Supreme Court Review:
Employment-Related Cases in the 2016-2017 Term
and an Overview of Issues that May be Candidates for Review

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This paper provides summaries of the employment-related cases that will be discussed at the Supreme Court Review panel on March 31, 2017.

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Recap of Employment-Related Cases Decided in the 2015-2016 Term

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A. Reverse Discrimination/Affirmative Action

_Fisher v. Univ. of Tex. at Austin_, 136 S. Ct. 2198 (2016). The plaintiff sued the University of Texas at Austin and University officials after the University denied her undergraduate admission. The plaintiff alleged that the University’s practice of considering race in the admission process violated the Equal Protection Clause. Although the University does not assign race a specific value in the application, “it is undisputed that race is a meaningful factor.” On cross-motions for summary judgment, the district court granted summary judgment for the University. The Fifth Circuit affirmed, finding that _Grutter v. Bollinger_, 539 U.S. 306 (2003), “required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity’s benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal.” The Supreme Court granted _certiorari_.

_Held:_ The Court reversed, holding that further judicial determinations were required because even if the University demonstrated that its goal was “consistent with strict scrutiny,” it still needed to prove that the means were narrowly tailored, and in that analysis a court may not give deference to the school. On remand, the lower courts again upheld the admission program as constitutional. _Held:_ The Court affirmed. The Court held that the University’s admission policy was narrowly tailored for four reasons. First, the University demonstrated a compelling interest that justified consideration of student race—an interest in obtaining “the educational benefits that flow from student body diversity.” The Court clarified that asserting an interest in the educational benefits of diversity writ large is insufficient, but held that the University had articulated “concrete and precise goals,” including ending stereotypes, promoting “cross-racial understanding,” preparing students for “an increasingly diverse workforce and society,” and cultivating leaders with “legitimacy in the eyes of the citizenry.” Second, significant statistical
and anecdotal evidence supported the University’s conclusion that race-neutral admission policies had not achieved the University’s diversity goals. Third, the University’s consideration of race had a meaningful effect on diversity, even if that effect was small. And fourth, none of the petitioner’s proposed race-neutral alternatives was workable as of the time of her application.

B. Protected Activity for Purposes of Retaliation Claims

*Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016). The plaintiff, a police officer, filed a claim pursuant to 42 U.S.C. § 1983 against the City and various officials, alleging that he was demoted in retaliation for exercising his First Amendment rights. The plaintiff was demoted the day after other police officers saw him obtain a local mayoral candidate’s campaign sign. The plaintiff had no actual involvement in the candidate’s campaign, and only picked up the sign for his mother, who could not get the sign herself. The district court awarded summary judgment to defendants, concluding that plaintiff had not been deprived of any constitutionally protected right because he did not actually engage in First Amendment conduct. The Third Circuit affirmed, concluding that the plaintiff would have an actionable claim only if his demotion was prompted by his actual, rather than perceived, exercise of free speech.

*Held:* The Supreme Court reversed the grant of summary judgment in favor of the City. The Court held that where an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge this action under § 1983—even if the employer operated under a factual mistake about the employee’s behavior. The Court concluded that the City’s factual mistake made no legal difference. For the purposes of its decision, the Court assumed that the City demoted the plaintiff with a constitutionally improper motive. Prior precedent and the language of § 1983 do not address whether the protected “right” at issue primarily focuses on an employee’s actual activity or on the supervisor’s motive. The Court concluded that the government’s motive for demoting the plaintiff is what matters. The Court went on to say that the constitutional harm remains the same whether the employer relied on a factual mistake or not—discouragement of employees from engaging in protected speech or association. The Court remanded the matter for the lower courts to determine whether the City’s policy that led to the demotion violated the Constitution.

C. Fair Labor Standards Act Overtime Exemptions
Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016). Plaintiffs, employees of an automobile dealership, filed suit against Encino Motorcars, an automobile dealer, claiming Fair Labor Standards Act (“FLSA”) violations for failure to compensate its service advisor employees for working more than 40 hours per week. In 1966, Congress created a FLSA overtime exemption for “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership. 29 U.S.C.S. § 213(b)(10)(A). The Department of Labor (“DOL”) promulgated regulations that defined “salesmen” to exclude service advisors who sell repair and maintenance services, but not vehicles. In 1978, the DOL issued an opinion letter departing from its original definition of “salesmen” to include service advisors in the overtime exemption. In 1987, the DOL amended its Field Operations Handbook to reflect the new definition. However, in 2011, the DOL, without explanation, issued a final rule abandoning its previous interpretation and returning to treating service advisors as non-exempt under §213 (b)(10)(A). In this case, defendant moved to dismiss, arguing that the FLSA overtime provisions did not apply to plaintiffs because service advisors were exempt. The district court granted the motion; the Ninth Circuit reversed, deferring to the DOL’s 2011 regulation which excluded service advisors from the exemption, pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Held: The Supreme Court held that the § 231(b)(10)(A) overtime exemption must be construed without giving Chevron deference or controlling weight to the DOL’s 2011 regulation. The Court reasoned that Chevron deference is not warranted where a regulation is “procedurally defective.” The Court found that in issuing the 2011 regulation, the DOL failed to comply with the basic procedural requirement to give “adequate reasons” for its decisions. That rendered the 2011 regulation arbitrary and capricious. Consequently, the Court remanded the case to the Ninth Circuit to consider whether the service advisors were covered by the relevant exemption without deference to the DOL’s 2011 regulations on the subject. Update: The Ninth Circuit, on remand, held that service advisers do not fall within the exemption for “any salesman, partsman or mechanic primarily engaged in…servicing automobiles.” The Ninth Circuit’s ruling created a circuit split with the Fourth and Fifth Circuits; as a result, the issue could again reach the Supreme Court. No petition for writ of certiorari has yet been filed.

D. Accrual of Cause of Action
**Green v. Brennan**, 136 S. Ct. 1769 (2016). The petitioner, a black Postal Service worker, sued the Service for racially discriminatory constructive discharge. After the petitioner complained that he was denied a promotion because of his race, two supervisors accused him of intentionally delaying the mail—a criminal offense. On December 16, 2009, the petitioner and the Service signed an agreement: the Service promised not to pursue criminal charges in exchange for the petitioner’s promise to leave his current post. The petitioner then chose to retire rather than accept reassignment and submitted his resignation on February 9, 2010, effective March 31, 2010. On March 22, 2010, forty-one days after submitting his resignation but 96 days after he signed the settlement agreement, the petitioner contacted the EEOC to report an unlawful constructive discharge. The petitioner later filed suit. Under 29 C.F.R. § 1614.105(a)(1), before a federal employee may sue his employer under Title VII, he must contact the EEOC “within 45 days of the date of the matter alleged to be discriminatory.” The district court granted summary judgment to the Service on the ground that the petitioner failed to timely contact the EEOC. The Tenth Circuit affirmed holding that the “matter alleged to be discriminatory” encompassed only the Service’s discriminatory actions, not the petitioner’s decision to resign, and that the 45-day period began running when the parties signed the settlement agreement. The Tenth Circuit joined the D.C. and Seventh Circuits in holding that the limitations period for a constructive-discharge claim begins to run after the employer’s last discriminatory act. In contrast, the Second, Ninth, Eighth, and Fourth Circuits had held that the limitations period does not begin to run until the employee resigns.

**Held:** In a 7-1 decision, the Supreme Court vacated and remanded. The Court held that a constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the date of the last discriminatory act that causes the resignation. The Court based this holding on the “standard rule” for limitations periods: a limitations period typically commences when the plaintiff has a complete and present cause of action (i.e., when the plaintiff can file suit and obtain relief). The Court held that: (1) in the context of a constructive-discharge claim, a resignation is part of the complete and present cause of action; (2) nothing in the text of Title VII or 29 C.F.R. § 1614.105(a)(1) clearly indicates an intent to displace the standard rule; and (3) starting the limitations period before a plaintiff can bring suit on a constructive-discharge theory would undermine Title VII’s remedial structure. The Court held that an employee resigns, starting the limitations period, when he gives his
employer definite notice of his intent to resign, not on his last day of work. In this respect, the Court’s ruling is consistent with its prior decisions that in a case of an involuntary termination or other adverse employment action, the statute of limitations begins to run from the date of definite notice of the termination. *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980). The Court remanded to the Tenth Circuit to determine when the petitioner gave definite notice.

E. Rule 68 Offers

*Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). The U.S. Navy engaged the marketing firm Campbell-Ewald to conduct a recruiting campaign that involved sending texts to cell phone users who consented to marketing solicitations. The plaintiff received one of these texts, and he filed a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act (“TCPA”) by sending the marketing message without his consent. Before the plaintiff filed a motion to certify the class, Campbell-Ewald filed a Rule 68 offer, offering to pay the plaintiff the statutory maximum he could recover under the TCPA plus court costs. The plaintiff did not accept the offer, and it lapse after 14 days. Campbell-Ewald then moved to dismiss the matter because it had offered the plaintiff all the relief he could obtain on his TCPA claim, thus eliminating any case or controversy. The district court denied the motion to dismiss, and the Ninth Circuit affirmed, holding that an “unaccepted Rule 68 offer does not moot a class action.”

*Held:* The Supreme Court affirmed, holding that an unaccepted Rule 68 offer that would satisfy a named plaintiff’s individual action does not moot a class action under Article III. Under contract law principles, the defendant’s Rule 68 offer had no legal effect once the plaintiff refused it, thus maintaining the necessary “case or controversy.” The Court did not decide “whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”

F. Award of Attorney’s Fees

*CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016). A female truck driver for CRST, a trucking company, filed a charge with the EEOC alleging that two male trainers sexually harassed her during a training trip. The EEOC investigated and discovered that four
other women had filed EEOC charges against CRST. The EEOC informed CRST that it had reasonable cause to believe that CRST subjected the first driver and “a class of employees and prospective employees” to sexual harassment. When conciliation efforts failed, the EEOC brought suit on behalf of the first driver and other similarly situated employees. During discovery, the EEOC identified more than 250 allegedly aggrieved women. The district court dismissed the EEOC’s claims on behalf of 67 of the women on the ground that the EEOC failed to investigate and conciliate as to them. The district court held that CRST was a “prevailing party” as to these claims and awarded CRST attorneys’ fees under 42 U.S.C. § 2000e-5(k). The Eighth Circuit reversed, holding that a Title VII defendant can be a prevailing party only if it obtains a ruling on the merits; this was contrary to prior rulings by the Fourth, Ninth and Eleventh Circuits.

_Held_: In an 8-0 ruling, the Supreme Court vacated the Eighth Circuit’s ruling and remanded. The Court held that a defendant need not obtain a favorable judgment on the merits to be a “prevailing party.” The Court explained that a defendant’s objective is to prevent the plaintiff from obtaining a material alteration in the legal relationship between the parties. The defendant fulfills this objective whenever the plaintiff’s allegations are rebuffed, regardless of the reason. As such, “the defendant may prevail even if the court’s final judgment rejects the plaintiff’s claim for a nonmerits reason.” The Court also held that the standard for awarding attorneys’ fees to a prevailing defendant in these circumstances is the same when the defendant wins on the merits: the defendant must show that the plaintiff’s position was “frivolous, unreasonable, or groundless.” _Christiansburg Garment Co. v. EEOC_, 434 U.S. 412, 422 (1978). Finally, the Court declined to address the EEOC’s argument that a defendant must obtain a _preclusive_ judgment to prevail, instead remanding the issue to the Eighth Circuit to decide that issue.

_James v. City of Boise_, 136 S. Ct. 685 (2016) (_per curiam_). The plaintiff brought a civil rights lawsuit under 42 U.S.C. § 1983 in state court and lost. On appeal to the Idaho Supreme Court, the defendant moved for attorneys’ fees under 42 U.S.C. § 1988. The Idaho Supreme Court held that, as a state court, it was bound only by the language of § 1988, and not by U.S. Supreme Court interpretation of that language. It proceeded to award the defendant attorneys’ fees under §1988 without considering whether “the plaintiff’s action was frivolous, unreasonable, or without foundation,” as required by _Hughes v. Rowe_, 449 U.S. 5 (1980) (_per
Held: The U.S. Supreme Court reversed and remanded in a *per curiam* decision, holding that “[t]he Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law.”

**G. Representative Proof in Class and Collective Actions**

*Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Meat-processing workers brought an action against their employer under the Fair Labor Standards Act (“FLSA”), alleging that the time Tyson’s automatic additions to paychecks for donning and doffing clothing and protective gear and for required walking was not sufficient to cover pre- and post-production line activities, in violation of the FLSA. Although Tyson did not record the actual time employees spent performing these tasks; it added about four minutes per shift to employees’ paychecks for the tasks, called “K-code” time. The district court granted collective action status. To prove liability and damages at trial, the workers relied on individual timesheets as well as average donning, doffing, and walking times, which were calculated via a study that observed 744 employees. The jury awarded about $5.8 million in compensatory and liquidated damages. The Eighth Circuit affirmed. The Supreme Court granted *certiorari*.

Held: In an opinion significantly narrower than many observers expected, the Supreme Court affirmed. The Court held that the permissibility of using representative statistical evidence “turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.” Relevant evidence cannot be excluded “merely because the claim is brought on behalf of a class.” The Court then held that the plaintiffs could permissibly use the representative evidence at issue “by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action.” Because defendant failed to keep proper records, the plaintiffs were entitled to use representative evidence to fill the “evidentiary gap.” The Court distinguished *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). There, because the plaintiff employees were not similarly situated, “none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers.” Here, in contrast, each plaintiff worked in the same facility, did similar work, and was paid under the same policy; “under these circumstances the experiences of a subset of employees can be probative as to the
experiences of all of them.” The Court took care, however, to note that defendant had not challenged the plaintiffs’ expert’s methodology under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court declined to address defendant’s argument, raised for the first time before the Court, that where class plaintiffs cannot prove that all class members were injured, they must demonstrate some mechanism of identifying uninjured class members prior to judgment so that these class members can be excluded from any damages award.

### 2016-2017 Term Employment-Related Cases

**PERRY v. MERIT SYSTEM PROTECTION BOARD**

No. 16-399 (to be argued April 17, 2017)

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I. **Question Presented**

Whether a Merit Systems Protection Board (“MSPB”) decision disposing of a “mixed” case (one which challenges certain adverse employment actions and also involves a claim under the federal anti-discrimination laws) on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

II. **History of the Case**

MSPB decisions concerning claims by federal-sector, civil-service employees are reviewed in the Federal Circuit, 5 U.S.C. § 7703(b)(1)(A), except in mixed cases. If the MSPB rules against the employee in a mixed case on the merits of a discrimination claim, then the employee must seek review of that decision in federal district court, not the Federal Circuit. *Id.* § 7703(b)(1). The D.C. Circuit had previously held that this exception does not apply where the MSPB dismisses the employee’s appeal for lack of jurisdiction—in which case, review would still lie with the Federal Circuit. *Powell v. Dep’t of Def.*, 158 F.3d 597 (D.C. Cir. 1998). But in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), the Supreme Court held that when the MSPB rules in a mixed case on a procedural ground rather than the merits—there, untimeliness—review still resides in federal district court.

The D.C. Circuit in *Perry v. Merit Systems Protection Board*, 829 F.3d 760 (D.C. Cir. 2016), considered whether *Powell* remained good law in light of *Kloeckner*. Here, the plaintiff challenged his suspension and retirement on the basis of race, age, and disability. He also
challenged a purported settlement agreement on the basis of coercion. An ALJ rejected the defense of coercion, enforced the agreement, and dismissed on the grounds of lack of jurisdiction. The MSPB lacks jurisdiction to review voluntarily-accepted actions (5 U.S.C. § 7512(1)–(5); 5 C.F.R. § 752.401(b)), and so upheld the dismissal for lack of jurisdiction. The D.C. Circuit held that, in this scenario, Powell rather than Kloeckner governed. In contrast to procedurally-barred appeals, jurisdictionally-barred appeals were never “appealable to the MSPB.” Kloeckner, 133 S. Ct. at 604. “[MSPB] can excuse the procedural error and permit the appeal to go forward.” Perry, 829 F.3d at 767. Moreover, “with procedurally defective appeals, unlike jurisdictionally barred appeals, the Board can excuse the procedural error and permit the appeal to go forward.” Id. “For those reasons, procedural dismissals can be understood to involve an employee ‘affected by an action which [she] may appeal to the Board,’ in a way that jurisdictional dismissals cannot.” Id.. The court thus dismissed the appeal and transferred Perry’s petition to the Federal Circuit.

III. Positions of the Parties

As of the time of writing, only the petitioner’s opening brief had been filed. The petitioner argues that the reasoning of Kloeckner covers all dismissals of mixed-cases by the MSPB, whether classed as jurisdictional or procedural. “Under § 7703(b)(2), ‘cases of discrimination subject to [§ 7702]’ shall be filed in district court.” Kloeckner, 133 S. Ct. at 604 (brackets in original). And “[u]nder § 7702(a)(1), the ‘cases of discrimination subject to [§ 7702]’ are mixed cases— those appealable to the MSPB and alleging discrimination.” Id. (brackets in original). “Ergo, mixed cases shall be filed in district court.” Id. Aside from the statutory-language argument, the answer resides in the structure of the respective courts: “The Federal Circuit, like other appellate courts, is not in the business of trying discrimination claims de novo, which is why the statutory regime channels both pure discrimination cases and mixed cases to district court.” If anything, “[t]he entire system is set up, in the words of the statute, to preserve federal employees’ ‘right’ to try their discrimination claims ‘de novo’ in district court.” Further, the D.C. Circuit’s division between jurisdictional and procedural dismissals would be “difficult and unpredictable” to apply in practice.

In the Solicitor General’s opposition to certiorari, it observed that the exception to Federal Circuit review, by the statute’s terms, applies only when an employee both “has been affected by an action which [he] may appeal to the [MSPB]” and “alleges that a basis for the
action was discrimination prohibited by” a listed antidiscrimination law. 5 U.S.C. 7702(a)(1); see 5 U.S.C. 7703(b)(2); Kloeckner, 133 S. Ct. at 601-602. If there was no jurisdiction in the MSPB, then there was no action that could be appealed under the terms of the statute, and by default it must go to the Federal Circuit. The solution to an erroneous decision by the MSPB of its jurisdiction lies in an appeal to the Federal Circuit. If the plaintiff prevails, “the case will be remanded to the MSPB for adjudication and then be treated as a mixed case for purposes of any further judicial review.”

_EEOC v. McLane Co._

No. 15-1248 (argued February 21, 2017)

Barbara B. Brown and Jane M. Brittan, Paul Hastings LLP, Washington, DC

I. Question Presented

The Equal Employment Opportunity Commission (“EEOC”) is the administrative agency charged with investigating violations of Title VII in the workplace. As part of its investigations, the EEOC may issue subpoenas to obtain documents. If a party refuses to comply with an EEOC subpoena, the EEOC may bring a subpoena enforcement action in district court to compel compliance. The question presented was:

Whether the appeals court should apply a _de novo_ or an abuse of discretion standard of review when evaluating district court rulings on whether to quash or enforce EEOC subpoenas.

II. History of Case

Damiana Ochoa filed a charge with the EEOC against her former employer, McLane Company, alleging violations of Title VII when she failed a strength test after returning from maternity leave. The defendant advised the EEOC that it used the strength test administered to Ochoa at its facilities nationwide for all positions classified as physically demanding. All new applicants for such positions, and employees returning to such positions from a leave longer than 30 days, were required to pass the test as a condition of employment. The defendant complied with some of the EEOC’s information requests, but declined to comply with others. The EEOC then brought a subpoena enforcement action, seeking identifying information regarding the defendant’s employees (“pedigree information”) and the reasons why certain test takers later left the company.
The district court refused to enforce the subpoena, finding the requested “pedigree information” irrelevant. The U.S. Court of Appeals for the Ninth Circuit reversed and vacated in part after reviewing the district court’s decision *de novo*. The Ninth Circuit held that the district court construed the statutory relevancy requirement too narrowly in light of the EEOC’s mission to determine whether a plaintiff’s charge was supported by reasonable cause. It held that the pedigree information was relevant, observing that the agency might plausibly use it to determine whether McLane had given test takers of one gender relatively lenient treatment in administering the strength test.

The Supreme Court granted *certiorari* and heard oral arguments on February 21, 2017. The Court has not yet issued an opinion.

**III. Positions of the Parties**

McLane argued that the Ninth Circuit erred in reviewing the district court decision to enforce the subpoena under a *de novo* standard of review. McLane emphasized that the fact intensive and case specific nature of district court proceedings to enforce an EEOC subpoena should entitle such decisions to review only for abuse of discretion. District courts are well-positioned to determine whether an agency subpoena seeks relevant information, the discovery needs of the parties, veracity of party explanations, and the resources the parties have expended in an attempt to comply with a subpoena. Appellate courts are far less well-equipped to handle these issues, given the static record they receive. Therefore, appellate courts should defer to district court decisions about the validity of agency subpoenas in enforcement actions.

McLane cited other contexts in which courts of appeals reviewed district court decisions regarding subpoenas and discovery issues for abuse of discretion. For example, the NLRA provision governing subpoenas that Congress later imported into Title VII to govern EEOC subpoenas, gives district courts authority to enforce agency subpoenas, but does not require them to do so. Eight circuits have concluded that district courts can exercise discretion in their decisions on NLRB subpoena enforcement. McLane also emphasized that the Ninth Circuit itself conceded that it was “unclear” why it applies *de novo* review in this context when all other circuits use the abuse of discretion standard.

The U.S. Solicitor General on behalf of the EEOC also argued that abuse of discretion should have been used. However, the Solicitor General also argued that the Ninth Circuit’s decision should be affirmed on the alternative ground that the district court did abuse its
discretion and construed the relevancy requirement too narrowly when it disallowed the request for the pedigree information. The Solicitor General argued that under the proper standard, the district court should have concluded the pedigree information could have shed light on the plaintiff’s allegations, and that to hold to the contrary would be an abuse of discretion.

The Ninth Circuit’s interest was represented in this matter by an appointed amicus, Stephen Kinnaird, who argued that the issue of whether a party must comply with a subpoena is a question of law, to which de novo review should apply. Kinnaird argued that the Supreme Court always determined a party’s duty to comply with an agency subpoena based on de novo review, citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) and U.S. v. Morton Salt Co., 338 U.S. 632 (1950), in which the Court reviewed Wage and Hour Administrator investigatory subpoenas and Federal Trade Commission orders without deference to lower court rulings.

Kinnaird argued that when an agency compels self-disclosure through an agency subpoena, that subpoena may be construed as a “constructive search.” Supreme Court precedent requires Fourth Amendment searches to be reasonable; a subpoena must be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. Under Ornelas v. United States, 517 U.S. 690 (1996), Fourth Amendment reasonableness determinations are reviewed de novo; therefore, as a “constructive search,” agency subpoenas are reasonableness determinations by another name. Even if the district court must make some subsidiary factual determinations in deciding whether to enforce a subpoena, the ultimate enforceability question must be reviewed de novo under Fourth Amendment reasonableness precedent.

Kinnaird also argued that under the Administrative Procedure Act (“APA”), a district court “shall sustain the subpoena…to the extent that it is found to be in accordance with the law.” Kinnaird argued that this meant any purported grant of discretion to district courts under Title VII was actually illusory. Rather, discretion lay with the agency, in this case the EEOC, which was entitled to exercise its judgment within the scope of its statutory jurisdiction under the APA.
I. Question Presented

Whether the Federal Arbitration Act pre-empts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

II. History of the Case

This is a new twist on the recurrent theme of States resisting the Supreme Court’s Federal Arbitration Act preemption doctrine. Kindred Nursing Centers operates nursing homes, including one in Kentucky. Kindred Nursing Centers Limited Partnership v. Clark, et al., 16-32, Br. of Pet’r., at 4. The respondents are the survivors of two residents of this home who died shortly after leaving it, in each case allegedly due to abusive care at the home. Br. of Resp’ts., at 4-5. The respondents had powers of attorney from the residents. Br. of Pet’r., at 4. The powers of attorney conferred broad powers including the right to contract on behalf of the principals. Br. of Pet’r., at 4-5. When the principals were admitted as residents to the home, the respondents did the paperwork and entered into an optional agreement to submit all claims to arbitration. After the principals died, the respondents filed suits against the nursing home in Kentucky state court, alleging statutory and common-law claims based on the allegations of abuse. Id. at 5. The nursing home moved to dismiss or stay the lawsuits based on the arbitration provision. Id. at 5-6. The motion was denied and the case went up on appeal. Id. at 5-7. The Supreme Court of Kentucky held in a 4-3 vote that under Kentucky law, an agent has no power to waive a principal’s fundamental rights under the Kentucky Constitution unless this is granted explicitly in the text of the power of attorney. Id. at 7-8. In this case, the fundamental rights were access to the courts, trial by jury and appeal to higher courts. Id. at 8.

III. Positions of the Parties

Kindred argues that the Federal Arbitration Act, 9 U.S.C. §1, et seq. ("FAA") preempts the rule of law announced by the Supreme Court of Kentucky because the rule disfavors arbitration. Br. of Pet’r., at 10. It relies particularly on last term’s case DIRECTV, Inc. v.
Imburgia, 136 S. Ct. 463 (2015), which held that courts must “place [] arbitration agreements on equal footing with all other contracts.” Br. of Pet’r., at 10. Although the Supreme Court of Kentucky did not say that its rule was about arbitration in particular, the constitutional rights involved “are the most defining characteristics of an arbitration agreement.” Br. of Pet’r., at 11. By requiring that these rights may not be waived in a power of attorney unless explicit authority is given, Kentucky places arbitration agreements in a class apart from other contracts. Br. of Pet’r., at 17. Petitioner also draws support from Doctor’s Assocs, Inc. v. Casarotto, 517 U.S. 681 (1996), where the Court struck down a Montana statute requiring that agreements to arbitrate be on the first page of a contract and expressed in underlined capital letters. Id. at 18. According to petitioner, the Kentucky rule is a close parallel. Id. Petitioner also points out that the Supreme Court of Kentucky has singled out constitutional rules that are peculiar to arbitration, and that the holders of power of attorney in Kentucky routinely waive other fundamental constitutional rights, such as the right to acquire and dispose of property. Id. at 25-26. The FAA was adopted to overcome the hostility of the courts to arbitration and the Supreme Court of Kentucky showed just this kind of hostility when it compared an attorney-in-fact waiving her principal’s right to jury trial to entering into a contract binding the principal to such things as personal servitude. Id. at 27-28.

The respondents argue that the FAA does not apply because the decision of the Supreme Court of Kentucky has to do with the formation of contracts. Br. of Resp’ts., at 14. Respondents assert that the decision below is about the interpretation of powers of attorney, not arbitration clauses in contracts. Br. of Resp’ts., at 21. The FAA does not control Kentucky’s laws about agency – what authority a principal may give an agent and how it must be expressed. Br. of Resp’ts., at 16-17. If the agent lacks the authority to bind a principal to a contract waiving the right to jury trial, the contract is never formed and so there is no question of interpreting what the arbitration provision means. Id. at 16. Respondents point out that the power of attorney itself contains no arbitration clause. Supp. Br. of Resp’ts., at 2. The Court has held that arbitration must be consensual, Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 664 (2010), and from this, respondents argue that since the rights involved are the principal’s, the Kentucky courts are entitled to require textual evidence that this is what the principal intended. Br. of Resp’ts., at 24.
COVENTRY HEALTH CARE OF MISSOURI, INC v. NEVILS

No. 16-149 (argued March 1, 2017)

Richard G. McCracken, McCracken, Stemerman & Holsberry, LLP, San Francisco, CA

I. Questions Presented

1. Whether the Federal Employees Health Benefits Act (FEHBA) pre-empts state laws that prevent carriers from seeking subrogation or reimbursement pursuant to their FEHBA contracts.

2. Whether FEHBA's express-pre-emption provision, 5 U.S.C. § 8902(m)(1), which expressly “preempt[s] any State or local law” that would prevent enforcement of “the terms of any contract” between the Office of Personnel Management and a carrier which “relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)” violates the supremacy clause.

II. History of the Case

Federal employees are covered by a national health plan administered by the Office of Personnel Management (OPM). OPM contracts with health insurance companies to provide coverage for federal employees throughout the country. Coventry Health Care of Missouri, Inc. v. Nevils, No. 16-149, Br. of Pet’r., at 3. Sometimes employees covered by the federal healthcare plan are compensated for their healthcare by other parties, most often when they receive a judgment or settlement from a tortfeasor who has caused injuries which needed medical attention. OPM has long included in its contracts with health insurance carriers a requirement that the carriers obtain subrogation to the employees’ rights of recovery, or reimbursement if the employee has already been paid. Id. at 12. This is a standard provision in OPM’s contracts nationwide without regard to state laws on subrogation and reimbursement. Id. Respondent Nevils, a federal employee, was injured in a car accident and OPM’s contract insurance carrier, Coventry, paid for his medical care. Id. at 13. Nevils obtained a settlement from the person who caused his injuries. Coventry placed a lien on the recovery and Nevils repaid Coventry for the benefits he received. Id. at 13. Missouri law prohibits subrogation and Nevils filed a class action against Coventry in Missouri state court for damages. Id.

The law under which the federal employee healthcare program is established is the Federal Employees Health Benefits Act (“FEHBA”), 5 U.S.C. § 8901, et seq. The FEHBA includes a provision preemption state laws. Section 8902(m)(1) provides:
The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

This is like the preemption section in ERISA, 29 U.S.C. §1144, but narrower in that it preempts only state laws which “relate to the nature, provision, or extent of coverage or benefits”, whereas the ERISA preemption provision applies to all state laws which relate to employee benefit plans without singling out particular elements of such plans. The Supreme Court has held that ERISA preempts state laws against subrogation and reimbursement. *FMC Corp., v. Holliday*, 498 U.S. 52 (1990). The lower courts in Missouri dismissed Nevil’s action on grounds of preemption. Br. of Pet’r., at 14. But the Missouri Supreme Court reversed. It interpreted Section 8902(m)(1). In its view, “relate to” requires a “direct and immediate relationship.” “Benefits” means only initial payments to participants, not any repayments. *Id.* at 14. The Court applied a presumption against preemption of state law and held that because of ambiguity in § 8902(m)(1), it must be construed against preemption of state law. *Id.* at 18. Six judges issued a concurring opinion stating that the statute is unconstitutional because it exceeds the Supremacy Clause by purporting to give preemptive effect to OPM contracts, not federal laws. *Id.* at 18.

### III. Positions of the Parties

Petitioner (and the Government) contend that laws restricting subrogation and reimbursement fall comfortably within the meaning of “coverage” or “benefits” in § 8902(m)(1). Br. of Pet’r., at 19. Whether subrogation and reimbursement are available affects how carriers calculate benefit levels. *Id.* at 27. Petitioner asks the Court to follow *FMC*, *supra*. The purpose of § 8902(m)(1) was to facilitate uniform administration of FEHBA and also to achieve cost efficiency, which would be compromised if subrogation and reimbursement depended on varied state laws. *Id.* at 20. Petitioner urges that no presumption against preemption may properly be applied because this is not a case about divining congressional intent to preempt, but one where Congress has expressly preempted state law. *Id.* at 20. Furthermore, the presumption is not triggered in areas where the interests at stake are uniquely federal in nature. *Id.* at 37. Petitioner points out that the Court has interpreted the phrase “relate to” in express preemption statutory provisions broadly, not narrowly at the Missouri Supreme Court had it. *Id.* at 22, citing *Morales v. Transworld Airlines, Inc.*, 504 U.S. 374, 383 (1992) (construing the Airline Deregulation Act, 49 U.S.C. §41713). Petitioner claims that OPM’s interpretation of the statute is entitled to
Chevron deference. Petitioner points to other federal laws pursuant to which the terms of contracts have been held to preempt state laws. Id. at 57-58. It argues that it is the statute itself, not the contracts made pursuant to it, which preempts state law. Id. at 56-57, 59-60.

Respondent takes the position that the Supremacy Clause uses the phrase “laws of the United States” and this means “official government-imposed policies, not negotiated contracts.” Br. of Resp’t., at 17. Surprisingly, there appear to be no Supreme Court decisions on this point. Respondent cites two law review articles for the proposition that federal contracts may not be given preemptive force. Id. at 43. He does not advocate that § 8902(m)(1) is unconstitutional. Instead, he relies heavily on Empire HealthChoice Assurance, Inc., v. McVeigh, 547 U.S. 677 (2006), in which the Court held that § 8902(m)(1) does not confer on the federal courts any jurisdiction of subrogation claims brought by FEHBA carriers. In the course of the McVeigh opinion, the Court stated that the statute is ambiguous on whether subrogation and reimbursement terms fall within its ambit. Id. at 18. From this, respondent argues that rather than invalidating § 8902(m)(1) as a whole, the Court should confine its scope to exclude state laws on subrogation and reimbursement. Id. Respondent points out the difference between the ERISA preemption provision and 8902(m)(1). In addition to the difference in wording, respondent argues that in the case of the ERISA preemption provision, the statute itself preempts state law whereas in the FEHBA, the preemption section gives preemptive force to the provisions of contracts the OPM enters into pursuant to that law. Id. at 29. The regulation of insurance is historically a matter for the States. Id. at 31-32. Therefore, respondent argues, there should at least be a reluctance to find preemption of state laws in this field where the statute is ambiguous. Id. at 33. Respondent asserts that Chevron deference is not due to the OPM’s interpretation of the statute because Congress has not clearly delegated it the authority to determine the extent of preemption of state laws. Id. at 18-19.

NATIONAL LABOR RELATIONS BOARD v. SW GENERAL
No. 15-1251 (argued November 7, 2016)

Richard G. McCracken, McCracken, Stemerman & Holsberry, LLP, San Francisco, CA

I. Question Presented

Whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis, requiring that a person
who is nominated to fill a vacant office that is subject to the Federal Vacancies Reform Act may not perform the office’s functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy, applies only to first assistants who take office under subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under subsections (a)(2) and (a)(3).

II. History of the Case

Many high-level positions in the federal government are appointed by the President with the advice and consent of the Senate. These are referred to as “PAS” positions. Historically, Congress has allowed Presidents to make temporary appointments to PAS positions which become vacant. Responding to what some in Congress perceived as abuses of this allowance, Congress passed the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345, et seq. Section 3345(a) has three subsections. The first provides that the first assistant to a PAS position automatically fills the vacant seat. The second subsection allows the President to make a temporary appointment of someone who is in another PAS position. The third allows temporary appointment of a senior official in the same agency meeting specified experience and compensation qualifications. Section 3345(b)(1) provides that “notwithstanding subsection (a)(1),” a person may not fill a vacant office in an acting capacity if the person has been nominated to fill the vacant seat permanently, unless the person has served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

The General Counsel of the National Labor Relations Board is a PAS position. It was vacated in 2010 and President Obama appointed Lafe Solomon to fill the vacancy. NLRB v. S W General, Inc., No. 15-1251, Br. of Resp’t., at 15. Solomon had not served as the first assistant to the General Counsel but met the criteria for appointment of a senior official from the same agency. Id. Six month later, on January 5, 2011, the President nominated Solomon to serve on a permanent basis. Id. at 16. Solomon was never confirmed and was replaced by Richard Griffin on November 4, 2013. Id. at 16. Part of the responsibility of the General Counsel is to issue unfair labor practice complaints. While he was serving as acting General Counsel, a complaint against SW General was issued under his authority. After a hearing, the NLRB issued an order against SW General. Id. at 17. The order was reviewed by the District of Columbia Circuit Court of Appeals, which ruled that the complaint was issued without authority because
subsection (b)(1) applies to anyone who may be appointed under subsection (a), not just to first assistants who move up. Since Solomon had never served as a first assistant, he could not hold the acting position when the President nominated him to serve permanently. Id. at 17-18.

III. Positions of the Parties

The NLRB contends that the proper construction of § 3345 is that subsection (b)(1) applies only to subsection (a)(1). One of the strongest indications of this, according to the Board, is that subsection (b) refers to prior service as a first assistant, a feature that can occur only with respect to subsection (a)(1) and not to the other pools of potential appointees, the “other PAS” and “senior agency officials” groups. Br. of Resp’t., at 21.

Looking at the history of why Congress enacted § 3345, the Board concludes that the purpose of subsection (b)(1) was to bar recently-appointed first assistants from serving as both acting officers and nominees. Id. at 22. This purpose is not at risk with respect to the latter two groups of potential appointees, because those in other PAS positions have already been confirmed by the Senate and those in the senior officials group, in order to be qualified, must have already served in the agency for at least 90 days in the preceding year. Id. at 23. The Board points out that in the original bill to enact this law, it was clear that subsection (b)(1)’s restriction applied only to first assistants. Id. The Board also emphasizes the historical practice under § 3345. Over 100 people have been nominated for the positions in which they were acting, without any objection from the Senate. Many were confirmed. The Government Accounting Office has agreed with the executive branch’s interpretation that subsection (b)(1) applies only to subsection (a)(1). Id. at 24-25; 48-55. This practice is entitled to substantial weight, according to the Board. Id. at 24.

Respondent replies that subsection (b)(1) refers to the entire section, not just to subsection (a)(1), and Congress would have been explicit if it had intended to limit this restriction to first assistants. Br. of Resp’t., at 19. Respondent explains that the purpose of the “notwithstanding” clause at the beginning of subsection (b) is to resolve a conflict that would otherwise occur between subsection(a)(1), which provides that the first assistant automatically fills the vacant office, and subsection (b)(1), which would prohibit this from happening when the same person is nominated to serve permanently. There is no automatic movement of officials in the latter two groups of potential appointees and so no need to avoid a conflict between the two subsections. Id. at 21. Respondent dismisses the practice under § 3345 by stating that “this is
not how statutes are amended.” Id. at 21. It says that there is no evidence that the Senate was aware of the executive branch’s interpretation. Id. at 56. Even though the Senate may have confirmed a nominee who was acting in the same position in violation of Respondent’s interpretation of § 3345, this is not meaningful because the Senate would certainly confirm a nominee of whom it approved rather than extending a vacancy. Id. at 57.

ADVOCATE HEALTH CARE NETWORK v. STAPLETON

No. 16-74 (to be argued March 27, 2017, along with consolidated cases)

Hyland Hunt, Deutsch Hunt PLLC, Washington, DC

I. Question Presented

The Employee Retirement Income Security Act of 1974 (“ERISA”) governs employers that offer pensions and other benefits to their employees. “Church plans” are exempt from ERISA’s coverage. 29 U.S.C. §§ 1002(33), 1003(b)(2). Specifically, ERISA provides that the “term ‘church plan’ means a plan established and maintained . . . by a church,” 29 U.S.C. § 1002(33)(A), and for “purposes of this paragraph,” “a plan established and maintained . . . by a church . . . includes a plan maintained by an organization [that is] controlled by or associated with a church,” id. § 1002(33)(C)(i).

The question presented in these three consolidated cases is whether ERISA’s church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

II. History of the Case

Petitioners are three religious nonprofits that operate hospitals and other healthcare facilities, and offer their employees defined benefit pension plans. Petitioners have administered the pension plans as ERISA-exempt church plans. In three separate cases, Respondents, who are participants in the plans, brought suits claiming the plans do not comply with ERISA provisions, including those requiring reporting and disclosure; minimum vesting and accrual; sound administration of plan assets; and adequate funding. Petitioners moved to dismiss on the ground that the pension plans are ERISA-exempt church plans, and the district courts denied the motions in all three cases. On interlocutory appeal, the Seventh, Third, and Ninth Circuits all affirmed, holding that the church plan exemption requires that a plan be initially established by a church,
which the plans at issue were not. Specifically, those courts reasoned that the definitional clause addressing plans maintained by a church-associated organization only expanded the types of entities that could maintain church plans, but did not expand the definition of the types of entities that could establish church plans.

III. Positions of the Parties

Petitioners argue that the plain text of the statute establishes that ERISA exempts plans maintained by church-affiliated organizations, regardless of whether they were established by a church because the statute states that “a plan established and maintained … by a church … includes a plan maintained by” a church-affiliated organization, and to read that clause as only applying to the church-maintenance requirement would render “established” surplusage. Petitioners also draw support from later-enacted statutes, arguing that they presume that plans established by church-affiliated are church plans, for example by recognizing the YMCA’s plan as a church plan. Petitioners further argue that the legislative history confirms their interpretation and that a church-establishment requirement serves no purpose. Although they contend that ERISA unambiguously exempts plans established by church-affiliated organizations, Petitioners argue that at the least the statute is ambiguous, requiring Skidmore deference to the IRS, the Department of Labor (DOL), and Pension Benefit Guaranty Corporation (PBGC), which have issued guidance interpreting the statute to exempt plans established by church-affiliated organizations. As a final argument in favor of resolving any ambiguity in their favor, Petitioners contend that constitutional avoidance requires interpreting ERISA in their favor, because to do otherwise would require the government to decide whether particular religious organizations constitute the “church,” introducing religious entanglement that expansion of the church-plan exemption to plans maintained by church-affiliated organizations sought to avoid.

The United States has filed an amicus brief in support of Petitioners, arguing that the views of the relevant federal agencies (the IRS, DOL, and PBGC) support Petitioners’ interpretation, reflect the most natural reading of the statute, are supported by statutory history, context, and purpose, and are long-standing and well-reasoned. Accordingly, the United States argues the agencies are entitled to Skidmore deference and there is no sound reason to reject the agencies’ settled view.
Respondents contend that the part of the church plan definition referring to maintenance by church-affiliated organizations simply allows churches to have their plans maintained by pension boards, but Congress retained the requirement that church plans be established by a church with statutory text that requires a plan “established and maintained” by a church, modifying only the maintenance element to include church-affiliated organizations. subparagraph (C)(i). As for deference, Respondents argue that the only guidance reflecting agency views are non-precedential agency letter rulings, all of which rely on one IRS memorandum that is itself devoid of reasoning, and they are therefore not entitled to Skidmore deference because it depends on the thoroughness of an agency’s reasoning and employment of its expertise. Finally, Respondents argue that constitutional avoidance compels their reading of the statute, because Petitioners reading would expressly favor religious entities over their secular competitors when it is unnecessary to avoid excessive government entanglement with religion.

2017-2018 Term Employment-Related Cases

**EPIC SYSTEMS CORP. v. LEWIS**
No. 16-285

**ERNST & YOUNG LLP v. MORRIS**
No. 16-300

**NATIONAL LABOR RELATIONS BOARD v. MURPHY OIL USA**
No. 16-307

Richard G. McCracken, McCracken, Stemerman & Holsberry, LLP, San Francisco, CA

1. **Questions Presented**

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act; Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in “concerted activities” in

Many employers now require their employees to agree to arbitrate any discrimination, pay or other employment-related claims. These arbitration agreements also frequently limit arbitration to the individual’s claims, forbidding class or collective actions. These agreements may be contained in employment handbooks. Employees must sign for receipt of the handbook, thereby agreeing to the arbitration provision. There may also be free-standing agreements either paper or electronic. They are voluntary in the sense that the employee has the choice to look elsewhere for work.

The National Labor Relations Board decided in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied* 737 F.3d 344 (5th Cir. 2013) that waivers of class or collective action are illegal. The NLRB reasoned that the waivers constituted interference with employees’ rights under § 7 of the National Labor Relations Act to engage in concerted activity for mutual aid and protection which the Supreme Court has held to include collective legal action. *Eastex v. NLRB*, 437 U.S. 556 (1978). It has long been the law that an employer may not require employees to waive their § 7 rights. *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). The Board concluded that this principle applies equally to the exercise of § 7 rights through litigation as to strikes and picketing. It held that the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (“FAA”), was not controlling because of the saving clause in the FAA, 9 U.S.C. §2. It reasoned that because a waiver of collective litigation action is illegal under the NLRA, the saving clause applies and the two statutes are reconciled so that an employer may require employees to submit their claims to arbitration but may not go further and mandate that they proceed individually.

The Fifth Circuit denied enforcement of the NLRB’s order, concluding that the FAA and its policy favoring arbitration controls because there is no “contrary congressional command” against arbitration in the NLRA. Nevertheless, the NLRB has continued to decide cases in this manner. Because an employer subject to an NLRB order may seek review in any circuit where it does business, all the NLRB orders so far have gone to the Fifth Circuit which has consistently applied its decision in *D.R. Horton* and denied enforcement, including *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2016).

Meanwhile, however, other circuits have weighed in on the question, not in NLRB cases but in employment cases where the plaintiffs have relied upon the NLRB’s analysis to resist
mandatory arbitration defenses. This has resulted in a split, with the Seventh and Ninth Circuits agreeing with the NLRB that class waivers are illegal and the Second and Eighth Circuits and the Supreme Courts of California and Nevada holding that they are valid and enforceable. Many more cases are in the pipeline. Compare Morris v. Ernst & Young, LLP, 834 F. 3d 975 (9th Cir. 2016) and Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155 (7th Cir. 2016), with Cellular Sales of Missouri, LLC v. NLRB, 824 F.3d 772, 775 (8th Cir. 2016), Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013), Tallman v. Eighth Jud. Dist. Ct., 359 P.3d 113, 122-123 (Nev. 2015) and Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 137-143 (Cal. 2014).

There is no question about the importance of this issue. It cuts across all employment laws since the arbitration provisions apply to all claims and the NLRB’s doctrine applies to any class or collective litigation regardless of the nature of the claim. It was inevitable that the issue would go to the Supreme Court before very long. If the Court agrees with the NLRB’s position, then the movement to mandatory arbitration of employment claims is probably at an end since many employment lawyers would be willing to arbitrate on a class basis.

The lower courts have disagreed how to analyze the issue. Those finding in favor of arbitration start with the FAA and then look to see if there is anything in the NLRA countermanding arbitration. Those finding against arbitration start with the NLRA and then move to the FAA’s saving clause. Each faction accuses the other of putting the cart before the horse.*

II. History of the Cases

Murphy Oil. Murphy Oil operates more than one thousand gas stations in 21 states. NLRB v. Murphy Oil U.S., Inc., No. 16-307, Cert. Pet. at 3. It requires its employees to sign an agreement to resolve any and all disputes by binding arbitration “without consolidation of such claim with any other person or entity’s claim.” Id. A Murphy Oil employee named Sheila Hobson and three other employees filed a collective action under the FLSA, which Murphy Oil successfully moved to dismiss on grounds of the arbitration provision. Id. at 4. Hobson did not

* So far, all the cases have arisen in employment subject to the National Labor Relations Act. Rail and airline employees are covered by the Railway Labor Act, 45 U.S.C. § 151 et seq. (“RLA”). The RLA has a different structure than the NLRA. It does have § 2 Fourth, 45 U.S.C. § 152 Fourth, which is analogous to NLRA Section 7 at least as far as protecting employees from coercive employer practices against concerted activity. This might provide basis for extension of the D.R. Horton doctrine to RLA employers.
appeal but filed an unfair labor practice charge with the National Labor Relations Board alleging that the arbitration provision interfered with her right under § 7 of the NLRA. Id. The Board ruled in her favor on the basis of its decision in *D.R. Horton*, declining to follow the contrary decision of the Fifth Circuit. Id. at 7-8. This led to the Fifth Circuit’s decision granting the employer’s request for review and denying enforcement of the Board’s order. Id. at 8.

*Epic Systems v. Lewis.* Epic Systems creates electronic medical records software. *Epic Systems v. Lewis,* No. 16-285, Cert. Pet. at 4. In April 2014, Epic required its employees to agree to an arbitration agreement which included a waiver of class and collective claims. Id. at 5. The plaintiff, Jacob Lewis, consented. Id. After he left Epic, Lewis sued Epic under the FLSA as the representative of a class of technical communications employees. Id. at 5-6. The District Court denied Epic’s motion to dismiss based on the arbitration agreement and Epic appealed to the Seventh Circuit. Id. at 6. The Seventh Circuit affirmed. It agreed with the NLRB that § 8 of the NLRA, which prohibits an employer from interfering with employees’ § 7 rights, made it illegal for Epic to demand that its employees waive their right to engage in collective litigation to enforce employment rights. Id. at 6. It rejected Epic’s contention that the FAA required enforcement of the arbitration promise, relying on the saving clause. The Court held that because the waiver of collective action is illegal, the saving clause prevents a conflict between the NLRA and the FAA. Id. at 6-7.

*Ernst & Young LLP v. Morris.* Ernst & Young is a large accounting firm. *Ernst & Young LLP v. Morris,* No. 16-300. Cert. Pet. At 5. It requires its employees to sign an agreement that all claims must be arbitrated in separate proceedings for each employee, preventing class or collective actions. Id. Plaintiffs Stephen Morris and Kelly McDaniel were auditors who worked for Ernst & Young. They brought an action under the FLSA against Ernst & Young. Id. at 6. The district court granted Ernst & Young’s motion to dismiss and motion to compel arbitration. Id. The plaintiffs appealed to the Ninth Circuit Court of Appeals, which reversed. Id. The Ninth Circuit followed the reasoning of the Board in *D.R. Horton* and the Seventh Circuit in *Lewis*. Id. at 6-7.

### III. Positions of the Parties

The NLRB and the employees† proceed by first looking to the NLRA. Section 7 guarantees the right of employees to engage in concerted activities for their mutual aid and

† The citations here are to the NLRB’s certiorari petition except whether otherwise indicated.
protection. Cert. Pet. at 10. This includes the right to use administrative and judicial forms to pursue employment-related claims. Id. at 10-11. But the Board and the Supreme Court have long held that waivers of § 7 rights are unlawful. Id. at 11, citing *National Licorice*. Furthermore, in the context of union-represented employees, the Board and the Court have outlawed individual contracts in derogation of the authority of the representative. Id. Unions, as collective bargaining representatives, may waive § 7 rights, as they do conventionally in no-strike provisions, but the Board considers this to be different because the waiver is itself a result of concerted activity in the form of collective bargaining. Id. at n. 4. The Board protests that it is not against arbitration and in fact, the statute and the doctrines it has developed under it are pro-arbitration. Id. at 12. Thus it should not be seen in the same light as courts which resisted arbitration (and still do). Id.

In the NLRB’s view, the NLRA and the FAA are not in conflict, because the saving clause prevents only the enforcement of the collective action waiver: this is the only part of the Murphy Oil arbitration agreement that is illegal. Id. at 13. The two statutes are not in conflict but in any event one federal statute does not supersede another. Instead, they must be reconciled, which is easy to do in this case because of the saving clause. Id., citing *Morton v. Mancari*, 417 U.S. 575, 551 (1974). The Court’s admonition to look for a “contrary congressional command” applies only when two federal statutes cannot be reconciled. Id. at 14 n. 5. According to the Board, the Court’s other arbitration cases are unlike this one because they involved the question of the procedural means to enforce various statutes and common law causes of action. In contrast, the right under § 7 is the core, substantive right under the NLRA and not a mere procedural means for vindicating some other statutory right. Id. at 16. The NLRB likens the class action waiver to contracts purporting to allow employers to terminate employees on the basis of age or to pay them less than the minimum wage. Id. Critically, the Board asserts that its doctrine against waivers of § 7 rights applies to any waivers, including a waiver of the right to proceed in a judicial forum on a collective basis. Id at 18. Cases like *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348, 351 (2011) are distinguishable because the laws of those other cases bore discriminatorily on arbitration. Id. Naturally, the Board also suggests that the Court should defer to its expertise. Id. at 21. Jacob Lewis adds that the employers’ position that an arbitration clause must always be given primacy could lead to the “surprising conclusion” that
companies would immunize otherwise illegal contracts, such as antitrust violations, simply by including arbitration in them. *Epic Systems*, Resp. Opp. at 24.

The employers cite the long line of Supreme Court cases favoring arbitration in commercial, consumer and employment contexts. They rely primarily on *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). *NLRB v. Murphy Oil USA*, No. 16-307, Br. of Respondent in Support of Cert., at 3 (“Murphy Oil Br.”). In *CompuCredit*, the Court held that the FAA “requires courts to enforce agreements to arbitrate according to their terms[,]…even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” 132 S. Ct at 669. The employers point to the absence of such a command in the NLRA. *Ernst & Young LLP v Morris*, Cert. Pet., at 15 (“Ernst & Young Br.”). Although the NLRA has provisions concerning arbitration – favoring it for resolution of disputes under collective bargaining agreements – it has no express prohibition of class waivers. The NLRA also does not have any provision guaranteeing employees the right to litigate employment claims in court, from which a prohibition of mandatory arbitration might be inferred. *Id.* at 17. The employers also emphasize the Court’s statement in *AT&T Mobility*, 563 U.S. at 348, 351, that the FAA envisions “bilateral” arbitration between two parties, not class arbitration. *Id.* at 20. They stop short of contending that the FAA itself does not allow class arbitration.

The employers attack the use of the FAA’s saving clause by the NLRB and the Seventh and Ninth Circuits. They point out that the saving clause applies only when the grounds for illegality would apply to any contract, and thus encompasses only defenses universal to all contracts, such as fraud or mistake. *Ernst & Young Br.*, at 19. The NLRA § 7 theory applies only to employment contracts and even then only to those to which employees within the meaning of § 2(3) of the NLRA are parties. Citing cases such as *DIRECTV, Inc v. Imburgia*, 136 S. Ct. 463 (2015), which held that any state-law rule of contract construction which is particular to arbitration and disfavors it is preempted by the FAA, the employers argue that the NLRB’s doctrine is defective for the same reason. *Epic Systems v. Lewis*, No. 16-285, Cert. Pet., at 15 (“Epic Systems Br.”)

The employers state that the history of enforcement activity under the NLRA shows that it was never intended to guarantee employees the right to litigate collectively. The NLRA was passed in 1935, before the adoption of FRCP 23, yet employees have not used § 7 to go to court
to seek a class or collective remedy under the NLRA. Murphy Oil Br., at 28-29. They also examine the outer reaches of what the NLRB doctrine may imply. They question, for instance, whether the NLRA § 8 prohibition against interference with § 7 rights means that employers would be prohibited from opposing class certification in employment cases. Epic Systems Br., at 18.

Potential Candidates for Future Supreme Court Review

A. ADEA Disparate Impact

**KARLO v. PITTSBURGH GLASS WORKS, LLC**

Barbara B. Brown and Jane M. Brittan, Paul Hastings LLP, Washington, DC

I. Question Presented

The Age Discrimination in Employment Act (“ADEA”) makes it “unlawful for an employer ‘to adversely affect [an employee’s] status … because of such individual’s age.” 29 U.S.C. § 623 (a)(2). Previously other circuits had interpreted the ADEA to permit only those disparate impact claims alleging that the entire protected group—employees age 40 and over—were disadvantaged as compared to those outside the protected group. However, a circuit split has emerged as to whether the ADEA allows disparate impact claims based on “sub-groups” within the protected class. The Third Circuit held that sub-group disparate-impact claims are cognizable under the ADEA.

The question presented which caused the circuit split was:

Whether so-called “sub-group” disparate-impact claims are cognizable under the ADEA.

II. History of the Case

Plaintiffs received a dismissal and notice of right to sue from the EEOC and filed a collective suit against defendant under the ADEA, claiming disparate treatment and disparate impact discrimination because a subgroup of employees aged 50 and older was disfavored relative to younger employees over age 40.

On plaintiff’s motion for conditional certification, the district court ruled that ADEA subgroups were cognizable and conditionally certified a collective action to extend to employees terminated in the reduction in force who were at least 50 years old at the time. Id. at 5. The case was transferred to another district. Following transfer, defendant filed motions to decertify the collective action and to exclude plaintiffs’ experts who provided statistical evidence to support their disparate-impact claim and information regarding age-related implicit-bias studies. Both motions were granted.

Defendant then filed motions for summary judgment. The district court granted summary judgment on the disparate treatment claim and in part on the disparate impact claim, finding: (1) plaintiffs’ age fifty-and-older disparate impact discrimination claim was not cognizable under the ADEA; and (2) plaintiffs lacked evidence to support their disparate impact claim following the exclusion of an expert’s testimony. Plaintiffs appealed to the Third Circuit seeking reversal of the district court’s summary judgment ruling and statistics-related Daubert ruling on the disparate impact claims. Id.

III. Positions of the Parties

Plaintiffs argued that disparate impact claims based on subgroups of the protected class should be cognizable under the ADEA. Plaintiffs claimed to have identified a policy that disproportionately impacted a subgroup of the protected class: employees older than fifty. Id. at 8. Because the policy favored younger members of the protected class, adding those younger individuals into the comparison group washed out the statistical evidence of a disparity. Plaintiffs claimed that they had a disparate impact cause of action and could proffer evidence that a specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age. Id.

Defendant argued that subgroup disparate-impact claims should not be recognized under the ADEA because such claims could allow plaintiffs to manipulate evidence to “gerrymander” arbitrary age groups in order to manufacture a statistically significant effect. Id. at 25-26. To hold otherwise would confuse the distinction between disparate impact and disparate treatment
because disparate impact claims should, and generally do, rely on comparisons between the entire protected class and those not in that class. By allowing the plaintiff the ability to select its own comparison groups within the protected forty-and-over class, plaintiffs could bring statistical studies that improperly manufacture the appearance of disparate-impact between two subgroups within the protected class when overall, forty-and-over employees are actually favored.

IV. Summary of Decision

The Third Circuit held that a disparate impact claim was cognizable under the ADEA where a subgroup of employees aged 50 and older were alleged to have been disfavored relative to younger employees, even if the younger employees were over age 40. Id. at 9. The court found that under the ADEA, an employment practice that favors younger members of the protected class can be illegal. The ADEA makes it unlawful for an employer “to adversely affect [an employee’s] status...because of such individual’s age.” Id. at 12. Under the plain text, the court concluded, subgroup claims are viable. Id. at 12-17.

The court relied on the Supreme Court’s analysis of the ADEA in O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), in which the Supreme Court noted that “the forty-and-older line drawn by § 631(a) constrains the ADEA’s general scope; it does not modify or define the ADEA’s substantive prohibition against discrimination . . . because of such individual’s age.” Id. at 14. In that case the Supreme Court held that an individual within the protected age group might have a claim if he or she were replaced by a “significantly younger” individual, even if that individual was also in the protected age category. The circuit court reasoned that the O’Connor analysis confirmed that “a specific, facially neutral policy that significantly disfavors employees over fifty years old [within the protected group of forty-and-older employees] supports a claim of disparate impact under the plain text of § 623(a)(2).” Id.

The court looked to Connecticut v. Teal, 457 U.S. 440 (1982), a Title VII disparate impact case, to hold that the statute is designed to protect the rights of individual employees, not the rights of a class. Id. at 17. Even though Teal dealt with Title VII race discrimination, the principle is the same as that under consideration here: the fact that black employees were favored as a class did not justify discrimination against individual members of the protected class. Accordingly, the Third Circuit found that the ADEA protects individuals, not the whole protected
class as such, and that protection “does not disappear when a plaintiff advances a disparate-impact claim.” *Id.*

The court also held that its decision was supported by the ADEA’s remedial purpose; refusing to recognize subgroup claims “would deny redress for significantly discriminatory policies that affect employees most in need of the ADEA’s protection.” *Id.* at 21. The court noted that if it adopted a mandatory forty-and-older comparison group, employers could adopt facially neutral policies with significant disparate impact on older individuals in the protected group. The court held that “such policies reflect the specific type of arbitrary age discrimination Congress sought to protect” when it enacted the ADEA. *Id.*

The court also found that plaintiffs could demonstrate disparate impact with various forms of evidence including 40-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling, so long as the evidence met the usual standards for admissibility.

The court noted that its ruling caused a circuit split with the Second, Sixth, and Eighth Circuits, but said the reasoning of those other appellate courts “relied primarily on policy arguments that we do not find persuasive.” *Id.* at 23. Among those policy considerations, the court noted that its sister circuits’ rulings contradicted *O’Connor* and *Teal* and confused evidentiary concerns about the sufficiency of expert statistical modeling with statutory interpretation. Specifically, the court disagreed with the Second Circuit’s holding in *Lowe v. Commack Union Free Sch. Dist.*, 889 F.2d 1264 (2d Cir. 1997) and the Sixth Circuit’s holding in *Smith v. Tennessee Valley Authority*, 924 F.2d 1059 (6th Cir. 1991) (table opinion). The court was confident that evidence could be presented to counter-balance any potential for “gerrymandering” and manipulation of subgroup discrimination statistics. *Id.* at 25. It also disagreed that recognizing subgroups would “proliferate liability for reasonable employment practices.” *Id.*
VILLARREAL v. R.J. REYNOLDS TOBACCO CO.
839 F.3d 958 (11th Cir. 2016) cert. filed Feb. 6, 2017, No. 16-971

Barbara B. Brown and Jane M. Brittan, Paul Hastings LLP, Washington, DC

I. Question Presented

Section 4(a)(2) of the Age Discrimination in Employment Act makes it “unlawful for an employer . . . to limit, segregate, or classify his employees in any way which could deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. § 623(a)(2). By contrast, Section 4(a)(1) makes it unlawful for an employer “to fail or refuse to hire . . . any individual . . . because of such individual’s age.” 29 U.S.C. § 623 (a)(1).

The question presented is:

Whether the ADEA allows an unsuccessful job applicant to sue an employer for a practice that has an alleged disparate impact on older workers.

The Eleventh Circuit held there is no cognizable claim for disparate impact discrimination under the ADEA for job applicants.

II. History of the Case

Plaintiff, Villarreal, applied for a position as a territory manager with defendant, R.J. Reynolds when he was 49 years old. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016). Defendant hired a contractor to screen applications and provided the contractor with guidelines. These guidelines described the “targeted candidate” as someone 2-3 years out of college that “adjusts easily to change.” Id. Defendant further instructed the contractor to avoid candidates with 8-10 years of sales experience. Plaintiff was never informed he was rejected for the job, and never followed up on his application. Two years later, plaintiff filed a charge with the Equal Employment Opportunity Commission (“EEOC”) alleging age discrimination under the ADEA. The EEOC issued a right to sue notice and plaintiff brought a collective action against defendant on behalf of “all applicants for the Territory Manager position who applied for the position since the date R.J. Reynolds began its pattern or practice of discriminating against applicants over the age of 40.” Id. at 961-62. Plaintiff claimed disparate impact discrimination under section 4(a)(2) of the ADEA. Defendant moved to dismiss the complaint for failure to state a claim because section 4(a)(2) does not give a cause of action to
job applicants, only employees. The panel held that section 4(a)(2) was ambiguous and therefore the EEOC’s interpretation of the rule, providing a cause of action for disparate impact discrimination to job applicants, should be controlling. Defendant submitted a petition for rehearing.

III. Positions of the Parties

Plaintiff made multiple arguments to demonstrate that section 4(a)(2) of the statute was ambiguous and should be construed to provide job applicants with a cognizable ADEA disparate impact claim. Section 7(c)(1) of the Act creates a cause of action for “any person aggrieved” and provides that right of action “shall terminate upon the commencement of an action by the EEOC to enforce the right of such employee under this chapter.” Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 967. Because this provision applies to all causes of action under the ADEA, plaintiff argued that “employee” must mean applicants, who clearly have disparate treatment claims under the statute. Plaintiff also argued that various cases, including Robinson v. Shell Oil Co., 519 U.S. 337 (1997), Texas Department of Housing & Community Affairs v. Inclusive Communities Project Inc., 135 S. Ct. 2507 (2015), and Griggs v. Duke Power Co, 401 U.S. 424 (1971) meant that job applicants should be included in the ADEA’s coverage. Id. at 967-69. Plaintiff argued the court must look beyond the text to the legislative history and due to the ambiguity in section 4(a)(2), must give deference to the EEOC’s interpretation of the statute.

Defendant argued that disparate impact claims are available only under section 4(a)(2) of the ADEA. See Villarreal v. R.J. Reynolds Tobacco Co., 2013 U.S. Dist. LEXIS 30018, No. 2:12-CV-1038-RWS (N.D. Ga. Mar. 6, 2013) at 13. That section applies to employees only and does not apply to hiring claims. Therefore plaintiff’s disparate impact failure-to-hire claim was not cognizable.

IV. Summary of Decision

The Eleventh Circuit, on rehearing, reversed the panel decision and held that plaintiff could not state a claim for disparate impact discrimination under the ADEA because section 4(a)(2) applied to employees, not job applicants, under its plain language. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961. The court rejected all of Villarreal’s arguments.

1 Defendant also moved to dismiss because plaintiff’s complaint was untimely. Plaintiff filed for leave to amend, claiming the untimeliness was due to lack of communication regarding his application status from R.J. Reynolds. The district court denied the motion because plaintiff alleged no misrepresentation or concealment by defendant. Plaintiff appealed and a divided panel of the Eleventh Circuit reversed, holding equitable tolling was appropriate.
Section 7(c)(1) did not expand the definition of employee to include “any individual” because the statute itself defined “employee” as “an individual employed by any employer.” Id. at 967. *Robinson v. Shell Oil Co.* was not applicable because: (1) the Supreme Court in that case did not interpret “employee” to mean “job applicant;” and (2) the statutory sections at issue on Villarreal’s appeal—specifically ADEA sections 4(c)(2) and 4(a)(1)—suggest a distinction between “employees” and “job applicants.” Id. at 967-68. Other cases plaintiff cited did not address whether the ADEA applies to job applicants or hiring criteria.

The court held that “our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute . . . [e]levating general notions of purpose over plain meaning of the text is inconsistent with our judicial duty to interpret the law as written.” Id. at 969-70. The court refused to defer to the EEOC’s interpretation because the text of the statute was clear. Id. at 970.

**B. Issue: Does Rejection of Sexual Advances Qualify as Protected Activity?**

Barbara B. Brown and Jane M. Brittan, Paul Hastings LLP, Washington, DC

**I. Question Presented**

Pursuant to Title VII, an employer may not retaliate against an employee because the employee has “opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.” 42 U.S.C. § 2000e-3.

The question presented which caused or contributed to a circuit split was:

Whether rejection of sexual advances constitutes protected activity for purposes of a retaliation claim under Title VII of the Civil Rights Act of 1964.

The Fifth Circuit held that rejection of sexual advances cannot qualify as protected activity in *LeMaire v. Louisiana*, 480 F.3d 383 (5th Cir. 2007).

The Eighth Circuit held that rejection of sexual advances can qualify as protected activity in *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

**II. History of the Cases**

*LeMaire*: Plaintiff worked as a bridge operator for the State of Louisiana, Department of Transportation and Development, defendant. *LeMaire v. Louisiana*, 480 F.3d 383, 384 (5th Cir. 2007). Plaintiff’s supervisor made derogatory and sexually explicit comments to plaintiff
regarding the supervisor’s own sexual past and sexual activities. The supervisor told plaintiff that he would make it impossible for him to transfer, and the only way plaintiff could get away from him would be to quit. After those comments, the supervisor ordered plaintiff to spray herbicide on a large area of the park lawn. Plaintiff believed this order was in retaliation for his objections to the supervisor’s sexually explicit stories. Following this and other incidents, plaintiff complained to his department head regarding the supervisor’s behavior. Plaintiff was later accused, by the same supervisor, of falling asleep on the job. Defendant ultimately suspended and terminated plaintiff for falling asleep on the job, as well as walking off the job site and refusing to comply with his supervisor’s instructions. Plaintiff brought an action against defendant for sexual harassment and retaliation. The district court granted defendant’s motion for summary judgment on all counts. Plaintiff appealed.

Ogden: Defendant Wax Works, Inc. hired plaintiff to work as a sales manager for its newly opened music store. Ogden v. Wax Works, Inc., 214 F.3d 999, 1002-03 (8th Cir. 2000). During her employment, plaintiff reported directly to a district manager, who was responsible for supervising several other stores in that geographic region. Plaintiff alleged that her district manager sexually harassed and retaliated against her. She alleged that the manager propositioned her, invited her to his motel room, put his arms around her waist, and offered to stay at plaintiff’s home to “protect” her from her estranged husband. Id. at 1004. Plaintiff physically rebuffed his advances and consistently told the manager to leave her alone. The manager responded by mistreating plaintiff at work; he criticized her performance and routinely screamed at her in front of other employees after she refused to go out with him. Plaintiff also claimed that the manager conditioned her evaluation and her raise upon her willingness to submit to his advances. When she refused, the manager refused to give her the raise, even though plaintiff’s store consistently outperformed others in her region in sales. Following this incident, the district manager’s supervisor ordered him to immediately give plaintiff a raise. However, the district manager told plaintiff she could only get her raise if she accompanied him on a “three-day gambling spree.” Id. When plaintiff refused, the district manager berated her over a personnel matter and refused her request for vacation time. Plaintiff left defendant’s employment without her raise and filed suit for sexual harassment, retaliation and constructive discharge. The jury returned a verdict in plaintiff’s favor on all claims. Defendant appealed arguing that plaintiff did not present sufficient evidence to support her claims.
III. Positions of the Parties

*LeMaire*: Plaintiff argued that he was engaged in protected activity by objecting to his supervisor’s sexual harassment, because his employer had an affirmative duty to provide its employees a harassment free work environment. Pl. Opp. To Def. Mot. for Summary Judgment, 8-9. Plaintiff contended that he suffered an adverse employment action and was retaliated against when he objected to the offensive behavior because his supervisor assigned him the worst shifts, ordered him to do jobs outside his job description, and ultimately falsely accused him of sleeping on duty which led to his termination. Plaintiff argued that there was a causal connection between his objections to the sexual harassment and the assignment of unpleasant duties and termination.

Defendant argued that plaintiff failed to establish a prima facie case of retaliation because he failed to allege that he participated in protected activity. Rather, defendant claimed plaintiff merely complained about unjust treatment when his supervisor asked him to spray herbicides and about being documented for refusing to perform assigned work. Def. Mem. in Support of Def. Mot. for Summary Judgment, 11. Defendant argued that plaintiff’s termination resulted from the culmination of various infractions including sleeping on the job, refusing to engage in assigned work tasks. *LeMaire v. Louisiana*, 480 F.3d 383, 391 (5th Cir. 2007).

*Ogden*: Plaintiff argued that she had presented adequate evidence of retaliation because she engaged in protected activity when she told her supervisor to stop his offensive and sexually harassing conduct. Defendant argued that plaintiff’s retaliation claim should fail because rebuffing a supervisor’s sexual advances could not constitute “protected activity” for purposes of a retaliation theory.

IV. Summary of Decisions

*LeMaire*: The Fifth Circuit agreed with the district court concerning plaintiff’s retaliation claim. The circuit court noted that because the retaliatory act in requesting to spray herbicide occurred before plaintiff complained about his supervisor’s sexual advances, the only protected activity plaintiff could have engaged in was rejection of those advances. *Id.* at 389. However, the court held there is no authority for the proposition that rejection of sexual advances constitutes protected activity for purposes of a retaliation claim under Title VII.

As to plaintiff’s suspension and termination, the circuit court found that defendant asserted a legitimate, non-retaliatory reason for taking both actions. *Id.* at 390-91. However, the
court reversed the grant of summary judgment, finding issues of material fact regarding both claims because they occurred after plaintiff lodged a complaint about his supervisor’s sexual harassment rather than just rebuffing his advances.

Ogden: The Eighth Circuit affirmed the jury verdict, finding that plaintiff engaged in protected activity when she rebuffed her supervisor’s advances. The Eighth Circuit held that plaintiff “engaged in the most basic form of protected activity” when she told the district manager, her supervisor, to stop his offensive conduct. The court noted that employers “may not retaliate against employees who oppose discriminatory conduct.” Id. Furthermore, because plaintiff’s testimony demonstrated that her supervisor denied her a raise as a result of her opposition to his advances, the court found the jury reasonably concluded that plaintiff’s rejection of the district manager’s sexual advances was sufficient to constitute protected activity for purposes of her retaliation claim. The employer claimed that plaintiff had not availed herself of the opportunity to use its internal complaint procedure. The court noted that such a defense is not available when a tangible employment action has occurred, and in any event, the jury rejected the employer’s testimony about the adequacy of the investigation and the follow-up remedial action.

C. Issue: Does the McDonnell Douglas Framework Apply to Mixed Motive Cases?

Paul W. Mollica, Outten & Golden LLP, Chicago

Two terms ago, the Supreme Court reaffirmed that “a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in McDonnell Douglas.” Young v. United Parcel Service, Inc., 135 S. Ct. 1338 (2015). (Under Title VII, as amended by the 1991 Civil Rights Act, the Supreme Court rejected the view that “direct evidence” of discrimination is required in mixed-motive cases. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003), so the reference to “direct evidence” is obscure.) In that case, the Court took no occasion to consider the recurring question of whether the McDonnell Douglas framework applies where the case involves a so-called “mixed-motives” claim, such as under Title VII § 703(m), Uniformed Services Employment and Reemployment Rights Act (“USSERA”) § 4311(c), or Equal Protection under Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). This issue remains unsettled and courts are divided on the right approach.
The U.S. Courts of Appeals have mostly held that *McDonnell Douglas* does not apply, though they use different formulas to recast the traditional burden-shifting test. One circuit, the Eighth, continues to apply *McDonnell Douglas* regardless of the type of claim advanced.

The most recent discussion was in *Quigg v. Thomas County School Dist.*, 814 F.3d 1227 (11th Cir. 2016). That case, under Title VII and § 1983, concerned an Assistant Superintendent of the School District who alleged she was terminated after school board members allegedly told her that her position required a tough “hatchet man” to address school policy implementation, admitted they wanted a “guy” who could be sent to individual schools to “handle things,” and made other references to needing a man in the position. The panel held that *McDonnell Douglas* “is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, ‘true reason’ for an adverse action.” *Id.* at 1237 (*citing Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). The “pretext” framework requires an employee to prove that the “true reason” for an adverse action was illegal. “In other words, an employee can only meet her burden under *McDonnell Douglas* by showing the employer’s purported legitimate reasons ‘never motivated the employer in its employment decisions or because [the reasons] did not do so in a particular case.’” *Id.* at 1237-38 (*quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (O’Connor, J., concurring). Under *McDonnell Douglas*, if an employee cannot rebut an employer’s proffered reasons for an adverse action, despite having evidence that the employer relied on a forbidden consideration, she fails her burden. This is contrary to the mixed-motive framework applicable to Title VII and § 1983. “In light of this clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims, it is improper to use that framework to evaluate such claims at summary judgment.” *Id.* at 1238.

*Quigg* adopted, as its model, the Sixth Circuit’s decision in *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008). In *White*, a Title VII case, the Sixth Circuit considered for the first time “the appropriate summary judgment framework to apply to mixed-motive claims.” *Id.* at 396. The court concluded that the *McDonnell Douglas* method-of-proof is compatible only with a single-motive framework—its burden-shifting steps are designed to narrow the possible reasons for an adverse employment action, with the goal of identifying whether discriminatory animus was “the ultimate reason” for the action. *Id.* at 400–01 (*citing Burdine*, 450 U.S. at 256). The court then found that “this elimination of possible legitimate reasons . . . is not needed when assessing whether trial is warranted in mixed-motive cases. . . [because] a plaintiff can win [a
mixed-motive case] simply by showing that the defendant's consideration of a protected characteristic was a motivating factor.” *Id.* at 401 (internal quotation mark omitted). Based on this finding, the court rejected *McDonnell Douglas* in favor of a new mixed-motive framework. *Id.* at 400–01. Under the framework set adopted in *White*, “Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) ‘race, color, religion, sex, or national origin was a motivating factor’ for the defendant’s adverse employment action” *Id.*

The Fifth Circuit has likewise adopted formal, modified standards to evaluate mixed-motive cases that builds on, but deviates from, the *McDonnell Douglas* framework. See *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir.2004) (adopting a “modified *McDonnell Douglas* approach” for mixed-motive cases, where in the third step “the plaintiff must then offer sufficient evidence to create a genuine issue of material fact ‘either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff's protected characteristic (mixed-motive[s] alternative)’”) (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)). Accord *EEOC v. LHC Group, Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (quoting *Rachid*).

Other Circuits, while declaring generally that plaintiffs need not establish pretext under the *McDonnell Douglas* framework in a mixed-motive case, have not formalized an alternative test. See *Burns v. Johnson*, 829 F.3d 1, 11 n.10 (1st Cir. 2016) (“this circuit has not required a plaintiff to use *McDonnell Douglas* with the mixed-motives theory”); *Holcomb v. Iona Coll.*, 521 F.3d 130, 141–42 (2d Cir. 2008) (“a plaintiff who, like Holcomb, claims that the employer acted with mixed motives is not required to prove that the employer’s stated reason was a pretext”); *Connelly v. Lane Const. Corp.*, 809 F.3d 780 (3d Cir. 2016) (“in a ‘mixed-motive’ case, the plaintiff must ultimately prove that her protected status was a ‘motivating’ factor, whereas in a non-mixed-motive or ‘pretext’ case, the plaintiff must ultimately prove that her status was a ‘determinative’ factor”); *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (“A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision”) (citing *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 284 (4th Cir. 2004)}
Hossack v. Floor Covering Assocs. of Joliet, Inc., 492 F.3d 853, 860 (7th Cir. 2007) (recognizing two separate theories) (but see Ortiz v. Werner Enterprises, Inc., 834 F.3d 760, 765 (7th Cir 2016) (suggesting just one standard for causation: “whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action”)); Fye v. Okla. Corp. Comm’n, 516 F.3d 1217, 1225 (10th Cir. 2008) (plaintiff may either “establish that retaliation played a motivating part in the employment decision at issue,” or else “rely on the familiar three-part McDonnell Douglas framework to prove that the employer's proffered reason for its decision is a pretext for retaliation”); Ponce v. Billington, 679 F.3d 840, 844 (D.C. Cir. 2007) (recognizing two separate theories).

The Ninth Circuit primarily treats “mixed-motives” as a defense rather than a standard of causation and thus has not declared a separate causation standard in a published opinion. Metoyer v. Chassman, 504 F.3d 919, 932-34 (9th Cir. 2007).

The Eighth Circuit alone holds that the McDonnell Douglas approach applies regardless of the nature of the claim. See Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); but see id. at 739–48 (Magnuson, J., concurring specially) (disagreeing with majority that the “McDonnell Douglas paradigm” is appropriate for evaluating mixed-motive claims). See also Massey–Diez v. University of Iowa Community Medical Services Inc., 826 F.3d 1149, 1161 (8th Cir. 2016) (to avoid McDonnell Douglas, plaintiff must produce “blatant” evidence of bias).

D. Issue: Does an Employee Need to File New EEOC Charges of Post-Charge Retaliation?

Paul W. Mollica, Outten & Golden LLP, Chicago

In National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the Supreme Court divided the world of Title VII (and other chargeable claims) into “discrete” retaliatory or discriminatory acts, which “occur” for purposes of charge filing requirement of Title VII on the date it happens, and hostile work environment claims that are continuing. For discrete acts under Morgan, “[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice,’” and must be the subject of a separate (or amended) charge. Courts have since split on whether this applies to post-charge or post-complaint acts of retaliation. The Eighth and Tenth Circuits say “yes.” Richter v. Advance Auto Parts, 686 F.3d 847, 851-53 (8th Cir. 2012) (“[w]e recognize that Morgan concerned
discrete acts of an employer that occurred prior to the filing of an EEOC charge, rather than
discrete acts of an employer that occurred thereafter, but the meaning of the phrase ‘unlawful
employment practice’ does not vary based on the timing of the alleged unlawful acts”);
*McDonald-Cuba v. Santa Fe Protective Services, Inc.*, 644 F.3d 1096, 1100-01 (10th Cir. 2011)
(“that the firing was a ‘discrete and independent action[ ]’ that should have been exhausted, even
though it ‘occurred after the filing of the judicial complaint’”) (citation omitted). Other circuits
say “no,” adhering to the long-observed principle that post-charge retaliation is “like or
reasonably related” to the originally-filed EEOC allegations are covered by the original charge.
*Swearnigen-El v. Cook County Sheriff’s Dep’t*, 602 F.3d 852, 864 n.9 (7th Cir. 2010)
(“Swearnigen does not contend that the alleged retaliation arose after his EEOC charge had been
filed, which would not require exhaustion”); *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 303 (4th
Cir. 2009) (result not affected by *Morgan*, because that case only addresses the issue of when
limitations clock for filing EEOC charge begins ticking with regard to discrete unlawful
employment practices); *Franceschi v. U.S. Dep’t of Veterans Affairs*, 514 F.3d 81, 86-87 (1st Cir.
2008) (“the retaliation claim survives what would otherwise be a failure to exhaust
administrative remedies by virtue of its close relation to and origins in the other Title VII
discrimination claims”); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (applying exception
to charge-filing where the complaint is “one alleging retaliation by an employer against an
employee for filing an EEOC charge”). *See also Arizona ex rel. Horne v. Geo Group, Inc.*, 816
F.3d 1189, 1206 n.11 (9th Cir. 2016) (noting conflict on issue, but not deciding it).

E. **Issue: Does the ADA Require an Employer, as a Reasonable Accommodation, to Give an Employee Preference for a Position when He Can Perform Job Duties but Is Not the Best Qualified?**

Barbara B. Brown and Jane M. Brittan, Paul Hastings LLP, Washington, DC

I. **Question Presented**

The Americans with Disabilities Act (“ADA”) requires employers to provide disabled
employees with reasonable accommodation to perform the essential functions of their jobs. The
ADA states the scope of reasonable accommodation may include: “job restructuring, part-time or
modified work schedules, reassignment to a vacant position, acquisition or modification of
equipment or devices, appropriate adjustment or modifications of examinations, training
materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. §12111(9)(B).

The question presented that caused or contributed to the circuit split is:

Whether the ADA requires an employer, as a reasonable accommodation, to give a current disabled employee preference in filling a vacant position when the employee is able to perform the job duties, but is not the most qualified candidate.

The Eighth Circuit concluded an employer is not required to give a disabled employee a vacant position as an accommodation if he or she is not the best qualified candidate in Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).

The Tenth Circuit concluded that an employer must give a disabled employee a vacant position as an accommodation even if he or she is not the best qualified candidate in Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

II. History of the Cases

Huber: Defendant established a policy to fill vacant job positions with the most qualified applicant. Huber v. Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 40251, No. 04-2145 (W.D. Ark. Dec. 7, 2005) at 2. Plaintiff claimed discrimination under the Americans with Disabilities Act (“ADA”). The parties agreed plaintiff had a covered disability when she sustained a permanent injury to her right arm and could no longer work as a grocery order filler. Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007) at 482. Because of her disability, plaintiff sought reassignment to a “router” position as a reasonable accommodation. Defendant did not agree to reassign plaintiff automatically to the router position. Instead, pursuant to its policy to hire the most qualified applicant, defendant required plaintiff to apply and compete for the router position with other applicants. Ultimately, defendant did not assign plaintiff to the position because she was not the most qualified applicant. The parties stipulated that the individual hired for the router position was the most qualified applicant. Huber v. Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 40251, No. 04-2145 (W.D. Ark. Dec. 7, 2005) at 3. After losing the router position, plaintiff was reassigned to another facility working as a maintenance associate for lower wages. Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007) at 482. Plaintiff filed suit under the ADA arguing she should have been reassigned to the router position as a reasonable accommodation for her disability. Defendant filed a motion for summary judgment, contending it had a legitimate non-discriminatory policy of hiring the most qualified applicant.
for all job vacancies and was not required to reassign Huber to the router position. Plaintiff filed a cross-motion for summary judgment and the district court granted plaintiff’s motion. Defendant appealed.

Smith: Plaintiff performed light assembly work for defendant. In his work, plaintiff came into contact with various chemicals and developed muscular injuries and dermatitis that eventually developed into a permanent disability. Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) at 1160. Eventually, defendant terminated plaintiff due to its inability to accommodate his skin sensitivity. Plaintiff sued under the Americans with Disabilities Act (“ADA”) claiming defendant failed to reassign him, as a reasonable accommodation, to one of the numerous job openings at Midland Brake. The district court granted summary judgment for defendant, finding that plaintiff was not a “qualified individual with a disability” and therefore was not afforded the protections of the ADA. Plaintiff appealed.

After an adverse panel decision, plaintiff petitioned for hearing en banc. The court agreed to rehear plaintiff’s ADA claim “on the issue of interpretation of the requirements of the Americans with Disabilities Act.” Id.

III. Positions of the Parties

Huber: Plaintiff argued that defendant, as a reasonable accommodation, should have automatically reassigned her to the vacant router position without requiring her to compete with other applicants for the position because under the ADA, reasonable accommodation includes “reassignment to a vacant position.” Id. at 482. Defendant argued that automatic reassignment to the position was not required under the ADA as a reasonable accommodation. Defendant noted that it had a non-discriminatory policy to hire the most qualified applicant for all job vacancies; plaintiff was in the pool of applicants; and even though she was qualified with or without an accommodation to perform the duties of the router position, she was not the most qualified candidate. Defendant argued that the ADA did not require it to reject superior applicants or violate its legitimate, non-discriminatory policy. See Huber v. Wal-Mart Stores, Inc., No. 04-2145, 2005 U.S. Dist. LEXIS 40251 (W. D. Ark. Dec. 7, 2005) at 1, 8.

Smith: Plaintiff argued that under the ADA, as a reasonable accommodation, defendant was required to reassign him to another position in the company outside of the light assembly department. See Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998) (panel decision) at 1308. Plaintiff did not contest that he was no longer qualified for his old job, did not seek
reinstatement to his former position. However, based on the language of the ADA, plaintiff argued that reassignment to a new position was necessary to provide him a reasonable accommodation.

Defendant argued that plaintiff could not meet the definition of “qualified individual with a disability” because he could not perform the essential functions of his existing job in the light assembly department regardless of the level of accommodation offered or provided. 180 F.3d 1154, 1161. Additionally, defendant argued that the term “reassignment” in the definition of “reasonable accommodation” in § 12111(9) must refer only to job applicants and not existing employees. Id.

IV. Summary of Decisions

*Huber:* The Eighth Circuit reversed the lower court ruling, finding that the ADA did not require the defendant to turn down a superior applicant for the router position in order to give the position to plaintiff to accommodate her disability. 486 F.3d 480, 483. The circuit court also found that the employer did not violate its duty under the ADA to provide a reasonable accommodation. The court held that defendant reasonably accommodated the plaintiff’s disability by placing the plaintiff in a maintenance associate position; while it may not have been a perfect substitute job or plaintiff’s most preferred alternative, the employer was not required to provide the disabled plaintiff with an accommodation that was ideal from the plaintiff’s perspective. The court noted that the ADA “is not an affirmative action statute” and does not require an employer to reassign a disabled employee to a position in violation of the employer’s legitimate non-discriminatory policy to hire the most qualified applicant. Plaintiff was “treated exactly as all other candidates were treated for the Wal-Mart job opening, no worse and no better.” Id. at 484.

Plaintiff’s petition for writ of certiorari was initially granted but later dismissed.

*Smith:* The Tenth Circuit reversed, concluding that even though plaintiff was unable to perform the essential functions of his existing job, that fact did not preclude his ADA claim for accommodation in the form of reassignment. The circuit court noted that under the ADA, a qualified individual with a disability is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Id. The court found that although a “qualified individual with a disability” has to be someone who can perform the essential functions of a job, that inquiry is
not limited to the employee’s existing job. The plain language includes an employee who has the ability to do other jobs within the company that such disabled employee “desires.” *Id.* at 1161.

The court rejected defendant’s argument that the term “reassignment” only applied to job applicants, and not existing employees because in §12111(9), “reassignment” is listed as one of the available reasonable accommodations in “the middle of a laundry-list of reasonable accommodations which clearly apply to existing employees.” Additionally, the prefix “re” in “reassignment” implies the presence of an existing assignment, or already existing employment.

Additionally, relying on the Equal Employment Opportunity Commission guidance, other decisions, and the plain language, the Tenth Circuit concluded that if no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation requirement may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden to reassign him or her. Anything more, such as requiring the reassigned employee to “apply” for the position and be considered with all the other applicants, or to be the best qualified employee for the vacant job, is “judicial gloss” which is not warranted by the statutory language and its legislative history. *Id.* at 1169.