

Some Recent Developments in Federal and State Labor and Employment Law

By Michael Evan Gold

I. The United States Supreme Court¹

A. Cases with Opinions

1. Arbitration: Who Applies the Limitations Period?

Howsam v. Dean Witter Reynolds, 123 S. Ct. 588 (2002)

The Supreme Court held that whether a time limit for invoking arbitration had been satisfied was a question for an arbitrator, not a court, in the absence of a statement to the contrary in the arbitration agreement.

A stockbroker recommended certain investments to an investor. The investor came to believe that the broker had misrepresented the virtues of the investment. This controversy fell within an arbitration agreement between the broker and the investor. The agreement allowed the investor to choose the arbitration forum; she chose the National Association of Securities Dealers and agreed to abide by its rules. One rule was that a dispute had to be submitted for arbitration within six years of the event giving rise to the dispute.

The broker sued in federal court to enjoin the arbitration, arguing that the six-year limitations period had expired. The District Court dismissed the action, but the Court of Appeals for the Tenth Circuit reversed on the ground that the suit raised the question of arbitrability, which is presumptively a question for a court. The Supreme Court reversed the judgment of the Tenth Circuit.

Writing for seven Justices (Justice O'Connor not participating and Justice Thomas concurring in the judgment), Justice Breyer conceded that whether parties have agreed to arbitrate a dispute is a question for a court unless the parties have clearly provided otherwise. But he added that this rule applies only where the parties expect a court, not an arbitrator, to make the threshold decision. Parties expect a court to make the decision about whether they are bound by an arbitration agreement, as well as the decision about whether a particular dispute is covered by the agreement; but parties expect an arbitrator to make decisions about procedural questions that grow out of the dispute, for example, whether conditions precedent to arbitration (such as steps in a grievance procedure) have been satisfied, and whether defenses to arbitration like waiver and delay are valid. Time limits fall in the latter category and are for the arbitrator to apply, absent a statement to the contrary in the arbitration agreement.

One may wonder whether the parties have any genuine expectations on these issues, apart from the arbitration agreement and their understanding of the law.

2. Arbitration: Class Actions

Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003)

The contract between a lender and its customers contained a clause referring all contract-related disputes to arbitration. The arbitration clause did not expressly address whether a customer could pursue a claim on behalf of a class of customers. The lender argued in the courts of South Carolina that the clause impliedly prohibited class claims, but the Supreme Court of South Carolina disagreed; the court held that the contract was silent on class claims and that, in such a case, state law permitted them. The U.S. Supreme Court granted certiorari to determine whether this holding was consistent with the Federal Arbitration Act.

Justice Breyer, joined by Justices Scalia, Souter, and Ginsburg, relied on the basic rule that when parties agree to submit all disputes to arbitration, the parties should receive the decision of an arbitrator, not of a judge. It is true that an exception to this rule exists. Courts assume that parties intend that certain issues are for judges, viz., whether the arbitration clause is valid and whether a dispute is covered by the clause. However, the question of whether a clause allows or prohibits class claims is not one of those issues; rather, this question concerns contract interpretation and arbitration procedures, which arbitrators are well situated to decide. Therefore, the question of whether the arbitration agreement permitted class claims should have been answered by an arbitrator, not by the court, and for this reason the judgment below was vacated.

Justice Stevens concurred in order to create a controlling judgment of the Court. Nevertheless, he believed that the Federal Arbitration Act did not preclude either holding of the Supreme Court of South Carolina.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented in the belief that a court should decide whether an arbitration agreement allows class claims. "Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted," 123 S. Ct. at 2409. Therefore, if the arbitrability of a dispute is for a court to decide, so is how the arbitrator is to be selected—one arbitrator per dispute or one arbitrator for a class of disputes. Thus, the Federal Arbitration Act did not preempt the Supreme Court of South Carolina from deciding whether the arbitration clause permitted class claims; however, that court misinterpreted the clause. Read as a whole, the agreement prohibited class claims. For this reason, the dissenters would have reversed the judgment below.

Justice Thomas dissented on the ground that the Federal Arbitration Act does not apply to proceedings in state courts and, therefore, cannot be the ground for preempting a state court's interpretation of an arbitration agreement.

One's first thought might be that lenders, employers, and their ilk can simply include a provision in the arbitration agreement specifying that class claims are not allowed. Based on Justice Breyer's opinion, we think this tactic will probably succeed, though it would have to overcome the argument that the provision is unconscionable. A possible risk of such a provision would be the decision of a sympathetic judge to permit a class action in court on the ground that the class claim could not be pursued in arbitration.

3. Late Assignment of Retirees, Coal Industry Retiree Health Benefit Act

Barnhart v. Peabody Coal Co., 123 S. Ct. 748 (2003)

The Coal Industry Retiree Health Benefit Act of 1962 required that the Commissioner of Social Security "shall, before October 1, 1993," assign each retiree who is eligible for benefits to an operating company, which became responsible for funding the retiree's benefits. Eligible retirees who were not assigned were not to lose benefits; rather, their benefits would be paid by other sources. The Commissioner assigned approximately 10,000 retirees after the deadline. Two of the companies to which these retirees were assigned sued in order to be relieved of funding benefits for the tardily assigned retirees. The District Court ruled for the companies, and the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed.

Justice Souter, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg, and Breyer, ruled that a statement that the government "shall" act within a specified time is not a jurisdictional limit that precludes later action. A requirement that a detention hearing shall be held immediately after a person's first appearance before a judicial officer did not bar detention following a tardy hearing, and a mandate that the Secretary of Health and Human Services make a report within a certain time did not deprive the Secretary of power to act thereafter. In general, wrote Justice Souter, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 123 S. Ct. at 755, quoting from *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (following footnote omitted).

Justice Scalia, joined by Justices O'Connor and Thomas, dissented, asserting in his usual diplomatic manner that the majority's holding "makes no sense. When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power. If a landowner authorizes someone to cut Christmas trees 'before December 15,' there is no doubt what happens when December 15 passes: The authority to cut terminates. And the situation is not changed when the authorization is combined with a mandate—as when the landowner enters a contract which says that the other party 'shall cut all Christmas trees on the property by December 15.'"

Given the opportunity, one might wish to ask Justice Scalia whether the federal courts remain courts of equity as well as courts of law. The Secretary's delay in assigning retirees caused no prejudice to the companies; and, as the majority pointed out, Congress did not provide the Secretary with sufficient funds to complete the assignments before the deadline.

4. Damages for Fear of Developing Cancer: Federal Employers' Liability Act

Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003)

Under the Federal Employers' Liability Act (FELA), a common carrier is liable in damages to employees for work-related injuries caused, in whole or in part, by the carrier's negligence. The plaintiffs contracted asbestosis and brought suit in a Circuit Court of West Virginia against the railroad for which they had worked. Two unrelated issues of law arose. DAMAGES: Under the FELA, may a worker's recovery for pain and suffering for a work-related disease include dam-

ages for the worker's genuine fear that cancer will later result from the disease? The trial court held yes and so instructed the jury. APPORTIONMENT: When third parties who are not before the court may have contributed to a worker's injury, is an employer in an FELA suit answerable in full to an injured worker, or is the employer liable only for the harm that it caused? The trial court held the railroad liable in full and refused to instruct the jury to apportion damages among the plaintiffs' employers. The jury returned a verdict for the plaintiffs, and the trial court entered a judgment of approximately five million dollars. The Supreme Court of Appeals of West Virginia declined to review the judgment. The U.S. Supreme Court affirmed the judgment on both issues.

APPORTIONMENT: The FELA makes a common carrier liable for occupational injuries "resulting in whole or in part from the negligence of the carrier." This text, along with consistent judicial application, convinced all of the justices that the railroad was liable to the plaintiffs for the full amount of their damages.

DAMAGES: Harkening to common law principles, Justice Ginsburg, joined by Justices Stevens, Scalia, Souter, and Thomas, pointed out that recovery is permitted under the FELA for pain and suffering resulting from a negligently inflicted physical injury. An occupational disease like asbestosis counts as a physical injury for this purpose. Emotional distress is an element of pain and suffering. Therefore, emotional distress resulting from an occupational disease is compensable. Fear of developing cancer from an occupational disease is an element of emotional distress. It follows that a worker's genuine fear of developing cancer from an occupational disease like asbestosis is compensable as part of the worker's damages for the pain and suffering resulting from asbestosis.

The Court noted that compensation for fear of developing a disease is distinct from compensation for the increased risk of developing a disease. Damages for increased risk are not allowed. Note also that, should a plaintiff actually develop lung cancer in the future, one would be entitled to compensation for a separate occupational injury.

The parties agreed that asbestosis is a cognizable injury under the FELA, and the evidence showed that asbestosis develops into mesothelioma, a deadly lung cancer, in about 10 percent of cases. The plaintiffs testified to their fear of developing mesothelioma, and the railroad did not challenge the sufficiency of the evidence to support the jury's verdict that this fear was genuine. Thus, the Court allowed the plaintiffs to recover, as part of their damages for having contracted asbestosis, compensation for the fear that asbestosis was a precursor of cancer.

The Court distinguished the plaintiffs' claim from claims for "stand-alone emotional distress," in which the distress was not brought on by a physical injury. Recovery is permitted for stand-alone claims only if the common law "zone-of-danger" test is satisfied. The zone-of-danger test allows damages for emotional distress if the plaintiff sustained a negligently inflicted physical impact, or if, though not physically impacted, the plaintiff was within the zone of danger of physical impact.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Breyer, dissented on this issue. The dissenters were concerned that the fund for compensating victims of asbestosis was limited, and that, by the time cancer actually develops in some of the victims, the fund will have been exhausted. In addition, the dissenters believed that the plaintiffs' fear of cancer was not the direct result of their injury and that, although a correlation may exist between asbestosis and cancer, no causal connection was established.

Causation was perhaps the most interesting issue in the case. Mesothelioma, which otherwise occurs rarely, follows asbestosis in 10 percent of cases. Does asbestosis cause mesothelioma, or do they have a common cause in these cases? The dissenters answered no, and one may wish that the majority had addressed this significant question in depth.

5. Preemption of Any Willing Provider Statutes: Employee Retirement Income Security Act

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471 (2003)

Health maintenance organizations (HMOs) in Kentucky maintained exclusive provider networks of doctors and hospitals. In exchange for reducing the price they charged for services rendered to patients belonging to the HMO, providers in the network received an increased volume of patients. Kentucky statutes required that health insurers, including HMOs, accept into their exclusive networks any provider who was willing to meet the terms and conditions of membership. HMOs claimed that these statutes were preempted by the Employee Retirement Income Security Act of 1974. ERISA preempts all state laws that relate to employee benefit plans, but does not preempt state laws that regulate insurance. The District Court rejected the HMOs' claim, holding that the statutes regulated insurance and were not preempted. The Court of Appeals for the Sixth Circuit affirmed, as did a unanimous Supreme Court.

The central question was whether the statutes regulated insurance. In previous ERISA cases, the Court had looked to the McCarran-Ferguson Act, under which three criteria determined whether practices constituted the business of insur-

ance: whether the practice transferred or spread the policyholder's risk; whether the practice was an integral part of the relationship between the insurer and the insured person; and whether the practice was limited to entities in the insurance industry. Breaking with this precedent, the Court announced a new standard for ERISA. A state law regulates insurance under ERISA if the law is specifically directed toward insurers and the law substantially affects the risk-pooling arrangement between insurers and insured persons. The Kentucky statutes satisfied the first element of the standard because the statutes were aimed at insurers. The statutes also satisfied the second element of the standard because, said the Court, they expanded the number of providers in the insurers' networks. Insured persons in Kentucky could no longer seek insurance from an exclusive network in exchange for lower premiums, and thus the statutes affected the type of risk pooling arrangements that insurers could offer.

One might question whether the Court applied its new standard with the proper facts in mind. It seems doubtful that the Kentucky legislature passed the statutes out of fear that the method of risk pooling reflected in exclusive provider networks was unsound. More likely, the legislature was responding to pressure from two sources: providers who wanted access to the networks in order not to lose patients, and patients who wanted to be covered for services rendered by their favorite providers. Viewing the case in light of these facts might have influenced its outcome. The statutes may have been directed more toward the practices of health care providers and the freedom of choice of patients, and less toward the pooling of risks.

6. Who Counts as an Employee?: Americans with Disabilities Act

Clackamas Gastroenterology Assoc. v. Wells, 123 S. Ct. 1673 (2003)

The Americans with Disabilities Act of 1990 covers employers of fifteen or more employees. A medical clinic, organized as a professional corporation, had fifteen employees only if its four physicians, who owned the shares of the corporation and constituted its board of directors, were counted as employees. When a worker sued the clinic, alleging disability discrimination, the clinic moved to dismiss because it had too few employees to be covered by the Disability Act. The District Court granted the motion, finding the physicians to be analogous to partners in a partnership. The Court of Appeals for the Ninth Circuit reversed on the ground that a professional corporation should not be allowed to claim corporate status for some purposes and partnership status for other purposes. The Supreme Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.

Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, ruled that, because Congress had used the term "employee" essentially without defining it (the act defines "employee" as "an individual employed by an employer"), the common law test should be used to determine the status of an individual. The Court endorsed the guideline in EEOC Compliance Manual §§ 605:0008–605:00010 (2000), which the Commission uses to determine whether partners, officers, members of boards of directors, and major shareholders are employees. The guideline, which appears to be an adaptation of the right-of-control test to contemporary organizational structures, lists several factors that should be taken into account. The factors include whether the organization can hire or fire the individual in question; whether the organization supervises or oversees the individual's work; whether the individual can influence the organization; whether the individual shares in the profits, losses, and liabilities of the organization; and whether the organization and the individual intend the individual to be an employee. Other factors may be relevant as well.

The Court specifically noted that the EEOC guideline on this score asserts that it is applicable to other federal anti-discrimination statutes. The Court also stated that it had applied the common law test to the Employee Retirement Income Security Act of 1974, which, like the Disability Act, defines "employee" as "any individual employed by an employer." It seems likely that the Court will apply the common law test, as illuminated by the EEOC guideline, to other civil rights statutes with similar definitions of "employee," such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.

Applying the common law test to persons in the place of the physicians, the Court wrote that one is an employer who owns and manages the enterprise, hires and fires employees, assigns tasks to employees and supervises their performance, and decides how profits and losses are to be distributed. Titles and documents are not controlling. No single factor dominates the others; rather, the determination of an individual's status depends on all of the incidents of the relationship. The Court remanded the case so that this standard could be applied to the facts.

Justices Ginsburg and Breyer dissented. They argued that one could be both a proprietor and an employee. They also noted that the physicians claimed status as employees for some purposes, such as the Employee Retirement Income Security Act and the state's workers' compensation law, and that, by incorporating, the physicians enjoyed the benefit of limited liability. As the Ninth Circuit said, they were not entitled to secure the best of both possible worlds.

The dissent brings to mind *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947), in which the Court said, in effect, that a worker could be a supervisor at some times and an employee at other times, and therefore supervisors were employees under the National Labor Relations Act. Congress disagreed and amended the act to provide that a supervisor is not an employee under the act.

7. Removal from State to Federal Court: Fair Labor Standards Act

Breuer v. Jim's Concrete of Brevard, 123 S. Ct. 1882 (2003)

A worker sued his former employer for unpaid wages under the Fair Labor Standards Act (FLSA) in state court. The employer removed the case to federal court pursuant to 28 U.S.C. § 1441(a), which allows removal of any civil action of which federal district courts have original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." The worker sought an order remanding the case to state court, arguing that the FLSA contained an express provision barring removal. The provision on which the worker relied was section 216(b) of the FLSA, which provides, in relevant part, "An action to recover . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." The District Court denied the motion to remand and certified the issue for interlocutory appeal. The Court of Appeals for the Eleventh Circuit affirmed, as did the Supreme Court.

Writing for a unanimous Court, Justice Souter found that section 216(b) was not an express prohibition of removal. The FLSA does not mention removal, and the phrase "may be maintained" is too ambiguous to be an express prohibition; for example, the phrase can mean to continue (as opposed as to commence) an action, or to bring or file an action. In contrast, unambiguous prohibitions on removal occur in other statutes, one being 28 U.S.C. § 1445(a) ("[a] civil action in any State court against a railroad . . . may not be removed to any district court of the United States"). In addition, a number of other statutes use the same phrase as section 216(b), for example, the Employee Polygraph Protection Act of 1988 and the Family and Medical Leave Act of 1993, and it is unlikely that Congress intended the right to "maintain" all such actions to displace the right to remove them.

The worker argued that removal would effectively kill many legitimate claims that are too small to litigate in federal court. One who sympathizes with this argument may find hope in another source. Increasingly, employers are requiring workers to agree to arbitrate all employment disputes, and the courts are enforcing such agreements. Although probably designed with discrimination claims in mind, the agreements may well cover FLSA claims, thereby providing the worker with a forum less costly than a federal court.

8. Eleventh Amendment Immunity: Family Medical and Leave Act

Nevada Dep't of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003)

The state of Nevada discharged an employee who sued it in federal court for violating his rights under the Family and Medical Leave Act of 1993 (FMLA). The District Court awarded the state summary judgment on the ground that the claim was barred by the Eleventh Amendment. The Court of Appeals for the Ninth Circuit reversed the judgment, and the Supreme Court affirmed the Ninth Circuit's ruling.

Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. The Eleventh Amendment, wrote the Chief Justice, immunizes states from suits in federal court by citizens of another state or subjects of a foreign state; however, Congress may abrogate this immunity if Congress makes its intent to abrogate unmistakably clear and is validly exercising the power created by section 5 of the Fourteenth Amendment. The intent to abrogate in the FMLA was clear beyond debate. Therefore, the issue became whether Congress acted within its authority under section 5.

The Chief Justice continued that Congress may enforce the guarantee of equal protection of the laws, not only by proscribing violations of the Fourteenth Amendment, but also by deterring and remedying conduct that is not itself forbidden by the Amendment. (One is reminded of the penumbra of the Bill of Rights cited by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), to invalidate a state law against using contraceptives.) "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 123 S. Ct. at 1977. An example is the Voting Rights Act, which bans literacy tests and requires pre-clearance for changes in voting procedures. Such prophylactic legislation must satisfy a three-step test. First, Congress must identify violations of the Constitution by the states. Second, Congress must enact legislation with the goal of remedying those violations; Congress may not attempt to redefine the states' legal obligations. Third, the legislation must be an appropriate remedy for the identified violations; that is, the "legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" 123 S. Ct. at 1978, quoting from

City of Boerne v. Flores, 521 U.S. 507 at 536 (1997). (Query from a former student of geometry: if one object is congruent with another, are they not, by necessity, proportional as well?)

The first step of the test was to identify constitutional violations by the states. States frequently limited women's employment opportunities in the past, such as by prohibiting women from tending bar or practicing law. Similar discrimination continued to the date of the FMLA. For example, fifteen states offered mothers up to one year of extended maternity leave, but only four granted fathers a parallel benefit. This difference was not attributable to the different physical needs of women and men, but to the pervasive stereotype that caring for family members is women's work. Congress was also aware that states applied facially neutral policies in discriminatory ways. In addition, gender discrimination was rampant in the private sector.

Did this evidence suffice to demonstrate unconstitutional behavior by the states? The answer depended on the standard for judging the evidence. In stating the standard, the Court distinguished its rulings that Congress could not abrogate the states' Eleventh Amendment immunity regarding age and disability discrimination. Like most other acts of government, acts that classify by age or disability are judged by the rational basis test: has the government taken a rational step toward a legitimate objective? This, the most permissive test under the Equal Protection Clause, leaves the least room for Congress to enact prophylactic legislation under section 5 of the Fourteenth Amendment. "Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria." 123 S. Ct. 1982, quoting from *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62 at 89 (2000). Congress had no such evidence regarding age and disability discrimination by the states, and, therefore, the attempts to abrogate the states' immunity were unconstitutional in the Age Discrimination in Employment Act of 1967 and in Title I of the Americans with Disabilities Act of 1990.

In contrast, acts of government that classify by gender are judged by the intermediate scrutiny test: is the act substantially related to an important objective of government? This test affords Congress greater scope than the rational basis test for enacting prophylactic legislation under section 5 of the Fourteenth Amendment. The Court held that the states' record of participation in, and tolerance of, gender discrimination in leave benefits justified the enactment of prophylactic legislation under section 5 of the Fourteenth Amendment.

The second step of the test was easily satisfied. The aim of the FMLA was to protect workers from gender discrimination in the workplace.

The third step of the test was also satisfied. For two reasons, "the FMLA is 'congruent and proportional to the targeted violation.'" 123 S. Ct. at 1983, quoting from *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 at 374 (2001). The first reason is that Congress outlawed gender discrimination and abrogated the states' immunity in Title VII of the Civil Rights Act of 1964, but gender discrimination by states did not cease. Congress addressed the issue again in the Pregnancy Discrimination Act of 1978, and still gender discrimination persisted. A statute that mirrored Title VII and simply mandated gender equality in the administration of leave benefits would not have achieved Congress's remedial objective, for states could have satisfied the statute by providing no family leave at all; because two-thirds of non-professional caregivers are women, a policy of no leave would have excluded far more women than men from the workplace. Added prophylactic measures were therefore in order. The measure Congress chose was congruent and proportional for two reasons: (1) the FMLA provides a benefit for men as well as women; thus, the act combats the stereotype that only women are responsible for caregiving in the family and ensures that employers cannot not evade their obligations by hiring only men, and (2) the scope of the FMLA is limited. It requires only unpaid leave, applies only to employees who have worked at least 1,250 hours within the preceding year, and excludes high-ranking employees and employees in sensitive positions (such as elected officials and their staffs and policymakers). In addition, employees must give advance notice of foreseeable leaves; employers may require certification of the need for leave by a health care provider; and the act requires only twelve weeks of leave. And damages for violations of the act are restricted to actual monetary losses, limited by a two-year limitations period.

Justice Scalia dissented on the ground that a violation of the Constitution by one state does not justify abrogating the immunity of another state. Justice Kennedy, joined by Justices Scalia and Thomas, also dissented. Justice Kennedy did not believe that Congress had identified a pattern of gender discrimination by the states, and he argued that the FMLA was not a remedial measure, but an entitlement program.

We find the dissenters' points hard to answer, but two other points are even more interesting. In addition to rational basis and intermediate scrutiny, the Court discussed the third test of equal protection. Citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which upheld the Voting Rights Act of 1965, the Court alluded to the strict scrutiny test, which is used regarding acts of government that classify by race or alienage or that burden fundamental interests like voting. Such acts

must be narrowly tailored to accomplish a compelling objective of government and, said the Court, they are “presumptively invalid,” 123 S. Ct. at 1982. Based on the Court’s discussion of the relationship of the level of equal protection scrutiny to the scope of permissible prophylactic legislation, one may readily infer that the strict scrutiny test leaves Congress the greatest room for prophylactic legislation. In addition, one might think that the prophylactic legislation approach would be applicable to deciding the constitutionality of another kind of governmental action that is judged under equal protection, namely, affirmative action. This approach, however, was not used in *Grutter v. Bollinger* or *Gratz v. Bollinger*, which dealt with affirmative action by government and were decided this term; they are discussed below.

Also, one might have been startled by some of the evidence which Chief Justice Rehnquist cited. He wrote that a statute that merely ordered gender equality in leave benefits would not have achieved Congress’s objective, as the states could have complied by providing no family leave for either gender; because—here is the startling part—two-thirds of caregivers are women, a no-leave policy would have excluded many more women than men from the workplace. In other words, a no-leave policy would have had a disparate impact on women! Recall that the Court’s standard required Congress to find violations of the Fourteenth Amendment by the states. Recall as well that the Court has steadfastly held that acts of government with a disparate impact do not violate the Constitution. *Washington v. Davis*, 426 U.S. 229 (1976). Yet the Chief Justice declared that the disparate impact of no-leave policies by states justified prophylactic legislation aimed at remedying unconstitutional discrimination. One might draw some fine lines here. For example, the Chief Justice used this evidence in the portion of his opinion in which he was discussing whether the FLMA was congruent and proportional to the violation, not in the portion of his opinion in which he discussed the record of the states’ discriminatory practices. Even if we have not stumbled upon evidence that disparate impact is creeping its way into the Court’s constitutional discourse, we may wonder whether the Court allowed Congress to use disparate impact to re-define the states’ obligations.

9. Direct Evidence in Mixed-Motive Cases: Title VII of the Civil Rights Act of 1964

Desert Palace v. Costa, 123 S. Ct. 2148 (2003)

The Civil Rights Act of 1991 sets forth the standard for mixed-motive cases under Title VII of the Civil Rights Act of 1964. An unlawful employment practice occurs when race, sex, etc. is a motivating factor in the defendant’s decision, even though other factors also motivated the decision. Thus, the defendant is liable if the decision was motivated, in whole or in part, by race or sex. Relief, however, is subject to an affirmative defense. After liability is established, the burden shifts to the defendant to prove that it would have taken the same action in the absence of the unlawful reason. If the defendant carries this burden, the remedy may not include damages, back pay, or an order to hire, reinstate, or promote the plaintiff.

A woman who had been discharged sued her employer for sex discrimination under Title VII of the Civil Rights Act of 1964. She offered circumstantial evidence that an unlawful reason motivated her discharge; the employer responded with evidence of lawful reasons. The District Judge proposed to instruct the jury that if it found the employer had been motivated by both lawful and unlawful reasons, the plaintiff was entitled to damages unless the employer proved that it would have treated her similarly in the absence of the unlawful reason. Based on Justice O’Connor’s opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the employer objected, arguing that the burden should shift to the defendant only when the plaintiff establishes liability with direct, not merely circumstantial, evidence. The District Judge overruled this objection, and the jury returned a verdict for the plaintiff. A panel of the Court of Appeals for the Ninth Circuit agreed with the employer, but the Ninth Circuit en banc affirmed the District Court. The Supreme Court unanimously affirmed the Ninth Circuit.

Justice Thomas delivered the opinion of the Court. He wrote that the relevant text of Title VII is unambiguous. It states that the defendant’s liability is established by a plaintiff who “demonstrates” that race or sex was a motivating factor in the decision; the statute does not require a heightened showing like direct evidence for this purpose. Also, section 701(e) states, “The term ‘demonstrates’ means meets the burdens of production and persuasion,” again without reference to a heightened showing. In addition, the conventional rules of civil litigation apply to Title VII cases, and they recognize the equal utility of direct and circumstantial evidence. Finally, the statute uses the word “demonstrates” in describing the defendant’s affirmative defense. Sauce for the goose is sauce for the gander, yet counsel for the defendant did not concede that the defendant must meet a heightened burden of proof; absent congressional indication to the contrary, a term in a statute should not vary in meaning depending on whether the rights of the plaintiff or the defendant are at stake.

Although we find the result of this case unimpeachable (the contrary decisions in the lower courts seem to have been driven more by ideology than law), we must observe that Justice Thomas flirted with what we consider to be a serious error. Defense counsel’s unwillingness to concede a point (that if the word “demonstrates” requires a heightened show-

ing of a plaintiff, the word requires the same of a defendant) was altogether irrelevant. What a single party concedes, or refuses to concede, should not control the interpretation of a statute that applies to all persons. A party may present inconsistent arguments, and the inconsistency may be a good reason for rejecting them; but a party does not own a statute, and the party's refusal to acknowledge an inconsistency (or any other point, for that matter) is of no consequence. Thus, neither a plaintiff nor a defendant need satisfy a heightened burden, not because the defendant in this action refused to make a concession, but because the statute does not mention such a burden, the conventional rules of civil litigation apply to Title VII, and so forth.

10. Race as a Selection Criterion: Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 1981; Fourteenth Amendment

Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

A white applicant was denied admission to the law school of the University of Michigan. She sued, claiming the school's affirmative action program discriminated against her because of her race. The District Court ruled that the school's policy flunked both parts of the strict scrutiny test: the goal of attaining a racially diverse student body was not a compelling interest, and the school's policy was not narrowly tailored to further that interest. Sitting en banc, the Court of Appeals for the Sixth Circuit disagreed on both parts of strict scrutiny and reversed the District Court's judgment. The Supreme Court affirmed the judgment of the Sixth Circuit.

Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, took guidance from the reasoning of Justice Powell in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), which has become the touchstone for applying strict scrutiny to race-conscious admissions policies. On the first part of strict scrutiny, Justice Powell had written that attaining a diverse student body was a compelling interest because a university may select students who will contribute to the robust exchange of ideas; such exchange is paramount to the university's mission of training the future leaders of the nation. Race may be one—but not the only—"element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." 123 S. Ct. 2337, quoting from *Bakke*, 438 U.S. at 314 (Justice Powell).

Strict scrutiny is sensitive to context, and so Justice O'Connor turned to whether the precise goal of the law school was compelling. That goal was to attain "the educational benefits that flow from a diverse student body." 123 S. Ct. at 2338. Noting that the school's judgment of the value of this goal was entitled to a degree of judicial deference, the Court agreed with the school that a diverse student body lies at the heart of the mission of the school. Diversity promotes cross-racial understanding and helps to break down racial stereotypes. Diversity enables spirited and enlightening discussions (both inside and outside the classroom, we may add), thereby enhancing learning outcomes and preparing students for the increasingly diverse society in America and the increasingly global marketplace. In addition, universities and law schools are the training ground for many of the nation's leaders. In order for those leaders to be legitimate in the eyes of the citizenry, the path to leadership must be "visibly open to talented and qualified individuals of every race and ethnicity." 123 S. Ct. at 2341.

Having found the law school's goal to be a compelling interest, Justice O'Connor turned to the second part of strict scrutiny, whether the school's means were narrowly tailored to achieve diversity. Justice Powell in *Bakke* had written that a race-conscious admissions program must consider all the elements of diversity and, in doing so, may treat an applicant's race as a "plus." In pursuit of diversity, the weight placed on race may vary from candidate to candidate. Diversity that passes muster as a compelling interest comprises many factors, including having lived abroad, possessing fluency in foreign languages, having overcome adversity in one's life, having performed extensive community service, having pursued a career in another field, as well as being an under-represented minority. Diversity of this breadth does not unduly burden an applicant who is not a minority, for this person may contribute to diversity in several other ways.

A critical mass of minority students is necessary to achieve racial diversity. According to the law school's Director of Admissions, "critical mass means . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." 123 S. Ct. at 2333 (internal quotation marks omitted). A race-conscious admissions program may not use quotas to achieve a critical mass, but may use a flexible goal. A goal allows for individual consideration of each candidate and does not insulate a candidate from comparison with all other candidates. The law school had a goal and not a quota. Between 1993 and 2000, the representation of African-American, Native American, and Latino students in each class varied from 13.5 to 20.1 percent.

The plaintiff and the United States argued that the law school's plan was not narrowly tailored because the school's objectives could have been achieved without taking race into account. The Court responded, "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 123 S. Ct. at 2344. Narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." 123 S. Ct. at 2345. (We note that narrow tailoring differs from the earlier version of strict scrutiny, under which the means

had to be the least restrictive possible.) The District Court suggested a lottery, but a lottery would relinquish other educational values and kinds of diversity. Lowering admission standards for all students would change the character of the school and sacrifice a vital component of its mission. Admitting all students above a certain class rank (the “Texas plan”) even if practicable for a graduate professional school, would preclude individual assessments necessary to assemble a student body that is diverse in all the ways the school desires.

Because “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,” 123 S. Ct. 2346, quoting from *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), a race-conscious admissions program must be limited in time. Sunset provisions and periodic reviews suffice for this purpose. The law school avowed that it would like nothing better than to revert to a race-neutral admissions formula and would do so as soon as practicable. Justice O’Connor wrote that twenty-five years had passed since race-conscious admission was approved in *Bakke*, and she expected that twenty-five years hence racial preferences would no longer be necessary. May we all live to see her expectation fulfilled!

Concurring, Justice Ginsburg, joined by Justice Breyer, found the law school’s system constitutional because “conscious and unconscious race bias, even rank discrimination, remain alive in our land, impeding realization of our highest values and ideals.” 123 S. Ct. at 2347–8.

Justice Scalia, joined by Justice Thomas, dissented. Justice Scalia argued that cross-racial understanding is learned, not only in school, but also in other social venues; thus, if the law school could admit a critical mass of minority students, so could the state’s civil service system. This was the first item in a parade of horrors, perhaps the most frightening of which was a lawsuit claiming that an institution was truly committed to educational diversity because the institution tolerated minority-only student organizations, housing, student centers, and graduation ceremonies.

Concurring and dissenting, Justice Thomas, plainly speaking from his own experience, quoted Frederick Douglass: “What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have but one answer from the beginning. Do nothing with us! . . . [I]f the negro cannot stand on his own legs, let him fall. . . . All I ask is, give him a chance to stand on his own legs!” 123 S. Ct. at 2350, quoting the *Frederick Douglass Papers* 59, 68 (J. Blasingame & J. McKivigan eds., 1991). Justice Thomas continued, “Like Douglass, I believe that blacks can achieve in every avenue of American life without the meddling of university administrators.” 123 S. Ct. at 2350. But affirmative action stamps minorities with a badge of inferiority. “When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.” 123 S. Ct. at 2362. Further, Justice Thomas maintained that the law school was not pursuing a compelling state interest. The school’s real interest was not educational diversity; rather, because the school could have increased minority enrollment by lowering its admission standards, the interest the school actually pursued was maintaining its prestige, which was hardly a compelling interest. Based on precedents, he found that only national security—preventing anarchy and violence—can justify racial classifications. Justice Scalia joined in these parts of Justice Thomas’s opinion.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, dissented. The Chief Justice argued that the law school was not in fact seeking a critical mass of minority students. Between 1995 and 2000, the school admitted approximately 100 African-Americans, but only 15 Native Americans and 50 Hispanics. “If the Law School [truly seeks to prevent] African-American students from feeling isolated or like spokespersons for their race, one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans.” 123 S. Ct. at 2366. If the law school was not really trying to create critical masses of minorities, what was it doing? The Chief Justice observed that the percentages of minorities that were accepted to the school closely tracked their representation in the pool of applicants. In short, concluded the Chief Justice, the school operated “a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups,” 123 S. Ct. at 2369, and this was patently unconstitutional racial balancing.

Justice Kennedy wrote separately. He accepted Justice Powell’s view in *Bakke* that a college “may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual,” 123 S. Ct. 2370, but dissented on the ground that the law school was not truly making individual determinations. Justice Kennedy noted that unlike schools such as Amherst, where the percentage of African-Americans enrolling fluctuated substantially from year to year, the percentage of African-Americans enrolling in the law school varied by only three-tenths of one percent from 1995 to 1998; greater variation over a longer period was explained by changes in the law school’s target. “The narrow fluctuation band raises an inference that the Law School subverted individual determination. . . .” 123 S. Ct. 2373.

Grutter suggests to us that properly constructed affirmative action programs of public employers will remain constitutional for another twenty-five years—or until the composition of the Supreme Court changes.

A European-American applied to the undergraduate program of the University of Michigan at Ann Arbor to be admitted in the fall of 1995, and another European-American applied to be admitted in the fall of 1997. Both applicants were rejected. They filed a class action against the university on the ground that they were treated less favorably on the basis of race than African-American, Native American, and Hispanic ("minority") applicants. The university changed its admission policy a number of times during the period relevant to the case. During 1995 and 1996, all applicants were initially awarded points according to the same criteria; then race was factored in, always to the advantage of a minority applicant over a white applicant with the same number of points. In 1997 the initial criteria were expanded to include points for being a minority. In 1998 a new point system was implemented; of a possible maximum of 150 points (100 being necessary for admission), 20 points were automatically awarded to minorities but not to whites. Up to 5 points could be awarded to anyone for characteristics like artistic talent. Between 1995 and 1998, the university managed its system of rolling admissions so as to protect a number of seats for certain categories of students who applied later in the admissions cycle; the categories eligible for protected seats were athletes, foreign students, ROTC candidates, and minorities. The protection of seats was abandoned in 1999; the 1998 point system was continued, including the award of 20 points for minority status, with the modification that admissions counselors forwarded to a review committee applications from academically prepared students who had a characteristic that would contribute to the quality of the entering class. The committee could ignore an applicant's points as it considered characteristics such as high class rank, unique experiences, challenges, interests, talents, socioeconomic disadvantage, geographic origin, and race. During the years 1995 through 2000, the university admitted virtually every academically prepared minority applicant. (It appears to us that the salient difference between the law school's admissions process in *Grutter* and the undergraduate college's admissions process in *Gratz* was the latter's use of points.)

The parties filed cross motions for summary judgment with respect to liability. Following the opinion of Justice Powell in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), the District Court found that creating a racially diverse student body was a compelling governmental interest. The court also held that the admission policy used in 1999 and 2000, which awarded twenty points for being a minority, was narrowly tailored, and not a quota, because minority applicants still competed with other applicants. The policy used between 1995 and 1998, however, was an unconstitutional quota because protecting seats for minorities saved them from competing against unprotected applicants for those seats. Accordingly, the court granted the plaintiffs' motion as to the policies of 1995 through 1998 and the university's motion as to the policy of 1999 and 2000. The court certified the issues for interlocutory appeal. The case was argued before the Court of Appeals for the Sixth Circuit en banc on the same day as *Grutter v. Bollinger*. The Sixth Circuit decided *Grutter* first. When a petition for writ of certiorari was filed in *Grutter*, the plaintiffs in *Gratz* also petitioned for certiorari, which was granted before the Sixth Circuit could decide *Gratz*. In *Grutter* the Supreme Court reversed the portion of the District Court's decision that upheld the university's policy of 1999 and 2000.

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, first ruled that the plaintiffs had standing to sue (Justice Stevens, but not the parties, having raised the issue) and then turned to the merits. All racial classification by government, regardless of the race burdened or benefited, must be judged by the standard of strict scrutiny. The opinion focused on the means element of the standard, in this case, whether the university's admissions policy was narrowly tailored. The Court held that the policy was not narrowly tailored because it automatically awarded twenty points, one-fifth of the points needed for admission, to every minority.

Reviewing Justice Powell's opinion in *Bakke*, the Chief Justice stressed that the sort of admissions program of which Justice Powell had approved "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to the university's diversity," 123 S. Ct. at 2428; instead, in a lawful system in which race is considered, each characteristic of each applicant must be considered. Whereas in a lawful system "the race of a 'particular black applicant' could be considered without being decisive . . . the [university's] automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every qualified underrepresented minority applicant." 123 S. Ct. at 2428, quoting *Bakke* at 317. The Chief Justice quoted the following example from Justice Powell's opinion:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic background was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black applicants much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it*.

123 S. Ct. 2428–9, quoting *Bakke* at 324 (emphasis by the Chief Justice). The university's point system was flawed in part because even if C were a budding Monet or Picasso, C could be awarded no more than 5 points. Although the review committee could ignore points, an applicant reached the committee only after an admissions counselor had automatically awarded 20 points to minority but not to other applicants.

One aspect of Chief Justice Rehnquist's opinion may generate unnecessary confusion. Above we quoted his statement that, whereas in a lawful system "the race of a particular black applicant could be considered without being decisive . . . the [university's] automatic distribution of 20 points has the effect of making the factor of race . . . decisive for virtually every qualified underrepresented minority applicant" (internal quotation marks omitted). The meaning of "decisive" is important. As used by the Chief Justice, the word did not mean simply changing or deciding the outcome (being a but-for cause); if the word carried this meaning, race could be even a "plus" and would become a prohibited factor. Rather, as the quotation from Justice Powell's opinion made clear, the Chief Justice used "decisive" to mean always giving an advantage. Race must not be allowed to advantage a minority over an otherwise indistinguishable non-minority in every case, but race may confer an advantage in some cases. For example, if the entering class needed more students of color in order to achieve diversity, a minority might be preferred over an indistinguishable non-minority; but if the entering class needed more musically or athletically talented students in order to achieve diversity, a non-minority musician or athlete might be preferred over an otherwise indistinguishable minority. Race would change the outcome in the first example, but such use of race is permissible. In neither example would race be decisive as the Chief Justice used the word.

Justice O'Connor, joined in large part by Justice Breyer, concurred because of her belief that the college did not "provide for a meaningful individualized review of applicants," 123 S. Ct. at 2431. Every minority automatically received a 20-point bonus, in contrast to the system approved in *Grutter v. Bollinger*, which "enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class." 123 S. Ct. at 2432.

Justice Stevens, joined by Justice Souter, dissented on the ground that the plaintiffs, who were not seeking admission as freshmen to the university, lacked standing to seek an injunction against the admission process for freshmen.

Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens as to standing, but added that the admissions system was not unconstitutional. Unlike the system in *Bakke*, in which only minorities were considered for certain spots in the class, the system at Michigan let all applicants compete for all places based on many factors, of which race was only one; thus, non-minority applicants could readily outscore minorities who received the 20-point bonus. That minorities were awarded a specific number of points did not condemn the admissions system, for 20 points could also be awarded for athletic ability, socioeconomic disadvantage, attendance at a minority high school, or any reason the provost deemed worthy; and lesser numbers of points were available for other factors. The use of points itself should not be faulted. "Since college admission is not left entirely to articulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a number scale what the law school accomplishes in its 'holistic review,'" 123 S. Ct. at 2441, citing *Grutter*, 123 S. Ct. at 2343.

Justice Ginsburg, joined by Justice Souter, argued that because of historical and contemporary discrimination, a distinction should be drawn between racial classifications that are used to maintain racial inequality and those that are used to achieve equality.

B. Cases Pending

1. Rehiring a Disabled Worker Who Was Discharged for Cause: Americans with Disabilities Act

Ratheon Co. v. Hernandez, No. 02-749

Did an employer that refused to rehire workers who had been discharged for cause deny re-employment to a former employee, who had separated from the firm because of testing positive for cocaine, because the firm regarded him as being disabled or he had a record of having been disabled? A worker alleged that he had failed a drug test and been allowed to resign. Two years later, after successfully completing rehabilitation, he applied for a job with the same employer. His application was rejected because of the employer's policy of not re-employing workers who had been discharged for cause or had resigned in lieu of being discharged. The worker argued that this policy discriminated against him because of his record of having a disability or because he was regarded as being disabled. The company replied that the policy was not discriminatory because former drug users were treated the same as other employees who had been discharged for cause. The Court of Appeals for the Ninth Circuit held the employer's policy, as applied to rehabilitated drug users, violated the Disability Act. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030 (9th Cir. 2002).

One might be thinking that the employer's policy had a disparate impact on disabled workers. *Raytheon* will not address this possibility, however, because the plaintiff failed to plead disparate impact.

2. Reverse Discrimination: Age Discrimination in Employment Act

General Dynamics Land Systems v. Cline, No. 02-1080

Does the Age Discrimination in Employment Act prohibit reverse discrimination? A collective bargaining agreement provided that the employer was not responsible to pay the full cost of medical insurance for employees when they retired except for employees aged 50 and older on a certain date. The class of employees aged 40 to 49 as of that date sued, claiming age discrimination. The Court of Appeals for the Sixth Circuit held the plaintiffs had stated a claim on which relief could be granted. *Cline v. General Dynamics Land Systems*, 296 F.3d 466 (6th Cir. 2002). This decision created a conflict in the circuits, as the First and Seventh Circuits had held that the Age Act does not support a claim of reverse discrimination. *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992).

3. Limitations Period: 42 U.S.C. § 1981(b)

Jones v. R.R. Donnelley & Sons, No. 02-1205

What is the limitations period for claims arising under the amendments to 42 U.S.C. § 1981 enacted by the Civil Rights Act of 1991? In *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), the Supreme Court held that section 1981 prohibited racial discrimination only regarding the formation of contracts and access to the legal process concerning the formation of contracts. Section 101 of the Civil Rights Act of 1991 amended section 1981 to broaden its coverage to include the performance, modification, and termination of contracts. Plaintiffs sued their employer under section 1981 for discriminatory transfers and terminations and a racially hostile work environment. Per *Patterson*, these claims were not cognizable before the 1991 amendment. The employer moved to dismiss the claims as untimely. Section 1981 itself contains no limitations period. In the past, the courts applied the appropriate limitations period of the forum state. Using this limit, the plaintiffs' claim was untimely. However, 28 U.S.C. § 1658 provides a four-year limitations period for all actions arising under federal statutes enacted after December 1, 1990. Plaintiffs' claim was timely under this limit. The Court of Appeals held that the claim arose under a statute enacted before 1990 and was therefore time-barred. *Jones v. R.R. Donnelley & Sons*, 305 F.3d 717 (7th Cir. 2002). This decision accorded with the decisions of the Third and Eighth Circuits in *Zubi v. AT&T*, 219 F.3d 220 (3d Cir. 2000) and *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001), but conflicted with the decision of the Tenth Circuit in *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (10th Cir. 2002).

II. Decisions of the New York State Court of Appeals

1. Vacation of Arbitration Awards: N.Y. Public Authorities Law § 1204(15)

New York City Transit Authority v. Transport Workers Union, 99 N.Y.2d 1 (2002)

A subway train operator was discharged for forgetting to set a hand brake, and a bus driver was discharged for injuring a pedestrian. Their union grieved both discharges. The arbitrators ruled that discharge was too severe a penalty in each case. The train operator was demoted and reinstated without back pay; the bus driver was reinstated without back pay. The employers brought proceedings to vacate the arbitration awards, arguing that New York Public Authorities Law § 1204(15) required them, in the exercise of their responsibility to manage transportation services, automatically to dismiss employees who violated safety rules. The union cross petitioned to confirm the awards. In the train operator's case, the Supreme Court agreed with the union and confirmed the award. In the bus driver's case, the Supreme Court agreed with the employer and vacated the award of reinstatement with demotion. The Appellate Division ruled for the employers in each case. The Court of Appeals reversed. It held that neither section 1204(15) nor public policy required automatic discharge.

2. Stay of Arbitration: CPLR Article 75

In re Arbitration Between the City of Johnstown and the Johnstown Police Benevolent Ass'n, 99 N.Y.2d 273 (2002)

A contract between a city and a police union provided for the calculation of some employees' benefits under a certain statute. When the statute was amended, the parties disagreed on how the amendment affected the contract, and the union demanded arbitration. The city petitioned to stay arbitration; the Supreme Court granted the stay, but the Appellate Division reversed and dismissed the petition. The Court of Appeals affirmed. Nothing in the state's constitution, statutes, or public policy prohibited arbitration of the issue. As to whether the grievance was arbitrable under the contract, the court's task was merely to determine whether a reasonable relationship existed between the subject matter of the dispute and the subject matter of the contract. The contract dealt with compensation, and therefore the dispute was arbitrable.

3. Establishing a Residency Requirement: N.Y. Civil Service Law §§ 20, 23(4-a)

Trager v. Kampe, 99 N.Y.2d 361 (2003)

The Nassau County Civil Service Commission promulgated Rule X, setting forth residence requirements for positions in county government, except that members of the police force would be governed by the requirements of the Public Officers Law. Neither Rule X nor the Public Officers Law imposed a residency requirement on candidates for the police officer examination. Thereafter, the commission published a notice for examination for police officer. The notice contained a residency requirement. A man who did not satisfy the requirement in the notice took the examination, passed, and was subjected to a background check. Upon discovering that he did not satisfy the residency requirement in the notice, the commission disqualified him, and he sued. The Supreme Court ruled for the county; the Appellate Division ruled for the man, as did the Court of Appeals. The residency requirement contained only in the notice of examination was invalid under Civil Service Law § 23(4-a), also under section 20, which requires a public hearing.

4. Spousal Waiver: Employee Retirement Income Security Act of 1974; Retirement Equity Act of 1984

Silber v. Silber, 99 N.Y.2d 395 (2003)

A husband designated his wife Barbara as the primary beneficiary of his pension plan; if he died before retiring, Barbara was to receive the full death benefit. Then they divorced. The divorce decree awarded Barbara half of the death benefit, and in 1993 the man filed an appropriate change-of-beneficiary form with the pension plan. The man married another woman, also named Barbara (surely a wise decision, as he guaranteed that he would not utter the wrong name at an inopportune moment) and changed the beneficiary designation so that Barbara No. 1 would receive half of the death benefit and Barbara No. 2 would receive the other half. A few years later, Barbara No. 1 asked the man to create separate annuities for her, thereby giving her immediate access to her half of the death benefit. He agreed and stipulated to a qualified domestic relations order (QDRO) under which No. 1 took ownership of the new annuities and he assumed sole ownership of the remainder in the pension fund. By its terms, the order superceded all prior agreements and orders, and No. 1 waived her rights to the remainder in the pension fund. Both parties and their attorneys signed the order. The man sent a copy of the order to his pension plan, but died before filing an appropriate change-of-beneficiary form. The pension plan paid half the remaining death benefit to No. 2, but withheld the other half because No. 1 claimed it on the basis of the beneficiary form filed in 1993. The parties went to court. The Supreme Court ruled in favor of No. 1, but the Appellate Division ruled in favor of No. 2. The Court of Appeals affirmed the Appellate Division. A QDRO may serve as a document of a pension plan that changes the beneficiary designation. Agreeing with the majority of circuits of the federal circuit courts, the Court of Appeals held that the validity of a waiver of rights should be judged by the common law standard: the waiver must be explicit, voluntary, and made in good faith. No. 1's waiver satisfied this standard, so No. 2 was entitled to the second half of the remaining death benefit.

5. Demolishing or Altering a Building: N.Y. Labor Law § 241(1)

Panek v. County of Albany, 99 N.Y.2d 452 (2003)

New York Labor Law § 241(1) requires contractors and owners in the erection, demolition, repairing, or altering of a building to furnish scaffolding, ladders, etc. that give workers proper protection. Plaintiff sued under this section after he fell from a ladder while salvaging equipment from a building that was scheduled to be demolished. The plaintiff moved for summary judgment on section 241(1) liability. The defendant cross moved for summary judgment, arguing that the plaintiff was not protected by section 241(1) because removal of the equipment was not part of the demolition project, for which a separate contract had been let, and that salvaging the equipment was not an alteration of the structure. The Supreme Court held that the plaintiff was not involved in demolishing the structure, but was involved in altering it, and so granted the plaintiff's motion and denied the defendant's. The Appellate Division reversed; it found the plaintiff was involved in neither demolition nor alteration. The Court of Appeals reversed and reinstated the order of the Supreme Court. The high Court concurred that the plaintiff was not demolishing the building; a third party was on tap to do that after the plaintiff finished removing the equipment. But the plaintiff was altering the building. Altering under section 241(1) means making a significant physical change, as distinguished from routine activities such as maintenance and decoration. The plaintiff was engaged in making a significant change to the building; that it was to be demolished thereafter was irrelevant.

6. Unjust Dismissal, Common Law Employment at Will: Education Law § 6509(9); Rules of the Board of Regents § 29.1(b)(8)

Horne v. The New York Times, 100 N.Y.2d 85 (2003)

A physician was employed at will by a company as its associate medical director. Her duties included providing medical care to other employees and monitoring their workers' compensation claims. Believing that medical ethics required her to protect her patients' confidential information, she consulted the state Department of Health, and then refused to divulge patients' information to the legal and human resource departments of the company without the employees' consent. Her position was eliminated, and she sued, alleging that the true reason for eliminating her position was her refusal to violate her patients' confidentiality. The company moved to dismiss the complaint. The Supreme Court denied the motion, and the Appellate Division affirmed. The Court of Appeals reversed. It said that the common law rule should be changed only by the legislature; an employer may discharge at will, absent a constitutionally impermissible purpose, a statutory proscription, a covenant implied in law, or an express limitation in an individual contract of employment. *Wieder v. Skala*, 80 N.Y.2d 628 (1992), was distinguished. An associate in a law firm alleged he was discharged for asking the partners to report another associate for misconduct to the disciplinary committee. In deciding whether to sustain the dismissal of his complaint, the Court of Appeals rejected his argument that public policy warranted recognition of a tort of abusive discharge, but accepted his argument based on breach of contract. His position was distinguishable from the accountant in *Sabetay v. Sterling Drug*, 69 N.Y.2d 329 (1987), who asserted he was dismissed for refusing to participate in financial activities that were illegal, unethical, and violated the employer's personnel policy manual and accounting code. Whereas the accountant provided professional services in furtherance of the company's objectives, the lawyer in *Wieder* provided professional services as a member of the bar to the firm's clients. A lawyer's duties as an attorney and as a member of a firm are inseparable. Also, the ethical rule at issue was indispensable to the self-regulation of attorneys, which the courts understand well because they oversee it. Indeed, if the plaintiff had failed to report the other associate, the plaintiff risked disbarment. These factors justified finding an implied-in-law obligation in the contract of employment between the plaintiff and his law firm that the firm would not discourage his compliance with the ethical obligations of the profession. The doctor in the case at bar, however, was not like the lawyer in *Wieder*. The doctor provided medical services on behalf of her employer. When she assessed work-related injuries, she was furthering the goals of the company. Unlike the lawyer, for whom giving legal services to clients was the core of his employment, the doctor's treatment of patients was not the core of her job; therefore, the ethical standards which the company required her to violate were not central to the discharge of her duties to her employer. Also, the physician-patient privilege is not a self-policing rule that is crucial to the self-regulation of the profession. In the absence of a common professional enterprise between the doctor and her employer, the provisions of Education Law § 6509(9) and section 29.1(b)(8) of the Rules of the Board of Regents do not impose any obligations on the company or the doctor as its employee.

7. Unemployment Insurance for Out-of-state Telecommuters: Labor Code § 511

In re Allen, 100 N.Y.2d 282 (2003)

The claimant telecommuted. The employer's office was in New York; she lived in Florida. The employer paid for a telephone line to her home and supplied her with a computer, software, and access to its mainframe computer in New York. She worked regular business hours, submitted time sheets and requests for vacation time to New York, and called New York to ask for sick leave or permission to begin work late or leave early. She filed weekly status reports in New York. The employer decided to end this arrangement and offered her work in the New York office, but she declined. Her application for unemployment insurance in Florida was denied on the ground that she had voluntarily quit without good cause. Following lower-level determinations, her application for unemployment insurance in New York was denied by the Unemployment Insurance Appeal Board because her employment had been in Florida; she had not worked in New York under Labor Law § 511 because she discharged her responsibilities entirely outside the state. The Appellate Department affirmed, as did the Court of Appeals. Section 511 defines "employment" as service within the state, or service both within and without the state if the service is localized in the state. In the latter event, the out-of-state service must be incidental to the in-state service, for example, be temporary or consist of isolated transactions. The Commissioner found that the claimant's service was localized in Florida. This finding was correct because physical presence determines localization for purposes of applying section 511 to an interstate telecommuter.

8. Pregnancy Discrimination: Executive Law § 296(1)

Mittl v. N.Y. State Div. of Human Rights, 2003 WL 21285212, 2003 N.Y. Lexis 1313 (2003)

The employer discharged his secretary because she became pregnant and his wife thought he was the father. The secretary complained to the Division of Human Rights, alleging sex discrimination based on pregnancy; the Commissioner held a hearing, found the employer had violated Executive Law § 296(1), and ordered back pay and damages for anguish. The employer sued to annul the Commissioner's order; the secretary cross petitioned for enforcement. The Appellate Division decided there had been no sex discrimination, arguing that the employer had been forced to choose between keeping his secretary and saving his marriage. The Court of Appeals held the Appellate Division had applied an improper standard. Judicial review of a decision after a hearing is limited to whether substantial evidence supports the agency's

determination. Substantial evidence supported the Commissioner’s decision that the employer’s reason for discharging the secretary was her pregnancy. For example, the employer said to the secretary that her pregnancy was becoming a problem, and when she asked for time off for a prenatal appointment, the employer’s wife objected that the secretary had too many appointments. The employer offered evidence of a non-discriminatory reason, but substantial evidence supported the Commissioner’s conclusion that this evidence was false. For example, the employer conceded that he was satisfied with the secretary’s job performance (one trusts the Commissioner exercised sufficient restraint to refrain from asking precisely which performance the employer had in mind) and no records supported the assertion that she had an attendance problem. Cases like *Kahn v. Objective Solutions, Int’l*, 86 F. Supp. 2d 377 (S.D.N.Y. 2001), in which claims of sex discrimination were rejected where the plaintiffs were terminated in the aftermath of consensual sexual relationships with their employers, were inapposite because neither party in the case at bar contended that the termination was connected to a sexual relationship.

III. Amendments to the Federal Rules of Civil Procedure Regarding Class Actions

On March 27, 2003, Chief Justice Rehnquist submitted to Congress a number of amendments to the Federal Rules of Civil Procedure.² Among them were amendments to Rule 23, which pertains to class actions. Although all of the amendments to Rule 23 are important, some deserve particular attention.

Before addressing the amendments, we must note that no change to Rule 23(b) is proposed.³ The three categories of class actions will remain: (b)(1) separate actions would create the risk of inconsistent adjudications for the defendant, or adjudication of one plaintiff’s claim would impair the ability of others to protect their interests; (b)(2) the defendant has acted on grounds applicable to the class; (b)(3) common questions of law or fact predominate over individual questions.

| Timing of Certification | |
|--|---|
| At Present | Amendment |
| 23(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. . . . | 23(c)(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action. |

The amendment pertains to when certification of the class occurs. At present, certification occurs “as soon as practicable”; the amendment changes the time to “an early practicable time.” The change was made in part because, for good reasons, the courts have not been certifying classes “as soon as practicable.” One good reason is that time may be needed to gather necessary information. Discovery in aid of certification may include information on the issues for trial. Some courts are requiring before certification that the plaintiff present a trial plan that describes issues likely to arise at trial. Another good reason is that the defendant may prefer to win dismissal or summary judgment before certification of the class. A third reason is that time may be needed to gather information regarding whether to appoint the named plaintiff’s attorney as counsel for the class. Thus, this amendment will allow courts to take a flexible approach to certifying classes, in contrast to the current rule’s emphasis on dispatch.

| Conditional Certification and Cut-off to Amend Certification | |
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| At Present | Amendment |
| 23(c)(1) . . . An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. | 23(c)(1)(C) An order under Rule 23(c)(1) may be altered or amended before final judgment. |

This amendment contains two changes. First, it deletes the present text allowing conditional certification. The new rule is intended to make clear that a court that is not satisfied that the requirements of class certification have been met should refuse to certify the class until the requirements have been met. Second, the amendment changes the cut-off point for amending class certification from “before the decision on the merits” to “before final judgment.” The reason for this change is an ambiguity in the present text. For example, it is common to divide class actions into liability and remedial stages. The present wording “before decision on the merits” could be construed to disallow amendment to the class certification after the conclusion of the liability phase of the action, though it may become apparent in the remedial phase that

the certification should be amended. The new wording "before final judgment" allows appropriate flexibility. (Note that if a class certified under Rule 23(b)(3) is amended to include members who have not been given notice and the chance to request exclusion, such notice must be directed to the new class members.)

| Notice to (b)(1) and (b)(2) Classes | |
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| At Present | Amendment |
| <p>23(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances. . . .</p> <p>23(d)(2) . . . the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given. . . .</p> | <p>23(c)(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.</p> |

The existing rule says nothing about notice to members of (b)(1) and (b)(2) classes. Implicit warrant for such notice exists in Rule 23(d)(2); the amendment makes this warrant explicit. A benefit of notice would be facilitation of the opportunity of members of the class to participate in the action. Notice to members of (b)(2) and (b)(3) classes will not be required, however. One reason for not requiring notice would be that, in an action in which damages are not sought, the cost of notice might overwhelm a public-interest group with modest resources. In deciding whether to require notice, the court should weigh the risk that the action would be abandoned if notice were required against the benefit that notice would produce in the particular case. If the court opts to require notice, it need not be the same as notice in (b)(3) cases; informal methods of giving notice may suffice, for example, posting notice in a place visited by many members of the class. (Of course, if a 23(b)(3) class is certified in conjunction with a (b)(2) class, notice must be given to the (b)(3) class.)

| Plain, Easily Understood Language | |
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| At Present | Amendment |
| <p>23(c)(2) . . . The notice shall advise each member that</p> | <p>23(c)(2)(B) . . . The notice must concisely and clearly state in plain, easily understood language. . . .</p> |

That members of a class be provided with notice they can understand, which has been aspirational in the past, is now required.

| Settlement: Approval and Notice | |
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| At Present | Amendment |
| <p>23(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.</p> | <p>23(e)(1)</p> <p>(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.</p> <p>(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.</p> <p>(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.</p> |

The existing rule is ambiguous with respect to whether the court must approve a settlement, voluntary dismissal, or compromise of a class claim (hereafter, "settlement") that resolves only the claims of the class representatives, but does not bind the class. Some courts have held that the existing rule requires court approval of this sort of settlement, and other courts have held otherwise. The amendment makes clear that court approval is needed only if the settlement would bind the class. Such settlements can occur before the class is certified by the court.

The amendment states that notice of settlement is not required if the settlement binds only the class representatives as individuals. The amendment preserves the present rule that when a settlement binds the class, notice to the class is required. Notice is required whether settlement follows certification of the class, or whether certification and settlement occur simultaneously. Notice must be reasonable; thus, in some cases notice to every individual in the class may not be required.

When required and appropriate, notice of settlement may need to conform to the same requirements as notice of class certification. Individual notice would be appropriate, for example, if members of the class are required to take action, such as filing claims, or are permitted by the court to opt out of the settlement.

The amendment mandates the common practice of holding a hearing as part of approving a settlement.

The standard a court should apply in deciding whether to approve a settlement is whether it is "fair, reasonable, and adequate." For a review of factors to take into account, the Committee Note refers the bench and bar to *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283 316–324 (3d Cir. 1998).

| Disclosure of Side Agreements Affecting Settlement | |
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| At Present | Amendment 23(e)(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. |

Under the present Rule 23(e),⁴ parties seeking to settle a class action are required to disclose to the court all of the terms of the settlement agreement. The amendment preserves this requirement, and adds the additional requirement that the parties identify any side agreement that may have influenced the terms of the settlement, such as trading advantages to the class in return for advantages to other persons. This disclosure is not meant to authorize additional discovery either by the parties or by objectors to the settlement. Nevertheless, the court may direct the parties to provide a summary or a copy of any side agreement that has been identified. The court may also require production of any agreement not identified by the parties if the court considers the document relevant to review of the settlement agreement. The court may proceed in steps, for example, first calling for a summary of a side agreement and then, if necessary, asking for a copy of the side agreement. The court is expected to heed the parties' legitimate interest in confidentiality, which may militate for protection of some information from general disclosure; the court should also allow parties to claim protection for work product and the like.

| Second Chance to Opt Out | |
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| At Present | Amendment 23(e)(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. |

The amendment allows a court to condition approval of the settlement of (b)(3) class actions (but not of (b)(1) or (b)(2) actions) on a second notice to the class, allowing members another chance to withdraw from the class. Such a

notice would allow a member to base one's decision on the terms of the settlement. Exactly this opportunity is afforded to individual litigants, and also to members of a class when the notices of certification of the class and of the settlement of the action are combined. If settlement appears imminent, a court might choose to economize by delaying notice of certification so that it and the notice of settlement may be combined. Many factors may influence the court in deciding whether to require that members be afforded a second chance to opt out, including whether the parties have agreed to it and whether significant new information has become available since the first notice. The court may guard against misuse of the second notice, such as by requiring that class members who elect exclusion in the second round be bound by rulings on the merits made before the settlement was approved.

Criteria for Appointment of Class Counsel

| At Present | Amendment |
|-------------------|---|
| | <p>23(g)(1)</p> <p>(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.</p> <p>(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.</p> <p>(C) In appointing class counsel, the court</p> <p>(i) must consider:</p> <ul style="list-style-type: none"> • the work counsel has done in identifying or investigating potential claims in the action, • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, • counsel's knowledge of the applicable law, and • the resources counsel will commit to representing the class <p>(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;</p> <p>(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and</p> <p>(iv) may make further orders in connection with appointment.</p> |

The text of the amendment is new, but most of its content is not. Under the existing rules, courts judge the competence of counsel under Rule 23(a)(4), which allows certification of a class "only if . . . the representative parties will fairly and adequately protect the interests of the class." The amendment seeks to distill and make explicit the best practices from years of experience. For example, the amendment states that it does not override specific procedures in existing statutes, such as the Private Securities Litigation Reform Act of 1995, and that counsel is obligated to represent the interests of the entire class as opposed to the interests of any individual members of the class. Nevertheless, some rules are left implicit. For example, it should be understood class counsel must be appointed for each subclass that has divergent interests, and that class representatives may not discharge counsel at will, or command counsel to accept or reject a proposal of settlement.

The amendment specifies criteria a court must use in deciding whether a given attorney may be appointed counsel to a class. The court must consider the work the attorney has put into identifying and investigating class claims, the attor-

ney's experience in similar litigation, the attorney's knowledge of the relevant law, and the resources the attorney would commit to the case. Naturally, an attorney's application for appointment as class counsel will address these criteria. The criteria are not exclusive, however, and the court may take other considerations into account. The amendment identifies one such optional criterion, namely, how attorney's fees will be handled. Another optional criterion could be how parallel litigation might be coordinated or consolidated with the instant action. All criteria should be weighed, and no single factor should determine a ruling. For example, counsel must be prepared to commit sufficient resources to the case, but the court should not limit consideration to attorneys with the greatest resources.

The amendment allows the court to make orders in connection with the appointment of counsel. One such order could be terms for the award of attorney's fees. Another order could pertain to information that is relevant not only to appointment of class counsel, but also to adversarial preparation of the case; the court could shield such information from disclosure to other parties.

If no attorney who has applied to represent the class would be satisfactory counsel, the court may deny certification of the class, reject all applications, recommend modification of an application, invite new applications, or make any other appropriate order.

| Procedures for Appointing Class Counsel | |
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| At Present | Amendment |
| | <p>23(g)(2)</p> <p>(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.</p> <p>(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the best able to represent the interests of the class.</p> <p>(C) The order appointing class counsel may include provisions about the award of attorney fees and nontaxable costs under Rule 23(h).</p> |

The amendment specifies the procedures for appointing counsel to the class. Counsel may be an individual attorney, an entire firm, or numerous attorneys who are not otherwise affiliated.

The interests of a putative class must be represented before the class is certified and counsel for the class is formally appointed. The motion to certify the class must be prepared, and for this purpose some discovery may be necessary; also, motions must be responded to, or may be made, before certification, and settlement may be discussed as well. Ordinarily, the attorney who filed the action will do such work, and it is not necessary that the court designate this attorney as interim counsel. But in some circumstances, for example, rivalry between counsel, the court may need to designate interim counsel. Whether or not designated as interim counsel, an attorney who represents a putative class must act in the best interests of the class; for example, an attorney who negotiates a pre-certification settlement must seek one that is fair, reasonable, and adequate for the class.

A court may defer certifying a class and appointing counsel for a reasonable period, for example, to allow competing applications to serve as class counsel when more than one class action has been filed, or to allow an additional application to be filed if the initial applicant has been found inadequate.

If only one attorney applies to be class counsel, naturally the attorney must satisfy the criteria of Rule 23(g)(1). If more than one adequate attorney applies, the court should compare the strengths of each applicant and choose the one best able to represent the class. The existence of an attorney-client relationship between an applicant and a proposed class representative may be relevant in this regard.

The order appointing counsel may include provisions regarding attorney's fees and nontaxable costs.

Attorney's Fees

At Present

Amendment

23(h) In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

At present, attorney's fees in class actions are handled under Rule 54(d)(2),⁵ but that rule does not address the specific issues that arise in class actions; the amendment is directed to those issues. The amendment applies both before and after a class is certified; thus, the amendment controls cases in which a motion for certification of the class is submitted simultaneously with a proposal for settlement. The amendment applies to all awards of attorney's fees, not merely to the award to class counsel; for example, the amendment applies to the award of fees to other counsel whose work has benefited the class, such as an attorney who acted for the class before it was certified but was not appointed class counsel.

The amendment does not create new grounds for an award of attorney's fees or nontaxable costs. The amendment provides for reasonable fees, which are customarily awarded under the common-fund theory, but does not take a position on whether the court should apply the "lodestar method" or the "percentage method" of calculating a reasonable fee. The amendment does contemplate that, in determining a reasonable fee, the court will take into account the actual benefit achieved for the class. In settlements that provide for future payments to the class, the court may decide to defer some portion of the fee award until actual payments to the class are known. A reasonable fee may be appropriate when relief does not take the form of a monetary benefit to the class, for example, an injunction or a declaration in a civil rights case; in this regard, see *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989).

An order from the court regarding attorney's fees, issued in connection with the appointment of class counsel under Rule 23(g), will, of course, have a strong influence on the award of fees under this amendment. Agreements among the parties regarding fees may also be influential. Fees charged by class counsel or other attorneys for representing individual claimants or objectors may be taken into account.

The amendment specifies that attorney's fees may be awarded only on motion under Rule 54(d)(2), which invokes the provisions for the timing of appeal in Rule 58 and Appellate Rule 4. The amendment controls the disposition of fee motions in class actions; Rule 54(d)(2) controls matters not addressed in the amendment. The court should direct when the motion for fees must be filed. In cases that are proposed to be settled, the fee motion should be made in time for information about fees to be included in the notice to the class about the proposed settlement. Notice of a motion for fees must be "directed to the class in a reasonable manner." This phrase was used to make clear that individual service of notice may not be necessary in every case.

Any party with an interest may object to a motion for fees. Thus, any member of the class, as well as any party from whom payment is sought, may object, but a non-settling defendant may not object. The court is expected to set a date by which objections are due. The court may allow limited discovery relevant to an objection, but the court should weigh the need for the information against the cost and delay attendant on discovery. If the material submitted in support of the motion for fees is thorough, the burden should fall on the objector to justify discovery.

The amendment permits, but does not require, a hearing on fees. In actions that are settled, a hearing on the motion for fees might be combined with proceedings under Rule 23(e). Taking into account cost and delay, the court may submit issues regarding fees to a special master or magistrate judge. The amendment requires findings and conclusions of law under Rule 52(a).

Endnotes

1. Not every decision which might bear on an issue in labor and employment law is discussed herein. Some such cases, plus most of the cases mentioned below, are discussed in Maria O'Brien Hylton, *The Supreme Court's Labor and Employment Decisions: 2002-2003*, a draft copy of which is available at <http://www.abanet.org/labor/hyltonam03.pdf>.
2. The text of the amendments appears in 123 S. Ct. Ct. R-1 to Ct. R-26 (2003). Our comments on the amendments are drawn from the excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Dec. 11, 2002, *id.* at Ct. R.-27 to Ct. R.-48, and the committee notes following proposed changes to the Federal Rules of Civil Procedure, submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, May 20, 2002, *id.* at Ct. R.-46 to Ct. R.-140.
3. Rule 23(b) provides that an action may be maintained as class action if—
 - (b)(1) (A) separate actions would create a risk of inconsistent adjudications that would establish incompatible standards for the defendant, or (B) adjudication of one plaintiff's claim would dispose of the claims of other persons not parties to the action or impair their ability to protect their interests;
 - (b)(2) the defendant has acted on grounds generally applicable to the class, so that declaratory or injunctive relief would be appropriate for the whole class; or
 - (b)(3) questions of law or fact common to the class predominate over questions affecting only individuals

Sections (b)(2) and (b)(3) are used in claims of employment discrimination.

4. Rule 23(3) provides, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."
5. Rule 54(d)(2) provides:
 - (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
 - (B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.
 - (C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).
 - (D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
 - (E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.

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This report was presented to the Section at the recent Fall Meeting in Ottawa.