WHAT THEY SAID IT MEANS: THE SUPREME COURT'S YEAR IN REVIEW PLUS OTHER RECENT DEVELOPMENTS IN ERR

I. CITY OF SAN DIEGO V. ROE

In *City of San Diego v. Roe*, 543 U.S, __ (Dec. 6, 2004), the Supreme Court considered whether a city violated a police officer's First and Fourteenth Amendment rights to freedom of speech, when it terminated his employment for selling sexually explicit items on the Internet.

A. Backdrop

Prior to *City of San Diego*, the U.S. Supreme Court had addressed the competing interests between the interests of governmental employers and the First and Fourteenth Amendment rights of governmental employees in a small number of cases. In *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968), the Court adopted a balancing test whereby "the interests of the [employee], as a citizen, in commenting upon matters of public concern," are weighed against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Several years later, the Court clarified its holding in *Pickering* and stressed that before this balancing test must be performed, it must first be determined whether the governmental employee's speech or conduct touched upon a matter of "public concern." *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, the Court found that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal

interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147.

Prior to *City of San Diego*, the Supreme Court had not set forth a precise definition of "public concern." In *Pickering*, a public school teacher's submission of a letter to a local newspaper criticizing the board of education for its financial decisions was deemed to touch upon a public concern. In *Connick,* a disgruntled assistant district attorney was discharged after circulating an intraoffice questionnaire seeking co-workers' views on issues such as office morale, office transfer policy, confidence in supervisors, and whether they were pressured to assist in political campaigns. With the exception of the last item, the Court determined that the employee's actions pertained to private concerns rather than public concerns. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court found that a county worker fired for commenting that he would approve of the President being assassinated was discussing a matter of public concern. In *United States v. Treasury Employees*, 513 U.S. 454 (1995) ("*NTEU*"), the Court struck down a federal regulation that limited certain federal employees from speaking and writing outside their employment.

B. Facts

In July 2000, a sergeant with the City of San Diego police department noticed that a uniform previously used by the police department was being sold on eBay by a person with the username, Code3stud@aol.com. The sergeant searched for other items sold under this username and discovered that the seller was a police officer under his command and that he was selling items under eBay's adults-only site.

In the course of an investigation, it was discovered that the police officer, "John Roe," was selling sexually explicit items, including a custom-made video of Roe (partially masked) taking off a generic police uniform and masturbating after supposedly issuing a citation. All aspects of the production and sales of the items were done off-duty and away from the police department's premises. Nothing identified Roe as being affiliated with the San Diego police department, and payments were made to a post office box in Northern California.

Roe was confronted about his activities and admitted to the conduct. The police department concluded that Roe had violated departmental policies governing immoral conduct, unbecoming conduct, and outside employment and directed that he cease these activities. Roe did not fully comply with this order and, as a result, he was terminated for his activities, including his failure to follow the cease and desist directive. Thereafter, Roe brought suit under 42 U.S.C. § 1983, claiming that his termination violated his constitutional right to freedom of speech.

C. Lower Courts' Holdings

The district court dismissed the plaintiff's complaint because it determined that the speech did not touch upon a public concern. The Ninth Circuit reversed the district court's decision. In doing so, the court held that "when the employee's speech is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace, that speech satisfies the public concern test because such speech is not related to the employee's status in the work place." 356 F.3d at 1119-20. In doing so, the Ninth Circuit relied heavily on the *NTEU* decision and adopted a very broad standard for determining the meaning of "public concern." The court remanded the case to the district court to implement the *Pickering* balance phase.

D. Supreme Court's Holding

In a per curiam decision, the Supreme Court reversed the Ninth Circuit's holding. The Court found that the Ninth Circuit's reliance on the *NTEU* decision was "seriously misplaced." Unlike the circumstances in *NTEU,* in which the speech outside the workplace had "no effect on the mission and purpose of the employer," the Court concluded that the San Diego police department "demonstrated legitimate and substantial interests of its own" that were compromised by Roe's conduct. By linking his products to the profession, Roe brought "the mission of the employer and the professionalism of its officers into serious disrepute."

Summarizing its previous decisions, the Court noted that "[t]hese cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of valued and concern to the public at the time of publication." Applying this standard, the Court found that it had "no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test."

II. CLINE V. GENERAL DYNAMICS LAND SYSTEMS, INC.

A. Introduction

The Age Discrimination and Employment Act, 29 U.S.C. §§ 621, et seq. ("ADEA") prohibits employers from discriminating against employees on the basis of their age. 29 U.S.C. § 623(a). Indeed, the purpose of the ADEA is to promote the employment of older persons based on their ability, rather than age, and to prohibit arbitrary age discrimination. See Hodgson v. First Federal Sav. & Loan Ass'n of Broward Co. Fla., 455 F.2d 818, 820 (5th Cir. 1972). In the recent case of Cline v. General Dynamics Land Systems, Inc., 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 71 USLW 3504, 123 S.Ct. 1786, 155 L.Ed 2d (2003) ("Cline II"), the Court considered whether the ADEA "provides a cause of action for employees within the protected class who claim their employer discriminated against them on the basis of age because of the employer's

more favorable treatment of older employees, also within the class." Cline II, 296 F.3d at 467. In overruling the district court, the United States Court of Appeals for the Sixth Circuit held that the ADEA does provide a cause of action for members of a protected class to sue their employer for discriminating against younger employees in the same protected class.

General Dynamics Land Systems, Inc. ("General Dynamics") appealed the decision by the Sixth Circuit to the Supreme Court of the United States, and, in turn, the Court granted *certiorari*. The Supreme Court—in a 6-3 decision—reversed the decision of the Sixth Circuit, and held that "[w]e see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one." General Dynamics Land Systems, Inc. v. Cline, __ U.S. __, 2004 WL 329956, at * 9 (Feb. 24, 2004) ("Cline III"). The following will discuss how the Court arrived at its conclusion.

B. Factual Background

This case arises out of the United States District Court for the Northern District of Ohio. The dispute involves 169 plaintiffs of a putative class who are present or former employees of General Dynamics. Cline v. General Dynamics Land Systems, Inc., 98 F.Supp 2d 846, 847 (N.D. Ohio 2000) ("Cline I"). Each of the plaintiffs in the suit were between 40 and 50 years of age on July 1, 1997. Id. Their relationship with General Dynamics was governed by a collective bargaining agreement with General Dynamics. Id.

There are two collective bargaining agreements at issue in this case. Id. The first agreement was in effect prior to July 1, 1997 ("CBA1"). Id. CBA1 provided for continued heath insurance benefits for retirees. Id. After the termination of CBA1, General Dynamics and the plaintiffs re-negotiated the provision regarding health insurance benefits for retirees. Id. The new

provision, which was included in the new collective bargaining agreement ("CBA2"), "provided that continued retiree health insurance benefits would be provided only for employees who were at least fifty years of age on July 1, 1997, the effective date of CBA2." Cline I, 98 F. Supp. 2d at 847.

The plaintiffs were divided into three subgroups. The first group — the "Cline Group" — consisted of 183 current employees who were eligible for retirement health insurance benefits under CBA1, but not under CBA2. Id. The next group — the "Dodd Group" — consisted of ten employees who retired prior to July 1, 1997, in order to preserve their benefits under CBA1. Id. The third group — known as the "Diaz Group" — consisted of three employees who retired after July 1, 1997, and did not receive the continued health insurance benefits to which they would have been entitled under CBA1. Id.

Plaintiffs brought suit under the ADEA and analogous Ohio state law claiming that CBA2 violates their rights by discriminating against them on the basis of their age. Id. They sought declaratory and injunctive relief, damages, and costs and fees. Cline I, 98 F. Supp. 2d at 847.

General Dynamics moved to dismiss on the basis that age discrimination in favor of employees over the age of 50 does not violate applicable federal and state anti-discrimination law. Id. In essence, General Dynamics' argument was that the ADEA does not countenance a cause of action for reverse discrimination. Id. Plaintiffs, however, denied that they were asserting a claim for reverse discrimination, but, rather, that they were wrongfully denied existing job benefits to which they had previously been entitled based on their age. Id. at 848.

C. The District Court Opinion

As an initial matter, the court conceded that CBA2 "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to

retiree health care benefits, and employees under the age of fifty, who are not." Id. However, the Court summarily dismissed plaintiffs' argument that they were wrongfully denied existing job benefits, and noted that "it would have been permissible under ERISA for Plaintiffs' union and the Company to agree to abrogate the retiree health insurance benefit programs for *all* current employees in CBA2." Cline I, 98 F. Supp. 2d at 848 (emphasis in original). The Court further noted that "[t]he fact that the benefits were available under CBA1 is not relevant to a determination of whether entitling only employees over the age of fifty to retiree health care benefits violates [the] ADEA." Id. Thus, the Court concluded that "[t]he sole issue before this Court is whether the employer may legally provide a benefit to workers over the age of fifty, while denying that same benefit to workers below the age of fifty." Id.

The Court concluded that the plaintiffs had not alleged any facts upon which they could prevail on their age discrimination claim. Id. The Court rested its decision on two points. First, the Court reasoned that no federal court has ever held a claim of reverse age discrimination to be cognizable under the ADEA. Id. The second point supporting the Court's holding was that "Congress' purpose in enacting [the] ADEA was to address the problems faced by *older* workers, not workers who suffered discrimination because they are too young." Cline I, 98 F. Supp. 2d at 848 (cite omitted). In dismissing plaintiffs' claims, the Court analyzed plaintiffs' claims under Ohio state law using the same legal test. The Court determined that the analysis under either cause of action was identical. Id. at 848, n. 1. The Court did not address plaintiffs' claims for declaratory and injunctive relief.

D. The Circuit Court Opinion

The Sixth Circuit—in a 2-1 decision written by Circuit Judge Ryan—did not agree with the holding of the district court. Indeed, the Court held that "[o]n the facts of this case, the ADEA

does provide the plaintiffs a cause of action and that they have made out an actionable claim." Cline II, 296 F.3d at 467. In reaching its holding, the Court chided the district court for failing to apply statutes consistently with their plain language. Id. The Sixth Circuit rested its decision on the plain language of the ADEA. Indeed, Section 623(a)(1) of the ADEA provides that:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). Based on the language of the statute, the Court concluded that:

> This language clearly and unambiguously forbids employers from defining the terms and benefits of "any individual['s]" employment based solely on his or her age. In § 631(a), Congress declared that "any individual" means those "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus by the law's plain language, an employer may not discriminate against any worker age 40 or older on the basis of age. Those younger than age 40 are not protected by the ADEA.

Id. at 469. (citation omitted). The Court observed that to reach the conclusion adopted by the District Court, one would have to infer that the term "any individual" means only "older workers." Id.

The Sixth Circuit reproved the district court for its interpretative reading that led it to conclude that "the ADEA does not prohibit an employer from discriminating on the basis of age, against 'any individual' who is a member of the ADEA's protected class, but only prohibits discrimination against those in the protected class who are 'older' than the favored employees." Id. The Sixth Circuit determined that the plain language of the ADEA would not support such a construction.

The Sixth Circuit then turned its attention to the conclusion by the district court that the ADEA does not recognize claims of reverse age discrimination. In particular, the district court relied on the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992). The Sixth Circuit determined that the Hamilton decision and its progeny assign too much weight to the general language contained in Congress' Statements of Findings and Purpose contained in the ADEA in which Congress referred to the need to protect "older persons" or "older workers." Cline II, 296 F.3d at 470. See also 29 U.S.C. § 621(a) - (b). The Court pointed out that the ADEA does not define the term older person, and that its holding would do nothing to defeat the congressional intent to protect older workers and older persons. Id.

The Sixth Circuit further concluded that its holding was unchanged regardless of whether 29 U.S.C. § 621 was inconsistent with 29 U.S.C. § 623. The Court noted that "[i]n § 621 Congress declared its intention to protect older workers, and in § 623 and § 631 it identified the older workers it intends to protect as 'any individual' age 40 or older." Id. at 471.

In addition, the Court questioned the validity of the term "reverse discrimination." The Court observed that:

> [W]hat the district judge and others mean when they conclude that the ADEA does not prohibit "reverse discrimination" is that otherwise prohibited discrimination is permitted if the victims are literally (statutorily) within the protected class, but are a group within the class who in most cases are the beneficiaries of discrimination against others.

Id. However, the Court concluded that "[a]ll the plaintiffs are members of the protected class created by § 631(a) and all properly alleged they are denied job benefits due to their age. Therefore the protected class should be protected; to hold otherwise, is discrimination plain and

simple." Id. The Court also pointed out that Hamilton and its progeny reached their respective conclusions concerning reverse discrimination in contravention of the EEOC's interpretation of the ADEA. Cline II, 296 F.3d at 471. In its interpretative regulations, the EEOC concluded that "[i]t is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over." 29 C.F.R. § 1625.2(a).

The Court concluded by observing that the fact that some members of the protected class were benefited by the change to the collective bargaining agreement, while other members of the protected class were harmed by the alterations to the collective bargaining agreement does not change the conclusion that the statute was designed to prohibit age discrimination against any individual within the protected class. Cline II, 296 F.3d at 472. Accordingly, the Court reversed the district court's ruling on the motion to dismiss. Id. On remand, the Sixth Circuit directed the lower Court to address the plaintiffs' declaratory judgment argument and to consider whether the plaintiffs made out an actionable claim under the Ohio Civil Rights Act. Id.

Circuit Judge Cole wrote a separate concurrence. In essence, Circuit Judge Cole agreed that the plain language of the ADEA compelled the result reached by the majority. However, he "entertain[ed] serious doubts as to whether Congress specifically intended to allow persons ages forty and over to recover for so-called reverse age discrimination." Id. at 472 (Cole, J., *concurring*).

District Judge Williams—who was sitting by designation—wrote a strong dissent. He took issue with the notion that while the clear purpose of the ADEA was to protect older people, the majority's opinion, was more concerned with the problems faced by younger employees. Id. at 476 (Williams, J., *dissenting*). Moreover, Judge Williams was concerned that the ADEA was not designed to interfere with collective bargaining, and he believed that the majority's opinion

called into question the validity of seniority and early retirement plans across the country. Cline II, 296 F.3d at 476 (Williams, J., *dissenting*).

E. The Supreme Court Opinion

As noted above, the Supreme Court reversed the decision of the Sixth Circuit in a 6-3 decision authored by Justice Souter. The Court framed the issue before it as follows "[t]he . . . [ADEA] forbids discriminatory preference for the young over the old. The question in this case is whether it also prohibits favoring the old over the young." Cline III, 2004 WL 329956, at * 3. The Court held that the ADEA does not prohibit an employer from favoring the old to the detriment of the young. Id.

The Court began its analysis by citing the operative language under the ADEA that prohibits discrimination against "any individual . . . because of such individual's age." Id. at * 3-4. See also 29 U.S.C. § 623(a)(1). The Court conceded that this provision could be read in two different ways, but that a natural reading of the provision, coupled with "Congress's interpretative clues," leads to "an understanding of discrimination as directed against workers who are older than the ones getting treated better." Cline III, 2004 WL 329956, at * 4. In reaching this conclusion, the Court first concentrated on the studies, debates, and prefatory language leading to the passage of the ADEA. In so doing, the Court concluded that "[t]he prefatory provisions and their legislative history make a case that we think is beyond reasonable doubt, that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young." Id. at * 5.

The Court bolstered this conclusion in three distinct ways. First, the Court concluded that the fact that the legislative record was devoid of evidence that younger workers were suffering at the expense of their elders was not remarkable because common experience indicates that

discrimination because of age "is naturally understood to refer to discrimination against the older." Id. at * 5. Thus, the lack of evidence indicates that there was no "social problem [that] required a federal statute to place a younger worker in parity with an older one." Id. The Court also observed that if Congress was concerned with protecting the younger, against the older, "it would not likely have ignored everyone under 40." Id. Finally, the Court observed that prior to the instant case, "[t]he Courts of Appeals and District Courts have read the law the same way, and . . . have enjoyed virtually unanimous accord in understanding the ADEA to forbid only discrimination preferring young to old." Cline III, 2004 WL 329956, at * 6. The Court concluded that "[t]he very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view." Id.

The Court then addressed three arguments stressed by the dissenting justices, the plaintiffs, and the Equal Employment Opportunity Commission (the "EEOC"). First, the Court addressed the argument that the statute's meaning is plain when the term "age" is given the same meaning throughout. The Court determined that although there is a presumption that identical words used in different parts of an act are intended to have the same meaning, "[t]he presumption . . . thus relents when a word has several commonly understood meanings . . ." Id. at * 7. The Court concluded that that "age" is such a word, and, moreover, the word must be read in context. Id. at * 7. Importantly, the Court observed that:

> The point here is that we are not asking an abstract question about the meaning of "age"; we are seeking the meaning of the whole phrase "discriminate . . . because of such individual's age," where it occurs in the ADEA, 29 U.S.C. § 623(a)(1). As we have said, social history emphatically reveals an understanding of age discrimination as aimed against the old, and the statutory reference

> to age discrimination in this idiomatic sense is confirmed by legislative history.

Id. The Court determined that when the word "age" is read in context, the context informs the reader that "age" means one thing in § 623(a)(1), and another thing in § 623(f). Id. Thus, the presumption of uniformity cannot operate in this case. Cline III, 2004 WL 329956, at * 7.

The next contrarian argument considered by the Court revolves around comments made by Senator Yarborough—who was a sponsor of the ADEA— on the Senate floor. Senator Yarborough was presented with a hypothetical involving discrimination between two individuals in the same protected class, one older and one younger. Id. at * 8. Senator Yarborough concluded that "'[t]he law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way [the] decision went.'" Id. (citing 113 Cong. Rec. 31255 (1967)). Although the Court conceded that it had given great weight to Senator Yarborough's comments in the past, it reasoned that "a single outlying statement cannot stand against a tide of context and history, not to mention 30 years of judicial interpretation producing no apparent legislative qualms." Id. (citations omitted).

Finally, the Court considered an EEOC regulation which stated that "[i]f two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make the determination on the basis of some other factor." 29 C.F.R. § 1625.2(a) (2003). The Court declined to defer to the agency's interpretation of its governing statute because the EEOC's interpretation is "clearly wrong." Cline III, 2004 WL 329956, at * 9. Moreover, the Court observed that deference is only called for when the devices of judicial construction fail. Id. In this case, the Court noted that the statute is "structured and manifestly intended to protect the older from the younger." Id. Accordingly, the Court held that

that "[w]e see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one." Id.

Three justices—Scalia, Thomas and Kennedy—dissented from the majority opinion. Justice Scalia's opinion was brief. He argued that the EEOC's interpretation is "neither foreclosed by the statute nor unreasonable." Id. at * 11 (Scalia, J., *dissenting*). Accordingly, Justice Scalia "would defer to the agency's authoritative conclusion." Cline III, 2004 WL 329956, at * 11 (Scalia, J., *dissenting*).

In an opinion joined by Justice Kennedy, Justice Thomas separately dissented. Justice Thomas argued that the plain language of the statute authorizes "suits brought by the relatively young when discriminated against in favor of the relatively old." Id. at * 12 (Thomas, J., *dissenting*). In the alternative, Justice Thomas argued that "[a]t the very least, it is manifestly unclear that [the statute] bars *only* discrimination against the relatively older." Id. (Thomas, J., *dissenting*). Justice Thomas concluded that his interpretation was bolstered by the EEOC's interpretation, and the only legislative history relevant to the issue; namely, Senator Yarborough's comments on the Senate floor. Id. at * 13 (Thomas, J., *dissenting*).

Justice Thomas also took issue with the majority's reliance on "social history" as an interpretative tool. Indeed, Justice Thomas observed that "the Court has never defined 'social history' in any previous opinion, probably because it has never sanctioned looking to 'social history' as a method of statutory interpretation." Id. at * 13 (Thomas, J., *dissenting*). Justice Thomas noted that the majority's "social history" analysis would prevent a white worker from recovering under Title VII, since there is no record of whites suffering at the expense of racial minorities. Cline III, 2004 WL 329956, at * 15 (Thomas, J., *dissenting*). Ultimately, Justice

Thomas concluded that the majority had resorted to "interpretive sleight of hand" to avoid the plain language of the ADEA. Id. at *16 (Thomas, J., *dissenting*).

F. Conclusion

In the end, the resolution of the issue of whether a subgroup of a protected class may sue for discrimination based on favored treatment of another subgroup within a protected class rested with the United States Supreme Court. The Court concluded that there was no cause of action for the relatively young to sue an employer for discriminatory treatment that favored the relatively old. In so doing, the majority harmonized the law on this matter, which weighed heavily in favor of majority's decision. Id. at * 6. However, the end result is likely to spark controversy, particularly in light of Justice Thomas' vigorous dissent on the issue of the use of "social history" as an interpretive tool.

III. IBM CORPORATION

A. Introduction

The sole issue in IBM Corp. is whether the Respondent, a nonunionized company, violated Sections 7 and 8(a)(1) of the National Labor Relations Act (the "Act") by denying the requests of employees to have coworkers present during investigatory interviews. 341 N.L.R.B. No. 148 (2004). IBM Corp. is the most recent case in a long line of cases that examine the scope of Sections 7 and 8(a)(1) in the context of investigatory interviews.

N.L.R.B. v. Weingarten, Inc., a 1975 Supreme Court decision, is the genesis of an employee's right to have a representative present during an investigative interview. There, the Supreme Court found that Sections 7 and 8(a)(1) of the Act provide employees in union workplaces the right to have a union representative present at any investigatory interview in

which the employee reasonably believes disciplinary action may result. 420 U.S. 251 (1975). This right is commonly recognized as the Weingarten right. In E. I. DuPont & Co., 289 N.L.R.B. 627 (1988), the Board examined whether the Weingarten right applies in nonunion settings and found that employees in nonunion settings are not entitled to the presence of coworkers in investigatory interviews. In 2000, in Epilepsy Foundation of Northeast Ohio, the Board reconsidered and overruled E. I. DuPont, finding that the Weingarten right also applies to employees in nonunion settings. 331 N.L.R.B. No. 92 (2000). In IBM Corporation, a 2004 decision, the Board reconsidered and overruled Epilepsy Foundation, finding once again that the Weingarten right does not apply in nonunion workplaces.

B. Factual Background

On October 15, 2001, IBM Corporation interviewed three employees about allegations of harassment contained in a letter received from a former employee. IBM Corp., 174 L.R.R.M. at 1538. None of the employees requested the presence of a coworker during the October 15 interviews. Id. A week later, on October 22, an IBM manager denied the requests of each of the employees to have a coworker or an attorney present at an interview scheduled for the next day. Id. Each of the employees was interviewed on October 23 without a coworker or attorney present during the interview, and each of the employees was discharged about a month after the interviews. Id.

C. Administrative Law Judge Decision

The administrative law judge found that each of the employees requested to have a coworker present during the October 23 interviews and that representatives of IBM denied these requests. Id. Applying Epilepsy Foundation, the judge then held that IBM Corporation violated

Section 8(a)(1) when it denied the requests of the employees to have a coworker present during investigative interviews. Id.

D. NLBR Decision

In determining whether Weingarten rights apply in nonunion settings, the Board first examined whether it was compelled to extend Weingarten to nonunion settings. Id. at 1539. To address this issue, the Board reasoned—as it did in DuPont—that Section 7 is amenable to more than one interpretation and that the Section can be interpreted as not requiring Weingarten rights in nonunion settings. Id. Thus, the Board reasoned, it could choose between two permissible interpretations of Section 7, and it was not compelled to extend Weingarten to nonunion settings. Id.

The Board next evaluated whether a reexamination of Epilepsy Foundation was a proper exercise of the Board's adjudicative authority. Id. at 1539-40. The Board noted that the Weingarten Court anticipated and approved the process of reexamining past constructions of the Act. Id. The Board accordingly found that it was a proper exercise of its adjudicative authority to reexamine Epilepsy Foundation in light of changes in the workplace environment. Id.

After determining that it could properly reexamine the holding of Epilepsy Foundation, the Board reviewed policy considerations underlying prior cases in which the Board applied the Weingarten right. Id. at 1540. In doing so, the Board observed that the Weingarten Court concluded that the presence of a union representative provides a safeguard for not only an employee's interests but also the interests of the entire bargaining unit. Id. Then, the Board observed that it provided in DuPont the following three reasons why the Weingarten right should not extend to nonunion settings: (1) unlike a union representative, an employee in a nonunion setting is not obligated to represent the whole workforce; (2) unlike a union representative, an

employee representative is less likely to have the skills necessary to effectively represent the employee being interviewed; and (3) the right to the presence of a coworker in an investigative interview in a nonunion setting may disadvantage employees because it would discourage employers from interviewing employees, resulting in these employees losing their only chance to tell their side of the story (unlike in a union setting where it is likely that a process has been established to settle grievances).

After reviewing these policy considerations, the Board set forth the following reasons that favor not extending the Weingarten right to nonunion workplaces: (1) coworkers do not represent the interests of the entire work force; (2) coworkers cannot redress the imbalance of power between employers and employees; (3) coworkers do not have the same skills as a union representative; and (4) the presence of a coworker may compromise the confidentiality of information. Considering these factors, the Board overruled Epilepsy Foundation, finding that, on balance, policy considerations favored returning to previous Board precedent that does not extend the Weingarten right to nonunion workplaces.

E. Dissenting Opinion

Members Liebman and Walsh dissented from the majority opinion. They argued that the right to coworker representation in investigatory interviews—in union and nonunion workplaces—has a strong foundation in the Act and that the majority impermissibly relied on less than compelling policy considerations to overrule carefully reasoned recent precedent. Id. at 1255. The dissenting members further asserted that the majority opinion "shows a startling lack of interest in what is actually happening in American workplaces." Id. at 1259. In support of this assertion, they argued that the presence of a coworker "brings a measure of due process to workplace discipline," giving employees in nonunion workplaces a potential witness, advisor, and

advocate in an adversarial situation. Id. Finally, the dissenting members argued that the Weingarten right provides "fairness and due process" in the workplace, and, for this reason, the opinion of the majority "is unlikely to have an enduring place in American labor law." Id. at 1560.

F. Conclusion

IBM Corporation overruled recent precedent, restoring the right of employers in nonunion workplaces to conduct investigative interviews of employees without the presence of a coworker. As indicated in the dissent, however, this right has been the subject of a "surprisingly fitful history," and the holding of IBM Corporation may not endure the test of time. Nonetheless, IBM Corporation is an important Board decision that helps define the rights of employees and employers in investigative interviews held in nonunion workplaces.

IV. JONES V. R.R. DONNELLEY & SONS COMPANY, 124 S.Ct. 1836 (2004)

A. Case Summary

In Jones v. R.R. Donnelley & Sons Company, 124 S.Ct. 1836 (2004) *(hereinafter "Donnelley"),* the Supreme Court unanimously decided that a statute of limitations enacted by Congress in 1990 with respect to claims arising under 42 U.S.C.§1981 applies to any claims asserted under §1981 regardless of whether they arose before or after the date the amendment was adopted..

B. Analysis

1. Background on Section 1981.

The statute that now appears in 42 U.S.C.§1981 was originally enacted by the Civil Rights Act of 1866. That statute provided that all persons within the United States shall have the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens. In 1989, the Supreme Court held in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) that the statutory right "to make and enforce contracts" did not protect against harassing conduct that

occurred after the formation of the contract. Those claims that an employer created a hostile work environment, wrongfully discharged or wrongfully refused to transfer an employee did not state claims under Section 1981.

In 1991, Congress amended Section 1991 to add a new subsection that defined the term "make and enforce contracts" to include "termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The 1991 amendments overturned the Supreme Court's decision in *Paterson*.

Section 1981 as originally enacted did not contain a statute of limitations. Under Supreme Court precedents, where a federal statute does not specify an applicable statute of limitations, the settled practice was to adopt a time limit by reference to local state law if to do so was not inconsistent with federal law or policy. This practice of looking to state law to determine an applicable statute of limitations created a separate set of subissues that resulted in frequent litigation.

In response to this problem, Congress passed a statute that was codified at 28 U.S.C. §1658. That provision provides that except as otherwise provided by law, any civil action arising under an Act of Congress enacted after the date of enactment of Section 1658 must be commenced within 4 years after the cause of action accrues.

2. *Jones v. R.R. Donnelley*.

In 1994, a group of African-Americans who were former employees of R.R. Donnelley's manufacturing operations located in Chicago filed a class action alleging violations of their rights under 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991 ("1991 Act"). Specifically, the three classes of plaintiffs alleged that they were subjected to a racially hostile work environment, given an inferior employee status, and wrongfully terminated or denied transfer in connection with the close of a Chicago plant.

The defendant, R.R. Donnelley & Sons Company, sought summary judgment on the ground that petitioners' claims were barred by the applicable Illinois statute of limitations because they arose more than two years before petitioners filed their complaint. Petitioners responded that their claims were not governed by Illinois' statute of limitations; but, by Section 1658. Under Section 1658, the employees argued, their claim arose under an Act of Congress (the 1991 amendment) that was enacted after the date of 1990 (the year in which Section 1658 was enacted. Thus the 4 year federal statute of limitation applied and their claims were not time barred.

The United States District Court for the Northern District of Illinois determined that petitioners' claims arose under the 1991 Act and therefore are governed by §1658**.** The court held that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations (§1658) applies to that cause of action." *Adams v. R.R. Donnelley & Sons,* 149 F.Supp.2d 459 (N.D. Ill. 2001). Furthermore, the court reasoned that by reversing the rule of *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), the 1991

Act opened the door to post-contract discrimination which was formerly not actionable under §1981. *Id.*

The issue was certified for an interlocutory appeal to the 7th Circuit. On appeal, the 7th Circuit reversed the lower court's ruling. It concluded that the 1991 amendment to Section 1981 did not create a separate wholly new cause of action but merely redefined a term in the original statute.

The Seventh Circuit's conclusion is consistent with the Third and Eighth Circuits. However, the Sixth and Tenth Circuits have held that §1658 applies, "whenever Congress, after December 1990, passes legislation that creates a new cause of action," whether or not the legislation amends a pre-existing statute. *Harris v. Allstate Insurance Co.,* 300 F.3d 1183 (C.A.10 2002). The United States Supreme Court granted certiorari to resolve the conflict in the Circuits.

The U.S. Supreme Court viewed the critical question to be the following: did the employees' claims "arise under" the Section 1981 (which was enacted prior to the enactment of Section 1658) or under the 1991 Amendment to Section 1981. Ultimately the Court reversed the decision of the 7th Circuit and concluded that the claims arose under the 1991 Amendment and therefore the 4 year statute of limitations set forth in Section 1658 applied.

Recognizing that both parties were in agreement that the 1991 Act is an "Act" of Congress "enacted" after December 1, 1990; the Court began with an analysis of the phrase "arising under." In *Osborn v. Bank of United States,* 9 Wheat. 738 (1824), Chief Justice Marshall stated that a case "arises under" federal law whenever federal law "forms an ingredient of the original cause." The Court agreed that petitioners' causes of action also arose under the 1991 Act, because the 1991 Act clearly "forms an ingredient" of petitioners' claims. *Adams v. R.R. Donnelley & Sons,* 124 S. Ct. 1836 (2005). However, as respondent points out, this interpretation does not preclude petitioners' action from also "arising under" the pre-1991 version of §1981.

Next, petitioners asserted that the placement of §1658 in Title 28 suggested that Congress meant to invoke the Court's interpretation of neighboring jurisdictional rules. Specifically, the statutes in Title 28 that define the scope of federal subject-matter jurisdiction. Those statutes have been interpreted to mean that a claim arises under federal law if federal law provides a necessary element of the plaintiff's claim for relief. *Id.* The Court dismissed this argument by

petitioners and turned to the most familiar definition of "arising under," stated by Justice Holmes. In *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257 (1916), Holmes stated that a suit "arises under the law that created the cause of action." Although this interpretation aids petitioners, it does the same for respondents. Respondents assert a similar argument as they did to Chief Justice Marshall's interpretation from *Osborn*; that, although it may arise under the 1991 Act, it can still arise from the pre-1991 Act. The Court agreed with respondent and finally turned to the context in which §1658 was enacted and the purposes it was designed to accomplish. *Id.*

The Court then proceeded to analyze the general set of problems that the practice of turning to state law to "borrow" an applicable statute of limitations for federal actions had created over the years. Citing *Board of Regents of Univ. of State of N.Y. v. Tomanio,* 446 U.S. 478, the Court stated that the lack of a uniform federal statute of limitations created a "void which is commonplace in federal statutory law." This void required the Court to practice "limitation borrowing," or adopt a state statute of limitations as federal law if it was not inconsistent with federal law or policy to do so. *Wilson v. Garcia,* 471 U.S. 261 (1985). This practice translated into numerous problems. First, a conflict of laws problem of determining which State statute was controlling, the law of the forum or that of the situs of the injury. S.Rep. No. 619, 84th Cong., 1st Sess., 4-6 (1955). Next, confusion between identical parties in federal court: a plaintiff borrowing from State A could find himself barred by that State's law, while State B's plaintiff would be permitted to proceed. Also, issues arose regarding joint resolution in class actions in federal court. Finally, the absence of a uniform federal limitations period complicated the question of when a statute of limitations could be tolled. This confusion led Congress to enact federal limitations periods for all federal causes of action.

Congress created the Federal Courts Study Committee, which recommended the enactment of a retroactive, uniform federal statute of limitations. (§1658 follows the Committee's recommendation with the exception of not being retroactive). The House Report accompanying this final bill stated that it was enacted to eliminate the practice of borrowing state statute of limitations. And, that the central purpose of §1658 was to minimize the occasions for that practice. H.R.Rep. No. 101-734, p. 24 (1990).

The Court stated that this history of §1658's enactment supports giving an interpretation of §1658 that would fill more rather than less of the void existing before the 1991 Act.

Accordingly, the Court could not agree with respondent's interpretation. That interpretation subverts the goal of §1658 by restricting the section to cases where the plaintiff's cause of action is based solely on a post-1990 statute that "established a new cause of action without reference to preexisting law." *Adams v. R.R. Donnelley & Sons*, 305 F.3d 717. Congress routinely creates new rights of action by amending existing statutes, and "altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." *Rivers v. Roadway Express, Inc.,* 511 U.S. 298 (1994). The Court agreed that the 1991 Act is exactly this type of act. Although the 1991 Act is an amendment to an existing statute, it is no less an "Act of Congress" than a new, stand-alone statute. *Adams v. R.R. Donnelley & Sons,* 124 S.Ct. 1836 (2004). What matters is the substantive effect of an enactment–the creation of new rights of action and corresponding liabilities–not the format in which it appears in the Code. *Id.*

The Court then turned its attention to the 7th Circuit's rationale that because Congress deliberately did not make Section 1658 retroactive in order to avoid disrupting litigants' settled expectations, Section 1658 should be inapplicable to claims under Section 1981. The Court recognized Congress's concerns about settled expectations but found those concerns to be inapplicable where but for the 1991 Amendment, none of the claims being asserted by the employees would have been possible under Section 1981.

The Court also stated that its holding is consistent with the common usage of the word "arise" to mean "come into being; originate" or "spring up." *Id.* The Seventh Circuit's interpretation of "arising under" as something akin to "based solely upon," has no basis in the Court's case law or statutory language. *Id.*

Finally, the Court cited *Rivers v. Roadway Express, Inc.,* which interpreted the 1991 Act. There, the Court stated that the 1991 amendment "enlarged the category of conduct that is subject to §1981 liability. The court concluded:

> "Because petitioners' hostile work environment, wrongful termination, and failure-to-transfer claims did not allege a violation of the pre-1990 version of §1981 but did allege violations of the amended statute, those claims "arose under" the amendment to §1981 contained in the 1991 Act."

Adams v. R.R. Donnelley & Sons, 124 S.Ct. 1836.

The Court ordered that the judgment of the Seventh Circuit Court of Appeals was reversed and remanded the case for further proceedings consistent with the Court's opinion.

C. Subsequent Cases

Lower Courts (No real effect)

Jones v. R.R. Donnelley & Sons, 2005 WL 14923, N.D.Ill. (2005).

- The court granted the motion of Suzanne Tongring for leave to intervene. The court also granted in part her petition for fees and reimbursement of expenses.

Cooper v. Southern Co., 390 F.3d (2004)

- Here, plaintiffs claimed that they should also be allowed the four-year federal "catch-all" statute of limitation provided for in *Donnelley.* However, the court barred plaintiffs from asserting this argument because they had waived the issue by not arguing for it in District Court or in their briefs.

Lower Courts

V. PENNSYLVANIA STATE POLICE V. SUDERS

A. Case Summary

In Pennsylvania State Police v. Suders [1] (Hereinafter "Suders") the Supreme Court via an 8-1 decision determined when constructive discharge could be considered a "tangible employment action" such that an employer is strictly liable for supervisor harassment. In cases where the constructive discharge does not qualify as a "tangible employment action", the employer may assert an affirmative defense to liability as articulated by *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998),* and *Faragher v. Boca Raton, 524 U.S. 775 (1998).* The Supreme Court also addressed what elements must be established by a plaintiff who asserts that an employer violated Title VII by subjecting the plaintiff to sexual harassment which resulted in a constructive discharge.

B. Analysis

1. The 8-1 Decision of the Court.

[1] 124 S.Ct. 2342 (2004)

Nancy Suders was hired by the Pennsylvania State Police (PSP) as a police communications operation in March of 1998. Suders had three supervisors all of whom subjected her to a continuous barrage of sexual harassment that ceased only when she resigned from the PSP. Among other things, the supervisors would continually discuss the subject of people having sex with animals, constantly grab their genitals and shout out invitations for having oral sex. In June 1998, one of those supervisors accused Suders of taking a missing accident file home with her. After that incident, Suders approached the PSP's Equal Employment Opportunity Officer and told her she "might need some help." Neither woman followed up on the conversation. On August 18, 1998, Suders again contact the EEO Officer this time stating that she was being harassed and was afraid. The Officer told Suders to file a complaint but did not tell her how to obtain the necessary form. The Officer's response appeared to Suders to be both insensitive and unhelpful.

Two days later, Suders' supervisors arrested her for theft and Suders resigned from the PSP. During Suders brief tenure with the PSP, she had on several occasions taken a computer skills exam to satisfy a PSP job requirement. Each time, she was told by her supervisors that she had failed. Then one day Suders came upon her exams in a set of drawers in the women's locker room and she concluded that they had never been forwarded for grading and that her supervisors' reports of her failures were false. Regarding the tests as her property, she removed them from the locker room. Meanwhile, upon finding that the exams had been removed, here supervisors devised a plan to arrest her for theft. They dusted the drawer in which the exams had been stored with a theft-detection power that turns blue when touched. When Suders attempted to return the tests to the drawer, her hands turned a telltale blue. Her supervisors then apprehended and handcuffed her, photographed her blue hands and proceeded to question her. Suders had previously prepared a written resignation, which she tendered to her supervisors soon after they detained here. Nevertheless, her supervisors initially refused to release her. Instead, they brought her to an interrogation room, gave her warnings under Miranda and continued to question her. Eventually they let her go. The PSP never brought any theft charges against Suders.

In September 2000, Suders sued the PSP alleging, inter alia, that she had been subjected to sexual harassment and constructively discharged all in violation of Title VII. The U.S. District Court for the Middle District of Pennsylvania granted summary judgment to the PSP.

The District Court reasoned that PSP could not be held vicariously liable for the acts of the three supervisors because the harassment to which they subjected Setter did not culminate in a tangible employment action for which PSP would have been strictly liable. The lack of a tangible employment action meant PSP could only be vicariously liable and the District Court found that the affirmative defense to vicarious liability set forth in the Supreme Court decisions in *Faragher v. Boca Raton* and in *Burlington Industries, Inc. v. Ellerth* had been successfully established by PSP. Faragher and Ellerth held that an employer could establish that affirmative defense by proving: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Id.

The District Court concluded that by resigning just two days after she first mentioned anything about harassment to the EEO Officer for PSP, Suders had never given the PSP the opportunity to respond to her complaints. The District Court did not address Suders constructive discharge claim.

On appeal to the U.S. Court of Appeals for the Third Circuit, the District Court's decision was reversed and remanded. The Third Circuit ruled that even if the PSP could assert the *Ellerth/Faragher* affirmative defense, genuine issues of material fact existed about the effectiveness of the PSP's program to address sexual harassment claims. The Third Circuit also held that Suders had stated a claim of constructive discharge due to hostile work environment. Finally, the Third Circuit held that a claim of constructive discharge, if proven, constitutes a tangible employment action rendering an employer strictly liable precluding any recourse to the *Ellerth/Faragher* affirmative defense.

The Third Circuit's determination that constructive discharge could constitute a tangible employment action was appealed to the U.S. Supreme Court. By an 8-1 decision, the Supreme Court ruled that constructive discharge does not automatically constitute a tangible employment action as the Third Circuit held. Instead, the Supreme Court held that a constructive discharge will constitute a tangible employment action when a supervisor's official act precipitates the constructive discharge. The Supreme Court began by acknowledging that Title VII does permit constructive discharge claim. According to the Court, an employee's reasonable decision to resign because of unendurable working conditions is equivalent to a formal discharge of the

employee by its employer. Claims of this nature fall within the "constructive discharge doctrine." In the absence of that "official act that precipitated" the constructive discharge, the employer will be free to assert the *Ellerth/Faragher* affirmative defense.

Satisfied with the standard for a "constructive discharge," the Court answered the question of when the *Ellerth/Faragher* affirmative defenses may be raised. This inquiry turns on what type of harassment actually precipitated the constructive discharge. Although the end result of a constructive discharge is the same, the Court held that when an official act does not underlie the constructive discharge the *Ellerth* and *Faragher* analysis calls for extension of the affirmative defense to the employer. The Court noted that "an official act of the enterprise," reflected in company records shows beyond question that the supervisor has used his managerial and controlling position to the employee's disadvantage. *Ellerth,* 524 U.S., at 760. Without this official act, the extent to which the supervisor's misconduct was aided by the employer is less certain. Therefore, the latter situation justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable. *Suders,* 124 S.Ct., at 2355.

The Court utilized two recent Court of Appeals decisions to come to their ruling on how the "official act" (or "tangible employment action") criterion should play out. Both cases involved constructive discharges, however, only one of the discharges was precipitated by an "official act." In *Reed v. MBNA Marketing Systems, Inc.,* 333 F.3d 27 (C.A. 1 2003), the plaintiff claimed a constructive discharge based on her supervisor's repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit ruled that because the supervisor's conduct "was exceedingly unofficial and involved no direct exercise of company authority, it was exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." Id. In contrast to *Reed,* in *Robinson v. Sappington,* 351 F.3d 317 (C.A.7 2003), when the plaintiff claimed she was sexually harassed by a judge she worked for, the judge transferred her to another judge, and told her that "her first six months probably would be hell," and that it was in her "best interest to resign." There, the Seventh Circuit precluded the employer from asserting an affirmative defense because the plaintiff's decision to resign "resulted, at least in part, from the presiding judge's official action in transferring her..." Id.

The Supreme Court remanded the case holding that the Third Circuit erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases.

2. J. Thomas' Dissent

Justice Thomas dissented from the Supreme Court's decision. Justice Thomas's dissent principally focused on what elements should be necessary to establish a claim of constructive discharge. He began by noting that the National Labor Relations Board's standard for constructive discharge requires employees to prove that: (a) the employer imposed burdens on the employee that cause and are intended to cause a change in the employee's working conditions that are so difficult or unpleasant as to force the employee to resign; and (b) those burdens were imposed because of the employee's union activities. He then cited some early Title VII constructive discharge cases which also required that the employer deliberately rendered the employee's working conditions to be intolerable. In sum, Justice Thomas concluded that any constructive discharge claim should require proof that the employer specifically intended to create an intolerable client that would force the employee to quit.

In Justice Thomas's view, neither the Supreme Court's opinion nor the Third Circuit's analysis requires proof of any such specific intent. The absence of that specific intent element, Justice Thomas argued, means that a plaintiff could establish a constructive discharge without any adverse employment action having been taken against the plaintiff. The failure to require either actual adverse employment action or specific intent, led Justice Thomas to conclude that the *Ellerth/Faragher* affirmative defense should be available in all constructive discharge actions.

Having constructed the analytical framework described above, Justice Thomas then turned to the specifics of the pending action and concluded that the facts alleged: (a) were insufficient as a matter of law to show that the plaintiff suffered any adverse employment action that was made on the basis of her sex; and (b) that were insufficient as a matter of law to show that PSP knew or should have known of the alleged harassment. Accordingly, Justice Thomas would have reserved the judgment of the Third Circuit.

C. <u>Summary</u>

The Suders decision is notable for several reasons.

First, it held that the strictly liability/negligence framework established by the Court's previous decisions, notably *Ellerth/Faragher*, also applies to constructive discharge claims under Title VII and gave more precise guidance to the lower courts regarding when an employer should be held strictly liable for a constructive discharge.

Second, although the issue was not squarely before the Supreme Court, it reaffirmed the legitimacy of constructive discharge claims under Title VII and provided some further guidance as to the elements that need to be established to sustain such claims.

Third, the Supreme Court effectively reaffirmed the standard consistently advocated by the Commission: constructive discharge is established when the conditions were so intolerable that a reasonable person would have felt compelled to resign; *i.e.*, the plaintiff's resignation was a "fitting response."

Finally, the Court's decision serves as a cautionary tale for employer's regarding the adequacy of the programs they put in place to address discrimination claims. The apparent passiveness or indifference of the employer's equal opportunity staff has created a real possibility of the employer being held liable for the constructive discharge claim even after asserting the *Ellerth/Faragher* affirmative defense.

The Court did not address the liability standard for constructive discharge resulting from coworker harassment.

D. Subsequent Cases

In *Hill v. Borough of Kutztown,* 2005 WL 67079 (E.D.Pa.), Keith Hill claimed age discrimination by a new Mayor who,

> "purposely undertook...to engage in...conduct to intimidate, oppress and harass Plaintiff in order to drive him from public employment, destroy his reputation, and destroy his ability to pursue a livelihood, his licensed profession and his chosen career as a public servant."

Id. Hill attempted to cite the Supreme Court's holding in Suders to allege that he, too, had been constructively discharged. The court found that Hill had not stated a claim for age discrimination and did not directly address the ruling from *Suders.*

VI. TENNESSEE V. LANE

In *Lane*, paraplegics who used wheelchairs brought suit against the State of Tennessee under Title II of the Americans with Disabilities Act ("ADA"), alleging that they were physically denied access to the court systems in certain rural counties based upon the courthouse layouts. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. The Supreme Court held that the Eleventh Amendment does not bar private cause of action against a state or local government under Title II

In *Board of Trustees of Univ. of Ala. v Garrett*, 531 U.S. 356 (2001), the Court concluded that the Eleventh Amendment bars private actions seeking monetary damages for state violations of Title I of the ADA, which governs employment discrimination. In *Lane*, the Court concluded that Title II, unlike Title I, is a valid exercise of Congress's power to enforce the Fourteenth Amendment's substantive guarantees. The *Lane* decision does not alter the *Garrett* holding.

VII. THE PAST, PRESENT AND FUTURE OF TAXABILITY OF EMPLOYMENT AWARDS

A. The Past

The taxability of awards in the arena of employment litigation has been a quagmire of uncertainty with practitioners in varying circuits having varying answers to questions surrounding whether awards are taxable and, if so, what part of the award is taxable. *See generally*, Commissioner v. Schleier, 515 *U.S.* 323, 115 *S. Ct.* 2159 (1995); United States v. Burke, 504 *U.S.* 229, 112 *S. Ct.* 1867 (1992); 26 *U.S.C.* § 104(a); and IRS Rev. Ruling 96-56. What has occurred in many jurisdictions, is that the contingency fee plaintiff pays federal and state income taxes on the attorneys' fees and costs part of the award that is paid by the defendant

to the plaintiff's attorney. Then the plaintiff's attorney pays federal and state income taxes on that same payment of monies which results in double taxation.

Lawyers would face the difficult scenario found by the plaintiff in Illinois. There, Cynthia Spina prevailed in a hotly contested and litigated sexual harassment and discrimination lawsuit against the Illinois Police Department. Ms. Spina's recovery for compensatory damages was subject to the $300,000 statutory damages cap found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Her attorneys were awarded fees and costs that approached $1,000,000. At the end of the day, Ms. Spina's tax bill exceeded her damages award and left her with an additional tax liability of $99,000. Spina v. Forest Preserve District of Cook County, 207 F.Supp.2d 764 (N.D. Ill. 2002).

B. The Present

1. The US Supremes

The issue of taxability of attorneys' fees to a contingency fee plaintiff was presented to the United States Supreme Court in Commissioner of Internal Revenue v. John W. Banks, II and Commissioner of Internal Revenue v. Sigitas J. Banaitis, Nos. 03-892 and 03-907, 2005 U.S. LEXIS 1370; 73 U.S.L.W. 4117; 94 Fair Empl. Prac. Cas. (BNA) 1793 (January 24, 2005).

In Commissioner of Internal Revenue v. John W. Banks, II, 345 F.3d 373 (2003), Banks was an educational consultant who was fired from the California Department of Education. He filed a cause of action alleging violations of, *inter alia*, 42 U.S.C. §§1981, 1983 and Title VII. Defendant settled with Banks and paid him $464,000 of which Banks paid $150,000 to his attorney in accordance with the contingent fee agreement. Banks did not include any of the monies as income and was issued a notice of deficiency for the $464,000 by the Commissioner

of the IRS. This was upheld by the Tax Court. The Sixth Circuit followed the Firth and Eleventh Circuit and reversed in part as to the taxability of the $150,000.

In Commissioner of Internal Revenue v. Sigitas J. Banaitis, 340 F.3d 1074 (2003), Banaitis was a vice president and loan officer at Bank of California that was acquired by Mitsubishi Bank. Banaitis filed a cause of action alleging, in essence, a breach of his employment contract. The matter proceeded to trial after which defendants filed post trial motions and appeals. After the resolution of these motions and appeals, the parties settled with Banaitis receiving $4,864,547, and defendants paying an additional $3,864,012 directly to his attorney. Banaitis did not include the additional $3,864,012 as income and was issued a notice of deficiency for the $3,864,012 by the Commissioner of the IRS. This was upheld by the Tax Court. The Ninth Circuit analyzed the law in Oregon. It found that only because Oregon law granted a special property right or superior lien on the attorneys' fee, then that fee should not be income to Banaitis.

The United States Supreme Court consolidated both cases in Commissioner of Internal Revenue v. John W. Banks, II and Commissioner of Internal Revenue v. Sigitas J. Banaitis, Nos. 03-892 and 03-907, 2005 U.S. LEXIS 1370; 73 U.S.L.W. 4117; 94 Fair Empl. Prac. Cas. (BNA) 1793 (January 24, 2005) ("Banks"). On January 24, 2005, the US Supreme Court reversed both the Sixth and Ninth Circuits and found in favor of the Commissioner of the IRS, in ruling that the payment of attorneys' fees was taxable to the plaintiff.

2. The Analysis

The analysis begins with the Internal Revenue Code that defines "gross income" for federal tax purposes as "all income from whatever source derived." 26 U.S.C. §61(a). This broad definition is all-encompassing and results in the IRS arguing that gross income includes all

economic gains not otherwise exempted. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-30, 99 L. Ed. 483, 75 S. Ct. 473 (1955); Commissioner v. Jacobson, 336 U.S. 28, 49, 93 L. Ed. 477, 69 S. Ct. 358 (1949).

Plaintiffs' attorneys have historically argued that the value of the legal claim found in the contingency fee agreement was speculative at the moment of assignment and may end up being worth nothing. Thus, the attorneys' fee and award should not be treated as an anticipatory assignment and thus should not be held as income to the plaintiff. They would argue that a contingent-fee arrangement is more like a partial assignment of income-producing property than an assignment of income. Estate of Clarks v. United States, 202 F.3d 854, 857-858 (2000).

The *Banks* Court definitively rejected this argument in stating that contingency fee agreements are still anticipatory assignments even though the value of the assignment may be unknown at the time of assignment Banks, *supra* at *17; Lucas v. Earl, 281 U.S. 111, 74 L. Ed. 731, 50 S. Ct. 241 (1930); United States v. Basye, 410 U.S. 441, 445, 450-452, 35 L. Ed. 2d 412, 93 S. Ct. 1080 (1973); Raymond v. United States, 355 F.3d 107, 115-116 (CA2 2004). Further, the Supreme Court has definitively held that such an anticipatory assignment of income is taxable to the plaintiff as he/she earned the income that gave rise to the attorneys' fee. Banks, *supra* 2005 US Lexis 1370 at *14; Lucas, *supra*; Comm'r v. Sunnen, 333 U.S. 591, 604, 92 L. Ed. 898, 68 S. Ct. 715 (1948); Helvering v. Horst, 311 U.S. 112, 116-117, 85 L. Ed. 75, 61 S. Ct. 144 (1940).

Plaintiff's attorneys have also historically argued that the plaintiff did not exercise dominion over the attorneys' fees and costs part of the award. They argued that payment of attorneys' fees and costs was compensation due to the attorneys' effort and skill, independent of the litigation. Thus, the relationship should be seen as a joint venture or partnership where each partner can be

taxed for the separate rewards that they actually received. The *Banks* Court also rejected this argument and found the relationship was more akin to that of principal-agent. The Court found that the plaintiff controls the critical decisions and makes the final decision as to whether to settle or proceed to judgment. Thus, the client retains ultimate dominion and control over the underlying income generating asset which is the plaintiff's legal injury. Horst, *supra*, at 116-117, 85 L. Ed. 75, 61 S. Ct. 144. *See also* Lucas, *supra*, at 114-115, 85 L. Ed. 75, 61 S. Ct. 144; Helvering v. Eubank, 311 U.S. 122, 124-125, 85 L. Ed. 81, 61 S. Ct. 149 (1940); Sunnen, *supra*, at 604, 92 L. Ed. 898, 68 S. Ct. 715. The Court found that this is reflected by the attorney being ethically obligated to act for the exclusive benefit of the client-principal rather than for the benefit of the attorney. The Court favorably commented on Judge Posner's analogy of treating the contingent fee relationship as similar to that of a commission salesman. Kenseth v. Comm'r, 259 F.3d 881, 883 (CA7 2001). In that case, Judge Posner opined that the commission salesman has as much ownership of his employer's accounts receivable as the contingent fee lawyer has ownership over the plaintiff's claim. Id. In both situations, the principal relies on the agent to realize an economic gain, and, in both cases, the economic gain is income to the principal. Id.

3. The American Jobs Creation Act

On October 22, 2004, President George W. Bush signed the American Jobs Creation Act which included a key provision from the Civil Rights Tax Relief Act (H.R. 1155/S. 557) ("CRTRA") into law.

This corporate tax bill which passed Congress on October 11, 2004 (H.R. 4520) has put to bed the issue of taxability of attorneys' fees in contingency fee matters pertaining to employment discrimination and harassment lawsuits. The new law specifically eliminates the double tax on attorneys' fees. The passage of the CRTRA is a massive victory to plaintiff and

defense lawyers and to all parties to employment disputes. Due to the broad positive implications of the bill, it enjoyed wide support from the plaintiff and defense bar as well as broad bi-partisan support in the Congress. The CRTRA was an ABA legislative priority and was a focus during the ABA Day lobbying effort in Washington, DC.

Thus, H.R. 4520 §703, permits plaintiffs an above-the-line deduction for attorneys' fees and costs paid by or on behalf of the plaintiff in employment cases as noted below in the discussion on the amended Internal Revenue Code. This provision precludes such payments from being subject to the Alternative Minimum Tax or the 2% floor on itemized deductions.

Although lobbyists and members of both parties such as the Senate Finance Committee Chair, Charles Grassley (R-IA) and Ranking Member, Max Baucus (D-MT), attempted to make the provision retroactive to December 2002, the CRTRA will only apply to judgments or settlements occurring after the date the President signed the bill into law – October 22, 2004.

C. The Future

1. Issues left for another day by the Banks Court

The Court left open the following arguments due to the fact that they were not raised prior to the briefs submitted to the US Supreme Court.

> (1) The contingent-fee agreement establishes a Subchapter K partnership under 26 U.S.C. § § 702, 704, and 761, Brief for Respondent Banaitis in No. 03-907, p. 5-21;
>
> (2) litigation recoveries are proceeds from disposition of property, so the attorney's fee should be subtracted as a capital expense pursuant to § § 1001, 1012, and 1016, Brief for Association of Trial Lawyers of America as *Amicus Curiae* 23-28, Brief for Charles Davenport as *Amicus Curiae* 3-13; and
>
> (3) the fees are deductible reimbursed employee business expenses under § 62(a)(2)(A) (2000 ed. and Supp. I), Brief for Stephen Cohen as *Amicus Curiae*.
>
> Banks, supra at *21-22

2. Future issues not address by the Banks Court

The Court left open what it would do in the situation where there was a court-ordered fee award in so far as whether it would find the payment of court-ordered attorneys' fees and costs taxable to the plaintiff as this was not the situation in either matter. Banks, *supra* at *23

Further, the Court left open what it would do in the situation where there was an indication in the contingency fee contract that the contingent fee paid to the attorney was in lieu of statutory fees the plaintiff might otherwise have been entitled to recover. Banks, *supra* at *23-24

3. Questions surrounding the CRTRA

a. Type of cases subject to the CRTRA

The question arises as to the implications of the non-taxability of attorneys' fees for cases nor specifically surrounding the issue of discrimination or harassment. Are the payment of attorneys' fees in contingency fee matters for non-discrimination or harassment claims taxable to the plaintiff?

This issue has not yet been resolved by the Courts. The Internal Revenue Code, found at 26 USCS §62 (2005), states the general rule that, "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:" IRC §62(a). The new proposed amendment reflects the following deduction: "Costs involving discrimination suits, etc. Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination (as defined in subsection (e)) or a claim of a violation of subchapter III of chapter 37 of title 31, United States Code [31 USCS §§ 3721 et seq.] or a claim made under section 1862(b)(3)(A) of the Social Security Act (42 U.S.C. 1395y(b)(3)(A)). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable

year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim." IRC §62(a)(20).

Although the provision commences with language about discrimination suits, many practitioners believe that any lawsuit pertaining to employment are included in the exception. It is important to take note of the US Supreme Court's *dicta* on this point. The *Banks* Court noted that, "[h]ad the Act been in force for the transactions now under review, these cases likely would not have arisen. The Act is not retroactive, however, so while it may cover future taxpayers in respondents' position, it does not pertain here. Banks, *supra* at *13-14. In this consolidated case, Banaitis was not a discrimination or harassment lawsuit. It dealt with breach of employment contract wrongful discharge for attempting to coerce Banaitis to breach his fiduciary duties.

Further, a comprehensive review of IRC §62(e) is helpful to support this argument:

> (e) Unlawful discrimination defined. For purposes of subsection (a)(19), the term "unlawful discrimination" means an act that is unlawful under any of the following:
> (1) Section 302 of the Civil Rights Act of 1991 (2 U.S.C. 1202).
> (2) Section 201, 202, 203, 204, 205, 206, or 207 of the Congressional Accountability Act of 1995 (2 U.S.C. 1311, 1312, 1313, 1314, 1315, 1316, or 1317).
> (3) The National Labor Relations Act (29 U.S.C. 151 et seq.).
> (4) The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).
> (5) Section 4 or 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623 or 633a).
> (6) Section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791 or 794).
> (7) Section 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1140).
> (8) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).
> (9) The Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 et seq.).
> (10) The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102 et seq.).
> (11) Section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2615).
> (12) Chapter 43 of title 38, United States Code [38 USCS §§ 4301 et seq.] (relating to employment and reemployment rights of members of the uniformed services).
> (13) Section 1977, 1979, or 1980 of the Revised Statutes (42 U.S.C. 1981, 1983, or 1985).
> (14) Section 703, 704, or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2, 2000e-3, or 2000e-16).
> (15) Section 804, 805, 806, 808, or 818 of the Fair Housing Act (42 U.S.C. 3604, 3605,

3606, 3608, or 3617).
(16) Section 102, 202, 302, or 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112, 12132, 12182, or 12203).
(17) Any provision of Federal law (popularly known as whistleblower protection provisions) prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted under Federal law.
(18) Any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law--
(i) providing for the enforcement of civil rights, or
(ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.

Thus, based upon IRC §62(e)(18)(ii), it appears that any dispute pertaining to any part of the employment relationship would be subject to the exception found in IRC §62(a)(20).

b. CRTRA implicated pre-litigation or post-litigation only

Questions arise over whether cases have to go to trial or at least be put into litigation for you to treat the payment of attorneys' fees and costs as not taxable to the employee. The prevailing wisdom is that one does not have to put these disputes into litigation to get the benefit of the CRTRA. Notably, the CRTRA and the IRC language refers to, "any action involving a claim." It does not limit the coverage to lawsuits. However, it is certainly conceivable that an argument could be made that the definition of action is, in fact, a lawsuit. In fact, Black's Law Dictionary, Sixth Edition, states that the term "action" usually refers to a lawsuit. Such an argument would certainly have dubious prospects of success considering the obvious implications of same. Practitioners would be constrained to put matters into litigation rather then resolve them pre-litigation. This would of course affect the ability of parties to keep these disputes confidential which may very well be the motivating reason for the employer to resolve the dispute – not to mention the other numerous negative implications.

c. Issuing a Form W-2 or a Form 1099 and deducting withholdings

It is unclear to many whether a former employer should issue a Form W-2 or 1099 and whether these tax documents should be issued for both plaintiff and plaintiff's lawyer and whether the company must deduct withholdings. Many New Jersey practitioners request that the monies are 1099'd to the lawfirm. Some employers insist that the monies need to be W-2'd. This issue requires a review of local decisional case law. In New Jersey and New York, there are cases such as Kim v. Monmouth County, 320 N. J. Super. 157 (Law Div. 1999) and Kelly v. Hunton & Williams, 1999 WL 759972 (USDC EDNY), which seem to hold that it is inappropriate to withhold taxes because the settlement (or judgment) proceeds cannot represent "wages for services performed" (even if for lost income damages). Thus, it supports the request that the monies should be subject to a Form 1099 without any withholdings

4. Issues beyond the CRTRA

a. Compensatory Damages

Compensatory wage damage awards to the plaintiff are construed as taxable income. In the world of personal injury, when a plaintiff receives monies to compensate them for a personal injury, the monies are generally not construed as taxable income to that plaintiff. If the facts suggest, one may want to have language in the settlement agreement stating that the monies are payment for the physical manifestation of emotional distress damages and/or physical injury as well as payment of attorneys' fees and costs in an action involving claims of discrimination or harassment.

Practitioners expect that there will be legislation introduced to the 109th Congress to restore the pre-1996 tax treatment of compensatory damages to make them not taxable to the plaintiff.

b. Income Averaging

Plaintiffs will often get back and front pay awards that cover several years of employment in one payment. This payment will affect their income tax payment for the year that the payment is paid. Some practitioners will request additional awards to compensate plaintiffs for the negative consequence of receiving a backpay award in a single year under the doctrine that discrimination victims are entitled to "make whole" relief. *See*, O'Neill v. Sears, Roebuck and Company, 108 F.Supp.2d 443, 448 (E.D. Pa. 2000); Sears v. Atchison, Topeka & Santa Fe Ry, 749F.2d 1451,1456 (10th Cir. 1984); E.E.O.C. v. Joe's Stone Crab, Inc., 15 F.Supp.2d 1364 (S.D. Fla. 1998); Arneson v. Sullivan, 958 F.Supp. 443(E.D. Miss. 1996); Gelof v. Papineau, 648 F.Supp. 912 (D. Del. 1986),*aff'd in part and vacated in part*, 829 F.2d 452 (3d Cir. 1987). However, lobbyists are seeking to introduce legislation to the 109th Congress to mitigate the tax effect of receiving back pay and front pay in one year by providing income averaging for those recoveries.