SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

ALAN L. MCLAUGHLIN*
TERESA L. MELTON**

INTRODUCTION: NATIONAL TRENDS AND DEVELOPMENTS

This survey period includes cases that should aid both employees and employers in future cases. For example, employee-plaintiffs have received some good news in the area of discrimination. Employee-plaintiffs can now receive a mixed-motive jury instruction without first proving evidence of direct discrimination.[1] They can count working shareholders who do not possess the requisite control, as defined by the common law test for "employees," towards the number of employees required to bring an Americans with Disabilities Act ("ADA") suit, and potentially use this test for other discrimination acts as well.[2] Additionally, the Seventh Circuit joined many other circuits allowing plaintiff-employees to state a § 1981 claim based on discriminatorily failing to promote an at-will employee.[3] Finally, the U.S. Supreme Court gave state employees a right to sue their state employer in federal court for Family Medical Leave Act violations.[4]

As for employer-defendants, the United States Supreme Court held an employer's "neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA" to not rehire a terminated employee, regardless of his past drug addictions.[5] Procedurally, the United States Supreme Court affirmed the Eleventh Circuit, holding a Fair Labor Standards Act action could be removed from state to federal court.[6] Finally, a unanimous United States Supreme Court decided the "treating physician rule," which gives deference to the determination of an employee's treating physician over other examining doctors (namely, an employer's doctor), has no place in Employee Retirement Income Security Act ("ERISA") benefits plans.[7]

This Article analyzes many of the more notable Supreme Court decisions applicable to the area of employment law, including the University of Michigan affirmative action decisions and those mentioned above. It also discusses pertinent Seventh Circuit and Indiana state cases decided this past survey period. This Article concludes with our annual watch list: pertinent cases pending before

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* Partner, Baker & Daniels, Indianapolis. A.B., 1979, Wabash College; J.D., 1982, Vanderbilt University.

** Associate Attorney, Baker & Daniels, Indianapolis. B.S., 1999, Indiana University—Fort Wayne; J.D., 2003, Indiana University School of Law—Bloomington.

1. Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2155 (2003).
2. Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673, 1675 (2003).
3. Walker v. Abbott Labs., 340 F.3d 471, 472 (7th Cir. 2003).
4. Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1976 (2003).
5. Raytheon Co. v. Hernandez, 124 S. Ct. 513, 519 (2003).
6. Breuer v. Jim's Concrete, Inc., 123 S. Ct. 1882, 1883 (2003).
7. Black & Decker Disability Plan v. Nord, 123 S. Ct. 1965, 1967 (2003).

the United States Supreme Court that may change significant areas of employment law in the *next* survey period.

I. General Employment Decisions

A. Definition of Employee

This past survey period, the United States Supreme Court decided an important case that extends beyond the borders of the ADA. The Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells* held courts should use the common-law definition of "employee" where, as in the ADA, Congress does not effectively define it in the statute.[8] The ADA defines an employee as "'an individual employed by an employer.'"[9] The EEOC argued, and the Court agreed, that courts should follow the common law definition of employee to determine the number of employees employed for purposes of the fifteen-person threshold for ADA applicability.[10] The Court abrogated the Seventh Circuit's decision in *EEOC v. Dowd & Dowd, Ltd.*,[11] which held that shareholders of a professional corporation engaged in the practice of law were not employees for purposes of Title VII. The Court used its holding in *Nationwide Mutual Insurance Co. v. Darden*[12] to adopt the common-law definition,[13] explaining that "as Darden reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law."[14]

This case is particularly noteworthy because some speculate this definition of employee will be used in the context of much more than ADA cases.[15] Thus,

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8. 123 S. Ct. 1673, 1679 (2003).

9. *Id.* (quoting 42 U.S.C. § 12111(4) (2000)).

10. *Id.*

11. 736 F.2d 1177 (7th Cir. 1984).

12. 503 U.S. 318 (1992). *Darden* used the common law definition of "employee" as a definition for purposes of ERISA. *Id.* at 319.

13. *See Clackamas*, 123 S. Ct. at 1677 n.5 (common law test for determining employment status considers such factors as (1) who controls the manner and means of accomplishing the task, (2) the skill required, (3) the source of the tools, (4) the work location, (5) the duration of the working relationship, and (6) the method of payment). The Court sets forth the following common law factors: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether, and if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that individual be an employee, as expressed in written agreements or contracts; (6) whether the individual shares in the profits, losses, and liabilities of the organization. *Id.* at 1680.

14. *Id.* at 1679.

15. ERISA Litig. Rep., Oct. 2003, at 5. This publication warns ERISA litigators to consider the Court's definition of employee for purposes of ERISA litigation "since there is nothing special

practitioners must take note that the control factors in the common law test will likely be used to determine not only the threshold number of employees an employer retains for purposes of the ADA, but also for other statutes that do not specifically define employee. Only one month prior to the United States Supreme Court decision in *Clackamas*, the Seventh Circuit, in *Schmidt, M.D. v. Ottawa Medical Center, P.C.*, used control test factors to determine a doctor, who was also a shareholder in a closely-held professional corporation, was not an employee for purposes of the Age Discrimination in Employment Act ("ADEA").[16] The ADEA, like the ADA, does not adequately define the term employee, defining it only as "an individual employed by an employer."[17] The Seventh Circuit did not have the hindsight of the Supreme Court's decision in *Clackamas*, and instead it noted "[t]he Supreme Court may ultimately resolve this tension between statutory purpose and agency principles since it has granted certiorari in *Wells v. Clackamas Gastroenterology Associates*."[18] The Seventh Circuit determined the essence of either test consisted of where the control lies in the relationship.[19] Because Dr. Schmidt helped manage and control the professional corporation through his work on the board, as a shareholder, and as an officer, the Seventh Circuit held that Dr. Schmidt was not an employee for purposes of the ADEA and thus did not have an age discrimination claim.[20] Careful to contain its decision, the Seventh Circuit "only h[e]ld that when an individual claimant-shareholder enjoys the opportunity for shared control of the closely held professional corporation, including the opportunity to share in its profits, [it would] treat him or her as a bona fide employer for purposes of the ADEA."[21]

B. Scope of EEOC's Authority

The Equal Employment Opportunity Commission's authority was strengthened this past survey period in *EEOC v. Sidley Austin Brown & Wood*.[22] The Seventh Circuit held the EEOC had the authority to issue a subpoena duces tecum to determine whether the law firm's demoted partners, none of whom filed charges with the EEOC, were employees for purposes of the ADEA.[23] Because the EEOC is able to bring ADEA claims without receiving a formal charge from

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about the definition of 'employee' in the ADA, it is a fair reading of the case that its holding will be applied under ERISA." *Id.*

16. 322 F.3d 461, 467 (7th Cir. 2003).

17. *Id.* at 463 (citing 29 U.S.C. § 630(f) (2002)).

18. *Id.* at 465.

19. *Id.* at 466.

20. *Id.* at 467-68. Dr. Schmidt is a shareholder, which gives him a vote in matters put before the owners. He sat on the board of the professional corporation, which gave him a vote in matters put before the board. Finally, he held a corporate officer position, which also gave him control.

21. *Id.*

22. 315 F.3d 696 (7th Cir. 2002).

23. *Id.* at 701.

an employee, the main issue was whether the EEOC could require the law firm to fully comply with the subpoena ducas tecum, which requested information on the status of the demoted partners to determine whether they could be classified as employees for purposes of the ADEA.[24]

The law firm argued it only needed to provide enough information regarding the partnership status of the demoted partners to show they were partners before their demotion.[25] It argued the partners shared in the debts of the partnership and sat on different committees at the firm; however, the court "[could] not understand how Sidley, without addressing the purpose of the employer exemption, can be so certain that it has proved that the 32 [demoted partners] are employers within the meaning of the ADEA. They are, or rather were, partners, but it does not follow that they were employers."[26]

The Seventh Circuit went on to differentiate between a partner and an employer, stating a simple re-labeling of a worker from employee to partner, without changing the employment relationship, does not change the status under the ADEA.[27] Thus, whether the demoted partners were, in fact, partners before their demotion is irrelevant.[28] "[T]he issue is not whether the 32 before their demotion were partners, an issue to which their liability for the firm's debts is germane; the issue is whether they were employers. The two classes, partners under state law and employers under federal antidiscrimination law, may not coincide."[29] Therefore, the court ordered Sidley Austin to comply with the portion of the subpoena that requested documents relating to the determination of whether the demoted partners were employers or employees.[30] That determination, the court said, must be decided before Sidley Austin should be made to turn over documents relating to the merits of the case.[31]

II. EQUAL PROTECTION CLAUSE: THE AFFIRMATIVE ACTION DECISIONS

Perhaps the most notable cases this past year are the United States Supreme Court decisions regarding affirmative action plans used in undergraduate admissions[32] and law school admissions[33] at the University of Michigan. Although these cases were decided under the Fourteenth Amendment's Equal Protection Clause, the decisions impact employment strategies relating to affirmative action programs, thus precipitating a need for employment practitioners to understand them. Employers frequently consider diversity when

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24. *Id.*
25. *Id.* at 698-99.
26. *Id.* at 702.
27. *Id.* at 702-03.
28. *Id.* at 704.
29. *Id.*
30. *Id.* at 707.
31. *Id.*
32. *See* Gratz v. Bollinger, 123 S. Ct. 2411 (2003).
33. *See* Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

determining which job candidates to hire and which employees to lay-off. The Supreme Court's decisions in *Grutter* and *Gratz* will impact those considerations.

In *Gratz v. Bollinger*, the Supreme Court held that the University of Michigan's affirmative action program at the undergraduate College of Literature, Science, and the Arts violated the Equal Protection Clause, Title VI, and § 1981.[34] Jennifer Gratz and Patrick Hamacher, both white applicants, were denied admission to the College and subsequently filed a class action suit alleging the policy violated the Equal Protection Clause, Title VI, and § 1981.[35] Although the College's admission program changed over the years pertinent to this lawsuit, it allowed minorities an advantage, either through different "Guidelines" tables for Caucasian and minority applicants, the "flagging" of minority applications, or, as set out in the current policy, awarding minorities an extra twenty points to the admissions scores (the students need 100 points for admission).[36] Using the Supreme Court's decision in *Bakke*, the district court concluded a racially and ethnically diverse student body was a compelling governmental interest and that the College's program, because it did not use rigid racial quotas, was narrowly tailored.[37] After all, the program did not set aside a set number of seats for minorities and "minority candidates were not insulated from review by virtue of those points."[38]

The Supreme Court granted certiorari, first addressing the Equal Protection Clause violation, stating,

> Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity.[39]

Then, through a series of examples, the Supreme Court concluded the policy was not narrowly tailored, because it did not provide individualized consideration and instead assigned a point value to minority status.[40] In Justice O'Connor's concurring opinion, she notes that "[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race."[41]

The Supreme Court explained in a footnote that because an institution that

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34. 123 S. Ct. at 2417.
35. *Id.* at 2417-18.
36. *Id.* at 2419.
37. *Id.* at 2421 (citing Regents of Univ. v. Bakke, 438 U.S. 265 (1978)).
38. *Id.*
39. *Id.* at 2428.
40. *Id.* at 2429-30.
41. *Id.* at 2432.

accepts federal funds violated the Equal Protection Clause, it also violated Title VI.[42] It further explained that contracts for educational services are contracts pursuant to § 1981 and, thus, the policy violated § 1981 as well.[43]

The Supreme Court, on the other hand, upheld the law school admissions program in *Grutter v. Bollinger*, because the individualized assessment of candidates the undergraduate program lacked was utilized at the law school level.[44] The Supreme Court decided once again that diversity is a compelling interest,[45] but this time decided the law school's admission policy, which "requires admissions officials to evaluate each applicant based on all the information available in the file," was narrowly tailored.[46] Distinguishing the undergraduate and law school decisions, the Supreme Court noted:

> Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger* . . . the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity.[47]

When counseling employers, it is important to differentiate between public employers, who are bound by the U.S. Constitution in addition to Title VII, and private employers, who are bound by Title VII. Thus, public employers must abide by *Grutter* and *Gratz* when making hiring decisions. Public employers must first have a compelling interest in diversity hiring programs. The Supreme Court in *Grutter* and *Gratz* upheld both schools' interest in providing a diverse learning experience. The Supreme Court, however, differentiated between the undergraduate program's practice of assigning points to minority applicants and the law school's program, which individually reviewed the applicants.[48] Thus, when counseling large public employers on hiring practices, attorneys must explain the importance of an individualized review of every job applicant. Point scales, like the one formally used by the undergraduate school at Michigan, should be avoided in addition to reserving a set number of job openings for minorities.

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42. *Id.* at 2431 n.23.
43. *Id.*
44. 123 S. Ct. 2325, 2345 (2003).
45. *Id.* at 2339.
46. *Id.* at 2327.
47. *Id.* at 2343.
48. *Id.*

III. TITLE VII

A. Burdens of Proof

During this past survey period, the United States Supreme Court simplified the proof a plaintiff must show to obtain a mixed-motive jury instruction. In *Desert Palace, Inc. v. Costa* the Supreme Court held a plaintiff need not prove *direct* evidence of discrimination in order for the jury to be instructed as to a mixed-motive case.[49] This case presented the Court with its first chance to interpret "the effects of the 1991 Act on jury instructions in mixed-motive cases."[50]

The plaintiff, the only female warehouse worker and heavy equipment operator, presented only indirect evidence of sex discrimination, but the district court gave a mixed-motive jury instruction.[51] The jury instruction, which instructed the jury it must side with the plaintiff if it found the plaintiff's sex was a motivating factor, advised the jury that the defendant must prove it would have treated the plaintiff the same even if sex had not played a role in its decision.[52] The Supreme Court held this instruction was appropriate because the statute on its face makes no mention of a heightened direct evidence requirement for the plaintiff.[53] The statute simply states the plaintiff must "'demonstrate' that an employer used a forbidden consideration with respect to 'any employment practice.'"[54] Further, the Court reasoned, Title VII contains similar language, allowing an employer to "'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor,'" which also does not require a heightened direct evidence requirement.[55] Thus, the Court concluded "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[56]

B. The Single-Filing Doctrine

The single-filing or piggybacking doctrine allows a claimant whose claims arise out of the same discriminatory acts to, essentially, piggyback off another employee's EEOC charge, allowing the employee to bypass the EEOC's administrative filing requirements.[57] The doctrine was meant to prevent the

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49. 123 S. Ct. 2148, 2155 (2003).
50. *Id.* at 2153.
51. *Id.* at 2152.
52. *Id.*
53. *Id.* at 2153.
54. *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2002)).
55. *Id.* at 2154-55 (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).
56. *Id.* at 2155 (quoting 42 U.S.C. § 2000e-2(m)).
57. Horton v. Jackson County Bd. of County Comm'rs, 343 F.3d 897, 899 (7th Cir. 2003).

EEOC from an inundation of claims that all arose from the same conduct.[58] In *Horton v. Jackson County Board of County Commissioners*, the Seventh Circuit decided an employee, who was fired at the same time as the employee into whose lawsuit she wished to intervene, did not prove sufficient similarities between her claim and the other employee's claim to allow her to bypass the EEOC administrative requirement.[59] The employee claimed she was fired at the same time as another employee in retaliation for the other employee filing a complaint with the EEOC three years prior.[60] The court discussed the history of the doctrine, noting its use initially in the context of class actions and speculating that after the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*[61] the Court may decide to limit the doctrine's use only to class actions.[62] Further, the court found, even if the doctrine were to be used for a mere two complainants, the facts show the employer retaliated against the other employee because she filed an earlier complaint, whereas the employer retaliated against Horton for sticking up for the other employee.[63] Thus, the court decided the reasoning behind filing with the EEOC, namely attempting a conciliation, would be undermined if an employee could simply bypass the administrative requirement by claiming he or she supported another employee's charge.[64]

C. Same Sex Sexual Harassment

Although the protections of Title VII extend to same-sex harassment, they do not extend to sexual orientation claims.[65] The case law makes this distinction clear.[66] Determining, however, whether a sexual remark is, on the one hand, based on sexual orientation or, on the other hand, based on sex proves difficult. For this reason, Judge Posner in *Hamm v. Weyauwega Milk Products, Inc.* wrote a separate concurring opinion in an attempt to clear up the case law that, as he put it, currently "holds . . . that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of 'sex stereotyping' or 'gender stereotyping.'"[67] The *Hamm* case involved an all male workforce that repeatedly made homosexual comments to the plaintiff, a heterosexual.[68] The Seventh Circuit

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58. *See id.* at 900.

59. *Id.* at 901.

60. *Id.* at 898.

61. 536 U.S. 101 (2002). In *Morgan*, the Supreme Court determined "each discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113.

62. *Horton*, 343 F.3d at 900.

63. *Id.* at 900-01.

64. *Id.*

65. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003).

66. *Id.* at 1066-67 (Posner, J., concurring) (discussing the evolution of Title VII case law on sexual orientation discrimination).

67. *Id.* at 1066 (Posner, J., concurring).

68. *Id.* at 1059-60.

concluded the plaintiff did not sufficiently show he was discriminated against *because of* his sex.[69] Judge Posner's concurrence separated an earlier U.S. Supreme Court case, *Price Waterhouse v. Hopkins*,[70] from the current cases that have attempted to interpret it.[71] In Judge Posner's view,

> If an employer refuses to hire unfeminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the *Hopkins* case. But if, as in this case, an employer *whom no woman wants to work for* . . . discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate.[72]

D. Sex Discrimination

The Seventh Circuit decided two significant sex discrimination cases in the last quarter of 2002. The first held an employee does not suffer sex discrimination when a co-worker of the opposite sex receives preferential treatment because of a sexual relationship she had with a supervisor.[73] The second held a city employer is entitled to a new trial if, after hearing evidence of both disability and sex discrimination the jury awards a verdict for the plaintiff, and the trial judge subsequently vacates the ADA award, leaving behind the Title VII sex discrimination award.[74]

First, in *Schobert v. Illinois Department of Transportation*, an employee claimed he was sexually discriminated against because he suffered from the harassment of a co-worker, or in the alternative, that he suffered because of the preferential treatment the female co-worker received as a result of the consensual relationship.[75] Using the Fifth Circuit's decision in *Ellert v. University of Texas* as a guide, the Seventh Circuit held an employee could not maintain a claim of sexual harassment if that employee did not suffer the harassment.[76] The Seventh Circuit held that "unless [the plaintiff] offered evidence that he too directly endured the same kind of harassment, which he has not, he does not have a claim of sex discrimination."[77]

The court then addressed the plaintiff's second argument, that the plaintiff suffered because the female employee was favored due to her consensual

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69. *Id.* at 1062.

70. 490 U.S. 228 (1989). That case allowed evidence that the female plaintiff's superiors did not like her unfeminine appearance to show the plaintiff was denied a promotion. *Id.* at 235.

71. *Hamm*, 332 F.3d at 1066 (Posner, J., concurring).

72. *Id.* at 1067 (Posner, J., concurring).

73. Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002).

74. Shick v. Ill. Dep't of Human Servs., 307 F.3d 605, 612 (7th Cir. 2002).

75. 304 F.3d at 727.

76. *Id.* at 732-33 (citing Ellert v. Univ. of Tex., 52 F.3d 543, 546 (5th Cir. 1995)).

77. *Id.* at 733.

relationship with a supervisor. According to the court, "Title VII does not, however, prevent employers from favoring employees because of personal relationships."[78] The court differentiated simply favoring a woman with a personal relationship with a supervisor, on the one hand, from sex discrimination, on the other, stating that other women in the shop would have received the same treatment as the males—the preferential treatment was due to the personal relationship, not sex discrimination.[79]

Next, in a very unique case, the Seventh Circuit addressed the issue of prejudice once a jury hears both evidence of disability discrimination under the ADA and sex discrimination under Title VII.[80] In *Shick v. Illinois Department of Human Services*, the jury heard evidence of both disability and sex discrimination before deciding to award the plaintiff damages. The jury heard evidence that Shick's supervisor was insensitive towards his need for disability accommodation. She apparently removed Shick's sleeping bag from the men's restroom, which he used to take naps during lunch because of his sleep apnea.[81] She banged on the men's restroom door if he took too long in the restroom, which he frequently did because he had an intestinal disease that caused internal bleeding. She moved a copy machine and printer near his desk to create more noise because she knew he had a hearing problem from his service in the war. She replaced his favorite chair, which he needed because he was tall and overweight, with a chair he had to adjust several times per day. She required Shick to use his eye drops, which he used because his intestinal disease caused one eye to weaken to the extent of near-blindness, at his desk instead of the men's restroom and made Shick obtain a doctor's note for his frequent restroom breaks. Additionally, Schick's boss favored the female employees by allowing them to take longer breaks, eat at their desks, and provided them with their own offices, none of which Shick was afforded.[82] His boss also made a few negative comments about men, which Shick attributed to her recent divorce. Shick even presented her with a log of the discrepancies between the women's breaks and his, but she refused to discuss it.

According to Shick, the sex and disability discrimination grated on him to the point he began having serious mental problems. He finally went to the EEOC, but the intake personnel said it would take over a year for the EEOC to do anything. On his way back from the EEOC's office in Chicago, although he said he does not remember it, he, "robbed a White Hen convenience store of about $200 while brandishing a sawed-off shotgun."[83] He blamed the robbery on his

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78. *Id.*

79. *Id.*

80. Shick v. Ill. Dep't of Human Servs., 307 F.3d 605, 612 (7th Cir. 2002).

81. *Id.* at 608.

82. *Id.* at 609.

83. *Id.* The sawed-off shotgun he apparently carries in his trunk because he carries large sums of money from a side business he runs and also because he gambles. He sawed-off the gun, which he received years before when a burglar dropped it after he and his wife interrupted the burglary. Apparently the burglars ran over the gun and bent the barrel, which he subsequently

unstable mental state caused by the sex and disability discrimination.

After hearing the evidence of sex and disability discrimination, the jury awarded Shick $5 million for emotional pain and suffering and $106,700 in lost past earnings. The district court vacated the ADA verdict, citing the Seventh Circuit's decision in *Erickson v. Board of Governors*,[84] which held the ADA "is not a valid abrogation of states' Eleventh Amendment immunity."[85] The district court capped the sex discrimination award at $300,000, awarded backpay, attorney's fees, and front pay until he reached age sixty-five,[86] and denied the defendant's motion for a new trial.

The Seventh Circuit noted, "the most compelling evidence of [Shick's] abuse was not in fact due to Shick's sex, but because of his disabilities."[87] The Seventh Circuit discussed the evidence, the majority of which dealt with Shick's disability discrimination, and weighed it against the evidence of sex discrimination, deciding "the occasions of sex discrimination are minuscule compared to the many conflicts involving his medical problems and disabilities."[88] The Seventh Circuit went on to explain, "[i]t is hard to imagine how a jury would have accepted this extraordinary theory for which it initially awarded Shick five million dollars, without the extensive testimony about the abusive treatment regarding his many ailments."[89] The Seventh Circuit concluded the district court abused its discretion when it denied the employer a new trial, stating "[the jury's] reaction ha[d] everything to do with disability discrimination and very little to do with sex discrimination."[90]

The Seventh Circuit went on to consider the award of front pay, concluding that employer's actions were not the proximate cause of Shick's criminal conviction and subsequent incarceration.[91] Concluding Shick's armed robbery was a superseding cause, the Seventh Circuit held Shick could not recover any damages from his conviction or incarceration.[92]

E. Hostile Environment

The Seventh Circuit in *Quantock v. Shared Marketing Services, Inc.*[93] reversed a district court decision, holding instead that three propositions for sex in a single meeting were severe enough to withstand summary judgment, regardless of the pervasiveness of the comments. "The district court noted that

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sawed-off in order to salvage the gun. *Id.* at 610.

84. 207 F.3d 945 (7th Cir. 2000).

85. *Shick*, 307 F.3d at 610 (citing *Erickson*, 207 F.3d at 952).

86. The plaintiff was convicted of the armed robbery and is serving ten years in jail for it.

87. *Shick*, 307 F.3d at 612.

88. *Id.* at 613.

89. *Id.*

90. *Id.* at 614.

91. *Id.* at 615.

92. *Id.*

93. 312 F.3d 899 (7th Cir. 2002).

the incident of harassment was an isolated occurrence, short in duration, and that it involved no physical touching."[94] The Seventh Circuit, however, evaluated the directness of the comments and the authority of the commenter holding a reasonable jury *could* conclude the three propositions for sex[95] made directly to the plaintiff in one single meeting were sufficiently severe enough to alter the plaintiff's employment terms.[96] Reiterating its earlier decision, the Seventh Circuit stated, "abusive conduct 'need not be both severe *and* pervasive to be actionable; one or the other will do.'"[97] Thus, the Seventh Circuit reversed, holding an issue of fact existed as to the objective and subjective severity of the sexual propositions.

IV. SECTION 1981: AT-WILL EMPLOYMENT CONTRACT

The Seventh Circuit joined the Second, Fourth, Fifth, Eighth, and Tenth Circuits when it decided an at-will employment relationship is a contract sufficient to state a § 1981 claim based on discriminatorily failing to promote.[98] Before deciding the main issue, however, the court decided a few small procedural issues. Although Title VII and § 1981 both provide a cause of action under disparate-treatment, the Seventh Circuit in *Walker v. Abbott Laboratories* decided an employee who fails to raise a Title VII claim with his § 1981 claim does not waive all intentional-discrimination theories by his failure to do so.[99] The district court in *Walker* held an at-will employee cannot maintain a § 1981 disparate-treatment cause of action, but the plaintiff did not amend his complaint to add a Title VII disparate-treatment cause, which does not require a contractual relationship.[100] The defendant unsuccessfully argued the plaintiff waived his right to appeal the dismissal of his § 1981 claim because he did not raise a Title VII claim before appealing.[101] The Seventh Circuit was not persuaded, instead "find[ing] this argument wholly without merit."[102]

The defendant then argued the plaintiff waived his right to appeal the dismissal of his § 1981 claim because "he failed to ask the district court to reconsider its ruling in light of new decisions from other circuits."[103] The Second, Eighth, and Tenth Circuits have, since the district court's ruling, decided

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94. *Id.* at 903-04.

95. The plaintiff asserts her supervisor first propositioned her to give him oral sex, then a "threesome," and finally phone sex. The plaintiff states she rejected all three propositions.

96. *Quantock*, 312 F.3d at 904.

97. *Id.* (quoting Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000)).

98. Walker v. Abbott Labs., 340 F.3d 471, 475-77 (7th Cir. 2003).

99. *Id.* at 474.

100. *Id.* at 473.

101. *Id.*

102. *Id.* at 474.

103. *Id.*

at-will employees could bring § 1981 claims.[104] The Court once again found the defendant's argument "wholly without merit," stating "there is simply no rule or case law that requires litigants to move for reconsideration of an interlocutory ruling in order to avoid waiving a challenge to that ruling on appeal of a final decision."[105]

Finally, the court reviewed the merits of the plaintiff's appeal of the § 1981 claim, which centers around whether at-will employment falls within § 1981's purview.[106] "Section 1981 provides that '[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.'"[107] The Second, Fourth, Fifth, Eighth, and Tenth Circuits are the only circuits that have addressed this issue and all have all concluded that at-will employees could state a claim under § 1981.[108] Deciding "[t]he lack of a fixed duration of employment does not make the relationship any less contractual," the court found an at-will employee could state a § 1981 claim for discrimination in promotion and pay.[109]

The court did not, however, explicitly contravene its dicta in *Gonzalez*, simply stating *Gonzalez* was only dicta. The court further differentiated *Gonzalez*, which stated an at-will employee may not be able to state a § 1981 claim for being fired or laid-off.[110] The Seventh Circuit in the *Walker* case decided an at-will employee may state a § 1981 claim for failure to promote; however, the court still leaves open the issue of whether an at-will employee who was terminated or laid-off can bring a valid § 1981 claim.

V. AMERICANS WITH DISABILITIES ACT

A. Disparate-Impact Analysis Within a Disparate-Treatment Case

The Supreme Court heard a pertinent ADA case in 2003, but the case was remanded to the Ninth Circuit and the main issue left undecided. The Supreme Court in *Raytheon Co. v. Hernandez*[111] did not decide whether an employer's decision not to rehire a recovered addict,[112] who previously quit in lieu of discharge, violated the ADA. It instead decided the Ninth Circuit should have

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104. *Id.* Obviously, the persuasive authorities of other circuits do not bind the Seventh Circuit.

105. *Id.* at 475.

106. *Id.*

107. *Id.* (quoting 42 U.S.C. § 1981(a) (2003)).

108. *See* Skinner v. Maritz, 253 F.3d 337 (8th Cir. 2001); Lauture v. Int'l Bus. Machs., 216 F.3d 258 (2nd Cir. 2000); Perry v. Woodward, 199 F.3d 1126 (10th Cir. 1999); Spriggs v. Diamond Auto Glass, 165 F.3d 1015 (4th Cir. 1999); Fadeyi v. Planned Parenthood Ass'n, Inc., 160 F.3d 1048 (5th Cir. 1998).

109. *Walker*, 340 F.3d at 477.

110. Gonzalez v. Ingersoll Mill Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998).

111. 124 S. Ct. 513 (2003).

112. The decision not to rehire was made pursuant to its policy against rehiring employees who violated company policy.

applied a disparate-treatment analysis instead of analyzing the case under a disparate-impact analysis.[113] The respondent in *Hernandez* quit in lieu of discharge because he tested positive for and admitted to cocaine use. Over two years later, he applied for a position with the company, who rejected his application because of his prior termination for violation of company rules and regulations. Respondent sued alleging the employer refused to hire him because of his drug addiction disability, in violation of the ADA.[114] The employee failed to plead the issue of disparate-impact in a timely manner, so the district court only reviewed the case under a disparate-treatment theory.[115]

In evaluating the *McDonnell Douglas* burden-shifting test that is required for a disparate-treatment analysis, the Ninth Circuit incorrectly intertwined the disparate-impact analysis.[116] The second prong of the *McDonnell Douglas* disparate-treatment analysis, that the employer must proffer a legitimate non-discriminatory reason for its decision, was incorrectly evaluated by the Ninth Circuit. The Ninth Circuit held the no-rehire policy had a disparate-impact on recovering drug addicts; and, thus, was not a legitimate, nondiscriminatory reason. The Supreme Court reasoned that "[h]ad the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA."[117] Thus, the Ninth Circuit incorrectly analyzed a disparate-treatment case under a disparate-impact analysis and the Supreme Court remanded the case requiring a disparate-treatment analysis. As a consequence, it is still undecided whether an employer's decision not to rehire a recovered addict who previously quit in lieu of discharge violates the ADA.

B. Defining a Disability Through the Employer "Regarded As" Provision

The Seventh Circuit reviewed three cases further defining what constitutes a disability under the ADA's[118] employer "regarded as" provision. First, the

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113. *Hernandez*, 125 S. Ct. at 516.

114. *Id.* at 517. "Respondent proceeded through discovery on the theory that the company rejected his application because of his record of drug addiction and/or because he was regarded as being a drug addict." *Id.* Under the ADA, a disability includes both a record of, or simply being regarded as having, an impairment. *See* 42 U.S.C. § 12102(2) (1995).

115. *Hernandez*, 124 S. Ct. at 517. Under a disparate-impact analysis, the respondent would have argued that even if the company failed to rehire him pursuant to its neutral no-rehire policy, the policy in effect discriminates against recovering addicts. Because the respondent failed to initially plead this, he was left to argue that the company's policy was not neutral on its face, but instead discriminated against him "on its face." The respondent failed to timely plead the "as applied" argument, and therefore could not raise it in the context of a disparate-treatment analysis.

116. *Id.* at 518-19.

117. *Id.* at 519.

118. In the third case, the Seventh Circuit interprets the ADA's "regarded as" clause in the context of the Rehabilitation Act. The Rehabilitation Act protects qualified individuals with a disability from disability discrimination by any program receiving federal financial assistance. *See*

Seventh Circuit determined an employer did not regard as disabled its employee, a truck driver with an injured hand.[119] Although the employer allegedly told the employee "he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person," the Seventh Circuit held that did not mean the employer *regarded* him as disabled for purposes of the ADA.[120] Calling an employee "crippled" or "handicapped" does not equate to knowledge that the employee is protected under the ADA. If simply regarding an employee as somehow "crippled" meant the employer regarded the employee as "protected under the ADA," then, the Court feared, employers would simply not hire partially crippled workers.[121] "Allowing this suit to go forward would merely discourage employers from giving a chance for employment to workers who have some degree of disability."[122] Thus, in order for the "regarded as" provision of the ADA to apply, the employer must regard the employee as protected under the ADA, not simply regard the employee as crippled or handicapped.

The Seventh Circuit in *Mack v. Great Dane Trailers*[123] also found the employer, Great Dane, did not regard its employee as disabled. The employee, Mack, had drop foot, which restricted his ability to lift. In order to be regarded as disabled, the employee must show his employer believes he is "substantially limited" in a "major life activity."[124] Mack claimed his employer believed he was substantially limited in lifting, which according to the EEOC regulations is a major life activity. Although Mack's drop foot impaired his ability to work, the court was not phased, citing United States Supreme Court precedent that a work-related impairment "does not necessarily rise to the level of a disability within the meaning of the ADA."[125] Just regarding Mack as substantially limited in lifting at work does not mean his employer regarded him as substantially limited in his daily life activities.[126] The court reviewed the evidence, a doctor's note stating Mack was restricted from lifting "at work," the testimony from the human resources manager stating Mack was unable to lift "at work," all of which could not conclude that Great Dane regarded Mack as disabled.[127]

Mack further argued that Great Dane accommodated[128] a similarly situated employee and, therefore, the jury could have inferred Great Dane regarded Mack

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29 U.S.C. § 794(a) (1999).

119. Tockes v. Air-Land Transp. Serv., Inc., 343 F.3d 895 (7th Cir. 2003). The Supreme Court denied certiorari of this case on February 23, 2004. *See* Tockes v. Air-Land Transp. Serv., Inc., 124 S. Ct. 1414 (2004) (mem.).

120. *Tockes*, 343 F.3d at 896.

121. *Id.*

122. *Id.*

123. 308 F.3d 776 (7th Cir. 2002).

124. *Id.* at 780.

125. *Id.* (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)).

126. *Id.* at 782.

127. *Id.*

128. The only employee that was accommodated received light duty work.

as disabled.[129] The Seventh Circuit, however, labeled this inference "illogical," stating "[t]he fact that Great Dane accommodated the other employee but not Mack does not support the inference that it regarded Mack as disabled. It is equally likely, if not more likely, that Great Dane regarded the other employee as disabled and therefore accommodated him but not Mack."[130] Thus, the Seventh Circuit concluded Great Dane did not regard Mack as disabled within the meaning of the ADA because the only information it received regarding his medical problems related to his ability to work.[131]

Finally, the Seventh Circuit interpreted the employer "regarded as" provision in the context of the Rehabilitation Act in *Peters v. City of Mauston*.[132] The Rehabilitation Act uses the ADA's standards to determine whether an employer who receives federal financial assistance discriminates against a qualified individual with a disability solely because of his disability.[133] Peters, whose doctor restricted his lifting after a shoulder injury, argued the City regarded him as disabled in the major life activity of working. "It is clear, however, that an employer does not regard a person as disabled simply by finding that the person cannot perform a particular job."[134] The employee must instead show evidence that indicates he is excluded from a number of jobs because of his impairment.[135] Because Peters "in no way presented evidence that he was substantially limited in his ability to work," the Seventh Circuit held his employer could not have regarded him as disabled.[136] In fact, Peters told his employer he "painted three rooms and varnished the floors in his house, cleaned out his garage, and built deer stands" during his disability time off. Thus, the court held, his employer did not regard him as disabled.[137]

Furthermore, the court held Peters did not even meet the definition of a "qualified individual with a disability" because Peters could not satisfy the essential functions of the job with reasonable accommodations. Peters asserted the City could hire someone else to do the heavy lifting, which Peters could not do; however, the Seventh Circuit did not think this accommodation was reasonable, stating, "it requires another person to perform an essential function of Peters' job."[138] Peters also recommended waiting to see whether he could lift the required amount for the job, to which the court stated "[t]he employer is not obligated to allow the employee to try the job out in order to determine whether some yet-to-be requested accommodation may be needed."[139] Thus, Peters did

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129. *Mack*, 308 F.3d at 782-83.
130. *Id.* at 783.
131. *Id.* at 783-84.
132. 311 F.3d 835 (7th Cir. 2002).
133. *Id.* at 842.
134. *Id.* at 843.
135. *Id.*
136. *Id.* at 844-45.
137. *Id.* at 844.
138. *Id.* at 845.
139. *Id.* at 846.

not prove his employer regarded him as disabled and did not request a reasonable accommodation that would allow him to meet the requirements of the job.

C. Reasonable Accommodations

The Seventh Circuit has continued to define "reasonable accommodations" under the ADA, this time determining whether a reasonable accommodation includes allowing a disabled software engineer to work from a home office. In *Rauen v. United States Tobacco Manufacturing Ltd. Partnership*, the Seventh Circuit affirmed the district court's grant of summary judgment, but found for the employer for a different reason than the district court.[140] The district court, using an unpublished Sixth Circuit case,[141] decided that the employee, although disabled, had performed all the essential functions of her job without an accommodation, thus making her request for an accommodation unreasonable.[142]

Rauen originally requested to work from a home office after returning from disability leave in January 1999. After undergoing treatment for rectal cancer, Rauen was diagnosed with breast cancer as well. She is missing part of her small intestine, which requires her to take IV fluid, increasing the frequency of her restroom breaks and requiring an ostomy bag that must be emptied regularly.[143] The routine restroom breaks she must make on her trip to work each day increase her fatigue, and she risks falling asleep at the wheel on her way to work. After her initial accommodation request, Rauen continued to work from the time of her initial request in 1999 until October 2001, when the district court granted her employer's summary judgment motion. The district court reasoned that because Rauen could, and did, complete her job without the requested accommodation, she could not prove the reasonableness of any accommodation.[144] In the district court's eyes, Rauen did not need an accommodation because she performed her job without one.[145]

The Seventh Circuit affirmed the district court's ruling, but instead determined that "the specific accommodation that Rauen has requested in this case is not reasonable."[146] Revisiting its earlier decision in *Vande Zande v. Wisconsin Department of Administration*, the Court held "working at home is rarely a reasonable accommodation . . . because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation."[147] The Seventh Circuit looked to the evidence, which

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140. 319 F.3d 891, 895 (7th Cir. 2003).

141. *See* Black v. Wayne Ctr., No. 99-1225, 2000 WL 1033026, at *3 (6th Cir. 2000).

142. *Rauen*, 319 F.3d at 896.

143. *Id.* at 893.

144. *Id.* at 896.

145. *See id.*

146. *Id.*

147. *Id.* (citing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (holding a home office is not a reasonable accommodation for a secretary and that "it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's

showed Rauen's "primary job responsibilities involve monitoring contractors' work, answering contractors' questions as they arise, and ensuring that the contractors' work does not interfere with the manufacturing process."[148] Thus, her job "requires teamwork, interaction, and coordination of the type that requires being in the work place."[149]

The Seventh Circuit did not explicitly decide whether a disabled employee who can perform her job functions without an accommodation can reasonably request an accommodation; however, it did state that, although not impossible, it is definitely more difficult to prove the reasonableness of an accommodation while performing all essential job functions without an accommodation.[150]

VI. FAMILY AND MEDICAL LEAVE ACT

A. State Employees Entitled to Sue Under FMLA

Although the states enjoy immunity from federal jurisdiction under the Eleventh Amendment, that protection is not all-encompassing. The United States Supreme Court reevaluated the breadth of the Eleventh Amendment this survey period in *Nevada Department of Human Resources v. Hibbs*.[151] The Court in *Hibbs* held state employees may recover damages for a state employer's violation of the Family and Medical Leave Act ("FMLA"). As long as Congress (1) acts in accordance with its Section 5 powers under the Fourteenth Amendment, and (2) the language of its act shows a clear intent to abrogate state immunity, Congress may pass a law abrogating the states Eleventh Amendment immunity.[152] The language of the FMLA makes clear Congress's intent to do so, allowing employees to request damages "'against any employer (including a public agency).'"[153] The Act then proceeds to include government entities in the definition of a public agency.[154] Thus, the Court explained, Congress showed a clear intent on the face of the FMLA to abrogate the states' Eleventh Amendment immunity.

The Court next discussed the second prong of the test, Congress's Section Five powers under the Fourteenth Amendment. *City of Boerne v. Flores*[155] outlines the pertinent test to determine whether Congress's Section Five legislation is valid.[156] According to the Court, for Section 5 legislation to be valid, it "must exhibit 'congruence and proportionality between the injury to be

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failure to allow the employee to work at home")).

148. *Id.* at 897.

149. *Id.*

150. *Id.*

151. 123 S. Ct. 1972 (2003).

152. *Id.* at 1977.

153. *Id.* at 1976 (quoting 29 U.S.C.A. §§ 2611(4)(A)(iii) (1993)).

154. *Id.* at 1977.

155. 521 U.S. 507 (1977).

156. *Hibbs*, 123 S. Ct. at 1978.

prevented or remedied and the means adopted to that end.'"[157] In interpreting the congruence and proportionality of the FMLA, the Court outlined the states' history of gender discrimination in regard to family leave, noting that gender-based discrimination receives heightened scrutiny.[158] Because Section 5 gives Congress the power to enforce equal protection of the laws,[159] the Court held Congress was justified in passing the FMLA,[160] which "aims to protect the right to be free from gender-based discrimination in the workplace."[161] Thus, the Court explained, because Congress passed both prongs of the test, state employers may be sued in federal court by its employees for FMLA violations.

B. Notice to Employer of Family Medical Leave

The Seventh Circuit in *Byrne v. Avon Products, Inc.*[162] found a genuine issue of material fact when an employee who suffered from severe depression was fired after missing a meeting at work. Byrne's employer, Avon Products, installed cameras in the break room, which revealed Byrne sleeping and reading for three hours during work one evening. The next day Byrne told a co-worker he wasn't feeling well and left work early. When Avon Products called his home, his sister told his employer he was "very sick." A facility engineer spoke with Byrne on the phone and, after "mumbl[ing] several odd phrases" Byrne agreed to attend a meeting.[163] When Byrne failed to show, Avon Products fired him for not showing up at the meeting and for sleeping during work.

The Northern District of Illinois entered summary judgment in favor of Avon Products, but the Seventh Circuit vacated and remanded. The Seventh Circuit agreed that, under the ADA, Byrne was not qualified for the job because he could not work. Although Byrne could propose a part-time accommodation, employers under the ADA are not required to accommodate an employee who cannot work *at all* for an extended period of time.[164] Extended leave resulting from a "'serious health condition'" is instead governed by the FMLA.[165] It is clear in the Seventh Circuit that an employee claiming to be sick is not enough to put an employer on notice of an employee's desire to use Family Medical Leave;[166] however, "it is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem."[167] The court decided that a reasonable jury *could* conclude that Byrne's change in behavior put his employer

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157. *Id.* (quoting *Flores*, 521 U.S. at 520).
158. *Id.* at 1978-82.
159. *Id.* at 1977 (citing U.S. CONST. amend. XIV, § 5).
160. *Id.* at 1981.
161. *Id.* at 1978.
162. 328 F.3d 379 (7th Cir. 2003).
163. *Id.* at 380.
164. *Id.* at 381.
165. *Id.* (quoting 29 U.S.C.A. § 2612(a)(1)(D) (2003)).
166. *Id.* (citing Collins v. NTN-Bower Corp., 272 F.3d 1006 (7th Cir. 2001)).
167. *Id.* at 381.

on notice of Byrne's need for medical leave. In the alternative, a jury could have concluded that it was not feasible for a person with "major depression" to give notice. "Avon should have classified this period as medical leave—if Byrne indeed was unable to give verbal or written notice, or if the sudden change in his behavior was itself notice of his mental problem."[168]

VII. Fair Labor Standards Act: Procedure

Recently, the United States Supreme Court, in *Breuer v. Jim's Concrete, Inc.*,[169] affirmed an Eleventh Circuit decision, holding an FLSA action could be removed from state to federal court. Section 216(b) of the FLSA provides that an action "may be *maintained* . . . in any Federal or State court of competent jurisdiction."[170] That language, the Court held, does not prohibit removal of a civil action to a federal district court with original jurisdiction, pursuant to 28 U.S.C. § 1441(a).[171] Section 1441(a) allows any civil action to be removed to a district court with original jurisdiction unless an Act of Congress expressly provides otherwise;[172] and the Court held the language of § 216(b) did not expressly provide otherwise.

VIII. Employee Retirement Income Security Act

A. Treating Physician Rule Not Applicable Under ERISA

In *Black & Decker Disability Plan v. Nord*,[173] a unanimous United States Supreme Court decided the "treating physician rule," which gives deference to the determination of a treating physician over other examining doctors, has no place in ERISA benefits plans. ERISA, the Court held, does not require such a rule, which historically was adopted for determining Social Security disability entitlement.[174] The employee in *Black & Decker* sued under ERISA after Black & Decker denied his disability welfare benefits based on an independent examination by a doctor the employee was referred to by Black & Decker.[175] The Supreme Court vacated the Ninth Circuit's decision, stating "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation."[176]

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168. *Id.* at 382.
169. 123 S. Ct. 1882 (2003).
170. Fair Labor Standards Act, 29 U.S.C. §216(b) (2004) (emphasis added).
171. *Breuer*, 123 S. Ct. at 1884.
172. *Id.*; *see also* 28 U.S.C. §1441(a) (2004).
173. 123 S. Ct. 1965 (2003).
174. *Id.* at 1967, 1969.
175. *Id.* at 1968.
176. *Id.* at 1972.

B. Any Willing Provider Laws Not Preempted by ERISA

In *Kentucky Ass'n of Health Plan, Inc. v. Miller*, the Supreme Court reviewed Kentucky's "Any Willing Provider" laws, deciding they were regulated by insurance and, thus, not pre-empted by ERISA.[177] ERISA pre-empts any state laws "'insofar as they may now or hereafter relate to any employee benefit plan.'"[178] It does not, however, pre-empt state laws regulated by insurance.[179] "[A] state law must be 'specifically directed toward' the insurance industry in order to fall under ERISA's savings clause."[180] Generally, Kentucky's Any Willing Provider laws prohibited health insurers from discriminating against any provider or licensed chiropractor within the geographic region who is willing to abide by the terms of the health plan.[181] Because these laws force health plans to allow any willing provider to participate, the Petitioners fear the laws will increase providers and decrease efficiency.[182] The plans control costs by obtaining a small number of doctors to care for a large number of patients, something Kentucky's Any Willing Provider laws hinder.[183] The Petitioners filed suit claiming ERISA pre-empted Kentucky's Any Willing Provider laws, but the Supreme Court did not agree.

> Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law . . . which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward the entities engaged in insurance. . . . Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.[184]

C. Future Promise to Develop Severance Plan Not Enforceable

Although courts have decided benefits plans do not have to be written to be enforced by ERISA, the Seventh Circuit held in *Brines v. Xtra Corp.* that a statement in a benefits plan that Xtra Corporation "will develop" a separation program was not enforceable.[185] The court interpreted the statement under common-law contracts, deciding the statement was not a promise but instead a

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177. 123 S. Ct. 1471 (2003).

178. *Id.* at 1475 (quoting 29 U.S.C. § 1144(a) (2003)).

179. *Id.* (citing 29 U.S.C. § 1144(b)(2)(A)).

180. *Id.* (quoting Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987)).

181. *Id.* at 1473-74.

182. *Id.* at 1474.

183. *Id.*

184. *Id.* at 1479 (citations omitted).

185. 304 F.3d 699, 701 (7th Cir. 2002) (citing Diak v. Dwyer, Costello & Knox, P.C., 33 F.3d 809, 811-12 (7th Cir. 1994)).

prediction.[186] The Seventh Circuit also decided the company's practice of paying severance packages did not create a contract, stating "[t]he normal understanding of severance pay (when not provided for in a written plan), as of bonuses, is that it is at the discretion of the employer; there is nothing here to upset that understanding."[187]

D. Scope of Review

The Indiana Court of Appeals in *Wheatley v. American United Life Insurance Co.*[188] determined the scope of review it wished to follow for an ERISA claim under a de novo standard in Indiana. Although many federal circuit courts have addressed the issue before, this was a first in Indiana. While the United States Supreme Court decided an ERISA denial of benefits claims should be reviewed de novo (unless the plan states otherwise),[189] the circuits disagree as to what evidence should be included in that de novo review. Where the Third and Eleventh Circuits admit additional evidence that was not presented to the plan administrator, the Sixth Circuit will not consider any evidence not presented to the plan administrator.[190] The Eighth and Fourth Circuits take a middle-of-the-road approach, allowing the introduction of additional evidence not presented to the administrator only when it is necessary for an adequate de novo review.[191] The Seventh Circuit uses a very similar approach, allowing additional evidence "when necessary 'to enable it to make an informed and independent judgment.'"[192] After reviewing these circuit court decisions, the court of appeals, citing Indiana's general rule that leaves trial courts the discretion to admit or deny evidence, held Indiana trial courts are allowed to look beyond a benefits administrator's presented evidence "only when necessary to conduct an adequate de novo review of the administrator's determination."[193] The Court went on to specify, "this discretion should only be exercised when good cause exists."[194] Thus, it is now clear that Indiana trial courts hearing an ERISA claim under a de novo standard have the discretion to allow additional evidence not presented to the plan administrator if good cause can be shown to allow such evidence.

E. Meaning of "Transfer" Under the Multi-Employer Pension Plan Amendment Act

The definition of "transfer," meaning transferring work from Funded to non-Funded workers, under the Multi-Employer Pension Plan Amendment Act

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186. *Id.*
187. *Id.* at 704.
188. 792 N.E.2d 927 (Ind. Ct. App. 2003).
189. *Id.* at 929-30 (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)).
190. *Id.* at 930.
191. *Id.* at 930-31.
192. *Id.* (quoting Casey v. Uddeholm Corp., 32 F.3d 1094, 1099 (7th Cir. 1994)).
193. *Id.* at 931.
194. *Id.*

("MPPAA")[195] was addressed for the first time by a federal court in *Nestlé Holdings, Inc. v. Central States, Southeast & Southwest Areas Pension Fund.*[196] More specifically, the Seventh Circuit in *Nestlé* addressed whether the work previously completed by union employees who were funded by Nestlé's multi-employer plan was transferred to non–union employees within the meaning of the MPPAA, thus incurring withdrawal liability.[197] In 1995, Nestlé closed two trucking terminals, one in Missouri and one in Illinois.[198] Because it had lost a shipping contract, the employees that were not funded by Nestlé's multi-employer pension plan did not increase their workload; however, union employees that were funded by the plan were terminated and non-funded employees took some of the work previously performed by the union employees funded by the plan.[199]

"The MPPAA requires a company that withdraws from a multi-employer pension plan covered by ERISA to pay 'withdrawal liability,' which is intended to cover that company's share of the unfunded vested benefits that exist when the company withdraws."[200] According to the MPPAA, withdrawal liability may be assessed for either a complete or partial withdrawal.[201] A partial withdrawal will occur when the employer permanently transfers work of the same type that was previously in the jurisdiction of a collective bargaining agreement where contributions to a plan were required.[202]

Pursuant to the MPPAA, the Fund assessed nearly $1.3 million in withdrawal liability after Nestlé terminated the fund employees.[203] After the Fund upheld the assessment of withdrawal liability, Nestlé demanded an arbitrator, who subsequently found Nestlé transferred work from Funded employees to non-Funded employees.[204] Because the work previously completed by union employees who were funded by the plan was "reassigned after closure of the company's transportation terminals," the district court, too, found a transfer, reasoning the work was "not essentially different in character."[205] At the Seventh Circuit, Nestlé argued the non-funded employees actually worked less after the closings, which, it argued, meant it did not transfer work to non-Funded employees.[206] However, the Court noted that just because the terminals closed didn't mean the work ceased.[207] In fact, "the arbitrator specifically noted that at

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195. *See* 29 U.S.C. § 1385(b)(2)(A)(i) (2004). The MPPAA is an amendment to ERISA.
196. 342 F.3d 801, 804-05 (7th Cir. 2003).
197. *Id.* at 804.
198. *Id.* at 802-03.
199. *Id.*
200. *Id.* at 804 (citing 29 U.S.C. §§ 1381, 1385, 1391).
201. *Id.* (citing 29 U.S.C. §§ 1383, 1385).
202. *Id.* (citing 29 U.S.C. § 1385(b)(2)(A)(i)).
203. *Id.* at 803.
204. *Id.*
205. *Id.* at 804.
206. *Id.* at 805-06.
207. *Id.* at 806.

least one non-union driver who . . . did not report to the [closed] terminal, [and] continued to drive in the lanes previously assigned to union members after the closures."[208] Before the closure, the non-Funded employee shared that particular drive with Funded employees; whereas after the closure, he was selected to drive even if one of the terminated Funded employees would have been chosen.[209] Holding Nestlé transferred work from Funded to non-Funded employees, thus incurring partial withdrawal liability under the MPPAA, the Seventh Circuit stated "Nestlé could have reduced its workforce across the board, including both Fund and non-Fund employee drivers, instead of only targeting union-represented drivers."[210]

IX. UNEMPLOYMENT BENEFITS: DEFINITION OF UNEMPLOYED

According to the Indiana Court of Appeals, an employer who places an employee on administrative leave and provides partial pay is not required to pay state unemployment compensation.[211] The court in *City of Bloomington v. Review Board of the Department of Workforce Development* reviewed a city employee's employment status, holding he was not entitled to unemployment benefits because he was not unemployed, as defined by Indiana Code section 22-4-14-1.[212] The Indiana Code provides unemployment benefits only for unemployed individuals, and further "provides that an individual is employed during '[p]eriods of . . . leave with pay.'"[213] Thus, the Indiana Court of Appeals held the employee was not unemployed because he was on administrative leave from the fire department pending a resolution of domestic violence charges. Further, the court held the employee was not entitled to *partial* unemployment benefits even though he was receiving partial pay during his leave. Partial employment, the court explained, was defined by the Act as an employee working less than his normal full week "'because of lack of available work.'"[214] The employee was on partial pay for disciplinary reasons, not from lack of work. Thus, the court denied the city employee's request for unemployment compensation and concluded allowing unemployment benefits to employees who are on leave from their own fault is against the purpose of the Act.[215]

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208. *Id.*

209. *Id.*

210. *Id.* at 807.

211. City of Bloomington v. Review Bd. of the Dep't of Workforce Dev., 794 N.E.2d 1143 (Ind. Ct. App. 2003).

212. *Id.* at 1146 (citing IND. CODE § 22-4-14-1 (2003)).

213. *Id.* (quoting IND. CODE § 22-4-11-1)

214. *Id.* (quoting IND. CODE § 22-4-3-2).

215. *Id.* at 1146-47. "I.C. § 22-4-1-1 identifies a primary purpose of the Act as: 'to provide for payment of benefits to persons unemployed through no fault of their own.'" *Id.* (quoting IND. CODE § 22-4-1-1.)

X. FEDERAL EMPLOYERS' LIABILITY ACT

The United States Supreme Court made an important determination on damages in this survey period under the Federal Employers' Liability Act ("FELA"). The Court allowed the plaintiffs, who suffered from work-related asbestosis, in *Norfolk & Western Railway Co. v. Ayers*[216] to recover for mental anguish damages attributed to the fear of developing cancer if they could prove their fears were "genuine and serious."[217] FELA allows employees of common carrier railroads to sue their railroad employer for injuries they incur "in whole or part" from the employer's negligence.[218] The Court in *Ayers* reviewed its prior case law in this area, stating courts should follow the zone-of-danger test for plaintiffs who suffer *only* an emotional injury.[219] In this case, however, the plaintiffs had developed asbestosis, a physical injury, not merely emotional injuries. Thus, the Court distinguished between the two, stating "pain and suffering damages may include compensation for fear of cancer when that fear 'accompanies a physical injury.'"[220] Although Norfolk argued asbestosis cannot cause cancer, attempting to separate the physical injury of asbestosis from the fear of cancer, the Court dismissed the argument pointing to statistics showing ten percent of asbestosis sufferers die from cancer.[221] The Court stated: "In light of this evidence, an asbestosis sufferer would have good cause for increased apprehension about his vulnerability to another illness from his exposure. . . ."[222]

In addition to allowing mental anguish damages, the Court also determined apportionment of fault. An additional impingement on defense attorneys, the Court held the jury should not apportion fault to companies outside of the railroad company who exposed the plaintiff so long as the railroad itself was negligent.[223] Reinforcing its prior decision, the Court stated, "[t]he FELA's express terms . . . allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury . . . thus placing on the railroad the burden of seeking contribution from other tortfeasors."[224] One plaintiff in the case was "exposed to asbestos at Norfolk for only three months," was exposed at other jobs for thirty-three years, and still received the benefit of non-apportionment.[225]

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216. 123 S. Ct. 1210 (2003).

217. *Id.* at 1223.

218. *Id.* at 1217; *see also* The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2004).

219. *Ayers*, 123 S. Ct. at 1218.

220. *Id.* (quoting Metro-North Commuter R. Co. v. Buckley, 521 U.S. 424, 430 (1997)).

221. *Id.* at 1221-22.

222. *Id.* at 1222.

223. *Id.* at 1228.

224. *Id.* at 1215.

225. *Id.* at 1216.

XI. OTHER STATE LAW DEVELOPMENTS: CASES OF FIRST IMPRESSION WITH THE INDIANA COURT OF APPEALS

During this past survey period, the Indiana Court of Appeals heard two important employment law cases of first impression. It interpreted the breadth of the Indiana whistle-blower statute,[226] and decided an employer had a legitimate protectible interest in its former employee sufficient to enforce a covenant-not-to-compete.[227]

For the first time, in *Coutee v. Lafayette Neighborhood Housing Services, Inc.*, the Indiana Court of Appeals interpreted Indiana's whistle-blower statute.[228] Indiana Code section 22-5-3-3 protects employees of private sector employers under public contract and prevents employees from being fired for reporting the existence of a violation of law or the misuse of public resources concerning the execution of the public contract.[229] The plaintiff claimed she was fired in violation of the Indiana whistle-blower statute when she wrote a letter to her executive director discussing her manager's ineffective management style.[230] The court of appeals interpreted "misuse of public resources" to require "a direct expenditure or use of public funds, property, or resources for a purpose other than that contemplated by the contract in question."[231] Thus, the plaintiff's act of blowing the whistle on her boss's management style does not, according to the Indiana Court of Appeals, violate Indiana's whistle-blower statute.[232]

In another factual first for the Indiana Court of Appeals, the court heard a case arising from a dispute between employer, WOWO radio station in Fort Wayne, Indiana, and its former conservative talk show host employee, Dave Macy. The Indiana Court of Appeals decision in *Pathfinder Communications Corp. v. Macy* allows Indiana employers to protect their legitimate interests in celebrity employees through enforcing covenants-not-to-compete under certain circumstances. In an effort to increase ratings, WOWO changed the structure of Macy's morning show from the controversial "Macy in the Morning" format, for which Macy is known, to a more news-oriented approach. Subsequently that year, WOWO fired him for falsifying program logs.[233] Macy had signed a covenant-not-to-compete, but took a job working for a competitor in the same market.[234] WOWO sued to enforce its covenant. Because the Indiana Court of Appeals had yet to encounter a case factually similar to this one, it reviewed

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226. *See* Coutee v. Lafayette Neighborhood Hous. Servs., Inc., 792 N.E.2d 907 (Ind. Ct. App. 2003) (interpreting IND. CODE § 25-5-3-3).

227. Pathfinder Communications Corp. v. Macy, 795 N.E.2d 1103 (Ind. Ct. App. 2003).

228. 792 N.E.2d at 907.

229. *Id.* at 912 (citing IND. CODE § 22-5-3-3).

230. *Id.* at 910.

231. *Id.* at 914.

232. *Id.*

233. Pathfinder Communications Corp. v. Macy, 795 N.E.2d 1103, 1107-08 (Ind. Ct. App. 2003).

234. *Id.* at 1107-08.

other state case law before determining that WOWO had a legitimate protectible interest in its employee, Dave Macy, even though it no longer had a protectible interest in the "Macy in the Morning" talk show format because WOWO had abandoned that specific format of the talk show. The court noted that Macy was unknown in the Fort Wayne market before WOWO hired and promoted his on-air show. It also noted Macy took a job with a competitor of WOWO using a similar talk show format during the same morning drive time period.[235] The court then proceeded to review the covenant-not-to-compete and determined it was unreasonably overbroad because it did not allow Macy to engage in *any* activity with a competitor radio station.[236] Nevertheless, as with most overbroad covenants, the court "blue-penciled" the unreasonable parts of the covenant, ultimately leaving a covenant forbidding Macy from working as an on-air personality for one of the listed competitors for a period of twelve months.[237]

XII. CONCLUSION: THE WATCH LIST

Although the United States Supreme Court "decline[d] to review dozens of employment law cases" when the 2003-2004 term opened,[238] it does review some pertinent employment law cases each year. It has accepted several employment cases for review during the upcoming year. These cases involve issues ranging from whether constructive discharge is a "tangible employment action" to whether a sole shareholder can be a participant in an ERISA plan. The Court's rulings on these and other pertinent employment issues could modify the legal landscape in the ever-evolving area of employment law.

The United States Supreme Court will answer the following questions in its upcoming term:

A. Does the ADEA Permit a Cause of Action for Reverse Age Discrimination?[239]

In the upcoming session, the Court will determine whether employees within the protected age class of forty years and over have a valid cause of action under the ADEA against an employer who discriminated against them by awarding more favorable treatment to those in the protected class who are older.[240] The

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235. *Id.* at 1113.

236. *Id.* at 1114.

237. *Id.* at 1115.

238. *Supreme Court Opens Term, Asks for Government's Views in Title IX Case*, BNA LAB. REP. AA-1 (2003).

239. *See* Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

240. *See id.* The Sixth Circuit has been reversed by the United States Supreme Court's recent decision in *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236 (2004). Reversing the Sixth Circuit, the Supreme Court held "the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 1248-49.

Sixth Circuit Court of Appeals interpreted the ADEA to provide a cause of action for employees in the protected age group who claim their employer discriminated against them by providing more favorable treatment to older employees also within the protected group.[241]

B. Are Racial Harassment and Termination Claims Under § 1981 Subject to the Four-Year "Catchall" Statute of Limitations Provided for Under § 1658 for All Federal Civil Actions?[242]

Section 1658 calls for a four-year statute of limitations for any "civil action arising under an Act of Congress" that was enacted after December 1, 1990.[243] The Seventh Circuit in *Jones v. R.R. Donnelley & Sons, Co.* decided § 1658 was not applicable to a claim arising from § 1981, even though § 1981 was amended in 1991 (after the 1990 enactment of the catch-all statute of limitations). Although the amendment increased the rights granted under it to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," the Seventh Circuit decided the § 1658 "catch all" statute of limitations was meant to be used for new causes of action, not amended causes of action like § 1981.[244]

C. Are Plaintiffs Whose Social Security Numbers Were Disclosed in Violation of the Privacy Act Entitled to Damages Even Though They Did Not Suffer Any Actual Damages?[245]

To facilitate the processing of black lung compensation claims, the Department of Labor's Office of Workers' Compensation Programs and its Division of Coal Mine Workers' Compensation asks applicants to voluntarily provide their social security numbers, informing them that it may be used to facilitate benefits determinations.[246] Administrative Law Judges sent to applicants, their attorneys, and their employers, a single document with the applicants' social security numbers, which were subsequently sometimes published in benefits decision reporters.[247] The plaintiffs alleged the publication of their social security numbers caused them emotional distress. However, the Fourth Circuit Court of Appeals held the claimants had to sustain actual damages

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241. *Cline*, 296 F.3d at 466.

242. *See* Jones v. R.R. Donnelley & Sons, Co., 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

243. 28 U.S.C. § 1658 (2002).

244. *Jones*, 305 F.3d at 726 (quoting 42 U.S.C. § 1981(b)).

245. *See* Doe v. Chao, 306 F.3d 170 (4th Cir. 2002), *cert. granted*, 123 S. Ct. 2640 (2003). The United States Supreme Court recently affirmed the Fourth Circuit, holding the claimants were not entitled to damages because they failed to show they suffered actual damages as a result of the violation. *See Chao*, 124 S. Ct. at 2640.

246. *Chao*, 306 F.3d at 175.

247. *Id.*

to receive the statutory $1000 minimum damage for violating the Privacy Act.[248]

D. Is a Sole Shareholder a Participant in an ERISA plan, Such That He Can Block a Bankruptcy Trustee from Taking a Loan He Repaid to the Pension Plan?[249]

A federal bankruptcy trustee wanted a court order setting aside a payment made by a shareholder/debtor to his corporation's pension plan only three weeks before bankruptcy.[250] ERISA requires profit-sharing pension plans to contain spendthrift clauses, protecting the plan from alienation or assignment except for loans to participants.[251] Yates was the sole owner of a professional corporation, the plan's administrator and the plan's trustee; there were a total of four participants to the plan.[252] Because "a sole shareholder cannot qualify as a 'participant or beneficiary' in an ERISA pension plan," and "'does not have standing under the ERISA enforcement mechanisms,'" the Fourth Circuit Court of Appeals held Yates, as a sole shareholder, could not enforce the spendthrift clause under ERISA.[253]

E. Is Constructive Discharge a "Tangible Employment Action" Such That if Committed by a Supervisor, an Employer Would Be Strictly Liable Under Ellerth *and* Faragher?[254]

In April of 2003, the Third Circuit held constructive discharge was a "tangible employment action" within the meaning of *Ellerth* and *Faragher*.[255] If the United States Supreme Court affirms the Third Circuit Court of Appeal's decision, the ramifications for employers is great. Currently under *Ellerth* and *Faragher*, employers are not able to raise an affirmative defense to liability or damages for sexual harassment of supervisors.[256] Thus, if constructive discharge is defined by the Supreme Court as a tangible employment action, employers will be strictly liable for supervisors who are found to have constructively discharged an employee.

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248. *Id.* at 175, 178-79.

249. *See In re* Yates, 287 F.3d 521 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 2637 (2003). On March 2, 2004, the Supreme Court reversed the Sixth Circuit Court of Appeals and held that Yates, as a working sole owner of a professional corporation, was a participant in the ERISA pension plan. *See* Yates v. Hendon, 124 S. Ct. 1330 (2004).

250. *In re Yates*, 287 F.3d at 524.

251. *Id.*

252. *Id.*

253. *Id.* at 526 (quoting Agrawal v. Paul Revere Life Ins. Co., 205 F.3d 297 (6th Cir. 2000)).

254. *See* Suders v. Easton, 325 F.3d 432 (3rd Cir.), *cert. granted*, Pa. State Police v. Suders, 124 S. Ct. 803 (2003).

255. *Id.* at 452.

256. *See id.* at 434-35 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

F. Does a Pension Plan Amendment That Effectively Reduces Early Retirement Benefits Violate ERISA's Anti-Cutback Rule?[257]

After retiring at an early age, the plaintiffs in *Heinz v. Central Laborers' Pension Fund* obtained jobs as construction supervisors, which the plan did not define as "disqualifying employment." Thus, the plaintiffs received monthly pension benefits until 1998 when their benefits were suspended because the plan was amended to define "disqualifying employment" to include "work 'in any capacity in the construction industry.'"[258] The Seventh Circuit Court of Appeals held this amendment violated ERISA's anti-cutback rule, which does not allow a decrease of accrued benefits of a participant under the plan.[259]

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257. *See* Heinz v. Cent. Laborer's Pension Fund, 303 F.3d 802 (2002), *cert. granted*, 124 S. Ct. 803 (2003).

258. *Heinz*, 303 F.3d at 803 (quoting the retirement plan in question).

259. *Id.* at 804, 813.