Labor and Employment Law

Debunking the Myth of a Pro-Employer Supreme Court

By Daniel J. Davis

By any measure, the Court's recently completed term included a number of victories for employees. Among other decisions, the Court adopted a broad view of a discrimination charge and reduced procedural hurdles employees may face in seeking assistance from the EEOC (*Federal Express v. Holowecki*); determined that trial courts have discretion to admit "me, too" evidence of non-parties alleging discrimination by persons who played no role in the challenged adverse employment action (*Sprint v. Mendelsohn*); allowed a participant in an ERISA plan to bring an action to recover losses attributable to an individual account in a defined contribution plan (*LaRue v. DeWolff*); and recognized a retaliation claim both for Section 1981 actions and under the ADEA's provision regarding federal employees (*CBOCS v. Humphries* and *Gomez-Perez v. Potter*, respectively). The Court heard more employment cases than usual and many of those decisions were favorable to the employee.

A number of news sources, however, indicated that these victories for employees should be considered a surprise. "The term... included some *unanticipated* developments, like a string of victories for employees in workplace discrimination cases."[1] "The U.S. Supreme Court this year made a number of key rulings on workplace discrimination which, *unusually for the conservative court*, mostly favored workers over their bosses."[2]

These articles suggest that the current composition of the Supreme Court would automatically lead to a strong bias in favor of employers, resulting in a lopsided number of pro-employer rulings. Indeed, as victories in favor of the employee occurred during the course of the term, they were depicted as an aberration. "The Supreme Court during recent terms has relied on cramped legal analysis to deny fairness to workers and criminal defendants in several notable cases. Yesterday, the justices issued a decision remarkable for the fact that it was unanimous in handing victory to the proverbial 'little guy.'"[3] "The Supreme Court ruled last week that a group of employees suing for age discrimination should get their day in court even though they filed their complaint on the wrong form. The decision is noteworthy because it suggests that this court could be pulling back from what has often seemed like a knee-jerk inclination to rule for corporations over workers and consumers."[4] "Voters in this election year do not appear to favor the blind deference to corporate power that has been a theme of the last seven years."[5]

These sources present an entirely cramped and, as this article will seek to demonstrate, inaccurate view of the Court, especially in the area of employment law. This article will suggest that the notion that the current Court is pro-employer in employment cases does not withstand scrutiny. To do so, this article reviews a number of cases from the Court's employment discrimination jurisprudence over the past ten years, primarily cases under Title VII of the Civil Rights Act of 1964.

A review of those cases shows several trends. First, a significant number of cases reach a result that should be considered favorable to the employee. Second, a number of times the Court reversed a circuit court's pro-employer position or decided a case in favor of an employee against the majority view of the circuit courts that have ruled on the issue. These cases strongly refute the implication that the Court is generally pro-employer.

These cases instead demonstrate that an approach focused upon the text of the statute and, in some cases, stare decisis does not necessarily lead to results that generally favor the employer. The Court has indeed used these traditional jurisprudential tools on several occasions to overrule the courts of appeals and make significant rulings that favor the employee. A review of these cases does not necessarily mean, however, that the Court should be considered pro-employee. Instead, these cases demonstrate that, at least in employment cases involving statutory interpretation, the Court tends to focus on traditional legal tools instead of policy arguments regarding a particular outcome. Such a focus improves the Court's credibility and the legal grounding of its employment decisions. In some circumstances, that focus has led the Court to make rulings that provide significant certainty to both employer and employee regarding the meaning of a particular provision.

This article will describe particular cases in the Court's employment jurisprudence over the past ten years and in the process elaborate on the ways these cases refute the characterization of the Court as pro-employer.

I. Title VII Cases

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[6] Several Supreme Court cases over the past decade have given an expansive view of Title VII's provisions in favor of the employee bringing the suit.

Burlington Northern v. White. In June 2006, the Supreme Court rendered a significant decision regarding the scope of Title VII's anti-retaliation provision in *Burlington Northern and Santa Fe Railway Co. v. White*.[7] The anti-retaliation provision makes it "an unlawful employment practice" for an employer "to discriminate against any individual... because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[8]

The relevant facts of *Burlington Northern* are straightforward. The plaintiff, Sheila White, alleged that her employer violated the anti-retaliation provision after she had brought a complaint against her supervisor by (1) changing her job responsibilities from forklift duty to the allegedly less desirable position of

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a track laborer; and (2) suspending her for thirty-seven days without pay for allegedly being insubordinate.[9]

The Court addressed two questions regarding the scope of Title VII's retaliation provision, "whether the challenged action has to be employment or workplace-related and... how harmful that action must be to constitute retaliation."[10] The Court answered both of those questions in a way that favored the employee. With respect to the first question, the Court ruled that "the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory act and harm."[11] In reaching that conclusion, the Court primarily compared the differences in the text and purpose of Title VII's anti-discrimination and anti-retaliation provisions and found that those differences justified a broader scope for the anti-retaliation provision.[12]

With respect to the second question, the Court determined that a plaintiff could establish a retaliation claim by showing that "a reasonable employee would have found the challenged action materially adverse."[13] Applying these standards to the facts of the case, the Court found that both of White's complained retaliatory acts were retaliatory in nature and that a jury could find that the complained acts were materially adverse.[14]

The *Burlington Northern* decision does great damage to the view that the Court is pro-employer. First, the decision was unanimous in affirming the decision of the court of appeals, with only Justice Alito concurring in the judgment. Second, the decision took a broad view of the anti-retaliation provision that went against what a majority of the courts of appeals to consider the issue had ruled. Three courts of appeals, for example, had required that the retaliatory act must adversely affect the terms, conditions or benefits of employment.[15] Two other courts of appeals had limited the anti-retaliation provision to specific retaliatory acts such as hiring, granting leave, discharging, promoting, and compensating.[16] Third, the pro-employee decision may have a broad impact. No longer must employees tie a retaliation claim in a Title VII case directly to an employment-related action or demonstrate that the alleged retaliatory acts were coterminous with an underlying claim of discrimination. The plaintiff need only show that the retaliatory act could materially affect an employee's desire to participate in or assist with a discrimination claim. Because there are a number of federal and state statutory schemes with retaliation provisions, *Burlington Northern* may be used as a basis by future courts to expand the reach of those various retaliation provisions.

Desert Palace v. Costa. In 2003, the Court considered the "mixed-motive" provision of Title VII in *Desert Palace, Inc. v. Costa*.[17] Title VII allows an employee potential relief "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[18] In *Desert Palace*, the Court considered whether, in proving a mixed-motive claim under Title VII, an employee must provide direct evidence of discriminatory animus or whether circumstantial evidence will suffice.[19]

Four courts of appeals had ruled that direct evidence was required to demonstrate discrimination in a mixed-motive case and that circumstantial evidence was insufficient.[20] These cases relied primarily on Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins,*[21] interpreting the predecessor provision to the current mixed-motive statute to require direct evidence of discrimination.[22] The Ninth Circuit, in the decision before the Court, had determined that either direct or circumstantial evidence could establish a mixed-motive claim.[23] The Ninth Circuit therefore upheld a jury instruction in a mixed-motive case when a female employee had provided evidence that "(1) she was singled out for 'intense stalking' by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men in the assignment of overtime, and (4) supervisors repeatedly 'stalk[ed]' her disciplinary record and 'frequently used or tolerated' sex-based slurs against her."[24]

In a relatively short opinion, Justice Thomas—writing for a unanimous Court—sided with the Ninth Circuit and found that direct evidence was not the only type of evidence to establish a mixed-motive claim under Title VII. The Court relied heavily on the term "demonstrates" found in the mixed-motive statute and how that term, in Title VII and elsewhere, does not change the normal rule in civil litigation that direct or circumstantial evidence can be used to establish an element by the preponderance of the evidence.[25] Justice O'Connor concurred in the opinion, noting that the new statute "codified a new rule for mixed-motive cases arising under Title VII."[26] Thus, the Court, basing its analysis on the text of the statute, ruled in favor of the employee and against four of the five courts of appeals to consider the issue.

Although the win for the employee might not be as significant as that in *Burlington Northern*, it does bear noting that there are a large number of discrimination cases in which direct evidence of discrimination is not found. The Court's willingness in *Desert Palace* to entertain all types of evidence in a mixed-motive case certainly simplifies an employee's ability to establish a case of discrimination.

Amtrak v. Morgan. In *National Railroad Passenger Corporation (Amtrak) v. Morgan*,[27] the Court addressed the conditions under which a discrimination claim was filed timely under Title VII. That timing provision, in relevant part, states: "A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred."[28] The *Morgan* Court considered under what circumstances acts that occurred outside the timeframe set forth under 42 U.S.C. § 2000e-5(e)(1) could still be considered part of an unlawful employment practice subject to a Title VII claim.[29]

The Court made two key holdings. First, a unanimous Court held that "discrete discriminatory acts [such as termination, failure to promote, denial or transfer, or refusal to hire] are not actionable if time barred, even when they are related to acts alleged in timely-filed charges."[30] Second, because a hostile work environment claim, unlike a claim based upon discrete retaliatory acts, "is composed of a series of separate acts that collectively constitute one 'unlawful unemployment practice,'"[31] a hostile work environment claim is timely if any part of that claim is filed within the limitations period.[32] Five members of the Court joined this holding.

Although *Morgan* cannot be characterized as a complete win for employees, it shows a commitment to text-based principles of interpretation in employment discrimination

cases and it did assist those employees bringing hostile work environment claims. The courts of appeals had adopted various tests for resolving the question, including determining whether the incidents "represent an ongoing unlawful employment practice"[33] or a multifactor test looking to whether the acts are recurring, of the same type, and have sufficient permanency put an employee on notice of the need to file a claim.[34] The Court did not adopt any of these tests, noting that although "the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute."[35] The Court, looking to the key terms of the statute—"shall," "after... occurred," and "unlawful employment practice"—developed the test that created different results for claims based on discrete retaliatory acts versus hostile work environment claims.[36] *Morgan* therefore made the law clearer regarding the scope of Title VII's timeliness and provision—hence reducing the need for litigation over the meaning of the Court's holding—and easier for employees bringing hostile work environment claims within the time limits of Title VII.

Faragher v. City of Boca Raton/Burlington Industries v. Ellerth. *Burlington Industries, Inc. v. Ellerth*[37] and *Faragher v. City of Boca Raton*[38] were decided on the same day and both considered the circumstances under which an employer would be subject to vicarious liability for the harassing actions of supervisor pursuant to Title VII. The courts of appeals had adopted various strategies, all primarily based upon a statement in *Meritor Savings Bank, FSB v. Vinson*[39] that agency principles controlled the question regarding an employer's vicarious liability.[40]

The Eleventh Circuit in the 7-5 en banc decision under review in *Faragher*, held that "an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate."[41] The Seventh Circuit's en banc decision under review in *Ellerth* had produced eight separate opinions with no controlling rationale.[42] The other courts of appeals had similarly produced a wide range of standards regarding vicarious liability.[43]

The Court, in two 7-2 decisions,[44] produced a far simpler and employee-friendly standard regarding an employer's vicarious liability by adopting a general blanket rule in favor of vicarious liability: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee."[45] The Court ruled that an employer would have an affirmative defense to vicarious liability, but only when no "tangible employment action"—such as firing or failing to promote—was taken against the employee. The defense consists of two 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."[46] The dissent would have required the employee to show that the employer was negligent in allowing the supervisor's conduct to occur.[47]

Faragher and *Ellerth* are different in kind from other Title VII decisions discussed in this article because those decisions did not rely on the statutory text. Rather, those cases considered a question for which the text provided little guidance and the Court therefore turned to agency principles to resolve an area that had generated a wide variety of opinions from the courts of appeals. The Court's holdings did not require an employee to show that a supervisor was acting within the scope of employment, or that there was an agency relationship between the supervisor and the employer. The Court also provided only a limited affirmative defense when the employee had not suffered a tangible employment action. The willingness of the Court to adopt a rule relatively favorable to the employee in a context with little statutory guidance and in which the courts of appeals had generally placed more burdens on the employee certainly does not appear to be the actions of a pro-employer Court.

Oncale v. Sundowner Offshore Services. The Court in *Oncale v. Sundowner Offshore Services, Inc.*[48] addressed whether Title VII allowed a cause of action for sex discrimination based upon same-sex sexual harassment.[49] Justice Scalia, writing for a unanimous Court, found that, because same-sex sexual harassment was "discrimat[ion]... because of... sex," 42 U.S.C. § 2000e-2(a)(1), it was actionable under Title VII.[50]

The decision, once again, went against the view of the majority of courts of appeals to consider the question. The Fifth Circuit had held that same-sex sexual harassment was never actionable under Title VII and the Fourth Circuit held that such claims were actionable only when a plaintiff can prove that the harasser was homosexual.[51] The Seventh Circuit had adopted a position similar to the Court in *Oncale*.[52] And, once again, the Court relied on the plain meaning of the text of the statute in reaching its decision. *Oncale* put forward a straightforward, easy-to-apply standard that expanded the scope of Title VII to same-sex discrimination.

Other Title VII Cases. The Court has ruled for the employee in a number of other Title VII cases as well. In *Arbaugh v. Y & H Co.*,[53] for example, the Court, in an 8-0 decision, found that Title VII's requirement that the Act to only employers with fifteen or more employees was not jurisdictional in nature.[54] The decision reversed the Fifth Circuit and removed a potential jurisdictional hurdle for some employees bringing Title VII claims. In *Edelman v. Lynchburg College*,[55] the Court, in a 7-0 decision reversing the Fourth Circuit, upheld the EEOC's relation-back provision,[56] which allowed a timely filer of a charge to verify the basis for a charge after the time for filing a charge had expired. Such a decision makes it easier for employees to be found to have filed timely charges. In *Swierkiewicz v. Sorema*,[57] a unanimous Court reversed the Second Circuit in holding that an employment discrimination complaint need not contain specific facts establishing a prima facie case of discrimination; rather, the complaint must contain a short and plain statement of the claim that the pleader is entitled to relief. The Court has also held that the EEOC has authority under Title VII to award compensatory against federal agencies in employment discrimination cases.[58] All of these cases can simplify an employee's ability to bring a successful Title VII claim.

II. Non-Title VII Cases

Pro-employee decisions are not found solely in the Court's Title VII docket. Cases brought under other discrimination statutes, such as the Age Discrimination in Employment Act (ADEA), have led to pro-employee holdings.

Federal Express v. Holowecki. The ADEA requires that "[n]o civil action... be commenced... until 60 days after a *charge* alleging unlawful discrimination has been filed with the [EEOC]."[59] The Court in *Federal Express Corp. v. Holowecki*[60] considered what the definition of "charge" meant under the statute. In *Holowecki*, the employee filed an intake questionnaire with the EEOC and attached with it a signed affidavit describing the alleged discriminatory employment practices. In a 7-2 decision, the Court found that a "charge"—as opposed to merely a request for information by an employee—must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee, adopting the position taken by the EEOC in internal directives regarding what constitutes a charge. The Court viewed the "agency's interpretive position—the need-to-act requirement—[as] provid[ing] a reasonable alternative that is consistent with the statutory framework."[61]

The Court's decision in *Holowecki* lessened a procedural hurdle for employees to have their claims heard in court. As Justice Thomas noted in dissent, the form sent by Holowecki to the EEOC said it was for "pre-charge" counseling, strongly implying that the form should not be construed as a "charge" under the ADEA. Indeed, the EEOC did not consider Holowecki's submission a charge nor did it assign a charge number or encourage the parties to engage in conciliation, as the EEOC is required to do when it receives a charge.[62] Notwithstanding those deficiencies, the Court granted the EEOC, and in turn, the employee, significant procedural leeway in complying with the "charge" requirement. In so doing, the Court simplified the employee's task in invoking the assistance of both the EEOC and the courts in discrimination disputes.

Reeves v. Sanderson Plumbing Products. The Court considered in *Reeves v. Sanderson Plumbing Products, Inc.*[63] whether, under the ADEA, a jury could consider (1) a prima facie case and (2) evidence that the employer's proffered reason for engaging in the employment action against the employee was pretext would be sufficient for a finding of a violation of the ADEA, even if no independent evidence of discrimination was presented. Four of the courts of appeals had found that independent evidence of discrimination was necessary to create a jury issue, while seven courts of appeals had adopted a less stringent standard.[64] In reviewing the text and purpose of the statute, a unanimous Court rejected the minority view of the four courts of appeals and found that a prima facie case and evidence that the reason offered by the employer was pretext *could* be sufficient for a finding of intentional discrimination under the ADEA.[65] Once again, the Court's holding simplifies the task of the employee trying to prove discrimination, as a subset of employees will be able to prove only that the employer's proffered reason was pretext but not be able to prove that the employer had a discriminatory motive.

Oubre v. Entergy Operations. An employee is allowed to waive any claims under the ADEA, but only if the waiver is knowing and voluntary. The Older Workers Benefits Protection Act (OWBPA) provides a number of minimum requirements an ADEA waiver must contain in order to be knowing and voluntary.[66] Under common law principles, a faulty contract, though voidable, may be ratified as acceptable if, after the innocent party learns of the defect in the contract, the party refuses to tender back the consideration received from the contract. The question in *Oubre v. Entergy Operations, Inc.*[67] was whether a release that was defective under the OWBPA could be rendered operable by the departed employee's failure to tender back the consideration received as part of the release of claims. In a 6-3 decision reversing the court of appeals, the Court ruled for the employee, finding that "[t]he statutory comment is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."[68] Therefore, an employee who received consideration for signing a release may nevertheless sue the employer if one of the terms of the release did not meet the OWBPA's requirements.[69]

III. Discussion

A simple recitation of these cases should dispel the view that the Court has a knee-jerk reaction to rule for the employer. In a variety of cases and contexts, the Court has looked to the text, structure, and purpose of the statutory provision in question and has in many instances found that the analysis led to a result advanced by the employee. Even in cases in which the text of the statute invited a wide degree of latitude, such as *Faragher* and *Ellerth*, the Court's resolution went in favor of the employee. Also, a view that the Court favors employers does not square with the several significant cases—such as *Burlington Northern*, *Desert Palace*, *Faragher*, *Ellerth*, *Oncale*, and *Reeves*—in which the Court went against the prevailing, pro-employer view adopted by the courts of appeals.

The Court's employment docket, of course, is not entirely populated with rulings that favor the employee. A number of decisions have been to the benefit the employer as well or have been mixed in its implications. *Morgan*, for example, had one holding that favored employers (discrete discriminatory acts must fall within the filing time period to state a claim) and another holding that favored employees (a hostile work environment claim is timely if an act that constituted the hostile work environment claim fell within the filing period). In another case, the Court reversed the Ninth Circuit in a per curiam decision, finding that no reasonable person could believe that a single incident—in which a single remark was made in response to a sexually explicit comment on an application—constituted a sexual harassment claim, precluding a retaliation claim based upon the employee's complaints against the incident.[70] Several of the Court's decisions regarding the Americans with Disabilities Act adopted holdings regarding the text of that statute that favored the employer by adopting a narrow view of disability under the statute.[71]

Nor does the Court always adopt the minority view of courts of appeals in favor of the employee. Last term, the Court held that the later effects of past discrimination do not restart the clock for filing an EEOC charge.[72] Because the clock does not restart, a female employee's claim that she had

received significantly less pay over the course of her career because successive pay increases were less than those of her male colleagues was time barred.[73] The 5-4 decision reversed the Eleventh Circuit, which had taken the minority view among the courts of appeals regarding that question.[74]

The Court's body of work over the past ten years in employment discrimination cases, however, does not support the view that the Court has a knee-jerk reaction in favor of the employer. Indeed, several of the key cases have relied on the text and other tools of statutory interpretation to reach a conclusion that turned out to be favorable to the employee and went against the majority of courts of appeals to consider the issue. Any characterization of the Court as in the pocket of the employers therefore seems wholly inaccurate.

The view of the Court as pro-employer and of the most recent term's pro-employer decisions as an aberration does not withstand scrutiny. Instead, a more thorough review of the Court's employment discrimination jurisprudence over the past ten years reveals a Court that is perfectly willing to take the text and structure of the statute in a direction that favors the employee and not the employer. It may just be the case that, when the Court is considering an employment discrimination matter, the notions of a decision being pro-employee or pro-employer are the furthest things from the justices' minds.

The public may be better served if commentators on the Court's workings would refrain from using the labels of "pro-employee" or "pro-employer" and instead focus on the unique and difficult issues that can arise in the Court's cases. For example, *CBOCS West, Inc. v. Humphries*[75] involved two conflicting notions of statutory interpretation: whether the Court should either following the plain meaning of the text of the statute or adopt, on stare decisis grounds, the same interpretation of a similar statute. Neither of these approaches to statutory interpretation is inherently pro-employer or pro-employee.

In *CBOCS*, the Court considered these two principles in considering whether 42 U.S.C. § 1981, which gives "[a]ll persons... the same right... to make and enforce contracts... as is enjoyed by white persons," allows for a claim of retaliation. In a 7-2 decision, the Court held that Section 1981 included claims of retaliation, notwithstanding the admission "that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his §1981 rights."[76] Instead, the Court relied on two points: (1) Section 1981 and Section 1982 (which states that "[a]ll citizens... shall have the same right... as is enjoyed by white citizens... to inherit, purchase, lease, sell, hold, and convey real and personal property") had consistently been interpreted in a similar manner because of the provisions' common language, origin, and purposes; and (2) the Court had previously interpreted Section 1982 to include a retaliation claim.[77] Justice Thomas's dissent took the view that the lack of a textual basis for a retaliation claim in Section 1981, notwithstanding the stare decisis concerns going the other way, should have carried the day.[78]

Although *CBOCS* is a pro-employee decision because it gives employers another statute that includes a retaliation claim, the more useful analysis for the public would be how the case shows a resistance by the Court to jettison former statutory interpretation cases in light of a renewed emphasis on textual analysis. The public and attorneys in general would be better suited if these cases were thought of in terms of their impact on legal analysis of statutory interpretation questions rather than the simple notion whether the Court is trending more pro-employee or pro-employer.

CONCLUSION

The Court has always been difficult to classify. All labels of the Court have their shortcomings, and the designation of the Court as "pro-employee" or "pro-employer" is no exception. The portrayal of the Court as having a knee-jerk reaction in favor of the employer, however, is particularly weak given the Court's employment discrimination jurisprudence over the past ten years. The Court has consistently been willing to refute the prevailing pro-employer view of the courts of appeals when the text and structure of the statute so required. That many of the Court's opinions in the employment context rely primarily on the text and structure of the statutory provision in question should be a welcome development and one that should be conveyed to the public more often.

Endnotes

1 Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made The Boldest Mark*, N.Y. Times (June 29, 2008) (emphasis added).

2 Fanny Carrier, *Workers' Rights Boosted By US Supreme Court*, Yahoo News (June 25, 2008) (emphasis added).

3 Wash. Post, *A Victory for Workers: The Supreme Court Allows Employees To Sue Their Retirement Plans*, A14 (February 21, 2008) (describing LaRue v. DeWolff, Boberg & Associates, Inc., which held that Section 502(a)(2) of ERISA allows for recovery of fiduciary breaches that impair the value of plan assets in a participant's account).

4 N.Y. Times, *A Verdict For Workers, For A Change* (March 2, 2008) (describing Federal Express v. Holowecki).

5 *Id.*

6 42 U.S.C. § 2000e-2(a)(1).

7 548 U.S. 53 (2006).

8 42 U.S.C. § 2000e-(3)(a).

9 *Burlington Northern*, 548 U.S. at 58-59.

10 *Id.* at 60.

11 *Id.* at 67.

12 *Id.* at 61-64.

13 *Id.* at 68.

14 *Id.* at 71-73.

15 *See id.* at 60 (citing White v. Burlington Northern and Santa Fe Railway Co., 364 F.3d 789, 795 (6th Cir. 2004) (en banc); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

16 *Burlington Northern*, 548 U.S. at 60 (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997)).

17 539 U.S. 90.

18 42 U.S.C. § 2000e-2(m) (emphasis added). An employer may limit the remedies available to an employee in a mixed-motive case if it demonstrates that it would have "taken the same action in the absence of the motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

19 539 U.S. at 92.

20 *Id.* at 95 (citing Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Board of Trustees of Univ. of Alab., 91 F.3d 1449, 1453-54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995)).

21 490 U.S. 228 (1989).

22 *Id.* at 276.

23 Costa v. Desert Palace, Inc., 299 F.3d 838, 853-54 (9th Cir. 2002) (en banc).

24 *Desert Palace*, 539 U.S. at 96.

25 *Id.* at 98-99.

26 *Id.* at 102.

27 536 U.S. 101 (2002).

28 42 U.S.C. § 2000e-5(e)(1). A charge must be filed 300 days after an unlawful employment practice occurred when an employee initiates proceedings before a state or local agency that can grant relief from an unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1).

29 536 U.S. at 104.

30 *Id.* at 113.

31 *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).

32 *Morgan*, 536 U.S. at 118.

33 Morgan v. Amtrak, 232 F.3d 1008, 1014 (9th Cir. 2000).

34 *See* Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983).

35 *Morgan*, 536 U.S. at 108.

36 *Id.* at 109-10.

37 524 U.S. 742 (1998).

38 524 U.S. 775 (1998).

39 477 U.S. 57 (1986).

40 *Id.* at 72.

41 111 F.3d 1530, 1534-35 (1997).

42 *See Ellerth*, 524 U.S. at 749-51 (describing the en banc decision).

43 *See Faragher*, 524 U.S. at 785-86 (listing decisions).

44 Justice Thomas and Justice Scalia dissented in both *Faragher* and *Ellerth*, while Justice Ginsburg concurred in the judgment in *Ellerth*.

45 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

46 *Faragher*, 524. U.S. at 807; *Ellerth*, 524 U.S. at 765.

47 *See Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting).

48 523 U.S. 75 (1998).

49 *Id.* at 76.

50 *Id.* at 82.

51 *Id.* at 79 (citing Garcia v. Elf Atochem North America, 28 F.3d 446, 451-52 (5th Cir. 1994); McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir. 1996)).

52 Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997).

53 546 U.S. 500 (2006).

54 *Id.* at 516.

55 535 U.S. 106 (2002).

56 42 U.S.C. § 2000e-5.

57 534 U.S. 506 (2002).

58 West v. Gibson, 527 U.S. 212 (1999).

59 29 U.S.C. § 626(d) (emphasis added).

60 128 S. Ct. 1147 (2008).

61 *Id.* at 1157.

62 29 U.S.C. § 626(d).

63 530 U.S. 133 (2000).

64 *Id.* at 140-41 (identifying circuit split).

65 *Id.* at 143.

66 29 U.S.C. § 626(f).

67 522 U.S. 422 (1998).

68 *Id.* at 426-27.

69 The contract violated the OWBPA because it (1) gave the employee only 14 days (instead of 45) to consider the release; (2) did not give the employee 7 days to revoke the release; and (3) the release did not specifically mention the ADEA. *Id.* at 424-25.

70 Clark County School District v. Breeden, 532 U.S. 268 (2001).

71 *See, e.g.,* Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. UPS, 527 U.S. 516 (1999).

72 Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

73 *Id.* at 2177-78.

74 *Id.*

75 128 S. Ct. 1951 (2008).

76 *Id.* at 1958.

77 *Id.* at 1958 (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), and Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)).

78 *CBOCS*, 128 S. Ct. at 1961-62.