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The Labor and Employment Law Decisions of the Supreme Court's 2003-04 Term

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I. Introduction

It is longstanding tradition for the Secretary of the ABA's Labor and Employment Law Section to prepare a summary of the labor and employment decisions issued during each Supreme Court term. The paper is presented at the Section's annual meeting and then published in THE LABOR LAWYER. In preparing for this task, I reviewed each of the articles published by the various Section secretaries over the past decade.[1] I was struck by the consistent good work and thoughtful analysis of these articles. I have big shoes to fill.

Not surprisingly, many of the authors attempted to identify an overarching theme from that year's set of decisions. Sometimes, the theme reflected the number of cases decided in a particular subject matter area, such as "the year of the sexual harassment trilogy" as identified by Marley Weiss in the 1997–98 term.[2] At other times, the theme emerged from a recurring procedural pattern.[3] In some years, of

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1. Maria O'Brien Hylton, *The Supreme Court's Labor and Employment Decisions: 2002–2003 Term*, 19 LAB. LAW. 247 (2003); Cynthia Estlund, *The Supreme Court's Labor and Employment Cases of the 2001–2002 Term*, 18 LAB. LAW. 291 (2002); Henry H. Perritt Jr., *Analysis of U.S. Supreme Court Employment Law Decisions*, 17 LAB. LAW. 367 (2001); James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999–2000 Term*, 16 LAB. LAW. 151 (2000); Harry F. Tepker Jr., *Writing on the Law of Work on Nero's Pillars: The 1998–99 Term of the U.S. Supreme Court*, 15 LAB. LAW. 181 (1999); Marley S. Weiss, *The Supreme Court 1997–1998 Labor and Employment Law Term (Part II): The NLRA, Takings Clause, and ADA Cases*, 14 LAB. LAW. 533 (1999); Marley S. Weiss, *The Supreme Court 1997–1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 LAB. LAW. 261 (1998); Keith N. Hylton, *Labor and the Supreme Court: Review of the 1996–1997 Term*, 13 LAB. LAW. 263 (1997); Michael H. Gottesman, *Labor, Employment and Benefit Decisions of the Supreme Court's 1995–96 Term*, 12 LAB. LAW. 325 (1997); Joseph R. Grodin, *Report on the 1993–1994 Supreme Court Labor and Employment Law Term*, 10 LAB. LAW. 693 (1994).

2. Weiss, *supra* note 1, at 261.

3. *See, e.g.*, Gottesman, *supra* note 1, at 326 (noting the Court's prevalence in that term to defer to administrative agencies, particularly the National Labor Relations Board).

course, the author's conclusion was that the smattering of decisions offered no theme whatsoever.[4]

The Supreme Court, during the 2003–04 term, decided seven labor and employment decisions. In three of these decisions, the Court construed provisions of the Employment Retirement Income Security Act (ERISA).[5] The other four cases each raised issues under a different federal statute, namely the Age Discrimination in Employment Act (ADEA),[6] Title VII,[7] the Americans with Disabilities Act (ADA),[8] and racial discrimination under 42 U.S.C. section 1981. The Supreme Court also decided two other decisions that, while not arising under a labor or employment statute, have definite implications for labor and employment law.

Two trends emerge as possible contenders for this year's theme. Perhaps the most obvious option is to identify the past term as "the year of ERISA." In terms of sheer volume, the ERISA decisions dominated with a whopping 43 percent of the total labor and employment docket.[9]

The other nominee may be less obvious at first blush, but nonetheless is a very legitimate contender. That is, this past term also could be remembered as "the year in which not a whole lot happened in the realm of labor and employment law." This possible conclusion also finds support in statistics. The seven labor and employment decisions issued by the Supreme Court represent the second lowest number of the past two decades.[10] Some of this paucity is attributable to the fact that the Court now accepts review of approximately one-half as many cases as it did in the early 1980s.[11] But even when viewed proportionately, this year's term is far below the norm. As former Secretary James Brudney has chronicled, labor and employment cases made up an average of 16 percent of the Court's docket during the last twenty-five years of the twentieth century.[12] This year's seven decisions, in comparison, constitute just 9.5 percent of the Court's seventy-four decisions.[13]

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4. *See, e.g.*, Grodin, *supra* note 1, at 694 (stating the term's "cases are diverse, and meaningful generalizations are difficult").

5. 29 U.S.C. §§ 1001–1461 (2000).

6. 29 U.S.C. §§ 621–634 (2000).

7. 42 U.S.C. § 2000e–2000e-17 (2000).

8. 42 U.S.C. §§ 12101–12213 (2000).

9. Three of the term's seven labor and employment law decisions arose under ERISA, which computes to 43 percent of the total number of labor and employment law decisions. These decisions are discussed *infra* at notes 171–291 and accompanying text.

10. *See* Gottesman, *supra* note 1, at 327 (reporting only six workplace-related decisions for the 1994–95 term).

11. *See* Hylton, *supra* note 1, at 264 (noting that the Supreme Court's caseload had declined from roughly 150 cases per year in the early 1980s to seventy-four cases during the 1996–97 term).

12. Brudney, *supra* note 1, at 152.

13. *See* Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 2003*,

Quantity, of course, is not the sole measure of significance. A case of great importance sometimes can trump a purely mathematical yardstick. The Court's 1999 decision in *Sutton v. United Air Lines, Inc.*,[14] which construed the ADA's definition of "disability," is a prime example of such a blockbuster decision.[15]

How significant are this term's decisions? I will return to this question and our competing themes after a review of each of this term's decisions.

II. The Supreme Court Decisions

A. *Age Discrimination in Employment Act*

1. Holding

In *General Dynamics Land Systems, Inc. v. Cline*,[16] the Supreme Court held that the ADEA does not prevent employers from implementing policies that treat older workers more favorably than younger workers.[17]

2. Context

General Dynamics maintained a policy of providing full health care benefits to its former employees who retired with thirty or more years of service.[18] In 1997, the company entered into a collective bargaining agreement with the United Auto Workers limiting the provision of health care benefits to subsequent retirees who were at least fifty years old at the time of the agreement's signing.[19]

A group of General Dynamics employees (Cline) between the ages of forty and forty-nine brought suit alleging that the new policy violated the ADEA.[20] Most existing precedent did not favor Cline.[21] While the ADEA makes it unlawful for an employer to discriminate against any employee aged forty or older on the basis of age,[22] most courts have interpreted this prohibition, in light of the ADEA's stated purpose of

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73 U.S.L.W. 3045 (stating that the Supreme Court decided a total of seventy-four cases after argument during the 2003–04 term).

14. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

15. *See* Tepker, *supra* note 1, at 181 (finding the 1998–99 term dominated by two decisions: Alden v. Maine, 527 U.S. 706 (1999) (ruling that the Eleventh Amendment bars suits under the FLSA against states in federal court); and *Sutton*, 527 U.S. at 471 (ruling that disability status under the ADA should be determined taking into account the impact of mitigating measures)).

16. Gen. Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236 (2004).

17. *Id.* at 1237.

18. *See* Cline v. Gen. Dynamics Land Sys., 296 F.3d 466, 468 (6th Cir. 2002).

19. *Cline*, 124 S. Ct. at 1239.

20. *See id.*

21. *See id.* at 1244 ("The Courts of Appeals and the District Courts have read the law the same way, and prior to this case have enjoyed virtually unanimous accord in understanding the ADEA to forbid only discrimination preferring young to old.").

22. 29 U.S.C. § 623(a)(1) (2000).

protecting "older workers," to be a one-way street.[23] Under this approach, a policy that disadvantages older workers relative to younger workers, such as an early retirement program that offers fewer benefits to employees as they get older, is unlawful,[24] but not one that works in the opposite direction, such as an early retirement incentive that is available to employees only after they reach age fifty-five.[25]

The district court followed the majority approach and dismissed Cline's claim citing a Seventh Circuit holding that "the ADEA does not protect . . . the younger against the older."[26] Identifying Cline's claim under the ADEA as one of "reverse age discrimination," the court noted that relief for such a claim had never been granted under the ADEA.[27]

A divided panel of the Sixth Circuit Court of Appeals reversed.[28] In interpreting section 623(a)(1) of the ADEA, which prohibits discrimination against "any individual . . . because of such individual's age,"[29] the circuit court concluded that if Congress had intended the ADEA to protect only older workers from age discrimination it would have explicitly so stated.[30] An interpretive regulation promulgated by the EEOC lent support to the circuit court's position.[31]

The Supreme Court reversed in a 6–3 decision.[32] Writing for the majority, Justice Souter acknowledged that section 623(a)(1), because its reference to age contains no direct modifier, theoretically could be construed to include claims of age discrimination against younger workers.[33] Justice Souter concluded, however, that "[t]his more expansive possible understanding does not . . . square with the natural reading of the whole provision prohibiting discrimination, and in fact Congress's interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better."[34]

Justice Souter began his discussion of the ADEA's legislative history with reference to the Wirtz Report, which was undertaken in 1964

23. *See, e.g.*, Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1227 (7th Cir. 1992) (holding that the ADEA "does not protect the younger against the older").

24. *See, e.g.*, Karlen v. City Colleges of Chicago, 837 F.2d 314, 318 (7th Cir. 1988).

25. *See, e.g.*, Henn v. Nat'l Geographic Soc'y, 819 F.2d 824, 826–27 (7th Cir. 1987).

26. Cline v. Gen. Dynamics Land Sys., 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000) (quoting Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1227 (7th Cir. 1992)).

27. *Id.* at 848.

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

29. 29 U.S.C. § 623(a)(1) (2000).

30. *Cline*, 296 F.3d at 472.

31. 29 C.F.R. § 1625.2(a) (2003) (stating, "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor").

32. *Cline*, 124 S. Ct. at 1236.

33. *Id.* at 1240.

34. *Id.*

by then Secretary of Labor Willard Wirtz.[35] The conclusions of the Wirtz Report, which were largely incorporated into the ADEA's statements of purpose and findings,[36] indicated that significant inducements existed for employers to prefer younger over older workers.[37] The report contained no indications that older employees were benefiting at the expense of their junior counterparts.[38] Testimony at the ADEA's congressional hearings substantially paralleled the Wirtz Report.[39] Finally, Justice Souter noted that, as the ADEA limits the protected class to persons aged forty and above,[40] had Congress been concerned with discrimination against younger workers "it would not likely have ignored everyone under forty."[41]

The Court specifically rejected three theories advanced by Cline in support of his position. First, Cline posited a uniform reading of "age" as it appears in the ADEA, and argued that since the meaning of "age" is not restricted to "old age" throughout the Act, section 623(a)(1)'s prohibition against discrimination based on age must apply to younger as well as older workers.[42] In response, the Court held that the presumption that identical words have the same meaning throughout an act is malleable, particularly where, as in the ADEA, there is great variation in the context in which the words are used.[43]

Second, the Court rejected Respondent's reliance on a statement by Senator Yarborough, a sponsor of the ADEA, suggesting that the Act's provisions applied equally to younger workers.[44] The Court held that a single outlying statement from the bill's sponsor does not counterbalance overwhelming evidence that the ADEA was intended to protect only older workers.[45]

Finally, Cline argued that the EEOC's adoption of 29 C.F.R. section 1625.2(a) supports a broad reading of the ADEA's application.[46] Cline

35. *Id.* at 1240–41 (Congress charged Secretary Wirtz with studying age discrimination in the workplace).

36. *Id.* at 1242.

37. *Id.* at 1241–42 (finding that, for example, employing older workers leads to increased pension costs).

38. *Id.* at 1241.

39. *See id.* at 1241–42.

40. *Cline*, 124 S. Ct. at 1243; 29 U.S.C. § 623 (2000).

41. *Cline*, 124 S. Ct. at 1243.

42. *Id.* at 1245–46.

43. *Id.* (holding that the presumption that identical words have the same meaning "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent") (quoting Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

44. *Cline*, 124 S. Ct. at 1247–48.

45. *Id.* The Court also noted that the lower courts have consistently read the ADEA not to apply to younger workers and Congress has taken no action to amend the Act in light of these decisions. *Id.*

46. *Id.* at 1248–49; *see supra* note 31 (quoting 29 C.F.R. § 1625.2(a) (2003)).

contended that 29 C.F.R. section 1625.2(a) deserved deference under the *Chevron* doctrine.[47] Rejecting this argument, Justice Souter held that devices of judicial construction left no doubt as to the meaning Congress attached to "age" in the ADEA, and thus *Chevron* deference was not applicable.[48]

A dissenting opinion authored by Justice Thomas and joined by Justice Kennedy would find that the plain language of the ADEA prohibits discrimination because of an individual's age, regardless of whether that individual is perceived as "too old or too young."[49] Justice Scalia filed a separate dissent in which he argued that the Court should defer to the EEOC's regulatory interpretation.[50]

3. Significance

The *Cline* decision is important in two principal respects. First, the *Cline* outcome results in a twofold standing requirement for ADEA plaintiffs. As the statute mandates, only employees aged forty and over may assert a claim of age discrimination.[51] In addition, the *Cline* decision adds a second requirement. An ADEA claim is actionable only if it challenges an employment action that disadvantages older employees as compared to younger employees.[52]

The ADEA, in this respect, stands in marked contrast to Title VII, which does not impose any class membership standing requirement. That statute, instead, protects members of all races, as well as both women and men.[53] Title VII bans discrimination because of an individual's race or gender but does not require that a person be of any particular race or gender in order to be protected.[54]

The upshot is that while reverse discrimination claims are actionable under Title VII, they are not under the ADEA. The ADEA is similar to the ADA in this vein. Since only qualified individuals with a disability have standing under the ADA, reverse discrimination suits similarly are not possible under that statute.[55]

Why this dichotomy? Although not expressly stated by Congress or the Supreme Court, this distinction may reflect the fact that while

47. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
48. *Cline*, 124 S. Ct. at 1248.
49. *Id.* at 1256 (Thomas, J., dissenting).
50. *Id.* at 1249 (Scalia, J., dissenting).
51. 29 U.S.C. § 631(a).
52. *See supra* note 34 and accompanying text.
53. *See* Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 423–24 (1997).
54. *See* 42 U.S.C. § 2000e-2(a).
55. 42 U.S.C. § 12112(a) (barring discrimination against "a qualified individual with a disability"); *see also* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 68–71 (1999) (contrasting the ADA's antidiscrimination formula with that of Title VII).

race and gender seldom bear any direct relevance to job performance, age and disability status frequently impact an individual's ability to perform the job.[56] As such, it is arguably more defensible to restrict the range of claims available under the ADEA and ADA than it is under Title VII.

The second important facet of *Cline* concerns the decision's potential impact on early retirement programs. The typical early retirement program offers additional benefits to workers over a certain age, such as age fifty-five or sixty, in exchange for an agreement to quit employment and to waive any claim of discrimination concerning the agreement's operation. Courts generally have found these programs lawful if the incentive is in the nature of a carrot rather than a stick.[57]

The Sixth Circuit's reading of the ADEA in *Cline*, in practical effect, would have signaled the death knell for such programs.[58] Under the Sixth Circuit's strict textual interpretation, an employer only could offer a lawful early retirement incentive if the offer extended to all employees aged forty and over. Any coverage less expansive would constitute a per se violation of the act. But few employers would be eager to encourage such relatively young, yet relatively experienced workers to leave their workforce. A forty year-old employee is in the prime of that portion of the employment life cycle during which employers enjoy the greatest margin of benefits over costs.[59] Further, the costs of a program offering retirement bonuses to all employees forty and older would be very expensive.

The elimination of early retirement programs would have been a blockbuster result. It also would have been bad policy. Early retirement programs structured through voluntary incentives provide a desirable safety valve for employers needing to reduce workforce size in response to an economic downturn. These programs also, to quote Judge Richard Posner, are a "valued perquisite of age" for older employees desiring to shrink the amount of calendar time before they can afford to retire.[60] It is likely that the preservation of such programs was a motivating, although unexpressed, factor in the *Cline* majority's purposive interpretation.

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56. *See, e.g.*, Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 850 (1982) (stating "unlike race, there is an inherent correlation between age and ability"); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000) (stating "unlike race, disability is frequently a legitimate consideration in employment decisions").

57. *See, e.g., Henn*, 819 F.2d at 826–29.

58. *See Karlen*, 837 F.2d at 318 (7th Cir. 1988) (discussing that "early retirement programs would effectively be outlawed" if an employer could comply with the ADEA only by offering a retirement plan to all employees aged forty and older).

59. *See generally* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

60. *Karlen*, 837 F.2d at 317.

B. *Title VII*

1. Holding

In *Pennsylvania State Police v. Suders*,[61] the Supreme Court held that the affirmative defense described in *Faragher v. Boca Raton*[62] and *Burlington Industries, Inc. v. Ellerth*[63] is available to employers facing sexual harassment allegations where the plaintiff alleges a constructive discharge and no adverse official action precipitated the plaintiff's resignation.[64]

2. Context

Nancy Drew Suders brought suit against the Pennsylvania State Police (PSP) alleging that pervasive sexual harassment by her supervisors forced her to quit her job as a police communications operator.[65] When Suders contacted her employer's equal employment opportunity officer complaining of sexual harassment, the officer told Suders to file a complaint but did not provide the necessary form or tell Suders how to obtain one.[66] Two days later, Suders resigned after being arrested for allegedly stealing her own computer-skills exam papers, tests she took as a necessary step for advancement.[67]

Suders brought suit under Title VII claiming that her supervisors created a hostile work environment that resulted in her constructive discharge.[68] A hostile environment claim requires proof of "harassing behavior sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[69] As determined in *Ellerth* and *Faragher*, employers generally can affirmatively defend against allegations of harassment by showing that: (1) sufficient internal mechanisms for reporting and correcting the harassment existed and (2) the plaintiff unreasonably neglected to pursue resolution of the alleged harassment through such internal mechanisms.[70] Employers are barred from raising this affirmative defense, however, if the harassment is the result of supervisor conduct "culminat[ing] in a tangible employment action, such as discharge, demotion, or undesirable reassignment."[71]

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61. Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004).

62. *See* Faragher v. Boca Raton, 525 U.S. 775 (1998).

63. *See* Burlingon Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that an employer is subject to vicarious liability for supervisor harassment "culminat[ing] in a tangible employment action, such as discharge, demotion, or undesirable reassignment").

64. *Suders*, 124 S. Ct. at 2347.

65. *Id.* at 2346–48 (describing harassment alleged by Suders).

66. *Id.* at 2348.

67. *Id.* Suders removed the papers after concluding that her supervisors falsely reported that she had failed the exams, when, in fact, the exams were never forwarded for grading. *Id.*

68. *Id.* at 2348.

69. Meritor Savings Bank, FSB, v. Vinson, 477 U.S. 57, 67 (1986).

70. *See Ellerth*, 524 U.S. at 742 (1998); *Faragher*, 524U.S. at 775.

71. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

The district court granted the PSP's motion for summary judgment, holding that "the PSP was not vicariously liable for the conduct of Suders' supervisors."[72] Relying on *Ellerth* and *Faragher*, the court held Suders' claims untenable because she unreasonably failed to employ the PSP's internal procedures for addressing sexual harassment.[73] The Court of Appeals for the Third Circuit reversed, ruling that a constructive discharge, if proved, amounts to a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense.[74] In arriving at this holding, the Third Circuit reasoned that "a constructive discharge constitutes a significant change in employment status by ending the employer–employee relationship and . . . inflicts the same type of direct economic harm . . . as tangible employment actions."[75]

In its decision, the Supreme Court held for the first time that Title VII includes employer liability for constructive discharge.[76] In order to establish a constructive discharge, a plaintiff alleging sexual harassment must establish that the hostile working environment became so intolerable that his or her resignation qualified as a fitting response.[77] In arriving at its holding, the Court reviewed the history of the constructive discharge doctrine, noting its development by the National Labor Relations Board "to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engagement in collective activities."[78]

The Court, however, reversed the Third Circuit and held that an employer may assert the *Ellerth / Faragher* affirmative defense unless the plaintiff quit in response to an adverse action officially changing her employment status or situation, such as a humiliating demotion or an extreme cut in pay.[79] In reaching this conclusion, Justice Ginsburg, writing for the Court, distinguished harassment resulting from a supervisor's official tangible employment action from other types of harassing actions lacking an official act. Following agency law, a tangible employment action provides a clear correlation between the actions of the supervisor-agent and employer-principal, and strict liability appropriately flows directly to the employer.[80] Absent a tangible official action, however, no obvious connection between the supervisor and em-

72. *Suders*, 124 S. Ct. at 2349.
73. *Id.* (in support of this position, the district court pointed out that Suders resigned only two days after notifying the PSP's equal employment opportunity officer).
74. *Id.*
75. Suders v. Easton, 325 F.3d 432, 460 (7th Cir. 2003).
76. *Suders*, 124 S. Ct. at 2352.
77. *Id.* at 2351.
78. *Id.*
79. *See id.* at 2355.
80. *Id.* at 2353–54.

ployer follows.[81] Consequently, where no adverse official action causes a constructive discharge, employers may assert the *Ellerth/Faragher* affirmative defense to a constructive discharge claim.[82]

3. Significance

The *Suders* decision is a good news/bad news outcome. The good news is that the "official act" line of demarcation is well-grounded in policy considerations. The *Suders* standard builds on the policy articulated in *Ellerth* and *Faragher* of only imposing strict liability where a supervisor engages in some objective use of agency authority on behalf of an employer.[83] Where harassment results from a supervisor's official action, the employer bears a greater degree of responsibility because it has empowered its "agent to make economic decisions affecting other employees under his control."[84] In addition, the employer in this context has a greater ability to detect and prevent harassment since official actions ordinarily are "documented in official company records and . . . subject to review by higher level supervisors."[85]

On the other hand, when a supervisor engages in harassing behavior that involves no official employment action, strict liability for the employer is less appropriate. So, for example, if a supervisor harasses an employee through unwelcome verbal or physical conduct, the supervisor is engaging in acts "which might be the same acts a coemployee would commit [where] the supervisor's status [would] make little difference."[86] Further, since the employer observes no objective signal of a change in terms and conditions of employment in such circumstances, it has less opportunity to countermand the harassing behavior. In this context, accordingly, the employer should be liable only if the victim reported the offensive conduct and provided the employer's antiharassment policy a chance to correct the problem.

In terms of bad news, the "official action" test is an imprecise standard that likely will spawn considerable litigation. Unlike a traditional tangible employment action such as a discharge or demotion that is objectively ascertainable, the question of whether an "official action" precipitated a constructive discharge in a particular case entails a subjective assessment of causation. This may pose a difficult factual issue in many circumstances. Take, for example, the situation of a male supervisor who promotes a female employee to a previously all-male work team that turns out not to be receptive to a female member. The coemployees engage in a pattern of harassing behavior that makes the

81. *Id.*
82. *Id.* at 2354–55.
83. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.
84. *Ellerth*, 524 U.S. at 762.
85. *Id.*
86. *Id.* at 763.

female employee's work life miserable. After three or four months, the female employee resigns and asserts a hostile work environment claim. Does this constructive discharge flow from the supervisor's official promotion action or from the harassment perpetrated by the nonsupervisory members of the work team? The causation element in this example, as it will be in many other instances, simply is not clear.

This lack of predictability is aggravated by another aspect of the *Suders* decision. The Court in *Suders* for the first time ruled that a constructive discharge is actionable under Title VII.[87] While this result is not surprising,[88] the Court's articulated standard for determining the existence of a constructive discharge is somewhat surprising. Justice Ginsburg stated that in order to establish a constructive discharge, the plaintiff "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."[89] This standard, although generally consistent with the approach adopted by a majority of circuit courts,[90] is a loose one that provides little guidance for future outcomes. Courts undoubtedly will struggle in the coming years to determine when a plaintiff's resignation is a "fitting response" and when it is not.

C. *The Americans with Disabilities Act*

1. Holding

In *Raytheon Co. v. Hernandez*,[91] the Supreme Court held in a 7–0 decision that an employment policy barring the rehire of employees whose prior employment with the same employer terminated because of a facially neutral workplace conduct rule does not establish a disparate treatment claim under the ADA in the absence of evidence that the policy was applied in a discriminatory manner.[92]

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87. *See supra* notes 75–77 and accompanying text.

88. The Court previously recognized the viability of constructive discharge claims under the National Labor Relations Act, *see* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984), and many circuit court decisions had done the same with respect to Title VII, *see, e.g.*, Robinson v. Sappington, 351 F.3d 317, 336–37 (7th Cir. 2003); Moore v. KUKA Welding Sys., 171 F.3d 1073, 1080 (6th Cir. 1999).

89. *Suders*, 124 S. Ct. at 2347.

90. *See* RICHARD T. SEYMOUR & JOHN F. ASLIN, EQUAL EMPLOYMENT LAW UPDATE 21–801 (BNA 2003) (stating that the standard adopted by a majority of circuit courts is whether a reasonable person in the employee's position would have felt forced to resign because of the terms and conditions of employment to which the plaintiff was subject). Some circuits, however, had required an element of employer intent to cause such a resignation. *See, e.g.*, Tork v. St. Luke's Hosp., 181 F.3d 918, 919 (8th Cir. 1999) (holding that a plaintiff must prove that her employer "intentionally create[d] a work environment so intolerable as to compel a reasonable employee to quit and the employee does in fact quit"). Justice Thomas' dissenting opinion in *Suders* urged the adoption of such an intent element. *Suders*, 124 S. Ct. at 2357–59 (Thomas, J., dissenting).

91. Raytheon Co. v. Hernandez, 540 U.S. 44, 124 S. Ct. 513 (2003).

92. *Id.*, 124 S. Ct. at 519–20. Justices Souter and Breyer took no part in the decision. *Id.* at 515.

2. Context

Joel Hernandez had worked for Hughes Missile Systems for twenty-five years when he tested positive for cocaine use in 1991.[93] Fearing the prospect of dismissal, he accepted Hughes' offer to resign in lieu of termination.[94] Hernandez reapplied to Hughes in 1994.[95] His application indicated previous employment with Hughes and included a letter from Alcoholics Anonymous (AA) vouching that Hernandez regularly attended meetings and was progressing in his recovery.[96] Hughes rejected Hernandez's application for rehire after reviewing his personnel file and learning of his previous cessation of employment for violating a workplace conduct rule.[97] The employee who reviewed the application testified that she possessed no knowledge of Hernandez's prior drug use or the reason for his termination.[98] Hughes stated that it maintains a neutral policy against rehiring any employee who was terminated or who resigns because of workplace misconduct.[99]

Hernandez filed a charge with the EEOC, which issued a right-to-sue letter.[100] The EEOC concluded that Hughes may have rejected Hernandez based on his record of past drug use and found "reasonable cause to believe that [Hernandez] was denied hire . . . because of his disability."[101]

Hernandez filed suit in district court, advancing a disparate treatment claim that Hughes rejected his application due to his record of drug addiction or because Hughes regarded him as being a drug addict.[102] In response to a summary judgment motion, Hernandez for the first time argued that even if Hughes did apply a neutral no-rehire policy, his rights were nevertheless violated because of the policy's disparate impact.[103] The district court granted summary judgment on Hernandez's disparate treatment claim but refused to consider his disparate impact claim because Hernandez did not plead that theory in a timely manner.[104]

The Ninth Circuit Court of Appeals upheld the district court's refusal to consider Hernandez's disparate impact claim.[105] The circuit court then applied the *McDonnell Douglas* test to Hernandez's dispa-

93. *Id.* at 516.
94. *See id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *See id.*
100. *Id.* at 517.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1037 n.20 (9th Cir. 2002).

rate treatment claim.[106] The court first found that Hernandez's prima facie case of discrimination sufficed to preclude summary judgment.[107] The court then moved to the test's second step, which shifts the burden to the defendant to produce evidence of a legitimate, nondiscriminatory reason for its employment action.[108] Hughes contended that its neutral policy against rehiring any employee terminated for workplace misconduct constituted such a reason.[109] The court of appeals, however, rejected this contention, holding the no re-hire policy to be unlawful "as applied to former drug addicts whose only work-related offense was testing positive because of their addiction."[110]

The Supreme Court reversed, holding that the Ninth Circuit erred by "conflating the analytical framework for disparate-impact and disparate-treatment claims."[111] Writing for the majority, Justice Thomas noted, the Court "has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact."[112] A disparate treatment claim succeeds if the employer's actions are based on protected traits of employees.[113] Disparate impact claims arise when an employment practice is facially neutral but nevertheless results in one group being treated more harshly than another in the absence of business necessity.[114] Though both disparate impact and disparate treatment claims are cognizable under the ADA,[115] each involves distinct factual issues requiring courts to carefully distinguish between the two theories.[116]

Hernandez's case was limited to a disparate treatment claim because of his failure to file a timely disparate impact claim.[117] The Ninth Circuit, however, found Hughes' no-rehire policy unlawful by errone-

106. *See Hernandez*, 124 S. Ct. at 517–18. Under the *McDonnell Douglas* burden-shifting approach, the plaintiff initially must establish a prima facie case of discrimination; if that burden is met, the defendant must produce evidence of a legitimate, nondiscriminatory reason for the employment action; if that burden of production is satisfied, the plaintiff then must demonstrate that the defendant's proffered reason is actually a pretext for discrimination. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

107. *Hernandez*, 298 F.3d at 1035.

108. *See supra* note 106.

109. *Hernandez*, 124 S. Ct. at 518.

110. *Hernandez*, 298 F.3d at 1036.

111. *Hernandez*, 124 S. Ct. at 519.

112. *Id.*

113. *Id.* (describing a disparate treatment claim as one where the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]") (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977)).

114. *Id.*

115. 42 U.S.C. § 12112(b) (2000).

116. *Hernandez*, 124 S. Ct. at 519.

117. *Id.* at 519–20.

ously applying disparate impact analysis.[118] Specifically, the court of appeals improperly focused on the extent by which the policy screens out applicants with a history of addiction and the failure of the employer to raise a business necessity defense.[119] Each of these "factors pertains to disparate impact, not disparate treatment, claims."[120]

The Court held that Hughes' proffer of its neutral no-rehire policy satisfied its obligation under the *McDonnell Douglas* framework to provide a legitimate, nondiscriminatory reason for not rehiring Hernandez.[121] The only remaining issue, accordingly, was whether Hernandez could show that Hughes made its hiring decision on the basis of Hernandez's status as disabled as opposed to its no-rehire policy.[122] Rather than deciding this issue, the Ninth Circuit improperly concluded that the otherwise neutral policy was illegal as a matter of law.[123] The Court remanded the case to the Ninth Circuit for a proper determination of the case under the third step of the *McDonnell Douglas* framework.[124]

3. Significance

The *Hernandez* decision is unsatisfactory in a number of respects. First, the decision tells us what we already knew; namely, that the analysis of disparate treatment and disparate impact claims entails distinct proof structures that are not interchangeable. The Supreme Court had made a similar pronouncement in *UAW v. Johnson Controls, Inc.*[125] In that case, the Court reversed a Seventh Circuit decision that had applied the business necessity defense to a claim of facial discrimination and ruled that the proper defense to a disparate treatment claim is the narrower bona fide occupational qualification (BFOQ) standard.[126] While the Ninth Circuit's failure to heed that lesson in *Hernandez* certainly warranted a reminder, the Court's message is far short of a blockbuster result.

The *Hernandez* decision also is unsatisfactory in that it does not provide much in the way of guidance with respect to the substantive issues surrounding the validity of no-rehire policies as applied to recovered addicts. While the Court suggests that an employer with a blanket no-rehire rule that does not inquire or look at the particular reason for an earlier separation in service is not liable for disparate

118. *Id.* at 520.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 521.
125. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).
126. *Id.* at 197–200.

treatment discrimination,[127] it does not address the legality of an employer policy that, either on its fact or as applied, disqualifies applicants seeking rehire who, in the past, have tested positive for illegal drug use in a workplace drug test.[128] Does such a policy constitute illegal status discrimination on the basis of the applicant's record of addiction, or does it constitute lawful action based upon the applicant's past history of misconduct? And does the length of time during which the applicant has been free of drug use have an impact on this determination? The answers to these questions are not clear.

The status of a no-rehire policy under a disparate impact analysis also is unclear. If Hernandez had filed a timely disparate impact claim, the initial issue he would have faced would have been whether the no-rehire rule disproportionately disqualifies individuals with a record of addiction.[129] A plaintiff may well be able to establish this threshold showing in a workplace having an ongoing regimen of drug testing.[130] If the disproportionate impact hurdle is cleared, the question then becomes whether the employer has a business necessity reason for the no-rehire policy.[131] This may be a difficult showing for an employer in many industries to make, particularly with respect to disabled appli-

127. *Hernandez*, 124 S. Ct. at 520 n.7 (stating that if the employer's human resource screener "were truly unaware that [Hernandez's] disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability").

128. This issue is similar to that remanded by the Supreme Court in *Hernandez* to the Ninth Circuit, *see* 124 S. Ct. at 520 (stating that "the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did not make its employment decision based on respondent's status as disabled despite petitioner's proffered explanation"). On remand, the Ninth Circuit concluded "that there is a genuine issue of material fact as to whether Raytheon failed to re-hire Hernandez because of his 'status as an alcoholic,' rather than in reliance on a uniform no re-hire policy." Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 568 (9th Cir. 2004). The Ninth Circuit, accordingly, remanded the case to the district court for trial. *Id.* at 570.

129. 42 U.S.C. § 12112(b)(6) (generally prohibiting the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities"); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i). Although only applicable by its terms to Title VII claims, most courts considering the issue have applied the amendatory provisions of the Civil Rights Act of 1991 to ADA cases. *See* PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY § 8.4 (2004).

130. *See* 29 C.F.R. § 1607.4D (According to EEOC guidelines, "A selection rate for any [protected characteristic] which is less than four-fifths (4/5) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact").

131. 42 U.S.C. § 12113(a) (authorizing the use of "qualification standards, tests or selection criteria [that have been shown to be] job related and consistent with business necessity"). *See also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (providing in Title VII, as amended by the Civil Rights Act of 1991, that once the plaintiff shows that a specific practice causes a disparate impact, the employer must "demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity").

cants who currently are not using illegal drugs and are qualified to perform the job.

Finally, *Hernandez* does not provide any explicit guidance with respect to the proper interpretation of the Court's controversial 2003 decision in *Desert Palace, Inc. v. Costa.*[132] In that Title VII case, the Court held that direct evidence of discrimination need not be presented in order to support a mixed-motive jury instruction.[133] Previously, many courts had used the "same decision test" of *Price Waterhouse v. Hopkins*[134] in cases presenting direct evidence of discrimination, while using the three-prong *McDonnell Douglas* analysis when only circumstantial evidence of discrimination was available.[135] Although some courts have not found tension between *Desert Palace* and the *McDonnell Douglas* burden-shifting scheme,[136] other courts have interpreted *Desert Palace* so as to find that the "same decision test" has superseded the *McDonnell Douglas* formula for all disparate treatment cases.[137] Still another group of decisions has staked out an intermediate position by concluding that *Desert Palace* modifies *McDonnell Douglas* only at the third step by asking whether the plaintiff can meet his or her ultimate burden to prove discrimination.[138] Under either of these latter two approaches, a trial court is likely to grant an employer's motion for summary judgment only if the employee fails to raise a genuine issue of material fact concerning whether or not a protected characteristic was a motivating factor in the employment decision.[139] The *Hernandez* decision, by finding that the Ninth Circuit erred in not adhering to the traditional *McDonnell Douglas* formula, seems to provide implicit evidence that *Desert Palace* has not eradicated *McDonnell Douglas*, but the lack of any direct reference to the current controversy will keep this issue in limbo.

D. *42 U.S.C. Section 1981*

1. Holding

In *Jones v. R.R. Donnelley & Sons Co.*,[140] the Supreme Court held that 28 U.S.C. section 1658's four-year statute of limitations applies to

132. Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148 (2003).

133. *Id.* at 101–02.

134. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

135. *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 639–40 (8th Cir. 2002); Mooney v. Aramco Serv. Co., 54 F.3d 1207, 1216–17 (5th Cir. 1995).

136. *See* Roberson v. Alltel Info. Serv., 373 F.3d 647, 647 n.3 (5th Cir. 2004) (listing cases).

137. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 992–93 (D. Minn. 2003).

138. *See, e.g.*, Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004); Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1197–98 (N.D. Iowa 2003).

139. *See Rachid*, 376 F.3d at 312.

140. Jones v. R.R. Donnelley & Sons Co., 124 S. Ct. 1836 (2004).

federal causes of action made possible by post-1990 statutory enactments, including a 1991 amendment to 42 U.S.C. section 1981.[141]

2. Context

Jones was the named plaintiff in a class action brought against R.R. Donnelley by several African Americans formerly employed at the company's Chicago manufacturing division.[142] Plaintiffs alleged violations of their rights under 42 U.S.C. section 1981 as amended by the Civil Rights Act of 1991.[143] Their claims included allegations of a racially hostile work environment, inferior employee status, and wrongful termination.[144] The action was filed more than two years, but less than four years, after the alleged occurrences.[145]

Prior to being amended in 1991, the Court had ruled that section 1981 did not include causes of action relating to employment actions occurring after the formation of an employment contract.[146] Thus, plaintiff's claims alleging post-hire discrimination were not actionable under the original version of section 1981.[147] The Civil Rights Act of 1991, however, amended section 1981 to include causes of action relating to the "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[148]

R.R. Donnelley moved for summary judgment, positing that plaintiff's claims were barred by Illinois's two-year statute of limitations.[149] Section 1981 does not contain an express statute of limitations.[150] Prior to 1990, courts borrowed the appropriate state statute of limitations for claims arising under federal statutes having no explicit limitation period.[151] In 1990, however, Congress enacted 28 U.S.C. section 1658—known as the "catch-all" statute of limitations—providing a four-year statute of limitations for "a civil action arising under an Act of Congress enacted after [December 1, 1990]."[152] R.R. Donnelley argued that section 1658's four-year statute of limitations applied only to new causes of action arising independently of previously enacted statutes.[153] Thus, the key issue in the case was whether or not plaintiff's cause of action

141. *Id.* at 1837.
142. *Id.* at 1839.
143. *Id.*
144. *Id.*
145. *See id.* at 1839.
146. *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that the statutory right to make and enforce contracts did not protect against harassing conduct that occurred after the formation of the contract).
147. *See Jones*, 124 S. Ct. at 1840.
148. 42 U.S.C. § 1981(b) (2000).
149. *Jones*, 124 S. Ct. at 1839.
150. *See id.* at 1839–40.
151. *Id.* at 1839.
152. 28 U.S.C. § 1658 (2000).
153. *Jones*, 124 S. Ct. at 1839.

"ar[ose] under the 1991 Act or under § 1981 as originally enacted" in 1866.[154]

The district court applied the four-year statute of limitations to plaintiff's claims, but the Seventh Circuit Court of Appeals reversed, holding that the 1991 amendments to section 1981 simply redefined terms in the original statute without altering the text that "provides the basic right of recovery for an individual whose constitutional rights have been violated."[155] Under this view, petitioners' claims were time barred.[156]

The Supreme Court reversed.[157] Writing for the Court, Justice Stevens acknowledged that ambiguity attached to section 1658's application to actions "arising under" an act of Congress.[158] To resolve this ambiguity, the Court reviewed the context in which section 1658 was enacted.[159] Prior to section 1658, the lack of a uniform statute of limitations applicable to federal causes of action generated considerable litigation.[160] Applying state statutes of limitations raised a number of difficult issues including conflict of law disputes, questions regarding tolling, and disputes over which of the forum state's statutes was controlling.[161] Congress, accordingly, enacted section 1658 in response to these and other problems generated by the practice of borrowing state statutes of limitations.[162]

The Court found that restricting section 1658's applicability to post-1990 statutes establishing causes of action independent of preexisting law, as the Seventh Circuit had ruled, would subvert the intent of Congress.[163] The Court noted that: (1) nothing in the text or history of section 1658 supports the court of appeals' limited reading of section 1658's applicability and (2) "Congress routinely creates new rights of action by amending existing statutes."[164] Thus, the Court concluded that a cause of action "aris[es] under an Act of Congress enacted after December 1, 1990—and therefore is governed by § 1658's 4 year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment."[165] Here, petitioners' claims under section 1981 were made possible only because of the 1991 amendments to section 1981.[166] Therefore, the petitioners' claims "a[rose] under an

154. *Id.* at 1840.
155. Jones v. R.R. Donnelley & Sons Co., 305 F.3d 717, 727 (7th Cir. 2002).
156. *See id.*
157. *Jones*, 124 S. Ct. at 1846.
158. *Id.* at 1841.
159. *See id.* at 1841–46.
160. *Id.* at 1842–43.
161. *Id.* at 1843–44.
162. *See id.*
163. *See id.* at 1845.
164. *Id.*
165. *Id.*
166. *Id.* at 1845–46.

Act of Congress enacted after [December 1, 1990]," and section 1658's four-year statute of limitations applies.[167]

3. Significance

The *Jones* decision underscores the Court's preference for utilizing a uniform statute of limitations for claims arising under federal statutes lacking an express limitations period. While section 1658, the statute providing for the uniform four-year statute of limitations, only applies to claims "arising under" federal laws enacted after December 1, 1990,[168] the Court's determination that this rule encompasses claims sanctioned by amendments to statutes predating 1990 suggests that the Court is likely to invoke the four-year rule whenever such is arguably defensible.

The Court's preference for such an outcome is understandable. The alternative practice of borrowing the most analogous state statute of limitations is unpredictable and "has spawned a vast amount of litigation."[169] In addition to the difficulty of identifying the closest state analogue statute, the practice of borrowing raises many attendant uncertainties such as the need to determine conflicts of law and tolling issues.[170] The uniform federal solution, in contrast, is clear and unambiguous. In a nutshell, the Court's preference for the four-year federal solution is a good policy choice.

E. *Employee Retirement Income Security Act (ERISA)*

1. *Aetna Health, Inc. v. Davila*, 124 S. Ct. 2488 (2004)

A. HOLDING

In *Aetna Health, Inc. v. Davila*,[171] the Supreme Court held that state law claims challenging medical coverage decisions under an ERISA health plan were preempted by ERISA and thus removable to federal court.

B. CONTEXT

Juan Davila and Ruby Calad (respondents) received health coverage from ERISA-regulated employee benefit plans, with Davila a participant in a plan administered by Aetna Health, Inc., and Calad a beneficiary in a plan administered by CIGNA Healthcare of Texas, Inc. (petitioners).[172] Davila and Calad sued separately in Texas state court claiming they sustained injuries proximately caused by their providers' failure to "exercise ordinary care when making health care treatment decisions" in violation of the Texas Health Care Liability Act (THCLA)

167. *Id.*
168. 28 U.S.C. § 1658 (2000).
169. *Jones*, 124 S. Ct. at 1842.
170. *Id.* at 1842–44.
171. Aetna Health, Inc. v. Davila, 124 S. Ct. 2488 (2004).
172. *Id.* at 2493.

section 88.002(a) and seeking to recover damages.[173] Davila alleged that he sustained severe internal injuries as a result of Aetna's refusal to authorize payment for the medication Vioxx, prescribed by his doctor to ameliorate arthritis pain.[174] Calad alleged she suffered complications following surgery as a result of CIGNA's denial of the extended hospital stay recommended by her treating physician.[175]

Arguing that Davila's and Calad's claims were entirely preempted by ERISA section 502(a), petitioners sought to remove the cases to federal district court.[176] The district court agreed and, when respondents declined to amend their complaints to bring specific ERISA claims, dismissed both cases with prejudice.[177] The Court of Appeals for the Fifth Circuit consolidated the cases and reversed, holding that respondents' claims did not fall within the scope of section 502(a).[178] According to the court of appeals, state causes of action are fully preempted only when they rather precisely duplicate those authorized by section 502(a).[179] The circuit court, relying on *Pegram v. Herdrich*,[180] found respondents' claims did not fall within section 502(a)(2), permitting suit against a plan fiduciary for breach of fiduciary duty,[181] because the state law claims asserted mixed issues of plan eligibility and appropriate health care treatment decisions.[182] The court found section 502(a)(1)(B), providing a cause of action for breach of contract where benefits are wrongly denied, equally inapplicable in that respondents' state law claims were grounded in tort.[183]

The Supreme Court unanimously reversed. Writing for the Court, Justice Thomas referred to ERISA's expansive preemption provisions,[184] enacted in accordance with ERISA's purpose of "provid[ing] a uniform regulatory regime over employee benefit plans."[185] To achieve this desired uniformity, ERISA's preemption provisions are "intended to ensure that employee benefit plan regulation [is] 'exclusively a federal

173. *Id.*
174. *Id.*
175. *Id.* A nurse employed by CIGNA determined that Calad did not meet her health plan's requirements for an extended hospital stay. *Id.*
176. *Id.*
177. *Id.*
178. Roark v. Humana, Inc., 307 F.3d 298 (5th Cir. 2002).
179. *Id.* at 310–11.
180. Pegram v. Herdrich, 530 U.S. 211 (2000).
181. Employee Retirement Income Security Act of 1974 § 502(a)(2), 29 U.S.C. § 1132(a) (2000).
182. *Roark*, 307 F.3d at 307–08. The Fifth Circuit relied on the Supreme Court's decision in *Pegram*, 530 U.S. at 211, where the Court ruled that claims based on mixed issues of eligibility and treatment were not fiduciary in nature and hence were not enforceable under § 502(a)(2).
183. *Roark*, 307 F.3d at 309.
184. 29 U.S.C. § 1144 (2000).
185. *Davila*, 124 S. Ct. at 2495.

concern.'"[186] Section 502(a) carries a particularly strong preemptive force in that it "converts state causes of action into federal ones for purposes of determining the propriety of removal."[187] Consequently, "causes of action within the scope of the civil enforcement provisions of § 502(a) [are completely preempted and] removable to federal court."[188]

The Court found that petitioners' claims fit within § 502(a)(1)(B), which allows participants or beneficiaries to bring suit to obtain plan benefits wrongfully denied.[189] Here, respondents' claims were based on the denial of medical services only available to them through the terms of an ERISA-regulated benefit plan.[190] As a result, respondents could have employed section 502(a)(1)(B) to seek an injunction to obtain treatment or to recoup the out-of-pocket costs paid for wrongfully denied services.[191] According to Justice Thomas, "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely preempted by ERISA § 502(a)(1)(B)."[192]

The Court rejected respondents' contention that the "duty of ordinary care" prescribed by the THCLA constituted an independent legal duty.[193] Section 88.002(d) of the THCLA states that health insurance carriers possess no obligation to provide treatment not covered by the plan itself.[194] Aetna and CIGNA denied the contested treatments on the grounds that the respondents' plans did not provide for such treatments under the circumstances.[195] Section 502(a)(1)(B) entitled respondents to contest this characterization of the plan's benefit provisions. Accordingly, the THCLA created no independent legal duty and was thus entirely preempted by ERISA.[196]

Finally, the Court rejected the Fifth Circuit's view that HMOs are not considered fiduciaries subject to ERISA when making mixed eligi-

186. *Id.* (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).
187. *Id.* at 2496.
188. *Id.* (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987)).
189. *Davila*, 124 S. Ct. at 2496.
190. *Id.* at 2497.
191. *Id.* at 2496.
192. *Id.*
193. *Id.* at 2497–98.
194. *Id.* at 2498.
195. *Id.*
196. *Id.* In reaching a contrary conclusion, the Fifth Circuit relied heavily on an erroneous interpretation of *Rush Prudential*, believing the case to hold that state law causes of action were not preempted unless they were identical to causes of action within ERISA. *Id.* at 2499–50 (citing Rush Prudential HMO v. Moran, 536 U.S. 355 (2002)). Rejecting this interpretation, Justice Thomas observed that "[n]owhere in *Rush Prudential* did we suggest that the pre-emptive force of ERISA § 502(a) is limited to the situation in which a state cause of action precisely duplicates a cause of action under ERISA § 502(a)." *Id.*

bility decisions.[197] The Fifth Circuit relied heavily on the Court's decision in *Pegram* in reaching this conclusion, but the Court found *Pegram* to be readily distinguishable. The Court, in that case, found that ERISA does not provide a cause of action for breach of fiduciary duty where a physician employed by a health plan and acting as a treating physician was negligent in making a mixed eligibility and treatment decision akin to medical malpractice.[198] In contrast, the key to the dispute in *Davila* was the HMO's determination of whether or not Davila was eligible for treatment under the plan.[199] Such eligibility determinations, according to the Court, are "part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan."[200] Accordingly, since the eligibility claims at issue in *Davila* are enforceable under ERISA, they completely preempt the purported state law claims.

In a concurring opinion, Judge Ginsburg stated that while she joined in the Court's decision, she also joined with several federal court opinions that have urged Congress to revisit ERISA to ensure that the statute provides make-whole relief.[201]

C. SIGNIFICANCE

The *Davila* decision confronts the contentious realm of health care claims and remedies. In order to gauge the significance of this decision, a brief review of the preexisting legal landscape is necessary.

As a general matter, ERISA preempts the field of health care claims administration, but not that of claims asserting medical malpractice in the delivery of medical treatment. A "quantity" versus "quality" distinction provides a convenient frame of reference that has been followed by a number of courts.[202] Section 502(a) of ERISA may redress a claim asserting that a health care plan improperly denied a quantity of the benefits due under a plan.[203] Indeed, the strength of the ERISA framework is demonstrated by the fact that any state law claim challenging plan coverage is completely preempted, such that the state law claim is converted to a federal claim and removable to federal court.[204] On the other hand, a claim asserting that an individual received medical care of a substandard *quality*, such as a claim for medical malprac-

197. *Id.* at 2500–01.
198. *Id.* (citing Pegram, 530 U.S. at 211).
199. *Davila*, 124 S. Ct. at 2492.
200. *Id.*
201. *Id.* at 2503 (Ginsburg, J., concurring).
202. Jane M. Mulcahy, *The ERISA Preemption Question: Why Some HMO Members Are Dying for Congress to Amend ERISA*, 82 MARQ. L. REV. 877, 886 (1999).
203. 29 U.S.C. § 1132(a) (2000); *see, e.g.*, Sofo v. Pan-Am. Life Ins. Co., 13 F.3d 239, 240–41 (7th Cir. 1994).
204. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987).

tice against a treating physician, does not implicate ERISA and may be pursued as a state law tort claim.[205]

The distinction between quantity and quality is imprecise, however, and tends to blur when issues of eligibility and treatment overlap. The zone of uncertainty increased in 2000 when the Supreme Court ruled in *Pegram* that an HMO is not liable under ERISA for a breach of fiduciary duty when its physician owners make "mixed eligibility and treatment decisions."[206] Although not a preemption case, some courts have construed *Pegram* to mean that ERISA does not preempt a state law medical malpractice claim challenging a mixed eligibility and treatment decision in the form of a medical opinion that serves to deny coverage under an ERISA health plan.[207] The Fifth Circuit, in the case leading to the *Davila* decision, essentially adopted this construction.[208]

If the Supreme Court would have affirmed the Fifth Circuit, such a decision would have had the blockbuster effect of opening up medical malpractice liability for medically based health plan coverage decisions, even when not made by a treating physician. This result would have affected a sea change in terms of permitting tort damages against ERISA health plans for improper denials of treatment.[209] Such a decision also would have had significant cost reverberations throughout the already financially stressed health care industry.[210]

While the Court's endorsement of the status quo in *Davila* falls short of a blockbuster result,[211] it nonetheless is the most significant of this term's labor and employment decisions. The Court's opinion clarifies the dicta in *Pegram* and nips the expansion of tort liability for mixed coverage and treatment decisions in the bud. Most significantly,

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205. *See, e.g.*, Prudential Health Care Plan, Inc. v. Lewis, 77 F.3d 493 (10th Cir. 1996). A state law malpractice claim also may be asserted against a plan that employs or has a sufficient agency relationship with a treating physician on vicarious liability grounds. *See, e.g.*, Pacificare of Okla., Inc., v. Burrage, 59 F.3d 151, 154 (10th Cir. 1995).

206. *Pegram*, 530 U.S. at 229.

207. *See, generally*, Land v. CIGNA Healthcare of Florida, 339 F.3d 1286 (11th Cir. 2003); Cicio v. Does, 321 F.3d 83 (2d Cir. 2003). But *cf.* DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 450 (3d Cir. 2003) (disagreeing with this interpretation and finding that the relevant question for preemption purposes is whether the claim could have been subject to enforcement under ERISA § 502(a)).

208. *Roark*, 307 F.3d at 315.

209. Courts traditionally have found that claims alleging that a plan negligently denied medical treatment are, in essence, denial-of-benefits claims subject to ERISA preemption. *See, e.g.*, Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996); Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).

210. *See* Matthew J. Binette, *Patients' Bill of Rights: Legislative Cure-All or Prescription for Disaster?* 81 N.C.L. REV. 653, 693–96 (2003) (cautioning that an expansion of liability for health plans similar to that envisioned by the Fifth Circuit in interpreting the THCLA could have a profound cost impact on HMOs and managed care plans).

211. *See Davila*, 124 S. Ct. at 2503 (Ginsburg, J., concurring) (stating that she joins the Court's opinion because "[t]hat decision is consistent with our governing case law on ERISA's preemptive scope").

the *Davila* Court firmly tosses the hot potato of health care reform back to Congress.[212]

Thus far, Congress has debated but been unable to pass a federal "patients' bill of rights."[213] Sound policy considerations support some type of expanded remedies for patients wrongfully denied medical treatment under a managed health care plan. Take, for example, the case of a patient whose treating physician recommends an organ transplant but whose health care plan denies coverage for such a procedure based upon the negligent preutilization review of another, nontreating health care professional. If the patient dies a month later, what remedies are available to his estate? The answer is virtually none. The estate cannot successfully maintain a state law malpractice claim against the treating physician because that doctor recommended the needed transplant. In addition, under *Davila*, any attempted malpractice claim against the plan for a mixed eligibility and treatment decision is treated as a claim for benefits and completely preempted by ERISA.[214]

The estate's only viable claims are those provided by ERISA section 502(a). But the available ERISA claims lack any practical clout. Section 502(a) provides that a plan beneficiary may only "recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[215] Monetary damages are not available.[216] Thus, our hypothetical patient could have sought injunctive relief to compel the plan to provide the transplant, but the emergency timeframe makes this option practically unavailable. Alternatively, the patient could have paid for the procedure himself and then sued for reimbursement. For most individuals, this option is financially unfeasible. In the end, the patient and his estate are left with no real remedy. Some congressional action is sorely needed to redress this injustice.

Finally, the *Davila* decision also is significant in that it runs counter to the Court's recent trend of restricting the scope of ERISA preemption. Following two decades of Supreme Court decisions recognizing a very expansive scope of ERISA preemption, the Court in 1995 signaled a retreat of sorts and began issuing a string of decisions adopting a narrower conception of ERISA preemption.[217] Whether *Davila*

212. *Id.* (stating "I also join 'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime'"; DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring)).

213. *See* Binette, *supra* note 210, at 689–93 (discussing congressional proposals for a "patients' bill of rights").

214. *See supra* notes 197–202 and accompanying text.

215. 29 U.S.C. § 1132(a)(1)(B) (2000).

216. Mertens v. Hewitt Assoc., 508 U.S. 248, 248 (1993) (holding that ERISA's authorization of "other appropriate equitable relief" in § 502(a)(3) does not include a damages remedy).

217. *See* Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1, 10–21 (2000).

represents another change in direction or simply a result-oriented anomaly remains to be seen.

2. *Central Laborers' Pension Fund v. Heinz*, 124 S. Ct. 2230 (2004)

A. HOLDING

In *Central Laborers' Pension Fund v. Heinz*,[218] the Supreme Court unanimously held that ERISA's "anti-cutback" rule[219] bars pension plan amendments expanding the categories of postretirement employment triggering suspension of previously accrued early retirement benefits.[220]

B. CONTEXT

Construction worker Thomas Heinz participated in a multiemployer pension plan (Plan) administered by the Central Laborers' Pension Fund.[221] After accumulating sufficient pension credits to receive full early retirement benefits, Heinz retired from the construction industry in 1996.[222] By the Plan's terms, Heinz's monthly retirement benefits were subject to suspension if he participated in any "disqualifying employment" after retiring.[223] At the time of Heinz's retirement, the Plan stipulated that such employment included any job as a "union or non-union construction worker."

Shortly after his retirement, Heinz accepted a job as a construction supervisor.[224] For nearly two years, the Plan continued to pay Heinz's monthly pension payment while he worked as a supervisor.[225] In 1998, however, the Plan expanded its definition of "disqualifying employment" to include any job "in any capacity in the construction industry."[226] After warning Heinz that continued work as a construction supervisor would result in suspension of his benefits, warnings Heinz did not heed, the Plan ceased its payments.[227]

Heinz filed suit to recover the suspended benefits, claiming that the Plan's amendment deprived him of accrued benefits in violation of ERISA's anticutback rule.[228] The district court held in favor of the Plan, but a divided panel of the Seventh Circuit Court of Appeals reversed on the grounds that post-hoc restrictions on access to accrued benefits violated the anticutback rule.[229]

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218. Central Laborers' Pension Fund v. Heinz, 124 S. Ct. 2230 (2004).
219. 29 U.S.C. § 1054(g) (2000).
220. *Heinz*, 124 S. Ct. at 2234.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 2234–35.
229. Heinz v. Central Laborers' Pension Fund, 303 F. 3d 802, 805 (7th Cir. 2002).

The Supreme Court affirmed the Seventh Circuit.[230] Writing for the Court, Justice Souter noted that protecting "employees' justified expectation of receiving the benefits their employers promise them" is one of the paramount goals of ERISA.[231] The anticutback provision is critically important to this objective, providing that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . ."[232] This protection extends to early retirement benefits following amendments included in the Retirement Equity Act of 1984.[233] Specifically, section 1054(g)(2) provides that "a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits."[234]

Justice Souter concluded that the Plan's 1998 amendments, expanding the definition of "disqualifying employment," violated section 1054(g)(2).[235] Though the statute itself does not define "early retirement benefit" or "accrued benefit" with great clarity, the Court agreed with the Seventh Circuit's commonsense conclusion that "placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment."[236] Heinz reasonably relied on the Plan's terms in planning his retirement.[237] Subsequent modification of the plan to his detriment undermined this reliance, forcing Heinz to choose between receiving benefit payments and working in the only industry with which he was familiar.[238] According to Justice Souter, "[w]e simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits."[239]

The Court rejected the Plan's technical arguments. Specifically, the Plan argued that the anticutback rule applied only to amendments that modified the nominal dollar amount of a pensioner's monthly payment.[240] Justice Souter dismissed this interpretation as overly narrow, noting that by the Plan's logic, benefits could be permanently sus-

230. *Heinz*, 124 S. Ct. at 2235.
231. *Id.*
232. 29 U.S.C. § 1054(g)(1) (2000).
233. *Heinz*, 124 S. Ct. at 2235.
234. 29 U.S.C. § 1054(g)(2) (2000).
235. *Heinz*, 124 S. Ct. at 2236.
236. *Id.* at 2235 (quoting Heinz, 303 F. 3d at 805).
237. *Heinz*, 124 S. Ct. at 2236.
238. *Id.*
239. *Id.*
240. *Id.* (arguing, "[a] retiree's benefit of $100 a month . . . is not reduced by a post accrual plan amendment that suspends payments, so long as nothing affects the figure of $100 defining what he would have been paid, if paid at all").

pended so long as the dollar amount a retiree would receive absent suspension remained constant.[241]

C. SIGNIFICANCE

The *Heinz* fact scenario, similar to that of *Cline*, illustrates what increasingly is becoming a common phenomenon: employers attempting to contain or reduce the cost of benefits previously conferred. Unlike the *Cline* outcome, however, the employer's efforts in *Heinz* proved to be unsuccessful.

In this case, the employer's attempted benefit reduction ran afoul of ERISA's core objective of requiring employers and other plan sponsors to keep promises upon which employees have relied.[242] The Court underscored this objective with the following quote taken from two earlier decisions:

> Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA it 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'[243]

The Court in *Heinz* ultimately determined that "an amendment placing materially greater restrictions on the receipt of the benefit" violates this principle "just as surely as a decrease in the size of the monthly benefit payment."[244]

It is important to recognize that the limitation imposed by the anticutback rule only applies to benefits that have accrued.[245] By their nature, welfare or nonpension benefits usually do not accrue. Accordingly, "employers are perfectly free to modify the deal they are offering their employees, as long as the change goes to the terms of compensation for continued, future employment."[246] Thus, based on the *Heinz* decision, employers would not be precluded from reducing the amount of benefits provided by a health care plan for current employees, at least in the absence of a collective bargaining agreement. But pension and other deferred benefits frequently do accrue, and employers who seek

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241. *Id.*

242. *Id.* at 2235.

243. *Id.* (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980)).

244. *Id.* at 2236 (quoting *Heinz*, 303 F.3d at 805).

245. *See* 29 U.S.C. § 1054(g) (2000); *see also* 26 C.F.R. § 1.411(d)-4 (stating that a plan "may be amended to eliminate or reduce section 411(d)(6) protected benefits with respect to benefits not yet accrued").

246. *Heinz*, 124 S. Ct. at 2237.

to alter the nature or amount of those benefits, such as by switching from a traditional defined benefit to a cash balance plan, must be careful not to diminish the value of those benefits that already have accrued.[247]

3. *Yates v. Hendon*, 124 S. Ct. 1330 (2004).

A. HOLDING

In *Yates v. Hendon*,[248] the Supreme Court held that a working owner of a business qualifies as a participant in a benefit plan covered by ERISA, so long as the plan covers one or more employees other than the business owner and his or her spouse.[249] Justices Scalia and Thomas each filed concurring opinions.[250]

B. CONTEXT

Dr. Raymond B. Yates was the sole shareholder and president of a professional corporation.[251] Yates' corporation provided a profit-sharing plan (Plan) administered by Yates, who also served as the Plan's trustee.[252] At all times, participants in the Plan included at least one person other than Yates or his wife.[253] The Plan included an anti-alienation provision, as required by both the Internal Revenue Code[254] and Title I of ERISA,[255] providing that "no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily."[256]

In 1989, Yates borrowed $20,000 from the Plan. Per the loan's terms, Yates was to make monthly payments over a five-year period.[257] He renewed the loan for five years in 1992.[258] Yates made no payments on the loan until 1996, when he made two payments totaling $50,467, paying off the loan's principal and interest due.[259] The money used for the payments came from proceeds from the sale of Yates' home.[260]

Shortly after Yates repaid the loan, his creditors filed an involuntary bankruptcy petition against him.[261] Hendon, the bankruptcy trustee, filed a complaint against the Plan and Yates alleging that Yates' recent lump-sum payment of the loan constituted a preferential transfer to

247. *See generally* Cooper v. IBM Pers. Pension Plan, 274 F. Supp. 2d 1010 (S.D. Ill. 2003).
248. Yates v. Hendon, 124 S. Ct. 1330 (2004).
249. *Id.* at 1335.
250. *Id.*
251. *Id.* at 1336.
252. *Id.*
253. *Id.*
254. 26 U.S.C. § 401(a)(13) (2000).
255. 29 U.S.C. § 1056(d) (2000).
256. *Yates*, 124 S. Ct. at 1336.
257. *Id.*
258. *Id.* at 1336–37.
259. *Id.* at 1337.
260. *Id.*
261. *Id.*

the Plan.[262] Hendon asked the bankruptcy court to order the Plan (and Yates as trustee) to pay the sum of $50,467.46 to Hendon.[263]

The bankruptcy court, after concluding that Yates' repayment of the loan qualified as a preferential transfer under 11 U.S.C. section 547(b),[264] ruled that the Plan's anti-alienation provision could not prevent Hendon from recovering the loan repayment because Yates did not qualify as a plan participant for the purposes of ERISA coverage.[265] As the self-employed owner of the corporation sponsoring the Plan, the court reasoned, Yates was disqualified from participating in the Plan as an employee under ERISA.[266] Thus, Yates could not rely on ERISA's anti-alienation provisions to restrict transfer of the loan repayment.[267] The district court and the Sixth Circuit affirmed.[268]

Justice Ginsburg, writing for the Court, reversed the Sixth Circuit, holding that a working owner of a business—in this case the business's sole shareholder and president—may qualify as a participant in an ERISA-covered benefit plan.[269] Finding ERISA's definitions of "employee" and "participant" uninformative, Justice Ginsburg arrived at her holding by reviewing other provisions within ERISA.[270]

Justice Ginsburg noted that well before ERISA's passage, certain provisions of the Internal Revenue Code permitted sole proprietors to participate in tax-qualified pension plans.[271] In enacting ERISA, Congress' "objective was to harmonize ERISA with [these] longstanding tax provisions."[272] Justice Ginsburg also found evidence from within ERISA itself, citing a number of Title I provisions that "partially exempt certain plans in which working owners likely participate from otherwise mandatory [ERISA] provisions."[273] Such exemptions would be superfluous if ERISA barred working owners from participating in any such plans.[274]

Certain provisions of Title IV of ERISA further support the conclusion that working owners are not barred from participating in ERISA qualified benefit plans.[275] Significantly, Title IV and the Internal Revenue Code strongly indicate that "a working owner may have dual

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262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 1335.
270. *Id.* at 1339.
271. *Id.* Justice Ginsburg noted that under the Internal Revenue Code, working owners have been eligible to participate in tax-qualified pension plans since 1942. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 1340–41.

status, i.e., he can be an employee entitled to participate in a plan and, at the same time, the employer . . . who established the plan."[276] The Court explained that the Sixth Circuit's interpretation derived from an erroneous reading of 29 C.F.R. section 2510.3–3 that a working owner could not be classified as an employee of his business for ERISA purposes.[277] Contrary to the Sixth Circuit, a 1999 advisory opinion by the Department of Labor read 29 C.F.R. section 2510.3–3 to mean that Title I of ERISA did not apply to plans where *only* the working owner and his or her spouse were participants.[278] The Court ultimately concluded that where one or more common law employees, as here, also participate in the plan, the plan "fall[s] entirely within ERISA's compass."[279]

Justice Ginsburg also faulted Sixth Circuit precedent for erroneously relying on ERISA's anti-inurement provision, which "prohibits plan assets from inuring to the benefit of employers."[280] The Sixth Circuit read the anti-inurement provision as a broad bar on the participation of working owners in ERISA-sponsored pension plans.[281] According to Justice Ginsburg, however, "the anti-inurement provision does not preclude Title I coverage of working owners as plan participants."[282] Instead, "the provision demands only that plan assets be held for supplying benefits to plan participants."[283] ERISA's anti-inurement provision is intended to prevent fiduciary breaches, not to prohibit working owners from participating in ERISA-protected plans on an equal basis with other employees.[284]

C. SIGNIFICANCE

Justice Ginsburg's opinion conveniently provided its own assessment of the benefits flowing from the *Yates* decision. The Court stressed two benefits in particular. First, the Court noted that its decision furthers "Congress' aim" by encouraging the creation of ERISA benefit plans.[285] As the Court stated, "[t]he working employer's opportunity personally to participate and gain ERISA coverage serves as an incentive to the creation of plans that will benefit employer and non-owner employees alike."[286] Second, the Court's ruling "avoids the anomaly that the same plan will be controlled by discrete [legal] regimes."[287]

276. *Id.* at 1341.
277. *Id.* at 1342.
278. U.S. Dep't of Labor, Advisory Opinion 99–04A, 26 BNA Pens. & Ben. Rep. (BNA) 559.
279. *Yates*, 124 S. Ct. at 1344.
280. 29 U.S.C. § 1103(c)(1) (2000).
281. *Yates*, 124 S. Ct. at 1344.
282. *Id.*
283. *Id.*
284. *Id.* at 1345.
285. *Id.* at 1333.
286. *Id.* at 1333–34.
287. *Id.* at 1334.

This anomaly would have occurred under the Sixth Circuit's reading of the statute because ERISA would govern that portion of the plan applicable to nonowner employees, while state law would govern the owner's rights under the plan.[288] Such a dichotomy, the Court suggested, would generate administrative difficulties and run counter to ERISA's goal of establishing a uniform national treatment of employee benefit plans.[289]

While these goals are undoubtedly laudatory, it remains to be seen whether the ruling in *Yates* produces the unintended consequence of sheltering Mr. Yates' questionable behavior. His conduct in taking an interest-free loan from the Plan for seven years and then repaying the loan out of the proceeds from the sale of his home on the eve of bankruptcy proceedings fails a basic smell test. Yet, Justice Ginsburg is correct in concluding that the mere possibility of self-dealing alone should establish "no categorical barrier to working owner participation in ERISA plans."[290] She noted that whether Yates himself had violated the anti-inurement provision was one of the issues to be determined on remand to the lower courts.[291]

F. *Nonemployment Decisions*

1. *Scarborough v. Principi*, 124 S. Ct. 1856 (2004)

In *Scarborough v. Principi*,[292] the Supreme Court made it easier for a prevailing party in an action against the United States to recover attorney fees under the Equal Access to Justice Act (EAJA). Under that statute, a prevailing party must file an application within thirty days of the respective action's final judgment.[293] The EAJA specifies that the application must include (1) a showing that the applicant's net worth did not exceed $2,000,000 at the time the action was filed,[294] (2) a statement of the amount sought,[295] and (3) an allegation "that the position of the United States was not substantially justified."[296] The Court in *Scarborough* held that a timely application may be amended after expiration of the thirty-day filing period to allege that the government's position in the underlying litigation lacked substantial justification.[297]

The Court's decision represents a victory of substance over form and builds upon two other recent decisions in which the Court applied

288. *Id.* (explaining that if a working owner is not a plan participant subject to ERISA, then state law relating to the working owner's interest in the plan is not preempted).
289. *Id.*
290. *Id.* at 1345.
291. *Id.*
292. Scarborough v. Principi, 124 S. Ct. 1856 (2004).
293. 28 U.S.C. § 2412(d)(1)(B) (2000).
294. 28 U.S.C. § 2412(d)(2)(B) (2000).
295. 28 U.S.C. § 2412(d)(1)(B) (2000).
296. 28 U.S.C. § 2412(d)(1)(A) (2000).
297. *Scarborough*, 124 S. Ct. at 1856.

the relation-back doctrine to allow curative amendments subsequent to filing deadlines.[298] In *Scarborough*, the Court reviewed the legislative rationale for enacting the EAJA, finding that Congress sought "to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government."[299] The Court found that permitting a post-filing amendment advances Congress' purpose in enacting the EAJA. The requirement that fee applicants allege that the government's position in the underlying litigation was not substantially justified serves as a mere pleading requirement, "ward[ing] off irresponsible litigation."[300] To defeat a fee application on the merits, the government knows from the outset it must prove its position was substantially justified.[301] Thus, the requirement in question "does not serve an essential notice-giving function."[302]

The decision has relevance for employees seeking access to government benefits or programs. The *Scarborough* outcome will enable an employee who, for example, has wrongfully been denied Social Security disability benefits, to pursue a claim against the federal government more easily.

2. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004)

The Supreme Court's decision in *Tennessee v. Lane* is the latest in a series of cases interpreting the reach of the Eleventh Amendment with respect to barring suits against state defendants under a variety of federal statutes. The decision also illustrates the impact of an egregious set of facts.

George Lane and Beverly Jones (respondents) are paraplegics.[303] Respondents alleged that the state of Tennessee and various counties within the state violated their rights under Title II of the ADA by denying them physical access to the state's courts on the basis of their disability.[304] Lane faced criminal charges and was required to appear in a court located on the second floor of a county courthouse.[305] With no elevator available, Lane crawled up the courthouse stairs to attend

298. *Id.* at 1865–68; *see* Becker v. Montgomery, 532 U.S. 757 (2001) (holding that a pro se litigant who failed to sign a timely filed notice of appeal could add the required signature even after the time for filing the notice expired); Edelman v. Lynchburg Coll., 535 U.S. 106 (2002) (extending relation-back concept to affirmation requirement attaching to Title VII discrimination claims).

299. *Scarborough*, 124 S. Ct. at 1861 (quoting H.R. REP. NO. 96–1005, at 9 (1980)).

300. *Id.* at 1866.

301. *Id.*

302. *Id.* at 1867.

303. Tennessee v. Lane, 124 S. Ct. 1978, 1982 (2004).

304. *Id.*

305. *Id.*

his first appearance.[306] For a required second appearance, Lane refused to again pull himself up the courthouse steps.[307] As a result, he was arrested for failure to appear.[308] Jones, who works as a court reporter, claimed that lack of disability access to several county courthouses cost her both work opportunities and the ability to participate in the judicial process.[309]

Respondents brought suit in district court, seeking damages and equitable relief.[310] Tennessee moved for dismissal, claiming immunity under the Eleventh Amendment.[311] When the district court denied its motion, Tennessee appealed to the Sixth Circuit Court of Appeals, which held the case in abeyance pending the Supreme Court's decision in *Board of Trustees of University of Alabama v. Garrett*.[312] In *Garrett*, the Supreme Court held that the Eleventh Amendment immunized states against private suits seeking money damages for alleged state violations of Title I of the ADA, which protects the disabled from employment discrimination.[313] The *Garrett* Court, however, left unresolved whether or not the Eleventh Amendment barred damages in law for suits brought under Title II.[314]

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[315] Interpreting *Garrett* to "bar private ADA suits against states based on equal protection principles, but not those that rely on due process principles," the Sixth Circuit affirmed the district court on the grounds that "respondents' claims were . . . based on due process principles," specifically the right of access to the courts as protected by the Due Process Clause.[316]

Affirming the Sixth Circuit, Justice Stevens' 5–4 majority opinion held that the Eleventh Amendment does not bar ADA Title II suits against states in federal court, at least as to claims implicating the fundamental right of access to the courts.[317] The Court reserved judgment with respect to the remaining portions of Title II.

The Supreme Court has held that Congress possesses broad power

306. *Id.*
307. *Id.* at 1983.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
314. *Id.* at 360.
315. 42 U.S.C. § 12132 (2000).
316. *Lane*, 124 S. Ct. at 1983–84.
317. *Id.* at 1993.

under the Fourteenth Amendment's enforcement clause (section 5) to abrogate a state's Eleventh Amendment immunity.[318] This congressional power includes the ability "[to] enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[319] Yet, while Congress' section 5 power is broad, it is not without limits.[320] As the Court stated in a two part test first set out in *City of Boerne v. Flores:* Section 5 legislation is valid only if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[321]

In applying the *Boerne* test to the respondents' claims, Justice Stevens first identified the constitutional rights Congress sought to enforce when enacting Title II.[322] Included in these rights are "basic constitutional guarantees" such as the right of access to the courts, as protected by the Due Process Clause of the Fourteenth Amendment.[323] Justice Stevens then determined that Title II's enforcement measures are appropriate relative to the harm Title II seeks to remedy.[324] In addressing this question, Justice Stevens concluded that "[t]he unequal treatment of disabled persons in the administration of judicial services has a long history and has persisted despite several legislative efforts to remedy the problem. . . ."[325] In view of this history, the Court concluded that Title II's mandate to provide court access to disabled persons is a "reasonable prophylactic measure, reasonably targeted to a legitimate end."[326]

In a dissenting opinion joined by Justices Kennedy and Thomas, Chief Justice Rehnquist found the Court's holding irreconcilable with

318. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (stating that Congress possesses "broad power indeed" to abrogate a state's sovereign immunity through exercise of its power under § 5 of the Fourteenth Amendment); Fitzpatrick v. Blitzer, 427 U.S. 445 (1976) (holding that Congress can abrogate a state's sovereign immunity to enforce the substantive guarantees of the Fourteenth Amendment).

319. *Lane*, 124 S. Ct. at 1985 (quoting Nev. Dep't. of Human Res. v. Hibbs, 538 U.S. 721, 727–28 (2003)).

320. *Id.* at 1986. In undertaking enforcement measures, Congress cannot affect substantive alterations of applicable law. *Id.* Thus, Courts must determine whether § 5 enforcement measures are remedial, and thus permissible, or impermissible because they substantively redefine existing law. *Id.*

321. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

322. *Lane*, 124 S. Ct. at 1988.

323. *Id.*

324. *Id.* at 1988–89.

325. *Id.* at 1993. Consequently, the Court concluded that "Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Id.*

326. *Id.* at 1994. Justice Stevens was careful to note that Congress requires states to take only reasonable measures to comply with Title II. *Id.* at 1993. Cost and convenience on their own, however, "cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Id.* at 1994.

Garrett.[327] In Chief Justice Rehnquist's view, Title II constituted an invalid exercise of Congress' section 5 power because it failed to "exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[328]

The *Lane* decision is interesting for several reasons. While the factual context cried out for judicial relief, the Court clearly was reluctant to retreat very far from its recent string of pro–states' rights decisions in this area.[329] The Court resolved this tension by making the narrowest of possible rulings. Rather than hold that Congress validly abrogated Eleventh Amendment immunity with respect to Title II generally, the Court used a scalpel to extract and save only those suits implementing the due process rights of access to the courts.[330] The principal importance of *Lane* for labor and employment law purposes, however, is as a guide to future decisions affecting federal employment law statutes. This topic is discussed in more detail below.[331]

III. Assessing the Significance of the 2003–04 Term

The labor and employment decisions of the 2003–04 term likely will not rank high in historical significance. That is not to say that these decisions are not important or interesting; they are both. But this term saw no blockbuster decisions similar to *Ellerth* and *Faragher*[332] in 1998 or *Sutton* in 1999.[333] These decisions, even collectively, will have little impact on the day-to-day work of most labor and employment law practitioners.

Two of the cases had the potential to become blockbuster decisions, but the Court decided each in a manner that avoided that outcome. If the Court had affirmed the Sixth Circuit's decision in *Cline* and sanctioned reverse discrimination claims under the ADEA, it would have had the blockbuster effect of eliminating early retirement programs for all practical purposes.[334] Similarly, if the Court had affirmed the Fifth Circuit's decision in *Davila* and sanctioned state law damages suits against health plans for medical treatment coverage decisions, it may have launched a medical malpractice revolution.[335] The Court, however, chose to do neither and instead endorsed the existing majority interpretations running in the opposite direction on each issue. In short, the final blockbuster tally for the term stands at status quo two, blockbusters zero.

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327. *Id.* at 1997 (Rehnquist, C.J., dissenting).
328. *Id.* at 1998 (quoting *City of Boerne*, 521 U.S. at 520).
329. *See infra* notes 374–91 and accompanying text.
330. *Lane*, 124 S. Ct. at 1992–93.
331. *See infra* notes 374–91 and accompanying text.
332. *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.
333. *Sutton*, 527 U.S. at 471.
334. *See supra* notes 58–60 and accompanying text.
335. *See supra* notes 209–10 and accompanying text.

This general assessment of the 2003–04 term bolsters the status of the two themes nominated above. If "the year of ERISA" label is tweaked to read "the year of employee benefits," the first theme would encompass *Cline*, which clearly is a case about benefits in a non-ERISA setting. This broadened theme, then, would embrace a majority of the Court's labor and employment decisions for the term (*Cline* and the three ERISA cases), as well as the two most potentially significant decisions of the term (*Cline* and *Davila*). The "not much happened" theme also gains strength by the fact that the relatively small set of labor and employment cases (seven) contains no decision of blockbuster quality. With both quantity and quality coalescing in such modest order, it seems safe to conclude that the Court experienced a relatively quiet year on the labor and employment front.

The question remains whether these themes represent long-term trends or merely blips on the radar screen. A look at some of the underlying forces giving rise to these themes provides some insight on this question.

A. *Increase in Employee Benefit Decisions*

The increased share of employee benefit decisions among the Court's labor and employment docket has been building for some time. Once again, the statistics compiled by former Section Secretary James Brudney are instructive.[336] As he reported in 2000, cases arising under ERISA and other retirement-related federal statutes rose from 11.69 percent of the Court's total of labor and employment decisions during the period from 1987 to 1989 to 20.9 percent in the period spanning 1996 to 1999.[337] This increase primarily came at the expense of NLRA and Title VII cases, which plummeted by more than one-half as a proportion of the Court's labor and employment docket during that same time period.[338] The trend has accelerated during the past three terms as decisions arising under ERISA have equaled those arising under the NLRA and Title VII combined.[339]

What is propelling this increase in ERISA decisions? This term's employee benefits decisions provide several clues.

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336. Brudney, *supra* note 1, at 153–59.

337. *Id.* at 156–57 n.12.

338. *Id.* at 155 nn.8 and 9 (reporting that labor–management decisions fell from 30.4 percent of the Court's labor and employment decisions in 1987–89 to just 13 percent in 1996–99, and that race and sex discrimination cases fell from 26.1 percent (eighteen out of a total of sixty-nine labor and employment decisions) of the Court's labor and employment caseload in 1987–89 to 14.8 percent in the 1996–99 period; together accounting for a drop from 56.5 percent to 27.8 percent).

339. During the past three terms, the Supreme Court has decided seven cases arising under ERISA, five cases arising under Title VII, and two cases interpreting the NLRA. These data reflect the number of cases reported in the articles published by the two immediately preceding Section secretaries, *see* Maria O'Brien Hylton, *supra* note 1, at 247 n.5, and Estlund, *supra* note 1, at 314–28, as well as in this article, *see supra* notes 5–8 and accompanying text.

First, the *Cline* and *Davila* cases illustrate the front-burner nature of health insurance benefits. Access to health care is a matter of crucial importance, as has been demonstrated by the Clinton administration's failed attempt at broad-based health care reform,[340] by Congress' continued debate over a proposed patient's bill of rights,[341] and by Senator John Kerry's attempt to make health insurance a major campaign issue during the 2004 presidential election.[342] The Census Bureau in 2003 determined that 44 million Americans were without health insurance.[343] In the United States, most individuals who are able to obtain health insurance do so through employer-sponsored plans.[344] This fact alone makes health insurance an important subject of labor and employment law.

Second, the *Cline* and *Heinz* cases demonstrate that employers are desperate to contain soaring benefit costs. Health care costs are skyrocketing at double-digit rates, four times as fast as the rise in wages.[345] One estimate predicts that by 2006 the cost of employer-sponsored health care coverage for the average American family will hit $14,500.[346] Benefit costs, however, are not limited to health care. With a growing retiree population and an aging workforce, the cost of funding employer pension obligations is staggering.[347] In total,

340. *See generally* HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT (1997) (discussing failure of Clinton administration's attempts at health care reform); W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, 7 STAN L. & POL'Y REV. 83 (1996) (discussing the development and failure of Clinton's universal health care proposal); Dana Priest, *Democrats Pull the Plug on Health Care Reform*, WASH. POST, Sept. 27, 1994, at A1.

341. *See, e.g.*, H.R.J. Res. 30, 108th Cong. (2003) (proposing a constitutional amendment to provide that all citizens have the right to health care of "equal high quality"); Binette, *supra* note 210, at 689–93; Sharon Reece, *The Circuitous Journey to the Patients' Bill of Rights: Winners and Losers*, 65 ALB. L. REV. 17, 31 (2001).

342. *See* Jeff Tieman, *Dems Hang Hat on Healthcare; Coverage for Poor, Uninsured in Spotlight at DNC*, MOD. HEALTHCARE, Aug. 2, 2004, at 8; Ronald Brownstein, *Kerry, Edwards Offer Different Prescriptions: As Medical Costs Rise and Access to Insurance Erodes, the Debate on Healthcare Moves to the Center of Candidates' Domestic Agendas*, L.A. TIMES, Feb. 28, 2004, at A22.

343. *See* CATHERINE MCLAUGHLIN, HEALTH POLICY AND THE UNINSURED (2004); David S. Broder, *To Save U.S. Health Care System from Certain Disaster, Drastic Surgery is Needed*, ST. PAUL PIONEER PRESS, July 15, 2004, at 12A.

344. *See* U.S. Census Bureau, Health Insurance Coverage in the United States: 2002, *available* at www.census.gov/hhes/www/hlthins.html (reporting that as of 2002, 61.3 percent of Americans were covered by employment-based health insurance, while only 9.2 percent of the population obtained coverage through direct purchase of a private health plan).

345. Broder, *supra* note 343, at 12A. *See also* Eduardo Porter, *Rising Cost of Health Benefits Cited as Factor in Slump of Jobs*, N.Y. TIMES, Aug. 19, 2004, *available at* http://www.nytimes.com/2004/08/19/business/19care.html.

346. *See* Broder, *supra* note 343, at 12A.

347. *See* Kathy M. Kristof, *Big Firms' Pension Deficits Continue*, L.A. TIMES, June 18, 2004, at C1 (stating that the 1,000 largest U.S. companies reported a combined shortfall in pension funding of $278.6 billion in 2003); *Pension Bills Coming Due, But Will We Be Able to Pay?* CRAIN'S CHI. BUS., Mar. 15, 2004, at 10.

employer-paid benefits constitute more than 15 percent of total employee compensation.[348]

Finally, the *Davila* decision highlights the ongoing federal/state tug of war with respect to the regulation of employee benefits. Much of this debate flows from the manner in which ERISA is structured. ERISA establishes procedural requirements with respect to the reporting, disclosure, and fiduciary responsibilities of covered benefit plans.[349] However, while ERISA contains detailed provisions governing the funding and content of pension plans, it contains little in the way of substantive regulation with respect to the content of welfare benefit plans, such as those providing health benefits.[350] This regulatory vacuum serves as a powerful incentive for states to adopt their own regulatory schemes such as the Texas statute at issue in *Davila*.[351] But such efforts frequently run head long into ERISA's broad preemptive exclusion of state regulation.[352] The result is a game of cat and mouse that has produced a steady stream of ERISA preemption cases and a bewildering maze of preemption jurisprudence.[353]

The increased importance of ERISA issues on the Supreme Court's agenda also is explained in part by the declining presence of labor and Title VII cases. As noted above, the increase in employee benefit decisions and the decrease in NLRA and Title VII decisions essentially have occurred in tandem.[354]

Several factors likely have influenced this trend. First, the ongoing decline in union density produces fewer labor disputes and may diminish the perceived importance of labor issues in the eyes of the Court.[355] Second, both the NLRA and Title VII are mature statutes that are largely uncomplicated by recent amendments. These "ossified" statutory schemes, accordingly, may require less in the way of judicial con-

348. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2002/2003 120, tbl. 2.2 (2003).

349. *See* 29 U.S.C. §§ 1021–1031 (2000).

350. *See* Peter J. Wiedenbeck, *ERISA's Curious Coverage*, 76 WASH. U. L. Q. 311, 341 (1998).

351. See Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 BRANDEIS L. J. 529, 530 n.4 (2004) (reporting that ten states, including Texas, have passed managed care liability statutes).

352. 29 U.S.C. § 1144(a) (2000) ("[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.").

353. *See generally* Befort & Kopka, *supra* note 217.

354. *See supra* notes 337–40 and accompanying text.

355. Union membership peaked in the United States in 1954 at 34.7 percent of the nonagricultural labor force, and then began a long and steady decline. *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 11, tbl. 2 (1987). Bureau of Labor Statistics data for 2003 show that union membership has fallen to 12.9 percent of the nonagricultural labor force. *See* U.S. Department of Labor, *Union Members Summary* (Jan. 21, 2004), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

struction.[356] Finally, to the extent that the current Court is considered to be conservative in its interpretation of labor and civil rights laws, union and employee representatives may consciously be choosing not to present some key issues for review.[357]

Neither the factors facilitating the increase in employee benefit cases nor those posited for the declining prevalence of labor and Title VII cases are short term in nature. This suggests that the Court's reshuffling of its docket is likely to continue into the foreseeable future. This conclusion also makes something of a sage out of Keith Hylton, the former secretary of the Section of Labor and Employment Law, who wrote the following in his 1999 article:

> . . . the day may soon come in which ERISA cases make up by far the largest share of the Court's labor and employment decisions. Traditional labor and employment law teachers will not, for the most part, be attracted to the prospect of reviewing these decisions.[358]

As a teacher of traditional labor and employment law courses, I think that Professor Hylton was prescient in more ways than one.

B. *The Overall Decrease in Labor and Employment Decisions*

This term's overall decline in labor and employment decisions also reflects a growing tendency. As noted above, labor and employment decisions generally comprised around 16 percent of the Court's total docket during the twenty-five years preceding 2000.[359] In four of the last five terms, however, the Court's share of labor and employment decisions has fallen below that norm.[360]

This trend likely will continue for the near future as it reflects what appears to be the Court's conscious policy of diverting employment claims away from the federal court system. A steady deluge of federal employment claims built during the early 1990s following the enactment of the ADA and the FMLA. In the four years following 1991, for example, the number of employment claims in federal court jumped by 128 percent.[361] By 1997, cases involving the workplace constituted an estimated 10 percent of the entire federal court docket.[362] During this same time frame, the Supreme Court began to issue a series of decisions

356. *See* Gottesman, *supra* note 1, at 327; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

357. Keith Hylton, *supra* note 1, at 266.

358. *Id.* at 267.

359. *See* note 12 and accompanying text.

360. The 2001–02 term is the outlier of this group. *See* Estlund, *supra* note 1, at 291 (reporting that labor and employment cases made up 22 percent of that year's total caseload).

361. *See* Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997).

362. *Id.*

redirecting many of these claims elsewhere. The Court's three-prong strategy is described below.

1. Encouraging Arbitration

In 1991, the Supreme Court decided the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.*, holding that an employment discrimination plaintiff may waive his right to proceed in court by entering into a predispute agreement to submit such claims to arbitration.[363] The Court explained that while a plaintiff cannot prospectively waive the right to file a statutory discrimination claim, she can agree to forgo pursuing such a claim in a judicial forum.[364] The Court in *Gilmer* effectively reversed decades of judicial hostility to arbitration and ruled that arbitration agreements are valid under the Federal Arbitration Act (FAA) unless the statute in question expressly evinces a policy proscribing such a waiver.[365] Significantly, the Court also ruled that such agreements are enforceable even where the agreement reflects an inequality in bargaining power.[366]

The *Gilmer* Court, however, did not decide the reach of the FAA's exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[367] The lower courts divided on whether this language excluded all employees working for a business engaged in interstate commerce[368] or just those engaged in the actual transportation of goods.[369] The Supreme Court in *Circuit City Stores, Inc. v. Adams* resolved this issue by adopting the latter construction, thereby extending the FAA's preference for arbitration to the vast majority of American employees.[370]

Following *Gilmer* and *Circuit City*, most arbitration agreements are enforceable unless they are procedurally defective or limit the substantive rights or remedies available to the parties.[371] Even here, the Court, in a trio of nonemployment cases decided in the 2002–03 term, ruled that questions concerning the validity of procedures and remedies under an arbitration agreement should be decided initially by the ar-

363. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

364. *Id.* at 33–35.

365. *Id.* at 26.

366. *Id.* at 33.

367. 9 U.S.C. § 1. *See Gilmer*, 500 U.S. at 25–26 n.2 (stating that the Court need not construe the FAA exception because the arbitration clause at issue was contained in a securities exchange contract, not an employment contract).

368. *See generally* Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998).

369. *See, e.g.*, Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 (7th Cir. 1995); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 599–601 (6th Cir. 1995).

370. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

371. *See, e.g.*, Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936–37 (4th Cir. 1999) (finding arbitration agreement unenforceable where procedural rules are egregiously unfair); Paladino v. Avnet Computer Tech. Inc., 134 F.3d 1054, 1057–58 (11th Cir. 1998) (finding arbitration agreement unenforceable where the agreement does not authorize the arbitrator to award relief authorized by statute).

bitrator rather than by the court in most instances.[372] Lower courts have extended these rulings to the employment setting.[373]

In this line of cases, the Court opened the door for the parties to substitute private arbitration for federal court litigation. In doing so, however, significant questions remain concerning the appropriate procedures and remedies of the arbitral alternative. While it is still too early to tell how many parties will adopt this substitute forum, it is clear that an increasing number of employment claims are now barred from the federal courthouse on this ground.

2. The Eleventh Amendment and State Defendants

The second diversionary tool utilized by the Supreme Court is the Eleventh Amendment to the U.S. Constitution.[374] Pursuant to the Court's jurisprudence, a state is not subject to suit in federal court unless it has given its consent to be sued or Congress has explicitly and validly abrogated such immunity.[375] The Court has invoked the Eleventh Amendment in a series of decisions that immunize states from suits under a number of federal employment statutes.

In *Seminole Tribe of Florida v. Florida*,[376] the Supreme Court set out a two-part test to determine whether a federal statute abrogates Eleventh Amendment immunity, by inquiring (1) "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity'" and (2) whether it has acted "pursuant to a valid exercise of power."[377] The second of these factors requires that Congress, in enacting legislation, act in furtherance of section 5 of the Fourteenth Amendment.[378] The Court has admonished that, for a resulting statute to be valid, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[379]

372. *See generally* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

373. *See, e.g.*, Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 823–24 (8th Cir. 2003).

374. The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI. Although the amendment refers only to suits against a state by citizens of another state, the Court has long extended the amendment's application to suits by citizens against their own states. Hans v. Louisiana, 134 U.S. 1 (1890).

375. *See* Edelman v. Jordan, 415 U.S. 651, 662–63 (1974) (discussing consent); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239–41 (1985) (discussing abrogation).

376. Seminole Tribe v. Fla., 517 U.S. 44 (1996).

377. *Id.*, 517 U.S. at 55.

378. *See City of Boerne*, 521 U.S. at 536. Section 5 grants Congress the authority to enforce the substantive guarantees of §1 of the Fourteenth Amendment, which prohibits the states from making any law that deprives individuals of due process or equal protection. U.S. CONST. Amend. XIV, §§ 1, 5.

379. *City of Boerne*, 521 U.S. at 520.

The Court, so far, has applied this test to hold that Congress did not validly abrogate Eleventh Amendment immunity under three federal employment statutes: the Fair Labor Standards Act,[380] ADEA,[381] and Title I of the ADA.[382] As a result, state employees cannot sue the state in federal court under these statutes. In contrast, the Court has ruled that Congress did validly abrogate Eleventh Amendment immunity with respect to the family-care provision of the FMLA[383] and, in a nonemployment case, with respect to access to the courts under Title II of the ADA.[384]

The difference in these results can be explained, at least in part, by the different level of scrutiny afforded to the classifications at issue. As the Court explained in *Nevada Department of Human Resources v. Hibbs*, the statutes in the former group of cases concerned classifications, such as age and disability, that are subject only to rational basis scrutiny under the Equal Protection Clause.[385] In this context, the Court is prone to conclude that the substantive requirements imposed by the statute are disproportionate to any unconstitutional conduct that conceivably could be targeted by that act.[386] In sharp contrast, the Court found in *Hibbs* that the FMLA's leave entitlement for family care purposes was intended by Congress to redress a past pattern of gender discrimination, a classification entitled to a higher level of scrutiny.[387] Because of this higher standard, the Court found that "it was easier for Congress to show a pattern of state constitutional violations" sufficient to sustain the abrogation of immunity.[388] The Court similarly upheld Congress' abrogation of immunity under Title II of the ADA, noting that the right of access to the courts implicates fundamental due process rights entitled to heightened Fourteenth Amendment scrutiny.[389]

If the level-of-scrutiny factor continues to be determinative, it is likely that the Court will find a valid abrogation in Title VII's race and gender discrimination ban because both of these classifications receive heightened scrutiny.[390] On the other hand, the Court likely will view the FMLA's leave entitlement for an employee's own serious health condition as akin to ADA Title I claims and thus not validly abrogated.

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380. Alden v. Maine, 527 U.S. 706 (1999).

381. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

382. *Garrett*, 531 U.S. at 356.

383. *Hibbs*, 538 U.S. at 726–27.

384. *Lane*, 124 S. Ct. 1978. This decision is discussed *supra* at notes 303–31 and accompanying text.

385. *See Hibbs*, 538 U.S. at 735 (contrasting *Hibbs* with *Kimel* (age) and *Garrett* (disability) as to their respective levels of scrutiny).

386. *See, e.g., Kimel*, 528 U.S. at 82.

387. *Hibbs*, 538 U.S. at 728.

388. *Id.* at 736.

389. *Lane*, 124 S. Ct. at 1992–93.

390. *See* STEPHEN F. BEFORT, 17 MINN. PRAC., EMPLOYMENT LAW AND PRACTICE § 12.12 (2d ed. 2003).

The ultimate effect of these Eleventh Amendment decisions is to preclude approximately 5 million state employees from suing their employer in federal court under three or perhaps four federal employment statutes.[391] Here again, the Court has succeeded in diminishing the federal employment litigation caseload.

3. Restricting Disability Status

One of the principal reasons for the surge in federal court employment cases during the 1990s was Congress' adoption of the ADA in 1990. This loosely crafted statute with an antidiscrimination formula unlike that of Title VII cried out for judicial interpretation.[392] Between the ADA's effective date in 1992 and the end of fiscal year 2003, claimants filed more than 189,000 charges of disability discrimination with the EEOC.[393] In a relatively short span from 1998 to 2004, the Supreme Court decided sixteen cases construing the ADA.[394] In this light, it is not surprising that the Court's third device for reducing employment-related federal court litigation is to raise the bar for plaintiffs seeking to assert claims under the ADA.

Under the ADA's statutory formula, a plaintiff may assert a claim of discrimination only if he or she is an "individual with a disability."[395] The ADA defines a covered "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[396] Alternatively, an individual may qualify as disabled for purposes of the ADA if he or she has a "record" of such an impairment or is "regarded as" having such an impairment.[397]

In four decisions beginning in 1999, the Court has narrowed the class of protected "disabled" employees under the ADA. The first and

391. U.S. Census statistics for March 2002 list total state employment at 5,072,130. U.S. Census, State Government Employment Data: March 2002 United States Totals, *available at* http://ftp2.census.gov/govs/apes/02stus.txt (last visited July 20, 2004).

392. *See* Befort & Thomas, *supra* note 55, at 80–81 (describing ten contentious ADA issues on which the circuit courts and/or the EEOC took conflicting positions and also discussing the reasons for this widespread judicial dissonance).

393. *See* The U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges, FY 1992–FY 2003 (reporting that 189,621 charges were filed under the ADA from the act's effective date in 1992 through September 30, 2003), *at* www.eeoc.gov/stats/ADA (last modified Mar. 8, 2004).

394. *Lane*, 124 S. Ct. 1978; *Hernandez*, 124 S. Ct. at 513; Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003); Barnes v. Gorman, 536 U.S. 181 (2002); Chevron USA, Inc. v. Echazabal, 536 U.S. 72 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001); *Garrett*, 531 U.S. at 356; Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); *Sutton*, 527 U.S. at 471; Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998).

395. 42 U.S.C. § 12112(a) (2000).

396. 42 U.S.C. § 12102(2)(A) (2000).

397. 42 U.S.C. § 12102(2)(B), (C) (2000).

most significant of these decisions was the landmark case of *Sutton v. United Air Lines, Inc.*[398]

Karen Sutton and Kimberly Hinton were twin sisters who both suffered from severe myopia. Each had uncorrected visual acuity of 20/200 in one eye and 20/400 in the other, but with corrective lenses their vision improved to 20/20 or better.[399] In 1992, both sisters applied for employment with United Air Lines (United) as commercial airline pilots. United rejected both sisters because they did not meet minimum uncorrected vision requirements.[400] Petitioners brought suit under the ADA, alleging that they fit within the protected class of individuals with a disability due to their respective vision impairments or, alternatively, because they were "regarded as" having a substantially limiting impairment.

The key issue in determining the twins' prong-one disability claim concerned whether mitigating measures should be considered in determining whether a person is "substantially limited" in a major life activity. The EEOC had issued interpretive guidelines suggesting that the issue of disability status should be assessed without regard to mitigating measures.[401] Under this approach, for example, an individual with diabetes who could perform normally with insulin injections, but who without insulin would lapse into a coma, would be considered "disabled" and thus protected by the ADA.[402] The *Sutton* Court, in a 7–2 decision, disagreed, stating:

> [I]t is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[403]

The Court rejected the contrary recommendations of the agency guidelines as "an impermissible interpretation of the ADA."[404] The Court reasoned that a person whose impairment is corrected by mitigating measures does not have an impairment that *presently* substantially limits a major life activity and therefore should not be considered disabled under the ADA.[405] In reaching this conclusion, the Court placed great weight on congressional findings set out in the ADA's preamble to the effect that the Act would protect some 43,000,000 Amer-

398. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
399. *Id.* at 475.
400. *Id.* at 475–76.
401. 29 C.F.R. app. § 1630.2(j) (1998).
402. *See, e.g.*, Arnold v. United Parcel Serv. Inc., 136 F.3d 854 (1st Cir. 1998) (following the EEOC's guidance).
403. *Sutton*, 527 U.S. at 482.
404. *Id.*
405. *Id.* at 482–83.

icans.[406] The Court explained that this figure would be much higher if the statute covered all persons with corrected conditions.[407]

The Supreme Court also rejected the sisters' alternative contention that they were protected under the ADA because they were "regarded as" disabled. The *Sutton* majority explained that an individual may fall within this "third prong" of the statutory "disability" definition in either of two ways: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities."[408] In either situation, the Court explained, the impairment, as perceived, must be one that substantially limits one or more major life activities.[409] Applying this standard to the *Sutton* facts, the Court ruled that the mere allegation that an employer has a vision requirement does not establish that the employer regarded the petitioners as substantially limited in the major life activity of working.[410] At best, the Court stated, the employer only regarded them as unable to perform the single job of a global airline pilot.[411]

The Court issued two companion decisions on the same day as *Sutton* that reached similar results. In *Murphy v. United Parcel Service, Inc.*, the Court held that a mechanic with hypertension and high blood pressure was not disabled when evaluated after considering the mitigating effect of his medication.[412] The Court also ruled that Murphy was not regarded as substantially limited in the major life activity of working because he was only viewed as unfit for jobs that required a commercial driver's license. In the other case, *Albertson's, Inc. v. Kirkingburg*, the Court held that whether monocular vision is a covered disability must be determined on a case-by-case basis, taking into ac-

406. *Id.* at 484–86 (discussing congressional findings set out in 42 U.S.C. § 12101(a)(1)).

407. *Id.* at 486 (stating that "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA"). The Court also stressed the importance of making an individualized inquiry with respect to each person making an ADA claim. The Court opined that the EEOC's guidance instruction to assess claimants in an uncorrected state impermissibly would create a system in which persons would be treated as members of a group rather than as individuals. *Id.* at 483–84.

408. *Id.* at 489.

409. *Id.*

410. *Id.* at 489–94. EEOC regulations state that an individual is substantially limited in the major life activity of working only if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i).

411. *Sutton*, 527 U.S. at 493.

412. Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

count mitigating measures including the brain's ability to compensate for the loss of vision in one eye.[413]

The Court further restricted the "disability" standing requirement three years later in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, where it overturned a Sixth Circuit decision that had found an assembly-line worker with carpal tunnel syndrome and tendonitis to be substantially limited in performing manual tasks because of her workplace difficulties in gripping tools and in performing repetitive work with hands and arms extended at or above shoulder level.[414] The Supreme Court explained that the proper inquiry was to determine whether an individual has an impairment that prevents or severely restricts the individual from engaging in activities that are of central importance to daily life.[415] This inquiry should involve an individualized assessment of the effect of the impairment.[416] In this case, the Court determined that the Sixth Circuit had engaged in an overly narrow inquiry by considering only those tasks that Williams performed at work, while ignoring the impairment's impact on her nonwork activities.[417] Since a broader view revealed that Williams could still perform household chores and personal hygiene activities, the Court concluded that she was not substantially limited in performing manual tasks and hence not disabled for purposes of the ADA.[418]

These decisions have significantly restricted the ADA's standing requirement for individuals with a qualifying "disability." One measure of this effect is provided by the EEOC's charge-filing statistics, which show a drop in annual ADA charges from the 17,000–18,000 range during fiscal years 1996–1999 to a range of 15,000–16,000 charges filed in each of the four fiscal years following the *Sutton* decision.[419] At another level, Professor Ruth Colker has conducted a detailed analysis of decided ADA federal court decisions and reported that the courts have resolved approximately 93 percent of these cases in favor of employers.[420] Many of these decisions are the result of summary judgment

413. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
414. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).
415. *Id.* at 198.
416. *Id.* at 198–99.
417. *Id.* at 200–01.
418. *Id.* at 202.
419. *See* The Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges, FY 1992–FY 2003 (reporting ADA charges filed with the EEOC from the act's effective date in 1992 through September 30, 2003), *at* www.eeoc.gov/stats/ada-charges.html (last modified Mar. 8, 2004).
420. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (finding, based on empirical analysis of decided court decisions, that defendants prevailed in 92.7 percent of all ADA cases at the trial court level and 94 percent of all ADA cases at the appellate level). *See also* Diller, *supra* note 56, at 22 (suggesting that the federal courts currently are engaged in "some kind of judicial backlash against the ADA").

rulings based upon a determination that the plaintiff lacks "disability" status.[421]

4. Making Sense of the Decline

Taken together, the Supreme Court's three-prong attack seems designed to reduce the workplace-related caseload of the federal court system. It also likely means that the current downturn in the number of labor and employment cases decided by the Supreme Court is not a fleeting phenomenon. Here again, the insights of a former Section Secretary rise to that of "sage" quality. In her 2002 article in this journal, Secretary Estlund summarized a surprisingly high eighteen decisions (the only term of the decade to exceed ten labor and employment decisions) but predicted that this upsurge was unlikely to continue, stating: ". . . Whatever may account for this uptick, it seems unlikely to signal a long-term trend, for the thrust of many of the decisions was to raise the substantive bar for plaintiffs—especially anti-discrimination plaintiffs and most especially plaintiffs under the ADA—in future lawsuits."[422]

Does this decline in federal and Supreme Court employment cases presage a shrinking of the labor and employment law field generally? That is not a forgone conclusion by any means. The Supreme Court's three-prong strategy does not so much eliminate employment law claims as it does transfer them to other forums. The *Gilmer* line of decisions, for example, simply shifts some employment cases from federal court to an arbitral forum.[423] The Eleventh Amendment[424] and "disability"[425] decisions largely reroute claims from federal courts to state courts. Thus, labor and employment lawyers, many of whom belong to the fifth largest of all ABA sections, will continue to be busy, albeit sometimes at a different location.[426]

This change in forum is not all bad. A system of litigating employment disputes in courts of general jurisdiction is expensive, slow, and

421. *See* Colker, *supra* note 420, at 109; Befort & Thomas, *supra* note 55, at 80.

422. Estlund, *supra* note 1, at 291.

423. *See supra* notes 363–73 and accompanying text.

424. While the Eleventh Amendment bars suits against state defendants in federal courts under several federal employment statutes, *see supra* notes 374–91 and accompanying text, the Eleventh Amendment does not preclude the assertion of federal or state law claims in state courts. *See, e.g.*, Williamson v. Dep't of Human Res., 572 S.E.2d 678 (Ga. App. 2002).

425. *See* Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1081 (2002) (noting that all fifty states have state laws banning disability discrimination in employment but that many state statutes do not provide the same level of protection as does the ADA).

426. More than 22,000 individuals belong to the Labor and Employment Law Section of the American Bar Association. *See* American Bar Association, Labor and Employment Law, Membership, *available at* www.abanet.org/labor/home.html (last visited Aug. 30, 2004).

cumbersome.[427] In contrast to the typical two and one-half year timetable for litigated employment termination cases to reach trial, for example, labor arbitration cases generally are completed in less than one year's time.[428] A system of specialized labor courts, as used in most European and South American countries,[429] could reduce the maze of multiple claims in multiple forums that currently plagues American employment law.[430] But a move in that direction should be accomplished, if at all, through legislation that establishes fair and predictable procedures as well as a uniform body of substantive law. The Court's ad hoc redirection of some employment law claims does neither.

IV. Conclusion

The decisions of the 2003–04 term provide a snapshot of two ongoing trends in the labor and employment law field. The first concerns the growing importance of employee benefit matters relative to other labor and employment topics. As the baby boomer cohort ages, issues relating to health care and retirement income loom ever larger. In addition, ERISA's regulatory vacuum with respect to the substance of welfare benefit plans generates a steady stream of federal preemption disputes. Congressional inertia, not only specifically with respect to health care reform but also more generally with respect to labor and employment law reform, likely will ensure that issues relating to employee benefits will continue to gain on the more traditional practice areas under the NLRA and Title VII in relative significance.

The second trend illustrated by this term's set of decisions is the Supreme Court's continued efforts to redirect employment law claims away from the federal court system. By virtue of its interpretation of arbitration agreements, the Eleventh Amendment, and the ADA, the Court has diverted a growing number of employment disputes to arbitral and state court forums. As a result of these efforts, and barring the enactment of congressional reforms, the Court's labor and employment law agenda likely will remain lean for the foreseeable future.

427. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 399–404 (2002).
428. *See id.* at 403–04.
429. *See id.* at 403.
430. *See id.* at 397–99.