HYDERALLY & ASSOCIATES P.C.

US Supreme Court
Year in Review 2010-2011
Labor & Employment Law Cases

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Colorado Bar Association | 2012 National CLE Conference

Thompson v. North American Stainless, LP, 562 U.S. _

- Eric Thompson and his fiancée, Miriam Regalado, both worked for North American
- Feb. '03, Regalado filed a charge with the EEOC alleging gender discrimination
- A few weeks later, North American fired Thompson

- Thompson sued in Eastern District of Kentucky
  - Allegation: North American violated Title VII by firing him in retaliation of Regalado's EEOC charge
  - Summary judgment granted: Title VII does not permit third-party retaliation claims

- Sixth Circuit
  - Panel reversed district court
  - Hearing en banc – affirmed by 10-to-6 vote
    - Reason: Because Thompson did not personally engage in protected activity, he is not included in the class of persons covered by the antiretaliation provision

- U.S. Supreme Court
  - Holding: Reversed 6th Circuit
    - J. Scalia writes for majority (all except Kagan)
    - Concurring: J. Ginsburg, joined by Breyer.
    - J. Kagan took no part.
  - Title VII prohibits retaliation against third parties

- Supreme Court's Rationale
  - Title VII antiretaliation provision covers a broad range of conduct – *see Burlington Northern v. White*
    - *"…prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."*
  - Scalia recognizes that it's "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

- Supreme Court's Analysis
  - Does not identify how closely the parties have to be connected to trigger Title VII protection
    - Close family member = almost always covered
    - Mere acquaintance = almost never covered

✖Scalia defines who can sue under Title VII

✚Title VII: the person who is "aggrieved"

✕This is not the same as Article III standing

✚New test: "zone of interests"

✕Can sue: any person with an interest arguably sought to be protected by the statute

✶I.e., Co-worker spouse

✕Cannot sue: anyone technically injured in an Article III sense but whose interests are unrelated to the statutory prohibitions of Title VII

✶I.e., Shareholder whose stock fell because of the discriminatory termination

- Implications of *Thompson*
  - S. Ct. accepts pro-employee interpretation of Title VII's antiretaliation provision
    - Same as the EEOC interpretation, as mentioned in J. Ginsburg's concurring opinion
  - How close must the relationship be to fall under Title VII protection?

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. _

- Kevin Kasten complained to the company that because of the location of the time clocks, employees were not compensated for time spent donning and doffing
  - Complaints were oral and informal, but made to multiple members of management
- Kasten was terminated not long after for failing to report his comings and goings on the time clock.

- Kasten sued in Western District of Wisconsin
  - District Court found FLSA violation for failure to compensate for time spent donning & doffing
    - Kasten was right!!!
  - District Court granted summary judgment for Company on retaliation claim
    - FLSA anti-retaliation provision not triggered by oral complaint

- Kasten appealed to Seventh Circuit
  - 7th Cir. affirmed
    - Decided that the FLSA anti-retaliation provision is triggered when complaints are "filed," which necessarily excludes oral complaints – only papers can get "filed"
    - 7th Cir. agreed with 2d Cir. *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993)
    - Disagreed with 5th Cir. & 9th Cir., as well as similar cases in 6th Cir., 8th Cir., 10th Cir., & 11th Cir.

- U.S. Supreme Court
  - Granted cert to resolve circuit split
    - Answered question: Whether the FLSA anti-retaliation provision, when it states "filed any complaint," includes oral as well as written complaints
  - Holding: Reversed 7th Circuit
    - J. Breyer, joined by C.J. Roberts, Kennedy, Ginsburg, Alito, & Sotomayor
    - Dissenters: J. Scalia, joined by Thomas
    - J. Kagan took no part

- Supreme Court's Analysis
  - Textual analysis – what does the word "filed" mean?
    - J. Breyer looks to dictionaries, state statutes, federal agency regulations, court decision from the 1920s & 1930s, other parts of the FLSA, and other federal statutes
    - Conclusion: still inconclusive whether "filed" includes oral complaints

- Functional considerations – Congressional intent
  - Enforcement of the FLSA relies on workers' reporting of violations – as opposed to detailed federal supervision
    - The workers in need of the most protection are the less educated and more likely to be illiterate – it doesn't make sense to impose writing requirements
  - Dep't of Labor regulates & enforces FLSA – oral complaints are covered by anti-retaliation provision

- Scalia's dissent – would have affirmed 7th Cir.
  - FLSA antiretaliation provision should only cover complaints filed with the government
  - No protection when employees complain internally to their private employers

- Supreme Court's conclusion:
  - "To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statutes and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones."

- After *Kasten*:
  - 2d Cir. case law is overruled – oral complaints to employers trigger antiretaliation protection
  - Supreme Court strengthens law on retaliation in employment context in Employees' favor
  - Employers' concern: at what point does an utterance of workplace displeasure become a filed complaint for FLSA antiretaliation purposes?

Staub v. Proctor Hospital, 562 U.S. _

» Vincent Staub:

> Angiography technician for Proctor Hospital

> Member of U.S. Army Reserve

+ 1 weekend per month; 2 weeks per year

» Janice Mulally – Staub's supervisor

> Scheduled Staub for additional shifts to pay back the department for having to cover for him when he was out with Reserves

> Told co-worker that military duty was a strain on the department

> Asked co-worked to help her get rid of Staub

» Michael Korenchuk – Mullaly's supervisor

> Referred to Staub's military service as a bunch of smoking and joking and a waste of taxpayers' money

> Aware that Mulally was out to "get" Staub

- January 2004 – Mulally issued "Corrective Action" discipline
  - But: the cited rule did not exist & the even if it did, Staub's actions would not have been a violation
- April 2004 – another co-worker complained of Staub's schedule to VP of HR and COO
- COO directs to create a plan to solve Staub's availability problems
- 3 weeks later – Staub accused of violating the January Corrective Action

» Linda Buck (VP of HR)
  > Relies on accusation of violation
  > Reviews personnel file
  > Terminates Staub
    + Stated reason: violation of January Corrective Action

» Staub tells Buck that Mulally fabricated allegations out of hostility for military service

» Buck: no investigation; termination stands

» Staub sued in Central District of Illinois

> Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
  + Prohibits employment discrimination based on military service

> Argument: Buck's decision to terminate was motivated by Mulally & Korenchuk's hostility towards the military

> Staub won at trial! – jury awarded $57,640

» Proctor appealed to Seventh Circuit

> 7th Cir. reverses!
  + No "cat's paw" liability if non-decisionmaker was not "singular influence" creating "blind reliance"
    – Since Buck reviewed file and made her own assessment, she did not rely on Mulally & Korenchuk

> Aesop's Fable, "The Monkey and the Cat"
  + by Jean de La Fontaine, 1679
  + Judge Richard Posner
    – *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (ADEA case)

» U.S. Supreme Court

> Reversed 7th Cir.

+ J. Scalia, joined by C.J. Roberts, Kennedy, Ginsburg, Breyer, & Sotomayor
+ Concurring in judgment: J. Alito, joined by Thomas
+ J. Kagan: took no part

» Supreme Court's Rationale

> Focused on statutory text: "motivating factor in the employer's action"
> Proximate cause analysis – there has to be direct relation between the injury asserted and the injurious conduct alleged
> Can have multiple proximate causes, discriminatory and non-discriminatory
> Multiple actors can be involved in the decision, a workplace reality of having multiple supervisors, and they are all acting on behalf of the "employer"

» Employer is liable if:

> 1. a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, **and**

> 2. that act is the proximate cause of the ultimate employment action

» Investigation

> Independent investigation, by itself, is not enough to cut off liability – limits ability to argue superseding / intervening cause

> To potentially cut off liability, the investigation would have to conclude that adverse action is warranted for reasons that exclude any biased information

» J. Alito concurred, with Thomas

> Agrees that the 7th Cir. was wrong

> But disagrees with Majority's new rule

+ Would require a direct causal link – termination directly caused by animus, based on delegation of decision-making
+ Would allow independent investigation, or independent decision-maker, to cut off liability
+ Would encourage internal grievance procedures like those under *Faragher* & *Ellerth*

» Implications of *Staub*

> Will employers will be discouraged from hiring Reserves or National Guard?

+ But isn't that also a USERRA violation itself?

> What about supervisor's reliance on tainted information from another employee?

Wal-Mart Stores, Inc. v. Dukes,

564 U.S. _

- Plaintiff Class: 1.5 Million female current and former employees
  - All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been of may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices.
- Suit under Title VII, alleging disparate impact as a result of a corporate culture that permits bias against women, making every woman a victim of a common discriminatory practice

- Plaintiffs sued in Northern District of California
  - Certified class under Fed. R. Civ. P. 23
    - Certification requirements – first, Fed. R. Civ. P. 23(a):
      - 1. Numerosity;
      - 2. Commonality:
      - 3. Typicality; &
      - 4. Fairness and adequacy of representation.
    - Type of class – Plaintiffs chose Fed. R. Civ. P. 23(b)(2):
      - "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"

- Plaintiffs specifically limited relief sought to satisfy the Fed. R. Civ. P. 23(b)(2) requirement
  - Injunctive & declaratory relief
  - Punitive damages
  - Backpay
  - NOT: compensatory damages
- District Court: certified class

- Wal-Mart appealed to Ninth Circuit
  - 9th Cir. affirmed certification
    - The evidence of commonality was sufficient to raise the common question of whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies
    - The named Plaintiffs were sufficiently typical to represent the class
    - Allowed trial by formula: Plaintiffs could get a random sampling of damages and then extrapolating the validity and value for the untested claims

- U.S. Supreme Court
  - Holding: Reversed 9th Circuit
    - J. Scalia, joined by C.J. Roberts, Kennedy, Thomas, & Alito
      - Agree with J. Kozinski's dissent
    - Ginsburg, Breyer, Sotomayor, and Kagan concurred in part and dissented in part
  - Why?
    - Lack of commonality
      - *Unanimous holding*
    - Cannot proceed under Fed. R. Civ. P. 23(b)(2)
      - *Dissent disagreed*

- Supreme Court unanimously holds:
  - Commonality – plaintiff must demonstrate that the class members suffered the same injury – not that defendant violated the same statute
    - The common contention must be such that its determination will resolve in one stroke an issue that is central to the validity of each one of the individual claims

- Here, Plaintiffs cannot establish commonality
  - Multitude of local managers making discretionary employment decisions that have no connection to discretionary decisions of other managers in other stores, all pursuant to a company-wide anti-discrimination policy
  - Back pay claims necessarily require individualize analysis and calculation to determine liability & extent of damages
  - Individualized defenses available to each plaintiff's grounds for liability and damages
  - Expert testimony about Wal-Mart's vulnerability to gender discrimination was insufficient to satisfy the commonality requirement

- Further…
  - A 23(b)(2) class is the wrong vehicle for a class seeking back wages
    - 23(b)(2) is a mandatory class – no opt-out or opt-in procedure
    - It's meant for classes where the resolution will impact each and every class member the same way
      - I.e., school desegregation cases
    - It's not meant for individualized backpay calculations
    - Plaintiffs cannot use "trial by formula" to circumvent this requirement

- Implications of *Dukes*
  - In Title VII litigation:
    - Will greatly reduce (or eliminate) the number of (b)(2) class actions filed
    - Plaintiffs will likely turn to (b)(3) classes.
      - Higher standard for certification than (b)(2) classes because they require Plaintiffs to show "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"
  - Other areas, i.e., FLSA collective actions
    - No direct impact if they do not proceed under Fed. R. Civ. P. 23

NASA v. Nelson, 562 U.S. _

* In 2004, the 9/11 Commission prompted President Bush to order a new ID standard for federal employees and contract workers

* As part of implementation of the directive, the Department of Commerce ordered uniform background checks on all employees and contract employees with long-term access to federal facilities

* Deadline for background checks: October 2007

* NASA = federal agency
* One NASA facility: Jet Propulsion Laboratory (JPL)
* JPL is operated by California Institute of Technology (Cal. Tech.) pursuant to a government contract
* As part of background check:
  * Employees fill out form SF-85
    * Asks whether the employee has "used, possessed, supplied, or manufactured illegal drugs" in the last year
  * Employee's references fill out Form 42
    * Asks about Employee's honesty and trustworthiness
    * Asks if Reference has any negative information about Employee, including criminal activity, drugs, mental/emotional instability, etc.

* 28 JPL contract employees (some working there for decades) sued in Central District of California
* Background check violates constitutional right to informational privacy
  * *See Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)
* District Court denied preliminary injunction

* Employees appealed to Ninth Circuit
  * Granted injunction pending appeal
  * Reversed District Court
    * Informational privacy rights violated
      * SF-85: Upheld question regarding drugs, but found question about drug counseling to be unconstitutional as serving no legitimate interest
      * Form 42: open-ended questions were not narrowly tailored to meet gov't interest in verifying contractors' identities and ensuring security at JPL
  * 9th Cir. denied hearing en banc
    * Over 5 dissenters

* U.S. Supreme Court
  * Holding: Reversed 9th Circuit
    * J. Alito, joined by C.J. Roberts, Kennedy, Ginsburg, Breyer, & Sotomayor
    * J. Scalia, joined by Thomas, concurring in judgment
    * J. Thomas concurring in judgment
    * J. Kagan took no part

* Existing law
  * Both *Whalen* & *Nixon* held that disclosure of private information was safeguarded by concurrent statutory security provisions
  * 2d, 3d, 5th, & 9th Cir.:
    * Disclosure of personal information warrants a balancing test weighing gov't interest against individual interest
  * 6th Cir:
    * Right of information privacy protects only intrusions upon interests that can be deemed fundamental or implicit in the concept of ordered liberty
  * D.C. Cir.:
    * Grave doubts whether such right even exists

* Supreme Court's Analysis
  * First, assumes that a constitutional right to informational privacy exists
  * Government is acting as employer, with significant interest conducting background checks
    * Ensuring security of facilities and employing competent & reliable workforce
    * That these are contract workers does not warrant a distinction – gov't has the same interests
  * Both forms are reasonable, employment-related inquiries that further the government's interests

* Supreme Court's Analysis
  * Privacy Act of 1974
    * Protects against dissemination of information
    * Requires written consent of employee before any disclosure
    * Criminal liability for violations
  * Thus, no violation of constitutional right to informational privacy

* Scalia, joined by Thomas, concurred in judgment:
  * A federal constitutional right to informational privacy does not exist, period. No need for further inquiry or analysis.
    * *Whalen* & *Nixon* did not provide a coherent basis for it, and thus are not worthy of application
  * Criticizes the majority for assuming that the right may exist, and separately for not resolving the question

* Implications of *NASA*:
  * The government has a lot of leeway when it is acting as an employer
  * Scalia finds the majority's opinion to be a "generous gift to the plaintiff's bar"
    * Foresees an increase in 1983 cases, which will easily distinguish this case

Borough of Duryea v. Guarnieri, 564 U.S. _

- Charles Guarnieri – Chief of Police, Duryea, PA
  - Terminated
  - Filed union grievance challenging termination
  - Arbitrator ordered reinstatement
  - City Council issued 11 directives regarding his duties upon returning to work

- Guarnieri filed second union grievance
  - Directives are retaliation
  - Council sent a message: "You may have won arbitration, but we control you."
- Arbitrator ordered withdrawal of some directives

- Guarnieri sued in Middle District of Pennsylvania
  - 42 U.S.C. § 1983 – First Amendment violation
    - Petition Clause: protects "the right of the people … to petition the Government for a redress of grievances."
    - First grievance was protected by Petition Clause of First Amendment
    - Directives were retaliation for activity protected by First Amendment
- Jury trial – Guarnieri won

- Defendants appealed to Third Circuit
  - 3d Cir. affirmed
    - Held that the "public concern" test does not apply to the Petition Clause of the First Amendment for public employees
      - Retaliation for formal petition, even if private concern, is actionable
  - Disagreed with other circuits: 1st, 2d, & 4th
    - For public employees – public concern test applied to both Free Speech & Petition Clause cases
      - *See Connick v. Meyers*, 461 U.S. 138 (1983) & *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

- U.S. Supreme Court
  - Holding: Reversed 3d Circuit
    - J. Kennedy, joined by C.J. Roberts, Ginsburg, Breyer, Alito, Sotomayor, & Kagan
    - J. Thomas concurring in judgment
    - J. Scalia concurring in judgment in part and dissenting in part

- Supreme Court's Analysis
  - Guarnieri could have used the Petition Clause or the Free Speech Clause for the conduct here
    - Petition: seek redress from the Court
    - Speech: information contained in the petition
  - Because of the public employment context, the public concern test and analysis applies for both Clauses

- Analysis for public employee First Amendment cases
  - Private concern: no First Amendment protection
  - Public concern:
    - 1. Whether "public" depends on content, form, and context of petition, as revealed by whole record
    - 2. Balance First Amendment interest vs. government's interest in effective management of internal affairs

- Policy driving Supreme Court's conclusion:
  - Petition Clause should not be available as an end-run around the Speech Clause requirements
    - Note: different situations may warrant divergent standards
  - Public concern test was developed to protect government's ability to function without becoming mired in litigation over workplace issues
  - Ample statutory protections exist to cover workplace issues, thus no need to stretch Constitutional protections to cover these issues

- Scalia agreed to reverse 3d Cir., but only partly:
  - Lawsuits are not petitions under the 1st Amend., thus should not trigger 1st Amend. protection
  - Public concern test should not apply to Petition Clause
  - The proper test should be: Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioner's employer
    - I.e., 1983 lawsuit – protected; union grievance – not protected
- Thomas – always use the public concern test

- After *Guarnieri*:
  - Increasingly tougher standards for public employees
  - Scalia – somewhat consistent with his other protective antiretaliation opinions

Cigna Corp. v. Amara, 563 U.S. _

- In 1998, Cigna Corp. changed its pension plan
  - From a defined benefit plan (annuity based on salary and years of service)
  - To an "account balance plan" (lump sum based on annual contributions plus interest)
- Employee class sued on behalf of the plan - employees were worse off under the new plan

Class sued in District of Connecticut

District Court found:

- Cigna failed to tell its employees about the features of the new plan
- Cigna intentionally misled its employees
  - Internal documents revealed Cigna purposely did not provide a comparison of the two plans
- Violation of:
  - ERISA 204(h) – no reduction of benefits unless notice is given
  - ERISA 102(a) & 104(b) – administrator must provide with summary plan description (SPD) and with summaries of material modifications

District Court's Remedy

- Although only the employees who were harmed could obtain relief, the evidence presented raised a presumption of "likely harm" to all class members
- Cigna failed to rebut presumption, so class-wide relief was warranted
- Relief under ERISA 502(a)(1)(B): beneficiary can bring a civil action to recover the benefits do to him under the terms of the plan
  - The Court rewrote the terms of the new plan so that each beneficiary could "recover the benefits do to him"

- Parties cross-appealed to Second Circuit
  - 2d Cir. affirmed
    - Brief summary order affirmed for substantially the reasons stated in the District Court's "well-reasoned and scholarly opinions"

- U.S. Supreme Court
  - Cross-petitions for writs of certiorari – granted Cigna's petition
    - Question presented: whether a showing of "likely harm" is sufficient to entitle plan participants to recover benefits based on faulty disclosures
  - Holding: Reversed 2d Circuit
    - J. Breyer, joined by C.J. Roberts, Kennedy, Ginsburg, Alito, & Kagan
    - Concurring in judgment: J. Scalia, joined by Thomas
    - J. Sotomayor took no part

- Supreme Court's Analysis
- First:
  - ERISA 502(a)(1)(B) does not authorize a court to alter the terms of a plan
  - The terms of a SPD are not the actual terms of the plan, and thus cannot themselves be enforced
    - Meaning: The plan governs, even if the SPD is inconsistent
  - So, the Court did not have the power to grant relief under 502(a)(1)(B)

- ERISA 502(a)(3) allows "appropriate equitable relief" to redress ERISA violations
  - Here:
    - Reformation of the terms of the plan – equitable remedy
    - Estoppel: holding Cigna to what it promised (that the new plan would not take from employees benefits that they had already accrued) – equitable remedy
    - Injunctions: requiring the administrator to pay already retired beneficiaries money owed to them under the reformed plan – equitable remedy
  - District Court should have used ERISA 502(a)(3)

- Second, the "likely harm" analysis
  - For ERISA 102(a) & 104(b) violations, beneficiary must show actual harm and causation
  - But, does not need to show detrimental reliance to be eligible for equitable remedies

- Scalia, joined by Thomas, concurs in judgment
  - Agrees that ERSISA 502(a)(1)(B) does not authorize relief for misrepresentations in a SPD – no need for the Court to say anything else
  - Not only should the Court not have discussed 502(a)(3), it is questionable whether the noted equitable remedies are even applicable here
  - Message to District Court – ignore the majority's dicta!

- Implications of *Amara*
  - 502(a)(3) – potential expansion of available remedies, including monetary relief
    - Previously, courts had been very restrictive as to what remedies were available under 502(a)(3)
  - "Actual harm" – Does that mean individualized harm? If so, should this still be a class action? (*Dukes*?)
  - Plan administrators and SPD writers – clear, accurate communications with beneficiaries, or risk litigation
  - Defined benefit plans are even less attractive because of their complexity and the high risk of error or perceived error – litigation significantly increases cost

AT&T MOBILITY LLC V. CONCEPCION,

563 U.S. __

- In 2002, Vincent Concepcion signed a cell phone contract AT&T (at the time, Cingular)
- The contract provided for a "free" phone, but Concepcion had to pay the tax on the retail value of the phone - $30.22
- The contract included an arbitration clause:
  - YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.

- Concepcion sued in Southern District of California
  - Complaint was consolidated with a putative class action alleging, among other things, that AT&T engaged in false advertising and fraud by charging sales tax on "free" phones
  - AT&T moved to compel arbitration per the contract
  - District court denied motion – found arbitration clause unconscionable because of the class action waiver in the clause
    - Following California law under *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005)

- AT&T appealed to Ninth Circuit
- 9th Cir. affirmed
  - Under *Discover Bank,* class action waivers are unconscionable as a matter of public policy
    - And, so, if the contract was unconscionable, the parties are not bound by the arbitration clause and can proceed to Court
  - Note: Federal Arbitration Act does not preempt *Discover Bank* because the case was simply a refinement of the unconscionability analysis applicable to contracts in California

- U.S. Supreme Court
  - Holding: 9th Cir. reversed – 5 to 4 decision
    - Majority: J. Scalia, joined by C.J. Roberts, Kennedy, Thomas, & Alito
      - Thomas "reluctantly" joined but wrote separate concurrence
    - Dissent: J. Breyer, joined by Ginsburg, Sotomayor, Kagan
- California's *Discover Bank* rule is preempted by the FAA

- Supreme Court's Rationale
  - FAA was designed to promote arbitration – there is a "liberal federal policy favoring arbitration agreements"
    - As a congressional/Scalia policy, lower courts are generally supposed to enforce agreements to arbitrate, and not look for reasons to invalidate them

- FAA § 2: arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"
  - Scalia finds that *Discover Bank* is inconsistent with this because it allows a party to demand class arbitration despite the terms of the arbitration clause waiving it
  - Since *Discover Bank* is inconsistent, it is preempted by the FAA

- Class arbitration generally
  - Scalia disfavors it and offers his thoughts:
    - 1. Survey of American Arbitration Association statistics reveals that class arbitrations are slow and costly
    - 2. Individual parties can proceed informally in arbitration, whereas class actions include absent parties that need formal protections – arbitration is not suited for this
    - 3. Class arbitrations greatly increase defendants' risks and they might be pressured to settle

- Thomas' concurrence – lone voice:
  - Would also overrule *Discover Bank*
  - Would only allow arbitration clauses to be invalidated due to fraud, duress, or mutual mistake – not unconscionability
- Breyer's dissent:
  - Points out that *Discover Bank* sets the test for determining when a class action waiver is unconscionable, and thus unenforceable – not a blanket rule, and thus not inconsistent with the FAA

- Following *Concepcion*:
  - Current Supreme Court majority announces a strong policy of enforcing arbitration provisions
    - This follows the recent trends of *Stolt-Nielsen* and *Rent-A-Center* from last term
  - *BUT* not class arbitration, because it disadvantages the defense

Chamber of Commerce v. Whiting,

563 U.S. _

- The U.S. Chamber of Commerce filed a pre-enforcement suit to challenge the Legal Arizona Workers Act of 2007, as preempted by the Immigration Reform and Control Act (IRCA), as amended
  - Michael B. Whiting: Apache County Attorney
- Arizona law: imposes penalty on employers who hire undocumented workers
  - Incl. suspension or revocation of licenses necessary to do business in AZ

- District of Arizona
- State law survives
  - IRCA did not preempt because state law only imposed licensing conditions on businesses operating within the state
  - Requirement to use E-Verify: voluntary per federal law, but nothing prevents the state from mandating participation
- Ninth Circuit
- Affirmed District Court in all respects

- U.S. Supreme Court
  - Holding: Affirmed 9th Circuit
    - C.J. Roberts (except Parts II-B and III-B), joined by Scalia, Kennedy, & Alito (all of whom joined full opinion)
    - J. Thomas concurred in judgment and joined in Parts I, II-A, and III-A
    - J. Breyer dissented, joined by Ginsburg
    - J. Sotomayor dissented
    - J. Kagan took no part

- Supreme Court's Analysis
  - C.J. Roberts, joined by Scalia, Kennedy, & Alito

  - No express preemption – instead, express carve-out
    - IRCA expressly preempts state immigrations laws, except those that impose licensing requirements
    - Here, the state law specifically addresses licenses to do business within the state
  - E-Verify can be made mandatory under state law
    - The statutory text does not prohibit states from making it mandatory – it merely says that the Secretary of Homeland Security cannot require it
      - Only consequence of not using it: lose the presumption that you complied with the law

- Supreme Court's Analysis
  - J. Scalia, Kennedy, Thomas, & Alito
  - No implied preemption
    - Congress intended the federal system to be exclusive (implied preemption), BUT Congress expressly allowed states to implement sanctions through licensing
      - AZ made sure to closely track IRCA's provisions to make sure there is no conflict with federal law
  - Use of E-Verify does not thwart federal objectives of reliable employment authorization verification, combating counterfeiting of identity documents, and protecting employee privacy

- Breyer, joined by Ginsburg, dissented
  - IRCA preempts state laws that impose criminal/civil sanctions upon those who employ unauthorized aliens, which is exactly what the AZ law does
  - Does not fall within the "licensing" exception
    - AZ "licensing" definition is so broad that it covers any form of authorization to conduct business
    - I.e., articles of incorporation, partnership certificates, etc.
  - Disagrees that states can require use of E-Verify since it is a voluntary federal pilot program
  - Notes that the AZ law is likely to result in employment discrimination, like IRCA did

- Sotomayor dissented
  - IRCA's "licensing" calls for narrow construction
    - First, "licensing" is not defined within IRCA
    - Looks to context: the allowance for state licensing sanctions is meant to apply to laws dealing with situations after IRCA is found to be violated
    - Since AZ law creates separate state mechanism for determining whether someone employed an unauthorized alien, it is preempted
  - The E-Verify provisions regulate relations between a private entity and the federal government – a federal interest, and therefore preempted
    - It is Congress' program, it is their decision whether it should be mandatory

- Implications of *Whiting*
  - Tensions over whether federal law preempts state law
    - Implied preemption & express preemption
  - Consequence: state laws pushing the limit to fall within exception to IRCA preemption
    - *E.g.*, Conn., Del., Fla., Kan., La., Me., Mass., Mont., N.H., Vt.

HYDERALLY & ASSOCIATES P.C.

US Supreme Court
Year in Review 2010-2011
Labor & Employment Law Cases

Ty Hyderally, Esq.

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