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The Employment Law Decisions of the October 1999 Term of the Supreme Court: Review and Analysis

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THE EMPLOYMENT LAW DECISIONS OF THE OCTOBER 1999 TERM OF THE SUPREME COURT: A REVIEW AND ANALYSIS

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1. INTRODUCTION

The five employment law cases decided by the Supreme

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Court during the October 1999 Term bring to nineteen the total number of significant employment law cases decided by the Court during the last three terms.[1] The October 1997 Term cases were marked by primary focus on employer liability, under Title VII of the Civil Rights Act of 1964,[2] for sexual harassment by supervisors.[3] Primary focus during the 1998 Term was on disability discrimination under the Americans with Disabilities Act of 1990 (ADA)[4] and on the constitutionality of actions brought by private parties against states under the Fair Labor Standards Act (FLSA),[5] in light of the Eleventh Amendment[6] sovereign immunity of the states.[7] An overview of the 1997 and 1998 Term employment law cases is provided in Section II of this article.

The most important of the October 1999 Term employment law cases focused on the pretext-plus doctrine in employment discrimi-nation law and standards for ruling on motions for summary judgment and judgment as a matter of

1. The six 1997 Term cases, discussed *infra* in Section II, are Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Geissal v. Moore Medical Corp., 524 U.S. 74 (1998); Bragdon v. Abbott, 524 U.S. 624 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The eight 1998 Term cases, also discussed *infra* in Section II, are Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998); Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999); West v. Gibson, 527 U.S. 212 (1999); Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Alden v. Maine, 527 U.S. 706 (1999). The five 1999 Term cases, discussed *infra* in Sections III - VII, are Kimel v. State of Florida Bd. of Regents, 120 S. Ct. 631 (2000); Christensen v. Harris County, 120 S. Ct. 1655 (2000); Reeves v. Sanderson Plumbing Prod., Inc., 120 S. Ct. 2097 (2000); Pegram v. Herdrich, 120 S. Ct. 2143 (2000); Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 120 S. Ct. 2180 (2000).

2. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994).

3. An excellent analysis of employment law cases from the October 1997 Term is contained in Robert Belton, *Employment Law: A Review of the 1997 Term Decisions of the Supreme Court*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 267 (1998).

4. 42 U.S.C. §§ 12101-12213 (1994).

5. 29 U.S.C. §§ 201-19 (1994 & Supp. IV 1998).

6. The Eleventh Amendment to the U. S. Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

7. An excellent analysis of employment law cases from the October 1998 Term is contained in Robert Belton, *The Employment Law Decisions of the 1998-99 Term of the Supreme Court: a Review*, 3 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 183 (1999).

law.[8] The Court also considered the impact of Eleventh Amendment sovereign immunity of the states on private law suits brought under the Age Discrimination in Employment Act (ADEA)[9] against state government employers,[10] forced use of FLSA compensatory time by public employees,[11] liability of HMOs under the Employee Retirement Income Security Act (ERISA)[12] for mixed eligibility and treatment decisions,[13] and ERISA actions against nonfiduciaries.[14]

If one takes a three year view of the nineteen employment law cases, from the perspective of victories for employee plaintiffs versus victories for employer defendants, the results are mixed, but generally favor employees. Beneath the surface, one sees three voting patterns. First, two members of the Court, Justices Scalia and Thomas, usually joined by Chief Justice Rehnquist, consistently vote in favor of employer interests unless they are constrained by Supreme Court precedent or controlling statutory language. Four members of the Court, Justices Breyer, Ginsburg, Souter, and Stevens, generally support employees, although deviations from this pattern occur based upon the specifics of individual cases. The remaining two Justices, Kennedy and O'Connor, are unpredictable in their voting patterns. Alone, or in combination with each other, they determined the outcome in six of the nineteen employment law cases.[15]

II. OVERVIEW OF EMPLOYMENT LAW CASES FROM THE 1997 AND 1998 TERMS

The three most significant employment law cases from

8. *See Reeves*, discused *infra* Section III.
9. 29 U.S.C. §§ 621-34 (1994).
10. *See Kimel*, discussed *infra* Section IV.
11. *See Christensen*, discussed *infra* Section V.
12. 29 U.S.C. §§ 1001-1467 (1994).
13. *See Pegram*, discussed *infra* Section VI.
14. *See Harris*, discussed *infra* Section VII. Three October 1999 Term nonemployment law cases, with employment law impact, are discussed in Section VIII. The cases are Beck v. Prupis, 529 U.S. 494 (2000) (RICO not violated by termination of employment in retaliation for reporting RICO violations); Cortez Byrd Chips, Inc. V. Bill Harbert Construction Co., 120 S.Ct. 1331 (2000) (Federal Arbitration Act venue issues); and Vermont Agency of Natural Resources v. United States ex-rel. Stevens, 120 S. Ct. 1858 (2000) (qui tam actions by state employees against state agencies).
15. *Oubre, Bragdon, West, Kolstad, Alden,* and *Kimel.*

the 1997 Term dealt with Title VII challenges to sexual harassment. The first two, *Burlington Industries, Inc. v. Ellerth*[16] and *Faragher v. City of Boca Raton*,[17] established standards for determining if employers are vicariously liable for sexual harassment by supervisors. The Court held that if a "tangible employment action"[18] is taken (such as discharge, demotion, or undesirable reassignment), there will be vicarious liability. If no tangible employment action is taken, an employer may avoid vicarious liability by proving that it acted reasonably "to prevent and correct promptly any sexually harassing behavior,"[19] and by proving that "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise . . .."[20]

Justices Thomas and Scalia dissented from the employee-protective approach of the majority in *Ellerth* and *Faragher*. If no tangible employment action is taken against the employee, these two justices would impose liability only when an employer is negligent. Justice Thomas expressed this view as follows: "[A]bsent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment."[21]

In the third sexual harassment case, *Oncale v. Sundowner Offshore Services, Inc.*,[22] Justice Scalia, writing for a unanimous Court, concluded that same-sex sexual harassment violates Title VII. Justice Scalia relied upon Supreme Court precedent holding that there may be unlawful discrimination even if a perpetrator is of the same race or gender as the victim.[23] In *Oncale*, Justice Scalia wrote: "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the

16. 524 U.S. 742 (1998).
17. 524 U.S. 775 (1998).
18. *Burlington*, 524 U.S. at 744.
19. *Id.* at 747.
20. *Id.* at 765.
21. *Faragher*, 524 U.S. at 810.
22. 523 U.S. 75 (1998).
23. Justice Scalia cited Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987), with respect to sex, and Castaneda v. Partida, 430 U.S. 482 (1977), with respect to race.

plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[24]

Another significant case from the 1997 Term provided encouragement for those who seek expansive protection for disabled workers under the ADA. In *Bragdon v. Abbott*,[25] Justice Kennedy controlled the outcome by joining the Breyer-Ginsburg-Souter-Stevens group. The Court held that HIV infection is a disability under the ADA because it causes "a physical or mental impairment that substantially limits one of the major life activities of [an] individual."[26] The Court discussed attacks by HIV on immune and lymphatic systems, resulting in physical impairments that substantially limit, among other things, a person's major life activitiy of reproduction. The Court stated: "Testimony from [Sidney Abbott] that her HIV infection controlled her decision not to have a child is unchallenged."[27] Chief Justice Rehnquist, joined by Justices Scalia, Thomas, and O'Connor, dissented and concluded that Sidney Abbott "failed to demonstrate that any of her major life activities were substantially limited by her HIV infection."[28]

The two remaining employment law cases from the 1997 Term reflect the pattern in which Justices Scalia and Thomas, joined by Chief Justice Rehnquist, favor employers when this does not require rejection of clear statutory text or Supreme Court precedent. In the first of these cases, *Geissal v. Moore Medical Corp.*,[29] Justice Souter, writing for a unanimous Court, interpreted a portion of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA),[30] which amended ERISA. Justice Souter concluded that the "plain meaning"[31] of the text required that a former employee retain his or her right to continued medical coverage under the former employer's medical insurance plan, even if the former

24. *Oncale*, 523 U.S. at 79.

25. 524 U.S. 624 (1998).

26. 42 U.S.C. § 12102(2) (1994). The quoted text is one of three ADA definitions of disability. The other two are having "a record of such an impairment" and "being regarded as having such impairment." *Id.*

27. *Bragdon*, 524 U.S. at 641.

28. *Id.* at 661 (Rehnquist, C.J., dissenting).

29. 524 U.S. 74 (1998).

30. 29 U.S.C. §§ 1161-68 (1994).

31. *Geissal*, 524 U.S. at 82.

employee was covered under another medical insurance plan at the time the employment relationship ended. Most lower courts had held that coverage under another plan at the time employment terminated precluded a right to continue under the employer's plan, unless there was a "significant gap"[32] in coverage between the employer's plan and the other plan.[33] Justice Souter's opinion for the Court considered the complicated factors involved in determining if there is a significant gap in coverage, and concluded that "the required judgment is so far unsuitable for courts that we would expect a clear mandate before inferring that Congress meant to foist it on the judiciary."[34] Because of this policy concern and the plain text of COBRA, all members of the Court joined Justice Souter's opinion.

The remaining case from the 1997 Term, *Oubre v. Entergy Operations, Inc.*,[35] also protected statutory rights of employees. A majority of six, consisting of Justices Breyer, Ginsburg, Souter, and Stevens, joined by Justices Kennedy and O'Connor, strictly applied statutory requirements for waiver and release of ADEA rights. These requirements were added to the ADEA in 1990 by the Older Workers Benefit Protection Act (OWBPA).[36] They were designed to insure that waivers and releases of ADEA rights by employees are knowing and voluntary. The majority concluded that an employee need not "tender back" the consideration received for a waiver and release of ADEA claims, as a precondition to bringing suit under the ADEA. At the same time, because it might be unjust for a plaintiff to retain the original consideration and also receive a remedy in the ADEA action, the majority noted that the employer may have "claims for restitution, recoupment, or setoff against the employee."[37] Justices Scalia and Thomas dissented, with Chief Justice

32. *Id.* at 85.

33. *See, e.g.*, National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558 (11th Cir. 1991); Brock v. Primedica, Inc., 904 F.2d 295 (5th Cir. 1990); *but see* Lutheran Hosp. of Indiana, Inc. v. Business Men's Assurance Co., 51 F.3d 1308 (7th Cir. 1995).

34. *Geissal*, 524 U.S. at 87.

35. 522 U.S. 422 (1998).

36. Pub. L. No. 101-433, Title II, 104 Stat. 978 (1990) (codified at 29 U.S.C. §§ 621-34) (1994)).

37. *Oubre*, 522 U.S. at 428.

Rehnquist joining the dissent of Justice Thomas. They would have required, "as a condition precedent to suit, that a plaintiff return the consideration received in exchange for a release . . ."[38] The dissent would have limited the ability of many plaintiffs to bring suit for ADEA violations because these plaintiffs, prior to bringing suit, already would have spent that which they received in return for their waiver and release of ADEA claims.[39]

The Court interpreted the ADA in three interrelated cases during the 1998 Term, *Sutton v. United Air Lines, Inc.*,[40] *Murphy v. United Parcel Service, Inc.*,[41] and *Albertson's, Inc., v. Kirkingburg*.[42] The Court held that a determination that an individual is disabled under the ADA requires an individualized determination of the extent to which a particular physical impairment limits a major life activity of that individual.[43] It further held that corrective or mitigating measures must be considered in determining if there is a substantial limitation of a major life activity of an individual. Six members of the Court, including Justices Ginsburg and Souter, joined the opinion of Justice O'Connor in *Sutton*. The case involved twin sisters with severe myopia who were denied global pilot positions with United Air Lines, even though their corrected vision was 20/20. The Court concluded that they were not disabled under the ADA because they were not substantially limited in a major life activity. Their ability to see was not substantially limited because their vision was corrected. They also were not limited in the major life activity of working because, although disqualified by their vision from being global pilots, they could hold other pilot positions.

In *Murphy*, a truck mechanic was fired by UPS because of medically controlled high blood pressure. As in *Sutton*, there was a physical impairment, but not one that substantially

38. *Id.* at 437 (Thomas, J., dissenting).

39. On December 11, 2000, the EEOC published a rule based on *Oubre* which dealt with the tender back issue and related OWBPA waiver and release issues. Waivers of Rights and Claims: Tender Back of Consideration, 65 Fed. Reg. 77437 (2000) (to be codified at 29 C.F.R. pt. 1625) (effective Jan. 10, 2001).

40. 527 U.S. 471 (1999).

41. 527 U.S. 516 (1999).

42. 527 U.S. 555 (1999).

43. *See supra* note 26 and accompanying text.

limited a major life activity. Medication permitted Murphy to function normally in his major life activities, and he was not substantially limited in the major life activity of working because, although disqualified from mechanic positions that required driving the trucks, Murphy could perform other mechanic jobs.

In *Albertson's*, a truck driver was fired because he suffered from amblyopia, which causes monocular vision. The Court held that mitigating measures must be taken into account in determining if he was disabled under the ADA, and an individualized determination must be made to determine if his medical condition substantially limits one of his major life activities. These mitigating measures included changes within the individual's own body to compensate for the impairment.

The majority opinions by Justice O'Connor in *Sutton* and *Murphy*, and by Justice Souter in *Albertson's*, leave the impression that the justices made a genuine attempt to discern the actual intent of Congress. In a concurring opinion in *Sutton*, Justice Ginsburg concluded that the intent of Congress was to "restrict the ADA's coverage to a confined, and historically disadvantaged class."[44] Because of this, she agreed that the ADA "does not reach the legions of people with correctable disabilities."[45]

The members of the Court agreed in their reasoning and result in another case involving the ADA, *Cleveland v. Policy Management Systems Corp.*[46] *Cleveland* involved the defense of judicial estoppel, which prevents "a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court."[47] The doctrine was applied by some federal courts in cases in which a plaintiff applied for Social Security Disability Insurance ("SSDI") benefits under the Social Security Act,[48] as a disabled person unable to work, and subsequently filed an

44. *Sutton*, 527 U.S. at 495 (Ginsburg, J., concurring).
45. *Id.* at 494.
46. 526 U.S. 795 (1999).
47. BLACK'S LAW DICTIONARY 517 (7th ed. 1999).
48. 42 U.S.C. § 423 (1994 & Supp. II 1996).

ADA action claiming to be a disabled person able to perform the essential functions of a job. The apparent inconsistency between these two positions led many lower courts to dismiss the ADA actions. The Court's unanimous opinion in *Cleveland*, written by Justice Breyer, relied upon the differences in the definitions of disability under the Social Security Act and the ADA. Reasonable accommodation is not taken into consideration under the Social Security Act in determining if an individual is able to work. The Court concluded that judicial estoppel does not apply in this situation, although a plaintiff who claims to be disabled for SSDI purposes and subsequently files an ADA action "cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation."[49] The Court thus was unanimous in a decision that gave a benefit both to employers and employees, and was based upon a straightforward reading of statutory text.

The Court also was unanimous in a case involving mandatory arbitration of employment disputes, *Wright v.Universal Maritime Service Corp.*[50] *Wright* involved a mandatory arbitration clause contained in a collective bargaining agreement. The employer sought to force Wright to submit his ADA claim to binding arbitration rather than proceed in federal court. The Court's decision focused on the power of a union to bargain away its members' right to a judicial forum for resolution of ADA claims (and other statutory claims). In a tantalizing opinion for the Court, that ultimately left more unresolved than resolved, Justice Scalia established a "clear and unmistakable"[51] waiver standard for a "union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination."[52] The next to last sentence in the opinion was as follows: "We do not reach the question whether such a waiver would be enforceable."[53] The Scalia-Thomas-Rehnquist group may have declined to use this case as an opportunity to advocate

49. *Cleveland*, 526 U.S. at 806.
50. 525 U.S. 70 (1998).
51. *Id.* at 80.
52. *Id.*
53. *Id.* at 82.

support for binding arbitration of employment disputes because of a reluctance to overrule existing Supreme Court precedent. A decision authorizing clear and unmistakable waivers by a union of its members' rights to a judicial forum for statutory employment claims would conflict, at least in part, with the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*[54] In *Alexander*, the Court considered a provision in a collective bargaining agreement that required union members to submit disputes to binding arbitration. The Court held that "there can be no prospective waiver of an employee's rights under Title VII."[55]

The importance of the binding arbitration issues raised by *Wright* warrants an update on the post-*Wright* decisions by lower federal courts. The Fourth Circuit, the only circuit to allow waivers before *Wright*, decided several cases indicating what it would recognize as a waiver. In *Carson v. Giant Food, Inc.*,[56] the Fourth Circuit read *Wright* as establishing two methods of waiver that would meet the requisite standard. First, the collective bargaining agreement's arbitration clause could provide specifically that employees agree to arbitrate all federal claims arising out of employment. Alternatively, where the arbitration clause applies to all disputes, or all disputes concerning the interpretation of the agreement, the statutory discrimination laws must be incorporated in the collective bargaining agreement in order for there to be a waiver.[57] A general anti-discrimination requirement will not suffice.[58] In *Brown v. ABF Freight Systems, Inc*,[59] the Fourth Circuit expanded upon *Carson* and held that contractual language which "may parallel, or even parrot, the language of federal anti-discrimination statutes,"[60] does not explicitly incorporate the statutes into the agreement. The court explained, "There is a significant difference, and we believe a legally dispositive one, between an agreement not to commit discriminatory acts that are prohibited by law and an

54. 415 U.S. 36 (1974).
55. *Id.* at 51.
56. 175 F.3d 325 (4th Cir. 1999).
57. *Id.* at 331-32.
58. *Id.* at 332.
59. 183 F.3d 319 (4th Cir. 1999).
60. *Id.* at 322.

agreement to incorporate, in toto, the antidiscrimination statutes that prohibit those acts."[61] Courts in other jurisdictions have followed *Carson* and, with a few exceptions, have declined to find waivers of the right to litigate in a judicial forum.[62] The *Wright* waiver standard has been applied to state discrimination law claims[63] and constitutional claims.[64]

One district court in the Fourth Circuit has found a waiver based on *Carson* and *Brown*.[65] While the language of the agreement is not quoted in the case, the court described the language as containing an agreement "not to discriminate against any employee because of gender and to abide by Title VII of the Civil Rights Act of 1964."[66] The court also wrote: "Section XX of the CBA requires that any grievance against Defendant for discrimination must be submitted to arbitration."[67] The case was not appealed and it is difficult to tell from the court's description of the language whether it met either of the requirements articulated in *Carson*. A recent decision from the Eastern District of New York gave preclusive effect to an arbitrator's decision denying a sexual harassment grievance, thereby granting summary judgment on the plaintiffs' Title VII and state law claims.[68] The court

61. *Id.*

62. *See, e.g.*, Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000) (holding that union waivers of individual rights are unenforceable, but even if they are enforceable after *Wright*, there is no waiver where there is no specific incorporation of the statute, by name or citation, and no contractual commitment to comply with the statute.); Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000) (finding no waiver where the collective bargaining agreement did not mention the statute and the employee's grievance alleging discrimination did not waive the right to litigate in a judicial forum, even though the arbitrator and the employee discussed the statute); Quint v. A. E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999) (finding no waiver where there was no contractual mention of the statute).

63. *See* Vasquez v. Superior Court, 95 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000). The Supreme Court of New York, Appellate Division, found a waiver of a state statutory claim where the arbitration clause covered "claims arising out of or under this [collective bargaining agreement] or the employee's employment, including but not limited to any EEOC, ADA, ADEA or other statutory claims . . . ." Torres v. Four Seasons Hotel, 715 N.Y.S. 2d 28, 29 (App. Div. 2000).

64. *See* Schumacher v. Souderton Area Sch. Dist., 163 L.R.R.M. (BNA) 2461 (E.D. Pa. 2000).

65. *See* Safrit v. Cone Mills, 162 L.R.R.M. (BNA) 2974 (M.D.N.C. 1999).

66. *Id.* at 2975.

67. *Id.*

68. Clarke v. UFI, Inc., 164 L.R.R.M. (BNA) 2388 (E.D.N.Y. 2000). Since the decision, however, the Second Circuit reaffirmed its earlier decision that union waivers of employee rights to litigate statutory claims are unenforceable. Rogers v.

concluded that there was a clear and unmistakable agreement to arbitrate statutory claims based on a contractual commitment to end sexual harassment, which included a definition drawn in part from Supreme Court Title VII cases and language stating that grievances under the sexual harassment clause will be handled with speed and confidentiality. In contrast to other courts, the New York court did not require express incorporation of the statute, but found a waiver based upon the use of language from cases interpreting the statute.

During the 1998 Term, in *Alden v. Maine*,[69] the Court applied the Eleventh Amendment and related principles of sovereign immunity to block enforcement of the overtime compensation provisions of the FLSA against state agencies through private law suits. Although the Eleventh Amendment previously was held only to block private law suits brought against states in federal court, in *Alden* the Court held that the Eleventh Amendment, and related state sovereign immunity principles, also shield an unconsenting state from being sued in state court. The decision in *Alden* demonstrates the traditional voting patterns of the justices in employment law cases. A majority of five was formed when Justices Kennedy and O'Connor joined Chief Justice Rehnquist and Justices Scalia and Thomas. Justices Breyer, Ginsburg, Souter, and Stevens were in dissent. *Alden* and other Eleventh Amendment state sovereign immunity cases led to the 1999 Term decision in *Kimel v. State of Florida Board of Regents*,[70] in which the ADEA was held to be unenforceable against state agency employers through private actions by state employees in federal court. *Kimel* is discussed in Section IV.

The remaining two employment cases from the 1998 Term interpreted the text of Title VII. In *West v. Gibson*,[71] the Court first considered language added to Title VII in 1972 that authorizes the EEOC to use an administrative procedure to provide "appropriate remedies" for employment

New York Univ., 220 F.3d 73 (2d Cir. 2000).

69. 527 U.S. 706 (1999).

70. 528 U.S. 62 (2000).

71. 527 U.S. 212 (1999).

discrimination against federal government employees.[72] The Court then considered the Compensatory Damages Amendment Act of 1991,[73] which provided for compensatory damage awards for victims of intentional employment discrimination, including victims who are employees of the federal government. The Court interpretated both statutes and concluded that the EEOC has power to award compensatory damages to federal government employees. Justice Breyer's opinion for the Court was joined by Justices Ginsburg, O'Connor, Souter, and Stevens, with the participation of Justice O'Connor making this the majority view. Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas were in dissent.

The Court also interpreted the text of Title VII in *Kolstad v. American Dental Association*,[74] which involved the standard to be used for awards of punitive damages under Title VII, as amended by the 1991 Civil Rights Act. The statutory language provides for an award of punitive damages if an employer acts "with malice or with reckless indifference to the federally protected rights"[75] of an employee. Some lower courts construed this language to mean that egregious misconduct is required. The opinion for the Court by Justice O'Connor did not accept this stringent test for awards of punitive damages, and held that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."[76] This portion of her opinion, supportive of employees, was joined by seven members of the Court, with dissents by Chief Justice Rehnquist and Justice Thomas who preferred an eggregious misconduct standard. Justice O'Connor then dramatically limited employer vicarious liability for punitive damages on a basis that was not briefed by the parties. Joined by Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, she wrote, "Recognizing Title VII as an effort to promote prevention as well as remediation . . . we agree that

72. 42 USC § 2000e-16(b)(1994).
73. 42 U.S.C. § 19811(a)(1)(1994).
74. 527 U.S. 526 (1999).
75. 42 U.S.C. § 1981a(b)(1) (1994).
76. *Kolstad*, 527 U.S. at 535.

an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"[77] Justice Stevens, joined by Justices Breyer, Ginsburg and Souter, dissented from the failure of the Court to remand the case for trial on the punitive damages issue. They wrote, "The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised."[78] This overview of the 1997 and 1998 Term employment law cases provides context for a review of the 1999 Term decisions.

III. PRETEXT-PLUS DOCTRINE, MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS FOR JUDGMENT AS A MATTER OF LAW – *Reeves v. Sanderson Plumbing Products, Inc.*

Employees were the victors in *Reeves v. Sanderson Plumbing Products, Inc.*[79] The decision rejected pretext-plus doctrine and limited the ability of federal judges to grant motions for summary judgment and motions for judgment as a matter of law in employment discrimination cases.

The pretext-plus portion of the Court's decision confirms the continuing validity of three earlier Supreme Court decisions that established a workable method for proving individual disparate treatment cases through the use of circumstantial evidence.[80] The first of these cases, *McDonnell Douglas Corp. v. Green*,[81] held that a plaintiff in a racial

77. *Id.* at 545.

78. *Id.* at 553 (Stevens, J., dissenting).

79. 120 S.Ct. 2097 (2000).

80. The three cases, McDonnell Douglas Corp.v. Green, 411 U.S. 792 (1973); Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981); and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), were based upon Title VII, whereas *Reeves* is an ADEA case. The parties in *Reeves* did not dispute the applicability of the holdings of the three cases to the ADEA and the Court "assume[d], arguendo, that the *McDonnell Douglas* framework is fully applicable . . ." 120 S.Ct. at 2105. Lower courts in all circuits have applied *McDonnell Douglas*, *Burdine*, and *Hicks* to ADEA cases, and the Supreme Court earlier "assume[d]" that *McDonnell Douglas* applies to ADEA cases. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996). In *O'Connor*, the Court reviewed a decision of the Fourth Circuit that applied *McDonnell Douglas* to an ADEA action and listed cases from the other eleven circuits in which *McDonnell Douglas* had been applied in ADEA cases. *Id.* at 309 n2.

81. 411 U.S. 792 (1973).

discrimination Title VII action may establish a prima facie case

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification.[82]

The Court's opinion also provided a basis for applying the basic approach of *McDonnell Douglas*, with appropriate variations, to individual disparate treatment claims involving other aspects of the employment process, such as promotions and terminations,[83] and other categories of discrimination covered by Title VII, such as national origin and gender.[84]

Establishment of a prima facie case shifts to the defendant employer a burden "to articulate some legitimate, non-discriminatory reason for the employee's rejection."[85] The plaintiff then must "be afforded a fair opportunity to show that the [defendant's] stated reason for [the plaintiff's] rejection was in fact pretext."[86]

In *Texas Department of Community Affairs v. Burdine*,[87] the Court clarified two aspects of *McDonnell-Douglas*. First, the Court made it clear that the defendant employer's burden is one of production, not persuasion. The Court explained this as follows:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination . . . The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it

82. *Id.* at 802.

83. *See id.* at 802 n.13 ("The facts will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

84. Title VII provides:

It shall be an unlawful employment practice for an employer -

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .

42 U.S.C. § 2000e-2 (1994).

85. *McDonnell Douglas*, 411 U.S. at 802.

86. *Id.* at 804.

87. 450 U.S. 248 (1981).

> discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reason for the plaintiff's rejection.[88]

The second part of *McDonnell Douglas* that was clarified by *Burdine* relates to proof of pretext by the plaintiff. The Court held that a plaintiff can demonstrate pretext in either of two ways, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence."[89]

The *Burdine* pretext stage was the focus of attention in *St. Mary's Honor Center v. Hicks*.[90] In *Hicks*, the Court emphasized that the ultimate burden of persuasion remains on the plaintiff at all times,[91] and that the prima facie case "is no longer relevant"[92] and "simply drops out of the picture,"[93] once the defendant has met its burden of production. The Court then focused on that portion of *Burdine* that held that pretext can be proven by "showing the employer's proferred explanation is unworthy of credence."[94] Justice Scalia's opinion in *Hicks* held that this proof of pretext does not "[compel] judgment for the plaintiff"[95] because "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."[96] Instead, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race . . . "[97] This does not mean, however, that proof of pretext is never sufficient, by itself, to prove discrimination, nor does it mean that the evidence used to create a prima

88. *Id.* at 254-55 (citation and footnote omitted).
89. *Id.* at 256.
90. 509 U.S. 502 (1993).
91. *Id.* at 507.
92. *Id.* at 510.
93. *Id.* at 511.
94. *Id.* at 517, quoting *Burdine*, 450 U.S. at 256.
95. *Hicks*, 509 U.S. at 511.
96. *Id.* at 514-15.
97. *Id.* at 511, quoting *Burdine*, 450 U.S. at 255.

facie case and prove pretext is irrelevant. Justice Scalia wrote:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proferred reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination . . . .[98]

Justice Scalia's pretext discussion in *Hicks* gave rise to the pretext-plus doctrine. It also led to *Reeves*, and the pretext-plus doctrine's demise.

The pretext-plus doctrine, as applied by the Fifth Circuit Court of Appeals in *Reeves* and by some federal courts in other cases,[99] provides that a prima facie case plus proof of pretext alone do not permit a judgment for the plaintiff. Instead, additional evidence of intentional discrimination is required. For example, in *Reeves* the Fifth Circuit Court of Appeals reversed a lower court judgment for the plaintiff because the additional evidence, beyond that which established the prima facie case and proved pretext, was insufficient in the appellate court's view to support a judgment for the plaintiff.[100] Proof of pretext plus other credible evidence was required. Justice O'Connor described the lower court's error as follows: "[B]ecause a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination."[101]

Roger Reeves was terminated at the age of fifty-seven after forty years of employment by Sanderson Plumbing Products. In his ADEA action, he established a prima facie case by proving: (1) he was in the ADEA protected class of

98. *Hicks*, 509 U.S. at 511.

99. *See, e.g.*, Taylor v. Virginia Union Univ., 193 F.3d 219, 230 (4th Cir. 1999) *cert. denied*, 120 S. Ct. 1243 (2000); Gillins v. Berkeley Elec. Cooperative, Inc., 148 F.3d 413, 416 (4th Cir. 1998); Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994).

100. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693 (5th Cir. 1999), *rev'd*, 120 S. Ct. 2097 (2000).

101. *Reeves*, 120 S. Ct. at 2109.

persons forty years of age or older, (2) he was qualified for his manufacturing supervisor position, (3) he was terminated, and (4) Sanderson successively hired three other people in their thirties for the position.[102] Sanderson met its burden of producing a legitimate, non-discriminatory reason for its action, "by offering evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records."[103] Reeves then introduced evidence, believed by the jury, that this explanation was pretextual, and offered additional evidence of intentional age discrimination. This additional evidence included evidence that Reeves was treated more harshly than similarly situated younger employees, and that age-based statements were made about him by the supervisor who recommended his termination, specifically that "he 'was so old [he] must have come over on the Mayflower,'"[104] and "that he 'was too damn old to do [his] job.'"[105]

Applying the pretext-plus doctrine, the Fifth Circuit Court of Appeals considered but was unconvinced by the additional evidence and disregarded the evidence that established the prima facie case and proved pretext. Justice O'Connor described the appellate court's decision as follows:

> [T]he Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. The Court confined its review of evidence favoring petitioner to that evidence showing that Chestnut had directed derogatory, age-based comments at petitioner, and that Chestnut had singled out petitioner for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination. In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through

102. *Id.* at 2106.
103. *Id.*
104. *Id.* at 2110.
105. *Id.*

indirect evidence.[106]

Justice O'Connor's opinion for the Court in *Reeves* thus rejected the pretext-plus doctrine, and confirmed that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[107] She provided this rationale for the Court's conclusion:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[108]

The Court also noted that "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."[109]

In a concurring opinion, Justice Ginsburg discussed circum-stances in which additional evidence will be necessary for plaintiffs "to survive a motion for judgment as a matter of law,"[110] and anticipated "that such circumstances will be uncommon,"[111] because "the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability."[112]

A recent case in which summary judgment was granted to the defendant, even though the plaintiff established his prima facie case and a jury might have concluded that the employer's explanation was pretextual, is *Schnabel v. Abramson*.[113] The Second Circuit Court of Appeals, wrote:

106. *Id.* at 2108 (citations omitted).
107. *Id.* at 2109.
108. *Id.* at 2108-09 (citations omitted) .
109. *Id.* at 2109.
110. *Id.* at 2112.
111. *Id.*
112. *Id.*
113. 232 F.3d 83 (2d Cir. 2000). Schnabel, a sixty year old attorney, was

> [W]e hold that after Reeves, a court may, in appropriate circumstances, still grant a defendant's motion for summary judgment—or judgment as a matter of law—on an ADEA claim when a plaintiff has offered only a prima facie case along with evidence that the defendant's stated nondiscriminatory reasons for an adverse employment action are pretextual.[114]

The court explained that "the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'"[115] The court upheld summary judgment for the defendant because "plaintiff has presented no evidence upon which a reasonable trier of fact could base the conclusion that age was a determinative factor in defendant's decision to fire him."[116]

The First Circuit Court of Appeals described the impact of *Reeves* in a similar manner, in *Fite v. Digital Equipment Corp.*[117] The court wrote:

> In *Reeves v. Sanderson Plumbing Prods., Inc.*, the Supreme Court made clear that 'the falsity of the employer's explanation' may permit the jury to infer a discriminatory motive but does not compel such a finding . . . . Obviously whether in a particular case a prima facie showing of discrimination and the disbelieved pretextual explanation make a stronger or weaker case for the plaintiff depends very heavily on the facts.[118]

The Eighth Circuit Court of Appeals relied upon *Reeves* in *Fisher v. Pharmacia & Upjohn*,[119] and reversed a trial court summary judgment in favor of an employer because of evidence that established the prima facie case and proved

terminated from his investigator position with a county legal aid society, and was replaced by a younger, former employee with a better employment record. Schnabel was fired by the same Chief Attorney who hired him three years earlier. No additonal evidence of age discrimination was available to Schnabel.

114. *Id.* at 91.

115. *Id.* at 90.

116. *Id. See also* James v. New York Racing Ass'n, 233 F.3d 149, 157 (2d Cir. 2000) (upholding a trial court's grant of defendant's motion for summary judgment because "James's evidence was insufficient to permit a reasonable trier of fact to find that age discrimination was the reason for his discharge . . . ").

117. 232 F.3d 3 (1st Cir. 2000).

118. *Id.* at 7 (citations omitted).

119. 225 F.3d 915 (8th Cir. 2000).

pretext, combined with additional "evidence [consisting] primarily of disparaging age-related remarks made to Fisher and other Pharmacia employees by members of Pharmacia's management."[120] The same court, again relying on *Reeves*, upheld the trial court's grant of a motion for judgment as a matter of law in *Tatom v. Georgia-Pacific Corp.*,[121] because "no rational jury could find that Tatom's suspension was the result of intentional discrimination based on age."[122] These post-*Reeves* decisions leave unclear the extent to which some lower courts may limit the impact of the *Reeves* pretext-plus holding by reviewing evidence to determine if a reasonable jury could find for the plaintiff.

The procedural holdings of the Court in *Reeves* are as important for employment litigation as the Court's rejection of pretext-plus doctrine. The procedural holdings apply not just to employment law cases, but to civil litigation in general.[123] They establish standards to control federal district court judges when they rule on motions for judgment as a matter of law, under Rule 50 of the Federal Rules of Civil Procedure, and motions for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure. The standards articulated in *Reeves* will curb the current practice of many federal judges who, when dealing with employment law cases, invade the province of the jury, evaluate the evidence in dispute, and dispose of cases by granting defense motions for summary judgment or judgment as a matter of law.

Rule 50 provides, in pertinent part:

> If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a

120. *Id.* at 922.

121. 228 F.3d 926 (8th Cir. 2000).

122. *Id.* at 932.

123. The Court made clear the obligation of trial courts to treat employment law cases the same as other civil cases: "[W]e have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact." *Reeves*, 120 S. Ct. at 2109 (internal quotation marks and citation omitted).

favorable finding on that issue.[124]

Rule 56 provides, in pertinent part:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.[125]

Rule 56 further provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[126]

Rules 50 and 56 do not inform a federal judge as to how evidence should be evaluated in determining, for purposes of a Rule 50 motion, if there is a "legally sufficient evidentiary basis"[127] for a jury to find for a party, or, for purposes of a Rule 56 motion, if there is a "genuine issue as to any material fact"[128] in dispute between the parties. *Reeves* fills this gap with standards for review of evidence by a federal judge ruling on either a Rule 50 or Rule 56 motion. First, the Court held that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'"[129] The Court then held that a trial judge: (1) "should review all of the evidence in the record,"[130] (2) "must draw all reasonable inferences in favor of the nonmoving party,"[131] and (3) "may not make credibility determinations or weigh the evidence,"[132] because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[133] In addition, the trial judge

124. FED. R. CIV. P. 50(a)(1).
125. Fed. R. Civ. P. 56(a).
126. FED. R. CIV. P. 56(c).
127. FED. R. CIV. P. 50(a)(1).
128. FED. R. CIV. P. 56(c).
129. *Reeves*, 120 S. Ct. at 2110.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

"must disregard all evidence favorable to the moving party that the jury is not required to believe,"[134] and "should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."[135]

The Fifth Circuit did not comply with these requirements because it "disregarded critical evidence favorable to [Reeves]—namely the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation."[136] The court "failed to draw all reasonable inferences in favor of [Reeves]"[137] and "impermissibly substituted its judgment concerning the weight of the evidence for the jury's."[138] Therefore, it was error for the court of appeals to overturn the jury verdict for Reeves. "Given that petitioner established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had intentionally discriminated."[139]

In both its pretext-plus and procedural holdings, *Reeves* will have a significant impact on employment law litigation. The predictable results will be more cases reaching juries and more cases settling prior to trial.

IV. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY AND THE ADEA – *Kimel v. Florida Board of Regents*

Kimel v. Florida Board of Regents[140] is the latest in a series of Supreme Court decisions that focus on state sovereign immunity from law suits brought by private parties, based upon the Eleventh Amendment to the U.S. Constitution and related principles of sovereign immunity. The Eleventh Amendment provides: "The Judicial power of the United

134. *Id.*
135. *Id.* (internal quotation marks and citation omitted).
136. *Id.* at 2111.
137. *Id.*
138. *Id.*
139. *Id.* at 2112.
140. 528 U.S. 62 (2000).

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[141] In *Kimel*, the Court concluded that Congress exceeded its authority under the Constitution when it amended the ADEA to provide for law suits brought by private individuals against the states.

The story told by the Eleventh Amendment sovereign immunity cases begins in Georgia in 1793, with the federal district court case that led to the Supreme Court's decision in *Chisolm v. Georgia*.[142] *Chisolm* was based on the text of Article III, Section 2, of the U. S. Constitution which provides, in relevant part, "The Judicial Power shall extend to Controversies . . . between a State and Citizens of another State . . . "[143] The Supreme Court applied this text literally in *Chisolm*, an action of assumpsit brought by Chisolm, a creditor, against the State of Georgia. The political result was ratification in 1798 of the Eleventh Amendment. Although the text of the Eleventh Amendment applies only to suits brought against one state by citizens of another state (as in *Chisolm*), the Supreme Court held in 1890, that the principles of state sovereign immunity reflected in the Eleventh Amendment also shield a state from law suits brought by citizens of the same state.[144] The Eleventh Amendment sovereign immunity shield, against actions by private individuals, was lowered somewhat in 1908. In *Ex Parte Young*,[145] the Court permitted actions against state officials, sued in their official capacities for injunctive and declaratory relief, but this did not permit actions against state officials if retroactive money damages were sought.[146]

Soon after Title VII was amended in 1972 to include states as defendants, with potential liability to private individuals for money damages, the Eleventh Amendment sovereign immunity shield was used by the State of Connecticut to defend against a Title VII sex discrimination

141. U.S. CONST. amend. XI.
142. 2 U.S. (2 Dall.) 419 (1793).
143. U.S. CONST. Art. III, § 2.
144. Hans v. Louisiana, 134 U.S. 1 (1890).
145. 209 U.S. 123 (1908).
146. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

action brought by retired state employees. The case, *Fitzpatrick v. Bitzer*,[147] reached the Supreme Court in 1976 and resulted in an opinion for the Court by then Justice Rehnquist. The Court concluded that the 1972 amendments, which extended Title VII to the states, were based upon an exercise of power by Congress under Section 5 of the Fourteenth Amendment, which gives Congress "power to enforce, by appropriate legislation, the provisions of this article."[148] The Fourteenth Amendment Equal Protection Clause, which provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[149] provides protection from sex discrimination by a state, and the 1972 amendments to Title VII provided a statutory remedy for this constitutional violation. The Court concluded "that the Eleventh Amendment and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment."[150] Therefore, "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[151]

The Eleventh Amendment sovereign immunity of the states was considered again by the Court in 1989, in *Pennsylvania v. Union Gas Co.*[152] Congress enacted legislation that provided for suits by private individuals against states to force states to pay part of the cost of environmental clean-up. The legislation was based upon the power of Congress under the Commerce Clause of the U.S. Constitution,[153] and not Section 5 of the Fourteenth Amendment. Although there was no majority opinion, the Court decided that Congress had the power under the Commerce Clause to abrogate the Eleventh Amendment sovereign immunity of unconsenting states, because the states consented to abrogation in advance

147. 427 U.S. 445 (1976).
148. U.S. CONST. amend. XIV, § 5.
149. U.S. CONST. amend. XIV, § 1.
150. *Fitzpatrick*, 427 U.S. at 456 (citation omitted).
151. *Id.*
152. 491 U.S. 1 (1989).
153. U.S. CONST. art. I, § 8, cl. 3.

when they ratified the Constitution (containing the Commerce Clause) in 1798.

Pennsylvania v. Union Gas was overruled, in 1996, by *Seminole Tribe of Florida v. Florida*,[154] a case that dealt with the Indian Gaming Regulatory Act of 1988.[155] This Act provided for law suits in federal court brought by Indian tribes against states. Congress enacted the legislation under the Indian Commerce Clause,[156] not Section 5 of the Fourteenth Amendment. In *Seminole Tribe*, the Court focused on two questions, first, whether Congress intended to abrogate the Eleventh Amendment sovereign immunity of the states and, second, whether Congress had the power to do so under the Indian Commerce Clause. The Court concluded that "Congress has . . . provided an 'unmistakably clear' statement of its intent to abrogate."[157] The Court then held that Congress lacked the power under Article I of the Constitution to abrogate the Eleventh Amendment sovereign immunity of the states. The Court wrote:

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[158]

A surprising development took place during the Court's October 1998 Term, in *Alden v. Maine*,[159] an action by state probation officers against the State of Maine alleging violations of the FLSA. Because the FLSA was enacted under Congress' Article I Commerce Clause power, *Seminole Tribe* superficially seemed to control and provide the state with Eleventh Amendment sovereign immunity. However, all prior Eleventh Amendment sovereign immunity cases involved litigation in federal court, and *Alden* was brought in a Maine

154. 517 U.S. 44, 66 (1996).

155. Pub. L. 100-497, 102 Stat. 2467 (1988), codified at 5 U.S.C. §§ 2701-21 (1994).

156. U.S. CONST. art. I, § 8, cl. 3.

157. *Seminole Tribe*, 517 U.S. at 56.

158. *Id.* at 72-3 (citation omitted).

159. 527 U.S. 706 (1999). *See supra* notes 70-72 and acompanying text.

state court. For Maine to prevail, it was necessary for principles of Eleventh Amendment sovereign immunity to provide protection when cut completely away from Eleventh Amendment textual moorings, because *Alden* was an action by citizens against their own state, not another state, and the jurisdiction of state courts, not federal courts, was at issue. Undaunted by this lack of textual support in the Constitution, Justice Kennedy wrote for the majority, "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."[160]

Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens, wrote a strong dissent disagreeing with the majority's view of Eleventh Amendment sovereign immunity. He wrote "The Court's rationale for today's holding based on a conception of sovereign immunity as somehow fundamental to sovereignty or inherent in statehood fails for the lack of any substantial support for such a conception in the thinking of the founding era."[161] The modern day implications of the majority's sovereign immunity doctrice were described by Justice Souter as follows, "The Court's federalism ignores the accepted authority of Congress to bind States under the FLSA and to provide for enforcement of federal rights in state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding."[162]

The October 1999 Term also produced *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[163] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[164] In each case the Court held that Eleventh Amendment sovereign immunity doctrine shields states from private law suits based upon statutes enacted by Congress under its Commerce Clause powers (and, in the case of *Florida Prepaid*, the Patent

160. *Alden*, 527 U.S. at 754.
161. *Id.* at 798 (Souter, J., dissenting).
162. *Id.* at 761.
163. 527 U.S. 627 (1999).
164. 527 U.S. 666 (1999).

Clause),[165] as opposed to its power under Section 5 of the Fourteenth Amendment.

Based upon the cases discussed above, the test for determining if a state is subject to federal claim litigation brought by private parties, either in federal or state court, is whether the underlying legislation was enacted by Congress as a legitimate exercise of its power under Section 5 of the Fourteenth Amendment. The key to determining if there was a legitimate exercise of Section 5 power is a 1997 case, *City of Boerne v. Flores.*[166] *City of Boerne* was the basis for the outcome in *Kimel*, and will determine the outcome during the October 2000 term in *Garrett v. Board of Trustees of the University of Alabama,*[167] an Eleventh Amendment sovereign immunity case that raises issues similar to those in *Kimel*, but under the ADA rather than the ADEA.

City of Boerne evaluated the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA).[168] RFRA was enacted by Congress in response to *Employment Division, Department of Human Resources of Oregon v. Smith,*[169] in which the Court held that the Free Exercise of Religion Clause of the First Amendment[170] is not violated by a "valid and neutral law of general applicability,"[171] even though the law may have the effect of interfering with the free exercise of religion. RFRA replaced this permissive constitutional standard and "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[172]

In enacting RFRA, Congress relied upon its powers under

165. U.S. CONST. art. I, § 8, cl. 8.
166. 521 U.S. 507 (1997).
167. 193 F.3d 1214 (11th Cir. 1999), *cert. granted,* 120 S. Ct. 1669 (2000).
168. Pub. L. No. 103-141, 107 Stat. 1488 (1993)(codified at 42 U.S.C. §§ 2000bb - 1 to 4 (1994)).
169. 494 U.S. 872 (1990).
170. U.S. CONST. amend. I.
171. *Smith,* 494 U.S. at 879.
172. *City of Boerne,* 521 U.S. at 515-6.

Section 5 of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects against violations of the Free Exercise Clause of the First Amendment. The problem, however, was that very little governmental action subject to the RFRA violated the Free Exercise Clause, as the Clause was interpreted in *Smith*. The *City of Boerne* Court held that for an exercise of Section 5 powers by Congress to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end."[173] This test distinguishes "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law . . ."[174] Congress may enact legislation under Section 5 to prevent and remedy Fourteenth Amendment violations, but may not enact legislation that, as expressed by the Court, "decree[s] the substance of the Fourteenth Amendment's restrictions on the States."[175]

In *Kimel*, the Court concluded that the intent of Congress to abrogate the Eleventh Amendment sovereign immunity of the states was clear.[176] It then considered the crucial Eleventh Amendment sovereign immunity question, whether the ADEA is based upon an exercise of power by Congress under the Commerce Clause or an exercise of power by Congress under Section 5 of the Fourteenth Amendment. If the former, then Congress exceeded its powers[177]. If the latter, and the congruence and proportionality test of *City of Boerne* is satisfied, then Congress acted within its powers and validly abrogated the states' sovereign immunity from ADEA

173. *Id.* at 520. The Court elaborated, "[T]here must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another." *Id.* at 530 (citation omitted). Later in the opinion, the Court wrote, "Remedial legislation under Section 5 should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *Id.* at 532 (internal quotation marks and citation omitted).

174. *Id.* at 519.

175. *Id.*

176. *Kimel*, 528 U.S. at 75-76.

177. *Id.* at 79. ("Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.").

law suits brought by private individuals.[178]

The Court considered whether or not the ADEA could be justified as an exercise of power by Congress under Section 5. Unfortunately for Daniel Kimel and other plaintiffs in the two consolidated cases before the Court, the Court recognized that, under its prior decisions, age is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment.[179] Accordingly, the Court observed, "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[180] Age discrimination, however, may violate the ADEA even if it is rational. The purpose of the ADEA is to require that every employee or applicant for employment is evaluated on the basis of individual ability and performance. This is different from the Equal Protection Clause under which "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant."[181]

The Court stated that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[182] However, "the same language that serves as the basis for the

178. *Id.* at 80. ("Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity. . .Accordingly, the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under Section 5.").

179. The Court concluded in three prior cases that age is not a suspect classification. If the Court had decided otherwise, a state would be required to justify an age-based classification by proving that there is a compelling governmental interest served by the classification, and that it was served by narrowly tailored means. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (involving mandatory retirement of state court judges at the age of 70); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 301 (1976) (involving mandatory retirement of state police officers at the age of 50); Vance v. Bradley, 440 U.S. 93 (1973) (involving mandatory retirement of foreign service officers at age 60).

180. *Kimel*, 528 U.S. at 83.

181. *Id.* at 84.

182. *Id.* at 81.

affirmative grant of congressional power also serves to limit that power."[183] The Court reviewed the legislative record, which confirmed that "Congress' extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."[184] In the view of the Court, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."[185] The Court summarized its conclusion:

> Judged against the backdrop of our equal protection jurispru-dence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.[186]

The *Kimel* dissent by Justice Stevens, joined by Justices Breyer, Ginsburg, and Souter, objected strenuously to the judge-made doctrine of sovereign immunity that, in this case, prevented the plaintiffs from suing their state employers for violating their rights under the ADEA. The dissent characterized the "judicial activism" of the majority as a "radical departure from the proper role of this Court . . . "[187]

The impact of *Kimel* is mitigated, to some extent, because the Eleventh Amendment sovereign immunity of the states has no impact on ADEA enforcement actions by the federal government.[188] On the other hand, the enforcement resources of the federal government are very limited, which is part of the reason why Congress designed the ADEA to be enforced, in large part, through private actions. The impact of *Kimel* also is limited because the Eleventh Amendment sovereign

183. *Id.*
184. *Id.* at 89.
185. *Id.*
186. *Id.* at 86 (internal quotation marks and citation omitted).
187. *Id.* at 99 (Stevens, J., dissenting).
188. In EEOC v.Wyoming, 460 U.S. 226 (1983), the Court held that Congress had the power under the Commerce Clause to enact the ADEA and make the ADEA applicable to the states. *Wyoming* supports ADEA enforcement actions against the states brought by the federal government.

immunity of the states is inapplicable to actions by private individuals "against a municipal corporation or other governmental entity which is not an arm of the state."[189] Eleventh Amendment sovereign immunity "bars suits against States but not lesser entities."[190]

As discussed earlier, the Court is about to decide *Garrett*, an ADA case raising Eleventh Amendment sovereign immunity issues. If the Court does not distinguish the age discrimination claims in *Kimel* from the disability claims in *Garrett*, and does not find a basis in Section 5 of the Fourteenth Amendment for enactment of the ADA, the result will visit immense harm upon a particularly vulnerable group of people who are harmed by state violations of the ADA in many aspects of their lives, not just employment.

V. FLSA AND PUBLIC EMPLOYEES' ACCRUED COMPENSATORY TIME –*Christensen v. Harris County*

The Supreme Court addressed the Fair Labor Standards Act in *Christensen v. Harris County*.[191] The action was filed by 127 deputy sheriffs employed by Harris County, Texas. Each deputy had individually agreed to accept compensatory time in lieu of cash compensation[192] for overtime.[193] Since 1985, the FLSA has authorized state and local governments to pay compensatory time rather than monetary compensation for overtime work, if the government has an agreement to do so with the employees or their representative.[194] The statutory provision sets a maximum number of hours of compensatory time that may be accumulated.[195] Once the maximum is reached, the statute requires the employer to pay monetary compensation for overtime.[196] In addition, the statute requires payment for unused compensatory time upon employment

189. *Alden*, 527 U.S. at 756.
190. *Id.*
191. 120 S. Ct. 1655 (2000).
192. *See* 29 U.S.C. § 207(o)(3)(A) (1994).
193. Although the deputies were represented by an association, Texas law prohibited the county from bargaining with the association so individual agreements for compensatory time were necessary pursuant to the statute. *See* Moreau v. Klevenhagen, 508 U.S. 22, 28-29 (1993).
194. 29 U.S.C. §§ 207(o)(1),(2) (1994).
195. *Id.* § 207(o)(3)(A).
196. *Id.* § 207(o)(3)(A).

termination.[197] Because the county was concerned about its potential liability for large cash payments to employees leaving their jobs with large accumulations of compensatory time, it forced employees to use compensatory time once they had reached a specified accumulation below the statutory maximum.[198] The county implemented the requirement over the objections of the employees despite an opinion letter from the Department of Labor advising the county that such a requirement was permissible under the statute only if the agreement with employees for compensatory time included such a provision.

The employees filed suit alleging that the county's policy violated Section 207(o)(5) of the FLSA, which provides that employees who request to use accrued compensatory time shall be permitted to do so within a reasonable period unless it would unduly disrupt the operations of the employer.[199] The employees argued that this provision specifies the exclusive procedure for utilization of compensatory time, absent agreement with the employees to another method. The district court agreed,[200] but the Court of Appeals for the Fifth Circuit reversed.[201] The appellate majority found a default principle that the employer was free to set workplace rules unless the statute or an agreement with employees provided otherwise. Since the statute did not directly address the issue, the employer's policy stood. The court expressly rejected the contrary holding of the Eighth Circuit in *Heaton v. Moore*[202] that banked compensatory time was the property of the employee, to be used as the employee chose so long as it did not unduly disrupt the operations of the employer.

The case generated five opinions in the Supreme Court: a majority opinion, two concurrences and two dissents. Justice

197. *Id.* § 207(o)(4).

198. Employees were encouraged to use their time as they approached the maximum but if they did not, the supervisor could schedule them to use their compensatory time involuntarily. *Christensen*, 120 S. Ct. at 1659.

199. 29 U.S.C. § 207(o)(5) (1994).

200. Moreau v. Harris County, 945 F.Supp. 1067 (S.D. Tex. 1996), *rev'd*, 158 F.3d 241 (5th Cir. 1998), *aff'd sub nom.*, Christensen v. Harris County, 120 S. Ct. 1655 (2000).

201. Moreau v. Harris County, 158 F.3d 241 (5th Cir. 1998), *aff'd sub nom.*, Christensen v. Harris County, 120 S. Ct. 1655 (2000).

202. 43 F.3d 1176, 1180 (8th Cir. 1994).

Thomas wrote the majority opinion, joined by Justices Rehnquist, O'Connor, Kennedy, Souter and, with the exception of one section, by Justice Scalia.

The majority rejected the argument of the plaintiffs, supported by the Secretary of Labor, that the statute set forth the exclusive method for use of compensatory time. Rather the majority viewed the statute as a "minimal guarantee" that the employee would be able to use the compensatory time when requested. The interpretation urged by the employees would, according to the majority, "convert Section 207(o)(3)(A)'s [maximum accrual limit] shield into a sword,"[203] an argument made by the employer. Since the statute permits employers to decrease the number of hours an employee works, and to cash out accumulated compensatory time by paying the employee for each hour, the employer is also free to do both of these things at once by forcing an employee to use compensatory time.

Section III of the majority opinion, which Justice Scalia expressly declined to join, held that opinion letters of administrative agencies are not entitled to *Chevron* deference.[204] In *Chevron*, the Court held that courts must defer to administrative agency regulations which reasonably interpret an ambiguous statute. The majority concluded that opinion letters are not entitled to the same deference that *Chevron* commanded courts to afford to agency regulations. Furthermore, the majority read the Secretary's regulation, which provided that the agreement between the employer and the employee "may include other provisions governing the preservation, use, or cashing out of compensatory time . . ." as permissive, rather than mandatory.[205] Like the court of appeals, the majority looked for an express prohibition on the employer's policy in the statute or regulations and found none.

Justice Souter's brief concurrence agreed with the majority based on the assumption that the opinion does not prevent the Secretary from issuing a regulation prohibiting

203. *Christensen*, 120 S. Ct. at 1661.

204. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

205. *Christensen*, 120 S. Ct. at 1663, quoting 29 C.F.R. § 553.23(a)(2).

the conduct engaged in by the employer.[206] Justice Scalia's concurrence disagreed with the majority's conclusion that the opinion letter was not entitled to *Chevron* deference and would further find that the Secretary's brief alone would be sufficient to require such deference.[207] Nevertheless, because he concluded that the Secretary's opinion was not a reasonable interpretation of the statute under *Chevron*, he joined the remainder of the majority opinion.[208]

Justice Stevens, joined by Justices Ginsburg and Breyer, dis-sented, reading the statutory amendments regarding compensatory time as permitting compensatory time in lieu of cash payments only pursuant to agreement with the employees. Based on this general rule, the dissenters concluded that compensatory time is permissible payment for overtime only on terms agreed to by the employees. Absent agreement on the method for using compensatory time, it can be used only in strict accordance with the statute. This burden on the employer, which the majority sought to avoid, is imposed by the statutory requirements for overtime pay. The employer concerned about employee use of compensatory time is free to cash out employees' compensatory time, seek an agreement with its employees to permit forced use of compensatory time, or hire more employees to avoid the overtime requirements, a primary initial purpose of the FLSA. Justice Stevens also noted that the Secretary of Labor's position was entitled to "respect" as "thoroughly considered and consistently observed."[209]

Justice Breyer's separate dissent, joined by Justice Ginsburg and agreed to by Justice Stevens in a footnote, focused on the *Chevron* deference issue. Unlike Justice Scalia, Justice Breyer argued that *Skidmore*[210] deference, which directs courts to look for guidance to expert agency views even where they are not an "exercise of delegated lawmaking authority"[211] survives *Chevron*. In *Skidmore*, the Court held that, in interpreting statutes, courts may give

206. *Id.* at 1663 (Souter, J., concurring).
207. *Id.* at 1664-65 (Scalia, J., concurring).
208. *Id.* at 1665.
209. 120 S. Ct. at 1667 (Stevens, J., dissenting).
210. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
211. *Id.* at 139-40.

weight to the views of administrative agencies expressed in forms other than regulations issued pursuant to delegated rulemaking authority, because such views are informed by the expertise of the agency.[212] Justice Breyer found the agency's position persuasive and reasonable regardless of whether *Chevron* or *Skidmore* was the appropriate framework for consideration of the agency's position and thus would have ruled for the employees.[213]

This is the third time since the 1985 compensatory time amendments that the Supreme Court has addressed the scope of the FLSA overtime provisions for public employees. In each case, the employees lost on the ultimate question, limiting their right to overtime compensation.[214] In *Auer v. Robbins*, however, the Court deferred to the Secretary's interpretation of the statutory exemption for administrators, executives and professionals.[215] The Court unanimously deferred both to a regulation and to the Secretary's interpretation of the regulation articulated in an amicus brief, stating that the interpretation was controlling unless it was either clearly erroneous or inconsistent with the regulation. The deference to the Secretary's interpretation, which favored the employer in *Auer*, is absent from the majority opinion in *Christensen*, even though the regulation seems at least open to the reading given by the Secretary.

The *Christensen* decision appears driven by a concern for protecting state and local governments from federal regulation, and particularly from the financial impact of federal regulatory requirements, a concern which has led the Court in the last several years to strike down or limit federal

212. The Court in *Skidmore* stated that such views do not have the "power to control" the courts but may have the "power to persuade." *Id.* at 140.

213. *Christensen*, 120 S. Ct. at 1687-68 (Breyer, J., dissenting). Justice Scalia argued that *Skidmore* deference is an anachronism. He would defer under *Chevron*, or not at all. *Id.* at 1664 (Scalia, J., concurring).

214. *In Moreau v. Klevenhagen*, 508 U.S. 22 (1993), the Court held that the employer did not have to enter into an agreement with the employees' union representative in order to pay compensatory time in lieu of cash, where state law prohibited collective bargaining. *Id.* at 35. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court held that the St. Louis police department did not have to pay overtime compensation to sergeants and a lieutenant because they were salaried employees exempt from the statute, despite a manual that "nominally" subjected them to reductions in pay for disciplinary reasons and one instance of such a reduction. *Id.* at 458-59.

215. 519 U.S. at 456-59.

regulation of state and local government in a number of cases.[216] The employer's articulated rationale for its policy was financial, and its brief emphasized financial concerns. The majority stated, "Petitioner's position would convert Section 207(o)(3)(A)'s shield into a sword, forcing employers to pay cash compensation instead of providing compensatory time to employees who work overtime."[217] Of course, the employer correctly argued that concern for the financial implications of imposing overtime requirements on public bodies motivated the compensatory provisions in the first instance, but the amendments strove to balance the employees' right to overtime compensation with the financial needs of the governmental unit. Where no union represents the employees for collective bargaining, the agreement with employees that is required to implement a compensatory time program is nothing more than notification to the employees and lack of express objection.[218] Thus, mandating that the agreement incorporate any policy requiring employees to use accumulated compensatory time does not significantly interfere with employer efforts to limit financial liability.

The issue of the scope of *Chevron* deference may have significance for other areas of employment law involving administrative agency regulations. The justices disagreed about the requisite level of deference due administrative agency interpreta-tions of statutes which are contained in forms other than regulations issued pursuant to congressionally delegated authority. Chief Justice Rehnquist

216. *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (discussed *supra* notes 176-90 and accompanying text); Vermont Agency of Natural Resources v. United States, 120 S. Ct. 1858 (2000) (discussed *infra* notes 280-84 and accompanying text); Alden v. Maine, 527 U.S. 706 (1999)(discussed *supra* notes 159-62 and accompanying text); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)(discussed *supra* notes 163-65 and accompanying text); Gebser v. Lago Indep. Sch. Dist., 524 U.S. 274 (1998) (limiting liability of public school district under Title IX); City of Boerne v. Flores, 521 U.S. 507 (1997) (discussed *supra* notes 166-75 and accompanying text); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress cannot constitutionally force officers of the state to enforce a federal regulatory scheme); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (discussed *supra* notes 154-58 and accompanying text). Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas and O'Connor, in the majority in the instant case, consistently voted for states' rights in the cases set forth above with one exception, Justice O'Connor's dissenting vote in *City of Boerne*.

217. *Christensen*, 120 S. Ct. at 1661.

218. *Id.* at 1659 n.1.

and Justices Thomas, O'Connor, Kennedy and Souter would give such interpretations only "respect" "to the extent" that they "have the 'power to persuade.'"[219] The majority conceded, however, that in accordance with the earlier decision in *Auer*, the agency's interpretation of its own regulations is entitled to deference where the Court finds the regulation ambiguous.[220] Justice Scalia would apply *Chevron* deference to any authoritative agency position, including a brief, so long as it is a "fair and considered judgment."[221] He would defer to the agency's interpretation of a statute or its own regulation, so long as the interpretation of the statute is reasonable.[222] Justices Stevens, Breyer and Ginsburg appear to agree with Justice Scalia, although they contend that both levels of deference survive. Thus, it appears that, in accord with *Auer*, all nine justices would defer to a reasonable agency interpretation of an ambiguous regulation, while only four would defer to a reasonable agency interpretation of a statute that is not contained in a regulation. The issues of whether a regulation is ambiguous and whether it is a reasonable interpretation of a statute leave substantial room for debate in any given case. This ongoing debate about the level of deference due to agency action is likely to continue and *Christensen* does little to clarify the standard. Indeed, by limiting *Auer* to ambiguous regulations, it may muddy the waters further.

VI. ERISA AND HMO MIXED ELIGIBILITY AND TREATMENT DECISIONS– *Pegram v. Herdrich*

In *Pegram v. Herdrich*,[223] a case much touted by the media,[224] the Court decided unanimously that an HMO may not be sued for breach of fiduciary duty based on the existence of financial incentives which paid bonuses to the doctor-owners at year's end, encouraging them to make coverage and treatment decisions that minimized costs to the

219. 120 S. Ct. at 1663.
220. *Id.* at 1663.
221 *Id.* at 1665 (Scalia, J., Concurring).
222. *Id.*
223. 120 S.Ct. 2143 (2000).
224. This discussion of the case benefitted from the American Bar Association Teleconference, The Supreme Court Speaks: Herdrich v. Pegram, June 30, 2000.

HMO. The plaintiff, Cynthia Herdrich, visited an HMO doctor who, after discovering an inflamed mass in her abdomen, required her to wait eight days for an ultrasound to be performed at an HMO facility 50 miles away. During the wait, her appendix ruptured and she suffered from peritonitis, causing severe infection and requiring hospitalization. She filed an action for malpractice and several state law fraud claims. She won the former at trial while the latter were found preempted by ERISA after removal to federal court. She then amended her complaint to allege a breach of fiduciary duty under ERISA. The ERISA count was dismissed by the trial court for failure to state a claim upon which relief could be granted.

The Seventh Circuit Court of Appeals reversed the trial court, finding that the HMO acted as a fiduciary under ERISA in making decisions about claims, referrals, and the nature, duration and location of treatment.[225] While disclaiming intent to find that incentives automatically breach fiduciary duty, the panel majority concluded that the plaintiff's allegations, that the particular incentive structure breached the fiduciary duty to act solely in the interest of participants and beneficiaries of the fund by encouraging physicians to delay or withhold treatment to increase their bonuses, adequately stated a claim under ERISA.

Judge Flaum, dissenting, argued that a mere structural incentive to deny care does not state a claim for breach of fiduciary duty. He suggested that the market incentives to the contrary provide adequate protection and that judicial determinations about permissible levels of incentives are "unnecessary and ill-advised."[226] Judge Flaum suggested that such incentives might support a claim where there was a breakdown in the market or negotiating process such that the incentives were not the result of a fair bargain between the HMO and the plan sponsor and beneficiaries, or where there was nondisclosure of the incentive.[227]

The opinion by Justice Souter began with a discussion of

225. 154 F.3d 362 (7th Cir. 1998), *rev'd*, 120 S. Ct. 2143 (2000).

226. *Id.* at 383 (Flaum, J., dissenting).

227. A petition for rehearing en banc was denied over a dissent authored by Judge Easterbrook. 170 F.3d 683 (7th Cir. 1999).

the differences between traditional fee for service and managed care, noting that managed care was designed to remove the incentive to provide unnecessary treatment to increase physician income. Justice Souter then pointed out that managed care inherently includes incentives to ration treatment and that any judgment about the legality of such incentives necessarily required the court to make a judgment about "socially acceptable medical risk,"[228] a task better left to the legislature. The plaintiff challenged the particular structure of the HMO. Under that structure, the physicians with discretion to determine the medical necessity of treatment under the plan had a direct financial incentive to deny treatment or to provide it through HMO facilities because, as owners of the HMO, they received bonuses from minimizing treatment.[229] The Court rejected the plaintiff's attempt to narrow the legal challenge and, having assumed that the plaintiff's argument would require all similar HMO decisions to be subjected to fiduciary duty standards regardless of the structure of the HMO, the Court necessarily concluded that the complaint stated no cause of action.[230] To reach that decision the Court first analyzed the statutory definition of fiduciary.

Under the statute, a fiduciary is a person who manages, administers or advises financially an ERISA plan, exercising discretionary authority.[231] The Court indicated that a fiduciary under ERISA is permitted to wear "two hats."[232] For example, an employer may be a plan sponsor and administrator. When an employer is acting as plan administrator making discretionary decisions, it must act solely in the interest of the participants and beneficiaries of the plan[233] but when acting as the employer of the

228. *Pegram*, 120 S. Ct. at 2150.
229. *Id.* at 2147 & n.3.
230. *Id.* at 2150-51.
231. 29 U.S.C. § 1002(21)(A) (1994).
232. *Pegram*, 120 S. Ct. at 2152.
233. In *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the Court found that an employer was acting as plan administrator and fiduciary when it convinced employees to change employers, assuring them that their benefits would be maintained, despite knowledge of the precarious financial condition of the new company. Thus, the employer was liable for breach of fiduciary duty to the employees, who lost benefits as a result of the change.

participants and beneficiaries, no such requirement attaches. Like an employer, the doctors at the HMO wore two hats – they made both treatment decisions, in which they did not act as ERISA fiduciaries, and eligibility decisions, in which they did. But as the Court noted, the two types of decisions were inextricably intertwined.

The Court proclaimed some difficulty in determining precisely what the plaintiff alleged in her complaint as a breach of fiduciary duty on the part of the HMO. Ultimately, the Court concluded that the plaintiff was challenging determinations as to whether treatments were medically necessary, which the Court characterized as a "mixed eligibility decision."[234] According to the Court, Congress did not intend such decisions to be fiduciary decisions under ERISA. Congress' focus was on financial decisions by plan trustees. Moreover, the Court foresaw dire consequences if such decisions were subject to fiduciary limitations. For profit HMOs would be eliminated because of incentives to limit costs, incentives which the Congress encouraged in enacting the HMO Act only one year before ERISA was passed. Nonprofit HMOs would also be at risk, threatening an "upheaval" in the health care industry which the Court did not want to initiate.[235] The Court also reasoned that it would be difficult to articulate a rule that would not encourage HMO doctors to engage in the very practice HMOs were designed to eliminate, costly and unnecessary treatment of patients. And whatever the rule, the HMO's defense would be that the treatment offered was appropriate medical practice, transforming fiduciary actions into malpractice claims, providing little to the ERISA beneficiary except a deeper pocket for such actions. In addition, it would raise an issue as to whether ERISA preempts state malpractice claims. This parade of negative consequences con-vinced the Court that no cause of action was stated by the plaintiff's complaint.[236]

Physician incentives in HMOs have been widely criticized in both the popular and medical press. Had the Court ruled otherwise, it would have provided patients with an important

234. *Pegram*, 120 S. Ct. at 2155.
235. *Id.* at 2156.
236. *Id.* at 2157.

vehicle for suing HMOs for denying or refusing to pay for treatment. Interestingly, the ERISA allegations in Herdrich's case were triggered by the HMO's preemption defense to Herdrich's original state law fraud claims. The defendant removed the original action to federal court based on its claimed fiduciary status under ERISA.[237] When the plaintiff amended the complaint to allege a breach of fiduciary duty, defendant argued that it was not a fiduciary for purposes of the allegations made by the plaintiff. The Court rejected the plaintiff's estoppel argument.[238]

Now plaintiffs must rely on Congress to enact legislation allowing patients to sue HMOs,[239] or on the growing trend in state courts to allow suits against HMOs despite ERISA preemption arguments.[240] While *Varity v. Howe* gave some hope to participants that actions for breach of fiduciary duty might provide recovery for individual losses by finding that an employer making representations to employees about the plan acted as plan administrator and thus as fiduciary rather than employer,[241] *Pegram* bars such actions, at least where the challenge is to medical necessity determinations by the HMO. Prior to the Seventh Circuit's decision in *Pegram*, the Eighth Circuit permitted a suit for breach of fiduciary duty against an HMO for failure to disclose physician incentives,[242] but the Supreme Court construed Herdrich's claim to

237. *Id.* at 2154 n.8.

238. *Id.*

239. Legislation addressing the relationship of HMOs and ERISA is currently pending in both the House and the Senate. *See* H.R. 2990, 106th Cong., 1st Sess., 145 Cong. Rec. H9523-01 (daily ed. Oct. 7, 1999); S. 1344, 106th Cong. 1st Sess., 145 Cong. Rec. S8623 (daily ed. July 15, 1999) (bill passed as amended); 106th Congress, 1st Session, 145 Cong Rec S 12728 (daily ed. October 15, 1999) (vitiating previous passage and postponing indefinitely by unanimous consent); H.R.Res. 348, 106th Cong., 1st Sess., 145 Cong Rec. H11341 (daily ed. Nov . 2, 1999) (House disagrees with Senate amendment to H.R. 2990 and agrees to conference). A major area of disagreement has been whether to provide individuals with the right to sue HMOs. *See* Suzanne Carter, *Recent Legislation: Health Care and ERISA*, 36 HARV. J. LEGIS. 561, 561 (1999); Michael E. Ginsburg, *Recent Legislation: HMO Grievance Processes*, 37 HARV. J. LEGIS. 237, 237 (2000); Harvey Berkman, *New Suits Preempt HMO Move by House*, NAT'L L.J., Oct. 18, 1999, at A1.

240. For discussion of the preemption issue as it relates to state tort claims, see Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV.1 (2000); Dawn Lauren Morris, *ERISA Preemption, HMOs and Denial of Benefit Claims*, 59 LA. L. REV. 961 (1999).

241. *See supra* note 232.

242. *See* Shea v. Esensten, 107 F.3d 625 (8th Cir. 1997).

challenge the provision of the incentives rather than the lack of disclosure.[243] Employer advocates have expressed concern about the plethora of class actions against HMOs based on allegations of failure to disclose incentives.[244] The decision in *Pegram* did not assuage the concern, leaving open the possibility that an HMO is a fiduciary with respect to plan administration and thus has a duty to disclose incentives.[245] Nor does it indicate which other types of decisions by HMOs might be subject to fiduciary requirements under ERISA.[246]

The implications of *Pegram* for ERISA preemption are yet to be determined. Just a week after the decision in *Pegram*, the Court granted *certiorari* and vacated and remanded an ERISA preemption decision to the Supreme Court of Pennsylvania for reconsideration in light of *Pegram*.[247] In that case, the Pennsylvania Supreme Court had concluded that ERISA did not preempt a state law negligence action against an HMO.[248] The court read the Supreme Court's recent preemption jurisprudence as narrowing the class of cases in which ERISA preempts state law claims.[249] Notably, in *Pegram*, the Court acknowledged the narrowing shift in preemption law but suggested that the state and alleged federal law claims in *Pegram* were sufficiently close to raise a substantial preemption question which could be avoided by finding no federal cause of action.[250]

The HMO in the Pennsylvania case was sued for denials and delays in authorizing necessary medical treatment for an emergency. The concurring justice reasoned that the decisions being challenged were "individual medical decisions" rather than plan administration decisions and thus not preempted.[251] Given that the actions of the HMO

243. *Pegram*, 120 S. Ct. at 2154 n.8

244. *See* William J. Kilberg, *The Impending Collision Between HMOs and ERISA: Can Either Emerge Unscathed?*, 25 EMP. REL. L.J. 1 (2000).

245. *See Pegram*, 120 S. Ct. at 2154 n.8.

246. For example, if the HMO uses a utilization review process with a board of doctors to determine whether treatment is medically necessary, are those decisions mixed decisions under *Pegram* or fiduciary decisions regarding plan administration?

247. U. S. Healthcare Sys., Pa. v. Pennsylvania Hosp. Ins. Co., 120 S. Ct. 2686 (2000).

248. Pappas v. Asbel, 724 A.2d 889 (Pa.1998).

249. *Id.* at 892-93.

250. *Pegram*, 120 S. Ct. at 2158.

251. 724 A.2d at 894-95 (Nigro, J., concurring).

were similar in *Pegram* and the Pennsylvania case, the Court's action vacating the decision finding no preemption is curious. *Pegram*, however, casts doubt on the preemption analyses of some lower courts which made a distinction between claims relating to quality of care, which are not preempted, and those relating to quantity of care, which are.[252] Instead, *Pegram* found a category of mixed decisions. The implication of this categorization for preemption is uncertain.[253] If the Pennsylvania preemption decision stands, *Pegram* may turn out to be a double-edged sword for HMOs, relieving them of ERISA liability but subjecting them to state negligence claims.[254]

VII. ERISA ACTIONS AGAINST NONFIDUCIARIES – *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*

In *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*,[255] the Court decided that ERISA allows a private action by a participant, beneficiary or fiduciary against a nonfiduciary party in interest who participated in a prohibited transaction. Harris Trust & Savings Bank, a fiduciary trustee of Ameritech's Pension Trust, sued Salomon Smith Barney alleging that Salomon engaged in a prohibited transaction while serving as a broker-dealer to the trust. Salomon sold interests in motel properties to the trust through the trust's investment manager, a fiduciary. The interests, purchased by the plan for $21 million, ultimately

252. *See, e.g.*, Dukes v. U.S. Healthcare, 57 F.3d 350 (3d Cir.), *cert. denied*, 516 U.S. 1009 (1995).

253. The delays in *Pappas* were caused by the HMO, not the treating doctor, raising the question of whether that distinguishes the case from *Herdrich* where the treating doctor was an owner of the HMO.

254. The Court has granted *certiorari* in another case that deals with the scope of ERISA preemption. In *Egelhoff v. Egelhoff*, 989 P.2d 80 (Wash. 1999), *cert. granted*, 120 S. Ct. 2687 (2000), the Washington Supreme Court held that a state law that revoked ERISA plan beneficiary designations in the event of divorce was not preempted by ERISA. The Court's decision in *Egelhoff* may provide some direction regarding the scope of preemption. Although the Court has narrowed the scope of preemption in recent years, consistent with its general approach to federalism issues, *Egelhoff* presents the Court with an issue of whether to preempt a state law that may directly affect administration of multistate plans. Absent preemption, multistate plans may be subject to differing laws in different states, some of which may conflict with the ERISA requirement to administer the plan in accordance with its terms.

255. 120 S. Ct. 2180 (2000).

proved virtually worthless, and Harris sued Salomon to recover the money paid. The basis of the action was that Section 406(a) prohibited sales of property between the plan and parties in interest.[256] Salomon moved for dismissal arguing that, even if the transaction was prohibited, ERISA authorized suit only against the fiduciary who caused the plan to enter into the prohibited transaction. The district court denied the motion[257] but the Seventh Circuit reversed, holding that Section 406(a) applies only to the conduct of fiduciaries and, accordingly, no cause of action existed against a nonfiduciary.[258] The Seventh Circuit's view diverged from that of other circuits which had held that Section 502(a)(3) authorized a civil suit against a nonfiduciary involved in a prohibited transaction.[259]

In a unanimous decision authored by Justice Thomas, the Court agreed that Section 406(a) applied only to fiduciaries, but disagreed that Section 406(a) limited the causes of action available under Section 502(a)(3), a remedial provision that does not specify the defendants. Section 502(a)(3) authorizes civil actions "by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of [ERISA Title I] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."[260] Since the section does not limit the defendants, but rather allows appropriate equitable relief for an act or practice which violates ERISA, it permits a civil claim against a party in interest. While the Court did not consider itself restricted by the literal language of Section 406(a), which specifies that a fiduciary shall not cause the

256. 29 U.S.C. § 1106(a)(1)(A) (1994), states: "(a) Except as provided in section 1108 of this title: (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—(A) sale or exchange, or leasing, of any property between the plan and a party in interest . . . (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . . "

257. Harris Trust & Sav. Bank v. Salomon Bros., 20 Empl. Ben. Cas. (BNA) 1449 (N.D.Ill. 1996), *rev'd*, 184 F.3d 646 (7th Cir. 1999)., *rev'd*, 120 S. Ct. 2180 (2000).

258. Harris Trust & Sav. Bank v. Salomon Bros., 184 F.3d 646 (7th Cir. 1999), *rev'd*, 120 S. Ct. 2180 (2000).

259. *See* 120 S.Ct. at 2186 (citing cases and observing that "the Seventh Circuit departed from the uniform position" of the other circuits).

260. *Id.* at 2187, quoting 29 U.S.C. § 1132 (a)(3) (1994).

plan to engage in a prohibited transaction, it relied on other sections of the statute to confirm that Section 502(a)(3) authorized the action. Section 502(l) authorizes the Secretary of Labor to assess civil penalties against fiduciaries and other persons, and defines the penalties by reference to the amount ordered to be paid in a civil action brought by the Secretary under Section 502(a)(5). Since the wording of Sections 502(a)(5) and (3) is similar, the Court reasoned that if the secretary could bring a civil action against a person other than a fiduciary, then the participants, beneficiaries and fiduciaries could also.[261]

The Court analogized to the common law of trusts, which allows an action for recovery of property or disgorgement of proceeds and profits against a third person who has possession of trust property, even where that person was not the primary wrongdoer. The Court rejected various arguments of Salomon suggesting that an interpretation allowing a cause of action would discourage dealings with ERISA plans, or encourage parties to charge higher prices to plans to compensate for potential liability. Salomon also argued that recognizing the cause of action would allow imposition of liability on the innocent based on a law suit by the guilty fiduciary. The Court found the statutory language clear and refused to depart from the language based on arguments regarding either the legislative history or the consequences of its decision.[262] The Court did suggest that concerns about requiring parties engaged in transactions with plans to monitor complicity with ERISA's complex provision might influence judicial decisions regarding the circumstances under which liability should be imposed on nonfiduciaries.[263]

While recovery from fiduciaries for prohibited transactions was always available, the decision provides another avenue for recovering plan assets lost through prohibited transactions. If the fiduciary has insufficient assets or insurance, an action against the nonfiduciary involved in the transaction will now be available. What the

261. *Id.* at 2188.
262. *Id.* at 2191.
263. *Id.* at 2190-91.

Court did not decide was the standard for imposition of liability on nonfiduciaries. Whether liability requires knowledge that the transaction is prohibited or some other level of knowledge is left for another day.

VIII. NONEMPLOYMENT CASES WITH EMPLOYMENT LAW IMPACT – *Beck v. Prupis*, *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, and *Vermont Agency of Natural Resources v. United States*

Increasingly, plaintiffs' attorneys are bringing actions on behalf of employees using vehicles other than traditional employment law. In *Beck v. Prupis*,[264] the Court substantially limited employees' ability to use RICO to challenge terminations. The plaintiff, Robert Beck, filed a RICO action against other officers and directors of a Florida insurance holding company after he was terminated, allegedly for reporting their fraudulent activity to insurance regulators. In addition to allegations of racketeering activity in connection with the fraud, Beck asserted that his termination violated RICO because it was done in furtherance of the defendant's conspiracy to violate RICO. The district court granted defendants' motion for summary judgment on the ground that employees terminated for threatening to report RICO activities or refusing to participate in them have no standing to sue for damages from the loss of employment.[265] The Court of Appeals held that the statute required that the plaintiff be injured by an act of racketeering, not merely an overt act in furtherance of the conspiracy.[266]

Lower courts had divided over whether persons injured by an overt act that was not itself racketeering activity, but that furthered the conspiracy, could sue under RICO.[267] The

264. 120 S. Ct. 1608 (2000).

265. *Id.* at 1612.

266. Becks v. Prupis, 162 F.3d 1090 (11th Cir. 1998).

267. *Compare* Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991); Reddy v. Litton Indus., Inc., 912 F.2d (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991), and Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990) *with* Khurana v. Innovative Healthcare Sys., Inc., 130 F3d 143 (5th Cir. 1997), *vacated sub nom.*, Teel v. Khurana, 525 U.S. 979 (1998); Schiffels v. Kemper Financial Servs., Inc., 978 F.2d 344 (7th Cir. 1992); Shearing v. E.F. Hutton Group,

Supreme Court resolved the split in the circuits on this issue, siding with the Eleventh Circuit in *Beck*. Justice Thomas' opinion relied on the common law to interpret the statute. Since the well-settled common law at the time of RICO's enactment provided that a plaintiff could sue for civil conspiracy only if he or she was injured by a tortious act, the Court concluded that Congress must have intended RICO's conspiracy provisions to be interpreted in accord with the widely accepted common law.[268] Since plaintiff's termination was not itself an act of racketeering as defined by the statute, plaintiff stated no claim under RICO. The plaintiff argued that such an interpretation would render meaningless the section of the statute under which the plaintiff sued, because racketeering activity would be actionable under other statutory sections. The Court responded that the section permitted the plaintiff to sue co-conspirators who might not have violated the substantive provisions individually.[269]

Justice Stevens, joined by Justice Souter, dissented, disputing the majority's conclusion that the common law required the result reached.[270] Justice Stevens argued that the plain language of the statute supported plaintiff's claim and imposed no requirement that the overt act causing his injury be of any particular kind, other than an act in furtherance of the conspiracy.[271] Further, he pointed out that racketeering activities themselves are not independently wrongful under RICO as the majority suggested, although they may be under other statutes, but only violate RICO if they transgress the specific prohibitions of Section 1962. In that event, they would be actionable under one of the other provisions of the statute.[272]

The Court's decision virtually eliminates RICO claims challenging terminations effectuated to allow continuation of

Inc., 885 F.2d 1162 (3d Cir. 1989).

268. 120 S. Ct. at 1614-15.

269. Section 1962(d) makes it unlawful for a person to conspire to violate any of the provisions of the substantive subsections, 1962(a), (b) and (c), which prohibit using a pattern of racketeering activity to establish, operate, acquire, control, or conduct an enterprise. 18 U.S.C. § 1962 (1994).

270. Justice Stevens factually distinguished each case cited by the majority from the case at bar. *Beck*, 120 S. Ct. at 1618-19 (Steven, J., dissenting).

271. *Id.* at 1620.

272. *Id.* at 1619-20.

conduct prohibited by RICO, *e.g.*, use of a pattern of racketeering to operate an enterprise. Plaintiffs still may have a claim for wrongful discharge in violation of public policy, or a statutory whistleblower's claim where such statutes exist and apply to the specific facts relating to the termination. In states where no such cause of action exists, such as New York,[273] or states where the action is limited, like Virginia,[274] plaintiffs may have no recourse.

The Court decided two other nonemployment cases that have potential impact for employment law and employees. In a commercial arbitration case, *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, [275] the Court held that the Federal Arbitration Act's (FAA) venue provisions are permissive rather than mandatory. Thus, actions to confirm, vacate or modify an arbitration award may be brought in the district in which the award was made, as provided by the FAA,[276] or in any district that is proper under the general venue statute. Employment arbitration actions frequently are brought under the FAA, and the Court is currently considering *Circuit City Stores v. Adams*,[277] in which the issue is the scope of the exclusion for employment contracts contained in Section 1 of the FAA.[278] The majority of circuit courts have read the exclusion for employment conracts in the FAA to apply only to contracts of employment of workers who are directly

273. *See* Murphy v. American Home Prods. Corp., 448 N.E. 2d 86 (N.Y. 1983) (declining , absent legislative action, to recognize a cause of action for wrongful discharge in violation of public policy based on termination for reporting illegal account manipulations which resulted in large bonuses for company officers).

274. *See* Dray v. New Market Poultry Prods., Inc., 518 S.E.2d 312 (Va. 1999) (finding no claim for wrongful discharge in violation of public policy for reporting adulterated products to government inspector as no generalized whistleblower claim in Virginia and the statute designed to prohibit distribution of adulterated poultry products gave no rights to the plaintiff, but instead was a governmental regulatory mechanism).

275. 120 S. Ct. 1331 (2000).

276. § U.S.C. §§ 9, 10, 11 (1994).

277. 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000).

278. The FAA provision at issue states "'Commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory, or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994).

engaged in the movement of goods or people in interestate commerce.[279] The Ninth Circuit disagreed, holding that all employment contracts are excluded from the coverage of the FAA.[280] If the Ninth Circuit's view prevails in the Supreme Court, arbitration agreements in employment contracts will be enforceable only under applicable state laws. If the Court in *Circuit City* follows the majority of circuits, however, and reads the employment contract exclusion narrowly, employees and employers may have a wider range of venue options in actions under the FAA to confirm, vacate or modify employment arbitration decisions.

Vermont Agency of Natural Resources v. United States,[281] another nonemployment case, also has relevance for employees. In *Vermont*, an employee of a state agency sued the agency in a qui tam suit on behalf of the United States. The plaintiff alleged that the agency defrauded the federal government by requiring employees to report their hours of work on a federal project falsely, thereby increasing the federal money to which the agency was entitled.[282] The federal False Claims Act[283] allows a private person to bring a qui tam action against the false claimant on behalf of himself and the federal government to recover damages. The private relator receives a portion of the recovery, which varies depending on whether the government or the relator is the primary prosecuting authority. The Court held that a private relator has constitutional standing to bring such an action, but that the statute does not sufficiently establish Congress' intent to include the states within the definition of persons against whom such actions may be brought.[284] Accordingly, the Court did not have to reach the issue of whether the

279. *See* Craft v. Campbell Soup Co., 177 F.3d 1083, 1086 n.6 (9th Cir. 1998) (collecting cases).

280. *See Circuit City*, 194 F.3d at 1071; *Craft*, 177 F.3d at 1094.

281. 120 S. Ct. 1858 (2000).

282. *See* 162 F.3d 195, 198 (2d Cir. 1998).

283. 31 U.S.C. §§ 3729-33 (1994).

284. The majority opinion was written by Justice Scalia and joined by Justices Rehnquist, O'Connor, Kennedy, Thomas and Breyer. Justice Ginsburg, concurring, read the Court's opinion as leaving open the question of whether states were persons under the statute when the suit is filed by the United States directly. 120 S. Ct. at 1871 (Ginsburg, J., concurring). Justice Stevens, joined by Justice Souter, dissented, arguing that the term "person" included states. *Id.* at 1871 (Stevens, J., dissenting).

Eleventh Amendment barred such actions. The opinion further protects the states from liability and prevents state employees from bringing qui tam actions against their employer when it is engaged in defrauding the federal government in violation of the False Claims Act, the statute that gives rise to most qui tam actions.[285]

IX. CONCLUSION

The October 1999 Term produced five employment law cases, compared to six in the October 1997 Term and eight in the October 1998 Term. The five 1999 Term cases impacted employment law doctrine in significant ways and revealed, beneath the surface, the traditional voting patterns of the three groups of Justices on the Court. Chief Justice Rehnquist and Justices Scalia and Thomas continued to vote against employee interests unless constrained by precedent or clear statutory language. Justices Breyer, Ginsburg, Souter, and Stevens continued to vote in a way that protected the statutory rights of employees, and Justices Kennedy and O'Connor continued to vote in an unpredictable manner, with their alignments determining the outcome in some cases.

Reeves is the most important employment law case of the October 1999 Term. In its substantive part, rejection of pretext-plus doctrine was a victory for employment law plaintiffs. Chief Justice Rehnquist and Justices Scalia and Thomas joined a majority opinion that clarified Justice Scalia's opinion for the Court in *Hicks*. In *Hicks*, the 5/4 decision of the Court made the task of employment law plaintiffs more difficult after a prima facie case has been established and pretext has been proven. However, the pretext-plus doctrine later developed by some lower courts contradicted crucial language in Justice Scalia's opinion. The procedural aspects of *Reeves*, relating to trial court review of evidence for rulings on Rule 50 Motions for Judgment as a Matter of Law and Rule 56 Motions for Summary Judgment, do not reveal the traditional voting patterns of the three groups of Justices in employment law cases. However, the procedural aspects of *Reeves* apply to civil litigation in

285. *Id.* at 1858.

general, and not just to employment law cases.

On the surface, *Kimel* focuses on broad issues of federalism and the Eleventh Amendment sovereign immunity of states. However, the Court could have viewed the case differently, as involving the power of Congress under Section 5 of the Fourteenth Amendment and not the Commerce Clause. In enacting the ADEA, and later extending it to the states, Congress *was* prohibiting arbitrary age discrimination in employment, an Equal Protection Clause concern, and the Court's 1976 decision in *Fitzpatrick v. Bitzer* provided a basis for upholding ADEA private actions against states. The 5/4 breakdown in *Kimel* is telling, with Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas in the majority, and Justices Breyer, Ginsburg, Souter, and Stevens in dissent.

Christensen required interpretation of the public employee compensatory time provisions of the FLSA. The Court's opinion favored state employers over state employees, and rejected a Labor Department opinion letter that supported the employees' position. Justices Breyer, Ginsburg, and Stevens dissented, and the concurring opinion of Justice Souter had the apparent objective of limiting the reach of the majority opinion by Justice Thomas.

On the surface, the Court's unanimous decision in *Pegram v. Herdrich* is a defeat for employees because the Court blocked breach of fiduciary duty actions by employees against HMOs for mixed eligibility and treatment decisions. However, Justice Souter's opinion for the Court also protects employees injured by the medical malpractice of HMOs because it avoids ERISA preemption of the medical malpractice actions employees now can bring in state and federal courts.

The fifth case, *Harris Trust*, also resulted in a unanimous decision for the Court, with Justice Thomas writing the opinion. Unanimity may be explained by the fact that the decision benefits employers and employees by permitting pension plan fiduciaries, participants and beneficiaries to sue non-fiduciaries for ERISA violations.

The 1997-1999 Term cases reflect the continuing importance on the Supreme Court docket of employment law

cases. There is an overall three year trend that favors employees. However, prediction of likely results in future cases requires consideration of the voting patterns, in employment law cases, of the three clearly identifiable groups of Justices.