Lancaster Bar Association
Employment Law Section CLE
Year in Review October 26, 2010

I. 2009-2010 Term Review

A. *Fourth Amendment: City of Ontario v. Quon*

1. **Justices:** KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined except for Part III-A. STEVENS, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.

2. **Issue:** Whether the City of Ontario violated Quon's Fourth Amendment rights by searching text messages he sent from a work-issued messaging device?

   Answer: No.

3. **Holding:** The search of Quon's text messages was reasonable. Reversed and remanded.

4. **Key Facts:** Plaintiff Quon was a SWAT team member with the Ontario Police Department ("OPD"). The department issued pagers with text messaging capabilities to its officers, including Quon. Prior to receiving the pager, Quon had signed an agreement stating that users of OPD computers, internet, and e-mail have no expectation of privacy when using these resources, and when he received his pager, he was informed that the OPD would treat text messages the same way as e-mails. When Quon and some other pager users exceeded their monthly texting limits for several months in a row, the police chief obtained transcripts of their messages in order to determine whether the OPD needed to upgrade its messaging plan. During its audit. the OPD discovered that many of Quon's messages were not work related, and some were sexually explicit. Quon was disciplined for violating OPD officer misconduct rules.

5. **Procedural History:** Quon and other OPD employees filed suit in the District Court, which granted summary judgment to Ontario. The Ninth Circuit reversed.

6. **Rationale:** A four-Justice plurality concluded that the correct analysis of *Fourth Amendment* claims against government employers has two steps: 1) consider the "operational realities" of the workplace to see if an employee has a legitimate expectation of privacy; and 2) if the employee has a legitimate expectations of privacy, whether the employer's intrusion was reasonable under the circumstances. \

   The Court did not decide whether Quon had a reasonable expectation of privacy, instead concentrating on the second step of the approach above. They determined that Ontario's warrantless review of Quon's pager was reasonable under the circumstances because it was motivated by a legitimate work-related purpose and because it was not excessive in scope: OPD needed to review the messages to determine whether the city needed to upgrade its messaging plan, and the department only requested and read

those messages that were necessary to complete this goal. In addition, Quon was told that his messages were subject to auditing.

7. **Concurrences:** Justice Stevens wrote to say that the court was correct in declining to resolve whether the plurality in *O'Connor v. Ortega* had the right approach to determining an employee's reasonable expectation of privacy, because using the reasoning from the opinion, concurrence, or dissent from that case, the court would still have found that Quon did not have a reasonable expectation of privacy. Justice Scalia wrote to express his dislike of the "operational realities" test from *O'Connor*.

B. Arbitration Agreements: *Rent-A-Center West v. Jackson*

1. **Justices:** SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

2. **Issue:** Whether it is for the District Court to decide if an arbitration agreement as a whole is unconscionable, even when the parties have clearly assigned the issue of unconscionability to the arbitrator for decision.

   Answer: No, the arbitrator decides whether an entire agreement is unconscionable.

3. **Holding:** The basis of the challenge must be directed specifically to the agreement to arbitrate before the Court will intervene. Reversed.

4. **Key Facts:** Jackson was formerly employed by Rent-A-Center West ("Rent-A-Center"). As a condition of that employment, he had signed an agreement to arbitrate all claims he might have against Rent-A-Center. He later filed an employment discrimination suit against Rent-A-Center.

5. **Procedural History:** Jackson filed a 1981 employment discrimination suit against Rent-A-Center in the District Court. Rent-A-Center filed a motion to dismiss or stay proceedings and to compel arbitration as per an arbitration agreement signed by Jackson. The District Court granted the motion to dismiss the proceedings and compel arbitration. The Ninth Circuit reversed in part, affirmed in part, and remanded.

6. **Rationale:** The Court reversed the Ninth Circuit, observing that the Federal Arbitration Act ("FAA") puts arbitration agreements on equal footing with other contracts, and that like other contracts, arbitration agreements can be invalidated on showings of unconscionability.

   According to the Court, the arbitration agreement had two provisions that were relevant to their discussion. First, the agreement stipulated the use of arbitration for all "past, present or future" claims arising from Lewis's employment with Rent-A-Center. Second, a "delegation provision," stated that the parties would arbitrate any threshold issues concerning the arbitration agreement. The Court found that the delegation

provision was an additional agreement, and the FAA operates on this agreement just as on any other agreement.

The Court noted that a party's challenge to another provision of a contract, or the contract as a whole, does not prevent a Court form enforcing a specific agreement to arbitrate. Therefore, they reasoned, unless Jackson challenged the delegation provision specifically, it was for the arbitrator to determine whether the agreement was valid as a whole. The Court noted that Jackson stated a number of times that the entire arbitration agreement (or the agreement as a whole) was unconscionable and did not contest the validity of the delegation provision in particular. Thus, Jackson's challenge of the contract should be arbitrated.

Dissent

The dissenters asserted that when a party raises a good-faith challenge to the validity of the arbitration agreement itself, that issue must be resolved before a court can say that the parties clearly and unmistakably intended to *arbitrate* that very validity question. The dissenters also disagreed with the majority's application of the test from *Prima Paint* (only a challenge to the validity of the agreement to arbitrate is relevant to a court's determination of whether the arbitration agreement is enforceable), wishing that they could apply the *First Options* test (Does the arbitration agreement at issue "clearly and unmistakably" evince petitioner's and respondent's intent to submit questions of arbitrability to the arbitrator?) instead.

C. Arbitration; CBA's; Tortious interference under LMRA: *Granite Rock v. Int'l Bhd. Of Teamsters*

1. **Justices:** THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, and in which STEVENS and SOTOMAYOR, JJ., joined as to Part III. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined.

2. **Issue:** 1) Whether the arbitration clause in a CBA made a dispute over the CBA's date of ratification a matter of arbitration; 2) Whether a party can bring a tortious interference claim under § 301(a) of the LMRA?

   Answer: 1) No; 2) No.

3. **Holding:** 1) The ratification date dispute was not arbitrable. Reversed; 2) The Court declined to recognize a new federal cause of action under § 301(a) of the LMRA. Upheld.

4. **Key Facts:** Respondent and defendant Local 287 ("Local") was a member of labor union International Brotherhood of Teamsters ("IBT"). Supported by IBT, Local initiated a strike against petitioner and plaintiff Granite Rock. On July 2, Local ratified

a collective-bargaining agreement ("CBA") containing no-strike and arbitration clauses, but failed to reach a separate back-to-work agreement holding harmless striking union members from strike-related damages. IBT then instructed Local's members to continue striking until a back-to-work agreement could be reached. Granite Rock informed Local and IBT that if they continued to strike, they would be violating the new CBA. On July 9, IBT and Local organized a strike that affected numerous Granite Rock facilities. On August 22, Local again voted to ratify the CBA and called off its strike..

5. **Procedural History:** Granite Rock sued IBT and Local in the District Court seeking an injunction against strike activities and for breach of contract for strike-related damages. Granite Rock amended its complaint to add a claim for tortious interference with contractual relations against IBT. IBT moved to dismiss the tortious interference claims. The District Court dismissed the tortious interference claims, but held that the parties' dispute over whether Local ratified the CBA on July 2 or August 22 should be held made by a jury. The jury found that the CBA had been ratified on July 2, and the District Court ordered the parties to arbitrate Granite Rock's claim for breach of the July 2 CBA.

   The Ninth Circuit Court of Appeals affirmed the dismissal of Granite Rock's tortious interference claims, but said that the disagreement over the date of ratification should have been arbitrated.

6. **Rationale:** Noting that arbitration is strictly a matter of consent, and can only be used to resolve those disputes that the parties have agreed to submit to arbitration, the Court looked to earlier precedents holding that Courts should order arbitration only when they are certain that neither the formation of the arbitration agreement nor its enforceability or applicability to the dispute is at issue. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 94 (1995).

   The Court distinguished *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) by noting that in that case, the formation of the parties' arbitration agreement was not at issue because the parties agreed that they had "concluded" an agreement to arbitrate and put it into contract. In *Buckeye*, the party resisting arbitration did not contest whether there was an agreement to arbitrate, only that an illegal provision in the contract invalidated the entire contract, so the Court compelled arbitration, saying it was severable from any invalid provisions. On the other hand, in the present case, the dispute between Granite Rock and IBT is over the whether the parties had actually agreed to arbitrate.

   The Court also noted that although there is a federal "policy favoring arbitration" of commercial and labor disputes, they have never held that this policy overrides the principle that parties must arbitrate only those disputes that they have agreed to submit to arbitration.

The Court reasoned that the District Court was required to decide the CBA's ratification date in order to determine whether the parties consented to arbitrate the no-strike provision covered because the parties only agreed to arbitrate disputes that would "arise under" the CBA. They added that the Court of Appeals was wrong to tie the arbitrability of the ratification-date issue to the arbitrability of the strike claims themselves, because if the arbitration clause was not ratified until August 22, there was no CBA for the July no-strike claims to "arise under." In other words, the District Court first had to determine whether a CBA existed on July 2 at all. If no valid CBA existed, then obviously there was agreement to arbitrate claims arising under a legally invalid CBA.

Finally, the Court concluded that Granite Rock had not consented to arbitrate the ratification date of the CBA when it sought an arbitration of the labor grievances giving rise to the strike.

As to the Second Claim, the Court found that Granite Rock could not bring a tortious interference claim under LMRA § 301(a). Granite Rock argued that in disallowing the tortious interference claim, the Court would be sanctioning conduct inconsistent with federal labor statutes and the Court's own precedents. The Court disagreed, noting that although § 301 authorizes federal Courts to fashion a body of federal law for the enforcement of collective bargaining agreements, they could not make a "freewheeling inquiry" into whatever rule they find to be the most desirable.

The Court stressed that in declining to create a new common law tort action under LMRA § 301(a), they were not giving their approval to IBT's alleged actions. They also added that Granite Rock has other remedies available, including, of course, its breach of contract claim.

7. **Dissent:** The Dissenters concurred with the judgment on the tortious interference claim. However, they asserted that the parties clearly agreed in the CBA to have this dispute resolved by an arbitrator, not a court. In addition, although the majority held that IBT waived its retroactivity argument by not raising it earlier, the dissenters did not feel as though they should ignore it.

D. NLRB: *New Process Steel v. National Labor Relations Board*

1. **Justices:** Justice Stevens wrote the opinion of the court in which Chief Justice Roberts and Justices Scalia, Thomas and Alito joined. Justice Kennedy filed a dissenting opinion, in which Justices Ginsburg, Breyer and Sotomayor joined.

2. **Issue:** Whether the NLRB could vote to decrease its quorum requirement from three members to two members when there were only two sitting members.

   Answer: No.

3. **Holding:** Section 3(b) of the NLRB requires a membership of three in order to exercise the authority of the Board. Reversed and Remanded.

4. **Key Facts:** the National Labor Relations Board ("NLRB"), anticipating that they would soon have only two of the five members prescribed by the Taft-Hartley Act, voted to decrease the Board's quorum requirement (Section 153(b)) from three to two members. There were only two members on the board during the subsequent 27 month period. This two-person Board twice found against New Process Steel in labor disputes.

5. **Procedural History:** The two-member NLRB sustained two unfair labor practice complaints against New Process Steel. New Process Steel appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit ruled in favor of NLRB.

6. **Rationale:** The Court observed that Section 3(b) made three provisions: 1) a delegation clause, which authorizes the board to delegate its powers to a group of three members; 2) a vacancy clause, which allows that a vacancy in the board does not impair the rest of the members from exercising the Board's full powers; and 3) a quorum requirement, which mandates a three-member quorum. The Court reasoned that because the best reading of the delegation clause allowed delegation to no less than three members and because the quorum clause mandated a three member quorum, even though the vacancy clause allows the Board to function with some vacant positions, the Board is still required to have at least three members to make decisions.

   In addition, the Court examined legislative intent, finding no evidence that Congress intended for the NLRB to function with only two members. Finally, the Court observed that the Board has only ever allowed decisions to be made by two members when a third member was disqualified from a case.

   Dissent: The dissenters read the statute to permit the two-member quorum and disagreed with the majority's reasons for its interpretation.

E. ***EEOC: Lewis v. City of Chicago***

1. **Justices:** SCALIA, J., delivered the opinion for a unanimous Court.

2. **Issue:** Whether a Title VII disparate impact claim is untimely if the earliest EEOC charges were filed while a discriminatory practice was being used, but more than 300 days after the practice was adopted?

   Answer: No.

3. **Holding:** A plaintiff who does not file a timely charge challenging the *adoption* of a practice may assert the claim in a timely charge challenging the employer's later *application* of that practice. Reversed, Remanded.

4. **Key Facts:** In 1995, Chicago gave a written examination to potential firefighters, and later announced that it would draw candidates from among those who scored at least 89 out of 100 points. In 1996, it first used the test results to create a hiring list. They repeated this process multiple times over the next six years. During this time, Lewis and other African-American applicants who had scored below 89 filed charges with the EEOC, and, gaining the right to sue, filed a Title VII claim alleging disparate impact. The first charge was filed with the EEOC more than 300 days after the city adopted its practice of accepting only firefighters with scores of 89 or above but while the city was still using the discriminatory test scores.

5. **Procedural History:** Lewis and other petitioners brought suit in the District Court, prevailing on the merits. The Court of Appeals reversed.

6. **Rationale:** Although no timely EEOC charge was filed against the city's adoption of its unfair practice, its later implementation of the decision allowed for new claims, because Lewis was claiming disparate impact, and a disparate impact claims does not arise until the employer actually uses the discriminatory criteria, not when it simply identifies that criteria. Because the city continued to use the 1995 exam's results in hiring decisions for a period of nine years—and the plaintiffs had filed their EEOC challenges within 300 days of learning of the City's hiring decisions—the Court found the claims timely. The statute of limitations on disparate impact claims begin to run when the actual employment decision is implemented, not before that. See 42 U.S.C. § 2000e-2(k)(i). It references when a respondent "uses a particular employment practice that causes a disparate impact." The Court found that this section establishes the essential ingredients of a disparate impact claim. Unlike disparate treatment cases where the plaintiff must show discriminatory intent within the limitations period, disparate impact only requires use of a discriminatory practice within the limitations period. They compare this case to *Ledbetter.*

   In response to Chicago's warning that allowing the claim would cause many problems for employers, the Court asserted that their responsibility was to give effect to the law Congress enacted, not to determine whether the correct approach produced too much mischief.

F. Attorney's Fees: *Perdue v. Kenney A.*

1. **Justices:** ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined.
2. **Issue:** 1) May the attorney's fee be increased beyond the loadstar calculation due to superior performance and results? 2) (Not a question presented to the Court) Did the District Court abuse its discretion in increasing the loadstar?

Answer: 1) Yes, but only in cases where the enhancement is not based on criterion already included in the Lodestar calculation, e.g. extraordinarily long litigation that delays the payment of fees and costs. 2)Yes.

3. **Holding:** 1) The Court reaffirmed its previous rule that fees can be increased beyond the loadstar, emphasizing that there is a strong presumption that the loadstar is sufficient; 2) The prevailing party did not prove with specificity that an enhanced fee is justified.

4. **Key Facts:** Kenney A. and other wards of the Georgia foster system filed a class-action suit against Perdue (Governor of Georgia) and other state officials, and thanks to the efforts of their attorneys, prevailed in the District Court. The attorneys exerted more than the usual effort in the case, advancing case expenses of over $1.7 million, going unpaid while the work was being performed, and working under the assumption that they would only be compensated if the case was successful. The District Court judge said that he had never seen such a high degree of skill, commitment, dedication, and professionalism from any attorney during his 58 year career. The Court enhanced the $6 million loadstar by 75% because of the attorneys' performance and superior results.

5. **Procedural History:** After the plaintiffs prevailed in the District Court, the court enhanced the attorney's fee loadstar by 75%. The Defendants appealed, but the Eleventh Circuit affirmed the decision.

6. **Rationale:**

   The court looked to six rules established in prior fee shifting decisions. 1) A "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case; 2) the lodestar method yields a fee that is presumptively sufficient to achieve this objective; 3) although the Court has never sustained an enhancement of a lodestar amount for performance, it has repeatedly said that enhancements may be awarded in "'rare'" and "'exceptional'" circumstances; 4) the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee"; 5) the burden of proving that an enhancement is necessary must be borne by the fee applicant; and 6) a fee applicant seeking an enhancement must produce "specific evidence" that supports the award, which is not already included in the lodestar analysis.

   The court rejected the defendants' contention that the loadstar may not be enhanced in any situation, saying that although there is a "strong presumption" that the loadstar is reasonable, that presumption may be overcome in those rare circumstances in which the loadstar does not adequately take into account a factor that may be properly considered in determining a reasonable fee.

   The court listed three situations in which an enhancement might be appropriate: 1) when the loadstar does not adequately measure the attorney's true market value; 2) if

the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted; and 3) an attorney suffers an exceptional delay in the payment of fees.

Finally, the court determined that the District Court abused its discretion in awarding a 75% enhancement to the loadstar calculation because it did not give specific evidence supporting the award. The District Court failed to point to anything in the record that showed that the attorneys' per hour rate should be increased pursuant to the standard now clarified in this opinion, nor did it calculate the amount of enhancement that was attributable to the fact that the attorneys had to front expenses or wait to be repaid.

Dissent

The issue on appeal was whether the calculation of attorney's fee that is based on the lodestar can ever be enhanced based solely on the quality of the lawyer's performance and the results obtained. It should merely have answered the question to which it granted *certiorari*, that is, whether the loadstar calculation can ever be enhanced. The dissenters agree with the majority that there are circumstances in which the loadstar calculation may properly be enhanced.

7. However, the dissenters thought that the District Court judge did not abuse his discretion in awarding the enhancement, citing the following reasons: 1) the lawyers' objective was unusually important in advocating civil rights and demanded an exceptionally high degree of skill and effort; 2) the lawsuit was lengthy and arduous; 3) the results the attorneys obtained were exceptional; and 4) the opinion of the District Court judge, who supervised the proceedings and oversaw much of the case, was not to be overlooked. These circumstances, said the dissenters, made this one of the rare and exceptional cases warranting an enhanced fee award.

G. ERISA; Attorney's Fees: *Hardt v. Reliance Std. Life Ins. Co.*

1. **Justices:** THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which STEVENS, J., joined as to Parts I and II. STEVENS, J., filed an opinion concurring in part and concurring in the judgment.

2. **Issue:** Whether a fee claimant must be a prevailing party in order to receive attorney's fees for a suit brought under ERISA § 1132(g)(1) (denial of disability benefits)?

   Answer: No.

3. **Holding:** A court, in its discretion, may award fees and costs to either party, as long as the fee claimant has achieved some degree of success on the merits. An advocate does not need to meet the "prevailing party" standard. Reversed, Remanded.

4. **Key Facts:** Hardt was an executive assistant who contracted carpal tunnel syndrome and stopped working due to the resulting physical pain. She sought long-term disability benefits under her employer's (Dan River's) insurance plan, which was subject to ERISA. Reliance Standard Life Insurance Co. ("Reliance") administered the plan and was in charge of deciding whether a claimant qualified for benefits and underwriting any benefits awarded. After Hardt completed a functional capacities evaluation, Reliance concluded that she was not totally disabled and therefore only eligible for temporary disability benefits for 24 months.

   Hardt filed an administrative appeal of Reliance's decision to terminate her benefits after 24 months. Reliance asked her to supplement her medical records with another functional capacities evaluation. Because her efforts at the evaluations were "submaximal," the evaluators deemed these evaluations invalid.

   Reliance's experts determined that Hardt's health would likely improve and that there were a number of employment opportunities suitable for her. As a result, Reliance concluded that its decision to terminate her benefits was correct.

5. **Procedural History:** After exhausting administrative remedies, Hardt sued Reliance in District Court. Both parties filed cross motions for summary judgment. The District Court denied both motions, and instead suggested that Reliance address the deficiencies in its benefits evaluation process. Reliance then re-examined Hardt and found her eligible for long-term disability. Hardt then moved for attorney's fees. The District Court, considering Hardt a "prevailing party," awarded the fees. Reliance appealed the award, and the Court of Appeals vacated the order, saying that Hart was not a "prevailing party" because she had not won a court judgment in her favor.

6. **Rationale:** The Court found that whether § 1132(g)(1) limited the availability of attorney's fees to a "prevailing party" was a question of statutory construction: the Court must enforce plain and unambiguous statutory language according to its terms, and the words "prevailing party" did not appear anywhere in this provision. In fact, reasoned the Court, the statute expressly granted District Courts "discretion" to attorney's fees "to *either* party." In addition, by contrasting § 1132(g)(1) with § 1132(g)(2), which specifically allows only plaintiffs who obtain a judgment in favor of the plan to be awarded attorney's fees, the Court concluded that Congress could have imposed such a limit on § 1132(g)(1) if it had wished to. Therefore, the Court concluded that a fee claimant need not be a "prevailing party" to be eligible for attorney's fees.

   The Court looked next to *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). In *Ruckelshaus*, the statute in question authorized a Court to award attorney's fees "whenever it determines that such an award is appropriate." The *Ruckelshaus* Court, noting that nothing in the text of the statute (§ 307(f) of the Clean Air Act) clearly showed that Congress meant to abandon the American Rule, ruled that fee claimants must have achieved some litigating success (not necessarily major success) to be eligible for a fee award under that section.

The Court then found that because Congress did not indicate in § 1132(g)(1) that it meant to abandon the American Rule (in which both parties pay their own costs), a fees claimant must show "some degree of success on the merits" before a Court may award him or her attorney's fees. Trivial success on the merits or a purely procedural victory, they added, does not qualify for attorney's fees.

The Court then applied this new rule to Hardt's case, finding that she had achieved far more than trivial success, *i.e.* "some success" on the merits or a purely procedural victory. For example, Hardt persuaded the District Court to find that the plan administrator did not comply with ERISA guidelines and that she did not get the kind of review to which she was entitled, and the District Court also found "compelling evidence" that Hardt was totally disabled and stated that it was "inclined" to rule in her favor. Because the litigation process ultimately resulted in an award of benefits to which Hardt would not have otherwise obtain, the Court concluded that Hardt may be awarded attorney's fees.

Other ERISA provisions provide for attorney fees when a plaintiff secured a judgment for an employer's failure to contribute to a multiemployer plan. Clearly Congress intended this result. Some degree of success is the requirement.

Concurrence: Justice Stevens did not wish to rely on *Ruckelshaus v. Sierra Club*, in which he believed the court had mistakenly interpreted the Clean Air Act.

H. ERISA: *Conkright v. Frommert*

1. **Justices:** ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.

2. **Issue:** Whether the District Court should have applied a deferential standard of review to the Plan Administrator's interpretation of the ERISA plan when the Administrator had already made a good faith but erroneous interpretation of that plan.

   Answer: Yes.

3. **Holding:** An ERISA plan administrator's interpretation is entitled to *Firestone* deference even when he or she has already made one erroneous but good-faith interpretation of the plan. Reversed, Remanded.

4. **Key Facts:** Frommert was unhappy with Xerox administrators' ("plan administrators") use of the "phantom account" method in calculating her ERISA benefits. The Court of Appeals found that interpretation unreasonable, and the plan administrators formed a new plan interpretation in response to that ruling. Frommert then challenged the new

interpretation, arguing that it was not entitled to *Firestone* deference based on the plan administrator's initial erroneous interpretation.

5. **Procedural History:** Frommert and other employees who left Xerox in the 1980's brought suit against Conkright along with other plan administrators and the Xerox pension plan ("plan"). The District Court granted summary judgment for the plan, but the Second Circuit vacated and remanded. On remand, the District Court declined to apply a deferential standard to the Plan Administrators newly-proposed interpretation, a decision which the Second Circuit upheld. The Second Circuit also granted deference to the District Court on the Merits.

6. **Rationale:** The Court looked to past decisions, noting that in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), they had held, guided by principles of trust, that an ERISA plan administration with discretionary authority to interpret a plan is entitled to deference in exercising that discretion. The Court had also expanded *Firestone'*s approach in *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), holding that even when a plan administrator operates under a conflict of interest, his or her interpretation is to be granted deference.

   The Court of Appeals had crafted an exception to *Firestone* in holding that the Court need not apply a deferential standard when the administrator has already construed the plan in a way that violated ERISA. The Court rejected this "one-strike-you're-out" approach. First, they found that this approach had no basis in *Firestone* or *Glenn* or the considerations upon which these holdings were based. In addition, the Court of Appeals' exception to *Firestone* deference was not required by principles of trust law because there had been no finding that the Plan Administrator acted in bad faith in making his erroneous interpretation.

   The Court also analyzed the issue's guiding principles, noting that ERISA was meant to ensure fair and prompt enforcement of plan rights, while also encouraging of the creation of benefit plans. The Court then observed that *Firestone* deference preserves this "careful balancing" by promoting efficiency, predictability, and uniformity, and these interests do not disappear simply because a plan administrator has made a single honest mistake.

   The Court concluded that the dissent's prediction (continued deference would encourage plan administrators to adopt unreasonable interpretations, anticipating a "second chance," and then provide several interpretations, driving up litigation costs and discouraging employees from challenging their decisions) was overblown, because there was no reason to think that deference would be required in such extreme circumstances.

   Dissent: The dissenters dwelt on three decisions which it termed "mistakes": 1) the Plan Administrator's "arbitrary and capricious" decision to use the phantom account method; 2) the District Court's finding for the employer; and 3) the Supreme Court's decision reversing the Court of Appeals' decision.

According to the dissenters, trust law does not require a court to defer to an administrator's second attempt at interpretation. They cannot read the cases cited by the majority as requiring courts to defer to second attempts.

I. False Claims Act *qui tam* actions*: Graham County Soil and Water Conservation District v. United States ex rel. Wilson*

1. **Justices:** STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined, and in which SCALIA, J., joined in part and filed an opinion concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, J., joined.

2. **Issue:** Whether § 3730(e)(4)(A) of the False Claims Act, which bars *qui tam* actions based upon the public disclosure of allegations or transactions in "administrative" reports, audits, and investigations encompasses state and local sources as well as federal sources.

   Answer: Yes.

3. **Holding:** The word "administrative" also refers to state and local reports, audits, and investigations, and § 3730(e)(4)(A), therefore, bars Wilson from asserting a *qui tam* claim. Reversed and Remanded.

4. **Key Facts:** For purposes of cleaning up and repairing flood-damaged areas, the United States Department of Agriculture (USDA) entered into a contract with Graham and Cherokee Counties, agreeing to pay 75% of the contract costs. The Graham County Soil and Conservation District, where Karen Wilson was employed, was partially responsible for coordinating and performing the work. When Wilson suspected the Soil and Conservation District of fraud, she contacted local officials and the USDA. Graham County, the state of North Carolina, and the USDA all performed investigations and issued reports finding irregularities in the county's administration of the contracts. Graham filed this action alleging that Graham and Cherokee County violated the False Claims Act and they retaliated against her for aiding the federal investigation.

5. **Procedural History:** Graham brought suit alleging that Graham County violated the False Claims Act and retaliated against her for aiding federal investigators. In a previous decision, the Supreme Court ruled that her retaliation claim was barred by a statute of limitations, and the Court of Appeals dismissed those claims. The District Court then dismissed her *qui tam* action for lack of jurisdiction, finding that it was barred by the public disclosure exemption to *qui tam* actions under the False Claims Act. The Court of Appeals reversed the judgment of the District Court.

6. **Rationale:** The Court noted that the FCA's public disclosure bar deprives courts of jurisdiction over *qui tam* suits when relevant information has already become public through, among other channels, "administrative" reports, hearings, audits, or investigations. Wilson argued that the adjective "administrative" indicates only disclosures in federal forums are subject to the public disclosure exemption, while Graham County urged that "administrative" includes disclosures made in state and local sources as well.

   First, the Court analyzed the text of the statute, following the approach advocated by Graham County. Having determined that there is no immediately apparent textual basis for excluding the activities of state and local agencies, the court addressed Wilson's arguments for excluding them. The Court of Appeals had applied the interpretive maxim of *noscitur a sociis,* concluding that because "administrative" was placed in the middle of a list of "obviously federal" sources, it should likewise be restricted to federal sources. The Court found this unpersuasive, stating that a list of three very distinct items was too short to be particularly illuminating. Instead, the Court chose to evaluate "administrative" within the entire text of the public disclosure exemption, noting that other outlets like the news media and "criminal, civil, and public hearings" cannot be assumed to be federal. The Court also rejected Wilson's remaining arguments.

   Then, the Court addressed both parties' arguments as to congressional intent. Wilson had placed particular emphasis on a remark made by Senator Grassley, a lead sponsor of the bill ("Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations"), but the Court found this irrelevant because the senator had not specified whether "other governmental bodies" might be state or local bodies. The court dismissed the only item in the legislative record that squarely corroborated Wilson's argument as being of scant or no value because it was merely a letter written thirteen years after the bill was passed. The Court concluded that there was no "evident legislative purpose" to guide them in this case.

   The Court also determined that Wilson did not prove that allowing "administrative" to apply to state and local outlets would lead to results that Congress could not have intended. She had argued that, while federal inquiries are readily available to the Department of Justice, many state and local reports and investigations never come to the attention of federal authorities, and would therefore go unremedied, but the Court called her argument sheer conjecture. The court also dismissed her argument that local governments would be able to insulate themselves from *qui tam* liability through "careful, low key disclosures," reasoning that no rational entity would risk disclosing its own fraud just to cut off *qui tam* actions. The Court concluded that the most deserving *qui tam* plaintiffs (whistle-blowers who qualify as original sources) are still protected.

   Concurrence: Justice Scalia asserted that, in his opinion, legislative purpose is irrelevant.

Dissent: Justices Sotomayor and Breyer agreed with the Court of Appeals' *noscitur a sociis* (Sandwich Theory) reading and reviewed the legislative history. Justice Sotomayor noted that the court had never said the Court had not previously required more than three terms for a *noscitur a sociis* interpretation. In addition, Justice Sotomayor asserted that the statutory context and legislative history were more supportive of the reading adopted by the court of appeals than the majority acknowledged, citing evidence of Congress' intent to expand *qui tam* actions, and worried that many abuses would not come to light in consequence of the Court's decision.

II. October 2010 Term Cases to Watch

A. Informational Privacy: *National Aeronautics and Space Administration v. Nelson*

1. **Argument Date:** October 5, 2010.

2. **Appealed from:** *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008).

3. **Issue:** Whether an employer violates a government employee's right to informational privacy by (1) requiring the employee to provide information about his or her medical history, including illegal drug use and/or (2) asking the employee's acquaintances to complete a questionnaire requesting negative information about the employee.

4. **Key Facts:** NASA adopted a requirement that "low risk" contract employees submit to in-depth background investigations, including inquiries into medical history and drug use (SF 85 Questionnaire) and questionnaires to be filled out by their acquaintances (Form 42). Nelson et al. ("personnel"), who were "low risk" contract employees for a research laboratory run by NASA and Caltech, sued, asserting that these investigations were unlawful.

5. **Procedural History:** Nelson and other personnel brought action against NASA, the US Dept. of Commerce, and the California Institute of Technology in the US District Court for the Central District of CA. The District Court denied Nelson's request for a preliminary injunction. The Ninth Circuit reversed the District Court's denial of the preliminary injunction and remanded.

6. **Ninth Circuit's Opinion:** The Ninth Circuit Court of Appeals agreed with the District Court that the personnel investigations did not violate the APA (Administrative Procedures Act) because the Space Act of 1958 provides that the NASA administrator may conduct such security or other personnel investigations as it deems appropriate, and that this was not limited by a "necessary for national security" requirement. The Court of Appeals also agreed that the personnel were unlikely to succeed in their Fourth Amendment claim because the inquiries would not be deemed "searches."

The Court of Appeals, however, did find that the personnel would likely succeed on a narrow portion (that which requested personal medical information) of their informational privacy challenge to questionnaire SF 85 because the government appeared to be compelling disclosure of information in which it had no legitimate interest. The Court of Appeals also found that Form 42, a questionnaire given to personnel's neighbors etc., was not "narrowly tailored" to meet the government's interest.

Finally, the Court of Appeals found the balance of hardship to "tip sharply" toward the personnel, who were being forced to choose between deprivation of their constitutional rights and loss of their jobs. Since it had also found that the personnel raised serious questions as to the merits of their informational privacy claim, the Court of Appeals found that the District Court should have issued the injunction.

B. Title VII: *Thompson v. North American Stainless*

1. **Appealed from:** *Thompson v. North American Stainless, LP*, 567 F.3d 804 (6th Cir. 2009).

2. **Issue:** Whether a third party is protected by the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) because of his association with an employee who has engaged in protected activity?

3. **Key Facts:** Plaintiff Thompson's fiancée, Regalado, filed a gender discrimination charge with the EEOC. Slightly more than three weeks after Stainless learned of the charge, it terminated Thompson's employment. Thompson then also filed a charge with the EEOC, alleging that he was terminated in retaliation for his fiancée's EEOC complaint. Stainless counters that it terminated him based on performance issues.

4. **Procedural History:** Thompson sued in the District Court, which granted summary judgment in favor of Stainless. The Court of Appeals affirmed.

5. **Sixth Circuit's Opinion:** The Sixth Circuit Court of Appeals noted that when Congress enacted the Civil Rights Act of 1964, it created a limited cause of action for retaliation, stating that it shall be unlawful to discriminate against any employee or applicant "*because he 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." § 704(a) of Title VII. Thompson did not claim that he engaged in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado; nevertheless, he argued that the statute should be construed include claimants who are closely related to or associated with a person who has engaged on such activity.

6. The Sixth Circuit joined the Third, Fifth, and Eighth Circuits in rejecting such Title VII third-party retaliation claims on the basis of plain language.

C. USERRA; The Cat's Paw Theory of Liability: *Staub v. Proctor Hospital*

1. **Appealed From:** *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009).

2. **Issue:** Whether an employer can be held liable based on the unlawful animus of a non decision maker when that non decision maker had some influence, but not singular influence, over the decision maker.

3. **Key Facts:** Staub was a member of the Army Reserve who spent the bulk of his time in the civilian world working for Proctor Hospital ("Proctor") as an angio technician. Staub's supervisors, Mulally and Korenchuk, were annoyed when he missed work to attend military training and spoke disparagingly of his military duties. Two co-workers testified that Mulally wanted to get rid of Staub. Staub, who had received warnings for insubordination and shirking in the past, was disciplined for shirking again, but he claims that he was not shirking. Another employee complained that she had difficulty working with Staub. Finally, one day Staub failed to report to Korenchuk as he had been instructed to do, leaving him a voicemail message instead, and was terminated.

   The vice-president of HR, Buck, beyond consulting with Korenchuck and reviewing the most recent incidents, also considered past problems in deciding to terminate Staub. She remembered "frequent complaints" about him, including two from workers who resigned because of him, and that his reputation made it difficult to attract new workers to angio. She did not speak to other angio techs, and had no idea that Mulally wanted him fired, but she did review his employee file.

   Staub filed a grievance asserting that his write-up for shirking was fabricated by Mulally to get him in trouble and that she, Mulally, was out to get him because he was in the reserves. Buck did not investigate the latter contention, and stuck with her decision. Buck was not swayed by Staub's involvement in the military.

   Staub brought a USERRA discrimination suit, which required that he show that the decision maker harbored animus and relied on that animus in choosing to terminate him. Using the Cat's Paw Theory, Staub sought to attribute Mulally's animus to Buck, and therefore to Proctor.

4. **Procedural History:** A jury found for Staub, and the District Court denied Proctor Hospital's motion for JMOL. The hospital appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit reversed and remanded.

5. **Seventh Circuit's Opinion:** The Seventh Circuit Court of Appeals looked to its decision in *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir.

2007) where they held that when a non decision making employee used her "singular influence" over a decision maker in order to harm the plaintiff for racial reasons, the actions of the non decision maker could be imputed to the employer, but that where the decision maker was not wholly dependent on a single source of information, but conducted his or her own investigation, the employer is not liable.

The Court of Appeals determined that, at trial, the District Court should first have positively determined that there was sufficient evidence of singular influence by Mulally over Buck before evidence of Mulally's anti-military animus could be admitted into evidence.

In *Maher v. City of Chicago*, 547 F.3d 817 (7th Cir. 2008), the Court of Appeals held that a plaintiff suing under USERRA must show that the adverse action taken against him or her was in part motivated by his or her military service. The Court of Appeals found that Staub was unable to show this under the cat's paw theory because a reasonable jury could not find that Mulally had singular influence over Buck. Rather, it asserted that a decision maker did not have to be a "paragon independence," and that it is enough that he or she conducts his or her own investigation into the relevant facts. The cat's paw theory, the Court of Appeals said, requires a "blind reliance" on the non decision-maker.

NOTE: Amicus brief supporting Staub by Solicitor General Elena Kagan *et al.*

D. Preemption; Due Process; Immigration: *Chamber of Commerce of the United States v. Candelaria.*

1. **Appealed from:** *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

2. **Issue:** 1) Whether an Arizona statute sanctioning employers who hire unauthorized aliens is expressly preempted by federal law; 2) whether the statute, which mandates that employers take part in a program made voluntary by federal law, is impliedly preempted by that law; and 3) whether the Arizona statute fails to provide constitutional due process to employers found to be in violation.

3. **Key Facts:** Arizona legislature passed the Legal Arizona Workers Act ("Act"), which authorized revocation of state licenses of businesses that hire illegal aliens. Plaintiffs argued that the Act was expressly preempted by the Immigration Reform and Control Act of 1986 ("IRCA"), and that the provision mandating the use of E-Verify was impliedly preempted. They also complained that businesses would not be afforded due process in receiving this sanction.

4. **Procedural History:** Various businesses and civil rights organizations brought suit against various Arizona officials. The District Court found for the Arizona officials. Plaintiffs appealed to the Ninth Circuit. The Ninth Circuit Court of Appeals upheld the District Court's ruling.

5. **Ninth Circuit's Opinion:** First, the Ninth Circuit Court of Appeals determined that the Act is not expressly preempted because it is a "licensing" measure that falls within IRCA's savings clause.

   Next, the Court of Appeals determined that the Act's provisions mandating the use of E-Verify was not impliedly preempted by federal law because, although Congress made participation in E-Verify voluntary at the national level, it did not indicate that it intended to prevent states from making participation mandatory.

   Finally, by analyzing the language of the Act, the Court of Appeals determined that businesses would be given a chance to dispute whether an employee was authorized to work, and were thus afforded due process.

E. FLSA: *Kasten v. Saint-Gobain Performance Plastics Corp.*

1. **Argument Date:** October 13, 2010.

2. **Appealed from:** *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009).

3. **Issue:** Whether an oral complaint of a violation of the Fair Labor Standards Act is protected under that act's anti-retaliation provision (29 U.S.C. § 215(a)(3)).

4. **Key Facts:** Kasten had received several warnings for his failure to swipe in and out at work, with the third warning stating that termination could result if another violation took place. He alleged that he verbally complained to three supervisors that he thought the location of the company's time clocks was illegal because it prevented employees from being paid for time spent donning and doffing their protective gear and that he told one supervisor that he was thinking of commencing a lawsuit. Saint-Gobain denied these allegations.

   Katsen received a fourth disciplinary action for timekeeping problems and attended a meeting regarding it. He claimed (and Saint-Gobain disputed) that he verbally told his supervisors that he believed the location of the clocks was illegal and that he could prevail against them in Court. Five days later, Saint-Gobain terminated his employment.

5. **Procedural History:** Kasten sued former employer Saint-Gobain in the District Court. The District Court granted summary judgment to Saint-Gobain. The Court of Appeals upheld the District Court's decision.

6. **The Seventh Circuit's Opinion:** Section 215(a)(3) of the FSLA defines the scope of protected activity, making it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to

serve on an industry committee." To determine whether he engaged in a protected activity, they considered two questions: 1) whether intra-company complaints that are not formally filed with any judicial or administrative body are protected activity; and 2) whether unwritten verbal complaints are protected activity.

First, the Court of Appeals, in line with the "vast majority" of the other circuits, decided that the plain language of the statute ("any compliant") includes internal complaints made within the company.

However, the Court of Appeals, noting that the statute required the plaintiff to "file" a complaint, said that, because the verb "to file" connotes the use of a writing, Kasten had not "filed" a complaint when he complained verbally. Recognizing that the circuits are split on this issue, the Seventh Circuit followed the Fourth Circuit in holding that there verbal complaints are not protected activities under the FLSA. The Sixth, Eighth, and Eleventh circuits have found otherwise. The Court of Appeals also reasoned that Congress could have chosen to use broader language in the FLSA's retaliation provision, as it did in Title VII and in the ADEA, when it offered protection to anyone who has "opposed any practice." Finally, the Court of Appeals stressed that although the remedial nature of the FSLA warrants an expansive interpretation, it cannot "read words out of" the statute, meaning that it could not just eliminate the "filing" requirement.