" is calculated as follows: [years of service] x [2.5%] x [final preretirement pay]. For hazardous workers who become disabled, but are not yet eligible for "normal retirement," the Plan permits the employees to retire at once if one has worked for 5 years or becomes disabled in the line of duty. In such case the Plan adds imputed years of service equal to the number of years the employee would have had to continue working in order to become eligible for "normal retirement" benefits (subject to a ceiling equal to the number of years the employee has previously worked.)

Charles Lickteig, a hazardous position worker in a sheriff's department, became eligible for normal retirement at age 55, but continued to work until he became disabled and retired at age 61. Because he
became disabled after normal retirement age, the Plan did not impute any additional years of service to his account. Lickteig filed a charge of discrimination with the EEOC and the Commission then sued Kentucky (and other defendants) under the ADEA claiming that the Plan failed to impute years to Lickteig solely because he became disabled after age 55. The district court granted the defendant's summary judgment motion, and a panel of the Sixth Circuit affirmed. The en banc Sixth Circuit granted rehearing and reversed, holding that the Plan did violate the ADEA. The Supreme Court granted certiorari in light of the potentially serious impact of the Sixth Circuit's decision on pension benefits provided under plans in effect in several states.

The Court, in a 5 to 4 decision, reversed the judgment of the Sixth Circuit and held that the Plan does not discriminate because of age within the meaning of the ADEA. Justice Breyer's opinion for the majority views this case as a variant on the Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), holding that without evidence of intent to discriminate based on age (instead of pension status), the discharge of a 62 year old employee within 6 months of vesting in pension benefits did not violate the ADEA. Recognizing that the Plan here refers explicitly to age, the majority nonetheless concludes on the basis of several considerations that Kentucky's disparate treatment of older disabled employees was not "actually motivated" by age. First, age and pension status are analytically distinct, according to the Court. Second, pension status here is not a proxy for age, as eligibility is not decided on an individualized age-related basis. Instead, age is one factor among many in a complex set of rules applicable to all employees regardless of age. Third, the rationale behind the plan's disparate treatment is to treat disabled employees more favorably, not older employees less favorably. Age is a factor only because the normal retirement rules employ it. Any disparity, therefore, "turns on pension eligibility and nothing more." Slip op., p. 9. Fourth, the Court posited that the Plan could in other circumstances work to the advantage of an older employee, thus confirming that its underlying motive is not age-related. Fifth, the Plan is based on assumptions about pension eligibility, not the stereotypical age-related assumptions that the ADEA was intended to eradicate. Sixth, Kentucky would have difficulty devising a remedy for imputing years to workers over 55 without jeopardizing the financial stability of the Plan. Accordingly, the Court concludes that the Plan does not create differences that are "actually motivated" by age. The majority adopts the following rule for this sort of case: "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." [Italics in original] Id., p. 11.

The majority finds beside the point the EEOC's argument that an ADEA amendment added by the Older Workers Benefit Protection Act ("OWBPA") making clear that age-based discrimination respecting all employee benefits is covered by the ADEA. Justice Breyer does not dispute that the ADEA applies here. His opinion's rationale is that the discrimination is not actually motivated by age. The majority also declines to defer to the EEOC's contrary interpretation of the ADEA in the agency's compliance manual and one of its regulations. Because the regulation does little more than restate the statutory prohibition, it is not entitled to deference. The Compliance Manual's more pertinent and detailed statements are entitled to "respect" but they do not persuade the Court to come to a different conclusion.

Justice Kennedy, joined by Justices Scalia, Ginsburg and Alito, dissented, concluding that where a benefit plan makes age a factor to the detriment of older employees, that violates the ADEA. Criticizing the additional burden the Court puts on plaintiffs to prove actual motivation, the dissenters note that such a requirement finds no support in the ADEA's text. Indeed, the statute, as amended by OWBPA and construed by the EEOC, indicates that age-related differentials in benefits are violations, and Kentucky here did not show that any exemption or affirmative defense protected it. The dissent opines that Hazen Paper
does not support the majority's view because the Court there made clear that no additional proof of motive is required when the employer's policy is discriminatory on its face. Likewise, Justice Kennedy finds beside the point the majority's comment, based on *Hazen Paper*, that age and pension status remain analytically distinct, arguing that pension status was tied solely to years of service in that case, whereas age is an active component in the scheme of the Plan here.

The dissent criticizes the majority's argument that there is no discrimination where age is one of a complex of factors in determining benefits, pointing out that the Court has in other cases rejected such a definition of discrimination. Finally, the dissent finds unpersuasive the majority's characterization of the case as one where the employer had the laudable motive of trying to assist disabled employees. Relying on Kentucky's own submission to the Court, Justice Kennedy points out that the state's motive in giving a "boost" to younger employees is one that plainly contravenes the ADEA. While the dissent expresses appreciation for the notion that the ADEA should not be construed in a way that encourages reducing or even eliminating employee benefits, Kentucky should nonetheless be obliged to conform its commendable public policy to the plain text of the ADEA. Accordingly, the dissent would remand the case for a determination of whether Kentucky can assert a cost-justification defense.

The practical significance of this decision is uncertain at this point. The problem with the Kentucky plan stemmed from its use of age as a factor in its normal retirement benefits, instead of just basing eligibility for and computation of benefits on years of service. It is unclear from the Court's opinion whether Kentucky's plan is anomalous or is typical of state retirement plans and, consequently, whether disability benefits are so explicitly tied to age in a wide range of plans. The Court's decision, nonetheless, puts a serious potential difficulty to rest and avoids the wholesale retooling of disability benefit plans that a contrary ruling might have caused. To this extent, the case may turn out to be an important one in the area of pension plan design.

It is considerably more certain that, from a doctrinal point of view, the rationale offered by the majority for its decision could cause significant havoc in the employment discrimination arena. Part of the Court's definition of what it means to discriminate seems at odds with what it has said in other cases where a particular protected trait is one of several factors determining employee benefits. E.g., *Manhart v. City of Los Angeles*, 435 U.S. 702 (1978) (Explicit use of gender, among other factors, to determine pension benefits violates Title VII); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (Same). If the Court's concept of discrimination here is really one that excludes situations where a protected trait is one of a complex of factors, that would signal a new and convenient way for employers to deny that they have engaged in discrimination, despite relying expressly on a prohibited trait. In this regard, the dissent justifiably expresses a serious concern about a rationale that could materially cabin the reach of the anti-discrimination laws.

Another aspect of the majority's rationale carries a similar prospect for limiting coverage in a way that Congress could hardly have contemplated. The majority's ruling that an age discrimination plaintiff in a multi-factor pension case must adduce sufficient evidence to show that the challenged disparity was "actually motivated" by age is at odds with the statute's simple "because of" language and more particularly with a legion of cases requiring only that age be "a factor" in order to be actionable. Perhaps the explanation is that the "actually motivated" standard, as applied to this unusual pension scheme, is a ticket good for this day and train only. That is, engrafting an actual motivation requirement onto the ADEA's simple causation standard is necessary in pension design cases because of the uncertainty that the disparate
treatment is because of age and not because of other factors, such as years of service. But, do not be surprised if enterprising defense attorneys try to capitalize more generally on the majority's phrasing of the new test for discrimination in this uniquely narrow case. The result is that while the Court resolved one question about a peculiar type of pension plan design, it may have opened the door to other challenges and thus destabilized the law by tinkering with the definition of discrimination.

B. Employee Benefits.

The Court's decisions appeared to favor plan participants in two important cases, but actually left a victimized participant without a clear path to a monetary recovery in one case and all victims but the plaintiff without assurance of relief in the other case. Viewed through a wider lens, the Court's work in the benefits area also left more questions about the law unanswered than resolved or even clarified. On the whole, therefore, the two "wins" for employees should be regarded with a suspicious eye.


The Court decided that a participant in a defined contribution pension plan may sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account.

James LaRue sued his former employer, DeWolff, Boberg & Associates and the retirement savings plan it administered. As permitted by the Plan, LaRue had directed DeWolff to make certain changes to the investments in his account in 2001 and 2002, but DeWolff failed to carry out his instructions. As a consequence, DeWolff's failure depleted LaRue's interest in the Plan by approximately $150,000. Disclaiming any request for damages, LaRue sought "make whole" and other equitable relief under the Employee Retirement Income Security Act ("ERISA").

The district court granted the defendants' motion for judgment on the pleadings, concluding that LaRue was not permitted to seek damages under ERISA section 502(a)(3). The Fourth Circuit affirmed, rejecting LaRue's argument under 502(a)(3) that his request for "make whole" relief was equitable and holding further that LaRue could not rely on ERISA section 502(a)(2) because that provision protects the entire plan and not the rights of individual beneficiaries. The Supreme Court granted certiorari on both the 502(a)(2) and 502(a)(3) issues.

The Court unanimously reversed the judgment of the Fourth Circuit on the ERISA 502(a)(2) issue. Justice Stevens' opinion of the Court begins with the premise that the defendants breached fiduciary obligations under section 409 of ERISA and that the breaches had an adverse impact on the value of plan assets in LaRue's account. The Court notes that the defendants' misconduct falls squarely within the statutory category relating to the proper management, administration and investment of plan assets. Justice Stevens then distinguishes the denial of relief under 502(a)(2) in Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985). In contrast to LaRue's request for relief from a shortfall in his account, Justice Stevens emphasizes that Russell had received all her plan benefits, but was seeking consequential damages for delay in processing her claim.

While Court in Russell (like the Fourth Circuit in this case) stressed that 502(a)(2) protects the financial integrity of the entire plan from fiduciary misconduct, Justice Stevens explains that it did so when
defined benefit plans were the norm for pension plans and that threats to an individual's account were
derivative of threats to the plan as a whole. Noting that landscape has changed and that defined contribution
plans dominate the scene today, Justice Stevens points out that fiduciary mismanagement of a defined
contribution plan can improperly reduce benefits without threatening the entire plan's solvency. The Court
thus regards the "entire plan" references in its prior decisions as beside the point in cases involving defined
contribution plans. Bolstering this point, the opinion also notes that the exemption in section 404(c) of
fiduciaries from liability for losses caused by a participant's exercise of control of individual account assets
would serve no real purpose if fiduciaries had no liability for losses in an individual account. Accordingly,
the Court holds that although section 502(a)(2) does not provide a remedy for individual injuries distinct
from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan
assets in a participant's individual account.

Chief Justice Roberts, joined by Justice Kennedy, filed an opinion concurring in the Court's judgment
and concurring in Justice Stevens' conclusion that the Fourth Circuit's analysis was flawed. Because LaRue's
right to direct investment of his contributions is based on the Plan, the Chief Justice says that his claim turns
on the application of Plan terms and arguably lies exclusively under section 502(a)(1)(B) to recover benefits
or enforce rights under the terms of his plan. If so, it is not clear whether LaRue's requests for relief under
other subsections of section 502(a) are "appropriate" within the meaning of the statute. Accordingly, Chief
Justice Roberts notes that on remand there is nothing precluding the lower courts from considering what he
regards as the significance of the prospect that LaRue may only have a claim under 502(a)(1)(B).

Justice Thomas, joined by Justice Scalia, filed an opinion concurring in the Court's judgment and
agreeing that LaRue alleged a cognizable claim. But Justice Thomas criticizes the Court's reliance on trends
in the pension markets and, claiming reliance on ERISA's text, harmonizes the Court's judgment with the
Russell decision in a different way. Justice Thomas characterizes the question in this case as whether losses
in LaRue's account are losses to the plan. He answers in the affirmative because the assets allocated to
LaRue's account are plan assets. Because a defined contribution plan is, according to Justice Thomas,
essentially the sum of its parts, losses to an individual account are necessarily losses to the entire plan.
Accordingly, section 502(a)(2) permits LaRue to recover such losses on behalf of the plan. A footnote at the
end of the opinion explains that "[o]f course, a participant suing to recover benefits on behalf of the plan is
not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan." 169 L.
Ed. 2d at 858.

*   *   *   *

This Court's decision left James LaRue far from certain that he will be entitled to any monetary relief
at all. Chief Justice Roberts and Justice Kennedy, despite protestations to the contrary, appear to embrace
the notion that LaRue's claim arises under 502(a)(1)(B). As a consequence, he may lose because he failed
to exhaust administrative remedies under ERISA before filing suit; he may lose because having a 502(a)(1)
claim for breach of the plan's terms may preclude having a 502(a)(2) claim for breach of fiduciary duty;
and he may lose because his breach of duty claim may have to be reviewed under an abuse of discretion
standard favorable to the defendants. Moreover, even Justice Stevens' opinion for the Court indicates that
LaRue may lose because he may not be able to show that he made the investment directives in accordance
with the Plan's requirements; and he may lose because he failed to assert his 502(a)(2) rights in timely
fashion. Finally, under the scenario envisioned by Justice Thomas' dissent, LaRue may lose much of the
relief he sought because the benefit of winning flows exclusively to the Plan and is then presumably allocated
in accordance with the Plan's terms - and not necessarily in whole part to LaRue's account. So, despite
winning a reversal of the Fourth Circuit's decision, James LaRue hardly emerges from this battle as the
victor. More to the point, these open questions illustrate the unsettled state of the law governing a participant's right to obtain monetary relief for the faithless act of a defined contribution pension plan's administrators.

Just as uncertain as James LaRue's claims might be is the unsettled state of the law following this decision. Until the Court clarifies the parameters of a participant's right to relief under ERISA section 502(a), litigation of these claims promises to be a doubtful enterprise for both sides. And, given the breathless volatility in the equity markets, LaRue's case may be a harbinger of considerable litigation by disappointed plan participants. This case, therefore, may turn out to be one of great significance, if not enduring principle, as to how the claims of disappointed plan participants are framed.

As a matter of decisionmaking, Justice Stevens' logic and his regard for economic realities is unassailable. But, this approach to the interpretation of ERISA is a slow and easy pitch for the purported "textualists" to hit back. That may be why Justice Thomas' simple regard for the text of the statute is the more satisfying way to a reversal of what all agreed was a flawed interpretation by the Fourth Circuit. On the other hand, the Thomas approach leads inexorably to his final footnote, which would rob LaRue of any direct relief at all because he can sue only on behalf of the plan, according to Justice Thomas. That, of course, is not what the statute actually says. So, each of the competing methods of statutory interpretation revealed its weak spot, and none satisfactorily fashioned a rule that employees and their investment advisors can rely upon in these troubled economic times.


The Court decided that a benefit plan administrator's dual role of determining eligibility for and funding benefits creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend on the circumstances of the particular case.

Metropolitan Life Insurance Company ("MetLife") serves as the administrator and insurer of Sears, Roebuck & Company's long term disability plan. MetLife is obliged by the plan to pay from its own funds valid claims for benefits. The plan in turn grants MetLife discretion to determine which claims are valid. Wanda Glenn, a Sears employee, was diagnosed with a severe form of cardiomyopathy whose symptoms include fatigue and shortness of breath. She applied for plan benefits in June of 2000, and MetLife found the claim valid for an initial 24 months of benefits, determining that she could not perform the material duties of her own job. MetLife also directed Glenn to a law firm that would assist her in applying for Social Security disability benefits which would partially offset MetLife's payments to her. In April of 2002 an administrative law judge granted her permanent disability benefits retroactive to April of 2000, concluding that her illness prevented her from performing any job (for which she was qualified) existing in significant numbers in the national economy. Glenn herself received none of the back benefits, as 75% went to MetLife and 25% went to the lawyers to whom MetLife had directed Glenn. MetLife then denied Glenn's claim for benefits beyond the 24 month initial period, determining that she was capable of performing full time sedentary work and thus had not shown that she was incapable of performing the material duties of any gainful occupation for which she was reasonably qualified.

Glenn sued MetLife, seeking judicial review of its benefit denial. The district court ruled in MetLife's favor, and on appeal the Sixth Circuit reviewed the benefits denial under a deferential standard because of the discretion granted to MetLife under the plan, but it treated as a "relevant factor" the conflict of interest arising
from MetLife's dual role as decider and payor of benefit claims. The Court of Appeals set aside MetLife's determination because of (a) the conflict of interest, (b) MetLife's failure to reconcile its conclusion that Glenn could work with the Social Security Administration's opposite conclusion; (c) MetLife's exclusive focus on one doctor's report suggesting that Glenn could work; (d) MetLife's failure to provide all treating physician reports to its own hired experts; and (e) MetLife's failure to take account of evidence that stress aggravated Glenn's condition. MetLife petitioned for certiorari, asking the Court to determine whether a plan administrator that evaluates and pays claims operates under a conflict of interest in making benefit determinations. The Solicitor General suggested that the Court also consider how such a conflict should be taken into account on judicial review of benefit determinations. The Court granted certiorari to consider both questions.

The Court, in an opinion by Justice Breyer joined in full by four other Justices, affirmed the judgment of the Sixth Circuit. The majority first recites four principles of judicial review set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989): (1) a reviewing court should be guided by principles of trust law such that benefit determinations are fiduciary acts by plan administrators who owe a special duty of loyalty to plan beneficiaries; (2) trust law requires that judicial review shall be under a *de novo* standard unless the plan provides to the contrary; (3) where the plan does provide to the contrary by granting discretionary authority to determine eligibility for benefits, trust principles make a deferential standard of review appropriate; and (4) if the administrator or fiduciary with discretion operates under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of such discretion. Slip op., pp. 4-5. Justice Breyer characterizes this case as focusing on the fourth factor.

The Court first concludes that an administrator who both evaluates and pays claims creates the kind of conflict of interest referred to in *Firestone's* fourth principle. Recognizing that an employer who assumes these dual roles has a clear conflict, Justice Breyer says it is less clear where the plan administrator is a "professional insurance company" which has a greater incentive (because of the fees it charges in a competitive market) to provide accurate claims processing. Nonetheless, the majority finds that an ERISA conflict exists here partly because the employer is conflicted in choosing an insurance carrier based on fees and partly because ERISA imposes higher-than-marketplace standards on insurers. Justice Breyer also notes that a rule treating employers and insurers alike can still take account of their differences by diminishing the significance or severity of the conflict in individual cases.

In determining how the conflict should be taken into account on judicial review, the majority begins by saying that it "elucidates" what the Court set forth in *Firestone's* fourth principle - namely that the conflict should be weighed as a factor in determining whether there is an abuse of discretion. Reaffirming that the standard of review is, under applicable trust principles, a deferential one, the majority declines to adopt a *de novo* standard in conflict cases. Nor does the majority believe it necessary for the courts to apply special burden of proof rules or other special evidentiary or procedural rules, for the complexities of benefit determinations are such that the Court cannot come up with a "one size fits all" procedural system likely to promote fair and accurate review. Instead, Justice Breyer says that "any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary [sic] depending upon the tiebreaking factor's inherent or case-specific importance." Slip op., p. 10. The opinion cites as examples of how a conflict may prove more important: a history of biased claims administration, a failure to wall off benefits people from finance people, and a failure to impose systemic checks that penalize inaccurate determinations. Reciting with approval the Sixth Circuit's reliance on a combination of factors, the majority found nothing improper in the way that court weighed a number of serious concerns along with the conflict factor. Accordingly, the Court affirmed the Sixth Circuit's decision.
Chief Justice Roberts filed an opinion concurring in the Court's judgment and concurring in all but the portion of Justice Breyer's opinion as to how the conflict factor is to be weighed by the reviewing court. Expressing concern that the majority's approach will increase the level of scrutiny in every conflict case, the Chief Justice would consider the conflict only where there is evidence that the benefit denial was motivated or affected by the conflict. In this case the Chief Justice joins the judgment of affirmance because the lower court was justified in finding an abuse of discretion wholly apart from MetLife's conflict of interest.

Justice Kennedy filed an opinion concurring in part and dissenting in part. Justice Kennedy agrees that MetLife had a conflict and that the Court's framework for considering the conflict is consistent with Firestone and is both important and correct. Because the Sixth Circuit made no effort to assess MetLife's attempts to safeguard against its conflict, the case should, in Justice Kennedy's opinion, be remanded to give MetLife a chance to defend its decision under the framework adopted by the majority.

Justice Scalia, joined by Justice Thomas, filed a dissenting opinion agreeing that MetLife had a conflict of interest, but expressing the view that it is still an open question about whether an employer would have such a conflict in similar circumstances. As to how a conflict should be regarded by a reviewing court, Justice Scalia opines that under the law of trusts, a fiduciary with a conflict does not abuse its discretion unless the conflict actually and improperly motivates the decision. Finding no evidence that MetLife acted dishonestly or with improper motive, or failed to use judgment or acted beyond the bounds of reasonable judgment, the dissenters would conclude that MetLife acted within the discretion entrusted to it, even where its decision about Glenn's ability to work is contrary to the Social Security determination. Accordingly, the dissenters would remand to the Sixth Circuit for a determination as to the reasonableness of the benefits denial without regard to the existence of a conflict of interest.

* * * * *

The Court's decision is old wine in new bottles. Having granted the writ ostensibly to determine the effect of a conflict of interest on a fiduciary's determination of disability benefits under ERISA, the Court winds up sloughing off its original task by trying to restate and expand upon what it said two decades ago in Firestone, supra. Even worse, Justice Breyer's choice of words that his majority opinion says is supposed to "elucidate" the Firestone factors unfortunately stirs up additional sediment in the already muddied waters of ERISA benefits denials. Not only does the majority's "elucidation" fail to clarify for fiduciaries and beneficiaries the standards for a proper determination, but Justice Breyer's opaque language and his open invitation to conduct discovery on the administrator's claims history and internal workings are likely to cause more difficulties, delay and expense in litigating these claims. Some claimants will be able to bear the additional burden of expanded discovery, as many long term disability cases are now being pursued by aging professionals with relatively high-dollar claims. But for run-of-the-mine employees, if not for their lawyers, the delay, expense and uncertainty likely to follow from this decision are not happy consequences in their already difficult daily lives.

Justice Scalia is at his sarcastic best in criticizing Breyer's opinion, though it must be said that the Breyer opinion is a slow moving target. Ultimately, however, Justice Scalia's rather heartless dissent is much less appealing than the more nuanced criticisms in the Chief Justice's and Justice Kennedy's concurrences (which make the same compelling arguments without losing sight of a just and lawful result for the parties in the case.) After all, as the case came to the Court, the record showed that Met Life had focused exclusively on the one report that said Ms. Glenn could work, had failed to give its expert all the pertinent information about Ms. Glenn from her treating physician, had failed to reconcile its denial with the Social Security Administration's determination that Ms. Glenn could not work (particularly after sending
her to make that claim and then taking 75% of her back benefits) and had even failed to consider the impact of stress on Ms. Glenn's ability to work. In these circumstances, there was simply no basis for the Court to reverse the Court of Appeals outright and reinstate the district court's approval of Met Life's denial of benefits, as only Justices Scalia and Thomas would do.

The practical upshot of this case is that challenges to benefit denials seem destined to become more cumbersome and expensive. The Court's focus on biased claims history, protocols for walling off claims people from finance people and the fiduciary's steps to minimize inaccurate claim determinations foretells both document and deposition discovery in cases that had previously been determined routinely in some courts on an administrative record without even a hearing. For claimants, that prospect may be a welcome one, in view of the limited opportunity to educate the trial courts on flaws in a fiduciary's handling of claims. The downside, of course, is the delay and expense that will attend this opportunity, circumstances that bear heavily on those in need of funds and unable to work. For employers and their plan fiduciaries, this case provides a clearer incentive to make sure that employee claims are handled fairly and accurately. In the long run, that is in the interest of employers, and the free market will rationally sort out which fiduciaries, acting under the standards imposed by ERISA and the law of trusts, best meet the employers' needs. So, despite the potshots one may take at the Court's opinion, it is hard to quarrel with its decision as a good result.

C. Dispute Resolution

The Court's cultivation of arbitration as a final and binding means of resolving employment disputes reached nearly full flower in its two decisions this term. In each case the Court's regard for what Congress intended to accomplish in the Federal Arbitration Act emerged as a central element of its rationale. Regrettably, the deferential respect for the will of Congress on this one statute does not appear to restrain the Court's hubris in its general approach to Congressional regulation of the employment relationship. The practical "takeaway" from these two cases, nonetheless, is that the Court continues to favor arbitration as a means of resolving disputes, and there is little reason to believe that its favor will not continue to embrace employment disputes.


The Court decided that the statutory grounds for vacating and modifying an arbitration award subject to the Federal Arbitration Act are exclusive.

Hall Street Associates, L. L. C. leased a manufacturing site in Oregon to Mattel, Inc. The lease provided that the tenant would indemnify the landlord for any failure by Mattel or its predecessors to follow environmental laws. After tests of well water on the property disclosed pollutants from discharges by Mattel and its predecessors, Mattel stopped using the water, signed a consent order with the state for cleaning up the site and in 2001 gave Hall Street notice of intent to terminate the lease. Hall Street filed suit contesting Mattel's right to terminate and seeking indemnification from Mattel for the costs of cleaning up chemical residue on the site.

The district court ruled in a bench trial in favor of Mattel on the termination issue. After an unsuccessful try at mediating the indemnification claim, the parties proposed to submit that claim to arbitration. The district court approved the parties' arbitration agreement and entered an order providing that the Court "shall vacate" any award where the arbitrator's findings of facts are not supported by substantial
evidence or the arbitrator's conclusions of law are erroneous. The arbitrator then ruled for Mattel, concluding that no indemnification was due for failure to comply with state water quality standards because they deal with human health as distinct from environmental contamination. Hall Street moved to vacate the award based on legal error. The district court agreed with Hall Street and remanded to the arbitrator for further consideration. On remand, the arbitrator, following the district court's view that the state act was an applicable environmental law, ruled in favor of Hall Street. Both parties sought modification of the award, and the district court, again applying the standard of review it had approved, corrected the arbitrator's calculation of interest and otherwise upheld the award. On appeal to the Ninth Circuit, Mattel contended that the court-approved provision for judicial review of an award for legal error was unenforceable. The Ninth Circuit agreed with Mattel and reversed and instructed the district court to consider the original award under the standard of review provided in the Federal Arbitration Act ("FAA"), 9 U.S.C. 10, 11. The district court again vacated the original award on the ground that the arbitrator's implausible interpretation of the lease exceeded his powers under the parties' agreement. On a second appeal to the Ninth Circuit, the court again reversed the district court, agreeing with Mattel that implausibility is not a statutory ground for vacating or correcting an award. The Supreme Court then granted certiorari to decide whether the FAA's grounds for vacatur and modification are exclusive.

After oral argument, the Supreme Court entered an order on November 16, 2007 directing the parties to file supplemental briefs addressing issues involving the availability of judicial review outside what is authorized by the FAA.

The Court, following the supplemental briefing it ordered, ruled in a 6 to 3 decision to vacate the Ninth Circuit's judgment, holding that the FAA's grounds for prompt vacatur and modification of an arbitration award are exclusive and may not be modified by contract. Justice Souter's opinion for the Court first explains the FAA's judicial review provisions for streamlined treatment as an alternative to a separate contract action in state or federal court. As his opinion points out, the lower courts were split on the issue of whether the FAA's grounds for review are exclusive or are open to expansion by agreement.

The majority rejects Hall Street's argument that prior decisions of the Court implied, if not held, that arbitration awards are reviewable under the FAA for "manifest disregard of the law." Acknowledging that there is language in Wilko v. Swan, 346 U.S. 427 (1953), that arguably supports such a standard, the Court points out that the language was not part of Wilko's holding and was ambiguous in any event. Likewise, the majority rejects Hall Street's argument that because Congress, in the FAA, favored private agreements to resolve disputes, the agreement crafted by the parties here ought to prevail. Justice Souter's opinion reasons that neither the text nor the history of the FAA supports Hall Street's position. (Justice Scalia declined to join the legislative history rationale or explanation.) Indeed, the majority points out that the FAA's categories in sections 10 and 11 emphasize something more than mistakes of law and that the language of section 9 carries "no hint of flexibility." The more sensible regard for the text of the FAA indicates, according to Justice Souter, that broader review would "bring arbitration theory to grief in post-arbitration process." 170 L. Ed. 2d at 265. Finally, the opinion notes that amici for Hall Street claimed that parties will flee from arbitration if expanded review is not available, while an amicus for Mattel foresaw such flight if such review were available. Justice Souter declined to get into that debate, concluding that whatever the consequences of the Court's holding, the FAA's text "gives us no business to expand the statutory grounds." Id. at 266.

Having dispatched of the question on which certiorari was granted, the majority stressed that it was not purporting to say that the FAA excludes more searching review of arbitral awards based on authority outside the FAA. The Court posited several avenues that Hall Street might yet travel in seeking to enforce the arbitrator's ultimate award in its favor. Noting that there is no reason for the Court now to treat the case
as a purely common law case, there is still a question about whether the order approving the agreement for expanded review should be enforced as a measure of the district court's authority to manage its cases under the Federal Rules of Civil Procedure. The Court, however, declined to resolve that question now, remanding the case for further proceedings (after noting that issues of waiver and the relevance of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. 651, et seq. may yet be pressed by Hall Street.)

Justice Stevens, joined by Justice Kennedy, dissented on the ground that the FAA favors, rather than precludes, the parties' private agreement for expanded judicial review of what the dissent characterized as the arbitrator's "glaring error of law." In the dissent's view, the literal text of the FAA not only does not foreclose negotiated judicial review provisions, but it also is inconsistent with the purpose of the statute to effectuate the intent of the contracting parties. And, if the FAA issue were as close as the Court views it, Justice Stevens would apply a presumption in favor of the parties' freedom to resolve it. While the dissenters agree that the Ninth Circuit's judgment should be vacated and that there may be additional avenues for judicial review, they would direct the Ninth Circuit to affirm the judgment of the district court enforcing the arbitration award.

Justice Breyer dissented in a separate opinion, expressing the view that the FAA does not preclude enforcement of an agreement giving the court power to set aside an arbitration award embodying an arbitrator's mistake about the law. (Indeed, the entire Court agrees to that proposition.) Justice Breyer, however, would not remand the case for further decisionmaking. Instead, he would simply instruct the Ninth Circuit to affirm the district court's judgment enforcing the arbitral award.

The fundamental difficulty in assessing the effect of the Court's decision in this real estate case on employment law is that the disputants, Hall Street and Mattel, are presumed to have bargained on equal footing. That is not often the case in employment disputes, except, perhaps, where employees are represented by a collective bargaining agent with some countervailing economic power. For this reason, it is difficult even for the most ardent supporters or opponents of employment arbitration to draw comfort from the Court's decision in this case. Moreover, the Court itself suggested in its opinion that the party that lost the award may yet obtain judicial review outside the purview of the FAA.

Notwithstanding the uncertain effect of this decision, one salutary consequence of the decision may be to buffer employment arbitration against inefficient and unwanted "judicialization." Decades ago, when labor unions had collective bargaining agreements covering a sizable portion of the workforce, employers and employees were used to an arbitration regime where judicial review was at the barest minimum. By rejecting the parties' agreement in this case to provide for judicial review in a manner not contemplated by the FAA, the Court signals that it favors the advantage of finality that arbitration has offered in the workplace for many years. At the very least, this case draws attention to the risk that carefully designed workplace arbitration programs could be scuttled - or at least impaired - by permitting arbitration awards to be subject to more searching review by the courts. The delay and expense that would attend such judicial review defeats the prompt and efficient resolution of workplace disputes that arbitration offers.

On the other hand, any regime of dispute resolution that does not do justice and vindicate the rights that Congress has conferred on employees may not be worthy of survival. Judicial review guards against results that do not serve the purposes of federal workplace laws - results that may come about from unqualified arbitrators with little knowledge of or appreciation for the workplace. Many arbitrators are not legally trained and lack rudimentary knowledge of the details of the anti-discrimination statutes. Yet, these
arbitrators, if they are chosen by the parties, are obliged to make an informed legal decision in order to resolve the parties' disputes. Judicial review is, nonetheless, too facile a response to this problem. The better answer may be a better trained pool of arbitrators, more careful selection by the parties and their lawyers, and even some rules that would require employment disputes to be arbitrated by someone who is familiar with workplace regulation.

_Preston v. Ferrer, 552 U.S. ---, 169 L. Ed. 2d 917, 128 S. Ct. --- (2008)_

The Court decided that the Federal Arbitration Act overrides a state law vesting primary jurisdiction in a state administrative agency.

Alex E. Ferrer, a former Florida trial judge (who now appears as the judicial arbitrator star of the Fox network's "Judge Alex") contracted with Arnold M. Preston, a California attorney who renders services to persons in the entertainment industry. Preston made a claim for fees under the parties' contract by invoking their agreement to arbitrate "any dispute . . . relating to the [contract's] terms or the breach, validity, or legality thereof. . . in accordance with the rules of the American Arbitration Association." Ferrer countered by filing a petition with the California Labor Commissioner claiming that the contract was unenforceable because Preston was acting as an unlicensed talent agent in violation of the state's Talent Agencies Act ("TAA").

The Labor Commissioner's hearing officer determined that Ferrer had stated a claim within the Labor Commissioner's jurisdiction, but denied Ferrer's motion to stay the arbitration for lack of authority to grant such relief. Ferrer then filed suit in Los Angeles County seeking a declaratory judgment that the controversy was not subject to arbitration. Preston moved to compel arbitration. The Superior Court denied Preston's motion and enjoined him from proceeding before the arbitrator until the Labor Commissioner determined she has no jurisdiction. On Preston's appeal, the California Court of Appeal affirmed, holding that the TAA vests exclusive jurisdiction over the dispute in the Labor Commissioner. The court found the U.S. Supreme Court's decision in _Buckeye Check Cashing, Inc. v. Cardegna_, 546 U.S. 440 (2006), inapposite because it involved state courts and not state administrative agencies. The California Supreme Court denied Preston's petition for review. The Supreme Court of the United States then granted Preston's petition for certiorari to determine whether the FAA overrides a state law vesting initial adjudicatory authority in a state administrative agency.

The Court, in an 8 to 1 decision, reversed the judgment of the California Court of Appeal in an opinion by Justice Ginsburg. As the Court points out, the underlying dispute between the parties is simple: Was Preston acting as a talent agent, as Ferrer claims (in which case the contract violates the TAA and is unenforceable) or was he acting as a personal manager (in which case the contract does not violate the TAA and is enforceable)? The controversy before the Supreme Court is whether the "talent agent v. personal manager" issue should be determined by an arbitrator or by the Labor Commissioner. Ferrer insisted that the Labor Commissioner had exclusive original jurisdiction of that controversy, while Preston urged that the TAA defense had to do with the legality of the contract and had to be determined in arbitration. The Court decided in favor of arbitration of the legality of the parties' contract.

Adverting to Ferrer's challenge to the validity of the contract as a whole (as distinct from contesting the validity of its arbitration clause, Justice Ginsburg concludes that the Court's ruling in _Buckeye_ that such challenges in state court are for the arbitrator and not the state courts "largely, if not entirely, resolves the dispute before us." 169 L. Ed. 2d at 925. Ferrer's attempt to distinguish _Buckeye_ on the ground that the TAA merely requires exhaustion of a state administrative remedy prior to arbitration is rejected because the TAA grants exclusive jurisdiction to the Labor Commissioner to decide an issue that the parties agreed to
arbitrate and its prerequisites for arbitration are not applicable to contracts generally, but only to talent agency agreements (thus requiring Preston to concede his case as a condition of arbitrating.) Ferrer's argument that the TAA merely postpones arbitration is likewise rejected by the Court, because requiring exhaustion of a state administrative remedy would hinder speedy resolution of the case and because the Labor Commissioner's role as an arbiter conflicts with what the parties had agreed under the FAA. (Justice Ginsburg points out that the adjudicator role, as distinct from the enforcer role, is what distinguishes this case from EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), where the federal agency was not barred from enforcement proceedings despite an arbitration agreement signed by a charging party.) Justice Ginsburg punctuates this reasoning by repeating that Ferrer is relinquishing no substantive right under the TAA or other California law - the Court is simply holding him to the contract he signed requiring that those rights be resolved in an arbitral forum. Putting the Court's holding succinctly, Justice Ginsburg says that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." Id. at 929.

The Court also distinguishes Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University, 489 U.S. 468 (1989), which held that the FAA did not bar a stay of arbitration pending resolution of a court case against Volt and two other parties not bound by the arbitration agreement. Unlike the situation in Volt, there is no need to accommodate litigation involving third party strangers to the arbitration agreement. There is, therefore, no risk in this case, as there was in Volt, of conflicting rulings on common issues. Moreover, in this case the agreement provides for arbitration under the AAA rules, one of which is that the arbitrator shall have the power to determine the validity of the contract of which the arbitration clause is a part. Justice Ginsburg concludes that the parties' incorporation of this rule weighs against inferring that any agreement to apply California law means that a California agency must decide what the parties had agreed to arbitrate.

Justice Thomas dissented on the familiar ground that he believes the FAA does not apply in state courts and thus cannot displace a state law delaying arbitration until the completion of administrative proceedings. Accordingly, he would affirm the judgment of the Court of Appeal.

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The irresistible first comment - one that should easily escape my editor's blue pencil - is to remark on the irony of Ferrer's position: Judge Alex is biting - nay, trying to chew off - the hand that feeds him. Here is an arbitrator in a judge's garb, who makes a living on cable television arbitrating people's disputes, doing everything he can to escape an agreement he made to arbitrate all disputes, including a claim against him for unpaid fees. Need one say more to bring a grin to the stoniest face?

Justice Ginsburg's opinion for the Court sends a strong signal that the Court believes in the private resolution of commercial disputes. The Court's opinion brooks little interference with strict and thorough enforcement of the parties' agreement to arbitrate by making clear that when the validity of the parties' contract is at issue, the courts will respect their choice of who shall decide that dispute. To have ruled differently would have cast in doubt a number of the Court's prior decisions holding that in both federal and state court the FAA requires that issues about the validity of agreements falling within that act are to be decided by arbitrators, not by the courts. All that this case does is to apply that settled principle to state laws purporting to require parties to exhaust an administrative remedy by submitting the contract issue in the first instance to a state agency. That is not a large step, and only Justice Thomas declined to take it.

The FAA's preemption of state laws seeking to limit arbitration of contract validity issues now
appears to be complete. Questions may yet arise about the applicability of the FAA to a particular contract, or the validity, scope and operation of a particular arbitration clause, but this case puts to rest attempts by parties to a contract to seek refuge from their agreements to arbitrate in state laws purporting to direct the parties to a state judicial or administrative remedy. As a matter of policy, the Court's decision is consistent with the FAA's protection of the arbitral forum and for the Court's own favorable regard of arbitration as a dispute resolution technique. As a result, this decision is likely to smooth the way toward a more efficient use of arbitration in commercial cases.

D. Sundry Cases.


The Court decided that a qui tam plaintiff must prove that the defendant intended that its false record or statement be material to the Government's decision to pay or approve the false claim.

Two shipyards contracted with the United States Navy in 1985 to build a fleet of guided missile destroyers for "an aggregate total of $1 billion for each new destroyer." The shipyards subcontracted with Allison Engine Company to build 90 generator sets (at a price of $3 million per set) to be used to supply electrical power in more than 50 of the destroyers. Allison in turn subcontracted with General Tool Company ("GTC") to assemble the generator sets at a price of $800,000 per set, and GTC subcontracted with Southern Ohio Fabricators, Inc. ("SOFCO") to manufacture bases and enclosures at a price of $100,000 per set. All funds ultimately came from the Federal Treasury. In 1995 Roger L. Sanders and Roger L. Thacker, former GTC employees, sued as qui tam relators alleging that invoices submitted to the shipyards from Allison Engine, GTC and SOFCO fraudulently sought payment for work not done in accordance with contractual specifications.

The case was tried to a jury. At trial the relators introduced evidence of false certificates of compliance furnished to the shipyards, along with invoices to the shipyards for payment. They did not, however, introduce the invoices submitted by the shipyards to the Navy. Pointing to this omission, the defendants moved for judgment as a matter of law at the close of the relators' case. The district court granted the motion, rejecting the relators' argument that it was sufficient for them to show that Government funds had been used to pay the invoices presented to the shipyards. The Sixth Circuit reversed, holding that the relators' claims under section 3729(a)(2) and (3) of the False Claims Act did not require proof of an intent to cause a false claim to be paid by the Government. Proof of an intent to cause a false claim to be paid by a private entity using Government funds would suffice. The Supreme Court granted certiorari to resolve a circuit conflict over the proper interpretation of the statute.

The Court unanimously vacated the judgment of the Sixth Circuit in an opinion by Justice Alito. The Court views the statute's text as requiring proof that a defendant make a false record or statement "to get" a false claim paid by the Government. Accordingly, the defendant must intend that the Government itself pay the claim. Because the Sixth Circuit's interpretation effectively reads that intent requirement out of the statute, Justice Alito concluded that its judgment impermissibly deviates from the statute's language. The Court rejects the Government's view that "paid by" the Government in the statute is a colloquialism and is not to be taken literally. Noting that there is no requirement that an invoice be presented to the Government under section 3729(a)(2) and (3) - in contrast to the presentment requirement under (a)(1) - the Court stresses that there still must be proof that the defendants acted for the purpose of getting a false claim paid or approved by
the Government. So, if a subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim, the subcontractor has violated section 3729(a)(2) of the statute. Without the element of purpose or intent, there would be no direct link between the false statement and the Government's decision to pay and the False Claims Act would, in the Court's opinion, be transformed into an all-purpose antifraud statute. In like manner, the Court concludes that it is not enough for a plaintiff to show under section 3729(a)(3) that conspirators agreed on a scheme having the effect of causing a private entity to make payment of funds obtained from the Government. Instead, a relator must show that the conspirators had the purpose of "getting" the false statement to bring about the Government's payment of a false of fraudulent claim. In Justice Alito's words, it must be established that the conspirators agreed that the false statement or record "would have a material effect on the Government's decision to pay the false or fraudulent claim."

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The growth and importance of federal contracts in a multitude of areas has gone hand-in-hand with the recent profusion of False Claims Act litigation and the advent of a highly specialized bar handling those matters. The Court's decision, therefore, promises to have a significant impact on how these claims are actually tried, as Justice Alito's opinion makes clear that the text of the Act demands proof of an intent to get the Government - not just private entities in the contracting chain - to pay a false or fraudulent claim. Given the statute's language, especially the absence of a presentment requirement under section 3729(a)(2) and (3), the Court's decision is a sensible construction of Congress' language. If perchance Congress intended a less stringent proof requirement, it can correct what the Court has wrought.

This decision marks the second time in as many terms that the Court has made it more difficult for a whistleblower to obtain a favorable judgment. See Rockwell Int'l Corp. v. U.S., 549 U.S. 457 (2007) (Federal court has no jurisdiction over qui tam allegations by whistleblower who was not the "original source" of information on which allegations were tried.) That is, perhaps, a testament to the growth of qui tam litigation. While none of what the Court has done in this area is a show-stopper for False Claims Act litigation, there is little doubt that this decision will at least be a mild deterrent to the plaintiffs' bar. Nonetheless, this area of employment-related law still holds the promise of being a growth industry for lawyers in the near term.


The Court decided (1) that the Clean Water Act's pollution penalties do not preempt punitive damages awards in maritime spill cases, (2) that a punitive damages award of $2.5 billion was excessive as a matter of maritime common law and (3) that in the circumstances of this case the award should be limited to $287 million - an amount equal to compensatory damages.

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The reverberations from this maritime common law case are bound to be felt well beyond the bounds of oil spill cases. Two features of this case appear to be especially noteworthy. First, the preemption holding is based upon the Court's conclusion that there is no clear intent by Congress to occupy the field of pollution remedies. Whether that holding can be effectively analogized to employment law is far from clear, but this case has pushed the issue closer to the front. Consider, for example, whether punitive
damages for violations of state antidiscrimination or antiretaliation laws may be vulnerable to a preemption argument based on the detailed extent of limited federal remedies for violations of analogous federal statutes.

Second, the effect of the punitive damages limitation on employment litigation is inevitable, even if it may be illogical as a strict matter of law. The Court's embrace of a 1:1 ratio between punitive and compensatory damages in a common law maritime spill case could, despite all the disclaimers in the various opinions supporting the Court's decision, have a spill-over effect (pardon the unintentional pun) on the yet-to-be divined proper constitutional ratio for punitive damages. For both of these reasons (preemption and punitive damages ratio), the Court's decision bears careful reading and considerable thought by employment lawyers. That is why the case is included here, despite its distance from employment law.


The Court decided unanimously that, in a case against the Federal Government, a prevailing party who satisfies other requirements of the Equal Access to Justice Act may recover its paralegal fees from the Government at prevailing market rates. (Justices Scalia and Thomas declined to join certain portions of Justice Alito's opinion for the Court.)

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Although this case has no direct connection with employment law, its holding under the Equal Access to Justice Act is based in part on Missouri v. Jenkins, 491 U.S. 274 (1989), addressing a similar question under the 42 U.S.C. 1988, the Civil Rights Attorney's Fees Awards Act of 1976. In both cases the "fees" referred to by the statute are construed to include paralegal fees, and in both cases the Court ruled that those fees are not measured by the cost to the attorneys employing the paralegals, but by the prevailing market rate for paralegal services incurred by the parties. The Court's unanimous reaffirmation of Missouri v. Jenkins, supra, is the most notable aspect of the Court's ruling for employment lawyers.

**E. Labor Relations.**

It has been many terms since this section of the annual review of employment decisions had anything of substance to report from the area of labor-management relations under the NLRA. This term, however, the Court decided an NLRA preemption case that promises to make it more difficult for states to level what they may determine is an uneven playing field for union organizing.

**Chamber of Commerce, etc. v. Brown, 554 U.S. ---, 171 L. Ed. 2d 264, 128 S. Ct. --- (2008)**

The Court decided that a California law prohibiting employers who do business with the State from using state funds to assist, promote or deter union organizing is preempted by the National Labor Relations Act.

California Assembly Bill 1889 prohibits employers that receive state funds from using funds to assist, promote or deter union organizing.
Several organizations whose members do business with the State of California sued the California Department of Health Services and several state officials to enjoin enforcement of AB 1889. Two labor organizations intervened to defend the statute's validity. The district court granted partial summary judgment in favor of the business organizations, holding that the NLRA preempts the contested statute because provisions of the state law regulate employer speech about union organizing. The Ninth Circuit, after affirming twice, granted rehearing *en banc* and reversed the district court's judgment, concluding that Congress did not intend to preclude states from imposing such restrictions on the use of their own funds. The Supreme Court granted certiorari.

The Court, in a 7 to 2 decision, reversed the Ninth Circuit in an opinion by Justice Stevens. The Court noted that although the NLRA contains no express preemption provision, prior Court decisions have recognized two types of preemption necessary to implement federal labor policy: (a) "Garmon preemption" forbidding states to regulate activity that is arguably protected or prohibited by the NLRA and (b) "Machinists preemption" forbidding any regulation of conduct that Congress intended to be unregulated because it is left to be controlled by the free play of economic forces. In this case the Court held that the two contested portions of the California statute are unenforceable by virtue of Machinists preemption because they "regulate within a zone protected and reserved for market freedom." After reviewing the NLRA's history, the majority concludes that Congress has made a policy judgment that free debate about unionization is a central element of national labor policy and that the express protection of "uninhibited, robust and wide-open debate in labor disputes" forcefully buttresses the Machinists preemption analysis in this case. The majority then opines that California's policy judgment that partisan employer speech interferes with an employee's choice about union representation is just what Congress renounced in the Taft-Hartley amendments to the NLRA. Accordingly, the Court holds that "[t]o the extent sections 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally pre-empted." Slip op., p. 8.

Justice Stevens' opinion finds none of the three reason advanced for avoiding Machinists preemption persuasive. First, the fact that the statute restricts only an employer's *use* of state funds, instead of its receipt of state funds, is inconsequential. Because the use restriction is not accompanied by a safe harbor for employers as to whether an employer has complied and because of significant risk of litigation costs and mistaken liability, California's reliance on a use restriction impermissibly burdens free debate (and that is so regardless of the fact that these restrictions are less onerous than federal restrictions that have been upheld under the First Amendment.) Second, the majority recognizes that the National Labor Relations Board (the "Board") has regulated election eve speech, but that does not mean that free speech falls outside the zone of activities that Congress intended to be regulated by market forces. Distinguishing the "special setting" of imminent elections, the Court declares that Congress has denied the Board the authority to regulate the broader category of noncoercive speech encompassed by the California statutes. Third, the Court is not persuaded that a few isolated federal restrictions on the use of federal funds to assist, promote or deter union organizing are intended to alter the broader contours of federal labor policy. Recognizing that it would be a closer question if there were a federal statute applying analogous restrictions to all federal grants or expenditures, the majority regards the few cited federal laws as not indicative of an invitation to the states to override the national labor policy of free debate. Accordingly, the Court reversed the Ninth Circuit's judgment and remanded the case for further proceedings.

Justice Breyer, joined by Justice Ginsburg, filed a dissenting opinion expressing the view that the California policy expressed in AB 1889 does not constitute regulation that the NLRA preempts. According to Justice Breyer, the operative provisions of the California law neither compels nor prohibits labor-related activity; it just says "do not do so on our dime." California's refusal to pay for speech does not impermissibly discourage speech, as the employer can spend its own money instead of the public's money.
Moreover, states generally retain the power to decide whether and how to spend or not spend public funds. Because the purpose of the state law here is to maintain a position of neutrality on contested labor matters and despite the targeted nature of a restriction applicable only to labor relations, the dissent does not find that California is "regulating" anything that Congress said is not regulable.

The dissenter agree that if state compliance provisions unreasonably discouraged expenditure of the employer's own funds, the NLRA might well preempt such provisions. But, the dissenter say that they cannot on this record reach such a conclusion because the lower courts did not address the portion of the business organizations' motion for summary judgment dealing with the compliance provisions. Pointing out that California had submitted expert evidence showing that the accounting and recordkeeping requirements of the statute are flexible and less onerous than those for federal grant recipients, the dissenter would vacate the Ninth Circuit's judgment and remand the case for further proceedings on the compliance-related questions.

As a practical matter, the Court's decision openly and substantially disadvantages labor unions, plain and simple. That may not have been the intent of all members of the majority, including Justice Stevens, the author of the Court's opinion, but the potential effect of the decision on union organizing in California appears undeniable. The superior resources of the business community can always be - and often are - employed to stem union organizing efforts, and California's unsuccessful attempt to maintain a level playing field robs states that are so inclined of the power to require that the parties to a labor dispute fund that process on their own and not with public money. The extent to which this decision will cause actual harm to the union movement, however, is not so clear as the potential for disadvantage. In our post-industrial economy, California may have been the rare state that would insist on the scope and extent of its law. Thus, the immediate impact of the case on current organizing efforts is far from certain, except, of course, in California.

On a more profound level, the Court's decision as an expression of federalism impugns and impairs the sovereignty of the states in significant fashion. Here, the Court is telling the states that they cannot even determine how public money in the hands of grant recipients can be spent. In other situations, such as the applicability of certain antidiscrimination laws to the states, the Court has expressed concern about protecting the "dignity" of the sovereign states by refusing to allow federal laws to apply where the state is an employer. But in this case, where states are perceived as coming to the aid of workers, the toggle switch of concern about sovereignty, federalism and "dignity" is flipped the other way. The Court's concern here is about the primacy of the NLRA irrespective of its effect on the applicability of state law. From whichever perspective the reader sees the Court's concern about dual sovereignty, its impairment of the states' power to determine how public funds are to be spent is at least noteworthy as a rather perverse expression of its federalism jurisprudence. And, as if to punctuate the irony of this point, the two defenders of state dignity and sovereignty are not Justices Scalia and Thomas, but Justices Breyer and Ginsburg.

Looking to the future, the business community's alignment with preemption may be short-lived under a different administration. That is, the Chamber of Commerce's brief romance with the NLRA may take a different turn depending on who wins the presidential election this year and thus has the power to appoint a new Board majority over time. Under a Board that is less tuned in to employer interests and more favorably disposed to unions, look for the Chamber of Commerce to be less enamored of preemption, if not in this circumstance, at least on other issues where some state regulation would be welcome in the face of a hostile Board.
F. Grants of Certiorari for the 2008 Term

The Court has so far granted review in the following cases scheduled for argument in the 2008 Term. Just like the 2007 Term, the number of grants in employment-related cases is notable, and the wide range of questions posed by these cases promises to refine further the shape of our employment jurisprudence.

Locke v. Karass, No. 07-610. The question presented is whether, and to what extent, a public sector labor union may use agency fees to finance litigation outside of the bargaining unit. The Court has scheduled oral argument for October 6, 2008.

Vaden v. Discover Bank, No. 07-773. The question presented is whether a suit brought under the Federal Arbitration Act to enforce a state law arbitration obligation in a dispute over a credit card balance "arises under" federal law within the meaning of 28 U.S.C. 1331. The Court has scheduled oral argument for October 6, 2008.

Crawford v. Metro. Gov't of Nashville, etc., No. 07-1595. The question presented is whether Title VII's anti-retaliation provision protects an employee who cooperates with her employer's internal investigation of alleged employment discrimination. The Court has scheduled oral argument for October 8, 2008.

Ysura v. Pocatello Education Ass'n, No. 07-869. The question presented is whether the First Amendment prohibits a state from banning a local government's payroll deductions for political activities. The Court has not yet scheduled oral argument.

14 Penn Plaza LLC v. Pyett, No. 07-581. The question presented is whether an arbitration clause in a collective bargaining agreement validly waived an employee's right to a judicial forum for his federal age discrimination claim. The Court has not yet scheduled oral argument.

AT&T Corp. v. Hulteen, No. 07-543. The question presented is whether an employee may obtain service credit for a pregnancy leave taken before enactment of the Pregnancy Discrimination Act. The Court has not yet scheduled oral argument.

Kennedy v. Plan Adm'r for Dupont Savings, etc., No. 07-636. The question presented is whether ERISA preempts qualified domestic relations orders (QDRO's). The Court has not yet scheduled oral argument.

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Concluding Remarks

Now for some strong words about the architecture of employment law as portrayed by the Roberts Court: The Court's decisions of the last few terms evidence an assault on the structure of federal employment regulation as we have known it. The laws Congress has deemed necessary to eradicate discrimination in the workplace appear to be the focus of this effort by a working majority of the Court,
almost always including Justices Scalia and Thomas and more than often including Chief Justice Roberts and Justices Kennedy and Alito. Notwithstanding that Congress has carefully constructed, and employers have generally thrived under, a regulatory structure of federal anti-discrimination statutes enacted over the past four decades, a number of decisions in recent terms plainly suggest that the Court is gnawing away at this structure. No longer is eradication of discrimination against workers the central imperative of the Court's work in the employment area. Now, the unspoken, yet unmistakably apparent, agenda of the new majority is enhancement of employer prerogatives, recently focusing on protection of the at-will doctrine. Just as remarkable is the Court's *laissez faire* rationale (sometimes spoken, other times implicit) that employers must be free to compete in a transforming global economy. However compelling that rationale may be for relaxing regulatory restraints, it is elementary that the proper forum for changing the regulatory architecture is Congress, not the courts.

The assault on federal regulation of the employment relationship is, nonetheless, being pressed with subtle vigor by a herd of Trojan horses in the guise of, among other things, limitations periods, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. --- (2007), coverage requirements, e.g., *Rockwell Int'l Corp. v. U.S.*, 549 U.S. --- (2007), and governmental immunity, e.g., *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). One can argue with some force that this approach not only disrespects the role of Congress as a co-equal branch of government, but it also distorts the plain meaning and clear intent of legislation deemed necessary by our elected representatives to address the national dilemma of discrimination in the workplace. Certainly, Congress itself has come to the latter conclusion most recently in enacting the Americans with Disabilities Amendments Act, S. 3406 (pending Presidential signature as of this date) specifically aimed at overruling the Court's misinterpretations of the ADA in *Toyota v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). As Congressman F. James Sensenbrenner, Jr. (R. Wisconsin) put it: "Courts have focused too heavily on whether individuals are covered by the law, rather than on whether discrimination occurred." R. Pear, The New York Times (Viewed on September 19, 2008 at <www.nytimes.com/2008/09/18/washington/18rights.html>)

Perhaps the most regrettable consequence of this statutory demolition cloaked as statutory construction is the Court's disregard for the separation of powers on which our constitutional government rests. The deference to the elected branches and modest restraint that should inform exercise of the Judicial power under Article III appear to be in full retreat. In their place is the hubris of a Court seemingly bent on dismantling or disabling laws Congress has deemed necessary to make the workplace a fair and productive one for employers and employees alike - one where workers can expect and enjoy nothing more or less than equal opportunity and where management can profit from that circumstance.

The recent course of decisions is in some respects a judicial capstone of the Reagan revolution's more generalized attack on federal regulation. Without debating the wisdom of that philosophy here, one should at least regard its recent dramatic consequences in our capital markets, retail financial markets, commodities markets and the real economy in deciding whether the push for *laissez-faire* in the labor market is a worthy idea. Whether federal regulation should be limited because it dulls the competitive edge of our employers in the global economy or whether deregulation creates a serious moral hazard by giving employers an incentive to sacrifice workplace fairness for short-term gain would be at the heart of any such debate. That debate over regulatory preferences, however, is for the elected branches to conduct. It is emphatically not for the Judiciary under our Constitution. Thus, if the architecture of employment regulation is to be altered, the appropriate way is through legislation, not judicial decisions.

Despite these obvious cautions, the edifice of our federal employment law has become less recognizable as a safe house for equal opportunity, especially to members of the bar who witnessed the
origins of the anti-discrimination laws and have lived with them for more than four decades. Furthermore, the crafty offensive against this structure does not stop with statutory regulation. Regard again, for example, this term's decision in Engquist v. Oregon Dep't of Agriculture, supra. The deregulation majority (inexplicably joined this time by Justice Breyer) demonstrated that no federal regulation is immune from assault - not even the Constitution itself. On a doctrinal level this Court's approach in Engquist was particularly perverse, as the original intent of the Equal Protection Clause simply cannot be squared with the judgment of those who purport to be "originalists." The same holds in the statutory area. The disconnect between Congress' original central intent to prohibit discrimination and the new majority's concern with preservation of the at-will doctrine is stark evidence that "originalism" is a result-oriented convenience and not a neutral principle of decision. As a result of these machinations, we now have a federal regulatory structure that the enacting Congresses would barely recognize, much less one that the electorate, the workers, the business community and the bar expected to remain intact - unless changed by Congress itself.

As outlined above, it appears that the Court in recent terms has assumed the role of architect of federal employment regulation, instead of leaving that legislative function to Congress. Thankfully, our Constitution wisely provides for a "check" when one branch usurps the role of another branch. Jeffrey Toobin thus states the obvious in his timely reminder that Presidential elections matter. J. Toobin, The Nine, p. 339 (2007). Where the Roberts Court is headed in employment cases may yet be uncertain, though the signs point in a direction that Congress assuredly did not contemplate. But, whatever direction the Court may take, the vector of its path will necessarily be a function of the Court's membership. So, the most important jurisprudential development during the 2008 Term will be easy to spot. It will not be one of the Court's decisions. It will be the outcome of the 2008 election - that is, who will control the elected branches. Not only will the election determine who directs the EEOC, NLRB and the Department of Labor, but most importantly, the new administration will likely reshape the membership of the Court itself. For workers, employers and the employment bar alike, the issue is this: Whether the ongoing dismantling of federal employment regulation will continue or whether the laws Congress enacted will be enforced as Congress intended. That issue may not be one that grabs headlines, engenders sound bytes, or inspires political passion, but its resolution will have much to do with how people lead their daily lives. And, it will be resolved to a great degree on the first Tuesday in November of the impending term  

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One concluding observation: It is just not enough - indeed, it is hazardous - for us, as members of the employment bar, simply to keep a scorecard and draw large conclusions from the outcomes of the Court's employment cases. First, outcomes and statistics about outcomes do not tell a complete and useful story. For another thing, some of the cases themselves are poor vehicles for large principles. That is partly because the employment jurisprudence is being warped by alternative dispute resolution. Settlements through mediation and resolutions through unpublished arbitration awards leave for public determination lawsuits that are often outliers factually or legally. The courts are thus obliged to construe statutes in odd and non-recurring contexts. That is a decidedly unhelpful basis for applying and explaining the law in a stable and rational way. Finally, outcomes themselves do not necessarily point in the direction the Court is going. Indeed, in most cases the Court's rationale is more illuminating than its decision when it comes locating the applicable rule of behavior. It behooves us, therefore, as counselors, litigators, academics and
neutrals, to look more deeply at what the Court is saying when it makes decisions that affect employers and employees. By doing so, we can better discern the contours of regulation that define the employment relationship. We will then be able to regard the Court's work not only with due respect for it as lawyers, but also with a keener appreciation of what we can do about it as citizens.

Jonathan R. Harkavy
Greensboro, North Carolina
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