TRIQUETRA LAW

APPEALS - CIVIL RIGHTS - EMPLOYMENT LAW

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U.S. SUPREME COURT
2008-09 TERM IN REVIEW AND 2009-10 TERM PREVIEW
EMPLOYMENT LAW CASE OUTLINE
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I. 2008-2009 TERM REVIEW

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- **B. FEDERAL PRACTICE – ASHCROFT V. IQBAL**
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I. The 2008 – 2009 Term in Review

A. LABOR & ARBITRATION: 14 PENN PLAZA LLC, ET AL V. PYETT ET AL., 129 S. CT. 1456, 173 L. ED. 2D 398, 2009 U.S. LEXIS 2497 (APRIL 1, 2009). OPINION BY THOMAS, J. (5-4). DISSENT FILED BY STEVENS, J. DISSENT FILED BY SOUTER, J, IN WHICH STEVENS, GINSBURG, AND BREYER, JJ., JOINED.

1. **ISSUE:** Is a provision of a collective bargaining agreement requiring mandatory arbitration of a claim arising under the Age Discrimination in Employment Act (ADEA) enforceable?

   ANSWER: Yes, as long as the provision clearly and unmistakably requires the union member to arbitrate the ADEA claims.

2. **HOLDING:** A CBA that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

3. **KEY FACTS:** Plaintiffs are employees of a building service and cleaning contractor. They worked as night watchmen in a commercial office building owned by Defendant. Plaintiffs are union members covered by a collective bargaining agreement (CBA). The CBA contains a mandatory arbitration clause for discrimination claims:

   > There shall be no discrimination against any present or future employee by reason of race, creed, color age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) [of the CBA] as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

4. **RATIONALE:** A freely negotiated term between the union and the Realty Advisory Board is a condition of employment and the NLRA provides the statutory authority to bargain about arbitration of workplace discrimination. The CBA must be honored unless the ADEA itself removes the particular class of grievances. It does not. *Gilmer*, which held that an individual employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate a federal age discrimination claim, applied equally in the collective bargaining process. The Court characterizes *Gardner-Denver* so as not to conflict with its holding. The Court says that *Gardner-Denver* involved a *non-mandatory provision* to arbitrate the Title VII claims.

PRACTICE TIPS:
Employers: Negotiate clear and specific mandatory arbitration clauses covering all anti-discrimination statutes and wrongful termination actions.

Employees: Always review a collective bargaining agreement of any union employee for purposes of determining whether arbitration can be compelled. Note that there must be a specific reference to the particular claim in the CBA to waive the right to a judicial forum. Determine whether the union controls access to and presentation of employees' claims in arbitration (which is usually the case) and argue that *Penn Plaza* left that question open.

B. FEDERAL PRACTICE - ASHCROFT V. IQBAL, 129 S. CT. 1937, 173 L. ED. 2D 868, 2009 U.S. LEXIS 3472 (MAY 18, 2009). OPINION BY KENNEDY, J. (5-4). DISSENT FILED BY SOUTER, J, JOINED BY STEVENS, GINSBURG, AND BREYER, JJ. BREYER, J., FILED A DISSENTING OPINION.

1. **ISSUE:** Whether Respondent Iqbal pled sufficient facts under Rule 8 to state a claim for purposeful and unlawful discrimination?

   ANSWER: No, Iqbal must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin.

2. **HOLDING**: The new rule for pleading under Rule 8(a)(2) is twofold:

   First - Allegations cannot be "threadbare recitals of a cause of action's elements, supported by mere conclusory statements."

   Second - Determine whether a complaint states a plausible claim by reviewing the context-specific requirements of the claim; Court is permitted to draw on its experience and common sense in determining whether the claim is plausible.

3. **KEY FACTS:** Javaid Iqbal was arrested shortly after 9/11 on a charge related to his immigration status. In January 2002 he was transferred to a maximum security prison in a special security unit, more commonly known as solitary confinement. He was held there for more than 150 days. The sole reason he was selected and transferred to this unit was because of his race, national origin and his religion. He was selected because of an order issued by Attorney General John Ashcroft shortly after 9/11/2001 (9/17/01). Indeed, there was a terrorism investigation order that did provide for the arrest and detention of Arab nationals who were devout Muslims.

   Mr. Iqbal was subjected to solitary confinement and unnecessary and abusive strip searches. He was also beaten by correction officers, among other abusive conditions. The complaint states the jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists."

After he was released, Mr. Iqbal pled guilty to his immigration violation, served his sentence, and he was removed back to Pakistan.

Pursuant to the USA PATRIOT Act (Patriot Act) the Inspector General initiated a review to examine the treatment of detainees arrested in connection with the Department's September 11 terrorism investigation. The report made findings and recommendations related to civil rights abuses of detainees. The OIG issued the report on April 29, 2003. The report contained substantiated findings of abusive practices against detainees such as Iqbal.

4. **PROCEDURAL HISTORY:** Mr. Iqbal filed a *Bivens* civil rights suit on May 3, 2004. He filed the civil rights action against multiple defendants. He sued at least 33 entities or individuals as well as 19 "John Does"

   Mr. Iqbal's 5/3/2004 Complaint alleged horrible beatings, negligent medical care, unlawful strip searches, and more. In addition to the 22 individually named correctional officers who mistreated him, he sued 7 supervisors, administrators or wardens in the Federal Prison system. He also sued John Ashcroft , Attorney General of the United States; and Robert Mueller, Director of the Federal Bureau of Investigation. Mr. Iqbal used the September 17, 2001 order, the subsequent Office of Inspector General Report and findings, and his own personal experiences to build the allegations in his complaint.

   Motions to dismiss were filed. The District Court denied the 12(b)(6) motions. The high level administrators appealed to the Second Circuit. The Second Circuit affirmed the District Court. Two issues were granted cert. 1) whether the Second Circuit had subject matter jurisdiction to hear the appeal; and 2) Whether a conclusory allegation that a cabinet- level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

5. **RATIONALE:** Justice Kennedy noted that pleading discriminatory purpose requires more than merely knowing the consequences of the act. Rather, it requires taking a course of action "because of" the actions adverse affects on an identifiable group.

   He stated:

   "It follows that, to state a claim based on a violation of a clearly established right, respondent Iqbal must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue ***not for a neutral, investigative reason*** but for the purpose of discriminating on account of race, religion, or national origin."

   He applied the Plausibility standard to Respondent Iqbal's claim of purposeful discriminatory intent against him as an Arab Muslim. He found "Under *Twombly*'s construction of *Rule 8*, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible."

   It is a two part test:
   Identify the allegations that are entitled to an assumption of truth;

Consider whether the factual allegations plausibly suggest an entitlement to relief.

He reviewed the complaint and pointed to ¶ 96 as a formulaic recitation of the elements. Because he found these to be formulaic and conclusory, he determined that they are not entitled to be true.

> "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."

Justice Kennedy then turned to the second part of the *Twombly* test. He found that the allegations are consistent with purposeful discrimination, but that discriminatory purpose was not plausible. Taken as true, some of the allegations were consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

He recounted the 9/11 attacks and the attempts to find terrorists and concluded that the real purpose was not discrimination but constitutional law enforcement action. Justice Kennedy also pointed out that "To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin."

6. PRACTICE TIPS:

a. Employers: The *Conley* test for assessing the sufficiency of a Federal Court pleading is clearly gone. The requirements of *Twombly* are now explained by *Iqbal*. The two part test gives you two opportunities to challenge complaints. File motions to dismiss where the allegations do not conform with the plausibility requirements of *Iqbal*.

b. Employees: Think of Rule 8 as requiring heightened pleading. Prepare complaints that lay out the context of the discriminatory act(s) so that you can meet the plausibility standard. Describe the facts in a manner that tells the story of the discrimination or employment wrong so that it fits squarely within the experience and common sense of the judge reviewing a potential 12(b)(6) motion. Monitor and lobby for the "Notice Pleading Restoration Act of 2009" it restores Rule 8 to the *Conley* standard.

C. EVIDENCE/BURDEN OF PROOF: GROSS V. FBL FINANCIAL SERVICES, INC., 129 S. CT. 2343, 174 L. ED. 2D 119, 2009 U.S. LEXIS 4535 (JUNE 18, 2009). OPINION BY THOMAS, J. (5-4). DISSENT FILED BY STEVENS, J. IN WHICH SOUTER, GINSBURG, AND BREYER, JJ., JOINED. BREYER, J. FILED A DISSENTING OPINION, IN WHICH SOUTER AND GINSBURG, JJ., JOINED.

1. ISSUE: May a plaintiff obtain a "mixed-motives" jury instruction in an ADEA case only when the Plaintiff presents direct evidence of age discrimination? OR Does the burden of persuasion ever shift to the party defending the alleged mixed-motives discrimination claim under the ADEA?

ANSWER: No. Mixed-motives jury instructions are never appropriate in an ADEA case.

2. **HOLDING**: In an age discrimination claim under the ADEA, the Plaintiff must prove, by either direct or circumstantial evidence, that age was the "but-for" cause of the challenged employer's decision.

3. **KEY FACTS:** Plaintiff worked for Defendant for more than 30 years. Plaintiff was a claims administration director. When Plaintiff was 54 years-old, the Defendant reassigned Plaintiff and transferred many of his job responsibilities to a newly created position that was given to a substantially younger individual who had actually been supervised by Plaintiff. The Defendant asserted that Plaintiff's job change was part of a corporate restructuring and that Plaintiff's new job more aptly suited his skills. The case went to trial and the District Court, over Defendant's objection, gave the jury "mixed-motive" instructions: (1) if Plaintiff proved, by a preponderance of the evidence, that he was demoted and that his "age was a motivating factor" in the Defendant's decision to demote him, the jury must return a verdict for Plaintiff; (2) Age qualified as a "motivating factor" if it played a part or a role in Defendant's decision to demote him; and (3) the verdict must be for the Defendant if it proved by a preponderance of the evidence that Defendant would have demoted Plaintiff regardless of his age. The jury awarded Plaintiff lost compensation of $46,945. Defendant appealed and challenged the jury instructions as improper under *Price Waterhouse.*

4. **BACKGROUND:** When a Title VII Plaintiff shows that discrimination was a "motivating" or a "substantial" factor in the employer's action, the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the impermissible factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed 2d 268 (1989). Courts instruct juries on this matter by what is known as a "mixed-motive" instruction. In a concurring opinion, Justice O'Connor found that to shift the burden of persuasion to the employer, the employee needed to present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." The Eighth Circuit found that the District Court did err because it allowed the "mix-motive" jury instruction *without requiring a particular type of evidence (direct) shown by the Plaintiff.*

5. **RATIONALE**: Plaintiff cannot rely on Title VII analysis, such as *Price Waterhouse,* to support a "mixed-motives" instruction in an ADEA case because Title VII and the ADEA have different language. Congress amended Title VII and explicitly authorized discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. 42 U.S.C. §2000e-2(m). Congress did not amend the ADEA to have this language when it amended Title VII. The Court says that "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." The ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. §623(a). "Because of" means "on account of" which is another way of saying "but/for." Plaintiffs retain the burden of persuasion that age was the "but-for" cause of the employer's adverse action. The Court reasons that *Price Waterhouse* is difficult for Court's to craft proper jury instructions and it is hard for juries to apply.

6. **PRACTICE TIPS:**

Employers: Try to use this case in ADEA summary judgment motions. *See Brown* v. *Craftmatic*, 2009 U.S. App. LEXIS 20293 (3d Cir. 2009). Modify form jury instructions to eliminate mixed-

motive instructions in ADEA cases. In ADEA cases make sure to advocate against improper jury instructions.

Employees: Do not file a cert petition in the U.S. Supreme Court right now. Distinguish burdens of production at summary judgment stage vs. persuasion at trial.

D. Disparate Impact – Ricci v. DeStefano, 129 S. CT. 2658, 174 L. ED. 2D 490, 2009 U.S. LEXIS 4945 (JUNE 29, 2009). OPINION BY KENNEDY, J. (5-4). SCALIA, J., FILED A CONCURRING OPINION. ALITO, J., FILED A CONCURRING OPINION, IN WHICH SCALIA AND THOMAS, JJ., JOINED. DISSENT FILED BY GINSBURG, J., JOINED BY STEVENS, SOUTER, AND BREYER, JJ.

1. **ISSUE:** When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, does a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

   ANSWER: Yes, Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. The Court's analysis begins with the premise that the City's actions would violate Title VII's disparate-treatment prohibition absent some valid defense. All the evidence demonstrates that the City rejected the test results because the higher scoring candidates were white. Without some other justification, this express, race-based decision making is prohibited.

2. **OUTCOME:** New Haven violated Title VII when it discarded the test results based solely on the fact the higher scoring candidates were white. The Court granted summary judgment to the Petitioners.

3. **HOLDING:** Under Title VII, before an employer can engage intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race conscious discriminatory action.

4. **KEY FACTS:** The New Haven fire department has a charter that established a merit based hiring and promotion system. Only candidates with the top three scores on the exams; with a minimum score of 70%; and who are on the "eligible" list of the Department's Personnel Director are eligible for promotion. This was commonly referred to as the "Rule of Three."

   In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. All met the aforementioned conditions precedent for promotion. The examination results showed that white candidates outperformed minority candidates (43 white; 19 black; 3 Hispanic). There were eight vacancies and the top ten performers were white, so none of the black and Hispanic firefighters would be promoted. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other

firefighters said the exams were neutral and fair. In the end the City took the side of those who protested the test results. It threw out the examinations.

5. **PROCEDURAL HISTORY**: In July 2004, eighteen firefighters (17 White and 1 Hispanic) filed a Federal Civil Rights Complaint alleging that the City of New Haven violated the fire fighters' right to be considered for the promotion without regard to race. Plaintiffs alleged that the mayor of New Haven threw out the test results because he feared a lawsuit by the African American firefighters; and he feared loss of re-election because the African American community leaders were threatening retribution if he did not throw the test results out.

   After discovery was complete, defendant/ respondents filed a motion for summary judgment. Plaintiff/petitioners cross filed a motion for summary judgment. Plaintiffs' main argument was "if defendants cannot prove that the disparities on the Lieutenant and Captain exams were due to a particular flaw inherent in those exams, then they should have certified the results because there was no other alternative in place." *Ricci v Stefano*, Memorandum and Ruling on Cross-Motion for Summary Judgment, at 30 (Doc. 133), Civil No. 3:04-cv-1109 (September 28, 2006). The trial court issued a 47 page opinion addressing the three claims brought by Plaintiffs, Title VII (disparate impact discrimination), an Equal Protection Claim, a § 1985 Civil Conspiracy Claim, a First Amendment Freedom of Association Claim, and an Intentional Infliction of Emotional Distress Claim. Forty-three pages of the decision addressed the Title VII Claim and the Equal Protection Claim. Citing prior Second Circuit precedent the District Court stated, "[T]he intent to remedy the disparate impact of [the test] is not equivalent to an intent to discriminate against non-minority applicants." *Id* at 44.

   Plaintiffs appealed and the Second Circuit affirmed. The Supreme Court granted Cert. The USSC heard argument on April 22, 2009. Justice Souter discussed the catch 22 involved in the case with Attorney Coleman, counsel for the petitioner firefighters. Justice Souter stated, "you make no distinction between race as an animating discriminating object on the one hand and race consciousness on the other." Justice Kennedy's colloquy focused on the circumstances and latitude that a city or municipality might choose one test over another, when the municipality is aware that one test has a disparate impact on racial minorities. The Petitioner conceded that the municipality could choose either test without risking a *Ricci* law suit, but this case was different because the City of New Haven used race to determine a 'remedy" when there was no strong evidence of discrimination.

   During argument there were references to *Grutter* and *Parents Concerned*. The purpose of these references was to distinguish between unlawful race-based determinations and lawful race consciousness.

   The United States argued as Amicus Curiae for the Respondent City of New Haven and asked for remand.

6. **RATIONALE:** Petitioner Firefighters argued that it is impermissible for an employer to use race based decisions and employment actions in order to avoid disparate impact liability. The court did not adopt this rationale because both disparate impact and disparate treatment must be given effect where possible. The Court also rejected Petitioner Firefighter's suggested holding that an employer first be in violation of the disparate impact provision of Title VII before the employer

can use compliance as a defense in a disparate treatment suit. The Court rejected the Respondent's good faith proposed holdings as well because they promoted quotas and impermissibly allowed race as a consideration in employment decisions.

The Court settled on an Equal Protection standard. "[C]ertain government actions to remedy past racial discrimination – actions themselves based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." *Ricci v.* Stefano, 129 S. Ct. 2688, 2675 (U.S. 2009). "Applying the strong basis in evidence standard to Title VII gives effect to both the disparate treatment and disparate impact provisions, allowing violations of one in the name of compliance with the other only in certain narrow circumstances." *Id.* at 2676. Everyone acknowledged that a prima facie case existed for disparate impact liability because the statistical disparity between the pass rates between the white and non-white candidates was so great. However, the Court found that because the City had viable defenses, there was no strong basis in evidence that the remedial action was necessary. A strong basis in evidence for liability arose only if: 1) the examinations were not job related and they were not consistent with a job necessity; 2) if there was an equally valid, less discriminatory alternative that served the City's needs, but that the City refused to adopt.

They did not reach the question as to whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution. *Id.*

7. **CONCURRING: JUSTICE SCALIA**: "Title VII's disparate impact provisions place a racial thumb on the scales." *Id.* at 2681. "The Court's resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how and on what terms to make peace between them." *Id.* at 2683.

8. **DISSENT: JUSTICE GINSBURG:** Justice Ginsburg's dissenting opinion provides a good case briefing on disparate impact cases decided by the USSC over the years. She points out that the Equal Protection Clause does not have a disparate impact component as it proscribes only intentional discrimination.

9. **PRACTICE TIPS:**

Employers: First make sure you have some evidence that a facially neutral employment practice has a disparate impact on racial minorities. If a prima facie case exists, consider your options carefully before selecting a remedy. Race based determinations will not survive unless you can show that the facially neutral practice challenged is not job related and there is no other alternative available.

Employees: Disparate impact is on its way out.

E. Retaliation & Protected Activity: CRAWFORD V. METROPOLITAN GOV'T OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, 129 S. CT. 846, 172 L. ED. 2D 650, 2009 U.S. LEXIS 870 (JANUARY 26, 2009). OPINION BY SOUTER, J. (9-0). ALITO, J., FILED AN OPINION CONCURRING IN THE JUDGMENT, IN WHICH THOMAS, J., JOINED.

1. **ISSUE:** Does an employee engage in opposition activity for purposes of Title VII's anti-retaliation protection when the employee discloses instances of sexual harassment in response to an employer's questioning of the employee during an internal investigation by the employer?

   ANSWER: Yes.

2. **HOLDING**: Title VII's anti-retaliation provision provides protection to an employee who speaks out about discriminatory acts not on her own initiative, but in answering questions during an employer's internal investigation.

3. **KEY FACTS**: The public employer began investigating sexual harassment allegations by the employee relations director, Hughes. An H.R. officer asked Plaintiff Crawford whether she had witnessed "inappropriate behavior" on the part of the director. Plaintiff described several instances of sexually harassing behavior, including Hughes' putting his crotch up to her office window several times and on one occasion entering her office and grabbing her head and pulling it to his crotch. Two other employees reported sexual harassment by Hughes. Plaintiff Crawford did not explicitly state that Hughes' conduct was harassing or discriminatory. The employer took no action against Hughes, but fired Plaintiff and the two other accusers soon after the investigation. Employer claimed to fire Plaintiff because of embezzlement. Plaintiff claimed retaliation for her report of Hughes' behavior under Title VII's anti-retaliation provision, *42 U.S.C. § 2003e-3(a).* The District Court granted the employer summary judgment and the Sixth Circuit affirmed.

4. **RATIONALE**: The "opposition" clause of Title VII's anti-retaliation provision uses the word "oppose" not "resist." Opposition includes resistance and active, consistent opposition, but it is not limited only to that type of activity. Oppose, in ordinary discourse, can mean someone who has taken no action at all to advance a position beyond disclosing it. Instigation is opposition, but so is standing pat, or refusing to engage in certain behavior. The Court cites with approval EEOC guidance that "When an employee communicates to her employer a belief that the employer has engaged in …a form of employment discrimination, that communication" virtually always "constitutes the employee's opposition to the activity." 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar. 2003)). Responding to someone else's question can be opposition just as "provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

5. **BACKGROUND:** Title VII's anti-retaliation provision provides that an employer may not discriminate against any of his employees because the employee has "opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. § 2003e-3(a).* The first clause is known as the "opposition clause." The second clause is known as the "participation" clause.

6. **PRACTICE TIPS**:

EMPLOYERS: This case is another reason to give employers continuing guidance on investigating sexual harassment. Argue that retaliation opposition should not be extended beyond employees testifying in internal investigations (this is Justice Alito's position concurring in the judgment). Use EEOC compliance manuals to support your legal position and cite this case for support of that usage.

EMPLOYEES: Use EEOC compliance manuals to support your legal position and cite this case for support of the usage. Argue that when an employee discloses allegations or behaviors of discrimination that the employee has engaged in protected activity**.**

F. PUBLIC EMPLOYEES/FREE SPEECH: YSURSA V. POCATELLO EDUCATION ASSOCIATION ET AL., 129 S.CT. 1093, 172 L.ED. 2D 770, 2009 U.S. LEXIS 1632 (FEBRUARY 24, 2009). OPINION BY ROBERTS, C. J. (6-3). GINSBURG, J. CONCURRING IN PART AND IN THE JUDGMENT. BREYER, J. FILED AND OPINION CONCURRING IN PART AND DISSENTING IN PART. DISSENTS FILED BY STEVENS, J. AND SOUTER, J.

1. **ISSUE:** Is an Idaho law that prohibits local governmental entities from allowing their payroll system to be used by employees to make political activity contributions unconstitutional?

2. **ANSWER:** No.

3. **KEY FACTS:** Prior to 2003, Idaho state employees could have payroll deductions for both union dues and union political activities. Idaho passed the Voluntary Contributions Act (VCA) in 2003 which prohibited payroll deductions for political purposes. The VCA defined "political activities" as "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure." A group of unions representing Idaho public employees challenged, on First Amendment grounds. The Idaho law that prohibited payroll deductions of union members to their unions for political activities by county, municipal, school district, and other local public employers. The Plaintiffs conceded that the limitations were valid as applied at the state level.

4. **HOLDING:** Idaho's ban on political payroll deductions as applied to local government units is not a violation of a Unions' First Amendment rights.

5. **RATIONALE:** Idaho's law does not restrict political speech. Rather, it covers all employees and there is not an affirmative right to use government payroll mechanisms for the purposes of obtaining funds for expression. The ban is valid at the local level because political subdivisions of a state are subordinate governmental instrumentalities. Because the ban is content-neutral, strict scrutiny does not apply. Idaho has a rationale basis for the ban – to avoid the appearance of impropriety, government favoritism, or entanglement in partisan politics.

6. **PRACTICE TIPS:**

Employers: Review Idaho's complete statutory framework in the VCA to know what will pass muster and what will not. Restrictions on private employer payroll systems will fail.

Employees: Avoid concessions and leave questions open for another day.

G. RETROACTIVE APPLICATION OF THE PREGNANCY DISCRIMINATION ACT – AT &T CORP. V. HULTEEN, 129 S.CT. 1962, 173 L. ED. 2D 898, 2009 U.S. LEXIS 3470 (MAY 18, 2009). OPINION BY SOUTER, J. (7-2). STEVENS, J., FILED A CONCURRING OPINION. GINSBURG, J., FILED A DISSENTING OPINION, IN WHICH BREYER, J., JOINED.

1. **ISSUE:** Does an Employer violate the Pregnancy Discrimination Act (PDA) when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA that gave less retirement credit for pregnancy leave than for medical leave generally?

   ANSWER: No.

2. **HOLDING:** A bona fide seniority system under Title VII insulates as employer for the present effects of previous discrimination as long as the previous discrimination was lawful at the time..

3. **KEY FACTS:** AT&T, before the PDA in 1978, provided pension service credit for employees on "disability" leaves of absence. AT&T, however, characterized pregnancy leaves as "personal" and did not give service credit towards pensions for pregnancy leaves. Before the passage of the PDA, it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. *General Elec. Co. v. Gilbert*, 429 U.S 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976). The PDA made this practice unlawful. Plaintiffs' Noreen Hulteen, Eleanora Collet, and Elizabeth Snyder worked and retired for AT&T. Plaintiff Linda Porter, was still working. All the Plaintiffs took maternity leave between 1968 and 1976. Plaintiffs did not receive service credit for their maternity leaves because of the *lawful* policy at the time. Plaintiffs' all received less remuneration because AT&T, in calculating the pensions *after the practice became unlawful*, did not credit the Plaintiffs' service credit records..

4. **RATIONALE:** When AT&T adopted the pregnancy leave rule, as a matter of law, AT&T did not have discriminatory intent because the law allowed for such gender discrimination under *Gilbert.* Title VII does provide protection for an employer operating a bona fide seniority system. *42 U.S.C. § 2000e-2(h).*

   42 U.S.C. § 2000e-2(h) provides that:

   > "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority…system…provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin…."

   Justice Souter reasons that the only way to hold AT&T's practice unlawful would be to read the PDA as applying retroactively. Here, there is no statutory authority or congressional intent that the PDA be retroactive. Because the seniority system was not originally adopted with an intentionally discriminatory purpose, the system today is not unlawful. The Court also rejects a *Lilly Ledbetter Fair Pay Act of 2009* argument. Congress adopted the *Lilly Ledbetter Act* in

response to a 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007). The Act reinstates the "paycheck" rule – every new paycheck that is the result of past discrimination becomes currently actionable. Justice Souter again reasons that the act was lawful when done, so that the *Ledbetter* Act does not apply.
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5. **PRACTICE TIPS:**
Employer: Refer to this case for legal principles on retroactivity of statutes and regulations.

Employee: Refer to this case for legal principles on retroactivity of statutes and regulations. Characterize harm to employees in terms of loss of compensation over a period of time. Make comparisons with those not in the protected class to show the different treatment

II. PENNSYLVANIA SUPREME COURT: SEX DISCRIMINATION – WEAVER V. HARPSTER, 2009 PA. LEXIS 1321 (JULY 20, 2009), OPINION BY BAER, J., (5-2) DISSENT BY TODD, J., JOINED BY CASTILLE, C.J.

1. **ISSUE:** Can an employer with fewer than four employees discriminate against an employee on the basis of sex?

   ANSWER: Yes.

2. **HOLDING:** The PHRA provides the remedy for the conduct it prohibits. It does not demonstrate a public policy sufficient to overcome its own limitation to employers of four or more employees.

3. **KEY FACTS:** Defendants hired Plaintiff on at at-will basis as an administrative assistant and office manager. Defendant had, at all times relevant, fewer than four employees. Plaintiff alleged continuing sexual harassment by Defendant, including inappropriate sexual and physical contacts, inappropriate comments, and closely following her around the office and to the bathroom. Plaintiff further alleged that Defendant offered her money to go to bed with him and requested her company on a trip for "entertainment purposes." Plaintiff rejected the unwelcome advances and sought a stop to the behavior. Defendant did not change his behavior and proceeded to make Plaintiff's working conditions intolerable and Plaintiff resigned.

4. **RATIONALE:** The Pennsylvania Human Relations Act (PHRA) forecloses any sex discrimination claim against an employer with fewer than four (4) employees. The PHRA expresses the unambiguous policy determination by the legislature as to which employers are liable for sex discrimination. It is not possible, therefore, for the PA Courts to create a wrongful termination claim based on public policy for sex discrimination because the legislature has decided the issue. There is no explicit legislative history on the exemption of small employers, but the legislature has lowered the necessary number of employees two (2) times, from 12 to 6 in 1966 and from 6 to 4 in 1967. The legislature rejected a motion to lower the PHRA's coverage to all employers. This action by the legislature is the determinative policy choice. The Equal Rights Amendment to the PA Constitution is only applicable to legislation embodying gender classifications.

5. **PRACTICE TIPS:**
Employers: Use Harpster as a defense to liability for any employer with less than 4 employees. Argue that the case extends to other discrimination covered by the PHRA, e.g. age, disability, race, color, national origin, religion.

Employees: Early in your assessment make sure to find out the number of employees of the employer. Pursue legislative change.

III. THE 2009 – 2010 Term CASES SCHEDULED

A. ATTORNEY'S FEES: *PURDUE V. KENNY A.*, 128 S. Ct. 2957, 2008 U.S. LEXIS 5217 (June 23, 2008). *Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.*

1. ISSUES:

a.. Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation? 42 U.S.C. § 1988.

b. Is an enhancement to the lodestar based on quality of representation and results obtained contrary to this Court's decisions in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986), and City of Burlington v. Dague, 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed?

2. PROCEDURAL HISTORY: Eleventh Circuit affirmed the decision of the District Court based on prior Eleventh Circuit precedent observing broad discretion.

3. KEY FACTS: Respondents filed a class action lawsuit on behalf of foster children in Georgia. Preliminary injunctions were ordered and discovery held. A consent decree was entered that resolved all matters except the attorney fees and expenses. Respondents filed an attorney fee application that included 38 time keepers and nearly 30,000 of hours on the case. The hourly rate claimed was as high as $495 and as low as $215 per hour. These hours and rates equaled $7, 171,434.30. The Respondents also asked for and enhancement. This equaled $14,342,868.

The trial court granted the petition, but not as much as the Respondent requested. The trial court adjusted the final amount by a multiplier of 1.75, which resulted in the total fee award of $10,522,405.08. The trial court justified this amount with the following rationale (1) class counsel were required to advance expenses of $1.7 million over a three-year period, (2) class counsel were not paid on an ongoing basis while the work was being performed, and (3) class counsel's ability to recover fees was contingent on the outcome of the case. The trial court found the following, "After 58 years as a practicing attorney and federal judge, the court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale."

Petitioner is arguing that enhancements are prohibited under § 1988 and that existing Supreme Court case law provides for all the factors that a trial court may consider.

4. ORAL ARGUMENT: .Scheduled for October 14, 2009.

B. RAIL LAW – *UNION PACIFIC RAIL ROAD V. BROTHERHOOD OF LOCOMOTIVE*, 128 S. CT. 1223, 2008 U.S. LEXIS 1418 (FEBRUARY 19, 2008) PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. **QUESTIONS PRESENTED:** (1) Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the Railway Labor Act (RLA) includes a fourth, implied exception that authorized courts to set aside final arbitration awards for alleged violations of due process; (2) Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

2. **KEY FACTS:** 5 Union Pacific railroad employees of Union Pacific filed claims through their union contesting discharge and discipline by the Railroad. The National Railroad Adjustment Board (NRAB) did not rule on the merits of the discipline, but decided that the union failed to submit conclusive evidence that the parties had "conference" to resolve the dispute. Because the conference is a procedural prerequisite, the Board determined it had to dismiss the claim for lack of jurisdiction.

3. **SIXTH CIRCUIT DECISION BELOW:** The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule."

4. **BACKGROUND:** {From ABA Preview} The Railway Labor Act ("RLA"), 45 U.S.C. §§151 et seq., sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board ("the Board"). The statute provides that the Board's judgment "shall be conclusive ... except ... for": (1)"failure ... to comply" with the Act, (2) "failure . . . to conform or confine" its order "to matters within . . . the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153 First (q). This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a "conference" between the parties. 45 U.S.C. §152 Second.

5. **ORAL ARGUMENT:** October 7, 2009