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Simon v. Celebration Company, A Step in the Inexorable March to "Educational Malpractice"?

By Usher L. Brown

In *Simon v. Celebration Co.*, the Fifth District Court of Appeal allowed a lawsuit to proceed on the theory that the School Board of Osceola County, its consulting universities, and a real estate developer broke their promises to the plaintiffs that the Celebration public school would have an excellent curriculum of "best practices."¹ *Simon* is the first reported appellate decision that permits a parent to maintain a tort claim based on an allegation that the quality of education and curriculum at a school is substandard.²

I. Claims in Educational Malpractice

Tort claims sounding in educational malpractice have, as a matter of public policy, uniformly been rejected by the courts.³ School districts and other educational institutions substantially benefit from this rule because the scarce resources that are available may be devoted to school programs, not on defending malpractice lawsuits. *Simon* is a substantial step towards the end of the rule that bans educational malpractice suits because it allows a tort claim for substandard educa-

"Educational malpractice" is a claim in tort that challenges the education received. The plaintiff can potentially recover for deficiencies in his or her knowledge "allegedly created by some substandard treatment of the student during the educational process."⁵ A school may defend against a charge of substandard education regardless of the cause of action pled or the nomenclature used in the pleading.⁶ However, there are actions that are permitted despite the rule. These actions include cases alleging a failure to comply with federal or state mandated procedures in the diagnosis, classification or placement of students, and breach of contract.⁷ But, until the decision in *Simon*, it was correct to say that all courts in the United States that considered a tort claim in educational malpractice had rejected the claim.⁸

Some commentators incorrectly refer to the decision in *B.M. v. Montana*, 649 P. 2d 425 (1982), as a claim in education malpractice and an exception to the general rule barring such claims. In that case the foster parents of a student alleged the student was negligently mis-

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room for the mentally handicapped. The foster mother alleged that there was deterioration in the behavior of the student after wrongful placement. The Montana court held that a special duty of care to special education students is owed with regard to testing and placement. The source of this special duty of care comes from statutory authority, such as the Individuals with Disabilities Education Act (IDEA), Montana's State Constitution, and administrative regulations.⁹

Although the Montana Court used language suggestive of a claim in malpractice, it is better to read *B.M.* as a special case involving the statutory duties for evaluation and placement of special education students. *B.M.* was decided in 1982, and no court since then, until *Simon*, allowed a claim based on an alleged deficiency in an educational program or incompetent educational practices, other than cases involving a student injury or breach of a statutory or regulatory duty.¹⁰

In addition to cases brought under the authority of a statute, the law of contracts is also unaffected by the ban against educational malpractice claims.¹¹ In *Barzilay v. Carlton Palms Educational Center, Inc.*, 875 So. 2d 1280 (Fla. 5th DCA 2004), a former private school student claimed that her residential placement failed to provide sufficient individual instruction or "around-the-clock therapeutic care."¹² The plaintiff alleged that she was expressly promised "around-the-clock therapeutic care" and that all instruction would be "individualized."¹³ The written contract between the parties merely called for the development and implementation of an Individualized Education Plan (IEP), and did not expressly require the level of service alleged by the plaintiff in her complaint. The IEP was furnished to the trial court and the

court dismissed for the reason that the written contract, and the IEP developed pursuant to the contract, set out the entire agreement between the parties.¹⁴ The Fifth District Court of Appeal affirmed by relying on the parol evidence rule, finding no error in the trial court's application of this "substantive rule of law" to the "alleged oral representation at variance with the unambiguous contract before the trial court."¹⁵ Although not addressed by the appellate court, the trial court agreed that it would have jurisdiction to enforce the provisions of a contract between a student and a school, and that such a contract claim, even if arising out of an allegation of a substandard education, would not be barred as "educational malpractice."¹⁶

Lawsuits in tort for substandard education or a bad educational outcome are a different matter. Torts involve a "legal wrong committed on the person or property independent of contract."¹⁷ The courts have always imposed a common law duty to provide for the safety of students and other persons on campus.¹⁸ Only to the extent a student claims a substandard education or bad educational outcome is the tort action prohibited as educational malpractice. For example, in *Rubio v. Carlsbad Municipal Sch. Dist.*, 744 P. 2d 919 (N.M. Ct. App. 1987), high school students claimed that a teacher in the public schools provided marijuana and that this breach of duty deprived them of an acceptable education. The New Mexico court affirmed the dismissal of all claims presented as sounding in educational malpractice. The claims may have been allowed if the students alleged the school negligently hired, retained and supervised the teacher, whose negligence caused personal injury.¹⁹

In *Poe v. Hamilton*, 565 N.E. 2d 887 (Ohio 1990), a student sued her psychology teacher after she failed a course. The failure prevented the student from graduation from high school. The student sued, claiming

that the teacher incompetently ignored school board guidelines regarding grades. The Ohio court affirmed the dismissal of the lawsuit, and held that an action for educational malpractice cannot be maintained, relying on *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E. 2d 1352, 1355 (N.Y. 1979). In *Donohue*, a New York court found that "factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." *Id.* Thus, even if the Ohio student could establish that her teacher's conduct was reckless, public policy prevented any recovery, as the Ohio court observed:

Finally, even if Poe were able to establish that Hamilton (the teacher) was reckless and that his conduct had proximately caused her to fail the course, we agree with the trial court that Poe may not prevail as a matter of public policy. In this determination we are in accord with apparently the only other Ohio appellate decision dealing with the issue of educational malpractice. In *Denson v. Steubenville Board of Education* (citation omitted), the court addressed an action by a student alleging that school authorities had addressed an action by a student alleging that school authorities had committed educational malpractice in promoting him from grades 1 through 12 without teaching him literacy and concluded that educational malpractice was no actionable. By implication the (lower) court followed the reasoning in *Donohue*, which had found that the professional judgment of educators in determining appropriate methods of teaching should not be disturbed.²⁰

Six months after *Donohue v. Copiague Union Free Sch. Dist.*
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was decided, the same New York court considered the extent of the rule barring educational malpractice in a case involving a horribly erroneous assessment and placement of a student in a class for mentally handicapped students. As explained in the intermediate appellate decisions, *Hoffman v. Bd. of Educ.*, 410 N.Y.S. 2d 99 (N.Y. App. Div. 1978), the plaintiff was misdiagnosed in kindergarten and remained in self-contained classes for mentally handicapped children until he was seventeen years old. The student, Hoffman, was tested in kindergarten as having an IQ of 74. The cutoff score for mental handicap was 75, and because Hoffman's score was so close, the school psychologist noted in his report that he should be reevaluated in two years to develop a more accurate understanding of his intellectual capabilities.²¹ The psychologist admitted at trial that he had difficulty understanding Hoffman's speech and doubted his test results. Despite that, the school psychologist did not interview Hoffman's mother, nor did he obtain a social history or determine whether the child was receiving treatment for speech problems (which he was). Hoffman was administered standard achievement tests over the years, which the school system weakly argued was a "constant evaluation." Furthermore, he was not given another intelligence test despite the original borderline score and the written order for additional testing by the school district's own psychologist.²² Hoffman was eventually retested at the age of 18 while attending occupational training; and it was determined that he had an IQ of 94.²³ The trial court found no reason in public policy to deny relief to someone who had been "so grievously injured" and awarded the student \$750,000 which was reduced to \$500,000 by the intermediate appellate court.²⁴

On appeal, New York's highest court reversed the judgment by a four to three decision and dismissed the complaint.²⁵ As in *Peter W. v. San Francisco Unified Sch. Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976), that placement decisions should be settled through state administrative procedures as opposed to being litigated in court.²⁶

In *W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P. 2d 554 (Alaska 1981), the Supreme Court of Alaska likewise determined that educational malpractice claims are best resolved exclusively in administrative proceedings. The Alaska court rejected claims brought by two former students in which they alleged the school district negligently failed to determine the nature or extent of their disabilities and negligently terminated special educational services. The students contended that as a result of this negligence they suffered loss of education, loss of employment and loss of opportunity to attend college or post high school studies.²⁷

II. Private Schools

The rule applies in the context of private schools as well as public. In *Rich v. Kentucky County Day*, 793 S.W. 2d 832 (Ky. Ct. App. 1990), the student, Rich, encountered academic problems at a private high school. The family had their son examined by a child psychologist who diagnosed him as having a mild form of attention deficit disorder which caused him to fail.²⁸ Rich's teachers, however, concluded that his failures were due to laziness and incomplete homework assignments.²⁹ The trial and appellate court both characterized the lawsuits as one in educational malpractice because the family claimed the school was negligent by failing to diagnose the alleged learning problems and by failing to provide the student with a personalized educational program.³⁰ Following the rule against education malpractice, the Kentucky court refused to recognize

the cause of action and dismissed the lawsuit.³¹

III. Universities and Colleges

Colleges and universities likewise benefit from the rule that educational malpractice claims are unavailable. In *Wilson v. Cont'l Ins. Cos.*, 274 N.W. 2d 679 (1979), the student claimed that Marquette University Law School negligently encouraged him to enroll in a privately run "mind control" course, and that as a result of this enrollment he allegedly suffered mental problems and was forced to withdraw from law school. Wilson alleged that Marquette University wrongfully encouraged him and other minority students to participate in tutoring and special classes, such as the "mind control" course, because they were admitted under lower standards than other students. The court ruled that law students experience mental imbalances for many different reasons, and Wilson could not prove that the law school's actions caused his problems.

In *Ross v. Creighton Univ.*, 740 F. Supp. 1319 (N.D. Ill. 1990), the Illinois court admitted that "educational malpractice" has a seductive ring to it because other categories of professionals are held liable for failing to exercise due care.³² However, the court distinguished education from other professions. Education is an "intensely collaborative process" which requires interaction between the teacher and the student, plus effort on the part of the student.³³

IV. *Simon v. Celebration Co.*

The plaintiffs in *Simon* are the parents of two students who attended a public school in Osceola County, Florida. They allege that they purchased a home in Celebration only because the developer, the school district, and several universities that consulted in the development of the Celebration school,

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promised that the education program would consist of “best practices” and would be “nonexperimental.”³⁴ Moreover, the parents claim that the defendants promised “whatever it takes” would be delivered at the school. Reversing the trial court’s dismissal with prejudice of the claims sounding in misrepresentation and fraud, the appellate court noted:

The precise allegations here are that the defendants falsely stated that they intended to implement a curriculum of “proven best practices” that would include “technology” and “whatever it takes” in a school that had not yet commenced operation. Despite the inclusion of over one hundred paragraphs in the fraud count, the complaint does not describe with specificity what “best practices” means, the type of technology promised, or what was meant by “whatever it takes.” These alleged misrepresentations are too vague to provide the essential foundation for a fraud claim . . . Furthermore, nowhere within the complaint do the Simons state how these representations were false. The complaint simply alleges the conclusory statement that the representations were false, a legally insufficient allegation under

the strict pleading requirements for a claim predicated on fraud . . . The lack of specificity is particularly troublesome here where nine separate defendants are lumped together in each count in a complaint that often fails to particularize which of the nine defendants made which statements.³⁵

Despite these pleading infirmities, the Fifth District Court of Appeal remanded to the trial court to allow the Simons an opportunity to amend their complaint in misrepresentation and fraud. The School Board of Osceola County, as well as the other defendants, of course, argued that despite the description of the claims as misrepresentation and fraud, the pleading was, in effect, a disguised cause of action sounding in educational malpractice.³⁶ The trial court dismissed the fraud and misrepresentation claims with prejudice, primarily because the action sounded in educational malpractice, “a cause of action not recognized by the Florida courts.”³⁷ The appellate court, being careful not to expressly recognize a claim in educational malpractice reversed that ruling of the trial court and stated:

We reverse this ruling because, although inartfully drafted, the Simons’ complaint sought to allege claims for fraud and misrepresentation, not educational malpractice. As such, the dismissal of these two counts should have

been with leave to amend.³⁸

The problem with that reasoning is the fact that common law fraud and misrepresentation are claims of tort.³⁹ The *Simon* court thus breaks from precedent and allows a tort claim grounded solely on substandard education:

Apparently, under an educational malpractice claim, a school would have a duty to educate its students and would be liable in tort/negligence for failing to fulfill its duty. Most cases involving educational malpractice deal with plaintiffs who allege that their school failed to teach them reading or failed to properly diagnose a learning disability.⁴⁰

This distinction between what is or is not prohibited under the rule leaves open the question of whether educators who assure families that their schools are of high quality are open to being sued in Florida. The *Simon* decision apparently allows a misrepresentation claim against a school if the educators allegedly “misrepresent” the quality of the educational program; and a plaintiff alleges he acted in reliance on the “misrepresentation,” and was somehow harmed. The court apparently concludes that public policy will not protect an educational institution that misrepresents the quality of its program, thus harming those who may act in reliance. The decision requires a more specific allegation of misrepresentation in an amended complaint on remand.⁴¹ Statements of opinion or regarding matters to be performed in the future are not generally actionable in misrepresentation, but this rule is relaxed if the person making the representation had expertise or superior knowledge regarding the subject matter.⁴²

The *Simon* decision does not address the extent to which an enthusiastic educator’s promotion of his school may be protected as mere “puffery,” expression of opin-

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ion, or as a statement regarding a future occurrence. How that question is answered in future cases will undoubtedly govern the extent to which the lawsuit floodgate is opened. If the “special expertise” exception opens the floodgate wide, then it is easy to imagine fact patterns for future cases, post-*Simon*. For example, the family of an athlete with a bright professional future in his sport may sue a school district claiming damages for the purchase price of a house in a particular neighborhood or for damages incurred by such attendance at a particular school because of representations that a team had tremendous prospects, or would cater to student athletes in a particularly helpful manner by providing “solid tutoring” or a “great program of assistance” so that student athletes will have “no problem” keeping their grade point average and maintaining eligibility to play. Under the *Simon* rationale, a family that is disappointed with the results at a particular school that made such assurances could file a lawsuit. The claim might include an allegation that the school failed to provide tutoring in accordance with the standard that was represented. Therefore, the student failed to maintain academic eligibility and was deprived of his opportunity for an athletic scholarship to the college of his choice. The loss of the college athletic scholarship opportunity may easily result in a claim that the student athlete suffered a loss or diminution of future earnings from a professional career in his chosen sport. (Even the NBA will not yet draft a high school student with no playing time in high school for lack of grade point eligibility.)

Other claims may follow if a parent alleged he rejected a job opportunity that would have paid a much greater salary because a school promised an excellent academic

program, or college scholarship opportunity. Of course, those are only a couple of the hypothetical situations one may conjure under the rationale of *Simon*. Many other scenarios are imaginable, hinging on the extent to which the general rule that opinions are not actionable gives way to the exception for special expertise or superior knowledge.⁴³

The attorney defending such claims will argue that representations are matters of opinion, puffery, or future occurrence, which are not actionable under the common law of fraud and misrepresentation. The plaintiffs will respond by arguing that the opinions are actionable because educators have greater expertise in the profession of education and the parents reasonably relied to their detriment on assurances of quality or excellence. As this is sorted out in the courts, the education profession will, like other professions, such as doctors, spend significant dollars in court, and not in the classroom, defending “bad outcome” cases.

The parties in *Simon* continue the litigation in the trial court, following the remand. The Osceola School Board will try to convince the Fifth District Court of Appeal, if the case is appealed again, that tort claims arising from substandard education and bad educational outcomes must be rejected, even if the school promised better. Even if educators promised the earth, the moon, the sun and the stars in the educational program, education *is* different from other professions, as the courts have recognized. The quality of educational results or outputs is, unlike other professions, uniquely dependent upon not only the skill of the professional, but also the aptitude and effort of the student, as well as a myriad of other societal and familial circumstances that impact the student and his learning throughout his educational career. Educators have little or no control over many of these factors that con-

tribute to the quality of the educational outcome.

If the floodgate opens it will be a good thing for lawyers, and bad for schools. Let’s opt in favor of our schools!

Usher L. Brown has practiced law in Florida since 1980. He is a graduate of the University of Florida Law School, is AV rated by Martindale-Hubbell and is listed in the Martindale-Hubbell directory of pre-eminent attorneys. Mr. Brown is also board certified by the Florida Bar in civil trial law and has represented many local government entities. Mr. Brown has represented as general counsel the School Board of Osceola County since 1992 and represents on a regular basis other local government as special counsel or trial counsel, including several other school boards and the Cities of Casselberry, Cocoa, Winter Springs, Palm Bay, Okeechobee and Lake Mary.

Endnotes:

1. *Simon v. Celebration Co.*, No. 5D02-2262, 2004 WL 1232762 (Fla. 5th DCA June 4, 2004). The court withdrew a prior opinion issued on December 5, 2003, and substituted this opinion, which has not yet been released for publication. The author represents the Osceola School Board and Johns Hopkins in this litigation. *Id.*
2. *Id.* To be precise, *Simon* is the first tort case in education malpractice absent the breach of a statutory or regulatory duty. *Id.* Certainly, a school may be liable for willfully or incompetently breaching a duty under the Individuals With Disabilities In Education Act, 20 U.S.C. §§ 1400, et seq. (IDEA), but *Simon* allows the claim merely because the education is not as good as promised. See *id.*
An excellent discussion of the traditional rule barring the action in education malpractice is provided in *Hunter v. Bd. of Educ.*, 439 A. 2d 582, 584 (Md. 1982). (Commenting on prior courts’ decisions that “a cause of action seeking damages for acts of negligence in the education process is precluded by considerations of public policy”). *Id.*; See also *Ross v. Creighton Univ.*, 957 F. 2d 410, 414 (7th Cir. 1992) (holding that there is a “lack of a satisfactory standard of care by which to evaluate an educator. Theories of education are not uniform . . .”). *Id.*; *Hoffman v. Bd. of Educ. of City of New York*, 400 N.E. 2d 317 (Ct. App. N.Y. 1979).
3. *Id.*; See also *Tubell v. Dade County Pub. Schs.*, 419 So. 2d 388 (Fla. 3d DCA 1982) (applying the Florida rule). *Id.*
4. *Simon*, 2004 WL 1232762 at * 4. The court

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characterizes the counts for fraud and negligent misrepresentation as claims in tort, completely independent of the alleged breach of a statutory duty. *Id.*; See also Gandy v. Transworld Computer Tech. Group, 787 So. 2d 116, 119 (Fla. 2d DCA 2001); Hinton v. Brooks, 820 So. 2d 325, 329 n.4 (Fla. 5th DCA 2001) (Sawaya, J., concurring). (holding that actions in misrepresentation are in tort). *Id.*

5 KERN ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 484 (3d Ed. 1992). See also Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student Athletes?*, 69 DENV. U. L. REV. 57 (1992)

6 *Tubell*, 419 So. 2d at 389; see also Puff 'N Stuff v. Bell, 683 So. 2d 1176, 1177 (Fla. 5th DCA 1996) (holding that a claim that is barred may not be brought merely by calling the claim something different, because that would be a mere game of "semantics"). *Id.*; Hoffman v. Bd. of Educ. of City of New York, 400 N.E. 2d 317, 319 (Ct. App. N.Y. 1979) ("At the outset, it should be stated that although plaintiff's complaint does not expressly so state, his action sounds in 'educational malpractice'"). *Id.*

7 See, e.g., Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D. N.Y. 1986). Claims under IDEA are actionable, but damages are generally not recoverable absent personal injury or an egregious violation. *Id.*; see also Frazier v. Fairhaven Sch. Comm., 276 F. 3d 52 (1st Cir. 2002); Sellers v. Sch. Bd. of Mannassas, Va., 141 F. 3d 524 (4th Cir. 1998), cert. den. 525 U.S. 871 (1998). See generally, Brian L. Porto, *Annotation, Availability of Damages in Action to Remedy Violations of Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400 et. seq.)*, 165 ALR FED. 463 (2000). Cf. Tolman v. Cencor Career Colleges, Inc., 851 P.2d 203, 206 (Colo. Ct. App. 1992); Broward County Sch. Bd. v. Ruiz, 493 So. 2d 474 (Fla. 1986). (regarding actions in contract and for failure to maintain a safe campus). *Id.*

8 Johnny C. Parker, "Educational Malpractice: A Tort Is Born," 39 CLEV. ST. L. REV. 301, note 7 (1991); Ross v. Creighton Univ., 957 F. 2d 410, 414 (7th Cir. 1992) (noting that "Only Montana allows these claims to go forward . . .") (citing B.M. by Burger v. State, 649 P.2d 425, 427-28 (Mont. 1982)). *Id.*

9 B.M., 649 P. 2d at 428. (Haswell, C.J. concurring). (emphasizing that B.M. was not in the

same category of other cases that had rejected the cause of action, because the case brought by B.M. presented a "violation of mandatory statutes alleged to constitute negligence."). *Id.* 10 Tolman v. Cencor Career Colleges, Inc., 851 P. 2d 203, 206 (Colo. Ct. App. 1992); see also *supra* n. 7.

11 Tolman, 851 P.2d at 206.

12 Barzilay v. Carlton Palms Educ. Ctr., Inc., 875 So. 2d 1280 (Fla. 5th DCA 2004). The author represented the private school in this case, and therefore has knowledge of underlying facts in the case that are not mentioned in the reported decision. *Id.*

13 *Id.* The alleged promises regarding level of service were not expressly provided for in the contract or the IEP. *Id.*

14 *Id.* The author conceded at the hearing on the motion to dismiss that if a school contracted to provide a private room or a specific service (such as horseback riding), charged for such but failed to deliver, it should be liable for breach of contract. *Barzilay*, 975 So. 2d at 1280.

Fortunately for the school, its contract did not require the level of service alleged by the plaintiff. If, however, there had been no written contract, and thus no occasion for the parol evidence rule to be applied, then this case would have been very close to *Simon*. The promises of "around-the-clock therapeutic" and "individualized" instruction at issue in *Barzilay* match up nicely with the alleged promises made by the school in *Simon* in terms of vagueness and "puffery." Without a contract to limit alleged oral promises regarding level of service, the *Simon* court may have allowed the action in *Barzilay* to proceed on a claim that the quality of education was not as represented. *Id.*

15 *Id.*

16 *Barzilay*, 875 So. 2d at 1280. The author represented the school in this case and reports this finding made by the lower court. *Id.*

17 BLACK'S LAW DICTIONARY 1489 (6th ed. 1990). See also, 74 Am. Jur. 2d Torts § 1 (2004) (defining a tort as "A private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages."). *Id.*; J.W. PROSSER, "PROSSER ON TORTS," 164-165 (5th Edition 1984) ("A tort is the breach of a duty imposed by law which results in reasonably foreseeable damages.") *Id.*

18 See, e.g. Broward County Sch. Bd. v. Ruiz, 493 So. 2d 474 (Fla. 1986).

19 Monroe v. Sarasota Co. Sch. Bd., 746 So. 2d 530, 531 (Fla. 2d DCA 1999) (holding that

personal injury or property damage are generally a requirement in Florida). *Id.* See Duyser v. Sch. Bd. of Broward County., 573 So. 2d 130 (Fla. 4th DCA 1991) (holding that even if the teacher's misconduct causes such injury, the school will not be liable if the action is outside the scope of authorized activity of employment. Further, the school was not liable for outrageous misconduct of teacher that took place during the course of school activities because the behavior was so wrongful it was outside of any conceivable course of employment.) *Id.*

20 Poe v. Hamilton, 565 N.E. 2d 887, 889 (Ohio 1990).

21 Hoffman v. Bd. of Educ. of City of New York, 400 N.E. 2d 317 (Ct. App. N.Y. 1979).

22 *Id.*, at 318-319.

23 *Id.*

24 *Id.*

25 *Id.* at 320. See also, Peter W. v. San Francisco Unified Sch. Dist., 60 Ca. App. 3d 814 (1976).

26 W. v. Fairbanks N. Star Borough Sch. Dist., 628 P. 2d 554, 556 (Alaska 1981).

27 *Id.* The court found that its decision did not deprive parents of a remedy for wrongful classification and placement. The Alaska statutes provided "that any parent believing classification or placement to be in error may request an independent examination and evaluation of the child, and for a hearing . . . in the event of a substantial discrepancy." *Id.* at 557.

28 Rich v. Kentucky County Day, 793 S.W. 2d 832, 834 (Ky. Ct. App. 1990).

29 *Id.*

30 *Id.* at 835.

31 *Id.* at 836.

32 Ross v. Creighton Univ., 957 F. 2d 410 (7th Cir. 1992)

33 *Id.* at 414

34 Simon v. Celebration Co., No. 5D02-2262, 2004 WL 1232762, at*1. (stating that a "quality education" was promised to the plaintiffs, "based upon a time-tested and successful curriculum known as 'best practices.'") *Id.*

35 *Id.* at 5.

36 *Id.* at 4.

37 *Id.*

38 *Simon*, 2004 WL 1232762, at * 4

39 *supra* notes 4, 17.

40 *Id.* at * 3. See *supra* note 4.

41 *Id.* at 5.

42 Tres-AAA-Exxon v. City First Mortgage, Inc., 870 So. 2d 905, 907 (Fla. 4th DCA 2004); Mejia v. Jurich, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001); Magnaleasing Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D. N.Y. 1977), *aff'd.*, 563 F. 2d 567 (2d Cir. 1977); 12A Am. Jur. *Pleading and Practice Forms, Fraud and Deceit* §199 (2004) (referencing instructions to Jury, statements by one having expert knowledge). *Id.*

43 *Id.* Moreover, the prediction of these cases post-*Simon* is not farfetched. In fact, the need for a recognized cause of action under these scenarios is the subject of considerable scholarly discussion. See, e.g., Monica L. Emerick, *The University/Student-Athlete Relationship: Duties Giving Rise To A Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865 (1997); Lesa A. Barkowsky, *The Illiteracy Problem and College Athletes: An Argument for Educational Malpractice*, 16 COLUM.-VLA J.L. & ARTS 537 (1997); Harold B. Hilborn, *Student Athletes and Judicial Inconsistency - Establishing a Duty to Educate*, 89 NW. U. L. REV. 741 (1995).

NOTE: Date Change for the General Meeting of Committees and Sections

Rescheduled for October 1 & 2 at the Tampa Airport Marriott.

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In *Desert Palace, Inc. v. Costa*, the Supreme Court Holds that Circumstantial Evidence May Justify Proceeding on a Mixed Motive Theory

By Donald J. Spero

The recent unanimous Supreme Court decision in *Desert Palace, Inc. v. Costa*,¹ has made it significantly easier for a plaintiff to establish discriminatory motivation behind an employer's adverse employment action. It has done so by lowering the bar for plaintiffs to have their cases decided on a "mixed motive" theory rather than through the commonly invoked *McDonnell Douglas* burden shifting order and allocation of proofs.

McDonnell Douglas burden shifting affords a very light burden on a defendant to rebut a plaintiff's *prima facie* case of discrimination.² It merely requires the production of evidence of a "legitimate, nondiscriminatory reason" for its actions.³ The Supreme Court has stated:

"The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."⁴

Once the defendant has met its burden of production the plaintiff must prove that the defendant's stated reason is not the true reason for its actions.⁵ Because this is often a formidable burden the majority of discrimination cases are dismissed without getting to trial.

A four justice plurality in *Price Waterhouse v. Hopkins*,⁶ held that where a plaintiff can advance evidence of an employer's discriminatory motive for the employer's actions the employer must prove as an affirmative defense "that it would have made the same decision in the absence of discrimination ... by a preponderance of the evidence."⁷

Obviously, this shifting of the burden of proof to the employer makes the defense more demanding than merely articulating a non-discriminatory reason for the employer's action, the much easier task allowed under *McDonnell Douglas* burden shifting.

Prior to *Desert Palace*, courts generally required plaintiffs to produce "direct evidence" of discrimination before shifting the burden of proof to employers.⁸ They focused on Justice O'Connor's statement in her concurring opinion in *Price Waterhouse*⁹ that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."¹⁰

Although Justice O'Connor was not joined in her opinion by any other member of the Court, the lower courts have almost universally required plaintiffs to present direct evidence before they will proceed with a mixed motive analysis. This has led to considerable dispute over what constitutes direct evidence, a matter on which there is hardly universal agreement. As Judge Tjoflat stated in his opinion in *Wright v. Southland Corp.*,¹¹ the question of what constitutes direct evidence is one "that has baffled courts for some time."¹² In *Rollins v. Techsouth, Inc.*,¹³ the court observed that "[d]irect evidence is [e]vidence which if believed, proves existence of fact in issue *without inference or presumption*."¹⁴ Judge Tjoflat found that this definition was too restrictive for discrimination cases. He defined direct evidence in the employment discrimination case context as "evidence from

which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."¹⁵

Desert Palace, Inc. v. Costa will, in many cases, obviate the need to wrestle with the question of whether or not certain evidence is direct evidence. The Court ruled that it is not necessary to present direct evidence of a discriminatory reason for an adverse employment decision in order to raise the question of the existence of a mixed motive in a Title VII discrimination case.¹⁶ The Court looked to the amendment to Title VII in the Civil Rights Act of 1991 at 42 U.S.C. §2000e-2(m).¹⁷ It observed that to establish an unfair employment practice, a plaintiff need only "*demonstrate* that race, color, sex, religion, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."¹⁸ The statute does not specify that only direct evidence is required to establish discrimination.¹⁹

The questions raised in the wake of *Desert Palace, Inc. v. Costa* are manifold. Since 42 U.S.C. §2000e-2(m) is applicable only to discrimination in violation of Title VII it is yet to be determined whether the reasoning of the case is relevant only to Title VII discrimination actions. Further is the perplexing question of what *quantum* of circumstantial evidence is required to place the burden on the employer to show that its motives for an act or a practice are neutral? Finally, will that *quantum* be so small that it will entirely, or at least partially, obliterate resort to the

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McDonnell Douglas burden shifting order and allocation of proofs in the categories of discrimination cases to which the *Desert Palace* decision applies? While the answers to these questions are by no means certain, useful insights may be gained by looking at some of the few lower court decisions applying the *Desert Palace* decision.

I. Is the Reasoning in *Desert Palace* Applicable Only to Title VII Discrimination Cases?

While it is clear that the *Desert Palace* decision is based on the effect of section 2000e-2(m) on burdens of proof in Title VII mixed motive cases, there is reasoning in the decision that might be applied to other cases. The Court commented on the value of circumstantial evidence in proving a discrimination case noting that “[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’”²⁰ Considering the newly enhanced respectability of circumstantial evidence, lower courts might well consider some measure of circumstantial evidence to be sufficient to establish a mixed motive case under statutes other than Title VII.

In *Skomsky v. Speedway SuperAmerica, L.L.C.*,²¹ Judge Magnuson of the United States District Court for the District of Minnesota applied *Desert Palace* to an action brought under the Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.* (the “ADA”).²² He was not concerned that the language of 42 U.S.C. §2000e-2(m) limits its applicability to Title VII and that the ADA does not specifically incorporate that section.²³

It is questionable whether the Supreme Court would agree with

Judge Magnuson’s view in *Skomsky*. In *Raytheon Co. v. Hernandez*,²⁴ a post-*Desert Palace* decision, the Court analyzed an ADA case under the *McDonnell Douglas* burden shifting method.²⁵ However the issue of whether section 2000e-2(m) as interpreted in *Desert Palace* is applicable to an ADA case does not appear to have been argued in that case.

At least one court has declined to find *Desert Palace* applicable to actions under statutes other than Title VII. In *Bolander v. BP Oil Co.*,²⁶ the court ruled that “the mixed motives rationale and *Desert Palace* do not apply to age discrimination cases” without stating the basis for its opinion.²⁷

*Ballatore v. Fairmont Hotel & Resorts, Inc.*²⁸ was an ADEA action in which the court cited *Desert Palace* as the basis for denying the employer’s motion for summary judgment in the plaintiff’s claim of disparate work assignment.²⁹ In referring to a supervisor’s reference to the plaintiff as “that old man” when declining to let him substitute for another employee the court reasoned that *Desert Palace* sanctioned circumstantial evidence as proof of discrimination in an ADEA case.³⁰ The court made no mention of the fact that 42 U.S.C. §2000e-2(m) is limited in its application to Title VII.

The Fifth Circuit also allowed circumstantial evidence to invoke a mixed motive analysis to an ADEA case in *Rachid v. Jack in the Box, Inc.*³¹ The court found that *Desert Palace* was precedent for not requiring direct evidence of discrimination as a prerequisite to applying a mixed motive analysis.³² The court reasoned that the language prohibiting discrimination on the basis of age in the ADEA is like that prohibiting discrimination in Title VII having been modeled on that language.³³ It made no mention of the absence in the ADEA of the 1991 Civil Rights Act language that was central to the reasoning in *Desert*

Palace. Neither did the court take notice of the comments in *Desert Palace* advancing the value of circumstantial evidence in proving discrimination.

*Disher v. Weaver*³⁴ was a race discrimination action brought under both Title VII and 42 U.S.C. §1981.³⁵ The court found *Desert Palace* applicable based on plaintiff’s raising an issue of whether comparators were treated more leniently under like circumstances.³⁶ In denying the defendant’s motion for summary judgment, the court applied a mixed motive analysis to the claims under both statutes.³⁷ The court reasoned that the statutes are analogous and like reasoning should apply to both.³⁸

Some pre-*Desert Palace* authority limited 42 U.S.C. §2000e-2(m) to Title VII discrimination cases. In *Pennington v. City of Huntsville*,³⁹ the Eleventh Circuit found that section inapplicable to Title VII retaliation cases as well as cases brought under 42 U.S.C. §1983.⁴⁰ The court held that section 2000e-2(m) does not state that an unfair employment practice exists where *retaliation* for filing an age discrimination action is a motivating factor in an adverse employment decision along with neutral motivating factors.⁴¹ Discrimination on the basis of race, color, religion, sex or national origin brings the section into play.⁴²

Also to be determined is whether *Desert Palace* will find acceptance under various state discrimination laws, or discrimination or retaliation cases brought under such statutes as the Family and Medical Leave Act,⁴³ the Fair Labor Standards Act,⁴⁴ or the Employee Retirement Income Security Act.⁴⁵ In *Dare v. Wal-Mart Stores, Inc.*,⁴⁶ the court declined to apply it to the plaintiff’s claim under the Minnesota Human Rights Act.⁴⁷ The court reasoned that Minnesota law had not adopted *Price Waterhouse* or the 1991 Civil Rights Act.⁴⁸

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II. How Much Circumstantial Evidence is Necessary to Require a Mixed Motive Decision?

So far, the case law has not revealed what amount or kind of circumstantial evidence is required before the mixed motive analysis will be applied. The plaintiffs in *Campetti v. Career Education Corp.*⁴⁹ and *Rowland v. American General Finance Inc.*,⁵⁰ were allowed to proceed under a mixed motive standard based on *Desert Palace*.⁵¹ However in each case there was enough “smoking gun” direct evidence to present a mixed motive case without invoking *Desert Palace*. In *Campetti* there were statements that “With women like me around, men like you will never make it in corporate America” and “Tony, its tough to be our only male manager!!! We women are ruthless and you are often the brunt of all our frustrations. Thanks for being secure enough to handle all us crazy broads!!”⁵² In *Rowland*, the decision maker stated that he did not need another woman in the district manager position and “the men run the company, and you just have to do what they say.”⁵³

III. What Remains of McDonnell Douglas Burden Shifting?

Judge Magnuson has carried *Desert Palace* about as far as it seems to be able to go by apparently nullifying the *McDonnell Douglas* paradigm in federal discrimination cases. In *Dare v. Wal-Mart Stores, Inc.*, which contained a Title VII race discrimination count, Judge Magnuson ruled that the amendment in the Civil Rights Act of 1991 requires the employer to prove a non-discriminatory reason for its actions by a preponderance of the evidence even where the plaintiff is

unsuccessful in proving pretext.⁵⁴ He reasoned that the *McDonnell Douglas* paradigm put an unreasonable burden on a plaintiff and that it was properly done away with by section 2000e-2(m).⁵⁵ He opined that in *Desert Palace*, “the Supreme Court abrogated the direct/indirect evidence distinction articulated in Justice O’Connor’s *Price Waterhouse* concurrence.”⁵⁶

In *Griffith v. City of Des Moines*,⁵⁷ a Title VII case, the court agreed with *Dare* finding it to be “well-reasoned.”⁵⁸ The *Griffith* court agreed that “in light of the 1991 amendments to Title VII and the Supreme Court’s decision in *Desert Palace*, courts are no longer obliged to apply the *McDonnell Douglas* framework when considering a motion for summary judgment on a ‘single motive’ Title VII claim.”⁵⁹

In the wake of *Desert Palace v. Costa*, employment lawyers and courts will have many challenges in molding new parameters of proof in discrimination and retaliation cases. Past performance indicates that they are well up to the task.

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ties, Tort.

Endnotes:

1. 539 U.S. 90 (2003).
2. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)
3. *Id.* at 802.
4. *Texas Dep’t. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (citation omitted).
5. *Id.* at 256.
6. 490 U.S. 228 (1989).
7. *Id.* at 252–53 (O’Connor, J. concurring).
8. *Desert Palace*, 539 U.S. at 95.
9. *Id.*
10. *Price Waterhouse*, 490 U.S. at 276 (O’Connor J. concurring).
11. 187 F.3d 1287 (11th Cir. 1999).
12. *Id.* at 1288.
13. 833 F.2d 1525 (11th Cir. 1987).
14. *Id.* at 1528 n.6 (quoting BLACK’S LAW DICTIONARY 413 (5th ed. 1979)) (emphasis in original).
15. *Wright*, 187 F.3d at 1293.
16. *Costa*, 539 U.S. at 92.
17. *Id.* at 94.
18. *Id.* (quoting 42 U.S.C. §2000e-2(m) (2000)) (emphasis added).
19. *Id.* at 99.
20. *Id.* at 100 (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).
21. 267 F. Supp. 2d 995 (D. Minn. 2003).
22. *Id.* at 1000.
23. *See id.*
24. 540 U.S. 44 (2003).
25. *See generally id.*
26. No. 3:02CV7341, 2003 WL 22060351 (N.D. Ohio Aug. 6, 2003).
27. *Id.* at *3.
28. No. 02 C 4807, 2004 WL 419908 (N.D. Ill. Feb. 25, 2004).
29. *Id.* at *7.
30. *Id.*
31. No. 03-10803, 2004 WL 1427046 (5th Cir. June 25, 2004)
32. *Id.* at *5.
33. *Id.* at *4.
34. 308 F. Supp. 2d 614 (M.D.N.C. 2004).
35. *Id.* at 620.
36. *Id.* at 623–24.
37. *Id.* at 622.
38. *Id.* at 622 n.4.
39. 261 F.3d 1262, 1269 (11th Cir. 2001).
40. *Id.* at 1269.
41. *Id.*
42. *Id.*
43. 29 U.S.C. §§2601–2654 (2000).
44. §§201–219.
45. §§1001–1461.
46. 267 F. Supp. 2d 987 (D. Minn. 2003).
47. *Id.* at 992.
48. *Id.* at 992–93.
49. No. 02-CV-1349, 2003 WL 21961438 (E.D. Pa. June 25, 2003).
50. 340 F.3d 187 (4th Cir. 2003).
51. *Id.* at 193; *Campetti*, 2003 WL 21961438, at * 8.
52. *Campetti*, 2003 WL 21961438, at * 2, 4.
53. 340 F.3d at 190.
54. 267 F. Supp. 2d at 992.
55. *Id.* at 991–92.
56. *Id.* at 990.
57. No. 4:01-CV-10537, 2003 WL 21976027 (S.D. Iowa July 3, 2003).
58. *Id.* at *12.
59. *Id.*

The Fair Pay Revisions to the Fair Labor Standards Act Regulations

By Donald J. Spero

I. The Purpose of the Revisions of the Fair Labor Standards Act Regulations

The Fair Labor Standards Act (the “FLSA”),¹ which was enacted in 1938 requires the payment of the minimum wage, currently \$5.15 per hour, to covered employees of covered employers.² Additionally, it requires payment to these employees of one and one-half times their “regular rate” for hours worked in excess of forty in a work week.³ Among those not covered by the minimum and overtime pay requirements of the FLSA are employees included in the so-called “white collar” exemptions.⁴ The white collar exemptions apply to individuals employed in an executive, administrative, or professional capacity as well as to outside salespersons.⁵

The FLSA empowers the Secretary of Labor (the “Secretary”) to issue regulations “delimiting” the exemptions.⁶ The former regulations relating to the white collar exemptions required that executive, administrative, and professional employees receive a certain minimum salary. The regulations set two different salary levels within each of these exemptions. Each exemption had a “short test” and a “long test.”⁷ The minimum required salary for the long tests was \$155 per week.⁸ The duties requirements for the long test were more exacting than those for the short test. The latter required a minimum salary, or \$250.00 per week.⁹ These sums, which were set in 1975, have only recently been revised in the new regulations published by the Secretary on April 23, 2004.¹⁰ The revised regulations go into effect 120 days after that publication.¹¹

The Department of Labor recognized that the salary requirements

for the white collar exemptions were unrealistic in the current economy.¹² It was further acknowledged that the employment landscape had changed dramatically over the years since the passage of the FLSA.¹³ Some jobs have disappeared and many new jobs have been added.¹⁴ Accordingly, the Secretary published proposed revised regulations on March 31, 2003.¹⁵ The revisions were intended to reflect the realities of the current economy and employment environment.¹⁶ Additionally, the Secretary sought to clarify and simplify some of the prior requirements which had given rise to considerable dispute over their application.¹⁷ The Secretary solicited comments from the public about the proposed regulations and many were forthcoming.¹⁸ The Secretary took account of many of the comments received relating to the proposed revisions.¹⁹ Some are reflected in the final revisions published on April 23, 2004.²⁰

In addition to raising the salary level of those who are exempt to \$455 per week, the revised regulations change the duties requirements for the various exemptions.²¹ The two tier short test/long test is eliminated.²² There is now only one set of duties for all individuals within each exempt category.²³ The revised duties requirements are intended to make them more easily applied. In addition a new category has been created exempting certain employees who earn no less than \$100,000 per year.²⁴ The restrictions on permissible deductions from exempt individuals’ salaries have also been revised and clarified.²⁵

The revised regulations explicitly state that the exemptions do not apply to certain types of employ-

ment. “[M]anual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy” are not covered by the white collar exemptions.²⁶ Employees such as police officers, fire fighters, deputy sheriffs, correctional officers, fire fighters, paramedics, and hazardous materials workers are not exempt unless they have supervisory or highly skilled duties that bring them into one of the specific exemptions.²⁷

The regulations relating to the duties test will be discussed below separately from those relating to the salary test.

II. The Duties Test — Elimination of the Short Tests

A. The Executive Exemption

To be covered by the executive exemption,²⁸ one:

1. Must receive a salary of no less than \$455 per week which sum does not include the value of board or lodging allowed to the executive.
2. Must have as a primary duty the management of an enterprise or a customarily recognized department or subdivision of the enterprise,
3. Must customarily and regularly direct the work of at least two other employees,
4. Must have the authority to hire and fire employees or have his or her recommendations as to hiring, advancing, promoting, firing, or otherwise changing the status of employees be given “particular weight.”²⁹

The new duties requirements dif-
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fer from those in the former regulations in that they eliminate the percentage limitation on duties not directly and closely related to management.³⁰ Otherwise, under the new regulations, the duties test is the same as the former long test with the added requirement relating to hiring and firing employees which was in the former long test. The term “particular weight” in relation to hiring and firing recommendations takes into consideration whether making such recommendations is part of the individual’s job and the frequency with which the person is called on to make such recommendations.³¹

Management of an enterprise consists of such duties as selecting and training employees, setting their salary levels, assigning work, determining the types of tools and materials that will be used, controlling inventory, providing for safety, planning and controlling the budget, and being in charge of legal compliance.³²

The fact that an employee may perform nonexempt work does not automatically disqualify an otherwise exempt individual.³³ An exempt individual will have the discretion as to when to perform nonexempt duties.³⁴ The regulations give as examples of the permissible performance of nonexempt duties; an assistant manager in a retail establishment serving customers; cleaning the establishment; or stocking shelves.³⁵

One who owns at least twenty percent of the business in which the individual is employed and is active in managing the business is also exempt as an executive regardless of whether or not the person receives a salary.³⁶

B. The Administrative Exemption

To be an “employee employed in a bona fide . . . administrative . . . capacity”³⁷ one must meet the follow-

ing criteria:

1. Receive a salary of at least \$455 per week exclusive of such extras as board and lodging.
2. The individual’s primary duty must be to perform office or non-manual work directly related to the business operations of the employer or the employer’s customers.
3. The primary duty of the individual must be to exercise “discretion and independent judgment with respect to matters of significance.”³⁸

Item number 2 is adopted from the former long test.³⁹ Item number 3 is taken from the former short test.⁴⁰ The new definition retains two of the difficult to apply terms from the former regulations. They are “work directly related to the . . . business operations” and “discretion and independent judgment.”⁴¹ To the latter, the new regulation has added the requirement that the discretion and independent judgment be applied to “matters of significance.”⁴²

The regulations state that work directly related to the business operations means running or servicing the business.⁴³ Examples given of such work include “tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources[,]” along with a number of others.⁴⁴ This is distinguished from production line work or retail sales.⁴⁵ Examples of work directly related to the business operations of the employer are advising or acting as consultants to the customers.⁴⁶

The regulations go into some detail in tackling the issue of what constitutes discretion and independent judgment. The term must be applied in the context of all of the circumstances of a particular employment situation.⁴⁷ It includes formulating or implementing manage-

ment or operating policies, carrying out major assignments in the operation of a business, authority to make significant financial commitments, authority to depart from established policies without prior approval, advising management and long range planning.⁴⁸ An employee may be exercising discretion and independent judgment even if the individual’s decisions are subject to review and may be reversed at a higher level.⁴⁹

The exercise of discretion and independent judgment does not include following well established procedures set out in manuals or merely tabulating data.⁵⁰ However, resort to manuals that can be understood and applied only by those with advanced or specialized knowledge or skills does not disqualify one from the exemption.⁵¹ The fact that a misstep by an employee may cause the employer a serious financial loss will not by itself make an employee exempt.⁵² Similarly, the fact that the individual operates very expensive equipment does not by itself make an employee exempt.⁵³

The regulations provide some examples of persons who may be covered by the administrative exemption. Among those given are insurance adjusters; financial services employees who gather or analyze customers’ financial information or service or promote the employer’s financial products; a team leader of other employees assigned to special projects; an executive assistant to a business owner or high ranking executive; a human resource manager who formulates, implements or interprets company employment policies; and purchasing agents with authority to commit the company to large purchases.⁵⁴ Some of those who the regulations indicate are not exempt are examiners, graders, and comparison shoppers as well as other employees who perform ordinary inspection work along standardized

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lines using well established procedures.⁵⁵

C. Employees of Educational Establishment Who are Exempt Administrative Employees

The administrative exemption includes employees of educational establishments “[w]hose primary duty is performing administrative functions directly related to academic instruction or training” and who receive a salary of not less than \$455 per week.⁵⁶ Alternatively, the compensation requirement for these individuals can be met by paying them a salary rate at least equal to the starting rate for teachers in the employing establishment.⁵⁷ The term educational establishment broadly encompasses elementary and secondary schools as well as institutions of higher learning.⁵⁸

D. The Exemption for Professional Employees

The exemption for professional employees is applicable to those receiving a salary of no less than \$455 per week whose primary duty consists of work:

- (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction; or
- (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.⁵⁹

As with the executive and administrative exemptions, the new regulation eliminates the two-tier long and short tests distinction. The salary and duty requirements are the same for all employees in the category.⁶⁰ Eliminated from the former rule is the requirement under the long test that no more than twenty percent of the professional’s time was permitted to be devoted to work which was “not an essential part of and incidental to” the individual’s

exempt work.⁶¹ The long test in the former regulation required “the consistent exercise of discretion and judgment.”⁶² The term “consistent exercise” does not appear in the revised version.⁶³ The former short test merely required that the employee’s work needed to “include” work requiring the consistent exercise of discretion and judgment or of “work requiring invention, imagination, or talent in a recognized field of artistic endeavor.”⁶⁴ The word “include” does not appear in the new regulation.⁶⁵

The term “work requiring advanced knowledge” applies to work that is primarily intellectual, consistently requiring the exercise of discretion and judgment.⁶⁶ It excludes work that is routine, manual, mechanical, or physical.⁶⁷ Embraced by the term “field of science or learning” are “law, medicine, theology, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from . . . skilled trades.”⁶⁸

Ordinarily, an academic degree in the field in which the employee is working is required for professional status.⁶⁹ However, in some cases, an individual who obtained comparable knowledge from work combined with academic instruction will be covered by the exemption.⁷⁰ Included among professionals if they have the requisite credentials are registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, accountants, executive and sous chefs, paralegals (but only if they use in their work advanced special degrees that they hold in other fields), athletic directors, funeral directors, and embalmers.⁷¹

The category of professionals includes regular teachers in academic establishments as well as those who teach kindergarten or in nursery schools and teachers of

gifted or disabled students.⁷² Flight instructors, driving instructors, and teachers of vocal or instrumental music are also exempt professionals.⁷³

E. Computer Employees as Exempt Professional Employees

The revised regulations place computer employees by themselves in a separate section. Computer employees may be exempt under 29 U.S.C. §213(a)(1) or 29 U.S.C. §213(a)(17). The salary requirement for the former is \$455 per week.⁷⁴ For the latter, it is \$27.63 per hour.⁷⁵ The computer employee exemption applies to employees whose primary duties consist of systems analysis, design or development of computer systems or programs, or design, development modification or testing of computer programs related to machine operating systems.⁷⁶ The computer employee exemption does not cover individuals employed in the manufacture or repair of computers or those who use computers to assist them in nonexempt work.⁷⁷ Of course, computer employees may have additional duties that qualify them for the executive or administrative exemptions.⁷⁸

F. Outside Sales Employees

The outside sales person exemption applies to those whose primary duty is making sales or obtaining orders for contracts, services, or facilities.⁷⁹ To be exempt, the salesperson must, in making sales, be “customarily and regularly engaged away from the employer’s place or places of business.”⁸⁰ The regulations state that any fixed site, including a home or office used by the employee’s headquarters is a place of business of the employer.⁸¹ There is no salary requirement for outside sales persons.⁸² Performing promotion work that is not done in conjunction with making sales is not exempt.⁸³

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The new outside sales regulation differs from the former regulation in that it eliminates the prohibition against the sales person' performing other work during more than twenty percent of the employee's time.⁸⁴

III. The Salary Test

A. Highly Compensated Employees

The new regulations add a provision exempting employees receiving compensation of no less than \$100,000 per year who "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee."⁸⁵ The highly-paid employee exemption only applies to those whose primary duty consist of office or non-manual work.⁸⁶ The individual must receive no less than \$455 per week.⁸⁷ The total compensation may include nondiscretionary payments, including nondiscretionary bonuses.⁸⁸ If, as the end of the compensation year approaches, the employee's earnings are falling short of the \$100,000 mark, the employer may make up the difference with one final payment.⁸⁹

An employee who has worked less than one year may be paid a pro-rata amount of the required \$100,000 based on the amount of time the employee has worked.⁹⁰ An employer is not required to base the total compensation on a calendar year. It may do so on some other fixed fifty-two week period.⁹¹

B. The Salary Basis Test

The salary basis test in the new regulations, like the former regulations, requires the payment of a predetermined amount not subject to deductions except under certain defined circumstances.⁹²

Deductions may not be made based on quantity or quality of pro-

duction or for absences for personal reasons for non-work days occasioned by the employer's operating requirements.⁹³ The full salary must be paid for any week in which the employee works regardless of the number of days or hours worked.⁹⁴ While deductions may be made for the employee's absence for a day or more for personal reasons other than sickness or disability, no deduction is permitted for such absences that are less than one day.⁹⁵ Deductions are permitted for sickness or disability absences of more than one day if the employee is covered by a plan or policy providing pay for such absences.⁹⁶

As in the former regulations, an employer may not deduct from the exempt employee's salary for absences due to jury duty or temporary military duty, but deductions may be made in the amount of the sums the employee is paid for such duty.⁹⁷ As with the former regulations, disciplinary deductions may be made in good faith for violations of "safety rules of major significance."⁹⁸ In addition, a new provision has been added allowing "unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules" that are in writing and applicable to all employees.⁹⁹ Examples given are rules prohibiting sexual harassment or workplace violence.¹⁰⁰

An employer may pay a pro-rata share of the salary for portions of a week that an exempt employee actually works where the individual works less than a full week during the first and last week of employment.¹⁰¹ As in the former regulations, an employer is not required to pay for unpaid leave taken pursuant to the Family and Medical Leave Act.¹⁰²

C. Correcting Improper Deductions

Where an employer has an actual practice of making impermissible deductions, the exemption will be

lost during the period in which such deductions are made for all employees in the same classification as those who have had deductions made and who work for the managers who make such deductions.¹⁰³ Thus, employees working for managers other than those who make improper deductions do not lose their exempt status. Exempt employees who work for the rogue managers in exempt classifications other than the classifications of the employees who are having improper deductions taken do not lose their exempt status.

Where an employer has inadvertently made an improper deduction in isolated incidents, the employees will remain exempt if the employer pays to the employees the amounts deducted.¹⁰⁴ The new amendments allow that where an employer has a clearly disseminated policy of not making improper deductions along with a complaint procedure and the employer reimburses the employees for the improper deductions while making a good faith commitment to comply with the regulations in the future, the exemption will not be lost.¹⁰⁵ This will not apply if the employer willfully makes improper deductions in the future.¹⁰⁶ Accordingly, it is a good idea for employers to have in place a policy that meets these requirements.

IV. Definitions and Miscellaneous Provisions

The revised regulations have a separate section with fairly detailed definitions of some of the more significant terms as well as some miscellaneous provisions. The following are summaries of some of these provisions. In specific cases, the regulations should be consulted for the complete definitions.

A. Primary duty

The primary duty consists of the most important, principal, or main functions of the employee.¹⁰⁷ Consideration should be given to the

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relative importance of the exempt duties, the amount of time spent on them, and the amount of the employee's wage as compared to the pay of nonexempt employees who perform the nonexempt work that the purportedly exempt employee performs.¹⁰⁸

B. Customarily and regularly

This term refers to frequency, which must be more than occasional. That frequency should be regularly, as opposed to occasional.¹⁰⁹

C. Directly and closely related

Functions that are directly and closely related to exempt work are also exempt.¹¹⁰ This type of work facilitates the performance of the exempt work.¹¹¹ It may consist of physical or menial tasks.¹¹² Examples given are "record keeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine."¹¹³ This regulation should be consulted for a litany of more specific examples of directly and closely related work.

D. Use of Manuals

The Secretary has acknowledged that highly skilled exempt employees may need at times to consult with technical manuals that can be understood and applied only by people with their particular skill.¹¹⁴ This is distinguished from those whose nonexempt work is performed by relatively routine selection of procedures from instruction manuals.¹¹⁵

E. Trainees

Employees in training to perform white collar exempt positions are not exempt unless they are actually performing exempt work.¹¹⁶

F. Emergencies

An employee will not lose an exemption if it is necessary for the employee to perform nonexempt work due to an emergency to avert a threat to safety or a work stoppage.¹¹⁷ Emergencies are rare events that cannot be reasonably anticipated.¹¹⁸ Examples of emergencies in the regulations include a mine superintendent who helps dig out miners after an explosion; helping with nonexempt work during a period of heavy workload or to fill rush orders; replacing an ill employee during the first day of illness; and emergency (i.e. non-routine) repair of equipment.¹¹⁹

G. Occasional tasks

The exemption is not lost where the employee performs infrequently occurring nonexempt tasks that cannot feasibly be performed by nonexempt employees where those tasks are essential to the individual's performance of exempt work.¹²⁰

H. Combination exemptions

An employee who performs work that is exempt in one classification will not lose that exemption by virtue of performing exempt work in another classification.¹²¹ Thus, an employee who performs work at times that is administrative and at other time work that falls under the executive exemption will remain exempt.¹²²

I. Special provision for employees of public agencies

Where a public agency has an established pay system or policy under which employees accrue personal leave and sick leave and that policy requires a pay reduction for less than one day of absence for personal reasons, illness or injury, the exemption will not be lost by virtue of such a deduction if the employee voluntarily chooses not to use accrued paid leave for the absence or where accrued leave is

exhausted.¹²³ Neither will the exemption be lost if the employee has not asked to use the accrued leave or if the employee has asked for permission to use it and the request has been denied.¹²⁴

Endnotes:

1. 29 U.S.C. §§201-219 (2000)
2. §206(a)(1).
3. §207(a)(1).
4. §213(a)(1).
5. *Id.*
6. *Id.*
7. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 68 Fed. Reg. 15,560, 15,561-62 (March 31, 2003) (hereinafter Defining I).
8. 29 C.F.R. §§541.1(f), 541.2(e)(1), 541.3(e) (2003).
9. §§541.1(f), 541.2(e)(2), 541.3(e).
10. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 69 Fed. Reg. 22,122, 22,260 (April 23, 2004) (to be codified at 29 C.F.R. pt. 541) (hereinafter Defining II).
11. *Id.* On May 4, 2004, as this article was being prepared, forty-seven Democratic senators were joined by five Republicans in passing an amendment introduced by Senator Tom Harkin of Iowa which would nullify the revisions to the regulations. S. Amend. 3107, 108th Cong. (2004). The Harkin Amendment will not become law unless it is also passed by the House as part of a corporate tax bill. S. 1637, 108th Cong. (2004). It is not certain if that will occur.¹² Defining I, 68 Fed. Reg. at 15,563.
13. *Id.*
14. *Id.*
15. *Id.* at 15,585.
16. *Id.* at 15,563.
17. Defining I, 68 Fed. Reg. at 15,563.
18. *Id.* at 15,560; Defining II, 69 Fed. Reg. at 22,122.
19. Defining II, 69 Fed. Reg. at 22,122.
20. *Id.*
21. *Id.* at 22,123.
22. *See id.* at 22, 139.
23. *Id.*
24. Defining II, 69 Fed. Reg. at 22,123.
25. *Id.* at 22,176.
26. 29 C.F.R. §541.3(a) (2004)
27. §541.3(b)).
28. 29 U.S.C. §213(a)(1).
29. §541.100(a).
30. Compare 29 C.F.R. §§541.1(e), 541.2(d), 541.3(d), 541.5(b) (2003) with 29 C.F.R. §§541.100, 541.200, 541.300 (2004).
31. 29 C.F.R. §541.105 (2004).
32. §541.102.
33. §541.106(a).
34. *Id.*
35. §541.106(b).
36. §541.101).
37. 29 U.S.C. §213(a)(1).
38. §541.200(a)).
39. Compare 29 C.F.R. §541.2(a)(1) (2003) with 29 C.F.R. §541.200(a)(2) (2004).
40. Compare 29 C.F.R. §541.2(b) (2003) with 29 C.F.R. §541.200(a)(3) (2004).
41. 29 C.F.R. §541.200(a)(2)-(3) (2004).
42. §541.200(a)(3).

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43. §541.201(a).
44. §541.201(b).
45. *Id.*
46. §541.201(c).
47. §541.202(b).
48. *Id.*
49. §541.202(c).
50. §541.202(e).
51. §541.704.
52. §541.202(f).
53. *Id.*
54. §541.203(a)-(f)).
55. §541.203(g)-(i)).
56. §541.204(a).
57. §541.600(c).
58. §541.204(b).
59. §541.300(a). As in the former regulations, the salary requirement does not apply to licensed physicians and lawyers engaged in the practice of their profession. *Compare* 29 C.F.R. §541.600(e) (2004) *with* 29 C.F.R. §541.314(a) (2003).
60. 29 C.F.R. §541.300 (2004).
61. *Compare id. with* 29 C.F.R. §541.3(d) (2003).
62. 29 C.F.R. §541.3(b) (2003).
63. 29 C.F.R. §541.300 (2004).
64. 29 C.F.R. §541.3(e) (2003).
65. 29 C.F.R. §541.300(a)(2)(ii) (2004).
66. §541.301(b).
67. *Id.*
68. §541.301(c).
69. §541.301(d).
70. *Id.*
71. §541.301(e)(1)-(10).
72. §541.303(b).
73. *Id.*
74. §541.400(b).
75. *Id.*
76. §541.400(b)(1)-(4); 29 U.S.C. §213(a)(17).
77. 29 C.F.R. §541.401.
78. §541.402.
79. §541.500(a)(1).
80. §541.500(a)(2).
81. §541.502.
82. §541.500(c).
83. §541.503(a).
84. *Compare* 29 C.F.R. §541.500 (2004) *with* 29 C.F.R. §541.5(b) (2003).
85. 29 C.F.R. §541.601(a) (2004).
86. §541.601(d).
87. §541.601(b)(1).
88. *Id.*
89. §541.601(b)(2).
90. §541.601(b)(3).
91. §541.601(b)(4).
92. §541.602(a).
93. *Id.*
94. *Id.*
95. §541.602(b)(1).
96. §541.602(b)(2).
97. §541.602(b)(3).
98. §541.602(b)(4).
99. §541.602(b)(5).
100. *Id.*
101. §541.602(b)(6).
102. §541.602(b)(7).
103. §541.603(b). The requirement that there be an actual practice of making improper deductions rather than the mere existence of a policy authorizing making such deductions

- appears to be adopting the holding in *Auer v. Robbins*, 519 U.S. 452 (1997). Defining II, 69 Fed. Reg. at 22, 180.
104. §541.603(c).
105. §541.603(d).
106. *See id.*
107. §541.700(a).
108. *Id.*
109. §541.701.
110. §541.703(a).
111. *Id.*
112. *Id.*
113. *Id.*
114. §541.704.
115. *Id.*
116. §541.705.
117. §541.706(a).
118. §541.706(b).
119. §541.706(c) (1)-(4). In *Counts v. South Carolina Electric and Gas Company*, the Fourth Circuit was far more lenient to the employer than the regulations. 317 F.3d 453 (4th Cir. 2003). It disallowed overtime pay to otherwise exempt administrative employees who were assigned to nonexempt work during two weeks in each 18 month period when a company plant had to undergo a scheduled shutdown for routine maintenance. *Id.* at 457. The court reasoned that their work was exempt since over the course of an eighteen month period, their primary duty was the performance of exempt work. *Id.* at 456.
120. §541.707.
121. §541.708.
122. *Id.*
123. §541.710(a).
124. *Id.*

Recent Supreme Court Decisions Bearing on the Employment Relationship

By Donald J. Spero

Since the enactment of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.*, along with other legislation barring discrimination in employment on various bases, the Supreme Court has on many occasions decided highly significant issues raised by those statutes. The following is a summary of a number of those cases along with a brief discussion of their rationales. For the purposes of this article, the discussions are of necessity excessively concise. The cases must be examined in their entirety for a full understanding of their implications. It is hoped that the following will, however, provide a useful quick reference and review of their holdings.

I. The Americans With Disabilities Act (the "ADA"), 42 U.S.C

§12101 et seq.

A. In *Toyota Motor Manufacturing Co., Kentucky v. Williams*,¹ the Supreme Court held that the plaintiff, who suffered from carpal tunnel syndrome, was not substantially limited in a major life activity where she was restricted in performing certain manual tasks.² The Court found that in determining if one is disabled, a court must look not at the specific disability.³ Rather, each individual's condition must be analyzed on a case by case basis.⁴ The effects of a disability must be considered beyond an individual's limitations in the workplace.⁵ It held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are

of central importance to most peoples lives. The impairment's impact must also be permanent or long term."⁶

Ms. William's condition "caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens and drives long distances."⁷ Nevertheless the Court held that the plaintiff's limitations "did not amount to such severe restrictions in the activities that are of central importance to people's daily lives that they establish a manual task disability as a matter of law."⁸

B. In *Sutton v. United Air Lines, Inc.*,⁹ the Court held that "the determination of whether an individual is
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disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance eyeglasses and contact lense."¹⁰ The vision of each of the plaintiffs, twin sisters, uncorrected was 20/200 or greater, although it was correctable with lenses to 20/20.¹¹ United declined to hire them as pilots, as the airline required uncorrected vision of no greater than 20/100 for that position.¹² Because their vision was normal with corrective measures, they were held not to be disabled within the meaning of the ADA.¹³

The *Sutton* court also held that an individual's being disabled from performing one job or a limited class of jobs does not necessarily bring that person within the protection of the ADA.¹⁴ "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs."¹⁵

C. *Murphy v. United Parcel Service, Inc.*,¹⁶ and *Albertson's, Inc., v. Kirkingburg*,¹⁷ were decided on the same day as *Sutton*, and like *Sutton*, limited recovery under the ADA. The plaintiff in *Murphy* was a mechanic who suffered from hypertension, which was controlled by medication.¹⁸ He was dismissed from his job at United Parcel Service, Inc., which required him to drive trucks.¹⁹ He was unable to obtain the required Department of Transportation ("DOT") certification for his job because he was clinically diagnosed with high blood pressure.²⁰ As in *Sutton*, the Court found that Mr. Murphy did not meet the ADA definition of "disabled" because, with mitigating measures, he was not substantially limited in performing any major life activities.²¹ The Court further found that he was not "regarded as disabled" from the major life activity of working as he

was only regarded as being unable to perform a job that required DOT certification.²² There were many other jobs, including mechanic jobs, that Mr. Murphy was capable of performing.²³

The plaintiff in *Kirkingburg* had a vision problem that prevented him from obtaining the DOT certification necessary to perform his job as a truck driver for Albertsons.²⁴ His vision in one eye was 20/200 and not correctable leaving him effectively with monocular vision.²⁵ He was fired after his condition was discovered.²⁶ The court found that *Kirkingburg* was not a person with a disability within the meaning of the ADA.²⁷ Monocular vision will not in every case be a substantial limitation on the major life activity of seeing.²⁸ In determining whether there is a substantial limitation, consideration must be given to any manner in which an individual is able to compensate for the condition.²⁹ The existence of disabilities must be assessed on a case by case basis to determine their degree and impact on a given individual.³⁰

Subsequent to his discharge, Mr. *Kirkingburg* obtained a waiver of the DOT requirement and was able to obtain his certification.³¹ The Court gave no weight to the waiver.³² It described the procedure for obtaining a waiver a failed experiment of the DOT in which Albertson's, Inc. was not required to participate.³³

D. *U.S. Airways, Inc. v. Barnett*,³⁴ a Title I case, is the first case in which the Court has articulated views regarding the burdens of proof on the reasonableness of an accommodation. The accommodation sought by the plaintiff was a reassignment to a position to which he was not entitled under the employer's seniority system.³⁵ The seniority system was created by the employer rather than in a collectively bargained union contract.³⁶

Reversing an *en banc* decision of the Ninth Circuit, the Court found that "the seniority system will pre-

vail in the run of cases."³⁷ The Court placed the burden of showing reasonableness on the plaintiff, finding that the ADA "does not require proof on a case by case basis that a seniority system should prevail."³⁸ A plaintiff may prevail in the face of a seniority system if the plaintiff can establish special circumstances.³⁹ One such special situation might be a showing that frequent exceptions have been made in the past leading to other workers not having a reasonable expectation of benefiting by virtue of their seniority.⁴⁰

E. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*,⁴¹ the plaintiffs challenged the West Virginia self-preservation law as being in violation of the Fair Housing Amendments Act of 1988 (the "FHAA") and Title II of the ADA.⁴² The subject state law prohibited the care home from housing those who were unable to remove themselves in case of imminent danger such as fire.⁴³ During the pendency of the suit, the state legislature revoked the self-preservation statute.⁴⁴ The suit was then dismissed on the defendant's motion.⁴⁵

Title II entitles the prevailing party to recover attorney's fees.⁴⁶ The plaintiffs argued entitlement to an award of attorney's fees on the "catalyst theory."⁴⁷ They contended that they were the prevailing party as their suit was the catalyst for the revocation of the statute that brought the state into compliance with the law.⁴⁸ The Court rejected the catalyst theory, finding that to be a prevailing party, it is necessary to obtain a judgment on the merits or a court-ordered consent decree.⁴⁹ The plaintiffs in *Buckhannon* obtained no court-ordered relief.⁵⁰ The plaintiffs might have been considered to be the prevailing party only if there had been a money judgment or some basis for the court to retain jurisdiction to supervise a settlement.

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The *Buckhannon* decision may give defendants in varied types of employment suits an opportunity to avoid paying plaintiff's attorney's fees by voluntarily and unconditionally giving relief to a plaintiff and convincing the court that no supervision is necessary to assure future compliance.

F. The ADA specifically states that one whose condition poses a threat to the health and safety of others may not be a qualified person with a disability.⁵¹ In *Chevron U.S.A., Inc. v. Echazabal*,⁵² the Supreme Court held that an employer is not required to hire one where the work would pose a threat to that individual's own health or safety.⁵³ The Court upheld the EEOC regulation, 29 C.F.R. §1630.15(b)(2), which goes beyond the specific language of the statute.⁵⁴ It requires that to be a qualified person with a disability, "an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace."⁵⁵ The Court also pointed out that 42 U.S.C. §12113(a) allows "qualifications standards" that are "job related and consistent with business necessity" where reasonable accommodation will not eliminate the difficulty posed by the condition.⁵⁶

G. Reversing the Ninth Circuit, the Court in *Raytheon Co. v. Hernandez*,⁵⁷ upheld the employer's refusal to re-hire a long service employee who had been dismissed for substance abuse and was thereafter rehabilitated.⁵⁸ The refusal was based on the company's unwritten policy of not rehiring employees dismissed for misconduct.⁵⁹ Applying the *McDonnell Douglas* burden-shifting order and allocation of proofs, the Court found this policy to be a neutral and thus non-discriminatory reason for its actions and not a *per se* violation of the

ADA.⁶⁰ The case was remanded to the state court for further proceedings, presumably to allow the plaintiff to try to prove that the employer's articulated reason for not rehiring him was a pretext.⁶¹ The Court held that the Ninth Circuit erred in finding that the employer's policy had a disparate impact on rehabilitated substance abusers who are protected by the ADA.⁶² The Court found this reason to be in error as it had not been timely raised by the employer in the district court proceedings.⁶³ It did not rule on whether disparate impact was or was not a valid theory for the employee to assert his claim.⁶⁴

II. Estoppel Under the Americans With Disabilities Act

In *Cleveland v. Policy Management Systems Corp.*,⁶⁵ after the plaintiff, who was severely disabled by a stroke, was fired from her job, she applied for and received Social Security Disability Benefits ("SSDI").⁶⁶ In order to receive SSDI, she was required to establish that she was disabled from gainful employment.⁶⁷ She subsequently sued her employer under the ADA claiming that the company failed to accommodate her disability.⁶⁸ The employer contended that, being disabled, she was estopped from claiming that she could perform the essential functions of her job with or without reasonable accommodation which is a prerequisite for recovery under the ADA.⁶⁹

In finding for the plaintiff, the Court reasoned that one is not barred from receiving SSDI if the person requires an accommodation to perform her work.⁷⁰ The plaintiff could truthfully state that she was disabled for purposes of SSDI.⁷¹ Accommodation is not involved in the Social Security Act definition of the term disabled as it is in the ADA.⁷² There is no *per se* inconsistency in claiming SSDI and claiming an ability to perform a job with a reasonable accommodation.⁷³

III. Sexual Harassment

A. One of the more frequently litigated issues in cases alleging sexual harassment in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.*, is whether employer should be held liable for the offending conduct. In cases decided on the same day, *Faragher v. City of Boca Raton*,⁷⁴ and *Burlington Industries, Inc. v. Ellerth*,⁷⁵ the Supreme Court provided guidelines for answering this question where the sexual harassment is committed by an employee's immediate supervisor or one who is successively higher in the chain of command. The Court held that "a tangible employment action taken by an employer becomes for Title VII purposes the act of the employer."⁷⁶ The Court then proceeded to render the draconian ruling that "[n]o affirmative defense is available, however, where the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."⁷⁷

The Court treated claims of a sexually "hostile environment" differently from those in which there is a tangible employment action. Hostile environment sexual harassment can be the result of conduct such as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁷⁸ Under *Ellerth*, the employer can prevail where a hostile environment based on sexual harassment is shown to exist only if it fulfills the conditions of an affirmative defense set out by the Supreme Court. The employer must prove by a preponderance of evidence that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."⁷⁹ Thus, the Court expanded the liability

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ity of an employer for a supervisor's hostile environment sexual harassment, but it fell short of imposing *per se* liability by allowing the affirmative defense.

B. *Farragher* and *Ellerth* left open questions as to what, short of discharge, demotion and undesirable assignment constitutes a tangible employment action. The Supreme Court answered one such question in *Pennsylvania State Police v. Suders*.⁸⁰ There, it found that a hostile environment created by a supervisor that leads to a constructive discharge may constitute a tangible employment action.⁸¹ Writing for an eight to one majority Justice Ginsburg said it best:

to establish "constructive discharge," the plaintiff must ... show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.⁸²

Thus, where an employee justifiably resigns due to a hostile work environment, there is a tangible employment action, but the em-

ployer may invoke the *Farragher/Ellerth* affirmative defense, unlike in other instances of tangible employment actions.⁸³ However, where the constructive discharge is the consequence of an official act of the employer such as demotion or reduction in compensation the employer may not avail itself of that affirmative defense.⁸⁴

C. Settling an issue on which the federal appellate courts had differed, the Court in *Oncale v. Sundowner Offshore Services, Inc.*⁸⁵ ruled that same-sex harassment was actionable sex discrimination under Title VII of the Civil Rights Act of 1964.⁸⁶ This ruling is applicable even where the complained of conduct is not motivated by sexual desire.⁸⁷

The decision is also notable for Justice Scalia's admonition that Title VII is not to be invoked as a "code of civility in the workplace." He stated that

the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it prevents only behavior so objectively offensive as to alter the 'conditions' of the victim's employment.⁸⁸

IV. Burdens of Proof

A. *Reeves v. Sanderson Plumbing Products, Inc.*,⁸⁹ was an Age Discrimination In Employment Act ("the ADEA") discharge case in which the Court decided that, generally, a plaintiff needs merely to prove that the defendant's proffered neutral reason for its action is pretextual to withstand a judgment as a matter of law.⁹⁰ It held that the appellate court erred in assuming that "a *prima facie* case of discrimination, combined with sufficient evi-

dence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination."⁹¹

In *Reeves*, the Court found that in most cases, "pretext plus" is not necessary for a plaintiff to get to a jury.⁹² However, the Court held out the possibility that in some cases more would be required than showing that the defendant's articulated reason is unworthy of belief.⁹³ If it is evident that the employer gave a false reason for its explanation to cover up some reason other than discrimination it might be that "no rational factfinder could conclude that the action was discriminatory."⁹⁴ In her concurring opinion, Justice Ginsburg "anticipate[d] that such circumstances will be uncommon."⁹⁵

B. In *Desert Palace, Inc. v. Costa*,⁹⁶ the Court ruled that amendments to Title VII by the 1991 Civil rights act made inapplicable Justice O'Connor's oft relied-on observation that direct evidence of discrimination is necessary before a discrimination case will be analyzed on a mixed motive basis.⁹⁷

When a case proceeds under the commonly-applied *McDonnell Douglas* burden shifting standard, the employer is required merely to state and not to prove that its actions were based on neutral considerations.⁹⁸ When the defendant does so, the plaintiff has the often insurmountable burden of proving that the employer's stated reasons are a pretext for discrimination.⁹⁹ A plaintiff who is able to produce sufficient evidence of discrimination escapes this burden by establishing that even though the employer had a non-discriminatory reason for its actions, discrimination also played a role.¹⁰⁰ In such a case, it is said that there is a mixed motive for the employer's actions.¹⁰¹ The burden of proof then shifts to the employer to

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prove it would have made the same decision in the absence of discriminatory motives.¹⁰² This is, of course, more difficult than merely stating a non-discriminatory reason.

Writing for the Court, Justice Thomas observed that, historically, circumstantial evidence has been entitled to no less dignity than direct evidence.¹⁰³ It should be allowed to establish a mixed motive.¹⁰⁴ “Smoking gun” direct evidence is no longer required to shift the burden of proof to the employer.¹⁰⁵

V. Employer Mandated Arbitration of Employment Claims

A. In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁰⁶ the Court found the arbitration clause in the “U-4” form used in the securities industry to be enforceable under the Federal Arbitration Act¹⁰⁷ (the “FAA”) to bar a judicial action under the ADEA.¹⁰⁸ The Court reaffirmed its view that statutory claims may be subject to an arbitration agreement that is enforceable under the FAA.¹⁰⁹ This decision was a departure but probably not a complete reversal of the Court’s reasoning in *Alexander v. Gardner-Denver*.¹¹⁰ There, the Court held that an employee whose claim had been decided in binding arbitration pursuant to the arbitration clause in a collective bargaining agreement was not barred from pursuing a judicial remedy under Title VII.¹¹¹

Gilmer left an important question unresolved. The FAA provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹¹² Traditionally, the term “interstate commerce” has been broadly construed to embrace activities with very minimal connection to interstate commerce.¹¹³ It would include the activities of employees covered

by such statutes as Title VII and the ADEA. The U-4, however, is not strictly a “contract of employment.” It is required to be signed by customers of security firms as well as by their employees.¹¹⁴ Therefore, it was not necessary for the Court to decide in *Gilmer* whether the FAA excluded only transportation workers or whether it was inapplicable to all employees who would ordinarily be found to engage in interstate commerce.

B. The Supreme Court resolved the question left open in *Gilmer* in *Circuit City Stores, Inc. v. Adams*.¹¹⁵ In *Circuit City*, the Court held that the FAA made arbitration provisions in employment contracts enforceable as to statutory claims except for those involving transportation workers.¹¹⁶ Writing for a 5-4 majority, Justice Kennedy noted that the specific categories excluded from the coverage of the FAA were already clearly within the control of Congress to regulate.¹¹⁷ When the statute was enacted, Congress had already passed legislation relating to the arbitration of seamen’s employment disputes and the Railway Labor Act was being considered for passage.¹¹⁸ Justice Kennedy wrote that “[i]t is reasonable to assume that Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.”¹¹⁹

C. The decision in *Wright v. Universal Maritime Service Corp.*,¹²⁰ negates requiring arbitration of statutory discrimination claims under the general arbitration clause in a collective bargaining agreement.¹²¹ The plaintiff in *Wright* was not required to pursue his rights under the ADA by arbitration although the collective bargaining under which he was covered. That agreement provided that “...no provision or part of this Agreement shall

be violative of any Federal or State Law.” The Court found that this language was not a specific waiver of the plaintiff’s right to assert an ADA claim in court. The Court required that such a waiver be “clear and unmistakable.” 525 U.S. at.82. Following the reasoning of the Court it is not certain whether any language can be written into a collective bargaining agreement that will waive the right to a judicial forum for a statutory claim. If so that language would need to be sufficiently explicit to leave no room for doubt.

D. The Court restricted the efficacy of employer mandated arbitration of statutory employment claims in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). There it held that an agreement to arbitrate between an employer and an employee does not bar the EEOC from suing an employer under the ADA, and by implication under Title VII, for monetary and other specific relief for such an employee. The Court reasoned that the statute empowers the EEOC to sue and it can not be deprived of that right by an arbitration agreement to which it is not a party. It pointed out that the statute “...specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed.” 534 U.S. at 298. The Court observed that in an action brought by the EEOC the same defenses are assertable against the agency as against a party. An employer would be able to assert failure of the individual to mitigate damages or setoff for any sums the individual may have recovered on his own with respect to the claim.

E. In *Green Tree Financial Corporation v. Randolph*, 531 U.S. 79 (2000) the Court held that an arbitration clause in a financing contract was enforceable despite the fact that it did not indicate which party would be responsible for which ar-

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bitration related costs. Randolph claimed that the costs of arbitration might prevent her from vindicating her rights. The court held that arbitration clauses that may require a party to pay arbitration costs are not *per se* invalid. It ruled that "... a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs." *Id.* at 94

F. The recent five to four Supreme Court decision in *Green Tree Financial Corp. v. Bazzle*, ___ U.S. ___ (2003) demonstrates the possibility that class actions may be heard by an arbitrator. That case involved actions by borrowers against a lender under contracts requiring in part that "All disputes, claims or controversies arising from or relating to this contract or the relationship which result from this contract ... shall be resolved by binding arbitration selected by us with the consent of you." The Supreme Court of South Carolina ruled that since the contracts were silent on arbitration of class claims, such claims were arbitrable. The Supreme Court had jurisdiction to accept the appeal under the Federal Arbitration Act. The Court held that whether the contract prohibited arbitration of class claims was an issue of contract interpretation which was for the arbitrator to decide and not the court. The Court observed that only certain "gateway" matters are to be decided by a court. These would include such questions as whether the parties have entered into a binding arbitration contract or whether their arbitration agreement applies to the matter in issue. However the question of whether the arbitration clause in question applies to a class action is a matter of contract interpretation which arbitrators are well suited to decide. The

moral of the story is for the drafter of an arbitration clause to determine whether or not the client wants class claims to be subject to arbitration and specifically set forth that preference in the contract.

In response to *Green Tree Financial Corp. v. Bazzle* the American Arbitration Association has drafted supplementary rules for class action arbitrations that are available on its website, www.adr.org.

VI. Limitations of Actions

A. In *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) (the "Amtrak" case) the Supreme Court continued to hold that to be timely a charge must be filed with the EEOC within 180/300 days of a discrete retaliatory or discriminatory act. The plaintiff averred that he had been subject to ongoing racial harassment as well as to discrete discriminatory acts such as disparate discipline during the entire course of his employment. The court held that "...Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300- day time period after the discrete discriminatory act occurred." 536 U.S. at 113.

On the other hand the Court found that hostile environment claims can be continuing violations. In such a case the employer may be subject to liability for *related* discrete acts committed more than 180/300 days prior to the plaintiff's filing an administrative charge with the EEOC if at least one act was committed within the filing period. The Court reasoned that hostile environment is one unlawful employment practice which is committed over a period of time. It may consist of discrete acts which do not by themselves constitute a violation. 535 U.S. at p. 117, 118.

B. In *Edelman v. Lynchburg College* 122 S.Ct. 1145, 1152 (2002) the Supreme Court recently found

the EEOC "relation back" regulation to be "... unassailable ." That regulation, 29 CFR §1601.12(b), allows a charge to "...be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify or amplify allegations made therein." Amendments, including those with additional allegations of unlawful employment practices "...related to or growing out of the subject matter of the original charge will relate back to the date that the charge was first received."

Edelman had faxed an unverified letter to the EEOC within the applicable filing period and later filed a verified charge outside of the filing period. The Court held that his charge was timely. The filing of the verified charge related back to the date of the timely filing of the initial complaint. See also *Sanchez v. Standard Brands* where the Fifth Circuit held that the scope of a judicial action under Title VII "... is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F.2d 455, 466 (5th Cir. 1970). (internal citation omitted) The action "...may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission." 431 F.2d at 466 quoting *King v. Georgia Power Co.*, 295 F. Supp. 943, 947 (N.D. Ga. 1968). The plaintiff had filed a timely charge on the EEOC form on which she checked off the check block indicating discrimination on the basis of sex. After the time for filing she amended the charge to include national origin discrimination. The court ruled that the amendment was timely having related back to the original filing.

C. *Jones v. R. R. Donnelly & Son Co.* ___ U.S. ___ (2004). Prior to the enactment of 28 U.S.C. §1658 on December 1, 1990 the limitation
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period for filing civil actions under federal statutes that had no limitations of their own was the most analogous limitation period of the state in which the action arose. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987). Section 1658 provides that the limitation period for filing suit under a federal statute enacted after its effective date is four years, if a limitation period is not otherwise provided. In *Donnelly* the Court held that the four year limitation period in section 1658 applies to federal statutes that were enacted prior to December 1, 1990 but amended thereafter.

Donnelly was a race discrimination action brought under 42 U.S.C. §1981, a post Civil War statute first enacted in 1866. It provides that all citizens shall have the right to make and enforce contracts as that afforded to white citizens. It is commonly invoked in race discrimination actions as, unlike Title VII, it does not require timely exhaustion of administrative remedies. The Supreme Court severely limited the applicability of section 1981 in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Court held that 1981 protection only extended to the making of a contract. It did not apply to discriminatory acts that occurred after the formation of the contract, *i.e.* after hiring. Thus no action could be brought under 1981 for creating a racially hostile environment, demotion, refusal to promote or discharge. Congress addressed this decision in the 1991 Civil Rights Act with the passage of 42 U.S.C. 1981(b). The amendment defined the right “to make and enforce contracts” to include “...the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, and terms, and conditions of the contractual relationship.”

The suits of the plaintiffs in

Donnelly would have been time barred under the applicable Illinois limitation period which was two years, but they were timely under section 1658. The Court found that the post 1990 amendment that added section 1981(b) constituted a post section 1658 enactment thereby making the four year limitation period applicable.

VII. The Age Discrimination in Employment Act (the “ADEA”) - 29 U.S.C. §621 et seq.

A. *O’Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996) was an ADEA action brought by a plaintiff who was 56 years old when he was discharged by his employer. He was replaced by an individual who by virtue of being 40 years old was also within the age group protected by the ADEA, although just barely. The Court held that being replaced by one outside of the protected age group is not an element of a *McDonnell Douglas prima facie* case. The Court stated that “The fact that someone in the protected class has lost out to another person in the protected class is ... irrelevant so long as he has lost out *because of his age.*” 517 U.S. at p. 312. (emphasis in the original).

B. The plaintiffs in *General Dynamics Land Systems, Inc. v. Cline* ___ U.S. ___ (2004) complained of a change in company policy under its collective bargaining agreement with their union which eliminated future retirement health benefits for employees who were then under 50. They complained of “reverse age discrimination.” Overruling an EEOC regulation, 29 C.F.R. §1625.2(a), that supported the plaintiffs’ position the Court held that the ADEA does not bar favoring older persons over those who are younger. It found the EEOC interpretation to be “clearly wrong.” The Court looked to the legislative history of the act which showed that discussions of the legislation in

Congress focused on the needs of older workers.

VIII. The Family and Medical Leave Act (the “FMLA”) - 29 U.S.C. §2601 et seq.

The recent Supreme Court decision in *Ragsdale v. Wolverine World Wide, Inc.* 122 S.Ct. 1155 (March 19, 2002) limited the power of the Secretary of Labor (the “Secretary”) to promulgate rules under the Family and Medical Leave Act (the “FMLA”), 29 U.S.C. §2601 et seq. The Court held that the Secretary exceeded her power by promulgating a regulation, 29 CFR §825.700(a). Under that regulation “If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” The Court reasoned that enforcement of the regulation could result in an employee receiving more than the 12 weeks of leave in a year that was authorized by Congress.

IX. Pleading

The Supreme Court decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) rejected the reasoning of lower court decisions which imposed a pleading burden on discrimination plaintiffs greater than that required by Federal Rule of Civil Procedure 8(a)(2). That rule requires a complaint to contain no more than “... a short and plain statement of the claim showing that the pleader is entitled to relief.” The Court ruled that discrimination complaints need not state facts that demonstrate the existence of a *McDonnell Douglas prima facie* case in order to withstand a Rule 12(b)(6) Motion to Dismiss.

The Court held that the *McDonnell Douglas prima facie* case “...is an evidentiary standard and not a pleading requirement.” 534 U.S. at 510. It reasoned that the elements required to prove a case

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of discrimination by circumstantial evidence, as set forth in the *McDonnell Douglas*, are not applicable in every discrimination case. Proof may be made by direct evidence which might be uncovered after the initial pleading stage in discovery. *Id.* The Court would not require a plaintiff to plead more facts than it might be necessary to prove. Such would be inconsistent with the simplified pleading requirements of Rule 8(a)(2). *Id.* The Court pointed to the availability of discovery to avoid surprise.

X Retaliation

Clark County School District v. Breeden, 532 U.S. 268 (2001). The plaintiff complained of the reaction of her supervisor and a co-worker to a statement in an employee's psychological evaluations they were reviewing in the course of their work. The evaluation indicated that an employee had stated to a co-worker that "I hear that making love to you is like making love to the Grand Canyon." There were chuckles and a comment by the supervisor to the plaintiff that he did not know what the statement means. The plaintiff claimed that she suffered retaliatory adverse action because of her complaint of sexual harassment.

In finding that there was no merit to the plaintiff's claim the Court observed that "No reasonable person could have believed that the single incident recounted above violated Title VII's standard [of severity and pervasiveness necessary to constitute sexual harassment]." 532 U.S. at 271. The holding of the court is that there is no retaliation where adverse employment action is taken after a complaint of a violation of Title VII where the plaintiff does not have a good faith, reasonable belief that the conduct complained did in fact violate the statute.

To establish retaliation an em-

ployee must demonstrate (1) that he or she engaged in protected conduct, (2) that an adverse employment action was taken against the employee and (3) that the adverse action and the protected conduct are not wholly unrelated, *i.e.* that there is a causal connection between them. The causal connection is often established by showing temporal proximity between the time of the protected conduct and the taking of the adverse action. The Court commented with approval about lower court cases ruling on temporal proximity to establish causal connection that required that proximity to be "very close." The Court cited cases holding respectively that four months and 20 months are not sufficiently close to constitute temporal proximity.

XI. The Fair Labor Standards Act (the "FLSA") 29 U.S.C. §201 et seq.

Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882 (2003). Although the FLSA was first enacted in 1938 it was not until 2003 that the Supreme Court had occasion to consider whether an action under that statute filed in state court could properly be removed by the defendant to federal court. The Court held that it could.

The federal removal statute provides that "... except as otherwise provided by Act of Congress any civil action brought in a State court of which the district court of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where the action is pending." 29 U.S.C. §1441(a). The FLSA allows that an action "... may be maintained against any employer ... in any federal or state court of competent jurisdiction." 29 U.S.C. §216(b) Since the federal courts have original

jurisdiction in FLSA actions the removal statute permits their removal from state court to federal court. After the defendant in *Breuer* removed the case from the state court in which it was filed to federal court the plaintiff argued the removal was improper. He contended that the word "maintained" in the FLSA means that once a case is filed in state court it can be retained there by the plaintiff until its conclusion.

In rejecting the plaintiffs argument the Court noted that "maintain" is an ambiguous word which must be considered in the context in which it is used. When used in reference to legal actions it commonly means to "bring" or to "file." The Court also pointed out that there are many statutes in which Congress has barred the removal of certain types of action to federal court. Where it has done so it has used precise language prohibiting removal. If it had intended that FLSA actions could not be removed it would have done so unambiguously.

XII. Undocumented Workers

Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137 (2002) involved an employer who committed an unfair labor practice when it fired one Jose Castro for supporting a union. Mr. Castro was an undocumented alien who illegally obtained his employment with false documents. Subsequent to his dismissal he did not obtain legal entry into the United States. In awarding relief against the employer the N.L.R.B. (the "Board") ordered the employer to pay Mr. Castro lost wages from the date of his dismissal until the date it learned of his illegal status.

The Court reversed the Board's decision finding that awarding back pay to an undocumented alien conflicts with the policy of the Immigra-

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tion Reform and Control Act of 1986 ("IRCA"). The Court stated that:

... allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing with the NLRA, it is not so unbounded as to authorize this sort of an award.

535 U.S. 151-52

The denial of backpay did not preclude the Board from imposing other remedies. The Court did not question the propriety of requiring the employer to post notices advising the employees of their rights nor did it question other sanctions that may be imposed by the Board. The application of this doctrine to the various federal employment discrimination statutes and to the FLSA is yet to be fleshed out. It is not unlikely that an employer may be subject to penalties other than backpay

for violating employment statutes. Injunctive relief and awards to plaintiffs of attorneys fees might result. Additionally on its facts *Hoffman Plastics* only applied to pay for work not performed. It does not necessarily preclude the award of compensatory damages for personal injuries. Neither did the case deal with the situation where an undocumented employee has been paid for work already performed at a rate that is discriminatory in comparison with the compensation paid for like work to one who is not in the individual's protected group.

XIII. Immunity of States to Damage Suits by Individuals

The Eleventh Amendment to the United States Constitution prohibits suits for money damages by individuals against states and their agencies. Congressional legislation will override that immunity only if Congress states its intention to do so in unmistakable terms and only if it does so pursuant to a properly invoked power. Subsequent to the adoption of the Eleventh Amendment, the Fourteenth Amendment was adopted granting individuals the right to due process and equal protection under the law. That Amendment grants Congress the power to enact legislation to enforce those rights.¹²² That power is the only authority under which Congress is authorized to enact legislation that will override state immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In order to effectively abrogate state immunity "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)

The Court has decided a number of cases under statutes granting employees rights that deal with whether an individual may sue a state or its agencies under those statutes. Generally the Court has not questioned the intention of Con-

gress to override Eleventh Amendment. The cases have largely turned on the question of Congress' power. That power has been found to exist only where Congress has established that there is a history of state denial of the right sought to be protected by the statute. The exercise of that power must be congruent and proportional to that right. With considerable consistency a five to four majority of the Court in recent years has upheld state immunity. The following are brief summaries of the issues and the outcome of some of the cases.

A. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). the Court considered a Title VII discrimination action filed against the state on behalf of all active and retired male employees of the state of Connecticut. The plaintiffs alleged that the state's statutory retirement program discriminated against them on the basis of sex. State employees had been brought under the coverage of Title VII by the changes in the definitions in the 1972 amendments.¹²³

In *Fitzpatrick*, the Court found Title VII was enacted pursuant to Section 5 of the Fourteenth Amendment, which granted Congress the power to enforce the provisions of that Amendment by "appropriate legislation."¹²⁴ The Court reasoned "[w]hen Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Id.* at 456.

B. In *Alden v. Maine*, 527 U.S. 76 (1999). a five-Justice majority of the Court left no doubt that it would find Congress did not have the power to remove state immunity to FLSA actions by individuals in federal court. See 527 U.S. at 749-50. In *Alden*,

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state employees tried to maintain an FLSA action against Maine in a court of that state. They argued that the state court was required by the Supremacy Clause to entertain their action. *Id* at 731. In holding that Congress was without power under the Supremacy Clause to abrogate the immunity of a state to suit in its own courts, the Court was not required to rule on Eleventh Amendment immunity in federal court. However, the arguments in both the majority opinion and the dissent were the same as those that have been advanced in support of their respective positions in Eleventh Amendment cases. Clearly, the present majority would not allow an FLSA action to proceed against a state in federal court. *Id*.

C. In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) the Court found Congress had articulated its intention to abrogate states Eleventh Amendment immunity to suits by individuals under the ADEA but its doing so was not a proper exercise of the authority granted to it under Section 5 of the Fourteenth Amendment. The Court found that the act failed the congruence and proportionality test. The Court reasoned that "... the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." 528 U.S. at 83. The Court further found that in enacting the ADEA Congress did not establish that there was a pattern of state violations of the equal protection clause by discriminating against people because of age. "A review of the ADEA's legislative record as a whole ... reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." 528 U.S. at 91.

D. The Supreme Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) ruled that Congress did not effectively override state's Eleventh Amendment immunity to suits against states under Title I of the ADA. 531 U.S. 356 (2001). Since the Eleventh Amendment only prohibits suits by individuals against a state for money judgements it would not prevent a Title I suit by the Attorney General.

The Court did not question the intention of Congress to abrogate state immunity in Title I of the ADA. However the Court reasoned that Congress had not established a history of unconstitutional denial of due process against disabled individuals in employment. The Court therefore ruled that:

... in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here...

531 U.S. at 374

E. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) upheld the right of individuals to sue states and their agencies for money judgements under the Family and Medical Leave Act (the "FMLA"), 29 U.S.C. §2601 *et seq*. In finding that Congress had acted appropriately under the power granted it in section 5 of the Fourteenth Amendment a six to three majority ruled that the statute addressed a well established gender based disparity by states in their grants of leave rights for family purposes. There is a history of states' granting maternity leave but not granting paternity leave to employees. This disparity fosters the view that the primary role of women is in

the home thereby diminishing their opportunities in the workplace. The FMLA is gender neutral in extending the same leave rights for family purposes to all employees. It does not relegate those rights with reference to gender.

The Court noted that state gender discrimination invokes a heightened level of scrutiny under which it can stand only if embodies important governmental objectives and is substantially related to the achievement of those objectives. The Court proceeded to find that:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

538 U.S. at 737

E. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) a five to four majority of the Court held that an action for money damages could be maintained under Title II of the ADA by a mobility impaired individual who had to crawl up stairs to reach a courtroom in order to answer criminal charges. The courthouse had no elevator. Title II requires public entities to afford access to their programs to persons with disabilities. The majority opinion is not a blanket endorsement of Title II suits against States for deprivation of program access under Title II. Rather it

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is narrowly focuses on the due process aspect of access to judicial proceedings. In applying the *Boerne v. Flores*, “congruence and proportionality test” the majority found that when Congress enacted the statute it had before it a history of State deprivation of access by persons with disabilities to State programs. The application of Title II to remedy this deprivation, at least as it relates to courthouse access, was held to be a proportional response to by Congress to this situation.

Endnotes:

1. 534 U.S. 184 (2002).
2. *Id.* at 202.
3. *Id.* at 198.
4. *Id.*
5. *Id.* at 200–01.
6. *Williams*, 534 U.S. at 198.
7. *Id.* at 202.
8. *Id.*
9. 527 U.S. 471 (1999).
10. *Id.* at 475.
11. *Id.*
12. *Id.* at 476.
13. *Id.* at 488–89.
14. *Sutton*, 527 U.S. at 490–91.
15. *Id.* at 491.
16. 527 U.S. 516 (1999).
17. 527 U.S. 555 (1999).
18. *Murphy*, 527 U.S. at 519.
19. *Id.* at 520.
20. *Id.* at 519.
21. *Id.* at 521.
22. *Id.* at 525.
23. *Murphy*, 527 U.S. at 525.
24. 527 U.S. at 560.
25. *Id.* at 559.
26. *Id.* at 560.
27. *Id.* at 567.
28. *Id.*
29. *Kirkingburg*, 527 U.S. at 566.
30. *Id.* at 567.
31. *Id.* at 560.
32. *Id.* at 571.
33. *Id.* at 576.
34. 535 U.S. 391 (2002).
35. *Id.* at 394.
36. *Id.* at 404.
37. *Id.* at 394.
38. *Id.* at 403.
39. *Barnett*, 535 U.S. at 405.
40. *Id.* In *Trans World Airlines, Inc. v. Hardison*. 432 U.S. 63, 79 (1977) the Supreme Court held that the employer did not have to violate the union seniority rights of other employees or incur more than a very minimal expense to accommodate an employee’s religious observance. The employer was not required to pay other employees overtime to take the plaintiff’s Saturday shift. *Id.*
41. 532 U.S. 598 (2001).
42. *Id.* at 601.
43. *Id.* at 600.
44. *Id.* at 601.
45. *Id.*
46. 42 U.S.C. §12205.
47. *Buckhannon*, 532 U.S. at 601.
48. *Id.*
49. *Id.* at 603-04.
50. *See id.* at 601.
51. 42 U.S.C. §12113(b).
52. 536 U.S. 73 (2002).
53. *Id.* at 76.
54. *Id.* at 87.
55. 29 C.F.R. §1630.15(b)(2) (emphasis added).
56. *Id.* at 78.
57. 124 S.Ct. 513 (2003).
58. *Id.* at 521.
59. *Id.* at 516.
60. *Id.* at 521.
61. *Id.*
62. *Hernandez*, 124 S.Ct. at 521.
63. *Id.* at 517.
64. *Id.* at 518.
65. 526 U.S. 795 (1999)
66. *Id.* at 798.
67. *Id.* at 801.
68. *Id.* at 799.
69. *See id.* at 800.
70. *Cleveland*, 526 U.S. at 802.
71. *See id.*
72. *Id.* at 803.
73. *Id.* at 802.
74. 524 U.S. 775 (1998).
75. 524 U.S. 742 (1998).
76. *Id.* at 762 (emphasis added).
77. *Faragher*, 524 U.S. at 778.
78. 29 C.F.R. §1604.11(a).
79. 524 U.S. at 745.
80. 124 S.Ct. 2342 (2004).
81. *Id.* at 2352.
82. *Id.* at 2347.
83. *See id.* at 2353.
84. *See id.*
85. 523 U.S. 75 (1998).
86. *Id.* at 79.
87. *Id.* at 80.
88. *Id.* at 81.
89. 530 U.S. 133 (2000).
90. *Id.* at 143.
91. *Id.* at 146.
92. *Id.* at 148.
93. *Id.*
94. *Reeves*, 500 U.S. at 148.
95. *Id.* at 154 (Ginsburg, J. concurring).
96. 539 U.S. 90 (2003).
97. *Id.* at 99-100.
98. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)
99. 42 U.S.C. §2000e-2(m).
100. *Green*, 411 U.S. at 804.
101. *Costa*, 539 U.S. at 94.
102. 42 U.S.C. §2000e-5(g)(2)(B).
103. *Costa*, 539 U.S. at 100.
104. *Id.*
105. *See id.*
106. 500 U.S. 20 (1991).
107. 9 U.S.C. §§1-16.
108. *Gilmer*, 500 U.S. at 35.
109. *Id.* at 26.
110. 415 U.S. 36 (1974).
111. *Id.* at 49.
112. 9 U.S.C. §1 (2003).
113. *See, e.g., Scarborough v. United States*, 431 U.S. 563 (1977).
114. *See Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Arbitration Process for Claims of Employment Discrimination*, 64 Fed. Reg. 59,815-01, 59,817 (Nov. 3, 1999).
115. 532 U.S. 105 (2001).
116. *Id.* at 109.
117. *Id.* at 120-21.
118. *Id.* at 121.
119. *Id.*
120. 525 U.S. 70 (1998).
- 121.
122. U.S. const. amend XIV, §5.
123. *See H.R. 1746*, 92d Cong., 86 Stat. 103 (1972).
124. *Fitzpatrick*, 427 U.S. at 453 (quoting U.S. Const. amend. XIV, §5).

