The Supreme Court's Labor and Employment Law Jurisprudence, 1999-2001

David L. Gregory

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INTRODUCTION

The millennium is vested with enormous significance. By definition, the millennial transition occurs but once every thousand years. The United States Supreme Court has been with us for little more than one-fifth of the past millennium, while labor and employment have been inherent components of the human condition from the inception of humanity.1 The evolving labor and employment law jurisprudence of the United States Supreme Court has been with us from the early years of the Court. Indeed, Marbury v. Madison,2 the single most famous3 case in

* David L. Gregory, Professor of Law, St. John's University. gregoryd@stjohns.edu. B.A. cum laude, 1973, The Catholic University of America; M.B.A., 1977 Wayne State University; J.D. magna cum laude, 1980, University of Detroit; LL.M., 1982, Yale University; J.S.D., 1987, Yale University. St. John’s law students Neil Dudich, Maura Keating, Jennifer Marciano, and Darren Mogil provided very helpful research assistance. St. John’s provided a faculty summer research grant.

3. By any measure, Marbury is the single best known, among lawyers, constitutional law academics, and judges, of all of the Supreme Court’s decisions. For commentary see for example, Dean Alfange, Jr., Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Tradi-
the Court’s history, in its often overlooked dimensions, was at least indirectly about employment—about whether Marbury would become employed as a justice of the peace.4

The present article is not nearly so millennial and majestic in its aspirations. It will, rather, critically examine the Court’s labor and employment law decisions, for the recently concluded 1999 Term—a Term which many commentators already surmise has been among the Court’s most significant in several decades.5 The labor and employment law decisions are part of the Court’s larger jurisprudential fabric which, like Marbury, also at least indirectly implicate issues of employment. For example, the Court decided that Dr. Carhart, and his like-minded medical doctor colleagues, could continue to pursue their chosen employment of performing partial-birth abortions without fear of criminal prosecution. Thus, from Marbury to Carhart, many of the Court’s decisions, while not directly about labor, have, indeed at least, implicated important questions of labor and employment.

The 1999 Term’s labor and employment decisions can be placed into two major groups. The most significant bloc involves issues of employment discrimination law. These decisions range from when a private organization can deny volunteer work opportunity to a person because of sexual preference,7 to substantial clarification of the scope of the prevaricating employer’s liability for employment discrimination,8 to the intersectionality of the Eleventh Amendment with federal employment discrimination law to preclude liability for states which, acting as employers, violate the federal Age Discrimination in Employment Act (ADEA) of 1967.

4. See id.
5. I will discuss the following 1999 Term decisions under the broadly understood umbrella of labor and employment law. Beck v. Prupis, 529 U.S. 494 (2000); Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000); Christensen v. Harris County, 120 S. Ct. 1655 (2000); Harris Trust v. Salomon Smith Barney, 120 S. Ct. 2185 (2000); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Pegram v. Herdrich, 120 S. Ct. 2143 (2000); Reeves v. Sanderson, 120 S. Ct. 2097 (2000). Although some of these decisions, such as Dale most especially, may not initially appear to be direct labor and employment law decisions, they do, just as Marbury, implicate labor and employment law themes.
The remaining cases of the 1999 Term span a much more heterogeneous spectrum, ranging from ERISA pension and benefit law, to severely limiting when the federal anti-organized crime racketeering law (RICO) can be invoked to contest employment termination.

Labor and employment law cases continue to represent somewhat less than one-fifth of the Court's annual case load, a relatively constant percentage each year for the past quarter century. In the 1999 Term, however, there was not a single labor management relations case per se. Thirty years ago, labor relations cases compromised three-quarters of the Court's labor and employment law decisions. The 2000 Term certiorari grants are thus far clustered primarily around themes of employment discrimination with alternative dispute resolution issues implicating more conventional labor management relations law. This article will conclude by offering some preliminary thoughts about possible ramifications from the 1999 Term, and from the pending labor and employment law decisions of the 2000 Term.

I. Employment Discrimination

A. Boy Scouts of America v. Dale

On June 28, 2000, the Supreme Court substantially strengthened the First Amendment associational prerogatives of private employers, and concomitantly weakened homosexual civil rights initiatives. Chief Justice Rehnquist, writing for the Court, gave great deference to the Boy Scouts of America's ("BSA") articulation of its mission as fundamentally antithetical to the inclusion of homosexuals among its volunteer Scout Leaders. The Court held unconstitutional the application of a New Jersey public accommodations law, which presumed to prohibit the BSA from denying membership and volunteer-employment to individuals based on their homosexual sexual orientation. The Court's decision was grounded on the BSA's First Amendment right of expressive association. Dale vitiated the New Jersey statute, and others like it, which attempted to provide legal recourse for individuals who were discriminated against in employment and related contexts on the basis of their homosexual status, a type of discrimination not directly prohibited by Title VII.

The BSA is a private, non-profit organization that strives to foster confidence, competence, patriotism and morality in boys and young men through a system of planned after-school activities such as camping, fishing and outdoor sur-

11. Id.
12. Id.
13. In the aftermath of Dale, several initiatives seek to deprive the BSA of public support, by withholding access to public premises and facilities. Kate Zernike, Scouts' Successful Ban on Gays Is Followed By Loss In Support, N.Y. TIMES August 29, 2000 at A1; Discrimination By The Scouts, N.Y. TIMES, September 3, 2000 at WK 10.
vival. The BSA is a large, national organization with a long history and tradition in America which is overseen by volunteer mentor Scout leaders. The BSA, in fact, is quintessential cultural Americana; what American doesn't know what a Boy Scout is? Dale, however, is also about what a Boy Scout leader cannot be: apparently a Boy Scout, and certainly a Boy Scout Leader, cannot be openly homosexual.

James Dale was a life-long Boy Scout, joining the organization as a Cub Scout at the age of eight, progressing through its increasingly challenging levels of honor and merit to attain the coveted, rare honor of Eagle Scout, and remaining with the BSA as a Scout Leader into adulthood. It was not until Dale entered college that he realized he was homosexual. This realization prompted his involvement with a campus group which offered support and friendship to other young homosexuals. Dale was interviewed by a local newspaper about the college support group. After the newspaper article was published, Dale received a letter from the BSA revoking his membership and, in essence, dismissing him from his volunteer position as Scout Leader. When Dale pressed the BSA for an explanation, he was informed by letter that the BSA "specifically forbid [s] membership to homosexuals."

Dale sued the BSA in New Jersey Superior Court, under the state's public accommodations statute and its common law. Summary judgment was granted in favor of the BSA. The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common law claim, but rejected the BSA's First Amendment claims, reversing and remanding. This decision was affirmed by the New Jersey Supreme Court, which cited the large size of the BSA, its inclusive purpose, its absence of a purely personal, private institutional nature, and the absence of information suggesting inclusion of Dale would prevent the BSA from carrying out its various purposes. The New Jersey Supreme Court rejected the BSA's expressive speech and intimate association arguments. Chief Justice Rehnquist's majority opinion for the Court, joined by Justices Scalia, O'Connor, Kennedy and Thomas, ruled in favor of the BSA. The Court emphasized the BSA's First Amendment freedom of association, and the correlative freedom not to associate. Chief Justice Rehnquist noted that these freedoms are not absolute, setting out the multi-part test for whether these federal constitut-

15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
21. Id.
22. Id.
24. Id.
25. Dale, 120 S. Ct. at 2446.
26. Id.
tional rights could be modified by the states: any state regulations must serve compelling state interests which are unrelated to the suppression of ideas, and which cannot be achieved through significantly less restrictive means.\textsuperscript{27}

The Court did not apply the three-part \textit{Jaycees}\textsuperscript{28} test.\textsuperscript{29} Rather, the Court employed another three part test: whether forced inclusion of Dale as a Scout Leader would significantly adversely affect the BSA's ability to advocate its institutional viewpoints; whether Dale's presence as a Scout Leader would significantly burden the BSA's desire not to legitimize or promote homosexual conduct; and, whether the application of New Jersey's public accommodations law runs afoul of the BSA's First Amendment freedom of expressive association.\textsuperscript{30} The Court answered all three questions in the affirmative.\textsuperscript{31} Consequently, New Jersey's public accommodations statute as applied was unconstitutional when measured against this federal constitutional law test\textsuperscript{32} The Court found that the New Jersey statute directly affects associational rights.\textsuperscript{33} Therefore, \textit{United States v. O'Brien},\textsuperscript{34} which involved a statute prohibiting the burning of draft cards having an incidental effect on protected symbolic speech, was not relevant here.

The Court took pains to emphasize that its decision was not influenced by the Justices' individual views as to whether homosexual conduct is morally right or wrong. Rather, the Court deferred substantially to the BSA's expressed mission: instilling "morally straight" and "clean" values in male youths.\textsuperscript{35} The Court accepted the BSA's characterization of its mission as inherently contrary to including homosexuals.\textsuperscript{36} Essentially, the Court took the BSA's word for it.

The Court also criticized New Jersey's public accommodations law as unduly broad, inappropriately applying to places which may not necessarily carry an invitation to the public, rather than just to physical places.\textsuperscript{37} The New Jersey Judiciary's expansion, over time, of the statutory meaning of "place of public accommodation" offended the BSA's First Amendment association right not to allow homosexuals in volunteer BSA employment.\textsuperscript{38}

Justice Stevens wrote the lengthy and bitter dissent, joined by Justices Souter, Ginsburg and Breyer.\textsuperscript{39} Justice Stevens faulted the majority for blind def-

\textsuperscript{28} Id. at 623. The test set forth in \textit{Jaycees} requires that to justify infringements upon the freedom of association by the state that: 1) such regulation causing infringement serve a compelling state interest, 2) such regulation be unrelated to the suppression of ideas, and 3) that the compelling state interest served cannot be achieved through means significantly less restrictive of associational freedoms. See id.
\textsuperscript{29} Dale, 120 S. Ct. at 2450-51.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 2452-53.
\textsuperscript{33} See id.
\textsuperscript{34} U.S. v. O'Brien, 391 U.S. 367 (1968).
\textsuperscript{35} Dale, 120 S. Ct. 2446 (2000).
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 2459.
ference to the BSA’s characterization of its mission. The dissenters do not believe that any organized form of opposition to homosexuality is a part of BSA activities or mission.

Justice Stevens pointed to *Roberts v. United States Jaycees* and *Board of Directors of Rotary Int’l v. Rotary Club* as precedent compelling the result that the BSA’s exclusionary policy is a violation of Dale’s Equal Protection and Due Process rights. It should not be enough, the dissent urged, that the BSA engage in some kind of expressive activity, or that it has openly adopted a membership policy which excludes homosexuals, or even that some connection between the expressive activity and the exclusionary policy has been articulated. The dissent urged that the appropriate test, drawn from an amalgam of expressive association cases, should be whether the mere inclusion of the individual would place a serious burden, affect in any significant way, or be a substantial restraint upon the organization’s shared, basic goals or its collective efforts to foster particular beliefs.

According to the dissent, the BSA could not meet this test. BSA’s legal arguments, according to the dissent, were a transparent sham to shield illegal discrimination. There was no evidence whatsoever that Dale had ever attempted to proselytize or practice homosexuality with the young scouts under his tutelage.

The dissent concluded by noting that notions of homosexuality, morality, tolerance, and acceptance have evolved, suggesting the law should also evolve.

Justice Souter dissented separately, joined by Justices Ginsburg and Breyer, and reminding Justice Stevens that the First Amendment rights of the BSA remain intact, whether or not they are in keeping with modern notions of homosexuality.

Although *Dale* is a First Amendment case not directly involving a for-profit employer/employee wage compensation relationship, it has obvious implications for conventional compensated employment settings. The New Jersey statute repudiated by the Court in *Dale* states, “All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . sexual orientation.”

State protection of this sort attempted to address the federal Title VII lacunae, since Title VII does not expressly protect individuals who are discriminated against in employment based on their sexual orientation. *Dale* repudiated this state law protection initiative, strengthening the First Amendment BSA association right to exclude homosexuals. Of course, not only the public accommoda-

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40. Id.
41. *Dale*, 120 S. Ct. at 2459.
42. 468 U.S. 609.
43. 481 U.S. 527.
44. *Dale*, 120 S. Ct. at 2468-2471.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
tions law of the state of New Jersey is subordinated to the BSA First Amendment expressive association right; but the public accommodations and, perhaps, human rights laws of other states are also rendered very tenuous, in so far as they may presume to protect homosexual association and rights in contested institutional association and employment contexts.

B. Reeves v. Sanderson Plumbing Products, Inc.

In Reeves, the Court clarified that the plaintiff employee can prevail in employment discrimination litigation by showing that the employer’s explanation for its adverse action against the employee was a lie. Even in the absence of concrete evidence of discrimination, proof that the employer’s explanation for its adverse conduct was not truthful may be sufficient proof of the employment discrimination itself, or can serve as the basis for an inference that discrimination was the underlying reason for the defendant employer’s adverse actions. Reeves thus provides plaintiffs with a much more viable evidentiary alternative than the former requirement that they must have actual proof of the employer’s discrimination. Workers can prevail without overt evidence of the employer’s intentional bias, and the plaintiffs no longer need to produce the proverbial “smoking gun,” to prove “pretext plus.” The Supreme Court thus resolved several important questions about the sufficiency of evidence in employment discrimination litigation. Following the McDonnell Douglas framework, the Court held that the prima facie case plus sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination without additional, independent evidence of discrimination.

Prior to Reeves, the Supreme Court had not squarely addressed whether the McDonnell Douglas framework, developed to assess claims brought under Title VII, also applied to ADEA actions. The parties did not dispute that the McDonnell Douglas framework is fully applicable in age discrimination litigation.

The employer contended that Reeves was fired due to his failure to maintain accurate attendance records, while Reeves demonstrated that the employer’s explanation was a pretext for unlawful age discrimination. Reeves introduced evidence that he accurately recorded the hours and attendance of the employees under his supervision, and that the employer demonstrated age-based animus against Reeves. Reeves was deemed by the Supreme Court to have met his burden of

53. Reeves, 120 S. Ct. 2097.
54. Id.
55. Id.
56. Id. at 2109.
58. Reeves, 120 S. Ct. 2097.
59. See id.
60. Id.
61. Id.
62. Id.
proving a prima facie case of discrimination, by introducing sufficient evidence for the jury to reject the employer's explanation and to find that the employer intentionally discriminated.63

In October 1995, Roger Reeves was 57 years old.64 He worked for Sander-son Plumbing Product, Inc. (SPP) for 40 years.65 SPP is a manufacturer of toilet seats and covers. Reeves worked in a department known as the "hinge room," and he supervised the "regular line."66 Joe Oswalt, in his mid-thirties, supervised the hinge room's "special line."67 Russell Caldwell, age 45, was the manager of the hinge room, and he supervised both Reeves and Oswalt.68 Reeves' duties included recording the attendance and hours of workers under his supervision, and reviewing a weekly report that listed the number of hours worked by each employee.69

During the summer of 1995, Caldwell told the director of manufacturing, Chesnut, that production in the hinge room was down and that the reason was that employees were often absent, or coming to work late and leaving early.70 Chesnut reviewed the monthly attendance reports, but found no problems.71 Thereafter, he ordered an audit of the hinge room's timesheets for the months of July, August, and September of 1995.72 At trial, Chesnut testified that the audit revealed many timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt.73 Following the audit, Chesnut, along with the vice president of human resources and the vice president of operations, recommended to the president of the company, Sandra Sanderson (Chesnut's wife) that Reeves and Caldwell be fired. Sanderson discharged Reeves and Caldwell in October of 1995.74

Reeves filed suit in the United States District Court for the Northern District of Mississippi in June, 1996.75 He alleged he was fired because of his age, in viola-
tion of the Age Discrimination in Employment Act of 1967 (ADEA).76 SPP con-
tended it fired Reeves because he failed to keep accurate attendance records.77 Reeves introduced evidence that he accurately recorded the attendance and hours of the employees under his supervision.78 He also produced evidence showing that Chesnut had "absolute power" within the company and, additionally, that Chesnut had demonstrated age-based animosity toward Reeves during their years of working together, and that Reeves was the subject of age-based pejorative comments

63. Id.
64. Reeves, 120 S. Ct. 2097.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Reeves, 120 S. Ct. 2111-12.
71. Id
72. Id.
73. Id.
74. Id.
75. Id.
76. Reeves, 120 S. Ct. 2113-14.
77. Id.
78. Id.
by the employer's agents.\textsuperscript{79}

On two occasions, the District Court denied SPP's motions for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.\textsuperscript{80} Under the court's jury charge, "if the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant."\textsuperscript{81} The jury found for Reeves, determining that SSP's age discrimination was willful.\textsuperscript{82} Accordingly, the District Court entered judgment in the amount of $70,000, with $35,000 in compensatory damages, and $35,000 in liquidated damages based on the jury's finding of the employer's willfulness.\textsuperscript{83} SPP renewed its motion for judgment as a matter of law and requested, in the alternative, a new trial.\textsuperscript{84} The court denied both motions by SPP, but granted Reeves' motion for front pay, and awarded him $28,490.80 in front pay for two years of lost income.\textsuperscript{85}

The Court of Appeals for the Fifth Circuit reversed, holding that Reeves had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination.\textsuperscript{86} The court reasoned that Chesnut's age-based disparaging comments about Reeves were not made in connection with Reeves' firing, that two of the people who decided to fire Reeves, including the president, were over age 50, and that there were several people working in management positions for the company who were over age 50.\textsuperscript{87} The court found that Reeves did not introduce sufficient evidence for a rational jury to find he was unlawfully fired because of his age.\textsuperscript{88}

Justice O'Connor delivered the opinion of the Court, reversing the Court of Appeals.\textsuperscript{89} The Court discussed the allocation of the burden of production and the order for the presentation of proof in discriminatory-treatment cases.\textsuperscript{90} First, the plaintiff has to establish a prima facie case of discrimination.\textsuperscript{91} The Court found that Reeves satisfied this burden by showing that at the time he was fired, he was a member of the class protected by the ADEA, in that he was over age 40, he was qualified for the position of Hinge Room supervisor, SPP fired him, and SPP subsequently hired three people in their thirties to fill Reeves' position.\textsuperscript{92}

The burden, therefore, shifted to SPP to "produce evidence that Reeves was rejected, or someone else was preferred, for a legitimate, nondiscriminatory rea-
son." 93 This, the Court stated, was a burden of production, not of persuasion; it cannot involve a credibility assessment. 94 The Court found that SPP met the burden by offering evidence sufficient to allow the jury to find that Reeves was fired because he failed to keep accurate attendance records. 95

The Court pointed out that, although intermediate evidentiary burdens shift back and forth, the ultimate burden of persuading the trier of fact that SPP intentionally discriminated remained with Reeves. 96 After SPP offered evidence of its purportedly nondiscriminatory reason for firing Reeves, Reeves must be given an opportunity to prove by a preponderance of the evidence that the reasons offered by SPP were not true reasons, but were only pretexts for unlawful discrimination. 97

The Court suggested that Reeves made a strong showing that the employer’s reasons for firing him were false. 98 Reeves produced evidence that he properly kept attendance records. 99 He also showed that the time clock, which the employees were supposed to use to clock in, was often broken.100 SPP’s allegation that Reeves did not report a worker when she was absent was shown to have occurred while Reeves was in the hospital, and another employee was in charge of supervising his employees.101

Reasoning that a plaintiff’s prima facie case, in combination with sufficient evidence to find that the employer’s asserted justification is false, allows the conclusion that the employer unlawfully discriminated. The Court found the Court of Appeals erred.102 The Court stated that disbelief of the employer’s reasons, along with the evidence put forth by Reeves in his prima facie case, were adequate to prove the employer’s intentional discrimination.103 Reeves, therefore, did not have to introduce additional, independent evidence of discrimination, beyond the prima facie evidence already introduced, in order to prove SPP’s unlawful discrimination.104

As to whether SPP was entitled to judgment as a matter of law, the Court held that the Court of Appeals also erred by finding for SPP.105 The Court of Appeals disregarded evidence supporting Reeves’ prima facie case and undermining SPP’s nondiscriminatory explanation; failed to draw all reasonable inferences in favor of Reeves; and, discredited Reeves’ evidence that Chesnut was the primary
discriminatory decision maker of SPP.\textsuperscript{106} Under Federal Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."\textsuperscript{107} By disregarding the crucial evidence, the Court reasoned that the Court of Appeals erred in its holding that SPP was entitled to judgment as a matter of law.\textsuperscript{108}

C. Kimel v. Florida Board of Regents

In January, 2000 the Supreme Court effectively eliminated the federal Age Discrimination in Employment Act of 1967 ("ADEA") as a viable cause of action, where the discriminatory actions are taken by state employers against state employees. The Court held that ADEA damages against defendant state employers are barred by the Eleventh Amendment. Kimel is thus an important part of a continuing effort on the part of the Court's conservative Justices to enhance states' rights.\textsuperscript{109}

Although the ADEA originally did not allow for suits for money damages in federal court against state employers, the Act was amended in 1974 to include states as defendants, changing the ADEA's definition of "employer" to include states and their agencies or instrumentalities.\textsuperscript{110} There were also amendments to the Fair Labor Standards Act ("FLSA"), which expanded the substantive requirements of the ADEA to the states.\textsuperscript{111}

The Eleventh Amendment of the Constitution provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state..."\textsuperscript{112} It has been interpreted to prohibit citizens of a particular state from bringing suit in federal court against their home state. There are two ways in which this strict state constitutional sovereignty may be relieved. First, the state may consent to be sued, and itself waive its immunity. Congress may also supersede a state's sovereign immunity, if two conditions are met.\textsuperscript{113} First, Congress

\begin{itemize}
  \item 106. Reeves, 120 S. Ct. at 2116-17.
  \item 107. Id.
  \item 108. Id.
  \item 111. In Alden v. Maine, the Court found the Eleventh Amendment barred FLSA suits by state employees agent state government as employees.
  \item 112. U.S. CONST. AMEND. XI.
\end{itemize}
must unequivocally express that it intends by statute to override state immunity.\[114\] Second, Congress must act pursuant to a valid exercise of its authority to abrogate immunity.\[115\] In *Seminole Tribe of Florida v. Florida*, the Court determined that such authority may be derived only from power given to Congress through Section 5 of the Fourteenth Amendment, which is the enforcement provision of the Equal Protection clause.\[116\]

In 1994, 1995 and 1996, three suits were commenced, naming state defendants under the ADEA.\[117\] Alabama was named in the first, by a plaintiff who had been an associate professor at a state university. Florida was named in the latter two, by employee plaintiffs within the prison and university systems. In all three cases, the states did not consent to suit, but, rather, defended by asserting that Congress did not intend to abrogate state sovereign immunity through the ADEA, and did not have authority to do so, thereby depriving the federal courts of jurisdiction over such state defendants. The district courts were not consistent in their decisions. Appeals were consolidated in the Eleventh Circuit which held that the

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114. Id.

In *MacPherson*, two associate professors at the public state University of Montevallo filed suit against their employer under the ADEA, alleging that the University had discriminated against them on the basis of their age. The professors were ages 57 and 58 at the time of the alleged discrimination. Specifically, the plaintiffs claimed that the University utilized an evaluation system that had a disparate impact on older faculty members. The plaintiffs were seeking injunctive relief, back pay, promotions to full professor, and compensatory and punitive damages. The University moved to dismiss on the basis of lack of subject matter jurisdiction. They claimed that since the University was an instrumentality of the State, the suit was barred by the Eleventh Amendment immunity. The District Court, finding that the ADEA did contain a clear statement of Congress' intent to abrogate the State's Eleventh Amendment immunity, also found, however, that Congress exceeded its constitutional authority under § 5 of the Fourteenth Amendment when extending the ADEA. The district court therefore granted the University's motion to dismiss.

In *Kimel*, a group of faculty and librarians formerly employed at Florida State University and Florida International University brought suit against the Florida Board of Regents. All of the plaintiffs were over the age of 40. They alleged that the Florida Board of Regents failed to require the two universities to allocate funds to provide previously agreed upon market adjustments to the salaries of eligible University employees. The plaintiffs claimed that the failure to allocate funds violated the ADEA because it had a disparate impact on the base pay of employees with a longer record of service, most of which were older employees. As relief, these plaintiffs sought back pay, liquidated damages, and permanent salary adjustments. The Florida Board of Regents moved to dismiss on the grounds of the State's Eleventh Amendment immunity. The District Court denied the motion, stating that the ADEA contained an expression by Congress of its intent to abrogate the States' immunity, and that Congress acted within its constitutional authority under the Fourteenth Amendment.

In *Dickson*, Dickson filed suit against his employer, the Florida Department of Corrections in the District Court for the Northern District of Florida. He claimed that the Department of Corrections declined to promote him because of his age, and because he had filed grievances with respect to past acts of age discrimination. Dickson sought injunctive relief, back pay, and compensatory and punitive damages. The Florida Department of Corrections moved to dismiss the suit on the basis of the State's immunity under the Eleventh Amendment. The District Court denied the motion, for the same reason as in *Kimel*.

The plaintiffs in *MacPherson*, along with the State defendants in *Kimel* and *Dickson*, appealed to the Court of Appeals for the Eleventh Circuit. The Court of Appeals combined the three cases and found, in a divided opinion, that the ADEA did not abrogate the States' Eleventh Amendment immunity.
ADEA did not abrogate the states' Eleventh Amendment immunity. Justice O'Connor wrote the 5-4 decision for the Court in Kimel. She began with the admonition that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States," and proceeded to apply the Seminole Tribe two part test. She first examined whether Congress unequivocally expressed its intent to abrogate state immunity. Finding that it had, she then examined "whether Congress acted pursuant to valid grant of constitutional authority." She found that it had not.

Justice O'Connor was joined in the first part of her determination by Chief Justice Rehnquist, and Justices Stevens, Scalia, Souter, Ginsburg and Breyer. Reading the ADEA as a whole, she found clear intent on the part of Congress to trump state immunity in the language of ADEA Section 216(b), which explicitly allows suits against the states by aggrieved individuals, and also in Section 203(x), which includes states and their agencies in the definition of "employer." To these seven Justices, the plain language of the ADEA made Congress' intention "unmistakably clear." Justice Thomas, joined by Justice Kennedy, dissented from this part of the opinion, calling it "a fiction," and expressing doubt as to whether Congress, in amending provisions of the FLSA, was fully aware of the implications for the ADEA. Statutory language that was enough for Justice O'Connor did not persuade Justices Thomas and Kennedy, for whom the definition sections of the ADEA and the FLSA were not unequivocal Congressional declarations of intent to abrogate state immunity.

The Court majority considered whether Congress acted within appropriate constitutional boundaries in drafting the ADEA so as to circumvent states' sovereign immunity. The only constitutional authority through which Congress could abrogate sovereign immunity was Section 5 of the Fourteenth Amendment, which is the enforcement mechanism for the Equal Protection clause of Section 1. Whether there is a congruence and proportionality between the evil addressed and the resulting statutory remedy is the test for whether Congress adhered to its power. The ADEA did not meet this test, according to the Court in Kimel.

Age discrimination, the Supreme Court held, does not violate the Equal Protection clause of the Fourteenth Amendment. Equal Protection is not violated because age is not an inherently suspect classification; there is not sufficient historical oppression of older Americans; no apparent political impotence; and, older people are not a classic discrete and insular minority. Everyone inexorably grows older. These are important statements by the Court, with ramifications far beyond the particulars of Kimel and the Eleventh Amendment.

119. Id. at 73.
120. Id.
121. Id. at 63.
122. Id. at 62.
123. Id.
125. Id. at 65-66.
For these reasons, Justice O'Connor, joined in this part by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, held that the ADEA is not a valid exercise of Congress' Section 5 enforcement power. Congress did not make detailed findings that any state engaged in widespread, unconstitutional age discrimination when the amendments to the ADEA purported to abrogate state immunity. Such findings, if there could in fact be any, perhaps could have saved the statute from its constitutional infirmity.

Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg and Breyer. He expressed distaste for the antiquated doctrine of sovereign immunity, which has its roots in the monarchy of England. Justice Stevens accused the majority of radical judicial activism, maintaining that it is not the job of the Court to act as ultimate champion of states' rights.

After Kimel, state employees may still invoke the age discrimination in employment law protections in their particular home state to protect and assert their rights in the state employer workplace, as Justice O'Connor pointed out at the close of her opinion for the Court. The federal Americans with Disabilities Act of 1990, although it was not mentioned in Kimel, may now be in jeopardy as a source of federal rights for state employees, on Eleventh Amendment similar grounds.

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126. Id. at 91.
127. Id. at 62.
128. Id.
129. Id.

Senior faculty members brought age discrimination claims against state university pursuant to the Age Discrimination in Employment Act ("ADEA"). In the prior opinion in this case, Coger v. Bd. of Regents, 154 F.3d 296, the Sixth Circuit had to decide whether states are immune from suits brought under the ADEA on the basis of Eleventh Amendment immunity. The Court concluded that Congress intended to abrogate the states' Eleventh Amendment immunity from suit, by Congress' enactment of the 1974 amendments to the ADEA, 29 U.S.C. 621 et seq., and that it had the authority to do so pursuant to Section 5 of the Fourteenth Amendment. The Court based this finding on the Supreme Court's states' rights federalism decision in Seminole Tribe v. Florida, 517 U.S. 44 (1996).

The Supreme Court granted certiorari, but then vacated and remanded the case in light of, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631(2000). In Kimel, the Court determined that although the ADEA does contain a clear statement of Congress' intent to abrogate the states' immunity, the abrogation exceeded Congress' authority under Section 5 of the Fourteenth Amendment. After considering Tennessee in light of Kimel, the Court of Appeals concluded that the faculty members could not maintain their ADEA suits against the University, a state employer. Accordingly, the prior judgment was vacated and the district court's order dismissing the plaintiff's ADEA action was affirmed.

In Board of Regents of Univ. of New Mex. v. Migneault, 158 F.3d 1131 (10th Cir. 1998) cert. granted, 120 S. Ct. 928 (2000), Joanne Migneault was an employee of the University of New Mexico from March 1982 through December 1994. She was placed on lay-off status in March 1994, and laid off in June 1994 after the University decided to eliminate her position as Assistant to the Director of the Center for Non-Invasive Diagnosis. In March 1994, Migneault applied for the position of Executive Secretary to the Vice President for Health Sciences at the University, which was two grades lower on the University personnel scale than her position at the Center for Non-Invasive Diagnosis and which paid a lower salary. Migneault was over forty years old at all relevant times. She was informed that she was not offered the job because she was overqualified, and because there was a feeling she would not be happy in the position. Migneault filed suit under the Age Discrimination in Employment Act (ADEA) with the Equal Opportunity Commission.

The University claimed that Migneault's suit was barred by Eleventh Amendment immunity and that Congress did not validly abrogate states' Eleventh Amendment immunity since the ADEA was
not enacted pursuant to the Fourteenth Amendment under which Congress derives its sole constitutional authority to abrogate. The Court of Appeals concluded that the district court correctly denied University's motion to dismiss on Eleventh Amendment grounds.

The University's argument was disposed of in light of the Court's opinion in *Hurd v. Pittsburg State University*, which stated that Congress validly abrogated Eleventh Amendment immunity by exercising its authority under the Fourteenth Amendment to enact the ADEA and by indicating its intent to abrogate. 105 F.3d 1540, 1546 (10th Cir. 1997). The Court of Appeals cited a prior opinion which stated “we are bound by the precedent of prior panels absent en banc reconsideration or a succeeding contrary decision by the Supreme Court.” See In Re Smith. 10 F.3d 723, 724 (10th Cir. 1993). The Court applied the reasoning of *City of Boeme v. Flores*, to conclude that Congress had the constitutional authority to enact the ADEA under § 5 of the Fourteenth Amendment, including the Equal Protection Clause. See 521 U.S. 507 (1997). The fact that age is not a suspect or quasi-suspect classification does not mean arbitrary age discrimination is not violative of the Equal Protection Clause. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

The Supreme Court, in a plurality opinion, has now resolved the split in the circuits, holding that while “the ADEA does contain a clear statement of Congress' intent to abrogate the states' immunity, the abrogation exceeded Congress' authority under § 5 of the Fourteenth Amendment.” See Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 634 (2000). Accordingly, the Court vacated the U.S. Court of Appeals decision in *Migneault*, and remanded for further consideration in light of *Kimel*. After considering the effect *Kimel* has on Migneault's suit, the Court of Appeals concluded that she cannot maintain her action against the University and the decision of the district court to deny the University Eleventh Amendment immunity was reversed.

Cooper v. New York State Office of Mental Health, 162 F.3d 770 (cert granted Board of Trustees of Univ. of Conn. v. Davis, 120 S. Ct. 928 (2000)) was brought by Ralph A. Cooper in November, 1993 against the New York State Office of Mental Health (OMH), alleging that OMH's decision to terminate his employment violated the ADEA. Two additional suits were commenced by plaintiffs, all alleging violation of the ADEA against their respective employers. The issue on appeal was whether the federal courts have subject matter jurisdiction over claims alleging violations of the ADEA, 29 U.S.C. §§ 621-634 (1994), brought by individuals against state agencies or officials. In all three cases, the district courts found that the Eleventh Amendment did not bar claims brought under the ADEA. The court of appeals affirmed, and appellants were granted certiorari to the United States Supreme Court.

The Eleventh Amendment provides the states with a substantial grant of immunity from suit in federal court. Congress may abrogate the states' sovereign immunity if it provides a "clear legislative statement" of its intent to abrogate and legislate pursuant to a valid exercise of its enforcement power under § 5 of the Fourteenth Amendment. See Seminole Tribe v. Florida, 537 U.S. 44 (1996).

The Court concluded that Congress satisfied both prongs of the test set forth in *Seminole Tribe* by enacting the 1974 amendments to the ADEA. The amendments extended coverage to include state employees, whereas when originally enacted in 1967, it only applied to private employers. While the definition of employer was amended, Congress did not alter the ADEA enforcement section. Appellants argued that since the language of § 626(c) remains unaltered, Congress did not express an unequivocal intent to abrogate the states' immunity from suit in federal court.

The Court found Congress' intent to abrogate is "unmistakably clear." The Court compared the ADEA with statutes in other cases. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Dellsnuth v. Muth, 491 U.S. 223 (1989). The Court acknowledged that because the States are exactly named as an "employer," they fall within the core group of potential defendants in ADEA actions. The fact that the States are not named again in the enforcement section does not make ambiguous otherwise clear statements of the intent to abrogate.

Further, the Court rejects appellants' argument that even if Congress intended to abrogate state sovereign immunity, it did not have the power to do so because the ADEA was not enacted pursuant § 5 of the Fourteenth Amendment. *California Public Employees' Retirement System v. Arnett*, 179 F.3d 690 (9th Cir. 1999), cert granted 120 S. Ct. 930 (2000), was brought by former police officers, correctional officers and other "safety employees" of the State of California and local agencies. They challenged the calculation of their disability benefits under the California Public Employees Retirement System ("PERS"). The Employees were all hired at age 40 or later, and retired from their jobs because of industrial disabilities.

If two individuals, one 25 and the other 45, were hired as police officers and after a year on the job were injured in the same accident, according to the California Public Employees' Retirement Law, Cal. Gov't Code § 21417, the younger employee would receive 50% of final monthly compensation as a disability benefit, while the older would receive only 20%, due solely to their ages. The Court of Appeals decided that such a plan constituted disparate treatment under the Age Discrimination in Employment Act ("ADEA"). 20 U.S.C. §§ 621-634, and reversed the district court's grant of motions to
A. Beck v. Prupis

The Supreme Court held that a person terminated from employment will not thereby usually have a RICO cause of action.\(^{131}\) Congress enacted RICO in 1970 for the purpose of "seek[ing] the eradication of organized crime in the United States."\(^{132}\) RICO seeks to eradicate organized crime by providing severe criminal penalties, and civil actions for any person "injured in business or property by reason of a violation of Section 1962."\(^{133}\)
Robert Beck is a former president, CEO, director, and shareholder of Southeastern Insurance Group (SIG). The respondents, Ronald Prupis, Leonard Bellezza, William Paulus, Jr., Ernest S. Sabato, Harry Olstein, Frederick C. Mezey, and Joseph S. Littenberg, are former senior officers and directors of SIG. SIG declared bankruptcy in 1990. Until this time, SIG had been an insurance company with three subsidiaries, each of which was involved in the business of writing surety bonds for construction contractors.

A number of directors from SIG, including the respondents, began engaging in acts of racketeering in 1987. The respondents created a corporation, Construction Performance Corporation, which demanded fees from contractors in exchange for qualifying them for surety bonds. The respondents also diverted corporate funds for personal use, and submitted false financial statements to regulators, shareholders, and creditors. Beck was unaware of the racketeering activities until 1988. Upon his discovery of the illegal activities, Beck contacted regulators regarding the company's false statements. At this point, the respondents devised a plan in which they would terminate Beck's employment. The respondents had an insurance consultant write a false report, suggesting that Beck had not performed his duties for SIG. The report was given to the SIG board of directors. The next day, the board dismissed Beck, pursuant to a clause in his employment contract stating that Beck could be fired for an "inability or a substantial failure to perform [his] material duties."

Beck sued the respondents in, inter alia, a civil RICO cause of action. Beck claimed that the respondents used income derived from a pattern of racketeering activity to establish an enterprise, in violation of RICO § 1962(a); acquired and maintained an interest in their enterprise through racketeering activities, violating § 1962(b); engaged in the conduct of the enterprise's affairs through a pattern of racketeering activities, in violation of § 1962(c); and conspired to commit acts in violation of § 1962(d). With respect to the final claim, Beck asserted that his injury was proximately caused by an overt act—his termination of his employment—which was done in the furtherance of the respondents' conspiracy and, therefore, that RICO § 1964(c) provided a cause of action.

The respondents filed a motion for summary judgment, claiming that an employee terminated for failure to participate in RICO activities, or who threatens

134. *Id.* at 497.
135. *Id.* at 497-98.
136. *Id.*
137. Beck, 529 U.S. at 498.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. Beck, 529 U.S. at 498.
144. *Id.*
145. *Id.* at 498.
146. *Id.* at 498-99.
to report RICO activities, does not have standing to sue for the termination of his employment.\textsuperscript{147} The District Court granted the motion for summary judgment, and dismissed Beck's RICO conspiracy claim.\textsuperscript{148}

The Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment holding that a RICO cause of action under § 1964(c) for a violation of § 1962(d) is not available to a person who is injured by an overt act in furtherance of a RICO conspiracy, unless the act itself—i.e., the termination from employment—is an act of racketeering.\textsuperscript{149} Since SIG's firing of Beck was not an act of racketeering, the Court of Appeals held Beck did not have a civil RICO claim.\textsuperscript{150}

Justice Thomas delivered the opinion of the Court, joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy Ginsburg, and Breyer. Justice Stevens filed a dissenting opinion, in which Justice Souter joined.\textsuperscript{151} The Court granted certiorari to resolve a conflict among the Courts of Appeal with respect to the question of whether a person injured by an overt act in furtherance of a conspiracy may assert a civil RICO conspiracy claim under § 1964(c) for a violation of §1962(d), even if the overt act—such as the discharge from employment—does not constitute "racketeering activity."\textsuperscript{152} The majority of courts that considered the question answered it in the negative.\textsuperscript{153}

RICO § 1964(c) states that a cause of action is available to anyone "injured . . . by reason of a violation of §1962."\textsuperscript{154} Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."\textsuperscript{155} The Court then turned to what it means to be "injured . . . by reason of a 'conspiracy.'"\textsuperscript{156}

First, the Court looked at the "well established common law of civil conspiracy."\textsuperscript{157} The Court pointed to \textit{Morissette v. United States},\textsuperscript{158} where the Court said that when Congress uses language with a settled meaning at common law, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning that its use will convey to the judicial mind."\textsuperscript{159} When RICO was enacted in 1970, it was widely accepted that a plaintiff could bring suit for a civil conspiracy only if he was injured by an act that was itself a tort.\textsuperscript{160}

\begin{enumerate}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Beck}, 529 U.S. at 499.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} The Courts of Appeal for the First, Second, Eighth, and Ninth Circuits. The Courts of Appeal for the Third, Fifth, and Seventh Circuits had allowed RICO conspiracy claims where the overt act was the termination of employment (as is the situation in the current case), and not racketeering activity.
\item \textsuperscript{154} \textit{See Beck}, 529 U.S. at 498.
\item \textsuperscript{155} \textit{See id.}
\item \textsuperscript{156} \textit{See id.} at 500.
\item \textsuperscript{157} \textit{See id.}
\item \textsuperscript{158} 342 U.S. 246, 263 (1952).
\item \textsuperscript{159} \textit{Beck}, 529 U.S. at 501.
\item \textsuperscript{160} \textit{Id.} (Citing Restatement (Second) of Torts § 876 comment b (1977)).
\end{enumerate}
The Court held that a conspiracy claim was not an independent cause of action, but only a mechanism for subjecting co-conspirators to liability when one of their members committed a tort. The principle that a civil conspiracy plaintiff must claim injury from an act of tort was so widely accepted at the time that RICO was enacted that it was incorporated in the common understanding of "civil conspiracy." The Court said, in light of the meaning that was attached to the term "civil conspiracy" at the time of RICO's enactment, Congress established a civil cause of action in RICO intended for a person who had suffered legal damage from a tortious act. Interpreting RICO in light of the common law meaning, the Court concluded that an injury caused by an overt act that is not itself an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a RICO cause of action under § 1964(c) for a violation of § 1962(d).

In this decision for the 7-2 majority, Justice Thomas summarized: "As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on an injury caused by any act of furtherance of a conspiracy that might have caused the plaintiff injury." Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an act of tortious character... meaning an act that is independently wrongful under RICO.

Justice Stevens, in dissent, argued that the plain language of RICO made it clear that Beck had a viable RICO cause of action under § 1964(c), because he alleged an injury which was caused by an overt act in furtherance of a conspiracy that violated § 1962(d).

B. Pegram, et al. v. Herdrich

The Court unanimously ruled that treatment decisions made by a health maintenance organization, acting through its physician employees, are not fiduciary acts within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA). Therefore, disappointed patients cannot use federal ERISA law to sue HMOs for providing financial incentives to HMO physician employees who reduce HMO patient treatment costs.

Carle Clinic Association, P.C., Health Alliance Medical Plans, Inc., and Carle Health Insurance Management Co., Inc. (collectively known as Carle) act as a health maintenance organization (HMO) organized for profit. The HMO is

161. Id. at 501.
162. Id. (Citing Ballentine's Law Dictionary 252 (3d ed. 1969) ("it is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action"); Black's Law Dictionary 383 (4th ed. 1968) (where, "in carrying out the design of the conspirators, overt acts are done causing legal damage, the person injured has a right of action")).
163. Id. at 503.
164. Id. at 506.
165. Beck, 529 U.S. at 494.
166. Id. at 494.
167. Id.
169. Id.
owned by a group of physicians who provide medical services to participants whose employers contract with Carle to provide such coverage.\footnote{Id.} Cynthia Herdrich was covered by Carle through her husband's employer, State Farm Insurance Company.\footnote{Id.}

Lori Pegram is a Carle physician.\footnote{Id.} Dr. Pegram examined Herdrich, who was experiencing pain in the midline area of her groin.\footnote{Id.} Six days later, Dr. Pegram discovered a six by eight centimeter inflamed mass in Herdrich's abdomen.\footnote{Id.} Dr. Pegram did not order an ultrasound diagnostic procedure at a local hospital, but decided that Herdrich would have to wait eight days for an ultrasound to be performed at a facility staffed by Carle physicians more than 50 miles away.\footnote{Id.} Before the time for Herdrich's ultrasound arrived, her appendix ruptured, causing peritonitis.\footnote{Id.}

Herdrich sued Dr. Pegram and Carle in state court for medical malpractice and state-law fraud.\footnote{Id.} Carle and Pegram responded that ERISA preempted the state-law counts, and removed the case to federal court.\footnote{Id.} They then sought summary judgment on the state-law counts.\footnote{Id.} The District Court granted the motion as to one count, but granted Herdrich leave to amend the other count.\footnote{Id.} She did so by alleging that provision of medical services under the terms of the Carle HMO, which reward physician owners for limiting medical care, entailed an inherent or anticipatory breach of an ERISA fiduciary duty, since these terms created an incentive to make decisions in the physicians' self-interest, rather than the exclusive interests of the plan participants.\footnote{Id.}

The District Court granted the motion by Carle and Pegram to dismiss the ERISA count for failure to state a claim upon which relief could be granted, finding that Carle was not an ERISA fiduciary.\footnote{Pegram, 120 S. Ct. at 2147.} The malpractice claim was tried, and a jury awarded Herdrich $35,000 in compensation for her injuries.\footnote{Id.} Herdrich appealed the dismissal of the ERISA claim. The Court of Appeals for the Seventh Circuit reversed the District Court, holding that Carle was acting as a fiduciary when its physicians made the challenged decisions.\footnote{Id. at 2148.} They stated that "incentives can rise to the level of a breach where, as pleaded here, the fiduciary trust between plan participants and plan fiduciaries no longer exists (i.e., where physi-
cians delay providing necessary treatment to, or withhold administering proper care to, plan beneficiaries for the sole purpose of increasing their bonuses)."185

Justice Souter delivered the unanimous opinion of the Court.186 The Court first described the nature of the HMO.187 HMOs receive a fixed fee from each patient enrolled, and agree to provide patients with specified health needed care.188 HMOs take steps to control costs, including financial rewards to physicians who decrease the utilization of health care services, and financial penalties to physicians who perform excessive treatment.189 Herdrich argued that Carle’s plan was different from a HMO, and would not open the floodgates if the Court allowed suits against HMOs; Carle’s incentive scheme was to pay each physician annually the profit resulting from their individual patient treatment decisions.190 The Court rejected this plaintiff argument, finding that this financial arrangement system is the very principle at the heart of HMOs.191

The Court opined that the judiciary is not in a position to draw a bright line between what constitutes a good or bad HMO.192 What constitutes a socially acceptable medical risk should be left to the legislature.193 Since courts cannot differentiate between an organization such as Carle and other HMOs, the Court assumed that the challenged HMO decisions here cannot be subject to a claim under ERISA fiduciary standards, unless all such decisions by all HMOs acting through their physicians are judged by the same standards and subject to the same claims.194

An ERISA fiduciary is someone acting in the capacity of manager, administrator, or financial adviser to a “plan.”195 The ERISA “plan” in this case was the set of rules in the agreement with the HMO, defining the rights of the beneficiary, and providing for enforcement.196 ERISA states that fiduciaries shall discharge their duties with respect to a plan “solely in the interest of the participants and beneficiaries.”197 If an ERISA fiduciary has financial interests adverse to beneficiaries, the question in alleged breach of ERISA fiduciary duty is whether the person who made the decision was performing a fiduciary function when taking the challenged action.198

Herdrich’s claim was that Carle was a fiduciary, acting through its physicians,

185. Id.
186. Pegram, 120 S. Ct. at 2146.
187. Id. at 2149.
188. Id.
189. Id.
190. Id. at 2150.
191. Id.
192. Pegram, 120 S. Ct. at 2150.
193. Id.
194. Id. at 2150-51.
195. Id. at 2151.
196. Id.
because Carle contracted with State Farm to provide coverage. Carle allegedly breached its fiduciary duty by making a decision that would affect the health of a beneficiary, while influenced by the compensation incentives for doctors who utilize less treatment.

The Court found that Congress did not intend an HMO to be treated as a fiduciary to the extent that the HMO makes decisions that are mixed eligibility and treatment decisions that rely on medical judgments in order to make plan coverage determinations. The Court compared the ERISA fiduciary to the fiduciary of common law trusts; since the common law trustee's main objective is the payment of money in the beneficiary's interest, and mixed eligibility decisions have only limited resemblance to that concern, Congress' intent is very clear. The Court reasoned that if Herdrich prevailed, a plaintiff could recover against a for-profit HMO for mixed eligibility decisions simply by showing that the profit incentive to ration care would generally affect such decisions, in derogation of the fiduciary standard to act in the patient's interest without possibility of conflict. They stated in pertinent part:

Granting the remedy would eliminate for-profit HMOs. The Court then said that it is not the judiciary's place to precipitate the upheaval that would occur in the HMO industry if Herdrich's claim were permitted. The Court said that such decisions are best left to the legislative branch.

The Court also opined that if Herdrich's claim was entertained, then, for all practical purposes, all fiduciary claims would boil down to a malpractice claim, and the ERISA fiduciary standard would be nothing more than the traditional medical malpractice standard. The only thing that would be of value to plan participants who brought an ERISA fiduciary action would be recovery of attorney's fees.

Justice Souter summarized:

The fact is that for over 27 years the Congress of the United States has promoted the formation of HMO practices... the federal judiciary would be acting contrary to the congressional policy... if it were to entertain [a claim] portending wholesale attacks on existing HMOs solely because of their structure. Any other ruling "would be nothing less than elimination of the for-profit HMO."

C. Harris Trust and Savings Bank v. Salomon Smith Barney

The Supreme Court unanimously decided that a suit to assert the fiduciary

199. Id. at 2153.
200. Id.
201. Id. at 2155.
202. Id.
203. Id.
204. Pegram, 120 S. Ct. at 2145-46.
205. Id.
206. Id.
207. Id.
208. Id.
rights of an employee benefit plan pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) may be brought against not only that fiduciary, but also against a non fiduciary party in interest. Consequently, employee benefit plans can sue brokers and others who provide services for losing money. The Court looked at ERISA as a whole, and at the common law of trusts, in making its determination.

Ameritech Pension Trust ("APT") is an ERISA pension plan that provides benefits to employees and retirees of Ameritech Corporation. Salomon Smith Barney ("Salomon") is a brokerage firm. During the 1980s, Salomon performed equity trades for the fiduciary of APT and became a "party in interest" as defined by ERISA. While these brokering service were being performed, Salomon also sold APT interests in several motels. This sale was orchestrated by National Investment Services of America, an investment manager hired by APT to act as fiduciary for the benefit funds. The cost of the interests was $21 million.

Harris Trust and Savings Bank ("Harris") later found out that the motel interests Salomon brokered for APT were virtually worthless. As a fiduciary of APT, Harris sued Salomon alleging a violation of § 406 (a) (1) of ERISA, which prohibits transactions likely to injure the pension plan. Harris sought rescission of the transaction, restitution of the purchase price, and disgorgement of profits made by Salomon from their use of plan assets.

The district court denied Salomon's motion for summary judgment, rejecting its argument that § 503(a)(3) of ERISA, under which Harris was suing, only authorized suit against the fiduciary which actually harmed the benefit plan.

The Seventh Circuit reversed the district court, holding that a non-fiduciary cannot, in fact, be liable under ERISA § 503(a)(3) for participating in a transaction made illegal by § 406. Summary judgment was entered in favor of Salomon. Because the Seventh Circuit differed in its result from other Courts of Appeals, certiorari was granted.

Justice Thomas, writing for the Court, pointed out that § 502 places no limits on the number or type of possible defendants, save for the rule that "appropriate equitable relief" must be sought. This omission contrasted with other ERISA

210. Id.
211. Id. at 2185.
213. Harris Trust & Savings Bank, 120 S. Ct. at 2185.
214. Id.
215. Id. (Citing to § 406 (a)(1)(A) prohibits a "sale or exchange of any property between the plan and a party in interest." § 406(a)(1)(D) prohibits a transfer to a party in interest of any assets of the plan").
216. Id. at 2186.
217. Id.
218. Id.
provisions, which do specify who may be a defendant.\footnote{220}

The remedial portion of ERISA, § 502(e), provides that, “any knowing participation in a breach of fiduciary duty by “any other person” than a fiduciary, gives rise to the assessment of a civil penalty.”\footnote{221} The Court reasoned that if the Secretary may file suit against an “other person,” then a participant, beneficiary or fiduciary of an ERISA benefit plan must be able to do the same.\footnote{222} Section 502(e) makes it clear that liability under § 503(a)(3) is not limited to that which is expressly imposed by the substantive portions of ERISA.\footnote{223}

Justice Thomas examined the common law of trusts, upon which analysis of ERISA depends in the first instance, and which allows for equitable relief against a non-fiduciary party in interest.\footnote{224} He offered the example of a property transaction where the property was fraudulently obtained; the fact that the transferee was not the perpetrator of the fraud would not shield that transferee from liability in restitution.\footnote{225} Here, the relief sought by Harris was equitable in nature, neither ERISA nor the common law of trusts prevented Harris from seeking such a remedy against Salomon, a non-fiduciary party in interest.\footnote{226}

The Court dismissed Salomon’s argument that weight should be given to the fact that a Congressional committee rejected language that would have specifically named non-fiduciary parties in interest as possible defendants.\footnote{227} Instead, the Court opted to allow only the language of the statute itself to enter into the analysis.\footnote{228} It also rejected the argument that to allow suit against non-fiduciary parties in interest is against public policy because of the increased cost of doing business with entities in such a vulnerable position, for the same reason: plain language.\footnote{229} The Seventh Circuit decision was therefore reversed, allowing Harris to proceed against Salomon as to whether Salomon had violated Erisa § 406(a).\footnote{230}

\textbf{D. Christensen v. Harris County}

In Christensen, the Court held that public sector employees may be compelled to accept compensatory time off, in lieu of premium wage compensation, for overtime work.\footnote{231} State and local governmental employers can dictate to their employees when the employees must take off compensatory time, which the employees previously agreed to bank in lieu of paid compensation for overtime hours worked, absent any collective bargaining agreement express provision other-
In *Christensen*, the petitioners were 127 deputy sheriffs, and the sheriff, of Harris County, Texas. All of these employees of Harris County agreed to accept compensatory time, instead of cash, as compensation for overtime. Harris County became concerned that it lacked the resources to pay monetary compensation to employees who worked overtime, after reaching the statutory limit on compensatory time accrual, and to employees who left their jobs with a large amount of accumulated compensatory time. Consequently, Harris County sought a method to reduce the amount of compensatory time that employees could accumulate.

Harris County inquired of the United States Department of Labor's Wage and Hour Division about the feasibility of a plan whereby the county sheriff would be able to schedule employees to use their compensatory time. The Acting Administrator of the Division replied that it was the Labor Department's position that Harris County could not schedule its employees to use their accrued compensatory time, unless there was a prior agreement between the employer and employee allowing such an action.

Despite the negative advice in the opinion letter issued by the Department of Labor, Harris County implemented a policy whereby the employees' supervisor would set a maximum amount of compensatory hours that an employee could accumulate. As the employee reached the limit, the employee would be alerted and asked to take steps to reduce accumulated time. If the employee did not reduce compensatory time, a supervisor would order the employee to use the time at a specified time.

The employees claimed that Harris County's policy violated the Fair Labor Standards Act of 1938 (FLSA). The alleged violation lies in the fact that §207(o)(5) of the FLSA requires an employer reasonably to accommodate employee requests to use compensatory time. The employees claimed that this was the exclusive means for utilizing accrued compensatory time, in the absence of an agreement to another method.

The District Court for the Southern District of Texas agreed with the employees. The court granted them summary judgment, and entered a declaratory judgment that the County's policy violated the FLSA. The Court of Appeals for

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232. *Id.* at 1659.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Christensen*, 120 S. Ct. at 1659.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* (Citing to 29 U.S.C. § 207(o)(5) (1991).)
242. *Id.*
243. *Christensen*, 120 S. Ct. at 1659.
244. *Id.*
the Fifth Circuit reversed, holding that the FLSA did not prohibit the County from implementing its compensatory time policy.\textsuperscript{245}

Justice Thomas delivered the opinion of the Court, joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Souter; Justice Scalia joined in part. Justice Stevens, Ginsburg, and Breyer dissented. The FLSA provides that employees who are paid by the hour and who work more than 40 hours per week be compensated for excess hours at a rate of not less than 1.5 times their regular wage.\textsuperscript{246} The FLSA encompasses public employers, such as Harris County. Through amendments to the FLSA, the State, and the political subdivisions of the State, may compensate employees for the overtime that they work by granting them compensatory time at a rate of 1.5 hours for every 1 hour of overtime worked.\textsuperscript{247} In order to give compensatory time to an employee, there must be an agreement between the employer and employee evidencing the fact that the employee understands that compensatory time will be granted in lieu of cash compensation.\textsuperscript{248}

The FLSA puts a cap on the compensatory hours that an employee may accumulate and after the employee reaches this cap, the employer must pay cash compensation for additional hours of overtime worked.\textsuperscript{249} The FLSA also allows an employer to "cash out" an employee's accumulated compensatory time hours by paying the employee for unused compensatory time.\textsuperscript{250} The FLSA further provides that an employer must honor an employee's request to use compensatory time within a "reasonable time" of the request, unless the requested use would "unduly disrupt" the employer's operations.\textsuperscript{251} It is this provision of the FLSA that the employees relied on in support of their claim.

The employees maintained that the express grant of control to employees to use compensatory time implies that all other methods of using compensatory time are precluded, relying on the canon \emph{expressio unius est exclusio alterius}.\textsuperscript{252} The Court found their argument unpersuasive, however, and that the FLSA merely forbids an employer from denying an employee's request to use compensatory time, unless such request would unduly disrupt the employer's business; the FLSA does not forbid an employer from telling an employee when to use accumulated compensatory time.\textsuperscript{253}

The Court reasoned that the cap that the FLSA puts on the amount of compensatory hours that an employee can accumulate is an effort to guarantee that employees only accumulate amounts of compensatory time that they can reasona-

\begin{footnotesize}
245. \textit{Id.} at 1660.
248. \textit{Id.}
249. \textit{Christiansen}, 120 S. Ct. at 1657.
250. \textit{Id.}
251. \textit{Id.}
252. \textit{Id.} at 1660.
253. \textit{Id.} at 1662.
\end{footnotesize}
Since the employer is free to cash out an employee's compensatory time, or to simply pay employees for the overtime hours they work, the cap is not meant as an aid to the employer. The cap is an effort to ensure that the employee has some input as to when to use accumulated time. The Court asserted that if the employees prevailed, they would be able to use the FLSA as a sword rather than as a shield; they would be able to force employers to pay cash compensation, rather than providing compensatory time to employees who work overtime.

In arriving at the conclusion that §207(o)(5) of the FLSA does not prohibit employers from forcing employees to use compensatory time, the Court pointed to two provisions of the FLSA. First, under the FLSA, employers are free to decrease the number of hours that an employee works. The Court cited precedent that an employer was free to tell an employee to take off for an afternoon, a day, or even a week. Second, an employer is allowed to cash out accumulated compensatory time by paying the employee the wage for each hour accrued. The Court reasoned that, under the FLSA, an employer is able to force an employee to take off, and an employer is also able to use the money that would have been paid in wages to cash out accumulated compensatory time. By compelling an employee to take compensatory time, the employer was merely combining the two steps. Since each step independently is lawful, the Court reasoned that the two step procedure is also lawful.

The Court focused on what they mistakenly saw as the crux of the employees' argument: express unius est exclusio alterius. The Court thus framed the underlying question: who decides how an employee's wages are to be spent? The District Court decided this issue alone, holding that forced usage policies deprive employees of their property. The Supreme Court rejected this assumption, and, in doing so, stripped employees of control over how and when their property wages will be used.

Aside from questions of equity, the Court's opinion ignores the main thrust of the employees' argument: while the FLSA does not prohibit compelled usage policies, such policies are enforceable only in the light of an agreement between the parties. This does not "nullify" the compensatory time exception by requiring employers to pay cash, as the Court majority contends; it simply forces the parties to abide by their voluntary, contractual agreements.

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254. Id.
255. Christiansen, 120 S. Ct. at 1662.
256. Id. at 1661.
257. Id. at 1662.
258. Id.
259. Id.
260. Id.
261. Christiansen, 120 S. Ct. at 1657.
262. Id.
263. Id.
264. Id.
265. Id.
The dissent maintained that by permitting compelled usage to reduce accrued compensatory time, the Court set back the labor movement to an era when "company scrip" compensation schemes decided when, where and how an employee could receive and spend earned compensation. It is also noteworthy, as the dissent points out, that this is exactly the view espoused by the United States Department of Labor in both the letter to Harris County and in the Department's amicus brief filed on behalf of the employees. Such an authoritative opinion is normally accorded wide latitude by the judiciary. However, the Court circumvented this issue, holding that the opinion letter and the amicus brief, which the Court makes slight mention of, are entitled only minimal deference.

The public sector employees who, in good faith, accepted compensatory time in lieu of cash, safely accruing it for the family summer vacation, now has the terms of its use dictated by the employer. The public sector rank-and-file employees are the obvious losers as the Court deferred to the government institutional employers.

The Supreme Court ruled that there is nothing in the text of the FLSA or regulations that prohibits an employer from compelling usage. The opinion essentially concludes that the statute is silent, and thus does not exclude the possibility of a future amendment prohibiting such policies absent an agreement. As indicated by its amicus brief, the Department of Labor is sympathetic to the plight of the employees and may fashion an administrative regulation that supercedes and repudiates this decision.

II. TERM 2000: SOME PRELIMINARY FORECASTS

A. Circuit City Stores v. Adams

The Ninth Circuit reversed the district court, holding that the Federal Arbitration Act does not apply to employment contracts. The Supreme Court granted certiorari on May 22, 2000, with oral arguments scheduled for the October, 2000 Term. The FAA's (non) applicability in the employment context has been one of the most intricate and vexing issues in employment law for decades.

In Circuit City Stores, Saint Clair Adams signed an arbitration agreement as a condition precedent to employment with Circuit City Stores, agreeing to settle all disputes arising out of his employment by arbitration. Shortly following his departure from Circuit City one year later, Adams brought suit against his employer in state court alleging discrimination and harassment.

266. Id. at 1666.
267. Christiansen, 120 S. Ct. at 1666.
268. Id.
269. Id.
270. Id.
271. See Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).
272. Id. at 1070.
273. Id. at 1071.
Circuit City sought an order in federal district court staying the state court proceeding and compelling arbitration pursuant to the arbitration agreement.\textsuperscript{274} Adams argued that the agreement was an unconscionable, unenforceable contract of adhesion.\textsuperscript{275}

The District Court for the Northern District of California ruled the agreement legally enforceable, and ordered arbitration to resolve the dispute.\textsuperscript{276} The Ninth Circuit reversed, holding the agreement an employment contract and therefore beyond the FAA's coverage.\textsuperscript{277}

The Supreme Court granted certiorari, limiting review to whether the Federal Arbitration Act applies to employment contracts, and whether the state retains its right to regulate arbitration agreements.

Saint Clair Adams signed an arbitration contract as a condition precedent to employment with Circuit City Stores.\textsuperscript{278} The dispute resolution agreement (DRA) between the parties states that "all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral arbitrator."\textsuperscript{279}

The District Court addressed the issue of jurisdiction. The Court acknowledged that section 4 of the FAA gives federal courts the power to compel arbitration, but only where the court has some independent basis for subject matter jurisdiction.\textsuperscript{280} Applying this principle, the Court found jurisdiction based on the diversity of the parties to the action.\textsuperscript{281}

Having established authority to hear the case, the Court turned to the merits. The Court rejected Adam's assertion that the agreement constituted an unconscionable contract of adhesion. While the agreement did contain some language limiting the recovery available to Adams, it did not rise to "the extreme one-sidedness required for a finding of unconscionability as a matter of law."\textsuperscript{282} Therefore, the DRA was legally enforceable.

The agreement provided for arbitration in the event of any dispute arising out of Adam's employment with Circuit City.\textsuperscript{283} Since Adams alleged discrimination in employment, the Court ruled the proper forum to resolve the dispute is arbitration. Pursuant to its power under the FAA, the Court ordered the parties into arbitration. The Court made no mention of the applicability of the FAA to employment contracts.

The Court of Appeals reversed in a terse \textit{per curiam} decision. The Ninth
Circuit reviewed de novo.\textsuperscript{284} As a threshold matter, the Court of Appeals addressed the district court’s authority under the FAA to compel arbitration.\textsuperscript{285} The FAA is a federal body of substantive law regulating the duty to arbitrate; it is not a jurisdictional statute.\textsuperscript{286} Therefore, any party bringing suit must establish an independent source of federal jurisdiction.\textsuperscript{287} The Court did not need to reach this issue, because the FAA does not bestow upon the federal judiciary the authority to enforce an employment contract.\textsuperscript{288}

The Ninth Circuit defined an ‘employment contract’ as “an agreement setting forth ‘terms and conditions’ of employment.”\textsuperscript{289} The Court ruled that the DRA constituted a ‘condition of employment’, despite some contract language to the contrary.\textsuperscript{290} While the DRA did not alter Adam’s status as an at-will employee, Circuit City would not hire him without one.\textsuperscript{291} Thus, the DRA constituted a condition precedent to employment, and, therefore, a condition of employment.\textsuperscript{292} The Court held the FAA does not apply to employment contracts, and the district court was therefore without authority to compel arbitration. The Court ordered the case dismissed for lack of federal authority.\textsuperscript{293}

The proliferation of arbitration employment agreements over the last decade has emboldened employers to push the limits. Have employers “killed the golden goose” of arbitration? Arbitration clauses, such as the one used by Circuit City, have become standard terms of employment, in a concentrated employer effort to avoid the skyrocketing cost of litigation. Many such agreements are not the result of a full ‘meeting of the minds’ between employer and employee. When employers dictate ADR terms to the employee, lower courts have often refused to endorse such ADR provisions, as violative of basic due process.\textsuperscript{294}

\textbf{B. Eastern Associated Coal Corp. v. United Mine Workers of America}

The Fourth Circuit affirmed the District Court, holding that public policy does not compel termination of an employee working in a safety sensitive position, who twice failed random drug tests and yet was reinstated to work by a labor arbitrator.\textsuperscript{295} The Supreme Court granted certiorari. James Smith was employed by the Eastern Associated Coal Corporation as a

\begin{itemize}
\item \textsuperscript{284} Id.
\item \textsuperscript{285} Id.
\item \textsuperscript{286} Id.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Circuit City Stores, Inc., 194 F.3d at 1071. See also Modzelewski Resolution Trust Corp., 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting Black’s Law Dictionary 525 (6th ed. 1990)).
\item \textsuperscript{290} Circuit City Stores, Inc., 194 F.3d at 1071. (The D.R.A. states in relevant part, “I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me”).
\item \textsuperscript{291} Circuit City Stores, Inc., 194 F.3d at 1071.
\item \textsuperscript{292} Id.
\item \textsuperscript{293} Id. at 1072.
\item \textsuperscript{294} Hooters of America, Inc., v. Philips, 173 F.3d 933 (4th Cir. 1999).
\item \textsuperscript{295} Eastern Assoc. Coal Corp. v. United Mine Workers of America, 188 F.3d 501 (4th Cir. 1999).
\end{itemize}
Mobile Equipment Operator ("MEG"). His position required him to operate heavy machinery, which ranged in weight from 32,000 to 55,000 pounds. A condition of Smith's employment was the maintenance of a commercial driver's license, for which federal regulations mandate random drug testing. In 1996, Smith tested positive for marijuana and his position with Eastern was terminated shortly thereafter. The United Mine Workers of America filed a grievance on his behalf challenging his termination, and taking the dispute to arbitration.

At arbitration, Eastern argued that it had 'just cause' to discharge Smith, the standard for termination under the collective bargaining agreement. Eastern pointed out that Smith had twice failed drug tests within 13 months, and therefore constituted a significant safety hazard to himself and others. To support the discharge, Eastern relied upon their zero tolerance substance abuse policy, which required that an employee who tests positive be "removed from any safety-sensitive position and subject to disciplinary action up to and including termination."

The union argued that, apart from these two instances, Smith's 17-year employment record with Eastern was impeccable. Smith testified that his drug use was recreational, and was triggered by an isolated family problem.

Arbitrator Jerome Barrett concluded that while Eastern's safety concerns were legitimate, Smith's actions did not give Eastern 'just cause' for termination and ordered Smith reinstated, following an unpaid disciplinary suspension period of 75 days. As a condition of judgment, Smith was required to provide Eastern with a signed, undated resignation letter, which would be rendered legal and binding if he tested positive for drug use within a 5-year period following reinstatement.

Eastern filed suit in federal district court seeking to vacate the arbitrator's decision. The District Court affirmed the arbitrator's decision, holding that the arbitrator did not exceed the scope of his authority, and that public policy does not compel termination of an employee with a history of drug use who works in a safety sensitive position.

The Court rejected Eastern's contention that the arbitrator exceeded the scope of his authority by not upholding the discharge in light of the strict policy on drug use. The Court began by reiterating the judicial standard for reviewing an
arbitrator’s decision: “As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” Nevertheless, an arbitrator’s power is limited, as an “award must draw its essence from the contract and cannot simply reflect the arbitrator’s own notions of industrial justice.” In seeking to resolve a dispute, the arbitrator can look to work rules and disciplinary enforcement policies and practices.

Under the collective bargaining agreement between Eastern and its employees, Eastern could discharge any employee, qualified by the requirement that it be for “just cause.” As “just cause” was not further defined by the agreement, the Court ruled the arbitrator was free to look to other sources for guidance, including Eastern’s substance abuse policy. The Court noted that Eastern’s policy called for disciplinary measures “up to and including termination.” Therefore, the arbitrator did not exceed his scope of authority, as a pertinent regulation permits discipline short of discharge for employees who test positive for narcotics.

The Court also rejected Eastern’s argument that public policy mandated discharge under the circumstances. A Court must vacate an arbitrator’s decision if it contravenes a well defined and dominant public policy. The Court cited numerous policy sources against the performance of safety sensitive jobs by employees impaired or under the influence, including Department of Transportation Regulations (“DOT”).

The Court concluded, however, that Eastern failed to establish that the arbitrator’s award contravened public policy. DOT regulations militate against drug use while operating machinery, but there was no evidence that Smith ever engaged in drug use at work. Therefore, the arbitrator’s reinstatement of Smith did not contravene a well defined and dominant public policy.

The Fourth Circuit affirmed the lower court in an unpublished per curiam opinion. The Supreme Court granted certiorari on March 20, 2000, and heard oral arguments on October 28, 2000. The Court was deciding whether to reaffirm the arbitrator’s decision.

310. Id. (Quoting United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 38, (1987)).
311. See id.
312. See id. at 801-02.
314. See id.
315. Id. at 802-03.
316. See id. at 803.
317. The department of transportation represented that it was a federal regulation that mandated random drug testing in the first place.
318. The Court acknowledged two decisions, Exxon Corp. v. Esso Worker’s Union, Inc., 118 F.3d 841 (1st Cir. 1997), and Etron Corp. v. Baton Rouge Oil and Chem. Workers Union, 77 F.3d 850 (5th Cir. 1996), that buttress Eastern’s position that public policy requires termination where an employee tests positive for drugs. While the Court could have focused on these two cases as expanding the scope of public policy, they ultimately chose to ground their decision in DOT regulations, which make no reference to such a policy. See Eastern Associated Coal Co. v. United Mine Workers, 66 F. Supp. 2d 796 at 804 (S.D.W.Va. 1998).
firm or modify its Misco precedent.321

In 1991, a subway train in New York City derailed; five people died in the aftermath, with 200 injured. Crack vials were later found in the cab of the train. The Exxon Valdez foundered off the coast of Alaska, spilling millions of gallons of crude oil and threatening an entire ecosystem. The captain of the ship was under the influence of alcohol. These tragedies, Eastern argues, could have been prevented, had those employers taken affirmative steps to remove employees with a history of drug abuse from safety sensitive positions.

Much speculation arose regarding the continuing validity of the standard for setting aside an arbitrator's award, as announced in Misco, when the Supreme Court granted certiorari to review the Fourth Circuit's decision in Eastern Coal Corp. On its face, Eastern Coal was a relatively typical and ordinary situation where an arbitrator, in construing a collectively bargained for “just cause” discharge provision, repudiated an employer’s decision to fire an employee for a second violation of the substance abuse policy, and ordered the employer to reinstate him, provided that certain conditions were met. The apparent normality of the situation presented in Eastern Coal suggested that perhaps the Court was ready to announce a new standard, one that would subject an arbitrator’s award to a more stringent and search level of judicial scrutiny.

This case, however, transcends a mere litmus test of the Court’s political climate. The implications are very significant. As the opinions of both the District and Circuit Court acknowledge, there is strong public policy against the use of drugs on the job, especially in safety sensitive positions. This view is essentially undisputed.322 This case presents a novel issue: whether public policy compels termination when an employee who uses drugs during non-work hours tests positive for narcotics.323 Essentially, Eastern is seeking a policy that compels termination where an employee has the potential to engage in drug use on the job. It thus partially transcends Misco.324

Tremendous judicial deference has been granted to arbitrators’ findings. Subsequently, the Court in Misco announced that “[a]n arbitrator’s award must draw its essence from the contract and cannot reflect the arbitrator’s own notions of industrial justice.... But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, [a finding by a court that he] committed serious error does not suffice to overturn his decision.” 325

322. It is outlined in numerous decisions and Department of Transportation Regulations, see, 49 CER. Section 382.101 (1998); see also, Gulf Coast Indus. Workers Union v. Exxon Corp., 991 F.2d 244 (5th Cir. 1993); Erron Corp. v. Baton Rouge Oil and Chem. Workers Union, 77 F.3d 850 (5th Cir. 1996); Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l, 861 F.2d 665 (11th Cir. 1988).
325. See id. at 36-37.
The Supreme Court framed the issue as whether “the agreement to reinstate Smith with specified conditions runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.”

By placing the “positive law” qualification on the exception, the Court sharply narrowed the exception’s application and further solidified Misco as the governing standard of virtually absolute judicial deference to arbitrators’ awards. The Court stated that its authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. In applying the standard, the Court found the arbitrator’s award violated no specific provision of any laws, and that it was totally consistent with the federal Department of Transportation’s regulations for allowing a person who tests positive for drugs to return to work. While not expressly stated, it is clear that Misco is alive and well.

C. Garrett v. University of Alabama at Birmingham Board of Trustees

Garrett presents the Court with the challenge, and the opportunity, to extend further the Eleventh Amendment jurisprudence of states’ rights and sovereignty so manifestly ascendant in Kimel, in further derogation of public sector workers’ employment rights to be free from discrimination on the basis of disability.

The Eleventh Circuit held that the state is not immune from suit under the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act. The decision of the district court granting summary judgment for the state as defendant employer was reversed.

In Garrett, the Eleventh Circuit decided that Congress unequivocally expressed the intent to abrogate sovereign immunity granted to the states by the Eleventh Amendment, and that the ADA and the Rehabilitation Act were, therefore, valid exercises of the Enforcement clause of the Fourteenth Amendment. The Family Medical Leave Act (“FMLA”), which sets standards for situations in which employers must grant leave for employees who care for oneself or a family member with a serious health problem, is also at issue.

The FMLA sets national minimum standards for family and medical leave in employment, requiring that covered employers provide twelve weeks of unpaid leave per year. An employer is prohibited from inhibiting an employee from exercising FMLA rights or retaliating for doing so.

327. Id.
328. Id.
330. The Third Circuit, however, has more recently held that Congress lacked the power to abrogate the states' Eleventh Amendment immunity when it enacted the ADA. Consequently, Pennsylvania is immune from a state employee's ADA lawsuit in federal court. Lavia v. Pennsylvania Department of Corrections, 224 F.3d. 190 (3d Cir. 2000)
The FMLA’s remedial measures combat sex and disability discrimination in employment, and applies to firms employing fifty or more employees who have worked for the employer one year or more. The FMLA guarantees only unpaid leave.

The FMLA contains a provision including state employees within its coverage. In order to lessen the burden on the states, Congress took the initiative to exclude from its coverage state employees who hold high-ranking, sensitive positions.

D. Martin v. PGA Tour, Inc.

The Court of Appeals for the Ninth Circuit affirmed the decision of the district court of Oregon, which ordered the PGA to make an exception to its “walking rule” to allow Martin to ride a golf cart during PGA competitions pursuant to the Americans with Disabilities Act (ADA). The Court found that golf courses are places of public accommodation and the use of the cart does not “fundamentally alter” the nature of the game.

Casey Martin suffers from a congenital, degenerative circulatory disorder that is manifested in a malformation of his right leg. This disorder causes Martin severe pain and atrophy in his lower leg, rendering him unable to walk for extended periods of time. If he is to pursue his chosen employment as a professional golfer, he contends that he needs the cart to move about the golf course during the game.

The PGA sponsors three competitive tours: the PGA, the Buy.Com Tour (formerly the Nike Tour), and the Senior PGA Tour. On days of the tournaments, PGA is the operator of the golf course. In order to gain entry to the PGA Tour and Nike Tour, competitors must have the best scores in qualifying school. There are three qualifying stages, the first two of which permit players to utilize golf carts, and in the third stage, players are expected to walk the course as they play without any use of golf carts to transport them. After qualifying for the third and final stage of the 1997 qualifying school, Martin requested permission of the PGA to use a golf cart. The PGA denied his request; Martin sued.

The district court granted him a preliminary injunction, and while using a golf cart, Martin qualified to earn a spot on the 1998 Nike Tour.
subsequently granted partial summary judgment by the court, holding that the PGA is subject to Title III of the ADA because it owns, operates, and leases golf courses, which the ADA identifies as public places of accommodation. The district court also ruled that the PGA is not exempt from the ADA as a private club, because it is a commercial enterprise offering athletic events to the public.

As a matter of law, Title III of the ADA applies to the PGA and Nike Tour competitions. The anti-discrimination statute of the ADA provides:

No individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

For purposes of this subchapter, a golf course is considered a public place of accommodation.

The PGA contends that the area “behind the ropes” is not open to the public (spectators); because they have no right to enter it, the course is therefore not a place of public accommodation. The court rejected this argument. The statute also defines “public accommodation” to include “place of exercise or recreation.” The PGA argued that the competitors are not there to exercise, but to try to win money, and the statute therefore should not apply. However, the court pointed out the statute still applies because the golf course is a “place of exhibition or entertainment.”

The Court of Appeals analogized to a case from the Third Circuit, Menkowitz v. Pottstown Memorial Medical Center. A physician with a disability sued a hospital, after it denied him hospital staff privileges. The court in the Menkowitz case rejected the idea that Title III could only be invoked by patients of hospitals. Denial of staff access constitutes a denial of “full and equal enjoyment of the goods, services, facilities . . . or accommodations of any place of public accommodations” prohibited by Title III.

The PGA contends that it may compartmentalize golf courses during competitions, just as a large hotel with a separate residential wing. The non-residential area would not be a place of public accommodation. The court responded by recognizing that the residential wing never functioned as a hotel, whereas a golf course...

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345. Id.
346. Id. at 997.
349. Martin, 204 F.3d at 996.
351. Martin, 204 F.3d at 996.
352. Id.
353. 154 F.3d 113 (3d Cir. 1998).
354. Id.
355. See id.
357. Martin, 204 F.3d at 996.
358. Id. (Citing 28 C.F.R. ch. 1, pt. 36, app. B at 623 (1999)).
course during a tournament can only serve as a golf course. The PGA is assuming there is nothing public about the competition itself. According to the PGA, the fact that its tournaments are limited to the best golfers means that the courses on which they play cannot be places of public accommodation. Title III does not restrict its coverage to members of the public; it provides that "No individual shall be discriminated against" in the enjoyment of public accommodations by reason of disability.

The golf course is a place of public accommodation. The winnowing process of competition by the sport’s best should not so restrict competition as to deprive the golf courses’ status as places of public accommodation. The court did not draw an artificial line between use of a public accommodation for pleasure, and use in the pursuit of a living.

The second issue addressed by the court was whether permitting Martin to use a golf cart will "fundamentally alter" the nature of the goods or services - in this case, the PGA or Nike tour. Title III of the ADA further defines discrimination as:

A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, privileges, advantages or accommodations.

Permitting Martin to use a golf cart solved Martin’s problem of access to the competition. It is not a difficult practical matter to permit the use of carts, since the district court found that golf carts are used in other competitions.

Permitting Martin to use a golf cart will not fundamentally alter the nature of the game. Walking is not essential to the game of golf. In the rules promulgated by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, the game of golf consists of playing ball from the teeing ground into the hole by a stroke or successive stroke in accordance with the Rules. These rules do not require a player to walk. The PGA does not require players to walk in the early stages of the qualifying school or the Senior Tour.

The PGA does make provisions for a player to ride the cart during the game in order to save time when players have lost a ball in the fairway and must tee off

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359. Id.
360. Id.
361. Id.
362. Id.
363. Martin, 204 F.3d at 997-98.
364. Id.
365. Id.
366. Id.
367. Id.
368. Id.
369. Martin, 204 F.3d at 999.
370. Id.
The district court found the purpose of making the players walk injected a fatigue factor, but this is not significant since there are low levels of exercise during the competition. A waiver for one player would apply to all. A waiver to Martin would not fundamentally alter the PGA and Nike Tour competitions. The district court noted that, if given the choice, a large number of players chose to walk; the use of a cart assigns no handicap penalty to those who ride as opposed to those who walk.

The district court also evaluated whether Martin would be advantaged over the other competitors. Even with the use of a cart, Martin must walk about twenty five percent of the course, because the cart cannot be brought near the ball in many situations. The district court found that since Martin experiences significant pain while walking and getting in and out of the cart, he easily endures greater fatigue even with a cart than his able-bodied competitors do by walking. The court of appeals concluded, as did the district court, that the central competition in shot-making would be unaffected by accommodation of Martin.

The PGA argues permitting a player to ride a cart fundamentally distorts the competition, and that the inquiry should summarily end there. The statute, however, mandates an inquiry into whether a particular exception to a rule would “fundamentally alter” the nature of the good or service being offered. The evidence must “focus on the specifics of the plaintiff’s or defendant’s circumstances and not on the general nature of the accommodation.” This is an intensive fact-based inquiry. The outcome would be different, the court notes, if Martin was requesting to use a special golf ball that carries further, or seeking to play a shorter course than his competitors. Martin, however, seeks only to use a cart between shots. The district court found that this accommodation does not fundamentally alter the competition.

The Court of Appeals concluded that, under Title III of the ADA, a golf course is a place of public accommodation when the PGA is conducting a tournament. The district court granted Martin the use of a cart as a reasonable accommodation to his disability holding that such use of a cart does not fundamentally alter the nature of the PGA and Nike Tour tournaments.

371. See id. at 1000.
372. Id.
373. Id.
374. Id.
375. Martin, 204 F.3d at 1000.
376. Id.
377. Id.
378. Id.
379. Id. at 1001.
380. Id.
381. Martin, 204 F.3d at 1001 (citing Johnson v. Gambrinus Co. Spoetzl Brewery, 116 F.3d 1052, 1060 (5th Cir. 1997)).
382. Id.
383. Id.
384. Id. at 1002.
385. Id.
E. Kentucky River Community Care, Inc. v. National Labor Relations Board

Kentucky River Community Care, Inc. (KRCC), a mental health and retardation service provider, seeks to avoid union representation of its work force, based on the argument that it is a political subdivision and therefore not an employer subject to the National Labor Relations Act (NLRA). In the alternative, it argues that even if it is an employer for purposes of the NLRA, its registered nurses and rehabilitation counselors are “supervisors” and therefore exempt from the collective bargaining unit.

The Court of Appeals for the Sixth Circuit held that KRCC is not a “political subdivision” within the meaning of the NLRA, that registered nurses are supervisors within the meaning of the NLRA, and that the rehabilitation counselors are not supervisors within the meaning of the NLRA.

The court first dealt with the issue whether KRCC is a political subdivision. KRCC claims that the NLRB incorrectly applied the test articulated in NLRB v. National Gas Util. Dist., when it decided that KRCC was not created as an arm of the state, and that KRCC was not administered by individuals who are responsible to public officials or the general electorate. To satisfy the first prong of the Natural Gas test, KRCC must show that it was created directly by the state, and that the state intended KRCC to operate as an arm of the government. The Court of Appeals was satisfied that KRCC was not formed directly by the state because, in part, KRCC is a private, nonprofit corporation, operating mental health and retardation contracts pursuant to contracts.

The alternative analysis articulated in Natural Gas determines whether KRCC is administered by individuals who are responsible to public officials or to the general electorate. KRCC argues that because the Secretary for Human Resources has significant control over KRCC’s operations, KRCC is an organization run by individuals responsible to public officials. The court pointed out that it does not necessarily follow that such oversight means that the individuals in charge at KRCC are responsible to public officials. Contrary to KRCC’s assertions, neither any Kentucky public official nor the general public control the composition of KRCC’s board of directors. KRCC complies with the state law requiring the board to be representative of the community served, but this is only

387. Id.
388. Id.
389. Id.
391. Kentucky River Community Care, 193 F.3d at 450.
392. Id.
393. Id.
394. Id.
395. Id. at 451.
396. Id.
397. Kentucky River Community Care, 193 F.3d 451.
because KRCC seeks to operate as a local mental health retardation board.\footnote{Id.}

KRCC maintains that even if it is an employer subject to the NLRA, the registered nurses and rehabilitation counselors it employs are supervisors and therefore exempt from the collective bargaining unit under 29 U.S.C. § 152(11).\footnote{Id. at 452.} The NLRA applies only to employees.\footnote{Id.} Individuals who are employed as supervisors are specifically excluded from the definition of “employee.”\footnote{Id. (Citing 29 U.S.C. § 152(11) (1994)).} The NLRA defines “supervisor” as any individual having authority, in the interest of the employer to hire, transfer, suspend . . . requires the use of “independent judgment.”\footnote{Id. (Citing 29 U.S.C. § 152(11) (1994)).}

The court acknowledged that whether an employee is a supervisor is a highly fact intensive inquiry and therefore must be scrutinized carefully.\footnote{Id. at 453.} During two-thirds of the day at Caney Creek, the nurses act as building supervisors.\footnote{Id.} Nurses are authorized to shift staff between units, and to write up those who do not comply immediately.\footnote{Id. at 453.} The nurses have the authority to call employees into work early, or ask employees to remain on duty.\footnote{Id.} The registered nurses are also responsible for ensuring that licensed practical nurses properly dispense patient medications.\footnote{Id.} After ascertaining the scope of the responsibilities nurses have, the court decided these responsibilities did not call for the exercise of “independent judgment” under NLRA § 152(11).

The NLRB’s interpretation of “independent judgment” differs from that of the court of appeals.\footnote{Id.} The NLRB says that the practice of a nurse supervising a nurse’s aide in administering patient care does not involve the use of independent judgment.\footnote{Id. (Citing 29 U.S.C. § 152(11) (1994)).} The NLRB classifies these activities as routine; nurses have the ability to direct patient care because of their training and expertise, not because of their connection with management.\footnote{Id. (Citing Mid-America Care v. NLRB, 148 F.3d 638,641 (6th Cir. 1998)).} The Court of Appeals has repeatedly rejected this interpretation, and has instead found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts.\footnote{Id. (Citing Mid-America Care v. NLRB, 148 F.3d 638, 641 (6th Cir. 1998)).}

In Mid-America Care, the Sixth Circuit reversed the NLRB’s conclusion that nurses are not supervisors.\footnote{Id.} The Sixth Circuit stated that it, not the NLRB, is the ultimate interpreter of this statutory provision, and that the NLRB’s narrow defi-
tion of the term “independent judgment” was rejected. However, in *Mid-America Care*, the court concluded that the Caney Creek nurses were supervisors, and thus rejected the NLRB’s decision to include them in the bargaining unit.

The last major issue the court of appeals addressed was whether rehabilitation counselors at Caney Creek are “supervisors.” Rehabilitation counselors do not have any hiring or scheduling responsibilities. In order to qualify as supervisors, they are evaluated according to the same standards as the registered nurses. The rehabilitation counselors must have the authority to engage in one of the activities enumerated in NLRA § 152(11), using independent judgment in the interest of the employer.

At KRCC, the primary function of the rehabilitation counselors is to design a patient treatment plan. This does not, in itself, involve any supervisory authority. The fact that the assistants carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors. The court of appeals held that substantial evidence supports the NLRB’s decision that rehabilitation counselors are not supervisors, and were therefore properly included in the bargaining unit.

**CONCLUSION**

By any measure, the Court’s labor and employment law jurisprudence has shifted dramatically over the decades. Conventional labor-management relations law, which was the dominant, if not exclusive, focus of the Court’s labor and employment law jurisprudence until a quarter century ago, is now an important, but no longer controlling part of the jurisprudential fabric. During the 1999 and 2000 Terms employment discrimination law surged. The trend towards Alternative Dispute Resolution (“ADR”) continues to accelerate. It is in the ADR arena where labor-management relations are an important part of the larger picture. Unlike many Terms over the course of the past several decades, the surge in federalism decisions during the past decade is now increasingly implicating the states

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413. *Id.*
414. *Id.*
415. *Kentucky River Community Care*, 193 F.3d at 454.
416. *Id.* at 455.
417. *Id.*
418. *Id.* (Citing Grancare, Inc. v. NLRB, 137 F.3d 372, 375 (6th Cir. 1998)).
419. *Id.*
420. *Id.*
421. *Kentucky River Community Care*, 193 F.3d at 455.
422. *Id.*
as employers. More precisely, the renaissance in states' rights is exempting states from liability for violating federal labor and employment laws, vitiating the power of the federal Congress to subject the states to federal laws in light of the Eleventh Amendment.

Within this broad framework of increasing emphasis on ADR and on the panoply of non-union employment law issues, there is little likelihood of the Court being presented with (re)examination of fundamental principles at the heart of labor and employment law. Rather, the Court seems to continue to be occupied with increasingly technical and intricate, indeed, almost Byzantine, parsing of labor and employment law statutes. As the national demographics inexorably reflect the graying of the baby boom into the first wave of retirement, there is one certainty for the Court's labor and employment law jurisprudence over the course of the next few decades. The Court will be faced with an intricate, and critically important, series of legal issues implicating retirement security. If the Court embraces ADR trends with any degree of enthusiasm, the bulk of non-pension labor and employment law disputes will be moving toward those ADR venues for private resolution, rather than to the courts. Consequently, within the next several years, apart from retirement security decisions, labor and employment law decisions will probably only rarely and sporadically be part the Court's broader jurisprudence. Depending on the course of its ADR decisions in the next several Terms, the bulk of labor and employment law disputes may be, for all practical purposes, departing the federal judicial arena for the myriad of ADR venues. Herdrich and Salomon Smith Barney may well auger the future.