

## Review of the Supreme Court's Labor and Employment Docket, O.T. 2005

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### I.

This cannot be the usual end-of-term reprise of the Supreme Court's work. This year, there is essentially one question; one discussion. Any backward looking review of this term's Court decisions, or any forward looking summary of those on the Court's docket, in the labor and employment area, or, indeed any other area, necessarily has to deal with the implications of the impending vacancy on the Court and her likely replacement.

The retirement of Justice Sandra Day O'Connor and the probable confirmation of D.C. Circuit Judge John Roberts will represent a significant change in the composition of the Supreme Court and its future direction. Very much the successor to Justice Lewis F. Powell, Jr. in both temperament and role as the Court's moderate, pragmatic voice, O'Connor so often has cast the decisive swing vote in so many areas that many a brief has been written exclusively with her views and predisposition in mind.

Roberts, who has only been on the bench since 2003, is something of an unknown quantity. He has been an extraordinarily gifted Supreme Court advocate, one of the very few 'must-consider' lawyers for any client with a case before the high court. I always tell my students 'I can tell you what will happen in 100 years, but don't ask me what will happen tomorrow.' Predictions about the future behavior of Supreme Court Justices is especially hazardous duty. A good number of Presidents have been disappointed in their judicial appointments. President Theodore Roosevelt is reported to have quipped of Justice Oliver Wendell Holmes, 'I could carve more backbone out of a banana.' And certainly, President Eisenhower bewailed his Republican appointees, Chief Justice Earl Warren and Justice William J. Brennan, who effectively turned into political liberals and judicial activists once on the high bench. Justices Harry Blackmun and David Souter are only the most recent examples.

For this audience, however, I will venture on a limb: By all appearances, Judge Roberts seems a reliable conservative, but more of the Powell-(Potter) Stewart-(John M) Harlan type than the (Antonin) Scalia- (Clarence)Thomas variety. Perhaps it is safer to say he will be a mix of the two.

In order to provide a sense of Judge Roberts' likely role, I will employ academic's license to provide a crude breakdown of the Court's voting blocs. A healthy majority of

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the Court's work involves the resolution of inter-circuit conflicts where the outcome is rarely in doubt, and the Court often renders a unanimous opinion. But for the controversial cases involving deeply held moral beliefs and values, the Court tends to break down into two reliably predictable wings: the liberal "gang of four" and the conservative "gang of three". The Court's liberal grouping is comprised of Justices John Paul Stevens, Ruth Bader Ginsberg, Stephen Breyer, and David Souter. Its conservative wing consists of Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Justice Anthony Kennedy often votes with the conservatives, except in certain areas like first amendment and personal autonomy cases where he is likely to cast his lot with the liberal wing.

Justice O'Connor has, of course, been the most unpredictable of the Justices, and as a consequence has been the critical fifth vote in several areas of major controversy. Consider these five examples:

- Church-State
  - Van Orden v. Perry (4+1 vs.; O'Connor dissents)
  - McCreary Co. v. ACLU (5-4; O'Connor joins and writes concurrence)
- Affirmative Action
  - Grutter v. Bollinger, 539 U.S. 244 (2003) (5-4; O'Connor writes for the majority)
- Federalism
  - Tennessee v. Lane, 541 U.S. 509 (2004) (5-4) (O'Connor joins majority)
- Campaign Finance
  - McConnell v. FEC, 540 U.S. 93 (2003) (O'Connor and Stevens write lead opinions)
- Abortion
  - Stenberg v. Carhart, 530 U.S. 914 (2000) (partial-birth ban) (5-4; O'Connor writes concurrence)

Justice O'Connor came to this role honestly. A conservative by instinct and upbringing, she earned her spurs as a state legislator. She has been more a judicial conservative than a political conservative in her decisions. Judicial conservatives believe in a limited judiciary, care about the facts of a particular case, decide cases narrowly, are reluctant to overturn precedent, and are mindful of the likely practical consequences of a ruling. They also tend to defer to policymaking by the Congress and the states. These virtues are not present in every O'Connor opinion, but they are present in a good many of them

By contrast, Justice Scalia has been more of a judicial activist. He may consider himself a political conservative, but he is quite open to, and actively seeks to prod, change. In constitutional cases, in particular, he believes in "originalism," a doctrine that holds that judges should always read constitutional text in light of the original intent of the framers. The doctrine may provide a useful counterweight to a more free-ranging "purposive" stance that allows judges to function as an ongoing constitutional convention that reads the text in light of changing realities. But it also tends to free Justice Scalia

and his like-minded colleagues to be more willing to upset longstanding precedent in the interest of restoring the original meaning of the Constitution.

Where will a Justice Roberts fall along the O'Connor-Scalia divide? It is undoubtedly too early in the game even for this foolhardy academic. Judge Roberts has been telling his Senatorial interviewers that he believes in *stare decisis*, and will vote to overturn precedent only in the most extreme of cases. This may be an instance of 'confirmation conversion,' but I suspect he is being forthright about his judicial instincts. This suggests a more cautious conservatism than we have seen from Justices Scalia and Thomas in constitutional cases. More I cannot say.

## II,

Getting down to business, and turning to the Court's labor and employment docket for October Term, 2004, we can see several key labor and employment cases in which Justice O'Connor exercised a pivotal influence.

### ***Smith v. City of Jackson* -- Does Disparate Impact Apply in Age Bias Cases?**

In *Smith v. City of Jackson*, 125 S.Ct. 1536 (2005), the Court held (5-3, with O'Connor concurring in the judgment but essentially dissenting) that the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.* authorizes disparate-impact challenges. However, because the ADEA has a provision permitting "otherwise prohibited" differentiation based on a "reasonable factor other than age," plaintiffs still lost. (As I told my colleague Glen Nager who argued the case for the respondent, he "really" won.)

In order to retain younger personnel and rationalize its pay structure, the City of Jackson, Mississippi granted pay raises to all police officers and dispatchers, thus matching their compensation to the regional average. The raises were proportionally greater for officers with less than five years of service than for those who had more seniority. Since most of the officers over 40 years of age had been on the force longer than five years, a group of older officers sued under the ADEA, arguing that they had a right to recover for this disparate impact under principles akin to those recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court in *Griggs* had ruled unanimously that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, authorizes disparate-impact suits.

Justice Stevens, writing for himself and Justices Souter, Ginsberg and Breyer (what I have affectionately termed 'the gang of four'), held that the ADEA had to be read in line with the interpretation given Title VII in *Griggs*. In *Griggs*, relief was permitted under the language of Section 703(a)(2) of Title VII, and since the language of that section was virtually identical to the language of Section 4(a)(2) of the ADEA, the *Smith* Court held that the disparate-impact theory had to be extended to ADEA claims as well.

Candor may require acknowledgment that the Court in *Griggs* did not spend very much time parsing the language of Section 703(a)(2). The case was decided more as a matter of underlying policy -- whether employers should be able to replicate the effects of prior discrimination by using ostensibly 'neutral' devices like high school diploma requirements and aptitude test scores -- than statutory language. Yet, with over hundreds of cases in the lower courts and nearly a dozen Supreme Court decisions working out the further reaches of disparate impact, the claim of stare decisis was quite strong.

Title VII was amended in 1991 to modify the Court's holding in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). In that case, the Court tried to limit the scope of disparate-impact liability; that aspect of *Ward's Cove* was overturned in the 1991 amendments. The 1991 law did not, however, amend the ADEA in this regard, and thus the *Smith* Court (Justice Scalia joined this part) reasoned that "*Ward's Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA" The aspect of *Ward's Cove* that seems to have survived is the insistence that the plaintiff is "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." 490 U.S. at 656 (emphasis added). Plaintiffs in *Smith* were faulted for failing to identify such a practice with sufficient specificity.

The ADEA also differs from Title VII in that it includes a provision, Section 4(f)(1), that allows employers to take any action otherwise prohibited under subsection (a) of the act, if the differentiation is based on "reasonable factors other than age discrimination" (the "RFOA" provision). This section, the *Smith* plurality notes, privileges a broader range of employer justifications that the "business necessity" test under Title VII. As Justice Stevens' opinion notes with respect to the City of Jackson's pay policy, "[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was no unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."

These differences -- the fact that ADEA's disparate-impact approach was not the subject of the 1991 amendments and the availability of the RFOA defense -- function to allow a more limited liability theory than the one *Griggs* found in Title VII, while still allowing the Court to hold that structural similarity in the language of the two statutes requires that disparate impact challenges be available in theory.

Justice Scalia, interestingly, opted to concur on the basis of deference to administrative agency interpretations under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even though the agency he was deferring to in this case was the Equal Employment Opportunity Commission. ("EEOC"). While the EEOC probably isn't a favorite agency of political conservatives, this approach offered a rather elegant solution from Scalia's perspective. Although in all likelihood he would not have agreed with the decision in *Griggs* had he been on the Court when it was decided, the case has been settled precedent for decades, and the Justices, liberal and

conservative alike, were disinclined to disturb it. However, as a diagnosed and documented "textualist", Scalia would have had difficulty aligning with the plurality in reading into the ADEA anything he could not find evident from the statutory language in either Title VII or ADEA. The EEOC's regulation permitted him to concur in the Court's decision while remaining faithful to his judicial philosophy.

Justice O'Connor, in her opinion concurring in the judgment, that was joined by Justices Kennedy and Thomas, argued that disparate impact could not be read into the ADEA, noting that *Griggs* had not been decided when the ADEA was enacted. While the language was parallel, there was no clear intent to authorize disparate-impact claims in ADEA. Rather, Title VII, unlike ADEA, could best be understood as a decision dealing with the "qualitatively different" problem of racial discrimination; *Griggs* "was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose*...." O'Connor disagreed with Scalia's administrative deference as well, noting that it was not an appropriate application of *Chevron*, because the EEOC's views were set forth more as an explanation of enforcement objectives rather than a binding interpretation of the statutory reach intended to have "the requisite 'force of law.'"

Although all the judges concurred in the outcome, there were significant disagreements under the surface. The liberal justices reaffirmed *Griggs* by holding that the language in the ADEA must serve the same purpose as the virtually identical language in Title VII, while Scalia subtly criticized *Griggs* by refusing to marry his holding to its logic. O'Connor disagreed on historical and statutory analysis, taking a judicially conservative approach by declining to read or infer something into the statute that she did not believe was there.

### ***Jackson v. Birmingham Board of Education*-- Does Title IX impliedly authorize retaliation claims?**

In *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497 (2005), Justice O'Connor joined the liberal group and wrote the 5-4 opinion for the Court/ The question was whether Title IX of the Education Amendments of 1972. 20 U.S.C. §1681(a)'s protection against sex discrimination by recipients of federal financial assistance applies to retaliation by indirect-victim third parties for reporting prohibited discrimination.

A male physical education teacher and coach of the girls' basketball team at a Birmingham, Alabama high school began complaining that his team was not receiving equal resources. As a result, he was given negative performance evaluations and was removed from his position as coach. He sued, charging that he had been retaliated against for attempting to redress discriminatory conduct under Title IX. The Court held that Title IX provides a cause of action on these facts.

Does the Title IX prohibition of "discrimination... on the basis of sex" impliedly also protect against retaliation for reporting sex discrimination? The liberal justices, favoring a muscular, 'progressive' jurisprudence, pushed for a broad interpretation of

“discrimination” under Title IX, while the conservatives sought to limit the reach of the term, restricting Title IX’s implied right of action to direct victims of direct discrimination in federally funded programs.

For Justice O’Connor and the liberal group, this case rested on considerations of stare decisis, stemming both the Court’s string of decisions extending Title IX’s implied right of suit and from the 1969 decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, awareness of which could be attributed to Congress when it enacted Title IX in 1972. In *Sullivan*, a white had rented a house to a black man and assigned him a membership share and rights to use a private park. The corporation that owned the park would not approve the assignment, and Sullivan was permitted to sue under 42 U.S.C. §1982, for retaliation for advocacy of the black lessee’s cause. According to the *Jackson* Court, since this case was decided prior to the passage of Title IX, Congress had ample notice that “discrimination” could be read to include retaliation. Thus, the fact that Congress did not list retaliation as a specific discriminatory practice, as it had in the 1964 enactment in Title VII, was held to be no defect in the plaintiff’s case.

Justice Thomas, writing for himself, Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented. They argued that, since Title IX imposes conditions on funding through Congress’s spending powers, such conditions should be explicit and unambiguous such that recipients are given clear notice of the obligations they are assuming when accepting federal funding. *Sullivan* was deemed distinguishable as a thirteenth amendment case not raising the same federalism-clear notice concerns as spending power measures.

### ***Spector v. Norwegian Cruise Line Ltd.*-- Does the ADA cover foreign-flag cruise ships?**

*Spector v. Norwegian Cruise Line Ltd.* , 125 S.Ct. 2169 (2005), the other major 'labor and employment' (only if the phrase is stretched) case of the term, involved the question whether Title III, the public accommodations title, of the Americans With Disabilities Act of 1990 (“ADA”), 42 U.S.C. §12181 *et seq.* applies to foreign-flag cruise ships. The petitioners were a class of passengers with disabilities who allegedly had not been accommodated by the respondent cruise line. The Court split off into a number of opinions; Justice Kennedy authored the lead opinion.

This case presented a fairly narrow question of statutory interpretation but one of crucial interest to the foreign-flag cruise ship industry. Presumably, the ADA could be rather easily read to include cruise ships as covered places of public accommodation. The question for the Court was whether applying the ADA to foreign-flag ships triggered concerns over extraterritorial application of U.S. statutes requiring an especially 'clear statement' from Congress that it intended the ADA to have such a reach

Justice Kennedy, writing for the Court in part and a plurality in part, held that the ADA applied -- some of the time. Foreign-flag ships were not, without specific evidence of congressional intent, reached by laws that governed the “internal order” of the ship,

such as the relations between the captain and its crew, but were reached by those laws that governed “the peace of the port.” The Court had held in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), that the National Labor Relations Act (“NLRA”) was inapplicable to the foreign crew of a foreign vessel for this reason. However, the NLRA was fully applicable to a foreign ship’s port-side relations with American longshoremen in *Longshoremen v. Ariadne Shipping Co.*, 397 U.S. 195 (1970).

Kennedy argued that the relations between a foreign-flag cruise company and U.S. passengers did not impinge upon the internal order of the ship, and Congress could regulate the treatment of disabled U.S. passengers. There was one important caveat to the ruling: To the extent the ADA required structural modifications of ships that conflicted with international legal obligations or endangered the crew or passengers, the Court left open the possibility that the ADA would not authorize such modifications or that an ‘internal affairs clear statement rule’ would require more explicit authorization from Congress.

Justice Scalia, joined this time by O’Connor and Rehnquist, dissented. He argued that requiring ships to comply with the ADA necessarily implicated the internal order of the ship, because it interposed the federal statute into areas governed by other laws. Safety, he noted, was typically governed, as a matter of internal order, by the laws of the flag state, and the strictures of the U.S. law, while, perhaps satisfying all domestic safety laws, could conflict with foreign law or treaties. The fundamental design changes the plaintiffs demanded -- accessible staterooms, public restrooms, and wheelchair-accessible cabins -- all implicated the physical structure of the ship, its operation at sea, and hence its ‘internal affairs’ requiring a clear statement from Congress absent in Title III of the ADA.

## **Remnants of the Term**

Other labor and employment cases include --

- *Commissioner v. Banks*, 124 S.Ct. 826 (2004) -- a unanimous holding that a discrimination plaintiff whose recovery constitutes income must report as gross income the contingent fee paid to his attorney (what I consider ‘the deepest cut of all’). This ruling is mitigated by the Civil Rights Tax Relief Act, part of American Jobs Creation Act of 2004, 26 U.S.C. §62(a)(19), which provides that attorney’s fees paid by or on behalf of taxpayer in connection with discrimination claims will be treated as an “above the line” item and not subject to the limitation on itemized deductions.
- *Rousey v. Jacoway*, 125 S.Ct. 1561 (2005) -- a unanimous holding that assets in an individual retirement account (“IRA”) can be exempted from the bankruptcy estate because they involve a right to payment “on account of ... age” within the meaning of §522(d)(10)(E) of Bankruptcy Code, even though plan participants can withdraw the balance before age 59 ½ but subject to a 10 % penalty. A ruling going the other way would have been trap for the unwary because of the common practice of rolling over distributions from pension plans into IRAs.

- *City of San Diego v. Roe*, 125 S.Ct. 521 (2004) -- a unanimous holding sustaining discharge of a police officer who made and sold explicit sex videos that showed him in a police uniform while off duty.
- *Stewart v. Dutra*, 125 S.Ct. 118 (2005) -- a unanimous ruling that a dredge is a “vessel” under the Longshoremen's workers compensation and the Jones Act <sup>2</sup>

### Cases on the Horizon

The Court already has granted review in a number of labor and employment cases scheduled for argument in the fall.

*In Tum v. Barber Foods*, 360 F.3d 274 (1st Cir. 2004), cert. granted, No. 04-66 & *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), cert. granted, No. 03-1238, the Court will consider the question of whether walking and waiting time associated with the donning and doffing of required safety equipment is compensable under the Fair Labor Standards Act. of 1938, as amended by the Portal-to-Portal Act of 1949. The time periods in question are relatively short when considered on a per-employee basis. However, aggregated over a large number of employees and assessed retroactively over a period of years, the damages faced by these defendants could be quite significant.<sup>3</sup>

Another case, *Arbaugh v. Y&H Corp.*, 380 F.3d 219 (5th Cir. 2004), cert. granted, No. 04-944, deals with the question of whether Title VII's 15-employee coverage threshold, 42 U.S.C. §2000e(b), is a nonwaivable jurisdictional requirement .

In *Garcetti v. Ceballos*, 361 F.3d 1168 (9th Cir. 2004), cert. granted, No. 04-473:, the Court will decide whether the first amendment protects a deputy district attorney who wrote a memorandum to his supervisor alleging that the deputy sheriff lied on a search warrant application. The issue is whether a purely job-related memorandum on a matter of public concern is protected by the First Amendment.

In *Domino's Pizza v. McDonald*, cert. granted, No. 04-593:, the question is whether a shareholder can recover under 42 U.S.C. § 1981 for a third party's breach of contract with the corporation.

*Schaffer v. Weast*, 377 F.3d 449 (4th Cir. 2004), cert. granted, No. 04-698, raises the question: under the Individuals with Disabilities Education Act, when parents of a

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<sup>2</sup> Although not technically a labor and employment decision, *MGM v. Grokster*, 125 S.Ct. 2764 (2005), is of interest. Justice Souter's opinion states: “We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties.”

<sup>3</sup> The author is counsel of record on a brief amici curiae filed on behalf of the U.S. Chamber of Commerce, National Assn. of Manufacturers, Society for Human Resources Management and Association of International Automobile Manufacturers, in support of respondent Barber Foods in the *Tum* case.

disabled child reach an impasse with the school district over the child's individualized education program, which side has the burden of proof in the hearing before the administrative officer?

In *United States v. Olson*, 362 F.3d 1236 (9th Cir. 2004), cert. granted, No. 04-759, the Court will decide whether inspectors/supervisors for the Mine Safety and Health Administration are immune under the Federal Tort Claims Act for negligence in carrying out or failing to carry out mandatory agency policies and procedures.

In *United States v. Georgia*, cert. granted, No. 04-1203 & *Goodman v. Georgia*, No. 04-1236, the Court will decide whether Title II of the ADA is a valid exercise of Congress's Section 5 enforcement authority under the fourteenth amendment, abrogating the states' immunity from damages suits under the eleventh amendment, as applied to the administration of prisons. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court held that Title II as related to "access to legal services" was a valid Section 5 enactment. However, in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2000), Title I, the employment title, of the ADA was held not to be a valid Section 5 measure.

Finally, in *Whitman v. Department of Transportation*, 382 F.3d 938 (9th Cir. 2004), cert. granted, No. 04-113, the Court will decide whether the Civil Service Reform Act's provision stating that collectively bargained grievance procedures are the exclusive means of resolving employee grievances precludes judicial review of federal employees' statutory and constitutional claims.

## **Conclusion**

The Court's labor and employment docket is not as large as it has been in past years but significant cases involving the workplace continue to require the Court's attention. All eyes are, of course, on Judge Roberts, President Bush's appointment to replace Justice O'Connor.