“HOW WILL THIS AFFECT MY CLIENT??”

THE LATEST FROM THE U.S. SUPREME COURT

The 2002 term of the United States Supreme Court has been dubbed the employment law session. The Court heard argument and issued rulings on several significant cases including: the American with Disabilities Act in *USAirways, Inc. v. Barnett*, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, and *Chevron U.S.A., Inc. v. Echazabal;* the National Labor Relations Act in *Hoffman Plastics Compounds, Inc. v. NLRB;* the Family Medical Leave Act in *Ragsdale v. Wolverine World Wide, Inc.;* and the effect of arbitration clauses in *EEOC v. Waffle House, Inc.* The Court further addressed the 180/300 day deadline for filing EEOC charges in National R.R. Passenger Corp. v. Morgan. This paper and panel presentation explains where each of these cases have left employers, employees, and their lawyers.

I. USAIRWAYS, INC. V. BARNETT[1]

USAirways, Inc. v. Barnett decided a potential conflict between (1) the interests of a disabled worker who seeks assignment to a particular position as a "reasonable accommodation" and (2) the interests of other workers with superior rights to bid for the job under an employer's seniority system.

A. Does the accommodation demand trump the seniority system?

In short, the U.S. Supreme Court said the seniority system will prevail "in the run of cases."

The U.S. Supreme Court rejected USAirways' claim that a seniority system virtually always trumps a conflicting accommodation demand. Yet, the Court also rejected the employee's argument that the employer must be able to prove that an accommodation that clashes with seniority constitutes an undue hardship.

In 1990, Robert Barnett, an employee of USAirways, injured his back while performing his job as a cargo-handler. Consequently, he invoked his seniority rights and transferred into a position in the mailroom, which position was less physically demanding. The seniority system of USAirways periodically allowed employees to bid for positions such as the mailroom slot.[2] In 1992, at least two employees planned to bid for Mr. Barnett's position. Mr. Barnett asked USAirways "to accommodate his disability imposed limitations by making an exception that would allow him to remain in the mailroom." Id. at 1519. USAirways allowed him to remain in his position for five months until it denied his request; Mr. Barnett lost his job. Mr. Barnett brought an ADA action, alleged that he was:

> . . . an individual with a disability capable of performing the essential functions of the mailroom job, that the mailroom job amounted to a reasonable accommodation of his disability, and that USAirways, in refusing to assign him the job [permanently], unlawfully discriminated against him.

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[1] This portion presented by Charles Woody, and case law update by Keith Frazier.

[2] Seniority systems, such as the one in Barnett, are common in the airline industry. These policies periodically allow employees to 'bid' on the positions held by less senior employees.

Id. at 1519. The U.S. District Court for the Northern District of California granted summary judgment to USAirways: since the seniority system of USAirways has been in place for decades and as is common within the airline industry, USAirways employees were justified in relying upon the policy. "As such, any significant alteration of that policy would result in undue hardship to both the company and its employees." Id. at 1520. An *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit reversed, stating that the ". . . seniority system was merely a factor in the undue hardship analysis." The Ninth Circuit held that a case-by-case fact-intensive analysis is required to determine if a particular reassignment would be an undue hardship on the employer. Id.

In its argument to the U.S. Supreme Court, USAirways argued an accommodation that would violate a seniority system always shows that such accommodation would not be reasonable and that the transfer would pose an undue burden on the employer. Mr. Barnett conceded that a violation of seniority rules might help to show undue hardship and argued the employer should be required to demonstrate the hardship on a case-by-case basis. Id. The U.S. Supreme Court said, "no," to both arguments and, by a 5-4 decision, moved to the middle ground.

The U.S. Supreme Court held that an "employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient . . ." to show that a requested accommodation is unreasonable. Therefore, such a showing ordinarily trumps the ADA in the run of the cases. However, a plaintiff can still show that special circumstances require a finding that the requested accommodation is reasonable under the particular facts, despite a seniority system. Id. at 1525.

The U.S. Supreme Court rejected USAirways' argument that a seniority system always 'trumps' a conflicting accommodation demand. This is based on the employer's interpretation of the statute as seeking only "equal treatment for those with disabilities," and does not require an employer to give preferential treatment to a disabled employee. The Court found that such an interpretation would fail to meet the ADA's "basic equal opportunity goal" that strives to allow those employees with

disabilities the same workplace opportunities as those without disabilities. Moreover, without some different treatment, the ADA's 'reasonable accommodation' provision could not be fulfilled. The Court concluded that the ADA does not create any automatic exception for seniority systems. Id. at 1521. However, the Court also rejected Mr. Barnett's argument that the statute requires the employer to prove on a case-by-case basis that a particular accommodation constitutes an undue hardship on the employer because of the company's seniority system. Instead, it held that ". . . it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system." Id. at 1524.

In support of an employer's showing that accommodation would violate the employer's seniority system is ordinarily sufficient to demonstrate that the requested accommodation is unreasonable and an undue burden in "the run of cases," the Court relied upon several factors. First, other case law has recognized the importance of seniority rights in employee-management relations. Next, the Rehabilitation Act, a linguistically similar statute, has been interpreted by lower courts to be trumped by collectively bargained seniority systems and should also apply to the ADA, even if the agreement was not collectively bargained, but rather, unilaterally imposed by management. The Court also found that "requiring the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment-expectations upon which the seniority system's benefits depend . . . . [N]othing in the statute suggests that Congress intended to undermine seniority systems in this way." Id. at 1524.

But, in deference to the plaintiff, Mr. Barnett, need show that "special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested accommodation is reasonable on the particular facts." Id. at 1525. The Court cites two examples[3] when such a showing might be made. First, a plaintiff might show that the

[3] The Court stated that these examples were not meant to be an exhaustive list; rather, there could be other examples shown by a plaintiff that would create an exception to the general rule.

employer alters the terms of the seniority system with such frequency that it reduces an employee's expectations that the system will be followed and, thus, one more departure will not likely make a difference. Second, an employee could show that the system already contains exceptions such that in the circumstances, one further exception is unlikely to matter. Id. No matter what the situation, a plaintiff has the burden of proving that the special circumstances make an exception to the general rule. To make such a showing, a plaintiff "must explain why, in a particular case, an exception to the employer's seniority policy can constitute a reasonable accommodation, even though in the ordinary case it cannot." Id. at 1525.

In remanding the case, the Court held:

> A showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer — unless there is more. The plaintiff must present evidence of that "more," namely, special circumstances, surrounding the particular case that demonstrate the assignment is nonetheless reasonable. Id.

B. Concurrence and Dissents

Justice Stevens concurred with the decision; Justice O'Connor concurred but wrote separately. Justice O'Connor believed that the effect of a seniority system on the reasonableness of the accommodation should depend on whether the seniority system is legally enforceable. Unenforceable seniority systems will often reduce an employee's expectations that the system will be followed.

Justices Scalia and Thomas dissented; they believe that the ADA only requires the "suspension (within reason) of those employment rules and practices that the employee's disability prevents him from observing" and that a seniority system is not one of those practices, but, rather, a policy that burdens disabled and non-disabled alike. They further argue that imposing this rebuttable presumption will cast uncertainty upon bona fide seniority systems, which gives the disabled a "vague and unspecified power to undercut bona fide systems." Id. at 1532.

Justices Souter and Ginsburg also dissented. They would affirm the decision of the Ninth Circuit and find that once Mr. Barnett has shown that his requested accommodation is reasonable, the burden should shift to USAirways to show that the accommodation is in violation of its seniority system — resulting in the undue hardship. Id. at 1534.

C. Treatment by the Lower Courts

Only a few cases have discussed *Barnett* since the decision of April 29, 2002. The majority of those cases declare that portions of the opinion either are not addressed or are not affected by the U.S. Supreme Court's holding. These courts find only the question of an employer seniority system qualifying as an undue hardship was under review by the U.S. Supreme Court. Many of the recent citations to the Ninth Circuit *en banc* opinion refer to that court's analysis of the "interactive process" as it relates to reasonable accommodation. The following cases cite directly to the U.S. Supreme Court's decision but refer to the surviving portions of the *en banc* opinion.

1. ***Siegel v. CAPMC***, 2002 WL 1042322, 6 (Cal. App. 1 Dist.), discusses specific portions of the lower courts' opinions, which were not affected by the U.S. Supreme Court's ruling. The discussion in this case centers around an issue that was not decided on appeal to the U.S. Supreme Court, i.e., the requirement that employers participate in an "informal, interactive process to attempt to identify reasonable accommodation."

2. ***Peeples v. Coastal Office Products, Inc.,*** 2002 WL 1058338, 30 (D. Md.), quotes a portion of the *en banc* decision, which was not affected by the U.S. Supreme Court decision: "Acting in good faith involves both sides communicating directly exchanging essential information and neither side can delay or obstruct the process."

These two cases have used the U.S. Supreme Court's holding that evidence of a seniority system gives rise to a rebuttable presumption that any conflicting accommodation will result in undue hardship to the employer in their analysis. *Jacques v. DiMarzio* cites to the Barnett decision but adds no substantive commentary. 2002 WL 851579, 4 (E.D.N.Y.).

3. ***Shapiro v. Township of Lakewood***, 2002 WL 1087137, 4 (3d Cir. NJ), attempts to clarify the U.S. Supreme Court's holding and spells out a two-step test that could be applied to similar situations. In *Shapiro*, the U.S. Court of Appeals for the Third Circuit approaches *Barnett* by simplifying it into a two-step test that can be applied to all situations where "a requested accommodation in the form of a job reassignment is claimed to violate a disability neutral rule of the employer." Id. (emphasis added). The first step requires the employee to show that the accommodation in question is a type reasonable in the run of cases. The Third Circuit explains that *Barnett* held an accommodation that violates the employer's seniority system "is by itself ordinarily sufficient to show that the requested accommodation is unreasonable." Id. It appears under the

Shapiro analysis that an employee cannot show accommodation is reasonable in the run of cases if it violates an employer's seniority system. The second step is contingent upon the outcome of the first. "If the accommodation is shown to be reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation will impose an undue hardship under the particular circumstances" (i.e., a case-specific inquiry). Id. This second step would ordinarily be taken in scenarios that concern "disability neutral" employer rules other than "seniority systems." "On the other hand, if the accommodation is not shown to be a type of accommodation that is reasonable in the run of cases [such as most seniority systems], the employee can still prevail by showing that the accommodation is reasonable under the particular circumstances of the case." Id. The Third Circuit based this two-step test in part by the U.S. Supreme Court's approval of the district court's holding in *Barnett*:

> A plaintiff/employee need only show that an accommodation seems reasonable on its face, i.e., ordinarily in the run of cases and that once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.

Id. quoting *Barnett*, 122 S. Ct. at 1523.

D. Conclusion

The upshot of the decision is that the ADA does not require proof on a case-by-case basis that a seniority system should prevail; in the run of cases, an assignment would not trump the rules of a seniority system. The employee now bears the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case. To do so, the employee must explain why, again, in the particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation," even though in the ordinary case it cannot.

E. Additional Treatment Post-*Barnett*

Barnett has not received a large amount of interpretation, but the interpretation it has received has been quite expansive. *Barnett* involved an employer who refused to deviate from a seniority system to accommodate a disabled employee. Yet, the Seventh Circuit has read the case to include any normal method of filling vacancies. *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002). In *Mays*, a Rehabilitation Act case, a nurse injured herself in a workplace accident. The hospital refused to create a light-duty position, and the nurse sued, claiming that the hospital had vacancies in administrative nursing positions into which it could have transferred her. The hospital conceded that

vacancies were available, but that it filled those positions with more qualified candidates. The court, relying on *Barnett*, agreed that the hospital was not required to deviate from its hiring methods and standards:

> This conclusion is bolstered by a recent decision of the Supreme Court which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. *U.S. Airways, Inc. v. Burnett*, 152 L.Ed. 2d 589, 122 S. Ct. 1516, 1519, 1524-25 (2002). If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break," *U.S. Airways* becomes our case.

A decision from the Third Circuit clarified the *Barnett* framework for analyzing a requested accommodation under the ADA. *See Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002). According to *Shapiro*, the analysis of a request for an accommodation is a two-step process. The first step is to determine if the requested accommodation is reasonable. If so, the employer bears the burden at the second step of proving that the accommodation would impose an undue hardship. If not, the employee must show "special circumstances" that justify finding that the accommodation is reasonable under the particular circumstances of the case. Under the facts of *Shapiro*, a request to transfer to a vacant, funded position was considered a reasonable accommodation.

At the district court level, one decision dismissed the argument by a Plaintiff that *Barnett* says the offer by an employer of a "reasonable accommodation" requires a court to assume the employee is disabled. *See Williams v. Philadelphia Housing Authority*, 2002 U.S. Dist. LEXIS 24412 (E.D. Pa. Dec. 20, 2002).

II. TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. V. WILLIAMS[1]

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams determined the proper standard for assessing disability under the ADA due to substantial limitations in performing manual tasks.

A. What is the standard for determining if an employee is disabled because of substantial limitations in performing manual tasks?

The proper standard for determining whether an employee is disabled under the ADA because they are substantially limited in performing manual tasks is whether the employee's impairments prevent or severely restrict them from performing tasks that are of central importance to most people's daily lives.

B. The Case

Ms. Williams worked at Toyota's manufacturing plant in Kentucky on the Quality Control Inspection Operations team. One of Ms. Williams' job duties as a member of the Quality Control Inspection team involved wiping each car on the assembly line with oil, requiring her to hold her hands and arms at shoulder height for hours at a time. After experiencing pain, Ms. Williams sought care at Toyota's in-house medical service and was diagnosed with myotendinitis bilateral periscapular, which is an inflammation of the shoulder blades, as well as myotendinitis and myotosis bilateral forearms with nerve compression causing median nerve irritation, and thoracic outlet compression, a condition causing pain in the nerves that lead to the upper extremities. Ms. Williams requested that Toyota accommodate her medical conditions by no longer requiring her to wipe the cars, but allowing her to continue performing other job duties on the assembly line, but the request was denied. According to Toyota, Ms. Williams then began missing work on a regular basis. Ms. Williams was eventually terminated for poor attendance.

[1] This portion presented by Jeff Patton, and case law updates by Keith Frazier.

Ms. Williams filed a charge of disability discrimination with the EEOC , and brought suit in the U.S. District Court for the Eastern District of Kentucky after receiving a right to sue letter from the EEOC. Her complaint alleged that Toyota had violated the ADA, the Kentucky Civil Rights Act, and the Family and Medical Leave Act of 1993, by failing to failing to reasonably accommodate her disability and terminating her employment. Ms. Williams claimed she was disabled under the ADA since her physical impairments substantially limited her in her manual tasks, housework, gardening, playing with her children, lifting, and working, all of which constitute major life activities under the ADA. She argued alternatively that she was disabled under the ADA because she had a record of a substantially limiting impairment and because she was regarded as having such an impairment.

The District Court for the Eastern District of Kentucky granted summary judgement to Toyota after finding that Ms. Williams' impairments did not substantially limit any of her major life activities. The court denied Ms. Williams' claim that she was substantially limited in performing because they found her claim to be contradicted by the fact that Ms. Williams continually insisted that she could perform other manual tasks as part of her job without difficulty. The District Court also denied Ms. Williams' claims that she had a record of a substantially limiting impairment and that Toyota regarded her as having such an impairment for lack of evidence.

The Court of Appeals for the Sixth Circuit reversed the holding of the lower court, finding that Ms. Williams' impairments did substantially limit her in the major life activity of performing manual tasks. The Court of Appeals held that in order for Ms. Williams to be considered disabled under the ADA she had to show that her "manual disability involved a 'class' of manual activities affecting the ability to perform tasks at work." Id. at 688. The Court of Appeals found that Ms. Williams satisfied this test as her ailments "prevented her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs" which require an employee to perform repetitive work with their arms extended at or above shoulder level for extended

periods of time. Id. The Court of Appeals granted summary judgement to Ms. Williams, finding her to be disabled under the ADA.

In a unanimous opinion, The Supreme Court reversed the Court of Appeals, holding that in order to demonstrate a substantial limitation in the major life activity of performing manual tasks, an individual must show that both that the limitation prevents or severely restricts the performance of manual tasks which are of central importance to most people's daily lives, and that the impairment's impact is permanent or long term. The Court held that the standard for determining that a manual impairment constitutes a disability is whether the employee is able to perform the variety of tasks central to most people's lives, not whether the employee is able to perform manual tasks only associated with their job. Occupational-specific tasks may have only limited relevance to the manual task inquiry as the manual tasks unique to any particular job are not necessarily important parts of people's lives. The Court also found that medical diagnosis of an impairment is not enough to show that the individually is personally impaired, as Congress intended determinations of disability to be made on a case by case basis, and because the severity of symptoms and their effects may vary between individuals with the same diagnosis.

The court found that repetitive work involving the extension of a person's arms at or above shoulder level for extended periods of time, as opposed to household chores, bathing and brushing one's teeth, is not the type of manual task of central importance to people's lives. The Court found that since Ms. Williams medical conditions still allowed her to "brush her teeth, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house," and since her conditions only reduced the frequency of other activities such as driving long distances and playing with her children, she was not severely restricted in the activities of central importance to most people's daily lives. Id. at 694. Therefore, court found that Ms. Williams did not have a manual-task disability as a matter of law, and reversed the decision of the Court of Appeals.

C. Conclusion

The Court of Appeals erred in analyzing a substantial limitation in the major life activity of manual tasks by examining whether an employee is able to perform a class of manual activities affecting the employee's ability to perform tasks at work as the proper standard for determining whether an employee is disabled under the ADA because they are substantially limited in performing manual tasks is whether the employee's impairments prevent or severely restrict them from performing tasks that are of central importance to most people's daily lives. Occupational-specific tasks may have only limited relevance to the manual task inquiry as the manual tasks unique to any particular job are not necessarily important parts of people's lives. Such a determination of disability under the ADA for substantial limitation in the ability to perform manual tasks cannot be made solely on the basis of medical diagnosis, as the effects of impairments can vary between individuals and must be analyzed on a case by case basis.

D. Subsequent Treatment by Lower Courts

This landmark ADA decision drew an immediate and intense response from lower courts wrestling with ADA decisions. Indeed, literally hundreds of decisions cited *Williams* within only a few months and the case became part of the standard framework of ADA cases. Generally, courts have found that the standards enunciated in *Williams* significantly raised the bar for plaintiffs. Namely, courts now require ADA plaintiffs to prove that their impairments interfere with major life activities "considerably" or "to a large degree." *Stewart v. Weast*, 228 F. Supp. 2d 660 (D. Md. 2002). For example, the Seventh Circuit found that peroneal neuropathy, known as "drop foot," was insufficient to constitute a disability because the alleged limitation on the major life activity of lifting "does not necessarily show an inability to perform the central functions of daily life." *Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002). In *Mack*, the Seventh Circuit declined to limit *Williams* to manual tasks or to actual disability cases. Instead, the court found that the employee's impairment

constituted only an "occupation-specific limitation" and thus insufficient to constitute a disability under the ADA.

The insistence in *Williams* that impairments be permanent has also impacted ADA litigation in favor of employers. The Fourth Circuit specifically rejected a claim that an employee's temporary back injury constituted a disability in light of *Williams*: "[T]he [*Williams*] Court stressed that an 'impairment's impact must also be permanent or long-term." *Pollard v. High's of Baltimore*, 281 F.3d 462 (4th Cir. 2002). Further, the Supreme Court's increasing disfavor with working disabilities has resonated in the lower courts, which are more reluctant than ever to accept working as a major life activity. *See Mickelson v. Albertson's, Inc.*, 226 F. Supp. 2d 1238 (D. Idaho 2002).

The Sixth Circuit, from which the *Williams* decision arose, has issued several decisions interpreting the case's impact on ADA litigation. Particularly, the *Williams* Court's criticism of working disabilities has impacted Sixth Circuit decisions. In one decision, the Sixth Circuit noted that "the [EEOC] may have acted beyond its mandate when it issued regulations that listed 'working' as a major life activity for purposes of the ADA." *Mahon v. Crowell*, 295 F.3d 585 (6th Cir. 2002). In that decision, the Sixth Circuit concluded that a herniated disc did not constitute a "working" disability: "We would be using a less-than-demanding standard were we to find Mahon substantially limited in working when he is still qualified for over half the jobs he was qualified for before his injury." *See also Cartwright v. Lockheed Martin Utility Svcs., Inc.*, 40 Fed. Appx. 147 (6th Cir. 2002) (sleep apnea does not constitute "working" disability).

Finally, the Eighth Circuit has found that an employee's brain injury constituted an injury that satisfied the *Williams* requirement that an impairment "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives." *Moysis v. DTG Datanet*, 278 F.3d 819 (8th Cir. 2002).

III. CHEVRON U.S.A. INC. V. ECHAZABAL[1]

In *Chevron U.S.A. Inc. v. Echazabal*, the Supreme Court addressed the validity of a regulation of the EEOC which authorized refusal to hire an individual because his performance on the job would endanger his own health, due to a disability. The Court held that the regulation was authorized under the Americans with Disabilities Act of 1990 and allowed the employer to refuse employment on the basis that conditions on the job would aggravate the employee's liver abnormality.

In *Chevron*, Mario Echazabal worked for independent contractors at one of Chevron's oil refineries until Chevron refused to rehire him because of a liver condition which its doctors said would be exacerbated by continued exposure to toxins at the refinery. Echazabal filed suit, claiming, among other things, that Chevron's actions violated the Americans with Disabilities Act of 1990 (ADA).[2] Chevron defended under an EEOC regulation permitting the defense that a worker's disability on the job would pose a direct threat to his health[3]. The Supreme Court reversed the Ninth Circuit and held that the ADA permits the EEOC's regulation.

The Court recognized that the ADA's discrimination definition covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as "using qualification standards. . . that screen out or tend to screen out [such] an individual," 42 U.S.C. 12112(b)(6). Along with Section 12113(a), the definition creates an affirmative defense for actions under a qualification standard "shown to be job related. . . and . . . consistent with business necessity," which "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The EEOC's regulation carries the defense one step further, allowing an employer to screen out a potential worker with a disability for risks on the job to his own health or safety.

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1 This portion presented by Jeff Patton, and case law updates by Keith Frazier.
2 42 U.S.C. § 12101 *et seq.*
3 See 29 CFR § 1630.15(b)(2) (2001)

Echazabal relied on, and the Ninth Circuit applied, the canon *expressio unius exclusio alterius*- expressing one item of an associated group excludes another left unmentioned- for his argument that the ADA, by recognizing only threats to others, precludes the regulation as a matter of law[4]. The Supreme Court rejected this argument for several reasons. The Supreme Court recognized that the statute includes the threat-to-others provision as an example of legitimate qualifications that are "job-related and consistent with business necessity."[5] These categories allow an agency a large amount of discretion in setting the limits of permissible qualification standards. The Court continued, "that discretion is confirmed, if not magnified, by the provision that 'qualification standards' falling within the limits of job relation and business necessity 'may include' a veto on those who would directly threaten others in the workplace."[6] Further, "may include" points directly away from the sort of exclusive specifications that Echazabal claims.[7] Additionally, the Supreme Court found additional problems with the *expressio unius* canon and eventually rejected it in its entirety.

Since Congress had not spoken exhaustively on threats to a worker's own health, the regulation is appropriate so long as it makes sense of the statutory defense for qualification standards that are "job-related and consistent with business necessity." The Court recognized the employer's legitimate concern for calling the regulation reasonable: avoiding time lost to sickness, excessive turnover from medical retirement or death and litigation under state tort law.[8] Further, on a practical matter, allowing the regulation as reasonable allows employers to avoid the risk of violating certain provisions of OSHA.[9]

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4 Chevron at 5.
5 Chevron at 6
6 Chevron at 6
7 Chevron at 6
8 Chevron at 10.
9 Chevron at 10.

Additionally, the Court in *Chevron* rejected the idea that the EEOC's resolution can be fairly called unreasonable as allowing the kind of workplace paternalism the ADA was meant to outlaw.[10] The Court stated,

> It is true that Congress had paternalism in its sights when it passed the ADA, see § 12101(a)(5) (recognizing "overprotective rules and policies" as a form of discrimination). But the EEOC has taken this to mean that Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. Its regulation disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face.[11]

The direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR § 1630.2r) (2001). Therefore, the Court held, the EEOC was within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job.

The Fallout of *Chevron*

The Supreme Court itself replied on this decision in another more recent decision, although not in an employment context. In *Echazabal*, the Supreme Court rejected the doctrine of *expressio unius est exclusio alterius* – if one item is of an associated group is mentioned, it can be presumed that other items were deliberately omitted. The plaintiff in *Echazabal* unsuccessfully relied on the doctrine to argue that the inclusion of "threat to others" in the ADA meant Congress had deliberately omitted "threat to self." In *Barnhart v. Bellaire Corp.*, 123 S. Ct. 748 (2003), the Supreme Court rejected the

[10] Chevron at 11.
[11] Chevron at 11-12.

argument that a deadline for assignments in the Coal Industry Retiree Health Benefit Act necessarily meant that untimely assignments were void.

Other decisions have relied on *Echazabal* for the general proposition that the employer bears the burden of proving that an employee would be a threat to the health or safety of others. *See, e.g.*, *Elliot v. Pratt & Whitney Aircraft*, 43 Fed. Appx. (2d Cir. 2002).

IV. HOFFMAN PLASTICS COMPOUNDS, INC. V. NAT'L LABOR RELATIONS BD.[1]

In *Hoffman Plastics Compounds, Inc. v. Nat'l Labor Relations Bd.*,[2] (hereinafter "*Hoffman Plastics*"), the Court essentially stripped the National Labor Relations Board ("NLRB") of its remedial power to grant backpay to undocumented and/or illegal immigrants who have been treated adversely by their employers, in violation of the National Labor Relations Act ("NLRA"). In *Ragsdale v. Wolverine World Wide, Inc.*,[3] (hereinafter "*Ragsdale*"), the Court struck down a regulation under the Family and Medical Leave Act ("FMLA"), promulgated and enforced by the Secretary of Labor, giving employees the right to twelve additional weeks of leave where the employer has failed to notify the employee that leave taken will count against the twelve weeks allotted by the FMLA.

A. Analysis

Hoffman Plastics hired Jose Castro to work as a compounder in May 1988.[4] Castro produced documentation which appeared on its face to verify that he was a legal immigrant authorized to work in the United States.[5] In December 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO, began a union-organizing campaign.[6] Castro participated in and supported the campaign by handing out authorization cards to other employees.[7] In response, Hoffman Plastics laid off four workers engaged in the organizing activity.[8] The NLRB determined that the layoffs were in violation of the NLRA and, inter alia, awarded reinstatement and backpay to the employees.[9]

However, during the compliance hearing, in order to determine the precise amount of backpay, Castro admitted his illegal status, stating that he was in fact a citizen of Mexico and had obtained

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1 This portion presented by Maureen Binetti, and case law updates by Keith Frazier.
2 122 S.Ct. 1275 (2002).
3 122 S.Ct. 1155 (2002).
4 Hoffman Plastics, supra, 122 S.Ct. at 1278.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at 1278-79.

false documentation from a friend born in Texas.[10] As a result, the Administrative Law Judge determined that the NLRB was precluded from awarding backpay in Castro's case, finding that such a remedy would contravene the Supreme Court's division in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and the Immigration Reform and Control Act of 1986 ("IRCA").[11] Nevertheless, in September 1998, the NLRB simply modified the remedy afforded to Castro; it declined to grant him reinstatement, but ordered backpay from the time Castro was fired until Hoffman Plastics discovered Castro's illegal status.[12] Hoffman Plastics filed a petition for review with the District of Columbia Court of Appeals, which twice denied the petition for review and enforced the NLRB's order.[13] The United States Supreme Court granted Hoffman Plastic's petition for certiorari,[14] and thereafter reversed the NLRB's order and the District of Columbia Circuit Court's ruling.[15]

The issue presented to the Supreme Court was whether Castro could be awarded backpay by the NLRB as a remedy, when he was never legally present or authorized to work in the United States during the period for which the NLRB calculated backpay.[16] The Court ruled that the IRCA precludes the NLRB from awarding backpay to illegal immigrants who were never legally authorized to work in the United States, even though the undocumented immigrant was terminated unlawfully, in violation of the NLRA. In doing so, the Court determined that the NLRB's award encroached upon the policies underlying the IRCA.[17] Allowing the NLRB to award backpay, the Court reasoned, would "encourage successful evasion of apprehension by immigration authorities, condone prior violations of the immigrations laws, and encourage future violation."[18]

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[10] Id. at 1279.
[11] Id.; 8 U.S.C. § 1324 et seq.
[12] Id.
[13] Id. at 208 F.3d 229 (D.C. Cir. 2000) (panel decision); 237 F.3d 639 (D.C. Cir. 2001) (en banc decision).
[14] Id. at 533 U.S. 976 (2001).
[15] 1225 Ct. 1275, 1279 (2002)
[16] Id.
[17] Id. at 1278.
[18] Id. at 1284.

The IRCA is a comprehensive scheme enacted by Congress in 1986, which prohibits the employment of illegal aliens in the United States.[19] The Act makes it illegal for an employer to knowingly hire an undocumented immigrant. Upon discovering the illegal status of its employee, the employer is required to discharge him/her.[20] Under the IRCA, an employment verification system was developed to ensure that illegal aliens would be barred from obtaining employment in the United States. Before hiring an employee, an employer must first verify the identity and eligibility of potential employees by examining certain documents.[21] If no such documents can be produced, the employer is precluded from hiring the undocumented immigrant.[22] The IRCA also makes it unlawful for any person to obtain employment by presenting fraudulent documentation that he/she is authorized to work in the United States.[23] An individual may be subject to criminal prosecution for knowingly using identification the individual knows is false and not lawfully issued.[24]

In *Hoffman Plastics*, despite Castro's use of such fraudulent documents to obtain employment, the NLRB had determined that "the most effective way to accommodate and further the immigration policies embodied in the [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[25] The rationale for this determination is as follows: the NLRA protects all workers by making it an unfair labor practice for an employer to refuse to hire or to fire an employee in an attempt to "encourage or discourage membership in any labor organization."[26] Upon violation of the NLRA, the NLRB is empowered to order the employer to "cease and desist from unfair labor practice, and to take affirmative action,

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[19] 8 U.S.C. § 1324a.
[20] 8 U.S.C. § 1324a(a)(2).
[21] See 8 U.S.C. §1324a(b). These documents include a "valid social security number card" §1324a(b)(C)(i) or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to acceptable for purposes of this section. §1324a(b)(C)(ii).
[22] 8 U.S.C. § 1324a(a)1.
[23] 8 U.S.C. § 1324c(a).
[24] 18 U.S.C. § 1324c(a)(1)-(3).
[25] Hoffman Plastics, supra, 122 S.Ct. at 1279 (citations omitted).
[26] 29 U.S.C. § 158(a)(3).

including reinstatement of employees with or without back pay."[27] Although it is within the discretion of the NLRB whether to award backpay, historically it has done so.[28]

However, the Supreme Court ruled that this remedy does not extend to undocumented aliens, who have no right to employment in the United States to begin with, adding that the award was beyond the bounds of the [NLRB's] remedial powers. The Court made a point of stating that it consistently has "set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment,"[29] and has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[30] Thus, the Court held that because the IRCA makes it illegal, and even criminal, for an undocumented immigrant to work in the United States, illegal immigrants are barred from being "rewarded" for a violation of the NLRA.[31] In so holding, the Supreme Court clarified its statements in *Sure-Tan, Inc. v. NLRB* (hereinafter "*Sure-Tan*")[32] which had been the subject of much debate. The issue in *Sure-Tan* was whether illegal immigrants were entitled to backpay as compensation for being unlawfully discharged. The Court determined there that the employer did violate the NLRA when it fired undocumented workers and reported them to the Immigration and Naturalization Services ("INS"), which resulted in the employees' immediate arrest and voluntary departure to Mexico to avoid deportation proceedings.[33] The NLRB had awarded the traditional remedies of reinstatement and backpay.[34]

The Seventh Circuit qualified the MRB's remedy by requiring the discharged employees to have been "legally present and legally free to be employed in this country when they offer themselves

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[27] Id., §160(c).
[28] See NLRB v. J.H. Rutter-Rex Mfg. Col., 396 U.S. 258, 261-62 (1969) (discussing the importance of awarding backpay as a remedial measure to discriminatees.) See also NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347 (1953) (noting the NLRB has awarded backpay to discriminatees since its first published decision).
[29] 122 S.Ct. at 1280.
[30] Id.
[31] Id.
[32] 467 U.S. 883 (1984).
[33] Id. at 886-888, 898-906.
[34] Id. at 889.

for reinstatement."[35] It denied backpay to the undocumented aliens "unavailable for work during any period when not lawfully entitled to be present and employed in the United States."[36] Knowing that this language would preclude the employees from being eligible for any backpay, however, the Court allowed the NLRB to award a minimal amount (six months) of backpay. In a much-debated sentence of its decision, the Supreme Court stated, with respect to backpay, that "the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[37]

Until the Supreme Court's holding in *Hoffman Plastics*, the question whether illegal immigrants ever were entitled to backpay was hotly debated. Conflicting interpretations of the *Sure-Tan* ruling led to inconsistent results. The NLRB had ruled in several cases, under the shadow of *Sure-Tan*, that backpay would continue to be allowed. In *Local 512, Warehouse & Office Worker's Union v. NLRB*, [38] for example, the NLRB determined that Felbro, Inc. had violated the NLRA when it unilaterally laid off workers and refused to execute a collective bargaining agreement.[39] The Ninth Circuit agreed with the NLRB that the NLRA had been violated, and further, ruled that the employees did not have to produce documentation to prove that they were legally authorized to work in the United States in order to obtain their remedy, finding that this requirement was inconsistent with "both the NLRA and the immigration laws."[40] In so ruling, the Ninth Circuit declined to read the *Sure-Tan* decision as precluding all backpay remedies to illegal immigrants. In fact, the Ninth Circuit stated:

> The Supreme Court in *Sure-Tan* gave no indication that it was overruling a significant line of precedent that disregards a discriminatees' legal status, as opposed to availability to work, in determining his or her eligibility for backpay. For example, in *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979), the NLRB found that six allegedly undocumented workers had been laid off in retaliation for complaining about the non-payment of overtime. The NLRB reinstated with backpay . . . The NLRB

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35 NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982).
36 Id.
37 Sure-Tan, 467 U.S. at 903.
38 395 F.2d 307 (9th Cir. 1986).
39 Id.
40 Id. at 709, 717-20.

> routinely awards backpay to restore discriminatees to the economic position they would have enjoyed absent unfair labor practice. [citations omitted].[41]

The Court further reasoned that *Sure-Tan* only barred backpay to those undocumented aliens who were not currently in the United States and would not be able to reenter legally.[42] Similarly, in *NLRB v. A.P.R.A. Fuel Oil Buyers*, [43] the Court held that backpay could be awarded to undocumented workers.

In contrast, in *Del Rey Tortilleria, Inc. v. NLRB*, [44] the Seventh Circuit had held that undocumented workers who were discharged in violation of the NLRA could not be granted backpay.[45] The Court reasoned that an illegal immigrant had no right to employment in the United States and, therefore, was not legally harmed when discriminated against by his/her employer. The Court regarded the award of backpay to the illegal immigrant as punitive and not remedial. The *Del Rey* Court thus interpreted the *Sure-Tan* ruling as precluding any form of backpay to undocumented immigrants.[46] The Supreme Court's decision in *Hoffman Plastics* has laid to rest how to interpret the "during any period when they were not lawfully entitled to be present and employed in the United States" clause of *Sure-Tan*. Illegal immigrants now are completely precluded from receiving backpay, regardless of their continuing presence in the United States.

B. Effects of Hoffman Plastics

The effect of this decision is potentially devastating to employees. By choosing to preclude undocumented workers from the remedial grasp of the NLRB, ironically the Court has given employers the incentive to hire undocumented workers. If the NLRB is precluded from awarding backpay, employers may seek to hire more illegal immigrants, thus undermining the very purpose of

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41 Id. at 717. See also Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976) (reinstatement and backpay awarded to undocumented workers); Rios v. Enterprise Ass'n Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988) (illegal immigrants who did not interrupt their legal stay awarded backpay).

42 Local 512, Warehouse & Office Workers' Union, supra, 795 F.2d at 722.

43 134 F.3d 50, 56 (2d Cir. 1997).

44 976 F.2d 1115 (7th Cir. 1992).

45 Id.

the IRCA, the very statute about which the Court was so concerned. "Employers resisting unionization 'could simply fire undocumented workers who try to organize and then raise 'the unlawful immigration status . . . in retaliation for protected activities; employers might even consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefit of union avoidance.'"[47]

Even more devastating is the looming potential for this decision to be expanded to Title VII and other anti-discrimination statutes, as well as to the Fair Labor Standards Act ("FLSA") and other laws governing fairness and safety for workers. Although such statutes generally have been held in the past to apply to illegal aliens, these decisions now will be attacked under the rationale of *Hoffman Plastics*. See e.g., *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988) (undocumented aliens are employees under the FLSA); In re *Reyes*, 814 F.2d 168 (5th Cir. 1987) (illegal status irrelevant under FLSA and Migrant and Seasonal Agricultural Worker Protection Act); *EEOC v. Tortilleria "La Mejor*", 758 F.Supp. 585 (E.D. Cal. 1991) (IRCA does not alter coverage to illegal aliens under Title VII). Indeed, even the Supreme Court had held that "aliens are protected from discrimination under Title VII." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). But see *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (illegal alien may not bring claim under Title VII).

With the new emphasis on enforcing immigration laws, particularly given the events of September 11th, employment law practitioners would be wise to monitor what the Supreme Court, and the courts which look to it for guidance, decide about protections afforded illegal aliens.

C. Subsequent Treatment by Lower Courts

There has been little case law interpreting this decision so far, although the collision of employment law and immigration law in this case that marked this decision forecasts far more

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[46] Id. at 1121.

[47] *Labor Law – Illegal Immigrants – D.C. Circuit Allows Illegal Immigrants to Collect Backpay as a Remedy for Employer's Violation of the NLRA* – Hoffman Plastics Compounds, Inc. v. NLRB, 273 F.2d 639 (D.C. Cir. 2001) (En Banc), cert. granted. 121 S.Ct. 23 (2001), 115 HARV. L. REV. 915, 918 (JAN. 2002).

interpretation in the future. One district court decision read *Hoffman* narrowly, holding that it precludes the remedy of back pay to illegal aliens, however it still permits traditional labor remedies such as unpaid wages and overtime pay. *See Singh v. Jutla & C.D. & R Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

An interesting development in post-*Hoffman* case law is the discoverability of a plaintiff's immigration status. Defendants, seeking to capitalize on the damage limitations in *Hoffman*, have increasingly requested such information in discovery. At least two district court decisions have held that such information is not relevant. In one decision, the court found that the time period set forth in the interrogatory exceeded the scope of relevant time. *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002). Another decision went even further, protecting an employee's immigration status based on the "risk of injury to the plaintiffs if such information were disclosed," even it were relevant. *See Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

V. RAGSDALE V. WOLVERINE WORLD WIDE, INC.[1]

In *Ragsdale v. Wolverine World Wide, Inc.,*[2] (hereinafter "*Ragsdale*"), the Court struck down a regulation under the Family and Medical Leave Act ("FMLA"), promulgated and enforced by the Secretary of Labor, giving employees the right to twelve additional weeks of leave where the employer has failed to notify the employee that leave taken will count against the twelve weeks allotted by the FMLA.

A. Analysis

Although of less far-reaching effect than Hoffman Plastics, the Supreme Court's decision in Ragsdale is important, in that the Court once again refused to give deference to the interpretation of the relevant statute by the federal authority entrusted with enforcing it.

In *Ragsdale*,[3] the employer, Wolverine World Wide, had a more liberal leave policy than that granted by the FMLA's twelve weeks. Wolverine World Wide allowed its employees thirty weeks of leave if the employee was suffering from a serious health condition. Tracy Ragsdale, an employee of Wolverine World Wide, requested and was granted 30 weeks of leave when she was diagnosed with Hodgkin's disease. Wolverine World Wide, however failed to inform Ragsdale that twelve of the weeks she had taken would be counted against the twelve weeks to which she was entitled under the FMLA. At the end of her 30-week leave, Ragsdale requested another twelve weeks of leave under the FMLA, arguing that she was entitled to another twelve weeks because Wolverine World Wide had failed to notify her that any of the weeks she had already taken were considered FMLA leave. Wolverine World Wide asserted that it did not owe Ragsdale an extra twelve weeks of leave and terminated her.[4]

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1 This portion presented by Maureen Binetti, and case law updates by Keith Frazier.
2 122 S.Ct. 1155 (2002).
3 Ragsdale, 122 S.Ct. at 1159.
4 Id.

Ragsdale relied on an FMLA regulation, promulgated by the Secretary of Labor, which provides that "if an employee takes medical leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.'"[5] The Supreme Court affirmed the Eighth Circuit's decision, holding that the regulation was in conflict with the FMLA, and beyond the Secretary of Labor's authority, because it impermissibly created an "irrebuttable presumption" that the employee has suffered some type of damage by the lack of individualized notification that leave taken would count as FMLA leave.[6]

In order to prevail under an FMLA cause of action,[7] the Court stated, the employee must show that the employer violated the FMLA, the employee suffered harm, and that the harm suffered was caused by the employer's violation of the FMLA.[8] The Court invalidated the regulation because it did not require the above elements to be proven in order to obtain relief, and nothing in the FMLA provides authority for the employee to be granted an automatic additional twelve weeks.[9] The Court's central concern was that the regulation "relieves the employees of the burden of proving any real impairment of their rights and resulting prejudice."[10]

The Court further stated that the penalty imposed by Section 825.700(a) penalizes the employer excessively, noting:

> [It] is disproportionate and inconsistent with Congress' intent… [evidenced by] the sole notice provision in the act itself… §2619 directs employers to post a general notice informing employee of their FMLA rights… This Provision sets out its own penalty for noncompliance: 'Any employer that willfully violates this section may be assessed a civil monetary penalty not to exceed $100 for each separate offense.' §2619(b). Congress believed that a $100 fine, enforced by the Secretary, was the appropriate penalty for willful violations of the only notice requirement specified in the statute. The regulation, in contrast, establishes a much heavier sanction, enforced

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5 29 C.F.R. §825, 700(a) (2001).
6 Id. at 1162.
7 29 U.S.C.A. §2601 et seq.
8 Ragsdale, 122 S. Ct. at 1162.
9 Id. at 1163.
10 Id.

> not by the Secretary but by the employees, for both willful and inadvertent violations of a supplemental notice requirement.[11]

The Court further noted that the regulation penalizes the "good" employer who voluntarily offers employees longer leave periods than the twelve weeks required by the FMLA, holding that the FMLA's purpose is to grant employees family and medical leave for a total of twelve weeks within a 12-month period, and no more.[12]

Before the Supreme Court's ruling in *Ragsdale*, several courts similarly had held that the regulation was invalid in granting an additional twelve weeks of leave to an employee. In *McGregor v. Autozone*,[13] the Eighth Circuit invalidated Section 825.700(a). The Court reasoned that the regulation adds requirements and provides employees with more rights than those granted by the FMLA statute, and is therefore inconsistent with its purpose.[14] Similarly, in *Howell v. Standard Motor Products, Inc.,*[15] the Court found that the employer's failure to notify the employee that leave was designated as FMLA leave did not entitle the employee to an additional twelve weeks of leave.[16] Finally, the Southern District of New York, in *Fulham v. HSBC Bank USA*,[17] concluded that an employee who had already taken twenty-six weeks of leave was not entitled to twelve additional weeks of leave, holding the regulation invalid and contrary to the FMLA.[18]

In contrast, the Sixth Circuit had held that the regulation was not inconsistent with the FMLA statute.[19] The Court stated: "[I]n the absence of specific statutory language governing a topic, agency regulations are given controlling weight unless they are arbitrary and capricious, or manifestly contrary to the statute."[20] The Court noted that the regulation supported Congress' intent that

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[11] Id. at 1164.
[12] Id. at 1164-65.
[13] 180 F.3d 1305 (11th Cir. 1999).
[14] Id. at 1308.
[15] 2001 WL 912387 (N.D. Tex, Aug. 10, 2001).
[16] Id. at *9.
[17] 2001 WL 1029051 (S.D.N.Y., Sept. 6, 2001).
[18] Id. at *7. See also Nolan v. Hypercom Mfg. Res, 2001 WL 378235, *7 (D. Ariz., March 26, 2001) (invalidating the FMLA regulation, stating that it provided the employee with more substantive rights than allotted by the FMLA statute).
[19] See Plant v. Morton Int'l, 212 F.3d 929, 937 (6th Cir. 2000),
[20] Id., citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

employees be given individual notice of their FMLA rights. It concluded that it was unfair for an employer retroactively to apply FMLA leave to leave taken, without proper notice given to the employee.[21] See also *Gadinski v. Shamokin Area Community Hosp.,* (holding that the requirement and consequences imposed by section 825.700(a) are valid and a reasonable interpretation of the FMLA).[22]

Similarly, the District Court of New Jersey also had upheld the regulation. In *Nusbaum v. CB Richard Ellis, Inc.,*[23] the Court stated that the requirement of individual notice was proper, in order to allow employees to make well-informed decisions about how they choose to use their allotted leave.[24] The Court held that, were the regulation to be invalidated, the balance between the employer and employee would be destroyed, as the employer is in the position of being intimately familiar with its own leave policies and the FMLA, while the employee rarely is so aware.[25]

B. Effect of Ragsdale: the Nusbaum Court Was Correct.

The *Nusbaum* court was correct: one of the impacts of *Ragsdale* will be the imbalance which the lack of an individual notice "penalty" will cause to the delicate relationship between employer and employee. However, the requirement of individual notice still exists;[26] it is only the "automatic" consequences of a failure to give such notice which have been invalidated. The burden on the employer is relatively light (the sending of a form), while the consequences to the employee potentially job threatening. Thus, even after *Ragsdale*, arguably, if an employee can show actual harm from the failure to provide individual notice, as opposed to the automatic additional twelve weeks' leave penalty invalidated by *Ragsdale*, the employee still may have a claim. The Court in *Ragsdale* specifically limited its holding to the particular regulation at issue, and, it may be argued, left

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21 Id.
22 116 F.Supp.2d 586, 591 (2000).
23 171 F. Supp.2d 377 (D. N.J. 2001).
24 Id. at 385-86.
25 Id.
26 29 C.F.R. §825, 301(c).

open the door to a claim of actual prejudice. For example, in *Nusbaum,* supra, the failure to comply with the notice requirement created prejudice, where the company's leave policy provided for much greater leave than twelve weeks, and the employee could have returned within that time frame, but the company fired her after only twelve weeks' leave, without providing the FMLA notice.[27] Thus, while *Ragsdale* makes a "notice" claim much more difficult, it leaves open the possibility of a claim by an employee who can show actual harm from the employer's violation of the notice requirement.

C. Subsequent Treatment by Lower Courts

The decisions interpreting *Ragsdale*, the first significant FMLA ruling from the Supreme Court, have echoed its general holding that 12 weeks means 12 weeks with respect to employee's medical leave. In one appellate decision, the Eighth Circuit rejected a claim by an employee that she was entitled to additional time above 12 weeks because her employer failed to inform her that earlier leave had counted as FMLA leave. *See Harris v. Emergency Providers, Inc.*, 51 Fed. Appx. 600 (8th Cir. 2002). In another decision, the Third Circuit held that an employer's termination of an employee three weeks into her thirty-week leave did not violate the FMLA because she could not have returned within 12 weeks, even though the employer did not notify her that her leave was FMLA leave, because that requirement does not afford an employee additional time after *Ragsdale*. *See Katekovich v. Team Rent a Car*, 36 Fed. Appx. 688 (3d Cir. 2002). However, one district court decision favored employees, finding that vacation time must be considered in calculating an employee's 12-month period of employment the FMLA requires for an employee to be eligible for medical leave. *Ruder v. Maine General Medical Ctr.*, 204 F. Supp. 2d 16 (D. Me. 2002). In *Ruder*, the employee took vacation time during his 52nd week of employment and thereafter took approximately 10 weeks of FMLA time, after which he was terminated. The court denied the employer's motion to dismiss,

[27] Nusbaum, supra, 171 F. Supp. 2d at 385-386.

finding that the employee's vacation time counted as ordinary employment, thus accumulating 12 months of employment and vesting the employee with FMLA rights.

VI. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. WAFFLE HOUSE, INC.[1]

A. Does an arbitration agreement between an employee and employer bar the EEOC from pursuing victim-specific judicial relief for a claim of discrimination under the Americans with Disabilities Act of 1990?

The Supreme Court ruled earlier this year that even though an employer and an employee have an agreement to arbitrate employment related disputes, the EEOC is not barred from pursuing victim-specific judicial relief such as back pay, reinstatement, and damages in an ADA enforcement action.

B. The Case

As a condition of his employment, Eric Baker agreed in his application for employment that any dispute or claim concerning his employment with Waffle House would be settled by binding arbitration. Mr. Baker began work as a grill operator at a Waffle House restaurant in August of 1994. Sixteen days after beginning work at the Waffle House restaurant, Mr. Baker suffered a seizure at work and was subsequently fired. Mr. Baker did not initiate arbitration proceedings, instead filing a timely charge of discrimination in violation of the ADA with the EEOC. The EEOC then filed an enforcement action, to which Mr. Baker was not a party, in the U.S. District Court for the District of South Carolina seeking both injunctive relief from Waffle House's unlawful employment practices, and victim-specific relief designed to make Mr. Baker whole such as backpay, reinstatement, compensatory damages, and punitive damages. Waffle House filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., to stay the EEOC's suit and to compel arbitration or dismiss the action. The District Court denied Waffle House's motions after making a factual determination that Baker's employment contract did not contain the arbitration provision.

The Circuit Court of Appeals for the Fourth Circuit granted an interlocutory appeal and found that an enforceable arbitration agreement did exist in the employment contract. The Court of Appeals

[1] This portion presented by Jeff Patton, and case law updates by Keith Frazier.

then held that the EEOC was prevented from seeking victim-specific relief in court due to the policy goals of the FAA even though the arbitration clause did not prevent an enforcement action by the EEOC since the EEOC was not a party to the contract, and even though the EEOC has independent statutory authority to bring suit in any district court with proper venue. The majority explained that when an employee has signed a mandatory arbitration agreement, the EEOC's remedies in an enforcement action are limited to injunctive relief because "when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action." Whereas, they held that when the EEOC is seeking victim-specific remedies, "the federal policy favoring enforcement of private arbitration clauses outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is nominal." Id. at 763.

The Supreme Court reversed the lower courts decision, holding that an arbitration agreement between an employee and employer does not bar the EEOC from pursuing victim-specific judicial relief. The ADA directs the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when enforcing the ADA's prohibitions against employment discrimination on the basis of disability. Therefore, following the 1991 amendments to Title VII, the EEOC has authority to bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, backpay, and compensatory or punitive damages, in both Title VII and ADA actions. Thus, the EEOC had unambiguous statutory authority to obtain the relief that it seeks here if it can prove its case against respondent. Since nothing in the statutes suggests that the existence of an arbitration agreement between private parties affects the remedies otherwise available to the EEOC. Despite the FAA policy favoring the enforceability of private arbitration agreements, it does not attempt to restrict the

choice of forum by authorizing a court to compel arbitration for those who are not parties to an arbitration agreement.

Under the ADA, The EEOC is the master of its own case, with the authority to evaluate the strength of the public interest at stake and to determine whether public resources should be committed to the recovery of victim-specific relief. Furthermore, the Court stated that Court of Appeals' attempt to balance policy goals against the arbitration agreement's clear language is inconsistent with Supreme Court's cases holding that the FAA does not require parties to arbitrate when they have not agreed to do so. Because the EEOC is not a party to the employment contract and had not itself agreed to arbitrate its claims, the Court found that regardless of the forum in which the employer and employee have chosen to resolve their disputes, the policy goals of the FAA don't require the EEOC to relinquish its statutory authority to pursue victim-specific relief.

The court did however state that an employee's conduct may limit the relief the EEOC can obtain in court if, for example, the employee fails to mitigate damages or accepts a monetary settlement. The Court held that in this case, because Mr. Baker did not seek arbitration or enter into settlement negotiations, there was no reason to limit the types of relief available to the EEOC in its suit. Even though the principles of res judicata, mootness, or mitigation may apply to EEOC claims, it does not follow that the EEOC's claim is merely derivative. The Supreme Court has recognized several situations in previous cases in which the EEOC does not stand in the employee's shoes, and in this case, the applicable statutes grant the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed.

The Court reversed the decision of the Court of Appeals and remanded the case.

C. <u>The Dissent</u>

Justices Thomas, Rehnquist and Scalia dissented from the decision. They dissented as they believed the majority's opinion conflicts with both the policy goals of the FAA and the basic principle

that the EEOC must take a victim as it finds them. Thomas states that "[b]y allowing the EEOC to obtain victim-specific remedies for Baker, the Court therefore concludes that the EEOC may do 'on behalf of Baker' that which he cannot do for himself. Id. at 768. While the EEOC has the statutory right to bring suit, it has no statutory entitlement to obtain a particular remedy. It is the court's role, not the role of the EEOC to decide whether a particular remedy is appropriate in any given case. Id. The dissent states that general principal which has arisen out of case law involving suits by the EEOC is that "To the extent that the EEOC is seeking victim-specific relief in court for a particular employee, it is able to obtain no more relief for the employee than the employee could recover for himself by bringing his own lawsuit." Id. at 770. The dissent stressed the fact that since Mr. Baker waived his right to seek relief for himself in a judicial forum by signing the arbitration agreement, the EEOC should not be able to recover victim-specific relief for Baker in court. Doing so would reduce a valid arbitration agreement to a "mere nullity," as well as contravene contravenes the "liberal federal policy favoring arbitration agreements" embodied in the FAA. Id. at 772. The dissent stressed that allowing the EEOC to seek victim-specific remedies would allow employees with arbitration agreements to have "two bites at the apple -- one in arbitration and one in litigation conducted by the EEOC," discouraging the use of arbitration agreements by employers. Id. at 779.

D. Conclusion

The EEOC may pursue both injunctive relief and those victim-specific remedies which are designed to make the employee whole regardless of any agreement between an employee and employer to arbitrate employment related disputes. The Supreme Court has determined that the EEOC is the master of it's own case and may seek any remedies available to it, though the relief available in court may be limited if the employee fails to mitigate damages or accepts a monetary settlement.

E. Subsequent Treatment By Lower Courts

This decision has received considerable attention in the lower courts, particularly as courts address each of the various procedural steps in the EEOC process and determine what is limited by an arbitration provision and what is not. Most decisions have favored the EEOC's right to sue regardless of arbitration agreements or other procedural barriers. For example, the Sixth Circuit found that filing a Charge of Discrimination does not violate an arbitration agreement, so long as the EEOC, and not the employee, files a subsequent lawsuit. *See EEOC v. Circuit City Stores, Inc.*, 285 F.3d 404 (6th Cir. 2002). Another decision from the Seventh Circuit read *Waffle House* to permit the EEOC to file lawsuits against state governmental agencies notwithstanding the Eleventh Amendment. *See EEOC v. Board of Regents of the University of Wisconsin*, 288 F.3d 296 (7th Cir. 2002). In *Board of Regents*, a state agency argued that the EEOC, just like individual plaintiffs, could not sue it in federal court under the Eleventh Amendment. The court rejected this theory: "[W]hatever the policy arguments on either side of the issue, *Waffle House* compels us to find that sovereign immunity does not bar this suit, which is brought independently by an agency of the United States government."

A decision from one district court rejected a broad interpretation of *Waffle House*, finding that *Waffle House* did not affect a lawsuit by an employee against individual defendants, and that the lawsuit was subject to an arbitration agreement. *See Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237 (D. Conn. 2002). In *Gambardella*, the plaintiff argued that her arbitration agreement with her employer did not affect her lawsuit against individual employees because *Waffle House* limited the scope of an arbitration agreement to signatories to the agreement. The court found that, notwithstanding the fact that the individual defendants were not signatories to the arbitration agreement, the agreement was binding on those parties: "[T]he issue is not whether non-signatories to the agreement can be compelled to arbitrate; rather, it is whether these non-signatories may compel plaintiff, admittedly a party to the contract, to arbitrate."

VII. Nat'l R.R. Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002)[2]

On June 10, 2002, the Supreme Court issued a decision holding that a Title VII plaintiff cannot recover for discrete acts of discrimination occurring more than 180 or 300 days before he filed a charge, but can recover for all acts constituting a hostile work environment as long as at least one act occurred within the charge-filing period. The Court affirmed in part and reversed in part a decision of the Ninth Circuit, which had held that a plaintiff may recover for discriminatory acts which occurred outside the charge-filing period if they are "sufficiently related" to incidents falling within the statutory period or are part of a policy or practice of discrimination that occurred, at least in part, within the limitations period.

Background

Abner Morgan, an African American man, began working at the Oakland, California maintenance yard of the National Railroad Passenger Corporation (Amtrak) in 1990. Morgan alleged that, over the course of his employment, he was subjected to numerous discriminatory actions based on his race. He asserted, inter alia, that he was unfairly disciplined on a number of occasions; that he was repeatedly denied training; and that he was assigned demeaning tasks outside his job description. Morgan also offered evidence that the working environment at the Oakland yard was rife with racial abuse directed at Morgan and other African Americans.

Morgan made at least five written complaints of race discrimination to Amtrak's Equal Employment Office. He also complained of race discrimination to his congressional representative. However, Morgan did not file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) until February 27, 1995, four days before he was terminated. After receiving a notice of right to sue from EEOC, Morgan filed this action, alleging that, "from the beginning of his tenure with Amtrak, and throughout his tenure, he was subjected to discriminatory and retaliatory acts

[2] This portion presented by Lousi Lopez.

and endured a racially hostile work environment." Some discriminatory acts occurred within 300 days of the time Morgan filed his EEOC charge; many occurred prior to that time period.

The district court granted Amtrak's motion for partial summary judgment, ruling that Amtrak could not be held liable for any conduct occurring more than 300 days before Morgan filed his charge with EEOC. Because Morgan's repeated complaints of race discrimination at the yard indicate that he believed that he was the victim of discrimination within the charge-filing period, the district court concluded that it would have been reasonable to expect him to file a charge challenging the earlier acts of discrimination when they occurred. The case proceeded to trial on claims relating to conduct after May 3, 1994 and Morgan was allowed to introduce evidence of Amtrak's pre-limitations conduct as background evidence. The jury returned a verdict for Amtrak and Morgan appealed.

The court of appeals reversed and remanded for a new trial. The court held that a plaintiff can establish a continuing violation, without regard to notice, either by "showing a series of related acts one or more of which are within the limitations period," or by "show[ing] a systematic policy or practice of discrimination that operated, in part, within the limitations period." The court of appeals concluded that "the pre-limitations conduct at issue in this case is sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine" with respect to Morgan's claims of race discrimination in discipline and training, racial harassment and retaliation.

Supreme Court Decision

The Supreme Court, in an opinion by Justice Thomas, began by noting that, under § 706(e)(1) of Title VII of the Civil Rights Act of 1964, "a litigant has up to 180 or 300 days ***after*** the unlawful practice happened to file a charge with the EEOC." 122 S.Ct. at 2070 (emphasis in original). According to the Court, "[t]he critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" Id. In Part II-A of the opinion, which was joined by all nine justices, the Court held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day

it 'happened.'" Id. Therefore, according to the Court, a plaintiff "must file a charge within either 180 or 300 days of the date of the act or lose his ability to recover for it."[3] Id. at 2071.

The plaintiff argued that, because § 706(e)(1) provides that a charge must be filed within a specified number of days after an "unlawful employment practice," it does not require the filing of a timely charge after each discrete act that is part of an ongoing discriminatory practice. According to the Court, that argument must fail because § 703 includes among the "[u]nlawful employment practices" it specifically prohibits "numerous discrete acts." 122 S.Ct. at 2071. Accordingly, the Court concluded, "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." Id. Moreover, the Court noted, it has "repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts." Id. (citing Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234 (1976); Bazemore v. Friday, 478 U.S. 385, 395 (1986)). The Court also noted that it has previously held that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period. Id. (citing United Air Lines v. Evans, 431 U.S. 553, 558 (1977); Delaware State College v. Ricks, 449 U.S. 250, 257 (1980)).

From this analysis, the Court derived the following principles:

- "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges;"
- "[e]ach discrete discriminatory act starts a new clock for filing charges challenging that act;"
- "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed;" and
- "the statute [does not] bar an employee from using the prior acts as background evidence in support of a timely claim."

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[3] The Court noted that "[t]here may be circumstances where it will be difficult to determine when the time period should begin to run." 122 S.Ct. at 2073 n.7. In particular, the Court stated, a question may arise as to "whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered." Id. According to the Court, "this case presents no occasion to resolve that issue." Id.

122 S.Ct. at 2072. The Court did not define what it means by "discrete acts," but stated that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." Id. at 2073.[4] In addition, the Court reiterated that Title VII's charge-filing period is "subject to equitable doctrines such as tolling or estoppel." 122 S.Ct. at 2072.

According to the Court, the court of appeals erred by "appl[ying] the continuing violation doctrine to what it termed 'serial violations,' [and] holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." 122 S.Ct. at 2072. The Court, therefore, reversed this aspect of the court of appeals judgment.

In Part II-B of Justice Thomas's opinion, which was joined by Justices Stevens, Souter, Ginsburg and Breyer, the Court held that "[h]ostile environment claims are different in kind from discrete acts." 122 S.Ct. at 2073. According to the Court, "[t]heir very nature involves repeated conduct." Id. The Court explained:

> A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.' The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile work environment may be considered by a court for the purposes of determining liability.

Id. at 2074 (internal citation omitted).

The Court refused to attach a "notice" requirement or "discovery rule" to hostile work environment claims.[5] "It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the

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[4] The Court also noted that "[w]e have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants . . . ." 122 S.Ct. at 2073 n.9.

plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct." 122 S.Ct. at 2075.

The Court held that a plaintiff may recover damages for the entirety of his hostile environment claim. The Court agreed with plaintiff's contention that Title VII's timeliness requirements do not dictate the amount of recoverable damages, even for the part of the hostile environment falling outside the 300 day period. "[The timeliness requirement] is but one in a series of provisions requiring that the parties take action within specified time periods . . . none of which function as specific limitations on damages." 122 S.Ct. at 2075. The Court found the explicit damages limitations elsewhere in the statute to be significant. The Court pointed out that compensatory and punitive damages are limited by § 1981a(b)(3) and that backpay awards are limited to two years prior to filing the charge. "If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay. And the fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period indicates that the timely filing provision was not meant to serve as a specific limitation on damages or the conduct that may be considered for the purposes of one actionable hostile work environment claim." Id.

The Court affirmed the court of appeals' decision remanding for trial Morgan's hostile work environment claim, because the court of appeals found that his claim was based on pre- and post-limitations incidents involving the same type of employment actions perpetrated by the same managers and occurring "relatively frequently." 122 S.Ct. at 2076 (quoting 232 F.3d at 1017). The Court noted that "Morgan presented evidence from a number of other employees that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the

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[5] The Court explicitly rejected the test articulated by the Seventh Circuit in Galloway v. General

capacity of blacks to be supervisors, and used various racial epithets" and accepted, without deciding the merits of Morgan's claim, that acts outside the 300 day period were part of the same actionable hostile environment claim. Id.

The Court reassured employers that they may rely on equitable doctrines where an employee unreasonably delays filing a charge, such as "a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." 122 S.Ct. at 2077.

Justice O'Connor filed a decision concurring in part and dissenting in part. In Part I of her opinion, which was joined by Chief Justice Rehnquist and Justice Breyer, Justice O'Connor agrees with the majority that it is unnecessary "to resolve fully the application of the discovery rule to claims based on discrete discriminatory acts." 122 S.Ct. at 2078. However, Justice O'Connor would hold that "some version of the discovery rule applies to discrete-act claims." Id. Accordingly, she would hold that "the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act." Id.

Part II of Justice O'Connor's opinion, which was joined by the Chief Justice and Justices Scalia and Kennedy, expressed the view that the same standard adopted by the Court for discrete acts should be applied to hostile work environment claims. 122 S.Ct. at 2078. According to Justice O'Connor, "[i]f a plaintiff fails to file a charge [within the limitations period], liability may not be assessed, and damages must not be awarded, for that part of the hostile work environment that occurred outside the charge-filing period." Id. at 2078. She observed that, "[a]lthough a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate 'occurrence,' and claims based on some of those occurrences forfeited." Id.

Motors Serv. Parts Operations, 78 F.3d 1164 (1996). See 122 S.Ct. at 2074 n.11.

Under the majority's approach, Justice O'Connor suggests, an employee who has been subjected to a hostile environment for 10 years "may, subject only to the uncertain restrictions of equity, . . . sleep on his or her rights for a decade, bringing suit only in year 11 based in part on actions for which a charge could, and should, have been filed may years previously in accordance with the statutory mandate." Id. at 2078-79.