The Supreme Court's Labor and Employment Decisions: 2002-2003 Term

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I. Introduction

This article summarizes the United State Supreme Court cases from the October 2002 Term that related directly or indirectly to labor or employment law or have implications for labor and employment practitioners. Of particular interest are the Michigan affirmative action cases and the Texas criminal sodomy case.[1] Although not nominally "labor and employment" cases, they will have profound impact on the legal issues faced by labor and employment practitioners. The *Lawrence* case has already profoundly altered public discourse related to homosexuality and the legal recognition of same-sex relationships.[2] This term, the Supreme Court decided labor and employment cases relating to ERISA, the ADA, the FMLA, the FLSA, Title VII, and the False Claims Act.[3] In addition, the Court decided an important cases relating to arbitration clauses[4] that will have implications for the labor and employment practitioner, as well an important case relating to limitations on punitive damage awards.[5] The Court also dismissed a case concerning false advertising and deceptive trade practices that may eventually result in an important decision concerning the constitutionality of limits on blended speech (i.e. speech that is both commercial and non-commercial).[6]

II. ERISA

In *Kentucky Assoc. of Health Plans, Inc., et al. v. Miller*,[7] the Supreme Court held that two Kentucky Any Willing Provider (AWP)[8] provisions prohibiting health insurers from

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[1] See MI cases, TX case.

[2] Collect Cites.

[3] See cites for all these cases.

[4] See Green Tree

[5] See State Farm v. Campbell, 123 S.Ct. 1513 (2003) dealt with the constitutionality of large punitive damage awards. Although the case did not involve labor and employment issues directly, it will impact the measure of punitive damages recoverable in labor and employment cases. *Campbell* involved a claim against an insurer for bad faith in failing to settle a negligence claim arising from an auto accident within the insured's policy limit. Id. at 1526. The Utah Supreme Court reinstated a $145 million punitive damage award in a case where the compensatory damage award was $2.6 million, reduced on remittitur to $1 million. The Utah Supreme Court cited extensive findings by the trial court that State Farm's failure to settle was part of a pattern of State Farm engaged in a "pattern of 'trickery and deceit,' 'false statements,' and other 'acts of affirmative misconduct' targeted at 'financially vulnerable' persons. Campbell v. State Farm, 65 P.3d 1134, 1148 (Ut. 2001). The Supreme Court reversed and held that the punitive damage award violated due process under the test established in BMW v. Gore. 123 S.Ct at 1513 (citing 517 U.S. 559, 575 (1996)).

[6] See Nike case

[7] SC Miller

[8] See generally... (collect cites on AWP laws in general)

discriminating against providers who were willing to meet the terms and conditions of the insurer, were not preempted by The Employee Retirement Income Security Act of 1974 (ERISA)[9] ERISA because they regulated insurance, falling within the ERISA saving clause.[10] *Miller* is likely to put pressure on the traditional low reimbursement/high volume arrangements that HMOs have struck with providers in jurisdictions that adopt AWP laws.

In 1994, the Kentucky legislature enacted the Kentucky Health Care Reform Act[11] which contained an AWP Provision requiring that:

> "[h]ealth care benefit plans . . . not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan."[12]

In 1996, the legislature added an AWP provision relating to chiropractors that required health benefit plans offering chiropractic benefits to:

> "[p]ermit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan.."[13]

Community Health Partners and Reservoir Park Health Services (the original plaintiffs) are Health Maintenance Organization (HMOs) that maintain exclusive provider networks in order "to provide health care services to beneficiaries of health care plans."[14] The Plaintiffs negotiated contracts with health care providers to participate in their networks and provide health services to members at predetermined, discounted rates in exchange for a guaranteed high volume of patients.[15] In 1994, when KHCRA was enacted, the plaintiffs had such an agreement with CHA HMO, Inc.[16] to supply health care providers for CHA products.[17] In 1996, Community Health attempted to negotiate an exclusive agreement for CHA to provide a different product.[18] The Kentucky Commissioner of Insurance determined that this agreement would violate the AWP provision of KHCRA and no agreement was ever entered finalized.[19] The Commissioner determined that such an agreement would prevent willing providers from providing health services to CHA members in violation of the AWP provision.[20]

In April 1997, the plaintiffs filed suit in federal court, seeking to enjoin the Commissioner from enforcing the AWP provisions of the KHCRA.[21] They claimed that the AWP provision "threaten[ed] their existence by effectively preventing them from

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[9] 29 USCS § 1001 et seq.
[10] SC Miller at ___.
[11] KRS 304.17A-100(4)(a), hereinafter, KHCRA
[12] KRS 304.17A-110(3)
[13] KRS 304.17A-171(2)
[14] DC, at page 993
[15] DC 993
[16] CHA HMO, Inc., hereinafter, CHA, is a licensed Kentucky HMO.
[17] DC at 994
[18] DC at 994
[19] DC at 994
[20] DC at 994
[21] DC at 994

contracting with any entity mentioned in KRS 304.17A-100(4)[22] for provision of selective provider services."[23] The plaintiffs filed a motion for summary judgment as did the Commonwealth of Kentucky.[24] The district court held that the AWP provisions related to an employee benefit plan under § 1144(a), but that the laws were saved from preemption as laws regulating insurance under § 1144(b)(2)(A).[25] The court granted the Commonwealth's motion and the plaintiffs appealed.[26]

The 6th Circuit Court of Appeals affirmed the district court's ruling.[27] While noting the lack of clear boundaries in ERISA preemption jurisprudence, the Court found that the Kentucky AWP provisions "related to" employee benefit plans within the meaning of § 1144(a), but were saved from preemption as laws "regulating insurance" under § 1144(b)(2)(A).[28] The court applied a two-step analysis to determine to "determine whether a state law 'regulates insurance' within the meaning of the saving clause." The court first sought to determine whether the law "regulates insurance . . . from a 'common sense view of the matter.'"[29] The court then considered three other factors used by courts to decide whether the law regulates "the 'business of insurance' as that phrase is used in the McCarran Ferguson Act:"[30]

> "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.'[31]

Citing *UNUM Life Ins. Co. of Am. v. Ward*[32] the 6th Circuit emphasized that the first prong of the analysis, whether, from a common-sense point of view, the law regulated insurance, was the more important inquiry, and used the McCarran-Ferguson factors only as guideposts.[33] The court found that the Kentucky AWP provisions met the first prong, irrespective of the fact that they reached HMOs in addition to traditional health insurers.[34] The Supreme Court granted *certiorari* to decide whether the Kentucky AWP provisions were preempted by ERISA.[35]

Scalia delivered the opinion for a unanimous court, and concluded that both provisions survived preemption.[36] The Court announced it would no longer use McCarran-Ferguson factors as part of its ERISA preemption analysis, instead applying a

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[22] This section was repealed in 1998.
[23] DC at 994
[24] DC at 994
[25] DC at ___.
[26] DC at ___.
[27] CC at ___.
[28] CC at 364.
[29] CC at 363.
[30] CC at 363.
[31] CC at 363.
[32] 526 U.S. at 366-67
[33] CC at 364
[34] CC at 364
[35] 536 U.S. 956
[36] SC at

more straightforward analysis.[37] In order for a state law to be considered a "law . . . which regulates insurance under the ERISA savings clause[38] it "must be specifically directed toward entities engaged in insurance" and "must substantially affect the risk pooling arrangement between the insurer and the insured."[39] The Court held that the Kentucky AWP provisions met each requirement, and were therefore saved from ERISA preemption.[40] Scalia pointed out that the Kentucky AWP provisions placed a "condition on the right to engage in the business of insurance" in much the same manner as a "state law require[ing] all licensed attorneys to participate in 10 hours of continuing education (CLE) each year."[41] Such a "statute 'regulates' the practice of law—even though sitting through 10 hours of CLE classes does not constitute the practice of law—because the state has conditioned the right to practice law on certain requirements, which substantially effect the product delivered by lawyers to their clients."[42]

> "Kentucky's AWP law operated in a similar manner with respect to the insurance industry: Those who wish to provide health insurance in Kentucky (any "health insurer") may not discriminate against any willing provider. This regulates insurance by imposing conditions on the right to engage in the business of insurance; whether or not an HMO's contracts with providers constitute "the business of insurance" under *Royal Drug* is beside the point."[43]

In *Black & Decker Disability Plan v. Nord*,[44] the Supreme Court held that ERISA plan administrators need not give special deference to the determinations of a treating physician under the so-called "treating physician rule" when making disability determinations under ERISA.[45] The "treating physician rule," as applied by the 9th Circuit, would require a plan administrator who rejects the recommendation of a treating physician to give specific reasons for doing so, supported by the factual record.[46]

Kenneth Nord was a Material Planner for Kwikset Corp., a subsidiary of Black & Decker.[47] His responsibilities included interacting with vendors and checking and ordering inventory.[48] His position was basically sedentary, requiring approximately two hours of walking or standing per day.[49] Nord was enrolled in the Black & Decker disability plan, which "granted absolute discretion to the Plan Manager to make disability determinations."[50] The plan also allowed the Plan Manager to delegate his responsibilities to a third-party claims administrator.[51] During the period at issue, Black

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[37] SC case (page)
[38] 29 USCS 1144(b)(2)(A)
[39] SC at 1479.
[40] SC at 1479.
[41] SC at 1477
[42] Id.
[43] SC case, at page 1477
[44] SC
[45] SC at ___.
[46] CC at ___.
[47] CC at 825.
[48] CC 825-26.
[49] CC at 826.
[50] Id.
[51] Id.

& Decker employed Metropolitan Life Insurance Company (MetLife) for this purpose.[52] The plan provided long-term disability benefits for the first 30 months of a disability which prevents an employee from performing his or her regular job.[53]

Nord experienced intermittent hip and lower back pain and consulted a physician in March of 1997.[54] The physician, Dr. Hartman, diagnosed Nord with sciatica and mild degenerative disc disease, which was confirmed on July 23 with an MRI, and prescribed medication.[55] After approximately one week of this treatment with no improvement, Dr. Hartman temporarily removed Nord from work and recommended orthopedic consultation.[56] Nord submitted a disability claim to the Plan on July 16 seeking long-term disability benefits.[57] Dr. Hartman wrote a letter on August 13 indicating that he was treating Nord and that Nord would not be able to return to work until he recovered sufficiently.[58] Nord later began treatment by Dr. Williams, an orthopedist.[59] Nord wrote again in March of 1998 to reiterate his diagnosis that Nord was unable to return to work, indicating that he was able to "sit for up to an hour a day" and "occasionally life up to five pounds."[60] Dr. Williams made a similar determination.[61]

MetLife reviewed Nord's disability claim and determined that "he did not meet the 'own occupation' definition of disability for the first 30 months of coverage.[62] His claim was denied, and Nord retained counsel to seek review through MetLife's formal review process.[63] MetLife referred him to another doctor in order to evaluate his claim.[64] The MetLife doctor determined that Nord was capable of sedentary work without significant limitation, so long as he remained on pain medication.[65] As part of the review process, Nord "provid[ed] the Plan with a work capacity evaluation performed by . . . a human resources representative at Black & Decker, who determined that Nord lacked the capacity to perform the requirements of his job because of his physical limitations. [She] based this determination on the assumption that Nord faced chronic myofascial pain . . . that . . . would make it impossible for him to carry on the necessary interpersonal relationships to perform his job."[66]

MetLife recommended that the Plan Manager deny the disability claim, and the recommendation was accepted.[67] On October 27, 1998, the Plan Manager notified Nord that his claim was denied and gave instructions on how to appeal under ERISA.[68] Nord

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[52] Id.
[53] Id.
[54] Id.
[55] Id.
[56] Id.
[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] CC 827
[63] Id.
[64] CC at 827
[65] Id.
[66] CC at 827.
[67] Id.
[68] Id.

filed suit in federal district court in January, 1999 claiming that Black & Decker had violated ERISA by denying his disability claim.[69] In February, 2000 both parties moved for summary judgment.[70] The district court reviewed the denial for an abuse of discretion by the Plan Manager, found no abuse of discretion, and granted Black & Decker's motion for summary judgment.[71]

Nord appealed to the 9th Circuit.[72] Nord argued that Black & Decker arbitrarily rejected the opinions of his treating physicians, which was evidence that the Plan was laboring under a conflict of interest.[73] The Court of Appeals held that "[t]he district court erred . . . in its refusal to view Black & Decker's rejection of the prevailing opinions of Nord's treating physicians as germane to a determination of whether the Plan's administration was impaired by a conflict of interest."[74] The 9th Circuit applied the "treating physician rule," requiring a Plan to defer to the disability determination of a treating physician, or "[give] specific, legitimate reasons for [rejecting this determination] that are based on substantial evidence in the record."[75] The Court noted "that the lone opinion of . . . the doctor hired by Black & Decker could not reasonably overcome all the other evidence demonstrating that Nord [was] disabled. Dr. Mitri's opinion is overwhelmed by substantial evidence in the record, including the opinions of three treating physicians that Nord's condition rendered him unable to meet the physical requirements of his position as a Material Planner."[76] The Supreme Court granted *certiorari* to resolve a Circuit split over whether the "treating physician rule" applies to disability determinations under ERISA.[77]

Justice Ginsburg, writing for a unanimous Court, rejected Nord's arguments in favor of the "treating physician rule."[78] The Court held that ERISA does not require special deference to the opinion of a treating physician in ERISA disability determinations, only that plan procedures "afford a reasonable opportunity . . . for a full and fair review" of dispositions adverse to the claimant.[79] Furthermore, ERISA does not impost a heightened burden of explanation on plan administrators when the reject the opinion of a treating physician.[80] The opinion reviews the genesis of the treating physician rule in Social Security disability cases and, comparing those cases to ERISA cases, notes that while "employers have large leeway to design disability and other welfare plans as they see fit[,] [i]n determining entitlement to Social Security benefits, the adjudicator measures the

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[69] Id.
[70] Id.
[71] Id.
[72] CC at 827.
[73] CC at 828.
[74] CC at 830.
[75] CC at 831, internal quotes ommitted
[76] CC at 832.
[77] See *Regula*, 266 F.3d at 1139; *Donaho* v. *FMC Corp.*, 74 F.3d 894, 901 (CA8 1996), with *Elliott* v. *Sara Lee Corp.*, 190 F.3d 601, 607-608 (CA4 1999); *Delta Family-Care Disability and Survivorship Plan* v. *Marshall*, 258 F.3d 834, 842-843 (CA8 2001); *Turner* v. *Delta Family-Care Disability and Survivorship Plan*, 291 F.3d 1270, 1274 (CA11 2002). See also *Salley* v. *E. I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (CA5 1992).
[78] SC at 1970
[79] SC 1970
[80] SC 1970

claimant's condition against a uniform set of federal criteria." "[T]he validity of a claim to benefits under an ERISA plan," on the other hand, "is likely to turn [in large part] on the interpretation of terms in the plan at issue."[81] While Social Security is an "obligatory, nationwide . . . program," "nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."[82]

The Court noted that although the 9th Circuit made mention that it felt use of the "treating physician" rule would lead to more accurate disability determination under ERISA, this was a determination to be made by the legislature or the Secretary of Labor, not the Courts.[83] An amicus brief reflected the view of the Secretary that such a rule was not necessary.[84]

Conclusion...

III. The ADA

In *Clackamas Gastroenterology Assoc., P.C. v. Wells*, the Court held that the principle guideposts for determining whether shareholders of a professional corporation were "employees" for purposes of triggering coverage under the ADA[85] is the common law element of control, and listed six factors relevant to this determination.[86]

Wells was a bookkeeper at Clackamas Gastroenterology Associates (hereinafter "the clinic") from 1986 until 1997 when she was terminated.[87] She sued under Title I of the Americans with Disabilities Act, claiming she was terminated due to a disability,[88] filed a claim under Oregon law, [89] and also sought damages for common law wrongful discharge.[90]

The clinic moved for summary judgment, claiming the ADA did not cover them.[91] The ADA does not apply to very small employers.[92] An employer is only covered if its workforce includes "15 or more *employees* for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."[93] Both sides agreed that the

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[81] SC 1971
[82] SC at 1971, quoting *Lockheed Corp.* v. *Spink,* 517 U.S. 882, 887, 135 L. Ed. 2d 153, 116 S. Ct. 1783 (1996)
[83] SC at 1966
[84] SC at 1970.
[85] 104 Stat. 327, as amended, 42 U.S.C. § 12101 *et seq.*
[86] SC 1679. (noting that "[s]pecific EEOC guidelines discuss both the broad question of who is an 'employee' and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees"). See 2 Equal Employment Opportunity Commission, Compliance Manual § § 605:0008-605:00010 (2000).
[87] SC at 1676.
[88] SC at 1676.
[89] See Or. Rev. Stat. § § 659.436-659.449
[90] CC at 904.
[91] SC at 1676.
[92] SC at 1676.
[93] SC at 1676, citing 42 U.S.C. § 12111(5)(emphasis added).

issue turned on whether four physicians who own and constitute the board of directors of the professional corporation were counted as "employees" for purposes of the ADA.[94]

The matter was referred to a Magistrate Judge who recommended that summary judgment be granted to the clinic.[95] In accepting this recommendation, the District Court relied "on an 'economics realities' test adopted by the Seventh Circuit[.]"[96] The court concluded that four physician-shareholders who, if counted as employees, would dictate that the clinic comply with the ADA, were "more analogous to partners in a partnership than to shareholders in a general corporation."[97] The court noted that the physicians constituted the board of directors, owned the professional corporation, shared in the profits, and managed the operations of the clinic.[98] The court concluded that the four physicians were employers, and should not be counted for purposes of ADA coverage, and granted the clinic's motion for summary judgment.[99]

Wells appealed to the Ninth Circuit.[100] The court noted that no circuit had yet interpreted who counted as an "employee" for purposes of determining coverage under the ADA.[101] The court noted, however that a number of cases had interpreted the meaning of "employee" under Title VII and the ADEA, and that the same interpretation should apply to ADA cases.[102] Noting that there was a split of authority on the issue, the court applied the reasoning from a Second Circuit case.[103] The court found it would be unfair to allow the professional corporation the tax and liability advantages of incorporate, but treat it's members as partners for the purposes of ADA determinations and allow them the additional advantage of avoiding liability for discrimination under ADA.[104] The court therefore determined that the four physicians were employees, and that any inquiry into partnership status would be irrelevant.[105]

Justice Stephens wrote the majority opinion in which six other Justices joined.[106] Stephens noted that in a previous case when Congress used the word "employee," without giving any further guidance as to its meaning, the Court "adopted a common-law test for determining who qualifies as an 'employee' under ERISA."[107] The majority

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[94] SC at 1676.
[95] SC at 1676.
[96] SC at 1676 (citing *EEOC* v. *Dowd & Dowd, Ltd.,* 736 F.2d 1177, 1178 (1984))
[97] DC Wells 2, at 10.
[98] DC 2 at 10.
[99] DC 2 at 11.
[100] CC at 903.
[101] CC at 904.
[102] CC at 904 (citing Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793, 796 (2d Cir. 1986) (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").
[103] CC at 905, quoting Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793, 796 (2d Cir. 1986)(the use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership.")
[104] CC at 905.
[105] CC at 905.
[106] Ginsburg and Breyer dissenting.
[107] SC at 1677, quoting *Reid*, 490 U.S., at 739-740

noted that and "employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title . . . should not necessarily be used to determine whether he or she is an employee or a proprietor."[108]

The majority concluded that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[109] The clinic contended that the Court should seek to determine whether the four physicians were employees by determining whether they were the equivalent of partners.[110] Stephens rejected this approach as circular.[111]

The Court looked to the common law definition of the master-servant relationship.[112] "At common law the relevant factors defining the master-servant relationship focus on the master's control over the servant."[113] The Court found that the "element of control [was] the principal guidepost that should be followed . . ." and adopted the EEOC definition because it also focused on control.[114] The EEOC uses six factors to determine "whether [an] individual acts independently and participates in managing the organization, or . . . is subject to the organization's control:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work[,]
2. [w]hether and, if so, to what extent the organization supervises the individual's work[,]
3. [w]hether the individual reports to someone higher in the organization[,]
4. [w]hether and, if so, to what extent the individual is able to influence the organization[,]
5. [w]hether the parties intended that the individual be an employee, as expressed in written agreements or contracts[, and]
6. [w]hether the individual shares in the profits, losses, and liabilities of the organization."[115]

Insert Conclusion. . .

IV. The Family and Medical Leave Act

In *Nevada Dept. of Human Resources et al. v. Hibbs et al.*, the Court held that employees of state government "may recover money damages in the event of the [s]tate's failure to comply with the family-care provision of the [Family and Medical Leave]

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[108] SC at 1680.
[109] SC at 1678, quoting *Darden*, 503 U.S., at 322-323.
[110] SC at 1678.
[111] SC at 1678.
[112] SC at 1679.
[113] SC at 1679.
[114] SC at 1679. (note – the EEOC was *amicus curiae* - "if the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees." Amicus Curiae 8.)
[115] SC at 1680. (citing EEOCCM § 605:0009 (2002)).

Act."[116] This means that state employees who are denied leave under the FMLA may sue the state in federal court.[117]

Hibbs worked for the Welfare Division of the Nevada Department of Human Resources (hereinafter "Welfare Division").[118] In early 1997, "he requested leave to care for his ailing wife."[119] The Welfare Division approved the full 12 weeks of leave allowed under the FMLA, to be used between May and December, 1997.[120] In June, "Hibbs requested 379.8 hours of 'catastrophic leave,' and . . . was granted 200 hours."[121] The Welfare Division informed him that the 200 hours would be counted against his annual FMLA entitled leave.[122] "In September[,] . . . Hibbs requested an additional 179.8 hours of catastrophic leave, and . . . was granted 180 hours."[123] Hibbs' last day at work was August 5, 1997, but prior to that he used his approved leave time intermittently.[124] In October, Hibbs was informed that he had used up his FMLA leave.[125] He requested 200 additional hours of catastrophic leave, and Hibbs claimed that this request was approved.[126]

On "November 6, 1997, the Welfare Division informed Hibbs that no further leave time would be approved and that he was to report to work on November 12, 1997, or face disciplinary action."[127] He failed to report to work, and did not call in to explain his absence.[128] He received a written reprimand which ordered him to "report to work immediately or face 'further disciplinary action up to and including termination.'"[129] On December 8, the Welfare Division informed Hibbs via a written "Specificity of Charges" that a hearing was scheduled and "that the recommended disciplinary action was dismissal."[130] At the hearing, Hibbs argued that the Welfare Division was not applying the FMLA correctly because his because "his unpaid FMLA leave should [have] run after his paid catastrophic leave ended, not concurrently with it."[131] This argument was rejected by the hearing officer, who recommended Hibbs be terminated, which he was, on December 22, 1997.[132]

Hibbs filed a grievance on January 7, 1998.[133] The Welfare Division rejected this grievance because the procedure was available to employees only, and at that point Hibbs

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[116] SC 1976.
[117] See SC.
[118] CC 848.
[119] CC 848.
[120] CC 848.
[121] CC 848.
[122] CC 848.
[123] CC 848.
[124] CC 848.
[125] CC 848.
[126] CC 848. (the Circuit court found no support for this claim in the record).
[127] CC 848.
[128] CC 848.
[129] CC 848.
[130] CC 848.
[131] CC 848.
[132] CC 848.
[133] CC 848.

was no longer employed with the Welfare Division.[134] The Welfare Division then forwarded the grievance, which it interpreted as an appeal of its decision to terminate Hibbs, to the Nevada Department of Personnel, which dismissed it as untimely.[135] Hibbs then filed suit in federal district court against the Department of Human Resources, seeking "damages and injunctive and declaratory relief for violations of the FMLA and the Due Process Clause of the Fourteenth Amendment."[136] The district court granted summary judgment to the Department of Human Resources on the grounds that suit under FMLA was barred by the State's Eleventh Amendment immunity, and that Hibbs' had not been denied due process under the 14th Amendment.[137] Hibbs appealed to the Ninth Circuit and the "United States . . . intervened to defend the application of the FMLA to the state employers."[138]

The Ninth Circuit reversed, and held that Hibbs' suit was not barred by the 11th Amendment.[139] States and state agencies are immune from private suit by operation of the 11th Amendment, absent an express abrogation of this immunity by Congress.[140] Congress must meet two criteria to accomplish this, first it must unambiguously state its intent to abrogate, and second, it must act pursuant to an express grant of Constitutional power.[141] Congress may act in this regard under the authority of Section 5 of the 14th Amendment.[142] The Ninth Circuit noted that seven other Circuits have addressed the issue of whether the FMLA was enacted pursuant to its section 5 powers, but also that only a one circuit, the Fifth, had addressed § 2612(a)(1)(C), the provision at issue in Hibbs' case.[143] In Kazmier v. Widmann,[144] the Fifth Circuit held that § 2612(a)(1)(C) was not a valid abrogation of the States' 11th Amendment immunity[145], however, the 9th Circuit found the reasoning of that case unpersuasive.[146] The 9th Circuit held that § 2612(a)(1)(C) was a valid abrogation because it was unambiguous, and was a valid exercise of Congress' Section 5 powers because it was plausibly an attempt to remedy past gender discrimination.[147]

The Supreme Court granted certiorari to resolve a circuit split over whether an individual may sue a state, or state agency, in federal court for money damages for violation of the family care provisions of FMLA.[148] The Supreme Court upheld the ruling of the 9th Circuit, that Congress made its intent to abrogate state immunity from

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[134] CC 848.
[135] CC 848.
[136] CC 848. (Hibbs also sought relief on state law grounds).
[137] CC 848. (The court also refused to exercise supplemental jurisdiction over Hibbs' state law claims).
[138] CC 848.
[139] CC 873.
[140] See CC at 850.
[141] CC at 850.
[142] CC at 850.
[143] CC at 850. See 107 Stat. 9, 29 U.S.C. § 2612(a)(1)(C) (creating a private right of action to seek damages and equitable relief "against any employer (including a public agency) in any Federal or State court . . .")
[144] 225 F.3d 519 (5th Cir. 2000).
[145] Id. at ___.
[146] CC at n.7.
[147] CC at 851.
[148] SC 1977.

suit clear by enacting the family care provisions of FMLA and that Congress acted under the authority of Section 5.[149]

Rehnquist wrote for the majority.[150] He noted that Congress' intent to abrogate state immunity from suit under FMLA was "not fairly debatable."[151] Congress provided for suit against public agencies[152], which Congress defined "to include both 'the government of a State or political subdivision thereof' and 'any agency of ... a State, or a political subdivision of a State.'"[153] It was clear to the Court that Congress sought to abrogate the States' immunity from suit under FMLA, however, whether Congress acted within its Constitutional authority in so doing was a closer question, on which the outcome of the case turned.[154]

Although Congress may not abrogate state immunity from suit by using it's Article I powers[155] it may do so in an effort to enforce the substantive guarantees of the 14th Amendment, via its Section 5 enforcement powers.[156] Although Congress may not use its Section 5 powers to redefine the scope of rights guaranteed under Section 1 of the 14th Amendment, it may enact prophylactic measures that prohibit constitutional conduct in order to prevent unconstitutional conduct.[157]

The Court determined that the family care provision of "[t]he FMLA aim[] to protect the right to be free from gender-based discrimination in the workplace."[158] The Court noted that

> "Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than [the] rational-basis test—it must 'serve important governmental objectives' and be 'substantially related to the achievement of those objectives'—it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina v. Katzenbach*, where we upheld the Voting Rights Act of 1965, because racial classifications are presumably invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment."[159]

The Court sought to determine whether Congress "had [sufficient] evidence of a pattern of constitutional violations on the part of the States in this area."[160] The opinion devotes substantial effort to describing Congress' efforts to identify and eliminate sex

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[149] SC 1977.
[150] SC at 1976.
[151] SC at 1977.
[152] 29 U.S.C. § 2617(a)(2).
[153] SC at 1977 (quoting from 29 U.S.C. § § 203(x) and 2611(4)(A)(iii)).
[154] Sc at 1977.
[155] See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).
[156] See U.S. Cont. Amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").
[157] SC at 1977, citing City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[158] SC at 1978.
[159] SC at 1981 (internal citations omitted).
[160] SC at 1978.

discrimination in the workplace and focuses on the importance of eradicating the notion that women are primarily mothers and care-givers.[161]

Exploring the history of gender-based discrimination, Rehnquist noted that "[t]he impact of the discrimination targeted by the FMLA is significant. Congress determined: '[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'"[162] Furthermore, state laws had suffered from a pattern of reinforcing these outdated gender stereotypes, and that the Court itself had, until recently, expressly upheld classifications that imposed restrictions on women based on stereotypes about the role of women in the workplace and in the home.[163] Noting that Congress had evidence that states continued to use gender-based stereotypes in passing employment measures, and that these measures often related to determination of leave benefits, the Court held that the evidence of a pattern of gender-based discrimination by the states was sufficient to justify prophylactic legislation under section 5.[164]

Justice Souter, joined by Justices Ginsburg and Breyer, concurred, and Justice Stevens concurred in the judgment.[165] Stevens was unconvinced that the FMLA was enacted in order to fulfill the substantive guarantees of the 14th Amendment under Congress' § 5 powers, but would have instead upheld the application of FMLA to the states because Hibbs was a citizen of Nevada.[166] Stevens noted that the type of sovereign immunity claimed by the state in *Hibbs* was "based on what [he] regard[ed] as the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text."[167] He noted that in order to abrogate this kind of sovereign immunity, all that was necessary was a clear statement of intent from Congress pursuant to exercise of the Commerce Power.[168]

Justices Kennedy dissented, joined by Justices Scalia and Thomas.[169] Kennedy noted Hibbs' complete failure to document a pattern of unconstitutional conduct by the States to justify a congruent and proportional response by Congress under § 5 of the 14th Amendment.[170] He argued that far from being a remedial measure aimed at preventing violations of the substantive rights guaranteed by the 14th Amendment, the family care provision was an entitlement program which "Congress chose to confer upon state employees."[171] Kennedy further argued that this would likely be a valid exercise of the

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[161] SC at 1978-82.
[162] SC at 1981 (quoting Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33, 100 (1986)).
[163] SC at 1978.
[164] SC at 1978.
[165] SC at 1984.
[166] SC at 1985.
[167] SC at 1985. (Stevens, J Concurring)
[168] SC at 1985 (Stevens, Concurring)
[169] SC at 1985.
[170] SC at 1994 (Kennedy dissent).
[171] SC at 1994 (Kennedy).

Commerce Power, which would support actions against states by private individuals under *Ex Parte Young*,[172] but would not support suits seeking money damages against a state, absent the consent of the state.[173]

Justice Scalia also wrote separately to note that "[t]here is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States."[174]

Insert Conclusion...

V. The Fair Labor Standards Act

In *Breuer v. Jim's Concrete of Brevard, Inc.*[175] the Court held that the provision of the FLSA that provides for state court jurisdiction over FLSA damage suits[176] was not an express prohibition of removal to federal court under the federal removal statute.[177]

Phillip Breuer sued his former employer, Jim's Concrete of Brevard, Inc. [hereinafter Jim's Concrete], for "unpaid wages, liquidated damages, pre-judgment interest, and attorney's fees under the Fair Labor Standards Act."[178] Breuer filed his lawsuit in Florida state court.[179] Jim's Concrete removed the case to federal district court under the federal removal statute, 28 U.S.C. § § 1441, 1446, and Breuer moved to remand to state court, arguing that FLSA provided that an action to recover damages under the Act, once filed in state court, could not be removed, by operation of § 216(b) of the FLSA.[180] His motion was denied, and Breuer's interlocutory appeal was certified to the 11th Circuit.[181]

The 11th Circuit sought to determine whether, by providing that an action under the FLSA *"may be maintained"* in state court, Congress expressly abrogated the general removal authorization of the federal removal statute, which provides for removal of cases over which the federal district courts have original jurisdiction except where *"otherwise expressly provided by Act of Congress."*[182]

The 11th Circuit adopted the reasoning of the First Circuit in Cosme Nieves v. Deshler[183] which held that § 216(b) was not an express congressional prohibition on removal.[184] The court noted that "district courts across the country [were] split on this issue, with the great majority of them permitting removal."[185] Comparing § 216(b) to other statutes, the court noted that where Congress expressly prohibited removal, it did so

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[172] 209 U.S. 123 (1908).
[173] SC at 1994 (Kennedy).
[174] SC at 1984 (Scalia dissent).
[175] SC
[176] 29 U.S.C. § 216(b) (" ").
[177] 28 U.S.C. § 1441, *et seq*.
[178] CC at 1308.
[179] CC at 1308.
[180] CC at 1308. See 29 U.S.C. § 216(b).
[181] CC at 1308.
[182] CC at 1308 (quoting 29 U.S.C. § 216(b) and 28 U.S.C. § 1441(a)) (emphasis in original).
[183] 786 F.2d 445 (1986).
[184] CC at 1308.
[185] CC at 1308.

directly, with unequivocal language.[186] It upheld the district court's denial of Breuer's motion to remand, but called on Congress or the Supreme Court to resolve the issue in order to bring uniformity to the district courts.[187]

Breuer petitioned for *certiorari*, and the Supreme Court took the case to resolve a split among the Courts of Appeals.[188] Souter delivered the opinion for a unanimous Court and rejected each of Breuer's arguments in favor of reading § 216(b) as an express prohibition on removal.[189] The Court noted that "[n]othing on the face of . . . § 216(b) looks like an express prohibition on removal, there being no mention of removal, let alone of prohibition."[190] Furthermore, the Court noted that the word "maintain" is at best ambiguous, but "when Congress wishes to give plaintiffs an absolute choice of forum, it is capable of doing so in unmistakable terms. It has not done so here."[191] To interpret "may maintain" as an express abrogation of removal authority within the meaning the federal removal statute would dictate that other federal statutes which use the same language be interpreted similarly as abrogating removal authority.[192] The Court therefore affirmed the ruling of the 11th Circuit, and held that § 216(b) of the FLSA is not an express prohibition on removal.[193]

Conclusion...

VI. Title VII; Civil Rights Act of 1991; Mixed Motive Cases

In Desert Palace, Inc. v. Costa[194] the Court held that a plaintiff in a Title VII sex discrimination case need only prove that sex was a motivating factor to a preponderance of the evidence, whether through direct or circumstantial evidence, in order to receive a mixed-motive jury instruction.[195]

Catharina Costa was the only female warehouse worker and heavy equipment operator employed by Desert Palace, Inc., and the only female member of her bargaining unit, Teamsters Local 995.[196] She worked at the warehouse for Ceasar's Palace in Las Vegas, Nevada, handling food and beverage shipments.[197] Although she received high marks for the quality of her work, she began having trouble with her co-workers and management.[198] She began being singled out because she was a woman, and when she complained, she found that management was unconcerned and treated her as an "outcast."[199] Costa testified that men who were late for work were rewarded with extra hours to make up for the lost time, while she was reprimanded for being as little as one

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[186] CC at 1310. See e.g. 28 U.S.C. § 1445 ("A civil action in any State Court . . . may not be removed").
[187] CC at 1310.
[188] SC at 929.
[189] SC at 929-32.
[190] SC 929.
[191] SC at 927.
[192] SC at 932.
[193] SC at 932.
[194] SC
[195] SC at 2150.
[196] CC at 844.
[197] CC at 844
[198] CC at 844.
[199] CC at 844.

minute late.[200] As the situation declined, Costa sought the intervention of human resources, but her request was declined.[201] She testified that her supervisor began stalking her around the warehouse and that she was received harsh discipline for activities, such as use of profanity, which male workers engaged in with impunity.[202] Workers and supervisors used and tolerated sexually-explicit verbal slurs directed at Costa, and when she complained she was suspended.[203] Events came to a head when Costa got into a physical altercation with a fellow employee.[204] She complained and was assured that the incident would be investigated, but returned to work to have the same employee "come at her a second time."[205] Costa was later terminated for the incident, while the other employee was merely suspended.[206]

Costa received an EEOC right to sue letter and filed suit against Desert Palace in Federal district court for sexual harassment and sexual discrimination.[207] The district court dismissed her sexual harassment claim on summary judgment, but allowed her Title VII sexual discrimination claim to go forward.[208] The district judge denied Desert Palace's motion for judgment as a matter of law[209], and gave a mixed-motive jury instruction as follows:

> "You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision."[210]

Desert Palace objected unsuccessfully to this jury instruction, noting that Costa presented no "direct evidence" that sex was a motivating factor, and the jury awarded back pay, compensatory damages, and punitive damages to Costa.[211] The judge the denied Desert Palace's renewed motion for judgment as a matter of law, and refused

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[200] CC at 845.
[201] CC at 845.
[202] CC at 845.
[203] CC at 845.
[204] CC at 845.
[205] CC at 846 (internal quotation omitted).
[206] CC at 846.
[207] CC at 846.
[208] CC at 846.
[209] CC at 846.
[210] CC at 858.
[211] CC at 846.

to grant a new trial, but granted remittitur and Costa agreed to accept a decreased damage award.[212]

Desert Palace appealed to the Ninth Circuit.[213] The court sought to determine the appropriate standard of proof in Title VII mixed-motive cases, i.e. whether direct evidence of discrimination is required, given a divergence of opinion among the Circuits caused by a "passing reference to 'direct evidence' in Justice O'Conner's concurring opinion in *Price Waterhouse v. Hopkins*"[214] and Congress' apparent negative reaction to *Price Waterhouse* in the form of the 1991 amendments to the Civil Rights Act.[215]

The Ninth Circuit upheld the mixed-motive jury instruction, and noted that the text of the 1991 amendments to the Civil Rights Act of 1964 made it clear that Congress did not appear to intend to impose a heightened evidentiary standard on plaintiffs in mixed motive sex discrimination cases.[216] Desert Palace sought certiorari, and the Supreme Court took the case in order to resolve the split of authority over "whether a plaintiff must prove by direct evidence that an impermissible consideration was a motivating factor in an adverse employment action."[217]

Thomas wrote the opinion for a unanimous Court. He noted that a 1991 Amendment to the Civil Rights Act,[218] was a response to the result in *Price Waterhouse*.[219] After reviewing the statute, mixed-motive case law, and the 1991 Act, he wrote: "[i]n addition, Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the 'conventional rule of civil litigation generally applies in Title VII cases.'"[220] Thomas recognized that circumstantial evidence was often useful in discrimination cases, and held that the appropriate standard was one "[t]hat . . . requires a plaintiff to prove his case by a preponderance of the evidence."[221] Thomas noted that the statute made no reference to a heightened standard of proof, and that Desert Palace could not cite a circumstance in which the court imposed such a standard without an explicit directive from Congress.[222]

Conclusion...

VII. Railroads and Coal Mines

In *Norfolk & Western Railway Co. v. Ayers*,[223] the Court held that damages for mental anguish resulting from the fear of developing cancer from exposure to asbestos may be recovered under the Federal Employers' Liability Act (FELA), and that workers may

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[212] Cc at 846-47.
[213] CC at 845.
[214] 490 U.S. 228, 270.
[215] CC at 847.
[216] CC at 848.
[217] SC at 2151-52. (internal quotation omitted).
[218] § 107 of the 1991 Act.
[219] SC at 2151.
[220] SC at 2154 (quoting Price Waterhouse, 490 U.S., at 253)(alterations in original).
[221] SC at 2154 (internal quotation omitted).
[222] SC at 2154.
[223] 123 S.Ct. 1210 (hereinafter Ayers).

recover the entire extent of their damages from a single railroad whose was jointly negligent in causing their damages, leaving the railroad to seek contribution from other tortfeasors.[224]

FELA makes railroads liable to injured employees for work-related injuries caused either entirely or partially by the railroad's negligence.[225] Six former employees of Norfolk & Western Railway Co. (Norfolk) sued the railroad in West Virginia state court, as allowed by FELA, for damages resulting from asbestosis, allegedly caused by exposure to asbestos while at work.[226] The plaintiffs sought, *inter alia*, damages for pain and suffering resulting from fear of developing cancer in the future.[227]

At trial, Norfolk attempted unsuccessfully to prevent the plaintiffs from introducing evidence regarding cancer.[228] The jury heard "expert testimony . . . [that] [a]sbestosis sufferers . . . whose exposure to asbestos has manifested itself in [the] chronic disease . . . have a significant (one in ten) risk of dying of mesothelioma, a fatal cancer of the lining of the lung or abdominal cavity."[229] The trial judge determined that none of the plaintiffs had proven he was "reasonably certain to develop [the] cancer" and instructed the jury that no damages for cancer or the increased probability of cancer could be awarded, but that the cancer testimony should be weighed to determine whether the plaintiffs' claims of fear from an increased probability of cancer were genuine.[230]

The court instructed the jury that "[a]ny plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering."[231] Norfolk argued unsuccessfully for an instruction requiring physical manifestation of fear and proof of a likelihood of cancer, as well as an instruction requiring apportionment of damages between Norfolk and other railroads whose negligence allegedly contributed to the plaintiffs' injuries.[232] Despite evidence that several of the plaintiffs were exposed to asbestos from sources other than Norfolk, the judge instructed the jury not to apportion damages, and to award damages against Norfolk so long as they jury found that Norfolk was negligent, and that exposure caused by Norfolk contributed to the plaintiffs' injuries.[233]

The jury awarded damages to the plaintiffs which after reduction for comparative negligence for smoking by three plaintiffs, and reduction for other settlements, amounted to $4.9 million.[234] Norfolk failed to seek a special verdict, or otherwise determine what portion of the damages were attributable to fear of cancer and the Supreme Court of

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[224] SC at ___.
[225] 35 Stat. 65, as amended, 45 U.S.C. § § 51-60.
[226] SC at 1215.
[227] SC at 1215.
[228] SC at 1215.
[229] SC at 1215 (internal citations omitted).
[230] SC at 1216 (internal citations omitted).
[231] SC at 1216 (internal quotation omitted).
[232] SC at 1216
[233] SC at 2116.
[234] SC at 1216.

Appeals of West Virginia refused to hear Norfolk's appeal. The U.S. Supreme Court granted *certiorari*.[235]

Ginsburg wrote the majority opinion which held that an asbestosis sufferer may seek compensation for fear of developing cancer, provided he prove that the fear is genuine and serious.[236] In addition, the court held that "FELA does not provide for apportionment of damages between railroad and non-railroad causes."[237] The court was unanimous on the second point.[238]

FELA abolished certain common law defenses in order to shift the costs of injuries associated with railroad work from employees to employers.[239] In every other respect, however, FELA left common law principles intact.[240] Ginsburg noted that "[w]hen the Court confronts a dispute regarding what injuries are compensable under [FELA] . . . common-law principles 'are entitled to great weight in our analysis.'"[241] In determining whether fear of cancer is a compensable damage in FELA cases, the Court followed the reasoning laid down in Gottshall and Metro North.[242]

In *Gottshall*, the Court adopted the common law "zone of danger" test in order to cabin employer liability under FELA for negligent infliction of emotional distress, and avoid recognizing claims that could "hold out the very real possibility of nearly infinite and unpredictable liability for defendants."[243] The zone of danger test is a common-law test, that requires a plaintiff in a stand-alone emotional distress case to prove he either sustained a physical impact, or be placed in immediate danger of physical harm.[244] In *Metro-North*, the Court applied the zone-of-danger test in a FELA case involving a claim for emotional distress stemming from the plaintiff's fear of developing cancer.[245] In that case, the Court rejected the plaintiff's claim.[246] Citing its reluctance to expose would-be tortfeasors to potentially unlimited liability, the Court distinguished claims for stand-alone emotional distress (which call for application of the limiting "zone of danger" test) from those cases where a plaintiff suffers emotional distress in addition to a physical injury, in which case the emotional damages are compensable under common law principles.[247]

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[235] SC at 1216.
[236] SC at 1223.
[237] SC at
[238] SC at ___.
[239] SC at 1217 (citations omitted). "FELA 'abolished the fellow servant rule'; 'rejected the doctrine of contributory negligence in favor of . . . comparative negligence'; 'prohibited employers from exempting themselves from [the] FELA through contract'; and, in a 1939 amendment, 'abolished the assumption of risk defense.'" SC 1217, quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).
[240] SC at 1217.
[241] SC at 1217 (quoting 512 U.S. at 544 (Souter, concurring))
[242] SC at 1217
[243] SC at 1217. (quoting Gottshall, 512 U.S. at 546)
[244] SC at 1217. (Quoting Gottshall at 544) ("[The zone of danger test] delineate[s] 'the proper scope of an employer's duty under [the] FELA to avoid subjecting its employees to negligently inflicted emotional injury.'")
[245] SC at 1218, citing Metro-North
[246] Metro-North
[247] SC at 1218.

Quoting the Restatement (Second) of Torts, Ginsburg explained that the common law allows recovery for emotional damages if the actor negligently "caused *any* bodily harm."[248] In addition, when FELA was enacted in 1908, fear of future harm was recognized as a "component of pain and suffering" and did not need to be proven more probably than not to lead to actual future harm.[249] The common-law therefore allows recovery for a reasonable fear of future disease.[250] Ginsburg then proceeded to recount the history of these claims.[251]

Rejecting Norfolk's argument that asbestosis does not itself cause mesothelioma (an often fatal cancer), Ginsburg noted that the presence of the former belies a significant increase in the incidence of the latter, and that a sufferer of asbestosis "would have good cause for increased apprehension about his vulnerability to another illness from his exposure, a disease that inflicts 'agonizing, unremitting pain,' relieved only by death."[252] In other words, the fact that an individual is exposed to sufficient quantities of asbestos to cause asbestosis indicates a frightening probability that the exposure was also sufficient to cause mesothelioma.[253] It remains to the plaintiff, however, to prove that the fear is both genuine and serious.[254]

Justice Kennedy, joined by Chief Justice Rehnquist, and Justices O'Connor and Breyer dissented.[255] Kennedy did not agree that the common law was settled in this area.[256] The dissenters did not feel that allowing damages in FELA cases for emotional distress caused by fear of developing cancer furthered "the purpose of FELA[,] [which] is to provide compensation for employees."[257] Of primary concern to the dissent was the potential that allowing damages for fear of developing cancer would deprive future plaintiffs who actually suffer from cancer caused by asbestos exposure, but never suffered from fear of developing cancer, of recovery.[258] The dissent was concerned that resources would not be available to compensate these victims, who are more deserving of compensation than the plaintiffs in this case, who probably would not develop cancer.[259]

Regarding the apportionment of damages under FELA, the Court noted that "[n]othing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third party also contributed in part to the injury-in-suit."[260] In addition, FELA provides for apportionment of liability between the employer and employee on principles of comparative fault, but mentions no other apportionment.[261] The Court refused to read into the statute a provision for apportionment neither supported by the text, nor by the "overall recovery facilitating

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[248] SC at 1218 (quoting R2d Torts § 456(a))(emphasis in original)
[249] SC at 1218.
[250] SC at 1218.
[251] SC at 1219-20.
[252] SC at 1222 (citation omitted)
[253] See id.
[254] SC at 1223.
[255] SC at 1228 (Kennedy, dissenting).
[256] SC at 1229.
[257] SC at 1228.
[258] SC at 1228-30.
[259] SC at 1230.
[260] SC at 1225.
[261] SC at 1225.

thrust" of FELA.[262] In addition, the Court noted that such a result would be contrary to the Court's previous FELA cases[263] and would not be in accord with the Court's general policy of applying joint and several liability[264] and would unduly handicap plaintiffs.[265] The Court was unanimous on this point.[266]

Conclusion...

In *Barnhart v. Peabody Coal*,[267] the Supreme Court held that initial assignments of coal industry retirees to entities responsible for funding their benefits under the Coal Industry Retiree Benefit Act of 1992 (the Coal Act) made after October 1, 1993 are valid despite the failure of the Commission of Social Security to make the assignments in a timely manner as required by the Coal Act.[268]

The Coal Act requires that the Commission of Social Security assign eligible coal industry retirees to an "operating company or a [other] entity, which shall then be responsible for funding the assigned beneficiary's benefits" before October 1, 1993.[269] Once an assignment is made, the operator must pay an annual premium into a fund established under the Coal Act to administer retiree benefits.[270] The Commissioner of Social Security initially assigned approximately 10,000 beneficiaries on or after October 1, 1993.[271] The respondents in *Barnhart* challenged the proposed assignment as foreclosed by a lack of jurisdictional authority after the statutory date in two separate actions in federal district courts, claiming that unassigned beneficiaries as of October 1 "must be left unassigned for life."[272] Such a result would dictate that the benefits for these unassigned beneficiaries be paid out of other sources, but would relieve the respondent of their financial responsibilities.[273] The respondents were granted summary judgment in both district court cases, and the Sixth Circuit affirmed.[274] The Supreme Court consolidated the cases and granted *certiorari* to resolve a conflict between the Sixth Circuit and the Fourth Circuit.[275]

Justice Souter wrote the majority opinion which held that assignments made on or after October 1, 1993 were valid despite their tardiness.[276] Although noting that the use of the word "shall" in the Coal Act viz. the timing of assignments by the Commissioner, mandated that the Commissioner act before October 1, 1993, the Court was reluctant "to conclude that every failure of an agency to observe a procedural requirement voids

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[262] SC at 1225.
[263] SC at 1225 (citations omitted).
[264] SC at 1226-27.
[265] SC at 1227.
[266] SC at ___.
[267] SC.
[268] SC at 752.
[269] SC at 752, citing 26 U.S.C. § 9706(a).
[270] SC at 752.
[271] SC at 753.
[272] SC at 754.
[273] SC at 754.
[274] SC at 754.
[275] *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (CA6 1999), *Peabody Coal Co.* v. *Massanari*, 14 Fed. Appx. 393 (2001), *Bellaire Corp.* v. *Massanari*, 14 Fed. Appx. 424 (2001). Cf. *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001).
[276] SC at 754.

subsequent agency action, especially when important public rights are at stake."[277] Souter stated that the Court had not, since *Brock*, interpreted a requirement that "the Government *shall* act within a specified time, without more, as a jurisdictional limit precluding action later."[278] Furthermore, the Coal Act was enacted after *Brock*, "when Congress was presumably aware that [the Court] . . . do[es] not readily infer congressional [sic] intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time."[279] The Court therefore held that late assignments were not invalid for failure to comply with the timing provision of § 9706(a) and reversed the decisions of the Sixth Circuit, upholding the late assignments of beneficiaries.[280]

Conclusion...

VIII. The False Claims Act

In *Cook County v. United States ex rel. Chandler*,[281] the Supreme Court held that branches of local government are "persons" under the False Claims Act and as such are amendable to *qui tam* actions under the FCA.[282]

The "FCA . . . provides for civil penalties against 'any person' who 'knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.'"[283] In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[284] the Court held that the term "persons" as used in the FCA provision relating to *qui tam* actions[285] did not encompass States.[286] In contrast, in *Chandler*, the Court held that local governments are amenable to qui tam actions under the FCA.[287]

From September 1993 until her termination in January 1995, Dr. Chandler ran a study at Cook County Hospital on the treatment of pregnant women addicted to drugs.[288] The study was supported by a $5 million federal grant which was subject to "a compliance plan meant to assure that the study would jibe with federal regulations for research on human subjects."[289] In 1997, Dr. Chandler filed a qui tam action in federal district court against Cook County under the FCA, claiming that the hospital had filed false claims in order to obtain research funds, and that her discovery of the fraud, and subsequent

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[277] SC at 755 (quoting Brock v. Pierce County, 476 U.S. 253 (1986)).
[278] SC at 755.
[279] SC at 756 (citing United States v. Wells, 519 U.S. 482, 495 (1997).
[280] SC at 762.
[281] 123 S. Ct. 1239 (2003).
[282] SC at 1242.
[283] SC at 1242 (quoting 31 U.S.C. § 3729(1)(1)).
[284] 529 U.S. 765 (2002).
[285] *qui tam* actions are brought by private individuals (relators) in the Government's name, in an effort for the private individual to share in any potential recovery. SC at 1242. See also ___ (find a LR article, or something about qui tam actions in general).
[286] 529 U.S. at ___.
[287] SC at 1242.
[288] SC at 1243.
[289] SC at 1243.

reporting of the fraud to the National Institute of Drug Abuse (the agency which awarded the grant), was the reason for her dismissal.[290]

Cook County moved to dismiss Chandler's claim, "arguing . . . that it was not a 'person' subject to liability under the FCA."[291] The district court denied this motion.[292] The Seventh Circuit affirmed the denial and the Supreme Court initially denied *certiorari*.[293] In the interim, the Court ruled on *Stevens*, and the district court reconsidered its previous decision, dismissing Chandler's action on the reasoning that, although it saw no reason to "no reason to alter its conclusion that the County is a 'person' for purposes of the FCA," the County nevertheless "could not be subjected to treble damages."[294] The Seventh Circuit reversed, conflicting with rulings in the Third and Fifth Circuits.[295] The Supreme Court granted *certiorari* in order to resolve the split in the Courts of Appeals.[296]

Justice Souter wrote the opinion for a unanimous Court which held that local governments are amenable to *qui tam* actions under the FCA.[297] The Court noted that local governments are commonly the recipients of federal funds, and the purpose of the FCA, i.e. to "to reach all types of fraud, without qualification, that might result in financial loss to the Government," would be served by including municipal governments as "persons" under the FCA.[298] The opinion contains an interesting historical exploration of the meaning of the word "person," noting that "neither history nor text points to exclusion of municipalities from the class of 'persons' covered by the FCA in 1863."[299]

The County argued that the 1986 amendments to the Act, which increased the fines significantly and provided for treble damages instead of double damages turned the FCA into a punitive, and not merely compensatory remedial scheme.[300] The Court noted that the common-law generally cuts against awarded punitive damages against municipalities, both because a local government's taxing power might make it an attractive target for a generous jury, and because courts are generally concerned with burdening blameless taxpayers "for the wrongdoing of local officials."[301] The Court distinguished the FCA treble damages provision, however, as only punitive in a limited sense.[302] In addition, the Court was unwilling to hold that the 1986 amendments "wordlessly redefined 'person' to exclude municipalities."[303] To hold such would violate the "cardinal rule . . . that repeals

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[290] SC at 1243.
[291] SC at 1243.
[292] SC at 1243.
[293] 528 U.S. 931 (1999), cert. denied.
[294] SC at 1243. (citing 118 F. Supp. 2d 902, 903 (2000)).
[295] SC at 1243, n. 6
[296] 536 U.S. 956.
[297] SC at 1242.
[298] SC at 1246 (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).
[299] SC at 1246.
[300] SC at 1246.
[301] SC at 1247 (quoting Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981)).
[302] SC at 1247.
[303] SC at 1247.

by implication are disfavored."[304] The Court therefore held that municipalities are subject to qui tam actions under the FCA.[305]

Conclusion...

IV. Criminal Sodomy and Deviant Sexual Intercourse

Although sounding in criminal law, *Lawrence v. Texas*[306] has important implications for the field of labor and employment law. Lawrence will likely have a significant impact on the climate in which labor and employment issues effecting gays and lesbians are decided. In *Lawrence*, the Court held that a Texas anti-sodomy statute violated the "substantive" due process clause of the Fourteenth Amendment.[307]

Harris County police officers responded to a reported weapons disturbance at the residence of John Lawrence.[308] They entered the apartment to find Lawrence, and Tyron Garner engaged in a sexual act.[309] Lawrence and Garner were arrested and charged with deviate sexual intercourse.[310] They plead *nolo contendere* and were convicted in Texas State court of violating section 21.06 of the Texas Penal Code.[311] Each was assessed a two hundred dollar fine.[312] On appeal to the Fourteen District Court in Houston, Lawrence and Garner argued that § 21.06 was unconstitutional because it violated both the equal protection and due process clauses of the Fourteenth Amendment.[313] The Fourteenth Circuit Court affirmed the convictions, and held that § 21.06 was not unconstitutional.[314] The Fourteenth Circuit was divided on the issue, but the majority opinion relied on the holding in *Bowers v. Hardwick*[315] in reaching the conclusion that the right to engage in homosexual sodomy is not constitutionally protected.[316] The Supreme Court granted *certiorari* in order to consider whether the Texas anti-sodomy statute under which Lawrence and Garner were convicted violated either the Equal Protection Clause or the Due Process Clause, and whether *Bowers v. Hardwick* should be overruled.[317]

Justice Kennedy wrote for a slim five justice majority. In a move that surprised many, the Court expressly overturned *Bowers*, a recent precedent, as incorrectly decided.[318] The

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[304] SC at 1247 (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).
[305] SC.
[306] 156 L. Ed. 2d 508 (2003).
[307] SC at 37
[308] SC at 9
[309] SC at 9.
[310] SC at 9.
[311] SC at 10.
[312] SC at 10. (citing Tex. Pen. Code Ann. § 21.06 (2003)) ("[Section 21.06] provides that '[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex' and defines 'deviate sexual intercourse' as . . . : '(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.') (Texas is one of only four states that have a same-sex sodomy law, while nine other states make deviate sexual intercourse with either sex illegal).
[313] CC at 350, 359.
[314] CC at 362.
[315] 478 U.S. 186 (1986).
[316] CC at 354.
[317] SC at 11.
[318] SC at 35-36.

five justice majority held that the Texas anti-sodomy statute violated due process, as violating an adult's liberty interest in private, consensual intimacy with another adult, and did not reach the Equal Protection issue, while Justice O'Connor, who concurred in the result would have found the law unconstitutional on Equal Protection Grounds alone.[319] The majority rejected a potential procedural exit offered by the lawyer for the state of Texas at oral argument, i.e. to dismiss for lack of a sufficient record on which to determine whether the alleged conduct was non-commercial, consensual and private.[320] The Court instead focused on the public perception of homosexual conduct, the history of anti-sodomy laws, and the relationship of the law to the "right of privacy" first recognized in *Griswold v. Connecticut*[321], and elaborated in later cases.[322] Pointing out *Bowers'* various "deficiencies," Kennedy stated that:

> "[t]he present case does not involve minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct or prostitution[,] . . . [or] whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. [They] . . . are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[323]

The Court held that the Texas anti-sodomy statute furthered no legitimate state interest sufficient to "justify its intrusion into the personal and private life of the individual." [324] *Lawrence* is likely to have a sweeping impact on the rights of homosexuals, and on the scope of the right of privacy protected by the due process clause.[325]

Conclusion...

X. Affirmative Action

Grutter v. Bollinger... etc.

Grutter, a white applicant to the University of Michigan Law School, was denied admission and asserts that the school's admission policy, which considers race and ethnicity, violates the 14th Amendment's Equal Protection Clause and the Civil Rights Act of 1964. Gratz and Hamacher, both white residents of Michigan were denied admission to the University of Michigan and raise substantially similar arguments as the law school applicant/plaintiff. The basic question is whether and when race'ethnicity may be used as a "plus factor" in student admissions without violating Title VI of the

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[319] SC at 37-50 (O'Connor, J concurring in the result).
[320] SC at ___.
[321] 381 U.S. 479 (1965).
[322] SC at 12-14 (citing *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), *Roe* v. *Wade,* 410 U.S. 113 (1973), *Carey* v. *Population Services Int'l,* 431 U.S. 678 (1977)).
[323] SC at 36.
[324] SC at 36.
[325] See SC.

Civil Rights Act of 1964, the 14th Amendment's Equal Protection Clause, or 42 U.S.C. section 1981. All of the now familiar arguments for and against racial preferences were made at oral argument. Since employment is the other major arena in American life in which affirmative action operates, labor and employment lawyers were watching this closely for signals about how/whether employers can conduct race conscious programs in the workplace.

To the surprise of only a few, the Court upheld the fairly individualized approach taken by the law school and struck down the formulaic "20 points added" approach of the undergraduate College. Noting that the law school employed a "narrowly tailored" role for race in its admissions practices that made it only a "potential plus factor," Justice O'Connor's majority opinion focused on the benefits of diversity. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

XI. Arbitration

In *Green Tree Financial Corp. v. Bazzle*,[326] the Court held that a determination of whether a contract that provided for arbitration of disputes also provided for class-wide arbitration was a matter to be resolved by the arbitrator.[327] *Green Tree* was not a labor and employment case, its subject matter was financing and security agreements made between a lender and individual borrowers, however, the case will have important implications for the arbitration of labor and employment contracts.[328]

In 1995, the Bazzles entered into an installment contract with Green Tree Financial for a secured home improvement loan.[329] Lackey and Buggs entered into similar agreements with Green Tree.[330] Each agreement included an arbitration clause worded substantially as follows:

> "ARBITRATION -- All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you[331]. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN) . . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief."[332]

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[326] SC
[327] SC at 18-19.
[328] See id.
[329] SC at 7-8.
[330] SC at 8-9.
[331] The word "you" was replaced by the word "Buyers" in the Lackey and Buggs contracts.
[332] SC at 8 (Capitalization in original document).

Green tree failed to provide the borrowers with a required legal form, and the two sets of buyers filed suit separately in South Caroline state court.[333] The Bazzles sought certification as a class, and Green Tree sought an order compelling arbitration.[334] The court subsequently ordered class arbitrated.[335] Green Tree selected an arbitrator, with the Bazzles' consent and awarded them over $10 million in statutory damages, which was later confirmed by the trial court.[336] Lackey and Buggs also sought class certification in their case.[337] Green Tree successfully sought arbitration of those cases, and the arbitrator (the same one mutually agreed to in the Bazzles case) later certified Lackey and Buggs cases as a class and awarded statutory damages of over $9 million, which was later confirmed by the trial court.[338] Green Tree appealed both cases, arguing "that class arbitration was legally impermissible."[339] The Supreme Court of South Carolina then assumed jurisdiction and consolidated the cases.[340] The court ruled that the contracts' silence regarding class arbitration effectively authorized such treatment, and upheld the arbitration awards.[341] The Supreme Court granted *certiorari* in order to determine whether the ruling of the South Carolina court was "consistent with the Federal Arbitration Act" (FAA).[342] Green Tree argued that the South Carolina ruling violated the FAA, which supercedes state law and requires arbitration agreements to be enforced "as written."[343]

Writing for a plurality of four justices, Justice Breyer wrote that the issue of whether the contracts compelled class arbitration was a "question that the literal terms of the contracts do not decide" and whether the contract's silence on the issue forbid class arbitration was "not completely obvious."[344] However, the Court held that the determination was not one for the Court to make, nor was it one for the Supreme Court of South Carolina to make.[345] Instead, it was for the arbitrator, as a matter of contractual interpretation, to determine whether the contracts called for class arbitration.[346] Having agreed to arbitrate any claims under the contract, the parties agreed that an arbitrator would also decide the issue at hand.[347] Breyer noted that there are instances in which parties may be presumed to have reserved certain issues to a judge, and not an arbitrator, such as "certain gateway matters, [e.g.] . . . whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain

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[333] SC at 9.
[334] SC at 9.
[335] SC at 9-10.
[336] SC at 10.
[337] SC at 10.
[338] SC at 10.
[339] SC at 10-11.
[340] SC at 11
[341] SC at 11.
[342] SC at 11.
[343] DC at ___ (also cite to the section of the FAA that says this... trouble locating it).
[344] SC at 13.
[345] SC at 14.
[346] SC at 14.
[347] SC at 14.

type of controversy."[348] The Court noted that this case, however, did not present such issues, and an arbitrator was well suited to make the class arbitration determination.[349]

Although Breyer gave little guidance on the substantive issue of the case, whether silence regarding class arbitration in an agreement either compels or forecloses such treatment, the Court indicated that this determination may not be for the courts to make, assuming a valid agreement to arbitrate is found.[350] This ruling may indicate an expansive role for arbitrators in contract disputes.[351] It should be noted however, that only four Justices joined the plurality opinion, and that a fifth, Justice Stevens, concurred in the result because he believed the ruling of the Supreme Court of South Carolina in interpreting the contract was correct as a matter of South Carolina law, and that nothing in the FAA dictated a contrary result.[352]

Conclusion...

XII. False Advertising and Unfair Competition

In *Nike v. Kasky*,[353] the Supreme Court dismissed a previously granted writ of *certiorari* as improvidently granted.[354] The case would have been important for its impact on the First Amendment protection afforded to blended speech, i.e. speech with both commercial and non-commercial components.[355] Although no substantive issues were decided in the case, a discussion of the possible implications for labor and employment practitioners is prudent, as *Kasky* or another similar case will likely find its way onto the Supreme Court docket in the years to come.[356]

In the 1990s, Nike was accused of mistreating and underpaying workers at its foreign manufacturing facilities.[357] In response, Nike engaged in an extensive public relations campaign, writing letters to colleges and athletic departments, putting out press releases denying the allegations, and publishing letters to the editor in national newspapers in hopes of improving its public image and diffusing the negative allegations.[358] Nike went so far as to commission a report by a former U.N. Ambassador which "commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers."[359]

Kasky, a California resident, sued Nike for deceptive trade practices and false advertising on behalf of the general public under the "the private attorney general provisions of California's Unfair Competition Law and False Advertising Law."[360] Kasky alleged "that 'in order to maintain and/or increase its sales,' Nike made a number

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[348] SC at 15
[349] SC at 16.
[350] See SC at 16. (this issue of one of S.C. contract law)
[351] See SC at 16.
[352] SC at 19 (Stevens, J, concurring in the result).
[353] SC
[354] SC at 1.
[355] See SC
[356] See SC
[357] SC at 1.
[358] SC at 1-2.
[359] SC at 2.
[360] SC at 17

of "false statements and/or material omissions of fact' concerning the working conditions under which Nike products are manufactured."[361] Nike successfully demurred to the complaint, and the California Court of Appeals affirmed.[362] The court held that "Nike's statements 'formed part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment.'"[363]

Kasky appealed to the California Supreme Court which reversed and remanded, holding that the speech in question was commercial because it was "directed by a commercial speaker to a commercial audience, and [contained] . . . representations of fact about the speaker's own business operations for the purpose of promoting sales of its products[.]"[364] The Supreme Court granted certiorari to decide whether "whether a corporation participating in a public debate may be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions; and . . . whether the First Amendment, as applied to the states through the Fourteenth Amendment, permits subjecting speakers to the legal regime approved by [the California Supreme Court.]"[365]

The Court dismissed the writ of *certiorari* because it did not present a final judgment as required by 28 U.S.C. § 1257, the parties lacked standing to invoke federal jurisdiction, and the Court wished to avoid prematurely deciding novel questions of Constitutional law.[366] The Supreme Court avoided ruling on the substantive issues involved in Kasky, however, on remand the case will likely result in an important decision regarding the constitutionality of limits on blended speech, and the issue may find its way to the Supreme Court in the coming years in more justiciable fashion.[367]

Conclusion...

XIII. Review Granted: A Preview of Next Term

Text...

XIV. Conclusion

Look for articles in the NY Times, L.A. times, Wall Street Journal covering the Court this term. Perhaps Fortune magazine for coverage of ERISA issues.

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[361] SC at 2 (citation omitted).
[362] SC at 3.
[363] SC at 3. (quoting CC at ___).
[364] SC at 3.
[365] SC at 4 (internal quotation marks and citation omitted).
[366] SC at 5.
[367] See SC.

Look for law review articles giving background information, or giving alternative viewpoints.

The audience is practitioners in labor and employment law, so be practical.