2014 Supreme Court Employment Law Commentary

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Nahomi Harkavy read this article with a keen eye for detail, calm perspective on the issues, and immeasurable patience with the author - her husband. I am, of course, solely responsible for the content and tone of the article and for any errors in it.

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The October 2013 Term of the Supreme Court of the United States focused on a large number of employment-related issues, illustrating yet again the central role that regulation of the employment relationship plays in American life. This term's employment decisions, exhibiting the same *laissez faire* flavor by the same slim majority, reaffirmed the Roberts Court as a champion of employers, an opponent of organized labor and no friend of working people. Consequently, neither employees nor unions fared well during the 2013 Term. Detailed examination of the 2013 Term's employment decisions, however, is much more revealing than a simple box score of results. Indeed, the Court's opinions provide a useful lens for examining broader aspects of our jurisprudence. What this closer look discloses is a deep and entrenched philosophical fracture that belies what many observers have hailed as the Court's new unanimity. Despite an unusually large number of unanimous judgments this term, the Roberts Court's signature continues to be written by a cohesive group of Justices bent on dismantling, or at least disabling, much of the regulatory framework in the labor and employment area. But, more about the thematic aspects of the opinions in this article's concluding section after you have an opportunity to feast on this term's smorgasbord of cases.

Section I of this article is devoted to a review of the major employment-related decisions of the term. Constituting the bulk of the article, the principal cases are arranged by familiar broad topics that are, in turn, introduced by a few brief observations. Additionally, a summary of my personal take on each decision is offered in the italicized paragraphs following each case. That case-specific commentary suggests, among other things, the likely practical impact of these decisions on employees, business owners and managers, benefit providers and labor organizations. Section II is a brief listing of the grants of certiorari thus far in employment-related cases for the upcoming term. Section III outlines the general scope of the Court's work during the October 2013 Term and the place of employment law in it. That section draws heavily on the SCOTUSBLOG's Stat Pack, a comprehensive compilation of current and historical Supreme Court statistics. K S. Bhatia, Stat Pack for October Term 2013, SCOTUSBLOG (July 3, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07

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SCOTUSblog_Stat_Pack_for_OT13.pdf. Section IV of the article offers some brief additional commentary on the Court's oversight of the employment relationship as well as a few observations about other current and prospective developments at the Court.

I. Decisions of the October 2013 Term

A. Employment Discrimination and Retaliation

The most notable decision of the term, according to many observers, is the Court's refusal to enforce the so-called contraceptive mandate provision of the Patient Protection and Affordable Care Act ("ACA"), popularly (but misleadingly) referred to as "Obamacare." While the Court's decision to deny female employees full access to preventive healthcare is technically an application of the Religious Freedom Restoration Act ("RFRA"), it is categorized here as an employment discrimination case because of its indisputably adverse and discriminatory impact on women workers.

Aside from the ACA case, the employment discrimination area was an unusually quiet one this term, except for one unequivocally pro-worker decision involving application of the Sarbanes-Oxley Act's whistleblower retaliation provision to employees of private contractors for a publicly traded company. The impending term, however, promises more employment discrimination decisions, as the grants of certiorari described in section II indicate. Before turning to the principal cases, two other decisions bear mentioning.

Oddly enough, the Court's criminal docket provided a bit of intrigue about the meaning of actionable discrimination in employment cases. The concept of "but for" causation, which itself caused quite a stir last term in *University of Texas Southwestern Medical Center v. Nassar, 570 U.S. ---, 186 L. Ed. 2d 503, 133 S. Ct. 2517* (2013), was the centerpiece of ***Burrage v. United States, 571 U.S. ---, 187 L. Ed. 2d 715, 134 S. Ct. ---- (2014)***. Here is a brief summary: The Controlled Substances Act ("CSA") permits enhanced punishment of an illicit drug distributor when death or serious bodily injury "results from" distribution of the drug to the victim. The Court held that a distributor's punishment could not be enhanced unless use of a drug that the defendant feloniously distributed is a but-for cause of a user's death or serious injury. The majority rejected the lower courts' approval of a jury instruction requiring only that the illegal distribution be a "contributing cause" of death or injury. Justice Scalia's majority opinion found the Court's treatment of Title VII's "because of" language in *Nassar* (as well as identical statutory language in a prior age discrimination case) "instructive" in construing the CSA's "results from" language because both phrases imply a requirement of "actual causality" - i.e., "but-for" causation. But, here is the really intriguing part: After quoting *Nassar's* language, Justice Scalia characterizes that decision's holding as follows: ". . . [w]e held that [Title VII] require[s] proof that the desire to retaliate was [a] but-for cause of the challenged employment action." 187 L. Ed. 2d at 724 ("[a]" in the quoted text). At the end of the same paragraph, referring to the older precedent, Justice Scalia says that the Court requires an age discrimination plaintiff to prove that age was "[a] 'but for' cause of the employer's adverse decision." *Ibid.*

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Those quotations inexplicably omit the definite article "the" which precedes "but-for cause" in the text of both of the quoted decisions. How very strange that such a careful reader and precise wordsmith as Justice Scalia would substitute the indefinite article "[a]" in both characterizations! The Court appears to be sending a signal that there may be, after all, multiple "but-for" causes of an employer's adverse action. Has much of the hand-wringing over *Nassar* been a bit overwrought in light of the Court's reconfiguring of its prior rubric? Justice Ginsburg, joined by Justice Sotomayor, concurred only in the judgment, preferring to rest her agreement with the result on the rule of lenity for criminal statutes. Pointedly, however, Justice Ginsburg remarked that she had explained in *Nassar* that "because of" in Title VII does not mean "'. . . solely' because of." Aha! Now the mystery deepens about why Justice Scalia used "a" instead of "the" in characterizing the Court's prior causation holdings. In any event, *Burrage's* extended (and mysterious) references to the Court's employment discrimination decisions make this criminal case a "must read" for employment lawyers, too. *But cf.* ***Paroline v. United States, 572 U.S. ---, 188 L. Ed. 2d 714, 134 S. Ct. ---- (2014)*** *("But-for" causation is not the proper standard for determining a defendant's obligation to pay restitution to a victim of child pornography exploitation.)* *See also*, M. Rosen and A. Anderson, "Employment Law: 'But for' a Criminal Case," 42 *Labor and Employment Law*, No. 4 at p. 5 (Am. Bar Ass'n, Summer 2014) (First accessed after preparation of this portion of the article.)

Finally, the Court's opportunity to determine whether a public employee can sue for age discrimination under the Fourteenth Amendment when there is an available remedy under the Age Discrimination in Employment Act ("ADEA") evaporated on the first day of the term. Less than thirty seconds into the argument of ***Madigan v. Levin, 571 U.S. ---, 187 L. Ed. 2d 1, 134 S. Ct. 2 (2013),*** doubts about the case's justiciability emerged because Levin might not have been an "employee" under the ADEA and because the Seventh Circuit's jurisdiction may have been limited to an immunity issue. Consequently, only eight days after that argument the Court dismissed the writ of certiorari as having been improvidently granted. So, the important question of whether existence of an ADEA cause of action precludes an equal protection claim will remained unanswered authoritatively for the time being. And, perhaps the next attempt to answer that question will arise in a justiciable appeal and involve a plaintiff who was not in his fifties when he first obtained his job and who was actually employed, not appointed, to his post!

Now to the principal cases themselves.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ---, 189 L. Ed. 2d. 675, 134 S. Ct. ---- (2014)

The Court decided that the ACA's requirement that employers provide health insurance coverage for methods of contraception that conflict with the religious beliefs of owners of closely held for-profit corporations violates the RFRA.

The ACA requires employers with 50 or more employees to offer health insurance that provides "minimum essential coverage" or pay a substantial penalty for not doing so. This coverage includes preventive health care and screenings for women without any cost sharing requirements. Specification of the types of preventive care was delegated to the Health Resources and Services Administration of the Department of Health and Human Services ("HHS") which in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisors. Based on the Institute's recommendations, HHS promulgated the Women's Preventive Services Guidelines that required coverage without cost sharing for contraceptive methods approved by the Food and Drug Administration (the "contraceptive mandate" in this article.)

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination that opposes abortion and believes that the fetus in its earliest stages "shares humanity with those who conceived it." 189 L. Ed. 2d at 12. The Hahns are the sole owners of Conestoga Wood Specialties, a woodworking for-profit business that employs 950 people. Believing that human life begins at conception, the Hahns have excluded from their company's group health insurance plan certain contraceptive methods they consider to be abortifacients. The Hahns and Conestoga consequently sued HHS and other federal officials and agencies under RFRA and the First Amendment seeking to enjoin enforcement of the contraceptive mandate as to four of the approved FDA methods that the Court says may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus: two forms of "morning after" pills and two types of IUD's. Arguing that it is sinful for them to facilitate or otherwise support these contraceptive methods, the Hahns sought an injunction that the district court denied. The Third Circuit affirmed, holding that for-profit secular corporations cannot "exercise" religion under RFRA or the First Amendment and that the Hahns themselves are not subject to the mandate in their personal capacity.

David and Barbara Green and their three children are Christians who solely own and operate two businesses: Hobby Lobby, a nationwide chain of 500 craft stores with more than 13,000 employees organized as an Oklahoma for-profit corporation, and Mardel, a chain of 35 Christian bookstores with nearly 400 employees started by one of the Green's sons and organized as a for-profit corporation under Oklahoma law. Like the Hahns, the Greens believe that life begins at conception and thus object to the same four contraceptive methods as the Hahns. Their companies' group health insurance plans exclude these four methods from coverage. The Greens and their corporations sued HHS and other federal officials and agencies seeking to enjoin the contraceptive mandate. The district court denied a preliminary injunction. On appeal, the Tenth Circuit granted the injunction, holding first that the Greens' corporations were "persons" under RFRA. In concluding that the plaintiffs had shown a likelihood of success on the merits, the Tenth Circuit opined that the contraceptive mandate substantially burdened the corporations' exercise of religion by forcing them to choose between compromising their beliefs or paying a heavy financial penalty not to compromise. The court then concluded that HHS had failed to show a compelling interest in enforcing the mandate and had, in any event, also failed to show that enforcing the mandate was the least restrictive means of furthering its interest. Accordingly, the Tenth Circuit remanded the case for the district court to consider the remaining factors of the preliminary injunction test.

The Supreme Court granted certiorari in both cases and consolidated them for argument and decision. In a 5-4 decision the Court reversed the Third Circuit case involving the Hahns and affirmed the Tenth Circuit's judgment involving the Greens, holding that RFRA prohibits enforcement of the contraceptive mandate against the corporations owned by the both families. The Court did not reach the question of the First Amendment's applicability to these two cases in light of its statutory ruling in favor of the corporations and their owners. Justice Alito, joined by the Chief Justice and Justices Scalia, Kennedy and Thomas, divided his majority opinion into three major segments.

First, the majority holds that RFRA is applicable to regulations that govern the activities of closely held for-profit corporations (such as Hobby Lobby, Conestoga and Mardel.) Justice Alito rejects the notion that for-profit corporations are not "persons" under RFRA, concluding that protecting the free exercise rights of closely held corporations protects the religious liberties of the humans who own and control them. Relying on the Dictionary Act's definition of "person." 1 U.S.C. sec. 1, the Court notes that it has entertained free exercise and RFRA claims by nonprofit corporations. Justice Alito also points out that "modern corporate law," which authorizes corporations to pursue any lawful purpose, forecloses any suggestion that they are incapable of exercising religion, noting that the Court has entertained similar claims by retail merchants trying to make a profit. Justice Alito further concludes that RFRA did not incorporate any contrary understanding based on cases that pre-existed its enactment. Finally, the majority concludes that any difficulty in ascertaining corporate religious "beliefs" (even those of publicly traded corporations that have not yet asserted RFRA rights) is alleviated by state corporate law, which deals with resolving internal corporate conflicts.

Second, the majority holds that the contraceptive mandate substantially burdens the exercise of religion by requiring the Hahns and the Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. Whether their companies refuse to provide coverage or drop insurance coverage altogether, they would face penalties under the ACA that would impose "severe economic consequences" on them. Rejecting what it deems a new argument, the majority finds uncertain that the companies could actually save money by dropping coverage. But, even if that were the case, Justice Alito finds dispositive the "fact" that the owners have religious reasons for maintaining health coverage for their employees, while also having religious reasons for objecting to an aspect of that coverage. Finally, the majority rejects the argument that the connection between what the ACA requires the owners to do and the end result that they find morally wrong is too attenuated (because it is the female employee who makes the actual decision about which contraceptive to use.) Justice Alito says that it is not for the Court to say whether the owners are mistaken or unreasonable in believing that it is immoral for them to facilitate another person's immoral act. The Court is limited to determining whether the asserted religious beliefs reflect an honest conviction, not whether those beliefs are reasonable.

Third, the majority holds that the Government failed to show that the contraceptive mandate meets the "exceptionally demanding" least restrictive means standard in furthering its interest in guaranteeing cost-free access to the challenged methods of contraception. Assuming, without deciding, that the Government's stated interest is compelling within the meaning of RFRA, the majority concludes that it lacked other means of achieving its goal without substantially burdening religious exercise. Justice Alito suggests that the Government could simply pay for the contraceptives that are challenged. Or, it could extend the accommodation it has already made for nonprofit organizations with religious objections, allowing them to self-certify opposition to a particular aspect of coverage. Justice Alito notes, however, that the Court is not deciding whether the latter suggestion would comply with RFRA.

Finally, the majority says that this decision should not be understood to hold that all insurance-coverage mandates, such as vaccinations or blood transfusions necessarily fail if they conflict with an employer's religious belief. Nor, according to Justice Alito, does this case provide a shield for employers who might cloak illegal discrimination as religious practice. Accepting as compelling the Government's interest in providing equal employment opportunity regardless of race, Justice Alito says that prohibitions on racial discrimination are "precisely tailored to achieve that critical goal." Finding unpersuasive the Government's analogy to the Court's prior rejection of religious objections to paying Social Security taxes, Justice Alito pointed out that there was no alternative to funding with a national system of taxation. In this case, however, there are (according to the majority, at least) alternatives to the contraception mandate. In its valedictory, the majority criticizes the dissent's worry that this case will force federal courts to face a host of claims for religious-based exemptions from generally applicable laws. Characterizing the dissent's objection as one to RFRA itself, Justice Alito says that the wisdom of Congress' judgment in enacting RFRA is not the Court's concern. Instead, RFRA is to be enforced as written, and under that standard, the Government's contraception mandate is unlawful. Accordingly, the Court affirmed the judgment of the Tenth Circuit in the Green's case and reversed the judgment of the Third Circuit in the Hahn's case, remanding it for further proceedings consistent with the majority opinion.

Justice Kennedy, while acknowledging the "respectful and powerful dissent," joined the majority opinion, but wrote a separate concurrence. His concurrence concludes that the contraceptive mandate serves a compelling interest to protect the health of female employees. But, the opinion stresses that there is an existing means for the Government to accommodate the employers' religious objection: treating employees in this case just like employees of nonprofit religious organizations (i.e., by requiring insurance companies to cover, without cost-sharing, contraception coverage for female employees who wish it.)

Justice Ginsburg, joined in full by Justice Sotomayor and in all but one part by Justices Breyer and Kagan, dissented. After summarizing the "startling breadth" and serious consequences of the majority's decision, the dissent first explains the legislative history of the contraceptive mandate that Justice Alito's opinion omitted. The ACA originally specified three forms of preventive care, but left out services for women that many health professionals and women's advocates considered critically important. To correct this oversight, two female Senators introduced the Women's Health Amendment which added to the ACA's "minimum coverage" requirement a new category of services specific to women's health. Proponents of this amendment noted that women paid more for health care than men and that better and less costly access to contraceptive services would reduce unintended pregnancies (which, among other things, are considerably more costly than contraceptive services.) Additionally, the non-partisan Institute of Medicine prepared a report about gaps in preventive services for women. The Institute specifically concluded that preventive coverage for women should include the "full range" of FDA-approved contraceptive methods, which it found would have a multitude of other benefits for women in particular and for public health generally. The Women's Health Amendment became part of the ACA that the Court was now facing. And, it was against this legislative background that HHS regulations required cost-free contraceptive access to women under employer plans and insurance.

Contrary to the majority's expansive view of RFRA, one of the dissent's major premises is that RFRA created no right to religious exercise beyond the First Amendment - and specifically beyond that which the Supreme Court had held was protected before the statute's enactment. Instead, its purpose, as spelled out in the statute itself, 42 U.S.C. 2000bb-1(a), was simply (1) to restore the compelling interest test after a Supreme Court decision had declined to apply it in favor of two members of the Native American Church who were fired and denied unemployment benefits for ingesting peyote in a religious ceremony and (2) to guarantee application of that test in all cases where free exercise is substantially burdened. Justice Ginsburg argues that the contraceptive mandate fits comfortably within the holding of the peyote case as well as RFRA, when the statute is properly understood.

After rejecting the majority's arguments that RFRA was not restorative, but was a new initiative favoring religious exercise, Justice Ginsburg answered more specifically the majority's holdings. First, her dissent rejects the notion that corporations can exercise religion. Not only does she see a distinction between a community of believers in one religion and a corporation comprising persons of diverse beliefs, Justice Ginsburg also concludes that incorporation of a for-profit business separates the owner from the enterprise. Her dissent also sounds a warning that the Court's expansive notion of corporate personhood invites for-profit businesses to seek religious exemptions from regulation.

Next, the dissent shows that the contraceptive mandate does not substantially burden the Hahns' and Greens' exercise of religion. Justice Ginsburg accuses the majority of eliding the distinction between the families' sincerity (which the dissent does not question) and the substantiality of the burden imposed on them by the mandate. Justice Ginsburg would conclude that any connection between the mandate's coverage requirements and the families' beliefs is too attenuated, pointing out that there is no command that the corporations purchase or provide the objectionable contraceptives, that being a choice made solely by the employees or their dependents.

The dissent then demonstrates that the mandate furthers the ACA's compelling interests in public health and women's well-being, alluding specifically to the Institute of Medicine report on which Congress relied in the statute's final enactment. As a consequence, Justice Ginsburg would hold that the Government showed that there is no less restrictive and equally effective means to carry out the ACA's objective while satisfying the families' challenge. Neither a government payment plan nor extension of the accommodation for religious non-profits will afford the unfettered access through the existing employer-based system that Congress promised to women. Lacking proof of an equally effective and less restrictive alternative, the families' challenge should have failed, according to the dissent.

Finally, the dissent relies on the Court's prior rejection of a religious (Old Order Amish) challenge to Social Security withholding in making two key points. First, Justice Ginsburg suggests that allowing a religion-based exemption to a commercial employer would operate to impose the employer's religious faith on the employees. While the Hahns and the Greens may decline to purchase or use contraceptives that they find sinful, they may not impose their personal choice on employees who hold other beliefs. Second, the Court should not be in the business of deciding which religious beliefs are worthy of accommodation, lest RFRA be deemed to violate the Establishment Clause. The dissent concludes by suggesting a parade of horribles being visited on judges faced with exemption requests from employers who object to blood transfusions (Jehovah's Witnesses), anti-depressants (Scientologists), medications - including anesthesia, intravenous fluids and gel-coated pills - derived from pigs (Hindus, Jews and Muslims), and vaccinations (Christian Scientists.)

Justice Breyer, joined by Justice Kagan filed a brief dissent that agrees with Justice Ginsburg's conclusion that the families' challenge to the contraceptive mandate fails on the merits. Unlike her dissent, however, they found no reason to decide whether for-profit corporations or their owners may bring claims under RFRA. Accordingly, they do not join that portion of Justice Ginsburg's dissent.

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The subject here is a touchy one, so let me disclose my own bias first: Without any doubt whatsoever, Justice Ginsburg's dissent should be the law of the land. But, because the rule of five trumps the rule of reason when it comes to corporate religious expression versus the imperative of equal protection of the law, women's rights must simply take a back seat to sectarian beliefs, according to the Roberts majority. Accordingly, I confess that my own take on this case is that Congress' mandate that women have unfettered access to healthcare on the same basis as men was improperly and unjustly sacrificed to the majority's indefensible and insensitive construction of RFRA favoring corporate exercise of its owners' religion-based preferences.

Practically speaking, corporate employers now have a new, though yet uncharted, opportunity to obtain religion-based exemptions from labor and employment laws - and presumably other laws of general application. To be sure, the prospect of litigation over sincerely held religious beliefs of corporate owners about such matters as employing unmarried mothers, allowing younger females to supervise older males and permitting women to hold scarce jobs that married fathers might have would still be a daunting one. So, a wholesale change in the American workplace is quite unlikely because of this case. But, using the fictive entity of the for-profit secular corporation to shield the religious-based biases and preferences of its owners from regulation is now a reality to some yet-to-be determined degree. And, it is all the more disheartening that this perverse deployment of state corporate law to interdict federal law may encourage more creative use of the corporate veil as a weapon against women, minorities, the disabled or any subset of employees outside the owner's peculiar (though heartfelt) circle of grace.

It is difficult not to view this decision through a partisan lens. Seen politically, the majority's decision may be regarded by some as simply another attempt to sabotage "Obamacare" and besmirch its namesake. Having succeeded in reducing the effectiveness of the ACA for many of the most vulnerable among us by holding invalid the statute's extension of Medicaid benefits in the several States, the Court now impairs the ability of female employees to obtain the healthcare benefits that Congress promised them in the Women's Health Amendment. In lockstep with the incessant partisan drumbeat to "repeal Obamacare," the majority's decision can be viewed as part of a "death by a thousand cuts" strategy to dismantle what Congress legitimately enacted as a centerpiece of a just society.

Even viewed in a non-partisan manner, the Court's decision may still be regarded as a species of deregulation that an activist majority has been pursuing for nearly a generation. And, the majority's damage to the framework of the ACA is far from being done. Indeed, Justice Alito's protest that the Court's decision does not portend what Justice Ginsburg's dissent fears has turned out to be disingenuous. Just two days after this decision, the Court issued its own temporary injunction against enforcement of the very accommodation suggested by the majority in the Hobby Lobby case. In ***Wheaton College v. Burwell, 573 U.S. ---, 189 L. Ed. 2d ---, 134 S. Ct. ---- (2014)****, the Court, in a 6-3 decision (with Justice Breyer joining the Roberts majority), sided (temporarily at least) with Wheaton College's objection to the very self-certification suggestion Justice Alito made in concluding that there is a less restrictive way to provide no-cost contraceptive coverage to women without compromising an employer's religious sensibilities. To be sure, Justice Alito also noted in the same breath that the Court was only suggesting that the Hahns' and the Greens' religious objections would be met by this proposal. His Hobby Lobby opinion warned that the Court was not deciding whether the self-certification regime already applicable to objecting non-profit organizations "complies with RFRA for purposes of all religious claims," citing the Court's recent order allowing a religious organization to opt out of notification to insurers in favor of certification to HHS. See* ***Little Sisters of the Poor v. Sebelius****, 571 U.S. ---, 187 L. Ed. 2d 867, 134 S. Ct. ----*

(2014). In light of the *Wheaton College* *injunction and the* *Little Sisters of the Poor* *order, Justice Alito's assurances about the availability of less burdensome alternatives to enforcement of the ACA are flimsy at best and a bit disingenuous in a less charitable light.*

For employers and employees alike, therefore, this decision marks only the first element of a judicial alteration of the ACA's promise of unfettered no-cost access to comprehensive contraceptive coverage Congress meant - and explicitly said it guaranteed - for women. The case thus raises for employers, plan administrators, insurance companies, workers and their families more questions than it resolved. In like manner, the Court also left the jurisprudence somewhat tattered not only by tearing a hole in a statutory scheme of healthcare assurances, but also by holding that Congress in RFRA made compliance with the law optional for employers whose sincerely held religious beliefs so dictate. A shocking result in a democracy, to say the least!

Lawson v. FMR LLC, 571 U.S. ---, 188 L. Ed. 2d 158, 134 S. Ct. ---- (2014)

The Court decided that whistleblower protection under the Sarbanes-Oxley Act of 2002 ["SOX"] applies to employees of private contractors and subcontractors that perform work for public companies.

Jackie Hosanag Lawson and Jonathan M. Zang, former employees of privately held companies that provided advisory and management services to the Fidelity family of mutual funds, sued their former employers under the whistleblower protection provision of SOX. The Fidelity funds themselves have no employees because they contract with investment advisory firms to handle their operations, including reporting under the securities laws. Lawson was employed by Fidelity Brokerage Services, LLC, a subsidiary of FMR Corp., the predecessor of FMR, LLC. Zang was employed by a different FMR LLC subsidiary, Fidelity Management & Research Co. (and later by one of its subsidiaries, FMR Co., Inc.) For ease of reference, the Court referred to all the respondents collectively as "FMR".

Lawson, a senior director of finance who had worked for FMR for 14 years, raised concerns about cost accounting methodologies that she believed overstated operating expenses of the mutual funds. As a consequence of her actions she was constructively discharged by a series of adverse actions. Zang was a portfolio manager who had worked for FMR for eight years when he was fired - allegedly in retaliation for raising concerns about inaccuracies in a draft SEC registration statement for certain Fidelity funds. After separately filing administrative complaints under SOX, Lawson and Zang filed individual suits in federal court.

FMR moved to dismiss on the ground that neither plaintiff was an employee of a public company (i.e., a company required to file reports with the SEC or whose securities are registered with the SEC for public trading.) The district court denied the dismissal motions in both cases, and the First Circuit reversed, holding that SOX does not reach employees of FMR, which is a private contractor for the publicly traded Fidelity funds. Several months later the Department of Labor's Appeals Review Board disagreed with the First Circuit and held that SOX protects employees of privately held contractors who perform work for public companies. The Supreme Court granted certiorari to address this division of opinion.

The Court reversed the First Circuit's judgment and ruled that SOX's whistleblower provision protects employees of private employers who perform work as contractors or subcontractors of public companies. Justice Ginsburg, joined by the Chief Justice and Justices Breyer and Kagan, delivered an opinion for the Court. Justice Scalia, joined by Justice Thomas concurred in the Court's judgment and in Justice Ginsburg's opinion in principal part, objecting mainly to reliance on legislative history in construing SOX. Justice Sotomayor, joined by Justices Kennedy and Alito, dissented.

Justice Ginsburg's opinion begins by emphasizing that SOX was enacted as an antidote to the fraud and coverup that attended the collapse of Enron Corporation. Borrowing the language of its retaliation provision from a parallel statute regulating air carrier safety, the Court reads "an employee" in SOX to mean employees of private contractors serving public companies, just as the parallel act has been construed. The Court's construction of "an employee" rests not only on the ordinary meaning of the statutory text, but also on the Court's view of the statute as a whole. Given the numerous references to an employment relationship between the retaliator and the whistleblower, Justice Ginsburg concludes that the most sensible construction of "an employee" encompasses employees of private contractors within SOX's coverage. In doing so, the Court points out that the public company here has no employees at all, so FMR's position would permit the Fidelity funds essentially to evade coverage by using private contractors. Also, as a practical matter, excluding from SOX coverage the accountants and lawyers who are best equipped to spot fraudulent practices would make these professionals vulnerable to retaliation for doing exactly what Congress intended them to do in the wake of the Enron debacle.

The Court also rejects as largely theoretical FMR's grammar-inspired concern that the Court's construction would literally cover housekeepers and gardeners for public company officers. And, Justice Ginsburg likewise finds wanting FMR's reliance on the statutory heading that refers only to employees of publicly traded companies, noting that the Court places less weight on captions than on the operative text - which is plainly more inclusive than the heading. Turning to SOX's purpose, the Court delves into the statute's legislative history to conclude that Congress meant to encourage whistleblowing by contractor employees who suspect fraud involving the public companies with whom they work. The Court then notes that its reading of the statute avoids insulating the entire mutual fund industry from coverage, as virtually all mutual funds are structured without employees of their own, but are instead advised and managed by private investment advisors. FMR's contrary argument that advisors and managers are already subject to regulation is unavailing because the other regulatory statutes contain no protection for whistleblowers. Justice Ginsburg thus concludes that

Congress could not have plausibly meant that employees in plaintiffs' positions who are discharged for whistleblowing would have no remedy. In like manner, Justice Ginsburg rejects the argument made by FMR and its *amici*, including the Chamber of Commerce, that plaintiffs' construction would also cover mail fraud, wire fraud and bank fraud and would even encompass nannies, babysitters and gardeners within its reach. Regarding this argument as largely hypothetical, Justice Ginsburg also concludes that such claims would not likely succeed at the administrative level and that if the Court is wrong, then Congress could amend household employees out of SOX's reprisal coverage.

The Court finally rejects FMR's argument that subsequent amendments to SOX extending whistleblower retaliation coverage to public company subsidiaries and nationally recognized statistical rating organizations shows that the original text did not cover contractor employees. Seeing nothing useful in an amendment that does not directly address the types of contractors in this case, the Court points out that Congress could have enacted an amendment that would alter the Department of Labor regulation construing "an employee" to cover private contractors, but it failed to do so. Returning to Congress' decision to pattern SOX coverage after the airline safety statute, the Court reverses the judgment of the First Circuit and remands the case for further proceedings consistent with this opinion.

Justice Scalia's concurrence, as noted above, does not endorse the Court's "excursions" into the "swamps of legislative history." To demonstrate that the Court should not have relied on Congressional "intent," of course, Justice Scalia himself referred to legislative history at odds with the Court's conclusion. Justice Scalia also disagrees with reliance on the administrative interpretation of the parallel airline safety law and with any suggestion (made by the Solicitor General) that SOX coverage is limited to a contractor's fulfilling its role as a contractor for a public company. Justice Scalia sees no such limiting principle in SOX's text, which he regards as clear enough to decide this case in plaintiffs' favor.

Justice Sotomayor's opinion for the odd array of dissenters stresses that the SOX whistleblower protection provision is "deeply ambiguous" and that the ambiguity should be resolved in favor of a narrow interpretation based on the statute's headings, the statutory context and the absurd results that a broader reading will yield. Aside from reliance on SOX's headings, the dissents main focus is on the context of SOX as a law that applies to public companies. Justice Sotomayor also suggests that the statute could have been aimed at outplacement firms for public companies and that a broader reading might encompasses literally millions of independent contractors, contract workers and outside lawyers, auditors and accountants. As for absurd results, the dissent's reference is to the household employee argument that the Court rejected as both hypothetical and not likely to be seriously regarded by adjudicators. More pointedly, the dissent objects to inclusion of lawyers and accountants, as they are already regulated by the SEC and the Public Company Accounting Oversight Board. Finding the majority's reference to administrative interpretation of the parallel airline safety statute unpersuasive, the dissent concludes that the Court's extension of coverage to employees of private contractors upsets a balance Congress struck between necessary coverage and reliance on other regulatory agencies.

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As noted above, this decision is the only unequivocal "victory" notched by employees during the 2014 Term. Had the decision gone the other way, the very employees whose job it is to ferret out fraud and bad faith dealings in the public financial markets would be at risk for the exact types of retaliation alleged by Jackie Lawson and Jonathan Zang in this case. Just as significantly, not only would employees in plaintiffs' positions suffer, but the chilling effect on discovery and disclosure of conduct that could adversely affect the marketplace and defraud an unknowing public would be significant. For this reason alone, the Court's decision is also a victory for opponents of marketplace fraud - including the Congress that enacted SOX.

It seems, therefore, that this is a case that applied the law as Congress intended. But, did Congress really say what it intended in SOX? That question is at the heart of the Court's construction of whether "an employee" means only an employee of the public companies that often operate in this industry (as the Fidelity Funds did here) without any employees. The four Justices in the plurality simply could not stomach that perverse result, particularly in light of the legislative history of SOX's enactment as a response to the Enron debacle. That reasoning, of course, prompted Justices Scalia and Thomas to concur on the narrower ground that Congressional "intent" does not matter. SOX's text was clear enough for these two Justices to support the Court's holding as to coverage of employees of private contractors. That point-counterpoint between Justices Ginsburg for the plurality and Justice Scalia over the proper means of statutory interpretation is emblematic of an ongoing debate about how the Court should determine the meaning of statutes. While that dispute is left unresolved by this case, the Court did unequivocally settle any question about the scope of SOX's retaliation coverage by including employees of private contractors for public companies.

For employees who observe misbehavior or uncover fraudulent conduct, whether or not they are charged with doing so, this case assures the protection of SOX's anti-retaliation provision and provides an incentive to disclose that misconduct to the proper authorities without fear of reprisal. Of course, that may be easier said than done when one's livelihood is actually on the line. Nonetheless, the teaching of this case is clear, and employers who are subject to SOX directly or through private contractors, as well as the contracting employers themselves, now need to put in place the necessary framework for employee protection called for by the statute. To the extent that there are costs associated with compliance here, those costs pale in comparison to the economic damage and dislocation associated with reprisals against whistleblowers.

B. Labor Relations and Labor Organizations

The 2013 Term was the most consequential one for labor relations and labor organizations in recent memory. In an eagerly anticipated ruling with obvious political color, the Court put in jeopardy hundreds of decisions made by the National Labor Relations Board (the "Board"), which the Court held was improperly constituted with three of President Obama's recess appointments. In another blockbuster decision, the Court made unionizing healthcare workers, a growing constituency, a considerably more difficult task. By sustaining the Chamber of Commerce position in these two leading cases, the Roberts Court (or, more accurately, the constant majority of Justices who embrace deregulation) reaffirmed its reliability as a friend of management and owners.

Indeed, the only solace working people and organized labor could draw from the Court's work in the labor area this term is that it refrained from doing additional damage when it dismissed a writ of certiorari as improvidently granted (colloquially known as a "dig") after full briefing and oral argument. In ***Mulhall v. UNITE-HERE, 571 U.S. ---, 187 L. Ed. 2d ---, 134 S. Ct. ---- (2013),*** the Court declined to determine the propriety of so-called union "neutrality" agreements under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). (These agreements typically provide that employers will recognize a union majority and will stay neutral during a union organizing drive, provide employee lists and grant limited access to company property in exchange for the union's agreement not to put economic pressure on the employer.) Instead, the Court, with three Justices expressing reservations, "digged" the writ of certiorari, leaving in place an Eleventh Circuit decision disapproving a neutrality agreement between UNITE-HERE and a Florida casino. The casino and the union had agreed to make the neutrality agreement effective upon the installation of slot machines at the casino. Accordingly, the union supported financially the casino's efforts to obtain the necessary slot machine licenses. While organized labor barely dodged this bullet that could have seriously wounded union organizing in the private sector, the Eleventh Circuit's decision leaves in place a circuit split about the validity of neutrality agreements, as well as questions about whether private challenges to these agreements are even justiciable. That lingering uncertainty is the basis for Justice Breyer's dissenting opinion, joined by Justices Sotomayor and Kagan, that bemoaned dismissal of the case. For the time being, neutrality agreements will remain in jeopardy, at least in the Eleventh Circuit.

One other case bears mentioning here. In a glancing way and without any explicit support for labor organizing, the Court offered some potential comfort to unions and their adherents when it sided with anti-abortion "sidewalk counselors" in a decision holding unconstitutional a Massachusetts statute banning speakers from public ways or sidewalks within 35 feet of reproductive healthcare facilities. In ***McCullen v. Coakley, 573 U.S. ---, 189 L. Ed. 2d 502, 134 S. Ct. 2518 (2014)***, the Court unanimously ruled that this Massachusetts buffer zone statute was unconstitutional, although Justices Scalia, Thomas, Kennedy and Alito concurred only in the Court's judgment, declining to join the Chief Justice's opinion for the Court. What split the Court was its conclusion - "the purest dicta" in the eyes of the concurring Justices - that the Massachusetts law does not trigger strict scrutiny because it does not expressly target anti-abortion speech and is thus content neutral. Putting that dispute to one side for purposes of this article, the Court was unanimous in affirming the traditional rights of patrolling sidewalk speakers who seek to engage the public as they enter and leave adjacent facilities. Union organizers, of course, fit squarely into this category of speakers, so it is no surprise that supporters of labor have taken notice of this decision. *See, e.g.*, Moshe Z. Marvit, *Why a Win for Anti-Choice Protesters Might Also Strengthen Workers' Rights to Strike*, www.thenation.com/article/180692/why-win-anti-choice-protesters-might-also-strengthen-workers-rights-strike (accessed September 15, 2014.) Do not be surprised to see passages from the Chief Justice's *McCullen* opinion appearing in union-side briefs in picketing and organizing cases.

NLRB v. Noel Canning, 573 U.S. ---, 189 L. Ed. 2d 538, 134 S. Ct. ---- (2014)

The Court decided that the Constitution empowers the President to fill any existing vacancy during any Senate recess of sufficient length, but that in this case President Obama lacked authority to appoint Board members during a three-day intra-session recess that was too short.

Noel Canning, a Pepsi-Cola distributor, refused to reduce to writing and execute a successor collective bargaining agreement reached with Teamsters Local 760 at a December 8, 2010 bargaining session. The union filed an unfair labor practice charge with the Board alleging bad faith bargaining in violation of section 8(a)(5) of the National Labor Relations Act ("Act"). The Board's General Counsel issued [a] complaint. The employer claimed that the parties had failed to reach any agreement at the December 8, 2010 bargaining session. After a hearing, the Board accepted the credibility determination of the administrative law judge and found that an agreement had been reached. It concluded that the employer's failure to execute the agreement was a violation of its duty to bargain in good faith under the Act. The Board ordered the employer to execute the agreement and make the affected employees whole for any losses.

The employer made two perfunctory arguments on the merits, but mainly argued on review of the Board's decision, that three of the five Board members (Sharon Block, Richard Griffin and Terence Flynn) had been invalidly appointed by the President, thus leaving the Board without a quorum under 29 U.S.C. 153(b) to exercise its statutory powers in this case. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 177 L. Ed. 2d 162, 130 S. Ct. 2635 (2010). President Obama had nominated the three challenged members in January of 2011 under Article II, section 1 of the Constitution. Almost a year later, on January 4, 2012, the President, invoking the Recess Appointments Clause of Article II, section 2 of the Constitution (the "Clause"), appointed Members Block, Griffin and Flynn on a day between two *pro forma* sessions of the Senate held pursuant to a Senate Resolution of December 17, 2011, authorizing a series of brief recesses between Tuesday and Friday pro forma sessions.

The D.C. Circuit agreed that the President's three 2012 appointments were invalid under the Clause for reasons different from what the employer had urged. The court concluded (a) that the Clause applied only to appointments made during the recess between the two formal sessions of Congress (*i.e*., inter-session appointments) and not to appointments made within those sessions (*i.e.*, intra-session appointments) and (b) that the Clause applied only to vacancies that come into existence during a recess and not vacancies (like the ones at hand) that arose before the recess. Accordingly, the three appointments were invalid, and the Board lacked a quorum when it issued its order against Noel Canning. The Supreme Court granted the Solicitor General's petition for certiorari and asked the parties to address not only the lower court's reasoning, but also the employer's argument about appointments made during brief recesses between *pro forma* sessions.

The Court unanimously affirmed the judgment of the D.C. Circuit, concluding that the Clause did not give President Obama the constitutional authority to make these three appointments during a three-day recess. Justice Breyer's opinion for a majority of the Court (joined by Justices Kennedy, Ginsburg, Sotomayor and Kagan) held that the Constitution empowers the President to fill any existing vacancy during any recess of the Senate of sufficient length. That holding results from answers to three questions under the terms of the Recess Appointments Clause, which gives the President the power ". . . to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

First, the Court concluded that Clause applies both to inter-session recesses (that is, breaks between formal sessions of Congress) and to intra-session recesses (that is, breaks in the midst of a session) of sufficient length. Viewing "the Recess" as ambiguous. based on dictionary and colloquial usage at the time of the founding, and finding recent history of intra-session recess appointments unopposed by the Senate for the last 75 years, the Court concluded that the President is authorized to make intra-session appointments during recesses of sufficient length. The Court ruled that a Senate recess that is so short (3 days or less) that it does not require consent of the House under the Adjournments Clause of Article I, section 5, cl. 4, is not long enough to trigger the President's recess appointment power. Finding no recess appointments ever made during intra-session breaks of less than 10 days, the Court also ruled that recesses of less than 10 days are presumptively too short as well.

Second, the Court concluded that "all Vacancies that may happen" during a recess applies to vacancies that initially occur before a recess and continue to exist during that recess. Conceding that the "most natural" reading of the language applies to vacancies that arise during a recess, Justice Breyer finds the phrase ambiguous and its narrow interpretation doubtful in light of its early consideration by President Jefferson and President Monroe's Attorney General. Turning, therefore, to the purpose of the Clause to illuminate the disputed phrase, Justice Breyer stresses that a broader interpretation of when a vacancy "happens" is more consistent with the purpose of the Clause to permit the Government to function with Presidential appointments when the Senate cannot confirm them. In like manner, historical practice of the last 200 years strongly favors the broader interpretation, according to Justice Breyer, upon reviewing in great detail various Presidents' recess appointments to pre-existing vacancies and the Senate's failure to disagree with this broader interpretation since 1940. In light of some linguistic ambiguity, and the historical interplay between Presidents and the Senate involving vacancies arising before a Senate recess, the Court said that it was reluctant to upset this traditional practice at the risk of shrinking authority Presidents have exercised for so long in order to keep their administrations functioning.

Third, in calculating the length of a Senate recess, the Court concluded that the Senate's pro-forma sessions count as sessions and not as part of a longer period of recess. In this case the Senate adopted a resolution on December 17, 2011 to convene pro forma sessions with "no business . . . transacted" every Tuesday and Friday from December 20, 2011 through January 20, 2012. At the end of each pro forma session the Senate would adjourn until the following pro forma session. President Obama made the three appointments during a recess between two of these pro forma sessions. The Solicitor General argued that the Court should treat the pro forma sessions as periods of recess because they were sessions in name only and that the Senate was functionally in recess from January 3, 2012 (the first day of the second session of the 112th Congress) until January 23, 2012, when the Senate reconvened to do regular business. The Court, however, rejected that argument, holding that the Senate is in session when it says it is, so long as it retains the capacity under its own rules to transact Senate business. In this case the Senate said it was in session and it did have capacity to transact business (by being able to pass a unanimous consent resolution during any pro forma session.) Justice Breyer also rejected the Solicitor General's request for a more realistic appraisal of what the Senate was actually doing during this time, reasoning that it would risk judicial interference with the functioning of the Legislative Branch.

Having held that the Constitution empowers the President to fill any existing vacancy during any Senate recess of sufficient length, the Court concluded that the Clause did not give President Obama the constitutional authority to make these three appointments to the Board during a three-day recess between two *pro-forma* sessions of the Senate. Accordingly, while rejecting the reasoning of the D.C. Circuit, the Court affirmed its judgment.

Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito, concurred only in the judgment of the Court. Opening his detailed and ascerbic opinion, Justice Scalia accused the majority of disregarding the principles (a) that the government-structuring principles of the Constitution are as critical to preserving liberty as the Bill of Rights and (b) the Court has no business deferring to the political branches when construing a government-structuring provision of the Constitution. In doing so, Justice Scalia pointedly cited prior opinions by Justice Kennedy, who instead joined Justice Breyer's opinion here.

The concurrence then posits first that "the Recess" means only the gap between sessions and that the appointments in this case are invalid because they were made during a session of the Senate. Justice Scalia found the Court's interpretation of the phrase linguistically unsound as well as unsupported by historical practice. Indeed, given that the Senate is now almost always available to consider nominations because of modern forms of transportation and communication, Justice Scalia deems the Recess Appointments Clause an "anachronism" whose only current purpose is the "ignoble" one of enabling the President to circumvent the Senate's role in the appointment process.

Second, the concurrence posits that only vacancies that arise during the recess in which they are filled can be legitimate under the Clause. Again, Justice Scalia says that his narrow interpretation is the only one consistent with the Clause's plain meaning, noting particularly that a "reasonable reader" may wonder why "any intelligent drafter" would have needed to say "that may happen" after "[v]acancies." In addition to his detailed linguistic argument, Justice Scalia argues that historical practice does not support the Court's broader interpretation of when a vacancy "happens." Recounting at length the same history Justice Breyer described, Justice Scalia concludes that it demonstrates a long-simmering inter-branch conflict that does not justify the Court's deference to what he says is the Executive Branch's views.

Criticizing the Court's decision as an unwarranted deferral to the Executive and a tragedy because of its "abolition" of limits on recess appointments and damage to separation-of-powers jurisprudence, Justice Scalia bemoans what he claims will be an aggrandizement of the Presidency beyond its constitutional bounds. Accordingly, he concurs only in the Court's judgment.

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Justice Breyer wins, and Justice Scalia loses! That's the take on this faux unanimous decision by one of the Court's keenest observers, Linda Greenhouse, former Supreme Court reporter for The New York Times and now a professor at Yale Law School. L. Greenhouse, "Tragedy or Triumph" <u>The New York Times</u>, (September 3, 2014) Although Greenhouse's insight is, as usual, spot on, the juicier story may be Justice Kennedy's abandonment of the Roberts majority to join Justice Breyer's majestic explanation to the President and the Senate about the Clause's constitutional limits. Competition for Justice Kennedy's vote must have been fierce, as Justice Scalia's concurring opinion demonstrates. Utilizing Justice Kennedy's own words from prior decisions, Justice Scalia's opinion (which is actually much more a dissent than a concurrence) pointedly dwells on what he regards as a change in Justice Kennedy's interpretive approach.

There is hardly a way to overstate both the immediate importance of this decision for workers, management, unions and their lawyers. Likewise, over the longer term, the delicate interplay of power between the President and the Senate has been recalibrated by this decision.

The immediate practical impact of this case is, of course, that hundreds of Board decisions have been drained of their validity by the Court's ruling, as the Board had operated without a properly appointed quorum from early 2012 until the Senate confirmed President Obama's later appointments on July 30, 2013. That impact, however, is confined to the parties to those specific cases (and their lawyers, of course.) So, any enduring consequence of the

Court's decision for labor law litigation, however, is likely to be minimal. As long as the Board continues to operate with a valid quorum, this decision will have virtually no practical effect at all on employers, unions and the labor bar.

On the other hand, the long-term consequences of the Court's decision - political, to be sure - are monumental. The delicate check and balance between the President and the Senate as to choosing who actually runs the federal government at its highest operating levels has been refined by Justice Breyer's opinion for a majority of the Court. No doubt, fresh political compromises will ultimately be forged on a nominee-by-nominee basis. Although that process may appear messy and divisive, at least there is now a set of guidelines for both branches of Government to follow in exercising power under the Recess Appointments Clause.

Whether the Court "got it right" in this case has been a matter of considerable controversy. There has been criticism that Justice Breyer simply "made up" rules that are not in the Constitution. One answer to that criticism is that the Constitution itself does not elaborate on what "the Recess" means and when a vacancy "happens." Looking up the dictionary meaning of those words, however, is no substitute for what the Constitution's structure and text fairly imply about declaring the law. Justice Breyer and his colleagues thus had the duty to do what Justice Scalia and his cohorts would delegate to the authors of vintage dictionaries - the duty to determine what the words of the Recess Appointments Clause mean. Surely, declaring what the Constitution's words mean requires more than reading glasses and a ripe old dictionary.

Nonetheless, there will be enduring debate about whose version of history surrounding Presidential appointments is the more compelling. For students of the Constitution these competing versions of this history, filled with nuggets of little-known facts and stories, is nothing short of fascinating. In the end, however, it is Justice Breyer's analysis that commanded a majority to go beyond invalidating the three Board appointments and to lay out guidelines for future appointments. As noted above, while the Court unanimously found the Board to be improperly constituted, it remains bitterly divided about how the Recess Appointments Clause should be understood by the President and the Senate.

Harris v. Quinn, 573 U.S. ---, 189 L. Ed. 2d 620, 134 S. Ct. ---- (2014)

The Court decided that the First Amendment prohibits collection of an agency fee from Illinois' home healthcare workers who do not want to join or support a union.

Medicaid recipients in Illinois who would normally need institutional care may, under the state's Rehabilitation Program, hire a personal assistant ("PA") to provide personal care services in the recipient's home. Both the State and the recipients (who are designated as "customers") play some role in employing the PAs, although the Illinois law that establishes the employment relationship states that the customer is "the employer" of the PA. Customers define the PAs' duties in service plans and control their hiring, firing, training, supervising, disciplining and many other aspects of the PAs' employment. The State, however, pays the PAs with federal funds through the Medicaid program. The State also sets some basic threshold qualification for employment as a PA, mandates an annual customer review, suggests certain tasks for a PA to perform and approves and signs off on customer service plans.

The Illinois Public Labor Relations Act ("PLRA") authorizes state employees to join labor unions and to bargain collectively on the terms and conditions of their employment. The PLRA contains an agency-fee provision under which a collective bargaining agreement may require members of a bargaining unit who do not wish to join the union to pay (through payroll deduction) a "fair share" fee to the union for the cost of collective bargaining and contract administration. Many years after the SEIU was denied certification in a unit of PAs in the Rehabilitation Program because the State did not employ PAs, Governor Rod Blagojevich circumvented that decision by a 2003 executive order that was later codified by an amendment to the PLRA declaring PAs to be "public employees" of the State solely for purposes of the state labor law. SEIU was, following a vote, designated as the bargaining agent for the PAs, and the union and the State entered into a collective bargaining agreement requiring the Rehabilitation Program PAs to pay a "fair share" agency fee through deductions from the PAs Medicaid payments.

Three PAs in the Rehabilitation Program (including one who is "employed" by her quadriplegic daughter) filed a putative class action in 2010 seeking an injunction against enforcement of the fair-share fee and a declaration that its authorization under the PLRA violates their First Amendment rights. The district court dismissed plaintiffs' claims with prejudice, and the Seventh Circuit affirmed, concluding that *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), controlled because the State is a joint employer (along with the customers) of the PAs. The Supreme Court granted certiorari "in light of the important First Amendment questions" raised by laws that deem PAs "to be state employees for the purpose of unionization and the assessment of fair-share fees." 189 L. Ed. 2d at 640.

The Court, in a 5-4 decision and a majority opinion by Justice Alito, reversed the judgment of the Seventh Circuit and held that the First Amendment prohibits collection of the fair-share agency fee from the Rehabilitation Program PAs who do not want to join or support their bargaining unit's union.

Justice Alito's majority opinion first finds *Abood's* analysis questionable on several grounds, thus undercutting the Seventh Circuit's rationale. Indeed, the majority deems *Abood* "something of an anomaly" because in its view, prevention of "free-riding" by nonmembers is generally insufficient to overcome First Amendment objections to agency fees. In addition to "misunderstanding" prior decisions, the majority accuses the *Abood* Court of failing to appreciate both the distinction between private and public sector union speech and the conceptual difficulty and administrative problems in separating chargeable and non-chargeable expenditures. The majority also finds empirically unsupported the *Abood* Court's link between collecting agency fees and maintaining "labor peace" in the public sector (another key rationale of *Abood*.)

Because of *Abood's* "questionable foundations" and because the PAs here are different from full-fledged public employees, the Court "refuses to extend" *Abood* to the facts presented by this case. As to the PAs, Justice Alito paints them as not having most of the rights and benefits of ordinary state employees and not enjoying the full scope of collective bargaining rights. Moreover, because state law requires PAs to receive the same rate of pay, the requirement of union representation of nonmembers has "little application" here, according to Justice Alito. Extending approval of agency fees to encompass what the majority calls "partial public employees" would also invite problems, such as determining which employees short of those who are "full-fledged" state employees should enjoy *Abood's* benefits.

Given *Abood's* inapplicability in this case, the majority measures the agency fee provision against the First Amendment to determine whether it serves a compelling state interest that cannot be served through means that are less restrictive of associational freedoms. Justice Alito concludes that none of the interests asserted by the State suffice. First, promotion of labor peace "misses the point," as the three challengers do not seek to form a rival union and the union's status as exclusive agent and the right to assess nonmembers are thus not inextricably linked. Also, the labor peace argument is undermined by the fact that PAs do not work together in a common facility and the union's role in the employment relationship is very restricted under Illinois law. Second, promoting the welfare of the PAs and contributing to the success of the Rehabilitation Program is insufficient as a rationale because there was no showing that the union could not effectively advocate for the PAs without receipt of the agency fees (which the majority had previously noted amounted to more than $3.6 million per year.)

Finally, the majority found additional arguments in support of Illinois' scheme unconvincing, rejecting the suggestion that a First Amendment balancing test is applicable to PAs who are unlike state employees and concluding that even if it were, the interests of the three objectors in free association trump any interest in promoting labor peace and addressing the problem of free-riders. Lastly, the majority, finding the Illinois scheme distinctive, rejected the argument that refusing to apply *Abood* would draw into question the Court's prior decisions approving imposition of analogues to agency fees on lawyers in "integrated bar" states and mandatory student activities fees in public universities. Accordingly, the Court reversed the judgment of the Seventh Circuit as to the *Abood* claims, affirmed the judgment as to dismissal of the First Amendment claims of workers in a related program as not being ripe, and remanded the case for proceedings consistent with this opinion.

Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, dissented in an opinion positing that *Abood* fully answers the question presented in the case and that a government entity may constitutionally require public employees to pay a fair share of the union's costs of negotiating better terms of employment for them. Justice Kagan finds no dispositive difference between the Detroit teachers in *Abood* and the Illinois PAs in this case. Addressing the only question in dispute, Justice Kagan concludes that the PAs are employees of both the customers and the State, thereby bringing them fully within *Abood's* scope.

Examining the Illinois program in depth, Justice Kagan points out that the State's workforce of 20,000 PA's in the Rehabilitation Program is subject to State oversight of the customer relationship (including withholding pay or disqualifying a PA based on customer allegations of neglect, abuse or financial exploitation.) Moreover, the State has sole authority over workforce-wide terms of employment, such as the PAs' rate of pay and their types of benefits - both items likely to be the subject of collective bargaining. More broadly, Justice Kagan outlines Illinois' interest in bargaining with an adequately funded agent in order to minimize workforce turnover and shortages in this low-wage industry. Otherwise, labor instability would affect customer care, forcing disabled persons out of their homes and into institutions at massively increased costs to the State.

That the customers also "employ" the PAs, sharing employment responsibilities with the State should not matter in applying *Abood*. Likewise, the dissent finds irrelevant that state law labels PAs as public employees for limited purposes, pointing out that the State and SEIU can still bargain over most matters, such as state-funded health coverage. Also, the fact that in Illinois the wages for all PAs is the same does not undercut the need for an exclusive bargaining agent for other terms of employment, such as benefits and grievances. In short, the dissent says that a joint employer remains an employer subject to *Abood's* holding.

As to the majority's calling into question the viability of *Abood* itself, Justice Kagan goes beyond an ordinary appeal to *stare decisis*. Pointing out the entrenched nature of *Abood*, the multiple affirmations of its rationale and the enormous reliance interests it has engendered in more than 20 states with "fair share" statutes, Justice Kagan emphatically affirms that *Abood* remains the law, even though it "does not rank on the majority's top-ten list of favorite precedents." 189 L. Ed. 2d at 668. Apart from *stare decisis*, Justice Kagan finds the majority's decision inconsistent with established First Amendment principles, concluding that *Abood* is "of a piece" with established and unquestioned precedent. The Court's approval of the line between fees for bargaining and fees for political activities strikes a balance that should be upheld. The dissent draws special attention to the distinctive nature of a union charged with representing every employee in a bargaining unit, regardless of whether the employees join or contribute to the union. Employing language from Justice Scalia, the dissent reasons that unions are required to go out of their way to represent free-riders. The majority's view that this problem is illusory because the PAs voted for the SEIU simply misses the point, according to Justice Kagan, who argues that simple economics will yield inadequate financing absent a fair-share provision.

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This decision is a new high-water mark in the Roberts Court's undisguised assault on labor unions. See also, Knox v. Service Employees Int. Union, 567 U.S. ---, 183 L. Ed 2d 281, 132 S. Ct. 2277 (2012) (When a union imposes a dues increase levied to meet expenses that were not disclosed when the regular assessment was set, it must provide a fresh notice and may not charge an agency fee to nonmembers without their affirmative consent.) While purporting to recognize the problems of free-riding that agency fees address, Justice Alito does yeoman's work in attempting to show that under Illinois law there is so little for the SEIU to do for these home healthcare workers that the speech and associational rights of the free-riders trump application of Abood to this case. Accordingly, the Court reads this entire subset of workers out of Abood's coverage. But is this case the ultimate high-water mark sought to be achieved by the Roberts majority? Certainly not, as you will see below.

Confining Abood to "full-fledged" state employees is, according to Justice Alito, all that this decision does. That is an ominous understatement of the Court's holding. In this age of creative employment relationships, where privatization of many state functions may render workers something less than "full-fledged" state employees, the Court's ruling could have the effect of decimating public employee unions. What of charter school teachers? What of prison guards at semi-privatized corrections facilities? What of nurses and staff at healthcare facilities that are jointly run by state and private management? What of administrative staff at privately managed agencies that perform public tasks ranging from economic development to building maintenance? It would be a mere baby step for the Court to find that these employees are not "full-fledged" public employees that fall within Abood's holding. That would certainly be an easy way to say good-bye to what the Court regards as the "anomaly" of compelled agency fees for the unions that represent these workers. In short, Justice Alito's opinion is pregnant with the possibility of effectively disabling public employee unions and depriving workers of the benefits of organized bargaining with public employers.

Looking at the Court's decision through a wider lens, the majority also did damage to the notion of stare decisis by failing to apply to these Illinois home healthcare workers the same legal principles it did to the Detroit teachers in Abood. Treating the hoary doctrine of stare decisis as no more than a convenience to be employed only when it is useful to do so, the Court demeans its basic purpose of furthering the law's predictability. Particularly in a labor economics setting, not knowing whether an established precedent will be honored injects an element of instability that neither employees, employers nor labor unions will like. To say that Abood is hanging by the thread of stare decisis no longer says much about its vitality, especially when the majority regards its rationale as an "anomaly." Agency fees in the public sector may become a thing of the past, if the Roberts majority has its way in a proper case.

C. Employee Compensation and Benefits

The Court focused its attention on a number of nuts-and-bolts issues in the area of employee compensation and benefits. In one case involving the recurring issue of payments for time spent donning and doffing protective gear under the Fair Labor Standards Act of 1938 ("FLSA"), the Court defined "changing clothes" under the statute and a labor agreement to deny compensation for putting on and taking off most protective items. In a case under the Employee Retirement and Income Security Act of 1974 ("ERISA"), the Court rejected a benefit plan participant's judicial challenge to an administrative denial of benefits because suit was not timely filed under the terms of the plan. The Court also ruled against participants in an ESOP plan when it declined to find that plan fiduciaries violated their duty of prudence under ERISA for investing the plan's funds in shares of the participants' employer.

The Court also ruled, in a dispute about an employer's contributions to a union-affiliated benefit fund under a collective bargaining agreement, that the district court's decision in favor of the fund was final for purposes of the employer's appeal, even if the issue of attorneys' fees had not been resolved. Accordingly, the employer's appeal was timely under 28 U.S.C. 1291. ***Ray Haluch Gravel Company v. Central Pension Fund, IUOE***, 571 U.S. ---, 187 L. Ed. 2d 669, 134 S. Ct. ---- (2014). Justice Kennedy's opinion for a unanimous Court reversed the First Circuit's ruling to the contrary, rejecting the pension fund's arguments that (a) the district court had not yet determined a portion of the breach of contract claim - i.e., attorneys' fees and (b) a portion of the fees were incurred prior to litigation and thus are not governed by a prior Supreme Court ruling. Given the purely adjective nature of this ruling as well as its clarity, fuller treatment of the case is not warranted here.

Sandifer v. United States Steel Corporation, 571 U.S. ---, 187 L. Ed. 2d 729, 134 S. Ct. ---- (2014)

The Court decided that donning and doffing certain protective gear is "changing clothes" under the FLSA, is thus subject to collective bargaining and in this case was not compensable under the parties' labor agreement.

Clifton Sandifer and other employees of United States Steel Corporation sued the employer in an FLSA collective action seeking backpay for time spent donning and doffing protective gear that the employer required them to wear because of hazards regularly encountered at the worksite. These items included a flame-retardant jacket, pants, gloves, hood, hardhat, leggings, boots, a "snood", wristlets, safety glasses, earplugs and a respirator. A collective bargaining agreement between the employer and the Steelworkers' Union purportedly makes the disputed time non-compensable under the FLSA.

The district court granted the employer's summary judgment motion, holding that donning and doffing the protective gear was "changing clothes" within the meaning of the FLSA's provision permitting the parties to a collective bargaining agreement to decide whether "changing clothes" is compensable. 29 U.S.C. 203(o). To the extent that some of the items (e.g., safety glasses, earplugs and respirator) are not "clothes," the court held that the time spent donning and doffing them was *de minimis* and thus not compensable. The Seventh Circuit affirmed, and the Supreme Court granted certiorari.

The Court, in a unanimous opinion (except for Justice Sotomayor's refusal to join in one footnote), affirmed the Seventh Circuit's judgment and held that donning and doffing the protective gear in this case qualifies as "changing clothes" within the meaning of section 203 (o). Justice Scalia's opinion for the Court first recites the statute's pertinent history, including Congress' action to limit employers' liability for "portal" actions - i.e., suits to collect pay for all preliminary and postliminary activities on the employer's premises (named for the portals to mines where workers put on and took off their gear.) A Department of Labor interpretive bulletin, construing regulations under the Portal-to-Portal Act amendments to the FLSA, however, held that "changing clothes" and "washing up or showering" may be compensable if they are directly related to the employees' work. In response, Congress enacted section 203(o) which makes time spent "changing clothes or washing" noncompensable if that time is excluded "by the express term of or by custom or practice" under a collective bargaining agreement. As Justice Scalia points out, in this case the employer does not dispute that donning and doffing this protective gear would be compensable time but for the statutory exclusion. The employees, however, quarrel with the premise that donning and doffing this protective gear qualifies as "changing clothes."

Justice Scalia first examines the meaning of "clothes," relying on dictionary definitions to show that the word means all items designed to cover the body and commonly regarded as articles of dress. Rejecting the employees' argument that the word does not cover protective items designed to guard against workplace hazards, Justice Scalia sees no basis for omitting protective clothing from the meaning of "clothes." Moreover, the Court points out that the historical context of section 203(o) is flatly inconsistent with the employees' contrary argument, pointing specifically to why the statute was passed in light of the Department of Labor's interpretations. Justice Scalia also notes, however, that the employer's proposal (like the Seventh Circuit's view) is too broad because it would cover not only clothing worn on the body, but also wearable accessories and devices. Accordingly, Justice Scalia says that the Court is bound by the statute to construe "clothes" to include protective clothing, but not other wearable items.

Next, the Court agrees with the employees that "changing" connotes substitution, but it also connotes "alteration" of one's dress. Hence, the Court rejects the employees' argument that putting gear over one's street clothing is not "changing" clothes. Finding the FLSA's text permits the Court's construction, Justice Scalia notes that limiting its reach to substituting or exchanging clothing would unduly limit the object of section 203(o) to permit bargaining over compensability as a way for the parties to achieve predictability through negotiation. In a foreboding footnote-aside (which Justice Sotomayor alone declined to join), Justice Scalia says that the Court has no occasion to disapprove application of the "narrow construction of exemptions" principle to FLSA cases, apparently because exemptions reside in a different portion of the statute. 187 L. Ed. 2d at 74, n. 7.

Applying the meaning of "changing clothes" above, Justice Scalia concludes that nine of the twelve items satisfy the Court's standard as "clothes." As to safety glasses, earplugs and respirators, they are not commonly regarded as articles of dress. Doubting, however, that the *de minimis* doctrine can properly be applied to a statute that Justice Scalia says is "*all about* trifles," the Court nonetheless finds the time noncompensable by viewing the donning and doffing periods as a whole - not as component parts, item by item. In this case, the vast majority of the time is spent on clothes. Accordingly, the Court holds that the time spent on safety glasses and earplugs need not be subtracted from the total time expended. As for the respirators, the Court left undisturbed the district court's conclusion that respirators are donned and doffed as part of an employee's normal workload and are thus beyond the scope of section 203(o).

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This decision makes little common sense and is heedless of the history and special context of changing clothes in the modern workplace. And yet, the Court's unanimous ruling against the employees rests on what the employees' labor union and employer agreed to many years ago. That agreement accounts for the odd array of parties in arguing this case. The plaintiffs not only sued their employer for wages, but their own union sided with the employer in seeking to deny them any compensation.

What the Court did has limited significance in an era nearly devoid of collective bargaining agreements. Indeed, one could argue with some force that this case really belongs in the Labor Relations section because of its holding's inextricable link to the bargaining history between United States Steel and the Steelworkers' Union. Whatever importance the case exhibits, however, has to do with compensating employees for performing tasks at the workplace that they would not have to do otherwise. And therein lies the rub in this case - the employees must spend a considerable amount of time donning and doffing protective gear in order to perform their jobs. Because of the Court's ruling, however, they will not be paid anything for this intrusion on time that would otherwise be their own if they did not have to change clothes.

We have not seen the end of how the FLSA should apply to time spent getting ready for (or leaving) work. The Court has, as noted below in Section II, granted review of a case involving time spent undergoing security screening in the workplace before and after normal working hours. Untethered from the particular bargaining history in Sandifer, the Court will, perhaps, come to grips in a more direct fashion with the competing equities of how to compensate employees for time they involuntarily spend at the workplace before and after their actual work.

Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. ---, 187 L. Ed. 2d

529, 134 S. Ct. 604 (2014)

The Court decided that a contractual limitations period for bringing a claim for benefits under an ERISA long-term disability plan is enforceable even where the limitations period starts to run before the participant's cause of action accrues.

Julie Heimeshoff, a senior public relations manager for Wal-Mart Stores, Inc., began reporting chronic pain and fatigue in 2005 and was later diagnosed with lupus and fibromyalgia. She stopped working on June 8, 2005 and filed a claim for long-term disability benefits on August 22, 2005, with Hartford Life & Accident Insurance Co., the administrator of the employer's disability plan. Hartford notified Heimeshoff in November of 2005 that it could not determine whether she was disabled because her rheumatologist had not responded to a request for information. The next month Hartford denied the claim for failure to provide satisfactory proof of loss, but later informed Heimeshoff that it would reopen the claim without an appeal if her rheumatologist provided the requested information.

Heimeshoff submitted an evaluation from another physician in July of 2006 that concluded she was disabled. She also submitted additional medical evidence in October of that year. Hartford retained its own doctor who concluded that Heimeshoff could perform the duties of her sedentary occupation, and it denied the claim in November of 2006. In May of 2007, Heimeshoff requested, and Hartford granted, an extension of the appeal deadline to the end of September in order to provide more evidence. On September 26, 2007, Heimeshoff submitted her appeal with additional evaluations. Hartford retained two more doctors to review the claim and issued a final denial on November 26, 2007.

On November 10, 2010, Heimeshoff filed suit seeking review of her denied claim. Although the suit was filed just within three years of Hartford's final denial, it was not filed within the contractual limitations period under the plan that measures the three year period from the time written proof of loss is required to be furnished under the plan. Accordingly, Hartford and the employer moved to dismiss based on the plan's contractual limitations period. The district court granted the motion, concluding that ERISA provides no limitations period and that the three year period from the date when proof of loss is due is enforceable. The Second Circuit affirmed, concluding that enforcement of the plan's limitation period did not offend ERISA even though the three years commenced during the administrative process and thus before Heimeshoff's claim accrued. The Court granted certiorari to resolve a circuit conflict about the enforceability of what the Court characterized as a "common contractual limitation provision."

The Court unanimously affirmed in an opinion by Justice Thomas. Noting that the courts of appeals have uniformly required that plan participants exhaust internal (or administrative) review before bringing suit, a cause of action for benefits under ERISA does not accrue until the plan issues a final denial. In this case the plan's 3-year limitations period began to run when Heimeshoff's proof of loss was due in 2005 instead of when Hartford denied the claim in

November of 2007. Accordingly, Heimeshoff argued that the plan's limitation provision ran afoul of the general rule that statutes of limitations commence upon accrual of the cause of action. The Court rejected that argument, holding that a plan may enforce a limitations period "that starts to run before the cause of action [for benefits] accrues, as long as the period is reasonable." 187 L. Ed. 2d at 536. In doing so, Justice Thomas relied on precedents that have enforced contractual limitations shorter than periods prescribed by general statutes of limitations, so long as the shorter period itself is reasonable. Because parties can agree to shorter reasonable periods of limitation, the Court reasoned that they could likewise agree to the start date or commencement of such periods. Additionally, Justice Thomas found "especially appropriate" enforcing the limitations period as written because the statute authorizes suits to recover benefits and enforce rights "under the terms of the plan." 29 U.S.C. 1132(a)(1)(B).

The Court then found that the 3-year period from the proof of loss due date is neither unreasonable on its face nor too short in light of the mainstream experience that internal review takes about one year in most cases, thus leaving participants with two years to file suit. In this case, where internal review took much longer, Heimeshoff still had approximately one year to file suit (i.e., from November 26, 2007 to November 20, 2008 - the latter date being three years after the due date for proof of loss, which was 90 days after Heimeshoff's August 22, 2005 claim for benefits.) Heimeshoff's counsel conceded at oral argument that a hypothetical one-year limitations period would be reasonable, thus foreclosing any justifiable reliance on cases where claimants are left with no realistic opportunity to sue because of obstacles to accrual of the cause of action.

Supported by the United States, Heimeshoff argued that even if the plan's limitations period is reasonable, enforcing the early start date will undermine ERISA's two-tiered remedial scheme because participants will forego internal review rights in order to have more time to seek judicial review. The Court rejected that argument, noting that participants who fail to develop evidence during the internal review process risk forfeiting use of that evidence on judicial review. Moreover, Justice Thomas noted that participants are not likely to value judicial review over internal review because the courts ordinarily review benefit denials for abuse of discretion. The Court likewise rejected the warning that administrators might attempt to prevent judicial review by delaying internal determinations in bad faith. Justice Thomas pointed out that the statutory penalty for failing to meet administrative deadlines is immediate access to judicial review (in addition to traditional defenses to an inequitable assertion of a limitations argument.) Also, the Court found no significant evidence that good faith administration of similar provisions in policies required by a large number of states is a barrier to judicial review. In many cases the participants did not diligently pursue their rights. And in the rare cases where internal review precludes timely judicial review, the courts are, according to Justice Thomas, "well equipped to apply traditional doctrines [*e.g.*, waiver, estoppel and equitable tolling] that may nevertheless allow participants to proceed." *Id*. at 542. And, even beyond those remedies, where plans offer appeals and dispute resolution as part of the internal process, ERISA's regulations require tolling of the limitations period during that time.

Finally, the Court rejected Heimeshoff's argument that the limitations period under this plan must be tolled either by contract, by ERISA itself, or by borrowing state law. Justice Thomas declined to rewrite the contract and likewise refused to judicially amend a regulation that requires limited tolling only during a voluntary internal appeal period. In like fashion, the Court found no need to look to state law where the parties adopted their own limitations period by contract and not through borrowing a state law period.

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In view of the chronology of Heimeshoff's pursuit of benefits, her counsel's concession at oral argument that one year is a reasonable time for commencing an action, made this case an easy one for the Court to decide against her. Heimeshoff had several years of opportunity during the internal process, including extensions of deadlines granted by Hartford, to prove her claim. Her suit would have been timely had she filed it just short of a year after this final denial - plenty of time to prepare a rather pedestrian claim for review of an administrative record. Instead, she waited a few days short of three years from the date of denial to do so, despite the clear provision in the plan that the time limit for suing was three years from the due date for her proof of loss. In light of this dilatory pursuit of benefits, it is hard to be sympathetic to Heimeshoff's argument about timeliness.

Putting the unsympathetic facts of this case aside, however, would it not make sense to adopt a rule that a limitations period cannot begin to run until the administrative review process terminates? At least that would be consistent with the familiar doctrine that limitations periods begin only when the cause of action accrues. And, it would provide an incentive for claimants to use the administrative process to the fullest, while providing a mirror-image disincentive to dilatory tactics by plan administrators. Justice Thomas dispatched those arguments handily in his opinion, mainly by stressing the freedom of parties to agree to shortened limitations periods that still permit the internal review process to run its normal course without adversely affecting claimants' ability to obtain effective review. It's tough to argue with the Court's logic, and not a single Justice did so.

Despite some hue and cry from the plaintiffs' bar about shortening the time for judicial review and about incentivizing intentional delay by plan administrators, the virtue of this decision is stability, i.e., less uncertainty about timeliness. This decision assures, for the benefit of all, that the courts will enforce the plan terms and that, absent bad faith management of the internal review process, all parties can thus focus their efforts on claims review during that process. In practical terms, the Court did little more than affirm the way plans are required to work in the many states requiring measurement of limitations periods from the proof of loss due date. What remains for employers is how to draft plans with clear provisions defining the limitations period for judicial review and how best to communicate those provisions to their plan participants. The bar can now assist those employers with the Court's assurance about the enforceability of reasonable contractual limitations periods.

Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. ---, 189 L. Ed. 2d 457, 134 S. Ct. ---- (2014)

The Court decided that a fiduciary of an employee stock ownership plan (ESOP) is not entitled to any presumption of prudence, but is subject to the same duty of prudence applicable to other ERISA fiduciaries (except that it need not diversify the fund's assets.)

Fifth Third Bancorp maintains a defined contribution retirement savings plan for its employees. The plan's assets are invested in 20 separate funds, including mutual funds and an "employee stock ownership plan" ("ESOP"). Employee contributions can be allocated as a participant wishes. The employer's matching contributions, however, are always invested initially in the ESOP, although a participant can move those contributions to other funds. The ESOP's funds are required by the plan to be invested primarily in the employer's common stock.

John Dudenhoeffer and other plan participants and former Fifth Third employees filed a class action claiming, among other things, that Fifth Third and some of its officers, as plan fiduciaries, violated their duty of prudence under ERISA by continuing to buy and hold Fifth Third stock when they knew or should have known that the stock was overvalued and excessively risky. The complaint alleged that publicly available information about subprime lending (a large part of Fifth Third's business) should have given the fiduciaries pause and that nonpublic information known by the Fifth Third insider fiduciaries revealed misconduct that led the market to overvalue Fifth Third's stock. Instead of acting on this information, the fiduciaries continued to hold and buy Fifth Third stock whose price fell by 74% in the two years before the complaint was filed. That price drop eliminated a large part of the participants' retirement savings. (By the time the Court's opinion was issued, the stock had recovered to about one-half of its pre-drop price.)

The district court dismissed the complaint for failure to state a claim based on the premise that plan fiduciaries enjoy a presumption that their decision to remain invested in the employer's stock was reasonable. The Sixth Circuit, while agreeing that ESOP fiduciaries are entitled to a presumption of prudence, ruled that the presumption is evidentiary and that it does not apply at the pleading stage. The Supreme Court granted certiorari in light of differences among the circuits as to the nature and applicability of a presumption of prudence in favor of ESOP fiduciaries.

The Court unanimously held, in an opinion by Justice Breyer, that "the law does not create a special presumption favoring ESOP fiduciaries." Instead, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that the latter is under no duty to diversify the ESOP's holdings. The Court noted that ERISA makes no reference to any presumption in the prudent person standard of section 1104(a)(1) or in the special exemption for ESOP fiduciaries in section 1104(a)(2). Instead, ERISA exempts ESOP fiduciaries from the prudence standard "only to the extent that [the statute] requires diversification." Accordingly, ESOP fiduciaries (such as the defendants here) are not liable for losses that result from a failure to diversify.

Justice Breyer's opinion squarely rejected several arguments made by the fiduciaries in support of a presumption of prudence. First, the Court found unavailing the argument that the special purpose of ESOPs to promote employee ownership of the employer's stock (typically embodied in the plan's investment instructions) calls for a presumption that these investment instructions are prudent. The Court concluded that ERISA's prudent person standard trumps the instructions of any plan to invest exclusively in employer stock, noting that ERISA itself requires that fiduciaries obey instructions only "insofar as [the instructions] are consistent with [the statute.]." And while Congress promoted ESOPs with tax incentives, it did not expressly relax the duty of prudence with any special presumption.

The Court also gave short shrift to the fiduciaries' argument that the plan's investment instructions effectively waived the duty of prudence, noting that under ERISA plan documents cannot excuse fiduciaries from their statutory duties. Likewise, Justice Breyer, while recognizing legitimate tension between insider trading prohibitions and the duty of prudence, opined that any potential for conflict can be dealt with by alternative means discussed later in the opinion. Lastly, the Court rejected the policy argument that without a special presumption, the threat of duty-of-prudence lawsuits will deter employers from offering ESOPs. Instead, the Court suggests that weeding out meritless claims can be better accomplished through "careful, context-sensitive scrutiny of a complaint's allegations at the motion to dismiss stage."

Expanding on its last point, Justice Breyer's opinion considers more fully the role of Rule 12(b)(6) motions, such as the one in this case. Vacating the Sixth Circuit's judgment that reversed the district court's dismissal of this case, Justice Breyer directed the Court of Appeals to apply the Court's most recent (and stringent) pleading plausibility standards in light of some special considerations. First, the participants' argument that the fiduciaries should have recognized from publicly available information that Fifth Third's stock was overvalued is generally implausible in the absence of special circumstances. Fiduciaries may ordinarily make their decisions in reliance on stock prices in the public markets, and the Sixth Circuit's decision denying dismissal apparently rested on an erroneous understanding of the prudence of relying on market prices. Second, as to a breach of duty based on nonpublic information, the Court ruled that to state such a claim, a plaintiff must plausibly allege an alternative action that the fiduciary could have taken that would be consistent with the securities laws and that would not have likely harmed the fund. In applying this ruling, Justice Breyer stressed [a] that the duty of prudence does not require the fiduciary to break the law (such as by selling the employer's stock on the basis of inside information in violation of the securities laws); [b] conflicts with insider trading and corporate disclosure requirements must be taken into account where a complaint faults fiduciaries for failing to act on the basis of nonpublic inside information; and [c] that lower courts must consider whether a prudent fiduciary could not have concluded that stopping purchases would do more harm than good to the fund by causing the market in the employer's stock to drop (and thus causing a drop in value of stock already held by the ESOP.)

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It would be a mistake to characterize this case as a "win" for John Dudenhoeffer and his fellow plan participants. Despite the Court's elimination of the "presumption of prudence" that has protected fiduciaries for many years, Justice Breyer's opinion replaced that presumption with a pleading regime that is not only likely to leave employees far worse off, but may also prematurely eliminate many claims at the pleading stage on a Rule 12(b)(6) motion. While this decision is really a defeat for ESOP participants, its impact only targets employer-sponsored ESOPs and does not alter ERISA's duty of prudence for other types of pension plans, including union-sponsored ones.

The principal virtue of Justice Breyer's opinion for the Court, aside from its commendable fidelity to ERISA's text, is its detailed roadmap for fiduciaries, plan participants, lawyers and judges alike. On the other hand (and perhaps this is just an annoying inconsequential nitpick), Justice Breyer's habit of never using footnotes makes his roadmap so dense that its path requires extra effort to decipher. In any event, for those who disagree with the Court's refinement of ERISA's duty of prudence, their appeal is now to Congress, which can amend the statute to recalibrate it.

The principal vice of Justice Breyer's opinion is that it raises as many questions as it answers. These questions involve duties of disclosure under the federal securities laws, a subject that is fraught with uncertainty because the Securities and Exchange Commission has not even weighed in on this particular subject. In any event, applicability of the securities laws to non-public information that an ESOP fiduciary receives is beyond the scope of this article, so there is nothing else to add, except a note of caution to employers, benefits administrators and lawyers that specialized counsel should be sought when dealing with inside or other non-public information.

D. Public employment

Aside from *Harris v. Quinn, supra*, section I(B), the most consequential decision affecting public employment did not primarily involve public employees; it involved public higher education in Michigan. In ***Schuette v. Coalition to Defend Affirmative Action, etc., 572 U.S. ---, 188 L. Ed. 2d 613, 134 S. Ct. ---- (2014),*** the Court upheld the constitutionality of a Michigan state constitutional amendment that prohibits the use of race-based preferences in public college admissions. Justice Kennedy, joined by the Chief Justice and Justice Alito concluded that the Court lacked authority to set aside the state laws that leave it to voters to determine whether racial preferences may be considered in governmental decisions. Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Breyer filed a separate opinion concurring in the judgment because the case does not involve a diminution of the ability of minorities to participate in the political process. Justice Sotomayor, joined by Justice Ginsburg filed a dissenting opinion. Justice Kagan, in recusal, took no part in the consideration or decision of the case.

Aside from sabotaging unions in the public sector and jeopardizing affirmative action in public employment, the Court's work in the area of public employment was limited to a single ruling that public employees who testify truthfully in response to subpoenas are engaged in citizen speech protected by the First Amendment. While that ruling did little to help the employee in that case, the principle at stake is a large one for the millions of public employees concerned about keeping their jobs when faced with having to testify about job-related matters in response to subpoenas.

Lane v. Franks and Burrow, etc., 573 U.S. ---, 189 L. Ed. 2d 312, 134 S. Ct. 2369 (2014)

The Court decided that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the course of the employee's ordinary job responsibilities.

Edward Lane was hired in 2006 on a probationary basis by Central Alabama Community College to be the director of a statewide program for underprivileged youth operated by the school. He was responsible for the program's day-to-day operations, hiring and firing employees and making decisions about the program's finances. When Lane was hired the program faced significant financial difficulties. That prompted Lane to conduct a comprehensive expense audit that revealed that Suzanne Schmitz, an Alabama State Representative on the program's payroll had not been reporting to the program's office. Lane told the college's president and attorney who warned him that firing Schmitz could have negative repercussions for him and the college.

Lane nonetheless instructed Schmitz to show up at a program office to work as a counselor. Schmitz refused, saying she wanted to continue serving the program as she had in the past. Lane fired her shortly after this conversation. Schmitz told another program employee that she intended to "get [Lane] back" for firing her and that if he ever requested funding from the state legislature for the program, she would tell him "[y]ou're fired." Schmitz' termination drew public attention, and the FBI started an investigation into her employment by the program. In November of 2006 Lane testified before a federal grand jury about his reasons for firing Schmitz. In January of 2008 Schmitz was indicted on four counts of mail fraud and four counts of theft involving federal program funds. The indictments alleged in part that she had received federal funds even though she performed virtually no services and rarely appeared for work.

At Schmitz' trial in August 2008, Lane testified under subpoena about the events leading to his firing Schmitz. The jury failed to reach a verdict, and Schmitz was re-tried about six months later. Lane testified again, and the jury convicted Schmitz on three counts of mail fraud and four counts of theft involving federal program funds. The district court sentenced her to 30 months in prison and ordered her to pay $177,251.82 in restitution and forfeiture.

In the meantime Lane began reporting to Steve Franks, who had become college president earlier in the year. Because the program continued to experience budget shortfalls, Lane recommended that Franks consider layoffs. In January 2009 Franks terminated 29 probationary employees, including Lane. Shortly thereafter, however, Franks rescinded all but two of the terminations - Franks and one other employee - purportedly because of an ambiguity in the other employees' probationary status. Franks also claimed that Lane was not simply an employee, but was the program director, thus putting him in a fundamentally different category from the others. Nine months later Franks eliminated the program completely and terminated its remaining employees. He later retired, and Susan Burrow replaced him as college president during the appeal of Lane's case.

In January 2011 Lane sued Franks under 42 U.S.C. 1983 and state law claiming (among other things) that Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz. The complaint sought damages from Franks in his individual capacity and equitable relief, including reinstatement, from Franks in his official capacity. The official capacity claims are now against Frank's successor, Susan Burrow. The district court, relying on *Garcetti v. Ceballos*, 547 U.S. 410, 164 L. Ed. 2d 689, 126 S. Ct. 1951 (2006), granted Franks' motion for summary judgment because Lane's testimony about information he learned on the job was "speech" that was part of his official job duties. The Eleventh Circuit affirmed, concluding in reliance on *Garcetti's* reasoning that Lane spoke on the witness stand as an employee and not a citizen. That Lane testified under subpoena in a litigation context did not bring his speech within First Amendment protection, but even if it did Franks was entitled to qualified immunity in his individual capacity because the right asserted by Lane was not clearly established. The Supreme Court granted certiorari to resolve "discord" in the circuits about taking adverse action against public employees for providing "truthful subpoenaed testimony outside the course of their ordinary job responsibilities." 189 L. Ed. 2d at 321-322.

The Court, in a unanimous opinion by Justice Sotomayor, held that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. After restating the framework for balancing a public employee's speech interest on matters of public concern against the state's interest as an employer in promoting efficient public service under *Pickering v. Bd. of Education, etc.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and describing the inquiry into protected speech under *Garcetti*, the Court concluded that Lane's testimony at Schmitz' trials was speech by a citizen on a matter of public concern and that the employer had no adequate justification for treating Lane differently from the general public.

Justice Sotomayor first concluded that truthful testimony under oath by a public employee outside the scope of his ordinary job duties is citizen speech even where the testimony relates to his employment or information learned only in that employment. Criticizing the Eleventh Circuit's broad reading of *Garcetti*, the Court finds trial testimony to be the "quintessential" example of citizen speech. As Justice Sotomayor stresses, when employees testify, their obligations as employees are distinct from their obligations as citizens to "speak the truth." And just because Lane learned the subject matter of his testimony as an employee of the college, *Garcetti* does not require that his sworn testimony not be treated as citizen speech. The critical question is whether the employee's speech is "ordinarily" within the scope of his or her duties, not whether it "merely concerns" those duties. Particularly in this public corruption case, Lane was uniquely situated as an employee to speak about Schmitz's theft of services. Accordingly, the Court deemed it essential that Lane be able to testify truthfully without fear of retaliation. His testimony, therefore, was deemed "speech as a citizen."

Next, the Court had no trouble in finding that Lane's testimony was speech on a matter of public concern based on its content, form and context. Not only did the content of Lane's testimony involve misuse of public funds, but its form and context as sworn testimony in a judicial proceeding fortified the conclusion that this testimony was speech on a matter of public concern.

The Court also concluded that the college did not assert and could not demonstrate any interest that would justify treating Lane differently from other employees. As Justice Sotomayor put it, the "employer's side of the *Pickering* scale is entirely empty." *Id*. at 326. There was no evidence, for example, that Lane's testimony was false or erroneous or that he unnecessarily disclosed confidential or privileged information or that he admitted to any employee wrongdoing on his own part.

Parsing a number of Eleventh Circuit cases, the Court ultimately agreed with Franks that even though Lane's testimony is protected under the First Amendment, the claims against Franks in his individual capacity should be dismissed on the basis of qualified immunity. In short, Franks could reasonably have believed, in light of Eleventh Circuit precedent at the time, that he could fire Lane on account of Lane's sworn testimony outside the scope of his ordinary job responsibilities. The Court noted that Eleventh Circuit precedent failed to provide "clear notice" that Lane's testimony based on information gained as an employee was nonetheless citizen speech entitled to First Amendment protection. Accordingly, the Court affirmed the judgment of the Eleventh Circuit as to the individual capacity claims against Franks. But the Court ruled that its decision "does not resolve" the official capacity claims against Franks' successor, Burrow. The judgment of the Eleventh Circuit as to the official capacity claims was thus reversed and the case remanded for further proceedings consistent with the Court's opinion.

Justice Thomas, joined by Justices Scalia and Alito, filed a brief concurrence indicating that Lane was not, in *Garcetti's* terms speaking "pursuant to" his ordinary job duties because his responsibilities did not include testifying in court proceedings and no one suggested that he was subpoenaed as an employer representative. The concurrence notes particularly that the Court had no occasion, therefore, to address "the quite different" question whether a public employee speaks as a citizen when he or she testifies in the course of his or her ordinary job responsibilities, as some police officers, crime scene technicians and laboratory analysts do as a routine part of their job duties.

* * * *

Despite its veneer of unanimity, the majority and concurring opinions cannot hide a longstanding dispute amongst the Justices about how to strike a balance between public employee speech and public employer prerogative. That ongoing disagreement about applying the Pickering test was, if anything, sharpened by Justice Sotomayor's opinion in this case - a point not lost on Justice Thomas in his concurrence.

The greater mystery of this case is why the Court granted review. After all, the First Amendment question could not be litigated through the individual capacity claim because everyone agreed that Franks had qualified immunity from liability. The official capacity claim was essentially moot by the time the case got to the Court because the program Lane headed had been completely terminated. Moreover, Lane was never a full-fledged employee, having stayed in probationary status from hire to discharge. Simply put, this case was less than an ideal vehicle for determining how the First Amendment applies to public employee testimony.

On the other hand, in the wake of Garcetti, this case teaches a valuable lesson to employers, employees and their lawyers: Testifying under subpoena is subject to some protection, even if the subject matter has to do with what the employee does on the job. But the protection afforded by this decision is narrow in scope, and the next case (as posited by Justice Thomas) lies in wait: Will the Court protect the truthful subpoenaed testimony of police officers, crime scene technicians and laboratory analysts who routinely testify as part of their job responsibilities? Garcetti would appear to point toward less protection, while this case and Pickering might support a more vigorous application of the First Amendment. In the meantime, this decision temporarily alleviates to some degree a real source of concern about keeping one's job when faced with the prospect of testifying about something one did, observed or heard in the workplace.

E. Sundry Other Decisions

Missing from the 2013 Term are arbitration and other dispute resolution decisions that have a material impact on employment and labor law. It would be a mistake, however, to conclude that the Roberts majority's romance with employment arbitration (a species of its more general penchant for limiting employee remedies) is less ardent than in past terms. The absence of these cases during the 2013 Term is most likely a function of the vagaries of the certiorari process and not a signal that the Court is abandoning its project to transfer law enforcement oversight of employment rights from the public judiciary to the opaque and unreviewable process run by private arbitrators.

The Court did manage to rule against employees in both an income tax case involving severance pay and a defamation suit filed by a discharged airline pilot. Both decisions are reviewed briefly below.

In two cases involving transnational issues the Court touched on issues a little beyond the outer edge of onshore employment law. The Court ruled that Argentine workers could not use United States courts to litigate human rights abuses (e.g., kidnapping, torture and killing) alleged to have been committed by state security forces in league with their employer during Argentina's "Dirty War." Briefly, the Court held that Mercedes-Benz' parent, Daimler AG (which sells Mercedes-Benz cars in California through a subsidiary), was not amenable to suit in California for injuries allegedly caused by another foreign subsidiary entirely outside the United States. ***Daimler AG v. Bauman***, 571 U.S. ---, 187 L. Ed. 2d 624, 134 S. Ct. ---- (2014). The other transnational case involved an arbitration provision in an investment treaty between Argentina and the United Kingdom. The Court ruled, in a dispute between Argentina and a British investor in an Argentinian gas utility, that construing a "local litigation" prerequisite to arbitration is a matter for arbitrators and that United States courts must review the arbitrators' determinations with deference. ***BG Group plc v. Republic of Argentina***, 572 U.S. ---, 188 L. Ed. 2d 220, 134 S. Ct. ---- (2014).

Finally, one development in the class action area is worth noting here because of its potential effect on how employment class actions are litigated. The Court denied certiorari in ***Martin v. Blessing***, 571 U.S. ---, 187 L. Ed. 2d ---, 134 S. Ct. ---- (2013), an antitrust case challenging the merger of Sirius and XM satellite digital audio radio services. The district judge, Harold Baer, Jr., appointed three law firms to serve as interim class counsel. His class certification order required the three firms to "*ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics*." Judge Baer had imposed similar conditions in a number of other cases, including at least one ERISA class action. Following certification in this case, the parties reached a settlement that offered no money to the class, required Sirius XM (the merged company) to freeze prices for five months and provided for a payment to class counsel of $13 million in attorneys' fees. In the Second Circuit, Nicholas Martin and other class members objected not only to the settlement terms, but also to Judge Baer's reliance on race and gender in assessing the adequacy of class counsel. The Court of Appeals rejected Martin's challenge to the certification order because he had failed to allege injury in fact. The Supreme Court denied certiorari, with the Chief Justice recused. Justice Alito, however, filed a lengthy statement respecting denial in which he excoriated Judge Baer's reliance on race and gender as indefensible court-approved discrimination. Doubting that Judge Baer's practice could survive a constitutional challenge, Justice Alito also questioned its feasibility, noting that learning the racial and gender makeup of Rule 23 classes is impractical and could lead to absurd results (in virtually single-gender classes of prostate or breast cancer victims, for example.) Despite expressing his own view that Martin had a legitimate interest in the "lawful" appointment of class counsel, Justice Alito concurred in the denial of certiorari. In a valedictory sentence, however, he warned: "If the challenged appointment practice [of Judge Baer] continues and is not addressed by the Court of Appeals, future review may be warranted." Judge Baer died within about six months of this warning after suffering a fall at his home.

Now to the abbreviated summaries of the two principal cases.

United States v. Quality Stores, Inc., 572 U.S. ---, 188 L. Ed. 2d 413
134 S. Ct. ---- (2014)

The Court decided that severance payments made to employees terminated against their will are taxable wages under the Federal Insurance Contributions Act ("FICA").

Thousands of employees of Quality Stores, Inc. and its affiliates were terminated against their will around the time the employer suffered an involuntary Chapter 11 bankruptcy filing. The terminated employees received severance payments as a result of reductions in force, or discontinuance of plants or operations. Payments were made under one of two termination plans, neither of which tied severance payments to receipt of state unemployment compensation. One plan based payments on job grade and management level. The other plan, seeking to retain employees for post-bankruptcy operations, conditioned payments on completion of their last day of service, as directed by the employer.

The employer initially reported the severance payments as wages on W-2's, paid the employer's share of FICA taxes and withheld the employees' share of FICA taxes. After asking 3100 former employees to allow the employer to file for FICA tax refunds, 1850 of them agreed. The employer sought just over $1 million on its behalf and on behalf of the consenting former employees. The Internal Revenue Service neither allowed nor denied the claim. The employer sought the refund through a proceeding in the Bankruptcy Court, which granted summary judgment in its favor. The district court and the Sixth Circuit affirmed, concluding that the severance payments were not "wages" subject to FICA taxes. The Supreme Court granted the certiorari petition of the United States in light of rulings from other circuits at odds with the Sixth Circuit.

The Court (with Justice Kagan recused), in a unanimous opinion by Justice Kennedy, reversed the judgment of the Sixth Circuit, holding that the severance payments here, which varied based on length of service and were not linked to receipt of state unemployment benefits, fell within FICA's broad definition of taxable wages.

Justice Kennedy's opinion reasons that the statute's definition of "wages" as "all remuneration for employment" plainly covers severance payments. Noting that Congress repealed in 1950 an exception from wages for "dismissal" payments, and referring to another provision of FICA that exempts severance payments made because of disability retirement, the Court concludes that Congress meant "wages" to cover severance payments generally. Next, Justice Kennedy concludes that the income tax withholding provision of section 3402(o) of the Internal Revenue Code does not narrow FICA's meaning of "wages" simply by instructing that "supplemental unemployment compensation benefits" ("SUB's") be treated "as if" they were wages. Properly understood in light of its regulatory background, Congress meant in section 3402(o) to address the problem that certain SUB's were being taxed, based on the vagaries of state unemployment benefits laws. By treating all SUB's as if they were "wages" for income tax withholding purposes, however, Congress did not mean that severance payments unlinked to state unemployment compensation are also not taxable "wages" under FICA. Accordingly, the judgment of the Sixth Circuit was reversed and the case remanded for further proceedings.

* * * *

Viewing this decision (as the Court did) in its most practical sense, the payments to Quality Stores' employees were not structured to be like social welfare benefits. Instead of weekly or other periodic payments that relate to workers' ongoing living expenses, the severance here was paid in a lump sum, mainly for the convenience of the employer. And, instead of conditioning these benefits on an employee's unemployment status and his or her receipt of state benefits, the payments here are essentially unconditional (except for those employees who had to remain in service under one of the two severance plans.) Given this view of the case, it is no wonder that the Court unanimously decided that these severance payments fell within the FICA's definition of "wages."

On the other hand, think in broader terms: Regardless of how these payments were structured, they were simply social welfare benefits funded by the employer instead of by the state. Did the FICA intend to cover post-termination payments made as welfare benefits instead of wages paid in exchange for work? It seems doubtful that our Social Security system, funded by FICA taxes, was intended to be funded by taxing other social welfare benefits. This broader view of Quality Stores' payments, however, did not prevail - and probably for good reason: the structure of the payments is likely to be the most reliable guide to the character of those payments. In this case the severance payments were like the proverbial duck that walked and quacked like a duck and thus was one.

**Air Wisconsin Airlines Corporation v. Hoeper, 571 U.S. ---,
187 L. Ed. 2d 744, 134 S. Ct. ---- (2014)**

The Court decided that an employer is entitled to immunity under the Aviation and Transportation Security Act ("ATSA") for its materially true statements about an

employee's behavior.

William Hoeper was employed by Air Wisconsin Airlines Corporation as a pilot in 1998. By 2004 the employer had stopped operating flights from Hoeper's home base on aircraft for which he was certified. So, Hoeper needed to gain certification on the BAe-146, an aircraft he had not flown. Hoeper failed his first three attempts to pass a proficiency test, rendering his employment by Air Wisconsin "at [the employer's] discretion." He and the employer then agreed that he would have one more opportunity to pass the test, leaving little doubt that his employment would be terminated if he failed again. In December of 2004 Hoeper flew from his home base to Virginia for simulator training as part of the test. During this training Hoeper failed to cope with a challenging scenario created by the instructor. When the instructor began to tell Hoeper that he should have known better, Hoeper took off his headset, tossed it on the glare shield, exchanged words loudly with the instructor and said something to the effect that this is a "bunch of shit" and that the instructor was "railroading" the situation. Hoeper said he wanted to call the legal department and the pilot's union. The instructor ended the session so Hoeper could do so, and the instructor then reported Hoeper's conduct to Air Wisconsin's manager of the BAe-146 fleet, who booked Hoeper on a commercial flight back to his home base.

The fleet manager then discussed the situation with a number of officials at Air Wisconsin's headquarters, including the vice president of operations, the managing director of flight operations, and the assistant chief pilot. The vice president regarded Hoeper's behavior in the simulator as a "fairly significant outburst" and knew it was a "given" that Hoeper would be fired for failing to complete the simulator training on the BAe-146. When the managing director mentioned that Hoeper was deputized as a Federal Flight Deck Officer ("FFDO") who was permitted to carry a firearm while piloting, the vice president concluded there was no way to confirm whether Hoeper had his weapon with him. In light of this information and knowledge of two episodes of assaults by disgruntled employees of other airlines, the vice president decided that Air Wisconsin needed to call the Transportation Service Administration ("TSA") to let them know the status of the situation. The fleet manager made the call, telling TSA that Hoeper was an FFDO who may be armed, that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that an "unstable pilot in the FFDO program was terminated today." TSA then ordered the commercial flight Hoeper was riding to return to the gate, whereupon officers boarded the aircraft, removed Hoeper, searched him and asked him about the location of his gun. Hoeper told them that the gun was at his home, and a federal agent went there to retrieve it. Hoeper boarded a later flight home, and Air Wisconsin fired him the next day.

Hoeper sued Air Wisconsin in state court in Colorado on several claims, including defamation. Air Wisconsin moved for summary judgment on the basis of immunity under the ATSA. The trial judge denied the motion, ruling that a jury should find facts pertinent to the immunity defense. The case was tried to a jury. The judge did not instruct that the ATSA protects materially true statements, but simply tracked the statutory language that immunity would not apply if the employer made a false disclosure to the TSA or with reckless disregard for the truth or falsity of what it reported. The jury found for Hoeper on the defamation claim and awarded him $849,625 in compensatory damages and $391,875 in punitive damages (the latter being reduced later by the court to $350,000.) The Colorado Court of Appeals affirmed, concluding that the immunity issued was properly submitted and that the record supports the jury's rejection of immunity. The Colorado Supreme Court affirmed, although it held that immunity under ATSA is a question of law for the court. Nonetheless, the trial court's error was deemed harmless because the employer made the statements to the TSA recklessly (because they overstated the facts), thus disqualifying it from ATSA immunity. Three Justices dissented on the ground that Air Wisconsin was entitled to immunity because its statements to the TSA were substantially true. The Supreme Court of the United States granted certiorari to decide whether ATSA immunity may be denied without a determination that an airline's disclosure was materially false.

The Court unanimously decided, in an opinion by Justice Sotomayor, that ATSA immunity may not be denied without a determination that an airline's disclosure is materially false and that in this context materiality means that the falsehood must have a natural tendency to influence a reasonable TSA officer's response to the report. The Court also decided, with three Justices dissenting in part, that Air Wisconsin's statements to the TSA about Hoeper were not materially false and that it could not be held liable for minor misstatements or loose wording about Hoeper. Accordingly, by a 6 to 3 vote, the Court reversed the state court judgment in Hoeper's favor and remanded for proceedings "not inconsistent with the majority opinion."

The Court first holds unanimously that ATSA immunity may not be denied to materially true statements. Because the ATSA immunity exception is patterned after the Court's "actual malice" standard, Congress did not mean to deny immunity for materially true statements made recklessly. Immunity for substantially true reports is necessary to insure that airlines and their employees do not hesitate to provide needed information to the TSA. Finding that the state courts did not properly apply the material falsity standard (mainly because there was no instruction about materiality at all), the Court found reason not to affirm the state courts' judgment.

Next, in a portion of the opinion joined by six Justices, the Court concluded that Air Wisconsin was entitled to ATSA immunity as a matter of law. Viewing materiality as the likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat, Justice Sotomayor concludes that any falsehoods in Air Wisconsin's report to the TSA were not material. In doing so, the Court rejected Hoeper's argument that the airline should have clarified that it had no reason to believe that Hoeper was armed. Justice Sotomayor regarded this defect as imprecise wording on the airline's part. In like manner, the Court regarded the falsehood that Hoeper had already been fired as immaterial to a TSA officer because "everyone" knew that he was about to be fired for having failed the simulator testing. Finally, the Court rejected Hoeper's argument that there is a material difference between "blowing up" in a professional setting and the statement the airline made about being concerned about Hoeper's mental stability. Again, the Court regarded this "imprecise" wording in the report as immaterial to the TSA.

Justice Scalia, joined by Justices Thomas and Kagan, dissented from the Court's disposition of the case. They agreed with the Court's answer to the question posed by the writ of certiorari, but said that the Court should have stopped at that point and remanded the case for further proceedings - presumably a retrial under different instructions. Justice Scalia went on to conclude that the Court then gave the wrong answer to a question it should not have determined. In the dissenters' opinion, the Court could not hold as a matter of law that Air Wisconsin's report to the TSA was not materially false. Because a reasonable jury could find, in a light favorable to Hoeper, that his outburst was brief, justified and harmless, it could also reasonably conclude that Hoeper was neither irrational nor a source of violence. According to the partial dissenters, it is thus implausible that a reasonable TSA officer would not consider important the difference between a person whose colleagues regard him as mentally unstable and a person who engaged in an understandable, but heated, outburst under challenging circumstances.

* * * *

This decision is yet another reminder of the shadow 9/11 continues to cast over our jurisprudence. Not only was ATSA enacted in the wake of that terrorist attack, but the Court's decisions since then also have often permitted intrusions on personal dignity and restrictions on individual rights that might have been unthinkable in a less troubled time. Indeed, the dispute over Hoeper's claims is witness to an extraordinary judicial tolerance for imprecise and just plain erroneous reports to the TSA - all in the name of erring on the side safety. The odd lineup of Justices, too, marks the ultimate outcome of the case as dubious.

Justice Scalia deserves credit (as do Justices Thomas and Kagan in joining him) for making a powerful point that there is wisdom in preserving the role of juries in matters where judges lack practical experience. My only quarrel is that he might have mentioned the Seventh Amendment at least with a "cf" citation.

II. Grants of Certiorari for the 2014 Term

As of September 15, 2014, the Court had granted certiorari in forty cases, of which eight involved questions relating to employment or labor law.

Integrity Staffing Solutions, Inc. v. Busk, No. 13-433. The question presented is whether time spent in security screenings is compensable under the Portal-to-Portal Act amendments to the FLSA. Oral argument is scheduled for October 8, 2014.

Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter, No. 12-1497. The questions presented in this False Claims Act case brought by a foreign-based employee involve application of the Wartime Suspension of Limitations Act to a civil fraud case and application of the False Claims Act's "first-to-file" rule to duplicative serial claims. Oral argument has not yet been scheduled.

Mach Mining v. Equal Employment Opportunity Commission, No. 13-1019. The question presented is whether and to what extent a court may enforce the EEOC's mandatory duty to conciliate discrimination claims before suit. Oral argument has not yet been scheduled.

Nickols v. Mortgage Bankers Association, No. 13-1052. The question presented is whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretive rules unless such revisions are made through notice-and-comment rulemaking. This case is consolidated with the following one, and oral argument is scheduled for December 1, 2014.

Perez v. Mortgage Bankers Association, No. 13-1041. The question presented is whether a federal agency must engage in notice-and-comment rulemaking pursuant to the Administrative Procedure Act before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation. This case is consolidated with the foregoing one, and oral argument is scheduled for December 1, 2014.

Department of Homeland Security v. MacLean, No. 13-984. The question presented is whether certain statutory protections codified at 5 U.S.C. 2302(b)(8)(A), which are inapplicable when an employee makes a discloure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information. Oral argument is scheduled for November 4, 2014.

M&G Polymers USA, LLC v. Tackett, No. 13-1010. The question presented is whether, when construing collective bargaining agreements in Labor Management Relations Act ("LMRA") cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold. Oral argument is scheduled for November 10, 2014.

Young v. United Parcel Service, No. 12-1226. The question presented is whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work." Oral argument is scheduled for December 3, 2014.

III. The Scope of the Court's Work

The Court's merits docket remained virtually constant in size in comparison to recent terms during the tenure of Chief Justice Roberts. Stat Pack, p. 16. The Court issued 67 signed opinions after oral argument and 6 summary reversals without briefing or oral argument. Two cases were dismissed on the ground that certiorari had been improvidently granted. 52 cases were civil in nature, comprising 71% of the docket. *Ibid.* Of the civil cases, 13 decisions (including the two dismissals after briefing and oral argument) directly involved employment-related issues. Employment law thus occupied 25% of the Court's merits docket, thus demonstrating the Court's continuing focus on this area of the law.

A number of statistical highlights offer some perspective on how the Court operated during the 2013 Term. First, many observers have remarked on the unusually high percentage of cases decided unanimously. *See*, *e.g*., A. Liptak, "On Supreme Court, Does 9-0 Add Up to More Than 5-4?" *The New York Times* (August 11, 2014). True enough, 48 of the 73 decisions (not including the two dismissals after argument) were unanimous, while only 10 cases were decided by 5-4 votes. As previously explained in the discussion of the cases, these statistics portray a *faux* unanimity that masks the same philosophical chasm that has divided the Roberts Court from its inception. One should not, therefore, infer anything momentous about what looks on the surface to be a unified Court. As the employment and labor decisions forcefully illustrate, the typical division between the Roberts majority on one side and the three women Justices plus Justice Breyer on the other side is still firmly in place.

Second, as for the work of the individual Justices, each of them wrote either 7 or 8 majority opinions this term. And, each Justice wrote 3 to 5 dissents, except for Justices Kennedy and Thomas, who wrote only one dissent each. Justice Kagan wrote no concurring opinions and Justice Kennedy wrote only one. But Justice Scalia wrote 10 concurrences and Justice Alito wrote 9, making their total output of 23 and 21 opinions respectively the highest of the term.

Finally, as to voting alignment, aside from a couple of odd lineups noted above, there was nothing out of the ordinary in the 2013 Term, save for Justice Kennedy's joining a new majority in *Noel Canning*. The voting agreement statistics speak most clearly. The highest percentage agreement was between Justices Thomas and Alito at 95.8% of all votes, closely followed by Justices Scalia and Thomas at 94.5% and Justices Ginsburg and Kagan at 94.4%. The lowest percentage, unsurprisingly, was between Justices Alito and Sotomayor at only 21.7% in divided cases and 74.6% in all cases. That was followed closely by Justices Alito and Thomas on one side and Ginsburg and Sotomayor on the other side at 25% in divided cases and 75% overall.

IV. Concluding Observations

Beyond "employee-versus-employer" scorecard results, beyond how the parties' individual disputes are resolved and beyond what legal principles carry the day, this term's decisions illuminated several deeper currents of Supreme Court jurisprudence and practice. *First*, the intersection of religious beliefs and civic obligations stands out as a place of renewed and growing controversy. In light of *Hobby Lobby* and the Court's approval of sectarian prayers at town meetings, *Town of Greece v. Galloway*, 572 U.S. ---, 188 L. Ed. 2d 835, 134 S. Ct. 1811 (2014), the Court's interest in promoting religious-based rights is a development that promises further conflict with the ability of civil society to function in a secular manner without affronting the Establishment Clause.

Second, in contrast with fresh controversy about religious beliefs, race discrimination is now viewed by the Roberts majority as a stale problem no longer meriting special regard for the rights (not to mention the hopes) of minorities. The *Schuette* decision, though couched in terms of majoritarian sovereignty, slights the competing citizenship rights of minorities almost to the vanishing point. In this respect, the Court's attitude toward racial equality and affirmative action goes hand-in-glove with its dismissive regard for enforcement of the Voting Rights Act last term. *Shelby County, Alabama v. Holder, 570 U.S. 2, 186 L. Ed. 2d 651, 133 S. Ct. 2612 (2013).* How the majority's attitude about racial discrimination will play out in employment cases, including especially the continued vitality of "disparate impact" theory, remains to be seen.

Third, in the area of process, the emergence of a small cadre of Supreme Court specialists and repeat-player *amici* are provocative developments that have been in the making for at least the last two decades or so. Mirroring a push for specialization within the legal profession, the process of obtaining Supreme Court review and arguing the few cases accepted for review is becoming the nearly exclusive bailiwick of an exceedingly small number of lawyers, mostly centered in Washington, DC. Accompanying this phenomenon, the Court is receiving *amicus curiae* briefs not so much from true "friends of the Court" as from partisans of powerful constituencies. And, some of these *amici* submissions are rich in factual assertions that are creeping into the Court's consideration, if not into all of its opinions. *See* A. Liptak, "Seeking Facts, Justices Settle for What Briefs Tell Them," *The New York Times* (September 1, 2014), *www.nytimes.com/2014/09/02/us/politics/the-dubious-sources-of-some-supreme-court-facts.html?_r=0*, (accessed September 1 and 28, 2014).

Fourth, at the risk of sounding like a broken record (probably too obscure a reference for readers raised in the digital age), the Court's insistent deregulation of the employment relationship continues apace - to my dismay, as regular readers of this annual survey know. *E.g.*, Harkavy, Jonathan Ross, "Deregulating Equal Employment Opportunity" (July 12, 2011) Available at SSRN: http://ssrn.com/abstract=1885186. And now, with the *Hobby Lobby* decision's imperiling the rights of female workers by disabling a key provision of the ACA in the name of corporate religious beliefs, this push for deregulation may appear to some as literally divinely inspired.

Finally, there is, perhaps, a better way to illustrate the Roberts Court's embrace of deregulation. Think about how you would look at a work by the neo-Impressionist, Georges Seurat. Stand back for a moment from the pointillistic dots and dabs of the individual cases and consider the portrayal you can discern only from a longer-range perspective. Now you can regard the following examples in a different light: Narrowing causation in a way that makes discrimination and retaliation harder to prove, rewarding free-riders and making a union's duty of fair representation a *pro-bono* exercise by prohibiting agency fees, calling a premature end to dealing affirmatively with our enduring national shame of race discrimination, embracing confidential private arbitration at the expense of public judicial oversight of the law, and subordinating the imperative of gender equality to the religious objections of corporations. Viewed in the aggregate, these examples look very much like an Ayn Rand-inspired partisan agenda that a bare (but cohesive and activist) majority has accomplished before our very eyes over the last many terms. To the extent that the Court has indeed altered the framework of employment regulation, one must wonder whether its achievement is a legitimate exercise of the Judicial power under a Constitution that vests law***making*** authority exclusively in an elected Congress.

Finally, a few words about the Court itself. As this article was being read by my spouse-editor, Justice Ginsburg was announcing in the pages of *Elle* that she is not planning to resign while she can do the job that she obviously loves. By the 2016 election, however, she and Justices Scalia, Kennedy and Breyer will be 83, 80, 80 and 78 respectively, so the Senate elections coming up this November and the Presidential and Senate elections in 2016 may have a profound impact on how the Court will be constituted during the remainder of the second decade of this century. Also during the editing process of this article, Attorney General Eric Holder announced that he would resign effective with the confirmation of his successor. The impact of this development will be immediate when the new Attorney General is confirmed. Holder's successor might, for instance, be, as many have speculated, Solicitor General Donald Verillli. If that comes to pass, the most experienced Supreme Court advocate in recent years will no longer be arguing before the Court on behalf of the United States. And, the President will then have an opportunity to appoint General Verilli's successor to the one position that plays a most critical role in shaping the Court's docket and defining the scope of the issues presented for decision. To be sure, the outcome of the 2016 Presidential election may make these changes short-term ones, no matter who wins. But at least for the next couple of terms, what the electorate says this coming November is likely to have a measurable impact on how the Court does its job.

* * * *

The 2013 Term brought into sharper focus how the Roberts Court approaches regulation of the employment relationship. As already shown, the framework of employment regulation is now being reconfigured not just by parsing the labor and employment laws. The Roberts majority is reconstructing it by an ambitious agenda that uses the First Amendment as a sword, enables corporate personhood, ratchets down attention to racial discrimination, subordinates gender equality to personal religious beliefs and focuses attention on a small group of advocates and *amici* who are shaping the Court's docket and fashioning the arguments before it. Some may view what the Court is doing as necessary to safeguard property, protect individual prerogatives and fuel a sluggish economy. Others may believe that this tide of judicial deregulation is both anti-democratic and heedless of the moral, Constitutional and statutory imperatives of equality and individual dignity. Whatever your take on the Court's decisions, informed reflection on what the Court does and how it does it is our constant obligation as American citizens.

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