Supreme Court Review, 2010

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I. Labor and Employment Law Cases

A. Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).

1. An important arbitration case, *Rent-A-Center* held 5-4 required an unconscionability challenge to an arbitration agreement to go to the arbitrator, rather than to the court in the first instance.

2. The broad arbitration agreement provided for arbitration of all "past, present or future" disputes arising out of Jackson's employment with Rent-A-Center, including "claims for discrimination" and "claims for violation of any federal … law."

3. The employee challenged it as unconscionable based on Nevada law, for including limits on discovery, cost sharing provisions, and covering only the types of claims an employee might bring and not those an employer might bring.

4. Majority focused on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a case barely discussed in the pleadings and about which the dissent expressed extreme skepticism.

B. Granite Rock, Inc. v. International Brotherhood of Teamsters., 130 S.Ct. 2847 (2010).

1. A second arbitration decision, this time involving whether or not a court should decide when a collective bargaining agreement had been ratified in the context of claims brought to enforce that agreement.

2. Court holds 7-2 that courts get first look at the dispute, ignoring contractual resolution of the date of ratification issue by parties in a later agreement.

3. Complex facts lead Court to tie itself into some knots to reach the result, but no mention of *Rent-A-Center*'s gymnastics to reach the opposite result, despite case being decided just 3 days previously.

4. Court rejects 9-0 tort claims under LMRA. No surprise here.

5. Employer wins battle, but perhaps not the war, since decision undermines arbitration and the rationale is more likely to turn up in employee efforts to avoid arbitration.

C. Lewis v. City of Chicago, 130 S.Ct. 2191 (2010).

1. Applicants for firefighter positions given a test; divided according to results into "well qualified", "qualified", and other group. City draws on well-qualified group (by random selection) for openings for years.

2. African-American applicants challenge division into "well qualified" and "qualified" groups as having disparate impact but bring challenge only after selection, not at time of grading/sorting. City raises statute of limitations defense.

3. Court holds 9-0 that choosing applicants from among the "well qualified" group is a "use" of an employment practice under Title VII and so the relevant date from which to calculate limitations.

4. Court repeatedly emphasizes it is merely enforcing what Congress said: "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."

D. Union Pacific Railroad v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, 130 S.Ct. 584 (2010).

1. Case might have been a major due process opinion (the 7th Circuit had decided on constitutional grounds), but Court decides 9-0 based on Railway Labor Act grounds instead.

2. National Railroad Adjustment Board panels cannot create a "jurisdictional" requirement outside the confines of the statute by insisting on written proof that a required "conference" was held prior to submission of a case.

3. Further evidence of the Court's focus on carefully reading statutory language.

E. Conkright v. Frommert, 130 S.Ct. 1640 (2010).

1. A complex ERISA case involving the increasingly common case of employees who come and go from a company and how to calculate their retirement benefits.

2. Court holds 5-3 that ERISA plan administrators must be given deference on interpreting plans even where a court has rejected their initial interpretation, where there is no bad faith.

3. Majority and dissent dispute the meaning of an 1888 Supreme Court case on trusts, the accuracy of trust law treatises' citation of cases, and ERISA principles. Justice Breyer, dissenting, attempts some math. The time value of money plays an important role.

4. Majority opts to reinforce the broader trend of deference to outside authority present in many of the Roberts Court decisions.

II. The "Sort of" Labor and Employment Law Cases

A. City of Ontario v. Quon, 130 S.Ct. 2619 (2010).

1. SWAT squad officer uses city-provided pager to send salacious emails to wife, mistress, others while on duty. When caught, sues city for violating 4th Amendment. 9th Circuit upholds verdict for officer.

2. Narrow holding with 2 concurring opinions (Stevens and Scalia), finding no violation under plurality holding from *O'Connor v. Ortega*, 480 U.S. 709 (1987). 4th Amendment law remains confusing after this opinion.

3. Lots of attention paid to case because central to Quon's claim was that a lieutenant had orally modified the written city policy on electronic communications; employer groups filed many amici briefs arguing that allowing this would be disastrous.

4. Court rejects definitively Ninth Circuit's attempt to require "least restrictive" method to conduct workplace searches.

B. Mohawk Industries Inc. v. Carpenter, 130 S.Ct. 599 (2010).

1. Court addresses issue of whether or not district court rulings on attorney client privilege claims are appealable before the final judgment. They are not in 9-0 decision with Thomas concurrence.

2. Discharged employee sought discovery of materials relating to his interview by employer attorney. District court found employer had waived privilege by putting facts of discharge at issue in a separate litigation.

3. Court offers attorneys an unappetizing menu of methods to get review of such orders in future, including risking contempt citations.

C. New Process Steel v. National Labor Relations Board, 130 S.Ct. 2635 (2010).

1. Administrative law issue involving whether an NLRB reduced to three members by unfilled vacancies can delegate its authority to a 3 member panel, knowing that one of the 3 will be leaving the board in a matter of days, thus vesting a group of 2 with the authority of the full NLRB despite the absence of a 3 member quorum.

2. Court holds 5-4 that it cannot.

3. The majority, in an opinion by Justice Stevens, focuses on need to read statute as a coherent whole: "In sum, a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board's full authority, coupled with the Board's longstanding practice, points us toward an interpretation of the delegation clause that requires a delegee group to maintain a membership of three."

III. Things to Think About

A. The "most conservative court"?

1. Is the Roberts Court "conservative" or are there better explanations? Voting patterns suggest this is not an "extreme" Court, the most prominent "conservative" decisions tend to be statutory interpretation questions Congress can reverse, and there are better explanations that fit the pattern of the Court's decisions more closely.

2. Court has a strong tendency to defer to other institutions, such as arbitrators.

B. The impact of the Court's Second Amendment jurisprudence.

1. Lots more cases coming after *District of Columbia v. Heller* and *McDonald v. Chicago*.

2. Concealed carry statutes (40 of 50 states have either "shall issue" or no restriction statutes) are starting to include provisions allowing employees to bring guns on their commutes. See Ramsey Winch, Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).

3. Need to think through policies for multistate employers in advance.

C. *Citizens United v. Federal Election Commission*

1. Spending by unions is as large or larger than spending by corporations under *Citizens United* (e.g. AFSCME claim to have spend $87.5 million in 2010 elections).

2. This will likely attract attention from the “defund the institutional left” efforts and lead to litigation over union political spending, dues, etc.

D. Higher taxes

1. Deficits are deferred taxes. We have deferred a lot of taxes.

2. Higher taxes lead to creative means of avoiding the higher taxes. Benefits issues will increase.

E. The public sector pension bomb

1. Pension overhangs for state and local governments are enormous.

2. Changes to public sector pensions provoke unrest among people in plans.

3. Failure to change public sector pensions is likely to provoke unrest among people not in the plans but who pay taxes.

4. Two tier benefits schemes for public sector employees?

F. What if the Fed’s efforts bring back inflation?

1. Inflation does funny things to contracts written before people knew there was going to be inflation.

2. Inflation produces real wage cuts unless nominal wages increase at least by the rate of inflation; during inflation governments attempt to restrain wage increases.

3. Resources:

a. Keith Rosenn, Law and Inflation (1982).
b. Jim Chen, *The Price of Macroeconomic Imprecision: How should the law measure inflation?* 54 Hastings L J 1375 (2003).