

2005-2006
U.S. SUPREME COURT CASES
YEAR IN REVIEW

Colorado CLE Conference
Aspen/Snowmass, Colorado
January 2007

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INTRODUCTION

The U.S. Supreme Court considered six cases in the area of employment law, in its 2005 term. The Court looked at issues of jurisdiction in two of these cases, Whitman v. Department of Transportation, 126 S. Ct. 2014 (2006) and Arbaugh v. Y & H Corp. 126 S. Ct. 1235 (2006), finding that federal courts did have jurisdiction in both matters. In Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), the Supreme Court examined the issue of employees' rights to free speech. The Court explored the extent of retaliatory actions prohibited by Title VII, in Burlington, N. & S. F. R. Co. v. White, 126 S. Ct. 2405 (2006). Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (2006) addressed the issues of racial bias and pretext in employment discrimination. And in IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005), the Supreme Court looked at whether activities which occur before and after employees' principal work, but which are necessary to that work, are compensable under the Fair Labor Standards Act.

Burlington, N. & S. F. R. Co. v. White, 126 S. Ct. 2405 (2006)

Respondent employee, Sheila White, was hired as a track laborer at the Tennessee Yard of the Burlington Northern & Santa Fe Railway Company (Burlington). In hiring her, the roadmaster had expressed interest in her experience operating a forklift; when the forklift duties became available, the roadmaster immediately assigned White those duties. Shortly thereafter, White complained about sexual harassment by her supervisor. Her supervisor was disciplined for sexual harassment, but Burlington also reassigned White to less desirable duties. In reassigning her duties, the Burlington roadmaster, explained that the reassignment reflected co-worker's complaints that, in fairness, a more senior man should have the less arduous and cleaner job of forklift operator. Burlington, N. & S. F. R. Co. v. White, 126 S. Ct. 2405, at 2409-2409 (2006). White later had a disagreement with her supervisor, and Burlington suspended her without pay for thirty-seven (37) days for alleged insubordination. White went through the internal grievance process, and Burlington eventually rescinded the suspension and paid White for the

thirty-seven (37) days. A jury found that Burlington had retaliated against White in violation of Title VII.

Petitioner Burlington appealed the decision. The Sixth Circuit Court of Appeals affirmed the decision, holding that (1) the anti-retaliation provision, unlike the substantive provision, of Title VII did not forbid only discriminatory actions which affected the terms and conditions of employment, and (2) that to succeed, the employee needed to show that a reasonable person would have found the alleged retaliatory actions materially adverse. In applying this standard, the Court of Appeals found that a jury could reasonably find that (1) the reassignment of duties was materially adverse to a reasonable employee even though the job duties fell within the same job description, and that (2) a jury could reasonably find that the suspension without pay, even though later rescinded, was materially adverse. The Supreme Court affirmed the decision of the Court of Appeals.

Whitman v. Department of Transportation, 126 S. Ct. 2014 (2006)

Terry Whitman, petitioner, alleged that the Federal Aviation Administration tested him for drugs and alcohol in a nonrandom manner, in violation of his constitutional rights and 49 U.S.C.S. §45104(8). Whitman v. Department of Transportation, 126 S.Ct. 2014 at 2015. In filing suit, Whitman declined to use the FAA's internal grievance procedures.

The FAA has its own procedural framework for the resolution of claims by its employees; and for this purpose it adopts certain sections of the Civil Service Reform Act of 1978 (CSRA), including Chapter 71 of Title 5, which sets forth the rules for grievances. 49 U. S. C. §40122(g)(2)(C). The District Court held that, under the provisions of the CSRA, it was without jurisdiction to consider the petitioner's claims. The Court of Appeals for the Ninth Circuit affirmed, stating that because 5 U. S. C.

§7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements, his claims are precluded. 382 F.3d 938, 939 (2004).

Whitman v. Department of Transportation, 126 S.Ct. 2014 at 2015.

The U.S. Supreme Court held that 28 U.S.C. §1331 grants jurisdiction to the federal courts over all civil actions arising under the Constitution, laws, or treaties of the United States. Id. Thus, the question here was not, as the Ninth Circuit saw it, whether 5 U.S.C. §7121 confers jurisdiction, but whether §7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts, or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA. Id. (internal citations omitted). The Court remanded the case for the Court of Appeals to address the issues of jurisdiction and preclusion, because it had not decide[d] whether the petitioner's allegations state a prohibited personnel practice, which is necessary to ascertain where Whitman's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. Id.

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)

Richard Ceballos was a deputy district attorney serving as a calendar deputy for the Los Angeles County District Attorney's Office. Calendar deputies are sometimes asked by defense attorneys to review affidavits. The defense attorney in a case asked him to review an affidavit which was used to obtain a search warrant, to see if there was probable cause. Ceballos reviewed the affidavit, visited the scene described, and determined that the affidavit contained serious misrepresentations. Garcetti v. Ceballos, 126 S. Ct. 1951, 1955 (2006). He spoke with the deputy sheriff who swore out the affidavit about his concerns, but was not satisfied with the officer affiant's explanations of the perceived inaccuracies. He conveyed his concerns to his supervisors and then wrote a disposition memo recommending that the case be dismissed. Despite

his recommendation, the prosecution went forward. Because of Ceballos' concerns, a meeting was held regarding the affidavit. This meeting involved Ceballos, his supervisors, the warrant affiant and others employed by the sheriff's department. The meeting got very heated, and Ceballos was criticized for his handling of the case. The case went forward, and Ceballos testified to the trial judge about his findings. The trial judge found the warrant to be valid. Following this, Ceballos' duties were changed, he was transferred, and denied a promotion. Ceballos concluded that this was in retaliation for his actions in this case. He filed an employment grievance, claiming retaliation. The grievance was dismissed, on the finding that he had not been subjected to retaliation. He then sued his supervisors, Carol Najera and Frank Sundstedt, for retaliation under Rev. Stat § 1979, 42 U.S.C. §1983, claiming that the County had violated his right to free speech under the U.S. Constitution. Petitioners claimed that there were valid reasons for the employment decisions, and that they were not made in retaliation against Ceballos; they also argued that, even if the actions were retaliatory, they were not violations of the First or Fourteenth Amendments, as Ceballos' memo did not qualify as protected speech.

Petitioners moved for summary judgment, which The U.S. District Court granted. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. Id., at 1956. Ceballos appealed to the Ninth Circuit Court of Appeals, which reversed, holding that the memo was protected speech.

The U.S. Supreme Court reversed. It held that:

- (1) The deputy's expressions had been made pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.
- (2) This consideration distinguished the deputy's situation from those cases in which the First Amendment provided protection to public employees against managerial discipline, as the deputy, in contrast to

employees involved in those cases, had not spoken as a private citizen by writing the memorandum.

- (3) It was immaterial whether the deputy had experienced some personal gratification from writing the memorandum, as his First Amendment rights did not depend on his job satisfaction.

Garcetti v. Ceballos, 164 L.Ed. 2d 689, 691(2006).

Arbaugh v. Y & H Corp. 126 S. Ct. 1235 (2006)

Jenifer Arbaugh worked for Y&H Corporation, dba The Moonlight Café, in New Orleans, from May 2000 to February 2001. She claimed that her supervisor, Yalcin Hatipoglu, sexually harassed her, and caused her constructive discharge. She sued Y&H Corporation in Federal Court, for sexual harassment in violation of Title VII. Suing under Title VII requires that the employer have a minimum of fifteen (15) employees. The defendant corporation stipulated to jurisdiction. Neither the plaintiff nor the defendant raised the issue of the number of employees until after the trial. The jury found for the plaintiff, and awarded her \$5,000 in back wages, \$5,000 in compensatory damages and \$30,000 in punitive damages. Two weeks after the two-day trial, defendant Y&H Corporation filed a motion to vacate the judgment, for lack of subject matter jurisdiction, because it claimed to have fewer than fifteen (15) employees. The district court judge made a factual determination that Y&H did have fewer than fifteen (15) employees, and that, therefore, the federal courts did not have jurisdiction to hear the case under Title VII. Commenting on the unfairness and wastefulness of allowing Y&H to claim lack of subject matter jurisdiction after admitting jurisdiction and then receiving an adverse jury verdict, the court vacated the judgment; it dismissed the Title VII claims with prejudice, and dismissed the state claims without prejudice. Arbaugh v. Y & H Corp. 126 S. Ct. 1235, 1241 (2006). Jenifer Arbaugh appealed to the Fifth Circuit Court of Appeals, which affirmed.

The U.S. Supreme Court held that the number of employees was an essential part of the substantive Title VII claim, rather than a matter of subject-matter jurisdiction. As the defendant had not raised this issue as a defense to the Title VII claim before the end of the trial, it had waived its right to do so.

To decide whether the number of employees was an issue of jurisdiction or an element of the claim, the Supreme Court looked at the language of Title VII and other federal statutes. It decided that, since Congress had not explicitly framed the issue as one of jurisdiction, it would be too restrictive and wasteful for the courts to deem it to be so. In this case, had the issue been one of jurisdiction, the two-day trial would have been wasted. This is because lack of jurisdiction can be raised as a defense at any time, even after a judgment has been handed down. Jurisdiction establishes the right of the courts to hear a case, so parties cannot waive jurisdiction or stipulate to it. Also, the courts have a duty to raise the issue and investigate, even if the parties do not raise it. Congress can, and has in other situations, explicitly defined issues as jurisdictional. Since it did not do so in this area of Title VII, it is not the place of the courts to determine that this issue is one of jurisdiction. The Supreme Court stated that it was leaving the ball in Congress' court, so that if Congress wants to make this an issue of jurisdiction, it can do so.

Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (2006)

Here, the Supreme Court affirmed earlier decisions, that qualifications evidence alone may be sufficient to show pretext, and also found that use of the word boy can be evidence of racial bias, even when it is not used in conjunction with other terms, such as black or white.

Two African-American males working as superintendents at a poultry plant for Tyson Foods, Inc., applied for two open shift manager positions. Tyson Foods, Inc., did not promote these two employees, but selected two white males instead. Petitioners alleged that Tyson had discriminated on account of race, and sued under Rev. Stat.

§1977, 42 U. S. C. §1981, and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* After petitioners presented their evidence at trial, Tyson moved for judgment as a matter of law under FRCP 50(a). The motion was denied, and the jury found for the plaintiffs, awarding compensatory and punitive damages. Tyson then moved for judgment under Rule 50(b). The trial court granted this motion and, in the alternative, ordered a new trial for both plaintiffs under Rule 50(c).

On appeal, the District Court's ruling was affirmed in part and reversed in part:

As to Ash, the court affirmed the grant of the Rule 50(b) motion, deeming the trial evidence insufficient to show pretext (and thus insufficient to show unlawful discrimination) under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). 129 Fed. Appx., at 533–534. As to Hithon, the court reversed the Rule 50(b) ruling, finding there was enough evidence to go to the jury. The court, however, affirmed the District Court's alternative remedy of a new trial under Rule 50(c), holding that the evidence supported neither the decision to grant punitive damages nor the amount of the compensatory award, and thus that the District Court did not abuse its discretion in ordering a new trial. *Id.*, at 536.

Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, at 1196 (2006), citing Appeals Court ruling at 129 Fed. Appx. 529, 536 (2005).

The Supreme Court found that the Court of Appeals had made two errors in its opinion, and thus vacated the judgment and remanded the case. The first error was in considering evidence that the plant manager, who selected the white males rather than the petitioners for the positions, had referred to each of the petitioners as boy on some occasions. Petitioners contended that this was evidence of racial animus, but the Court of Appeals disagreed, holding that [w]hile the use of boy ' when modified by a racial classification like black ' or white ' is evidence of discriminatory intent, the use of boy ' alone is not evidence of discrimination. *Id.*, at 533 (citation omitted). *Id.*, at 1197. The Supreme Court found this holding to be flawed, and reasoned that,

Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.

Id.

The Supreme Court also found error in the Court of Appeals' articulation of the standard for determining whether the asserted nondiscriminatory reasons for Tyson's hiring decisions were pretextual. Id. Petitioners offered evidence to show that they were more highly qualified than were the individuals selected for the positions. The Court of Appeals found the proffered evidence insufficient, stating, 'Pretext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.' *Ibid.* (quoting *Cooper v. Southern Co.*, 390 F. 3d 695, 732 (CA11 2004)). Id., at 1196 (2006), citing Appeals Court ruling at 129 Fed. Appx. 529, 536 (2005).

The Court held that this was error, in that, qualifications evidence may suffice, at least in some circumstances, to show pretext. Id. (internal citations omitted). It stated, 'The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. However, the Supreme Court declined to clarify the standard, stating that, This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Id., at 1198.

IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005)

The issue here was whether certain time necessarily spent by employees at a slaughtering and meat processing facility and employees at a poultry processing plant was compensable under the Fair Labor Standards Act (FLSA), as amended and restricted by the Portal-to-Portal Act (29 U.S.C.S. § 254(a)). At the slaughtering and meat processing plant (IBP, Inc.), employees must spend time prior to their primary work activities, donning protective gear and clothing; they must spend time after their primary work activities, doffing such gear and clothing. After donning and before doffing, they must also walk to and from the site of their primary work activities; whether this time spent walking was compensable was also at issue. At the poultry processing plant (Barber Foods), employees must also don and doff gear and clothing, and walk to and from work sites after donning and before doffing. These workers also must spend time waiting to don their protective gear before starting work each day.

The FLSA afforded employees many rights, and defined many important terms in the area of worker compensation. In response to the FLSA and the courts' interpretation of it, Congress passed the Portal-to-Portal Act, which limited the activities for which employers must compensate employees. The Portal-to-Portal Act determined that employers were not responsible for compensating employees for the time they spent walking from the time clock at the employer's gate, to the site of their work, nor for the time spent from their work site back to the time clock at the gate.

The courts have since interpreted the Portal-to-Portal Act in many cases. The courts have determined that the time an employee spends in activities which are integral and indispensable to the employee's principal work activity is compensable.

The U.S. Supreme Court held that time spent donning and doffing necessary protective clothing and equipment was compensable, because it was integral and indispensable to the employees' primary work activities. It also found that time spent after donning, walking to the site of the primary work activity was compensable and that

time spent walking from the site of the primary work activity to the doffing area was compensable, because it was integral and indispensable to donning and doffing, which are integral and indispensable activities to the principal work activity. However, it held that the time the poultry plant workers spend after they arrive, waiting to receive their protective gear and clothing, so that they may don it, is not compensable under the Portal-to-Portal Act. In short, we are not persuaded that such waiting—which in this case is two steps removed from the productive activity on the assembly line—is integral and indispensable to a principal activity that identifies the time when the continuous workday begins. IBP, Inc. v. Alvarez, 126 S. Ct. 514, 528 (2005). The Court did state, though, that if an employer required employees to arrive at a certain time in order to wait to don their protective gear and clothing, then that time would be compensable, as it would be required by the employer.