REVIEW OF THE SUPREME COURT'S EMPLOYMENT CASES (2002-2003 TERM)

and

A PREVIEW OF THIS TERM (2003-2004)

by

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In Gratz v. Bollinger, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 2003 U.S. Lexis 4801, 71 U.S.L.W. 4480 (2003), the Supreme Court held that the undergraduate admissions policies set forth by the University of Michigan violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C.§ 2000d) and 42 U.S.C. §1981. The University's policy is not narrowly tailored, granting 20 "points" out of a possible 100 for applicants who represent an underrepresented class, virtually guaranteeing admission to all minimally qualified minority candidates. This assignment of points did not allow for an individualized review of candidates and was not specifically designed to further the State's interest in diversity. Chief Justice Rehnquist delivered the opinion of the Court, with whom Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices O'Connor, Breyer, and Thomas also filed concurring opinions. Justices Stevens, Souter, Ginsburg, and Breyer, in part, dissent.

Comments:

In Grutter v. Bollinger, 123 S.Ct. 2325, 156 L.Ed.2d 304, 2003 U.S. Lexis 4800, 71 U.S.L.W. 4498 (2003), the Court found that promoting diversity amongst law students at a state university is a permissible interest of the State, and as such, the State may advance this interest so long as the plan is narrowly tailored to avoid impermissible discrimination toward other ethnic groups. See, e.g., Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice O'Connor delivered the opinion of the Court, Justices Stevens, Souter, Ginsburg, and Breyer joined. Justices Scalia and Thomas joined in part. Justices Scalia, Ginsburg, and Thomas each filed a concurring opinion. Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia, Kennedy, and Thomas joined. Justice Kennedy also filed a dissenting opinion.

Comments:

In Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882, 155 L. Ed. 2d 928 (2003), the Court unanimously determined that the language of the Fair Labor Standards Act of 1938 did not preclude the defendant from removing plaintiff's FLSA claim to federal court. The FLSA reads, in relevant part, that "[a]n action to recover… may be maintained... in any Federal or State court of competent jurisdiction," 29 U.S.C. § 216(b). Justice Souter, writing for the Court, found that the term "maintain" means only the right to continue a legal action and was never intended to mean that the plaintiff could not remove. The defendant's right to remove under 28 U.S.C. § 1441(a) is not displaced by the plaintiff's right to "maintain" an action.

Comments:

The Court held in Desert Palace Inc. v. Costa, 123 S. Ct. 2148, 2003 U.S. Lexis 4422 (2003), that direct evidence is not required in mixed-motive cases. Where an employee is terminated for legal and illegal reasons, no direct evidence must be produced as to the discriminatory reasons for the termination. Circumstantial evidence is sufficient according to 42 U.S.C. §§2000e-2(m), which only requires that the "complaining party demonstrate that… sex… was a motivating factor". Congress specifically changed this language in 1991 from its original wording, in an apparent attempt to unambiguously state that direct evidence is not required.

Comments:

In Clackamas Gastroenterology Ass. PC v. Wells, 123 S. Ct. 1239, 155 L. Ed. 2d 615 (2003), the Court lays out in its 7 – 2 decision, written by Justice Stevens, nonexclusive factors to use in determining whether shareholders and directors of professional corporations are employees under the Americans with Disabilities Act for purposes of reaching the 15-employee threshold. The factors are: whether the firm can hire or fire them, extent to which firm supervises their work, whether they report to a superior in the firm, extent of their influence in the firm, written expression of parties' intent that they be employees, and whether they share in the firm's profits, losses, and liabilities. Justices Ginsburg and Breyer dissented.

Comments:

In State Farm Mutual Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 2003 U.S. Lexis 2713 (2003), Justice Kennedy, writing for a 6 – 3 majority, reaffirmed that punitive damages cannot be grossly excessive or unreasonable when compared to compensatory damages. See, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). Due process requirements pose restriction on the State's otherwise broad discretion to award punitive damages, the ratio between compensatory and punitive damages, while not explicitly set by the Court, must be within reason, generally a single-digit ratio. In State Farm, the facts did not warrant a $145 million punitive award where only $1 million in compensatory damages were awarded. Justices Scalia, Thomas, and Ginsburg wrote individual dissents.

Comments:

In Green Tree Fin. Corp v. Bazzle, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003), the Court had to decide whether class-wide arbitration is permissible where an arbitration agreement is silent on arbitration of class action disputes. Where the terms of a contract require disputes to go to an arbitrator, disputes regarding the form of arbitration must also be determined by the arbitrator, according to the Federal Arbitration Act. Here, the Circuit Court granted class certification and required the class to go to arbitration. Green Tree claimed that the question of whether or not the disagreement could be settled as a class or whether class certification was allowable under the terms of the arbitration agreement should have been a matter for the arbitrator, not the courts to decide. Justice Breyer, writing for a plurality of the Court (three fellow Justices join, Justice Stevens writes a separate concurrence), found that the arbitrator should have been the governing body to decide whether or not class certification was appropriate. Chief Justice Rehnquist filed the dissent, joined by three other Justices, in which they maintain that the state law, not the FAA, governs state contractual disputes and arbitrations arising out of such disputes.

Comments:

In Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588, 537 U.S. 79, 154 L. Ed. 2d 491, 2002 U.S. Lexis 9235 (2002), the Court held that the arbitrator, not district court should interpret the rules of arbitration for the designated arbitration forum. Procedural disputes are for the arbitrator, not district court judges to decide; however, questions of arbitrability, such as whether the arbitration clause is binding and whether the controversy is the type meant to be covered by the clause, are for the court to decide. The Supreme Court held that time limitations, such as the six year limitation in the Howsam case, are a procedural dispute to be determined by the forum arbitrating the case, not for the district court to determine whether or not the parties intended the case to be arbitrated to begin with. Other procedural disputes included, but are not limited to: "notice, laches, estoppel, and whether other conditions precedent to an obligation to arbitrate have been met." Revised Uniform Arbitration Act §6(c), comment 2, 7 U.L.A., 13.

Comments:

In a unanimous decision (Justice Thomas not participating), the Court held in PacifiCare Health Sys. Inc. v. Book, 123 S. Ct. 1531, 155 L. Ed. 2d 278, 2003 U.S. Lexis 2714 (2003), that where an arbitration agreement is silent as to whether the term "punitive damages" is meant to include "treble damages" under the Racketeer Influenced and Corrupt Organizations Act the dispute must be submitted to an arbitrator to determine whether the arbitration agreement is enforceable or whether it is unenforceable because it would preclude meaningful relief for RICO violations.

Comments:

In Jinks v. Richland County, S.C., 123 S. Ct. 1667, 155 L. Ed. 2d 631, 2003 U.S. Lexis 324 (2003), South Carolina claimed, and the State Supreme Court held, that 28 U.S.C. § 1367 is unconstitutional as applied to state political subdivisions. 28 U.S.C. §1367(d) requires state courts to toll the statute of limitations period while a supplemental claim is pending in federal court and for 30 days after the dismissal of the claim, unless state law provides for more than 30 days. The Court, in an opinion written by Justice Scalia, unanimously found §1367(d) constitutional. Justice Souter also wrote a concurring opinion. This decision explicitly did not hold that Congress has unlimited power to regulate practice and procedure in state courts, only that this section is constitutional. Justice Scalia's opinion states that Congress need not specifically mention in the text of legislation that the Act applies to local government (such as Richland County) because "municipalities are subject to suit as persons under §1983".

Comments:

In Kentucky Ass'n of Health Plans Inc. v. Miller, 123 S. Ct. 1471, 155 L. Ed. 2d 631, 2003 U.S. Lexis 2710 (2003), the Court clearly asserts that state laws regulating insurance providers are distinct and separate from laws regulating insurance policy and health care plans, both of which are regulated by federal law not state law may not preempt the federal law. Justice Scalia, writing for the unanimous Court, emphasizes that the laws must be "specifically directed toward" the insurance industry to fall within the protections of §1144(b)(2)(A), which is the statutory exception permitting states to regulate the insurer. The Court leaves behind the old test/factors under McCarran-Ferguson and enumerates two requirements for a state law to be one "which regulates insurance": must be specifically directed toward entities engaged in insurance, and the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Comments:

In Virginia v. Black, 123 S. Ct. 1536, 155 L. Ed. 2d 535, 2003 U.S. Lexis 2715 (2003), the Supreme Court upheld a Virginia law banning cross burning done with the intent to intimidate another. The Court takes great care to distinguish the case at hand from R.A.V. v. St. Paul, 505 U.S. 377 (1992), stating that the VA law does not prohibit "speech directed toward one of the specified disfavored topics", R.A.V. at 391, rather it targets all cross burning that intimidates, regardless of the purpose for the intimidation. The majority found the law to be constitutional; however, the court was split on whether or not the cross burning itself is prima facie evidence of an intent to intimidate. Chief Justice Rehnquist, along with Justices Stevens, O'Connor, and Breyer, found that the jury instruction regarding prima facie intent to intimidate was unconstitutional, therefore the law was unconstitutional as applied to Black's case, but the statute itself does not violate the First Amendment. Justices Souter, Kennedy and Ginsburg found the statute to be unconstitutional on its face.

Comments:

In Norfolk & W. Ry. Co. v. Ayers, 123 S. Ct. 1210, 155 L. Ed. 2d 261, 2003 U.S. Lexis 1956, 71 U.S.L.W. 4197 (2003), the Court holds that where a railroad employee suffers from asbestosis caused by the negligence of the employer, that employer is jointly and severally liable for all of the employee's damages, without apportionment among other tortfeasors, and the employee is entitled to receive pain and suffering related to such illness. In the case at hand, the employees were able to recover for the fear of cancer as a result of the exposure to asbestosis, the Court is careful to point out the difference between these claimants and those with stand-alone mental anguish claims unrelated to a physical injury.

Comments:

Brown v. Legal Found. of Washington, 123 S. Ct.1406, 155 L. Ed. 2d 376 (2003), stands for the proposition that, when determining whether a violation of the Fifth Amendment taking clause has been violated, one must look at the detriment to the one losing something, not at the gain to the state. In Brown, the state of Washington required that interest from certain client trust accounts be given to the state for the purpose of supporting indigent legal aid. The statute mandating this procedure specifically states that only money that would not otherwise be earning interest may be deposited into an interest baring account, with the government being the recipient of such interest. The Court held, in Stevens' 5 -4 decision, that by definition the owner of the principal was not losing money as a result of the state taking this interest; therefore, no per se violation of the Fifth Amendment taking clause was found. Scalia and Kennedy wrote dissenting opinions.

Comments:

In Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 123 S. Ct. 1389, 155 L. Ed. 2d 349, 2003 U.S. Lexis 2492 (2003), the complainants argued that their Fourteenth Amendment right to Equal Protection was violated when the City failed to approve low-income housing developments in a certain area. The Court found that the rights of those individuals were not violated because it was through a required administrative process, allowing public opinion to determine the final decision of the city engineer, which prevented the housing project from being approved. No evidence was presented to suggest that city officials made discretionary decisions with a racial bias; in fact, the City had originally approved the development, it was through the efforts of a public referendum that the development plans were terminated.

Comments:

In Black & Decker Disability Plan v. Nord, 123 S. Ct. 1965, 2003 U.S. Lexis 4061, 71 U.S.L.W. 4405 (2003), the Court unanimously determined that administrators of plans covered by the Employee Retirement Income Security Act of 1974 do not have to give deference to the claimant's treating physician. Unlike the "treating physician rule" adopted by the Commissioner of Social Security which requires deference to the opinions of the treating physician when determining entitlement to social security benefits, plan administrators are not required to give such deference under ERISA; the Act guarantees all claimants a full and fair assessment of their claim as well as a clear communication of any reasons for the denial of the same claim. See generally 29 U.S.C. §1133; 29 CFR §2560.503-1(2002).

Comments:

In Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 155 L. Ed. 2d 953, 2003 U.S. Lexis 4272 (2003), the Court found that when Congress explicitly invokes §5 of the Fourteenth Amendment, Congress may prescribe legislation that will allow private suits against non-consenting States. Hibbs carefully carves out and exception to the long recognized immunity that states have enjoyed. In City of Boerne v. Flores, the Court set out a test that, in part, necessitates that the legislation must show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," 521 U.S. 507, 520 (1997). Here, the Court found such a congruence, holding that the States were in violation of individual's rights to not be discriminated against and that Congress promulgated a law that effectively minimized the States' discriminatory practices by allowing private suits for monetary damages.

Comments:

In Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2003 U.S. Lexis 4277 (2003), the Court maintains that federal courts may exercise removal jurisdiction under the doctrine of complete preemption where the claim was brought under state law and also arises under federal statute. The Court, while recognizing that generally only the well-pleaded complaint is considered when determining if a case arises under federal, holds that a state claim may be removed to federal court under two circumstances: "when Congress expressly so provides, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption." Beneficial National Bank (paragraph before III). Anderson sought relief based upon supposed state usury violations of Beneficial National Bank. The Court found that the National Bank Act provided the exclusive cause of action for usury claims against national banks; therefore, Anderson's claim, although a state claim, was wholly displaced by the federal law, allowing for removal to federal court.

Comments:

Sprietsma v. Mercury Marine, 123 S. Ct. 518, 537 U.S. 51, 154 L. Ed. 2d 466, 2002 U.S. Lexis 9067 (2002), involves the Federal Boat Safety Act of 1971. The Act was established as a means of promoting safe boating and related recreational guidelines for manufacturers as well as individual operators of marine equipment. The lower courts found that the Federal Act pre-empted state law, which required that boats have a propeller guard and thus Sprietsma had not tort claim against Mercury Marine. Justice Stevens, writing for a unanimous court, held that state common law is not, and was not intended to be, pre-empted by the Act where the Act was silent on the issue of propeller guards. The Act was not meant to be the only, or ultimate, safety guide on marine related safety issues, but rather the Act was written with the intention that it would supplement then existing state common law and promote some interstate uniformity where practicable.

Comments:

In Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239, 155 L. Ed. 2d 349, 2003 U.S. Lexis 1957 (2003), the Court held that, unlike States, see Vermont Agency of Natural Res. v. US ex rel. Stevens, 529 U.S. 765 (2000) (holding that states are not "persons" under the False Claims Act and therefore not subject to *qui tam* actions), local governments are subject to *qui tam* actions under the federal False Claims Act. The Court defined the term "person", as used by the Act, to include political entities and corporations as well as natural persons. Section 3729 of the original Act, passed in 1863, included local governments. While the County argues that this inclusion was altered by the 1986 amendments, the Court holds that the recent amendments did not alter or redefine the meaning of "persons" and it is still read to include local governments.

Comments:

In Meyer v. Holley, 123 S. Ct. 824, 537 U.S. 280, 154 L. Ed. 2d 753, 203 U.S. Lexis 902 (2003), the Court unanimously held that, when asserting a vicarious liability claim, the corporation itself is liable for the tortuous actions of its employees, not the officers and/or owners of the corporation in their capacity as such. Here, a salesman of a real estate company refused to sell a home to the Holleys for racially discriminatory purposes. The Holleys then sought to sue Meyer, the president, sole shareholder, and licensed officer/broker of the real estate company. The District Court dismissed these claims against Meyer, finding that the Fair Housing Act did not provide for vicarious liability against officers/ owners in their personal capacity. The Ninth Circuit found that the Fair Housing Act imposed strict vicarious liability principles and that Meyers could be held liable in his personal capacity. Justice Breyer, writing for the Court, remanded the case, noting that while the Act clearly provides for vicarious liability, nothing in its written, implied, or historical documents suggest that Congress meant to impose liability beyond the traditional standards recognized by the legal community.

Comments:

The Citizens Bank v. Alafabco, Inc.,123 S. Ct. 2037, 2003 U.S. Lexis 4418 (2003), was a per curiam decision in which the Court attempts to clarify its holding in United States *v.* Lopez, 514 U. S. 549 (1995), which the Alabama Supreme Court seems to have misinterpreted in The Citizens Bank. 2002 Ala. Lexis 249 (Ala. 2002). The Court continues to hold that "Congress' Commerce clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." The Citizens Bank at 2040. The Federal Arbitration Act requires that there be some evidence that the contract was "involving commerce". 9 U.S.C. §2. This showing was made where Alafabco, Inc. engaged in business in several states other than Alabama and the loans from The Citizens Bank were secured through business assets, including inventory of goods assembled from out-of-state parts and raw materials.

Comments:

Nike, Inc. v. Kasky, 123 S. Ct. 2554, 156 L. Ed. 2d 580, 2003 U.S. Lexis 5015, 71 U.S.L.W. 4602 (2003), per curiam decision holding that "the writ of certiorari is dismissed as improvidently granted." Justice Stevens, in his concurring opinion with whom Justice Ginsburg joins and Justice Souter joins in part, holds that: 1) there was no final judgment from the California Supreme Court, see, 27 Cal. 4th 939, 45 P. 3d 243 (2002) 2) neither party has Art III standing, and 3) the Court must avoid ruling on novel constitutional questions prematurely. Justice Breyer (joined by Justice O'Connor) dissents, finding that there is standing and no federal law/case bars the Court from hearing the matter and strongly emphasizing the need to not delay a decision where such an important 14th Amendment claim exists.

Comments:

In Miller-El v. Cockrell, 123 S. Ct. 1029, 573 U.S. 322, 154 L. Ed. 2d 931, 2003 U.S. Lexis 1734 (2003), the Court examined when a state prisoner can appeal the denial or dismissal of his/her petition for writ of habeas corpus. Kennedy, writing for the Court in an 8 – 1 decision, maintains that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of the claims. Furthermore, the court held that reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African American prospective jurors was result of purposeful discrimination, and thus the petitioner was entitled to a certificate of appealability. The Court remanded to the Fifth Circuit for further proceedings.

Comments:

CASES TO BE CONSIDERED NEXT TERM (2003-2004):

Cline v. General Dynamics Land Sys., Inc., 296 F. 3d 466 (6th Cir. 2002), cert. granted, 123 S. Ct. 1786 (2003), question of statutory interpretation of the ADEA: Can an employer discriminate against one class of protected employee when giving preferential benefits to an older class of employees also protected by the ADEA. Appellate Court used the EEOC interpretation of the statute, plain language, and held that an employer cannot offer benefits to employees over 50 and not to those aged 40-49?

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Jones v. R.R. Donnelley & Sons, 305 F.3d 717 (7th Cir. 2002), 2002 U.S. App. Lexis 18842, cert. granted, 123 S. Ct. 2074 (2003).Question presented for review: does the four-year "catch-all" limitations period of 28 U.S.C. §1658 apply to new causes of action created by public law 102-166, 105 Stat. 1071, the Civil Rights Act of 1991, which were codified at 42 U.S.C. §1981(a) and (b)?

Comments:

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Tennessee v. Lane 315 F. 3d 680 (6th Cir. 2003), cert. granted, 123 S. Ct. 2622, 2003 U.S. Lexis 4818 (2003)- Question presented: Does Title II of ADA exceed Congress's authority under Section of 14th Amendment, thereby failing validly to abrogate states' 11th Amendment immunity from private damage claims?

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Frew v. Hawkins, 300 F. 3d 530 (5th Cir. 2002), cert. granted, 123 S. Ct. 1481 (2003), does a state waive its 11th Amendment sovereign immunity when it urges the federal courts to issue a decree and supervise the state official's ongoing compliance with that decree?

Comments:

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Raytheon Co. v. Hernandez (Hernandez v. Hughes Missile Systems Co.), 298 F. 3d 1030 (9th Cir. 2002), cert. granted, 123 S. Ct. 1255 (2003), can an employee who was legally terminated for misconduct obtain preferential rehire status under the Americans with Disabilities Act?

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