

Review of U.S. Supreme Court Cases from the 2008-2009 Term

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The Supreme Court's 2008-09 Term

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Employment Law Cases

Kennedy v. Plan Adm'r, 129 S. Ct. 865 (decided Jan. 26, 2009)

Facts: The designated beneficiary of a pension plan waived any right to benefits in a divorce decree, but the divorce decree was not a QDRO.

Issue: Can a divorced spouse who was the designated beneficiary under her ex-husband's pension plan waive her entitlement by a federal common law waiver embodied in a divorce decree that does not qualify as a QDRO (which are exempted from ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1), (3))?

Holding: Yes, a designated beneficiary may disclaim her interest in a pension plan. However, in present case, administrator properly disregarded the wife's waiver because the husband never removed the wife as a beneficiary in any of the plan documents, and the plan documents ultimately govern

Key Analytical Points:

- 1) A waiver does not actually designate another person or transfer an interest, so it cannot be considered an "assignment" or "alienation." The wife's waiver is therefore not a nullity under 1056(d)(1).
- 2) The plan administrator must act in accordance with plan documents, 29 U.S.C. 1104(a)(1)(D), and since documents here name the divorced spouse as beneficiary, the plan documents trump the waiver and the wife is still the beneficiary.

Crawford v. Metro Gov't of Nashville & Davidson Cnty, 129 S. Ct. 846
(decided Jan. 26, 2009)

ISSUE

The issue in *Crawford* was whether the opposition clause of Title VII of the Civil Rights Act of 1964 protects employees who speak out about discrimination when answering questions as part of an employer's internal investigation. Slip Op. at 1. The opposition clause forbids an employer from retaliating "against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a).

CONTEXT

At the Circuit Court level, it is well-established that participation in an employer's internal investigation, on its own, is not protected by the other anti-retaliation prong of Title VII: the participation clause. *See, e.g., EEOC v. Total Sys. Serv., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). However, the Courts of Appeals had not directly addressed

whether such conduct is protected under the opposition clause until this case. In holding that such conduct falls outside the scope of statutory protection, the Sixth Circuit in *Crawford* was out of sync with the other Circuits.

While the different Circuits have taken various approaches in defining the scope of protected employee “opposition,” common themes among their decisions point to a relatively consistent body of law. Protected conduct clearly extends beyond the filing of a formal complaint. *See, e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000), and *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998). The Circuits are virtually unanimous in holding that “informal protests of discriminatory employment practices” qualifies for protection under the opposition clause. *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir. 2006); *see also, e.g., Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85 (1st Cir. 2006). The Court of Appeals for the Second Circuit, in oft-cited language, listed several examples of such informal conduct: “making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.” *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2nd Cir. 1990). Other courts have followed the lead of the Second Circuit by extending protection to written letters to management, *see Abrahamson*, 260 F.3d 265, 288 (3d Cir.) (employee’s letters), and *O’Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1255 (10th Cir. 2001) (employee’s attorney’s letter), internal complaints to supervisors, *see Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85 (1st Cir. 2006), and *Pipkins v. City of Temple Terrace*, 267 F.3d 1197 (11th Cir. 2001), and the “informal expressions of one’s views, whether through established grievance procedures or alternative forms of protest.” *Dea v. Washington Suburban Sanitary Com’n*, 11 Fed. App’x 352 (4th Cir. 2001).

When confronted with borderline cases, several Circuits engage in some form of judicial balancing to determine whether an employee’s conduct is protected under the opposition clause. The Fourth Circuit’s balancing test weighs “the purpose of the Act to protect persons engaging in activities opposing . . . discrimination against Congress’ equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.” *Laughlin*, 149 F.3d at 260. According to the Third Circuit, “there is no hard and fast rule” to apply, and the tough questions are best answered by analyzing the substance—rather than the form—of the employee’s conduct. *Curay-Cramer v. Ursaline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135 (3d Cir. 2006) (“look[ing] to the message being conveyed rather than the means of conveyance”). The opposing activity at the heart of *Crawford* is one of those borderline cases, and the Supreme Court addressed it through its own form of definitional balancing.

BACKGROUND

The unlawful employment practice at issue here was the creation of a hostile work environment by Gene Hughes, who allegedly engaged in abusive, sexual conduct. Hughes was the Employee Relations Director for the Metro School District. *Id.* When a human resources officer “began looking into rumors of sexual harassment,” Crawford—a

Metro employee—responded to questions asking “whether she had witnessed ‘inappropriate behavior.’” *Id.* at 1-2. She answered by describing “several instances” of what the Court deemed “sexually obnoxious behavior.” *Id.* at 2, 4. As part of the investigation, two other employees reported sexually harassing behavior by Hughes. Metro gave Hughes an oral reprimand, but fired all three employees who complained about Hughes’s conduct. *Id.*

In deciding Crawford’s Title VII retaliation claim, the District Court for the Middle District of Tennessee found that Crawford’s statements fell outside the scope of the opposition clause’s protection. It reasoned that, “she had not ‘instigated or initiated any complaint,’ but had ‘merely answered questions by investigators in an already-pending internal investigation, initiated by someone else.’” *Id.* at 2-3 (citing Memorandum Opinion, No. 3:03-cv-00996 (M.D. Tenn., Jan. 6, 2005)). It thus granted summary judgment for Metro. The Court of Appeals for the Sixth Circuit affirmed the decision by relying on a restrictive interpretation of the opposition clause, which required opposition to be “active,” “consistent,” and “overt.” 211 Fed. Appx. 373 (6th Cir. 2006).

ARGUMENTS BEFORE THE COURT

The relevant legal battle between the parties centered on the statutory meaning of “oppose,” the legislative intent behind Title VII, and the policy implications inherent in statutory interpretation. There was also a lengthy debate regarding the participation clause, but the Court passed on this issue as unnecessary to its holding. Slip Op. at 8.

Respondents Metro relied on dictionary definitions of “oppose,” arguing that the word’s plain meaning required the communication of “resistance” or “hostile or contrary action.” Respondents’ Br. at 27. Thus, for an employee to be protected by the opposition clause, she must “take some affirmative steps to communicate opposition,” rather than “merely being in a re-active mode.” *Id.* at 30.¹ Because Crawford did not initiate her complaint, Metro saw her actions as falling short of the “active” and “overt” conduct required by the statute. *Id.* at 30.

Petitioner Crawford viewed the Sixth Circuit’s interpretation of as contrary to the text and purposes of Title VII. Petitioner’s Br. at 46. Her argument focused on the social complexity involved in workplace harassment, including the vulnerable position of victims. Countering the necessity of “active” opposition, Crawford argued that “[p]assive resistance is a time honored form of opposition.” *Id.* at 47. When sexual harassment victims attempt to prevent abuse by “trying to stay, literally, out of reach,” this form of opposition should not be unprotected “merely because it is relatively low key, quiet, or even entirely passive.” *Id.* Countering the necessity of “overt” opposition, Crawford explained that some workers “may opt for a less confrontational form of opposition precisely because he or she is afraid of retaliation.” *Id.* at 51. Thus, in order to

¹ Metro provided the following instructive examples of this type active, overt conduct: “making informal protests of discriminatory employment practices, making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support for co-workers who have filed formal charges.” *Id.* at 29-30.

avoid a “perverse interpretation” of the opposition clause that exposes prudent victims to even greater harm, protection should cover “the cautious as well as the brazen.” *Id.* at 50-51. These arguments were bolstered by Crawford’s reliance on the language of an EEOC Compliance Manual, which described any statement or action that “would reasonably [be] interpreted as opposition” to meet the requirements of the opposition clause. 2 EEOC Compl. Man. (BNA) §8-II(B)(2), at 614:0003.

Furthermore, Crawford argued that the anti-retaliatory purposes of Title VII would be undermined if the Sixth Circuit’s holding were affirmed. To do so would arguably exclude from future harassment cases the critical evidence of employee-witnesses, “whose statements may be essential to determining the merits of the initial allegations.” Petitioner’s Br. At 48. Also, employees might interpret the result of the new exceptions as “no protection at all.” *Id.* at 54. Because few employees are able to afford “the legal advice required to devise the sophisticated tactics needed to obtain protection,” Crawford claimed that employers would be able to fire those who made their complaints “at the wrong time, to the wrong person, or in the wrong terms.” *Id.* Thus, the policy behind the statute—eradicating workplace harassment—would necessarily be hampered by formal and technical restrictions.

Metro responded by claiming that an extensive interpretation of “oppose” would “warp[] the meaning of the term and render the ‘participation’ clause superfluous.” Respondents’ Br. at 25. Stretching the scope of protection against retaliation to circumstances like those in this case could frustrate the Act’s purpose by allowing employees to “ambush” employers with bogus claims. *Id.* at 32. Metro also claimed that the Court’s previous rulings in *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)—which, according to Metro, encouraged employers to be proactive in eradicating discrimination and compelled employees to use the reasonable means available to them —would be weakened by a broad reading of “oppose.” Respondents’ Br. at 27-28.

Alternatively, according to Metro, judicial policy-making was the wrong approach to resolving “any perceived ambiguity” in the Act. *Id.* at 39. Claiming that *Chevron* deference to EEOC interpretations was inappropriate in this case, Metro argued that changes to the statute (or to the rule-making authority of the EEOC) was a role reserved to legislative branch. *Id.* at 36-40.

THE COURT’S DECISION

Holding for Petitioner Crawford, the Court rejected the Court of Appeals’ restrictive interpretation of “oppose” by turning to the word’s plain meaning. The Court relied on dictionary definitions and “natural discourse” usage to find that, “‘oppose’ goes beyond ‘active, consistent’ behavior.” Slip Op. at 5. It was also influenced by the EEOC’s interpretation of the Act. Quoting from the same compliance manual cited by Crawford, the Court held, “[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s *opposition* to the activity.’” *Id.* at 4 (citing 2

EEOC Compliance Manual §§8-IIB(1), (2), p. 614:0003 (Mar. 2003)). While the Court admitted possible exceptions to this rule, It stated that “these will be eccentric cases.” *Id.*

Applied to facts of this case, this broader definition encompassed Crawford’s statements in response to Metro’s internal investigation. According to the Court, “[t]here is . . . no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion.” *Id.* at 5-6. To hold otherwise would lead to a “freakish rule,” under which an employee would be protected by the Act if she took the initiative to report unlawful discrimination, but not if she reported “the same discrimination in the same words” in response to her employer’s question. *Id.* at 6.

The Court also addressed Respondents’ argument that a broad reading of “oppose” would undermine the purposes of Title VII by removing employers’ incentive to investigate possible discrimination. The Court felt this argument underestimated the “strong inducement” that still existed for employers to avoid liability by ending discrimination in their workplace. Slip Op. at 6. Furthermore, it rejected the claim that *Faragher* and *Ellerth* established an affirmative duty to report for employees: “We have never suggested that employees have a legal obligation to report discrimination against others to their employer on their own initiative, let alone lose statutory protection by failing to speak.” *Id.* at 7. Turning Metro’s argument on its head, the Court countered that the Sixth Circuit’s holding would undermine the purposes of Title VII, because it would give “prudent employees . . . a good reason to keep quiet” about discrimination. *Id.*

The Court suggested in dicta that “opposition” could also refer to inaction or silence. Citing a case from the Court of Appeals for the Seventh Circuit,¹ the Court attempted to broaden the scope of the Act’s protection beyond the circumstances in this case. For example, the Court “would call it ‘opposition’ if an employee took a stand against an employer’s discriminatory practices not by ‘instigating’ action, but by standing pat, say by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.” Slip Op. at 5.

It was this “silent opposition” scenario that led Justice Alito to write a concurring opinion. Arguing that the Court’s holding should be limited to “employees who testify in internal investigations or engage in analogous purposive conduct,” Concurring Op. at 1, Alito feared a dramatic increase in an already high number of EEOC retaliation claims. *Id.* at 4. However, since silent opposition was not central to the holding in *Crawford*, this issue will have to be addressed in another case.

¹ *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (where employer retaliated against employee who failed to prevent a subordinate from filing an EEOC charge).

Facts: Female employees/pensioners of company had taken maternity leave before the Pregnancy Discrimination Act (PDA) (42 U.S.C. 2000e-2(h)) was passed (1978) and challenge the continued effect given to the pre-PDA seniority system, which treated pregnancy leave less favorably than “disability” leave, in determining pensions.

Issue: Has the company violated Title VII, the PDA in particular, by continuing to acknowledge differential seniority credit for pregnancy and disability leave that accrued before the PDA was passed?

Holding: No, the company has not violated Title VII and may continue to acknowledge the seniority credit effect of pre-PDA pregnancy leave, as opposed to general disability leave, in determining the amount of pension pay.

Key Analytical Points:

- 1) Congress intended pension matters to be treated differently for the purpose of Title VII; stability and predictability in these plans is important
- 2) Benefit differentials pursuant to bona fide seniority-based pension plans are permissible as long as they are not the result of an intent to discriminate [in the administration of the plan itself, not in any extraneous or indirectly related matters].
- 3) Because, per the Court’s decision in *GE v. Gilbert*, 429 U.S. 125 (1976), differential treatment of pregnancy leave was not “sex-based discrimination” before the PDA was passed, it is not discriminatory to continue to acknowledge such treatment in otherwise non-discriminatory pension administration.
- 4) Presumption against retroactivity requires Court to read PDA as only applying prospectively.
- 5) Recently passed Lily Ledbetter Act is also not violated by AT&T’s continue acknowledgment of its former system in determining pensions. [very little discussion on this point- and very questionable conclusion]

ISSUE & HOLDING

The issue before the Court was whether a plaintiff in a non-Title VII discrimination case must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction. However, the Court addressed a different question: whether the burden of persuasion ever shifts in mixed-motive cases under the ADEA. It held that it does not. Additionally, the Court held that, for a plaintiff to prove discrimination under the ADEA, it must show that age was a “but for” factor in the employer’s decision to take adverse action.

CONTEXT

This case dealt with an age discrimination claim under the ADEA. However, Petitioners and the lower courts relied on Title VII precedent in attempting to resolve the claim. The Supreme Court had also previously applied Title VII interpretations to ADEA cases. However, the precedent was not clear. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (declining to definitively decide whether the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Title VII test applies in the ADEA context).

One Title VII case central to the dispute in *Gross* was *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which addressed the burden of persuasion in Title VII mixed-motive cases. The Court held that, if the plaintiff “shows that discrimination was a ‘motivating or substantial’ factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration.” *Id.* at x (citation omitted). It further held that plaintiff’s showing must be through direct evidence.

A brief look at some ADEA cases also provides helpful context to the Court’s decision in *Gross*.

In *Hazen Paper Co. v. Biggins*, . 507 U.S. 604 (1993), employees alleged discrimination under the ADEA and ERISA, because they were terminated before their pension benefits vested. The Court focused on language in the ADEA that stated an employer’s actions must be “because of” an employee’s age. Relying on this language, the Court held that a disparate treatment claim under the ADEA is not cognizable unless “the employee’s protected trait actually played a role in [the employer’s decision] and had a determinative influence on the outcome.” *Id.* at 610. However, the Court did not address whether the statute demanded that the plaintiff present direct evidence, or whether it allowed for a shift in the burden of persuasion to the employer.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court examined whether the ADEA permitted disparate-impact claims and considered the effect of Congress’s amendments to Title VII in this context. The Court noted that the 1991 amendments expanded Title VII’s coverage, but did not do the same for the ADEA. This is relevant to the Court’s decision in *Gross*, where the Court would rely on this legislative history in reaching its decision.

BACKGROUND

After working over 30 years at FBL Financial Services, Petitioner Gross had earned the job of claims administration director. Two years later, FBL changed his job description and assigned many of his responsibilities to a younger employee. Gross considered this reassignment a demotion, and filed suit in district court. He claimed that FBL violated the ADEA, and introduced evidence that his demotion was, at least in part, due to his age.

The district court gave the jury the following instructions: (1) it should find for Gross if he proved age was a motivating factor in FBL’s decision; (2) it should find for FBL if it proved that it would have demoted Gross regardless of his age. The jury found in favor of Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury was given improper instructions. Relying on *Price Waterhouse*, 490 U.S. 228, the court of appeals determined that the district court should not have given the jury a mixed-motive instruction. Because Gross failed to present direct evidence that age was a motivating factor, the court of appeals held that the burden should not have shifted to FBL to prove that it would have made the same decision regardless of age.

THE COURT’S DECISION

The Supreme Court vacated the Eighth Circuit’s decision, and held that the burden of persuasion never shifts in ADEA mixed-motive cases. Instead, the Court articulated that it is the burden of the plaintiff to establish that age was the “but for” cause of the employer’s actions.

The Court stated that Title VII cases do not control its analysis of discrimination cases brought under the ADEA. This conclusion was based on the fact that the ADEA, unlike Title VII, does not contain an express statutory provision that allows a plaintiff to establish discrimination by proving that discrimination was a motivating factor. The court also relied upon legislative history. When Congress amended both statutes in 1991, it added the relevant provisions to Title VII, but declined to add the same to the ADEA. Slip op. at 6. Therefore, the Court refused to use Title VII cases—like *Price Waterhouse*—in its analysis of an ADEA case. *Id.*

The Court also grounded its decision in a textual analysis of the ADEA. *Id.* at 7. The ADEA states that it “shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” *Id.* (citations omitted). Applying the ordinary meaning of “because of,” the Court interpreted the ADEA to mean that age must be *the* reason that the employer acted. *Id.* at 8.

This led the Court to conclude that a plaintiff must “prove that age was the ‘but-for’ cause of the employer’s adverse decision” in order to establish a disparate treatment claim under the ADEA. *Id.* In other words, the burden of persuasion remains with the plaintiff to prove by a preponderance of the evidence (circumstantial or direct) that the employer would not have taken the adverse action “but for” the employee’s age. *Id.* at 9. The burden of persuasion never shifts to the employer. Under this analysis, age must have been the determining factor in the employer’s actions in order for a plaintiff to prove a violation under the ADEA. *Id.* at 8.

ISSUE & HOLDING

In *Ricci*, the Court attempted to resolve the “competing expectations” faced by employers under Title VII’s provisions prohibiting disparate treatment and disparate impact. *Ricci v. DeStefano*, No. 07-1428, Slip op. at 34 (U.S. June 29, 2009). The disparate-treatment provision prohibits employers from “fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). The disparate-impact provision prohibits employers from engaging in “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” § 2000e-2(k)(1)(A)(i).

Recognizing that “these two prohibitions could be in conflict absent a rule to reconcile them,” the Court sought “to provide guidance to employers and courts” concerning how to avoid or impose liability. Slip op. at 20. Specifically, it addressed whether an employer may be excused from disparate-treatment discrimination if its purpose is to avoid liability for disparate-impact discrimination. The Court’s guidance came in the form of a new rule—the strong-basis-in-evidence standard—imported from constitutional jurisprudence. It held “that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.” *Id.* at 26.

FACTUAL & PROCEDURAL BACKGROUND

In 2003, the City of New Haven, Connecticut (the City) contracted with Industrial/Organizational Solutions, Inc. (IOS) to develop tests for promotions within its Fire Department. The Department was seeking to fill both captain and lieutenant positions. The tests were developed with the aim of finding the most qualified applicants. They were also developed in light of the City’s obligations under federal and state law, the New Haven city charter, and a collective bargaining agreement.

The results of the tests showed a significant racial disparity. The pass rate of black applicants was approximately half of the rate for white applicants. Due to the hiring procedures required under the city charter, this also meant that no black applicants would be able to fill immediate vacancies at the captain or lieutenant position. However, before any promotions could be ordered, an independent Civil Service Board (CSB) needed to certify the results of the exam.

Given the racial disparity in the scores, the CSB held a number of public hearings aimed at determining whether the tests were racially biased. Some of the more influential speakers at the hearings included the City’s counsel, the director of the City’s Department

of Human Resources, an IOS employee who led the team responsible for developing the City's tests, a representative from an IOS competitor, and a number of firefighters. Notably, the City's counsel testified that, if the CSB decided to certify the test results, the City could be liable under Title VII's disparate-impact prohibition. After the hearings, the CSB split evenly on whether to certify, and thus the results were not certified.

Petitioners, a group of firefighters who scored highly on the tests, sued after the CSB decided not to certify the examination results. They alleged that respondents violated, and conspired to violate, the Equal Protection Clause. *Id.* at 14-15. They also filed discrimination charges with the EEOC, which issued them right-to-sue letters. *Id.* at 15. Before trial, petitioners amended their complaint to include an allegation that the City violated Title VII's disparate-treatment prohibition. *Id.* Respondents' defense was that "they had a good faith belief that they would have violated the disparate-impact prohibition in Title VII, had they certified the examination results." *Id.* (citation omitted).

In district court, the parties filed cross-motions for summary judgment and the court granted respondents' motion. *Id.* On the constitutional question, it held that respondents had not violated the Equal Protection Clause, because their actions were not "based on race." *Id.* at 16 (citing *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 161 (D. Conn. 2006)). On the statutory question, it held that employers need not "certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method." *Id.* (citing 554 F. Supp. 2d at 156). In a one-paragraph opinion adopting the reasoning of the district court, the court of appeals affirmed.¹ Slip Op. at 16. The Supreme Court granted certiorari, focusing its analysis solely on Title VII and avoiding the constitutional issue. It reversed the court of appeals' judgment, and remanded the case with instructions that "summary judgment [was] appropriate for petitioners on their disparate-treatment claim." *Id.* at 33-34.

ARGUMENTS BEFORE THE COURT

The Court, in providing guidance to employers and lower courts, deemed it necessary to return to "the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity." *Id.* at 20. It started from the premise that respondents' actions in discarding the test results were a violation of the disparate-treatment prohibition "absent some valid defense." *Id.* at 19. In other words, it assumed discriminatory conduct and only addressed the issue of what constitutes "a lawful justification for . . . race-based action." *Id.* at 20.

Petitioners argued that, "under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination." *Id.* at 22. They alternatively suggested that the only way an employer could rely upon good-faith compliance as a defense against disparate treatment was if the employer were "in fact . . . in violation of the disparate-impact

¹ The court of appeals first decided the case in an unpublished summary order, which it later replaced with a "nearly identical" *per curiam* opinion. The court also "voted 7 to 6 to deny rehearing en banc, over written dissents" by two judges. Slip op. at 16.

provision.” *Id.* at 21. The Court found petitioners’ arguments “overly simplistic and too restrictive of Title VII’s purpose.” *Id.* First, petitioners “ignore[d] the fact that . . . Congress has expressly prohibited both types of discrimination.” *Id.* at 22. Second, it is well established “that ‘voluntary compliance’ [is] ‘the preferred means of achieving the objectives of Title VII.’” *Id.* at 21 (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986)).

Respondents argued from the other extreme. They “assert[ed] that an employer’s good-faith belief that its actions are necessary to comply with Title VII’s disparate-impact provision should be enough to justify race-conscious conduct.” Slip op. at 21. The Court found this argument to contradict the purpose of Title VII. It saw such an approach as “encourag[ing] race-based action at the slightest hint of disparate impact,” and “amount[ing] to a *de facto* quota system in which a ‘focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.’” *Id.* at 22 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988)). This result would be contrary to Title VII, which “is express in disclaiming any interpretation of its requirements as calling for outright balancing.” *Id.* at 22. The Court also found this argument to contradict the language of the statute. “[W]hen Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k).” *Id.*

THE COURT’S ANALYSIS

The Strong Basis In Evidence Standard

Since “few, if any, precedents in the courts of appeals” have addressed Title VII’s competing prohibitions, *id.* at 16, the Court turned to its constitutional decisions—in “cases similar to this one”—for guidance with its statutory analysis. *Id.* at 22-23. In the context of the Equal Protection Clause, the Court had previously employed the “strong basis in evidence” standard to determine when racially-motivated governmental actions were justified to remedy past racial discrimination. *Id.* at 22 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1986))). By importing this standard into the Title VII context, the Court could reconcile a similar conflict.

In order to understand how the strong basis in evidence standard functions in this context, one need only turn to the statutory requirements relating to a disparate-impact prohibition. After a plaintiff has established a *prima facie* disparate-impact violation, “[a]n employer may defend against liability by demonstrating that the practice is ‘job related for the position in question and consistent with business necessity.’” 42 U.S.C. § 2000e-2(k)(1)(A)(i). Slip op. at 19. However, even if an employer meets that burden, it may still be liable if a plaintiff can show “that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer’s legitimate needs.” § 2000e-2(k)(1)(A)(ii), (C). The standard would require employers to have a strong basis in evidence that they would be subject to disparate-impact liability

before engaging in racially discriminatory action. This means that an employer would have to show that there was a strong basis in evidence to support its conclusion that the practice at issue was not job related, or that it refused to adopt less discriminatory practices that were available to it.

The Court concluded that the strong basis in evidence standard was appropriate in this context for several reasons. It was deemed to be consistent with the purposes of Title VII, by “leav[ing] ample room for employers’ voluntary compliance efforts.” Slip op. at 23. Although it only allows for “certain, narrow circumstances,” under which violations of one prohibition in the name of compliance are justified, *id.*, “it is not so restrictive that it allows employers to act only when there is a provable, actual violation.” *Id.* at 24. Also, by importing this standard into the statutory analysis, the Court guaranteed that the disparate-impact provision would be interpreted “in a manner that is consistent with other provisions of Title VII.” *Id.* This includes § 2000e-2(l), which prohibits “adjusting employment-related test scores on the basis of race,” and § 2000e-2(h), which expressly protects employers’ “bona fide promotional examinations.” Slip op. at 24 (citing *AT&T Corp. v. Hulteen*, 556 U.S. ___, ___, No. ___-___, Slip op. at 8 (2009)).

The Standard Applied

The Court’s application of the standard to the record helps to define the contours of this doctrine in the statutory context. The Court addressed whether a strong basis in evidence existed to find the promotional test inadequate. This required a two-part inquiry: (1) Was the test job-related? (2) Did a less discriminatory alternative exist?

The only reason such an inquiry was even necessary in this case was that the adverse racial impact of the test was significant enough to establish “a prima facie case of disparate-impact liability.” Slip op. at 27. This liability “compelled [respondents] to take a hard look” at the test and the available alternatives. *Id.* However, the Court concluded that the record showed “no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate” *Id.* at 26.

This conclusion was justified because it found “no evidence—let alone the required strong basis in evidence—that the tests were flawed,” either because they were not job related or because equally valid, less discriminatory alternatives were available. *Id.* at 33. Referring to the “painstaking analyses” taken by IOS during its development of the test—which included “ma[king] sure that minorities were overrepresented” at the assessment stage—the Court found “no genuine dispute that the examinations were job-related and consistent with business necessity.” *Id.* at 28-29. Even though respondents proffered several alternatives to the test the CSB rejected, the Court found that none were “an equally-valid, less-discriminatory testing alternative that the City . . . would necessarily have refused to adopt.”¹ *Id.* at 30.

¹ First, the Court found nothing in the record that supported the idea that a different proportional weighting of the written and oral sections (from 60%-40% to 30%-70%) of the test would have been equally valid. *Id.* at 30. Second, the Court refused to resolve whether the use of “banding” test scores under the City’s mandated “rule of three” was a

The remaining evidence relied upon by respondents fell short of that required under the standard. Respondents' problem, "essentially," was that a "showing of significant statistical disparity, and nothing more . . . is far from a strong basis in evidence" that the City would have been liable for disparate-impact discrimination. *Id.* at 28. Furthermore, the Court noted that "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." *Id.* at 33. Therefore, it concluded that respondents' rejection of the results was "impermissible under Title VII." *Id.*

OTHER NOTABLE IMPLICATIONS FROM THE DECISION

The Constitutional Issue

The Court concluded that it "need not reach the question whether respondents' actions may have violated the Equal Protection Clause." *Id.* at 3. This left big questions about the future of the Title VII's disparate-impact prohibition. For instance, though the Court avoided deciding "whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution," it implied that the standard articulated in this case may not "satisfy the Equal Protection Clause in a future case." *Id.* at 25. This was also the primary concern of Justice Scalia's concurring opinion. According to Justice Scalia, the majority's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question" concerning the constitutionality of the disparate-impact provision. Slip op. at 1 (Scalia, J., concurring).

How to Address Disparate Impact Fears *Before* Tests are Administered

This holding was limited to circumstances where employers already find themselves faced with potential liability under Title VII's anti-discrimination provisions. However, the Court also provided guidance for employers seeking to avoid such situations. It expressly stated that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." Slip op. at 25 (maj. op.).

The Standard Cuts Both Ways

The facts of this case required the Court to address how the strong-basis-in-evidence standard can guide employers seeking to avoid disparate-impact liability by engaging in

legitimate alternative, because that practice "would have violated Title VII's prohibition of adjusting test results on the basis of race." § 2000e-2(1); *see id.* at 31. Third, the Court rejected the suggestion that an "assessment center process" was either equally valid or less discriminatory, mostly because this option was only "brief[ly] mentioned" during the debate over whether to certify the test results, and a "few stray" remarks alone "cannot create a genuine issue of fact" under the strong-basis-in-evidence standard. *Id.* at 32.

practices that would otherwise violate Title VII's disparate-treatment prohibition. However, the Court implied that the standard can be employed in the opposite direction as well. This came when it was addressing the issue of whether the City would still be subject to litigation in the wake of this opinion, after it certified the test results. The Court stated, "in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Id.* at 34.

The Role of Pretext: Justice Alito's "Subjective Question"

According to Justice Alito's concurring opinion, the majority's analysis was confined to the "objective question" of "whether the reason given by the employer is one that is legitimate under Title VII." Slip op. at 1-2 (Alito, J., concurring). The Court answered this question by applying the strong-basis-in-evidence standard in determining the legitimacy of the employer's actions and reasons. Justice Ginsburg's dissenting opinion argued that the proper objective standard should be "good cause." Slip op. at 19 (Ginsburg, J., concurring). However, Justice Alito pointed out that there is a second, necessary step under Title VII: a "subjective question" regarding whether "the employer's intent . . . was just a pretext for discrimination." Slip op. at 1-2 (Alito, J., concurring). In this case, Justice Alito found that respondents would have failed the subjective part of the inquiry, even if they passed the first. He stated that "a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency." *Id.* at 10. In short, pretext is still a component of Title VII analysis in conflicting-prohibition cases. Therefore, the employer defense of good-faith compliance may require more than what the majority explained in its decision.

Labor Law Cases

Locke v. Karass, 129 S. Ct. 798 (decided Jan. 29, 2009)

Facts: State government nonunion employees are charged a “service fee” by the union that represents them. This service fee includes an affiliation fee charged by the national union to the local, and part of the affiliation fee goes to litigation on behalf of the national union as well as other locals.

Issue: Is including the litigation costs for the national union as well as for other locals in the service fee charged to the nonunion employees a violation of the nonunion employees’ First Amendment rights?

Holding: No, there is no violation of the First Amendment so long as 1) the subject matter of the litigation is of a kind that could properly be charged to the nonunion members (e.g., related to collective bargaining or grievances, rather than a suit involving the political interests of the union) if the litigation were on behalf of their local and 2) the charges and expenditures are reciprocal so that these charges *may* ultimately inure to the benefit of the local union representing the nonunion members.

Key Analytical Points:

- 1) Mandatory fees for collective bargaining, administration costs, and the like are constitutional, while mandatory fees for political, public relations, and lobbying purposes are not constitutional.
- 2) *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991): A direct relationship between the expense and some tangible benefit to the local union is not needed.
- 3) One day local union here might be beneficiary of the national union’s resources, so the reciprocity requirement is met.

Ysursa v. Pocatello Educ. Ass’n, 129 S. Ct. 1093 (decided Feb. 24, 2009)

Facts: Because of a provision in Idaho’s Right to Work Act, public employees are not allowed to deduct from their paycheck amounts to support union political activities.

Issue: Does this law, at least as applied to employees of municipalities and other subdivisions of the state, violate the First Amendment?

Holding: No, this is not an infringement of free speech, but merely the government refusing to subsidize it.

Key Analytical Points:

- 1) The state has a legitimate interest in preventing the appearance of bias or partisanship.

- 2) It costs the state to provide the service demanded here.
- 3) As for argument that it does not cost the state when subdivisions of it perform this service, that ignores the fact that these subdivisions are still part of the state without any sovereignty of their own.

14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (decided April 1, 2009)

FACTS

The employees are members of the SEIU working under a collective bargaining agreement (CBA) as night watchmen. The CBA requires all union members to submit all claims of discrimination to binding arbitration under the grievance procedure. With the union's consent, the employer hired another unionized company to provide security to the building where the employees worked as watchmen and moved the employees to other jobs as porters and cleaners. The employees asked the union to file a grievance against the employer alleging, among other things, that the employer violated the workplace ban on discrimination by reassigning them to lesser jobs on account of their age contrary to the Age Discrimination in Employment Act (ADEA). The union requested arbitration under the CBA but later withdrew its age discrimination claim on the grounds that its consent to the new security contract precluded it from objecting to the employees reassignments as discriminatory. The employees filed a complaint with the Equal Employment Opportunity Commission alleging that the employer had violated their rights under the ADEA, and the EEOC issued each employee a right to sue notice. In the ensuing lawsuit, the District Court denied the employer petitioner's motion to compel arbitration and the Second Circuit affirmed, holding that *Alexander v. Gardner Denver*, 415 U.S. 36 (1974), forbids enforcement of collective bargaining provisions requiring arbitration of ADEA claims and individual statutory claims.

ISSUE

Whether a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the ADEA is enforceable.

HOLDING

A provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.

ARGUMENTS

In the majority opinion issued by Justice Thomas, the court stated that the Union and the employer collectively bargained in good faith and agreed that discrimination claims, including ADEA claims, could be resolved in arbitration. Under the NLRA, a Union has the authority to bargain with the employer over terms and conditions of employment on behalf of its members and courts generally may not interfere with this bargained for

exchange. Thus, the arbitration of discrimination provision must be honored unless the ADEA itself removes this class of grievance from the NLRA's broad sweep (which it does not).

The court found that the employees incorrectly interpreted *Gardner-Denver*. The court found that the *Gardner* holding is narrow, and only speaks to the issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Gardner* did not touch on the subject at issue: whether agreements to arbitrate statutory claims are enforceable and *Gardner* in inapplicable to a case such as this, where there is a CBA that expressly covers both contractual and statutory claims.

The individual's right to be free of employment discrimination is a non-waivable substantive right. However, in the majority's view, the choice of forum is not one of the substantive rights that cannot be waived and the agreement to arbitrate rather than go to court did not constitute a waiver of any substantive right created by the ADEA.

The *Gardner* line of cases treated the use of arbitration to vindicate anti-discrimination rights with hostility and skepticism. That view was misconceived and has since been abandoned by the Court. Now the Court believes that arbitration is well suited to the resolution of both contractual and employment rights. *See Shearson/American Express v. McMahon*, 482 U.S.220, 232 (1987).

Any speculative concerns regarding union subordination of an individual employee's interest to the collective bargaining process cannot be relied on to introduce a qualification into the ADEA that is not found in its text. It is the legislation's job to amend the statute if they believe arbitration is not the proper forum for discrimination suits. Furthermore, injured employees may bring a discrimination claim or duty of fair representation suit against a union and file age discrimination claims with the EEOC and NLRA to vindicate their rights if the union fails to bring the claim to arbitration.

POSSIBLE IMPLICATIONS

Despite the holding, there still remains an unanswered question of what happens when a union declines to arbitrate a discrimination claim and in doing so blocks the employee from pursuing arbitration on his own. This remains unresolved because *Pyett* was an odd case where the union declined to arbitrate but allowed the employees to proceed to arbitration without union support. The argument was not raised in the courts below, so the Court did not address the issue.

The Court states that the employee could vindicate her rights through a duty of fair representation suit against the union, but is that an effective remedy? The standard for a duty of fair representation suit is extremely deferential to the union. And more importantly, this scenario would create the litigation that arbitration seeks to avoid; the employee would presumably be forced to bring suits against both his union and his employer. Furthermore, the union would be placed in the tough position of having to defend its reasoning for not going to arbitration. If there is an arbitration of

discrimination clause in the CBA, the union will be squeezed between compulsory arbitration or the prospect of defending itself against the employee, with both options tapping the union's limited resources. In the end, unions will be encouraged to keep arbitration of discrimination clauses out of the CBA.

For the employee who has been discriminated against, the idea of placing his discrimination claim in the hands of his union may be unattractive. A union can settle without the grievant's permission in accordance with the interests of the majority of the bargaining unit, require representation at arbitration by an agent who does not deal with discrimination claims, or refuse to bring the suit. A union's interest may not be aligned with the employee's interest and the union may be more concerned with economic issues rather than individual wrongs.

Lastly, discrimination claims require intense discovery, expert witnesses, time and money. Unions do not have the resources to devote to a discrimination claim and an arbitrator, who deals primarily with construing contracts, may not have the expertise required to construe anti-discrimination statutes or oversee complex anti-discrimination litigation.

CASES CITING *PYETT*

Thompson v. North American Stainless, LP., Appeal No. 07-5040 (Sixth Circuit, decided June 5, 2009)

Mathews v. Denver newspaper Agency, LLP., 2009 WL 1231776 (D. Colo., decided May 4, 2009)