ATTACHMENT B
MANAGEMENT RIGHTS' CREATED BY THE U.S. SUPREME-COURT DECISIONS:
AN ANALYSIS OF RIGHTS CREATED BY CASE LAW AND RECOMMENDATIONS FOR
EMPLOYERS INTERESTED IN THEIR UTILIZATION IN WAGE AND HOUR, DISABILITY,
LABOR, EMPLOYMENT, AND, ALSO, WORKPLACE SAFETY AND ENVIRONMENTAL
LEGAL MATTERS TO MINIMIZE OR PRECLUDE CLAIMS AND CHARGES

(The Federal Common Law of the Workplace in 2012)

by

Joseph Z. Fleming, Esq.¹
Greenberg Traurig, P.A.
333 Avenue of the Americas
Miami, Florida 33131
T. (305) 579-0517
F. (305) 961-5517
Email: flemingj@gtlaw.com

Woody Allen in his "Prayer for the Graduates" stated the following:

"There are two paths before you. One path leads to despair and
utter hopelessness. The other path leads to total destruction. I pray
you choose wisely."

Most employers will be faced with the type of paths which Woody Allen described, when
they try to comply with wage and hour, disability, labor, employment and also workplace safety
and environmental matters. This is increasingly the dilemma if an employer achieves work force
diversity and, then, tries to comply with various applicable laws. Employers may encounter the
following types of issues:

1. Under the First Amendment, applicants have the right to their beliefs and freedom
of speech. Employers are not permitted to question applicants and avoid hiring, based upon
concerns that certain individuals will not work well with others, due to varying beliefs or
backgrounds, even if the applicants may state beliefs that might be regarded as unwelcome to

¹The views expressed are solely those of the author and should not be attributed to the author’s firm or its clients.
others in the workforce. Hiring laws not only protect an individual from discrimination on account of minority status and other statutory protections but, also, because of beliefs.

2. Achieving a diverse workforce is increasingly synonymous with achieving conflicting beliefs and interests in the workforce. We know this from elections. We also know this from cases which involve white males now over 40, who started working before any of the significant employment laws were passed and maintain that they are entitled to retain their positions and not be moved to create opportunities for minorities and females. If you were 20 in 1964 when Title VII of the Civil Rights Act was enacted, you would now be 68. As Woody Allen said, “I reached 60; nearly a third of my life is over.” Even if you were not as optimistic as Woody, you probably could not afford to retire if your house and your savings values were diminished. You may not want to leave the workplace. Simultaneously, to compound difficulties, there may be potential class actions, because of the failure to advance minorities and females, or needs to lay off and reduce forces which impact on the last in, which often includes minorities and females. Ironically, there may be a form of employment opportunity "gridlock" created by the various and conflicting employment laws.

3. The workplace laws and regulations are increasing. We have laws on our books that are not, yet, fully understood. The Sarbanes-Oxley Act and the Dodd-Frank Act\(^2\) and ever-increasing federal and state statutes and case law may open up new areas for "whistle blowing" and “anti-retaliation” protected conduct. The results may mean that if an individual does not have a discrimination claim (either because of direct discrimination, reverse discrimination, or some other protected category) an individual may be able to maintain that they were aware of, and complained about, a certain type of conduct, or that there were certain types of materials that

were provided to a governmental agency in an investigation that might not have been accurate. There are even financial incentives for employees who do not "blow the whistle" until after their employment ends.

4. There are new requirements to avoid invasions of privacy of employees accompanied by legal requirements to monitor employees’ electronic communications. The FTC precludes certain background checks which do not comply with the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., while also making employers responsible for their employees’ private communications on, for example, Facebook and other “social media”:

Employers May Be Liable for Online Conduct By Employees Under FTC Endorsement Rules:

Federal guidelines designed to protect consumers from deceptive endorsements and advertising may pose liability issues for employers whose employees use social media such as blogs or Facebook to comment on their employer’s products or services, even if the comments are not authorized by or sponsored by the company, attorneys told BNA....The newly revised FTC guidelines on endorsements and testimonials in advertising, codified at 16 C.F.R. § 255, impose liability on endorsers and companies for failure to make required disclosures about ‘material connections,’ such as payments or employment relationships, that exist between endorsers and the companies about whom they comment....The guidelines apply to endorsements made using ‘new media’ such as blogs and social networking sites, and FTC enforcement actions could be brought against a company whose employees comment on company products or services without disclosing the employment relationship, Anthony E. DiResta, a partner with Manatt, Phelps & Phillips in Washington, D.C., and a former FTC regional director, told BNA Dec. 22.

Daily Labor Report, BNA 247 DLR C-1.

Most employees come to work, perform their jobs, and do so, with admirable skills and do not create problems. The difficulty that any employer has, is that it is possible to encounter individuals who create problems. H.L. Mencken once said that: "It is a sin to think badly of others, but it is never a mistake." Assuming that an employer never thinks badly of the programs as well as new regulatory and enforcement processes.
employees and assuming further they are always perfect, and that an employer never hires applicants who will misuse the laws, the employer may, still hire management representatives who make mistakes (even if the employer's rank and file do not make any errors). Assuming further that managers also do not intend to make errors (and assuming even further that management is made up of the same type of group of individuals as the employees, who never make mistakes because they are paying attention at all times to all applicable laws), it is still possible to be in a situation in which the workplace laws conflict.

For example, the need to protect the employer's, or stockholders', interests and the need to provide a safe workplace may require exclusion of employees from the workplace, because they may not be able to do the job without risks to themselves, or others, including employer. However exclusion from a job—albeit for an ostensibly legitimate purpose—may still cause litigation. The United States Supreme Court resolved one case in which an employer excluded an individual, who might be prone to be injured, or to be a risk to others, in a certain type of a job from working in such a job. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 79, 122 S.Ct. 2045, 153 L.Ed. 2d 82 (2002) ("*Chevron*"). However, until *Chevron* was decided by the Supreme Court, there was a concern that claims of individuals that they had disability, or special protected status, might entitle them to the job and to the opportunity to work in the job (even if they were a danger to themselves and, possibly, to others). If the Supreme Court had ruled, as the plaintiff in *Chevron* requested, it could have exposed the employer to liabilities and dangers to the employee and others. The employee lost, because the Supreme Court found that the employer could protect the employee, and others, from an injury by exclusion from a dangerous job, since there was sufficient evidence to justify such concerns. Employers in such a situation may seek to comply with all the laws, but they still have to make the decision to risk litigation as
to whether the appropriate circumstances justify excluding an employee from a position. If the employer has made a mistake, which is later shown by discovery and the type of retro-active evaluation that cannot take place when the management is making such decisions on a daily basis, then the exclusion of an individual can possibly result in an adverse ruling.

Because of such conflicts, there are going to be workplace problems caused by diversity, different interests, and the need to make decisions. Free speech and a number of other factors prevent prophylactic precautions that absolutely eliminate the potential for any problems. Audits and proactive compliance programs may assist in minimizing problems; but, they will not preclude disputes.

The question is whether an employer can utilize any type of standards, or systems, that may enable corrections, or selection processes, or alternative dispute resolution systems, that may be available for employers. As this article contends, analysis of decisions demonstrate that the United States Supreme Court is interested in establishing such standards and systems, and what are referenced to here as "management rights" for employers. These "management rights", in many respects, borrow from those traditionally found in collective bargaining agreements created under labor laws.

There may be a suspicion that the Supreme Court of the United States is acting solely on the basis of conservative positions, policies or inclinations. As shown in the analysis provided here, however, while conservative Justices may be interested in protecting employers, the

---

3 Cf. Tony Mauro, “Maybe Roberts Court is not so pro-business after all,” Daily Business Review, Thursday, March 24, 2011, page A4 ("Mauro Article"), discussing "a pair of business cases" in which the U.S. Supreme Court “by lopsided majorities” ruled in favor of an employee in a wage hour dispute and in favor of plaintiffs in a securities case; corporations lost in both cases. See, e.g., for the cases: Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834 (March 22, 2011) (ruling the scope of the statutory term “filed any complaint” under Fair Labor Standards Act includes oral as well as written complaints); and Matrix Initiatives, et al. v. Siracusa, No. 09-1156 (March 22, 2011) (finding a complaint’s allegations suffice to have “raised reasonable expectation that discovery will reveal evidence,” satisfying the Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 materiality requirement—broadening Twombly, supra, pleading requirements).
Supreme Court rulings which have created what will be referred to here as "management rights," that can be exercised to resolve problems, are not based upon a conservative or a liberal approach. To the contrary, they appear to be based upon concerns that courts are increasing resolving employment decisions which make them seem to appear to be "super personnel" tribunals. Such employment cases involve credibility issues, which are frequently like domestic relations cases—in that there are factual claims by various sides and credibility issues. Employment laws can often establish situations in which, especially in sexual harassment cases, there must be an analysis of very personal types of events. Courts, including the Supreme Court, have become interested in finding better systems to utilize to resolve such suits while, also, protecting rights of employees.4

The best way to appreciate that it is not just the conservatives but, also, the liberal Justices as well who have created such "management rights" to resolve issues, is to evaluate the decision of the United States Supreme Court in Gebser and McCullough v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998) (which precluded litigation under a federal statute alleging sex discrimination against the Lago Vista School District, hereafter "Lago"). According to the allegations of the complaint, a teacher misused his role in order to engage in sex with a student. The questions presented was whether the school district could be sued due to the teacher's improper conduct. The majority of the Supreme Court found that the provisions of Title IX of the Civil Rights Act did not authorize such litigation.

Two important dissents in Lago were written by "liberal" Supreme Court Justices who argued for access to the Courts, and a more liberal interpretation of the prohibitions of the federal law involved. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concluded in the

4 See, e.g., Joseph Z. Fleming, "Just Like Umpires: Why Chief Justice Roberts Correctly Relied on Baseball to Describe the Supreme Court of the United States," 5 Albany Government L. Rev. 286 (Issue 1, 2012), discussing
first dissent that there should be a "... 'judicially implied'" private cause of action and a remedial scheme; and, they stated:

As long as the intent of Congress is clear, an implicit command has the same legal force as one that is explicit. The fact that a statute does not authorize a particular remedy in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under [the statute]." Deckert v. Independence Shares Corp., 311 U.S. 282, 288, 85 L.Ed. 189, 61 S. Ct. 229 (1940). Gebser, supra.

Justice Ginsberg, along with Justice Souter and Justice Breyer, wrote a second even more important dissent establishing and explaining a proposed "affirmative defense." They argued a remedy and right to sue should be permitted; and, to offset concerns about liability risks, there could be a "complaint system" which would have to be exhausted—and it would be an affirmative defense if not exhausted. They stated:

JUSTICE STEVENS' opinion focuses on the standard of school district liability for teacher-on-student harassment in secondary schools. I join that opinion, which reserves the question whether a district should be relieved from damages liability if it has in place, and effectively publicizes and enforces, a policy to curtail and redress injuries caused by sexual harassment. Ante, at 13. I think it appropriate to answer that question for these reasons: (1) the dimensions of a claim are determined not only by the plaintiffs' allegations, but by the allowable defenses; (2) this Court's pathmarkers are needed to afford guidance to lower courts and school officials responsible for the implementation of Title IX.

In line with the tort law doctrine of avoidable consequences, (see generally) C. McCormick, Law of Damages 127-159 (1935), I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct. School districts subject to Title IX's governance have been instructed by the Secretary Education to install procedures for "prompt and equitable resolution" of complaints, 34 CFR § 106.8(b)(1997), and the Department of Education's Office of Civil Rights has detailed elements of an effective grievance process, with specific reference to sexual harassment, 62 Fed. Reg. 12034, 12044-12045 (1997).
The burden would be the school district's to show that its internal remedies were adequately publicized and likely would have provided redress without exposing the complainant to undue risk, effort, or expense. Under such a regime, to the extent that a plaintiff unreasonably failed to avail herself of the school district's preventive and remedial measures, and consequently suffered avoidable harm, she would not qualify for Title IX relief (emphasis added). *Id.*

This second dissent in *Lago* was very important; since the liberal Justices (arguing for a broader interpretation than the majority ruled to be appropriate) tried to add to the statutory provisions (as they would have expanded them to imply a private right to sue) an implied defense process, that initially did not involve the courts. There was no statutory basis, according to the majority, for the expanded interpretation of the statute and, therefore, no jurisdiction. However, in addition to implying (and arguing for) such jurisdiction, the minority Justices, in their dissent in *Lago*, contended that a mechanism that appeared to be made out of whole cloth should be tailored for dealing with, and resolving, such matters. The dissenting Justices in *Lago* essentially argued for a mechanism for not only affirmative defenses (under their interpretation of the expanded jurisdiction) but, also, for a framework that could be used to preclude such litigation (even though that framework was not in the statute). This was most unusual. It appeared to be a tradeoff. In return for expanding the jurisdiction of the law and permitting suits (to prohibit such conduct by teachers, with authority conferred upon them by their employers), the dissenting liberal Justices in *Lago* proposed creating a type of defense mechanism that could be used by employers; and, that was not provided in the Act.

The foregoing analysis involved an attempt of liberal Justices in *Lago* to expand the rights of individuals to sue based on the proposition that the school systems would not go bust across America, if the law required a preliminary informal complaint process with an opportunity for the school system management to correct the issue. That could enable evaluation and
immediate correction by the management of the school systems; and, if the individual did not exhaust that remedy, which could possibly cause a resolution and moot the matter, the individual could be barred by an affirmative defense (of failure to exhaust remedies). This was not adopted by the Supreme Court in *Lago*, because the conservative Justices did not want to open up that area for litigation, even if it might have a failsafe system for complaints and affirmative defenses. However, the reality is that it was the liberal Justices in *Lago* who were pushing for a type of complaint system, as an affirmative defense mechanism. This was intended as a judicially made attempt to correct a statutory problem.

Ironically, later in the same week, the Supreme Court decided two additional cases—now quite familiar to most labor and employment attorneys—which expanded the employer responsibility for sexual harassment in the workplace (discussed below in more detail) and utilized the affirmative defense process first announced in *Lago*. The *Lago* decision, as noted, was the first to announce a process that could be available as a mechanism to stop employees from suing for sexual harassment without limiting the type of prohibited sexual harassment. The two subsequent cases in which the minority proposal of a complaint system defense in *Lago* became the majority were narrower. The resulting discussions prohibited suits when employees were not disciplined, or terminated, but might, in the absence of these newly created affirmative defenses, be able to argue that they had been subjected to unwelcome sexual harassment and, as a result, a hostile workplace environment. The Supreme Court noted that these types of divisions, between cases where improper threats are carried out and those cases in which there is a hostile work environment, have been helpful in making "rough demarcation between cases in which threats are carried out and those where they are not, or are absent all together, but beyond this are of limited utility." These distinctions are judicially made and, while the Supreme Court initially
indicated that they were "of limited utility," as noted below, the Supreme Court has applied
distinctions to qualify, and has also expanded, this defense in cases decided subsequent to Lago.

Liberal Justices, who did not prevail in Lago (a case interpreting Title IX), now were
participating in the majority opinions, and restating the concept first articulated in Lago, in cases
involving a public employer and a private employer under Title VII as follows:

1. In the first case, *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275
(1998) the Court concluded:

[1]n order to accommodate the agency principle of vicarious
liability for harm caused by misuse of supervisory authority, as
well as Title VII's equally basic policies of encouraging
forethought by employers and saving action by objecting
employees, [w]e adopt the following holding in this case and in
*Burlington Industries, Inc. v. Ellerth*, also decided today. An
employer is subject to vicarious liability to a victimized employee
for an actionable hostile environment created by a supervisor with
immediate (or successively higher authority over the employee.
When no tangible employment action is taken, a defending
employer may raise an affirmative defense to liability or damages,
subject to proof by a preponderance of the evidence, See Fed.
Rule. Civ. Proc. 8(e). The defense comprises two necessary
elements: (a) that the employer exercised reasonable care to
prevent and correct promptly any sexually harassing behavior, and
(b) that the plaintiff employee unreasonably failed to take
advantage of any preventive or corrective opportunities provided
by the employer or to avoid harm otherwise. While proof that an
employer had promulgated an anti-harassment policy with a
complaint procedure is not necessary in every instance as a matter
of law, the need for a stated policy suitable to the employment
circumstances may appropriately be addressed in any case when
litigating the first element of the defense. And while proof that an
employee failed to fulfill the corresponding obligation of
reasonable care to avoid harm is not limited to showing an
unreasonable failure to use any complaint procedure provided by
the employer, a demonstration of such failure will normally suffice
to satisfy the employer's burden under the second element of the
defense. No affirmative defense is available, however, when the
supervisor's harassment culminates in a tangible employment
action, [such as discharge, demotion, or undesirable reassignment.]
2. In the second case, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998) the Court stated:

[In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt] in this case and in *Faragher v. Boca Raton*, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, [such as discharge, demotion, or undesirable reassignment.] *(Emphasis added)*

The foregoing is an amazing evaluation and result; because the provisions of the Civil Rights Act, which were in effect and did allow claims were, suddenly, subjected to an affirmative defense which was not in the Civil Rights Act. There is no provision in the Civil Rights Act that establishes a mechanism by which an employee has an opportunity and, also, an obligation to complain to the employer. There is no provision that states that if such a complaint
is not submitted by the claimant in a sexual harassment case, then the complaint may be barred due to an affirmative defense.

Nevertheless, the Supreme Court created out of, as they like to say in law schools, "whole cloth" a mechanism, which seems to be an affirmative defense that comes from the Federal Rules of Civil Procedure. However, the Federal Rules of Civil Procedure do not reverse congressional acts. Yet, in these two cases—Faragher v. City of Boca Raton and Burlington Industries Inc. v. Ellerth—as demonstrated above, the Supreme Court created a mechanism that bars the statutory claim. An individual can allege sexual harassment; but, under what is now known as the Faragher-Ellerth defense, if the individual failed to complain and use a system that was available, that may be an affirmative defense.

The Faragher-Ellerth defense was expanded: it was used in a promotion case—Kolstad v. American Dental Association, 527 U.S. 526 (1999)—and in a constructive termination case—Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). Although the Supreme Court has not yet concluded that the Faragher-Ellerth defense is available when there is a tangible employment action (such as a discharged demotion, or undesirable reassignment), the reality is the courts are establishing ways to expand the application and use of the Faragher-Ellerth defense as is discussed below in more detail. In addition, our system of regulatory interpretation by the judiciary is carving out exceptions.

And there are more such systems and defenses for employers, if management establishes the appropriate factual and legal explanations. These are, or should be, considered as judicially created "management rights." Illustrations are listed below and include the following:

---
5 Discussed infra in the Management Rights Itemization List.
6 Discussed infra in the Management Rights Itemization List.
1. The concept of “mooting” a matter – A classic example of the ability to moot a claim and also eliminate attorneys’ fees, by actually changing a process (so that whatever the plaintiff had sought was immediately in effect), occurred in an Americans With Disabilities Act case in Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001). This concept and variations of it may be available in more than just disabilities cases. A good example was Goss et al. v. Killian Oaks House of Learning, etc. 248 F. Supp. 2d 1162 (S.D. Fla. 2003). In Goss, a wage and hour claim of plaintiff was immediately responded to by an offer of the amount and reasonable fees. The plaintiff’s attorney chose to ignore the offer, and proceeded with litigation. The court considered that in the denial of relief to the plaintiff for fees, and in rulings on other issues that were adverse to the plaintiff. While the Goss decision did not turn on Buckhannon, it reached a similar result, by a variation. The Court, in Goss, supra. at 1167, refused to apply Buckhannon since:

[4][5] In Buckhannon, the Court stated that in order to have “finally prevailed,” a party must have obtained either a judgment on the merits or reached a settlement agreement that was enforced through a consent decree. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Department of Health and Human Resources, 532 U.S. 598, 607, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001). A prevailing party, however, does not exist “because the lawsuit brought about a voluntary change in the defendant’s conduct.” Id. at 121 S. Ct. 1835. “A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change.” Id. at 605, 121 S. Ct. 1835.

[6] Defendant claims, that in accordance with the standards set down in Buckhannon, plaintiff is not the prevailing party, because this was a voluntary decision made by Killian Oaks Academy to tender payment to Mr. Goss, and not a legal settlement. A voluntary change, they claim, is not sufficient to create the “material alteration of the legal relationship” necessary to permit an award of attorney’s fees. Nevertheless, a court’s approval of a settlement or retention of jurisdiction to enforce a settlement or
retention of jurisdiction to enforce a settlement is a judicially sanctioned change in the legal relationship of the parties. See American Disability Assoc. v. Chmielarz, 289 F.3d 1315, 1320 (11th Cir. 2002). (Emphasis added.)

The Court, in Goss, supra. at 1168, did not apply Buckhannon to moot the matter because, as noted in the quote from the decision above, there had been a judicial approval of the offer. The Court, however, concluded it could deny fees for a similar reason—similar to mooting due to “special circumstances”:

The settlement made in this case, in light of the meager damages, however, represents a nuisance settlement that was made solely in an effort to avoid the expense of litigation. Moreover, Defendants attempted to resolve the case numerous times in an effort to avoid precisely the grossly excessive fee requests that are present in this case.

[13] There are “special circumstances” that can render such an award of attorney’s fees unjust, and so-called nuisance settlements represent such a circumstance. See Tyler v. Corner Construction Corp., 167 F.3d 1201, 1206 (8th Cir. 1999) The instant case seems to be a such a special circumstance.

* * *

Every action by Plaintiff’s counsel it seems was calculated to avoid prompt out-of-court resolution that would have kept the costs of litigation down to any reasonable amount. Indeed, he has the temerity to clothe a case of this frivolous nature in the laudable and salutary policy objectives that the FLSA was enacted to combat.

To ask in good faith for upwards of $16,000 in attorney’s fees for prosecuting a case that Plaintiff’s counsel knew would involve no more than a modest sum of $316, and to continue to engage in a pattern of behavior aimed at inflating the levels of attorney’s fees shocks the conscience of the Court.

* * *

Therefore, the Court finds that it would be unreasonable and indeed, unjust, to force Defendants to pay any of Plaintiff’s attorney’s fees, since the suit was frivolous in the first instance and Plaintiff’s counsel grossly exaggerated the amount of hours expended. If the award of any amount of attorney’s fees in this case is not flatly unreasonable, then the Court struggles to envision
a scenario of reasonability. According, both of Plaintiff's Motion for Attorney's Fees are DENIED in their entirety.

* * *

Although the FLSA provides that costs may be recovered in accordance with 28 U.S.C. § 1920, the district court, however, has discretion to deny costs to a prevailing party. See Head v. Medford, 62 F.3d 351, 354 (11th Cir. 1995).

This is a complex area of judicial analysis. As a result, U.S. Supreme Court clarification will continue to define the processes and rights of parties in years to come.

2. **Limitations Periods.** In Ledbetter vs. Goodyear Tire & Rubber Co., Inc. 127 S.Ct. 2172 (2007) the Supreme Court held that discriminatory pay claims based on past acts of discrimination, that occurred outside of the statute of limitations, are time barred. Congress reversed the decision (after Ms. Ledbetter addressed the Democratic National Convention and was the subject of Presidential campaign ads). See Sheryl Gay Stolberg, New York Times, “Obama Signs Fair Pay Act” (discussing the enactment). The application of the new law to matters other than wage discrimination cases may still remain to be determined in part due to the more general approach in the Court’s Ledbetter decision. Cf. Delaware State College v. Ricks, 449 U.S. 250 (1980) (statutory limitations ran from the denial of tenure to a plaintiff rather than the effect, the later termination date). This potential use of distinctions, in order to use the time bar in factual situations distinct from the Congressional bar, is illustrated by Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (June 18, 2009) discussed below regarding burdens of proof and “mixed-motives.”

3. **Equal treatment under company’s rules** — In connection with another disability case, an individual terminated because he was an alcoholic, sought a job after going through rehabilitation. He was denied a job, because of a rule that prohibited anyone who was ever
terminated from ever returning to employment. That job denial was upheld in the Supreme Court decision in *Raytheon Company v. Hernandez*, 124 S. Ct. 513 (2003) (an employer’s unwritten policy against rehiring former employees terminated for violation of any misconduct rule was a legitimate non-disability based reason under the ADA for the employer’s refusal to hire an employee who left his position after testing positive for cocaine).

4. **Seniority requirements** – There have been situations in which individuals with disabilities have been denied positions that might become available, because they lack seniority. In *United States Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), an accommodation request conflicted with seniority rules (even though they were unilaterally imposed and not part of any union agreement and unilaterally alterable by the employer). The Supreme Court found that in a situation in which there was an absolute rule which was strictly followed, so that seniority always controlled and was not ever subject to any exception, the seniority rule could be a defense to a claim by a disabled individual who was seeking a job denied, because it was given to a senior employee.

5. **Arbitration of statutory disputes** – The Supreme Court has held that the opportunity to litigate can be denied because of arbitration clauses requiring exhaustion of arbitration remedies. *See Circuit City Stores v. Saint Claire Adams*, 532 U.S. 105 (2001), confirming that there can be arbitration of statutory suits under the Federal Arbitration Act (with the exception of those employees who are involved in transportation such as those who would be working for airlines or railroads under the Railway Labor Act). In *Wright v. Universal Maritime Service Corporation, et al.*, 525 U.S. 70 (1998), the Supreme Court confirmed that while a disability claim under a federal statute was not automatically resolved by a vague collective bargaining agreement provision which required exhaustion of arbitration processes, arbitration of
statutory claims such as OSHA claims (which were clearly provided for in the collective bargaining agreement) could be enforced. In *14 Penn Plaza LLC, et al. v. Pyett*, 129 S. Ct. 1456 (April 2009) the Court confirmed arbitration of statutory claims in a collective bargaining agreement could be enforced if “clearly and unmistakably” required. In *AT&T Mobility LLC v. Conception et ux.*, No. 09-893 (April 27, 2011), the Court reversed California law which invalidated class action waivers in any contract, including an arbitration contract, as unenforceable. See Adam Liptak, “Supreme Court Allows Contracts That Prohibit Class Action Arbitration,” *New York Times*, Thursday, April 28, 2011, page B3, Col. 1 (“Businesses may use standard-form contracts to forbid consumers claiming a fraud from coming together in a single arbitration...” as a result of the Supreme Court’s ruling). Plaintiffs, agencies, and courts will continue over many years to come, to refine and clarify this area of the law.

6. **Informal complaint systems** – The Supreme Court, as noted, in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), concluded that while an employer is subject to vicarious liability to a victimized employee for actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee, if no tangible employment action were taken, a defending employer may raise an affirmative defense to liability or damages (subject to proof by a preponderance of the evidence). The defense consists of two elements that are necessary: (a) that the employer exercised reasonable care to prevent, and correct promptly, any sexually harassing behavior; and, (b) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. As a result, if there is a complaint system publicly announced and available, so that the employee could complain even to someone other than their manager (when that manager might be
allegedly responsible for the problem), the failure to use that system may be an affirmative defense. Some courts have even applied this to whistleblowers in certain areas (such as involving safety claims in a nuclear weapons dismantling area). See Williams, et al. v. Administrative Review Board, United States Department of Labor, 376 F.3d 471 (5th Cir. 2004).

The Supreme Court as noted in the Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) held that an employer may assert the Faragher-Ellerth defense in a constructive discharge case. ("We hold, however, that the Court of Appeals erred in declaring the affirmative defense described in Ellerth and Faragher never available in constructive discharge cases." At 542 U.S. 152). Thus, the concept of an affirmative defense is potentially transportable (due to Rule 8(b) of the Federal Rules of Civil Procedure, where it is provided for), from Title VII matters, as initially developed, into a broader defense—in not only Title VII cases but other areas of the law. As noted, in Kolstad v. American Dental Association, 527 U.S. 526 (1999), the Court applied the defense in a promotion case.

In Farragher (524 U.S. 775, at 805-806) the Court also declared that the primary objective of Title VII was "not to provide redress" and award persons for injuries due to discrimination or provide redress, but rather "to influence primary conduct" and "to avoid harm." The Court specifically noted:

"Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination’ . . . its ‘primary objective’, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm”.

This is consistent with the concept of the educational process and informal complaint system proposed by the Court. It suggests an approach to be used for such systems as defense mechanisms.

7. Shifting Burdens, Mixed Motives, and the Use of Statistics. There are Supreme
Court decisions which shift burdens by such means as evaluating mixed motives and also by virtue of requirements in order to identify employment practices as opposed to asserting that there are disparate impacts (such as comparing a plan that might be less generous to older workers than to younger workers). As examples:

A. **Shifting Burdens and Mixed Motives**—In *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court established a mixed motive requirement to determine whether there was violation of Title VII of the Civil Rights Act of 1964 and a “recognition of the balance that Congress struck between eliminating invidious employment discrimination and preserving an employer’s prerogative to employ whomever it wishes.” The Court’s majority held that an employer would bear no liability for a mixed type of motive employment decision, if it would have “made the same decision absent the illegal motive.” *PriceWaterhouse*, which dealt with Title VII, was reversed by Congress in the Civil Rights Act of 1991. However, in the reversal, Congress authorized limited relief to a plaintiff in a “mixed motive” case and excluded certain relief for damages, rehiring, or reinstatement, if the employer could show a mixed motive.

In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court concluded that a mixed motive standard would not apply to the provisions of the Age Discrimination in Employment Act of 1967 (“ADEA”), which makes it unlawful for an employer to take adverse action against an employee “because of such individual’s age.” The Court in *Gross* held that a plaintiff bringing an ADEA disparate treatment claim must prove by a preponderance of evidence that age was the “but-for” cause of the challenged adverse employment action. The burden did not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one
motivating factor in that decision. Because Title VII is materially different, the Court interpreted the provisions of Title VII, even though there had been an amendment, to conclude that the ADEA text did not authorize an alleged mixed motive age discrimination claim. See, also, Serwatka v. Rockwell Automation, Inc., Case No. 06 C 1012 (7th Cir., January 15, 2010), concluding that under the Americans With Disabilities Act, in view of Gross, there was no provision in the governing version of the Americans With Disabilities Act comparable to Title VII’s mixed motives provisions. As a result, since there was a lack of a provision in the ADA recognizing mixed motive claims, such claims did not entitle a plaintiff to relief for disability discrimination.

B. Use of Statistics—In Smith v. The City of Jackson, Mississippi, et al., 125 S. Ct. 1536 (Mar. 30, 2005), the Supreme Court concluded that the Age Discrimination in Employment Act authorizes disparate-impact claims; but the allegation of disparate-impact is not sufficient to enable liability. The employee must isolate and identify specific employment practices that are allegedly responsible for any observed statistical disparities. The Court (at 1545) noted:

[2][3][4] Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in Wards Cove, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is ‘responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.’ 490 U.S., at 656, 109 S.Ct. 2115 (emphasis added) (quoting Watson, 487 U.S., at 994, 108 S. Ct. 2777). Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could “result in employers being potentially liable for ‘the myriad of innocent causes that may lead to statistical imbalances...’” 490
U.S., at 637, 109 S. Ct. 2115. In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City’s plan was based on reasonable factors other than age.

This shift in burdens can also be affected by rulings on “retaliation” as noted below.

8. **Retaliation** – By virtue of Supreme Court rulings on retaliation there are additional “protected interest” groups. While this expands exposure to claims, it ironically also creates defenses since an increasing part of the workplace becomes protected. The result creates defenses to claims by employees that they were protected as opposed to “others favored” as the “others favored” are increasingly protected too.

In *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497 (2005), the Supreme Court concluded that a former coach of a girls’ high school basketball team could sue the Board of Education alleging that it retaliated against him in violation of Title IX. The Court concluded the retaliation against the Plaintiff, because he complained of sex discrimination, is a form of intentional sex discrimination encompassed by Title IX’s private cause of action. The Court noted:

The Court of Appeals’ conclusion that Title IX does not prohibit retaliation because the “statute makes no mention of retaliation,” 309 F.3d. at 1344, ignores the import of our repeated holdings construing “discrimination” under Title IX broadly. Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX’s private right of action. *Franklin*, 503 U.S. at 74-75, 112 S.Ct. 1028; see also id., at 75, 112 S.Ct. 1028 (noting that, under *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex,” and holding that “the same rule should apply when a teacher sexually harasses . . . a student”). Thus, a recipient’s deliberate indifference to a teacher’s sexual harassment of a student also “violate[s] Title IX’s plain terms.” *Davis, supra*, at 643, 119 S.Ct. 1661 (citing *Gebser, supra*, at 290-291, 118 S.Ct. 1989). Likewise, a recipient’s deliberate
indifference to sexual harassment of a student by another student also squarely constitutes “discrimination” “on the basis of sex.” 
*Davis*, 526 U.S., at 643, 119 S.Ct. 1661; see also *1505 id.* at 650, 119 S.Ct. 1661 (“Having previously determined that ‘sexual harassment’ is ‘discrimination’ . . . under Title IX, we are constrained to conclude that student-on–student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute”). “Discrimination” is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broach reach. See *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed. 299 (1982) (Courts “must accord” Title IX “a sweep as broad as its language”).

In *Burlington Northern & Santa Fe Railway v. White* 126 S.Ct 2405 (2006), the U.S. Supreme Court held an employer’s action is retaliatory, if a reasonable employee would find the challenged action to be “materially adverse”, in the sense that it would “dissuade a reasonable worker from making or supporting a charge of discrimination” 126 S.Ct. at 2415. This is a broader standard for employers, which will be of major concern. However, it also shifts burdens, by increasing the group of protected individuals. See also *Thompson v. North American Stainless*, 131 S.Ct. 863 (2011) (a worker fired after his coworker and fiancee filed an EEOC Charge had a viable retaliation claim under Title VII).

One of the interesting issues created by increasing civil rights and protected persons to prevent retaliation is that, as the group, or zone, of those interests protected becomes larger, as noted, there are increased reasons to justify actions that may provide such protection, even if they have a negative effect on others. Once everyone in the workplace is protected (perhaps even with numerous layers of protected interests), it becomes harder for employees to claim that they were discriminated against because “others” may have been given favored treatment, since the “others” also may be entitled to the favored treatment. Another interesting issue is the use of a “materially adverse” standard, which can expand to shift burdens and create new defenses for
employers.

The expansion of the retaliation concept has not ended. In *CBOCS v. Humphries*, 128 S.Ct. 1951 (2008), an employee who alleged that he had been dismissed, for complaining to management that a black co-employee had been dismissed for racial reasons, was held to have an actionable retaliation claim under 42 U.S.C. § 1981. Although a dissent argued that no such right existed under § 1981, the majority ruled that even though there was statutory silence, that did not prevent the majority from creating a retaliation claim. In *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008), a postal worker claimed retaliation after filing an age discrimination complaint. The Postal Service is covered by a federal sector provision of the ADEA, (rather than the ADEA provision applicable to private sector employees). The private sector ADEA provision has an explicit anti-retaliation prohibition. The federal sector ADEA provision does not have an anti-retaliation prohibition. The Court implied it. Justice Alioto, in his opinion, noted that the provisions were drafted eight years apart but the concept of reading the two provisions together was appropriate. In addition, he noted that cases discussing retaliation refer to retaliation as simply another form of discrimination. The result was that the Court said that the federal sector provision outlawed retaliation with “requisite clarity.” It follows that anti-retaliation protection will be expanded in future retaliation cases. *See also Straub v. Proctor Hospital*, No. 09-400 (March 1, 2011) (finding a prior supervisor’s improper discriminatory motive could preclude a later decision-maker from relying on the “record” created by that supervisor and using a “cat’s paw” theory to relate back to the prior supervisor’s bad motive). If those “complaining” and “whistleblowing” are protected, then those involved in “positive contributions” may share equal protection and, if so, that may expand “protected” interests. The more “protected” the greater the defenses may be for employers.
9. **Challenging Awards as Excessive Under the Due Process Clause** - Ever since the ruling in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), there has been a possible judicial "guide post", or limitation, on imposing damages—and in particular, punitive damages. While this is an area of law that is evolving, and the Supreme Court has recently been involved in consideration of the various punitive damage legal issues, nevertheless, it is important to bear the *BMW* case in mind. This is because there are some areas where it may be of assistance, in connection with minimizing exposure to extremely large awards. There may be also some additional due process defenses, when there is no relationship between the amount being paid and the claim. There may be defenses which can be used, based on this due process concept, such as in wage and hour claims for overtime. Cf. *Goss supra*. The basic concept for overtime is that the employee receives "*time and a half*"—but not "*time and a half*" of the minimum wage. Overtime is paid at "*time and a half*" of whatever the hourly rate of an employee involved is determined to be. In those cases where employers incorrectly classify employees as being exempt from overtime (because they feel they are being paid a salary), the forty hours in the work week will be divided into the salary received in the work week, which can be substantially larger than the minimum wage. For example, if you were getting $400.00 a week, your hourly rate would be based on that—so your hourly rate would be $10.00, based on dividing $400.00 by 40 hours of work; and, thus, "*time and a half*" is $15.00 an hour. If you were getting $800.00 a week, your hourly rate would go to $20.00 an hour; and "*time and a half*" would be $30.00 an hour. As you increased the salary, in the event you have a mistake in the calculation, the overtime rate can increase too. One of the arguments that can be made is that in a situation where the overtime is astronomical, there is no relationship to the minimum wage. The *BMW* case may, then, become a basis for a due process argument.
10. *Challenging an Award Due to Desire to Punish As a “Violation of due process by taking property from a company.”* In Phillip Morris v. Williams, 127 S.Ct. 1057, 2007 US Lexis—Feb. 20, 2007, US 005-1256 (2007), the Supreme Court ruled a $79 million verdict was a “violation of due process by taking property” from a company because of a desire to punish the company for harming persons not before the Court. See also Joseph Z. Fleming, “Justice Scalia Takes Foreign Sources to Support Judicial Takings: Analysis of Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al., the Woodchuck, Queen of Hearts and Orwellian References,” http://apps.americanbar.org/litigation/committees/environmental/articles.html.

11. *Approval of the At-Will Employment Doctrine.* In Village of Willowbrook *et al.* v. Olech, 528 U.S. 562 (2002), the Supreme Court held a property owner could assert an equal protection claim, as a class of one, because a governmental entity engaged in intentional and arbitrary discrimination against the property owner—and such unequal treatment was prohibited. The Supreme Court, in Engquist *v.* Oregon Dept. of Agriculture, 128 S.Ct. 2146 (2008), rejected the concept of expanding Village of Willowbrook, *supra,* so that a “class of one” claim could be asserted in a public employment cases. Plaintiff claimed she was subject to “arbitrary treatment”, but not due to discrimination based on membership in a protected class. The Court ruled all employment decisions are subjective and individual, so no such claim could exist. The Court relied on the employment-at-will doctrine. The Court also stated that a “class of one” claim would upset the “delicate balance” between employer rights and governmental discipline, leading every adverse personnel decision to provoke a lawsuit. The dissenters criticized the majority for speculation about hypotheticals, and for an incorrect evaluation of the importance of the government’s interest in preserving a regime of “at will” employment. This decision
promotes the “at will” doctrine, which also provides a form of management rights because it means that in the absence of a protected category such as those noted which are expanding, there is no right to sue for arbitrary employment decisions. Such a ruling is not startling but it sends an important policy message by endorsing the at-will doctrine. While as noted above the classes of the protected are increasing and that promotes litigation, it also promotes substantial defense grounds—for not taking decisions because of an increasing category, as noted, of protected individuals. These decisions illustrate an expanding evolving series of considerations to be evaluated; and, as protected interests are expanding, they are also being diluted and diminished.

12. *Protecting Against Direct Threats to Employees.* In *Chevron U.S.A., Inc.* v. *Echazaval* 536 U.S. 73 (2002) the Supreme Court held an employee who was a direct threat to the employee or others can be removed from the workplace.

13. *Creating pleading requirements that favor management.* The United States Supreme Court, on May 18, 2009, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), 2009 U.S. LEXIS 3472 (hereafter “*Iqbal*”) concluded that “the tenet that a court must accept as true all of the allegations in a complaint is inapplicable to legal conclusions.” The Court noted that: “Threadbare recitals of the elements of a cause of action supported by mere conclusionary statements do not suffice.” *Iqbal*, *supra* (describing the “Two working principles” which “underlie our decision in *Twombly*”; *Bell Atlantic Corp v. Twombly*, 55 U.S. 544 (2007) (hereafter “*Twombly*”)). The Court in *Iqbal* ruled there has to be “sufficient factual matter as accepted as true for relief that is plausible.” This new *Iqbal* pleading requirement actually reversed *Conley v. Gibson*, 355 U.S. 41 (1957), a duty of fair representation claim by plaintiffs, railroad employees, which did not allege specific facts to support general allegations of discrimination. In *Conley, supra*, the district and appellate courts dismissed the suit due to that
pleading deficiency. The Supreme Court, in *Conley*, ruled “notice pleading” enabled discovery and reversed setting up a relaxed pleading standard—now reversed by *Iqbal*. The result may impact labor and employment law cases (as well as others) imposing substantion additional pleading burdens. In addition, this may apply to complaints seeking injunctive relief, which means that it is necessarily just employees, or labor organizations, that might be impacted, but also management. The more important emergency relief may be, the more difficult the shift in pleading obligations may become, depending on the facts and the law involved in different cases. This is a major change in connection with litigating in the federal courts, and many state courts seem to be picking up on the application of the *Iqbal* pleading requirements.

The decision involved the arrest of the Respondent Iqbal, a Pakistani Muslim, on criminal charges. Iqbal filed a complaint against numerous federal officials, and he alleged that they designated him a person of high interest on account of his “race, religion and/or national origin in contravention to the First and Fifth Amendments in that they condone and willfully and maliciously agree to subject him to harsh conditions of confinement solely on account of prohibited factors and for no legitimate reason.” The district court denied a motion to dismiss. The Second Circuit analyzed, in a “collateral order doctrine” interlocutory appeal, the question of the standards set forth in *Twombly* to evaluate whether the complaint were sufficient to survive a motion to dismiss. The Supreme Court in *Iqbal* could have restricted the case to its criminal proceedings, or otherwise distinguished it. However, the Court concluded that the complaint failed to state specific sufficient facts to state a claim for purposeful and unlawful discrimination and among other points declared that:

A. *Twombly*, which involved an antitrust case, had concluded that detailed factual allegations are not required under the Federal Rules of Civil Procedure; but, there has to be
“sufficient factual matter as accepted as true, to state a claim for relief that is plausible on its face” (emphasis added). In addition, Twombly should not be limited to antitrust cases.

B. The question of whether complaint allegations might be sufficient does not turn on controls placed on discovery; and, if a complaint is not sufficient, then the result does not justify discovery. In Twombly the Court had noted that to be entitled to survive a motion to dismiss and obtain costly discovery “something beyond the mere possibility of causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed ‘to take up the time of a number of other people with the right to do so representing an in terrorem increment of the settlement value.’”

C. While Rule 9(b) of the Federal Rules of Civil Procedure requires particularity when pleading “fraud or mistake” but allows “other conditions of a person’s mind to be alleged generally,” that relaxed general allegations standard does not require the courts to credit a complaint’s conclusionary statements without reference to its factual content. Rule 9 merely excused a party from pleading discriminatory intent under an elevated pleading standard but did not give the party license to evade less rigid but still operative strictures of Rule 8.

By applying Twombly beyond a narrow category of cases, and not limiting the Iqbal facts to a limited type of situation, the civil complaint must now allege “[factual content] which allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” This has created a number of dismissals and summary judgment rulings which have cited Iqbal.

The results raise the following issues:
A. Does the attorney drafting the complaint, in order to allege the heightened standards, need more information to justify filing a complaint; and, if so, in a situation where a plaintiff may not have information without discovery, what occurs?

B. If a plaintiff’s attorney relies on the plaintiff, and the plaintiff does not provide the sufficient information, or discovery demonstrated that the plaintiff was incorrect, does the summary judgment take on a new role in terms of exposing both the plaintiff and the plaintiff’s attorney to sanctions and, if so, what effect does that have on the relationship of the attorney to the client?

C. If the plaintiff’s attorney is required to obtain more information, will that always work to the advantage of the defendant, since a carefully drafted complaint may not only withstand a motion to dismiss but may create issues that could still need to be resolved in the summary judgment process?

D. Could the ability to maintain that summary judgment should not be considered until there is more discovery have an effect on the proceedings in a situation where the standards were met under Iqbal, and end up postponing summary judgment rulings?

E. Could detailed pleading of a complaint enable a plaintiff to survive a motion to dismiss and motion for summary judgment or, if failing to do so in a situation where the lower court erred, could that enable a cross motion for summary judgment by the plaintiff to be granted on appeal in a manner that otherwise would not have occurred if the complaint were not as detailed?

F. Does the heightened standard of pleading requirements for a complaint tie into the increasingly strict line of cases that tend to preclude certain plaintiffs from proceeding under theories that the Supreme Court has adopted (that create affirmative defenses)?
G. Do the *Iqbal* pleading requirements apply to affirmative defenses?

H. Will the *Iqbal* decision result in new Congressional enactments?

For several months, certain U.S. Senators have discussed *Iqbal* as creating a new “plausibility requirement for lawsuits” and stifling civil lawsuits. Senators have tried to determine whether meritorious cases are being dismissed and if they would have been dismissed before *Iqbal*. Senator Patrick Leahy (D-VT) has stated: “If the cases are dismissed, how are we going to know whether they were meritorious?” Many civil rights groups and others who represent plaintiffs have been organizing to reverse Supreme Court decisions. It has been reported that there were more than 1500 District Court decisions related to *Iqbal* in the four months after it was decided. Legislation has been introduced in the House and in the Senate to revert to the previous standard. For an illustration of background, see the report posted by David Ingram on December 2, 2009, at 3:12 p.m. in *Politics and Government*, and see also the blog of the *Legal Times*, “Former Solicitor General Feels the Wrath of Senators,” December 2, 2009. One approach in proposed Senate legislation (titled the “Notice Pleading Restoration Act of 2009”) provided that “a Federal court shall not dismiss a complaint under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedures except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).” Perhaps, this is one reason the Supreme Court appeared to relax certain aspects of the *Iqbal* standards in *Matrix Initiatives, et al. v. Sitacusano*, No. 09-1156 (March 22, 2011). See Mauro Article, *supra*, note 3.
CONCLUSION

If you look at the foregoing concepts and divorce them from the types of factual cases that they were involved with, you can perceive concepts, or management rights—or at least options—that can be applied in a variety of different types of employment, labor, wage and hour and workplace law cases. Such concepts are subject to continuing expansion and revision.

The Congress of the United States has increasingly become the last resort to overcome what happens in court; but even after Congressional action, subsequent litigation may create additional issues. Cf. the decision of the 7th Circuit in Serwatka v. Rockwell Automation, Inc. and Gross, supra, demonstrating that even after Congressional amendment, in order to change, modify, or “reverse” Supreme Court decisions, there may be additional Court cases distinguishing legislative action by Congress. The result is that these concepts and decisions are going to continue to create important expanding area of the law for all practitioners to be familiar with and concerned about in labor and employment cases (regardless of whether they involve labor, employment, civil rights, disability, wage/hour, and other protected categories).