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## EMPLOYMENT DISCRIMINATION DECISIONS FROM THE OCTOBER 2008 TERM

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### I. INTRODUCTION

Several employment discrimination decisions were handed down this Term.<sup>1</sup> They were *Ricci v. DeStefano* (Title VII);<sup>2</sup> *Gross v. FBL Financial Services, Inc.* (Age Discrimination in Employment Act);<sup>3</sup> *AT & T Corp. v. Hulteen* (Pregnancy Discrimination Act);<sup>4</sup> and *14 Penn Plaza L.L.C. v. Pyett*,<sup>5</sup> which concerned the impact of arbitration agreements upon the reach of federal employment discrimination laws.

Title VII of the Civil Rights Act of 1964 contains two provisions that are important in understanding some of the litigation that has ensued over the years.<sup>6</sup> The first is the “Disparate Treatment

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<sup>1</sup> See Perry Craft & Michael G. Sheppard, *Summary of United States Supreme Court’s 2008 Term*, 45 TENN. B.J. 21, 24-25 (2009).

<sup>2</sup> 129 S. Ct. 2658, 2664 (2009) (5-4 decision).

<sup>3</sup> 129 S. Ct. 2343, 2346 (2009) (5-4 decision).

<sup>4</sup> 129 S. Ct. 1962, 1966 (2009).

<sup>5</sup> 129 S. Ct. 1456, 1461 (2009) (5-4 decision).

<sup>6</sup> See 42 U.S.C.A. § 2000e-2 (West 2009). The statute states, in pertinent part:

It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

Provision.”<sup>7</sup> A plaintiff can bring suit if he or she can show that an employer acted in a discriminatory fashion on an impermissible basis.<sup>8</sup> “[It] is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”<sup>9</sup> These are individual suits for the most part, although there are variations.<sup>10</sup>

The other is the “Disparate Impact Provision.” In 1971, the Supreme Court in *Griggs v. Duke Power Co.*<sup>11</sup> held that where a plaintiff can show that an employment screening device had a disproportionate race, color, religion, sex, or national origin effect, and the employer could not show that the device was “job related” or “consistent with business necessity,” Title VII was also violated.<sup>12</sup> The concepts of disparate treatment and disparate impact have been imported into other employment discrimination laws,<sup>13</sup> such as the Age Discrimination in Employment Act of 1968.

The Pregnancy Discrimination Act was a free-standing amendment to Title VII.<sup>14</sup> Congress enacted it because of United States Supreme Court decisions which held essentially that discrimination based on pregnancy did not violate the Constitution or Title VII.<sup>15</sup> The Pregnancy Discrimination Act reflected a congressional determination that, although Congress could not do much about the Constitution, it certainly could do something about Title VII.<sup>16</sup>

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otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

*Id.*

<sup>7</sup> *Id.* § 2000e-2(a)(1).

<sup>8</sup> *Id.*

<sup>9</sup> *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

<sup>10</sup> *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155-56 (1982) (permitting individuals to maintain class action suits under Title VII if they meet prerequisites that “‘limit the class claims to those fairly encompassed by the named plaintiff’s claims’” (quoting *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980))).

<sup>11</sup> 401 U.S. 424 (1971).

<sup>12</sup> 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (West 2009); *Griggs*, 401 U.S. at 431.

<sup>13</sup> *See* 42 U.S.C.A. § 2000e-2(k)(1)(A) (amending Title VII and officially codifying disparate impact); 42 U.S.C.A. § 1981a(a)(1) (West 2009) (permitting recovery of both compensatory and punitive damages for victims of disparate treatment).

<sup>14</sup> 42 U.S.C.A. § 2000e(k) (West 2009).

<sup>15</sup> *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (holding that Title VII did not bar discrimination on the basis of pregnancy or pregnancy-related conditions).

<sup>16</sup> *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (explaining that Congress took action in order “to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace”).

## II. *RICCI V. DESTEFANO*

In *Ricci v. DeStefano*, a decision involving Judge Sotomayor—now Justice Sotomayor<sup>17</sup>—the Second Circuit affirmed the decision of the lower court, finding that there was no violation of Title VII in the treatment of white firefighters by the City of New Haven, Connecticut.<sup>18</sup> However, there was a question about whether the summary affirmance was an adequate treatment of the lower court decision.<sup>19</sup> An unsuccessful effort was made to have this matter reviewed en banc.<sup>20</sup> Judge Jose Cabranes dissented from the denial of rehearing en banc, and essentially laid out his reasons for believing that the *Ricci* case was important and needed the attention of the Supreme Court.<sup>21</sup>

Meanwhile, the panel had withdrawn its summary affirmance and entered a per curiam opinion that actually gave some reasons for its determination.<sup>22</sup> It was only a paragraph long, and described why the panel felt that the lower court had acted properly under the circumstances, and why there was no reason for this matter to be considered en banc.<sup>23</sup>

The facts of the *Ricci* case are as follows. New Haven decided that it needed to fill the higher ranks of its fire department, and gave an examination to that end.<sup>24</sup> That examination produced a result that the city refused to certify,<sup>25</sup> because there were not enough black candidates who scored sufficiently high to be eligible for the

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<sup>17</sup> Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1.

<sup>18</sup> *Ricci v. DeStefano (Ricci II)*, 264 F. App'x 106, 107 (2d Cir. 2008).

<sup>19</sup> *Ricci v. DeStefano (Ricci IV)*, 530 F.3d 88, 93 (2d Cir. 2008) (Cabranes, J., dissenting) (explaining that the court initially affirmed the lower court's decision but then withdrew it and issued a per curiam opinion affirming the lower court); see *Ricci v. DeStefano (Ricci III)*, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam) (withdrawing the court's previous summary judgment and affirming the lower court's decision per curiam).

<sup>20</sup> *Ricci IV*, 530 F.3d at 88 (majority opinion) (denying a rehearing en banc).

<sup>21</sup> *Id.* at 93 (Cabranes, J., dissenting) (explaining and listing complex questions, which the dissent hoped the Supreme Court would resolve).

<sup>22</sup> *Ricci III*, 530 F.3d at 87.

<sup>23</sup> *Ricci IV*, 530 F.3d at 88 (majority opinion) (denying a rehearing en banc); *Ricci III*, 530 F.3d at 87.

<sup>24</sup> *Ricci v. DeStefano (Ricci V)*, 129 S. Ct. 2658, 2665 (2009) (5-4 decision).

<sup>25</sup> *Id.* (explaining that the New Haven Civil Service Board will certify by rank the individuals who passed the exam; promoting individuals from a pool of "the top three scorers").

upper level positions.<sup>26</sup> The plaintiffs, white firefighters who had achieved high marks on the examination, alleged that they had been denied promotions on account of race in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment.<sup>27</sup> This was a claim of disparate treatment.<sup>28</sup> The city's defense was that it did not urge certification of the results for fear that to do so would open it up to Title VII liability for potential claims brought by black firefighters, because of the test's racially disparate impact.<sup>29</sup> It was a situation of disparate impact confronting disparate treatment.

The question for the Court was as follows: what does an employer need to show to justify rejecting on intentionally racial grounds the results of a professionally-developed employment test in order to avoid Title VII disparate impact liability?<sup>30</sup> The Court was confronted with several opposing formulations on how to answer this question.<sup>31</sup> One was the position of the plaintiffs, which was that employers can never justify making decisions based upon race under these circumstances, even if the employer knows that its decisions would violate the Disparate Impact Provision.<sup>32</sup> In other words, "under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination."<sup>33</sup> That is a fairly "zero-tolerance" position. The alternative formulation was that an employer "must be in [actual] violation of the disparate-impact provision before it can use compliance as a defense in a disparate treatment suit."<sup>34</sup>

The City of New Haven had yet another point of view: "[A]n employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct."<sup>35</sup> However, in the opinion written by Justice Kennedy—joined by Chief Justice Roberts, and Justices Sca-

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<sup>26</sup> *Id.* at 2673 (explaining that the evidence showed that the city refused to certify the results because of the disparity between the test scores of minority and white candidates).

<sup>27</sup> *Id.* at 2664.

<sup>28</sup> *Id.* at 2671.

<sup>29</sup> *Ricci V*, 129 S. Ct. at 2664.

<sup>30</sup> *Id.* at 2674 (considering "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination").

<sup>31</sup> *Id.* at 2674-75 (turning to each party's proposed meaning of Title VII and attempting to strike a balance between these competing theories).

<sup>32</sup> *Id.* at 2674.

<sup>33</sup> *Id.*

<sup>34</sup> *Ricci V*, 129 S. Ct. at 2674.

<sup>35</sup> *Id.* at 2674-75.

lia, Thomas, and Alito—the Court adopted a third and admittedly new test, instead of the ones that had been offered.<sup>36</sup> The Court held that an employer may not make race-based decisions unless it can show “a strong basis in evidence” of disparate impact liability.<sup>37</sup> Applying this standard to the facts of *Ricci*, the Court found that New Haven lacked a strong basis in evidence for refusing to certify the examination results.<sup>38</sup>

Where did the test that Justice Kennedy set out in *Ricci* come from? He drew the test from cases under the Equal Protection Clause of the Constitution where the allegations were that race or gender was used to disadvantage one group of government employees or applicants.<sup>39</sup>

Justice Ginsburg wrote a dissent in which Justices Stevens, Souter, and Breyer joined. She challenged the majority’s assertion that the “disparate treatment” and “disparate impact” provisions of Title VII were in conflict.<sup>40</sup> It is curious that Justice Kennedy’s opinion does not address “whether a legitimate fear of disparate impact [liability] is ever sufficient to justify discriminatory treatment under the Constitution.”<sup>41</sup> Justice Scalia acknowledged this and said that although Justice Kennedy may not have wanted to address it, “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”<sup>42</sup> This is one of the “markers” to be found in more than one of the Supreme Court’s decisions of this past Term. By “markers,” I mean statements in Supreme Court decisions that either suggest that a particular statutory provision may be courting a finding of unconstitutionality or may be

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<sup>36</sup> *Id.* at 2676.

<sup>37</sup> *Id.* at 2677 (“[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”).

<sup>38</sup> *Id.* at 2681 (“On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results.”).

<sup>39</sup> *Ricci V*, 129 S. Ct. at 2675-76.

<sup>40</sup> *Id.* at 2699 (Ginsburg, J., dissenting).

<sup>41</sup> *Id.* at 2675-76 (majority opinion) (“This suit does not call on us to consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution. That does not mean the constitutional authorities are irrelevant, however.”).

<sup>42</sup> *Id.* at 2683 (Scalia, J., concurring).

amended to overcome a restrictive Supreme Court construction.

Justice Alito wrote a separate concurrence, joined by Justices Scalia and Thomas, that said a lot about the way *Ricci* was framed in terms of its factual allegations.<sup>43</sup> There were no findings of fact since the district court decided the case on summary judgment.<sup>44</sup> Yet, the concurrence was devoted almost entirely to what Justice Alito viewed as the case's "racial politics" overhang.<sup>45</sup>

What does this all mean with respect to any ultimate resolution of the tension between the disparate impact and disparate treatment provisions of Title VII? First, it was very surprising that the Supreme Court granted review. This was a case decided on summary judgment from one district court, in one circuit in the entire country raising potentially quite significant issues, but not issues that were developed in the lower courts. Second, the Court may have just been looking for cases that raised issues about the use of race in various contexts,<sup>46</sup> as it did, for example, earlier in the *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>47</sup> (schools) and *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*<sup>48</sup> (voting) cases. *Ricci* presented a very attractive vehicle for the Court to do so in an employment discrimination case because of its sympathetic factors.<sup>49</sup> The white lead plaintiff, Frank Ricci, a dyslexic, worked very hard to prepare for the examination, and he qualified.<sup>50</sup> To deny him and the other plaintiffs their "just desserts" may have struck the majority as fundamentally unfair.

There is one other consideration that was not addressed in any of the opinions. In the late 1970s, the four agencies of the federal

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<sup>43</sup> *Id.* (Alito, J., concurring) ("[T]he dissent . . . provides an incomplete description of the events . . . . [W]hen all of the evidence in the record is taken into account, it is clear that, even if the legal analysis in Parts II and III-A of the dissent were accepted, affirmance of the decision below is untenable.").

<sup>44</sup> *Ricci V*, 129 S. Ct. at 2665 (majority opinion).

<sup>45</sup> *Id.* at 2690 n.1 (Ginsburg, J., dissenting) ("Never mind the flawed tests New Haven used and the better selection methods used elsewhere, Justice ALITO's concurring opinion urges. Overriding all else, racial politics, fired up by a strident African-American pastor, were at work in New Haven." (citing *id.* at 2685-88 (Alito, J., concurring))).

<sup>46</sup> *See id.* at 2672 (majority opinion).

<sup>47</sup> 551 U.S. 701 (2007) (plurality opinion).

<sup>48</sup> 129 S. Ct. 2504 (2009).

<sup>49</sup> *See Ricci V*, 129 S. Ct. at 2664 (discussing the high stakes of the examinations the fire-fighters took and their expenditures to adequately study for those examinations, in both their time and money).

<sup>50</sup> *Id.* at 2667.

government responsible for then enforcing federal employment discrimination laws—the Justice Department, Equal Employment Opportunity Commission, Labor Department, and Civil Service Commission—decided what standards ought to govern disparate impact claims.<sup>51</sup> These standards defined what types of tests would be viewed as professionally-developed, and therefore, could be relied on to defend against discrimination suits.<sup>52</sup> One product of that collective effort was the “Four-Fifths Rule.”<sup>53</sup> Generally, under that rule, if the selection rate of the lower scoring group is above four-fifths of the rate of the higher group, the federal government agencies will not bring disparate impact suits against an employer.<sup>54</sup> It does not bar suits by private parties. The disparity in *Ricci* was below the four-fifths level, and therefore, was potentially susceptible to challenge by the federal government.

So what is this about? For many years there has been, in some quarters, displeasure with the 1971 Supreme Court decision in *Griggs v. Duke Power Co.*<sup>55</sup> In the late 1980s, the Court itself decided several cases that were designed to sap *Griggs* of much of its power.<sup>56</sup> It rejected many of those standards and made it easier for employers to justify cases where there was a disparate impact.<sup>57</sup> The Court also increased the burden on plaintiffs to show that a particular group had been the subject of disparate impact as a result of an employer’s use of multiple screening devices.<sup>58</sup>

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<sup>51</sup> See 29 C.F.R. § 1607.4 (1978); Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1, 4 n.11 (1985).

<sup>52</sup> See 29 C.F.R. § 1607.4.

<sup>53</sup> *Id.* § 1607.4(D) (stating that a test or similar manner of selection will generally have an adverse or disparate impact if it has “[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate”).

<sup>54</sup> *Id.*

<sup>55</sup> 401 U.S. 424, 431 (1971); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506-07 & n.53 (2003) (referring to the widespread criticism over the *Griggs* decision, which found that Title VII applied to both disparate impact and intentional discrimination claims because the language of the statute “evinced congressional intent to prohibit disparate impact regardless of an employer’s intentions”).

<sup>56</sup> Primus, *supra* note 55, at 522.

<sup>57</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-52, 657 (1989).

<sup>58</sup> See Mark Kelman, *Concepts of Discrimination in “General Ability” Job Testing*, 104 HARV. L. REV. 1157, 1185 (1991) (“If employers irrationally underestimate the productive value of the tasks that members of protected groups best perform, especially if they do so . . . because those tasks are associated with members of the . . . socially devalued group, the stat-

Congress decided to respond to those limiting Supreme Court decisions by enacting the Civil Rights Act of 1990, but was vetoed by President Bush.<sup>59</sup> The second attempt, the Civil Rights Act of 1991,<sup>60</sup> was successfully enacted into law.<sup>61</sup> One of the things that the 1991 Civil Rights Act did was enact the *Griggs* test into federal law.<sup>62</sup>

One further notable feature of the *Ricci* decision was remarked upon by Justice Ginsburg in her dissent. She acknowledged that the Court had adopted a new rule, the “strong basis in evidence” standard.<sup>63</sup> But when the Court establishes a new rule it usually remands the case to “allow the lower courts to apply the rule in the first instance.”<sup>64</sup> Remand was not ordered in this instance, thereby, according to Justice Ginsburg, “stack[ing] the deck further by denying respondents any chance to satisfy [that new standard].”<sup>65</sup> In the end, the key issues were left unresolved by Justice Kennedy and those who voted with him. The result is a lack of precision as to the nature of the standard, how it should be applied, and what protection it augurs for disparate impact defenses under the Equal Protection Clause.

### III. *GROSS V. FBL FINANCIAL SERVICES, INC.*

*Gross v. FBL Financial Services, Inc.* is another case involving employment discrimination. *Gross* involved a suit brought by an older person, pursuant to the Age Discrimination in Employment Act (ADEA).<sup>66</sup> The majority opinion was written by Justice Thomas, and

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ic validity of screening devices with disparate impact will be systematically overestimated.”).

<sup>59</sup> Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 539-40 (2009) (“Congress passed the Civil Rights Act of 1990, but it was vetoed by President George H.W. Bush. Congress narrowly failed to overcome the veto, and in 1991, Congress again addressed the issue.”).

<sup>60</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.A.).

<sup>61</sup> Widiss, *supra* note 59, at 540 (“This bill passed the Democrat-controlled House, but largely along partisan lines.”).

<sup>62</sup> Civil Rights Act of 1991 § 3; Gwen A. Ashton, *The Equal Credit Opportunity Act From a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANKING L. 465, 479 (1998).

<sup>63</sup> *Ricci v. DeStefano (Ricci V)*, 129 S. Ct. 2658, 2702 (Ginsburg, J., dissenting).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2347 (2009).



joined by Chief Justice Roberts, and Justices Scalia, Kennedy, and Alito. Justice Stevens, in his dissent, characterized the decision as one in which the Court did not answer the question that was presented for review, but rather, one raised for the first time in respondent's brief.<sup>67</sup> Furthermore, Justice Stevens stated that "the majority's inattention to prudential Court practices [was] matched by its utter disregard of our precedent and Congress' intent."<sup>68</sup>

In sum, the majority held that an ADEA plaintiff, unlike one suing under Title VII, must establish a claim of disparate treatment discrimination by "a preponderance of the evidence," the normal civil suit standard.<sup>69</sup> Title VII, in contrast, allows a plaintiff to obtain certain forms of redress by showing that the challenged personnel action was motivated by discrimination, at least in part; this is a "mixed motive" claim.<sup>70</sup> The plaintiff does not have to establish that discrimination was the sole basis for the action, just that it was a "motivating factor" in the decision-making process.<sup>71</sup>

The Court's ruling in *Gross* means that ADEA plaintiffs' evidentiary burdens will be heavier than those under Title VII, whereas, according to the dissent, they had been assumed to parallel one another in prior rulings.<sup>72</sup> Indeed, the big debate in this decision was over whether the 1991 Civil Rights Act's explicit incorporation of the "mixed motive" test under Title VII implicitly intended the same result with respect to the ADEA.<sup>73</sup> Since this legislation emerged from a series of political compromises, it has lent itself to various interpretations by the Court. Here, the Court rejected the implicit incorpora-

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<sup>67</sup> *Id.* at 2353 (Stevens, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2352 (majority opinion).

<sup>70</sup> *See, e.g.,* Chadwick v. Wellpoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009); *see also* 42 U.S.C.A. § 2000e-2(m) (West 2009) ("[A]n unlawful employment practice is established 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.").

<sup>71</sup> *See, e.g.,* Makky v. Chertoff, 541 F.3d 205, 213 (3d Cir. 2008) ("A Title VII plaintiff may state a claim for discrimination under . . . the mixed-motive theory . . . under which a plaintiff may show that an employment decision was made based on both legitimate and illegitimate reasons.") (internal citations omitted).

<sup>72</sup> *Gross*, 129 S. Ct. at 2349 ("This Court has never held that this burden-shifting framework applies to ADEA claims. . . . We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

<sup>73</sup> *Id.*

tion of the Title VII standard.<sup>74</sup>

Unlike in *Ricci*, it should be noted that in *Gross* the Court vacated the judgment of the court of appeals and remanded the case for further proceedings consistent with its opinion.<sup>75</sup> This was an opportunity for the lower courts to reconsider the case based upon that new standard.<sup>76</sup> This determination is another “marker,” because it is essentially an invitation—open or otherwise—for Congress to go back and amend the statute, if it so desires.<sup>77</sup>

#### IV. *AT & T CORP. v. HULTEEN*

The circumstances in *AT & T Corp. v. Hulteen* are very much like those in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>78</sup> In *Ledbetter*, a woman was the victim of pay discrimination, but was not aware of it for many years.<sup>79</sup> When she found out, the statute of limitations had expired and the Court ruled that her right to recover had been extinguished.<sup>80</sup> Although Congress amended Title VII in that respect, Ms. Ledbetter could not benefit from that change in the law.<sup>81</sup> In *Hulteen*, a woman who was pregnant before the enactment of the Pregnancy Discrimination Act of 1978 (PDA), returned to work and was told that she would be denied some of the seniority credit she ordinarily would have received, but for the fact that she had taken pregnancy leave.<sup>82</sup> The question presented was whether the PDA operated retroactively in circumstances such as this one?<sup>83</sup> Justice Souter, writing for the seven-to-two majority, held that it did not.<sup>84</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2352.

<sup>76</sup> *Id.*

<sup>77</sup> *Gross*, 129 S. Ct. at 2351 (“[N]othing in the statute’s text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases.”).

<sup>78</sup> 550 U.S. 618 (2007).

<sup>79</sup> *See id.* at 621-22.

<sup>80</sup> *Id.* at 632.

<sup>81</sup> *Id.* at 637 (“Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her.”).

<sup>82</sup> *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1967 (2009).

<sup>83</sup> *Id.* at 1966.

<sup>84</sup> *Id.*

**V. 14 PENN PLAZA LLC v. PYETT**

The final case, *14 Penn Plaza LLC v. Pyett*, is one involving arbitration. Arbitration is the “darling” of the Supreme Court of the United States.<sup>85</sup> Milton Friedman lived not only in the flesh, but continues to live in the way that the Supreme Court embraces arbitration.<sup>86</sup> It is an agreement between knowing individuals or entities about what is in their best economic interests. For a court or legislature to dictate how these trades should occur is something that simply should not be generally accepted; to that end, Congress passed the Federal Arbitration Act in 1925.<sup>87</sup> For many years, the act was viewed with suspicion by the federal courts. But the modern Supreme Court has elevated the Federal Arbitration Act to a place of respect.<sup>88</sup> The question is how the act fits into employment discrimination litigation.

In *Pyett*, Justice Thomas, writing for the majority, held that a collective bargaining agreement arising under the ADEA of 1967, which required that all of the union members’ claims of employment discrimination be submitted to binding arbitration, was enforceable.<sup>89</sup> In doing so, the Court resolved an apparent tension between two of its earlier decisions.<sup>90</sup> The first was a 1974 Title VII decision, *Alexander v. Gardner-Denver Co.*,<sup>91</sup> which had long been thought to stand for the proposition “that a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for caus-

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<sup>85</sup> See, e.g., Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 776 (2002) (“Even more than those devices, however, mandatory arbitration clauses have become not merely favorites but darlings of the courts.”).

<sup>86</sup> See *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901-02 (2009) (stating that the government should stay out of agreements to arbitrate when they are found in a contract); Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 *FORDHAM URB. L.J.* 167, 173 n.27 (1999) (stating that Friedman believed the scope of government needed to be limited);

<sup>87</sup> See 21 *WILLISTON ON CONTRACTS* § 57:45 (4th ed. 2009); see also *Tai Ping Ins. Co. v. M/V Warschau*, 731 F.2d 1141, 1144 (5th Cir. 1984) (“[T]he Court reiterated the strong pro-arbitration policy embodied in the Arbitration Act: ‘Congress’s clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.’” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983))).

<sup>88</sup> See e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

<sup>89</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).

<sup>90</sup> See *id.* at 1468-69.

<sup>91</sup> 415 U.S. 36 (1974).

es of action created by Congress.”<sup>92</sup> The other was a 1991 decision under the ADEA, *Gilmer v. Interstate/Johnson Lane Corp.*<sup>93</sup> The Court “‘held that an individual employee who had agreed individually to waive his right to a federal forum *could* be compelled to arbitrate a federal age discrimination claim.’”<sup>94</sup>

The lower courts had been struggling with how to reconcile those precedents.<sup>95</sup> Justice Thomas reasoned that, since unions are authorized under federal labor law to represent workers on a wide range of issues, they also should be authorized to waive their members’ access to a judicial forum and require arbitration instead.<sup>96</sup> Justice Souter, in the principal dissent, charged the majority with a failure to respect *stare decisis*, and an evasion of a relevant precedent “‘simply by ignoring it.’”<sup>97</sup> According to Justice Souter, Justice Thomas’ opinion is a complete revisionist view of what happened in *Gardner-Denver*.<sup>98</sup> But Justice Thomas’ response is about as full-throated an endorsement of arbitration as one will read anywhere in the United States Reports. He argued that the majority in *Gardner-Denver* was “‘highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights,’”<sup>99</sup> and went on to say “[t]hat skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.”<sup>100</sup> In his view, there was no reason to believe that federal courts were in a better position than the parties themselves to resolve these types of disputes fairly and consistent with the interest of employees and workers.<sup>101</sup>

Although this is an ADEA decision, the question becomes

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<sup>92</sup> *Pyett*, 129 S. Ct. at 1463 (quoting *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 92 n.3 (2d Cir. 2007)).

<sup>93</sup> 500 U.S. 20, 23 (1991).

<sup>94</sup> *Pyett*, 129 S. Ct. at 1463 (quoting *Pa. Bldg. Co.*, 498 F.3d at 92 n.3).

<sup>95</sup> *Id.* at 1463, 1473-74.

<sup>96</sup> *Id.* at 1473 (“Given this avenue that Congress has made available to redress a union’s violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process.”).

<sup>97</sup> *Id.* at 1478 (Souter, J., dissenting).

<sup>98</sup> *Id.* at 1479 (“When the majority does speak to *Gardner-Denver*, it misreads the case . . .”).

<sup>99</sup> *Pyett*, 129 S. Ct. at 1469 (majority opinion).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 1471 (“According to the Court, the ‘factfinding process in arbitration’ is ‘not equivalent to judicial factfinding’ and the ‘informality of arbitral procedure . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.’” (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974))).

whether the Court's holding will be applied across the board to other federal employment discrimination statutes.<sup>102</sup> The primary statutory framework, of course, is the 1964 Civil Rights Act. In recent years the Supreme Court has handed down decisions, however, arising under post-1964 "progeny" statutes that have curtailed their effectiveness.<sup>103</sup>

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<sup>102</sup> *Id.* at 1469-70 (discussing agreements to arbitrate Title VII claims as opposed to arbitrating claims under the Age Discrimination in Employment Act of 1967 specifically).

<sup>103</sup> Drew S. Days III, "Feedback Loop": *The Civil Rights Act of 1964 and its Progeny*, 49 ST. LOUIS U. L.J. 981, 988-90 (2005) (discussing how the Supreme Court has taken decisions under the provisions subsequent to the 1964 Civil Rights Act and applied them to the original provisions of the 1964 Act).